IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC008-658

BYRON BRYANT

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
Attorney General
Tallahassee, FL

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF CITATIONS

FEDERAL CASES

STATE CASES

PRELIMINARY STATEMENT

Appellant, Byron Bryant, Defendant below, will be referred to as "Bryant". Appellee, State of Florida, will be referred to as "State". Reference to the appellate records will be as follows:

Trial record: "TR";
Original Postconviction record: "1PC-R";
Original Postconviction transcripts: "1PC-T"
Successive Postconviction Record: "2PCR"
Supplemental records: "S" before the record supplemented;
Initial Brief: IB.

References will be followed by volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On February 6, 1992, Bryant was indicted for Leonard Andre's murder and for armed robbery with a firearm. Upon his 1993 trial, Bryant was convicted and sentenced to death, however, this Court reversed because the trial judge was absent during a read-back of testimony without a valid waiver. Bryant v. State, 656 So.2d 426, 429 (Fla. 1995).

Retrial commenced on February 9, 1998, and on February 13, 1998, the jury convicted Bryant of armed robbery and first-degree murder (TR.23 62-63). After waiving the jury, the trial court took penalty phase testimony on April 14, 1998 and September 10, 1998 (TR.30 1055, 1065-1220, 1247-1312). On February 5, 1999, Bryant was sentenced to death (TR.31 1332-40).

The Florida Supreme Court found on direct appeal:

... On December 16, 1991, at approximately 8 p.m., Andre took the receipts of the day to the back of his store. Shortly thereafter, two men came into the store, one going to the back .... At gunpoint, one of the men ordered Andre's wife to open the cash register and demanded money, whereupon she took money from the cash register and gave it to one of the intruders. She then heard gunshots in the back of the store, and the men ran out. She found her husband in the back of the store lying on the floor with blood all around him. The autopsy determined that Andre had been shot three times at close range.

Police developed Bryant as a suspect only after several of his acquaintances contacted the police about his involvement in the murder. Subsequently, Bryant gave police a taped statement in which he admitted to killing Andre during a robbery attempt. In his statement to police, Bryant explained that he was with three other men on the night of the incident and was advised by one of them about the location of Andre's Market and that there was money in the store. Bryant went into the store and walked towards the back ... when Andre turned his back, Bryant pulled out his gun. Andre began to struggle and wrestle with Bryant over the gun, until Bryant got control of the gun and shot Andre. When Andre continued to fight, Bryant shot him again. After shooting Andre the third time, Bryant ran out of the store and left the scene. Bryant admitted in his statement that he shot Andre three times with a .357 magnum and admitted that he had a ski mask in his possession. Bryant told the detective that although he did not wear the ski mask, he dropped it when he ran from the store. During the investigation, a ski mask was found in the alleyway near the market.

After returning home from the scene at Andre's Market, Bryant asked his girlfriend to dispose of the gun he had used in the incident. ... At trial, however, Bryant denied any involvement in the robbery or killing, claiming his statement given to police was the result of police coercion.

A jury found Bryant guilty as charged. After

> Bryant waived his right to a jury for sentencing, the trial judge imposed the death penalty for the first-degree murder of Leonard Andre and life in prison for the armed robbery. The court found three aggravating circumstances applied to Bryant: he previously had been convicted of a capital or violent felony; the murder was committed during a robbery; and the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.... The court found no statutory mitigating circumstances and only one nonstatutory mitigator, remorse, but gave it very little weight. The court concluded that the aggravating circumstances outweighed the mitigating circumstances, and sentenced Bryant to death by electrocution for the first-degree murder and life imprisonment for the armed robbery.

Bryant v. State, 785 So.2d 422, 426-27 (Fla. 2001).

On direct appeal, Bryant raised seven issues.[1] Each, in turn, was rejected by this Court. On April 5, 2001, the mandate issued. Similarly, on November 13, 2001, Bryant's United States Supreme Court petition for writ of certiorari[2] was denied.

[1] (1) The lower tribunal erred in requiring the Defendant to be shackled before the jury; (2) Electrocution is cruel and unusual punishment; (3) The trial court erred in failing to properly evaluate the non-statutory mitigating circumstances of the Defendant's lack of education; (4) The lower tribunal erred in failing to [] evaluate the non-statutory mitigator that the Defendant lacked a positive role model; (5) The lower tribunal erred in determining that the Defendant was competent to stand trial; (6) The lower tribunal failed to exercise its discretion in evaluating the non-statutory mitigating factor of Defendant's neurological impairment; and (7) The death penalty is not proportionally warranted in this case.

[2] Bryant asked: Whether the analysis employed by the Florida Supreme Court in permitting Bryant to appear shackled before the jury at the guilt phase of his trial violated his right to a fair trial before an impartial jury, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

Bryant v. Florida, 121 S.Ct. 557 (2001). That same day, Bryant filed a *pro se* motion in which he requested this Court to recall its mandate and order a new appeal because he had the same counsel at trial and on appeal. The motion was stricken.

Capital Collateral Regional Counsel South ("CCRC"), on or about October 30, 2001, moved to withdraw from Bryant's case due to "caseload conflict." During the November 14, 2001 hearing, the trial court heard argument on the motion. By the December 6, 2001 order, CCRC was permitted to withdraw, and Gordon Richstone was appointed as Registry Counsel. On January 23, 2002, Mr. Richstone was permitted to withdraw, and on January 29, 2002, Jo Ann Kotzen was appointed to represent Bryant. She filed her Notice of Appearance on February 10, 2002. During the May 2, 2002 status hearing, the trial court inquired whether everything was in order on the case and how the matter was progressing. Ms. Kotzen responded:

> Yes, I am. I've corresponded with my client several times and I've received some correspondence from Mr. Bryant. I've met with Mr. Dubiner who was the trial attorney and he has given me all the transcripts and the records that he has in his possession.
>
> I'm also making plans to visit Mr. Bryant sometime in June and July. That's what's going on with the case right now.

