

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1089

LABRANT DENNIS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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 CASE AND FACTS

On May 8, 1996, Defendant was charged by indictment with the first degree murder of Marlon Barnes, the first degree murder of Timwanika Lumpkins, armed burglary of Mr. Barnes's apartment with an assault or battery and criminal mischief for slashing Earl Little's car's tires. (R. 1-3)<sup>1</sup> The crimes were alleged to have been committed on April 13, 1996. Defendant had been arrested in connection with these crimes on April 30, 1996. (R. 5) Defendant was arraigned on May 10, 1996. (T. 4) The matter proceeded to trial on September 8, 1998. (R. 6) Following a jury trial, Defendant was found guilty as charged on all counts. (R. 2814-15, 2817-18) The trial court adjudicated Defendant in accordance with the verdict. (R. 3266-67)

After a penalty phase, the jury recommended that Defendant be sentenced to death by a vote of 11 to 1 for each of the first degree murder counts. (R. 3120-21) The trial court followed the jury's recommendations and sentenced Defendant to death for each of the murders. (R. 3254-65, 3268) In doing so, it found 4 aggravators had been proved as to each murder: prior violent felony; during the course of a burglary; heinous, atrocious and cruel (HAC); and cold, calculated and premeditated (CCP). (R.

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<sup>1</sup> The symbols "R.," "T." and "SR." will refer to the record on appeal, transcripts of proceedings and supplemental record on appeal from Defendant's direct appeal, FSC Case No. SC95211.

3256-60) In mitigation, it found that Defendant was under the influence of extreme mental or emotional distress, that Defendant was not a totally criminal person, that Defendant had exhibited acts of kindness, that Defendant loved his family, and that Defendant exhibited good courtroom demeanor. (R. 3262, 3263) It considered and rejected, as mitigation, Defendant's claims that he did not have a significant criminal history, that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, that Defendant could be sentenced consecutively, and that he was innocent. (R. 3261-63) It also sentenced Defendant to life imprisonment with a 3 year minimum mandatory term for the armed burglary and 1 year imprisonment for the criminal mischief. (R. 3264, 3269-71) All of the sentences were to be served consecutively. (R. 3265, 3272)

Defendant appealed his convictions and sentences to this Court, raising 13 issues: (1) "the trial court committed fundamental error in failing to provide the jury with a cautionary instruction on accomplices with regards to the testimony of Joseph Stewart;" (2) "the State improperly bolstered the credibility of several of its witnesses with inadmissible hearsay and opinions, along with the prosecutor's unsworn testimony;" (3) the trial court abused its discretion in

allowing the State to impeach Watisha Wallace, its own witness;

(4) "the trial court erred in denying his motion to suppress Nidia El-Djeije's identification of Wallace's car;" (5) "the trial court erred in allowing the State to impeach its own witness, Jessie Pitts;" (6) "the trial court erred in admitting collateral evidence that he stalked, threatened, and assaulted Lumpkins;" (7) the trial court abused its discretion in allowing "the State's introduction of evidence that he had a jealous character;" (8) "the trial court erred in admitting several autopsy photos of the victims;" (9) "the trial court's sentencing order provides an inadequate basis for review in that it contains several factual inaccuracies;" (10) the trial court erred in finding CCP; (11) the trial court erred in finding HAC; (12) "the trial court erred in according little or no weight to the extreme mental or emotional disturbance mitigator;" and (13) "the death sentence is not proportionate." *Dennis v. State*, 817 So. 2d 741, 750-66 (Fla. 2002). This Court affirmed Defendant's convictions and sentences. *Id.* at 767. In doing so, this Court found that issues 1, 4, 5, 6, 8-13 and part of issue 2 were meritless. *Id.* at 750-53, 759-62, 763-67. It determined that any error in issues 3, 7 and parts of issue 2 were either harmless if the issue had been preserved or not fundamental error if they had not. *Id.* at 753-59, 762-63.

On rehearing, Defendant asserted that Florida's capital sentencing scheme was unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court denied rehearing. After the United States Supreme Court issued *Ring v. Arizona*, 536 U.S. 584 (2002), Defendant moved this Court to recall its mandate, claiming that *Ring* showed that his *Apprendi* argument was meritorious. This Court denied that motion on May 23, 2002. Defendant then sought certiorari review in the United States Supreme Court, which was denied on December 2, 2002. *Dennis v. Florida*, 537 U.S. 1051 (2002).

On June 2, 2002, the Office of the Attorney General sent its notices of affirmance to the State Attorney's Office and the Department of Corrections (DOC). (PCR-SR. 76-79)<sup>2</sup> On July 2, 2003, the State Attorney's Office sent its notice of affirmance to the Miami-Dade Police Department (MDPD), the University of Miami Police Department and the Coral Gables Police Department. (PCR-SR. 82-84) That same day, it also notified the Office of the Attorney General that the medical examiner's office and the Miami-Dade Department of Corrections (Dade DOC) also had pertinent information. (PCR-SR. 85-86) The Office of the Attorney General then sent notices to produce records to these

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<sup>2</sup> The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal in the appeal from the first denial of this motion, FSC Case No. SC04-2176.



agencies on July 8, 2002. (PCR-SR. 87-91)

On August 22, 2002, DOC sent its notices of compliance and delivery of exempt materials. (PCR-SR. 93-94, 309-10) On August 27, 2002, MDPD sent its notice of compliance. (PCR-SR. 98-99) On October 3, 2002, the State Attorney sent notice of compliance and notice that it had delivered exempt materials. (PCR-SR. 96, 102-03) On November 18, 2002, the medical examiner sent his notice of compliance. (PCR-SR. 104) On November 26, 2002, Defendant filed a motion to compel the Coral Gables Police, the University of Miami Police, the medical examiner and Dade DOC to comply with the State's public records notices, which the lower court granted. (PCR-SR. 106-10)

On February 25, 2003, Defendant filed requests for additional public records on the Coral Gables Police, DOC, the University of Miami Police, MDPD, the State Attorney, the City of Miami Police Department, the Division of Elections, the Opa-Locka Police Department, the Florida Department of Insurance, the Florida Department of Law Enforcement (FDLE), the Judicial Qualification Commission (JQC), the Department of Health, Coral Gables Fire Rescue, the Miami Beach Police Department, the South Miami Police Department and the Office of the Attorney General. (PCR-SR. 112-96) As part of his request to the Coral Gables Police, he requested "any and all" documents in personnel files

of 14 officers. (PCR-SR. 116) As part of the request to the State Attorney, Defendant asked for "any and all" documents in the personnel files of 4 assistant state attorneys. (PCR-SR. 128) As part of the request to MDPD, Defendant asked for "any and all" documents in the personnel files of 41 officers and "any and all documentation related to proficiency tests and competency practice casework and the credentials of" Toby Wolson and Thomas Quirk. (PCR-SR. 138-39, 140)

The City of Miami responded that it had no records responsive to the request. (PCR-SR. 200-01) The Coral Gables Police and Fire Rescue Departments, DOC, MDPD, State Attorney, FDLE, JQC and Office of the Attorney General all filed objections to the requests. (PCR-SR. 197-99, 202-52, 322-23) MDPD specifically asserted that the requests for the personnel files of 41 officers and information regarding Mr. Wolson and Mr. Quirk were irrelevant, overly broad and unduly burdensome (PCR-SR. 229-30, 231) The Coral Gables made a similar objection regarding its personnel files. (PCR-SR. 236)

Even though most of these requests were made pursuant to Fla. R. Crim. P. 3.852(i), Defendant made no attempt to obtain the orders required by that rule. Instead, the State informed the lower court of the need to enter the orders at a status hearing on April 30, 2003. (PCR. 797-802) As such, the State

suggested that the lower court set a public records hearing. (PCR. 799) When Defendant suggested that the court should delay setting a hearing until the time for all of the agencies to respond to his requests under Fla. R. Crim. P. 3.852(g) expired, the State pointed out that the agencies had already objected. (PCR. 802) When the lower court attempted to set the hearing for May, Defendant stated that he was not available. (PCR. 803) The lower court then set the hearing for June 24, 2003. (PCR. 804)

At the June 24, 2003 hearing, MDPD argued that Defendant's request was overly broad and unduly burdensome, that it had already sent its complete file regarding this matter to the repository and that Defendant had not shown that anything he was requesting was either relevant or calculated to lead to the discovery of relevant information. (PCR. 421-22) Regarding information in the personnel files of the 41 officers, the lower court found that the request was overly broad but stated that it would order disclosure of a list of complaints against the officers. (PCR. 430-32) Regarding Mr. Wolson and Mr. Quirk, MDPD indicated that they had worked for MDPD for decades and that it would be able to comply if the request was limited to the time of their work in this case. (PCR. 434-35) When Defendant continued to insist that he needed decades' worth of information about this people, the lower court found the request was overly

broad but required the production of their resumes and suggested that Defendant request specific information about complaints after reviewing the information concerning their personnel files. (PCR. 435-37)

Regarding Coral Gables Fire Rescue, the agency argued that the request sought personnel files for individuals who simply responded to the crime scene and did nothing. (PCR. 458-60) As such, the lower court denied the request. (PCR. 460) When Defendant stated that Lt. Kerns and Lt. Sibley had testified at trial that they had examined the victims, the lower court ordered the production of any reports from these people or anyone who supervised them. (PCR. 462-65)

Regarding Coral Gables Police, Defendant indicated that it had received reports but had not received any other response. (PCR. 465-66) Since the city attorney had never seen the request, the lower court ordered Defendant to send it directly to her. *Id.*

Regarding DOC, Defendant confirmed that DOC had received his consent to the release of his medical records and that it would send him his medical records. (PCR. 472) The lower court then reset the hearing until July 1, 2003.

