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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1280

JOSE ANTONIO JIMENEZ,

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

PAMELA JO BONDI
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
Primary: capapp@myfloridalegal.com
Secondary: Sandra.Jaggard@myfloridalegal.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF CASE AND FACTS

On October 21, 1992, Defendant was charged by indictment, with the first degree murder of Phyllis Minas and the armed burglary with an assault on Ms. Minas. (R. 1-3)[1] The crimes were alleged to have been committed on October 2, 1992. The murder was charged alternatively as felony or premeditated murder.

Trial commenced on October 3, 1994. (R. 516) The jury found Defendant guilty of first degree murder and armed burglary with an assault. (R. 449-50) The trial court adjudicated Defendant in accordance with the verdict. (R. 451-52)

On November 10, 1994, a sentencing hearing was held before the same jury. (R. 512) The jury unanimously recommended that Defendant be sentenced to death. (R. 487) On December 14, 1994, the trial court followed the jury's recommendation and sentenced Defendant to death for the murder. (R. 529-44) The trial court also imposed a consecutive life sentence for the burglary. (R. 544)

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[1] The symbols "R." and "T." will refer to the record on direct appeal and transcripts of proceedings, Florida Supreme Court Case No. 85,014. The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal from the denial of the first motion of post conviction, Florida Supreme Court case no. SC00-1436. The symbol "PCR2." will refer to the record on appeal in Florida Supreme Court Case No. SC01-1660. The symbol "PCR3." and "PCR3-SR." will refer to the record on appeal and supplemental record on appeal in Florida Supreme Court case no. SC05-2373. The symbol "PCR4." will refer to the record in the instant appeal.

In aggravation, the trial court found that Defendant had previously been convicted of a violent felony, resisting arrest with violence - moderate weight; the murder was committed during the course of a burglary - great weight; Defendant was on community control when he committed the murder - great weight; and the murder was especially heinous, atrocious or cruel (HAC). (R. 530-33) In mitigation, the trial court gave minimal weight to the statutory mitigating circumstance that Defendant's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was substantially impaired at the time of the crime, which was based on Defendant's drug use. The trial court also gave very little weight to Defendant's potential for rehabilitation and great weight to the fact that if sentenced to two consecutive life sentences, Defendant would never be released. (R. 534-42)

Defendant appealed his conviction and sentence to this Court, raising 9 issues. On October 30, 1997, this Court affirmed Defendant's convictions and sentences. In affirming Defendant's convictions and sentences, this Court outlined the facts of the case as follows:

> On October 2, 1992, [Defendant] beat and stabbed to death sixty-three-year-old Phyllis Minas in her home. During the attack her neighbors heard her cry, "Oh God! Oh my God!" and tried to enter her apartment through the unlocked front door. [Defendant] slammed the door shut, locked the locks on the door, and fled

> the apartment by exiting onto the bedroom balcony, crossing over to a neighbor's balcony and then dropping to the ground. Rescue workers arrived several minutes after [Defendant] inflicted the wounds, and Minas was still alive. After changing his clothes and cleaning himself up, [Defendant] spoke to neighbors in the hallway and asked one of them if he could use her telephone to call a cab.
>
> [Defendant's] fingerprint matched the one lifted from the interior surface of the front door to Minas's apartment, and the police arrested him three days later at his parents' home in Miami Beach.
>
> * * *
>
> [Defendant's] fingerprints were found on the inside of the front door. This is consistent with the neighbors' testimony that the door was pushed shut when they tried to get in to help Minas. Further, while the neighbors were blocking the front door, [Defendant] was seen jumping from the rear balcony next to Minas's, and the sliding glass doors leading to her balcony were open. Finally, [Defendant] told Rochelle Baron that the police wanted to talk to him about a stabbing when the police never mentioned a stabbing. They told [Defendant] they wanted to talk to him about some burglaries.

Id. at 438, 441. Defendant then sought certiorari review in the United States Supreme Court, which was denied on May 18, 1998. *Jimenez v. Florida*, 523 U.S. 1123 (1998).

On January 31, 2000, Defendant filed his initial motion for post conviction relief, alleging six claims:

> CLAIM NO. 1
>
> THE DEFENDANT, JOSE JIMENEZ, WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF THE TRIAL, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BY THE FAILURE OF HIS TRIAL COUNSEL TO CALL WITNESSES ON HIS BEHALF.
>
> CLAIM NO. 2
>
> THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN

VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BY COUNSEL'S FAILING TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE; INCLUDING INVESTIGATING WHETHER THERE WAS AVAILABLE EVIDENCE TO ARGUE THE APPLICABILITY OF MENTAL HEALTH MITIGATING EVIDENCE, FAMILY RELATED, AND OTHER TYPES OF MITIGATING EVIDENCE.

