IN THE CIRCUIT COURT OF FLORIDA
FIRST JUDICIAL CIRCUIT, IN AND
FOR OKALOOSA COUNTY

STATE OF FLORIDA,

Plaintiff,

vs.

JIMMY L. ATES,

Defendant.

CASE NO. 97-945-CFA

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RESPONSE TO DEFENDANT ATES' SECOND MOTION FOR POST-CONVICTION RELIEF

THE STATE OF FLORIDA, through counsel, respectfully files this timely response to the defendant's most recent Motion for Post-Conviction relief and in support thereof states:

Eighteen years since the murder of which the defendant was convicted, a decade after his sentencing, and five years after the litigation and denial of his first motion to vacate his conviction and sentence, the defendant has filed a second such prayer for relief including two supplements. He claims the State itself has discovered the inaccuracy of the scientific evidence it used to convict him and alleges numerous instances of prosecutorial misconduct under the decision of the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To establish a Brady violation, the

Additionally, you should be aware that the FBI is cooperating with the Innocence Project. The Innocence Project is interested in determining whether improper bullet lead analysis testimony was material to the conviction of any defendant, and, if so, to insure appropriate remedial actions are taken.

(Emphasis added), [Defendant's Second Supplemental Appendix A2]

The state cannot deny that the bullet lead analysis testimony in this case was material to the defendant's conviction. By the same token, it cannot endorse the perpetuation of any first degree murder conviction predicated on a jury's probable misunderstanding of the probative value of evidence emphasized as conclusive by the prosecution at trial. It believes the defendant is entitled to relief on this timely filed claim.

Ground Seven [Defendant's Motion at p. 64]

The defendant claims the state withheld exculpatory fingerprint evidence (three documents) he has since obtained from the FDLE. The object of his complaint is "an unidentified fingerprint which was lifted from a plastic .22 cartridge container that police found inside a H&R pistol box located on a shelf in the utility room of the Ates' home." [Defendant's motion at p. 64]

The defendant has attached Appendix R - an April 15, 1998 report written by FDLE Senior Crime Laboratory Analyst Charles Richards five months prior to the start of this trial that shows a latent fingerprint was lifted from Exhibit 100-A which included an "empty FEDERAL .22 catridge [sic] box with plastic container inside..." [Appendix R; p. 67] That report proves the fingerprint, obtained from the area where the projectiles used to kill the victim were allegedly found, did <u>not</u> belong to the defendant or the victim. A second report dated August 31, 1998, proves the fingerprint was <u>not</u> that of investigators Lewis Barberree, Mark Young, or Thomas Carmichael (the law enforcement officers most likely to have touched them). [P. 68]

A third earlier report dated January 13, 1993, says a "[c]omparison of the previously reported unidentified latent print with the listed inked prints revealed the latent print was <u>not</u> made by two other people of interest, KEITH ANDREW GRIFFITH or JACKIE DARELL LONG." [P. 69] (It is not clear if this report relates to the same lift analyzed five years later, but it was known to the defendant, contrary to his allegations here, and does not contribute to his claim). [Defendant's Appendix A, State's Supplemental Discovery", p. 2] However, reference to the April 15, 1998 and August 31, 1998 reports does not appear to have been disclosed in any of the state's discovery responses.

The importance of this newly discovered evidence is obvious. At trial, Okaloosa Deputy Carmichael testified that he seized boxes of .22 cartridges from the gun box found in the utility room of the Ates' residence. [TR 312] Therefore, the evidence now discovered by the defendant suggests some unknown party had access not only to an unlikely area of the Ates' residence, its utility room, but to the precise area so crucial to the state's case - the location of the shooter's bullets, by an unauthorized person who the defendant could have and would have claimed was the real killer. Because the defendant did not have such evidence at trial, he was denied a material piece of evidence consistent with his similarly consistent claim of innocence.

The defendant's claim is supported by the state's discovery response which lists Richards by name and identifies his reports but which conspicuously omits any mention of any report dated April 15, 1998 or August 31, 1998. It also gains support from the fact his lawyers never made to the jury any of the arguments one would expect to be made based on these reports and the fingerprints they revealed.

The very recent decision of the Court in Rivera v. State, ___ So.2d ___, 33 Fla. L. Weekly S386 (Fla. June 12, 2008) controls here. It appears to be materially indistinguishable from the case here if "fingerprint" is substituted for "DNA" evidence.

Rivera, very much like the defendant here, alleged that newly discovered DNA evidence involving the testing of hairs found in a van used during the crime indicated that the hair did not come from the victim and testing done on hairs found with the victim's body indicated that they probably did not come from defendant. In other words, the newly discovered DNA evidence tended to negate Rivera's connection to the murder scene and the murder victim - the same effect the unmatched fingerprints have here. In his post-conviction motion, Rivera claimed that the results of the DNA testing constituted important newly discovered physical evidence in his favor that when considered with other evidence and the lack of physical evidence connecting him to the crime, as does the defendant here, established his entitlement to a new trial.

