

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1055

MICHAEL ALLEN GRIFFIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY,
CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was charged, in an indictment filed on May 2, 1990, with: (1) the first degree murder of Off. Joseph Martin, (2) the armed burglary of Carlos Munoz's occupied hotel room, (3) the grand theft of Mr. Munoz's property, (4) the grand theft of Richard Marshall's car, (5) the aggravated assault of Off. Juan Crespo, (6) the theft of Off. Daphne Mitchelson's badge and (7) the possession of a firearm by a convicted felon. (R. 1-4)¹ The crimes charged in counts 1, 2, 3, 5 and 7 were alleged to have been committed on April 27, 1990. The crime charged in count 4 was alleged to have been committed between April 23 and 28, 1990. The crime charged in count 6 was alleged to have been committed between February 25, 1990 and April 28, 1990. On December 13, 1990, the State entered a nolle prosequi on count 5 and filed an information charging Defendant with the attempted first degree murder of Off. Crespo. (R. 5, 934) Count 7 was severed from the remaining counts. (R. 934)

The matter proceeded to trial on January 28, 1991. (R. 6) On February 8, 1991, the jury found Defendant guilty as charged

¹ The symbol "R." will refer to the documents and transcripts contained in the record from the direct appeal, Florida Supreme Court Case No. 77,843. The symbol "PCR." will refer to the record from the appeal from the denial of Defendant's first motion for post conviction relief, Florida Supreme Court Case No. SC01-457. The symbols "PCR2." and "PCR2-SR." will refer to the record on appeal and supplemental record on appeal in the instant appeal.

on all counts. (R. 515-20) The trial court adjudicated Defendant in accordance with the jury's verdicts. (R. 489-91) The penalty phase commenced on February 13, 1991. (R. 61) On February 14, 1991, the jury recommended that Defendant be sentenced to death by a vote of 10 to 2. (R. 612)

On March 7, 1991, the trial court followed the jury's recommendation and sentenced Defendant to death. (R. 497-13) In aggravation, the trial court found Defendant had been convicted of a prior violent felony, the murder had been committed during the course of a burglary, the murder was committed to avoid a lawful arrest merged with the fact that Off. Martin was a police officer in the lawful performance of his duties and the murder was committed in a cold, calculated and premeditated manner (CCP). (R. 502-09) In mitigation, the trial court found the Defendant's age of 20, Defendant's remorse, Defendant's poor family background and Defendant's learning disability. (R. 509-11)

The facts adduced at trial were:

On April 27, 1993, [Defendant], Samuel Velez, and Nicholas Tarallo determined to commit a burglary. They left Tarallo's apartment in [Defendant's] father's Cadillac and drove to the location of a white Chrysler LeBaron where they switched cars. [Defendant] had previously stolen the Chrysler, and he used the vehicle during burglaries. Once in the Chrysler, the three proceeded to search for an appropriate target. After driving around, the trio approached an apartment building in Broward County.

Nothing happened at this location, and as they left, [Defendant] suggested they go to the Holiday Inn Newport where [Defendant] had committed successful burglaries in the past. Upon arriving at the Holiday Inn, [Defendant] and Velez exited the car, entered a hotel room, and stole a cellular phone and purse. The three then left the Holiday Inn. Tarallo drove while [Defendant] and Velez divided the stolen property.

While leaving the Holiday Inn and returning to the Cadillac, the three observed a police car. [Defendant] panicked and told Tarallo to turn, speed up, and turn several more times. During these maneuvers, another police car, driven by Officers Martin and Crespo, spotted the Chrysler, noticed the three men acting suspiciously, and began to follow. At this point, Tarallo tried to pull over but [Defendant] stated that he would not go back to jail and ordered Tarallo to continue to evade the police. Finally, Tarallo was able to pull over and attempted to exit the vehicle. As he got out, [Defendant] began shooting at the police, killing Officer Martin. After an exchange of gunfire, Tarallo and Velez exited the vehicle and surrendered to Officer Crespo. [Defendant] fled in the Chrysler and was eventually apprehended.

Griffin v. State, 639 So. 2d 966, 967 (Fla. 1994).

Defendant appealed his convictions and sentences to this Court, raising 6 issues:

[1]the trial court erred in allowing the State to elicit evidence of numerous acts of criminal behavior on the part of [Defendant,] . . . [2]the trial court erred in restricting the introduction of nonstatutory mitigating evidence[,] . . . [3]the trial court erred in finding the aggravating factor that the murder was committed while [Defendant] was engaged in the commission of a burglary[,] . . . [4]the evidence did not support the cold, calculated, and premeditated aggravating factor . . . [5]the trial court erred in denying a motion to impanel a new jury for sentencing, and [6]the trial court erred in denying a motion to suppress certain statements by [Defendant].

Griffin, 639 So. 2d at 968, 970, 971, 971 n.4. This Court affirmed Defendant's convictions and sentences. *Griffin*, 639 So. 2d at 972. Defendant sought certiorari review in the United States Supreme Court, which was denied on March 6, 1995. *Griffin v. Florida*, 514 U.S. 1005 (1995).

On March 19, 1997, Defendant filed his first motion for post conviction relief. (PCR-SR. 16-55) On December 10, 1999, Defendant finally filed his second amended motion for post conviction relief, raising 31 claims. After a *Huff* hearing, the lower court granted an evidentiary hearing on two claims: ineffective assistance of counsel for failing to investigate and present mitigation and the sentencing order was the product of *ex parte* communications between the State and trial court. (PCR. 251-55) After a six day evidentiary hearing, the lower court denied these claims as well. (PCR. 257-62)

Defendant appealed the denial of his motion for post conviction relief, raising 21 issues:

- (1) trial counsel rendered ineffective assistance during the penalty phase of trial by failing to investigate and present available mitigating evidence;
- (2) the trial court failed to independently consider and weigh the aggravating and mitigating factors and counsel was ineffective in failing to object at the time of sentencing;
- (3) postconviction counsel was hampered in his representation of [Defendant] due to a large workload, a lack of funding, and the failure of various agencies to provide requested public records;
- (4) trial counsel rendered ineffective assistance

during the guilt phase of trial by failing to adequately cross-examine various State witnesses, failing to advise [Defendant] of possible judicial bias, conceding guilt during opening argument, and failing to argue an alternative theory of defense; (5) trial counsel rendered ineffective assistance by failing to move for a change of venue based on pretrial publicity; (6) trial counsel rendered ineffective assistance by failing to object to the use of shackles during trial; (7) trial counsel rendered ineffective assistance by failing to adequately question prospective jurors during voir dire; (8) trial counsel rendered ineffective assistance by failing to object to improper prosecutorial argument; (9) trial counsel rendered ineffective assistance by failing to move for the suppression of statements Griffin made to the police; (10) [Defendant] is innocent of the murder and is ineligible for the death penalty and the jury instruction on the CCP aggravating circumstance was unconstitutionally vague; (11) [Defendant] was absent during critical stages of his trial; (12) the jury was erroneously instructed regarding the standard for evaluating expert testimony; (13) the jury was not properly instructed on the proof necessary to establish an aggravating circumstance or how to weigh the aggravating circumstances, the jury was allowed to consider an automatic aggravator, and the sentencing order failed to consider and weigh mitigating evidence presented at trial; (14) the jury instructions unconstitutionally diluted the jury's responsibility for its role in the sentencing process; (15) Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar, which prevents counsel from contacting jurors, is unconstitutional; (16) Florida's capital sentencing scheme is unconstitutional on its face and as applied to [Defendant]; (17) appellate counsel rendered ineffective assistance on direct appeal based upon an inadequate record on appeal; (18) the cumulative effect of errors by trial counsel, the prosecutor, and the trial court deprived [Defendant] of a fair trial; (19) the jury was erroneously instructed on the avoid arrest aggravating circumstance; (20) [Defendant] is insane to be executed; and (21) the trial court erred in admitting autopsy photographs of the victim during the guilt phase.