Regarding the State Attorney, Defendant argued that he needed the entire personnel files of the four prosecutors

because he had moved to dismiss the case based on an improper contact between Judge Platzer and Mr. Von Zamft. (PCR. 886-87) The lower court indicated that while it might be possible that Mr. Von Zamft's personnel may have some documents relevant to that issue, it did not understand how that made the other 3 prosecutor's files relevant. (PCR. 888-89) Defendant then asserted that Mr. Von Zamft had spoken to Judge Platzer after speaking to Ms. Seff and that the other two prosecutors had been involved in litigating this case. (PCR. 889-90) The State responded that Defendant's assertions did not show anything about the personnel files would be relevant to the post conviction proceedings. (PCR. 891-92) Defendant responded that the incident was relevant because a motion to dismiss had been litigated based on it before trial. (PCR. 891-92) While the State maintained its position that the files were not relevant, it suggested that, as a compromise, the lower court could review the personnel files of Ms. Seff and Mr. Von Zamft to determine whether there was anything relevant. (PCR. 892) Defendant then replied that information in a state employee's personnel file was public record under Chapter 119. (PCR. 892-93) When the lower court pointed out there were exemptions for information about prosecutors under 119, Defendant asserted that the State would redact that information. (PCR. 893-94) The State then

replied that Defendant could not use Chapter 119 to get information that did not meet the relevancy requirements of Fla. R. Crim. P. 3.852. (PCR. 894-95) The lower court then ruled that the files of the two prosecutors who were not involved in the incident with Judge Platzer were not relevant and denied the request for them. (PCR. 896, PCR-SR. 311) It ordered production of Mr. Von Zamft's file and stated that it would conduct an in camera review of Ms. Seff's file for information relevant to this incident because the request was overly broad. *Id.*

During the hearing, Defendant submitted an order to have the exempt materials transported for an in camera review, and the State suggested that it was unnecessary for the court to review Defendant's medical file, as Defendant had already received the file directly from DOC. (PCR. 909-10) Defendant insisted that the court should still have the records sent for an in camera review so that he review the materials and check them against his copy. (PCR. 910-11) During this discussion, the State informed the court that the exempt materials from DOC consisted of Defendant's medical records, victim information and NCIC printouts. (PCR. 911) The lower court told Defendant it would order the exempt materials sent to it, which it did on November 24, 2003. (PCR. 911, PCR-SR. 348-49)

On July 7, 2003, the Department of Health filed its notice

of compliance and indicated that it had provided some materials under seal. (PCR-SR. 286-89) On the transmittal sheets attached to the notice, the Department of Health indicated that the sealed materials were "Patient Information, Exam Scores and Transcripts" from the files of Dr. Rao and Dr. Gulino. (PCR-SR. 288-89)

At a hearing on September 24, 2003, the parties discussed the in camera review of Ms. Seff's personnel file, and Defendant asked to be present during the review so that he could object if the court ruled against him. (PCR. 922-24) The State responded that Defendant did not have a right to review the information provided during an in camera review so the court should simply enter a written order. (PCR. 924-25) Defendant insisted that he needed to place any objection to the court's ruling on the record, and the State suggested that he do so in writing. (PCR. 925) Defendant insisted that he needed to review the materials the court was reviewing to object. (PCR. 925) Finding that suggestion inconsistent with the purpose of an in camera inspection, the lower court denied the request and told Defendant to make his objections in writing. (PCR. 925)

On October 6, 2003, Defendant filed a motion to compel the South Miami Police and the Coral Gables Police and Fire Rescue to comply with his requests. (PCR-SR. 332-24) Defendant stated

that he had received some information from the Coral Gables Police and Fire Rescue but did not believe it was everything the court had ordered. (PCR. 932) Because there was a dispute about what had been ordered, the lower court suggested that it needed a transcript of its ruling, which Defendant indicated he was trying to get. (PCR. 932-34) The lower court then indicated that it would hold the motion in abeyance while the transcript was obtained and the parties determined if they still needed court action. (PCR. 933-34)

On November 25, 2003, Defendant filed his motion for post conviction relief, raising 11 claims: (1) denial of public records, (2) ineffective assistance of counsel during the guilt phase; (3) trial counsel's alleged conflict of interest; (4) ineffective assistance of counsel at the penalty phase; (5) cumulative error; (6) allegedly improper comments and admission of evidence by the State; (7) constitutionality of the bar rule regarding juror interviews; (8) constitutionality of Fla. R. Crim. P. 3.851; (9) sufficiency of the evidence; (10) violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (11) constitutional of Florida's capital sentencing scheme. (PCR. 34-160)

At a hearing held on December 2, 2003, the lower court stated that it had review Ms. Seff's personnel file and



determined that there was no relevant information in the file. (PCR. 490-91) Defendant then indicated that he had received the transcript regarding the issue about Coral Gables but had not yet spoken to the City Attorney. (PCR. 492) He stated that he would do so and file a pleading if any issues still needed resolution. (PCR. 492-93)

After the State filed its response to the motion (PCR. 497-567), the lower court conducted a *Huff* hearing on April 22, 2004. (PCR. 946-90) During that hearing, the lower court indicated that it would conduct another public records hearing regarding Coral Gables. (PCR. 949-50) It granted an evidentiary hearing on the portions of Claim II regarding an alleged question in violation of his right to remain silent and the failure to hire crime scene experts, Claim IV and Claim X. (PCR. 968, 979, 984, 990)

When the lower court conducted the additional public records hearing on June 17, 2004, Coral Gables indicated that all of the issues except the personnel files had been resolved. (PCR. 995) Regarding the personnel files, Coral Gables indicated that it had provided the file of Det. Hudak but objected to the other files because the officers were just at the scene. (PCR. 996) Defendant insisted that Off. Chang, Off. Escobar, Off. Nguyen, Off. Oppert, Sgt. Santiago and Lt. Sibley had done more

than simply be at the scene because they had written reports or taken pictures. (PCR. 996-97) The lower court granted the file of Sgt. Santiago because he took pictures, Off. Escobar because he was first officer to respond and Off. Chang and Nguyen because they allegedly wrote reports showing they did some work. (PCR. 997-1001) It denied the remaining requests. (PCR. 1001-03) At the conclusion of the hearing, it indicated that it had conducted the in camera review of the DOC and Department of Health records and found they were not discoverable. (PCR. 1004-06)

On June 22, 2004, Defendant filed his witness list and attached report from Sherrie Borg Carter, a psychologist, who had concluded that no statutory mitigation applied to this matter but that the facts Defendant allegedly suffered from mild and intermittent symptoms of post traumatic stress disorder (PTSD), was raised in a bad neighborhood, had made a good adjustment to prison and was allegedly not a psychopath should be considered as non-statutory mitigation. (PCR-SR. 361-69)

On July 13, 2004, the lower court started the evidentiary hearing, during which it heard testimony from Det. Tom Romagni; Elaine Williams, Defendant's mother; Annie Siplin, Defendant's maternal grandmother; Virginia Dennis, Defendant's paternal grandmother; Dr. Borg Carter; Marvin Dunn, a community

psychologist; and Dr. Rao. (PCR. 1008-48) During her testimony, Dr. Rao stated that she did not recall if she had ever seen the memo from Mr. Weintraub and that it would not have affected her testimony even if she had. (PCR. 1126-29) She stated that differences between her testimony and Dr. Gulino's testimony would be based on the difference in the questions, the difference in how they worded things and the difference in experience between them. (PCR. 1132-34) When Defendant started to question Dr. Rao about her employment after her trial testimony and before her evidentiary hearing testimony, the State objected that the testimony was irrelevant, and the lower court overruled the objection. (PCR. 1135) As the testimony in this area continued, the State again objected to Defendant's improper impeachment, and the lower court again overruled the objection. (PCR. 1136) However, after the answer was given, the lower court instructed Defendant to move away from the area. (PCR. 1137) After Dr. Rao was excused, the judge stated that it had known Dr. Rao from his work as a defense attorney before becoming a judge and that he had once written a recommendation letter for her. (PCR. 1146)

When the lower court attempted to continue the proceedings the following morning, Defendant requested a continuance to prepare a motion for disqualification. (PCR. 1151) The lower

court initially denied it but subsequently reconsidered and granted it. (PCR. 1151-52) On July 19, 2004, Defendant filed a motion to disqualify Judge Crespo, claiming that he was biased because he initially overruled objections during Dr. Rao's direct examination but eventually ordered Defendant to move on and because he had stated that it had written a recommendation letter for Dr. Rao at one time. (PCR. 586-96) The State filed a response, asserting that the motion was legally insufficient. (PCR. 597-605, PCR-SR. 370-78) The lower court then denied the motion. (PCR-SR. 398-400)

On July 26, 2004, the lower court entered a written order stating that it had determined that the exempt materials were not discoverable after its in camera review. (PCR-SR. 380) On July 28, 2004, the lower court continued the evidentiary hearing and heard testimony from Ron Guralnick, Defendant's trial counsel; Alberto Fuentes, an investigator Mr. Guralnick employed in this case; and Chris Taylor, an investigator for Defendant's present counsel. (PCR. 1156-1220) It then heard closing arguments on September 7, 2004. (PCR. 1230-97)

On October 4, 2004, the lower court entered an order denying Defendant's motion for post conviction relief. (PCR. 680-85) On October 13, 2004, the State moved the lower court to clarify its order because it did not include specific factual

findings. (PCR. 686) On October 15, 2004, Defendant moved the lower court to order certain corrections to the transcript. (PCR. 688-89) During an October 26, 2004 hearing on the transcript motion, the lower court announced that it was granting the State's motion and would be issuing a new order. (PCR. 1313, 1319-20) Despite knowing that a corrected order would be forthcoming, Defendant filed a notice of appeal on November 3, 2004. (PCR. 691-92) On November 10, 2004, the lower court entered an amended order. (PCR. 699-706)

Defendant appealed the denial of his motion for post conviction relief to this Court, raising 12 issues, including one that asserted that the lower court's order was insufficient to allow review and a second that the lower court had erred in denying the motion for disqualification. Initial Brief of Appellant, FSC Case No. SC04-2176. He also filed a state habeas petition, raising 3 claims. Petition, FSC Case No. SC07-2208. On December 17, 2008, the Court entered an order remanding the matter to the trial court for "a new proceeding on [Defendant's] postconviction motion." *Dennis v. State*, 999 So. 2d 644 (Fla. 2008). This Court dismissed the habeas petition. *Id.*

When the lower court became aware of this Court's order, it set the matter for status hearing on March 13, 2009. (PCR2. 445-

47, 452)<sup>3</sup> At the hearing, the State asserted that the matter needed to be set for a *Huff* hearing. (PCR2. 448) Defendant then indicated that he wanted the "opportunity" to file public records demands and an amended motion. (PCR2. 448) After listening to argument, the lower court indicated that it wanted to see a written motion for leave to amend and set a status hearing for April 17, 2009. (PCR2. 448-58)

On April 13, 2009, Defendant filed his motion for leave to amend and attached a proposed amendment to it. (PCR2. 49-143) In the proposed amendment, Defendant alleged 2 additional claims: (12) a report by the National Research Council constituted newly discovered evidence and (13) lethal injection is unconstitutional. (PCR2. 55-92) In his motion for leave to amend, Defendant asserted that his good cause was that both of these claims were based on new evidence. (PCR2. 49-54) The State filed a response asserting that there was no good cause because the report did not qualify as newly discovered evidence and the lethal injection claim was untimely. (PCR3. 175-83)

Also on April 13, 2009, Defendant sent requests for additional public records pursuant to Fla. R. Crim. P. 3.852(i), to the Office of the Attorney General, the Governor's Office, FDLE and DOC. (PCR2. 155-74) All of these requests sought

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<sup>3</sup> The symbol "PCR2." will refer to the record in this appeal.