The Court agreed, reversed the trial court's summary denial of the defendant's claim and remanded concluding that this evidence, when viewed in conjunction with Rivera's other due process claims and other evidence, was sufficient to warrant an evidentiary hearing.

Here, however, more than that which persuaded the Rivera Court to reverse exists. There is a vital additional factor which operated to mislead the jury. Agent Richards wrote each of the reports revealing the fingerprint evidence from the plastic shell box in the utility room. When Richards testified at trial,

however, he never disclosed the existence or results of his testing of fingerprints in the area of the utility room where the bullets were found.

Agent Richards testified at trial about his involvement in the gathering of fingerprint evidence. He explained that he attempted to lift latent prints from some paper objects but found none of value:

Q. What about prints, latent prints, did you collect any fingerprints that evening, any latent prints?

A. The paper items which were on the floor, which I earlier testified to, were examined for latent prints. Also we processed the area for latent prints, but no latent prints of value were developed.

Q. You did find some latent print but they were not of value?

A. There were some smudges and a little bit of ridge detail, but from my experience they were not of value. [TR 297]

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Q. What in the house did you dust or whatever method you used? What area of the house did you check for prints?

A. A lot of the areas in the bedroom like the dresser counter...We did try items in the bedroom...Also in the other bedroom where the drawers were pulled out, I did try to develop prints in there, also... the sliding glass door.

Q. Anything off the sliding glass door?

A. No, sir. [TR 298]

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And to resolve any ambiguity in the Agent's testimony:

Q. Was any fingerprint work done out in the carport-utility room area?

A. No, sir. (Emphasis added) [TR 299]

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Q. No print work was done out there?

A. No, sir. (Emphasis added) [TR 299]

Therefore, not only did the state not provide the defendant with the reports in Appendix R, the author of those very reports, Richards, did not disclose them or their contents when directly asked about fingerprints in the case when, in fact, five months earlier, he had conducted a comparison of crucial items which we now know were recovered from the utility room the results of which at least tend to prove the defendant not guilty. (Arguably, Richards did not know the prints he found on the plastic cartridge box came from the utility room, but the jury was grossly misinformed nonetheless.)

Although defense counsel through cross-examination established that no latent fingerprints of value were lifted at the scene, [TR 297 - 300] and therefore there existed no incriminating fingerprint evidence against the defendant, the existence of an unidentifiable fingerprint in a place in the defendant's house from where the defendant was alleged to have gotten the fatal ammunition is exactly the kind of evidence that can determine a jury's verdict.

This was newly discovered, previously undisclosed, material evidence which calls into question the reliability of the defendant's verdict. It was Brady material, and the jury was

misled about this important evidence at trial. The defendant should be granted relief.

Ground Eight [Defendant's Motion at p. 68]

The defendant claims the state withheld exculpatory DNA evidence. He has appended three FDLE reports created prior to his trial describing Exhibit #3, "a towel" containing debris consisting of three Caucasion body hairs. [Exhibit S] Two reports, dated 7/28/98 and 8/7/98 are by FDLE analyst James Freeman, and one, dated 8/7/98 is by analyst Magda Clanton. While Freeman is listed in the state's discovery response, these two reports are not. [Appendix A, p.6] Magda Clanton is listed as Magda Clinton, but the report described here is not. [Appendix p. 1] The defendant claims the towel was "bloody", and while nothing in his appendix appears to describe it as such, the testimony of Magda Clanton describes the blood DNA and blood found on this towel. [TR 606]

These reports, all authored approximately one month prior to the start of the defendant's trial, establish that the hairs had roots present. [Appendix S; p.71] The 1998 analysis of two of the hair roots determines the "PCR DNA results were negative on those hairs." [Appendix S; p. 73] By implication there exists

one additional hair with a root that has not been analyzed for DNA.

Various items were microanalyzed by the state for hair and fibers. [TR 737 - 738] At trial, the state argued that no one's DNA was found at the scene but the victim's. It stressed to the jury the significance of its DNA expert's testimony and stressed that the "negative" test results "indicated for [sic] blood of any other person..." "[A]ll the positive results in the entire random survey of this room for blood spots is always DNA consistent with - DNA consistent with Norma...". [TR 1716] "The DNA blood is consistent with who? Norma Jean." [TR 1719]

The discovery now that there existed male Caucasion hairs with roots on a bloody towel at the scene the existence of which was unknown to the defense through no fault if its own raises serious issues.

The defense was entitled to know of the existence of this evidence. It was entitled to look at it, confront it, investigate it, and conduct its own analysis of it. Because it was denied those opportunities, this discovery violation, while arguably insufficient in and of itself to justify the award of a new trial, at least contributes to the defendant's theme that an unidentified intruder was the actual killer, and supports his

prayer for relief.