CLAIM NO. 3

TRIAL COUNSEL WAS INEFFECTIVE IN THAT THEY FAILED TO OBJECT TRIAL AND PRESERVE ISSUES ON APPEAL. THIS CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM NO. 4

DEFENDANT'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, AND THE OUTCOME THEREOF WAS MATERIALLY UNRELIABLE BECAUSE THERE WAS NOT AN ADEQUATE AMOUNT OF ADVERSARIAL TESTING DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM NO. 5

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE WHERE DEFENDANT AND HIS LAWYER MR. KASSIER HAD A CONFLICT OF INTEREST AND COUNSEL'S PERFORMANCE AT THE PENALTY PHASE WAS CONSTITUTIONALLY DEFICIENT.

CLAIM NO. 6

DEATH BY ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT AN[sic] VIOLATIVE OF THE DEFENDANT'S RIGHTS UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

(PCR. 29-37) On March 10, 2000, Defendant filed his Amended 3.850 Motion, claiming that he was entitled to relief under *Delgado v. State*, 776 So. 2d 233 (Fla. 2000).

On June 8, 2000, the lower court denied Defendant's motions for post conviction relief. (PCR. 91-112) The lower court found that the alleged ineffectiveness regarding the witness was

refuted by the record. (PCR. 96-100) It also held that the alleged penalty phase ineffectiveness was insufficiently plead and refuted by the record. (PCR. 100-105) As to claims 3 and 4, the lower court found that they were insufficiently pled. (PCR. 105-06) The lower court stated that claim 5 had been raised on direct appeal and was procedurally barred. (PCR. 106-07) The electrocution claim was found to be moot. (PCR. 108) With regard to the *Delgado* claim, the lower court held, *inter alia*, that *Delgado* was inapplicable to this matter as it was not retroactive and no consent defense, or evidence of consensual entry, was presented at trial. (PCR. 108-10)

Defendant appealed the denial of his first motion for post conviction relief to this Court, claiming only that he was entitled to relief under *Delgado*. On September 26, 2001, this Court affirmed the denial of the motion for post conviction relief, holding that *Delgado* did not apply retroactively to this case. *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001). Defendant sought certiorari review of the affirmance of the denial of the first motion for post conviction relief, which was denied on May 13, 2002. *Jimenez v. Florida*, 535 U.S. 1064 (2002).

During the pendency of the appeal from the denial of the first motion for post conviction relief, Defendant filed a *pro se* pleading in the lower court entitled Petition for Writ of

Habeas Corpus, Seeking a Belated Appeal. (PCR2. 24-35) In this motion, Defendant complained about the quality of representation by registry counsel, Mr. Casuso, and sought the appointment of new counsel. On June 15, 2001, the lower court entered an order summarily denying the motion without notice to the State and without holding a *Huff* hearing. (PCR2. 36) When the State learned of the entry of this order, the State moved to rescind the order, pointing out that the trial court did not have jurisdiction because of the pendency of the appeal from the denial of the first motion for post conviction relief. (PCR2. 44-46) The trial court rescinded the order.

After the order was entered but before it was rescinded, Defendant filed a notice of appeal with the Florida Supreme Court from the order. The State moved to dismiss the appeal because the order was being rescinded. This Court granted the State's motion and dismissed the appeal on November 13, 2001. *Jimenez v. State*, 800 So. 2d 614 (Fla. 2001).

After certiorari was denied on Defendant's first motion for post conviction relief, the State arranged for the trial court to hold a hearing on Defendant's *pro se* writ of habeas corpus. At the hearing, Defendant personally stated that what he wanted was new counsel appointed to represent him in further post conviction proceedings. Louis Casuso stated that he no longer

wished to represent Defendant. As such, the lower court discharged Mr. Casuso, appointed Martin McClain as new counsel, and struck the *pro se* pleading. Defendant did not seek to appeal that order.