Griffin v. State, 866 So. 2d 1, 6-7 (Fla. 2003). This Court affirmed the denial of the motion for post conviction. *Id.* at

4. With regard to the claim concerning the sentencing order, this Court held:

[Defendant] argues he is entitled to a new sentencing hearing because the trial court asked the prosecutor to prepare the sentencing order. The circuit court heard testimony relating to [Defendant's] claim that the sentencing judge and the State engaged in ex parte communication about the sentencing order. The evidentiary hearing testimony of defense counsel Kassier and prosecutor Brill supports the circuit court's finding that no ex parte communication occurred. Kassier testified that the trial judge asked him to provide a sentencing memorandum on mitigation and asked the prosecutor to provide the same as to aggravation. Brill testified that one of the other prosecutors informed her of the trial judge's request and asked her to prepare the sentencing memorandum; that she delivered a copy of the memorandum to Kassier, even though this was not reflected on the document; and that her memorandum did not suggest what weight the judge should give the aggravating circumstances nor conclude that the aggravators outweighed the mitigators. Thus, we affirm the denial of relief on this claim.

Id. at 7.

While the matter was pending on appeal, Kenneth Malnik, who had represented Defendant in the circuit court, withdrew from representing Defendant, and Michael Giordano assumed representation of Defendant. On June 23, 2003, after Malnik's withdrawn and while the matter remained on appeal, Malnik

attempted to file a successive motion for post conviction in the lower court. The motion alleged two claims:

I.

[DEFENDANT'S] CONVICTION AND SENTENCE ARE UNCONSTITUTIONAL UNDER *RING V. ARIZONA*

II.

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES [DEFENDANT'S] RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND OF THE FLORIDA CONSTITUTION.

(PCR2. 79-103) The State moved to dismiss the motion on the grounds that it was filed by someone who did not represent Defendant at a time when the lower court was without jurisdiction. (PCR2-SR. 4-33) The lower court heard the State's motion to dismiss and granted it on October 17, 2003. (PCR2-SR. 34-35) A formal order dismissing the motion was entered on June 3, 2004. *Id.*

Defendant filed a *pro se* appeal of the order dismissing this motion. The State moved to dismiss the appeal because Defendant could not file *pro se* proceedings and the order was not appealable. This Court ordered Defendant's counsel to file a response to the State's motion and to indicate whether he was adopting the appeal. Counsel filed a pleading adopting the appeal. This Court affirmed the dismissal of the motion, without prejudice to Defendant refiling the motion. *Griffin v. State*, 894 So. 2d 970 (Fla. 2005).

On February 18, 2005, Defendant served a pleading seeking to adopt the previously dismissed motion. (PCR2. 39-41) On February 25, 2005, the State filed a response to the second motion for post conviction relief, asserting that the motion was untimely and successive and that the claims were meritless. (PCR2. 42-78)

After the matter had been fully pled, Martin McClain filed a motion to substitute as counsel and a new version of the motion for post conviction relief. (PCR2. 104-27, 134-37) McClain's version of the motion for post conviction relief sought to add another claim:

III.

THE STATE WITHHELD IMPORTANT EVIDENCE DURING THE PRIOR PROCEEDING THAT IMPEACHED ITS CLAIM THAT THE SENTENCING ORDER IN [DEFENDANT'S] CASE WAS NOT THE PRODUCT OF *EX PARTE* COMMUNICATION AND DID NOT VIOLATE [DEFENDANT'S] RIGHT TO AN INDEPENDENT SENTENCING ORDER PREPARED BY THE SENTENCING JUDGE. THE STATE'S FAILURE TO DISCLOSE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

(PCR2. 120-25) The State moved to strike McClain's version of the motion, as an improper attempt to amend a motion without having been granted leave to do so. (PCR2. 138-51) McClain responded to the motion to strike, asserting that he was not seeking to amend the existing motion but to refile the prior motion and that Defendant previous refileing of the motion should somehow be ignored because McClain had substituted as counsel.

(PCR2. 202-28)

At a hearing held on March 30, 2005, the lower court heard argument on the motion to strike and granted it to the extent of striking the new claim, without prejudice to Defendant seeking leave to amend to add the claim. (PCR2. 392-409) With regard to the other claims in the motion, Defendant conceded that the *Ring* claim was meritless. (PCR2. 410) With regard to Claim II, Defendant acknowledged that this Court had held that lethal injection was constitutional but asserted that there might be new information about the subject if he had autopsy reports from prior lethal injections or new information about possible changes in the protocols. (PCR2. 412-13) The State argued that the motion, as pled, only relied on the republication of old information and not new information, that the motion was insufficiently pled as it did not even attach the republication of the old information and that Defendant should have sought public records pursuant to Fla. R. Crim. P. 3.852(i) before filing a motion for post conviction relief since claims were supposed to be fully pled when filed. (PCR2. 413-14) Defendant insisted that Fla. R. Crim. P. 3.852 did not permit him to request additional public records but that he would do so if he was wrong. (PCR2. 414-15) The lower court indicated that it was going to deny Claims I and II but would give Defendant 10

days to file a motion for leave to amend before it entered its order doing so. (PCR2. 416)

On April 8, 2005, Defendant served his motion for leave to amend to add the claim that the lower court had stricken, Claim III. (PCR2. 242-46) Defendant asserted that his good cause for not having previously asserted Claim III was that Mr. Malnik could not have understood the significance of the information that the State allegedly withheld because he was no longer representing Defendant and that claims based on alleged *Brady* violations could not be barred. *Id.* The State responded to the motion for leave to amend, asserting that there was no good cause, as Defendant did not satisfy the requirements for filing a successive motion, Mr. Malnik had every reason to understand the alleged significance of the allegedly suppressed information since he was litigating a claim regarding the authorship of the sentencing order and that the allegedly suppressed material could not be considered suppressed or newly discovered as it consisted of a statement in a brief in *State v. Riechmann* that had been filed with this Court in 1998. (PCR2. 254-65) Moreover, the State pointed out that *Brady* claims could be barred and that the statement would not qualify as *Brady* material as Defendant asserted that he could have used the information to impeach his witness regarding a post conviction

claim but would not even be admissible for that purpose. *Id.*

At the hearing held on April 15, 2005, the State appeared and Defendant did not. (PCR2. 380-82) The Clerk indicated that Defendant had been noticed of this hearing at the time of the last hearing. (PCR2. 382) The lower court then reset the matter and ordered the clerk to provide notice to Defendant. (PCR2. 382-83) On the reset date, Defendant again failed to appear, and the lower court indicated that it would rule on the pleadings. On May 13, 2005, the lower court conducted a hearing to enter its orders denying leave to amend and the motion for post conviction relief, at which Defendant again failed to appear. (PCR2. 384-86)

Defendant took no further action regarding this matter until January 6, 2006, when he filed a motion for clarification. (PCR2. 266-70) In the motion, Defendant claimed to have only "recently" learned that his motion had been denied, to have realized that hearing were conducted on April 29, 2005 and May 13, 2005, to have been unable to locate a written order denying the motion and to need the lower court to clarify what had occurred at the hearing he did not attend and whether a written order had been entered. *Id.* Defendant made no attempt to have this motion heard. On April 23, 2006, the State filed a written response to the motion for clarification, attaching copies of

the written orders denying leave to amend and the successive motion for post conviction relief, which were stamped filed by the clerk's office on May 13, 2005. (PCR2. 271-82) The State also argued that the motion was untimely, that the lower court had confirmed that Defendant had been noticed at every hearing and that transcripts of every hearing were available for Defendant to order. *Id.*