(SPCR.1 20-21).

During the July 25, 2002 status, Ms. Kotzen reported:

> I did visit Mr. Bryant up in Raiford this week. We did discuss this case. I talked to Mr. Zacks (Assistant State Attorney) yesterday regarding public records, all the requirements from the State Attorney's Office, as well as documents sent to Tallahassee. There is a central depository. I spoke to the woman in charge and they are going to send me a CD-ROM as well as on paper; it's going to take a couple of weeks. That's the status of this case.

(SPCR.1 27-28). Ms. Kotzen noted resolution of Bryant's prior dispute with her stating: "No, he was appreciative of me traveling up there. He was a little testy before. He's a lot happier with me. We have a very good working relationship." (SPCR.1 28).

On November 4, 2002, Ms. Kotzen explained in open court that she had talked with Bryant on November 1, 2002 and he indicated he was unhappy with her representation. Ms. Kotzen reported that the postconviction motion was due November 12, 2002 and that she had forwarded everything to Bryant, but he was refusing to sign the motion and wanted her to withdraw (SPCR.35-36). She informed the trial judge, Judge Mounts, that she had prepared a motion to withdraw and a motion to the Florida Supreme Court for a 30-day extension of time to file the postconviction relief pleading to which the State had no objection to the request for extension. (SPCR.1 36). Ms Kotzen advised that Bryant had asked her to withdraw due to her involvement in a case where Judge Mounts was a witness for another judge. However, after discussing the matter with

Bryant, he withdrew his request to have her withdraw (SPCR.1 44). In order to resolve this issue quickly, Judge Mounts set the matter for the next day and permitted Bryant to appear by telephone. (SPCR.1 47).

During the November 5, 2001 hearing, with Bryant on the telephone, Judge Mounts reiterated that he had found Bryant to be "a competent, intelligent and articulate person" and was reassured by Bryant that he understood everything that had progressed so far (SPCR.1 52-54, 59). Bryant was told, and understood, that his postconviction motion, absent the granting of an extension by the Florida Supreme Court, would have to be filed by November 12th. (SPCR.1 60-61). There were further discussions regarding Bryant's complaints and inquiries, however, the hearing ended with the understanding that Bryant would be provided the documents and motion, and the filing of the motion would depend upon the Florida Supreme Court's decision on the extension of time. (SPCR.1 78-79).

When court reconvened on November 12, 2002, Bryant again appeared by telephone, and advised he was awaiting the notary so he could sign the motion (SPCR. 89, 92-94). On November 13, 2002, this Court granted the extension of time, giving Bryant until December 13, 2002 to file his motion. Bryant v. State, 901 So.2d 810, 817 (Fla. 2005). Ms. Kotzen filed Bryant's verified motion on November 20, 2002, and such was accepted as timely.

After litigating procedural/jurisdictional defenses and deficiencies, Bryant was permitted to file an amended motion to which the State responded. Id. 901 So.2d at 817.[3] In addition to the jurisdictional defenses, the State argued for a summary denial as the claims[4] were pled insufficiently, were procedurally

[3] During the postconviction litigation in the trial court, the State sought to have Bryant's motion stricken as insufficiently pled and for non-compliance with Florida Rule of Criminal Procedure 3.851. Judge Mounts' order striking the motion was rendered December 30, 2002 following which the case was reassigned to a successor judge, Judge Brown, due to Judge Mount's retirement. On January 16, 2003, Bryant sought to amend or supplement his initial postconviction motion. Over the State's objection, on February 4, 2003, Judge Wennet, handling the case for Judge Brown, granted Bryant leave to amend. On March 4, 2003, Bryant served his Amended Postconviction Motion, and subsequently, the State responded. When the State renewed its objection to the propriety of the filing of the amended motion without seeking additional time from this Court, Judge Brown ruled in the alternative, that the court was without jurisdiction, but if there was jurisdiction, the claims were in part legally insufficient, procedurally barred, or meritless. (PCR.5 785-851). This Court determined that the trial court had jurisdiction to grant additional time to amend an earlier filed postconviction motion without having to strike the motion and have the defendant seek additional time from the appellate court. Bryant v. State, 901 So.2d 810, 817-19 (Fla. 2005).

[4] In his initial rule 3.851 motion, Bryant raised the following: (1) trial and penalty phase counsel were ineffective in failing: (a) to prevent Bryant's shackling and not preserving the issue for appeal; (b) to suppress Bryant's confession; (c) to explain Bryant's right to a penalty phase jury and waiving the jury; (d) to present mitigators; (e) to dispute aggravators; (f) to seek a continuance/mistrial upon discovery a ski mask had not been tested; (g) to preserve denial of suppression motion; (h) to prevent proceeding without Bryant during voir dire; (i) to obtain hand swabs before trial; (j) cumulative error; (k) to recuse Judge Mounts after suppression motion; (2) Brady v. Maryland, 373 U.S. 83 (1963) violation - State failed to disclose favorable evidence in the form of (a) testing of swabs from victim's hands and (b) a report showing "no match" with

barred, were refuted from the record and/or were meritless. The trial court agreed with the State regarding its jurisdictional defense, but ruled in the alternative that if the motion were before it properly, the claims were in part legally insufficient, procedurally barred, or meritless. On appeal, this Court rejected the State's jurisdictional argument, but found relief was denied properly based on the alternate ruling, and affirmed. Bryant, 910 So.2d at 815, 830. Likewise, Bryant's petition for habeas corpus was denied. Bryant, 910 So.2d at 830.

