

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 1994-CF-0498

LORAN KENSTLEY COLE,

Defendant.

_____ /

**ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE
JUDGMENT OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO
FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AFTER A SIGNED
DEATH WARRANT
AND
ORDER DENYING THE STATE'S MOTION FOR MEDICAL
AND INMATE RECORDS**

THIS CAUSE is before the Court on Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 after a Signed Death Warrant, filed on August 3, 2024. The State filed its Response on August 4, 2024. A *Huff*¹ hearing was held on August 6, 2024, after which this Court determined that all of Defendant's claims for relief could be resolved by a review of the record and prevailing case law. The Court has considered Defendant's Motion, reviewed the record, and is duly advised in the premises. For the reasons stated below, the Court finds that Defendant is not entitled to any relief.

¹ *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

FACTS OF THE CASE

In its opinion affirming Defendant's convictions and death sentence, the Florida Supreme Court described the facts of the case as follows:

On February 18, 1994, Pam Edwards, a senior at Eckerd College in St. Petersburg, Florida, drove to the Ocala National Forest, where she met her brother, John Edwards, a freshman at Florida State University in Tallahassee, Florida. The two planned on camping in the forest for the weekend and eventually decided to camp in Hopkins Prairie. They were setting up camp when Loran Cole briefly stopped by their campsite. Cole soon returned to the campsite, introduced himself as "Kevin," and helped them set up camp. After John and Pam ate dinner, Cole and William Paul came to the Edwards' campsite. Paul was carrying a walking stick and was introduced to the Edwards as Cole's brother. The four sat around the campfire, and at about 10:45 p.m., they decided to walk to a pond.

The four walked for a while but never found the pond. Instead, Cole jumped on Pam and knocked her to the ground. She got up and tried to run; however, Cole caught her, hit her on the back of the head, handcuffed her, and threw her down on the ground. Meanwhile, John had taken Paul's walking stick and was hitting him with it. Cole then helped Paul subdue John and moved John on the ground next to Pam. While they lay close to each other on the ground, John apologized to Pam for having exposed them to the dangers of these two strangers. Cole told the Edwards that he wanted to take their cars, and he went through their pockets and took their personal property, including their jewelry.

Paul took Pam up the trail, and he was complaining about his hand and head, which were injured in the altercation with John. Pam could hear Cole asking John why he hurt Cole's brother and could hear John grunt a few times. Cole then came to where Pam and Paul were sitting and told them that they were going to wait until John passed out. Cole called back to John several times, and John responded by moaning. Eventually, Cole told Pam he was going to move John off the trail and tie him up. Pam then heard something that resembled a gagging sound. When Cole returned, he said that John must be having trouble with his dinner, hinting that John was vomiting. John died that night from a slashed throat and three blows to the head, which fractured his skull. The injury to the throat caused a loss of blood externally and internally into John's lungs.

Pam, Paul, and Cole then started walking back to Cole's campsite. On the way, they walked past John, and he was not moving. At the campsite, Cole forced Pam to sleep naked by

threatening her that unless she cooperated, she and John would be killed. Cole then forced her to have sexual intercourse with him.

The next morning, Cole went to check on John and told Pam that John was fine. Cole left the campsite to purchase marijuana. When he returned, the three smoked marijuana, and Cole again forced Pam to have intercourse with him. After eating dinner, they packed up as much of the camp as would fit into the backpacks carried by Cole and Paul. Cole then gagged Pam and tied her to two trees. Cole and Paul left in Pam's car and went to a friend's trailer, where they spent the night. The two left several items of John Edwards' personal property at the trailer. Thereafter, Cole and Paul returned Pam's car to the Ocala National Forest and took John's car, a Geo Metro.

By the early morning on Sunday, Pam was able to free herself of the ropes. She did not move because she was afraid that if Cole and Paul returned and she was not there, they would hurt John. She stayed in that spot until daylight and tried to find John. When she was unable to find him, she flagged down a motorist, who took her to call the police. The police returned with Pam to the scene, and the police located John's body. The body was face down and was covered with pine needles, sand, debris, and small, freshly cut palm fronds. Both of his hands were in an upward fetal position; there was a shoestring ligature around his left wrist and a shoestring partially wrapped around his right wrist.

Police thereafter arrested Paul and Cole in Ocala on Monday, February 21, 1994.

Cole v. State, 701 So. 2d 845, 848-49 (Fla. 1997).

PROCEDURAL HISTORY

Defendant was charged, by indictment, with one count of first-degree murder, two counts of kidnapping with a weapon, two counts of robbery with a weapon, and two counts of sexual battery. Defendant proceeded to trial and was found guilty as charged. After the penalty phase, the jury unanimously recommended a death sentence. On December 21, 1995, the Court, through predecessor judge, the Honorable William T. Swigert, sentenced Defendant to death on the first-degree murder count and life imprisonment on the remaining counts. The Court found the following aggravators: (1) Defendant had previously

been convicted of another felony; (2) the murder was committed during the course of a kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was heinous, atrocious, or cruel. The Court found the following nonstatutory mitigators: (1) Defendant suffered from organic brain damage and mental illness; and (2) Defendant suffered an abused and deprived childhood. Defendant appealed and the Florida Supreme Court affirmed Defendant's judgments and sentences. *Cole v. State*, 701 So. 2d 845 (Fla. 1997).² The United States Supreme Court denied certiorari on March 30, 1998. *Cole v. Florida*, 523 U.S. 1051 (1998).

On June 5, 1998, Defendant filed his first motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, which Defendant amended on September 27, 1999. An evidentiary hearing was held on May 15, 2000. On May 24, 2000, the Court entered an order denying Defendant's motion. Defendant appealed the denial and filed a petition for writ of habeas corpus in the Florida Supreme Court. The Florida Supreme Court upheld the denial of Defendant's post-conviction motion and denied relief on the habeas petition. *Cole v. State*, 841 So. 2d 409 (Fla. 2003).