Ground Nine [Defendant's Motion at p. 71]

The defendant has appended a newly obtained affidavit from a "time line" witness, Tara Sargent, to demonstrate the falsity of her trial testimony.

The "time line" was crucial to the state's case. The state argued that the defendant killed his wife before going to the baccalaureate ceremonies at the nearby high school, and the defense argued he was at the ceremony, had left his house before the murder in a light colored Toyota, and could not have been the killer. At trial, Sargent said she saw the defendant speaking with another man as they passed the Ate's home at 6:05 to 6:20 p.m., and that she did not recall seeing a car there. (TR 1123-1127) [Emphasis added].

On direct examination, Sargent was asked, "Did you see his car?" to which Sargent responded, "I don't remember seeing it. I don't remember." (TR 1125) The defense cross-examined Sargent about the issue, but she reiterated, "I don't remember whether there was one [a car] there or not." (TR 1128).

defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced.

The defendant's burden of proof is high. A successive motion may be dismissed if it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the failure to raise those issues in a prior motion constitutes an abuse of process. Fla.R.Crim.P. 3.850. To overcome this bar, a movant must allege that the grounds asserted were not known and could not have been known to him at the time of the earlier motion. Christopher v. State, 489 So.2d 22, 24 (Fla.1986). The movant must show justification for the failure to raise the issues in the prior motions. Id. Moreover, "new evidence" must be of the character that it would "probably produce an acquittal." Preston v. State, 970 So.2d 789 (Fla. 2007). In addition, speculation will not support a claimant's request for relief in a post conviction proceeding. Johnson v. State, 904 So.2d 400 (Fla. 2005). Conclusory allegations do not justify an evidentiary hearing. Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989).

The defendant claims all of his arguments fall under the category of "newly discovered evidence." Accordingly, his burden

The prosecutor relied on this testimony during the state's closing argument, "Don't let your eye get off the ball here because there is no car there". [TR 1704]

During subsequent cross-examination, the defense repeatedly attempted to refresh Sargent's recollection by prior statements she had made <u>in which she had acknowledged the presence of the (defendant's) car</u>. While Sargent endorsed the truthfulness of her prior sworn testimony at the time she made it, the defense never successfully refreshed Sargent's recollection or got her to change her substantive trial testimony. [TR 1128-1130]

In her post trial [October 20, 2006] affidavit, Sargent says, in pertinent part, "It was not quite 6:15 when I drove by the Ates' residence." ...Half way up the driveway I saw Jim Ates and another man. ... <u>It appeared that Mr. Ates was leaving his house</u>, and the car that was in the driveway (presumably the one he would take to the event) was light in color." [Defendant's Motion at p. 42] (Emphasis added).

The new affidavit clearly gives the defendant support for his alibi and his claim that he left for the baccalaureate ceremony in his (light colored) Toyota prior to the homicide. There was little in this case more important to the jury than the validity of the defendant's alibi evidence. It was consistently

attacked by the state. The recantation of a key defense alibi witness whose trial testimony departed from her sworn pre-trial testimony constitutes crucial new evidence.

This claim would likely deserve an evidentiary hearing to determine the likelihood of the recantation affecting the jury's verdict if relief was not granted on the basis of the defendant's other claims.

* * *

There are several of the defendant's arguments that the state urges do not constitute grounds for relief:

<u>Ground Ten</u> [Defendant's Motion at p. 75]

The defendant complains that he has discovered three additional FDLE reports pertaining to shoe/boot tracks collected at the crime scene that did not document any comparisons. He alleges these reports are exculpatory because "the probability is the tracks were made, not by him, but by the person(s) who murdered Norma Jean Ates." [Defendant's Appendix T, pp. 74 - 80]

The defendant claims that there were boot tracks on the bathroom floor and appends [A2], an October 11, 1991 FDLE report prepared seven years prior to trial. The defendant should have been provided the report. However, the boot tracks in the bathroom were known to the defense. The defendant established, through the cross-examination of FDLE Agent Charles Richards, the fact the that the state did not compare boot prints even though there was a forensic procedure by which comparisons could be made, and that no effort was made to do so. It specifically established that boot prints existed in the bathroom in this case. [TR 293] Accordingly, the defense knew about the unmatched boot prints in the bathroom and used that evidence in the defendant's favor.

The defendant also appends [T3], an October 23, 1995 report by Senior Crime Lab Analyst Kenneth Hoag. [T3] describes Exhibit 2A3 as "Three shoe or boot tracks of value." [Defendant's Appendix p. 77] The defendant mistakenly claims the state withheld this report, but his own Appendix A, the State's Supplemental Discovery, at p. 2, reveals that "Report of Kenneth Hoag, FDLE; 10/23/95 was indeed provided to him in discovery, and he was on notice of its existence.

