IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY
FLORIDA

Case No. 05-1983-CF-002375-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

v.

GARY BENNETT, JR.,

Defendant.
_____/



**ORDER DENYING DEFENDANT'S MOTIONS FOR POSTCONVICTION RELIEF**

THIS CAUSE came before the Court upon the Defendant's Motion for Postconviction Relief, brought pursuant to Florida Rule of Criminal Procedure 3.850 and filed September 15, 2010. Having reviewed the motion, the State's Response filed September 28, 2011, the Defendant's Reply filed October 31, 2011, and the files and records in the case, and being otherwise fully advised in the premises, the Court finds that the Defendant's motion is time barred and successive. The Court makes the following findings of fact and conclusions of law:

FACTUAL BACKGROUND OF THE CRIME

a. Helen Nardi died from infliction of 26 puncture wounds, four of which were deemed lethal by the medical examiner. She died 8 to 36 hours prior to her body being discovered in her residence between 5:00 – 6:00 p.m. on July 13, 1983. A pair of scissors was found protruding from her chest, and an ice pick was embedded in her back. A broken knife blade was found on the bed. A plastic knife handle and a wooden ice pick handle were found in a cup of water in the kitchen. A palm print and fingerprint on the bedroom door and molding were identified as matching the Defendant's left palm and ring finger.

PROCEDURAL HISTORY

b. On October 14, 1983, an indictment was returned charging the Defendant with one count of first-degree premeditated murder. (Exhibit "A," Indictment).

c. Trial was held January 3 - 6, 1984. Investigator John Preston[1] testified that on November 16, 1983, he conducted three dog scent discrimination lineups in the grand jury room at the Titusville courthouse. (Exhibit "B," Excerpts of Trial Transcript, p. 447-48). For the first lineup, Preston "scented" his dog[2] with a shirt worn by the Defendant, which had been kept in a sealed envelope provided to him by the State Attorney's Office. (Exhibit "B," p. 448-49, 675). He then told the dog to "search," and the dog began sniffing a row of wooden knife handles on the floor. The dog immediately selected the handle in the first position and took it in his mouth. (Exhibit "B," p. 449). Preston commanded the dog to drop the handle and sniff the remaining ones, which the dog did before returning to the first handle. (Exhibit "B," p. 450). Preston concluded that the scent the dog was searching for was on the first handle. (Exhibit "B," p. 450).

d. Preston further testified that a second scent lineup was conducted on ice pick handles. (Exhibit "B," p. 451-52). This time, after being "scented" with the Defendant's clothing again, the dog failed to alert on any of the handles in the lineup. (Exhibit "B," p. 452, 676). Preston testified that it was possible that the heavy coating of fingerprint powder had interfered with the dog's ability to smell. (Exhibit "B," p. 452-53). The ice pick handles were removed from the room, and when they were returned, "a substantial amount of the powder

[1] Preston passed away in 2008.

[2] The dog Preston used in these scent lineups was named Bar. This was not Harass II, a dog Preston had used in other instances in both this and other cases. (Exhibit "B," p. 677).

was not present." (Exhibit "B," p. 453). After again being "scented" with the control article of the Defendant's clothing, this time the dog went to the handle in the third position and laid down with it between his paws. (Exhibit "B," p. 454). Preston concluded that the scent from the Defendant's clothing (the control article) was present on the handle located in position three. (Exhibit "B," p. 454).

e. During closing argument, the prosecutor summed up the dog scent evidence by stating that the Defendant's scent was found on two of the murder weapons left at the scene. (Exhibit "B," p. 673-74). He argued to the jury, "[T]he dog alerted on the Defendant's scent. It's a fingerprint. The scent of a human being is just as much a fingerprint as that on those doors which there are two of, palm and fingerprint."[3] (Exhibit "B," p. 677).

f. On January 6, 1984, the Defendant was found guilty as charged. (Exhibit "C," Verdict Form). On that same date he was sentenced to life in prison without the possibility of parole for 25 years. (Exhibit "D," Judgment and Sentence).

g. The Defendant appealed his conviction and sentence to the Fifth District Court of Appeal in Case No. 84-105. The Defendant raised five issues in the direct appeal, including the allegation that the trial court had erred in admitting testimony regarding the dog scent discrimination lineup conducted 126 days after the murder. (Exhibit "E," Appellate Briefs).

h. On March 18, 1985, the Fifth District affirmed the Defendant's conviction and sentence without opinion. The mandate issued on April 4, 1985. (Exhibit "F," Decision and Mandate). The decision may be found at Bennett v. State, 466 So. 2d 231 (Fla. 5th DCA