Instead of ordering the transcripts of the hearings, Defendant, on May 5, 2006, filed pleading entitled "Motion to Get Facts," claiming that an evidentiary hearing was necessary regarding what occurred at the hearings Defendant did not attend and regarding how the lower court verified that it had noticed Defendant. (PCR2. 283-90) Defendant also moved to disqualify the lower court, claiming that the lower court had engaged in improper ex parte communications by conducting noticed hearings at which Defendant failed to appear and that the judge would be a material witness at any hearing on his motion to get facts. (PCR2. 327-35)

The State responded to the motion to get facts and pointed out that there were no nonrecord facts to get as all of the hearing that Defendant did not attend had been reported and were available from the court reporters. (PCR2. 376-77) The State responded to the motion for disqualification, asserting that the

motion was untimely as Defendant had admitted in his pleadings that he was aware that hearings had been held that he did not attend since December 2005, well more than 10 days before the motion was filed. (PCR2. 367-75) Moreover, the State argued that there were no improper ex parte communications, as there had been no substantive discussions at the noticed hearings Defendant did not attend and the lower court was not a material witness because there were transcripts of the hearings available. *Id.*

On May 8, 2006, Defendant moved this Court to grant him a belated appeal of May 13, 2005 orders. On May 19, 2006, the lower court entered an order on the motion to disqualify, which stated:

THIS CAUSE came on to be heard on the motion of the defendant seeking disqualification of the undersigned judge. After reviewing the motion and response filed by the state, and considering the motion for legal sufficiency, this court finds that the motion is legally insufficient and should be denied. However, because this court considered the veracity of the allegations, being fully aware of the short history of the proceedings before the undersigned judge, and recognizing that defense counsel did indeed have notice of the scheduled proceedings, and further recognizing that this court entered its order on defendant's motion based on the filed pleadings and not on any communications with any of the attorneys, save those had with the attorneys on the record when they were all present, this court does find it necessary and prudent to enter an order of recusal, and the court does hereby enter such order.

(PCR2. 378-79)

On July 5, 2006, Defendant moved the lower court to void its prior orders. (PCR2. 388-91) Defendant claimed that he did not recall being given oral notice of the April 15, 2005 hearing at the March 30, 2005 hearing as reflected in the transcript of April 15, 2005 hearing that the State had provided and that his notice of hearing had been sent to the wrong address. *Id.* The State responded to the motion, asserting that there was no basis to invalidate the orders, that the motion was untimely and insufficient under Fla. R. Jud. Admin. 2.160, that there had been no improper ex parte proceedings and that the appropriate remedy for the alleged failure to receive the copies of the order was a belated appeal, which Defendant was already seeking. (PCR2. 419-26) After listening to the parties' argument, the lower court decided to vacate the orders because it believed that Defendant had not been properly noticed. (PCR2. 475-82) However, it denied the motion to get facts because Defendant could have simply ordered the transcripts. (PCR2. 481)

The lower court then entered new orders denying the motion for leave to amend and the motion for post conviction relief. (PCR2. 440, 442-46) Defendant then filed a notice of appeal. However, this Court subsequently granted the petition for belated appeal of the prior orders. This appeal follows.

SUMMARY OF THE ARGUMENT

The portion of the lethal injection claim concerning the Diaz execution is not properly before this Court. The portion of the lethal injection claim that does not concern the Diaz execution was properly summarily denied.

The lower court did not abuse its discretion in striking Defendant's attempt to amend the successive motion for post conviction relief without being granted leave to do so. It also did not abuse its discretion in denying leave to amend as there was no good cause shown. Moreover, the claim Defendant sought to add was procedurally barred and without merit.

The lower court did not abuse its discretion in finding that the *Ring* claim was not properly asserted in a successive motion for post conviction relief. Moreover, the claim is without merit.

ARGUMENT

I. THE LETHAL INJECTION CLAIM WAS PROPERLY DENIED.

Defendant first asserts that he is entitled to discovery and post conviction relief based on a claim that lethal injection is unconstitutional. Defendant devotes much of his argument under this claim to discussing the events surrounding the execution of Angel Diaz. He then briefly argues that the lower court erred in denying the claim he actually presented below. However, Defendant is not entitled to any relief.

With regard to the assertions based on the Diaz execution, this issue is not properly before this Court. As Defendant admits, this matter was on appeal when Diaz was executed. As such, Defendant's argument relies on nonrecord allegations and matters were not presented to the lower court. It is grossly improper for an appellate litigant to rely on nonrecord material in a brief. *Altchiler v. State, Dept. of Professional Regulation*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983) ("That an appellate court may not consider matter outside of the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.").² When a brief relies

² Defendant's reliance on nonrecord materials is typical of his conduct during this litigation. In the version of the motion that Defendant attempted to file after the motion had been refiled and answered, Defendant made numerous misstatements of the facts and law. (PCR2. 104-27) When the State pointed out

on nonrecord material, the appropriate remedy is to strike the reliance on the nonrecord material from the brief. *Id.*; *Gilman v. Dozier*, 388 So. 2d 294 (Fla. 1st DCA 1980); *Finchum v. Vogel*, 194 So. 2d 49 (Fla. 4th DCA 1966); *Sheldon v. Tiernan*, 147 So. 2d 593 (Fla. 2nd DCA 1962). As such, the State respectfully requests that this Court strike from its consideration as reference concerning the Diaz execution.

Moreover, this Court has held that it is improper for a defendant to present new matters for consideration for the first time on appeal. *Gudinas v. State*, 816 So. 2d 1095, 1011 (Fla. 2002); *Carroll v. State*, 815 So. 2d 601, 609 n.6 (Fla. 2002); *Thompson v. State*, 796 So. 2d 511, 516 (Fla. 2001); *Thompson v. State*, 759 So. 2d 650, 667 n.12 (Fla. 2000); *Shere v. State*, 742 So. 2d 215, 218 (Fla. 1999); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). In fact, this Court did so in Defendant's appeal from the denial of his first motion for post conviction relief. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003). Here,

these misstatements in its motion to strike (PCR2. 138-51), Defendant insisted that there was nothing wrong with misstating the facts and the law. (PCR2. 202-28) At the *Huff* hearing, Defendant insisted that nothing in the rules required him to attach evidence and name witnesses despite the existence of Fla. R. Crim. P. 3.851(e)(2)(C). (PCR2. 416) During argument regarding the lethal injection claim, Defendant asserted that he could not request additional public records because Fla. R. Crim. P. 3.852 barred such requests, despite the existence of *Tompkins v. State*, 872 So. 2d 230, 244 (Fla. 2003), and the fact that *Tompkins* and Defendant are represented by the same attorney. (PCR2. 414-15)

Defendant is clearly attempting to present new matters on appeal, since the Diaz execution occurred after this matter was on appeal. As such, Defendant's attempt to present this new matter on appeal should be rejected.

While Defendant claims that he will somehow be treated differently from other inmates unless this Court orders an evidentiary hearing on this unrepresented claim, this is not true. In *Lightbourne v. State*, SC06-1241, order (Fla. Apr. 16, 2007), this Court affirmed the denial of the lethal injection claims that had been raised prior to the Diaz execution. This Court also permitted Lightbourne to litigate the new claim regarding the Diaz execution that he had raised in an all writs petition in accordance with the law in effect at the time. *Id.* Moreover, in the all writs litigation, this Court dismissed all other inmates named in the petition without prejudice to those inmates filing the claim on their own in the appropriate court.³ *Lightbourne v. McCollum*, SC06-2391, order (Fla. Feb. 9, 2007). Moreover, this Court noted that it "made no decision as to the validity of the claims raised and whether those claims are timely or otherwise barred." *Id.* As such, each of these inmates were only given the right to have their claims considered in accordance with the law at the time they file and litigate the

³ Defendant was not a named Petitioner in that case.

claim.