Following denial of state collateral relief, Ms. Kotzen withdrew from the case and Capital Collateral Regional Counsel – South ("CCRC") was appointed and on December 27, 2005, entered an appearance for the federal habeas litigation. To date, Bryant has not filed a federal habeas corpus petition. However, on September 13, 2007, Bryant filed a successive postconviction motion raising a non-cognizable claim of ineffective assistance of postconviction counsel and a challenge to the constitutionality of execution by lethal injection based upon the events surrounding Angel Diaz's December 13, 2006 execution. (2PCR.1 1-46).

The State, responded on October 1, 2007, asserting that the

---

respect to ski cap; (3 and 4) Bryant's confession was coerced and obtained as a result of an unlawful arrest; (5) death sentence is unconstitutional under Ring v. Arizona, 122 S.Ct. 2428 (2002); and (6) proportionality.

claim of ineffective assistance of postconviction counsel was not cognizable and that the constitutional challenge was without merit. (2PCR.1 48-114). Following the January 31, 2008 Case Management/Huff Hearing (2PCR.2 201-67 and attached transcript), the trial court denied relief. (2PCR 68-70). In its February 26, 2008 order, the trial court concluded that based upon Kokal v. State, 901 So.2d 766, 777-78 (Fla. 2005), Bryant's claim of ineffective assistance of postconviction counsel was not cognizable. (2PCR.2 69). In denying relief on the claim challenging the constitutionality of Florida's lethal injection protocols, the court relied upon the recent opinions in Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007) and Schwab v. State, 969 So.2d 318 (Fla. 2007) wherein no constitutional infirmity was found. Bryant's rehearing was denied (2PCR.2 272-76), and this appeal followed. (2PCR.2 277-78).

SUMMARY OF THE ARGUMENT

Issue I – The trial court properly denied relief upon finding the claim of ineffective assistant of postconviction counsel was not a cognizable claim.

Issue II – The trial court properly relied upon this Court's precedent in Lightbourne and Schwab to deny Bryant's successive postconviction relief motion summarily.

Issue III – Given the fact that Florida's lethal injection statute and protocols have been found to be constitutional under Lightbourne, the trial court correctly denied additional public records requests. Bryant's requests were overbroad and burdensome. He failed to show that he did not have all the records requested or that the records would lead to a judiciable issue especially in light of this Court's Lightbourne decision.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY DENIED RELIEF UPON FINDING BRYANT'S ALLEGATION OF INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL WAS NOT COGNIZABLE (restated)

Bryant presses that he is not raising the non-cognizable claim of ineffective assistance of postconviction counsel and that the trial court erred in denying him collateral relief on this ground. He claims that he is seeking relief on the ground that he was denied meaningful access to the judicial process due to registry counsel's ineffectiveness. Such is a distinction without a difference. In fact, Bryant points to five areas of collateral counsel's alleged deficiencies[5] which he claims prejudiced him. Whichever way Bryant presents his argument, the basis of the claim is that postconviction counsel rendered ineffective assistance. As such, he raised a non-cognizable claim below, and complains here that his non-cognizable claim was recognized as such, and denied. The Court has a long history of rejecting claims of ineffective assistance of postconviction counsel. The instant issue should be rejected similarly and the denial of postconviction relief affirmed.

[5] Bryant maintains collateral counsel was deficient for her: (1) failure to obtain trial attorney files; (2) failure to investigate/hire an investigator; (3) failure to make supplemental public records requests; (4) deficient pleading of false confession issue; and (5) failure to preserve Bryant's right to federal habeas review.

On appellate review, a summary denial of postconviction relief will be affirmed where the law and competent substantial evidence support the trial court's findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So.2d 380, 388 (Fla. 2003), this Court stated: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999) (citation omitted). To support a summary denial, the court "must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (quoting Anderson v. State, 627 So.2d 1170 (Fla. 1993)).

Here, the trial court heard argument of counsel and determined that Bryant was raising the non-cognizable claim of ineffective assistance of postconviction counsel, and based upon Kokal v. State, 901 So.2d 766, 777-78 (Fla. 2005), denied relief. Such is a correct decision as this Court has not recognized claims of ineffectiveness of postconviction counsel as a basis for additional review and has rejected Bryant's

interpretation of Peede v. State, 748 So.2d 253 (Fla. 1999) and Fotopooulos v. State, 741 So.2d 1135 (Fla. 1999). The only time postconviction counsel's deficiency is recognized involves instances where he was directed, but failed to file a timely motion/appeal. See Williams v. State, 777 So. 2d 947 (Fla. 2000); DeMaria v. State, 777 So. 2d 975 (Fla. 2001), Medrano v. State, 748 So. 2d 986 (Fla. 1999), and Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999).[6] Such a belated review is provided for in Fla.R.Crim.P. (d)(2)(C). The law remains that claims of ineffectiveness of postconviction counsel are not cognizable. See Kokal v. State, 901 So.2d 766, 777-78 (Fla. 2005); Brown v. State, 894 So.2d 137, 154 (Fla. 2004); Spencer v. State, 842 So.2d 52, 72 (Fla. 2003); Foster v. State, 810 So.2d 910, 917 (Fla. 2002); King v. State, 808 So.2d 1237, 1245 (Fla. 2002); Waterhouse v. State, 792 So.2d 1176, 1193 (Fla. 2001); State v. Riechmann, 777 So.2d 342, 364 n.22 (Fla. 2000); Lambrix v.