information concerning the 2007 lethal injection protocols. *Id.*

At the hearing on April 17, 2009, the lower court ruled that it would allow the amendment in an abundance of caution. (PCR2. 336) Regarding the public records demands, the lower court decided to requests response from the agencies. (PCR2. 336-42) It also set a *Huff* hearing for May 11, 2009, and stated it would address the requests at that hearing. (PCR2. 342-43)

The State then filed a response to the amended motion. (PCR2. 196-201) The agencies all filed objections asserting the records Defendant had requested were not relevant to a colorable claim for post conviction relief. (PCR2. 186-95, 285-90, 294-95) The Attorney General and the Governor also argued that the requests were overly broad and pointed out Defendant had received documents in response to substantially similar requests during the Lightbourne and Schwab litigation. (PCR2. 285-90)

At the May 11, 2009 hearing, Defendant acknowledged that he had received records regarding lethal injection in the Lightbourne litigation but asserted that it was limited to a thousand pages, including copies of internet articles and duplicates of interagency memos. (PCR2. 348-50) The agencies then argued that Defendant failed to establish any of the 4 facts needed to order production. (PCR2. 351-54) Defendant replied that he was entitled to request records and litigate

lethal injection on his own and that records must have been withheld because he believed that he received a small number of records and he had emails from one agency that had been sent to a different agency. (PCR2. 354-62) The lower court stated that it was denying the requests. (PCR2. 363)

Regarding the post conviction claims, Defendant admitted that the issues regarding public records raised in Claim I had been resolved previously and stood on the motion. (PCR2. 368) He asserted that counsel was ineffective for requesting a continuance before he had all of the discovery and for not requesting a second chair attorney. (PCR2. 370-74) He insisted that his statements to the lower court about only wanting one attorney should be ignored because the ABA guidelines were not explained to him. (PCR2. 374-81) He asserted that counsel had been ineffective for failing to object to certain testimony on the grounds that it allegedly improperly bolstered other testimony, while admitting that objections had been made to some of the testimony and some of the issue had been raised on direct appeal. (PCR2. 381-88) He insisted that the redirect questions to Det. Romagni about Defendant not being cooperative were comments on silence, that the record was not clear that the time referred to was prearrest and that counsel was ineffective for failing to object. (PCR2. 392-99) He also asserted that counsel



was ineffective for failing to object to testimony that a rape kit was performed on Ms. Lumpkins, Det. Poitier's testimony about Defendant and testimony that the phone Defendant was using to make admittedly relevant calls was cloned. (PCR2. 399-401) He further averred that counsel was ineffective for failing to question Det. Romagni more about other people Ms. Lumpkins may have been involved with and investigated these people. (PCR2. 402-06) He insisted that counsel was ineffective regarding the crime scene evidence because he stipulated to Mr. Quirk's qualifications and did not investigate the evidence. (PCR2. 410-12)

Regarding the conflict of interest, Defendant asserted that being busy with other, unrelated cases was a cognizable conflict. (PCR2. 415) He asserted that his counsel was ineffective at the penalty phase because he did not investigate Defendant's background properly. (PCR2. 416-18) He was now prepared to present evidence that Defendant's relationship with his family was superficial, that he grew up in a bad neighborhood and that he would be a good prisoner. *Id.* He admitted that the other portions of Claim IV and Claim V were legal issues. (PCR2. 423) He asserted that Claim VI was a claim about prosecutorial comments and questions that did not need evidentiary development except to the extent that counsel had

not objected. (PCR2. 424) He admitted that the claim about the juror rule was a legal claim and that his counsel was present when the issue was first addressed on the record. (PCR2. 425-26) He rested on the pleading regarding Claims VIII and IX. (PCR2. 427)

Regarding Claim X, Defendant insisted that he could have used a trial preparation memo to impeach Dr. Rao and that doing so would have prevented a finding of HAC. (PCR2. 427-31) He acknowledged that Claim XI was a legal claim. (PCR2. 431-32) Regarding Claim XII, Defendant admitted that the information in the report was not new but asserted that the compilation of the old information and the recommendations the committee made were newly discovered evidence that showed counsel was ineffective for not challenging the crime scene evidence differently. (PCR2. 432-37) He admitted that this Court had rejected his lethal injection claim but insisted that he was entitled to his own evidentiary hearing. (PCR2. 437-39)

On May 20, 2009, the lower court entered an order denying the additional public records request, noting that Defendant admitted receiving records and finding the requests foreclosed by precedent. (PCR2. 296) On June 12, 2009, it entered its order denying the motion for post conviction relief. (PCR2. 297-323) It found that Claims I, III, V, VII, XII and parts of Claim II

and IV were facially insufficient. *Id.* It determined that Claims V, VI, IX, XI and parts of Claim II and IV were procedurally barred. *Id.* It also found that parts of Claim II and IV were refuted by the record. *Id.* Finally, it determined that Claims V, VII, VI, VIII, X, XI, XII, XIII and parts of Claim II and IV were without merit as a matter of law. *Id.* This appeal follows.

#### **SUMMARY OF THE ARGUMENT**

The lower court properly denied the claim of ineffective assistance of counsel at the guilt phase because the claim was insufficiently plead, refuted by the record and without merit as a matter of law. The claim of ineffective assistance of counsel at the penalty phase was properly denied as insufficiently plead and refuted by the record. The *Brady* claim was properly denied because the record refuted any materiality of the allegedly suppressed information. The conflict of interest claim was properly denied because Defendant failed to allege a cognizable conflict. The claim regarding the comments was properly denied as procedurally barred and meritless. The claim relating to juror interviews was properly denied as procedurally barred and meritless. The lower court did not abuse its discretion in ruling on the public records requests. The lower court properly determined that the National Research Council report was not newly discovered evidence. The lethal injection claim was

properly denied as meritless. The lower court also properly rejected the challenge to the sufficiency of the evidence.

### **ARGUMENT**

#### **I. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE WERE PROPERLY DENIED.**

Defendant first asserts that the lower court erred in denying his claims that counsel was ineffective during the guilt phase of trial. However, the lower court properly denied these claims as they were procedurally barred, insufficiently plead, refuted by the record and without merit as a matter of law.

In order to plead properly a claim of ineffective assistance of counsel, Defendant must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668 (1984).

Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong

presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

*Strickland*, 466 U.S. at 694-695.

Even if a criminal defendant shows that particular errors of defense counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense in order to establish ineffective assistance of counsel. The test for prejudice requires the defendant to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different, or, alternatively stated, whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. *Strickland*, 466 U.S. at 694.

Moreover, this Court has held that a defendant must make more than conclusory allegations regarding both prongs to be entitled to an evidentiary hearing. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). Further, as the United States Supreme Court has recently held, it is improper to treat the ABA guidelines as rules that a counsel must follow. *Bobby v. Van Hook*, 130 S. Ct. 13, 16-17 (2009). Instead, they only provide guides to what the prevailing professional standards are and only to the extent they are applicable to the time at which

counsel acted. *Id.*

Applying these standards here, the lower court properly denied Defendant's claims that his counsel was ineffective during the guilt phase. As such, it should be affirmed.

Defendant first asserts that the lower court erred in denying his claim that his counsel was ineffective for taking a continuance when he had not received the lead detective's report before the trial date. In making this claim, Defendant did not suggest that his counsel would have been ready to proceed to trial by the initial trial date. (PCR. 41-43) Instead, Defendant asserted that counsel "did not have sufficient time to investigate or review discovery" within that time period. (PCR. 42) Defendant also did not allege that counsel should not have requested a continuance.<sup>4</sup> (PCR. 41-43) Instead, he suggested that counsel should have requested a continuance charged to the State. Given that Defendant expressly asserted that his counsel could not be ready for trial within the time allotted, his present assertion that an evidentiary hearing was necessary to determine readiness should be rejected.

Moreover, the lower court was also correct in rejecting the argument that counsel should have requested a continuance charged to the State. In *State v. Naveira*, 873 So. 2d 300 (Fla.

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<sup>4</sup> In fact, the record reflects that Defendant agreed to the continuance and the waiver of speedy trial. (R. 446-47)

2004), this Court held that a defendant was not entitled to have a continuance charged to the State and a discharge under the speedy trial rule simply because he received discovery at such a time that he could not be ready for trial within the speedy trial period. In doing so, this Court expressly rejected the argument that doing otherwise caused a defendant to choose between his right to a speedy trial and his right to prepare for trial. *Id.* at 307-08. In fact, this Court went so far as to suggest that a defendant had to show that the State committed a discovery violation before any sanction could be imposed on the State. *Id.* at 306 n.2.

Even where a discovery violation has been shown, the defendant must show that he has diligently sought the discovery before a defendant may have a continuance charged to the State based on an alleged discovery violation. *State v. Guzman*, 697 So. 2d 1263, 1264 (Fla. 3d DCA 1997); *Pura v. State*, 789 So. 2d 436, 439 (Fla. 5th DCA 2001). Moreover, the defendant must show that the alleged discovery violation prejudiced his ability to prepare for trial in a manner that could not be corrected within the speedy trial time. *Guzman*, 697 So. 2d at 1264; see also *Pura*, 789 So. 2d at 339-40; *Staveley v. State*, 744 So. 2d 1051, 1053 (Fla. 5th DCA 1999). Further, before charging a continuance to the State beyond the speedy trial period, the trial court

must consider lesser sanctions for the discovery violation. *Pura*, 789 So. 2d at 440; *Staveley*, 744 So. 2d at 1053. Additionally, a defendant cannot show that he was prejudice by an alleged discovery violation where he has possession of the information that was allegedly not disclosed through another source. *Sireci v. State*, 399 So. 2d 964, 968-69 (Fla. 1981); *Cooper v. State*, 336 So. 2d 1133, 1138-39 (Fla. 1976); *State v. Banks*, 418 So. 2d 1059, 1060 (Fla. 2d DCA 1982).

Here, Defendant has never alleged that the State committed a discovery violation or made more than a conclusory allegation about his ability to prepare for trial. Instead, Defendant has merely noted that the State amended its initial discovery response and that he did not receive the lead detective's report for months after his arrest. However, Fla. R. Crim. P. 3.220(j) expressly contemplates the filing of amended discovery notices. Moreover, Defendant acknowledged in his October 11, 1996 motion to compel that the reason why he did not already have Det. Romagni's report was that it had yet to be written because of Det. Romagni's other responsibilities, as was confirmed at the hearing on the motion. (R. 458-49, T. 422-23) Further, while Defendant may not have had the report, he did have Det. Romagni's *Arthur* hearing testimony regarding his investigation. (T. 237-441)



Given all of these circumstances, the lower court properly determined that any request to have a continuance charged to the State would have been meritless under *Naveira*. Since counsel cannot be deemed ineffective for failing to raise a meritless issue, the lower court properly denied this claim. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). It should be affirmed.

Defendant next complains that the lower court denied his claim that his counsel was ineffective for failing to obtain the services of a second attorney to represent him. Again, the denial of the claim was proper.