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[3] The prosecutor was referring to the fact that the Defendant's fingerprint and palm print

1985)(table).

i. On May 3, 1985, the Defendant filed a *pro se* motion for postconviction relief. (Exhibit "G," Motion, with attachments). Therein the Defendant raised two issues, including the allegation that his conviction had been obtained through the use of unreliable and highly prejudicial evidence involving dog scent discrimination. To support this claim, the Defendant alleged that Investigator John Preston and his dog Harass II had been found by various other state and federal authorities to be highly unreliable and suspect. The Defendant attached to his motion an investigative memorandum from a law enforcement agency in Washington, DC. The memorandum stated that Preston and his dog had been under investigation in New York for allegations that included the "possibility that Preston has lied about his qualifications, may be cuing his dog to supply the wanted result, and that he has made claims about the dog's abilities that are impossible." The memorandum further contained information that had been uncovered during the New York investigation, which the Defendant claimed supported the Washington DC investigator's suspicions.

j. The State's Answer to the Defendant's postconviction motion alleged that the facts contained in the Defendant's motion were known by the Defendant prior to trial, and that the documents attached to his motion would have been available to the Defendant by the exercise of due diligence. The State additionally argued that defense counsel had made a concerted attack on Preston's credibility and the abilities of his dog during the Defendant's trial. Moreover, the State argued, the issue raised in the postconviction motion had been raised on direct appeal, and therefore was procedurally barred. (Exhibit "H," State's Answer).

k. On October 1, 1985, the Court rendered an Order denying the Defendant's

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were found on a door frame in the victim's bedroom .

postconviction motion, finding that the grounds raised were procedurally barred because they had been raised both at trial and on direct appeal. (Exhibit "I," Order, without attachments).

l. On December 29, 1986, a second motion for postconviction relief was filed, this time by counsel. (Exhibit "J," Motion). The motion alleged 14 grounds for relief, including the following:

-Ineffective assistance of counsel in failing to file a motion to attack the failure of the police to memorialize the scent discrimination lineup on video;

-Ineffective assistance of counsel in failing to use expert witnesses to question the reliability of Investigator Preston and his dog;

-Ineffective assistance of counsel in failing to present witnesses to impeach/rebut the State's evidence, and failing to seek suppression of the dog scent discrimination lineup.

m. The State's Answer to this second postconviction motion argued that the motion was successive. (Exhibit "K," State's Answer).

n. On May 21, 1988, the Court rendered an Order on the second postconviction motion. (Exhibit "L," Order, without attachments). Therein the Court found as follows:

-Defense counsel was not ineffective in failing to file a pretrial motion to suppress the dog scent lineup. Though the objection made during trial was unsuccessful, waiting until trial had not prejudiced the Defendant:

> It may have been better practice to file a pretrial motion to suppress or a motion in limine with regard to the dog scent line-up; however, it was not error to bring such a motion at trial. Defense counsel had experience in dog scent line-ups with this same dog handler on at least two prior occasions. He reasonably believed the testimony would be allowed because of his past experience in criminal cases in Brevard County with the same dog handler.

-Defense counsel was not ineffective in failing to call witnesses to challenge Preston's reliability:

> Defense counsel sufficiently attacked the dog handler's testimony by showing that many experts in the field disagreed about how long a scent lasts. Also, on cross-examination defense counsel elicited testimony from the dog handler and other witnesses about the procedure used in this case that challenged the credibility of this evidence. It is true that similar dog scent line-ups involving this same dog handler were later successfully challenged. However, defense counsel did not have a crystal ball allowing him to predict this decision in Ramos v. State, 496 So. 2d 121 (Fla. 1986).[4]

o. The Defendant appealed the denial of his second postconviction motion to the Fifth District Court of Appeal in Case No. 88-1186. On appeal, the Defendant argued, *inter alia*, that the trial court had erred in denying the second postconviction motion, because counsel had been ineffective in failing to investigate and seek suppression of the dog scent discrimination evidence. (Exhibit "M," Appellate Briefs). On May 9, 1989, the Fifth District affirmed the denial of the second postconviction motion without opinion. The mandate issued on May 26, 1989. (Exhibit "N," Decision and Mandate). The decision may be found at Bennett v. State, 544 So. 2d 212 (Fla. 5th DCA 1989)(table).

p. On October 23, 2009, the Defendant filed a motion for DNA testing of oral, vaginal, and anal swabs taken from the victim, as well as swabs of blood from the refrigerator door. (Exhibit "O," Motion). The State agreed to the testing. (Exhibit "P," Order).