[6] To the extent Bryant relies upon Williams; DeMaria;, Medrano; and Steele to assert that there has been a change in the law with respect to claims of ineffective assistance of postconviction counsel, his reliance is misplaced. Each of these cases dealt with the limited circumstance where counsel was hired to file a postconviction motion and/or appeal, but failed to do so. Under such circumstance, this Court determined that "due process entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner." Steele, 747 So. 2d at 934 (emphasis supplied); Williams, 777 So. 2d at 948-49 (finding Lambrix does not foreclose provision permitting belated appeal where postconviction counsel has failed to timely file a notice of appeal); DeMaria, 777 So. 2d at 975 (same).

State, 698 So.2d 247, 248 (Fla. 1996). The trial court denied relief on the legal issue of whether a cognizable claim was raised, thus, did not make findings on each claim of deficiency. As such, the State will not address the factual basis of those allegations unless directed to by this Court.[7]

The United States Supreme Court in Pennsylvania v. Finley, 481 U.S. 551 (1987), refused to extend a due process requirement for ineffective assistance of collateral counsel claims to situations where a state has chosen to provide collateral counsel to indigent inmates. See Murray v. Giarratano, 492 U.S. 1 (1989). This announcement was embraced by the this Court in Lambrix, 698 So.2d at 248, where, it too, found a claim of ineffective assistance of collateral counsel did not present a valid basis for relief. As is evident from Kokal v. State, 901 So.2d 766, 777-78 (Fla. 2005) the law has not changed in this area. In fact, Kokal is dispositive of the issue before this Court and directly rejects Bryant's reliance upon Peede and Fotopoulos (IB at 16-18). This Court in Kokal determined:

> We have repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable. *See Foster v. State*, 810 So.2d 910, 917 (Fla. 2002); *King v. State*, 808 So.2d 1237, 1245 (Fla. 2002); *Waterhouse v. State*, 792 So.2d 1176, 1193

[7] However, the State would note that the record rebuts Bryan's claim that collateral counsel did not investigate his case, did not review trial counsel's files, and did not meet, correspond, and discuss the case with Bryant. (SPCR.1 20-21, 27-28, 35-36, 44, 47, 52-54, 59-61, 78-79, 89, 92-94).

(Fla. 2001); *Lambrix v. State*, 698 So.2d 247, 248 (Fla. 1996). As recognized by both this Court and the United States Supreme Court, "defendants have no constitutional right to representation in postconviction relief proceedings." *State ex rel. Butterworth v. Kenny*, 714 So.2d 404, 407 (Fla. 1998); *see also Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). As we explained in *Butterworth*: "All that is required in postconviction relief proceedings, whether capital or non-capital, is that the defendant have meaningful access to the judicial process." *Butterworth*, 714 So.2d at 408. Notably, by statute, claims of ineffective assistance of postconviction counsel are barred in federal court. *See* 28 U.S.C. § 2254(i) (2000) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). Because Kokal does not possess a constitutional right to postconviction counsel, and further, because we have refused to recognize claims of ineffective assistance of postconviction counsel, Kokal's claim regarding the ineffectiveness of counsel's representation of Kokal during his first postconviction litigation was properly summarily denied.

In his brief to this Court, *Kokal* relies upon our order in *Fotopoulos v. State*, 741 So.2d 1135 (Fla. 1999) (table report of unpublished order), and our decision in *Peede v. State*, 748 So.2d 253 (Fla. 1999), to support his claim. Kokal contends that in those cases, the death-sentenced defendants was, in effect, given a second chance on their postconviction motions due to ineffectiveness on the part of postconviction trial counsel. Kokal's argument is misplaced. Neither *Fotopoulos* nor *Peede* involved claims of ineffective assistance of postconviction counsel. Rather, in *Fotopoulos*, this Court recognized that during oral argument of the postconviction appeal, counsel raised claims not raised at the trial level. Therefore, we dismissed the appeal and allowed *Fotopoulos* to file a successive, although limited, postconviction motion. *See Fotopoulos v. State*, No. 91,227, 741 So.2d 1135 (Fla. order filed Aug. 25, 1999). The order entered in Fotopoulos did not address the issue of ineffective

> assistance of counsel during postconviction litigation. Further, although this Court, in *Peede*, did briefly address the failures of Peede's postconviction representation, *see Peede*, 748 So.2d at 256 n. 5, we remanded the cause to the trial court because that court had failed to hold an evidentiary hearing on many of Peede's claims. We did not allow Peede to file a successive postconviction motion to argue ineffective assistance of his first postconviction counsel, as Kokal has done. The cases of *Fotopoulos* and *Peede* differ significantly from the procedural posture presented here, and therefore offer Kokal no support.
>
> Kokal is requesting that this Court recognize a claim of ineffective assistance of postconviction counsel, which we have consistently been unwilling to do. Allowing Kokal's claim to survive will open this Court to a barrage of claims from all inmates, seeking successive postconviction hearings due to the purported ineffective assistance of initial postconviction counsel. Because a defendant does not have a constitutional right to counsel during postconviction proceedings, he clearly does not have a claim for ineffective postconviction representation.

Kokal, 901 So.2d at 777-78.

Relying upon Kokal and this Court's statement, "and the record of Kokal's first postconviction action which conclusively demonstrates that Kokal was provided meaningful access to the judicial process," Kokal, 901 So.2d at 776, Bryant asserts that he should have been granted an evidentiary hearing on his claim that he did not have meaningful access to the judicial process. Bryant misses the point. Both he and Kokal had full postconviction reviews and as such, had meaningful access to the courts in contrast to a defendant whose counsel failed to file a postconviction motion to an appeal from the denial of same.

Where the defendant had his initial collateral review, he is not permitted to file a successive motion raising the non-cognizable claim of ineffective assistance of collateral counsel. Given that such a claim is not recognized in Florida or under federal law, there is no need, and in fact no right, to an evidentiary determination of whether prior collateral counsel was effective in the manner in which he presented the case for judicial review. Kokal; Lambrix. It was proper to enter a summary denial on the legal issue of whether a cognizable claim has been raised, and this Court should affirm.