This Court has held that to state a facially sufficient claim that counsel was ineffective for failing to request a second attorney, a defendant has to allege specifically how the solo representation affected the attorney's performance at trial. *State v. Riechmann*, 777 So. 2d 342, 359 (Fla. 2000); see also *Cummings-el v. State*, 863 So. 2d 246, 249-50, 258 (Fla. 2003); *Larkins v. State*, 655 So. 2d 95, 100 (Fla. 1995); *Armstrong v. State*, 642 So. 2d 730, 737 (Fla. 1994). This is entirely consistent with *Strickland* requirement that any alleged deficiency must create a reasonable probability that a defendant

would not have been convicted had the alleged deficiency not occurred. *Strickland*, 466 U.S. at 694. It is also consistent with the statement in the comment to Fla. R. Crim. P. 3.112 that the *Strickland* standard had to be met to obtain relief. In fact, in *Armstrong*, this Court found that a request for a second attorney was insufficient where the defendant asserted that his one counsel needed help investigating the case. *Armstrong*, 642 So. 2d at 737.

Here, the lower court properly found that Defendant did not meet this pleading requirement. At no point did Defendant ever allege that the lack of a second attorney affected the outcome of the trial or even counsel's performance at trial. Instead, Defendant merely alleged that the lack of a second attorney caused delays in the discovery process and caused the State to be concerned about counsel's preparation well before trial. (PCR. 43-45) As such, the lower court properly found the claim to be insufficiently plead and denied it as such.

The denial of this claim was particularly appropriate as the record reflects that the reason why Defendant had one attorney was that he chose to have one attorney. During a pretrial hearing, Defendant's attorney indicated that he had not obtained a second attorney because Defendant wanted counsel to handle both phases of trial. (R. 2057-58) Immediately before

voir dire, Defendant personally indicated in a colloquy with the trial court that he had arranged for Mr. Guralnick to be his only attorney in both phases of trial. (T. 1033) During voir dire, counsel indicated that he knew that Defendant could have sought additional representation, and the trial court again indicated that Defendant had chosen to be represented solely by Mr. Guralnick. (T. 2390) As it was Defendant's wish to be represented only by Mr. Guralnick, counsel cannot be deemed ineffective for following his client's wishes. See *Cole v. State*, 841 So. 2d 409, 426 (Fla. 2003). Moreover, the United States Supreme Court has rejected the assertion that a waiver of even a constitutional right is sufficient even if the defendant did not have all of the implications of the waiver in his case explained to him. *Iowa v. Tovar*, 541 U.S. 77, 92 (2004). The denial of the claim should be affirmed.

Defendant next complains about the lower court's denial of his claim that his counsel was ineffective for failing to object to certain testimony. However, the lower court properly denied this claim. In pleading this claim, Defendant made no attempt to explain how objecting to any of this testimony would have created a reasonable probability of a different outcome. (PCR. 45-57) As such, the claims were insufficiently plead and properly denied.

Moreover, Det. Charles's testimony concerning his description of the punctures in the tires and the pieces of metal he found were merely that: descriptions of things he had seen. A witness is properly permitted to describe things he had seen. As such, counsel cannot be deemed ineffective for failing to claim that such evidence was not admissible. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim was properly denied.

Moreover, objecting to Det. Charles's testimony about the blood spatter evidence would not have been meritorious. When the State sought to prevent Det. Charles from giving an opinion about blood spatter, the trial court found that Det. Charles was qualified to give such an opinion. (T. 3315-17) The qualification of a witness is within the discretion of the trial court. *Anderson v. State*, 863 So. 2d 169, 179-80 (Fla. 2003). Here, Det. Charles stated that he had been a police officer for 26 years, during which he had worked in crime analysis for 3 years and been a crime scene technician for 6 to 7 years. (T. 3248) He stated that he had been trained in blood spatter analysis. (T. 3249) Under these circumstances, the trial court would have properly overruled an objection that Det. Charles was not qualified to give an opinion as it later did. As such, counsel cannot be deemed ineffective for failing to have

objected. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The denial of the claim should be affirmed.

Defendant next complains that his counsel was allegedly ineffective for failing to testify about Det. Sanchez's testimony regarding Ms. El-Djeije's identification. However, counsel did repeatedly object to Det. Sanchez's testimony, and the trial court repeatedly overruled these objections. (T. 3546) In fact, counsel objected when the State first attempted to ask the question about which Defendant complains but the lower court found that the statement was properly admitted as a statement of identification. (T. 3546) Since counsel did object, he cannot be deemed ineffective for failing to do so. The denial of the claim should be affirmed.

Defendant next asserts that counsel was ineffective for not objecting to Mr. Stewart's testimony about not being charged. However, the lower court properly determined that such any objection would be meritless. Florida has long allowed anticipatory rehabilitation of witnesses. *McCrae v. State*, 510 So. 2d 874, 877-78 (Fla. 1987); *Bell v. State*, 491 So. 2d 537, 538 (Fla. 1986). In this case, the State properly anticipated that Defendant would assert that Stewart was testifying to avoid being charged with this crime himself. As such, the State

properly anticipatorily rehabilitated him by eliciting testimony that Stewart had never been threatened with prosecution. Under these circumstances, counsel is not ineffective for failing to object to this testimony. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The denial of the claim should be affirmed.

Defendant next complains that counsel was ineffective for failing to object to Det. Romagni's testimony about his investigation and Det. Poitier's testimony about the number of assailants. However, Defendant raised these issues on direct appeal, and this Court rejected them, finding that the testimony was properly admitted and that any error would be harmless and not fundamental. *Dennis*, 817 So. 2d at 751-54. As the issues were raised and rejected on direct appeal, they are now procedurally barred, and couching the claim in terms of ineffectiveness does not lift the bar. *Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995); *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). Thus, the denial of the claim was proper and should be affirmed.

Defendant also complains that the lower court rejected his claim that counsel was ineffective for failing to object to Det. Poitier's testimony about the sexual assault kit. However,

Defendant asserted that the police did not conduct a careful investigation. He repeatedly insinuated that Little may have interrupted the crime in progress and that the assailant may have had a motive other than jealousy. (T. 3322, 3361-66, 3373-76) Under these circumstances, the State was properly allowed to elicit testimony that Lumpkins's body was tested to determine that she had not been sexually assaulted to show that the police had not conducted a sloppy investigation and ignored evidence of other possible motives. (T. 3367, 4242-43) As this evidence was relevant, counsel cannot be deemed ineffective for failing to claim that it was not. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The denial of the claim should be affirmed.

With regard to the admission of the fact that Wallace purchased a gun for Defendant, Defendant wanted this testimony before the jury. Defendant went to a great effort to elicit from Stewart that Defendant had a gun of his own. (T. 3697-3701) He used this evidence to assert that there was no reason for Defendant to have borrowed the shotgun from Stewart to commit this crime when he had his own gun. (T. 3701-02) Counsel even admitted that this was this theory. (T. 4268) As counsel wanted this evidence before the jury, he had no reason to have objected to it. Thus, counsel cannot be deemed ineffective for failing to

object to it. *Strickland*. The denial of the claim should be affirmed.

With regard to the cellular phone bill, part of the State's case was that Defendant made a call to a friend of his during which he admitted knowledge of information that was not generally available and was not provided to Defendant by the source he claimed. (T. 3949-50, 3996-98, 4215, 4666-67) Another part of the State's case was that Defendant had made certain calls to Joseph Stewart from his cell phone. (T. 4215) Finally, Defendant had claimed to have made certain calls to Lumpkins, which were not reflected either in his phone bill or her beeper. Under these circumstances, the record of calls made from the cell phone number Defendant was using and which of those calls were made from the phone in Defendant's possession was relevant. The fact that this evidence also tended to show that Defendant had committed another crime did not render this evidence inadmissible. *Bryan v. State*, 533 So. 2d 744, 745-48 (Fla. 1988)(evidence that defendant had committed bank robbery using the murder weapon admissible to show that defendant possessed murder weapon). Under these circumstances, counsel cannot be deemed ineffective for failing to claim that this evidence was inadmissible. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.



The denial of the claim should be affirmed.

Defendant next asserts that his counsel was ineffective for failing to object to Det. Romagni's redirect testimony concerning Defendant's alleged cooperation. However, the lower court properly determined that counsel was not ineffective because any objection would not have been meritorious. The United States Supreme Court has repeatedly held that a defendant may not use his Constitutional rights as a shield to allow him to mislead the jury. *Kansas v. Ventris*, 129 S. Ct. 1841, 1846-47 (2009)(statement obtained in violation of Sixth Amendment admissible as impeachment); *United States v. Robinson*, 485 U.S. 25 (1988)(defense comment that government prevent defendant from explaining himself made comment that defendant could have testified proper); *Harris v. New York*, 401 U.S. 222, 224-26 (1971)(statement taken in violation of *Miranda* can be used to impeach testimony at trial); *Walder v. United States*, 347 U.S. 62, 65 (1954)(evidence ceased in violation of Fourth Amendment can be used to impeach a defendant's testimony at trial). Here, the lower court properly applied this precedent to find that the question was not objectionable.

During his cross examination of Det. Romagni, Defendant attempted to portray himself as a person who had fully cooperated with the investigation by eliciting that he had

voluntarily appeared at the police station, gave a voluntary statement, consented to a search of his car, and agreed to being photographed and fingerprinted. (T. 4144-46) Given Defendant's attempt to mislead the jury into believing that he was fully cooperative, the State's questioning was a proper attempt to show that this was not true.<sup>5</sup> (T. 4222-24) Thus, counsel cannot be deemed ineffective for failing to make a nonmeritorious objection to the contrary. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The denial of the claim should be affirmed.

Defendant next complains about the lower court's denial of his claim that counsel was ineffective for failing to investigate other individuals who may have been involved with Ms. Lumpkins. This Court has required that a defendant allege specific facts showing that an alleged deficiency in counsel's performance prejudiced the defendant, including an explanation of what admissible evidence would have been uncovered and how the presentation of that evidence would have affected the outcome of trial. *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004). Here, Defendant did not allege what an investigation of

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<sup>5</sup> Further, while Defendant insists the request to speak to him might have been post arrest, the record shows that this is not true. Det. Romagni directly stated that he told Defendant on April 13, 1996, that he would like to speak to him again in a couple of days. (T. 4237) Defendant was not arrested until April 30, 1996.

any other individual would have revealed or how this information would have affected the outcome of the trial. (PCR. 57-61) Instead, he merely noted that there were entries in Ms. Lumpkins' planner that he assumed indicated that Ms. Lumpkins might have been sexually involved with Ray Lewis and someone named P and suggested that counsel should have investigate these entries to ascertain their meaning and discover the identity of P. Given these circumstances, the lower court properly determined that the claim was insufficiently plead. It should be affirmed.