Here, this Court has already granted Defendant this same right. When Defendant moved to relinquish jurisdiction to present a claim regarding the Diaz execution, this Court denied the motion without prejudice. *Griffin v. State*, SC06-1055, order (Fla. May 18, 2007). As such, Defendant will be afforded the same right to present his claim to the lower court and have it considered under the law as it stands when jurisdiction is returned to lower court at the conclusion of this matter and the claim is actually presented to the lower court.

As this Court noted with regard to the other inmates in *Lightbourne*, determining the form of consideration in the lower court is a matter that should be addressed by the lower court at the time the claim is filed and considered. As of yet, Defendant has not filed a claim in the lower court. As such, whether the claim will be properly filed below is not a matter that this Court can determine.

Moreover, this Court cannot know what the state of the law will be when the claim is filed and ripe for consideration below. This is so because once an issue has been finally determined by this Court, all lower courts are bound by this Court's determination of the issue. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); see also *Hernandez v. Garwood*, 390 So. 2d

357 (Fla. 1980).

Thus, when lethal injection was adopted, an evidentiary hearing was held in *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000), to determine its constitutionality. This Court then applied this decision to other defendants raising the same claim. *E.g.*, *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006); *Rolling v. State*, 944 So. 2d 176 (Fla. 2006); *Hill v. State*, 921 So. 2d 579 (Fla. 2006); *Rutherford v. State*, 926 So. 2d 1100, 1113-14 (Fla. 2006); *Bryan v. State*, 753 So. 2d 1244 (Fla. 2000). Similarly, when issues arose regarding the constitutionality of electrocution, an evidentiary hearing was held in *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999). This Court then applied that decision to other inmates raising the same claim. *E.g.*, *Suggs v. State*, 923 So. 2d 419, 441 (Fla. 2005); *Ellege v. State*, 911 So. 2d 57, 78 (Fla. 2005); *Rodriguez v. State*, 919 So. 2d 1252, 1285 (Fla. 2005); *Griffin*, 866 So. 2d at 17.

As such, Defendant is not necessarily entitled to an evidentiary hearing on any claim regarding the Diaz execution. Instead, he is entitled to nothing more than he has already been given: an opportunity to present his claim to the lower court and have it considered under the law as it stands when the claim is ripe for consideration. Defendant's contrary suggestion should be rejected.

Defendant also asserts that he is somehow being denied due process because the State has allegedly not provided him with favorable information about his lethal injection claim. The United States Supreme Court had defined the favorable information that the State had a due process obligation to disclose as that information that is exculpatory regarding a defendant's guilt or mitigating as to a defendant's punishment. *Brady v. Maryland*, 383 U.S. 83, 87-88 (1963). While the Court has included information that impeaches a state witness at trial as included within this definition,⁴ the Court has stressed that the right to disclosure of such information is related to trial and not other proceedings. *United States v. Ruiz*, 536 U.S. 622, 629-33 (2002). As such, the Court has noted that the state's *Brady* obligation does not create a general right to discovery or to any information that a defendant might deem useful. *Id.* at 629; *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). In fact, the Court has stated that a "prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Bagley*, 473 U.S. at 675.

Here, the information to which Defendant seems to believe

⁴ *United States v. Bagley*, 473 U.S. 667, 676 (1985).

that he is entitled is information concerning a post conviction challenge to a method of execution. Such information has nothing to do with Defendant guilt or the fairness of his trial. To the extent that Defendant may assert that it mitigates his sentence, this is not true. As the United States Supreme Court has held, challenges to methods of execution do not implicate the propriety of a death sentence. *Hill v. McDonough*, 126 S. Ct. 2096 (2006); *Nelson v. Campbell*, 541 U.S. 637 (2004). As such, the information that Defendant seeks does not fall within the ambit of the State's *Brady* obligation. His claim to the contrary should be rejected.

While Defendant appears to believe that *Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998), extended the State's *Brady* obligation to the information that he seeks, this is not true. In *Johnson*, this Court merely stated that the State could not refuse to disclose information that fell within its *Brady* obligation because that information happened to be contained within materials that were not otherwise subject to public records disclosure. That decision in no way expanded the State's obligation under *Brady*. As such, it does not support Defendant's present request for information that does not meet *Brady*. His assertion to the contrary should be rejected.

With regard to the claim actually presented in the lower

court, it was properly summarily denied. The motion as originally filed and refiled alleged that a report by the National Coalition to Abolish the Death Penalty had issued a report "within the last month" entitled "Drug Companies and Their Role in Aiding Executions," and that this report constituted newly discovered evidence. (PCR2. 39-40, 101-02) A review of the report, which had in fact been issued almost a year earlier, showed that it was merely a compilation of preexisting information about the potential for problems in lethal injections. (PCR2. 57-78)

However, this Court recently stated in denying a newly discovered evidence claim in *Rutherford v. State*, 926 So. 2d 1100, 1107 (Fla. 2006):

In *Jones v. State*, 591 So. 2d 911 (Fla. 1991), this Court set forth the standard that must be satisfied in order for a conviction to be set aside based on newly discovered evidence. First, the "asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" *Id.* at 916 (quoting *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)). Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Jones*, 591 So. 2d at 915. In determining whether the evidence compels a new trial under *Jones*, the 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." *Id.* at 916. This determination includes

whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether this evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (citations omitted).

This Court recently described this standard as a "stringent" standard. *Melton v. State*, 949 So. 2d 994, 1011 (Fla. 2006).

Moreover, this Court has required claims to be filed within a year of when the evidence could have been discovered through an exercise of due diligence when the claim is raised in an untimely, successive motion for post conviction relief. *Stewart v. State*, 495 So. 2d 164 (Fla. 1986); *Christopher v. State*, 489 So. 2d 22 (Fla. 1986); *Webber v. State*, 662 So. 2d 1287 (Fla. 5th DCA 1995). Additionally, this Court has held that reports that are merely compilations of existing information do not constitute newly discovered evidence. *Diaz v. State*, 945 So. 2d 1136, 1145, 1146 (Fla. 2006); *Rolling v. State*, 944 So. 2d 176, 181, (Fla. 2006); *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006); *Glock v. Moore*, 776 So. 2d 243, 250 (Fla. 2001).

Here, the lower court properly determined that Defendant's claim did not meet the standard for newly discovered. The report was merely an inadmissible compilation of existing

material. Thus, it did not meet the *Jones* standard. The denial of the claim should be affirmed.

To the extent that Defendant is suggesting that the lower court was not entitled to consider the report in determining the viability of his claim, this is untrue. Pursuant to Fla. R. Crim. P. 3.851(e)(2)(C), Defendant was required to attach a copy of the report to his motion. Moreover, pursuant to Fla. R. Crim. P. 3.851(f)(5)(B), a trial court is permitted to deny a successive motion for post conviction relief summarily when "motion, files and records in the case conclusively show that the movant is entitled to no relief." Because the report had to be a part of the motion for it to be properly filed and because a review of the report conclusively shows that it is not newly discovered evidence, the lower court properly denied the motion because the report showed Defendant was not entitled to relief. In fact, this Court has affirmed the summary denial of motion for post conviction relief based on the *Lancet* article and other allegedly new information because it did not qualify as newly discovered evidence after reviewing the report and material. *Diaz*, 945 So. 2d at 1144-45; *Rutherford*, 926 So. 2d at 1113-14; *Rolling*, 944 So. 2d at 179; *Hill v. State*, 921 So. 2d 579, 583 (Fla. 2006). Thus, the lower court properly summarily denied this claim and should be affirmed.