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[4] Ramos held: (1) that the testimony of a dog handler and police officer was insufficient, by itself, to establish the reliability of dog scent discrimination lineups as a method of proof; and (2) the dog scent discrimination lineups in Ramos were not conducted in a fair manner where, aside from fact that the defendant had recently been interrogated for approximately seven hours in the same room where the lineups were conducted, the shirt identified in the first lineup was the only shirt in the lineup with blood on it, and the knife identified in the second lineup was also the only knife in the lineup with blood on it.

Although no documentation is found in the Court file regarding the outcome of the testing, the Defendant alleges in his current motion that some of the evidence was destroyed in 1995. As to the oral and vaginal swabs, the motion alleges that no DNA evidence could be found. (Defendant's Motion, p. 5).

DEFENDANT'S CURRENT POSTCONVICTION MOTION

q. The Defendant has now filed a third postconviction motion. The motion once again attacks the dog scent discrimination evidence presented at trial, but this time the allegation is framed in the context of newly discovered evidence. The Defendant alleges two items of newly discovered evidence:

1. In January of 2010, postconviction counsel discovered a note in the State Attorney's file which indicated that the State would not use at trial a September 9, 1983 dog scent discrimination lineup (which had involved the scissors taken from the victim's body), because: "1. The control item may not have been legally seized; 2. A substantial predicate would have to be developed to avoid dual contamination; 3. The lineup is not attractive cosmetically, because the questioned scissors stand out and the alert by HII was passive."[5] (Defendant's motion, p. 10; and Exhibit B attached to Defendant's motion). The Defendant further alleges that the State unlawfully suppressed this information prior to trial; and

2. The outcome of the postconviction motion in the case of State v. Dillon, 05-1981-CF-001746-AXXX-XX, in which Dillon was granted a new trial on November 14, 2008.

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[5] This scent discrimination lineup, which was not admitted as evidence at the Defendant's trial, was conducted by Preston and his dog Harass II. The scent discrimination lineups which *were* admitted at trial were conducted by another of Preston's dogs named Bar.

## LEGAL ANALYSIS

r. Florida Rule of Criminal Procedure 3.850 requires that a postconviction motion must be filed within two years after a judgment and sentence become final. This occurs when the mandate issues at the conclusion of the direct appeal. Wattles v. State, 771 So. 2d 1209 (Fla. 5th DCA 2000). The Defendant's conviction and sentence became final on March 18, 1985. (Exhibit "F," Decision and Mandate). The Defendant had two years from that date to file a postconviction motion attacking his conviction and sentence.

s. The Defendant's latest motion is filed long after the two-year deadline. Florida Rule of Criminal Procedure 3.850(b) provides for three exceptions to the two-year time limit for the filing of postconviction motions:

> (1) 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
> (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, or
> (3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion.

t. The Defendant alleges that the claims in his latest postconviction motion fall within the first category of exceptions to the two-year time limit. 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 diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See* Jones v. State, 709 So. 2d 512, 521 (Fla. 1998), cert. denied, 523 U.S. 1040, 118 S. Ct. 1350, 140 L. Ed. 2d 499 (1998)

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(Exhibit "B," p. 677).

(Jones II). Newly discovered evidence satisfies the second prong of the Jones II test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Jones II, 709 So. 2d at 526 (*quoting* Jones v. State, 678 So. 2d 309, 315 (Fla. 1996)). In determining whether the evidence compels a new trial, a trial 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." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991) (Jones I).

u. In addition to the timeliness issue, the Court also notes that the Defendant has previously filed two motions for postconviction relief, which were denied by the Court and affirmed on appeal. (Exhibits "G" through "N"). A defendant is not entitled to raise piecemeal claims in successive postconviction motions. Jones I. There are two conditions or exceptions in the rule that permit a second or successive Rule 3.850 motion: (1) if new grounds are asserted, and (2) if the judge finds that there was a justifiable reason for the failure of the movant or his attorney to assert those grounds in a prior motion. Aikens v. State, 488 So. 2d 543, 544 (Fla. 1st DCA 1986), rev. denied, 496 So. 2d 143 (Fla. 1986). To overcome this procedural bar of successiveness, the Defendant must show that the newly discovered facts could not have been discovered with due diligence by collateral counsel and raised in his previous postconviction motions. *See* Owen v. Crosby, 854 So. 2d 182, 187 (Fla. 2003).