[T4], a February 6, 1996 report by FDLE analyst Janice

Johnson, describes "a partial shoe track" on paper items near the closet and near the victim. [Exhibits 1 & 2]. From the report it is not clear whether any attempt(s) were made to compare that partial print to any known shoes or even if it was of forensic value. The State's Supplemental Discovery [Defendant's Appendix A] discloses Johnson as a witness and the existence of several of her reports, one of which is dated 1/23/96. Even if the defendant was able to establish at an evidentiary hearing that the 2/6/96 report had been excluded from discovery, there is no likelihood he could support a claim that the outcome of this trial would have been different.

The defendant has failed to state a basis for relief.

__Ground Two__ [Defendant's Motion at p. 38]

The defendant claims newly discovered evidence in the form of crime scene photographs demonstrate the state deliberately withheld exculpatory evidence and knowingly solicited false testimony from the state's two fire experts. The defendant explains that after his conviction was affirmed on appeal, he hired an investigator who found 310 photographs of the crime scene in the possession of the FDLE through a public records request.

First, the scale of the defendant's complaint should be clarified. In his motion, the defendant only claims significance as to two of these photographs which he argues depict a candle that burned from the top down and so could not have been the incendiary device claimed by the state at trial.

Second, it is abundantly clear, even from the defendant's own pleading in this case, that the candle he is describing is not the one to which the state referred as an incendiary time delay device. The candle in the defendant's two newly discovered photographs were located, by the defendant's own allegations, on the other side of the room:

> "...Showalter testified that the fire started on the floor between two chairs underneath the double-window in the living-room; but the two previously withheld photographs show that the candleholder, etc. were located on the side of the living-room opposite from the double window" [Defendant's Motion at p. 41](Emphasis by defendant).

Fire Marshall Michael Showalter described in photographic Exhibit 24A where he had seen the remains a votive candle on a table between two chairs that had been used, in proximity to newspaper, to create a "time delayed" fire. [TR 447 448, 459] He admitted, however, that none of the fifty plus photographs he took at the scene showed the actual candle or its remains, and explained that the actual time-delay evidence had been "disposed

of." [TR 475-477] He acknowledged having found a melted candle in the living room with a "white" (unburned) wick. [TR 451] This appears to be the candle to which the defendant refers in this claim.

This Court is not obliged to indulge the defendant's illogical presumption that the home of the Ates' contained but a single candle. In fact, such an assumption belies the evidence. Louise Kotarba, the victim's mother, testified that the victim kept candles both on each end of her piano and on her coffee table. [TR 968 - 969]. She offered that "she (the victim) probably had nine or ten" candles in the home altogether. [TR 986] Through Agent Richards, the state showed two candle sticks on the dining room counter. [TR 267] Showalter testified he located one candleholder without a candle in it [TR 453] but described numerous other candles in the area of the fire that were never claimed to have been the source of the initial flames. [TR 462 - 463]

Thus, there is no reasonable possibility, let alone likelihood, that the defendant's use of these two photographs would have changed the result of his trial.

More important, perhaps, is the fact this is not newly discovered evidence. The defendant admits that he had the

photographs turned over to his post-conviction attorney who represented him on his motion for post-conviction relief, the appeal from the denial of that motion, and in federal habeas corpus proceedings. He also admits that his own counsel told him that he felt that none of the photographs contained anything of evidentiary value. [Defendant's Motion at p. 40]

Accordingly, this issue is time barred and an abuse of process.

<u>**Ground Six**</u> [Defendant's Motion at p. 58]

The defendant claims the prosecutor misrepresented certain evidence at trial. The defendant complains that the prosecutor argued that there was no evidence of a break-in when, in fact, that claim was contradicted by his brother's testimony. He calls the prosecutor's argument "snake oil banter." [Defendant's Motion at p.63] On its face, this claim must be denied. It is an issue possibly cognizable on direct appeal, but not in a 3.850 motion.

There was ample evidence presented at trial that the door to the master bedroom was damaged. That testimony was presented not only by defense witnesses as the defendant claims, but by the state as well. As FDLE Agent Richards testified:

Q. The door into the bathroom, you indicated, appeared to be splintered or some part of it broken or separated?

A. Yes Sir. [TR 294]

That evidence, however, is unrelated to the question whether the exterior of the house was forcibly entered (by a stranger who committed the murder or if the murder was committed by someone with easy access). Whether the killer was the defendant or a stranger, evidence of a broken interior door would support an inference of resistance by the victim in either case. Accordingly, the probative value of the evidence is limited.

The jury was instructed that the lawyers' arguments are not evidence. [TR 1545] Assuming, arguendo, the prosecutor mischaracterized the evidence, it is not newly discovered evidence, evidence that would have changed the outcome, or supportive of any issue cognizable here.

