IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2179

MICHAEL ALLEN GRIFFIN,

Petitioner,

vs.

WALTER A. MCNEIL, Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR ALL WRITS/
WRIT OF HABEAS CORPUS

RESPONSE

BILL MCCOLLUM
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

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STATEMENT OF THE 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 on all counts. (R. 515-20) The trial court adjudicated Defendant in

[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.

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. While the matter was pending on appeal, Kenneth Malnik, who had represented Defendant in the circuit court, filed a motion to withdrawal on September 25, 2001, indicating that Defendant had informed him that he had retained counsel to pursue an appeal from the denial of the motion for post conviction relief. (App. A)[2] Michael Giordano then filed a motion for substitution of counsel, indicating that he had been retained by a person acting on Defendant's behalf to represent Defendant in the appeal. (App. B) This Court permitted the substitution of counsel on October 18, 2001. (App. C)

Defendant then filed his brief, raising 21 issues:

[2] The symbol "App." will refer to the appendices to this response.

(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 [Defendant] 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.

On June 23, 2003, after Malnik's withdrawal and while the matter remained on appeal, Malnik attempted to file a successive motion for post conviction in the lower court, raising a *Ring* claim and a lethal injection claim. (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.*

After the appeal of Defendant's initial motion for post conviction relief concluded, Mr. Giordano moved to have registry counsel Daniel Daly substituted as counsel because he had only been retained to handle the post conviction appeal. (App. D) The post conviction court permitted the substitution of counsel on February 18, 2004. (App. E) Defendant, through Mr. Daly, sought certiorari review of this Court's affirmance of the denial of post conviction relief, which was denied on November 1, 2004. *Griffin v. Florida*, 543 U.S. 962 (2004).

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, in which Counsel acknowledged that Mr. Giordano had been retained merely for the purpose of handling the post conviction appeal. (App. F) 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, indicating that Defendant had retained him to act as his post conviction counsel. (PCR2. 134-37) On March 7, 2005, Mr. McClain filed a new version of the second motion for post conviction relief. (PCR2. 104-30) As required by Fla. R. Crim. P. 3.851(e)(2)(B), this version of the motion included a procedural history, summarizing the prior post conviction proceedings. *Id.* In this version of the second motion

for post conviction relief, Defendant attempted to add a third claim, asserting that the State had committed a *Brady* violation by failing to disclose a statement in a brief in an unrelated case that Defendant averred could have been used to impeach the post conviction testimony of Assistant State Attorney Penny Brill, who despite Defendant's repeated claims to the contrary, testified as his witness at the evidentiary hearing on the first motion for post conviction relief. *Id.*

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's previous refiling 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) After receiving arguments on the other two claims, 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) The State responded to the motion for leave to amend, asserting that there was no good cause for leave to amend. (PCR2. 254-65)

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 hearings 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)

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 and treated the second notice as part of the belated appeal. On appeal, Defendant argued that he should be entitled to an evidentiary hearing on the effect of the Diaz execution on the constitutionality of lethal injection, that the lower court had abused its discretion in refusing to allow the addition of the new claim raised in the version of the second motion for post conviction relief filed by McClain and that he was entitled to relief under *Ring*. On June 2, 2008, this Court affirmed the state post conviction court's denial of the second motion for post conviction relief. *Griffin v. State*, 992 So. 2d 819 (Fla. 2008). Petitioner moved for rehearing, which was denied on September 3, 2008.

On November 21, 2008, Defendant filed the instant petition, which he entitled a "Petition Seeking to Invoke This Court's All Writs Jurisdiction and/or Petition for Writ of Habeas Corpus." In this petition, Defendant seeks to file a belated petition for writ of habeas corpus, raising claims of ineffective assistance of appellate counsel. On December 5, 2008, this Court ordered the State to respond. This response follows.

ARGUMENT

I. THE REQUEST TO FILE A BELATED STATE HABEAS PETITION SHOULD BE DENIED.

Defendant contends that this Court should exercise its "All Writs" jurisdiction to grant him a belated writ of habeas corpus. In the course of the unsworn petition, Defendant appears to contend that this Court should extend the rationale behind Fla. R. Crim. P. 3.851(d)(2)(C) to allow the filing of belated habeas petitions in capital cases. However, this petition should be denied.

While Defendant suggests that he is attempting to invoke this Court's "All Writs" jurisdiction, this Court has held that the "all writs provision of section 3(b)(7) does not confer added appellate jurisdiction on this Court, and this Court's all writs power cannot be used as an independent basis of jurisdiction as petitioner is hereby seeking to use it." *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1305 (Fla. 1980). Rather, it operates as an aid to the Court in exercising its "ultimate jurisdiction." *Williams v. State*, 913 So. 2d 541, 543 (Fla. 2005). Thus, to the extent that Defendant is attempting to invoke the all writs provision as an independent basis for jurisdiction, the petition should be dismissed.