On December 11, 2002, Defendant filed an untimely petition for writ of habeas corpus in this Court, raising 3 claims:

> CLAIM I
>
> [DEFENDANT] WAS DEPRIVED OF HIS STATUTORY RIGHT TO EFFECTIVE REPRESENTATION IN COLLATERAL PROCEEDINGS.
>
> A. Florida Provides a Substantive Right to Effective Assistance of Collateral Representation in Capital case.
>
> B. [Defendant's] Collateral Counsel's Representation Failed to Deliver the Effective Representation That Had Been Promised.
>
> 1. Refused to meet with client.
> 2. Denigrate Client to fact tribunal.
> 3. Violated confidentiality obligation.
> 4. Waived without consent client's Chapter 119 rights.
> 5. Abandoned any advocacy on [Defendant's] behalf.
> 6. Abandoned all of [Defendant's] appellate issues.
> 7. Waived without consent the right to seek habeas relief.
>
> C. [Defendant] Must Be Afforded the Same Relief Afforded Others Who Were Deprived of Adequate Collateral Representation.
>
> CLAIM II
>
> [DEFENDANT] WAS DEPRIVED OF DUE PROCESS WHEN JUDGE ROTHENBERG ENGAGED IN EX PARTE CONTACT WITH LOUIS CASUSO AND CONSIDERED ONLY MR. CASUSO'S SIDE WITHOUT PERMITTING [DEFENDANT] TO BE HEARD.
>
> A. Notice and Opportunity To Be Heard.
>
> B. Fair and Impartial Judge.
>
> CLAIM III
>
> THE FLORIDA CAPITAL SENTENCING PROCEDURES AS EMPLOYED IN [DEFENDANT'S] CASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE A JURY RETURN A VERDICT ADDRESSING HIS

GUILT OF ALL THE ELEMENTS NECESSARY FOR THE CRIME OF CAPITAL FIRST DEGREE MURDER.

Petition for Writ of Habeas Corpus, Case No. SC02-2600. This Court denied this petition on June 10, 2003. *Jimenez v. Crosby*, 861 So. 2d 429 (Fla. 2003). Defendant moved for rehearing, which was denied on November 14, 2003.

On May 24, 2004, Defendant filed a successive petition for writ of habeas corpus in this Court, raising 2 claims:

I.

[DEFENDANT'S] CONVICTION FOR BURGLARY VIOLATES HIS RIGHTS TO DUE PROCESS AND TO NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD, AS WELL AS THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II.

[DEFENDANT'S] RIGHT TO CONFRONTATION WAS VIOLATED AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court denied the petition on March 18, 2005. *Jimenez v. Crosby*, 905 So. 2d 125 (Fla. 2005). It denied rehearing on May 25, 2005.

On April 28, 2005, Defendant served a third motion for post conviction relief, raising one claim:

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR KNOWINGLY PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE, AND/OR THE FAVORABLE EVIDENCE

> CONSTITUTES NEWLY DISCOVERED EVIDENCE OF INNOCENCE WHICH UNDERMINES CONFIDENCE IN THE RELIABILITY OF THE TRIAL CONDUCTED WITHOUT THE EVIDENCE PRESENTED.

(PCR3. 68-94) The lower court denied this claim summarily, as procedurally barred and without merit. (PCR3. 435-42)

Defendant appealed the denial of this motion to this Court. On June 19, 2008, this Court affirmed the denial of the successive motion, finding that the claim and all of its sub-parts were barred. *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008). Defendant sought certiorari review of this decision, which was denied on June 22, 2009. *Jimenez v. Florida*, 557 U.S. 925 (2009).

On November 29, 2010, Defendant filed a fourth motion for post conviction relief, raising one claim:

> [DEFENDANT'S] CONVICTION AND SENTENCE VIOLATE THE SIXTH AND EIGHTH AMENDMENTS UNDER *PORTER V. MCCOLLUM.*

(PCR4. 57-94) On February 11, 2011, the trial court denied the fourth motion, finding that *Porter* was not a change in law and would not apply retroactively even if it was and that the claim was meritless. (PCR4. 134-40) The order was rendered that same day. *Id.* Defendant filed no timely motion for rehearing and did not appeal the denial of this motion. Instead, he filed a pleading on March 16, 2011, in which he complained that he had not been served with a copy of the order denying his motion from the clerk, contended that the word rendition was not defined and

averred that it had to mean service of the pleading by the clerk. (PCR4. 141-44) He asserted that he planned to file a motion for rehearing after his complaint about service was resolved. *Id.*

On April 22, 2011, Defendant filed a motion for leave to amend the fourth motion for post conviction relief to add a claim that Florida's then-existing lethal injection protocol was unconstitutional due to a shortage of sodium thiopental. (PCR4. 146-60) The State responded to this motion, pointing out that the order denying the fourth motion had been rendered on February 11, 2011, that the lower court no longer had jurisdiction over that motion because the time for rehearing had expired without a timely motion for rehearing being filed and that the motion for leave to amend was untimely. (PCR4. 161-64)

On March 20, 2013, Defendant filed a fifth motion for post conviction relief, raising one claim:

> BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS INITIAL COLLATERAL REVIEW PROCEEDINGS, [DEFENDANT] IS ENTITLED TO EQUITABLE RELIEF AND CONSIDERATION OF THE MERTIS OF HIS CLAIMS THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF *STRICKLAND V. WASHINGTON* AT BOTH THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL.