Although this argument is subject to denial without a hearing, the defendant additionally complains that one of the many photographs he discovered in FDLE possession after his conviction clearly showed the damage to the bedroom door. Indeed, Defendant's Exhibit L, p. 41, shows just such damage as the defendant describes. This photograph, (like the other 300+) was discoverable and should have been made available to the

defense prior to his trial. However, the defendant erroneously claims that none of the 55 photographs disclosed by the state showed the crack in the door. At trial, Richards identified a photograph that was introduced as evidence that showed the door "is splintered just a little bit." [TR 264; R 683, Exhibit 10TT].

Thus, the photograph the defendant claims he did not receive was cumulative, and the defendant has failed to meet his burden of proof on this issue.

<u>Ground Five</u> [Defendant's Motion at p. 55]

The defendant claims the state had an affidavit derived by the FDLE from a witness, Diane C. Hill (Cadenhead-Hill), which the state withheld, establishing the happy relationship between the defendant and his wife in the days preceding the murder. The defendant appends an affidavit from his wife, Glenda Ates, acknowledging the existence of the Hill affidavit and explains that the copy he had of the original has been lost. For the purpose of this argument, the state will assume that the Hill affidavit was not disclosed.

The issue is moot and meritless, however, because "Diana

Cadenhead Hill" was disclosed by the defense in reciprocal discovery dated August 14, 1998. [Attached hereto] The defendant can not legitimately claim surprise or prejudice. This claim is without merit.

Ground One (Defendant's Motion at Page 25)

The defendant claims that his trial counsel were ineffective for either ignoring or failing to discover exculpatory evidence, misleading him to believe such evidence did not exist, and failing to use that evidence for the defendant's benefit. The "exculpatory" evidence to which the defendant refers was a videotape of the crime scene taken by the homeowner's insurance company.

This claim is barred because it constitutes an abuse of process since the defendant previous raised ineffective assistance of counsel claims, which were litigated on their merits after an evidentiary hearing, in his first motion to vacate. A movant must allege that the grounds asserted were not known and could not have been known to him at the time of the earlier motion. See, Christopher v. State, supra. The movant must show justification for the failure to raise the issues in

and the standards by which his allegations must be judged are well defined.

The Florida Supreme Court in Preston v. State, 970 So.2d 789, 797-780 (Fla. 2007) recently summarized the applicable standards:

> The standard of review governing claims of newly discovered evidence was first enunciated in Jones v. State, 709 So.2d at 521. To obtain a new trial based on newly discovered evidence, 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 nature that it would probably produce an acquittal on retrial. See Jones, 709 So.2d at 521. **"Newly discovered evidence satisfies the second prong of the Jones test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability."** Jones, 709 So.2d at 526 (quoting Jones v. State, 678 So.2d 309, 315 (Fla. 1996)). Id. at 797, [Emphasis added].
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> ***
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> In determining whether the evidence compels a new trial, the state court must "consider all newly discovered evidence which would be admissible" and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id. At 916. This determination includes
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>> Whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

the prior motions. Id.

Here, the defendant, himself, concedes, "...a state's discovery response lists a video taken of the outside and inside of the Ates' home by Linton Willis, a property/claims adjuster for Nationwide Insurance Company (See, Appendix, Exhibit A, State's Supplemental Discovery, p. 7; also, see Trial Exhibit Inventory Exhibit 34 [R630])].

Since the evidence was explicitly disclosed by the state, the defendant has shown no basis for relief, and his claim is procedurally barred.

Ground Thirteen [Defendant's Supplemental Motion at p. 8]

The defendant claims the state deliberately withheld evidence of a bullet hole in a bathroom door which would have accounted for a ninth bullet contrary to the state's suggestion that the ninth bullet from the defendant's gun was found in the defendant's car. He relies on a December, 29 1995 FDLE report appended to his supplemental motion as M-1 to M-5 prepared by FDLE Analyst David Williams.

This report, like others the defendant claims were withheld from him, was not. It was clearly disclosed by the state in its

Supplemental Discovery Response by the agent's name and date of his report. [Appendix A, p. 2].

Therefore, the defendant has shown no newly discovered evidence, and no basis for relief is stated.

<u>Ground Four</u> [Defendant's Motion at p. 51]

The defendant claims that newly discovered police investigation reports, deliberately suppressed by the state, show that the prosecutor knowingly argued false motives to the jury to urge it to convict. The defendant claims that six reports of Investigator Barberree of the Okaloosa County Sheriff's Department were not disclosed to the defense and that those reports contained memorializations of witness interviews that supported the defendant's claim that his marriage was sound. (Appendix I, pp. 33 - 38) [Defendant's Motion at p. 52] Those witnesses are Regina Ward, Rhonda Robinson, Rachael Davis, Karen Schell, Mary Lou Halstead, and Pam Fenoff.

Again, the defendant's claim is disproved by his own documentation. "State's Supplemental Discovery" dated April 21, 1998 explicitly and timely lists the interviews of these six witnesses. [Defendant's Appendix A, p. 6]

This claim is meritless and should be denied on its face.