The Pretrial Note in the State Attorney's File:

v. As to the first item claimed to be "newly discovered evidence," the pretrial note in the State Attorney's file indicating the reasons the State would not use the September 9,

1983 scent discrimination lineup involving the scissors at trial, the Court finds that this evidence could have been discovered by trial counsel and/or previous postconviction counsel by the exercise of due diligence. As such, it does not qualify as newly discovered evidence, and the Court finds that this claim is time barred. *See* MacFarland v. State, 929 So. 2d 549 (Fla. 5th DCA 2006)(Under the exception to the two-year window within which a postconviction motion is required to be filed for motions based on newly-discovered evidence, a claim of newly discovered evidence must be made within two years from the date upon which the evidence could have been discovered through the use of due diligence).

The Outcome of the Dillon Postconviction Proceeding:

w. The second item that the Defendant claims constitutes "newly discovered evidence" is the Order rendered November 14, 2008 in State v. Dillon, Case No. 05-1981-CF-001746-AXXX-XX, which vacated the conviction and sentence in that case and granted a new trial. The Defendant alleges that relief was granted in Dillon because it was proven in postconviction proceedings that Preston had given false testimony at Dillon's trial regarding dog scent discrimination evidence. The Order granting a new trial in Dillon occurred less than two years before the Defendant filed his latest postconviction motion in this case on September 15, 2010. The Defendant therefore argues that this claim is timely.

x. The Defendant's motion also makes reference to the outcome of the postconviction proceeding in the case of State v. Dedge, Case No. 05-1982-CF-000135-AXXX-XX, in which Dedge's conviction and sentence were also vacated and he too was granted a new trial. The Defendant claims that in Dedge, the postconviction proceeding did

not establish conclusively that Preston had lied during trial in that case; instead, it was proved only that Preston's testimony in Dedge's 1982 trial and 1984 retrial regarding his dog's scent discrimination lineup was "either wrong or false." The Defendant argues that it was not until the outcome of the Dillon postconviction proceeding in 2008 that it was proven for the first time to a scientific certainty that Preston had lied during trial in that case. The Defendant argues that if the jury in the Defendant's case had known that it was proven to a scientific certainty that Preston had lied in the Dillon case, it would have created a reasonable doubt about the Defendant's guilt. (Defendant's motion, p. 7, 13, 49).

y. The Defendant attempts to distinguish the outcome of the Dillon postconviction proceeding from the outcome of the Dedge postconviction proceeding because Dedge's conviction was vacated more than two years prior to the filing of the Defendant's latest postconviction motion. Therefore the Defendant would be time barred from alleging newly discovered evidence based on the outcome of the Dedge case. But Dillon's conviction was vacated less than two years prior to the filing of the Defendant's latest motion. Therefore the Defendant's latest claim is timely only if the Defendant is correct that the Dedge postconviction proceeding proved only that Preston's testimony in Dedge's trial was "either wrong or false," and that it was not until the outcome of the Dillon postconviction proceeding in 2008 that it was proven for the first time to a scientific certainty that Preston had lied. To determine whether this allegation is correct, an analysis of the postconviction proceedings in both Dedge and Dillon is required.[6]

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[6] The propriety of the Court taking judicial notice of the substantive and procedural facts in Dillon and Dedge is addressed in footnote 7, *infra*. A court may take judicial notice of the records of any court of this state. Section 90.202(6), Fla. Stat. (2010).

The Dedge Case:

z. Victim Patricia Graham was viciously sexually assaulted and attacked with a razor blade in the bedroom of her home on December 8, 1981. In Dedge's first trial, he was convicted of two counts of burglary, two counts of sexual battery, and one count of aggravated battery, and was sentenced to 30 years incarceration. (Exhibit "Q," Judgment and Sentence).

aa. The evidence presented by the State in this first trial is summarized in Dedge v. State, 442 So. 2d 429 (Fla. 5th DCA 1983). The State offered three means of identifying Dedge as the perpetrator: the victim's eyewitness testimony, a hair analysis, and a dog scent discrimination lineup conducted by Investigator Preston. However there were problems with the first two means of identification. The height and weight description of the perpetrator given by the victim differed significantly from Dedge's measurements. And when the hair samples on the victim's bed were compared to known samples from Dedge, similarities were found, but there was no conclusive match.