Defendant then filed a motion for post-conviction DNA testing on September 29, 2003. The Court denied relief and the Florida Supreme Court affirmed the denial. *Cole v. State*, 895 So. 2d 398 (Fla. 2004).

² The Florida Supreme Court found the court erred in sentencing the defendant to minimum mandatory sentences on each of the defendant's other felony convictions. The Florida Supreme Court remanded the case to the trial court to impose an appropriate sentence on the other felony convictions. *Cole*, 701 So. 2d at 856.

Defendant next filed a petition for writ of habeas corpus in the United States Middle District on May 6, 2005. The District Court dismissed the petition as untimely, but in the alternative, ruled that all claims lacked merit. *Cole v. Crosby*, 2006 WL 1169536 (M.D. Fla. May 3, 2006). Defendant then filed an application for certificate of appealability on May 25, 2007, which was denied. Defendant appealed to the United States Court of Appeals for the Eleventh Circuit and filed a renewed application for certificate of appealability. In a one-page order, the renewed application for certificate of appealability was denied. A motion for reconsideration was denied on September 7, 2007. On October 25, 2007, Defendant filed a petition for writ of certiorari with the United States Supreme Court, which was denied on January 7, 2008.

Defendant then filed a successive motion for post-conviction relief on September 8, 2010. On March 10, 2011, the Court denied the motion. Defendant appealed and the Florida Supreme Court affirmed the denial on February 8, 2012. *Cole v. State*, 83 So. 3d 706 (Fla. 2012).

Defendant attempted to file a second petition for writ of habeas corpus. However, on March 20, 2012, the Eleventh Circuit Court of Appeals denied Defendant's application for leave to file second petition for writ of habeas corpus.

On November 19, 2012, Defendant filed a second successive motion for post-conviction relief. On March 7, 2013, the Court denied the motion. Defendant appealed and the Florida Supreme Court affirmed the denial on December 17, 2013. *Cole v. State*, 131 So. 3d 787 (Fla. 2013).

On January 9, 2017, Defendant filed a third successive motion for post-

conviction relief. On March 20, 2017, the Court denied the Motion. Defendant appealed and the Florida Supreme Court affirmed the denial. *Cole v. State*, 234 So. 3d 644 (Fla. 2018).

On July 29, 2024, Governor Ron DeSantis signed a death warrant ordering Defendant be put to death. The execution is scheduled for Thursday, August 29, 2024, at 6:00 p.m.

CLAIMS FOR RELIEF

Defendant raises three claims for relief.

CLAIM ONE: Newly discovered evidence

In his first claim, Defendant claims he is entitled to relief based upon newly discovered evidence regarding his treatment while he attended the Arthur G. Dozier School for Boys in 1984. According to Defendant, the newly discovered evidence is the State of Florida's acknowledgement of the mistreatment of individuals who attended the Dozier School, demonstrated through CS/HB 21-Dozier School for Boys and Okeechobee School Victim Compensation Program, which the Governor signed on June 21, 2024, and became effective on July 1, 2024. Defendant claims that, had the jury known about the abuse that occurred at the Dozier School and the State of Florida's acknowledgement of said abuse, there is a reasonable probability he would have received a lesser sentence.

The Court finds that evidence regarding Defendant's treatment while he attended the Dozier School is not newly discovered evidence. Defendant first raised a claim regarding his treatment at the Dozier School in his successive motion for post-conviction relief, filed on September 7, 2010. Defendant claimed

his trial counsel was ineffective for failing to present evidence regarding his abuse at Dozier School as mitigation during the penalty phase. On March 10, 2011, the Court denied Defendant's claim as untimely and procedurally barred. *See attached Order Denying Defendant's Successive Motion for Postconviction Relief (without attachments)*. Defendant appealed the Court's denial of his successive motion and the Florida Supreme Court affirmed. *Cole v. State*, 83 So. 3d 706 (Fla. 2012).

Defendant then raised a second claim regarding his treatment at the Dozier School in his second successive motion for post-conviction relief, filed on November 19, 2012. Defendant claimed evidence regarding his treatment at the Dozier School was not presented as mitigation. On March 7, 2013, the Court denied Defendant's claim as untimely and procedurally barred. *See attached Order Denying Second Successive Motion to Vacate Conviction and Sentence (without attachments)*. Defendant appealed and the Florida Supreme Court affirmed the denial on December 17, 2013. *Cole v. State*, 131 So. 3d 787 (Fla. 2013). The Florida Supreme Court found Defendant's claim to be "nearly undistinguishable" from his previous claim. *Id.*

Here, Defendant claims that CS/HB 21-Dozier School for Boys and Okeechobee School Victim Compensation Program³, signed by the Governor on June 21, 2024, and effective on July 1, 2024, is newly discovered evidence

³ As Defendant acknowledges in his Motion, this bill allows for compensation for individuals who attended the Dozier school from 1940-1975. Defendant attended the Dozier school from June 1, 1984, to November 14, 1984.

showing the State of Florida's acknowledgment of the mistreatment of individuals who attended the Dozier School.

The Court finds that although Defendant is using a different argument, he is attempting to relitigate the same issue he raised in two prior motions. But "resolutions, consensus opinions, articles, research, and the like, do not constitute newly discovered evidence." *Barwick v. State*, 361 So. 3d 785 (Fla. 2023). Likewise, CS/HB 21 and Defendant's treatment while he attended the Dozier School is not newly discovered. *See Zack v. State*, 371 So. 3d 335 (Fla. 2023) ("new scientific consensus" found in articles is not newly discovered evidence and claim procedurally barred); *Dillbeck v. State*, 357 So. 3d 94 (Fla. 2023) ("alleged newly emerged medical and scientific consensus" is not newly discovered evidence and claim procedurally barred).