<u>Ground Three</u> [Defendant's Motion at p. 46]

The defendant claims his trial counsel were ineffective for either overlooking or failing to use newly discovered videotapes of the baccalaureate service (to support the defendant's alibi).

This issue is controlled by the same rules which defeat the Defendant's Claim One. The videotapes in question were, by the defendant's admission, listed in the state's discovery response over a decade ago. The defendant, himself, admits the videotapes were in the custody of the state "as shown by the state's discovery response dated August 4, 1997." [Defendant's Motion at p. 46, referring to Appendix, Exhibit C]

In addition, the defendant's claim to have discovered the existence of these tapes in 2007 establishes a lack of due diligence, especially when, as he claims, he told his trial lawyers prior to trial he believed such evidence existed. [Defendant's Motion at p. 46] It is merely a transparent attempt to raise an ineffective counsel claim that should have been raised in his first motion for post-conviction relief.

Accordingly, this ground, too, should be denied as an abuse of process and because it is time barred.

Ground Eleven [Defendant's Motion at p. 68]

The defendant claims the state withheld a videotape of the festivities at the high school baccalaureate services he attended which showed a clock reflecting 6:39 which corroborated the trial testimony of Mary Barrow that she saw the defendant at the school at 6:35 p.m.

First, this evidence was not withheld from the defense. The defendant, himself, admits videotapes were listed by the state in its response to the defendant's demand for discovery ["...and a separate state's discovery response lists two other videos that are relevant to this case." Exhibit C, p. 20]

Second, the evidence was only corroborative. Barrow testified to the same fact at trial. [TR 1229 - 1230] It was cumulative evidence at best which could not reasonably have changed the jury's verdict.

Third, the defendant admits the clock does not show the time

of 6:39; it show the time of 7:39. While the defendant offers a speculative explanation for the discrepancy (failure to adjust for a time change), 7:39 would not have helped the defendant establish his "exculpatory time line" at trial at all.

Accordingly, there is no merit to this claim.

<u>Ground Fifteen</u> [Defendant's Supplemental Motion at p. 20]

The defendant alleges that "newly discovered evidence reveals that Norma Jean Ates was shot 8 times, not seven, as the state avered [sic], and the Medical Examiner Dr. Cumberland perjured his testimony." He bases his entire claim on the results of a second autopsy conducted on the victim in 1995 and its inconsistencies with the original autopsy done in 1991.

The defendant engages in a complex analysis of the evidence, including the height of bullet holes in the walls compared to the victim's height in high heels, in addition to claiming the 1995 discovery of three instead of two projectiles in the left side of the body show the victim was shot at least eight times and not seven as the prosecution argued. This, the defendant argues, proves the unspent cartridge found in the defendant's Toyota could not have come from 9-shot pistol, the never found firearm

the state claimed was the murder weapon, since another bullet, presumably the ninth, was recovered from a mattress in the victim's home. However, the defense knew that an additional bullet was recovered from the victim's body after it was exhumed and argued to the jury during closing argument, "You see back in around '95, November of '95, interest was rekindled in this case to the extent that Mrs. Ates' body was exhumed and they recovered more of the bullets making a total of five bullets recovered from her." [TR 1687]

The defendant indulges several assumptions to conclude that the initial autopsy describing wound #1 as an entrance wound was correct, and he faults the prosecutor for arguing to the jury that #1 was an exit wound. This claim, however, is belied by the results of the second autopsy upon which the defendant, in other contexts, relies upon as more accurate. The 1995 report concludes, "Because of the procedures prior to the second autopsy, tracing the paths of the bullets is impossible. It is, however, evident after careful examination of medical legal photographs taken prior to the first autopsy, that the bullet wound of the left anterior neck (Wound number One) labeled an entrance in the original autopsy is, in fact, an exit wound and is, therefore, associated with one of the posterior entrance gunshot wounds." [R. 237].

Accordingly, the prosecutor's argument that wound #1 was an exit wound was not only supported by the evidence but correct. This is not, however, the primary problem with the defendant's Ground Fifteen.

This is not, and can not be, newly discovered evidence. The trial of this cause occurred in 1998. The results of the 1995 autopsy and its differences with the one conducted in 1991 were disclosed and known to the defense well prior to trial. The "Report of Autopsy" and "Final Anatomic Diagnosis" appears at Vol. II, R. 237-240 of the Record on Appeal in this case and is attached hereto. Defense counsel acknowledged the discrepancy in the reports in his closing argument ("One says it's an entry wound. One says it's an exit wound") and even advanced it in support of reasonable doubt. [TR 1664]

Because this claim is not based on newly discovered evidence or any other reason to grant post-conviction relief, it must be denied on its face.

Ground Fourteen [Defendant's Supplemental Motion at p. 12]

The defendant claims that the prosecution based its case, not on bullets found at the scene of the murder but bullets which

belonged to W.C. Buck Bryan who was pushing for an aggressive prosecution. He also claims the prosecutor corruptly submitted Bryan's bullets for comparison to the FDLE rather than projectiles found at the scene or in the victim.