To the extent that Defendant is seeking a writ of habeas corpus, the petition should still be dismissed because it is untimely. Pursuant to Fla. R. App. P. 9.142(a)(5), "In death

penalty cases, all petitions for extraordinary relief over which the supreme court has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for relief under Florida Rule of Criminal Procedure 3.851."[3] Here, Defendant filed the initial version of initial brief in the post conviction appeal on February 21, 2002.[4] As such, any petition for writ of habeas corpus was due at that time. However, Defendant did not submit the instant petition until November 21, 2008, almost seven years later. As such, the petition is untimely and should be dismissed as such.

In an attempt to avoid the fact that the petition is untimely, Defendant asks this Court to incorporate an exception to the time period for filing a state habeas petition similar to the exception to the time period for filing a motion for post conviction relief that this Court recognized in *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999). However, this Court has only recognized the use of the *Steele* exception with regard to the late filing of pleadings without which there would be no case before a court. *Williams v. State*, 777 So. 2d 947 (Fla. 2000)(late filing of notice of post

[3] Defendant cites to Fla. R. Crim. P. 3.851(d)(3) as establishing this requirement. However, as this Court acknowledged in *Mann v. Moore*, 794 So. 2d 595, 598 (Fla. 2001), the proceedings in this Court are governed by the Appellate Rules; not the Rules of Criminal Procedure.

[4] This Court struck this version of the brief because it was oversized and had footnotes in an incorrect format. An amended

conviction appeal); *Steele v.. Kehoe*, 747 So. 2d 931 (Fla. 1999)(late filing of post conviction motion). This Court has refused to expand the exception beyond those circumstances. *Brown v. State*, 894 So. 2d 137, 153 n.11 (Fla. 2004).

With regard to state habeas petitions in capital cases, they are required by rule to be filed in conjunction with post conviction appeals and are considered concurrently with those appeals. Fla. R. App. P. 9.142(a)(5). As such, there is a case before this Court at the time the petitions are due. As a result, this Court had treated claims of ineffective assistance of appellate counsel as state habeas proceedings even when they were raised improperly in post conviction appeals. *Connor v. State*, 979 So. 2d 852, 868 n.10 (Fla. 2007). In fact, this Court did so in Defendant's own post conviction appeal. *Griffin*, 866 So. 2d at 21. Moreover, this Court has made inquiries regarding the lack of a state habeas petition when one was not timely filed. (App. G) As such, this situation is more similar to the situation in *Brown* than the situation in *Steele*. Thus, the *Steele* exemption should not be expanded to cover belated state habeas petitions in capital case. The petition should be denied as untimely.

Even if this Court were to expand the *Steele* exception to the timely filing of state habeas petitions in death cases, Defendant would still be entitled to no relief. In *Steele*, this Court

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initial brief was filed on March 25, 2002.

amended Fla. R. Crim. P. 3.850 to allow an exception to the time limit if a defendant alleged that he retained counsel to file a motion for post conviction relief on a timely basis and retained counsel failed to do so. *Steele*, 747 So. 2d at 934. Under Fla. R. Crim. P. 3.850, the entire content of the motion must be made under oath. Fla. R. Crim. P. 3.850(c). Similarly, pursuant to Fla. R. App. P. 9.141(c)(4), a defendant in a noncapital case seeking to avail himself of an exception to the time limitations for filing a state habeas petition is also required to swear to the facts supporting the exception.

Here, Defendant's petition is not sworn. Moreover, the petition does not even contain unsworn allegation that Defendant who had discharged his appointed post conviction counsel and retained his own counsel before his state habeas petition was due, actually retained that counsel for the purpose of filing a state habeas petition. Instead, in the introduction to the petition, Defendant merely cites the provision of Fla. R. Crim. P. 3.851 regarding the time limitations for filing a state habeas petition, states that this provision "obliged" counsel to file a state habeas petition and suggests that there was confusion over who was representing Defendant. Petition at 1-2. The petition then makes a conclusory assertion that the failure to file a timely state habeas petition was due to neglect. Petition at 3. In the statement of case and facts, Defendant then alleges that counsel

promised to challenge Mr. Kassier's effectiveness on direct appeal. Petition at 37-38, 39. Given the unsworn and conclusory nature of the allegations, the petition should be deemed untimely and denied.

Moreover, the record appears to refute even these conclusory allegations. In responding to the State's motion to dismiss the appeal in FSC Case No. SC04-1522, Defendant explained that the reason why Defendant's original post conviction counsel had filed a successive motion for post conviction relief on Defendant's behalf because the original post conviction counsel was "[a]ware that Michael Giordano was privately retained as counsel solely for the purpose of appeal." (App. F) Moreover, it should be remembered that Mr. Giordano did raise a claim of ineffective assistance of appellate counsel in his brief in the post conviction appeal. Amended Initial Brief of Appellant, SC01-457, at 93. Further, Mr. Giordano's motion for substitution of counsel further indicates that Mr. Giordano was retained merely to handle the post conviction appeal, in that Mr. Giordano stated that he had explained to Roger Maas that "he had been asked by [Defendant] to handle the appeal from the denial of [Defendant's] Rule 3.850 motion. (App. D at 1-2) Thus, the record shows that the reason a state habeas petition was not timely filed was not neglect. Instead, the reason is that Defendant chose to retain an attorney solely for the purpose of prosecuting a post conviction appeal. Under these circumstances, leave to file a belated state habeas petition should be denied.