The harsh conditions at the Dozier School were exposed long ago. The State of Florida's decision to now compensate some of those individuals who attended the school does not revive Defendant's previously denied post-conviction claims.

This claim is procedurally barred.

CLAIM TWO: Experience while an inmate in the Department of Corrections

In his second claim, Defendant claims his Eighth Amendment rights were violated because his experience while an inmate in the Department of Corrections has been cruel and unusual. According to Defendant, while an inmate in the Department of Corrections for the last three decades, Defendant "has experienced neglect and mistreatment" because the Department of

Corrections has “den[ied] him proper medical treatment, allow[ed] him to have access to illicit drugs, and then punish[ed] him with disciplinary reports” when Defendant was found with the illicit drugs.

The Court finds Defendant’s claim to be untimely. Florida Rule of Criminal Procedure 3.851(d)(1) requires a motion to vacate judgment of conviction and sentence of death to be filed within one year after the judgment and sentence become final. No motion shall be filed beyond the one year unless it alleges

(A) 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, or

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2). Defendant’s judgment and sentence became final in 1998 when the United States Supreme Court denied Defendant’s petition for writ of certiorari. *Cole v. Florida*, 523 U.S. 1051 (1998). Defendant has failed to allege any specific date on which he claims he experienced “neglect and mistreatment” during his thirty years in the Department of Corrections other than to allege that he was “provided a ‘laced’ suspected cannabis joint” two years ago. Regardless, it is clear this instant claim has been raised beyond the one-year time limitation of Rule 3.851(d)(1). As Defendant has failed to allege any of the exceptions under Rule 3.851(d)(2), this claim is untimely.

Moreover, the Florida Supreme Court has repeatedly rejected claims that a prolonged stay on death row constitutes cruel and unusual punishment. *See*

Orme v. State, 361 So. 3d 842 (Fla. 2023). Defendant’s voluntary use of illegal drug while incarcerated cannot constitute cruel and unusual punishment.

CLAIM THREE: Lethal injection procedures

In his third claim, Defendant claims Florida’s lethal injection procedures, as applied to him, are unconstitutional and constitute cruel and unusual punishment. According to Defendant, he has suffered from Parkinson’s disease for the last seven to ten years and his involuntary body movements due to his Parkinson’s disease “will affect the placement of the intravenous lines necessary to carry out an execution by lethal injection.” Defendant claims the lethal injection protocols require the placement of two intravenous lines in a peripheral vein, or, if that is not possible, an intravenous line in a central vein, which may require the “cut down” procedure to locate. Defendant claims his Parkinson’s disease will make the placing of the intravenous lines “very difficult, needlessly painful, and unreasonably dangerous.”

The Court finds Defendant’s claim to be untimely. As stated above, Defendant has suffered from Parkinson’s disease for the last seven to ten years. Defendant has been aware of the symptoms of his disease, including, *inter alia*, involuntary body movements, for the last seven to ten years, yet Defendant failed to raise the instant claim until a death warrant was signed. The Court notes that Defendant filed his third successive motion for post-conviction relief on January 9, 2017. However, Defendant failed to raise the instant claim in that motion even though, according to his timeline, he was already suffering from Parkinson’s disease. This Court questioned Defendant’s counsel regarding the

delay in raising the instant claim at the *Huff* hearing and Counsel claimed the lethal injection protocols have changed. However, Counsel cited to no such change that could justify the delay in raising the instant claim. Accordingly, the Court finds that the newly discovered evidence exception to the requirement that Defendant file a motion within one year does not apply and this claim is untimely.

The Court further finds this claim is without merit. To challenge a method of execution under the Eighth Amendment's prohibition of cruel and unusual punishment, an inmate must "(1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering and (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain." *Asay v. State*, 224 So. 3d 695 (Fla. 2017) (citing *Glossip v. Gross*, 576 U.S. 863 (2015)).

As discussed above, Defendant claims that his "Parkinson's disease will make the placing of two intravenous catheters very difficult, needlessly painful, and unreasonably dangerous." However, Defendant's claim is speculative. Defendant failed to allege that medical personnel have previously had problems finding a vein in his arm or that he has previously suffered pain during the placement of an intravenous line. Instead, he merely speculates that he will suffer because of his involuntary body movements. This is insufficient to establish a "substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering" or to require an evidentiary hearing. *See*

Jimenez v. State, 265 So. 3d 462 (Fla. 2018) (speculative and conclusory allegations that legal injection protocols present substantial risk of serious harm insufficient). Defendant’s mere speculation that his medical condition may make it more difficult to follow the current protocols is “insufficient to require revisiting [the Florida Supreme Court’s] holding in *Asay VI.*” *Jimenez*, 265 So. 3d at 475.

The placement of an intravenous line in a patient with body movements is neither unique nor rare in the medical field. Defendant acknowledges in his Motion that restraints can secure a person’s body and block muscle movements. The Department of Corrections’ lethal injection protocols include restraints, which could be used to block muscle movements. Additionally, if an intravenous line cannot be placed, the protocols allow for the placement of a central line, with or without a venous cut-down. This protocol has previously been found to be constitutional in *Asay v. State*, 224 So. 3d 695 (Fla. 2017). Thus, even if Defendant could establish that he has tremors or body movement, he cannot “establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering.”

“Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.” *Baze v. Rees*, 553 U.S. 35 (2008). As the Honorable Charles Holcomb stated in his Order Denying Defendant’s Third Successive Motion to Vacate Sentence or Stay Execution, which the Florida Supreme Court adopted, “[b]eing pricked numerous times in the course of having an IV inserted is not cruel and unusual

punishment, however uncomfortable it may be.” *Schwab v. State*, 995 So. 2d 922, 927 (Fla. 2008).