bb. Therefore the primary source of identification evidence in Dedge's first trial came through Investigator Preston and his dog, Harass II. A scent discrimination lineup was prepared using the victim's sheets and four control sheets. Harass II was scented with towels that had been used by Dedge. After sniffing the lineup of sheets, Harass II made an indication on the victim's sheets. The dog was then taken to the victim's home, where he made indications in areas of the home where Preston claimed the dog detected Dedge's scent.

cc. In reversing Dedge's first conviction, the Fifth District noted that "[t]he ability of

a dog to identify human scents on objects at the crime scene more than three months after a crime is committed was a key point in this case." The appellate court found that the trial court had erred in excluding a defense expert on human scent discrimination without first hearing the proffered testimony, and further erred in allowing hearsay testimony concerning the reliability of Harass II. The case was remanded for a new trial. Id.

dd. Dedge's second trial was held August 20 – 31, 1984. This time he was acquitted of one of the burglary counts, but was again convicted as charged on the remaining counts. He received two concurrent life sentences with 25-year minimum mandatory terms, consecutive to 15-year sentences on the remaining two counts. (Exhibit "R," Judgment and Sentence). During this second trial the State presented essentially the same evidence, but also presented the testimony of a prison informant who testified that Dedge had made admissions to him about having committed the crime. The defense called experts in the area of dog handling/training to attack the credibility of Preston and Harass II. (Exhibit "S," Appellate Briefs).

ee. Dedge again appealed his convictions and sentences to the Fifth District Court of Appeal in Case No. 85-58. He alleged, *inter alia*, that the trial court had abused its discretion in failing to strike the dog scent discrimination evidence presented through Investigator Preston. (Exhibit "S"). On December 26, 1985, the Fifth District affirmed Dedge's conviction, but reversed the 25-year minimum mandatory portions of his life sentence. (Exhibit "T," Opinion). The opinion may be found at Dedge v. State, 479 So. 2d 882 (Fla. 5th DCA 1985).

ff. Dedge then sought and was granted DNA testing on the two pubic hairs taken

from the victim's bed immediately after the crime, as well as a rectal swab containing a weak semen sample. The semen sample yielded no results based on the technology available at that time. (Exhibit "U," Transcript of Hearing, p. 23-24). But the testing of the two pubic hairs showed that Dedge was excluded as a possible source. After the results of the testing were received, Dedge filed a motion pursuant to Florida Rule of Criminal Procedure 3.853 seeking vacation of his conviction and sentence. (Exhibit "V," Motion and Memorandum of Law). A hearing was held on the motion on June 10, 2003. (Exhibit "U"). During the hearing, defense counsel stated that the victim had been informed of the DNA results. The victim had replied that there were only three possible sources of the pubic hairs found on her bed: herself, her sister, or the perpetrator. (Exhibit "U," p. 9). Defense counsel's factual representation was supported by an affidavit of a private investigator who had interviewed the victim, and which was attached to Dedge's motion. At the hearing defense counsel argued that even if the Court should find that the DNA evidence from the pubic hair did not completely exonerate Dedge, at the very least the new evidence created a reasonable probability that the outcome of a retrial would be different. (Exhibit "U," p. 9, 12). Defense counsel also argued, "The evidence of Mr. Preston, the frankly fraudfeasor, will never be introduced in any court again." (Exhibit "U," p. 17). In response, the State maintained that Dedge's actual innocence had not been demonstrated by the DNA results, and that the most Dedge might be entitled to would be a new trial. (Exhibit "U," p. 21-22).

gg. On June 23, 2003, the Court rendered an Order granting the Defendant's Rule 3.853 motion. (Exhibit "W," Order, without attachments). The Order made the following factual findings:

> 1. Mitochondrial DNA testing was performed on or about 2001 on two pubic hairs found in the victim's bed immediately after she was raped. The evidence was tested by Reliagene Technologies, Inc., and the pubic hair evidence was entirely consumed by that process;
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> 2. The results of the DNA testing on the pubic hair would likely be admissible at trial and there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing, though the Defendant would have the burden of properly predicating its admission;
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> 3. There is a reasonable probability that the Defendant would have been acquitted had the evidence been admitted at trial. Identity was the key issue at trial and the mistaken identity of the Defendant as the attacker was the defense's sole theory of the case. ... At trial, the defense challenged Ms. Rennie's identification of the defendant as the attacker, pointing to discrepancies given by her as to the rapist's weight, height, and build. ... In addition to Ms. Rennie's identification of the Defendant as the attacker, the State also heavily relied on the fact that the Defendant 'could not be eliminated' as a possible source of a pubic hair recovered from [the] victim's bed where the rape occurred. For example, in closing argument, the prosecutor suggested that the pubic hair corroborated Ms. Rennie's testimony, and also stated that David Jernigan, who microscopically visually compared the pubic hair found at the crime scene to the Defendant's known hair 'cannot eliminate the Defendant as the contributor of that hair, but also that hair is alike in almost every respect.' ... The prosecutor further stated that the hair and dog scent evidence 'say that is the man [the Defendant] who did it.' ... Later, in closing, the prosecutor commented that Jernigan had testified that 'I have examined these, and I have compared the suspect pubic hair from the bed sheet where Patricia was raped, and I have compared it to the samples ... from Wilton Allen Dedge, and they are microscopically identical.' ...

