Filing # 61573671 E-Filed 09/15/2017 11:27:53 AM

RECEIVED, 09/15/2017 11:28:26 AM, Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC17-929

DENNIS SOCHOR,

Appellant

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant/Sochor was the Defendant and Appellee/State was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In this brief, the symbol "ROA" will be used to denote the record on direct appeal; PCR #1 will denote the record from the initial postconviction hearings in Case No. SC01-85; PCR #2 will denote the record from the successive postconviction hearings in Case No. SC11-393.

STATEMENT OF THE CASE AND FACTS

Defendant was indicted on October 9, 1986 for the first-degree murder, kidnapping and attempted sexual battery of Patti Gifford. Defendant's trial began on October 13, 1989 and the jury returned guilty verdicts on October 20, 1989. (ROA. 1189-90). Defendant was sentenced to death on November 2, 1989. (ROA. 1237-38). The trial court found the following aggravating circumstances: (1) prior violent felony (PVF); (2) committed during the course of a felony; (3) heinous, atrocious and cruel (HAC); (4) cold, calculated and premeditated (CCP). (ROA 1231-36). On direct appeal this Court struck CCP but upheld Defendant's conviction and death sentence. Sochor v. State, 580 So. 2d 595 (Fla. 1991). This Court found the facts to be as follows:

[V]ictim, an eighteen-year-old female, and a friend went to a lounge located in Broward county to celebrate New Year's Eve. During the course of the evening the friend became ill. Sochor and his brother, Gary, helped the victim escort her friend outside to her car. Promising her that she would return soon, the victim returned to the lounge.

Early the next morning the friend awoke in the car, discovered the victim missing, and called the police… The police talked with Sochor's roommates who said that he had left suddenly when he saw his picture on television. They also told police that Sochor's brother, Gary, had been visiting him and had recently returned to Michigan. The police interviewed Gary who implicated his brother in the victim's disappearance...

At trial Gary gave the following testimony. He went to the lounge on New Year's Eve with his brother who spent the evening talking with the victim and her friend. When it came time to leave, the victim and his brother were kissing in the lounge parking lot while Gary waited in the truck. Several minutes later, she agreed to go to breakfast with them…Sochor drove to a secluded spot nearby and stopped the truck. Gary remembered the victim screaming for help and seeing Sochor on top of her with her hands pinned down on the ground. He yelled at him and threw a rock over his head. In response Sochor stopped assaulting the victim, turned and looked at Gary like a man "possessed," angrily told him to get back in the truck, and resumed his assault. A while later Sochor got in the truck with Gary and drove home…A few days later Gary returned to Michigan.

The state also introduced Sochor's three taped confessions which it played to the jury. In these statements Sochor said that he met the victim that night at the bar and spent the evening talking with her. He remembered kissing her in the lounge parking lot and wanting to have sex. When she refused, they argued and he grabbed her. When she hit him, he became angry and choked her. He thought that he killed her and drove to a secluded area where he disposed of the body. He said that Gary was not with him when this happened. When he awoke the next morning, he remembered feeling that something terrible had happened. He thought he had raped "another girl."…

Sochor v. State, 619 So. 2d 285 (Fla. 1993).

The United States Supreme Court granted certiorari, vacated the death sentence and remanded the case for a proper harmless error analysis. Sochor v. Florida, 504 U.S. 527 (1992). On remand, this Court affirmed Defendant's death sentence. Sochor v. State, 619 So. 2d 185 (Fla. 1993). The United States Supreme Court then denied certiorari. Sochor v. Florida, 114 S. Ct. 638 (1993).

On July 25, 1995, Defendant filed his initial 3.850 postconviction motion. After an evidentiary hearing, the Circuit court denied relief. This Court upheld the denial and further denied Defendant's motion for a writ of habeas corpus. Sochor v. State, 883 So. 2d 766 (Fla. 2004). Defendant's federal petition for a writ of habeas corpus was denied on September 23, 2009 (Sochor v. McNeil, 2009 WL 9046175 (U.S.D.C., S.D. Fla. 2009)) and his appeal to the Eleventh Circuit Court of Appeals was denied on June 27, 2012. Sochor v. Secretary, Dept. of Corrections, 685 F. 3d 1016 (11th Cir. 2012). The United States Supreme Court denied certiorari April 22, 2013. Sochor v. Crews, 133 S.Ct. 1998 (2013).