Based on the foregoing, the Court finds that Defendant is not entitled to any relief. It is, therefore,

ORDERED:

1. Defendant’s Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 after a Signed Death Warrant is **DENIED**. Defendant may appeal this decision to the Florida Supreme Court by Monday, August 12, 2024, at 9:00 a.m., as detailed in the Florida Supreme Court’s order entered on July 29, 2024.

2. The State’s Motion for Medical and Inmate Records is **DENIED** as moot.

ORDERED in Marion County, Florida, on this 8th day of August 2024.


ROBERT W. HODGES
Circuit Judge

CERTIFICATE OF SERVICE

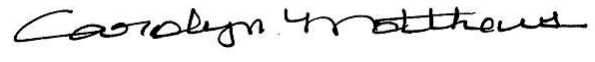
I HEREBY CERTIFY that a true and accurate copy of the foregoing has been provided by U.S. Mail or the Florida Court's e-portal this 8th day of August 2024, to the following:

Richard Buxman, Assistant State Attorney
Kenneth S. Nunnally, Assistant State Attorney
Office of the State Attorney

Timothy A. Freeland, Sr., Assistant Attorney General
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The Florida Supreme Court
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Judicial Assistant

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

CASE NO.: 1994-CF-0498

LORAN COLE,

Defendant.

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MARION COUNTY FLA

**ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION FOR POSTCONVICTION
RELIEF**

THIS CAUSE is before the Court on the Defendant's Successive Motion for Postconviction Relief, pursuant to *Florida Rule of Criminal Procedure* 3.851(e)(2), filed on September 7, 2010. This motion is time-barred, procedurally barred, and without merit.

On December 21, 1995, the trial court imposed upon the Defendant a death sentence for first degree murder and life sentences for the remaining charges (two counts of kidnapping with a weapon, two counts of robbery with a weapon, and two counts of sexual battery). The trial court found the following aggravators: (1) the Defendant had previously been convicted of another felony; (2) the murder was committed during the course of a kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was heinous, atrocious, or cruel. The trial court found and weighed the following nonstatutory mitigators: (1) the Defendant suffered from organic brain damage and mental illness, slight to moderate weight; (2) the Defendant suffered an abused and deprived childhood, slight weight. The convictions and sentences were affirmed on direct appeal. *Cole v. State*, 701 So. 2d 845 (Fla. 1997). The United States Supreme Court denied certiorari on March 30, 1998. *Cole v. Florida*, 523 U.S. 1051 (1998).

On June 5, 1998, the Defendant filed his first motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. On September 27, 1999, the Defendant filed an Amended Motion to Vacate Judgment and Sentences. An evidentiary hearing was held on May 15, 2000. The trial court entered a final Order denying Cole's motion on May 24, 2000. The Defendant appealed the denial and filed a petition for writ of habeas corpus in the Florida Supreme Court. The Florida Supreme Court upheld to denial of the Defendant's postconviction claims and denied relief on the habeas petition. *Cole v. State*, 851 So. 2d 409 (Fla. 2003).

The Defendant then filed a Motion for Postconviction DNA Testing in state court on September 29, 2003. The circuit court denied relief and the Florida Supreme Court affirmed the denial. *Cole v. State*, 895 So. 2d 398 (Fla. 2004). The Defendant filed a Petition for Writ of Habeas Corpus in the United States Middle District – Ocala Division, on May 6, 2005. The District Court dismissed the petition as untimely, but in the alternative, ruled that all claims lacked merit. *Cole v. Crosby*, 2006 U.S. Dist. LEXIS 34562, 2-3 (M.D. Fla. May 3, 2006). The Defendant filed an Application for Certificate of Appealability on May 25, 2007, which was denied. The Defendant appealed to the United States Court of Appeals for the Eleventh Circuit and filed a Renewed Application for Certificate of Appealability. In a one page Order, the Renewed Application for Certificate of Appealability was denied. A Motion for Reconsideration was denied on September 7, 2007. On October 25, 2007 a Petition for Writ of Certiorari was filed with the United States Supreme Court, and that Petition was denied on January 7, 2008.

In this instant motion, the Defendant alleges that his trial counsel was ineffective for failing to present certain mitigating evidence during the penalty phase of his 1995 trial. The motion alleges that the Defendant suffered abuse while he was an inmate at the Arthur G. Dozier School for Boys which has resulted in depression, anxiety, and Post-Traumatic Stress Disorder.

The motion alleges that this information was discovered in early 2009 after the Defendant suffered a mental breakdown from watching a documentary about the Dozier School.

On November 4, 2010, a case management conference was held regarding this instant motion. *See attached transcript.* Attorneys Rock E. Hooker and Barbara Davis (by telephone) were present at the hearing for the State. Attorneys Richard E. Kiley and Ali Shakoor were in attendance on behalf of the Defendant.

Timeliness

Rule 3.851(d), *Fla. R. Crim. P.*, provides that:

(1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final.

For the purposes of this rule, a judgment is final:

(A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or

(B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

(A) 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, or

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

The defendant's instant motion falls outside of the one year window and does not contain newly discovered evidence, therefore it is time barred. The Defendant's judgment and sentence became final when the Supreme Court denied certiorari review on March 30, 1998. The newly discovered evidence issue will be discussed below.

Newly Discovered Evidence

The Defendant's motion alleges that his trial counsel was ineffective for failing to present evidence that the Defendant was an inmate at Dozier School for Boys. To qualify as an exception to the one year time limit "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). On page 8 of the pre-sentence investigation ("PSI") document, under "Educational History" the following is written:

The defendant advised that he received his GED in 1986 at the Arthur G. Dozier School for Boys in Marianna, Florida. The defendant's mother confirmed this information stating that he received a GED during his incarceration in the Florida Department of Corrections.

PSI, p. 8. Therefore the Defendant/movant knew that he had attended the Dozier School for boys and even expressed this fact to Correctional Probation Specialist that prepared the PSI.