The version of the claim asserted in the version of the motion McClain attempted to file after the motion had already been refiled and answered was also properly summarily denied.⁵ This version of the motion attempted to include conclusory allegations that a "growing number of medical and legal experts" had warned of potential problems with the use of pancuronium bromide, that "[a]dvances in medicine" indicated that this drug could "mask severe suffering," that the American Veterinary Medical Association condemned the use of this drug, that the protocols and autopsy reports had never been disclosed and that there had never been an evidentiary hearing on lethal injection. (PCR2. 119-20) However, the motion did not assert when any of these alleged circumstances could have been discovered, attached any documentary evidence and included any witness information. *Id.* At the *Huff* hearing, Defendant asserted that there was "information that's come out in case law addressing it [in other] jurisdictions" and that he hoped he would be able to develop information to support the claim later. (PCR2. 412-13)

Since Defendant did not actually identify any admissible evidence and show that it was not discoverable within the year before the motion was filed, the lower court properly found that

⁵ As will be argued in Issue II, *infra*, this version of the motion was never properly before the lower court as it was an improper attempt to amend a pending motion without leave of court. See Fla. R. Crim. P. 3.851(f)(4).

Defendant's claim was insufficiently plead. *Stewart v. State*, 495 So. 2d 164 (Fla. 1986); *Christopher v. State*, 489 So. 2d 22 (Fla. 1986); *Webber v. State*, 662 So. 2d 1287 (Fla. 5th DCA 1995). This is particularly true, as this Court has repeatedly rejected claims based on the type of information that Defendant vaguely mentioned. *Diaz*, 945 So. 2d at 1144-45; *Rutherford*, 926 So. 2d at 1113-14; *Rolling*, 944 So. 2d at 179; *Hill v. State*, 921 So. 2d 579, 583 (Fla. 2006). The lower court should be affirmed.

While Defendant asserts that the lower court "made up its own pleading requirements" by requiring that he identify evidence and witnesses, this is untrue. Pursuant to Fla. R. Crim. P. 3.851(e)(2)(C), this information was required:

A successive motion shall not exceed 25 pages, exclusive of attachments, and **shall include**: if based upon **newly discovered evidence**, *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), or *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972), the following:

- (i) the names, addresses, and telephone numbers of all witnesses supporting the claim;
- (ii) a statement that the witness will be available, should an evidentiary hearing be scheduled, to testify under oath to the facts alleged in the motion or affidavit;
- (iii) if evidentiary support is in the form of documents, copies of all documents shall be attached, including any affidavits obtained; and
- (iv) as to any witness or document listed in the motion or attachment to the motion, a

statement of the reason why the witness or document was not previously available.

(Emphasis added). Since the rule itself imposes the requirement, the lower court did not make up its own pleading requirements. Instead, it properly enforced the existing pleading requirements. It should be affirmed.

Moreover, while Defendant asserts that he could not meet this pleading requirement without disclosure of public records, he is again entitled to no relief. Defendant never actually made any requests for additional public records. Instead, he merely stated in his motion for post conviction relief that "the Florida Department of Corrections has not disclose the precise details of its protocol and the results of autopsies of those executed using lethal injections in which the chemical levels have been measured." (PCR2. 119) However, this Court has held that it expects motions for post conviction relief to be fully pled when filed. *Vining v. State*, 827 So. 2d 201, 212-13 (Fla. 2002). Moreover, this Court has held that defendant who do not diligently seek public records waive any claim of entitled to said records. *Reaves v. State*, 826 So. 2d 932, 942-43 (Fla. 2002); *Cook v. State*, 792 So. 2d 1197, 1204 (Fla. 2001); *Asay v. State*, 769 So. 2d 974, 983 n.16 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 658 (Fla. 2000); *Gaskin v. State*, 737 So. 2d 509, 518 (Fla. 1999); *Lopez v. Singletary*, 634 So. 2d 1054, 1058

(Fla. 1993). Given that Defendant never requested the records, he evidenced a lack of diligence that waived any right to request the records. The lower court should be affirmed.

To the extent that Defendant may assert that he could not have made the records requests or did not understand that he could do so, Defendant is entitled to no relief. Pursuant to Fla. R. Crim. P. 3.852(i), defendant are entitled to request additional public records in addition to those provided during the litigation of initial motion for post conviction and those provided during the pendency of a death warrant if they can convince a trial court that the requests meet the requirements of the rule. In *Tompkins v. State*, 872 So. 2d 230, 244 (Fla. 2003)(quoting *Sims v. State*, 753 So. 2d 66, 70-71 (Fla. 2000), this Court held that this provision “allows collateral counsel to obtain additional records at any time” if he can satisfy the requirements of the rule. Defendant’s attorney is listed as counsel in the *Tompkins* opinion. *Tompkins*, 872 So. 2d at 233. Thus, any claim that the records could not have been requested earlier or that Defendant did not know they could is specious. The lower court should be affirmed.

Even if Defendant could have been considered diligent in seeking the public records he requested, he would still be entitled to no relief. This Court found that the Department of

Corrections had sufficiently disclosed its original lethal injection protocol in *Sims v. State*, 754 So. 2d 657, 665-66 (Fla. 2000). Moreover, this Court affirmed the denial of requests for the records that Defendant mentions and rejected lethal injection claims in *Diaz*, 945 So. 2d at 1143-45, 1148-49; *Rolling*, 944 So. 2d at 179-81; *Rutherford*, 926 So. 2d at 1113-16; and *Hill*, 921 at 582-83, 584-85. In fact, in *Rolling v. McDonough*, 944 So. 2d 346 (Fla. 2006), and *Rutherford v. Crist*, 945 So. 2d 1113 (Fla. 2006), this Court continued to reject public records requests and lethal injection claims after the State rewrote the initial lethal injection protocol to make explicit that which had been implicit under the first protocol. Thus, the lower court properly rejected this claim even if Defendant had been diligent in seeking public records to support the claim. It should be affirmed.

Finally, while Defendant asserts that the lower court should not have found this claim foreclosed by *Sims*, the lower court acted properly. In each of the situations relied upon by Defendant, there had been a problem during an execution before a new evidentiary hearing was required. *Lightbourne v. State*, SC06-1241, order (Fla. Apr. 16, 2007)(affirming without prejudice to have evidentiary hearing based on assertion of problems in Diaz execution); *Provenzano v. Moore*, 744 So. 2d 413

(Fla. 1999)(evidentiary hearing order because of nose bleed during Davis execution); *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997)(ordering evidentiary hearing based on flames during Medina execution). However, after this Court subsequently determined that the problem did not show that that the method of execution was unconstitutional, this Court then summarily denied other defendant relief based on the fact that this Court had already decided the issue. *Suggs v. State*, 923 So. 2d 419, 441 (Fla. 2005); *Ellege v. State*, 911 So. 2d 57, 78 (Fla. 2005); *Rodriguez v. State*, 919 So. 2d 1252, 1285 (Fla. 2005); *Griffin*, 866 So. 2d at 17; *Remeta v. State*, 710 So. 2d 510, 546 (Fla. 1998); *Buenoano v. State*, 717 So. 2d 529 (Fla. 1998). Here, Defendant's motion did not rely on any problem in any execution. As such, the lower court properly considered itself bound by *Sims*. It should be affirmed.

II. THE REJECTION OF THE SENTENCING ORDER CLAIM WAS PROPER.

Defendant next asserts that the lower court abused its discretion⁶ in striking Claim III of McClain's version of motion for post conviction relief and in refusing to grant leave to amend. Defendant further asserts that he was entitled to relief based on Claim III. However, the lower court did not abuse its discretion in refusing to permit the filing of this meritless claim.

Defendant first contends that the lower court erred in striking the version of the motion McClain attempted to file. He asserts that there was no authority to strike the McClain version because McClain was merely complying with this Court's order affirming the dismissal of the original version of the motion and allowing Defendant to refile the motion nunc pro tunc. However, in presenting this issue, Defendant ignores the record.