The need to have such specific allegations is illustrated in this case by Defendant's assertions regarding Mr. Lewis. As Defendant admitted in his motion, Mr. Lewis refused to speak to Defendant's investigator prior to trial.<sup>6</sup> (PCR. 60) Moreover, the record reflects that the victims were murdered between 5:30 and 7:00 a.m. and that Mr. Lewis was in Lakeland, Florida, several hundred miles from Miami, at 9:00 a.m. (T. 3411-13) As such, Mr. Lewis could not have committed the crimes. Given these circumstances, counsel cannot be deemed ineffective for failing to present this information. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595

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<sup>6</sup> While Defendant suggests that his counsel should have sought to depose Mr. Lewis, he has never explained how such a deposition would have been legally possible. Fla. R. Crim. P. 3.220(h)(1)(A)-(D).

So. 2d at 11.

The lower court also properly denied the claim to the extent that Defendant really meant to assert that counsel should have used the information to show that the police failed to investigate other individuals who might have had a motive to kill Ms. Lumpkins. Counsel elicited from Det. Romagni that he was aware that Ms. Lumpkins was seeing other men but that he not checked into alibis from these men. (T. 4137) He had Det. Romagni admit that he did not even know the number of other men Ms. Lumpkins was seeing. (T. 4138) He had Det. Romagni testify that he never checked on these people at all and did not know if any of them were jealous of Ms. Lumpkins. (T. 4232-33) Given this testimony, the lower court properly found that Defendant did present evidence that police did not investigate Ms. Lumpkins' other boyfriends. The denial of the claim should be affirmed.

Defendant next complains that the lower court denied his claim that his counsel was ineffective for failing to hire crime scene experts. However, the lower court properly denied this claim as insufficiently plead. In his motion, Defendant merely recited some of the expert testimony presented by the State and complained that this evidence "went virtually unchallenged" because counsel did not present his experts. (PCR. 62-65) He

then made the conclusory assertion that evidence that crime could have been committed by more than one person and that the assailant might have gotten blood or other materials on him would have supported a defense, without explaining what evidence was actually available regarding these issues. However, this Court has required that a defendant specify the evidence that could have been presented had counsel not been deficient and explain how the presentation of this evidence would have affected the outcome. *Nelson*, 875 So. 2d at 583. Moreover, this Court has required that these allegations be more than conclusory. *Ragsdale*, 720 So. 2d at 207. As such, the lower court properly determined that the claim was insufficiently plead and should be affirmed.

The lack of specific pleading was important in this case. Counsel elicited through the State's witnesses that whoever committed this crime may have gotten blood or other biological matter on him. (T. 3221-22, 3224-25, 3309-10, 4456, 4458, 4459-60, 4577, 4588-89) He elicited that nothing in the crime scene evidence revealed the number of perpetrators. (T. 3230, 3309, 3322, 3375, 4458, 4593) As this Court has held, counsel cannot be deemed ineffective for failing to present his own crime scene experts when he elicited the information from the State's experts. *Riechmann*, 777 So. 2d at 354-56. Moreover, the theory

of defense was that Defendant had an alibi, the only evidence tying him to the crime was Stewart's testimony and Stewart was involved in the crime. Under this theory it did not matter that Stewart's shotgun was linked to the crime. Nor was the nature of the victim's injuries or the manner in which those injuries were inflicted relevant to this defense. Given these circumstances, the lower court properly denied this claim. It should be affirmed.

**II. THE CLAIM OF INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE WAS PROPERLY DENIED.**

Defendant next asserts that lower court erred in denying his claim that his counsel was ineffective during the penalty phase. However, the lower court properly denied this claim.

In order to plead a facially sufficient claim of ineffective assistance of counsel, a defendant must make detailed allegations regarding what additional evidence could have been presented had counsel not been deficient and provide an explanation of how the presentation of this additional evidence would create a reasonable probability of a different result. *Nelson*, 875 So. 2d at 583. Further, the allegations must be more than conclusory. *Ragsdale*, 720 So. 2d at 207. Moreover, there is no prejudice, where the additional mitigation merely added details about evidence that was presented and would not outweigh the aggravation. *Bobby v. Van Hook*, 130 S. Ct. 13, 19-

20 (2009).

Applying this law here, the lower court properly denied this claim. While Defendant contended that counsel failed to investigate and present evidence about Defendant's family history and life (PCR. 68-74), the record reflects the contrary. At the penalty phase, Defendant presented the testimony of both of Defendant's grandmothers and his mother.

Elaine Williams, Defendant's mother, testified that she was 16 years old when Defendant was born out of wedlock. (T. 5259-60) She stated that Defendant spent a year in college on a football scholarship. (T. 5262) She stated that he left college to pursue a career in rap music. (T. 5263) She stated that his group had songs on the charts and performed nationally and internationally. (T. 5263-64) She stated that Defendant had 3 children, loved them and supported them. (T. 5267)

Annie Siplin, Defendant's grandmother, testified that Defendant's father did not acknowledge legally that Defendant was his son. (T. 5268-70) She also testified to Defendant's college scholarship, his musical career and his loving relationship with his children. (T. 5270-77) Virginia Dennis, Defendant's other grandmother, testified about these same areas. (T. 5277-84)

Testimony was presented also that Defendant was a member of a rap group during the guilt phase. (T. 4142, 4334) Katia Lynn testified that the group performed throughout the Southeast before crowds of 5 to 6 thousand people. (T. 4335) Keith Bell testified the group was successful and had a song on the charts. (T. 4650-51) He stated they performed around the country and internationally. (T. 4651) Bell also testified that Defendant attended college on a football scholarship and quit to go into the music business. (T. 4662) As such, the record reflects that evidence of Defendant's family history and life was presented. *Turner v. Dugger*, 614 So. 2d 1075, 1078-79 (Fla. 1992). Thus, the claim was properly denied.

Moreover, the additional evidence that Defendant seeks to present appears to concern his family members lives and not his. However, only evidence that concerns a defendant's life or character or the circumstances of the crime is admissible in the penalty phase. *Hill v. State*, 515 So. 2d 176, 177-78 (1987) (evidence relevant to witness's character and not defendant's not admissible). As such, this evidence would not have been admissible. Thus, it cannot create a reasonable probability of a different result. *Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995). The claim was properly denied.



While Defendant complained about the fact that counsel received Defendant's school and employment records from the State, he did not even suggest that the records were incomplete or that any other records should have been obtained. As such, he failed to allege how counsel's failure to get the same records again had any effect on the outcome.

Regarding expert testimony, Defendant merely alleged in conclusory terms that expert testimony was available to explain "the psychological effect that [his] environment had on him" and to show that he could adapt to prison. (PCR. 73) He made no attempt to explain what the "psychological effect" was or how evidence of this effect would have created a reasonable probability of a different result. Thus, Defendant did not present any allegation, as he does now, that the expert testimony would have supported statutory mitigation. In fact, the expert report he filed pursuant to Fla. R. Crim. P. 3.851(5)(a) expressly concluded that the statutory mental mitigators did not apply to Defendant. (PCR-SR. 361-69) Thus, rather than adding weight to the extreme mental or emotional distress mitigator found by the trial court, presentation of expert testimony would have weakened the mitigation presented. Thus, the lower court properly rejected this claim as facially insufficient and should be affirmed.

Further, while Defendant made no attempt to explain how anything he said would have created a reasonable probability of a different result, the record shows that it would not have done so. Defendant beat 2 people to death after meeting Barnes at the door and smashing his face with a shotgun. He then entered the apartment and continued the beating. He did this after a week of preparation and an evening of stalking because he was jealous of Lumpkins's relationship with Barnes. These facts resulted in the finding of 4 aggravating circumstances, including both HAC and CCP. The proffered mitigation did not allege any childhood abuse. Moreover, there is no allegation of any mental disease or defect. Instead, the claim is that growing up in a violent neighborhood affected Defendant. Finally, Defendant had never been incarcerated before these crimes. As such, any prediction about his behavior while incarcerated would be highly speculative. Thus, the proffered mitigation is weak. Under these circumstances, there is no reasonable probability that had counsel presented this evidence, Defendant would not have been sentenced to death. *Strickland*. The claim was properly denied.

### **III. THE *BRADY* CLAIM WAS PROPERLY DENIED.**

Defendant next asserts that the lower court erred by denying his claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a memo a prosecutor sent

to Dr. Valerie Rao, the medical examiner who testified at the penalty phase, in preparation for her testimony. However, the lower court properly denied this claim and should be affirmed.

In order to plead a *Brady* claim properly, a defendant must allege:

[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

*Way v. State*, 760 So. 2d 903, 910 (Fla. 2000)(quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). To show prejudice, the defendant must show that but for the State's failure to disclose this evidence, there is a reasonable probability that the results of the proceeding would have been different. *Allen v. State*, 854 So. 2d 1255, 1260 (Fla. 2003). In determining whether the prejudice standard is met, a court must consider the impact of the evidence objectively, basing the impact on a reasonable decisionmaker, and must consider the totality of the evidence. *Strickland*, 466 U.S. at 694-96; see also *United States v. Bagley*, 473 U.S. 667, 682 (1985)(expressly applying the *Strickland* formulation of "reasonable probability" to *Brady* cases).

Here, the information that Defendant asserted that the State suppressed was a memo from Assistant State Attorney Joshua

Weintraub to Dr. Valerie Rao. (PCR. 90-91) In the memo, Mr. Weintraub outlined that he wanted Dr. Rao to describe the defensive wounds to Ms. Lumpkins, the fact that these wounds must have occurred before the blow that rendered her unconscious, the fact that Ms. Lumpkins' injuries would have been painful and the fact that Ms. Lumpkins would have been able to hear the attack on Mr. Barnes before she was attack. (PCR. 412-13) Regarding Mr. Barnes, Mr. Weintraub indicated that he needed testimony regarding the number of blows to Mr. Barnes's face, the pain associated with these injuries, Mr. Barnes' consciousness and ability to move after the injuries and his defensive wounds. *Id.* He suggested that the term "languished and died" was a term of art and needed to be used. *Id.* Defendant seemed to suggest that had he possessed this memo, he could have used it to impeach Dr. Rao by suggesting that her testimony was coached and that this impeachment would have affected the finding of HAC. However, the lower court properly determined that this alleged impeachment would not create a reasonable probability of a different result.

This Court has consistently upheld HAC where the victims died as the result of a brutal beating. *Guardado v. State*, 965 So. 2d 108, 115-16 (Fla. 2007); *Coday v. State*, 946 So. 2d 988, 1006 (Fla. 2006); *England v. State*, 940 So. 2d 389, 402 (Fla.