In his motion before the trial court, Bryant relied on Finney v. State, 831 So.2d 651, 659, n.7, 661 n.8 (Fla. 2002) in support of his assertion that there has been a shift in this Court's bar to claims of ineffectiveness of postconviction counsel. While he does not raise that point here, the State reminds this Court that the posture of Finney was more akin to Peede and Fotopoulos, where the Court determined that the review and/or remand was not for ineffectiveness of postconviction counsel, even though this Court noted the deficiency allegations raised by Finney without merit. A review of the opinion establishes clearly that this Court did not overrule Lambrix, 698 So.2d at 248 and its holding that ineffective assistance of postconviction counsel does not exist as a constitutional claim. This Court merely looked at additional evidence in the capital

case and found it wanting. Moreover, merely because an appellate court decides to look at the evidence presented on appeal and discuss it, does not establish a new right of review especially where the Court does not announce the creation of a new right and where there is a long line of cases, both before and after, which have held directly that such a claim is not cognizable. The apparent extra review Finney received does not undermine Lambrix and its progeny. See In Re Amendment to Florida Rules of Criminal Procedure-Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 820 So.2d 185, 188 (Fla. 2002) (declining to adopt judicially-created minimum standards for postconviction counsel in capital cases "because the right to capital postconviction counsel is a statutory right").

Further, postconviction counsel's failure to timely file a federal habeas petition does not provide a petitioner with a basis for relief. See Lawrence v. Florida, 127 S.Ct. 1079 (2007) (opining "Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel...But a State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay."); Helton v. Sec'y for Dep't of Corr., 259 F.3d 1310, 1313 (11th Cir. 2001) (agreeing miscalculation of

filing deadline does not establish basis for equitable tolling).[8]

ISSUE II

SUMMARY DENIAL OF THE CONSTITUTIONAL CHALLENGE TO FLORIDA'S LETHAL INJECTION STATUTE AND PROTOCOLS WAS PROPER (restated)

It is Bryant's claim that it was error for the trial court to summarily deny his constitutional challenge to Florida's

[8] The Supreme Court in Pennsylvania v. Finley, 481 U.S. 551 (1987), refused to extend a due process requirement for effective assistance of collateral counsel claims to situations where a state has chosen to provide collateral counsel to indigent inmates. See Murray v. Giarratano, 492 U.S. 1 (1989). Further, "equitable tolling" of the time for filing a federal habeas petition is "an extraordinary remedy which is typically applied sparingly." Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace, 544 U.S. at 418 "Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999). "Equitable tolling is limited to rare and exceptional circumstances, such as when the State's conduct prevents the petitioner from timely filing" his federal habeas petition. Id. 421 F.3d at 1226. Usually, there must be some affirmative misconduct by the opposing party, such as deliberate concealment. See Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (recognizing equitable tolling allowed in situations where petitioner has been induced or tricked into missing filing deadline by opposing party's misconduct); Arce v. Garcia, 400 F.3d 1340, 1349 (11th Cir. 2005) (same); Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir.2000) (noting state's misconduct necessary to establish propriety for use of equitable tolling). Moreover, "A petitioner is not entitled to equitable tolling based on a showing of either extraordinary circumstances or diligence alone; the petitioner must establish both. Arthur v. Allen, 452 F.3d 1234, 1252 (11th Cir. 2006).

lethal injection statute and protocols under the United States and Florida Constitutions. The trial court acknowledged the binding nature of Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007), cert. denied, 128 S.Ct. 2485 (2008), and Schwab v. State, 969 So.2d 318 (Fla. 2007), thus rejected the need for further evidentiary development and denied relief.[9] The trial court correctly followed Lightbourne and Schwab in summarily denying relief and that decision should be affirmed[10] as this Court has done in another successive postconviction relief case. See, Griffin v. State, SC06-1055 (Fla. June 2, 2008), (unpub. op.) (Exhibit 1).

In his motion below, Bryant argued that the events surrounding the Angel Diaz execution and subsequent

[9] When the methods of execution, electrocution, and lethal injection, were challenged previously, a single evidentiary hearing was held for the lead defendant. See Schwab v. State, 969 So.2d 318 (Fla. 2007) (affirming summary denial of relief on lethal injection claim); Griffin v. State, SC06-1055 (Fla. June 2, 2008) (same); Provenzano v. Moore, 744 So.2d 413 (Fla. 1999) (finding electrocution constitutional); Hamblen v. State, 565 So. 2d 320, 321 (Fla. 1990) (deciding claim without evidentiary hearing in spite of claim of error in prior execution of Jesse Tafero based on electrocution head-piece catching on fire); Sims v. State, 754 So.2d 657, 668 (Fla. 2000) (finding lethal injection constitutional); Diaz v. State, 945 So.2d 1136, 1144 (Fla. 2006) (stating "Court considered the constitutionality of lethal injection in Florida after a full evidentiary hearing in Sims...We subsequently rejected similar claims in cases where the trial courts summarily denied the claims").

[10] The summary denial of the postconviction relief motion is a legal issue, which is reviewed *de novo*. State v. Coney, 845 So. 2d 120, 137 (Fla. 2003) (holding pure questions of law discernible from the record to be subject to *de novo* review).

investigation revealed that the then existing protocols had not been followed as had been promised in Sims v. State, 754 So.2d 657 (Fla. 2000). He claimed that the new protocols developed in August 2007 failed to address the "critical aspects of the lethal injection process," namely, the "provisions for the administration of the drugs, the assessment of consciousness, and the monitoring [of] the inmate for consciousness throughout the procedure remain inadequate to protect against the foreseeable risk of the unnecessary and wanton infliction of pain." This claim was based on the fact that non-medical personnel were administering the lethal drugs and monitoring the inmate's consciousness. Further, DOC refused to employ a Bispectral Index Monitor ("BIS monitor"). (2PCR.1 17-18, 22-23). Because the former Secretary of the Department of Corrections, Harry K. Singletary, opined that "We know for sure this is going to happen again" when speaking of the events surrounding the Diaz execution, Bryant offered that Florida's protocols amounted to cruel and unusual punishment. (2PCR.1 25).