This claim must be dismissed on its face because there exists not even a claim there is evidence to support it. It appears to be a theory developed by the defendant because the prosecutor used Bryan's H&R handgun as a demonstrative aid at trial (because the murder weapon was never found)[TR 1153], the victim's uncle, [TR 1153] Bryan, had a bias, and the defendant's skepticism about the credibility of the witness, Deputy Carmichael, who claims to have found ballistics evidence in the defendant's house and in his car in 1991. He also seems to claim that because Bryan's weapon was used for test firing, and the land and groove impressions were "very close" to those of the evidence bullet, firearms examiner Lundy must have been "tricked" into comparing Bryan's ammunition rather than the crime scene bullets to reach the erroneous conclusion that they matched the crime scene.

Moreover, the defendant tangentially raises a serious question in light of reports generated by FDLE crime scene analysts Laura J. Rousseau and Charles Richards in 1991 immediately after the shooting. Rousseau inspected the

defendant's Toyota. Richards inspected the defendant's house. Rousseau's report is devoid of any mention of a .22 caliber cartridge found in the defendant's vehicle. Richards' 1991 report makes no mention of any cartridges found in the gun box in the utility room among the 29 items he recovered at the scene including numerous projectiles. [Defendant's Exhibit N-1 - N-3].

The defendant argues, therefore, that Deputy Carmichael lied and the evidence was contrived.

The defendant's observation that the discovery of these important items of evidence [4X1A, 100-A-1, and 100-A-2] is not memorialized until reports are generated in 1995 and later [Defendant's Exhibit M and P] is incorrect. As Deputy Sheriff Carmichael testified at trial, the cartridge from the car and bullets from the gun box were recovered on June 3, 1991, immediately after the crime from the scene pursuant to search warrants and are reflected on inventories of the same date introduced into evidence at trial by the defense. [TR 312, 323 - 341; R 711-715, 717-718]

There is simply no valid claim for relief as stated in this argument.

Conclusion

The "expert" ballistics evidence which played a pivotal role in the state's prosecution of this case was determined a decade after his conviction to be unreliable and inaccurate. This is clearly newly discovered evidence as Rule 3.850 contemplates.

Accordingly, the belated revelation that the metallurgic ballistics analysis relied upon by the state to link the defendant's ammunition to the crime to the exclusion of others "in all the world", as the prosecutor argued, was fundamentally flawed proves that the fairness of the defendant's trial was severely jeopardized.

Applying the Preston standards governing the review of Motions to Vacate, fundamental standards of fairness and due process invite the conclusion that the defendant has fulfilled his burden of proof. In the context of the cumulative effect of the errors identified by the defendant, and the circumstantial if not "close" nature of the evidence in this case, no one should be confident in the accuracy of the verdict in this case.

Accordingly, it is the state's belief that the defendant should be granted a new trial.

Jones, 709 So.2d at 521 (citations omitted).

The defendant's 84 page motion, while replete with outrageous claims of prosecutorial misconduct (from a corrupt political motivation to convict him to a deliberate plot to elicit perjured testimony), which are utterly unsubstantiated and which deserve no consideration whatsoever, in substance constitutes a claim that the scientific evidence relied upon to convict him has recently been deemed unreliable, and crucial, discoverable, exculpatory evidence was withheld from him prior to trial. He claims the existence of each of these items was previously unknown to him and argues, therefore, that his claims should be considered on their merits notwithstanding the passage of time and the fact that this is a successive petition under Rule 3.850 for similar relief. For each item, the defendant explains why in his view the withholding of the evidence by the state would likely have resulted in a different trial outcome. He emphasizes that when viewed cumulatively, especially in light of the circumstantial nature of this "close" case, he should be granted a new trial.

The state finds many of the defendant's claims to be either procedurally barred or without merit. However, it concludes that flawed science and the withholding of material evidence by the

state were two factors which operated to deny the defendant due process and the fair trial to which he was entitled. Critical scientific ballistics evidence used to convict the defendant has been found only recently to lack the probative value the state relied on to urge the jury to convict. Certain failures of the discovery process which caused the defendant to lack exculpatory evidence he was entitled to have prior to trial to aid in the preparation of his defense were noted even by the trial judge. When the defense complained about its failure to timely receive discovery, the Court, with some prescience, asked,

> **"What have you folks been doing with this stuff?"** [TR 623]... "I'm getting frustrated because ... Mr. Ates ... deserves a fair trial. The fact that this has been going on for this length of time and this stuff keeps popping up all the time, is making me feel very uncomfortable. **At some point in time it's going to be cumulative to the point where somebody is going to be paying for all of this. I don't want it to be that man over there."** (Emphasis added) [TR 624]

The state will address each of the issues offered by the defendant but in an order which is intended to make more sense considering the state's ultimate conclusion:

Ground Twelve [Defendant's Supplemental Motion at p. 2 and Second Supplement to his Motion for Post-Conviction Relief]

The state relied heavily on expert metallurgical testimony, "bullet lead analysis", to link bullets from the defendant's gun to the murder scene to identify the defendant as the killer.