The Defendant's attorney at each level of this case, both trial and appellate, either knew or could have found this information with due diligence. At the November 28, 1995 Sentencing hearing, the Defendant's trial counsel stated on the record that he discussed the PSI with the Defendant at least twice and that they did not have any corrections as to the substance of it. *Sentencing Hearing*, p. 6-7. The PSI was included in the record on direct appeal. Appellate counsel could have accessed the information in the PSI with due diligence.

This claim is alleged more than a decade after the judgment and sentences became final and does not qualify for an exception to the one year limit. This motion is time barred.

Procedurally Barred

The issue raised in this motion is also procedurally barred. The Defendant has filed multiple postconviction motions prior to the instant motion. Because the "newly discovered evidence" alleged in this motion was actually known by the Defendant, readily accessible to trial counsel, and included in the record, it fails to qualify as newly discovered and therefore could

have been litigated in the prior proceedings. Therefore, this issue is procedurally barred. *See Brown v. State*, 41 So. 3d 116 (Fla. 2010); *Marek v. State*, 14 So. 3d 985, 999 (Fla. 2009).


Futhermore, this claim is refuted by the record. Claims in successive motions may be denied without an evidentiary hearing “[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.” Rule 3.851(f)(5)(B), Fla. R. Crim. P.; *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007); *White v. State*, 964 So. 2d 1278 (Fla. 2007). Because the Defendant’s attendance at the Dozier School for Boys was known by the Defendant and trial counsel and with the exercise of due diligence could have been known by collateral counsel, this claim is without merit.

It is hereby,

ORDERED: Defendant’s Successive Motion for Post Conviction Relief is DENIED.

Defendant may appeal this decision to the Fifth District Court of Appeal within thirty (30) days of this Order’s effective date.

DONE AND ORDERED this 10 day of March, 2011, at Ocala, Florida.



Hale R. Stencil
Circuit Court Judge

CERTIFICATE OF SERVICE

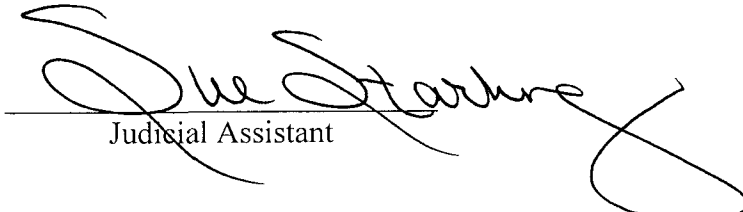
I HEREBY CERTIFY that a true and accurate copy of the foregoing has been provided by US Mail/Inter-Office Mail this 10 day of March, 2011, to the following:

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Judicial Assistant

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 94-498-CF

LORAN COLE,

Defendant.

_____ /

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MARION COUNTY, FL

ORDER DENYING SECOND SUCCESSIVE MOTION TO
VACATE CONVICTION AND SENTENCE

THIS CAUSE came before this Court on the defendant's second successive motion to vacate his conviction and sentence of death which was filed on or about November 19, 2012. The State of Florida filed its Answer to the successive motion on December 28, 2012. This Court conducted a Case Management Conference in accordance with the *Florida Rules of Criminal Procedure* on February 27, 2013. For the reasons set out below, the second successive motion is denied:

THE FACTS AND PROCEDURAL HISTORY OF THIS CASE

In its decision on direct appeal affirming the conviction and sentence, the Florida Supreme Court summarized the facts of this case as follows:

We have on appeal the judgment and sentence of the trial court imposing a death sentence upon Loran Cole. We have jurisdiction. Art. V, § 3(b)(1), *Fla. Const.* For the reasons expressed below, we affirm Cole's convictions and death sentence but remand to the trial court for imposition of appropriate sentences for the

remaining convictions for which Cole was adjudicated guilty.

On February 18, 1994, Pam Edwards, a senior at Eckerd College in St. Petersburg, Florida, drove to the Ocala National Forest, where she met her brother, John Edwards, a freshman at Florida State University in Tallahassee, Florida. The two planned on camping in the forest for the weekend and eventually decided to camp in Hopkins Prairie. They were setting up camp when Loran Cole briefly stopped by their campsite. Cole soon returned to the campsite, introduced himself as "Kevin," and helped them set up camp. After John and Pam ate dinner, Cole and William Paul came to the Edwards' campsite. Paul was carrying a walking stick and was introduced to the Edwards as Cole's brother. The four sat around the campfire, and at about 10:45 p.m., they decided to walk to a pond.

The four walked for a while but never found the pond. Instead, Cole jumped on Pam and knocked her to the ground. She got up and tried to run; however, Cole caught her, hit her on the back of the head, handcuffed her, and threw her down on the ground. Meanwhile, John had taken Paul's walking stick and was hitting him with it. Cole then helped Paul subdue John and moved John on the ground next to Pam. While they lay close to each other on the ground, John apologized to Pam for having exposed them to the dangers of these two strangers. Cole told the Edwards that he wanted to take their cars, and he went through their pockets and took their personal property, including their jewelry.

Paul took Pam up the trail, and he was complaining about his hand and head, which were injured in the altercation with John. Pam could hear Cole asking John why he hurt Cole's brother and could hear John grunt a few times. Cole then came to where Pam and Paul were sitting and told them that they were going to wait until John passed out. Cole called back to John several times, and John responded by moaning. Eventually, Cole told Pam he was going to move John off the trail and tie him up. Pam then heard something that resembled a gagging sound. When Cole returned, he said that John must be having trouble with his dinner, hinting that John was vomiting. John died that night from a slashed throat and three blows to the head,

which fractured his skull. The injury to the throat caused a loss of blood externally and internally into John's lungs.

Pam, Paul, and Cole then started walking back to Cole's campsite. On the way, they walked past John, and he was not moving. At the campsite, Cole forced Pam to sleep naked by threatening her that unless she cooperated, she and John would be killed. Cole then forced her to have sexual intercourse with him.

