IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC12-107
L.T. No. CRC80-00192 CFASO-A

DEATH WARRANT SIGNED
EXECUTION SCHEDULED
February 15, 2012

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

Citations to the record in this brief will be designated as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "DAR V/__" followed by the appropriate page number. The record on appeal of the denial of the original 3.850 motion shall be referred to as "PCR1 V/__" followed by the appropriate page number. The record on appeal of the resentencing trial court proceedings shall be referred to as "RSR V/__" followed by the appropriate page number. The record on appeal of the denial of the second 3.850 motion shall be referred to as "PCR2 V/__" followed by the appropriate page number. The appeal of the denial of the 3.853 motion shall be referred to as "DNAR V/__" followed by the appropriate page number. And the instant record on appeal will be designated as "PCR3 V/__" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

In January of 1980, while on life parole for the rape-murder of a 77-year-old female in New York, Robert Waterhouse met the victim at a bar in St. Petersburg. Sometime later, after they were seen leaving the bar together, Waterhouse repeatedly beat the victim with a tire iron or similar object, penetrated her anally, stuffed a bloody tampon down her throat and dragged her still-breathing body onto the mud flats of Tampa Bay,

leaving her to drown with the incoming tide. In January of 1980, after police discovered the inside of his car was covered in blood spatters that he had attempted to clean the day after the murder and after Waterhouse made numerous inculpatory statements admitting that he had dated the victim, gotten violent with a woman on the night of the murder and that he had problems with women who were menstruating when he wanted to have sex, Waterhouse was indicted for the murder. (DAR V7/l251, 1259) He was convicted, as charged, after his trial in August of 1980 and sentenced to death pursuant to the jury's recommendation in September of that year.

On appeal to this Court, Waterhouse raised eleven issues. This Court affirmed the conviction and sentence on direct appeal. *Waterhouse v. State*, 429 So. 2d 301 (Fla. 1983). The United States Supreme Court denied Waterhouse's petition for writ of certiorari on November 7, 1983. *Waterhouse v. Florida*, 464 U.S. 977 (1983).

In 1985 after Governor Graham signed a warrant for Waterhouse's execution, Waterhouse filed a Motion to Vacate in the trial court attacking his conviction for first-degree murder and death sentence. On appeal from the denial of the motion, and in a state habeas petition, Waterhouse urged, among other

issues,[1] that his lawyers erred in not presenting substantial mitigation evidence and that the jury was precluded from considering same. This Court denied relief as to the guilt phase but granted a new sentencing phase finding the jury was instructed in violation of *Hitchcock v. Dugger*, 481 U.S. 393 (1987). *Waterhouse v. State*, 522 So. 2d 341, 345 (Fla. 1988).

At the 1990 resentencing, the State presented evidence of the instant conviction. Additionally, the State again established that the Appellant had been previously convicted of a violent felony - the 1966 murder of a 77-year-old New York victim - and that he was on parole for that crime at the time he murdered the instant victim. Detective Hawes vividly recalled the scene when on February 11, 1966 he arrived at the victim's residence in Greenport, Long Island. He found the elderly victim lying on her bed severely beaten and covered in blood. She had bruises over her face, neck, shoulder, elbows and abdomen and had defensive wounds on her hands. Her dentures were broken. An autopsy revealed she had been strangled; there was bruising of the strap muscles of the neck and her hyoid bone and larynx were fractured. She had six broken ribs on her right side and four on

[1] Waterhouse also raised a *Brady* claim based on the State's disclosure, on the eve of trial, of the availability of two witnesses, Steve Spitzig and ABC bouncer Leon Vasquez. *See* Appellant's Brief in Chief (Case No. 69,557) at 10-12; *Waterhouse*, 522 So. 2d at 342-43.

her left. Waterhouse's bloody fingerprints were found on a pane of glass he had broken in exiting the residence after the crime and on a beer can left on top of the refrigerator. He pled guilty to second-degree murder and was sentenced to life in prison. (RSR V5/621-637; V6/724-732)

Despite having obtained resentencing based on the jury's not having heard and/or considered mitigating evidence, at the resentencing Waterhouse refused to allow counsel to present mitigating evidence, although his attorney was prepared to do so. (RSR V6/737) Waterhouse also insisted on making a closing argument, waiving his right to have argument by counsel. The jury unanimously recommended a sentence of death. The judge again imposed death finding six aggravating factors and no mitigating circumstances. (RSR V6/856, 871-72) On appeal, this Court affirmed the sentence. *Waterhouse v. State*, 596 So. 2d 1008, 1017-1018 (Fla. 1992).

After certiorari review was denied in the United States Supreme Court, *Waterhouse v. Florida*, 506 U.S. 957 (1992), Waterhouse once again sought collateral review of his conviction and sentence in circuit court. On January 22, 1998, the Honorable Robert E. Beach summarily denied the motion. On appeal Waterhouse raised twelve issues. This Court subsequently affirmed the denial of the collateral motion, as well as the

state habeas filed by Waterhouse. *Waterhouse v. State*, 792 So. 2d 1176 (Fla. 2001) and *Waterhouse v. Moore*, 838 So. 2d 480 (Fla. 2002).[2]

On September 29, 2003, Waterhouse then went back to the circuit court with a Rule 3.853 Motion for Postconviction DNA Testing seeking testing of blood found in Waterhouse's vehicle and on his clothing, serology evidence from the victim at the autopsy, as well as from the victim's clothing and hair. (DNAR V1/1-9) The State responded that no evidence remained for testing in the instant case. (DNAR V1/10-28) A hearing was held on the motion on April 15, 2005 before the Honorable R. Timothy Peters. (DNAR V2/126-188) At the hearing, defense counsel conceded that the evidence in question had been destroyed and that there was no evidence to be submitted for DNA analysis. (DNAR V2/141) Nevertheless, counsel requested an evidentiary hearing as to the circumstances surrounding the destruction of the evidence to determine if there was bad faith in the evidence being destroyed. (DNAR V2/133, 140)

After the State's interlocutory appeal was denied without prejudice, a hearing was conducted on the destruction of evidence. At the hearing, defense counsel conceded that the

[2] Current counsel, Robert Norgard, filed the reply brief for the state habeas, representing to this Court he was replacing CCRC-M [who had filed the State Habeas Petition and the 1998 postconviction motion] as counsel for Waterhouse.

destruction of evidence was discovered in 1989[3] and that he was not alleging bad faith. (DNAR V2/134) After hearing testimony from court clerks that the evidence was inadvertently destroyed during the relocation of the criminal courts from the Clearwater and St. Petersburg courthouses to the criminal complex, the lower court issued an order on April 19, 2005 denying the motion. The court made extensive factual findings concluding that the destruction of the physical evidence in this case was inadvertent and that there was nothing to infer bad faith in that destruction. (DNAR V1/47-49) An Amended Motion for DNA testing on May 12, 2005, requesting a new trial based on the destruction of evidence was also denied. (DNAR V1/53-57) The lower court found that the evidence had been inadvertently destroyed and reversed the prior determination that the motion made sufficient allegations under Rule 3.853. (DNAR V1/61) A subsequent rehearing was denied in part and granted in part. A corrected order denying the Rule 3.853 motion was filed on July 6, 2005. (DNA V1/85) Waterhouse's appeal to this Court from the denial of the Rule 3.853 motion was summarily denied. *Waterhouse v. State*, 942 So. 2d 414 (Fla. 2006).

[3] This discovery was made during preparation for the resentencing proceedings resulting from this Court's 1988 opinion reversing and remanding for a new penalty phase. *Waterhouse v. State*, 522 So. 2d 341, 344 (Fla. 1988).

On January 4, 2012, Governor Rick Scott signed a death warrant on Robert Brian Waterhouse for his 1980 first degree murder conviction. The execution is scheduled for February 15, 2012. Waterhouse filed his Successor Motion For Post-Conviction Relief on January 10, 2012 raising two issues 1) the destruction of the serology evidence and 2) newly discovered evidence/*Brady/ Giglio*. The State filed its response on January 12, 2012. A case management conference was held on the motion on January 13 and an evidentiary hearing was held January 17, 2012.

