

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

MICHAEL SKINNER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Case No. 2D20-1111

Opinion filed May 7, 2021.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court for
Polk County; Jalal A. Harb, Judge.

Rachael E. Reese of O'Brien Hatfield
Reese, P.A., Tampa, for Appellant.

PER CURIAM.

Affirmed.

BLACK, SLEET, and ATKINSON, JJ., Concur.

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

SECOND DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL, AND
AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS
BE HAD IN SAID CAUSE, IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF
THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS ORDER,
AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE ROBERT MORRIS CHIEF JUDGE OF THE
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT, AND
THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

DATE: July 09, 2021

SECOND DCA CASE NO. 20-1111

COUNTY OF ORIGIN: Polk

LOWER TRIBUNAL CASE NO. CF02-00015

CASE STYLE: MICHAEL SKINNER

v. STATE OF FLORIDA



Mary Elizabeth Kuenzel

Mary Elizabeth Kuenzel
Clerk

cc: (without attached opinion)
ATTORNEY GENERAL, TAMPA
MICHAEL SKINNER

RACHAEL E. REESE, ESQ.

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**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327**

June 18, 2021

**CASE NO.: 2D20-1111
L.T. No.: CF02-00015**

MICHAEL SKINNER

v.

STATE OF FLORIDA

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing and request for written opinion is denied.
Appellant's motion for rehearing en banc is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

ATTORNEY GENERAL, TAMPA
MICHAEL SKINNER

RACHAEL E. REESE, ESQ.
STACY BUTTERFIELD, CLERK

ag

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk



VIRGIL

**IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

v.

**MICHAEL SKINNER,
Defendant.**

**CASE NO.: 2002CF-000015-XX
SECTION: F9**

**ORDER SUMMARILY DENYING DEFENDANT'S SUCCESSIVE MOTION FOR POST
CONVICTION RELIEF**

THIS MATTER came before the Court upon Defendant's "Successive Motion for Post Conviction Relief", (the "Motion"), filed on January 13, 2020, pursuant to Fla. R. Crim. P. 3.850. Upon review of the Motion, the court file and applicable law, the Court finds as follows:

Procedural History:

Defendant was sentenced on March 3, 2003, to life in State Prison. Defendant's direct appeal was *per curiam* affirmed pursuant to the Mandate issued on October 19, 2004. Defendant's first Motion for Postconviction Relief was filed on August 17, 2006, and denied on April 16, 2012, following an evidentiary hearing. The Defendant appealed, and the Second District Court of Appeal *per curiam* affirmed pursuant to the Mandate issued on October 1, 2013. Defendant filed his first successive Motion for Postconviction Relief on March 17, 2014. This was denied on November 13, 2014, the appeal of which was *per curiam* affirmed pursuant to the Mandate issued on August 26, 2016. Defendant's second successive Motion for Postconviction Relief was filed on June 29, 2016. This was denied on November 21, 2016, the appeal of which was *per curiam* affirmed pursuant to the Mandate issued on March 5, 2018. The current Motion is Defendant's

C: SAG/ATTY/DEPT

third successive motion for postconviction relief, and raises one claim of newly discovered evidence in the form of a recent investigation of one of the jurors.

Legal Standards:

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 party or counsel at the time of trial, and the defendant or defense counsel seemingly could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such a type that it would probably produce an acquittal on retrial. See *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

A defendant is entitled to an evidentiary hearing on any claims if specific facts have been alleged which are not conclusively refuted by the record. See Fla. R. Crim. P. 3.850(f)(4). At this stage in the postconviction proceeding, this Court must therefore "accept the defendant's factual allegations to the extent they are not refuted by the record." *Nordelo v. State*, 93 So. 3d 178, 186 (Fla. 2012) (quoting *Pesde v. State*, 748 So. 2d 253, 257 (Fla. 1999)) (emphasis removed). However, postconviction relief cannot be based merely on speculation or possibility. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000).

Analysis and Conclusions of Law:

Defendant's claim relates to Ms. Kay Mahar, a juror seated in Defendant's trial. The Motion states that during *voir dire*, other prospective jurors were asked questions by the prosecutor in reference to a questionnaire prospective jurors filled out beforehand, on whether they or a family member had been a witness or a victim to a criminal act. The Motion alleges that although Ms. Mahar was not specifically asked this question, Ms. Mahar's silence along with "[t]he fact that

neither ASA Castillo nor defense attorney Todd Dodds ever asked Juror Mahar about that portion of her questionnaire during the Voir Dire implies that she left it blank." Defendant's Motion at 9. Later in the proceeding, trial counsel asked if any of the prospective jurors had been in any type of fight. Ms. Mahar raised her hand and volunteered, "I wasn't in a fight. It was a previous husband who committed domestic violence, and I didn't fight back."