See Steele v. State, 809 So. 2d 8 (Fla. 5th DCA 2001)(where documents showed that counsel was not retained to handle post conviction motion, leave to file belated motion properly denied).

Even if Defendant's petition was sworn, did sufficiently allege that he had retained counsel to file a state habeas petition and was not refuted by the record, Defendant would still not be entitled to a belated state habeas petition, as the request for a belated petition is itself untimely. This Court has consistently required that exceptions to the timeliness of proceeding themselves must be timely asserted. As such, a defendant seeking to avail himself of the exception to the time period for filing a motion for post conviction relief based on newly discovered evidence under Fla. R. Crim. P. 3.851(d)(2)(A) must file the untimely motion within one year of when the new evidence could have been discovered through an exercise of due diligence. *Jimenez v. State*, 33 Fla. L. Weekly S805 (Fla. Jun. 19, 2008); *Swafford v. State*, 828 So. 2d 966 (Fla. 2002); *Mills v. State*, 684 So. 2d 801, 804-05 & n.7 (Fla. 1996); *Bolender v. State*, 658 So. 2d 82 (Fla. 1995). Similarly, a defendant seeking to avail himself of the exception to the time period for filing a motion for post conviction relief based on a fundamental, retroactive change in law under Fla. R. Crim. P. 3.851(d)(2)(B) must file the untimely motion within the applicable time period for filing an initial motion for post conviction relief after the change is determined to be retroactive. *See Dixon v.*

State, 730 So. 2d 265 (Fla. 1999). This is true despite the fact that neither of these exceptions expressly includes these time limits. Moreover, noncapital defendants seeking belated review are expressly required to do so on a timely basis. Fla. R. App. P. 9.141(c)(4). In fact, this Court has gone so far as to apply a presumption of laches to noncapital defendants who delay in bringing their requests for state habeas review. *McCray v. State*, 699 So. 2d 1366 (Fla. 1997). Given this body of law, a defendant seeking any form of belated post conviction review based on the fact that his counsel allegedly failed to file a pleading due to neglect should be required to raise this claim within the applicable limitations period for seeking timely review of when the defendant knew or should have known through an exercise of due diligence that counsel neglected to file the pleading. As such, for a capital defendant, a one year period from when the defendant knew or should have known that the pleading was not filed should apply.

Here, since the time the attorney whom Defendant retained to represent him in the post conviction appeal failed to file a timely state habeas petition, more than six years have passed and Defendant has been represented by two more attorneys in that time period. Defendant's present counsel was retained and appeared on his behalf for the first time in March 2005, more than three years ago. At the time that Defendant's present counsel appeared, he

attempted to file a new version of Defendant's successive motion for post conviction relief. Pursuant to Fla. R. Crim. P. 3.851(e)(2)(C), Defendant was required to include in that motion "the disposition of all previous claims raised in postconviction proceedings." Thus, in drafting that pleading, a diligent attorney and defendant should have realized that no state habeas petition had been filed. Moreover, even a cursory review of the caption of this Court's opinion from the affirmance of the denial of Defendant's first motion for post conviction relief, which Defendant's present counsel referenced in the motion he attempted to file (PCR2. 107), would have shown that no state habeas was timely filed,[5] as the caption does not reference a state habeas petition or include a case number for such a case. *See Griffin v. State*, 866 So. 2d 1 (Fla. 2003). Given these circumstances, Defendant knew or should have known that a state habeas petition was not timely filed no later than March 2005. However, Defendant did not seek a belated state habeas until December 2008. Defendant's only explanation of why he did not realize that no state habeas petition was filed is to assert that Defendant's present counsel did not learn that no state habeas had been filed until he started drafting Defendant's federal habeas petition.

[5] This Court did allow some defendants whose convictions were final before January 1, 1994, more time to file state habeas petitions. *Mann v. Moore*, 794 So. 2d 595 (Fla. 2001). However, this exception has no applicability to Defendant, as this Court did not even issue its opinion on direct appeal until July 7, 1994. *Griffin v. State*,

However, as this Court recently emphasized in *Jimenez v. State*, 33 Fla. L. Weekly S805 (Fla. Jun. 19, 2008), the issue is not when counsel actually discovered the information but when he should have done so through an exercise of due diligence. As such, the request for belated review should be deemed time barred and dismissed at such.

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639 So. 2d 966 (Fla. 1994).

II. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ARE PROCEDURALLY BARRED AND MERITLESSError! Bookmark not defined..

Even if Defendant could show that he was entitled to a belated state habeas petition, Defendant would still be entitled to no relief. All of the claims of ineffective assistance of appellate counsel are procedurally barred and meritless.

The standard for evaluating claims of ineffective assistance of appellate counsel is the same as the standard for determining whether trial counsel was ineffective. *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994). In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court announced the standard under which claims of ineffective assistance must be evaluated. A petitioner must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.

Moreover, appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved. *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995). Nor may counsel be considered ineffective for failing to raise an issue that was without merit. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998).

A. THE CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR THE MANNER IN WHICH HE RAISED AN ISSUE REGARDING THE EXCLUSION OF HIS SELF-SERVING HEARSAY STATEMENTS IS PROCEDURALLY BARRED AND MERITLESS.

Defendant first appears to contend that his appellate counsel

was ineffective for the manner in which he raised an issue regarding the exclusion of testimony regarding self-serving statements he had made. However, this claim should be denied because it is procedurally barred and meritless.

As Defendant acknowledges, counsel did raise an issue regarding the exclusion of the testimony of defense witnesses concerning Defendant's self-serving statements that he was sorry for committing the murder. Initial Brief of Appellant, FSC Case No. 77,843, at 28-29. As part of that argument, Defendant asserted that the trial court had abused its discretion in excluding the testimony because the rules of evidence did not strictly apply at the penalty phase. *Id.* He cited to *Hodges v. State*, 595 So. 2d 929, 933 (Fla. 1992), which noted the potential admissibility of hearsay at the penalty phase and cited to *Chandler v. State*, 534 So. 2d 701, 702-03 (Fla. 1988), in which this Court conducted an extensive analysis of §921.141(1), Fla. Stat. and its impact on the admissibility of hearsay at the penalty phase. He also argued that it was unconstitutional for the State to exclude evidence that was relevant to mitigation under *Lockett v. Ohio*, 438 U.S. 586 (1973). In rejecting this issue, this Court acknowledged the right to present mitigation but determined that the right to present hearsay was not unlimited and found that the trial court had not abused its discretion in excluding the evidence. *Griffin v. State*, 639 So. 2d 966, 970 (Fla. 1994).

This Court has repeatedly held that claims that attempt to relitigate issues that were raised and rejected on direct appeal in the guise of claims of ineffective assistance of counsel are procedurally barred. *Green v. State*, 975 So. 2d 1090, 1105-06 (Fla. 2008); *Franqui v. State*, 965 So. 2d 22, 33 (Fla. 2007); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990). This Court has held that this bar applies even where the defendant argues that counsel should have raised different grounds or legal arguments in support of the issue. *State v. Riechmann*, 777 So. 2d 342, 365 (Fla. 2000); *Sireci v. State*, 773 So. 2d 34, 40 n.10 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 657 n.6 (Fla. 2000); *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina*, 573 So. 2d at 295. As seen above, Defendant's appellate counsel did raise this issue on appeal. As such, this claim is barred and should be denied as such.

Even if the claim was not barred, Defendant would still be entitled to no relief. In the petition, Defendant seems to suggest that the reason why counsel was ineffective is that he did not cite to *Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989), and *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993), in support of the argument that hearsay is admissible at the penalty phase and to *Green v. Georgia*, 442 U.S. 95 (1979), in support of the argument that the exclusion of the evidence violated *Lockett* and did not contend that because the right of confrontation does not apply to the State, the ability

of a defendant to present hearsay at a penalty phase should not be constrained. However, none of these assertions show that this Court was not correct in holding that the trial court did not abuse its discretion.

While Defendant seems to suggest that *Rhodes* and *Garcia* permit the admission of all hearsay so long as a defendant's right to confrontation is not violated, this is not true. In *Rhodes*, this Court directly stated that the admissibility of hearsay was depended on whether the opponent had the fair opportunity to rebut the evidence. *Rhodes*, 547 So. 2d at 1204. In fact, this Court held that while the admission of some of the hearsay evidence in *Rhodes* was proper, the trial court abused its discretion in admitting other hearsay evidence. *Id.* at 1204-05. Similarly, in *Garcia*, this Court did not hold that hearsay was automatically admissible. Instead, this Court merely noted that "the hearsay rule was not an automatic bar" to the admission of the evidence. *Garcia*, 622 So. 2d at 1329. Given that neither of these cases support the argument that Defendant appears to be making, neither of these cases show a reasonable probability that this Court would have changed its ruling that the trial court did not abuse its discretion in excluding the self-serving hearsay statements that Defendant sought to admit here with the State having a fair opportunity to rebut them. *Griffin*, 639 So. 2d at 970; *see also Johnson v. State*, 608 So. 2d 4, 10 (Fla. 1992)(trial court did not

abuse its discretion in refusing to allow the defendant to admit a self-serving statement of remorse without subjecting himself to cross examination). As such, Defendant's claim that his counsel was ineffective for failing to use these cases as additional support is without merit. *Kokal*, 718 So. 2d at 143.