At the beginning of the evidentiary hearing the lower court issued its Non-Final Order denying 'Claim I' and granting an evidentiary hearing on 'Claim II' of Defendant's motion. The parties agreed to accept the affidavits of trial counsel and to forego the presentation of their testimony. The parties conceded that the testimony of trial counsel Paul Scherer and John Thor White would be consistent with the contents of their affidavits attached to the "Successor Motion for Post-Conviction Relief." However, the State maintained that it was disputing the veracity of the affidavits' content. (PCR3 V4/600)

Leglio Sotolongo was called to testify for the defense. (PCR3 V4/541) Mr. Sotolongo had signed an affidavit that was presented with the motion in which he claimed that he was at the ABC Lounge the night of the murder and that he saw Waterhouse

leave with two white males. In the affidavit, he claimed he had told this to Detective Hitchcox in January 1980.

At the hearing, Sotolongo testified that he grew up in St. Petersburg and that he and his extended family still live there. His brother is a St. Petersburg police officer. He testified that he owned a couple of General Nutrition Centers for the last 16 years. (PCR3 V4/542) He currently owns a cigar business in Clearwater, Florida. He testified that he has lived in the same house for the last ten years. (PCR3 V4/578)

At the time of this crime he was working a second job as a bouncer at the ABC Lounge on Fourth Street in St. Petersburg. (PCR3 V4/543) He said that he did not know the victim, but it was possible he saw her in the lounge as a customer. At the time of the original investigation he was interviewed by Detective Hitchcox. (PCR3 V4/543) He does not remember Hitchcox showing him a photograph of the victim but he would not dispute it. He did know Waterhouse at the time as a patron of the bar and testified he saw him at the lounge that night. He could not recall the exact time that Waterhouse came into the lounge but if he was working that night it would have been at the beginning of his shift at 7:00, 8:00 or 9:00 p.m. (PCR3 V4/545-46) Sotolongo was not sure if he was working and admitted that Detective Hitchcox’s report which reflected that he was off that

night may be more accurate. (PCR3 V4/583-86) He also believed Waterhouse returned $10 to him but he cannot be 100% certain it happened that evening. (PCR3 V4/546)

Sotolongo testified that he saw Waterhouse leave the lounge with two white males, not a female, sometime toward the end of his shift which was 2:00 a.m. (PCR3 V4/546-47) Subsequently, Sotolongo admitted Waterhouse could have left around 12:00 but he could have left earlier if he wasn't working because he would not have had to stay until the end of a shift. (PCR3 V4/565-67)

Sotolongo testified that he specifically told Detective Hitchcox about seeing Waterhouse leave with two men and that he might have been able to give him a more precise time then because "that was a long time ago." (PCR3 V4/550-52) He denied telling the detective that he did not remember when Waterhouse or the victim left as this is not the type of thing he keeps track of. (PCR3 V4/557)

He also testified that he knew the bartender Kyoe Ginn who testified at trial that she served the victim and Waterhouse drinks and saw them leave the bar together. When asked if he saw Waterhouse at her station, Sotolongo admitted that he never saw Waterhouse inside the bar because he could not see inside the bar from the exit where he (Sotolongo) was stationed. (PCR3 V4/548-49, 598) He also admitted, contrary to his affidavit,

that Kyoe Ginn could see the exits. From inside the bar she could see the front exit, which he could not, the exit to the package store and people heading down the hall to his exit. (PCR3 V4/567-69, 598) On cross, in addition to his admission that he wasn't sure of the times, he also agreed that Waterhouse could have come back after leaving with these two guys and that Waterhouse could have left with the victim but he (Sotolongo) was just not there to see it. (PCR3 V4/565-68)

The State presented the testimony of Detective Gary Hitchcox. Hitchcox testified that he was with the St. Petersburg Police Department for 27 and a half years. He is now an investigator for the Public Defender's Office. (PCR3 V4/603-04) During his investigation of the instant case, he spoke to a number of people from the ABC Lounge, including Mr. Sotolongo. He called him on the phone and Sotolongo came down to the station on January 7, 1980. (PCR3 V4/604-05)

After documenting Sotolongo's personal information including addresses and phone numbers, Sotolongo told Detective Hitchcox that he was not working that night but he was there from 10:00 to 1:00 a.m. Hitchcox showed him photographs of the victim and Waterhouse. He recognized both. Sotolongo told Hitchcox that he did not know when Waterhouse or the victim left, as it was not the type of thing he kept track of. (PCR3

V4/606-07) He testified that Sotolongo's claim that he told him Waterhouse left with two men was false; that if he had told him that it would have been put in the report. If he had said that, it would have been on the detective's notepad, and would have been in that report he filed documenting the interview. If it is not in the report, it was not said. (PCR3 V4/608, 610) If the witness had said that he saw the suspect leaving with two men, that would have been very important and something they would have wanted to pursue; it would not have been left out of the report. (PCR3 V4/615, 618)

Hitchcox then, reading from his report, explained that "the entire statement says that he saw several photos, one of which was the suspect Waterhouse," and "stated that he knew Waterhouse by the name of 'Bob' and that he comes in the bar several times a week, that he had general conversation with this subject, however, does not remember when Bob left or when the victim left as this is not the type of thing he keeps track of." (PCR3 V4/622)

In response to the State's inquiry about what steps collateral counsel took to investigate this claim in light of trial counsel's accusations at trial that Hitchcox had lied about fellow ABC bouncer Vasquez' statements and considering

there were only four employees from the bar interviewed, Attorney Robert Norgard put the following on the record:

> "Sotolongo, it's undisputed that his name was in Detective Hitchcox's report. There is the information that's contained in Detective Hitchcox's report. And I can tell this Court that, first of all, when I got involved in the representation of Mr. Waterhouse, it was initially at the point of doing a reply brief to a petition for writ of habeas corpus related to ineffective assistance of appellate counsel. I then followed up by raising issues related to the destruction of evidence, and I was his counsel during that, and I can also tell the Court that as part of my representation of Waterhouse -- because when Sotolongo's name came up, I can tell the Court that I went through the file. I did not remember Leon Vazquez's name. But I must have reviewed it several years ago where his name came up, and I had an investigator at that time essentially see if we could track down some of these people. So efforts were made. I can tell this Court . . . [ ] It did not include Sotolongo, and what I can tell the Court [is] that was based on my review of the records in an attempt to identify who was pertinent that may potentially change their testimony, that may recant their testimony or recant their statement in the sense of somebody who gave incriminating information against Mr. Waterhouse. I don't have any independent recollection of Mr. Sotolongo. But frankly similar to what the Defense attorney said in their affidavit, that I in reading his statement would sit there and read it and take it on face value that that's what his statement said. And as a Defense attorney frankly -- and I think the Supreme Court recognizes this in *Mungin*, and what disturbed them in *Mungin* was the fact that they felt officers of the Court, attorneys, should be able to rely on police reports. And it would disturb them that attorneys are put in a position of relying on police reports that aren't true. And so I would have read that. I have read the discovery in the case. I would have accepted it on face value just like Mr. White did and just like Mr. Scherer did. So that's the answer.

(PCR3 V4/108-10)

On January 20, 2012, the lower court issued a final Order denying all relief. A notice of appeal was filed on January 13, 2012.

SUMMARY OF THE ARGUMENT

The court below properly denied Waterhouse's claim regarding the destruction of serological evidence as untimely and procedurally barred because this claim was previously raised and rejected in a prior appeal, the destruction has been known since 1989, the destruction was inadvertent, and no prejudice has been shown.

The lower court erroneously found that the newly discovered evidence/*Brad*y claim based on the affidavit of an employee from the ABC Lounge who was known to all parties at the time of trial could not have been discovered with due diligence. The court nevertheless properly denied the claim finding that Appellant failed to establish that the alleged newly discovered evidence would have probably produced an acquittal and in finding that Appellant failed to show that the State suppressed material evidence in violation of *Brady*.