2006); *Buzia v. State*, 926 So. 2d 1203, 1212 (Fla. 2006); *Douglas v. State*, 878 So. 2d 1246, 1260-61 (Fla. 2004); *Beasley v. State*, 774 So. 2d 649, 669-71 (Fla. 2000); *Lawrence v. State*, 698 So. 2d 1219, 1221-22 (Fla. 1997); *Willacy v. State*, 696 So. 2d 693, 696 (Fla. 1997); *Bogle v. State*, 655 So. 2d 1103, 1109 (Fla. 1995); *Whitton v. State*, 649 So. 2d 861, 866-67 (Fla. 1994); *Colina v. State*, 634 So. 2d 1077, 1081 (Fla. 1994); *Owen v. State*, 596 So. 2d 985, 990 (Fla. 1992); *Penn v. State*, 574 So. 2d 1079, 1083 & n.7 (Fla. 1991); *Bruno v. State*, 574 So. 2d 76, 82 (Fla. 1991); *Cherry v. State*, 544 So. 2d 184, 187-88 (Fla. 1989); *Lamb v. State*, 532 So. 2d 1051, 1053 (Fla. 1988); *Scott v. State*, 494 So. 2d 1134, 1137 (Fla. 1986); *Wilson v. State*, 493 So. 2d 1019, 1023 (Fla. 1986); *Heiney v. State*, 447 So. 2d 210, 216 (Fla. 1984). The only times that this Court has found that HAC was not applicable in a beating death involve situations where the victim was rendered immediately unconscious by a blow and did not regain consciousness. *Zakrzewski v. State*, 717 So. 2d 488, 493 (Fla. 1998); *Elam v. State*, 636 So. 2d 1312, 1314 (Fla. 1994).

Here, it is undisputed that both victims died as the result of brutal beatings that consisted of a multitude of blows. It is also undisputed that both victims sustained defensive wounds. Both Dr. Gulino and Dr. Rao testified to these facts, and

Defendant has never even proffered any evidence that this is not true. (T. 4413-34, 4435-46, 5228-32, 5238-40)

Further, not only did both Dr. Gulino and Dr. Rao testify that the victims were conscious during the beatings and capable of hearing the attack on the other victim (T. 4433-34, 4437, 4446, 4450, 4452-53, 5233, 5241-42), but also the fact the victims remained conscious and did not die immediately was confirmed by other evidence. Earl Little testified that Mr. Barnes was alive and responded to his name when Mr. Little arrived at the apartment. (T. 3176-78) Off. Oppert testified that Ms. Lumpkins was alive and attempted to get up when he arrived at the apartment after 7:30 a.m. (T. 3205, 3213-15) One of Ms. Lumpkins' earring was found under the bed and she was found next to the bed, which was consistent with having attempted to hide under the bed before she was attacked. (T. 3275-76, 3279) Moreover, the walls of the living room and furniture were covered in smeared blood, consistent with Mr. Barnes have groped his way around the room in an attempt to find a way out of the apartment. (T. 3292, 3319, 4544, 4557-63, 4602)

Given all of the evidence supporting HAC that would not have been affected by any attempt to impeach Dr. Rao, the lower court properly determined that there was no reasonable probability of a different result had Defendant been given the

memo. *Allen*, 854 So. 2d at 1260; see also *Strickland*, 466 U.S. at 694-96. This is particularly true, as the State would have been entitled to have the jury instructed that it is perfectly normal and acceptable for an attorney to discuss a witness's testimony with the witness prior to trial. Fla. Std. Jury Instr. 3.10(7). Moreover, it should be remembered that while the prosecutor urged Dr. Rao to use the terms "languished and died" during her testimony (PCR. 412-13), Dr. Rao did not do so. (T. 5222-57) The denial of the claim should be affirmed.

Instead of focusing on the facts supporting HAC, Defendant asserts that there was a reasonable probability of a different result because Dr. Rao's testimony was allegedly more inflammatory than Dr. Gulino's testimony. However, in making this argument, Defendant ignores that Dr. Rao's testimony was presented at the penalty phase and was directed toward the victims' suffering. As this Court has recognized, the presentation of such testimony at a penalty phase is proper. *Cummings-el v. State*, 863 So. 2d 246, 254 (Fla. 2003). As such, the lower court properly denied this claim and should be affirmed.

#### **IV. THE CONFLICT OF INTEREST CLAIM WAS PROPERLY DENIED.**

Defendant next asserts that the lower court erred in denying his claim that his counsel had a conflict of interest.

Defendant bases his claim on the fact that counsel had a large workload. However, the lower court properly denied this claim.

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Court addressed the issue of whether a defendant would be entitled to post conviction relief if he showed that his counsel had a conflict of interest. The Court held that if the defendant showed that his attorney actually had a conflict of interest that adversely affected counsel's representation of the defendant, he was entitled to post conviction relief. *Id.* at 350. This Court has adopted this test and required both an actual conflict of interest and a show of an adverse effect on representation before relief is granted. *Quince v. State*, 732 So. 2d 1059, 1064-65 (Fla. 1999). Moreover, in *Mickens v. Taylor*, 535 U.S. 162, 174-76 (2002), the Court made clear that *Cuyler* was a limited exception for conflicts of interest resulting from representation of multiple defendants. The Court pointed out that *Cuyler* was not intended to apply outside such a context and noted that it had never even applied the test to successive representation case, let alone other claims of conflict of interest:

It must be said, however, that the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application. "Until," it said, "a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim



of ineffective assistance." 446 U.S. at 350 (emphasis added). Both *Sullivan* itself, see *id.* at 348-349, and *Holloway*, see 435 U.S. at 490-491, stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice. See also Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 125-140 (1978); Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 941-950 (1978). Not all attorney conflicts present comparable difficulties. Thus, the Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation. See *Sullivan*, *supra*, at 346, n. 10 (citing the Rule).

This is not to suggest that one ethical duty is more or less important than another. The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel. See *Nix v. Whiteside*, 475 U.S. 157, 165, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986) ("Breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"). In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question.

*Id.* at 175-76. In *Beets v. Collins*, 65 F.3d 1258 (5th Cir. 1995)(en banc), which was cited with approval in *Mickens*, the Court refused to apply *Cuyler* to conflicts of interest outside

the area of multiple representations. In doing so, the Court reasoned that applying *Cuyler* to alleged conflicts of interest that were not based on multiple representation would allow the *Cuyler* exception to swallow the *Strickland* rule.

Here, Defendant did not assert a conflict of interest based on multiple concurrent representation. In fact, he did not even assert a conflict based on successive representation. Instead, Defendant asserted that his counsel had a conflict of interest because he was handling more than one completely unrelated case during one period of time and because he believed that counsel does not change a sufficient fee to some of the individuals counsel chooses to represent. As such, the lower court properly determined that Defendant had not sufficiently alleged a cognizable conflict of interest under *Mickens*. In fact, recognizing a claim that an attorney had a conflict of interest simply because he was handling more than one case at one time would allow the *Cuyler* exception to swallow the *Strickland* rule. Thus, the lower court's denial of this claim should be affirmed.

**V. THE CLAIM CONCERNING THE STATE'S COMMENTS AND EVIDENCE WAS PROPERLY DENIED.**

Defendant next asserts that the lower court erred in denying his claim that the State asked allegedly improper questions during voir dire, elicited allegedly improper testimony and made allegedly improper comments during closing

and that his counsel was ineffective for failing to object to these actions. However, the lower court properly denied this claim.

This Court has held that claims that were or could have and should have been raised on direct appeal are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). Claims that the State asked improper questions during voir dire, elicited inadmissible evidence and made improper comments are all claims that could have and should have been raised on direct appeal. *Robinson v. State*, 707 So. 2d 688, 697-99 & n.17 & 18 (Fla. 1998); see *Franqui v. State*, 699 So. 2d 1312, 1322 (Fla. 1997); *Kelly v. State*, 569 So. 2d 754, 756 (Fla. 1990). Moreover, this Court has held that defendants cannot avoid the fact that a claim is barred simply by making conclusory assertions that counsel was ineffective regarding the barred claim. *Lowe v. State*, 2 So. 3d 21, 37-38 (Fla. 2008); *Pooler v. State*, 980 So. 2d 460, 471 (Fla. 2008); *Rodriguez v. State*, 919 So. 2d 1252, 1280 (Fla. 2005). Additionally, this Court has held that a defendant must make more than conclusory allegations to state a facially sufficient claim of ineffective assistance of counsel. *Ragsdale*, 720 So. 2d at 207.

Here, the lower court properly applied these cases to deny this claim. In his motion, Defendant spent pages detailing the

allegedly improper comments, questions and evidence.<sup>7</sup> (PCR. 79-83) However, he merely made a conclusory assertion that counsel was deficient for allegedly failing to object and that he was prejudiced as a result. (PCR. 83) Given these circumstances, the lower court properly determined that claim was barred. It should be affirmed.

Even if the claim was not barred, it was still properly denied. The record shows that counsel did object, and the questions and comments were proper. As such, counsel cannot be deemed ineffective. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Regarding the voir dire questioning, the record reflects that counsel objected to any mention of domestic violence and any voir dire questioning about such violence during a pretrial hearing, but the trial court overruled the objections except to the extent that it refused to allow the State to use the phrase "domestic violence."<sup>8</sup> (T. 939-46) He renewed the objection and moved for a mistrial when the State's questioning about domestic

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<sup>7</sup> Defendant included within this issue matters that he had already raised in his claim of ineffective assistance of counsel, which indicated that this was different claim. (PCR. 80)

<sup>8</sup> The trial court reiterated this ruling during individual questioning of one veniremember before the State was allowed to question the venire generally. (T. 2134-35)

violence led a juror to reveal a particularly severe incidence of such violence. (T. 2341-43) Thus, the record shows that counsel did object to this area of question.

Moreover, the trial court's ruling on this issue was proper. In *Davis v. State*, 790 So. 2d 1182, 1190 (Fla. 1997), this Court held that it was not an abuse of discretion to allow the State to question the venire about whether hearing that the victim was learning disabled would affect the veniremembers' impartiality because the State intended to present evidence that the victim was targeted because of the handicap. Here, the State planned to present evidence that Defendant had been domestically violent toward Ms. Lumpkins. As such, the State's questioning of the venire about whether they would be able to return a verdict based on the evidence even if they heard of incidence of domestic violence was proper. Since counsel did object and the questions were proper, the lower court properly denied this claim.

Regarding the comments during guilt phase closing, the arguments were proper in context. Contrary to Defendant's contention, the State did not suggest that Defendant has wasted anyone's time. Instead, the State merely pointed out that while the presumption of innocence had been repeatedly referenced, the evidence had proven that he was guilty and rebutted the

presumption. (T. 4822-23) As such, the comment was not improper. See *Belcher v. State*, 961 So. 2d 239, 246 (Fla. 2007).

Further, throughout trial, Defendant suggested that the police had conducted a sloppy investigation, ignoring other possible motives for the murders and other potential suspects. As such, the State merely responded to this suggestion by pointing about that the fact that there were valuables evident in the apartment but not taken showed that robbery was not a motive, the negative rape kit negated sexual assault as a motive and the lack of ransacking in the apartment showed that the murderer was not looking for drugs. (T. 4835-37) It concluded its initial closing by urging the jury to consider the consistency between Defendant's argument and the evidence. (T. 4880) Given these circumstances, these comments were also proper. *Rimmer v. State*, 825 So. 2d 304, 324 n.16 (Fla. 2002).