(PCR4. 165-90) In support of this claim, Defendant argued *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), required the reconsideration and granting of an evidentiary hearing regarding

the denial of the claims raised in his first and third motions for post conviction relief. *Id.* He averred that this Court had already held that *Martinez* did not affect post conviction litigation in Florida courts should be ignored because he believed the manner in which his prior claims had been litigated differed from the litigation in this Court's precedent. *Id.*

The State responded that the motion was time barred, procedurally barred and meritless. (PCR4. 191-210) At the *Huff* hearing, Defendant argued that *Martinez* had recognized an equitable right to present a claim of ineffective assistance of counsel, that the United States Supreme Court had a case before it regarding the scope of *Martinez* and that this Court's prior rejection of this argument should be ignored because he believed that his post conviction counsel was more ineffective than the counsel in the prior cases. (PCR4. 288-95) The State responded that the motion was untimely, procedurally barred and did not even present a claim within the *Martinez* exception to the procedural default doctrine and that this Court had already determined that *Martinez* only applied in federal court. (PCR4. 295-98) It also pointed out that the issue in the pending Supreme Court case also concerned federal court proceedings. (PCR4. 298-99) Defendant responded that he did not have to show that his motion was timely because this Court had rejected the

Martinez claims as not cognizable without addressing their timeliness and averred that his claim did meet the *Martinez* exception. (PCR4. 299-303)

On April 24, 2013, the lower court denied the motion, finding the motion time barred, procedurally barred, refuted by the record and meritless. (PCR4. 211-13) That order was rendered on April 25, 2013. *Id.* On May 9, 2013, Defendant filed a pleading in which he again complained about the manner in which he was served with the order, insisted that rendition was not defined and claimed that rendition had to include service. (PCR4. 214-18) Alternatively, Defendant moved for rehearing, arguing that *Martinez* did permit him to raise his claim and that his claim of ineffective assistance of counsel at the penalty phase had merit because while he was claiming that counsel was ineffective for failing to investigate and present mitigation that counsel had presented at trial, the mitigation had not been fully accepted. *Id.* The lower court denied the motion on June 10, 2013. (PCR4. 247) On July 10, 2013, Defendant filed his notice of appeal. (PCR4. 274-75) This appeal follows.

SUMMARY OF THE ARGUMENT

Because Defendant does not acknowledge the bases of the lower court's denial of his fifth motion for post conviction relief and does not argue why any of the rulings was error, he has not adequately brief the issue and has waived it. Moreover, the lower court was correct to find the motion untimely, procedurally barred and meritless. This Court has already determined that *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), does not apply to proceedings in Florida courts. The fact that the United States Supreme Court modified the holding of *Martinez* provides no basis to reconsider this Court's precedent.

ARGUMENT

THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM BASED ON *MARTINEZ V. RYAN*.

Defendant asserts that the lower court erred in summarily denying his fifth motion for post conviction relief. However, the lower court properly denied this motion and should be affirmed.

As this Court has explained, "the purpose of an appellate brief is to present arguments in support of the points on appeal." *Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008). This Court has held that initial briefs from the denials of post conviction motions do not satisfy this standard when they do not "explanation why summary denial was inappropriate." *Sexton v. State*, 997 So. 2d 1073, 1086 (Fla. 2008)(quoting *Doorbal*, 983 So. 2d at 482-83)). Here, while Defendant has filed a 70 page brief and included more than 50 pages in the argument section of that pleading, Defendant never even acknowledges the reasons why the lower court summarily denied his fifth motion for post conviction relief and offers no argument regarding why these reasons are erroneous. Instead, Defendant devotes most of the argument section of his brief to reiterating and embellishing[2]

[2] For example, in his brief, Defendant repeatedly suggests that the cab driver picked up a fare who was bleeding from the apartment complex where the crimes occurred. Initial Brief at 23, 33. However, in his motion, Defendant never asserted that

the allegations made in his motions for post conviction relief. Given these circumstances, Defendant's brief should be deemed insufficient and his assertion that the lower court improperly denied the fifth motion for post conviction relief should be rejected.