Defendant's complaint about the failure to rely on *Green* is equally meritless. While Defendant suggests that *Green* held that the exclusion of all hearsay shows a *Lockett* violation, this is not true. Instead, the Court held that the exclusion of the testimony in *Green* caused a due process violation under *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Under *Chambers*, a state is required to relax its evidentiary rules only where the excluded evidence bore sufficient guarantees of trustworthiness and was highly relevant to the defense. *Id.* at 302-03. In fact, in finding that the evidence was improperly excluded in *Green*, the Court noted the high relevancy to the defense and the evidence of trustworthiness of the evidence before stating that, under "**these unique circumstances**, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'" *Id.* at 97 (quoting *Chambers*, 410 U.S. at 302)(emphasis added). Thus, contrary to Defendant's suggestion, *Green* does not show that the exclusion of any hearsay is automatically violative of *Lockett*.

Moreover, here, *Green* had no applicability. The statements that Defendant sought to admit were his own self-serving statements

to his investigator and supporters asserting that he was sorry made while he was awaiting trial. (R. 579-80, 584-85, 606, 3706-11, 3771) As such, there were no guarantees of trustworthiness inherent in these statements. Moreover, as this Court noted in rejecting this issue, the evidence was not highly relevant, as Defendant was permitted to present evidence of remorse. *Id.* at 971; (R. 3717-19, 3725) In fact, the claim that exclusion of similar hearsay violates *Green* has been rejected by the federal appellate courts. *Alderman v. Zant*, 22 F.3d 1541, 1556-57 (11th Cir. 1994); *see also McGinnis v. Johnson*, 181 F.3d 686, 692-93 (5th Cir. 1999); *Edwards v. Scroggy*, 849 F.2d 204, 211-12 (5th Cir. 1988). Given these circumstance, *Green* is inapplicable to this matter. As such, the claim that counsel was ineffective for failing to claim that it was is also without merit. *Kokal*, 718 So. 2d at 143. The claim should be denied.

While Defendant asserts that counsel should have argued that he should have the unlimited ability to present hearsay, this Court has repeatedly rejected the argument that a defendant has an unlimited right to present hearsay at a penalty phase. *Frances v. State*, 970 So. 2d 806, 814 (Fla. 2007); *Blackwood v. State*, 777 So. 2d 399, 411-12 (Fla. 2000); *Williamson v. State*, 961 So. 2d 229, 238 (Fla. 2007); *Parker v. State*, 873 So. 2d 270, 282-83 (Fla. 2004); *Hitchcock v. State*, 578 So. 2d 685, 690 (Fla. 1990). In fact, this Court directly stated that "[There is no merit] to [the]

claim that the state must abide by the rules but the defendants need not do so," in rejecting the issue when it was raised on direct appeal. *Griffin*, 639 So. 2d at 970 (quoting *Hitchcock*, 578 So. 2d at 690). As such, Defendant's claim that he did not need to abide by the rules is without merit. This is particularly true, as the United States Supreme Court has rejected the notion that a defendant has a right to confrontation at a penalty phase hearing. *Williams v. New York*, 337 U.S. 241, 245 (1949); *see also United States v. Grayson*, 438 U.S. 41, 45-50 (1978); *United States v. Tucker*, 404 U.S. 443, 446-47 (1972); *Williams v. Oklahoma*, 358 U.S. 576, 583-84 (1959); *Mitchell v. United States*, 526 U.S. 314, 337 (1999)(Scalia, J., dissenting). Since the argument is not meritorious, Defendant's claim that counsel was ineffective for failing to make it is also meritless. *Kokal*, 718 So. 2d at 143. The claim should be denied.

B. THE CLAIM CONCERNING THE USE OF DEFENDANT'S STATEMENT TO SUPPORT THE ISSUE ABOUT THE EXCLUSION OF HEARSAY IS PROCEDURALLY BARRED AND MERITLESS.

Defendant next asserts that his appellate counsel was ineffective for failing to argue that his statement at the *Spencer* hearing supported his claim that the trial court erred in excluding the self-serving hearsay. However, this claim should be denied because it is procedurally barred and meritless.

As noted in response to the last claim, counsel did raise an issue regarding the exclusion of hearsay statements on direct

appeal. Initial Brief of Appellant, FSC Case No. 77,843, at 28-29. In addition to the arguments outlined in response to the last claim, counsel also argued that the statement satisfied the state of mind hearsay exception. *Id.* at 29. As noted in response to the last claim, the attempt to relitigate a claim that was raised and rejected on direct appeal in the guise of an ineffective assistance claim results in the claim being procedurally barred, even where the claim alleges that counsel should have advanced additional grounds or arguments in support of the issue. *Green*, 975 So. 2d at 1105-06; *Franqui*, 965 So. 2d at 33; *Riechmann*, 777 So. 2d at 365; *Sireci*, 773 So. 2d at 40 n.10; *Thompson*, 759 So. 2d at 657 n.6; *Harvey*, 656 So. 2d at 1256; *Medina*, 573 So. 2d at 295. As such, this claim is barred and should be rejected as such.