Moreover, the State's comment about regarding second degree murder merely pointed out that the planning of the murders distinguished this case from a second degree murder. (T. 4832) As this Court has recognized, planning or premeditation is what distinguishes first degree murder from second degree murder. *Randall v. State*, 760 So. 2d 892, 901 (Fla. 2000). Thus, the State's comments were not improper, and the claim was properly denied.

Regarding the *Williams* rule evidence, this Court determined on direct appeal that the evidence was properly admitted. *Dennis*, 817 So. 2d at 761-62. Moreover, the record reflects that counsel repeatedly objected to the witnesses' testifying regarding anything that they did not personally observe. (T. 4256-58, 4259, 4260, 4262-63, 4265, 4266-70, 4291, 4295, 4307, 4311, 4317, 4318) Since the evidence was properly admitted, it was also proper for the State to comment on the evidence in closing. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). Additionally, since the State proved that Defendant abused Ms. Lumpkins, it was not improper for the State to refer to him as an abuser. *Fernandez v. State*, 730 So. 2d 277, 281 (Fla. 1999). Under these circumstances, the lower court properly denied this claim.

Finally, the State's comments concerning the photographs and Ms. Lumpkins' fear were made during a discussion of the evidence supporting HAC. (T. 5365-72)<sup>9</sup> It pointed out that the photos showed that Mr. Barnes was conscious after the beating because he attempted to locate the door while blind. (T. 5369) As this Court held on direct appeal, this evidence did show HAC. *Dennis*, 817 So. 2d at 766. Further, this Court has held that it is proper to consider a victim's fear based on common sense

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<sup>9</sup> While Defendant cites to page 5359 as containing the comment about the photos, the comment actually appears on page 5369.

inferences in applying HAC. *Aguirre-Jarquin v. State*, 9 So. 3d 593, 608 (Fla. 2009). Given these circumstances, the lower court properly determined that these comments did not warrant post conviction relief. *Bertolotti v. State*, 476 So. 2d 130, 133-34 (Fla. 1985). The denial of the claim should be affirmed.

**VI. THE ISSUE RELATED TO JUROR INTERVIEWS SHOULD BE REJECTED.**

Defendant next complains about the bar rule that prohibits him from contacting jurors. He then recites his version of a communication between the trial court, the parties and the State and claims that he needs to conduct a juror interview. However, Defendant never clearly asserts what ruling of the lower court he is attacking or why. This Court has held that such a presentation of an issue is insufficient to present an issue for review. *Doorbal v. State*, 983 So. 2d 464, 482-83 (Fla. 2008); *Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999); *Duest v. State*, 555 So. 2d 849, 852 (Fla. 1990). As such, this issue should be rejected.

Even if the issue could be deemed to be properly presented, Defendant would still be entitled to no relief. To the extent that Defendant intends to challenge the lower court's summary denial of his claim that the bar rule is unconstitutional, Defendant is entitled to no relief. This Court has repeatedly the claim that R. Regulating Fla. Bar 4-3.5(d)(4) is



unconstitutional, finding the claim is procedurally barred and meritless. *Israel v. State*, 985 So. 2d 510, 522-23 (Fla. 2008); *Overton v. State*, 976 So. 2d 536, 566 (Fla. 2007); *Preston v. State*, 970 So. 2d 789, 796 (Fla. 2007); *Spencer v. State*, 842 So. 2d 52, 71-72 (Fla. 2003); *Johnson v. State*, 804 So. 2d 1218, 1224 (Fla. 2001); *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2000). Since the claim is procedurally barred and meritless, the lower court properly summarily denied it and should be affirmed.

To the extent that Defendant is asserting that the lower court abused its discretion in denying him juror interviews, he is still entitled to no relief. This Court has held that to preserve an issue regarding the denial of juror interviews, it is necessary to file either a motion for juror interviews or a notice concerning juror interviews. *Preston*, 970 So. 2d at 796 n. 12.; see also *Israel*, 985 So. 2d at 522-23. Here, Defendant did neither. Instead, he simply claimed in his motion for post conviction relief that the lower court should declare R. Regulating Fla. Bar. 4-3.5(d)(4) unconstitutional. Since this issue is not preserved, it should be denied.

Moreover, in *Griffin v. State*, 866 So. 2d 1, 20-21 (Fla. 2003), this Court held that unless a defendant could allege specific acts of juror misconduct that did not inhere in the verdict and that would entitle him to a new trial if true, he

was not entitled to interview any jurors. See also *Coday v. State*, 946 So. 2d 988, 1007 (Fla. 2006). A defendant may not seek an interview based on mere speculation. *Johnston v. State*, 841 So. 2d 349, 357-58 (Fla. 2002). Here, the lower court did not abuse its discretion in finding that this standard was not met.<sup>10</sup> In his motion for post conviction relief, Defendant requested that the lower court declare the bar rule unconstitutional and allow him to interview all of the jurors. (PCR. 83-86) The only basis for this request was the fact that Juror Reid had asked the trial court to contact people with whom she had a meeting and confirm that she needed the meeting rescheduled because she was on jury duty and the trial court had asked the State to assist it in determining whom to call. *Id.* Defendant then speculated that the State may have provided assistance to Juror Reid, which he speculates may have biased Juror Reid. However, such speculation is insufficient to state a request for even an interview of Juror Reid. *Johnston*, 841 So. 2d at 357-58. As such, the lower court properly denied this claim and should be affirmed.

In an attempt to justify his speculation, Defendant asserts that he has no way of determining the fact regarding his claim

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<sup>10</sup> This Court reviews the denial of juror interviews for an abuse of discretion. *Anderson v. State*, 18 So. 3d 501, 519 (Fla. 2009).

without interviewing the jurors. He insists that the lower court erred in finding that he did because the record shows that his trial court was unaware of this conversation. However, the lower court was correct in rejecting this argument.

At the beginning of the day's proceedings, the trial court had Defendant brought into the courtroom, directly asked if Defendant's counsel was ready to proceed and received an affirmative response from counsel. (T. 3444) The trial court then stated that it had received Juror Reid's note and would discuss the matter with her and counsel for both parties later. (T. 3444-45) Further, after the last witness testified, the lower court, in both Defendant and his counsel's presence, excused the jury but directed Ms. Reid to stay. (T. 3556-57, R. 1949) After the other jurors left, the trial court continued to address Defendant's counsel and indicated that Defendant was still present. (T. 3557) The trial court then stated that Ms. Reid had provided a note stating that she had an appointment she could not miss with child support enforcement the following Wednesday morning, and Ms. Reid stated that she had attempted to move the appointment because she was on jury duty but the child support enforcement office refused without some further proof of jury duty. (T. 3557-59) When Ms. Reid was unable to name the person she spoke to, the trial court asked the State to contact

the office and get it information to confirm the jury duty. (T. 3559) It was only at that point that the trial court declared a recess. (T. 3559) Given that Defendant and his counsel were both present at the beginning of the discussion, that the proceedings continued and that neither Defendant nor his counsel was excused, the lower court was entirely correct to find that Defendant's claim that he and his counsel were not present was refuted by the record. The denial of the claim should be affirmed.

**VII. THE LOWER COURT'S PUBLIC RECORDS RULINGS WERE NOT AN ABUSE OF DISCRETION.**

Defendant next asserts that the lower court abused its discretion in sustaining objections to some of his requests for additional public records. Specifically, Defendant complains that the lower court limited discovery regarding the expertise of Thomas Quirk and Toby Wolson and personnel files of officers from the Coral Gables Police Department and refused to order production of one prosecutor's personnel file. He also complains about the lower court's in camera review of exempt materials from the Department of Corrections and Department of Health. Finally, he complains that his requests to numerous agencies for records regarding lethal injection were denied. However, the lower court did not abuse its discretion in any of these

rulings.<sup>11</sup>

Pursuant to both Fla. R. Crim. P. 3.852(g) and (i), a trial court is justified in refusing to require compliance with a request for additional public records where the request does not specifically identify the records sought, the records requested have not been shown to be relevant to a colorable post conviction claim or the request is overly broad and unduly burdensome. This Court has stated that these requirements are imposed to prevent the use of additional public records requests from being used to conduct "a fishing expedition for records unrelated to any colorable claim for post conviction relief." *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000); see also *Moore v. State*, 820 So. 2d 199, 204-05 (Fla. 2002); *Mills v. State*, 786 So. 2d 547, 551-52 (Fla. 2001). Instead, the requirements ensure that the records sought are part of "a focused investigation into some legitimate area of inquiry." *Sims*, 753 So. 2d at 70; *Glock v. Moore*, 776 So. 2d 243, 254 (Fla. 2001). As a result, this Court has repeatedly held that trial courts have not abused their discretion where the defendant's requests sought "any and all documents" because such requests are overly broad and unduly burdensome. *Diaz v. State*, 945 So. 2d 1136, 1148-50 (Fla. 2006);

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<sup>11</sup> A trial court's ruling on post conviction discovery, including public records disclosure, is reviewed for an abuse of discretion. *Reaves v. State*, 942 So. 2d 874, 881 (Fla. 2006); *Rodriguez v. State*, 919 So. 2d 1252, 1279-80 (Fla. 2005)

*Hill v. State*, 921 So. 2d 579, 584-85 (Fla. 2006); *Mills*, 786 So. 2d at 552. Further, this Court has required the defendant to show that the records he requests have some relevance to a possible claim. *Walton v. State*, 3 So. 3d 1000, 1010-11 (Fla. 2009).

Applying this precedent here, the lower court did not abuse its discretion in denying Defendant's requests. In his request to MDPD, Defendant sought the complete personnel files of Mr. Quirk, Mr. Wolson and 39 other officers and all documents regarding the proficiency and competency of Mr. Quirk and Mr. Wolson. (PCR-SR. 138-39, 140) Despite being informed that both of these individuals had been employed for decades,<sup>12</sup> Defendant refused to limit the request for a time period around this case, insisting that he needed anything that might show problems with their work. (PCR. 434-37) As the lower court noted, MDPD would have been required to go through voluminous records of hundreds or thousands of cases searching for evidence of possible problems in order to response to Defendant's request. (PCR. 437) Moreover, it should be remembered that this Court had held that evidence that an expert made a mistake in a prior case is not even admissible. *Cruse v. State*, 588 So. 2d 983, 988-89 (Fla.

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<sup>12</sup> At the time of the hearing, Mr. Quirk was about to retire after 30 years, and it was estimated that Mr. Wolson had been working for 20 years. (PCR. 435, 437)

1991). Given these circumstances, the lower court did not abuse its discretion in denying this overly broad request. This is particularly true, as the lower court permitted Defendant to review Mr. Quirk and Mr. Wolson's personnel files and to make specific requests for individual incidence of problems with their work after doing so. (PCR. 437) The lower court should be affirmed.