During the Case Management Hearing, Bryant argued that Florida's protocol, at issue in Baze v. Rees, 128 S.Ct. 1520 (2008) was unconstitutional and he questioned DOC's ability to follow its protocols. He again suggested that the August 2007 procedure did not fix the deficiencies which permitted the Diaz execution difficulties. (2PCR.2 248-49). Critical to Bryant was

the fact that non-medical personnel conducted the executions and that their "experience, training and character remain unknown." It was Bryant's position that although this Court had decided Lightbourne, such case was not controlling. (2PCR.2 249).

Here, Bryant asserts that the August 2007 protocols are unconstitutional and he should have been permitted to investigate the background, training, and qualifications of the execution team to show there had been deviations from the prior written protocols. From this, he prognosticates that there will be deviations in the future and that such failure to follow what may be constitutional protocols establishes that in practice lethal injection is unconstitutional. (IB 38-42). It is Bryant's position that discovery of the background, training, and qualifications of the execution team members is necessary to a complete inquiry into whether a protocol that appears constitutional on its face violates the Eighth Amendment when it is not carried out as written." (IB 41). Such is a different argument than that which was offered to the trial court. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So.2d 446 (Fla. 1993). See Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). As such, the matter is not

preserved for appellate review. However, assuming that this Court reaches the merits of the claim, it will find that the trial court correctly denied relief and that all of Bryant's complaints have been rejected by this Court in Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007), cert. denied, 128 S.Ct. 2485 (2008), Schwab v. State, 969 So.2d 318 (Fla. 2007) (Schwab I) and Schwab v. State, 33 Fla. L. Weekly S431 (Fla. 2007) (Schwab II).

In Lightbourne, this Court reviewed the current protocols, adopted in August 2007, and recognized that such represented a concerted effort to improve the administration of the death penalty following the identification of weaknesses discussed by both the Governor's Commission and the DOC following the Diaz execution. Lightbourne affirms the presumption of deference to the executive branch in administering lethal injection. Lightbourne, 969 So. 2d at 352; Provenzano v. State, 739 So. 2d 1150, 1153 (Fla. 1999); Buenoano v. State, 565 So. 2d 309, 311 (Fla. 1990). All Bryant offers here is speculation of what will happen in the future, based on one person's opinion that errors in a Florida execution will happen again.

This Court has rejected previously Bryant's challenges the lethal injection procedures on the grounds non-medical personnel are employed to administer the execution and a BIS monitor is not used. In Lightbourne, this Court held:

The next significant issue raised by Lightborne focuses on whether DOC's protocol for assessing consciousness is adequate. If the inmate is not fully unconscious when either pancuronium bromide or potassium chloride is injected, or when either of the chemicals begins to take effect, the prisoner will suffer pain. Pancuronium bromide causes air hunger and a feeling of suffocation, and potassium chloride burns and induces a painful heart attack.

If the sodium pentothal is properly injected, it is undisputed that the inmate will not feel pain from the effects of the subsequent chemicals. While we cannot determine whether Diaz suffered pain, as detailed above, the protocol has changed since the Diaz execution, with the most significant change consisting of a pause after the sodium pentothal is injected in order to assess the inmate's consciousness. The DOC has clearly attempted to reduce the risk that the human errors will occur in future executions.

Although Lightborne suggests that trained medical personnel would do a better job of assessing consciousness, based on the evidence presented below and after reviewing the newly revised protocol, we cannot conclude that Lightborne has sufficiently demonstrated that the alleged deficiencies rise to the level of an Eighth Amendment violation. A claim that the protocol can be improved and the potential risks of error reduced can always be made. However, as this Court has already recognized, the Eighth Amendment is not violated simply because there is a mere possibility of human error in the process.

Moreover, this claim must be reviewed in light of the testimony presented. As mentioned above, sodium pentothal is an extremely fast-acting sedative which will have an immediate effect if it is injected properly. According to Dr. Dershwitz, a person will be rendered unconscious in a minute or less if only a few hundred milligrams are injected into the patient. In lethal injection procedures in which five grams of this chemical are injected, it should be clear that there is a problem if the inmate is still talking minutes after the injection, as occurred in Diaz's execution. Moreover, the August 2007 procedures

> requires the warden to determine that the inmate is indeed unconscious "after consultation." Warden Cannon also testified that he would consult the medically qualified members of his team in making this assessment. If the warden determines that there is a problem and the inmate is not unconscious, he must suspend the execution process and the execution team will assess the viability of the secondary access site. Once a viable access site has been secured, the team warden will order the execution to proceed, and the executioners will inject another five grams of sodium pentothal into the inmate. Thus, even if the first five grams of the drugs were injected subcutaneously and took longer to be absorbed into the inmate's system, the inmate would have a total of ten grams in his system by the time that the warden made his second assessment of unconsciousness, which is required before the pancuronium bromide is injected.

Lightborne, 969 So. 2d at 351-352.