ARGUMENT

1) Destruction of Evidence Claim

Appellant's first claim once again challenges the inadvertent destruction of the serological evidence in this case.[4] Although the lower court summarily denied this claim finding that it was procedurally barred, successive and untimely because it was previously raised in Waterhouse's 2003 Rule 3.853 motion, Appellant urges this Court to ignore the law because he is now under an active death warrant. He contends that at "the time of the prior proceedings, execution was a possibility, not a certainty" and therefore, he "is not precluded from challenging the warrant on the grounds that execution would be unconstitutional at this time, when the certainty of execution has never previously been before this Court." (Initial brief of Appellant at 21)

This argument is contrary to established precedent as the United States Supreme Court has made it clear that even capital litigation must come to an end. *See e.g. McCleskey v. Zant*, 499

[4] The evidence consisted of the known blood sample of the victim; numerous slides containing blood samples recovered from Appellant's vehicle; two Petri dishes and their contents; slides mounted with hair recovered from Appellant's vehicle; and various parts of Appellant's vehicle that contained blood spatter, including the seat covers, seat backing material, bench seat, carpet pieces, seat–belt strap, and vacuum sweepings; Appellant's clothing and the clothing of the victim. (DAR V3/7-9)

U.S. 467, 491 (1991) (rejecting capital defendant's successive pleading, noting the importance of finality and the heavy burden that successive collateral review places on the system). Further, his argument that heightened due process considerations allow for consideration of his claim at this late date and creates a lower standard has also been rejected. *Smith v. Murray*, 477 U.S. 527, 538 (1986) (applying same standard of review on collateral review in capital and noncapital cases); *Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (POWELL, J., concurring) (noting that the Court's decisions imposing heightened requirements on capital trials and sentencing proceedings do not apply in the postconviction context). Likewise, this Court should reject the premise that barred claims are made timely again by the setting of an execution date. The lower court correctly denied this claim as procedurally barred, successive and untimely.

First, the motion did not meet any of the time bar exceptions set forth in Rule 3.851(d)(2)(A). The record shows that Appellant not only knew about the basis of this claim when he filed the Rule 3.853 motion in 2003, but, also, shows that the inadvertent destruction of the evidence was discovered at the time of the resentencing in 1989. (DNAR V2/133) Thus, it would be time barred for failing to present it at the time of

the resentencing.

Further, as the court found, the motion did not meet any of the time bar exceptions set forth in Rule 3.851(d)(2)(B). No Court has found a due process violation based on the inadvertent destruction of evidence after there has been a fair trial and conviction, let alone one that has been held to apply retroactively for postconviction relief. Appellant recognizes this failure but urges that this Court should make an exception where "a not previously recognized constitutional right is at stake." (Initial Brief of Appellant at 21) Not only is there no legal basis for this Court to ignore the failure to comply with the rule requirements, but Appellant's underlying premise that such a right should be created by this Court, which has no constitutional or other precedential support, would still not excuse his failure to timely raise the claim unless this Court also held that it not only existed but, also that it should be retroactively applied. Since neither this Court nor any court has ever done so, his claim fails.

His reliance on the granting of clemency in Virginia and North Carolina in two cases where evidence had been destroyed actually is adverse to his position. Obviously clemency is an executive function that this Court does not have the power to grant. *Parole Comm'n v. Lockett*, 620 So. 2d 153, 154-55 (Fla.

1993) (explaining that the clemency process derives solely from the Florida Constitution and is strictly an executive branch function).[5] Moreover, the very reason clemency was sought in those cases is because there was no legal basis for either defendant to obtain relief. *See Lovitt v. True*, 403 F.3d 171, 187 (4th Cir. 2005). Appellant's contention that the United States Supreme Court's holding in *Arizona v. Youngblood*, 488 U.S. 51 (1988) should be distinguished from his case because it was not a capital case, was an argument that was available to him when the destruction was discovered. His failure to make the argument then waives it. Further, the United States Supreme Court has "generally rejected attempts to expand any distinctions [between capital and noncapital cases] further." *See e.g. Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 281-82 (1998) and cases cited therein. Accordingly, because his newly fabricated claim does not satisfy any of the rule requirements, it should be rejected.

Further, relief was properly denied as the prior litigation of this claim in *Waterhouse v. State*, 942 So. 2d 414 (Fla. 2006) (table) bars review. *See King v. State*, 597 So. 2d 780, 782 (Fla. 1992) (claims properly barred because they could have been, should have been, or were raised in a prior proceeding);

[5] Appellant was/is free to seek clemency relief from the Governor on this basis.

Medina v. State, 573 So. 2d 293 (Fla. 1990) (Postconviction proceedings are not to be used as a second appeal).

On appeal to this Court, from the denial of his Rule 3.853 motion, Appellant argued the motion was legally sufficient and that even though there was no evidence of bad faith, this case presented an exception to the "bad faith" requirement set forth in *Youngblood* and its Florida progeny. Based on this "exception" Appellant contended the court should have granted his request for a new trial. This Court rejected the argument and affirmed the lower court's order denying relief. *Waterhouse v. State*, 942 So. 2d 414 (Fla. 2006) (table). This ruling on the issue bars any further review and relief must be denied. *Tompkins v. State*, 994 So. 2d 1072, 1083 (Fla. 2008); *Torres–Arboleda v. Dugger*, 636 So. 2d 1321, 1323 (Fla. 1994).

Moreover, even if this claim was not barred, it is without merit. Appellant concedes he could not satisfy *Youngblood's* bad faith requirements, but contends it should be extended to collateral proceedings and the standard broadened to include negligence. A number of courts have recognized that the United States Supreme Court has not extended *Youngblood* to collateral proceedings. *See Lovitt v. True, supra*; *Ferguson v. Roper*, 400 F.3d 635, 638 (8th Cir. 2005) (distinguishing *Youngblood* as concerning pretrial destruction versus destruction of evidence

which existed until long after the trial). This is so because the Due Process considerations of the defendant's right to a fair trial are considerably diminished in postconviction. Notably, even courts that have considered the destruction in postconviction have held that "perhaps even more stringent, standard would seemingly apply when the destruction takes place long after the criminal defendant's conviction and appeal." *Penn v. Little Rock Police Dept.*, 2005 WL 2653722, 1 (E. D. Ark. 2005) (unpublished opinion).

This Court has considered claims of evidence destruction in postconviction and denied relief for failure to establish bad faith or to make a sufficient showing of prejudice. *Hitchcock v. State*, 991 So. 2d 337, 348 (Fla. 2008); *Dufour v. State*, 905 So. 2d 42, 68 (Fla. 2005); *Guzman v. State*, 868 So. 2d 498, 509 (Fla. 2003). In fact, contrary to Appellant's claim that no defendant has been executed after evidence has been destroyed is without merit, Amos Lee King was denied similar relief prior to his execution in 2003 because he could not establish bad faith. *King v. State*, 808 So. 2d 1237, 1242-43 (Fla. 2002) (finding no error with the trial court's application of *Youngblood* that King has failed to demonstrate bad faith on behalf of the State.).

Even if this claim was not barred and simple negligence was enough to satisfy the first prong of *Youngblood,* Waterhouse

would still not be entitled to relief. Waterhouse has failed to make the requisite showing that the evidence to be tested would exonerate him or mitigate his sentence. Waterhouse makes no more than a passing reference to a contention that if the evidence had been tested, the result of the test might establish his innocence. This is not sufficient under *Youngblood* to establish a due process violation. *See also Guzman*, 868 So. 2d at 509-510. As the lower court previously noted, the only argument that Waterhouse ever put forward that the hair and blood belonged to someone other than the victim was previously rejected by this Court. *Waterhouse v. State*, 792 So. 2d 1176, 1183 (Fla. 2001). (DNAR V2/64-65) There is nothing alleged, or in the record, that would refute the State's evidence that the victim was severely battered inside Appellant's vehicle.

Finally, while Waterhouse makes a vague reference to the cruel and unusual punishment clause of both state and federal constitutions and "his liberty" interests in proving his innocence, the fact is, Waterhouse has never truly asserted that he is innocent, but, only that he might be able to undermine the State's evidence establishing his guilt. To the contrary, Waterhouse made numerous statements to law enforcement and other

witnesses admitting to his involvement in the murder.[6] *See Waterhouse v. State*, 429 So. 2d 301, 303-04 (Fla. 1983). If any party was prejudiced by the inadvertent destruction of this evidence, it would be the State as it would undeniably support the already substantial evidence before this Court. This Court should affirm the lower court's denial of the claim as successive, untimely and procedurally barred.