The same is true of the request for the personnel files of the Coral Gables officers. Defendant requested "any and all" documents from the personnel files of 14 officers. (PCR-SR. 116) He made this request despite the fact that most information in a personnel file, such as insurance elections, would have no bearing on anything and the fact that only two of the officers testified at trial: Off. Oppert and Det. Hudak. (PCR-SR. 116, R. 1966-2005, 3139-45, 3220) Coral Gables agreed to disclose Det. Hudak's file and only objected to the other officers' files because they had done little more than be at the scene. (PCR. 996) Defendant's only explanation of how these files would be relevant in lower court was that some of the officers had written reports or taken photos, some had been identified as assisting the people and some of the people had just been present at the scene. (PCR. 996-1003) Given these circumstances, the lower court did not abuse its discretion in ordering that

only the files of those officers who actually took pictures or did substantive work would be produced. *Parker v. State*, 904 So. 2d 370, 379 (Fla. 2005). It should be affirmed.

Defendant's suggestion that the lower court somehow acted improperly in deciding to review Ms. Seff's personnel file in camera is also meritless. This Court has held that a trial court has the discretion to conduct in camera inspections to resolve public records disputes. *Kearse v. State*, 969 So. 2d 976, 988 (Fla. 2007). Here, the lower court appropriately utilized its discretion in deciding to do so. Defendant made a request for "and and all" documents contained in the personnel files of 4 prosecutors. (PCR-SR. 128) Defendant's only assertion regarding how anything in these files would be relevant was that since one of the prosecutors had engaged in an ex parte communication with the judge originally assigned to the case, there might be something in all 4 personnel files regarding the incident. (PCR. 891-95) Given the over breath of Defendant's request and his limited proffer of relevance, the lower court did not abuse its discretion in deciding to review Ms. Seff's personnel file in camera. It should be affirmed.

Further, Defendant's arguments about the manner in which the lower court conducted its in camera review of the exempt materials from DOC and the Department of Health are at best



misleading. While Defendant seems to suggest that he needed to be present while the lower court conducted its in camera review in order to know the nature of the exempt materials, this is not the argument Defendant presented below. Instead, what Defendant argued below was that he needed to be present during the lower court's in camera review so that he could read the exempt materials himself. (PCR. 925) In fact, Defendant went so far as to suggest that the lower court should provide him with a copy of his medical records, even though he had already received a copy of these records directly from DOC, as part of its in camera inspection. (PCR. 910-11) An in camera inspection is defined as a "judge's private consideration of evidence." Black's Law Dictionary 828 (9th Ed. 2009). As a result, it has been recognized that the party seeking disclosure is not entitled to review the materials submitted for an in camera inspection. *Media General Operations, Inc. v. State*, 933 So. 2d 1199, 1201 (Fla. 2d DCA 2006); see also *Ford Motor Co. v. Hall-Edwards*, 997 So. 2d 1148, 1153-54 (Fla. 3d DCA 2008). Thus, the lower court did not abuse its discretion in rejecting Defendant's request regarding the in camera review.

Moreover, the record shows that Defendant was, in fact, aware of the nature of the exempt materials. During the public records hearing on July 1, 2003, Defendant was informed that the

materials that DOC had claimed to be exempt consisted of his medical records, victim information and NCIC printouts. (PCR. 911) Moreover, the transmittal sheet that the Department of Health filed with its notice of compliance directly stated that the exempt materials consisted of "Patient Information, Exam Scores and Transcripts pursuant to 456.014(4), F.S." (PCR-SR. 289) Despite knowing the nature of the exempt materials, Defendant has never argued that these materials are not exempt from disclosure, which they are. §§119.07(3)(s), 456.014(1), 943.053 & 945.10(1)(a) & (f), Fla. Stat. (2003). Thus, the lower court did not abuse its discretion in conducting an in camera review and refusing to disclose these materials. It should be affirmed.

With regard to Defendant's requests for records regarding lethal injection, the lower court again did not abuse its discretion. In *Walton*, this Court affirmed the denial of similar requests. *Walton*, 3 So. 3d at 1013-14. As such, the lower court did not abuse its discretion in denying these requests. It should be affirmed.

#### **VIII. THE CLAIM REGARDING THE NATIONAL RESEARCH COUNCIL WAS PROPERLY DENIED.**

Defendant next asserts that the lower court erred in denying his claim that a report by the National Research Council constitutes newly discovered evidence. However, the lower court

properly denied this claim.

This Court has held that inadmissible information does not constitute newly discovered evidence. *Williamson v. State*, 961 So. 2d 229, 234 (Fla. 2007); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *Johnson v. Singletary*, 647 So. 2d 106, 110-11 (Fla. 1994). Moreover, this Court has stated that it has never recognized new opinions or new research studies as newly discovered evidence. *Schwab v. State*, 969 So. 2d 318, 326 (Fla. 2007). It has repeatedly rejected claims that governmental studies, such as the one at issue here, constituted evidence at all, much less newly discovered evidence. *Power v. State*, 992 So. 2d 218, 220-23 (Fla. 2008); *Tompkins v. State*, 994 So. 2d 1072, 1082-83 (Fla. 2008); *Díaz v. State*, 945 So. 2d 1136, 1145-46 (Fla. 2006); *Rolling v. State*, 944 So. 2d 176, 181 (Fla. 2006); *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006). Instead, this Court has characterized such reports as, "a compilation of previously available information . . . and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches." *Rutherford*, 940 So. 2d at 1117. Further, in determining whether information in a report constitutes newly discovered evidence, this Court has actually looked at when the information in the report could have been discovered through an

exercise of due diligence. See *Diaz*, 945 So. 2d at 1144 (newly published letter not newly discovered evidence when information underlying letter available since 1950); *Glock*, 776 So. 2d at 251.

Here, Defendant admitted at the *Huff* hearing that he was not asserting that any information in the report was newly discovered. Instead, he asserted that what made the report new was that it compiled existing information and made recommendations regarding changes in the law. (PCR2. 432-37) Given these circumstances, the lower court properly determined that the report did not constitute newly discovered evidence. This is particularly true, as this Court has just held that this report does not qualify as newly discovered evidence. *Johnston v. State*, 2010 WL 183984 (Fla. Jan. 21, 2010). The denial of the claim should be affirmed.

In an attempt to avoid this result, Defendant asserts that this Court has held that governmental reports are newly discovered evidence in *Trepal v. State*, 846 So. 2d 405 (Fla. 2003). However, in *Trepal*, this Court actually affirmed an order finding that the report from the FBI was not newly discovered evidence. *Trepal*, 846 So. 2d at 407, 424. As such, Defendant's reliance on *Trepal* is misplaced.

In a further attempt to bolster his claim, Defendant

asserts that the report should be considered newly discovered evidence showing that counsel was ineffective in failing to request a *Frye* hearing. However, in making this assertion, Defendant ignores that this Court had held that claims of newly discovered evidence are logically inconsistent with claims of ineffective assistance of counsel because newly discovered evidence must not have been discoverable through an exercise of due diligence. *Sireci v. State*, 773 So. 2d 34, 40 n.11 (Fla. 2000). As such, Defendant's assertion does not show that the lower court erred in rejecting this claim.

Moreover, in making this claim, Defendant misstates the law regarding *Frye* hearings. Contrary to Defendant's suggestion, a *Frye* hearing is not required anytime scientific evidence is admitted. Instead, a *Frye* hearing is only required when new and novel scientific evidence is admitted. *Branch v. State*, 952 So. 2d 470, 483 (Fla. 2006); *Spann v. State*, 857 So. 2d 845, 852-53 (Fla. 2003). Here, Defendant has never alleged that any of the evidence admitted at his trial is new and novel scientific evidence. As such, the lower court properly denied this claim. It should be affirmed.

#### **IX. THE LETHAL INJECTION CLAIM WAS PROPERLY DENIED.**

Defendant next asserts that the lower court erred in summarily denying his claim that Florida's lethal injection

protocols are unconstitutional. However, the lower court properly denied this claim.

This Court has repeatedly rejected claims that lethal injection and the protocols used to carry it out in Florida are unconstitutional and repeatedly held that each defendant is not entitled to his own evidentiary hearing on the issue. *Davis v. State*, 34 Fla. L. Weekly S605, S605 n.3 (Fla. Nov. 5, 2009); *Chavez v. State*, 12 So. 3d 199, 213 (Fla. 2009); *Marek v. State*, 8 So. 3d 1123, 1130 (Fla. 2009); *Reaves v. State*, 14 So. 3d 913, 920 (Fla. 2009); *Cox v. State*, 5 So. 3d 659, 659 (Fla. 2009); *Bates v. State*, 3 So. 3d 1091, 1105-06 & n.18 (Fla. 2009); *Walton*, 3 So. 3d at 1011-13; *Ventura v. State*, 2 So. 3d 194, 198 (Fla. 2009); *Henyard v. State*, 992 So. 2d 120, 130 (Fla. 2008); *Lebron v. State*, 982 So. 2d 649, 666 (Fla. 2008); *Lightbourne v. McCollum*, 969 So. 2d 326, 334, 353 (Fla. 2007); *Schwab v. State*, 969 So. 2d 318, 324 (Fla. 2007). As such, the lower court properly rejected Defendant's claims that lethal injection and its protocols are unconstitutional and that he is entitled to his own evidentiary hearing on the issue. It should be affirmed.

**X. THE CLAIM REGARDING THE SUFFICIENCY OF THE EVIDENCE WAS PROPERLY DENIED.**

Defendant next asserts that the evidence is insufficient to sustain his conviction. However, the lower court properly denied this claim. Issues regarding the sufficiency of the evidence

are issues that could have and should have been raised on direct appeal, which are procedurally barred in post conviction proceedings. *Burr v. State*, 518 So. 2d 903, 905 (Fla. 1987); *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). As such, the lower court properly denied this claim as procedurally barred. This is particularly true, as this Court expressly stated that the evidence was sufficient to sustain the convictions on direct appeal and expressly found that the evidence was not only sufficient to establish the simply premeditation necessary to sustain the conviction but also sufficient to established heightened premeditation. *Dennis*, 817 So. 2d at 765-66, 767. The denial of the claim should be affirmed.

#### CONCLUSION

For the foregoing reasons, the denial of post conviction relief should be affirmed.

Respectfully submitted,

BILL MCCOLLUM  
Attorney General  
Tallahassee, Florida

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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 **BRIEF OF APPELLEE** was furnished by U.S. mail to **Suzanne Keffer**, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this \_\_\_\_ day of January 2010.

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SANDRA S. JAGGARD  
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE**

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

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SANDRA S. JAGGARD  
Assistant Attorney General