At the time this Court issued its order affirming the dismissal of the original version of the motion, Defendant was represented by Daniel Daly. Pursuant to this Court's order, Daly refiled the motion on February 21, 2005. (PCR2. 39-41) The State answered the motion on February 25, 2005. (PCR2. 42-

⁶ Decisions regarding striking pleadings and granting leave to amend are reviewed for an abuse of discretion. *Bryant v. State*, 901 So. 2d 810, 817 (Fla. 2005).

78) Only after the motion had been refiled and answered did McClain seek to file his version of the motion on March 7, 2005. (PCR2. 104-30) Moreover, McClain's version sought not merely to refile the existing motion but also to add an additional claim. *Id.* Given that the motion had already been refiled and that McClain's version sought to add a claim, the lower court properly considered McClain's version as an attempt to amend the pending, refiled motion for post conviction relief.

Pursuant to Fla. R. Crim. P. 3.851(f)(4), amendment of a motion for post conviction relief is only permissible upon "motion and good cause shown." Because Defendant did not file a motion and show good cause, the lower court properly considered the McClain version an unauthorized pleading. When a litigant files an unauthorized pleading, it is proper for a court to strike the unauthorized pleading. *See Grainger v. State*, 906 So. 2d 380, 382 (Fla. 2d DCA 2005)(unauthorized pro se pleading subject to being stricken); *WFTV, Inc. v. Hinn*, 705 So. 2d 1010 (Fla. 5th DCA 1998)(unauthorized claim for punitive damage must be stricken); *Kraft General Foods, Inc. v. Rosenblum*, 635 So. 2d 106 (Fla. 4th DCA 1994)(trial court required to strike unauthorized pleading). Under these circumstances, the lower court did not abuse its discretion in striking McClain's attempt to amend the pending, refiled motion for post conviction relief

and requiring Defendant to obtain leave to amend. It should be affirmed.

To the extent that Defendant may attempt to claim, as he did below, that the refiling of the motion should be ignored because Defendant decided to change counsel after the motion was refiled, he is entitled to no relief. In *Brown v. State*, 894 So. 2d 137, 153-54 (Fla. 2004), this Court held that a trial court did not abuse its discretion in refusing to permit a defendant to present additional arguments and claims because there had been a substitution of counsel. See also *Huff v. State*, 762 So. 2d 476, 481-82 (Fla. 2000). Since Daly was representing Defendant at the time that the motion was refiled, the trial court did not abuse its discretion in refusing to treat his pleading as a nullity. It should be affirmed.

To the extent that Defendant asserts that the refiling of the motion should be ignored because this Court permitted Defendant to refile "a proper motion for post conviction relief" and the refiled motion was not sworn, Defendant is again entitled to no relief. The statement about a proper motion was made in connection with affirming the granting of the State's motion to dismiss. In its motion to dismiss, the State made asserted numerous procedural defects in Defendant's second motion for post conviction relief but had not complained that

the motion was not sworn. (PCR2-SR. 7-9) While it is true that the refiled motion did not fix any of these pleading deficits, neither did McClain's version. Compare PCR2. 79-103 with PCR2. 104-30. Moreover, while the State did note that the refiled version was unsworn in its response (PCR2. 50), it specifically did not rely upon the fact that the motion was unsworn as a grounds for denying the motion. (PCR2. 50-54) Moreover, it has been held that the allowing a defendant to amend to fix a technical deficit in a motion for post conviction relief is not grounds for permitting a defendant to add claims to a motion. *Jumper v. State*, 903 So. 2d 264 (Fla. 2d DCA 2005); *Richardson v. State*, 890 So. 2d 1197 (Fla. 5th DCA 2005). Under these circumstances, the lower court did not abuse its discretion in not ignoring the fact that the motion had already been refiled and in deeming the McClain version an unauthorized attempt to amend a pending motion. It should be affirmed.

Further, refusing to permit the filing of an additional claim without moving for, and being granted, leave to amend is consistent with the rationale of this Court's prior order. In *Tompkins v. State*, 894 So. 2d 857 (Fla. 2005), which was issued on the same day as the prior order in this case, this Court upheld the dismissal for lack of jurisdiction of a successive motion for post conviction relief, where the motion was filed

while the matter was pending on the appeal of a prior motion. However, this Court then permitted the defendant to refile the motion to avoid what this Court considered to be a "procedural dilemma" that would be created because of the denial of a motion to relinquish and the time limit on newly discovered evidence claims. *Id.* at 859. Here, there was no similar procedural dilemma with regard to the claim that Defendant attempted to add. As such, the lower court did not abuse its discretion in striking Defendant's attempt to amend his motion without seeking and being granted leave to do so. It should be affirmed.

Moreover, the lower court also did not abuse its discretion in denying Defendant's motion for leave to amend. In *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002), this Court addressed the requirements for a showing of good cause for leave to amend a motion for post conviction relief under Florida law. This Court stressed that motions for post conviction relief should be fully pled when filed and that later attempts to amend such motions were improper unless the defendant satisfied the requirement for filing a successive motion. To meet the requirements for filing a successive motion, a defendant is required to show that the claim is based on newly discovered evidence or a fundamental change of constitutional law that applies retroactively. Fla. R. Crim. P. 3.851(d)(2). Given

that Defendant did not meet either of these requirements, the lower court did not abuse its discretion in denying leave to amend.

When Defendant finally did move for leave to amend,⁷ he asserted that his good cause for failing to have raised the claim earlier was that the State had allegedly not disclosed the statement in the brief in *State v. Riechmann*, SC89564, Mr. Malnik allegedly could not have known of the significance of the statement even if he knew about it because he was no longer representing Defendant at the time he filed the initial version of the successive motion and *Banks v. Dretke*, 540 U.S. 668 (2004), allegedly provided a basis for this claim that was unavailable until *Banks* was decided. (PCR2. 244-45) However, Defendant did not allege that he or his counsel were unaware of the Riechmann litigation or that they could not have learned of what occurred during that litigation through an exercise of due diligence before 2004.

As noted previously, to qualify as newly discovered evidence, evidence must have been unknown to counsel or the defendant and could not have been discovered through an exercise of due diligence until less than one year before the claim was

⁷ While Defendant suggests that he did not attach a copy of the claim he sought to add, this is untrue. A copy of the claim was attached to the motion for leave to amend. (PCR2. 242-52)

raised. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *Stewart v. State*, 495 So. 2d 164 (Fla. 1986); *Christopher v. State*, 489 So. 2d 22 (Fla. 1986); *Webber v. State*, 662 So. 2d 1287 (Fla. 5th DCA 1995). Since there were no allegations of newly discovered evidence, the lower court properly found that Defendant had not shown that Defendant had not sufficiently alleged newly discovered evidence as a basis for leave to amend. As such, the lower court did not abuse its discretion in denying leave to amend on this basis.

Moreover, the record refutes any notion that there was newly discovered evidence. The alleged basis of this claim was a statement made in the State's initial brief in *Riechmann*. That brief was filed with this Court in January 1998. (PCR2. 153-96) Defendant first raised the claim concerning the State's sentencing memorandum in his amended initial motion for post conviction relief, which was served at the end of October 1998. (PCR-SR. 257, 323-25) The motion was filed by CCRC-South. (PCR-SR. 353) CCRC-South also represented Rickey Roberts and began filing pleadings on Roberts' behalf based on the sentencing order claim in *Riechmann* in October 1996.⁸ *Roberts v. State*, 840 So. 2d 962, 966 (Fla. 2002). Thus, Defendant's

⁸ Additionally, that organization represented Mauricio Beltran-Lopez at the time that he obtained relief because the State had drafted the sentencing order in that case.

counsel was aware of the *Riechmann* litigation and its alleged importance to sentencing order claims from Dade County at the time he was litigating such a claim during the initial round of post conviction proceedings. Moreover, Mr. Malnik started representing Defendant with CCRC-South and then continued as registry counsel after he left CCRC-South. (PCR-SR. 603-05) Further, Defendant cited to *Riechmann* in support of this claim when he appealed its denial. Initial Brief of Appellant, FSC Case No. SC01-457, at 51-52. Under these circumstances, the lower court properly found that the request for leave to amend was not based on newly discovered evidence.