Even if the claim was not barred, Defendant would still be entitled to no relief. Defendant does not explain how relying on Defendant's statement at the *Spencer* hearing would have furthered any issue about the exclusion of hearsay testimony from other individuals about other statements. This is particularly true, as when the issue about the exclusion of the hearsay statements first arose, the State agreed that Defendant could testify about his alleged remorse if he wanted to do so. (R. 3708) In fact, the record does not reflect any ruling by the trial court that precluded the jury from hearing Defendant make a statement of remorse. However, it is necessary for a defendant to present the

argument that he suggests counsel was ineffective for omitting to state a facially insufficient claim of ineffective assistance of appellate counsel. *See Patton v.* State, 878 So. 2d 368, 380 (Fla. 2004); *see also Franqui v. State*, 965 So. 2d 22, 37 (Fla. 2007). As Defendant has not done so, the claim should be denied as insufficiently plead.

Moreover, since there was no adverse ruling from the trial court that prevented Defendant from expressing his remorse to the jury personally, there was no preserved issue regarding the fact that the jury did not hear his statement. *Rhodes v. State*, 986 So. 2d 501, 513 (Fla. 2008)("To be preserved, the issue or legal argument must be raised and ruled on by the trial court. *See* § 924.051(1)(b); *see also* Philip J. Padovano, Florida Appellate Practice, § 8.1, at. 148 (2007 ed.) ('The aggrieved party must obtain an adverse ruling in the lower tribunal to preserve an issue for review. The appellate courts review only the decisions of lower tribunals .... Without a ruling or decision, there is nothing to review.')"). However, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue. *Groover*, 656 So. 2d at 425. The claim should be denied.

To the extent that Defendant's reference to the State's closing argument is intended to suggest that counsel should have used it to argue that the exclusion of the hearsay statements was harmful because the State's argument made a verbal expression

necessary to show remorse, this argument is without merit. The State did not suggest in closing that Defendant's claims of remorse should be rejected because there was no verbal expression of remorse. Instead, the State's comments were:

> Remorse. You know I thought up until a couple of days ago that I knew what the word remorse meant. Remorse means moral anguish arising from repentance for past misdeeds.
>
> Sorry is something different. Sorry is mental suffering because of injury or loss. No mention of repentance, no mention of moral anguish. Simply mental suffering because of a loss, and no mention of what kind of loss.
>
> This murderer may be sorry for himself and sorry for his predicament and sorry he now faces the ultimate sanction that may be imposed lawfully within this state, but I submit to you, he's not truly remorseful.
>
> Because to be remorseful, you must repent, and in order to repent you must accept responsibility for your actions. This murderer, through his witnesses, has blamed everyone but himself for taking that .357 Magnum, firing six shots, and firing those two controlled shots that killed a police officer. Everybody is to blame but this murderer.
>
> And ask yourselves, and when is the time for remorse? Is the time for remorse after you have had a chance to sit in jail for nine and a half months and consider what faces you? Or is the time for remorse right after your misdeed?
>
> What did this murderer do on April 27th that suggested to you he was remorseful for what he had done?
>
> Would a remorseful murderer try to hide, try to gain entry in someone's home, tell that person don't call the police. Would the remorseful murderer fight police dogs?
>
> Just as the killing of Officer Joseph Martin was not borne out of fear but was borne out of desperation, I submit to you that the remorse about which these witnesses spoke is not remorse at all, is not moral anguish after repenting a misdeed.
>
> It is remorse borne of desperation and of fear, perhaps, but fear that this jury will recommend, and this Court will impose the ultimate sanction.
>
> He is insincere in that. It is not remorse. And it is guided exclusively by a desire to avoid a sentence of

> death.
>
> On April 27, 1990, this murderer killed a police officer because he deemed it necessary to avoid returning to jail and losing his freedom.
>
> Your common sense should tell you, and again, the same rules apply as in the first phase. You are to bring your common sense back into that deliberation room with you.
>
> Your common sense should tell you that it would be a simple and predictable thing for that same murderer to express insincere remorse or, in fact, simply sorry for his own plight to avoid a sentence which would result in the loss of his life.

(R 3797-3800) Thus, when read in context, the State's argument was not that Defendant's evidence of remorse should be rejected because it did not include a verbal statement of remorse. Instead, the State's argument was that Defendant's claim of remorse should be rejected because Defendant did not accept responsibility for his actions.

Given the argument the State actually made, it would not have supported Defendant's argument. In fact, even the excluded hearsay statements would not have conflicted with the State's argument. According to Defendant's proffer of the excluded evidence, the statements consisted of Defendant merely telling witnesses he was sorry. (R. 579-80, 584-85, 606, 3771) However, while telling one witness that he was sorry, Defendant blamed his father for his actions. (R. 579-80, 584-85) Moreover, Defendant's own statement would also not have countered the State's argument, as Defendant blamed his family and his codefendants for his actions and claimed that he was wrongfully convicted by a corrupt system. (R. 3845-62)

Under these circumstances, citing to the closing argument would not have supported the issue about the exclusion of the statements. As such, counsel cannot be deemed ineffective for failing to make this meritless argument. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Finally, as noted above, counsel did argue on direct appeal that the statements were admissible under the state of mind hearsay exception.[6] Initial Brief, FSC Case No. 77,843, at 29. As such, he cannot be deemed ineffective for failing to raise the argument. *Strickland*. The claim should be denied.

C. THE CLAIM REGARDING CCP IS PROCEDURALLY BARRED AND MERITLESS.

Defendant next asserts that his appellate counsel was ineffective for the manner in which he raised an issue regarding the applicability of CCP. However, this claim should also be denied because it too is procedurally barred and meritless.

As Defendant concedes, counsel challenged the finding of CCP. Initial Brief of Appellant, FSC Case No. 77,843, at 33-34. Defendant argued that the evidence was insufficient to support the aggravator. *Id.* This Court rejected this argument, finding that the evidence was sufficient to support CCP. *Griffin*, 639 So. 2d at 971-72. Defendant now asserts that counsel was ineffective for

[6] As the State noted in its answer brief, this issue was not preserved because Defendant had not claimed the statements met this hearsay exception at the time of trial. Answer Brief, FSC Case No.

failing to rely on a comment that the trial court made in response to his statement as showing the evidence was insufficient to support CCP. However, once again, claims that attempt to relitigate issues that were raised and rejected on direct appeal, even based on different grounds or theories, are procedurally barred. *Green*, 975 So. 2d at 1105-06; *Franqui*, 965 So. 2d at 33; *Riechmann*, 777 So. 2d at 365; *Sireci*, 773 So. 2d at 40 n.10; *Thompson*, 759 So. 2d at 657 n.6; *Harvey*, 656 So. 2d at 1256; *Medina*, 573 So. 2d at 295. As such, this claim is barred and should be rejected as such.

Even if the claim was not barred, Defendant would still be entitled to no relief. As this Court has repeatedly stated:

> [I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt--that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997); *see also Hudson v. State*, 992 So. 2d 96, 115 (Fla. 2008); *Woodel v. State*, 985 So. 2d 524, 530 (Fla. 2008); *Cave v. State*, 727 So. 2d 227, 229 (Fla. 1998).

Here, the trial court's statement that "the jury probably didn't convict you on premeditated murder, they convicted you on felony murder" does not show that the trial court applied the wrong

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77,843, at 61 & n.11.

rule of law in applying CCP or that its findings of fact are not supported by competent, substantial evidence. This is particularly true, as the statement does not even suggest that the State's evidence was insufficient to support a premeditated murder conviction. Instead, it merely reflects the trial court's thoughts on what the jury might have done. In ruling on Defendant's motions for judgment of acquittal, the trial court indicated its only concern was whether the evidence was sufficient regarding the count of grand theft auto and that it believed there was sufficient evidence on all of the other counts, including the charges that included premeditation as an element. (R. 3238, 3319) Thus, the record reflects that the trial court did believe there was sufficient evidence to sustain a premeditated murder conviction. As such, the argument about this statement does not show that the evidence was insufficient to support CCP.

Moreover, relying on an opinion about what the jury may have done to invalidate an aggravator would be inconsistent with this Court's precedent. In *State v. Steele*, 921 So. 2d 538, 544-48 (Fla. 2005), this Court held that the use of special verdict forms in the penalty phase was a departure from the essential requirements of law. Among the reasons relied upon by this Court for doing so was a fear that having jury findings regarding which aggravators a jury found might unduly influence a trial court's sentencing decision, which was required to be independent. *Id.* at

546. Similarly, relying on a statement about how a trial court believed a jury reached a verdict to invalidate a finding of an aggravator would also interfere with the trial court's duty to independently consider the evidence, particularly where the record reflects that the same trial judge believed the evidence was sufficient to sustain an alternative finding. As such, the argument is without merit. Since the argument is without merit, appellate counsel cannot be deemed ineffective for failing to make it. *Kokal*, 718 So. 2d at 143. The claim should be denied.

D. THE CLAIM REGARDING THE MOTION FOR MISTRIAL IS ALSO PROCEDURALLY BARRED AND MERITLESS.

Defendant finally asserts that his appellate counsel was ineffective for failing to raise an issue regarding the denial of a motion for mistrial based on an off-the-record comment by a prosecutor to his codefendant's counsel about the State's position regarding a jury instruction on a special jury instruction the codefendant was raising. Once again, the claim should be denied because it is procedurally barred and meritless.