The next morning, Cole went to check on John and told Pam that John was fine. Cole left the campsite to purchase marijuana. When he returned, the three smoked marijuana, and Cole again forced Pam to have intercourse with him. After eating dinner, they packed up as much of the camp as would fit into the backpacks carried by Cole and Paul. Cole then gagged Pam and tied her to two trees. Cole and Paul left in Pam's car and went to a friend's trailer, where they spent the night. The two left several items of John Edwards' personal property at the trailer. Thereafter, Cole and Paul returned Pam's car to the Ocala National Forest and took John's car, a Geo Metro.

By the early morning on Sunday, Pam was able to free herself of the ropes. She did not move because she was afraid that if Cole and Paul returned and she was not there, they would hurt John. She stayed in that spot until daylight and tried to find John. When she was unable to find him, she flagged down a motorist, who took her to call the police. The police returned with Pam to the scene, and the police located John's body. The body was face down and was covered with pine needles, sand, debris, and small, freshly cut palm fronds. Both of his hands were in an upward fetal position; there was a shoestring ligature around his left wrist and a shoestring partially wrapped around his right wrist.

Police thereafter arrested Paul and Cole in Ocala on Monday, February 21, 1994. Paul and Cole were indicted on charges of first-degree murder, two counts of kidnapping with a weapon, and two counts of robbery with a weapon. Cole was also indicted on two counts of sexual battery. Paul pleaded nolo contendere to the charges and was sentenced to life in prison without

possibility of parole for twenty-five years on the murder charge and concurrent terms on the remaining charges. After a jury trial, Cole was found guilty on all counts of the indictment. A penalty-phase hearing was held, after which the jury unanimously recommended death. Finding four aggravators, [FN1] no statutory mitigators, and two nonstatutory mitigators, [FN2] the trial court followed the jury's recommendation and sentenced Cole to death.

[FN1] The trial court found the following aggravators: (1) Cole had previously been convicted of another felony; (2) the murder was committed during the course of a kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was heinous, atrocious, or cruel.

[FN2] The trial court found and weighed the following nonstatutory mitigators: (1) Cole suffered from organic brain damage and mental illness, slight to moderate weight; (2) Cole suffered an abused and deprived childhood, slight weight.

Cole v. State, 701 So. 2d 845, 848-849 (Fla. 1997).

In his first post-conviction relief motion, Cole raised the following claims, as framed by the Florida Supreme Court:

Cole raises numerous claims and subclaims in his rule 3.850 appeal [FN3] and in his habeas petition. [FN4] We have rearranged the order of the claims presented by Cole and will initially discuss the guilt phase claims and then discuss the penalty phase claims.

[FN3] In his rule 3.850 appeal, Cole argues that: (1) the trial court erred in denying Cole an evidentiary hearing on trial counsel's failure to (a) present evidence of Cole's extensive drug and alcohol abuse, (b) present evidence of childhood abuse, (c) object to prosecutorial misconduct during the penalty phase closing, (d) request an HAC limiting jury instruction, (e) introduce Paul's life sentence, (f) request co-counsel

to assist with the penalty phase, and (g) object to hearsay testimony of Dan Jackson and Deputy Tammy Jicha; (2) trial counsel was ineffective for failing to request and argue two statutory mental mitigators; (3) trial counsel was ineffective for failing to have a competent neuropsychological evaluation performed on Cole; (4) Cole did not receive effective mental health assistance as required by *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); (5) the trial court erred by excluding Dr. Dee's testimony during the evidentiary hearing; (6) after an evidentiary hearing, the trial court erred in not finding trial counsel ineffective during the guilt phase regarding trial counsel's (a) failure to conduct individual *voir dire*, (b) failure to utilize a peremptory challenge to remove juror Cutts, (c) failure to present Paul's testimony, (d) failure to contemporaneously object to the prosecutor's improper opening statement, (e) decision to only call John Thompson during Cole's case-in-chief, and (f) cumulative error as to this claim; (7) the trial court erred in refusing to allow a DNA test; (8) the trial court considered nonstatutory aggravating circumstances; (9) the State withheld exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (10) Cole should be allowed to question jurors to determine if there was juror misconduct; (11) the trial court erred in failing to grant an evidentiary hearing on trial counsel's failure to litigate the unconstitutional nature of the aggravating circumstances; and (12) cumulative error exists.

[FN4] In his habeas petition, Cole argues that: (1) his appellate counsel was ineffective for appellate counsel's failure to argue that (a) Florida's death sentencing statute was unconstitutionally applied to him in light of *Apprendi v. New Jersey*, 530

U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), (b) the trial court erred in denying Cole's motion for a statement of particulars regarding aggravating circumstances, and (c) a jury death recommendation must be unanimous; (2) the prosecutor's penalty phase closing argument constituted fundamental error; (3) Cole may be incompetent to be executed; (4) electrocution (a) remains the mandated mode of execution as the Death Penalty Reform Act of 2000 is unconstitutional, and (b) is cruel or unusual or both; and (5) lethal injection is cruel or unusual or both.

Cole v. State, 841 So. 2d 409, 414 (Fla. 2003). The Florida Supreme Court affirmed the denial of relief. *Id.* Cole's motion for post-conviction DNA testing was denied by this Court, and the Florida Supreme Court affirmed that ruling. *Cole v. State*, 895 So. 2d 398 (Fla. 2004). Cole unsuccessfully sought federal habeas corpus relief. *See, Cole v. Crosby*, 2006 WL 1540302 (M.D. Fla. May 30, 2006). The United States Supreme Court denied review of the habeas denial. *Cole v. McDonough*, 552 U.S. 1115 (2008).