To the extent that Defendant intended the allegations in his motion for leave to amend to assert that *Banks v. Dretke*, 540 U.S. 668 (2004), changed the law such that *Brady* claims can never been found to be procedurally barred, he is entitled to no relief. *Banks* did not purport to recognize a new fundamental constitutional right. Instead, the Court claimed it was merely applying preexisting precedent regarding *Brady* claims and the determination under federal law of the existence of cause to excuse a procedural default in a federal habeas proceeding, an issue that the United States Supreme Court has characterized as an issue of federal law that does not have to depend on a constitutional claim. *Murray v. Carrier*, 477 U.S. 478, 489

(1986). Moreover, Defendant did not show that *Banks* has been held to be retroactive. As such, *Banks* does not meet the requirements of the second condition for filing a successive motion.

Moreover, Defendant is incorrect regarding the United States Supreme Court's holding in *Banks* about what constitutes cause to overcome a procedural default. In *Banks*, the Court based its finding that the defendant had shown cause on three factors:

"(a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the [State] confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government."

Banks, 540 U.S. at 692-93 (quoting *Strickler v. Greene*, 527 U.S. 263, 289 (1999)). The Court then stated that it had not decided "whether any one or two of these factors would be sufficient to constitute cause" and was not doing so in *Banks*. *Id.* at 693 n.13 (quoting *Strickler*, 527 U.S. at 289). The language that Defendant relies upon is contained in a discussion of Texas' argument regarding cause after the Court had already found cause as discussed above. *Banks*, 540 U.S. at 696. Given that Defendant's argument is basically that he only needs to satisfy part (a) of the reasons the Court found cause and the Court

directly stated that it was not deciding that question, Defendant's reliance on *Banks* is misplaced.

This is particularly true when one considers the fact that, in *Strickler*, the case the Court quoted regarding the issue of cause in *Banks*, the Court expressly noted "[w]e do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." *Strickler*, 527 U.S. at 288 n.33. Moreover, this Court has consistently found that a *Brady* claim is meritless when the defense was aware of the information before trial. *Davis v. State*, 928 So. 2d 1089, 1116 (Fla. 2005); *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000) ("Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.")(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). This Court has also determined that a *Brady* claim is properly found to be barred, when the information was available in time to be raised in a prior proceeding. *Smith*

v. State, 931 So. 2d 790, 805-06 (Fla. 2006); *Davis v. State*, 928 So. 2d 1089, 1113-14 (Fla. 2005).

Under these circumstances, the lower court properly found that Defendant's allegations did not provide grounds for filing a successive motion. As such, it did not abuse its discretion in finding that Defendant did not show good cause to be granted leave to amend. (PCR2. 281-82) It should be affirmed.

Even if the lower court had abused its discretion in refusing to allow Defendant to amend, it should still be affirmed. As noted above, the claim is not based on newly discovered evidence or a fundamental change of constitutional law that applies retroactively. Instead, it is a claim based on information that has been publicly available and being claimed as authority and a basis for presenting claims regarding the drafting of the sentencing order by the law firm representing Defendant at the time he was litigating the claim in his first motion for post conviction relief. As such, the claim is barred in this motion. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994); *Stewart v. State*, 495 So. 2d 164 (Fla. 1986); *Christopher v. State*, 489 So. 2d 22 (Fla. 1986); *Webber v. State*, 662 So. 2d 1287 (Fla. 5th DCA 1995). The rejection of the claim should be affirmed.

Moreover, the claim is also without merit. While Defendant insists that there was a *Brady* violation because of the State's alleged failure to disclose the brief in *Riechmann*, this is not true. As noted in Issue I, the United States Supreme Court has made it abundantly clear that *Brady* does not create a general right to discovery even regarding criminal trials, much less post conviction proceedings. *United States v. Ruiz*, 536 U.S. 622, 629-33 (2002); *United States v. Bagley*, 473 U.S. 667, 675-76 (1985); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Instead, it concerns only information that exculpates a defendant of guilt of the crime, mitigates his sentence or impeaches a state witness at trial. *Ruiz*, 536 U.S. at 629-33; *Bagley*, 473 U.S. at 675-76; *Brady v. Maryland*, 383 U.S. 83, 87-88 (1963). Here, Defendant does not assert that the allegedly suppressed information meets any of these requirements. Instead, he alleges that the allegedly suppressed information would have impeached a witness at a post conviction and provided support for a post conviction claim regarding an alleged procedure defect in the imposition of his sentence. However, such allegations of procedure defects do not meet the definition of *Brady* material. *United States v. Ramirez*, 513 F.2d 72, 78 (5th Cir. 1975); *Adler v. State*, 666 So. 2d 998 (Fla. 5th DCA 1996). As such, the claim was without merit. Its rejection

should be affirmed.

Even if *Brady* did extend to post conviction claims, the claim would still be meritless. In order to allege a *Brady* claim properly, a defendant must show three things: “[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.” *Way v. State*, 760 So. 2d 903, 910 (Fla. 2000); see also *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003); *Maharaj v. State*, 778 So. 2d 944, 953 (Fla. 2000). To show that prejudice ensued, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different had the State disclosed the evidence. *Allen*, 854 So. 2d at 1260; *Way*, 760 So. 2d at 913. Here, none of these prongs are satisfied.

Defendant asserted first that the statement in the brief was favorable to him because it could have been used to impeach Ms. Brill’s testimony as a State witness at the post conviction evidentiary hearing about how she came to prepare the State’s memorandum regarding the aggravating factors and how the memorandum was served. However, this assertion is based on a misstatement of the record that Ms. Brill testified as a State witness. She did not. Defendant called Ms. Brill as his

witness at the first evidentiary hearing.⁹ (PCR. 884, 895-911)

Defendant does not actually explain how impeaching his own witness would be favorable to him. In fact, it would not be. Impeaching a witness merely shows that the evidence is not credible and not that the converse of the witness's testimony is true. *Morton v. State*, 689 So. 2d 259, 261-64 (Fla. 1997)(showing one's own witness is incredible does not result in substantive evidence and creates "a net result of zero."). Thus, had Defendant successfully impeached Ms. Brill, he would have been presented no credible evidence to support his claim. However, Defendant bore the burden of proof on this claim. *Jones v. State*, 845 So. 2d 55, 63-65 (Fla. 2003). Without any credible evidence to support a claim that the State drafted the sentencing order, the claim would have been doomed to failure. *Rodriguez v. State*, 919 So. 2d 1252, 1267-69 (Fla. 2005);¹⁰ *Randolph v. State*, 853 So. 2d 1051, 1056-59 (Fla. 2003); *Jones v. State*, 845 So. 2d 55, 63-65 (Fla. 2003). Thus, any claim that the statement was favorable to Defendant because it could have been used to impeach his own witness is without merit. The claim was properly rejected.

⁹ The State has pointed out that Ms. Brill was a defense witness previously, yet Defendant continues to misstate the record in calling her a State witness. (PCR2. 147, 262)

¹⁰ In fact, Rodriguez presented the same argument about the statement in the Riechmann brief. Initial Supplemental Brief of Appellant, FSC Case No. SC00-99, at 22-25.