Moreover, it appears that the reason why Defendant has substituted repeating and reiterating the allegation underlying his motion for addressing the reasons why his fifth motion was denied is to obfuscate the fact that the fifth motion was properly denied. As a review of the lower court's order shows, it rejected the fifth motion because it was untimely, his assertion that *Martinez* allowed him to raise claims based on ineffective assistance of post conviction counsel had already been rejected by this Court and his claims were procedurally barred. (PCR4. 211-13) Each of these rulings was correct.

As this Court explained to Defendant in the opinion affirming the denial of his third motion for post conviction relief, claims raised in a successive motion for post conviction

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the fare was picked up from the apartment complex. (PCR4. 186) Moreover, in his third motion for post conviction relief, Defendant had sworn that the cab driver, Anwar Ali, would testify that he had been dispatched to pick up someone name Jose from the apartment complex at 8:20 p.m., that he did not find this person when he subsequently went to the apartment complex and that he picked up a fare who was bleeding and who flagged him down somewhere on 6th Avenue between 135th Street and 151st Street. (PCR3. 74-75)

relief filed more than one year after the defendant's convictions and sentences became final are only timely if they are based on evidence that was newly discovered within one year of the filing of the motion or are based on a fundamental change of constitutional law that has been held to be retroactive. *Jimenez*, 997 So. 2d at 1063-64. Here, Defendant's motion did not meet these requirements.

In his motion, Defendant made no attempt to suggest that any of his arguments were based on newly discovered. (PCR4. 165-89) Instead, he asserted that his post conviction counsel had been ineffective in the manner in which he had litigated the initial motion for post conviction relief and that *Martinez* now required reconsideration of claims that had previously been asserted. *Id.* As this Court has recognized, claims of ineffective assistance of counsel cannot be based on newly discovered evidence. *See Sireci v. State*, 773 So. 2d 34, 40 n.11 (Fla. 2000). As such, the lower court properly determined that the claims could not be deemed timely as based on newly discovered evidence.

Moreover, the record refuted any notion that the claims Defendant actually sought to relitigate were based on newly discovered evidence. In his motion, Defendant identified that the claims that should be relitigated as his assertion that his

trial counsel had been ineffective in failing to investigate and present mitigation, his claim that the cab driver had not testified based on a combination of ineffective assistance of counsel and alleged withholding of evidence, his claim that the State withheld the involvement of Calderon's investigator, his claim that counsel should have called Off. Cardona, his claim that counsel should have attempted to impeach Ms. Baron and his claim that counsel should have challenged the fingerprint evidence.[3] (PCR4. 165-89) This Court already determined that all of the claims except the claim of ineffective assistance of counsel regarding mitigation and the claims regarding Jeffrey Allen were untimely when they were raised in Defendant's third motion for post conviction relief. *Jimenez*, 997 So. 2d at 1064, 1066, 1067, 1068, 1069, 1070, 1071. Moreover, the claim regarding mitigation is a claim of ineffective assistance of counsel, which cannot be based on newly discovered evidence. *Sireci*, 773 So. 2d at 40 n.11. As such, the lower court properly determined that the motion was not based on newly discovered evidence and could not be considered timely on that basis.

[3] Defendant attempts to embellish these allegations by assertion that the State suppressed mitigating evidence and that there was some improper conduct regarding Jeffrey Allen. However, these assertions are not properly before this Court as they were not raised below. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003).

Moreover, while Defendant relied on *Martinez*, even he did not claim that *Martinez* was a change in constitutional law that applied retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). Instead, he averred that *Martinez* had created a new equitable rule. (PCR4. 169-70) *Martinez*, itself, confirms that it was not a constitutional change in law, as the Court expressly refused to recognize a new constitutional right and distinguished the limited exception it was making regarding cause in federal habeas proceedings from a constitutional change in law. Martinez, 132 S. Ct. at 1313, 1315, 1319-20. However, as this Court held in *Witt*, a change in law must be constitutional in nature to qualify for retroactive application. *Id.* at 928-29. As such, the lower court also properly determined that the claim could not be considered to be based on a fundamental, retroactive change in law.