Cole then filed his first successive post-conviction relief motion. **That motion contained essentially the same claim as the current motion.** This Court denied relief on the "Dozier school" claim contained in that motion, and the Florida Supreme Court affirmed, saying:

Loran Cole, a prisoner under sentence of death, appeals from the circuit court's summary denial of his successive motion for postconviction relief. *See Fla. R. Crim. P.* 3.851. We previously affirmed Cole's

convictions and sentence of death. *Cole v. State*, 701 So. 2d 845, 856 (Fla. 1997). We affirmed the denial of his initial motion for postconviction relief and denied his petition for writ of habeas corpus. *Cole v. State*, 841 So. 2d 409 (Fla. 2003). We also affirmed the denial of Cole's motion for postconviction DNA testing under rule 3.853, finding "no basis to determine that the trial court erred in denying Cole's 3.853 motion." *Cole v. State*, 895 So. 2d 398, 401 (Fla. 2004).

In his sole claim on appeal, Cole argues that **previously repressed memories had resurfaced about abuse he witnessed and suffered at the Dozier School for Boys**. Cole claims that this newly discovered evidence demonstrated that trial counsel was ineffective during the penalty phase of Cole's trial. Because the allegations in Cole's claim are clearly refuted by the record, we hereby affirm the postconviction court's summary denial of relief.

Cole v. State, 83 So. 3d 706 (Fla. 2012) (table). (emphasis added). This Court's prior order is attached hereto and is incorporated herein as if fully set forth.

THE SECOND SUCCESSIVE MOTION

Cole says he is entitled to relief from his sentence of death because evidence about his five-and-a-half-month stay at the Dozier School was not presented as "mitigation." The exact legal nature of this claim is unclear -- the pleading is not clear if this is an ineffective assistance of counsel claim, or if it is an "unpresented mitigation" claim. Either way, the claim must get through the newly discovered evidence gateway -- that is something Cole cannot do.

When Cole raised a claim about the Dozier School in his first successive motion for post-conviction relief, this Court found the successive post-conviction motion, which was filed 12 years after Cole's conviction became final and 11 years after his first post-conviction motion, to be time-barred, procedurally barred, refuted by the record and without merit.

(Exhibit 1). The Court said:

Timeliness

Rule 3.851(d), *Fla. R. Crim. P.*, provides that: (1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within **1 year after the judgment and sentence become final**. For the purposes of this rule, a judgment is final: (A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or (B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed. (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

(A) 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, or (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or (C) postconviction counsel, through neglect, failed to file the motion.

The defendant's instant motion falls outside of the one year window and does not contain newly discovered

evidence, therefore it is time barred. The Defendant's judgment and sentence became final when the Supreme Court denied certiorari review on March 30, 1998. The newly discovered evidence issue will be discussed below.

Newly Discovered Evidence

The Defendant's motion alleges that **his trial counsel was ineffective for failing to present evidence that the Defendant was an inmate at Dozier School for Boys.** To qualify as an exception to the one year time limit "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). On page 8 of the pre-sentence investigation ("PSI") document, under "Educational History" the following is written: The defendant advised that he received his GED in 1986 at the Arthur G. Dozier School for Boys in Marianna, Florida. The defendant's mother confirmed this information stating that he received a GED during his incarceration in the Florida Department of Corrections. PSI, p. 8. Therefore the Defendant/movant knew that he had attended the Dozier School for boys and even expressed this fact to Correctional Probation Specialist that prepared the PSI.

The Defendant's attorney at each level of this case, both trial and appellate, either knew or could have found this information with due diligence. **At the November 28, 1995 Sentencing hearing, the Defendant's trial counsel stated on the record that he discussed the PSI with the Defendant at least twice and that they did not have any corrections as to the substance of it.** Sentencing Hearing, p. 6-7. The PSI was included in the record on direct appeal. Appellate counsel could have, accessed the information in the PSI with due diligence. This claim is alleged more than a decade after the judgment and sentences became final and does not qualify for an exception to the one year limit. This motion is time barred.

Procedurally Barred

The issue raised in this motion is also procedurally barred. The Defendant has filed multiple

postconviction motions prior to the instant motion. **Because the "newly discovered evidence" alleged in this motion was actually known by the Defendant, readily accessible to trial counsel, and included in the record,** it fails to qualify as newly discovered and therefore could have been litigated in the prior proceedings. Therefore, this issue is procedurally barred. See *Brown v. State*, 41 So. 3d 116 (Fla. 2010); *Marek v. State*, 14 So. 3d 985, 999 (Fla. 2009).

Futhermore, this claim is refuted by the record. Claims in successive motions may be denied without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Rule 3.851(f)(5)(B), Fla. R. Crim. P.; *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007); *White v. State*, 964 So. 2d 1278 (Fla. 2007). Because the Defendant's attendance at the Dozier School for Boys was known by the Defendant and trial counsel and with the exercise of due diligence could have been known by collateral counsel, this claim is without merit.

The previous claim was that trial counsel was ineffective for "failing to uncover Mr. Cole's juvenile records detailing his placement at Dozier, and the abuse he both witnessed and suffered at the hands of Dozier staff" (V1, R17) (Exhibit 2) and that trial counsel's ineffectiveness violated *Strickland v. Washington*, 466 U.S. 688 (1984), but the "claim could not have been raised on Direct Appeal because it's based on developments that came to light during 2009." (V1, R17). Cole then claimed that the Dozier evidence was not raised in the first postconviction motion because it was unknown "prior to September 16, 2009," the date collateral counsel reviewed Cole's files at Dozier. (V1, R17). The previous post-conviction motion was filed

September 7, 2010. In that motion, Cole claimed that "newly discovered evidence proves Mr. Cole did not receive effective assistance of counsel . . ." (V1, R18). **Cole did not argue a claim of newly-discovered evidence** under Rule 3.851(d)(2) of the *Florida Rules of Criminal Procedure* or *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991). The only "legal argument" made was that counsel was ineffective for failing to present evidence about "Mr. Cole's ordeal at Dozier." (V1, R20, 20-25). This Court held the claim of ineffective assistance of counsel is time-barred, procedurally barred and refuted by the record. The issue was not raised in the first (or initial) post-conviction motion, even though the evidence Cole attended Dozier was available in the pre-sentence investigation which was part of the record on direct appeal. (V1, R70-71, R73-83) (Exhibit 3). The pre-sentence investigation document prepared October 23, 1995, was discussed at sentencing and is in the record on direct appeal. (V1, R165, 167-177; record on direct appeal, pages 82-83, 889-912) (Exhibit 4). Under "Educational History," the PSI relates:

The defendant advised that he received his GED in 1986 at the **Arthur G. Dozier School for Boys** in Marianna, Florida. The defendant's mother confirmed this information stating that he received a GED during his incarceration in the Florida Department of Corrections.