2) Newly Discovered Evidence/*Brady v. Maryland* Claim

In his second claim, Appellant presents two related sub-claims based on the January 9, 2012, affidavit, and subsequent testimony, of Leglio Sotolongo. Waterhouse claims that Sotolongo's testimony constitutes newly discovered evidence which would probably produce an acquittal on retrial. In the alternative, Waterhouse claims that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose Sotolongo's complete statement to Detective Hitchcox because Sotolongo's statement allegedly impeached the testimony of State witness, ABC bartender Kyoe Ginn, and corroborated the testimony of defense witness Leon Vasquez. The lower court erroneously found that this claim was timely as counsel could not have discovered

[6] After admitting he'd had sex with the victim on three occasions, he claimed he flipped out on the day of her death and "did terrible things" with a woman on that day because she was on her period; and, that his problem with sex and violence had occurred following excessive drinking that Wednesday night. (DAR V10/1851-53

it with due diligence and noted that due diligence does not require that counsel allocate limited pre-trial resources in investigating witnesses that police have interviewed. The court did not address the diligence of postconviction counsel. Although the lower court clearly erred in finding that Appellant's motion was timely under Florida Rule of Criminal Procedure 3.851(d)(2), this issue will be discussed in depth, in the State's cross-appeal. The court nevertheless properly denied the claim finding that Appellant failed to establish that the alleged newly discovered evidence would have probably produced an acquittal and in finding that Appellant failed to show that the State suppressed material evidence in violation of *Brady*.

Appellant bases his two sub-claims on the recent affidavit and testimony of Leglio Sotolongo, a doorman who worked at the ABC Lounge in January, 1980. It is undisputed that Sotolongo was interviewed by St. Petersburg Police Department Detective Gary Hitchcox on January 7, 1980, just a few days after the victim's murder, and it is further undisputed that the State provided Detective Hitchcox's report to trial counsel prior to Waterhouse's trial.[7] Sotolongo claims that Detective Hitchcox did not accurately detail his statements in the report.

[7] Appellant's two trial attorneys acknowledged in affidavits that the State provided Detective Hitchcox's report to them prior to trial. (PCR3 V2/245-51)

Specifically, Sotolongo testified that he told Detective Hitchcox that Waterhouse left the ABC Lounge, at an unknown time, with two other males. In the report, Detective Hitchcox wrote:

> At that time I felt it was necessary to contact the ID checkers or bouncers at the bar and make contact with a Leglio E. Sotolongo who was at the bar on Wednesday, 2Jan80. He advised he would contact everyone else he could think of that was working that night and would respond to the station. I interviewed him on the second floor at which time he ID'd himself as Leglio E. Sotolongo, WM/23, 8650 15 S/N, phone 576-3700. Stts that he works in Tampa and is manager of a candle shop, 1506 E. 7 Ave, Tampa, Fl 33605, phone 248-3559, and employed in the evening as an ID checker at ABC Lounge, 3535 4 S/N, phone 894-4875. He stts he has worked for ABC apprx 6 months and that on Wednesday, 2Jan80, he was off however was in the bar from 10 p.m. to 1 a.m.. He was shown a photo of the vict and he sttd that he has seen her several times in the lounge however has never talked to her. He then saw several photos one of which was the susp WATERHOUSE and sttd that he knew WATERHOUSE by the name of BOB and that he comes in the bar several times a week. **That he has had general conversation with this subj however does not remember when BOB left or when the vic left as this is not the type of thing he keeps track of.**

(PCR3 V3/447-48) (emphasis added) In rebuttal, Detective Gary Hitchcox unequivocally testified that Sotolongo never told him that Waterhouse left with two males. (PCR3 V4/605-09) Detective Hitchcox stated that had Sotolongo made such an important statement, he would have noted it in his report as it would have been an exciting development for his investigation. (PCR3 V4/609, 615, 617)

Although the lower court erred in finding Appellant's motion timely under Rule 3.851(d)(2)(A), the court nevertheless properly denied the claims on the merits. After conducting an evidentiary hearing on Appellant's claim, the lower court rejected his claims and found that Sotolongo's testimony that he told Detective Hitchcox that Waterhouse left with two males was not reliable, was cumulative to other testimony heard and rejected by the jury, and would not have affected the jury's verdict in any manner given the substantial evidence of Waterhouse's guilt.

In order to obtain relief on his newly discovered evidence claim, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. Second, the newly discovered evidence must be of such a nature that it would produce an acquittal on retrial. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *see also Trepal v. State*, 846 So. 2d 405, 438 (Fla. 2003) (noting that the test for prejudice under a newly discovered evidence claim is the most difficult standard for a defendant to meet) (Pariente, J., concurring). "To reach this conclusion the trial court is required to 'consider all newly discovered evidence

which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence **and the evidence which was introduced at the trial.'"** *Jones*, 709 So. 2d at 521 (quoting *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)) (emphasis added). Furthermore, the court should also determine whether the evidence is cumulative to other evidence and consider any inconsistencies in the newly discovered evidence. *Tompkins v. State*, 980 So. 2d 451, 457-59 (Fla. 2007); *Williamson v. State*, 961 So. 2d 229 (Fla. 2007).

In the instant case, Appellant asserts that the evidence from Sotolongo would have impeached the testimony of State witness, Kyoe Ginn, the bartender at ABC Lounge who served Waterhouse and the victim drinks and observed them leaving the bar area together around 1:00 a.m., and would have corroborated the testimony of defense witness Leon Vasquez, a bouncer at the ABC Lounge who testified to observing Waterhouse leave the bar with his friend and Steve Spitzig to go and purchase marijuana between midnight and 12:45 a.m. Although the trial court erroneously concluded that Appellant had satisfied the diligence requirement of the *Jones* newly discovered evidence standard, the court correctly found that the evidence from Sotolongo would not have been of "such a nature that it would probably produce an

acquittal on retrial in that it would not give rise to a reasonable doubt as to Waterhouse's credibility." (PCR3 V3/371)

Appellant erroneously argues that the lower court applied an incorrect standard when analyzing the prejudice prong of the *Jones* standard. Contrary to Appellant's assertions, the *Jones* standard does not require a court to view the newly discovered evidence against the evidence which may be presented if there were a new trial, but rather, this Court stated that the standard requires the court to evaluate the "weight of both the newly discovered evidence and the evidence which ***was*** introduced at the trial." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991) (emphasis added); *see also Marek v. State*, 14 So. 3d 985, 990-91 (Fla. 2009) ("In determining whether newly discovered evidence would probably result in an acquittal or a lesser sentence, ***the new evidence must be viewed in conjunction with the evidence presented at trial***.") (emphasis added). To engage in a speculative analysis of what may be done at a retrial some thirty years after the original trial, as Appellant has incorrectly done on pages 30-36 of his brief, is simply not the appropriate analysis when considering whether the newly discovered evidence would probably produce an acquittal. For example, Appellant incorrectly states that the serology testimony from Theodore Yeshion and David Baer would be excluded

on retrial based on the inadvertent destruction of evidence and that Judith Bunker would not be able to testify regarding the blood spatter stains based on her falsifying her credentials. Contrary to these assertions, these witnesses would be able to testify at any retrial regarding their observations of blood stains and spatter throughout Appellant's vehicle. *See Johnston v. State*, 27 So. 3d 11, 19-20 (Fla. 2010) (stating that fact that blood evidence was consumed in testing prior to trial in 1984, and that no blood can now be found on item, "does not prove that there was never any blood on the item" and also rejecting a claim based on Judith Bunker); *Correll v. State*, 698 So. 2d 522 (Fla. 1997) (finding that Bunker's exaggerated credentials had little effect on the outcome of the case, especially considering her vast experience in working on thousands of cases while employed by the medical examiner).