Because Defendant's motion was not based on either newly discovered evidence or a retroactive change in constitutional law, the lower court's determination that the fifth motion for post conviction relief was untimely was correct. *Jimenez*, 997 So. 2d at 1063-64. It should be affirmed.

Moreover, the lower court was also correct to find that *Martinez* did not provide a basis for relief. This Court has repeatedly held that *Martinez* concerns federal habeas

proceedings in federal court and provides no basis for relief in state court. *Moore v. State*, 132 So. 3d 718, 724 (Fla. 2013); *Mann v. State*, 112 So. 3d 1158, 1163-64 (Fla. 2013); *Howell v. State*, 109 So. 3d 763, 774 (Fla. 2013); *Gore v. State*, 91 So. 3d 769, 777-78 (Fla. 2012); *see also Lambrix v. State*, 2014 WL 1271527, *1 (Fla. Mar 27, 2014); *Chavez v. State*, 129 So. 3d 1067 (Fla. 2013); *Atwater v. State*, 118 So. 3d 219 (Fla. 2013). As such, the lower court was correct to find that Defendant's attempt to rely on *Martinez* was meritless. It should be affirmed.

In a footnote, Defendant suggests that the prior rejection of the claim that *Martinez* does not create a new claim in state court is no longer good law because the United States Supreme Court subsequently decided *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). However, *Trevino* does not alter the basis on which had already rejected the claim.

In *Martinez*, 132 S. Ct. at 1320, the Court had included, among the limitations it placed on the exception recognized regarding the doctrine of cause applicable in federal court, a holding that the exception only applied "[w]here, under state law, claims of ineffective assistance of counsel must be raised in an initial-review collateral proceeding." In *Trevino*, the Court considered only the question of whether the exception

recognized in *Martinez* applied not only to cases arising from states that precluded raising claims of ineffective assistance of trial counsel on direct appeal but also to those that made it "virtually impossible" to raise such claims but technically permitted them. *Trevino*, 133 S. Ct. at 1914-15. The Court held that *Martinez* would apply to cases arising from states whose "procedural framework, by reason of [their] design and operation, make[] it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 1922. However, the Court did not alter the holding of *Martinez* in any other manner and, in fact, emphasized that *Martinez* concerned federal court proceedings. *Id.* at 1914 ("In *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), we considered the right of a state prisoner to raise, **in a federal habeas corpus proceeding**, a claim of ineffective of trial counsel.")(emphasis added); *see also id.* at 1916-18. As such, while *Trevino* expanded the number of cases to which *Martinez* applied in federal court, it did not create a new rule applicable in state court.

This Court did not rule that *Martinez* was inapplicable in state court because Florida did not prohibit claims of ineffective assistance of trial counsel from being raised on

direct appeal. This Court rejected the attempts to rely on *Martinez* because *Martinez* applies to federal court proceedings. *Moore*, 132 So. 3d at 724; *Mann*, 112 So. 3d at 1163-64; *Howell*, 109 So. 3d at 774; *Gore*, 91 So. 3d at 777-78; *see also Lambrix*, 2014 WL 1271527 at *1; *Chavez*, 129 So. 3d at 1067; *Atwater*, 118 So. 3d at 219. Thus, *Trevino* provides no basis for this Court to reconsider its prior rejection of application of *Martinez* to proceedings in state court. The denial of the fifth motion for post conviction relief should be affirmed.

This is all the more true as Defendant would not even be entitled to relief under *Martinez* in federal court. While Defendant avers that *Martinez* applies to claims based on *Brady v. Maryland*, 373 U.S. 83 (1963), and suggests that it permits a defendant to use a claim anytime a new attorney thinks an old attorney was ineffective in litigating a post conviction claim, this is not true. In *Martinez*, the Court recognized that it had previously held that claims of ineffective assistance of counsel did not provide a basis to assert cause to overcome a procedural default in a federal habeas proceeding in *Coleman v. Thompson*, 501 U.S. 722 (1991). *Martinez*, 132 S. Ct at 1316. The Court directly stated that it was only recognizing a limited exception to the general rule of *Coleman*:

> *Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause,

> and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial.
>
> * * * *
>
> The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. *See* 501 U.S., at 754, 111 S. Ct. 2546; *Carrier*, 477 U.S., at 488, 106 S. Ct. 2639. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

Id. at 1319, 1320. The Court explained that its rationale for this limitation was that it wanted defendants to be able to receive a merits review of his ineffective assistance of trial counsel claims by one court. *Id.* at 1316. As such, *Martinez* does not apply to *Brady* claims at all and only provides a basis for cause to overcome a procedural default regarding a claim of ineffective assistance of trial counsel when the default occurred in the trial court. *See Gore v. Crews*, 720 F.3d 811, 816-17 (11th Cir. 2013).

Additionally, it should be remembered that a claim is only subject to the doctrine of procedural default in federal court when the state court has either denied the claim on an adequate and independent state law ground or the defendant has failed to

exhaust the claim in state court and state law is clear that an adequate and independent state law ground would now apply. *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). As a result, a state court's denial of a claim on other grounds, such as the fact that a claim was not sufficiently plead, is a merits ruling on the claim; not an application of a procedural default. *Pope v. Secretary for Dept. of Corrections*, 680 F.3d 1271, 1284-86 (11th Cir. 2012). Thus, *Martinez* would not apply to claims that were denied by the state courts on such grounds. *Gore*, 720 F.3d at 816-17.

Here, Defendant raised the claims that his trial counsel was ineffective for failing to investigate and present mitigation, for failing to call a witness who would have allegedly testified Defendant regarding his location during the crimes and for failing to preserve issues for appeal. (PCR. 29-37) The state post conviction court denied these claims as refuted by the record and insufficiently plead. (PCR. 91-112) Since these were merits rulings, *Martinez* would not apply to any bar to these claims.

While Defendant raised additional claims of ineffective assistance of counsel at the guilt phase in his third motion for post conviction relief, this Court affirmed the denial of the claims not only because they were procedurally barred but also

because they were meritless. *Jimenez*, 997 So. 2d at 1064-72. As such, Defendant received the merits consideration of his claim from one court that underlies *Martinez* Given these circumstances, Defendant would not even be entitled to relief under *Martinez* in federal court. As such, the denial of the fifth motion for post conviction relief should be affirmed.

Additionally, the lower court was also correct to deny his claims as procedurally barred. Claims that were raised and rejected in prior post conviction proceedings are barred. *Hendrix v. State*, 2014 WL 1386364, *1 (Fla. Apr. 10, 2014); *Van Poyck v. State*, 116 So. 3d 347, 362 (Fla. 2013). Here, all of the claims of ineffective assistance of counsel or alleged violations of *Brady* that Defendant mentioned in his motion were raised and rejected in either his first or third motions for post conviction relief or both. As such, the lower court was correct to find Defendant's claims barred. It should be affirmed.

Moreover, the new claims that the State allegedly suppressed evidence that allegedly could have been presented as mitigation is also barred. First, Defendant did not raise these claims in his post conviction motion and is instead presenting them for the first time on appeal. (PCR4. 165-90) As such, they are procedurally barred. *Griffin v. State*, 866 So. 2d 1,

11 n.5 (Fla. 2003). Second, claims that could have been raised in a prior post conviction motion are also barred. *Everett v. State*, 54 So. 3d 464, 488 (Fla. 2010); *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Here, Defendant admits that these claims were available before he filed his first motion for post conviction relief. As such, these claims are procedurally barred. The lower court should be affirmed.

This is all the more true in asserting that much of this information could have been presented as mitigation. While Defendant suggests that this Court had held that evidence impeaching the State's guilt phase witnesses can be presented as mitigation in *Keen v. State*, 775 So. 2d 263 (Fla. 2000), and *Pomeranz v. State*, 703 So. 2d 465 (Fla. 1997), this is not true. In both of these cases, this Court was not addressing the admissibility of evidence in mitigation. Instead, this Court was addressing whether the override of a life recommendation was proper. *Keen*, 775 So. 2d at 282-87; *Pomeranz*, 703 So. 2d at 471-72. In fact, in *Keen*, this Court went to great lengths to explain how the analysis of that issue differed from the analysis applicable when a defendant had received a death recommendation, particularly with regard to the issue of relative culpability, the issue on which the witness's credibility was mentioned. *Keen*, 775 So. 2d at 283-86 & n.19.

Here, Defendant did not receive a life recommendation; he received a unanimous death recommendation. (R. 487) As such, *Keen*, *Pomeranz* and the legal standard governing jury overrides do not apply.