(V1, R175). Cole knew he was at Dozier and related this fact to the Correctional Probation Specialist. The PSI shows that Cole's

only commitment was to CYF for a juvenile offense in 1984 (V1, R171), and that by 1985 Cole was an adult. (V1, R171). Collateral counsel was appointed on April 30, 1998. Case No. SC60-87337.

The Dozier records were not requested prior to 2009. Any claim relating to Cole's attendance at Dozier should have been litigated in the prior proceedings. This issue is procedurally barred. See *Brown v. State*, 41 So. 3d 116 (Fla. 2010); *Marek v. State*, 14 So. 3d 985, 999 (Fla. 2009); *Power v. State*, 992 So. 2d 218 (Fla. 2008).

In the prior litigation, Cole attempted to fix the date of his "due diligence discovery" as September 16, 2009, when collateral counsel obtained verification Cole was at Dozier. (V1, R17) (Exhibit 3). **This point in time was argued at the Case Management Conference as the operative date which began the one-year period for newly discovered evidence.** (V3, R14, 21) (Exhibit 5). The Dozier information has been in the direct appeal record for 11 years, and could have been discovered with due diligence.

Cole's first successive post-conviction motion stated that "At some point in **early** 2009," Mr. Cole watched a documentary program on television detailing abuse at Dozier and he subsequently suffered a mental breakdown. (V1, R16). The current motion says the same thing. Under the most favorable scenario of

the time limitation accruing when Cole's repressed memories flooded forth, the first successive motion was time barred, and the second successive motion is doubly so. Although Cole claims the Dozier records were not discovered until September 2009, he cannot explain (1) why the records were not obtained during the preceding years that collateral counsel represented Cole, and (2) if Cole's alleged repressed memories were "available" in **early** 2009, why collateral counsel did not file the first successive motion until **September 2010**.

In the prior litigation, Cole fixed the one-year time limitation as beginning at the time collateral counsel finally investigated and obtained Cole's Dozier records -- information which had been available since the 1995 PSI. He is bound by that claim, and the report attached to his motion does not help him.

A defendant may not bring a claim in a successive postconviction motion that could have been raised during the initial postconviction proceeding. *See, e.g., Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003) ("We will not entertain a second appeal of claims that were raised, or should have been raised, in a prior postconviction proceeding."); *Downs v. State*, 740 So. 2d 506, 518 n. 10 (Fla. 1999) (stating that claim raised in earlier postconviction motion is barred in subsequent postconviction motion even if based on different facts); *Atkins v. State*, 663 So. 2d 624, 626 (Fla. 1995) (explaining that

issues that were or could have been presented in postconviction motion cannot be relitigated in subsequent postconviction motion). The "Dozier School claim" could have been raised in the initial post-conviction relief motion, and is barred now because it was not so raised.

Cole says that a 2011 report from the Department of Justice on its investigation into the Dozier School is "newly discovered evidence." Cole's second successive motion largely repeats the first successive motion, and that claim cannot satisfy the *Jones* standard for newly discovered evidence. At most, that report provides some minimal details that add nothing to what has been known for years. In fact, the report itself shows that it is not "newly discovered" at all. At footnote 6, the report refers to a federal district court order from 1995. Instead of helping Cole, that order, in its opening paragraph, establishes that Cole's claim is untimely:

This case has been lingering before this Court for more than a decade. **It began in 1983** when a class action was filed alleging scores of unconstitutional practices -- including severe overcrowding and vicious punitive practices such as hogtying -- in Florida's juvenile training school facilities. Twelve years later, all parties agree that conditions have improved immensely in the training schools. In fact, everyone agrees that the Arthur G. Dozier Training School ("Dozier"), the subject of the present motion, is in full and complete compliance with those standards which are prescribed by the Constitution of the United States and all relevant federal law.

Bobby M. v. Chiles, 907 F.Supp. 368, 369 (N.D. Fla. 1995). The report is not newly discovered evidence, and it does not supply a basis for Cole to litigate this untimely claim.

WHEREFORE, it is

ORDERED, ADJUDGED AND DECREED that the second successive motion for post-conviction relief is denied and dismissed for the following reasons: the motion is barred because it is untimely and successive; because it is not based on "newly discovered evidence;" because the claims contained in the motion are refuted by the record; and because the claim has been previously litigated.

It is the Court's intent that each of the reasons set out above for the denial of relief is sufficient, standing alone, to support the denial of all relief.

The defendant is advised that he has a right to appeal within 30 days of the rendition of this order.

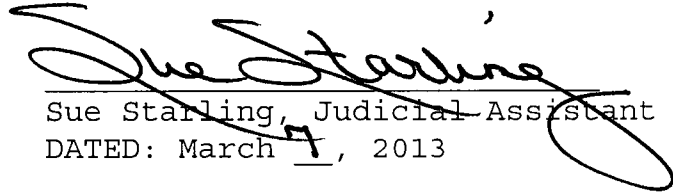
DONE AND ORDERED in chambers at Ocala, Marion County, Florida, this 7 March, 2013.


HALE R. STANCIL, CIRCUIT JUDGE

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