In the instant case, the trial court properly evaluated the newly discovered evidence and weighed it against the substantial evidence introduced by the State at Appellant's trial in 1980. The court, applying the *Jones* standard, correctly determined that the new evidence did not give rise to a reasonable doubt regarding Appellant's guilt and would not have probably produced an acquittal:

Sergeant Gail Murry (“Murry”) and Hitchcox both testified that during an interview with Waterhouse conducted on January 7, 1980, he denied knowing the victim. (TT, pp. 1231, 1258.)* Waterhouse further related that he was drinking at the ABC Lounge on the night of January 2, 1980. (TT, p. 1232.) He also told both Murry and Hitchcox that nobody had used his car for at least two weeks prior to the night of the murder. (TT, p. 1232, 1258-59.)

*[The Court refers to the page numbers of the trial transcript (“TT”) rather than the page numbers of the record on appeal.]

Waterhouse was subsequently arrested on January 9, 1980. During the ride to the police station Hitchcox asked Waterhouse whether the police had been right when they interviewed him earlier about his involvement in the murder, to which he replied, “Might.” This response was relayed to the jury in the testimony of both Murry and Hitchcox. (TT, pp. 1234, 1259-60.) Also, during the trip to the police station Waterhouse was shown a picture of the victim and admitted that he knew her and identified her as “Debbie.” (TT, pp. 1234-35, 1260.) Murry further testified that during a January 9, 1980 interview at the police station, Waterhouse said that nothing will bring her back, his life was over, and he was going to the electric chair. (TT, p. 1236.) At that interview, talking in relation to the murder investigation, Waterhouse also stated that he had problems with sex and violence. (TT, pp. 1237, 1262.)

The jury also heard that during a January 10, 1980 interview with Murry and Hitchcox, Waterhouse indicated that he really liked sex, that he had a problem with violence, and found himself doing things that were wrong but which he had no control over when he drank. (TT, pp. 1239). Hitchcox testified that Waterhouse generally discussed sex, violence, and alcohol in talking about the victim. (TT, p. 1262.) He related that he really liked sex and enjoyed anal intercourse. (TT, p. 1239.) Murry’s testimony also reflected that at the January 10, 1980 interview, Waterhouse stated that sometimes he became frustrated when a woman was menstruating and that type of problem happened on Wednesday night, the night of the murder. (TT, p. 1240-41.) He stated that this problem would

just come over him very quickly, like flipping a switch, and that it was like he could watch himself do terrible things. (TT, p. 1241.) It was Murry's testimony that Waterhouse stated that this problem arose when he drank in excess and he had more alcohol than normal, which included his consuming eight or nine beers before arriving at the ABC Lounge and four or five white Russian drinks while at ABC Lounge. (TT, p. 1241-42.) Murry further testified that Waterhouse also stated, "why do you think I quit drinking since Wednesday night?" in discussing that this problem occurs when he has had a lot to drink. (TT, p. 1242.) During the January 10, 1980 interview, Waterhouse also stated that he in fact had known the victim for about six months and that they had had sex on about three occasions. (TT, p. 1242.) When Waterhouse was asked about Wednesday night and his problem, Murry testified that he responded that "You do what you can to protect Bobby Waterhouse. No one wants to go to jail." (TT, p. 1243-44.) This statement was made in the context of his discussion of the problem he had and doing things that are wrong. (TT, p. 1244.) Murry testified that Waterhouse again stated that his life was over and he was going to the electric chair. (TT, p. 1244.)

At trial, Robert Van Vuren ("Van Vuren"), the foreman at Waterhouse's place of employment, testified that Waterhouse appeared at work on January 3, 1980 and asked for the day off. (TT pp. 538-40.) He told Van Vuren that he was feeling rough. (TT, p. 539-40.) Van Vuren observed that Waterhouse had "red marks on his face, like scratches, on each side of his face" and he had blood shot eyes and appeared hung-over. (TT, p. 539.) Van Vuren testified that he saw Waterhouse on January 7, 1980. At that time, Van Vuren testified, it looked like he was wearing makeup covering the red scratches on his face. (TT, p. 541-42.) Van Vuren testified that he had previously been in Waterhouse's car and had noticed a tire tool inside the car. (TT, p. 542—44). On this date Vuren observed new beige cloth seat covers on the front seat of Waterhouse's vehicle that he had never seen before. (TT, p. 542.) Van Vuren asked Waterhouse why the driver's side window was down, and he replied that it was not working. (TT, p. 545.) Frank Sierra, the custodian of records at Waterhouse's place of employment testified,

that Waterhouse's time card reflected that he did not work on January 3, 1980. (TT, pp. 590-92.)

Van Vuren also testified that, one to two weeks prior to the murder, Waterhouse told Van Vuren that he liked anal intercourse and that he liked to slap women and liked girls that liked that done to them. (TT, p. 557-59.) Waterhouse's girlfriend, Sherry Rivers, testified that Waterhouse had asked her if he could hit her during sex. (TT, pp. 716.) She further testified that they had anal intercourse multiple times. (TT, p. 717.) She stated that Waterhouse asked her if he could hit her and she told him that he could not; however, Waterhouse struck her anyway. (TT pp. 716-18.)

Kenneth Young ("Young") testified that while in jail pending his trial, after Waterhouse had held a shank to another inmate's throat, Waterhouse then made everyone else, except that inmate, leave the cell. (TT, pp. 1180-82.) Young testified that Waterhouse left the cell a few minutes later, and stated "I wonder how he'd like a Coke bottle up his ass like I gave her." (TT, p. 1183.) Additionally, Young testified that while in jail, Waterhouse was reviewing legal documents and when he realized his foreman was going to be called to say that Waterhouse appeared at work on January 3, 1980 with scratches on his face, Waterhouse told Young that that was incorrect and that he was so scratched up he didn't go into work at all that day. (TT, p. 1176.)

Medical examiner Joan Wood ("Wood") testified at trial that the victim's rectum was damaged consistent with a foreign object being inserted, and that the damage was consistent with a Coke bottle being inserted. (TT, p. 437-39, 454.) Sergeant John Long testified that the he found a Coke bottle underneath the front seat of Waterhouse's vehicle. (TT, p. 833-34.) Wood further testified that a tampon was present in the victim's mouth, preventing the victim from crying out. (TT, pp. 442-43.) Wood also determined that the victim was menstruating at the time of death. (TT, p. 457.) Wood testified that the injuries to the victim were consistent with the victim being struck with moderate force by a blunt object that was relatively long and not very heavy. (TT, p. 446.) Further, Wood testified that being struck in such a way would result in blood splatter, and that being struck with a tire changing

tool would cause results such as those seen on the victim. (TT, pp. 447-48, 454.) Wood also testified that when she conducted an autopsy on the victim, she found evidence strongly suggestive of semen in the victim's rectum. (TT, p. 432-36.) Specifically, Wood testified that in the victim's rectum she found acid phosphatase, which is present in high concentration only in semen. (TT pp. 436-37.)

Florida Department of Law Enforcement (FDLE) crime laboratory analyst Theodore Yeshion ("Yeshion") testified that he visually inspected Waterhouse's vehicle on June 5, 1980, and he observed what appeared to be blood stains throughout the interior. (TT, pp. 927-28.) He also testified that he conducted a phenolophthalien reagent test of the vehicle, which resulted in positive indications for the presence of blood. (TT, pp. 928-29.) Yeshion also testified that he performed a luminol test of the vehicle, which revealed a positive reaction throughout the interior of the vehicle. (TT, pp. 929-31.) Yeshion further testified that he observed spatter marks, as well as smears, which were consistent with someone trying to wipe the blood. (TT, pp. 931-34.)

Blood stain expert Judith Bunker ("Bunker") testified to the angle and velocity of blood splatters found throughout the vehicle. (TT, pp. 1005-1012.) She stated that many of the splatters were the result of medium velocity forceful bloodshed. (TT, pp. 1007.) Bunker further testified that the blood stains originated from the right front passenger seat and appeared to be the result of a person using a tool in a right-handed back-swinging motion. (TT, pp. 1009-1012, 1014-1015.)

David Baer, an FDLE crime lab analyst, testified that there was human blood staining on pieces of evidence taken from the interior of Waterhouse's car. (TT, pp. 860-68.) He also tested blood samples from Waterhouse and the victim. (TT, pp. 868-870.) Baer testified that the blood on the pieces of the car interior that he tested was consistent with the victim's blood. (TT, p. 869-70, 889.)