Moreover, this Court has repeatedly held that lingering doubt is not mitigation in Florida and that evidence that would only be relevant to lingering doubt is not admissible at the penalty phase. *Duest v. State*, 855 So. 2d 33, 40 (Fla. 2003); *Darling v. State*, 808 So. 2d 145, 162 (Fla. 2002); *Way v. State*, 760 So. 2d 903, 916 (Fla. 2000)("[T]his Court has previously rejected the argument that evidence that would serve only to create a lingering doubt of the defendant's guilt is admissible as a nonstatutory mitigating circumstance.")(citing *Preston v. State*, 607 So. 2d 404, 411 (Fla. 1992); *King v. State*, 514 So. 2d 354, 358 (Fla. 1987)); *Waterhouse v. State*, 596 So. 2d 1008, 1015 (Fla. 1992). As such, Defendant's argument that he could have argued that "credibility problems" with the State's guilt phase case was mitigation is incorrect. The lower court should be affirmed.

This Court has also held that the views of the victim's family regarding the appropriateness of the death penalty is also not admissible and not mitigation. *Perez v. State*, 919 So. 2d 347, 376-77 (Fla. 2005); *Floyd v. State*, 569 So. 2d 1225,

1230 (Fla. 1990). As such, Defendant's suggestion that a note from Ms. Minas' daughter would have been relevant mitigation is meritless. The lower court should be affirmed.

Finally, Defendant's reliance on *Hinton v. Alabama*, 134 S. Ct. 1081 (2014), is misplaced. There, three restaurant managers had been robbed under similar circumstances over a five month period. *Id.* at 1083. In each of the cases, two .38 caliber bullets were fired and recovered. *Id.* While the victims were killed in the first two robberies, the victim of the last robbery survived and identified the defendant as his attacker. *Id.* During a subsequent search of the defendant's home, a .38 caliber revolver was recovered. *Id.* However, no other evidence linking the defendant to the crimes was discovered anywhere. *Id.* at 1084. The State elected to prosecute the defendant for the crimes in which the victims were killed but not the case in which the victim survived based entirely on the third victim's identification and testimony that the bullets recovered at all three crime scene matched each other and the defendant's gun. *Id.* at 1083-84.

Recognizing that challenging the State's ballistics evidence was vital to the defense, trial counsel moved for funds to hire his own ballistics expert. *Id.* at 1084. The trial court granted the motion and allowed what had been the maximum

amount of money allowable under state law for experts prior to a statutory amendment. *Id.* at 1084-85. It expressly informed trial counsel that it would consider another motion for funds for experts if the amount was insufficient. *Id.* at 1084. Even though counsel found this amount insufficient to hire an expert he believed was qualified, counsel did not make a motion for additional funds. *Id.* at 1085. Instead, he hired an expert who was willing to work for the funds provided even though he believed the expert was unqualified and told the trial court as much prior to trial. *Id.*

In finding that this was deficient conduct, the Court stressed that it was not creating a special standard that required the hiring of experts at all or the hiring of specific experts. *Id.* at 1088-89. Instead, it did so because hiring an expert was the "only reasonable and available defense strategy" in the case. *Id.* at 1089. Moreover, it stressed that even in these circumstances, it was not basing its decision on the fact that "better" experts were available:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." *Strickland*, 466 U.S., at 690, 104 S. Ct. 2052. We do not today launch federal courts into examination of the relative qualifications

> of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that *he himself* deemed inadequate.

Id.

Here, Defendant has presented nothing remotely similar to the situation presented in *Hinton*. He has not shown that the hiring of an expert was the only defense available at either the guilt or penalty phases. Moreover, he has not shown that trial counsel hired an expert who he believed was unqualified. Given these circumstances, *Hinton* does not apply to this matter.

Further, Defendant largely attempts to rely on *Hinton* with regard to the conduct of his post conviction counsel. However, *Hinton* was based on an infringement on the defendant's Sixth Amendment right to counsel. *Hinton*, 134 S. Ct. at 1083. The United States Supreme Court has made it clear that the Sixth Amendment right to counsel does not apply beyond direct appeal as of right and does not apply to post conviction proceedings. *Murray v. Giarratano*, 492 U.S. 1, 7-10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-59 (1987); *Wainwright v. Torna*, 455 U.S. 586 (1982); *Ross v. Moffitt*, 417 U.S. 600 (1974). As such, *Hinton* would have no application to the actions of post conviction counsel. Given these circumstances, the lower court properly denied Defendant's fifth motion for post conviction

relief. It should be affirmed.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

\s\Sandra S. Jaggard
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
Primary: capapp@myfloridalegal.com
Secondary: Sandra.Jaggard@
myfloridalegal.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to **Martin J. McClain**, martymcclain@earthlink.net, 141 N.E. 30th Street, Wilton Manors, Florida 33334, this 23rd day of April 2014.

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
Assistant Attorney General