Defendant filed his first successive 3.851 postconviction motion on March 14, 2008. The Circuit Court denied the motion and this Court affirmed the denial on October 30, 2009. Sochor v. State, 22 So. 3d 68 (Fla. 2009). In the meantime, Defendant also filed a second successive 3.851 postconviction motion on March 13,

2009, **raising a claim of newly discovered evidence alleging that Defendant's brother, Gary Sochor, actually committed the murder.** On January 18, 2011, the Circuit Court denied the motion. Defendant had also filed a claim based on Porter v. McCollum, 130 S. Ct. 447 (2009), which the Circuit Court treated as a separate motion (third successive postconviction motion). The motion was denied on September 6, 2011. This Court affirmed the denial of both motions. Sochor v. State, 95 So. 3d 210 (Fla. 2012), Sochor v. State, 83 So. 3d 709 (2012).

On August 8, 2016, Defendant filed his fourth successive 3.851 postconviction motion, which is the subject of the instant petition. (Defendant filed amendments to his fourth successive motion on January 10, March 15, and April 17, 2017 raising Hurst claims but has not raised such issues in the instant appeal.) On June 14, 2017, the Circuit Court denied the fourth successive 3.851 motion. Defendant then filed this appeal on August 28, 2017.

SUMMARY OF THE ARGUMENT

Failure to hold a case management conference was harmless error. Further, the trial court denied properly, without an evidentiary hearing, Defendant's fourth motion for postconviction relief. Although the claim was predicated on a claim of newly discovered evidence, summary denial was proper as the claim was merely a repackaging of the claim made in Defendant's second

postconviction 3.851 which was already denied, and which consisted of 'evidence' that was not suppressed by the State, was discoverable with the exercise of due diligence, was hearsay and was neither probative, nor possessed any indicia of reliability and as such would not have been admissible at either phase of a new trial. Even if admissible, it would not have produced an acquittal or a lesser sentence.

STANDARD OF REVIEW

This is a successive motion as "a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. Florida Rule of Criminal Procedure 3.851(e)(2). In order to bring a successive postconviction claim and one outside the one-year limitation, the defendant must show either newly discovered evidence or a new constitutional right made retroactive to his case. See Rule 3.851(d)(2); Knight v. State, 784 So. 2d 396, 400 (Fla. 2001); Francis v. Barton, 581 So. 2d 583, 584 (Fla. 1991). Absent such a showing, the motion should be denied. Procedurally barred claims may be denied summarily. Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992). Postconviction claims may be denied summarily when the motion and the record conclusively demonstrate that the movant is entitled to no relief. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

ARGUMENT

CLAIMS I & II

THE TRIAL COURT'S SUMMARY DENIAL OF DEFENDANT'S CLAIM OF A BRADY VIOLATION WAS PROPER GIVEN THAT THE EVIDENCE WAS NOT SUPPRESSED BY THE STATE, WAS DISCOVERABLE WITH THE EXERCISE OF DUE DILIGENCE, HEARSAY, NOT PROBATIVE OF ANY MATERIAL ISSUE AT TRIAL, AND THE TRIAL COURT'S FAILURE TO HOLD A CASE MANAGEMENT CONFERENCE WAS HARMLESS ERROR(RESTATED).

In this appeal, Defendant is challenging the trial court's summary denial of his fourth motion for collateral relief pursuant to Fla.R.Crim.Pro. 3.851. The legal basis for the motion filed below was a claim of a violation pursuant to Brady v. Maryland, 373 U.S. 83 (1963). The evidence, as characterized by Defendant, consisted of "a confession by Gary Sochor to the murder of Patti Gifford" which the Defendant claims the State was put on notice of when Marvin Droste called the Broward Sheriff's Office (BSO) indicating he had a 'tip' about the Dennis Sochor case. The evidence Defendant sought to advance was not the affidavit of Gary Sochor. Instead, Defendant's entire claim was predicated on the hearsay statement of Marvin Droste. Mr. Droste's 'affidavit' is not notarized and simply states that he had a conversation with Gary Sochor at a bar 32 years before writing the affidavit, where Gary mentioned that there was an incident in Florida involving an automobile where a woman was picked up at a bar and had died in an accident, that her body was not found, and he was 'more responsible

than anyone else'; it further stated that after he learned Dennis Sochor was wanted for murder, he called BSO with a tip that he had information concerning the Dennis Sochor case but that no one called him back.

Following the state's response, the trial court summarily denied relief. A case management conference was not held in this case (also referred to as a 'Huff' hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993)). "[F]ailure to hold a hearing on a successive postconviction motion that is legally insufficient on its face is harmless error." Marek v. State, 14 So. 3d 985, 999 (Fla. 2009); *see also* Archer v. State, 151 So. 3d 1223 (Fla. 2014); Davis v. State, 736 So. 2d 1156, 1159 n.1 (Fla. 1999); Groover v. State, 703 So. 2d 1035, 1038 (Fla. 1997) ("[E]ven if a Huff hearing had been required in the instant case, the court's failure to do so would be harmless as no evidentiary hearing was required and relief was not warranted on the motion.").

Defendant relies on the affidavit of Marvin Droste as the sole basis for two separate and mutually exclusive legal theories. First, he is alleging that because Droste contacted BSO 'with a tip' the State is charged with knowing the specific details of the tip and concealing this "material, exculpatory and impeachment evidence" from defense in violation of Brady. Motion at 16. Alternatively, Defendant in a conclusory manner argues that

pursuant to Jones v. State, 709 So. 2d 512 (Fla. 1998), the hearsay statement of Droste is newly discovered evidence and his statement is material impeachment evidence against Gary Sochor.

The trial court was correct to summarily deny Defendant's claim for three reasons: (1) it was untimely, therefore, procedurally barred as it could have and should have been raised in the first motion for postconviction relief; (2) the affidavit was factually insufficient and refuted by the record; and (3) it was successive as a variation of the 1999 claim. See Franqui v. State, 59 So. 3d 82 (Fla. 2011) (explaining a defendant is not entitled to an evidentiary hearing where the claim is legally insufficient or records conclusively establish no right to relief).

The Brady claim was untimely as it could have and should have been presented in Defendant's initial postconviction motion. Defendant admits that Droste was a witness on his behalf during litigation of the prior motion for postconviction relief. Motion at 12. In 1999, Droste was called in support of the claim of ineffective assistance of counsel for failure to present mitigating evidence of Defendant's poor upbringing and testified about his close relationship with Defendant while growing up. (PCR 160-171). Yet Defendant does not even attempt to overcome this fatal procedural bar by explaining why he waited seventeen years

to present Droste's affidavit when he had the opportunity to do so at the first evidentiary hearing in 1999. In fact, the contents of this affidavit are closely connected to the prior Brady claim involving Gary's relative culpability in the murder. As this information was available at that time and was not raised, Defendant is precluded from presenting it now. Rivera v. State, 187 So. 3d 822 (Fla. 2015) (upholding finding of lack of due diligence in failing to bring Brady claim in initial motion as the defense was well aware of information that would have led to discovery of the evidence); Reichmann v. State, 996 So. 2d 298, 305 (Fla. 2007) (finding that defendant failed to meet his burden that claim could not have been raised previously as previous records demonstrate that counsel was aware of the facts in support thereof); Wright v. State, 857 So. 2d 861, 868 (Fla. 2003) (precluding relitigation of Brady claim as defendant did not demonstrate that "new evidence" claim could not have been raised in first motion for postconviction relief).

Summary denial was also warranted because the affidavit did not satisfy the requirements of Brady.

> In order to establish a Brady violation, a defendant must prove: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Carroll v. State, 815 So. 2d 601, 619 (Fla. 2002) (citations, quotations omitted); Way v. State, 760 So. 2d 903, 911 (Fla. 2000) (explaining that evidence is not suppressed if it is equally available to the State and the defense for purposes of Brady). In applying these three elements, the evidence must be considered in the context of the entire record. Carroll, 815 So. 2d at 619; Sireci v. State, 773 So. 2d 34 (Fla. 2000); Haliburton v. Singletary, 691 So. 2d 466, 470 (Fla. 1997); Floyd v. State, 902 So. 2d 775, 779 (Fla. 2005).

Defendant mischaracterizes the content of Droste's affidavit by incorrectly describing the substance of the statement as Gary's "confession". **Droste's statement absolutely did not contain a confession to the murder of Patti Gifford.** What Droste said Gary Sochor told him was there was an incident in Florida involving an automobile where a woman was picked up at a bar and had died in an accidental manner, that her body was not found, and he was 'more responsible than anyone else'. This rank hearsay does not contain any indicia of reliability as Droste's statement exposes no one to any criminal liability. Instead, it is Gary's self-serving denial of criminal culpability.

Further, Defendant has failed to properly allege facts that if taken as true would demonstrate that the state withheld this

information. Defendant states that "Droste told the BSO that he heard Gary Sochor make these admissions, the State had a duty to disclose this evidence to the defense." Motion at 19. That is another complete mischaracterization regarding the content of the affidavit. Therein, Droste merely states that he called BSO and advised them that he had a 'tip' about the Dennis Sochor case. Advising a law enforcement agency that you have a 'tip' does not morph into proof that the tipster actually heard someone confess to a murder nor that the tipster told law enforcement the content of the claimed confession; yet that is what Defendant is asking this Court to infer without any evidence. Dorste never states in his affidavit that he provided anyone at BSO the content of the information. Instead, 32 years later, he claims he made a call saying he had a tip about the case. Therefore, Defendant has failed to properly allege that the State possessed, let alone withheld, any evidence. Jones, 709 at 520 (finding lack of evidence that information was withheld as information not contained in any document or report in possession of police and no proof that specific police officer was involved in the investigation); Hunter v. State, 29 So. 3d 256 (Fla. 2008) (upholding summary denial where claim that evidence would establish that the defendant was not present for the murder was not supported by any factual allegations).

When assessing the materiality of the alleged Brady evidence, the evidence must be viewed in the context of the entire record. Carroll, 815 So. 2d at 619. Even if this statement would be admissible at a new guilt phase, the statement does not in any way overcome the overwhelming evidence of Dennis Sochor's guilt. The evidence presented by the state included **Dennis Sochor's own three taped confessions**, wherein he admitted to choking Patti Gifford. At trial the jury heard the following admissions from Defendant. When he drinks alcohol, and a girl he is attracted to refuses his sexual advances, Defendant loses total control and he experiences a 'charge' inside himself. (ROA 474-475). There is a complete release, a satisfying feeling after he forces himself on a girl. (ROA 475). On the night of this murder, he thought, '[t]hat I might of forced myself on another woman.' (ROA 476). Defendant admitted he had scratches on his face the day after the murder and realized that he had probably committed another rape. (ROA 477). Later during the interview Defendant was told that his brother Gary described to the police, the "actual abduction and rape." When asked if there was a reason why Gary would be lying, Defendant replied "no". (ROA 485). Defendant then accompanied the police to the Banana Boat Lounge to conduct 'a walk through' and became emotional, stating "Oh God, I killed her, I choked her." (ROA 491). In the second statement to police, Defendant admitted he wanted sex, Patti Gifford said no so he grabbed her, she hit him and

started screaming and he then "got angry and began choking her" then when she stopped moving realized "I probably just murdered her" so he drove off. (ROA 499-501). Defendant then described how he hid the body; got rid of the truck and the items that belonged to the victim. (ROA 503-505). In his third taped statement to police, Defendant repeated the above details regarding the circumstances of how he murdered Patti Gifford.

The jury also heard the testimony of Gary Sochor, an eye witness to the murder. His testimony, which was recounted by this Court on direct appeal, was that the victim and Defendant were kissing. Ms. Gifford willingly accompanied them in their truck, ostensibly to go for breakfast. Gary remembers the victim screaming for help, with Defendant sitting on top of her. Gary threw a rock over Defendant's head, but that did not stop him from killing the victim. Sochor, 619 So. 2d at 287-288.

In addition to the state's presentation, **Defendant's own guilt phase defense was that he killed Patti Gifford but that the crime was a 'heat-of-passion' murder, or in the alternative, his intoxication precluded a finding of premeditation.** Sochor, 619 So.2d at 289-290. In support thereof, Defendant presented the testimony of two mental health experts at the guilt phase. The doctors discussed Defendant's chronic alcohol and substance abuse, including his blackouts; his inadequacies with women; his quick temper and destructive behavior; his aggressive tendencies towards

women when he is under the influence; and his inability to remember his actions due to his alcoholic blackout.[1] (ROA 646-736). Defendant's doctors opined that Defendant was sane at the time of the crime. However, when asked if Defendant could form the specific intent to kill, Dr. Zager opined that while under the influence of alcohol he would act on impulse regardless of whether he knew it was wrong. He further opined that based on Defendant's mental health problems he was extremely dangerous. (ROA 659).

At best, the ambiguous statement of Droste would be impeachment evidence against Gary Sochor, not against Defendant. **It is Defendant's own statements** to police as well as his theory of defense presented through his doctors which formed the basis for all the elements of premeditated murder and felony murder. Summary denial of this claim for purposes of the guilt phase was proper. See Kokal v. State, 901 So. 2d 766 (Fla. 2005)(upholding denial of claim of newly discovered evidence that someone else confessed to murder because such evidence was inadmissible hearsay that was in complete contradiction to evidence at trial); Melton v. State, 949 So. 2d 994 (Fla. 2006)(rejecting claim that statements of other inmates about Melton's culpability would not

[1] The state offered a rebuttal witness Dr. Castillio who opined that Defendant suffered from select amnesia regarding the events of that night. (ROA 798). Castillio further opined that Defendant has an antisocial personality. (ROA 799).

have reduced his culpability as Melton testified that he was the shooter, therefore his role in the crime had already been established).

Droste's statement would also have been excluded at the penalty phase, not just based on its hearsay nature, but also because it was not probative of any material sentencing issue. Under Florida law, penalty phase evidence must be of probative value in order to be admissible. Section 921.141(1), Florida Statutes (1979) (emphasis added) provides in part:

> In the [penalty] proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Droste's hearsay version of Gary Sochor's comment has no probative value and therefore would be inadmissible at a new penalty phase pursuant to Henyard v. State 992 So. 2d 120, 126 & n. 3. (Fla. 2008). In that case, Henyard made a claim of newly discovered evidence based on an affidavit from Jason Nawara, an inmate who had been in custody with Henyard's co-defendant, Alfonza Smith. Nawara claimed to have overheard Smith refer to himself as a "killa." Id. 992 So. 2d at 125. Before rejecting the claim on the merits, this Court noted that the statement faced a "serious

question of admissibility", was probative of nothing, and would not have subjected him to criminal liability. Similarly, Droste's statement lacks any probative value, was not corroborated by any other evidence, bears no indicia of reliability as it subjected Gary Sochor to no criminal liability, and therefore would have been inadmissible. The trial court's ruling was proper.

Even if Droste's statement was admissible at a new penalty phase, there is no reasonable probability that it would result in a lesser sentence. The impact of this statement would be analyzed against the other evidence presented at the penalty phase as well as the evidence presented at Defendant's postconviction hearings.

At the sentencing phase of his trial, Defendant's defense was that he suffered from an inability to control his sexual urges with women he barely knew following their chance meetings at bars. This "irresistible impulse" led to violent sexual batteries, poor memory of the events and remorse the following day. (ROA 987-988). Sochor, 619 So. 2d at 292. Following his unsuccessful appeal, Defendant filed his initial motion for postconviction relief,[2] wherein he continued with this theme. Through his evidentiary presentation in 1999, Defendant argued that he suffered from

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[2] Defendant was granted an evidentiary hearing on his claim that trial counsel did not present a constitutionally adequate penalty phase presentation and the state improperly told Gary to omit certain facts relating to his sexual activity with the victim. Sochor v. State, 883 So. 2d 776 (Fla. 2004).

chronic drug and alcohol abuse, in conjunction with his manic-depressive disorder, which included a "hyper-motor/hyper sexuality compulsion." This disorder manifested itself during the strangulation death of Patti Gifford. Defendant claimed, through Dr. Froming, that "he couldn't help himself". (PCR 450-452).

At the evidentiary hearing, Gary Sochor, consistent with his trial testimony, maintained that his brother Dennis strangled the victim. Gary offered additional evidence to support Defendant's theory of mitigation that he strangled the victim because he was angry at her for rejecting him and kissing Gary in front of Defendant in the car after the three had left the bar together. Gary testified that Defendant asked him to stop kissing Patti Gifford, he said no, and he could tell Defendant was upset. Gary testified it was after this that Defendant stopped the car and pulled her out of the vehicle. (PCR #1 346-348).

Defendant also presented forensic psychiatrist, Dr. Greer, who opined that Defendant suffers from a bi-polar condition, i.e., manic depressive disorder and he was in a manic state at the time he strangled Patti Gifford. (PCR #1 399-400). This evidence, most of which was presented by Defendant's own witnesses, without a doubt established his guilt for the strangulation of Patti Gifford. The facts remain, as admitted to by Defendant and relied upon by his own experts, that he strangled Patti Gifford in a fit of sexual rage, during the manic phase of his bipolar disorder.

It is against this very damaging background, that this court must assess the impact of Droste's hearsay statement. The State asserts that there is no reasonable probability that Droste's statement, if presented at a resentencing would result in a lesser sentence. The meager hearsay statement is in direct contradiction to the overwhelming and consistent evidence presented at trial and in the collateral proceeding that Dennis Sochor strangled Patti Gifford in a fit of sexual rage.

Droste's statement would also have had no impact on the state's case in aggravation, as it was Defendant's own admissions that more than supported the aggravators. For instance, the state presented portions of Defendant's taped statement to police where he admitted to committing prior sexual batteries. (ROA 975-985). One such rape occurred in 1979 in Michigan. Defendant met a girl at a bar and went home with her. She refused to have sex with him and he raped her. Defendant choked her while raping her. He passed out afterwards. (ROA 981-982). Eight months later in Fort Lauderdale, Defendant again met a girl in a bar who resisted his advances and he raped her. (ROA 982-984).

The jury also heard the testimony of Vicki Russo, a police officer with the City of Fort Lauderdale who was involved in the rape investigation. (ROA 989). Defendant abducted the victim in the parking lot of a bar, forced her into his car, forced her out of the car and into a camper shell that was unattached, threatened

to kill her if she resisted, ripped off her clothes and raped her repeatedly. Because he was unable to climax, he became angry with her and then viciously bit her breasts and vaginal area. (ROA 993-994). Defendant passed out and the victim was able to escape. (ROA 994-995). Defendant ultimately received five-years probation for this crime. (ROA 995-996).[3]

Defendant also admitted that he strangled Patti Gifford, while she fought him by screaming and scratching him,[4] during an attempted sexual battery.[5] There is no probability that Droste's statement would result in a lesser sentence. Davis, 26 So. 3d at 530-531, (upholding summary denial of claim of newly discovered evidence, finding the recanted testimony would have no impact on the sufficiency of the evidence for three of the aggravators as they were all based on other evidence, therefore the 'newly discovered evidence' did not undermine confidence in the

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[3] This evidence established the existence of the aggravating factor of prior violent felony. Sochor never challenged that finding on appeal. See Sochor v. State, 619 So. 2d 285, 292 (Fla. 1992).

[4] This evidence supported the finding that the murder was 'heinous, atrocious, and cruel.' See Sochor v. State, 619 So. 2d 285, 292 (Fla. 1992). The Florida Supreme Court noted, "[m]oreover, Sochor confessed that he choked the victim to death." Id.

[5] This evidence established the aggravating factor that the murder was committed during the course of a felony. The Florida Supreme Court noted that Sochor was convicted of both kidnapping and attempted sexual battery. See Sochor v. State, 619 So. 2d 285, 292 (Fla. 1992).

sentence); Kokal v. State, 901 So. 2d 766 (Fla. 2005) (upholding denial of claim of newly discovered evidence that someone else confessed to murder because such evidence was inadmissible hearsay that was in complete contradiction to evidence at trial); Melton v. State, 949 So. 2d 994 (Fla. 2006)(rejecting claim that statements of other inmates about Melton's culpability would not have reduced his culpability as Melton testified that he was the shooter, therefore his role in the crime had already been established); Wainwright v. State, 2 So. 3rd 948 (Fla. 2008) (newly discovered evidence that Wainwright not responsible for rape of victim did not rebut evidence to support Wainwright's conviction for felony first degree murder under armed robbery and kidnapping); Henyard, 992 So. 2d at 126-127 (rejecting claim that hearsay evidence allegedly reduced culpability at sentencing as this evidence does not cast doubt on defendant's role as major participant in the underlying felonies); Sims, 754 So. 2d 657, 662 (finding that hearsay statement at best would impeach witness testimony at trial and did not negate eye witness testimony of others that Sims was the perpetrator).

This successive motion faces a second procedural bar as it is nothing more than a repackaging of the identical claim litigated previously in 1999 and denied by this Court. Droste's claim that Gary Sochor felt responsibility "greater than anyone else" is actually consistent with the theme presented by Defendant in the

prior evidentiary hearing where the evidence was that the Defendant murdered Patti Gifford in a fit of sexual rage. The collateral proceedings merely offered more details of how the evening progressed; it was Gary's coaxing to go out on New Year's Eve to a bar against the wishes of Defendant coupled with Gary's sexual advances towards Patti Gifford that led to Defendant's sexual rage. (PCR 339-340, 346-348). Gary's remorseful claiming of 'greater responsibility' for the 'accidental death' is merely a variation of what was presented in Defendant's previous postconviction proceeding. As such, this claim is procedurally barred as it has been previously litigated and rejected. Van Poyck v. State, 116 So. 3d 347, 355 (Fla. 2013) (upholding summary denial of newly discovered evidence claim where variation of the issue was raised in prior motion); Marek v. State, 8 So. 3d 1123, 1124 (Fla. 2009) (precluding re-litigation of IAC claim and finding it successive).

Likewise, Defendant is not entitled to an evidentiary hearing on his claim that the Droste affidavit constitutes newly discovered evidence. For evidence to be considered 'newly discovered evidence' it must be admissible evidence at a retrial or resentencing. Trepal v. State, 846 So. 2d 405 (Fla. 2003); Rogers v. State, 782 So. 2d 373 (Fla. 2001); Williamson v. State, 961 So. 2d 229 (Fla. 2007). Droste's statement was hearsay and Defendant has failed to explain how this hearsay would be admissible at a retrial or resentencing. Kormondy v. State, 154 So. 3d 341, 353

(Fla. 2015) (recognizing the longstanding precedent that newly discovered evidence in the form of hearsay is inadmissible at trial).

In order to set aside a conviction based on newly discovered evidence, Defendant must demonstrate that the evidence was unknown by the parties, could not have been discovered by the exercise of due diligence and the evidence is of such a nature that it would probably produce an acquittal on retrial. Jones, 709 So. 2d at 521. The elements under Jones apply to the penalty phase as well in that the evidence would have to be of such a nature that it would probably have resulted in a lesser sentence. Ventura v. State, 794 So. 2d 553 (Fla. 2001).

When assessing the impact of this evidence at a retrial or resentencing, a court must also take into account all other evidence previously presented at trial as well as any other evidence presented in previous postconviction proceedings. See Kokal v. State, 901 So. 2d 766, 776 (Fla. 2005)(explaining that when conducting an analysis of newly discovered evidence, courts must evaluate that evidence along with evidence from the trial as well as evidence presented at prior evidentiary hearings); Sims v. State, 754 So. 2d 657, 662 (Fla. 2000)(explaining that in order for trial courts to obtain a "total picture" for purposes of establishing the effect of "newly discovered evidence" trial courts must, "consider the newly discovered evidence in

conjunction with the newly discovered evidence at the prior proceedings and then compare with evidence introduced at trial."). Since Droste testified in postconviction proceedings in 1999, Defendant was required to explain why he did not raise this issue in that previous proceeding; Defendant failed to demonstrate that the information from Droste could not have been discovered by the exercise of due diligence and thus has not satisfied the requirements of Jones. Therefore, summary relief was appropriate. Marek, 8 So. 3d at 1127 (finding summary denial proper when defendant did not explain why this claim could not have been raised in prior motion).

Further, based on the record as outlined above, including Defendant's multiple confessions, there is no likelihood that the Droste affidavit would produce an acquittal or life sentence at a retrial or resentencing. Therefore, summary denial was appropriate. See Kokal, 901 So. 2d at 766. (upholding denial of relief on a claim of newly discovered evidence that someone else confessed to murder because such evidence was inadmissible hearsay and was in complete contradiction to evidence at trial); Melton v. State, 949 So. 2d 994 (Fla. 2006)(rejecting claim that statements of other inmates about Melton's culpability would not have reduced his culpability as Melton testified that he was the shooter, therefore his role in the crime had already been established); Wainwright v. State, 2 So. 3rd 948 (Fla. 2008) (newly discovered

evidence that Wainwright not responsible for rape of victim did not rebut evidence to support Wainwright's conviction for felony first degree murder under armed robbery and kidnapping); Henyard, supra, 992 So. 2d at 126-127 (rejecting claim that hearsay evidence allegedly reduced culpability at sentencing as this evidence does not cast doubt on defendant's role as major participant in the underlying felonies); Sims, 754 So. 2d 657, 662 (finding that hearsay statement at best would impeach witness testimony at trial and did not negate eyewitness testimony of others that Sims was the perpetrator).

As this is Sochor's fourth postconviction motion, he was not automatically entitled to an evidentiary hearing on this claim simply because he alleged that someone else admitted to committing the crime. Summary denial was warranted because, "the motion, files and records" conclusively establish no entitlement to relief. Rutherford v. State, 926 So. 2d 1100, 1112 (Fla. 2006) (upholding summary denial of successive motion as the evidence of guilt was overwhelming, the affidavits which form the basis of the claim of newly discovered evidence were inconsistent with one another; and the alleged perpetrator had severe mental difficulties which impacted her credibility). Additionally, this Court has explained although evidentiary hearings are normally required to assess the due diligence and materiality prongs of Jones, that is not the case when the affidavit is "obviously

immaterial to the verdict or sentence”. Davis v. State, 26 So. 3d 519, 526 (Fla. 2009). The trial court was correct to summarily deny relief and their order should be upheld.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Appellee respectfully requests this Court AFFIRM the decision of the trial court. **Further, the State objects to oral argument in this case.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Answer Brief has been furnished to: Rachel Day Esq, OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL, 101 N.E. 3rd Ave. Suite 400, Fort Lauderdale, Florida 33301 this 15th day of September 2017.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned

hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

/S/ Donna M. Perry