Patricia Ann Lasko, FDLE microanalyst, testified that strands of hair found in Waterhouse's vehicle could not be excluded as having come from the victim. (TT, pp. 1075-1076.)

> Mary Lynn Henson, FDLE microanalyst, testified that fibers found in Waterhouse's vehicle were similar to fibers from the victim's pants and could not be excluded as having come from the pants. Henson also testified that other fibers found in Waterhouse's vehicle were similar in characteristic and could not be excluded as having come from the victim's coat. (TT, pp. 1097-1114.)
>
> As noted above, Ginn testified that Waterhouse and the victim were regulars at the ABC Lounge. She further testified that after conversing for around 30 minutes, the victim and Waterhouse left the bar together around one o'clock. (TT, p. 518-19). Ginn was subsequently questioned by police. She testified that she immediately identified the Defendant's photo out of a group of pictures as the person who left the bar with the victim on the night of the murder. (TT, pp. 531-32.) Ginn further testified that after the night of the murder, Waterhouse came into the bar and only ordered orange juice and left before closing. (TT, pp. 520—21.) This behavior was atypical for him as he would normally consume alcoholic beverages and leave at closing time. (TT, p. 521.)
>
> Kenneth Norwood ("Norwood"), who was living with Waterhouse at the time of the murder, testified that on January 3, 1980, he observed Waterhouse beginning at around noon and at some point thereafter, saw Waterhouse washing his car. (TT, p. 653-56.) Norwood testified that he left during the afternoon and that Waterhouse was cleaning the car when Norwood returned at approximately 4:00 — 4:30 p.m. (TT, p. 656.) Norwood testified that it appeared Waterhouse was cleaning the interior of the vehicle. (TT, pp. 656-57.)

(PCR3 V3/371-75)

Based on this evidence, the court properly concluded that Sotolongo's unreliable testimony would not have probably produced an acquittal. The court made the following factual

finding after hearing testimony from Sotolongo and Detective Hitchcox:

> Sotolongo's testimony as to seeing Waterhouse leave the bar with two other men the night in question was **not reliable** because of the long passage of time, the fact that his memory when interviewed by Detective Hitchcox was closer to the time of the event, and his testimony at the time of the January 17, 2012 evidentiary hearing was admittedly weaker.

(PCR3 V3/375-76) (emphasis added) The court's factual findings are clearly supported by the record and this Court must defer to the lower court's factual findings. *See Hurst v. State*, 18 So. 3d 975, 992-93 (Fla. 2009) ("In reviewing the circuit court's decision as to a newly discovered evidence claim following an evidentiary hearing, where the court's findings are supported by competent, substantial evidence, we will not substitute our judgment for that of the trial court on questions of fact, credibility of the witnesses, or the weight to be given to the evidence by the trial court."); *Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009) (stating that when the postconviction court rules on a newly discovered evidence claim after an evidentiary hearing, this Court reviews the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence and reviews the court's application of the law to the facts *de novo*).

In addition to finding Sotolongo's testimony unreliable, the court also noted that his testimony was cumulative to, and much less detailed than, the testimony from defense witness Leon Vasquez. At trial, Vasquez, a fellow bouncer at the ABC Lounge, testified that he observed Waterhouse leave the lounge with two other males around midnight on January 2, 1980. (DAR V10/1938-43) According to Vasquez, Waterhouse and his male friend left the lounge with Steve Spitzig to purchase marijuana, and when they returned to the lounge around 12:45 a.m., they dropped Spitzig off and Spitzig re-entered the lounge alone while Waterhouse and his male friend stayed in the car and left the parking area. (DAR V10/1938-43) Vasquez further testified that the victim was inside the lounge around last call at approximately 1:15 a.m., but he did not see her leave and did not know whether she left with anyone. (DAR V10/1971-72) On cross examination, Vasquez, like Sotolongo, acknowledged that he could not observe all of the entrances to the ABC Lounge from his vantage point and that it was possible that Waterhouse had re-entered the lounge at some point. (DAR V11/1964-67)

Clearly, Sotolongo's vague and unreliable testimony is cumulative and less favorable to the defense than Vasquez's trial testimony which was heard and rejected by the jury. As the court noted, Vasquez "was able to offer a more definitive and

narrower timeframe as to Waterhouse's departure with the two men than Sotolongo could provide." (PCR3 V3/376) Thus, because Sotolongo's unreliable testimony was cumulative to other testimony rejected by the jury and would not have resulted in an acquittal, the trial court properly denied his newly discovered evidence claim.

Likewise, the court also properly denied Appellant's related claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose Sotolongo's statement. In order to establish a *Brady* violation, a defendant must establish three elements: (1) the evidence at issue was favorable to the defendant, because it was either exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) the suppression resulted in prejudice. *Johnson v. State*, 921 So. 2d 490 (Fla. 2005). Under the *Brady* standard of materiality, the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667 (1985). A criminal defendant alleging a *Brady* violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have

produced a different verdict. *Strickler v. Greene*, 527 U.S. 263, 281 n.20 (1999).

In addressing Appellant's *Brady* claim, the lower court first concluded that Sotolongo's testimony was impeaching evidence because it impeached bartender Kyoe Ginn's testimony and corroborated defense witness Vasquez's testimony. The State submits that this factual finding is not supported by competent, substantial evidence and should be rejected by this Court. Contrary to the court's finding that Sotolongo was "confident he saw Waterhouse leave between 12:00 a.m. and 2:00 a.m.," a review of Sotolongo's testimony belies any finding of "confidence" in his timeframes. Sotolongo was extremely vague regarding when he observed Waterhouse leave the lounge with two men, and his vague recollections did not impeach Ginn's specific timeframe that Waterhouse and the victim left the bar around 1:00 a.m. (DAR V6/1114-1120) Sotolongo conceded that he is unable to recall ***any*** specifics regarding the time he observed Waterhouse leaving the bar with two other males, and he further admitted that Waterhouse may have returned to the lounge prior to closing and left with the victim but he (Sotolongo) was just not there to see it. (PCR3 V4/565-68) Sotolongo also admitted, contrary to his affidavit, that Kyoe Ginn could see the front exit. (PCR3 V4/565-68)

In contrast to Sotolongo's vague testimony, Kyoe Ginn testified at Waterhouse's trial that she was a bartender at the ABC Lounge and she waited on, and observed, Waterhouse and the victim drinking together sometime after midnight when the victim's friends left the lounge. Ginn further testified that Waterhouse and the victim "left the bar" together around 1:00 a.m. (DAR V6/1114-20) Thus, the court erred in finding that Appellant had satisfied the first prong of the *Brady* analysis by showing that Sotolongo's vague testimony impeached Kyoe Ginn's testimony that she observed Waterhouse and the victim leaving the bar area together around 1:00 a.m.

Although the lower court erred in finding that Sotolongo's testimony was favorable to the defense because it would have impeached Ginn's testimony, the court nevertheless properly denied Appellant's *Brady* claim because he failed to establish that the State suppressed the evidence and that it was material. In finding that the State did not suppress the evidence, the trial court noted that it was uncontested that the State provided Detective Hitchcox's report to trial counsel prior to trial. Appellant, in an attempt to avoid this fatal flaw in his *Brady* claim, argues that the State suppressed Sotolongo's "actual" statements to the detective because the detective filed a "false" police report. The trial court rejected this

contention based on a credibility finding after hearing the testimony of Sotolongo and Detective Hitchcox at the evidentiary hearing:

> [T]he Court finds that the description of Sotolongo's interview by Hitchcox is more reliable since it was reduced to writing at the time of the interview. Additionally, the passage of time and Sotolongo's weak recollection militate against the reliability of Sotolongo's statements.

(PCR3 V3/379-80)

Appellant argues that the court's factual findings in this regard are not supported by competent, substantial evidence. According to Appellant, the record contradicts any finding of reliability by Detective Hitchcox based on his "prior documented behavior in this case." Appellant asserts that Hitchcox's claim that he would have noted Sotolongo's statement in his report because it was an "exciting" development is "conclusively contradicted" by the detective's actions with Leon Vasquez. Initial Brief of Appellant at 38-39. Appellant notes that Hitchcox testified at trial that he was told by Vasquez that Appellant left with two males, but asserts, without any evidentiary support, that Hitchcox failed to put Vasquez's statements into any report. Thus, Appellant argues that Hitchcox was not credible when he testified at the evidentiary hearing that he would have written Sotolongo's "exciting" information in a report based on his alleged failure to do the same when given

similar information from Vasquez.

Contrary to Appellant's claim, the trial court's factual findings are supported by competent evidence and are not refuted in any manner by Detective Hitchcox's prior actions in this case. There is simply no evidence that Detective Hitchcox failed to prepare a report involving Vasquez. At the evidentiary hearing, Detective Hitchcox was questioned by collateral counsel Norgard regarding a single report: his December 7, 1980 report which involved Leglio Sotolongo's statements. The detective acknowledged that he may have authored other reports and also noted that other detectives were involved in the murder investigation who had interviewed Vasquez.[8] (PCR3 V4/624-31) At trial, Detective Hitchcox testified that he spoke with Vasquez *after* obtaining Vasquez's information from others (DAR

[8] At trial, Detective Robert W. Long testified that he interviewed Leon Vasquez on January 11, 1980, and filed a supplementary report regarding this information. (DAR V11/2000-01) Detective San Marco also prepared a report based on an interview with Vasquez. (PCR3 V4/630) All of the police reports from the St. Petersburg Police Department were available at the time of trial (DAR V1/69, 86), and were also turned over by the police department and the State Attorney's Office during public records litigation associated with Appellant's postconviction proceedings. (PCR2 V3/560; V4/640) Furthermore, collateral counsel Norgard was obviously aware of the existence of police reports regarding Vasquez as he began his representation of Appellant in 2002 during Waterhouse's state habeas proceedings in this Court where this issue was discussed in Waterhouse's claim that appellate counsel was ineffective for failing to move for a continuance based on the late disclosure of two witnesses, Leon Vasquez and Steve Spitzig. *See Waterhouse v. State*, 838 So. 2d 480, 484 (Fla. 2002).

V11/2003), and further testified that detectives followed up and investigated Vasquez's information. Thus, it is clear that detectives recorded Vasquez's statement that Waterhouse left with two other males and the detectives did not fail to document or investigate Vasquez's statements. Based on this record, the trial court properly made a factual finding that Detective Hitchcox was credible when he testified that he would have noted Sotolongo's statement, had he made it, at the time of the January 7, 1980 interview and it would have been contained in his report.

In this case, as the lower court correctly noted when denying Appellant's *Brady* claim, it is undisputed that the State did not suppress 'the information from Sotolongo." Trial counsel admitted they possessed Detective Hitchcox's report detailing Sotolongo's statements. This Court has consistently found that a *Brady* claim is meritless when the defense was aware of the information before trial. *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000) (noting that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant") (quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)); *Davis v. State*, 928 So. 2d 1089, 1116 (Fla. 2005). To the extent that

Appellant argues that he did not have Sotolongo's "accurate" statement because Detective Hitchcox filed a false report, the trial court properly rejected this argument based on the conflicting testimony and made a factual finding that Sotolongo's current statements were not reliable.

Likewise, the lower court also properly found that Appellant failed to establish prejudice because Sotolongo's testimony was not material. Under the *Brady* standard of materiality, the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667 (1985). A criminal defendant alleging a *Brady* violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict. *Strickler v. Greene*, 527 U.S. 263, 281 n.20 (1999).

Based on the substantial evidence establishing Waterhouse's guilt, including Waterhouse's own incriminating statements, the lower court concluded that confidence in the outcome had not been undermined. The court noted that the jury heard, and rejected, the cumulative, and arguably more defense-favorable

evidence from Leon Vasquez regarding Waterhouse leaving the lounge with two other males. Because Appellant failed to establish that the State suppressed Sotolongo's statements and failed to establish that his testimony was material, the trial court properly denied Appellant's *Brady* claim.

Cross-Appeal Issue: The trial court erred in finding that Appellant had timely filed his successive postconviction claim pursuant to Florida Rule of Criminal Procedure 3.851(d)(2)(A).

The State submits that the lower court erred in finding that Appellant timely filed Claim Two of his successive postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851(d)(2)(A).[9] This rule prohibits the filing of a postconviction motion more than one year after the judgment and sentence become final unless "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). Appellant claims that he or his counsel could not have known of Sotolongo's statements to Detective Hitchcox with the use of due diligence because the detective falsely reported Sotolongo's statements in his report.

[9] This Court's standard of review following a denial of a postconviction claim where the trial court has conducted an evidentiary hearing accords deference to the trial court's factual findings, but the trial court's legal conclusions are reviewed *de novo*. *Lowe v. State*, 2 So. 3d 21, 29-30 (Fla. 2008).

The lower court based its finding of due diligence on *trial counsel's* efforts, but failed to address the lack of due diligence of *collateral counsel*. As this Court has long held, in "order to overcome a procedural bar, a defendant must show that the newly discovered facts could not have been discovered with due diligence by collateral counsel and raised in an initial rule 3.850 motion." *Owen v. Crosby*, 854 So. 2d 182, 187 (Fla. 2003). Further, in finding that Appellant could not have discovered Sotolongo's testimony earlier with the use of due diligence, the lower court erroneously relied on *dicta* from this Court's recent decision in *Mungin v. State*, ___ So. 3d ___, 36 Fla. L. Weekly S610 (Fla. Oct. 27, 2011), in concluding that "due diligence surely does not require that counsel allocate limited ***pre-trial*** resources in investigating a witness that is reported by police to have said something contrary to what the witness now claims." (PCR3 V3/371) (emphasis added). The State submits that, as the following will show, Waterhouse made no showing that collateral counsel could not have discovered this information with due diligence and this failure is not excused by the nature of the unsupported allegations presented. Accordingly, this claim should have been denied as untimely.

In *Mungin*, this Court reversed and remanded for an evidentiary hearing after the lower court summarily denied a

successive postconviction motion raising claims of newly discovered evidence, and *Brady/Giglio* violations.[10] The defendant in *Mungin* filed an affidavit from an eyewitness who alleged that he was the first person at the murder scene and that no other person was present. The witness further stated that he told police this information, but the police report was false and did not accurately contain his statements. *Id*. at *1.

In reversing and remanding for an evidentiary hearing on the *Brady/Giglio* claims, this Court did not address the due diligence requirement of Rule 3.851(d)(2)(A) at any point in its opinion. Rather, when discussing the materiality of the witness's testimony and the need for an evidentiary hearing, this Court noted that "[w]e are troubled by the possibility that a false police report was submitted and then relied on by defense counsel." *Id*. at *9. As previously noted, the lower court relied on this to conclude that "due diligence surely does not require that counsel allocate limited ***pre-trial*** resources in investigating a witness that is reported by police to have said something contrary to what the witness now claims." (PCR3 V3/371) (emphasis added).

[10] This Court affirmed the trial court's summary denial of the newly discovered evidence claim based on the defendant's failure to show that the evidence would probably produce an acquittal, but remanded for an evidentiary hearing on the *Brady/Giglio* claims. *Mungin*, at *10.

Contrary to the lower court's finding, this Court did not "suggest" in *Mungin* that a defendant satisfies the due diligence prong of Rule 3.851(d)(2)(A) by claiming that a police report contained false statements of a witness. To do so would be to *sub silentio* overrule the requirements of the rule and the legion of cases that require not only counsel, but also, collateral counsel to establish why they could not, with the use of due diligence, have discovered the testimony previously. However, this Court does not intentionally overrule itself *sub silentio*. *Tompkins v. State*, 994 So. 2d 1072, 1088 (Fla. 2008) (observing that this Court has made it clear it "does not intentionally overrule itself sub silentio" citing to *State v. Ruiz*, 863 So. 2d 1205, 1210 (Fla. 2003) (quoting *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002)).