This decision is in agreement with the Supreme Court's analysis in Baze, wherein the plurality stated:

> Petitioners also fault the Kentucky protocol for lacking a systematic mechanism for monitoring the "anesthetic depth" of the prisoner. Under petitioners' scheme, qualified personnel would employ monitoring equipment, such as a Bispectral Index (BIS) monitor, blood pressure cuff, or EKG to verify that a prisoner has achieved sufficient unconsciousness before injecting the final two drugs. The visual inspection performed by the warden and deputy warden, they maintain, is an inadequate substitute for the more sophisticated procedures they envision. Brief for Petitioners 19, 58.
>
> At the outset, it is important to reemphasize that a proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated. All the experts who testified at trial agreed on this point. The risks of failing to adopt additional monitoring procedures are thus even more "remote" and attenuated than the risks posed by the alleged inadequacies of Kentucky's procedures designed to ensure the delivery of thiopental. *See Hamilton v. Jones*, 472 F.3d 814,

817 (CA10 2007) (per curiam); *Taylor v. Crawford*, 487 F.3d 1072, 1084 (CA8 2007).

Baze, 128 S.C.t at 1536. Also, the Court opined:

> The dissent would continue the stay of these executions (and presumably the many others held in abeyance pending decision in this case) and send the case back to the lower courts to determine whether such added measures redress an "untoward" risk of pain. Post, at 11. But an inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures. This approach would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner. See Baze v. Parker, 371 F.3d 310, 317 (CA6 2004) (petitioner Baze sentenced to death in 1994); Bowling v. Parker, 138 F. Supp. 2d 821, 840 (ED Ky. 2001) (petitioner Bowling sentenced to death in 1991).
>
> JUSTICE STEVENS suggests that our opinion leaves the disposition of other cases uncertain, see post, at 1, but the standard we set forth here resolves more challenges than he acknowledges. A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

Baze, 128 S.Ct. at 1535.[11] As this Court concluded previously, the claim that the Eighth Amendment requires employment of

[11] Florida's lethal injection protocol including the procedure to assess unconsciousness, is more comprehensive than the procedure found constitutional in Baze. See Schwab v. State, 33 Fla. L. Weekly S431 (Fla. Jun. 27, 2007) (hereinafter Schwab II); See also Baze v. Rees, 128 S.C.t 1520, 1567, 1571 (2008) dissent of Justice Ginsberg (recognizing that Florida's protocol provides for greater safeguards in assessing level of unconsciousness).

medical personnel or use of monitoring equipment for an assessment of the level of unconsciousness is without merit. See Schwab II, 33 Fla. L. Weekly at S433 (adopting court's order and analysis in rejecting constitutional challenges to lethal injection protocol). The trial court cannot be faulted from following binding precedent and rejecting the instant constitutional challenge.

Bryant claims discovery is needed in the background, training, and qualifications of execution team members. (IB 41) However, this is prohibited explicitly. See Bryan v. State, 753 So. 2d 1244, 1250-51 (Fla. 2000). As has been recognized by this Court, even where information from an execution team member may be necessary, his identity remains protected. See Provenzano v. State, 761 So. 2d 1097, 1099 (Fla. 2000) (upholding exclusion of testimony from execution team member without foreclosing the possibility of taking such testimony in camera). Bryan directly upheld the constitutionality of this statute, and Bryant has failed to address this fact when seeking discovery of the background, training and qualifications of the execution team is desired.

Additionally, this Court, in Schwab II, has rejected the complaint that the August protocols are unconstitutional because errors have occurred under prior protocols and during the

training sessions under the August 2007 protocols.[12] Bryant does not identify any specific errors which invalidate the statute, however, in Schwab II, this Court considered several noted by that inmate. In adopting the trial court's findings and legal conclusions in that case, this Court rejected the claim that errors in the training exercises, technical errors in the placement of the IV catheter and multiple needle punctures, the difference between the average length of a Florida execution and that of other states, the extent of training afforded execution teams from Kentucky versus Florida, visible movement of the inmate following the administration of the fist drug, and the personnel used to assess consciousness. After it was determined that none of these claimed errors were newly discovered evidence, this Court reaffirmed that the Florida and Kentucky protocols were virtually identical. As a result, Baze did not invalidate Florida's lethal injection protocols, rather, by extension, Baze supports the conclusion the Florida protocols are constitutional. As this Court agreed:

> Carefully comparing the Florida protocol to Kentucky's as described [in] *Baze*, the Court finds them substantially similar Florida has several additional safeguards not mentioned in *Baze*. For

[12] Bryant also points to changes made to the protocols of other states due to the physical infirmities, Taylor v. Crawford, 2006 U.S. Dist. LEXIS 42949 *15 (W.D. Mo. 2006), or criminal behavior, Morales v. Tilton, 465 F.Supp.2d 972, 979 (N.D. Cal. 2006) do not further his position, especially in light of Schwab II and Baze.

> example, the drugs used for execution must be prepared by a licensed pharmacist and, one week before execution, the inmate must be physically examined to determine whether there are issues which could compromise proper administration of the lethal injection process Schwab has failed to point out any significant differences that would impact an Eighth Amendment claim.

Schwab II, 2008 WL 2553999, at 10.

The court below properly denied relief, applying binding precedent from Lightbourne and Schwab I. Schwab II and Baze have now confirmed that Florida's procedures are constitutionally valid. Bryant has offered no valid basis for reviewing these recent decisions or for altering their conclusions. This Court should affirm the summary denial of relief on this issue.