Toward the end of the guilt phase, codefendant Velez moved for a mistrial based on a comment that was allegedly made to him off the record. (R. 3098-99) According to Velez, he had submitted proposed jury instructions on the defense of withdrawal to the State in advance of trial and asked the State to inform him of any authority on which it would be relying to counter the requested instruction. (R. 3098) According to Velez, one of the prosecutors

stated that the State did intend to object to the requested instruction but would not be presenting authority for this argument. (R. 3099) Velez stated that the prosecutor stated that she was doing so because the State "would rather risk a reversal than risk an acquittal." (R. 3099) Velez argued that this statement summed up the State's strategy, amounted to prosecutorial misconduct and merited a dismissal or mistrial. *Id.*

Petitioner joined in the motion and averred that it supported a motion to dismiss based on the admission of evidence concerning his commission of uncharged crimes. (R. 3099-3100) The State responded by pointing out that the prosecutor who was being accused of misconduct was not present and that regardless of what decision the trial court made on the instruction, the facts did not support the defense. (R. 3100-01) The trial court ruled that it made the decisions regarding the instructions and that the assertions regarding trial strategy did not provide a basis for a motion for mistrial. (R. 3101-02)

During the charge conference, the trial court commented that he was surprised by the State's proposed special jury instruction. (R.3320) When the prosecutor whose alleged statement formed the basis of Velez's motion for mistrial indicated that she wanted to respond to the prior accusation, the trial court indicated that it did not want a response. (R. 3320)

When the issue of the withdrawal instruction was discussed,

Velez insisted that the language he proposed should be used because it was drawn from one of this Court's case. (R. 3343-44) The State responded that while there was language in the opinion that supported Velez's request, a review of the facts of the case, the sources relied upon in the opinion and the underlying law of felony murder showed that the language upon which Velez was relying was not a accurate statement of the law.[7] (R. 3344-52) The trial court rejected the State's argument. (R. 3354)

On direct appeal, counsel raised an issue regarding the admission of the evidence concerning Defendant's commission of uncharged crimes. Initial Brief of Appellant, FSC Case No. 77,843, at 15-22) In support of this issue, counsel argued that the State had an obligation as a "minister of justice" beyond its role as an advocate, cited to the incident regarding the statement that Velez's counsel claimed a prosecutor made, averred that the statement showed the admission of the other crimes evidence was a violation of due process and urged this Court to find the alleged error in the admission of the other crimes evidence harmful to reinforce the prosecutor's duty to do justice. *Id.* This Court rejected this issue, finding not only was most of the evidence properly admitted but also that the State had been overly cautious

[7] On habeas review, the Eleventh Circuit quoted the text of the jury instruction that was actually requested in the case on which Velez relied, which was entirely consistent with the State's argument regarding how the instruction should have been worded. *Smith v. Dugger*, 840 F.2d 787, 792 (11th Cir. 1988).

in complying with the requirements for the admission of *Williams* Rule evidence regarding some of this evidence instead of overly zealous. *Griffin*, 639 So. 2d at 968-70.

Given these circumstances, Defendant is once again claiming that counsel was ineffective for the manner in which he presented an issue that was raised and rejected on direct appeal. Once again, the claim is procedurally barred as a result. *Green*, 975 So. 2d at 1105-06; *Franqui*, 965 So. 2d at 33; *Riechmann*, 777 So. 2d at 365; *Sireci*, 773 So. 2d at 40 n.10; *Thompson*, 759 So. 2d at 657 n.6; *Harvey*, 656 So. 2d at 1256; *Medina*, 573 So. 2d at 295. As such, the claim should be denied.

Even if the claim was not barred, Defendant would still be entitled to no relief. "A motion for mistrial is addressed to the sound discretion of the trial judge and '. . . should be done only in cases of absolute necessity.'" *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978). In order for an absolute necessity to arise, the error must be "so prejudicial as to vitiate the entire trial." *Dessaure v. State*, 891 So. 2d 455, 464-65 (Fla. 2004).

Here, Defendant bases his argument regarding the denial of the motion for mistrial on an off-the-record statement a prosecutor allegedly made to his codefendant's counsel about the State position regarding an issue that was not even relevant to Defendant. As such, he has not shown that there was an error so

prejudicial as to vitiate the fairness of his trial. As such, his claim that the denial of the motion for mistrial was an abuse of discretion is without merit. As such, appellate counsel cannot be deemed ineffective for failing to raise that claim. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Defendant's reliance on *Berger v. United States*, 295 U.S. 78 (1935). There, the Court did not reverse because a prosecutor allegedly expressed a greater fear of an acquittal than a reversal. Instead, the Court reversed there because the prosecutor actually asked improper questions and made improper comments to the jury. *Id.* at 84-89. In fact, the Court has subsequently made clear that without some actual improper conduct in the proceedings, a prosecutor's subjective intentions are irrelevant because "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson*, 467 U.S. 504, 511 (1984). As such, this issue is meritless, and appellate counsel was not ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143. The claim should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

BILL MCCOLLUM
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Martin McClain, 141 N.E. 30th Street, Wilton Manors, Florida 33334, this ____ day of December, 2008.

SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

SANDRA S. JAGGARD
Assistant Attorney General