Moreover, it is unclear how the statement could have been used to impeach Ms. Brill. The methods by which a witness can be impeached are limited. §90.608, Fla. Stat.; *Rose v. State*, 472 So. 2d 1155, 1157-58 (Fla. 1985). Mr. Sutton's statement in the *Riechmann* brief does not appear to fit into any of the limited methods of impeachment of Ms. Brill, particularly given that the post conviction court refused to allow Defendant to ask Ms. Brill about other cases when she testified because it was irrelevant. (PCR. 908-09) See *Morton v. State*, 689 So. 2d 259, 262 (Fla. 1997)(to be admissible as impeachment, statement must be inconsistent with testimony); *Fulton v. State*, 335 So. 2d 280 (Fla. 1976)(specific acts of misconduct by a witness are not admissible to impeach); *Claussen v. State*, 750 So. 2d 79, 80-81 (Fla. 2d DCA 1999)(prior inconsistent statement must have been made by witness whose testimony it is being used to impeach); *Cantero v. State*, 612 So. 2d 634 (Fla. 2d DCA 1993)(to be admissible under 90.608(1)(e), evidence must contradict testimony on material issue). This is particularly true as a review of the context in which Mr. Sutton made his statement shows that it concerned the time prior to *Patterson v. State*, 516 So. 2d 1257 (Fla. 1987). (PCR2. 195) However, Defendant was not sentenced prior to *Patterson*. Since the statement would not have been admissible to impeach Ms. Brill, any failure to

disclose the statement would not have constituted a *Brady* violation even if Ms. Brill had been a state witness at trial. See *Wood v. Bartholomew*, 516 U.S. 1 (1995). The rejection of the claim should be affirmed.

Moreover, Defendant's claim that Ms. Brill had a motive to testify given her employment that could be used as impeachment does not implicate Mr. Sutton's statement. In fact, Defendant elicited that Ms. Brill was assigned to the case at the time of trial and continued to be responsible for the case during the post conviction proceedings. (PCR. 895-96) Thus, this assertion does not show the claim is meritorious.

Defendant next attempts to claim that Mr. Sutton's statement was favorable because it would constitute circumstantial evidence to support his claim. While Defendant does not explain how Mr. Sutton's statement would be admissible as circumstantial evidence, it appears that he believes that it would have shown that the State acted in conformity with its actions in other cases. However, evidence of prior bad acts is generally inadmissible in Florida. §90.404(2), Fla. Stat.; §90.405(2), Fla. Stat. This prohibition on the admission of other acts without evidence of similarity between the acts applies equally to the defense and State. *Gore v. State*, 748 So. 2d 418, 430-32 (Fla. 2001).

Here, such similarity is lacking. In *Riechmann, Maharaj*, 778 So. 2d 944 (Fla. 2000), *State v. Beltran-Lopez*, 11th Jud. Cir. Case No. F86-19790B, and *State v. Espinosa*, 11th Jud. Cir. Case No. F86-19790A, the State admitted that it wrote the trial court's actual sentencing order. In *Roberts v. State*, 840 So. 2d 962 (Fla. 2002), the post conviction court found that the State had written the trial court's actual sentencing order based on testimony from the trial judge. Here, Defendant has never asserted that the State wrote the actual sentencing order. Instead, Defendant's claim was that Ms. Brill drafted an interoffice memo regarding the State's position on the aggravators. (PCR. 120-22) Moreover, a review of the interoffice memorandum Ms. Brill drafted in this case shows that it only addressed the facts and how those facts proved the aggravators the State was asserting. (PCR. Defense Exhibit 2) It did not even suggest the weight that the trial court should assign to the aggravators found. *Id.* It did not discuss mitigation at all. *Id.* It did not discuss how the aggravating circumstances should be weighed against the mitigating circumstances. *Id.* Thus, the similarity necessary for admission of the State's actions in other cases was lacking. *Gore v. State*, 748 So. 2d 418, 430-32 (Fla. 2001). In fact, when Defendant attempted to question Ms. Brill about other cases at

the evidentiary hearing, the lower court refused to allow the questioning. (PCR. 908-09) Because this information would not be admissible, it cannot support a *Brady* claim. *Wood v. Bartholomew*, 516 U.S. 1 (1995). The lower court's rejection of the claim should be affirmed.

Even if the information could be considered admissible, it would still not support a *Brady* claim. In *Gore v. State*, 32 Fla. L. Weekly S438, S439-40 (Fla. July 5, 2007), this Court found that the State's submission of a sentencing memorandum was not an improper ex parte communication. Here, the State did not even submit a complete sentencing memorandum. Its memorandum did not address the weight to be assigned to anything and contained no discussion of mitigation at all. Thus, under *Gore*, Defendant's claim would not have any merit even if he could have proven. Under these circumstances, it cannot be said that any failure to disclose Mr. Sutton's statement created a reasonable probability of a different result. Thus, the claim was without merit and was properly rejected.

III. THE RING CLAIM WAS PROPERLY DENIED.

Defendant finally asserts that he is entitled to relief based on *Ring v. Arizona*, 536 U.S. 584 (2002). However, Defendant is entitled to no relief

In presenting his argument on this issue, Defendant chooses to ignore the fact that this claim was even not cognizable in his untimely, successive motion. Pursuant to Fla. R. Crim. P. 3.851(d)(2), an untimely and successive motion for post conviction relief cannot be properly filed unless it depends on newly discovered evidence or a fundamental change of constitutional law that applies retroactively.¹¹

Defendant's claim does not depend on any newly discovered evidence. The nature of the jury's death recommendation in this case, the instructions provided to the jury regarding this recommendation and the trial court's sentencing order has been obvious since 1991. As such, the claim cannot be said to be based on newly discovered evidence.

Moreover, the claim cannot be said to be based on a fundamental change of constitutional law that applies

¹¹ The rule also contains a provision for considering an untimely initial motion based on counsel's neglect in filing a timely motion. Fla. R. Crim. P. 3.851(d)(2)(C). However, Defendant had a timely filed initial motion for post conviction relief, and the instant proceeding concerns a motion that is successive. This Court has refused to expand this provision to such situations. *Brown v. State*, 894 So. 2d 137, 153 n.11(Fla. 2004).

retroactively. Both this Court and the United States Supreme Court have directly held that *Ring* does not apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). As such, Defendant's motion does not satisfy the second prerequisite to be considered in an untimely and successive motion.

Since the motion did not satisfy either of the prerequisites for consideration of this claim in an untimely and successive motion for post conviction relief, the lower court properly determined that the claim was not properly before it and was barred. The lower court should be affirmed.

Even if Defendant had shown that the claim was properly presented in a successive and untimely motion for post conviction relief, the lower court would still have properly denied the claim. It is meritless. The trial court found four aggravating circumstances in this case: (1) prior violent felony, based on a contemporaneous conviction for the attempted murder of Off. Crespo; (2) during the course of a burglary; (3) murder of a law enforcement officer and avoid arrest, merged; and (4) CCP. (R. 502-09) In this case, Defendant was charged with the attempted murder of Off. Crespo and the burglary, and the indictment specifically included allegations that Off. Martin was a law enforcement officer in the course of his duties

when he was murdered. (R. 1-5) At the guilt phase, the jury unanimously found Defendant guilty of the first degree murder of Off. Martin, the attempted murder of Off. Crespo and the burglary. (R. 515, 516, 519) Moreover, the jury specifically indicated on the verdict form for the murder of Off. Martin that it found that he was a law enforcement officer. (R. 515) By doing so, the jury specifically and unanimously found the facts that supported the prior violent felony, during the course of a burglary and merged law enforcement aggravators. In *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003), this Court held that a *Ring* claim was meritless where aggravators were based on facts that were charged and unanimously found by the jury as part of their guilt phase verdicts. As this is true here, the claim is without merit. As such, the lower court's denial of the claim should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying the untimely, successive motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Martin McClain, 141 N.E. 30th Street, Wilton Manors, Florida 33334, this 24th day of July 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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