Based on documents received in 2008 by the State Attorney for the Eighth Judicial Circuit which it forwarded to the defendant, the defendant claims he is entitled to a new trial because the ballistics evidence used to support his conviction has been determined to have been unreliable. Specifically, these documents show the FBI suspended "bullet lead analysis" in 2004 and "ceased entirely performing such examinations and providing such testimony in 2005" because the science was simply wrong. [Appendix B1]

Moreover, the Department of Justice began conducting reviews of trial testimony resulting in convictions to determine whether examiners "correctly stated the significance of a match between the elemental composition of bullet fragments and the composition of bullets known to be associated with a defendant" as was used in this case. [February 25, 2008 U.S. Department of Justice Letter; Defendant's Appendix, Exhibit B1] Therefore, the defendant questions the reliability of the testimony used to

convict him here.

The issue is crucial to this case because a bullet recovered from the mattress under the victim [Exhibit 18], unquestionably discharged by the murder weapon, was compared by FDLE analyst Kathleen Lundy to the .22 caliber cartridge found in the Toyota Camry [Exhibit 4X1A] associated with the defendant as well as a box of cartridges in the utility room of the defendant's house. [Exhibit 100-A-1]. These cartridges were important links between the murder and the defendant, especially since the state emphasized that the defendant admitted owning, and even recently shooting, a nine shot .22 caliber weapon. [TR 1555] As a metallurgical expert [TR 806], Lundy testified not only that the bullet and cartridge in the car were consistent, but that the lead in each was of the same general alloy. [Defendant's Exhibit I-2] She also testified that the composition of the bullet recovered was from the "same" lead at Federal Manufacturing Company and was manufactured either on the same date or "within a period of the dates" (closely in time?) from the same batch of lead. [TR 816]

In closing, the state could not have argued the significance of her testimony more strenuously:

> "...Kathleen Lundy comes in as a metallurgical expert assigned to the FBI in Maryland. She is a weapons metallurgist and she explained to you that she has been

all over the United States studying the process by which bullets are made and she gave you a lecture on that I'm sure you will never forget but part of that lecture was that bullets like everything else in the world are made from batches and ingots and they are not all the same. In fact, even within the same company there are differences because the batches aren't that pure. But she tells you there are certain identifiable residue levels of certain type elements that tell us that this company required this amount of trace element. So that if you find in the bullet - if you find in the round that was fired that it had those trace elements that means it's from that company and then if you find even more that a bullet that has been fired is of the identical trace composition of another bullet, then you can assume they were manufactured from the same batch." (Emphasis added) [TR 1577 - 1578]

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"Kathleen Lundy says I examined five Federal rounds from the body of Norma Jean and I compared those to the two Federal rounds that were taken from the box that was found at that house ... and what does that tell us? She says that I found that those five bullets are from the same batch or ingots of the two that were out in the box in the laundry room." [TR 1578]

The prosecutor continued:

"Now what does that really mean to us? I'll tell you. It means of all the millions and billions of bullets that are made by any given company in any given time frame the bullets that killed Norma Jean were manufactured from the same batch that were found in the box in the back room." (Emphasis added) [TR 1578]

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"At that point the case changed from what I call the scientific phase. I really recognize that because the scientific phase was put on by someone who understood the science so well. (Emphasis added) [TR 1578 - 1579]

And, in rebuttal closing, the prosecutor continued the

theme:

> "[T]he shells found in that box are from the same batch in all the world the shells in that batch - in that box are from the same batch that are found in that woman's body. ...[I]n all the world that box is consistent. If that weren't true, we'd hear the opposite." (Emphasis added) [TR 1370]

The jury did not and could not have heard the "opposite" because the faults of the metallurgic testing procedures only became known years after the defendant's trial and conviction. The defendant can not be faulted for failing to raise this claim earlier because he could never have known about the issue until ten years after his conviction.

Moreover, in his Second Supplement to his Motion for Post-Conviction Relief, the defendant appends a May 30, 2008 letter from the U.S. Department of Justice which reaches a startling conclusion based on its own analysis of the transcript in <u>this</u> case:

> "After reviewing the testimony of the FBI's examiner, it is the opinion of the FBI Laboratory that the examiner properly testified that the examination revealed that the evidentiary specimen(s) probably came from the same melt of lead. However, the reviewers felt that the examiner did not provide sufficient information to the jury to allow them to understand the number of bullets made from the melt.
>
> <u>Without having evidence concerning the approximate number of bullets made from a single melt, the jury could have misunderstood the probative value of this evidence."</u>