The Motion also alleges Defendant has recently sought the assistance of Mary Rose Peterson with Jury Investigations, and has recently learned new information regarding Ms. Mahar. This information alleged in the Motion includes:

1. Ms. Mahar married James Mahar, Jr., on April 2, 1988.
2. James Mahar, Jr., is the natural brother of Brenda Mahar.
3. Brenda Mahar lived with Kay Mahar prior to jury selection.
4. Brenda Mahar has been in a relationship with Kevin Lee Spaulding since the 1980's.
5. On December 30, 1991, Brenda Mahar sought an injunction/restraining order against Mr. Spaulding.
6. In 1993, Mr. Spaulding was arrested, charged, and convicted of Armed Burglary of a Dwelling, one count of Aggravated Battery (reduced from Attempted Murder), one count of Armed False Imprisonment, and one count of Grand Theft (reduced from Robbery with a weapon).
7. Mr. Spaulding was in prison at the time of jury selection for the above referenced crimes, having been sentenced to eight years in State Prison.
8. On March 3, 1997, Brenda Mahar married Kevin Spaulding.

The Motion alleges this is newly discovered evidence that shows Ms. Mahar should have previously disclosed that she was a victim of a criminal act and that her sister-in-law had been abused.

The Court finds the Defendant's claim fails to meet either prong of *Jones*. First, the claim does not appear to be timely. The Motion sets forth that at the time of Defendant's trial, "... legal

records were not available at the snap of a finger or the striking of a key on a keyboard” and that “[o]ver the last two decades, technology has advanced tremendously.” Although these are likely true statements of which this Court does not take issue, advancing technology does not allow a defendant to continuously raise claims decades after a conviction has become final merely because technology has lessened the burden of such efforts, under the guise of “newly discovered evidence.” Defendant also alleges “[i]f there is no chance that he could have learned this information at the time of his trial, even with the most due diligence available.” However, any claim of newly discovered evidence must be made “. . . within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence.” Fla. R. Crim. P. 3.850(b)(1). See also, *Blake v. State*, 152 So. 3d 66 (Fla. 2d DCA 2014). Defendant does not provide the date upon which he first could have learned this information, and provides no insight as to what occurred at most, two years before the date the Motion was filed (January 13, 2018), that advanced technology so rapidly to allow these previously undiscoverable claims to now come to light. The mere fact that Defendant or someone on his behalf has recently used the internet or other investigative techniques to learn this information does not create newly discovered evidence under *Jones*.

Despite the insufficiencies in the timeliness of the claim, it is Defendant’s failure to establish the second prong of *Jones* that is dispositive. First, Defendant merely offers speculation that Ms. Mahar in fact lied on her questionnaire, based on a lack of volunteering information that she was the victim of a domestic violence involving a former husband. Second, assuming arguendo that Ms. Mahar did not disclose this information on the questionnaire, any possible prejudice was cured when she did in fact volunteer the information based on the subsequent question from trial counsel. Third, Defendant attaches to his Motion the first page of a “Temporary Injunction for Protection and Notice of Hearing (Ex Parte)” with Brenda Mahar as the petitioner,

and Kevin Spaulding as the respondent, and information showing Kevin Lee Spaulding's criminal convictions. Defendant only offers speculation to reach the conclusion of his claim, that: Brenda Mahler was in fact the victim of domestic violence or some criminal act; that Kevin Spaulding was the perpetrator of any such act; that the temporary injunction entered established an act of domestic violence had occurred between them; and that Kay Mahler was aware of this and/or the incident. These conclusory allegations based wholly on speculation and unfounded assumptions cannot form the basis of postconviction relief.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's "Successive Motion for Post Conviction Relief" is **DENIED**. Defendant has thirty (30) days from the date of this Order within which to appeal this Order to the Second District Court of Appeal.

DONE AND ORDERED at Bartow, Polk County, Florida, this 17th day of January, 2020.


JALAL A. HARB
Circuit Court Judge

Copies furnished to:

- Rachael E. Reese, Esq., 511 West Bay Street, Suite 330, Tampa, FL 33606
- Victoria Avalon, Esq., A.S.A.

JAH/jwl

I HEREBY CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of Polk County, Florida, and that I have furnished copies of this order and its attachments to the above-listed on this 17th day of January, 2020.

CLERK OF THE CIRCUIT COURT
By: 
J. M. Webb
Deputy Clerk