As noted, this Court in *Mungin* did not discuss the due diligence pleading requirement of Rule 3.851(d)(2)(A) in any fashion, but merely expressed concern with the possibility that trial counsel had relied on a false police report and remanded the case for an evidentiary hearing to "explore this issue." *Mungin*, at *9. Because *Mungin* was a summary denial, the trial court was required to accept the allegations of due diligence as true. *Mungin*, at 5. As this Court has previously stated, there is a "heightened requirement to establish due diligence" during

an evidentiary hearing, and it "remains to be factually tested in an evidentiary hearing to determine whether the defendant has demonstrated that the successive motion has been filed within the time limit for when the statement was or could have been discovered through the exercise of due diligence." *Davis v. State*, 26 So. 3d 519, 526-29 (Fla. 2009) (noting that when examining a newly discovered evidence claim based on a recanting witness, a determination of whether the witness's statements are true and meet the due diligence and probability prongs of *Jones* usually requires an evidentiary hearing to evaluate credibility unless the affidavit is inherently incredible or obviously immaterial to the verdict and sentence).

This Court's statements in *Mungin* did not create new law that automatically establishes due diligence whenever there is an allegation that a false police report has been filed when, as here, there has been an evidentiary hearing and counsel was afforded the opportunity to present evidence establishing his diligence, but did not do so. Based on the facts before the lower court, Waterhouse has simply failed to carry his burden of establishing due diligence to show why, after more than thirty years, neither he nor his counsel could not have easily discovered the witness now being presented.

Rather, the record clearly establishes that the evidence from Sotolongo could have easily been ascertained with due diligence prior to the current warrant proceedings. It is undisputed that Waterhouse's trial counsel, and consequently, all subsequent counsel, possessed Detective Hitchcox's January 7, 1980 report prior to trial. The only excuse presented for failing to attempt to speak to a witness who is, and always has been, local and easily contacted, is that counsel "relied upon the veracity of the police report." This purported "reliance" on Hitchcox's report seems paradoxical, given Waterhouse's contention at trial that Detective Hitchcox was not accurately reporting statements from bouncers at the ABC Lounge (DAR V11/2133, 2137), his challenge on appeal to the court's failure to grant a continuance based on the late disclosure of witnesses Vasquez and Spitzig, *Waterhouse*, 522 So.2d at 343, and his representation in the state habeas that counsel was ineffective for failing to seek a continuance to conduct depositions of the witnesses. *Waterhouse*, 838 So.2d at 484.

At trial, defense counsel introduced evidence from another ABC bouncer, Leon Vasquez, who testified that he observed Waterhouse leave the ABC Lounge around midnight with Steve Spitzig and another male to go purchase marijuana. According to Vasquez, the three men returned to the ABC Lounge about forty-

five minutes later and dropped off Spitzig, but Vasquez testified that he did not see Waterhouse re-enter the lounge.[11] According to Vasquez, he told this information to Detective Hitchcox, but the detective "told me he didn't want to hear it . . . his job was to make a case, not listen to a defense." (DAR V10/1949, 1974) Trial counsel subsequently argued to the jury in closing that Vasquez was being truthful and Detective Hitchcox was "white-washing" his meeting with Vasquez. (DAR V11/2133, 2137)

The lower court failed to even consider collateral counsel's due diligence in ascertaining this information from Sotolongo. This Court has long held that in "order to overcome a procedural bar, a defendant must show that the newly discovered facts could not have been discovered with due diligence by collateral counsel and raised in an initial rule 3.850 motion." *Owen v. Crosby*, 854 So. 2d 182, 187 (Fla. 2003). Sotolongo testified at the evidentiary hearing that he has continuously resided in Pinellas County since 1980. In light of trial counsel's contentions regarding the credibility of Detective Hitchcox (or lack thereof), it is inconceivable that collateral counsel would not have investigated Hitchcox's interview with ABC bouncer Sotolongo, especially considering that he was only

[11] Vasquez conceded that it was possible that Waterhouse may have re-entered the lounge without him noticing. (DAR V10/1964-66).

one of four people listed in the January 7, 1980 police report as being present at the ABC Lounge on the evening of the victim's murder. *See generally Lowe v. State*, 2 So. 3d 21, 40-41 (Fla. 2008) (finding that counsel did not exercise due diligence in discovering witness because witness was mentioned in police report and in officer's deposition); *Swafford v. State*, 828 So. 2d 966, 974-78 (Fla. 2002) (affirming denial of successive postconviction claim based on newly discovered evidence where the defendant had not exercised due diligence in timely presenting the claim because the witness whose testimony was the newly discovered evidence had been interviewed by police at the time of the trial and the witness's name appeared in police reports); *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991) (noting that witness, if not already known to the defendant or counsel, could have been obtained with the exercise of reasonable diligence as the witness's name and telephone number were set forth in a police report). Accordingly, because Sotolongo was known to Appellant,[12] trial counsel, and all subsequent collateral counsel based on his documentation in Detective Hitchcox's police report, the State submits that the lower court erred in finding this claim timely filed pursuant to

[12] According to Sotolongo, Appellant would have knowledge that he was a potential witness because Waterhouse gave Sotolongo $10 on the night of the murder as repayment for a prior loan.

Rule 3.851(d)(2)(A). The claim should have been denied based on Appellant's failure to meet the due diligence standards applicable to successive postconviction motions and the State urges this Court to find that this claim is untimely under the rule.

The murder in the instant case happened in 1980. Waterhouse's postconviction proceedings in state court were completed in February, 2003. Other than an improperly filed Rule 3.853 motion seeking testing of serology evidence that Appellant knew was destroyed prior to the resentencing in 1989, Waterhouse has made no effort to pursue litigation of his case in state or federal court. When given the opportunity at the evidentiary hearing to explain what, if any, steps counsel Norgard had taken to investigate this claim, he admitted that Sotolongo's name was contained in the police reports, but he did not recall seeing his name. Thus, even though counsel Norgard represented to this Court in 2002 that he would represent Waterhouse in his state habeas petition, "as well as all times in the future until the current judgment and sentence is reversed, reduced or carried out," there was no evidence put before the lower court of any due diligence made to investigate this claim by current counsel. Having failed to carry his burden of establishing what efforts he made to pursue this claim during the past year, this motion

should have been deemed untimely.

The State urges this Court to make it clear to Appellant, and all other capital defendants to follow, that this Court's rules apply and that they cannot simply wait until a warrant has been signed and then produce an untimely allegation to obtain further delay. *See Chandler v. Crosby*, 916 So. 2d 728, 734 (Fla. 2005) (Wells, J. concurring). The expressed finding by this Court of a procedural bar is important so that the federal courts, who will surely be asked to consider Appellant's claims prior to the scheduled execution, will be able to discern the parameters of their federal habeas review. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (finding that § 2254(d)(1) limits review to claims adjudicated on the merits in State court proceedings to ensure that federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings). Accordingly, the State asks this Court to not only deny this appeal but, also, make it clear that the denial of Appellant's newly discovered evidence/*Brady* claims rest upon the adequate and independent state grounds of a state procedural bar. *Spencer v. Secretary, Dep't of Corr.*, 609 F.3d 1170, 1178 (11th Cir. 2010) (quoting *Parker v. Secretary, Dep't of Corr.*, 331 F.3d 764, 771 (11th Cir. 2003) (recognizing that federal

courts cannot consider a claim where "the last state court rendering a judgment in the case clearly and expressly state[d] that its judgment rests on a state procedural bar.").

RESPONSE IN OPPOSITION TO ANY REQUEST FOR STAY

As both this Court and the United States Supreme Court have held, a defendant must show that he has presented substantial grounds for relief from his conviction and sentence in order to be entitled to a stay. *See Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998); *Delo v. Sykes*, 495 U.S. 320, 321 (1990); *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983); *Bowersox v. Williams*, 517 U.S. 345 (1996). Waterhouse has not presented any substantial grounds for relief. As such, any request for stay should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, the State of Florida, respectfully urges this Court to affirm the order of the lower court denying Waterhouse's successive motion for postconviction relief and deny the request for a stay.

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 electronic transmission and U.S. mail to Robert A. Norgard, Esquire, Norgard and Norgard, P.O. Box 811, Bartow, Florida 33831-0811 (norgardlaw@verizon.net), on this 31st day of January, 2012.

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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