(Exhibit "W," p. 6-7). The Court's Order made no finding as to whether the DNA evidence from the pubic hair qualified as newly discovered evidence which would entitled Dedge to a new trial. Instead, the Order merely found that the DNA results were properly obtained and accepted, and granted Dedge the right to file a postconviction motion based on newly discovered evidence.

hh. In its Order granting Dedge's 3.853 motion, the Court relied heavily on the dissenting opinion of Judge Sharp in Dedge v. State, 723 So. 2d 322, 323 (Fla. 5th DCA

1998):

> The evidence of Dedge's guilt, other than the victim's testimony, was minimal. A pubic hair recovered from the crime scene established only that Dedge 'could not be eliminated' as a possible source. An inmate who had his sentenced reduced from 180 years to 60 years testified Dedge confessed to him he had committed the crimes. The prosecutor also relied on a scent hound to establish Dedge had been at the victim's home. There was doubt as to the accuracy of the dogs, and there was testimony that they were incorrect 40% of the time.

(Exhibit "W," p. 8). The State appealed the Order giving Dedge the right to file a motion for postconviction relief based on newly discovered evidence, but the Fifth District Court of Appeal affirmed the trial court's Order in Case No. 5D03-2238. *See* Dedge v. State, 873 So. 2d 338 (Fla. 5th DCA 2004)(table).

ii. Thereafter on June 30, 2003, Dedge filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 seeking a new trial, alleging that the DNA evidence from the pubic hair constituted newly discovered evidence. A hearing was held on the motion on July 21, 2004. During the hearing, Dr. Sudhir Sinha, president and laboratory director of ReliaGene Technologies, unexpectedly testified that DNA testing on the semen sample from the anal swab would now be possible using new technology. The Court ordered immediate and expedited DNA testing of the anal swab, and the postconviction proceedings were stayed pending the results. When the results determined that the DNA from the semen sample did not match Dedge, the State conceded that the evidence completely exonerated Dedge, and that he was entitled to immediate release. Dedge was released from incarceration on August 12, 2004.[7]

[7] Section 90.204, Florida Statutes (2011) provides in pertinent part, "When a court determines upon its own motion that judicial notice of a matter should be taken . . .the

The Dillon Case:

jj. Victim James Dvorak was killed near Canova Beach shortly after midnight in the very early morning hours of August 17, 1981. Dillon was convicted of first-degree felony murder and sentenced to life in prison on March 12, 1982. During trial, John Parker testified that in the early morning hours of that date near the scene of the crime, he met a man whom he later identified as Dillon. Dillon was not wearing a shirt, but was holding a bloody yellow "Surf-It" t-shirt in his hand. He had blood smears on his upper leg and shorts, and he appeared sweaty. Parker and Dillon engaged in a sex act in Parker's vehicle, and then Parker dropped Dillon off at a bar. The following morning Parker noticed that Dillon had left his bloody t-shirt in Parker's truck, and he threw it into a trash bin.

kk. Upon learning of Dvorak's murder, Parker contacted the Sheriff's

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court shall afford each party reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed." On April 11, 2011, the Court rendered an Order notifying the parties of its intent to take judicial notice of the substantive and procedural facts of both the Dillon and Dedge cases. In response, defense counsel filed a memorandum of law objecting to the Court taking judicial notice of anything in the Dillon and Dedge cases without an evidentiary hearing. To support its claim that an evidentiary hearing is required before the Court may take judicial notice, the defense relies on Bergeron Land Development, Inc. v. Knight, 207 So. 2d 240 (Fla. 4th DCA 1975), which held that, "[i]n order to prove some matter contained in the record of a case other than the one being litigated, a party must offer the other court file or certified copies of portions thereof into evidence in the case then being litigated."

The Court notes that Bergeron is a pre-evidence code case. The Florida Evidence Code was adopted unanimously by the legislature in the 1976 regular session. The effective date of the code was delayed, however, until July 1, 1979. In re Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979), decision clarified, 376 So. 2d 1161 (Fla. 1979). The evidence code clearly now authorizes the Court to take judicial notice of facts under certain circumstances. The Court therefore takes judicial notice of the facts in this paragraph, as they are not subject to dispute because they are generally known within the territorial jurisdiction of the Court, and because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. Section 90.202 (11) and (12), Fla. Stat. (2010).

Department and led them to the trash bin where he had disposed of the t-shirt. The t-shirt was examined, but tests were unable to provide any forensic evidence linking the shirt to Dillon. (Exhibit "X," Excerpts of Trial Transcript of Dillon case, p. 65-66, 161-192).

ll. At Dillon's trial, Investigator Preston testified that his dog Harass II was "scented" with the yellow "Surf-It" t-shirt, and then a scent discrimination lineup was conducted using a piece of paper that had been crumpled by Dillon, along with five other visually identical pieces of paper. The dog alerted on the piece of paper crumpled by Dillon. The dog was then taken to the courthouse parking lot and again scented with the t-shirt in evidence. The dog trailed the scent to the car Dillon had arrived in, then to the courthouse door through which Dillon had entered, all the way to the room in which Dillon was being questioned. The dog put his head on Dillon's hands, pushed his hands away from his body, and looked him in the eyes. (Exhibit "X," p. 762-773).

mm. Dillon's conviction and sentence were affirmed on appeal. Dillon v. State, 433 So. 2d 533 (Fla. 5th DCA 1983)(table). His first attempt at postconviction relief was unsuccessful, and the denial was affirmed on appeal.[8] Dillon v. State, 695 So. 2d 707 (Fla. 5th DCA 1997)(table). Then on April 26, 2007, Dillon filed a motion for postconviction DNA testing of several items of evidence, including the yellow "Surf It" t-shirt. (Exhibit "Y," Motion). The motion alleged that the shirt "clearly" had been worn by Dvorak's killer, because it was "soaked in the victim's blood." (Exhibit "Y," p. 13). The State's Response posited that the results of any DNA testing on the t-shirt would be incapable of being determinative of Dillon's innocence. (Exhibit "Z," State's Answer).

[8] This *pro se* motion made no allegations pertaining to the dog scent discrimination

nn. The Court granted the request for DNA testing. (Exhibit "AA," Order). Several areas of the t-shirt were tested. The results showed that in area 7B, a partial DNA profile originated from an unknown male, and Dillon was excluded as a contributor. The profile obtained from area 8B came from the same unknown male contributor as area 7B. (Exhibit "BB," Report of Orchid Cellmark). A supplemental report of Orchid Cellmark clarified that the partial DNA profile from areas 7B and 8B were consistent with the profile of victim Dvorak. The supplemental report also indicated that a testing of the right armpit of the t-shirt showed that the DNA profile obtained was a mixture of at least two persons, and at least one of them was a male. Both Dvorak and Dillon were excluded as contributors from this mixed profile. (Exhibit "CC," Supplemental Report).

oo. Based on the results of the DNA testing of the t-shirt, Dillon filed a motion for postconviction relief seeking to vacate his conviction and sentence. (Exhibit "DD," Postconviction Motion). Therein Dillon alleged that, because the victim's blood on the shirt proved that it had been worn by the killer during the crime, the fact that the sweat from the armpit could not have come from Dillon proved that he was not the perpetrator. The motion further alleged that, since Dillon's trial, Preston had been exposed as a "charlatan." The motion pointed out that Preston had testified in the trials of both Juan Ramos and Wilton Dedge, who had both had their convictions reversed.

pp. The State filed an Answer to Dillon's postconviction motion on September 16, 2008. (Exhibit "EE," State's Answer). The State argued that the results of the DNA testing on the t-shirt would not probably produce an acquittal upon retrial, because the results did not exclude the possibility that Dillon had worn the t-shirt, and therefore did not

evidence.

exclude him as the perpetrator. But less than two months later, the State filed a motion asking the Court to grant the Defendant's postconviction motion. (Exhibit "FF," State's Motion). Therein the State admitted that, "although the DNA testing conducted by the defendant does not establish the actual innocence of the defendant, the current case law would allow the court to grant a new trial even when actual innocence has not been established by DNA testing."

qq. Upon the filing of the State's motion, the Court granted Dillon's motion for postconviction relief, vacated his conviction and sentence, and granted him a new trial. (Exhibit "GG," Order). The State subsequently filed its witness list for the retrial, which noted that nine previous trial witnesses had become deceased since Dillon's trial, including eyewitness John Parker. (Exhibit "HH," State's Witness List). Ultimately the State elected not to pursue a retrial of Dillon and filed a *nolle prosequi* of the charge pending against him. (Exhibit "II," Nolle Prosequi). Even so, the State has continued to pursue further DNA testing of the evidence in the Dillon case. (Exhibit "JJ," Orders for transportation of evidence for DNA testing).

Analysis of Dillon and Dedge in the Context of a Newly Discovered Evidence Claim:

rr. The Defendant attempts to distinguish the outcome of the Dillon postconviction proceeding from the outcome of the Dedge postconviction proceeding because Dedge's conviction was vacated more than two years prior to the filing of the Defendant's latest postconviction motion, while Dillon's conviction was vacated within the two-year time limit for filing a postconviction motion on the basis of newly discovered evidence. To establish this distinction, the Defendant argues that the Dedge postconviction proceeding proved only that

Preston's testimony in Dedge's trial was "either wrong or false," and that it was not until the outcome of the Dillon postconviction proceeding in 2008 that it was proven for the first time to a scientific certainty that Preston had lied.

ss. The Court finds this argument unavailing. In Dedge, it was conclusively demonstrated by the DNA testing of the semen sample taken from the victim's rectum that Dedge was actually innocent. In contrast, actual innocence was not proven in Dillon. Instead, the Court's Order granting the postconviction motion in Dillon was narrowly tailored to meet the standard required by Strickland v. Washington, 466 U.S. 668 (1984): there was a reasonable probability that the outcome of Dillon's trial would have been different if the jury had had the benefit of the DNA evidence on the armpit of the t-shirt. The fact that actual innocence was not conclusively proven in Dillon was demonstrated by the State's attempt to pursue retrial after Dillon's conviction was vacated due to the DNA results. But most significant to the resolution of the issue pending before the Court in the motion in the case at bar, in neither Dillon *nor* Dedge did the postconviction Court make a factual finding that Investigator John Preston had committed perjury during either trial.

## CONCLUSION

tt. In neither Dillon nor Dedge did the newly-discovered DNA evidence established to a scientific certainty that Investigator John Preston had lied at either of the trials in those cases. Even after the discovery of the DNA evidence in both cases, the possibility remained that Preston and/or his dog had simply been mistaken. The Defendant has failed to distinguish the outcome of the postconviction proceedings in Dillon from the

outcome of the postconviction proceedings in Dedge insofar as the testimony of Investigator Preston is concerned. Therefore the Court finds that the outcome of the postconviction proceeding in Dillon does not qualify as newly discovered evidence.

uu. The Defendant's latest motion once more brings before this Court the same argument he has repeatedly made in various pleadings in this Court as well as in the appellate court: that the dog scent discrimination evidence presented at his trial through Investigator Preston and his dog Bar rendered the verdict in his case unreliable. The Court finds that this argument in the Defendant's latest postconviction motion is both time-barred and successive.

Accordingly, it is

**ORDERED AND ADJUDGED** that

1. The Defendant's third Motion for Postconviction Relief is **DENIED**.

2. The Defendant has the right to appeal this Order within thirty (30) days of the date of its rendition.

**ORDERED** at the Moore Justice Center, Viera, Brevard County, Florida, this 14th day of November, 2011.

**DAVID DUGAN**
**CIRCUIT JUDGE**

CERTIFICATE OF SERVICE
STATE OF FLORIDA, COUNTY OF BREVARD

I, Mitch Needelman, Clerk of the Circuit Court, do hereby certify that a copy of the foregoing, **with attachments**, was furnished by mail to **Paul Casteleiro,** 200 Washington Street, 5th Floor, Hoboken, NJ 07030; and **Innocence Project of Florida, Inc., Seth Miller**, 1100 East Park Avenue, Tallahassee, FL 3230; and **Jeffrey L. Ashton**, Assistant State Attorney, Post Office Box 1673, 415 N. Orange Avenue, Orlando, FL 32802-1673, this 15th day of November, 2011.

**MITCH NEEDELMAN**
**CLERK OF COURT**

By _____
Deputy Clerk

CLERK OF CIRCUIT & COUNTY COURTS
BREVARD COUNTY, FLORIDA

Exhibits sent to Attorneys