ISSUE III

THE TRIAL COURT PROPERLY DENIED THE PUBLIC RECORDS REQUESTS (restated)

Bryant asserts that it was error for the trial court to deny his public records requests addressed to the lethal injection issue as moot after denying the constitutional challenge to Florida's lethal injection protocols. Each agency, Department of Corrections ("DOC"), the Governor's Office, and the Office of the Attorney General responded objecting on a myriad of grounds. Not only was the trial court correct to find the issue moot after denying relief on the constitutional claim,

but the requests did not comply with Florida Rule of Criminal Procedure 3.851(i). As such, the requests would have been denied properly under that ground also. This Court should affirm under the abuse of discretion standard of review. See Mills v. State, 786 So.2d 547, 552 (Fla. 2001); Glock v. Moore, 776 So.2d 243, 254 (Fla. 2001). Under this standard, a ruling will be upheld unless it is "arbitrary, fanciful, or unreasonable." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

Under Rule 3.851(i), a death row inmate seeking public records must include an affidavit that:

> (A) attests that collateral counsel has made a timely and diligent search of the records repository; and
> (B) identifies with specificity those public records not at the records repository; and
> (C) establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence.

Before an agency is required to respond to a request pursuant to Fla. R. Crim. P. 3.852(i), the Court must find:

> (A) collateral counsel has made a timely and diligent search of the records repository;
> (B) **collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository**;
> (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or **appear reasonably calculated to lead to the discovery of admissible evidence**; and
> (D) **the additional records request is not overly**

broad or unduly burdensome.

(emphasis supplied).

In Bryant's requests, he identifies the records he wants using such phrases as: (1) "any communications" (¶5a2i-ix); (2) "any public input" (¶5a2i-x); (3) "Personnel files of the following execution team members" (¶11); (4) "all notes, memoranda, letters, electronic mail and/or files, drafts, charts, reports and/or other files generated as a result of an investigation conducted by internal affairs that relates to the conduct and/or actions of the individuals listed in paragraph 11 above" (¶12); (5) Documents, memoranda, or other materials created, reviewed, and/or considered by DOC since Secretary McDonough was appointed related to lethal injection, including but not limited to any and all documents, memoranda, or other materials created, reviewed, and/or considered by DOC in promulgating the August 16, 2006 procedures related to lethal injection" (¶16)(2PCR.1 120-22); (6) "Emails, faxes, letters, minutes or notes of meetings, telephone call records or notes and other records created during the development of the August 2007 Procedures including those related to: any communication with ... any public input ...." (¶5a2); (7) "Any documents produced by the Department of Corrections concerning the August 2007 Procedures that are in the possession of the Office of the Attorney General" (¶5a3) (2PCR.1 126-27); and (8) "Emails,

faxes, letters, minutes or notes of meetings, telephone call records or notes and other records created during the development of the August 2007 Procedures including those related to: any communication with ... any public input ....” (¶5a2) (2PCR.1 130).

It is well settled that requests that ask for “[a]ll notes, memoranda, letters, electronic mail, and/or files, drafts, charts, reports, and/or other files” are not proper under this rule and would be considered overly broad and unduly burdensome. See Diaz v. State, 945 So.2d 1136, 1149 (Fla. 2006); Mills v. State, 786 So. 2d 547, 551-52 (Fla. 2001). See also Schwab, 969 So.2d at 323-24. This Court has stressed that public records requests are not to be used for fishing expeditions and that defendants bear the burden of proving that the records they request are, in fact, related to a colorable claim for post conviction relief. Moore v. State, 820 So. 2d 199, 204 (Fla. 2002); Glock v. Moore, 776 So. 2d 243, 253 (Fla. 2001); Sims v. State, 753 So. 2d 66, 70 (Fla. 2000). Denials have been entered were the requests for additional public records sought general information. to “research and discover” post conviction claims that the inmate had no specific basis for believing actually existed. Johnson v. State, 804 So. 2d 1218, 1224 (Fla. 2001). Moreover, this Court has described requests pursuant to Rule 3.852 as post conviction discovery requests. Amendments to Fla.

R. Crim. P. 3.852, 754 So. 2d 640, 643 (Fla. 1999) and has determined that courts may properly deny post conviction discovery if the documents sought would not support a claim. Reaves v. State, 942 So.2d 874, 881-82 (Fla. 2006); Rutherford v. Crist, 945 So.2d 1113 (Fla. 2006); Rollings v. McDonough, 944 So. 2d 346 (Fla. 2006). Additionally, the identity of the execution team is confidential under section 945.10(1)(g), Fla. Stat. (2006) and not subject to public records disclosure. See Provenzano v. State, 761 So.2d 1097 (Fla. 2000); Bryan v. State, 753 So. 2d 1244, 1250-51 (Fla. 2000).

This Court reviewed Lightbourne, following a 13-day evidentiary hearing and the disclosure of public records.[13] See Lightbourne, 969 So.2d at 33134 (finding no abuse of discretion regarding the public records disclosures, but determining that the "Dyehouse" memoranda should have been disclosed and considered their content in finding Florida's lethal injection protocols constitutional). Bryant has not pointed to anything specific which was not disclosed to which he was entitled.

Furthermore, this Court has rejected the constitutional challenge to Florida's lethal injection statute and protocols. Lightbourne; Schwab I; Schwab II; Griffin v. State, SC06-1055 (Fla. June 2, 2008) (unpub. Op.) (Exhibit 1). The State relies

[13] As this Court will recall, Bryant and Lightbourne are represented by the same counsel, i.e., Capital Collateral Regional Counsel-South.

upon and reincorporates its answer to Issue II. Also, the Supreme Court's decision in Baze supports this Court's conclusion in Lightbourne; Schwab I; Schwab II; and Griffin. As such, there was no need for an evidentiary hearing, and likewise, with the summary denial, there was no need for further public records litigation. There was no showing that Bryant's record requests would lead to admissible evidence for a judicial issue. The finding that the public records issue was moot given the denial of relief should be affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Leor Veleanu, Esq., Offices of the Capital Collateral Regional Counsel - South, 101 NE 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 this _30_ day of July, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_S/Leslie T. Campbell_____
LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1515 N. Flagler Dr.; Ste. 900
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE