

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-404

HARREL FRANKLIN BRADDY,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On November 25, 1998, Defendant was charged by indictment with: (1) the first degree murder of Quatisha Maycock, (2) the attempted first degree murder of Shandelle Maycock, (3) the kidnapping of Quatisha, (4) the kidnapping of Ms. Maycock, (5) burglary of Ms. Maycock's home with an assault or battery, (6) child neglect causing great bodily harm regarding Quatisha and (7) attempted escape. (R1/70-77)¹ The murder charge was charged alternatively on felony and premeditated murder theories, with kidnapping and burglary as the predicate felonies for the felony murder theory. (R1/70) The crimes were alleged to have been committed during the period between November 6 and 9, 1998. (R1/70-73)

On June 19, 2006, the trial court granted one of Defendant's repeated motions to be allowed to represent himself. (R89/22-23) While he was representing himself, Defendant filed six motions to disqualify the trial court. (R9/1027-31, 1106-10, 1114-21, 1131-38, R10/1158-62, 1166-69) He also filed two petitions for writ of prohibition regarding these motions in the Third District Court of Appeal, which were consolidated and denied. *Braddy v. State*, 950 So. 2d 1249 (Fla. 3d DCA 2007). However, when a firm trial date was set, Defendant changed his

¹ The symbol "R[Vol. no.]" will refer to the record on direct appeal, Florida Supreme Court No. SC07-2174.

mind about representing himself, and counsel was reappointed on April 30, 2007. (R127/54-58, R53/5-12)

The matter finally proceeded to trial on June 25, 2007. (R20/2670-71) After considering the evidence presented, the jury found Defendant guilty as charged on all counts. (R150/2748-2802, R22/2947-53) The trial court adjudicated Defendant in accordance with the jury's verdict. (R150/2809, R28/3711-13)

The penalty phase commenced on August 28, 2007. (R26/3450-53) After considering the evidence presented, the jury recommended that Defendant be sentenced to death by a vote of 11 to 1. (R155/3441-63, R27/3620) On September 24, 2007, the trial court conducted a *Spencer* hearing. (R110)

At the October 15, 2007 sentencing hearing, the trial court followed the jury's recommendation and sentenced Defendant to death. (R28/3695-3706) In doing so, it found 5 aggravators: victim less than 12-great weight; during the course of a kidnapping-great weight; avoid arrest-great weight; CCP-great weight; and prior violent felony, based on the crimes against Mr. Bermudez, the Coles and Mr. Davis-great weight. *Id.* In mitigation, it found Defendant's prison record and potential for rehabilitation-little weight; the potential alternative of a life sentence-little weight; appropriate courtroom conduct-moderate

weight; Defendant's relationship with his friends-little weight; Defendant's relationship with his wife and children-moderate weight; the impact of Defendant's execution on his family and friends-little weight; Defendant's relationship with his parents and brothers-little weight; and Defendant's religious activities -little weight. *Id.* It considered and rejected Defendant's age and the fact that he did not commit additional criminal acts on Quatisha as mitigation. *Id.* It also sentenced Defendant to 30 years imprisonment for the attempted murder of Ms. Maycock, life imprisonment for the kidnappings and burglary, 15 years imprisonment for the child neglect and 5 years imprisonment for the escape. (R28/3715-19) All of the sentences are to be served consecutively. *Id.*

Defendant appealed his convictions and sentences to this Court. On November 15, 2012, this Court affirmed Defendant's convictions and sentences. *Braddy v. State*, 111 So. 3d 810 (Fla. 2012). It determined that Issues I, II, V, VII, VIII, IX, XI, XII, XIV and XV were meritless. *Id.* at 829-34, 837, 844-46, 856-59, 860-61. It held that Issues III, IV and XIII were meritless and unpreserved. *Id.* at 835-36. It rejected Issues IV and X while noting that Defendant had not preserved his claims regarding some of the comments. *Id.* at 837-44, 846-56. It determined that the evidence was sufficient to sustain his

convictions and his death sentence was proportionate. *Id.* at 861-63. Defendant sought rehearing, which was denied on April 10, 2013. *Id.* at 810. He also sought certiorari, which was denied on October 7, 2013. *Braddy v. Florida*, 134 S. Ct. 275 (2013). On April 26, 2013, this Court issued its mandate and an order appointing CCRC-South to represent Defendant in post conviction proceedings. (PCR. 81, 83)² On May 22, 2013, CCRC-South filed its notice of appearance. (PCR. 226-27)

On May 6, 2013, the Office of the Attorney General sent its notices of affirmance to the Office of the State Attorney and the Department of Corrections (DOC). (PCR. 222-25) On May 24, 2013, the State Attorney sent her notices of affirmance to the Miami-Dade Police Department (MDPD), the Palm Beach County Sheriff's Office, the Broward County Sheriff's Office and the Florida Highway Patrol (FHP). (PCR. 229-36) On June 11, 2103, DOC sent its notice of compliance and notice of delivery of exempt records. (PCR. 237-40) On August 2, 2013, the Palm Beach County Sheriff sent his records to the repository. (PCR-SR. 1165) On September 11 and 13, 2013, the State Attorney sent her notice of compliance and notice of delivery of exempt records. (PCR. 243-46) On September 18, 2013, MDPD sent its records to

² The symbols "PCR." and "PCR-SR." will refer to the record on appeal and corrected supplemental record on appeal in the instant case. The symbol "PCR-SR3." will refer to the third supplemental record in this case.

the repository. (PCR. 390) On November 15, 2013, the Broward County Sheriff sent his notice of compliance. (PCR. 247-54)

At a status hearing on June 20, 2013, Defendant raised no issued regarding the public records process. (PCR. 2160-67) At another hearing on September 13, 2013, the State noted that it had not received notices of compliance from MDPD, the Broward Sheriff, the Palm Beach Sheriff or FHP. (PCR. 2714-18) Defendant acknowledged that he should file a motion to compel regarding any agency that had failed to comply with a notice of affirmance and averred that he was considering doing so. (PCR. 2718-19) However, Defendant did not commit to do so or request that the post conviction court hold a hearing in less than 90 days. (PCR. 2719-22, PCR-SR. 1159)

On December 3, 2013, Defendant moved for additional time to seek additional public records because his attorney was injured in an accident. (PCR. 256-59) At a status hearing on December 6, 2013, the post conviction court granted a 30 day extension. (PCR. 2724-27) It then inquired whether MDPD had complied, and the State responded that it had received a receipt from the repository for MDPD's records. (PCR. 2727) Defendant then indicated that he had not received records from FHP, and the State indicated that Defendant should file a motion to compel. (PCR. 2728) Defendant responded that he planned to do so the

following week. (PCR. 2728) On December 9, 2013, FHP sent a notice of compliance, indicating it had no records. (PCR. 264-65) On December 16, 2013, Defendant filed a motion to compel FHP to send its public records but withdrew the motion when he realized FHP had already sent its notice of compliance. (PCR. 269-72)

On January 21, 2014, Defendant sent additional public records demands to the State Attorney, DOC, MDPD, the Broward Sheriff, the Palm Beach Sheriff, the Medical Examiner's Commission, the Division of Elections, the Florida Department of Law Enforcement (FDLE), the State Attorney for the Seventeenth Judicial Circuit (SAO-17), the State Attorney for the Fifteenth Judicial Circuit (SAO-15), the Broward County Medical Examiner, the Judicial Qualifications Commission (JQC), and the Attorney General. (PCR. 275-317) The requests to DOC, the State Attorney, MDPD, the Broward Sheriff, the Palm Beach Sheriff, SAO-17, SAO-15 and Broward Medical Examiner were made pursuant to Fla. R. Crim. P. 3.852(g). (PCR. 275-343) The requests to the Medical Examiner's Commission, FDLE, the Division of Elections, JQC and Attorney General were made pursuant to Fla. R. Crim. P. 3.852(i). (PCR. 318-43) None of the requests identified specific records and instead sought all records in broad categories. (PCR. 275-343) Moreover, a number of the requests

sought all records regarding long lists of people with no indication of any connection between those people and this case or how any records about the people would be relevant. (PCR. 284-89, 299-322)

The State Attorney, DOC, MDPD, Broward Sheriff, FDLE, SAO-17, JQC and Attorney General all objected to the demands. (PCR. 344-54, 360-69, 377-90, 464-73, 476-80) The Palm Beach Sheriff filed a response indicating that it had no additional records responsive to most of the request and was providing personnel information about its investigators to the repository. (PCR-SR. 1160-78) The Division of Elections, Broward County Medical Examiner and SAO-15 filed notices of compliance. (PCR. 474-75, 492-95)

At a status hearing on February 7, 2014, the post conviction court set a hearing for the objections to the requests for additional public records for April 4, 2014. (PCR. 2568-75) It pointed out that Defendant had failed to provide sufficient information about the people he had listed in his request. (PCR. 2575) Defendant responded that he had planned to identify who the people were at a public records hearing. (PCR. 2575) The court rejected Defendant's plan and ordered him to file a pleading explaining how the records he was requesting were actually relevant by March 25, 2014. (PCR. 2575-76)

On March 7, 2014, CCRC-South served a motion to withdraw, claiming a conflict of interest. (PCR. 355-59) The alleged conflict was the fact that Neal Dupree had supervised the Assistant State Attorneys who prosecuted Defendant for the crimes he committed against the Coles and signed off on the plea agreement in that case. *Id.* The State responded that the motion was untimely and provided no basis for withdrawal, particularly as CCRC-South could not litigate the validity of the convictions for the crimes committed against the Coles. (PCR. 370-76) At a March 21, 2014 hearing on this motion, CCRC-South insisted that the motion was timely because Mr. Dupree had not even recalled being the prosecutors' supervisor. (PCR. 2579, 2585-86) On questioning by the court, Mr. Dupree indicated that his involvement in the prior case would have been limited to having a prosecutor provide him with the reasons why he believed a particular plea should be offered and agreeing that the offer could be made. (PCR. 2586-87, 2590) After considering this information, the court denied the motion, finding that no conflict existed and that the motion was untimely. (PCR. 391-95)

On March 25, 2014, Defendant served a memorandum regarding the relevancy of the records he had requested. (PCR. 449-61) In this pleading, Defendant made a blanket assertion that all the

requested records were relevant because they might have some connection to a legal claim. *Id.* He then provided a brief statement regarding the connection between the individuals he had listed and Defendant, the victims or the case. *Id.*

On April 4, 2014, the post conviction court conducted a public records hearing. (PCR. 2594-2677) During that hearing, Defendant acknowledged that his request to DOC was improper and stated that he and DOC had reached an agreement on the production of only some of the records he had requested. (PCR. 2605-07) The court sustained the objections from the JQC, FDLE, the Medical Examiner's Commission and the Attorney General. (PCR. 2607-08, 2623-27, 2245-46) It ordered the Broward Sheriff to produce a list of the content of the personnel and internal affairs files of two officers and stated that Defendant could submit a new request after reviewing that list. (PCR. 2611-20) It ordered MDPD to produce a similar list with regard to internal affairs files of Det. Otis Chambers, Off. Victor Chavez, Det. Sal Garafalo, Tech. Sharon Hinz, Det. Ray Hoadley, Det. Elvey Melgarejo, Det. Giancarlo Milito, Det. Juan Murias, Det. Greg Smith, Det. Fernando Suco, Det. Anthony Wilson, Det. Wayne Watkins, Det. Pascual Diaz and Tech. Toby Wolson and the personnel files of Tech. Hinz, Tech. Wolson, Det. Melgarejo and Det. Smith. (PCR. 2646-68) It ordered SAO-17 to produce its

files on the prior convictions that were used as aggravators and on two of Defendant's brothers. (PCR. 2620-23) It ordered the State Attorney to produce files from adult prosecutions of James Shotwell and Dennis McArthur prior to 1998 only. (PCR. 2633-44) In discussing access to exempt materials from the Medical Examiner's Office, the State repeatedly indicated that the process provided by Fla. R. Crim. P. 3.852 for Defendant to access records that were generally exempt from public records production involved an *in camera* review of the exempt materials, noted that there were exempt materials at the repository from several agencies and stated that it had no objection to such an *in camera* review being ordered, if Defendant moved for such a review. (PCR. 2597, 2600-04, 2605, 2669-71)

On April 8, 2014, Defendant served a *pro se* pleading, indicating that he wanted to represent himself. (PCR. 486) After the post conviction court set a hearing to colloquy Defendant about self-representation, CCRC-South filed a motion claiming that Defendant was not competent to proceed. (PCR. 499-502) In support of this motion, it contended that Defendant was paranoid and made statements about what happened during the case that were "unreliable or untrue." *Id.* Defendant then filed another *pro se* pleading, again averring that he wanted to represent himself and adding that he had been previously

determined to be competent and was presumed to remain competent.
(PCR. 504-06)

On April 25, 2014, the post conviction court conducted a colloquy with Defendant and ensured that Defendant understood the dangers of self representation and was choosing to represent himself voluntarily. (PCR. 2169, 2174-2210) It then decided to have Defendant's competency evaluated even though Defendant personally objected to any mental health evaluation and it believed that there was no indication that Defendant was incompetent. (PCR. 2172, 2211-14, 2218-19, 2248-51, 2257-59, 2273) In objecting, Defendant stressed that he wanted the evaluations limited to the issue of his competency and not to be used as potential evidence regarding other claims. (PCR. 2218, 2248) The post conviction court assured Defendant the evaluations would be so limited. (PCR. 2251)

Defendant then filed a *pro se* pleading, objecting to the competency evaluation. (PCR. 507-26) In this pleading, Defendant argued that his counsel's assertions in the motion for competency determination should have been considered insufficient to overcome the presumption of competence because she was not qualified to offer an opinion regarding his mental state and that the competency motion had been filed in retaliation for his complaints about his attorney's refusal to

accept his input regarding claims he wanted to raise in his post conviction motion. *Id.* He noted that the claims he wanted raised were that his trial counsel had been ineffective for raising to argue that the trial judge was required to recuse himself because he did not rule on motions to disqualify him on a timely basis through either a petition for writ of prohibition or a motion for new trial and that his appellate counsel was ineffective for failing to move to supplemental the record with a printout of the trial court's computer docket to support a similar argument. *Id.* During a hearing, Defendant indicated that he would not cooperate with the evaluations. (PCR. 2284-86)

CCRC-South then file an amended motion for a competency determination. (PCR-SR. 1179-91) In this motion, CCRC-South added an assertion that some of Defendant's statements that it considered "untrue and unreliable" were accusations of misconduct by Defendant's penalty phase and appellate counsel and that Defendant's reasons for wanting to represent himself were "not the product of rational thinking." *Id.* It also seemed to suggest that while Defendant might be competent to proceed, he was not competent to represent himself. *Id.* It acknowledged that it was responsible to continue to represent Defendant in a timely and diligent manner while the issue of

Defendant's request to represent himself was being litigated.
Id.

Because CCRC-South insisted on being able to name an expert to be appointed, the post conviction court did not enter its orders appointing Dr. Tonia Werner and Dr. Eric Mings until May 20, 2014. (PCR. 558, 563, 2234-46, 2261-73) Dr. Werner conducted her evaluation on June 6, 2014, and found Defendant competent with no sign or history of any mental illness. (PCR-SR3. 14-20) Dr. Mings conducted his evaluation on June 16, 2014, and also found Defendant competent with no sign or history of mental illness, but suggested he might have paranoid personality disorder. (PCR-SR3. 22-28) Defendant then filed another *pro se* arguing that the post conviction court should not have ordered his competency to be evaluated and that it should grant his request to represent himself. (PCR. 791-95) After reviewing the reports and again discussing the issue with Defendant on June 30, 2014, the post conviction court entered an order on July 3, 2014, allowing Defendant to represent himself. (PCR. 789-90, 2803-31)

At the end of the June 30, 2014 hearing, Defendant reminded the court that there was an outstanding issue regarding access to the autopsy photos. (PCR. 2831-32) Defendant acknowledged that the photos were exempt but asserted that he was allow

access to them and indicated that he wanted the Medical Examiner's office to send them directly to him rather than follow the procedure for an *in camera* review. (PCR. 2832-33) The State pointed out that proceeding in this manner created an issue regarding whether Defendant had received what had been filed in the repository and that proceeding in the manner authorized by Fla. R. Crim. P. 3.852 eliminated this issue. (PCR. 2834) The post conviction court then decided to order the Medical Examiner's Office to provide it with a second copy of its exempt materials, to order the repository to send it the copy filed there and to compare the copies before disclosing them to Defendant. (PCR. 2834-35, PCR-SR. 1193-96)

While the issue of Defendant's representation was being litigated, Defendant, through CCRC-South, sent new requests for additional public records to the Broward County Sheriff on April 14, 2014, and MDPD on May 22, 2014. (PCR. 496-98, PCR-SR3. 3-7) The Broward Sheriff complied with the new request, but MDPD objected on June 13, 2014. (PCR. 567-69, PCR-SR3. 9-12)

On August 12, 2014, the post conviction court *sua sponte* reconsidered the issue of self representation and denied Defendant's request to represent himself. (PCR. 822-26) On August 15, 2014, Defendant, through CCRC-South, then moved the post conviction court to reconsider the issue again. (PCR. 839-

43) At a hearing on August 18, 2014, the court denied that motion. (PCR. 2477-81)

Defendant then complained that access to the autopsy photos had been delayed and asked the court to grant him prospective leave to amend. (PCR. 2481-83) He also again asked that the court to order the Medical Examiner to provide him copies of the autopsy photos directly. (PCR. 2485-86) The State then pointed out that the issue of access to the autopsy photos could be resolved immediately because the court had already received the exempt records from the repository such that it could conduct an *in camera* review as contemplated by Fla. R. Crim. P. 3.852(f) and provide copies to Defendant of the documents to which he was entitled. (PCR. 2488-90, PCR-SR. 1197) Defendant complained that following the procedure required the court to make copies but, when the court pointed out that following the rule would expedite production of the records, relented. (PCR. 2490-91) The post conviction court then opened the box of exempt materials, determined that the Medical Examiner had already sent two copies of the materials to which Defendant was entitled, verified the copies were identical and provided a copy to Defendant. (PCR. 2491-93, 2498-99) The State then pointed out that Fla. R. Crim. P 3.851 contained specific procedures for moving, and being, granted leave to amend that precluded the

granting of anticipatory leave to amend. (PCR. 2494-95) The post conviction then set a hearing to consider MDPD's objections to Defendant's new demand for additional records for September 2, 2014. (PCR. 2500-04)

On August 27, 2014, Defendant sent requests for additional public records regarding lethal injection to DOC and FDLE. (PCR. 1066-1116) The agencies objected to these requests. (PCR. 858-62, 949-54)

At the September 2, 2014 hearing, Defendant moved for an *in camera* inspection of the exempt materials that had been submitted to the repository and not reviewed already. (PCR. 847-49, 2341-45, 2349) He requested that the post conviction court conduct this *in camera* inspection in open court and averred that he would provide the court with a memo regarding any exemptions that he was asserting were improperly claimed. *Id.* The State objected to Defendant's request that the *in camera* inspection be conducted in open court, asserting that any argument Defendant wanted to present regarding any exemption being improperly claimed could be made based on the documentation Defendant already possessed and that Defendant had been dilatory in not requesting the *in camera* inspection earlier, especially as the State had repeatedly suggested that it would have no objection to an *in camera* inspection during the April 4, 2014 public

record hearing. (PCR. 2346-48) The court granted Defendant's request to conduct an *in camera* review of the documents and entered an order to have the exempt records delivered to it but indicated that it would not conduct the review in open court. (PCR. 850-51, 2347, 2349)

After considering arguments regarding the second request to MDPD, it denied the request except for the internal affairs file of Det. Greg Smith. (PCR. 1059, 2292-2341) MDPD sent that file to the repository on September 11, 2014, and subsequently filed a notice of compliance. (PCR-SR. 1204-06)

Defendant, on September 10, 2014, sent yet another request for public records to DOC, seeking documents related to DOC's refusal to allow Marvin Dunn to visit Defendant. (PCR. 956-62) DOC objected to this request. (PCR. 1117-22) On September 11, 2014, the post conviction court conducted a hearing regarding requests for records regarding lethal injection and denied the requests. (PCR. 1056-58, 2359-74) It also indicated that it had conducted the *in camera* inspection and found that none of the exempt records were subject to disclosure. (PCR. 1060-64, 2383)

On September 12, 2014, Defendant filed a motion to reconsider the determination that the exempt materials were exempt. (PCR. 967-81) In this motion, Defendant complained that he had been denied the opportunity to be heard regarding whether

public records exemptions had been properly claimed because the post conviction court had conducted the *in camera* review before he got around to presenting his memo on the claim exemptions. *Id.* He then noted that the State Attorney's office has listed certain of the materials it had sent as exempt as "attorney notes/work product." *Id.* He argued that it was improper for the State Attorney's office to claim work product once a case was final but admitted that attorney notes that did not formalize an agencies knowledge were not considered public records at all. *Id.* On September 15, 2014, the court denied the motion for reconsideration. (PCR. 1065) On September 18, 2014, the court denied the new public records request to DOC. (PCR. 2389-97, PCR-SR. 1202-03)

On October 3, 2014, Defendant filed his first motion for post conviction relief, raising 8 claims:

I.

THE DENIAL OF THE MOTION TO WITHDRAW VIOLATES [DEFENDANT'S] STATUTORY AND/OR CONSTITUTIONAL RIGHTS TO CONFLICT-FREE COUNSEL AND HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

II.

SINCE [DEFENDANT] WAS FOUND COMPETENT, THE COURT'S REFUSAL TO ALLOW HIM TO REPRESENT HIMSELF IN COLLATERAL PROCEEDINGS IS A VIOLATION OF FLORIDA LAW AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE US CONSTITUTION.

III.

REQUIRING [DEFENDANT], A DEATH SENTENCED INDIVIDUAL, TO FILE HIS POSTCONVICTION MOTION ONE(1) YEAR AFTER

HIS CONVICTION BECAME FINAL VIOLATES DUE PROCESS AND EQUAL PROTECTION GUARANTEES MADE BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

IV.

FLORIDA STATUTE § 119.19 AND RULE 3.852 ARE UNCONSTITUTIONAL BOTH FACIALLY AND *AS APPLIED*, AND VIOLATE ART. I, § 24 OF THE FLORIDA CONSTITUTION AND [DEFENDANT'S] FIFTH SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION BECAUSE HE IS BEING DENIED ACCESS TO PUBLIC RECORDS IN THE POSSESSION OF STATE AGENCIES

V.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; FLORIDA RULES PROHIBITING CONTACT WITH JURORS ARE UNCONSTITUTIONAL

VI.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSIAL TESTING DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, THE STATE'S FAILURE TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE AND IMPROPER PROSECUTORIAL AND JUDICIAL MISCONDUCT, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE US CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

- a. Trial counsel failed to challenge the denial of the motion to disqualify the trial judge.
- b. Trial Counsel was ineffective for not hiring an expert to assist in challenging the voluntariness of [Defendant's] statements and/or failing to impeach the State's witnesses.
- c. Crime scene and forensic evidence.
- d. Failure to consult with and/or present a forensic pathologist.
- e. Failure to impeach state witnesses or mount a defense.
- f. State Misconduct.
- g. Prejudice

VII.

[DEFENDANT] WAS DENIED A ADVERSARIAL TESTING AT THE PENALTY PHASE OF HIS TRIAL DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR STATE MISCONDUCT IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VIII.

FLORIDA'S METHOD OF EXECUTION BY LETHAL INJECTION VIOLATES [DEFENDANT'S] RIGHTS UNDER THE FIRST, FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BOTH AS WRITTEN AND/OR AS CARRIED OUT IN ACTUAL PRACTICE.

(PCR. 1123-1219)

On October 8, 2014, the post conviction court informed the parties that it had set a status hearing for November 21, 2014. (PCR. 1303) On November 7, 2014, the State served its response to the motion. (PCR. 1220-94) On November 19, 2014, the post conviction court inquired whether the parties would be prepared to use the previously set November 21, 2014 hearing for the *Huff* hearing or could do so on November 24, 25 or 26, 2014. (PCR. 1306) Defendant responded that he could not be prepared for a *Huff* hearing at that time and suggested that the court instead set a status hearing for the middle of December. (PCR. 1309-10) The State replied that it believed that the status hearing should go forward as planned even if the time was not used for the *Huff* hearing. (PCR. 1309) The court agreed that it would conduct the status hearing as planned. (PCR. 1309)

On November 21, 2014, Defendant moved to continue the status hearing. (PCR. 1295-1300) In this motion, Defendant

admitted that he had been aware that there was a status hearing set for this date as of October 8, 2014, but insisted that she could not be prepared for the hearing on short notice. *Id.* At the hearing that day, the lower court attempted to set a case management hearing, and Defendant objected to do so because he allegedly lacked notice of the hearing and setting a date for a *Huff* hearing was allegedly a substantive matter. (PCR. 2399-2405) He also averred that he had planned to file an amended motion and insisted that it was premature to set a date for a *Huff* hearing. (PCR. 2405-08) When the lower court rejected these arguments, Defendant then asked that the *Huff* hearing be delayed until after the first week in February 2015. (PCR. 2408-09) When the lower court stated that it would not delay the proceedings that much, Defendant first asked the lower court to rule on her motion for continuance, which the lower court denied, and then asked that the lower court recess the proceedings so his attorneys could consult with him, which was also denied. (PCR. 2410-11) The lower court then set the *Huff* hearing for January 8, 2015. (PCR. 2412)

On December 9, 2014, Defendant filed a motion for extension of time to file his witness and exhibit lists. (PCR. 1506-11) In this motion, Defendant averred that he believed that an evidentiary hearing was necessary regarding all the claims in

his post conviction motion except Claims II and IV. *Id.* However, he claimed that providing a list of witnesses he would call and exhibits he would present regarding the other claims would be "onerous and time consuming." *Id.* He requested that the court reset the due date for the lists until ten days after it entered an order granting him an evidentiary hearing. *Id.* He claimed that granting him the additional time would not delay the proceedings because the court could deduct the additional time it gave Defendant to file his witness and exhibit lists from the time period provided in Fla. R. Crim. P. 3.851(f)(5)(A) for the State to file its witness and exhibit lists. *Id.*

The State responded in opposition to the extension. (PCR. 1461-64) It noted that this Court had required that motions for post conviction relief be fully plead when they were filed such that Defendant should already know what witnesses he would call and what exhibits he would seek to present if an evidentiary hearing was ordered. *Id.* As such, it argued that there was nothing onerous or time consuming about preparing witness and exhibit lists. *Id.* On December 23, 2014, the lower court denied Defendant's motion. (PCR-SR3. 30)

On December 30, 2014, Defendant moved the post conviction court to stay the post conviction proceedings pending the outcome of the petition in *Finney v. Jones*, SC14-1703. (PCR.

1568-80) The motion was denied on December 31, 2014. (PCR. 1565)

On December 31, 2015, Defendant served a *pro se* motion to discharge CCRC-South. (PCR. 2118-27) The caption of this motion and certificate of service indicated that this motion was filed in both this Court and the post conviction court. *Id.* In this motion, Defendant indicated that his attorney had refused to discuss potential post conviction claims with him during a phone call in April 2014, that she had challenge his competence to proceed in bad faith and that she had insufficiently communicated with him when he was asked to verify the motion for post conviction relief. *Id.* He further alleged that he had requested that the motion be amended but that his counsel had refused to do so unless he was interviewed by Marvin Dunn and Dr. Amador first. *Id.* He again indicated that he had wanted counsel to raise issues regarding the disqualification of the trial judge and regarding the evidence from the Lincoln. *Id.* The post conviction court summarily denied this motion on January 7, 2015. (PCR. 2133-34, PCR-SR. 1207-08)

On January 5, 2015, Defendant filed a motion to stay the post conviction proceedings in this Court in the *Finney* case. (PCR. 2077-82) On January 15, 2015, this Court also denied the motion. (PCR. 1814)

At the *Huff* hearing, Defendant admitted that Claims II and IV did not require an evidentiary hearing but argued that the lower court had improperly denied his a right to represent himself and access to public records. (PCR. 2420-28) He argued that he was entitled to an evidentiary hearing on Claim I because there was allegedly a factual dispute about the nature of Mr. Dupree's involvement in the prior case while acknowledging that Mr. Dupree was not personally involved in the prosecution of the prior case. (PCR. 2530-34) After the State pointed out that the lower court had already had a hearing on this issue, Defendant acknowledged that Mr. Dupree had already informed the court of his involvement but claimed this was insufficient because "there has been no testimony." (PCR. 2535) Defendant then argued that he needed a hearing regarding Claim III because he believed the facts regarding what had occurred during the pendency of the post conviction proceedings needed to be developed. (PCR. 2435-36) Regarding Claim V, Defendant argued that an evidentiary hearing was necessary to develop facts regarding whether his trial counsel had been diligent in pursuing a claim of juror misconduct at trial. (PCR. 2437-38)

Defendant stood on his pleading regarding Claims VI(A), VI(C) and VI(E). (PCR. 2439, 2447-48, 2449-50) Regarding Claim VI(B), Defendant argued that whether expert testimony on false

confessions was admissible was a disputed issue of fact that required an evidentiary hearing. (PCR. 2440-42) He also argued that he had sufficiently alleged prejudice by claiming that Defendant might not have testified if an expert had presented his version of what occurred during his interaction with the police. (PCR. 2442-47) He argued that the prejudice at the penalty phase needed to be considered with regard to Claim VI(D) and asserted that there was an issue regarding the time of death. (PCR. 2448-49) When the State pointed out that Defendant had not explained how testimony from a medical examiner would create a reasonable probability of a different result in his motion, Defendant argued that he did not need to do to plead a claim of ineffective assistance of counsel sufficiently. (PCR. 2449) Regarding Claim VI(F), Defendant argued that he could not sufficiently plead the portion of the claim regarding an alleged *Brady* violation because he had been denied public records and was presenting the claim for preservation purposes. (PCR. 2450) Defendant admitted that this Court had held that a defendant could not show prejudice from a failure to object to comments in closing where this Court had already determined that the comments did not constitute fundamental error but argued that the decision was wrong without explaining how. (PCR. 2450-51)

Regarding Claim VII, Defendant averred that he could not allege how counsel was allegedly deficient because she had not completed the investigation of the claim. (PCR. 2451-52) Regarding Claim VIII, Defendant argued that a challenge to lethal injection could not be barred because it was raised at trial and not pursued on direct appeal. (PCR. 2452-53) He also insisted that there was a factual dispute regarding whether the use of midazolam was constitutional and that he did not have to allege that there was anything about the protocol that was sure or very likely to cause serious illness or needless suffering. (PCR. 2453-62)

At the end of the *Huff* hearing, Defendant provided his witness and exhibit lists. (PCR. 1768-81, 2463-64) When the State inquired about reports from the experts Defendant had listed, Defendant averred that he had no reports and did not intend to have reports prepared. (PCR. 2464-65)

On February 19, 2015, the post conviction court denied the first motion for post conviction relief. (PCR. 1827-51) It rejected that Claims I and II because it had already held a hearing on the issues and determined they was without merit. *Id.* It determined that Claims III and IV were without merit as a matter of law. *Id.* It also noted that it had already held an *in camera* inspection and determined that Defendant was not

entitled to the sealed records. *Id.* It found Claims V, VI(A), VI(B) and part of Claim VI(F) were procedurally barred and meritless in light of the record. *Id.* It rejected Claims VI(C), VI(D), VI(E), the rest of VI(F) and Claim VII as insufficiently plead and refuted by the record. *Id.* Finally, it determined that Claim VIII was without merit as a matter of law. *Id.*

On February 20, 2015, Defendant served a pleading he entitled "Motion for Rehearing and Motion for Leave to Amend." (PCR. 1854-59) In this pleading, Defendant admitted that he had intentionally filed a motion that was not complete but argued that he was entitled to an evidentiary hearing on any claim upon which he requested an evidentiary hearing. *Id.* He further contended that he had not claimed that his counsel was ineffective for failing to investigate and present mitigation in Claim VII of his motion and that the court had erred in considering Claim VII to be such a claim. *Id.* He further noted that the court had determined that certain claims were insufficiently plead and argued that this was error. *Id.* However, he alternatively asserted that if the claims were insufficiently plead, he should be permitted to amend his motion within a "reasonable time." *Id.* He also asked that the court reconsidered its denial of his motion to stay the proceedings.

Id. The post conviction court denied the motion on February 23, 2015. (PCR. 1852) On February 26, 2015, Defendant appealed the denial of his first motion for post conviction relief. (PCR. 2099-2100)

On March 10, 2015, this Court relinquished jurisdiction for the post conviction court to consider Defendant's December 31, 2014 *pro se* motion to discharge counsel. (PCR. 2137) On March 13, 2015, the post conviction court again denied the motion to discharge counsel. (PCR. 2135-36) On March 18, 2015, Defendant filed an amended notice of appeal, seeking to include the second order denying the December 31, 2014 *pro se* motion. (PCR. 2148-49)

On July 13, 2015, Defendant filed a pleading he entitled "Successive Motion to Vacate Judgments of Conviction and Sentence or in the Alternative Amendment to the Initial Motion to Vacate Judgments." (PCR-SR. 1-27) In this pleading, Defendant averred that he had been unable to plead a claim of ineffective assistance of counsel at the penalty phase because DOC would not allow the individuals CCRC-South wanted to have evaluate his mental state to interview him and that he had intentionally filed a "shell" claim of ineffective assistance of penalty phase counsel in his initial motion for post conviction relief. *Id.* He then claimed that his counsel had been

ineffective during the penalty phase. *Id.*

Regarding deficiency, Defendant acknowledged that he was not interested in presenting mitigation, refused to allow the presentation of mental health evidence and discharged numerous attorneys when they refused to follow his wishes. *Id.* However, he complained that no one requested a competency hearing to prevent him from proceeding *pro se* under *Indiana v. Edwards*, 554 U.S. 164 (2008), that counsel did not investigate and present mitigation regardless of his wishes, that there was no record colloquy regarding the waiver of mitigation and that counsel had failed to object to comments in closing about which Defendant had already raised an issue on direct appeal. *Id.*

Regarding prejudice, Defendant claimed that he could have presented evidence regarding trauma suffered by his ancestors that occurred before he was born, information about his upbringing and evidence that he suffered from paranoid personality disorder and might also suffer from bipolar disorder. *Id.* According to Defendant, this evidence would have supported the extreme mental or emotional disturbance statutory mitigator. *Id.*

The motion was not sworn and did not claim that Defendant was incompetent to proceed with post conviction litigation. *Id.* Moreover, instead of the certification required by Fla. R. Crim.

P. 3.851(e)(1)(F), the motion stated:

[Defendant's counsel] has informed [Defendant] in person and in letters that she intended to file a successive motion or an amendment to the initial rule 3.851 motion raising a claim of ineffective assistance of counsel in the penalty phase. On July 8, 2015, a CCRC-South investigator and [] counsel traveled to UCI with a draft of the motion for [Defendant] but he refused both visits. [C]ounsel has not been able to have a rational conversation or discussion with [Defendant] whether due to the legal conflict of interest or due to his continued his [sic] mental illness or both. [C]ounsel believes that [Defendant] is not capable of acting in his own best interest. [C]ounsel has complied with Rule 4.14 of the Rules of Professional Conduct, and this motion is filed in good faith.

(PCR-SR. 26)

Defendant attached to this pleading a report from a David Schaich, Psy. D., dated June 30, 2015. (PCR-SR. 204-24) In this report, Dr. Schaich noted that he had attempted to evaluate Defendant on June 15, 2015, but that Defendant had refused to be evaluated. *Id.* He then opined, based on review of records and information provided by CCRC-South, that Defendant suffers from paranoid personality disorder, relationship distress and a history of trauma and that the issue of whether Defendant also suffers from bipolar disorder needed to be ruled out. *Id.*

On July 16, 2015, Defendant moved this Court to relinquish jurisdiction to the lower court to consider this motion. On July 23, 2015, this Court denied the motion. On July 24, 2015, the lower court dismissed the successive motion because it

lacked jurisdiction. (PCR-SR3. 32) Defendant then moved for rehearing, insisting that the lower court was required to stay the proceedings on the successive motion. (PCR-SR3. 34-35) On July 31, 2015, the lower court denied the motion, finding that while it was appropriate to stay proceedings on successive motions that asserted claims based on newly discovered evidence, Defendant's successive motion was not based on newly discovered evidence. (PCR-SR3. 37-38) On August 3, 2015, Defendant filed a "second amended notice of appeal," seeking to add the dismissal of his successive motion to this matter. (PCR-SR3. 40-42) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court did not abuse its discretion in denying CCRC-South's motion to withdraw after hearing from Defendant and Neil Dupree because there was no actual conflict of interest. It also properly summarily denied Defendant's attempt to relitigate this issue by raising it as a claim in the initial motion for post conviction relief. Finally, the lack of a *Nelson* inquiry regarding motions to discharge counsel filed in this Court provides no basis for relief as the lower court lack jurisdiction to hold a hearing on one of the motions and had already ruled on the other before this Court relinquished jurisdiction. It also did not abuse its discretion in finding

that the motion did not suggest that CCRC-South was being ineffective with it denied the motion it the first time.

The lower court properly rejected Defendant's constitutional challenge to Fla. R. Crim. P. 3.852. Defendant waived any issue about the disclosure of the State Attorney's notes and invited any error in the *in camera* review by not presenting his challenge to placing these materials under seal until after the lower court had conducted the *in camera* review and instead informing the lower court that they were not subject to disclosure. Moreover, the lower court did not abuse its discretion in refusing to disclose the notes as they are not public records at all. It also did not abuse its discretion in rejected Defendant's over broad requests for additional record, where Defendant failed to show that records were relevant to a colorable claim for post conviction relief.

Defendant has failed to brief the issue of ineffective assistance of counsel at the penalty phase properly as he had offered no argument regarding why the lower court erred in dismissing the successive motion for lack of jurisdiction, which it did not. Further, the claim would have been properly summarily denied the claim if the lower court had jurisdiction because the motion was not properly filed, was procedurally barred, was insufficiently plead, was refuted by the record and

was without merit as a matter of law.

The lower court properly rejected the claim of ineffective counsel regarding comments in closing that was presented to it as this Court had already rejected the argument regarding the comments on direct appeal. Moreover, Defendant's new arguments about this issue are not properly before this Court and are meritless. The lower court properly rejected the claim of juror misconduct because it was procedurally barred, insufficiently plead, refuted by the record and without merit as a matter of law. It also properly summarily denied the claims of ineffective assistance of counsel at the guilt phase that were insufficiently plead, refuted by the record and without merit as a matter of law.

ARGUMENT

I. THE CLAIMS REGARDING THE REPRESENTATION OF DEFENDANT DURING THE POST CONVICTION PROCEEDING PROVIDE NO BASIS FOR RELIEF.

Defendant first asserts that the lower court erred in refusing to allow CCRC-South to withdraw from representing him. In support of this issue, Defendant appears to contend that the lower court's denial of CCRC-South's motion to withdraw was error, that the lower court erred in failing to grant an evidentiary hearing on the alleged conflict and that the lower court erred in not conducting a *Nelson* inquiry regarding some request by Defendant to discharge CCRC-South. In doing so, Defendant conflates the proceedings and rulings regarding a number of different motions. However, when each of the lower court's actual rulings is considered in the context of the proceeding that generated that ruling, Defendant is entitled to no relief.

The first ruling that Defendant challenges is the lower court's denial of CCRC-South's March 7, 2014 motion to withdraw. However, the lower court did not abuse its discretion in denying that motion.³

Despite the fact that §27.703(1), Fla. Stat. (2013), had just been amended to require a showing of an actual, as opposed

³ This Court reviews trial court rulings regarding motions to withdraw. *Weaver v. State*, 894 So. 2d 178, 187 (Fla. 2004).

to a potential, conflict of interest for a CCRC to withdraw when it attempted to do so more than 30 days after the direct appeal mandate had issued and to shift "the responsibility of determining whether an actual conflict exists [to] the court," *Abdool v. Bondi*, 141 So. 3d 529, 553 (Fla. 2014); Fla. R. Crim. P. 3.851(b)(2), the motion merely made a conclusory assertion that a conflict existed because Mr. Dupree had supervised the attorneys who prosecuted Defendant for the crimes he had previously committed against the Coles and had signed off on Defendant's plea in that matter. (PCR. 355-59) It made no attempt to explain how Mr. Dupree's involvement in the prior conviction would adversely affect CCRC-South's ability to represent Defendant in post conviction proceedings in this case and, instead, asserted that prejudice should be presumed. *Id.* This was true despite the fact that the language the Legislature used to define an actual conflict of interest was consistent with from language in the United States Supreme Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and that the Court had recently construed the phrase "actual conflict of interest" from *Cuyler* as requiring a showing of an adverse effect. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

Further, the motion offered no explanation of why it had taken CCRC-South more than 10 months after it was appointed and

9 months after it had appeared to realize the alleged conflict existed. (PCR. 355-59) This was true despite the fact that this Court had extensively discussed the facts of Defendant's conviction for the crimes against the Coles in its direct appeal opinion. *Braddy*, 111 So. 3d at 826-27 & n.1, 858-60.

At the hearing on the motion, Mr. Dupree did not attempt to suggest that the discussion in the direct appeal opinion was insufficient to provide notice of the crimes against the Coles or that the delay in filing the motion was due to any lack of access to any materials. Instead, he asserted that he had not even remembered the case, only realized that he might have been involved when Defendant sent CCRC-South a letter mentioning the case and had to go to the Broward State Attorney's Office and pull the files even at that point to know if he had had any involvement. (PCR. 2585-86) Moreover, Mr. Dupree did not suggest that he was privy to any confidential information about the other case. Instead, he stated that his involvement would have been limited to having the prosecutor who was actually representing the State in that case give him an overview of the facts and request, and receive, his approval for a plea offer. (PCR. 2586-90) He also did not suggest that limited involvement would impair his ability to represent Defendant in this case. Instead, he suggested that he was concerned that Defendant would

complain that about his prior employment if he was unable to obtain post conviction relief. (PCR. 2588-89, 2590)

This Court has consistently rejected claims that an attorney had an actual conflict of interest based on a circumstance related to the attorney's employment where there was no showing that the attorney's employment caused him to be privy to information that would have been useful in representing the defendant but which could not be used because it was gained through the employment. *Salazar v. State*, 2016 WL 636103, *5 (Fla. Feb. 28, 2016); *Butler v. State*, 100 So. 3d 638, 654-55 (Fla. 2012); *Stephens v. State*, 975 So. 2d 405, 422 (Fla. 2007); *Sliney v. State*, 944 So. 2d 270, 278-81 (Fla. 2006); *Mungin v. State*, 932 So. 2d 986, 1000-02 (Fla. 2006); *Cooper v. State*, 856 So. 2d 969, 974-75 (Fla. 2003); *Hunter v. State*, 817 So. 2d 786, 791-93 (Fla. 2002); *Gorby v. State*, 630 So. 2d 544, 546 (Fla. 1993); see also *State v. De La Osa*, 28 So. 3d 201, 202-04 (Fla. 4th DCA 2010); *McCaskill v. State*, 638 So. 2d 567, 568 (Fla. 5th DCA 1994); *Rodriguez v. State*, 684 So. 2d 833, 833-24 (Fla. 3d DCA 1996); *State v. King*, 447 So. 2d 395, 395 (Fla. 1st DCA 1984); *Endress v. Coe*, 433 So. 2d 1280, 1280-81 (Fla. 2d DCA 1983). In fact, in *Endress*, the State had moved to disqualify a former prosecutor from serving as a defendant's attorney. *Endress*, 433 So. 2d at 1280. At the hearing on the motion, it

was revealed that the extent of the former prosecutor's involvement in the case was limited to discussing plea negotiations with the Assistant State Attorney who was actually prosecuting the defendant. *Id.* at 1280-81. The court determined that this limited involvement was insufficient to create an actual conflict of interest. *Id.*

Here, as noted above, Mr. Dupree never claimed that he was privy to information about this matter or Defendant because of his prior employment as an Assistant State Attorney. Instead, he averred that he did not even recall Defendant. He also acknowledged that his involvement with Defendant's prior case as a prosecutor had been limited to discussing plea negotiations with the actual prosecutor, much like the situation in *Endress*. Thus, the lower court did not abuse its discretion in finding that there was no actual conflict of interest and denying the motion to withdraw. It should be affirmed.

This is all the more true, as not only did Mr. Dupree make no suggestion that his prior involvement was limiting his ability to represent Defendant in this matter, but it would appear that it could not do so. Mr. Dupree did not even claim to be involved as a prosecutor in this matter; he claimed to have approved a plea that resulted in a prior conviction that was used as an aggravator in this case. This Court had made it

clear that Defendant could not attempt to invalidate that prior conviction in this case, and instead, could only argued that the prior conviction was improper relied upon in this case if he successfully challenged that conviction in that case. *Lukehart v. State*, 70 So. 3d 503, 513 (Fla. 2011); *Melton v. State*, 949 So. 2d 994, 1005 (Fla. 2007). Moreover, this Court has held that CCRC-South does not, and cannot, represent Defendant in any challenge regarding that prior case. *State v. Kilgore*, 976 So. 2d 1066 (Fla. 2007). Thus, it appears that nothing about Mr. Dupree's prior employment could adversely affect CCRC-South's representation of Defendant in this matter. The lower court did not abuse its discretion in denying the motion to withdraw and should be affirmed.

In attempting to avoid this result, Defendant asserts that he was entitled to a presumption of prejudice because his counsel made an "affirmative representation" of a conflict and that the trial court should have found that CCRC-South's alleged inability to "establish a relationship of trust" with Defendant was sufficient to show an adverse effect. However, neither of these assertions show that the lower court abused its discretion in denying the motion to withdraw.

As noted above, §27.701(3), Fla. Stat. (2013), was amended to require a showing of an actual conflict of interest and to

shift the responsibility for determination whether an actual conflict of interest exists to the court. *Abdool*, 141 So. 3d at 553. Further, as the Court has made clear, an actual conflict of interest requires a showing that the alleged conflict adversely affected the attorney performance before a presumption of prejudice applies. *Mickens*, 535 U.S. at 171-72; see also *Sliney*, 944 So. 2d at 279-80. Thus, Defendant's suggestion that he was entitled to a presumption of prejudice merely because his attorney claimed a conflict is incorrect.

Moreover, to show such an adverse effect, a defendant has to show that the attorney took a course of action or declined to take a course of action because of a need to protect the interests of another. *Hunter v. State*, 817 So. 2d 786, 792-93 (Fla. 2002); see also *Burger v. Kemp*, 483 U.S. 776, 784-88 (1987) (rejecting claim of adverse effect from law partners representing codefendants where evidence showed that inability to obtain a plea was the result of state's refuse to bargain and that counsel argued codefendant was more culpable); *Butler v. State*, 100 So. 3d 638, 655 (Fla. 2012); *Johnson v. State*, 78 So. 3d 1305, 1308-09 (Fla. 2012); *Connor v. State*, 979 So. 2d 852, 861 (Fla. 2007); *Stephens*, 975 So. 2d at 422; *Sliney*, 944 So. 2d at 280-81; *Gorby v. State*, 630 So. 2d 544, 546 (Fla. 1993); *Bouie v. State*, 559 So. 2d 1113, 1115 (Fla. 1990); *Barclay v.*

Wainwright, 444 So. 2d 956, 958 (Fla. 1984). As such, Defendant's assertion that he showed an adverse effect merely by asserting that he and counsel did not develop an appropriate relationship is incorrect. This is all the more true as the United States Supreme Court has expressly rejected the assertion that the Sixth Amendment "guarantees a 'meaningful relationship' between an accused and his counsel." *Morris v. Slappy*, 461 U.S. 1, 14 (1983); see also *Wheat v. United States*, 486 U.S. 153, 159 (1988) (noting that the evaluation of Sixth Amendment right to counsel claims "focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'). As a result, the Florida court have repeatedly held that a lack of confidence and trust in an attorney is not a basis to discharge the attorney. *Schoenwetter v. State*, 931 So. 2d 857, 870 (Fla. 2006); *Trease v. State*, 768 So. 2d 1050, 1053-54 & n.3 (Fla. 2000); *Johnston v. State*, 497 So. 2d 863, 867-68 (Fla. 1986); *Augsberger v. State*, 655 So. 2d 1202, 1204 (Fla. 2d DCA 1995). Since Defendant did not show an adverse effect, the lower court did not abuse its discretion in denying the motion to withdraw.

Defendant also insists that the lower court should not have considered the timing of the motion in rejecting it because "timeliness is only a factor where there is no specific conflict alleged." However, again, the duty to determine whether there

is a conflict has been shifted to the court, who has to find an actual conflict of interest before permitting an attorney to withdraw. *Abdool*, 141 So. 3d at 553. Thus, the mere fact that a conflict was alleged does not make timing irrelevant. This is all the more true because, as argued above, the determination of whether an actual conflict existed depends heavily on the information the attorney obtained from his prior employment. *Cooper*, 856 So. 2d at 974-75; *Hunter*, 817 So. 2d at 792. As such, the fact it took CCRC-South months to realize Mr. Dupree had even had any involvement with Defendant's prior case even though it was featured in this Court's direct appeal opinion was certainly relevant to whether CCRC-South actually possessed any information from Mr. Dupree's involvement in the prior case. The lower court did not abuse its discretion in denying the motion to withdraw and should be affirmed.

Defendant also suggests that the lower court should have conducted an evidentiary hearing on his motion to withdraw so that he could have presented evidence regarding when he received certain records. He seems to suggest that presentation of this information would somehow justify the delay in filing the motion to withdraw. However, in presenting this argument, Defendant ignores that he made no request to present any evidence at the hearing on CCRC-South's motion to withdraw. (PCR. 2585-92)

Instead, he elected to rely on the allegations in the motion and Mr. Dupree's statements as an officer of the Court. See *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978) ("Finally, attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.") (internal quotations omitted). Moreover, during those statements, Mr. Dupree did not suggest that the delay was caused by any lack of records, despite the fact that the State had argued in its response that the delay in filing the motion was unreasonable given the reference to the prior case in both the sentencing order and direct appeal opinion. (PCR. 370-76, 2585-86) Instead, Mr. Dupree sought to justify the delay by stating that he did not remember having had any involvement in Defendant's prior case and admitted to being able to access the prosecution files on the prior case. (PCR. 2585-86) Moreover, Defendant did not even file a motion for rehearing contesting the findings after the lower court denied the motion. Given the lack of request for an evidentiary hearing and the reliance on Mr. Dupree's statements, Defendant invited any error in the lack of an evidentiary hearing. *Pope v. State*, 441 So. 2d 1073, 1075-76 (Fla. 1983). Moreover, given that the lower court received the information regarding this issue through Mr. Dupree's

statements, it did not abuse its discretion in not requiring that the information be presented through a formal evidentiary hearing. *In Re Certification of Conflict*, 636 So. 2d 18, 21 (Fla. 1994). The denial of the motion to withdraw should be affirmed.

Defendant's citation to *People v. Abar*, 786 N.E.2d 1255 (N.Y. 2003), does not compel a different result. While Defendant cites to, and quotes from, pages 1259 and 1260 of the opinion in that case as if it were the majority opinion, those pages are actually part of the dissent in that case.⁴ *Abar*, 786 N.E.2d at 1259-63 (Smith, J., dissenting). Moreover, the majority opinion actually found no basis for relief based on the alleged conflict even though the attorney who represented the defendant when he entered pleas in two cases had originally been the prosecutor in one of those cases because there was nothing to suggest that she had confidential information about the case. *Id.* at 1256-59. It did so even though New York required only a showing of a potential conflict of interest; not an actual

⁴ Moreover, Defendant continued citation to this portion of that decision as the holding of the court is particularly inappropriate. The State pointed out that Defendant was relying on the dissent in its response to Defendant's motion for post conviction relief. (PCR. 1247-48) At the *Huff* hearing, Defendant acknowledged that the State was correct and that *Abar* did not support his position and claimed that the citation was a mistake made in a rush to file the motion. (PCR. 2431) Yet, Defendant has now cited the dissent as the holding again.

conflict. *Id.* at 1257. As such, *Abar* actually supports the denial of the motion to withdraw. The lower court should be affirmed.

The next ruling that Defendant challenges is the lower court summary denial of the claim he raised in his post conviction motion in which he asserted that the denial of CCRC-South's motion to withdraw had been improper. (PCR. 1128-34, 1829-30) However, the lower court properly summarily denied this claim.

Florida law has long recognized that a defendant may only seek post conviction relief based on a claim regarding the legality of his conviction and sentence. Fla. R. Crim. P. 3.850(a); *Foster v. State*, 400 So. 2d 1, 4 (Fla. 1981); see also *Medina v. State*, 690 So. 2d 1241, 1249 (Fla. 1997). Here, Defendant made no attempt to suggest that the lower court's refusal to allow CCRC-South to withdraw has any effect on the legality of his convictions or sentences. This is hardly surprising as CCRC-South was only appointed to represent him in post conviction proceedings. Claims regarding alleged improprieties during post conviction proceedings do not affect the legality of a conviction or sentence. *Carroll v. Sec'y, DOC*, 574 F.3d 1354, 1365-66 (11th Cir. 2009); *Anderson v. Sec'y, Dept. of Corrections*, 462 F.3d 1319, 1330-31 (11th Cir. 2006);

Quince v. Crosby, 360 F.3d 1259, 1261-62 (11th Cir. 2004); *Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987); see also *Hassine v. Zimmerman*, 160 F.3d 941, 945-55 (3d Cir. 1998); *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995); *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989); *Hopkinson v. Shillinger*, 866 F.2d 1185, 1218-20 (10th Cir. 1989); *Kirby v. Dutton*, 794 F.2d 245, 247-48 (6th Cir. 1986); *Mitchell v. Wyrick*, 727 F.2d 773, 774 (8th Cir. 1984). As such, this claim was not cognizable in his motion for post conviction relief and was properly summarily denied as a result. The lower court should be affirmed.

Finally, Defendant complains about the lower court's failure to conduct a *Nelson* inquiry regarding motions to discharge counsel. Defendant identifies the motions to discharge counsel as pleadings filed in this Court on March 3, 2015, and October 21, 2015. However, Defendant does not even begin to explain why the lower court would have had any ability to conduct a *Nelson* inquiry regarding a motion filed in a different court at a time when it had no jurisdiction. In fact, a court that lacks jurisdiction cannot hold a hearing. See *Smith v. State*, 208 So. 2d 462, 463 (Fla. 1st DCA 1968). Here, since the October 21, 2015 motion was filed in this Court after this Court had assumed jurisdiction over this matter, Defendant's

claim about a lack of *Nelson* inquiry regarding this motion is meritless.

Moreover, the complaint about the other motion filed in this Court is also meritless. While this Court did relinquish jurisdiction for the lower court to consider this motion and the lower court did not hold a *Nelson* inquiry before entering a ruling on the motion, the record reflects that this motion was the same motion that the lower court had already denied on January 7, 2015. (PCR. 2117-27, 2133-34, 2137-47, PCR-SR. 1207-08) Thus, the lower court did not abuse its discretion in not holding a *Nelson* hearing to deny the motion a second time. See *Rutledge v. State*, 1 So. 3d 1122, 1125-26 (Fla. 1st DCA 2009).

To the extent that Defendant actually intends to complain about the lower court's failure to hold a *Nelson* inquiry before denying the motion on January 7, 2015, Defendant is entitled to no relief. As this Court has held, a trial court is not required to hold a *Nelson* inquiry when a defendant presents general complaints about strategic decisions, communication with counsel and dissatisfaction with counsel and does not show that counsel is being incompetent. *Davis v. State*, 136 So. 3d 1169, 1209 (Fla. 2014); *Morrison v. State*, 818 So. 2d 432, 440 (Fla. 2002); *Stephens v. State*, 787 So. 2d 747, 758 (Fla. 2001).

Here, as a review of the motion shows, Defendant's

complaints concerned the conflict alleged in CCRC-South's motion to withdraw, his counsel's communication with him and his disagreements with counsel regarding strategic decisions. (PCR. 2118-26) In fact, the closest Defendant came to asserting that his counsel was being ineffective was to contend that he believed his strongest claims concerned trial counsel allegedly being ineffective in seeking to relitigate issues concerning the denial of motions to disqualify the trial judge that Defendant had filed while he was representing himself and concerning the evidence found in the truck of the Lincoln. (PCR. 2125-26) However, these claims had been raised in the motion for post conviction relief. (PCR. 1158-60, 1168-71) Given these circumstances, the lower court did not abuse its discretion in denying the motion without holding a *Nelson* inquiry.⁵ This is all the more true as the lower court had already heard from Defendant regarding his position on the motion to withdraw and his dissatisfaction with CCRC-South during the numerous hearings it held regarding the withdraw and Defendant's desire to represent himself. (PCR. 2169-2288, 2504-13, 2579-93, 2803-40) It should be affirmed.

⁵ This Court applies an abuse of discretion standard to decision regarding holding *Nelson* inquires. *Guardado v. State*, 965 So. 2d 108, 115 (Fla. 2007).

II. THE CLAIM THAT FLA. R. CRIM. P. 3.852 IS UNCONSTITUTIONAL WAS PROPERLY DENIED AND THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN RULING ON PUBLIC RECORDS DISCLOSURE.

Defendant next complains about the production of public records in his case. In support of this complaint, Defendant asserts that Fla. R. Crim. P. 3.852 was unconstitutionally applied in this matter because unidentified public records requests were denied. He also contends that the lower court should have ordered disclosure of all of the records to which the State Attorney claimed an exemption, the complete internal affairs file of every officer involved in the case and records regarding the "criminalists." However, the lower court properly rejected the claim regarding the constitutionality of Fla. R. Crim. P. 3.852 and did not abuse its discretion in denying his public records requests.⁶

First, while Defendant insists that Fla. R. Crim. P. 3.852 was unconstitutional as applied because the lower court relied on cases from this Court that make clear that a defendant has the burden of show that the additional public records he is requesting are specifically identified and the request is

⁶ This Court reviews constitutional challenges *de novo*. See *State v. Sigler*, 967 So. 2d 835, 841 (Fla. 2007). It reviews rulings on public record requests for an abuse of discretion. *Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002)

calculated to lead to the discovery of relevant evidence and not simply a fishing expedition, the lower court properly rejected this claim. This Court had repeatedly rejected constitutional challenges to the requirements of Fla. R. Crim. P. 3.852. *Twilegar v. State*, 175 So. 3d 242, 249-50 (Fla. 2015); *Howell v. State*, 133 So. 3d 511, 515-16 (Fla. 2014); *Lambrix v. State*, 124 So. 3d 890, 895 (Fla. 2013); *Wyatt v. State*, 71 So. 3d 86, 110-11 (Fla. 2011). Thus, the lower court was correct to deny this claim and should be affirmed.

Defendant next suggests that the lower court abused its discretion in determining that attorney notes that the State had submitted under seal were properly claimed to be exempt from production after an *in camera* review. In doing so, Defendant avers that since the State Attorney's office allegedly only listed a statute number as a basis for its claim that the records were not subject to disclosure, the lower court must have relied on the statutory work product privilege in refusing to disclose the information and doing so was improper because the State Attorney's statutory work product privilege ends when a case is affirmed on direct appeal. However, Defendant is entitled to no relief.

Initially, the State would note that Defendant did not properly present the issues he is raising below and invited the

lower court to conduct its *in camera* review in the manner it did. Despite the fact the State Attorney's exempt materials had been sent to the repository in August 2013, and the last of the exempt materials about which Defendant sought *in camera* review was received by the repository on January 31, 2014, (PCR. 982, 1048-55), Defendant did not seek an *in camera* review until September 2, 2014, a mere 5 weeks before his motion had to be filed. (PCR. 847-49, 2341-45, 2349) This is true even though the State had repeatedly noted the present of exempt materials at the repository at the April 4, 2014 public records hearing and suggested that such a review was appropriate if Defendant requested one.⁷ (PCR. 2597, 2600-04, 2605, 2669-71) Moreover, in his motion for *in camera* review, Defendant presented nothing to suggest that any of the exempt materials had been improperly claimed to have been exempted. (PCR. 847-49) Instead, he asserted that the *in camera* inspection needed to be conducted in open court so that he could then present his arguments regarding the exemptions. (PCR. 847-48) He did so even though this Court had previously rejected this argument. *Dennis v. State*, 109 So. 3d 680, 699-700 (Fla. 2012). He also expressly asked for the

⁷ Any suggestion that the delay was proper given the litigation concerning CCRC-South's motion to withdraw and Defendant's request to proceed *pro se* is meritless. CCRC-South, itself, admitted that it continued to represent Defendant unless they were relieved of that responsibility and had a duty to do so diligently. (PCR-SR. 1183)

lower court to review the exempt materials to determine if *Brady* required its disclosure even if it was properly exempt. (PCR. 848)

Far from suggesting that he believed that there was any impropriety in the State Attorney claiming that its notes were exempt during the hearing on this motion, Defendant actually told the lower court:

There might be other documents, for example, attorney notes, state attorney notes, generally those are exempt from public record, but might be something in the state attorney notes—and I'm talking about handwritten work product – that might constitute *Brady* material.

(PCR. 2344) In fact, he acknowledged that most of the exemptions were properly claimed by the agencies. (PCR. 2344)

Moreover, throughout the hearing, the lower court indicated that it understood that Defendant faced a looming deadline and needed to act expeditiously. (PCR. 2341, 2346, 2350, 2354, 2356) However, after the lower court rejected Defendant's request to conduct the *in camera* review in open court and Defendant stated that he would provide the court with his arguments in writing, Defendant did not do so in a timely basis. (PCR. 2348-49) Instead, he waited until after the lower court had completed its *in camera* review and then filed a motion for reconsideration in which he raised these arguments. (PCR. 967-81) Since Defendant did not present his arguments regarding

why he believed the he was entitled to the attorney notes until after the lower court had conducted its *in camera* review and had actually informed the lower court that the notes were not properly subject to disclosure before it conducted the review, Defendant both failed to raise the issue properly and invited any error. See *Vining v. State*, 827 So. 2d 201, 213 (Fla. 2002); *Terry v. State*, 668 So. 2d 954, 962 & n.10 (Fla. 1996). The lower court should be affirmed.

Further, while Defendant insists that the lower court must have considered the statutory work product exemption as being the basis for the State Attorney's claim of exemption because he attached documents to his motion for reconsideration that listed a statutory provision with the assertion that the attorney notes were not discoverable and used the term work product to described the information, this is not true. He ignores that these documents were not before the lower court was it conducted the *in camera* review. Instead, during the hearing on the request for *in camera* review, both Defendant and the State informed the lower court that the basis for the claimed exemptions would appear on the transmittal notices for the public records. (PCR. 2343, 2346) On its transmittal sheet, the State Attorney did not claim that an exemption for work product pursuant to §119.071(1)(d)(1), Fla. Stat. Instead, it

asserted that it had removed items that were not public records under the definition this Court adopted in *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980), *State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990), and *Atkins v. State*, 663 So. 2d 624, 626 (Fla. 1995). Not only has this Court repeatedly upheld trial courts' ruling that precluded disclosure of such information, *Geralds v. State*, 111 So. 3d 778, 801-02 (Fla. 2010); *Arbelaez v. State*, 775 So. 2d 909, 918 (Fla. 2000); *Lopez v. State*, 696 So. 2d 725, 728 (Fla. 1997), this Court has also used the term work product to describe such information. *Jennings v. State*, 782 So. 2d 853, 864-65 (Fla. 2001). As such, the lower court did not abuse its discretion in denying access to this information. This is all the more true as the notations on the list on which Defendant rely supports that the notes were not memos intended to communicate information between employees. (PCR. 983-1047) The lower court should be affirmed.

Further, the lower court did not abuse its discretion in denying Defendant's public records requests regarding the files of law enforcement employees. This Court has held that defendants seeking additional public records must specifically identify the records they are seeking to make a proper request for additional public records. *Geralds*, 111 So. 3d at 802.

Further, the request may not be overly broad and unduly burdensome. *Dennis v. State*, 109 So. 3d 680, 699 (Fla. 2012). Moreover, defendants bear the burden of showing that the records they are requesting are relevant to a colorable claim for post conviction relief. *Twilegar v. State*, 175 So. 3d 242, 250 (Fla. 2015). As this Court has explained, these requirements have been imposed because "rule 3.852 'is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief.'" *Rimmer v. State*, 59 So. 3d 763, 775 (Fla. 2010) (quoting *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000)).

Here, when Defendant filed his additional public records requests, Defendant simply sought the entire personnel files of 24 named employees from 3 police agencies without making any attempt to explain how any of the individuals had any connection with the case or why any documents in these individuals' personnel files might be relevant to a colorable post conviction claim. (PCR. 277, 269, 296) At the time the lower court set a hearing on these requests, it informed Defendant that it believed that the requests were improper because they did not provide sufficient information regarding the individuals about whom Defendant had requested records. (PCR. 2575) Defendant responded that he had planned to wait for a hearing on

objections to his requests to provide any information identifying the individuals. (PCR. 2575) As a result, the lower court had to order Defendant to provide a memo regarding the alleged relevancy of the request he was making. (PCR. 2575-76)

In the memo he filed, Defendant still did not attempt to explain why any specific record was relevant. (PCR. 449-61) Instead, he simply insisted that all the records he had requested were relevant and included a list of claims that defendants routinely assert in motions for post conviction relief without attempting to explain why he believed that the records he was requesting would support any of these claims. *Id.* He then provided a brief statement regarding the role each of the law enforcement personnel had played in the investigation. (PCR. 451, 453-55, 455-56) In doing so, Defendant only claimed that 15 of the 24 personnel had even testified at trial. *Id.*

At the public records hearing, Defendant acknowledged that even he did not believe that all of the contents of the personnel files were relevant. (PCR. 2613) Instead, he asserted that he was really only interested in internal affairs files and proficiency documentation. (PCR. 2611, 2648) When it was pointed out that even that information was not relevant when

the officers had not testified, Defendant then claimed to have limited his request by not seeking the complete personnel files of every officer whose name appeared in the file and suggested that he would be satisfied with a listing of content of the files so that he could make a specific request without attempting to explain how the documents would be relevant even as so limited. (PCR. 2611-14) Despite the lack of any showing of relevancy and the admitted overbreadth of the requests, the lower court did order the productions of listings of the internal affairs files of two Broward County Sheriff's officers who did not testify at trial, the internal affairs files of 14 MDPD officers, including one who did not testify, and the rest of the personnel files of Det. Greg Smith and three other MDPD employees.⁸ (PCR. 2115-20, 2649-67)

Moreover, even after having been given these listings, Defendant still did not attempt to identify specific documents and show how they were relevant. Instead, he continued to seek all documents regarding performance evaluations and training for 14 law enforcement personnel for two agencies and the complete internal affairs files for 8 individuals from MDPD. (PCR. 496-98, PCR-SR3. 3-7) As a result, one of the agencies again

⁸ The Palm Beach Sheriff agreed to produce its files without objection. (PCR. 2630-31)

objected.⁹ (PCR-SR3. 9-12)

At the hearing on this motion, Defendant made no attempt to explain how he had specified the information he sought based on the listings he had been given. (PCR. 2292-93, 2296-97) Instead, he claimed to have narrowed his demand by requesting all records regarding fewer officers. *Id.*

After the lower court was reminded that it had already ordered MDPD to provide listings regarding the contents of the files so that Defendant could identify particular documents that were allegedly relevant, the lower court went through each of the listings and provided Defendant with the opportunity to explain why he believed the listed documents would be relevant. (PCR. 2301-40) However, Defendant never presented any argument regarding why he believed that the listed documents would be relevant. (PCR. 2304-40) This is particularly true as this Court had held that police officers may only be impeached with evidence that they had pending or recent criminal charges or evidence of an investigation that was "not [] too remote in time" and "related to the case at hand," and that it is error to permit a "police officer to be questioned concerning unrelated reprimands." *Breedlove v. State*, 580 So. 2d 605, 607-09 (Fla.

⁹ Despite the fact that the lower court had already indicated that this manner of making requests was improper, one of the agencies complied. (PCR. 567-69)

1991). Instead, he provided anecdotes regarding finding information in other cases in other jurisdictions that his counsel had considered relevant by reviewing random documents. (PCR. 2305-06, 2308, 2310) As a result, the lower court denied Defendant's requests except for his request for the internal affairs file of Det. Greg Smith. (PCR. 2311-12, 2319-20, 2341, 1059)

Given that Defendant requested the records in an overly broad manner, failed to specify the records he was requesting even after being given listings of the contents of the files and could not show relevancy for any of the documents he was seeking even when given the opportunity to do so, the lower court did not abuse its discretion in denying Defendant's requests. This is all the more as anecdotes Defendant presented instead showed that he requested the documents merely as a fishing expedition. The lower court should be affirmed.

In attempting to show that the lower court did abuse its discretion, Defendant suggests that he should have been entitled to the entire contents of all of the internal affairs files he requested because Det. Greg Smith have shoved him during the search for Quatisha and his trial attorney questioned Det. Hoadley "about his efforts to manufacture facts in aggravation" during trial. Initial Brief at 44. However, lower court

ordered production of Det. Smith's file. (PCR. 1059)

Moreover, Defendant's suggestion that his trial counsel's questions of Det. Hoadley showed that his request for records regarding Det. Hoadley concerned misconduct is meritless. First, trial counsel's questions did not even indicate that Det. Hoadley had actually engaged in any misconduct. During direct, Det. Hoadley had testified that he had asked Defendant why he had not taken Quatisha home after he left Ms. Maycock in Palm Beach county. (R148/2441) He averred that Defendant had responded that he was concerned about Quatisha divulging what he had done to Ms. Maycock to other and being able to identify him. (R148/2441-42) Defendant then claimed that he had driven Quatisha to Alligator Alley and left her in a rest stop. (R148/2442) During his cross examination, trial counsel asked questions attempting to show that Det. Hoadley had asked these questions to provide a basis to support the avoid arrest aggravator at an eventual trial. (R148/2455-57) However, as Det. Hoadley responded that the time, the questioned he asked Defendant were merely routine questions regarding Defendant's motives. (R148/2457-58) Thus, trial counsel's questions do not even provide a basis to suggest that Det. Hoadley even committed any misconduct.

Moreover, Defendant's citation to the direct appeal opinion

in an attempt to show that the questions did show misconduct is even more specious. This Court did not mention the questions to Det. Hoadley as any evidence of misconduct. Instead, this Court mentioned the comments to explain why the comments the State made during its closing argument in response to these accusations were not improper. *Braddy*, 111 So. 3d at 839. As such, the mere fact that trial counsel made baseless accusation of misconduct against Det. Hoadley does not show that the trial court abused its discretion in denying Defendant's request from records from his file. This is all the more true as Defendant was provided with a listing of the documents in Det. Hoadley's file. Yet, even now, he has yet to identify any incident that would even potentially be admissible as impeachment. *Breedlove*, 580 So. 2d at 607-09. The lower court should be affirmed.

Moreover, Defendant offers no explanation regarding how these assertions show that anything in the files of the other officers would be relevant to a colorable claim. In fact, this Court had previously held that a trial court did not abuse its discretion in denying a request for access to information in the personnel file of a government employee based on assertions regarding misconduct by a different employee of the agency, labeling such a request a fishing expedition. *Dennis*, 109 So. 3d at 699. Thus, these assertions do not show that the lower

court abused its discretion in denying the request regarding the other officers' files.

Similarly, Defendant's assertions about the "criminalist" do not show the lower court abused its discretion. Despite having the listings of the personnel files of the crime lab personnel, Defendant merely points to evidence from a case from Washington state and a government report. Since this alleged misconduct is even more remote than relying on misconduct of a different employee of the same agency, these assertions merely show that Defendant was engaged in an improper fishing expedition. *Dennis*, 109 So. 3d at 699. The lower court did not abuse its discretion and should be affirmed.

III. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE PROVIDES NO BASIS FOR RELIEF.

Defendant next contends that his trial counsel was ineffective for failing to investigate and present mitigation. However, Defendant is entitled to no relief.

As this Court has explained, the purpose of an appellate brief is to present arguments in support of an issue on appeal and not simply to refer to assertions made in the lower court. See *Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008). In fact, this Court has held that merely repeating the allegations made in the lower court without arguing about why the lower court erred in its ruling on an issue is improper. *Peede v. State*, 748 So. 2d 253, 256 n.5 (Fla. 1999). This Court has held that such a presentation of an issue on appeal waives the issue. *Doorbal*, 983 So. 2d at 482.

Here, Defendant does present any argument regarding why the lower court's ruling was erroneous. Instead, he simply noted that he raised claims of ineffective assistance of counsel at the penalty phase both in his initial motion and the successive motion he filed during this appeal. Initial Brief at 46. He then proceeds to reiterate the allegations he made in his successive motion regarding the investigation and presentation of mitigation. Compare Initial Brief at 46-67 with PCR-SR. 7-13, 17-67. He next cites to a case regarding the standard for

summarily denying a post conviction claim and asks this Court to remand this matter for an evidentiary hearing. Initial Brief at 67-68. However, even this citation does not help to explain how the lower court erred because the lower court did not summarily deny this claim. Instead, it dismissed the allegations in the successive motion because it lacked jurisdiction to consider the motion because it was filed during the pendency of the appeal from the denial of the initial motion. (PCR-SR3. 32) Since Defendant has not even acknowledged that ruling, much less presented any arguments showing that it was incorrect, Defendant has waived this issue. *Doorbal*, 983 So. 2d at 482; *Peede*, 748 So. 2d at 256 n.5.

Moreover, that ruling was correct. As this Court has recognized, a lower court lacks jurisdiction to entertain a successive motion for post conviction relief during the pendency of an appeal from the denial of an earlier motion that raised similar claims. *Tompkins v. State*, 894 So. 2d 857, 859 (Fla. 2005); see also *Siskos v. State*, 163 So. 3d 739, 740 (Fla. 5th DCA 2015). Here, as Defendant admits, he raised a claim that counsel was ineffective during the penalty phase in he initial motion. (PCR. 1177-86) After the trial court denied the claim as insufficiently plead and refuted by the record, Defendant filed a notice of appeal with this Court on February 26, 2015.

(PCR. 1844-46, 2099-2100) Despite the fact that this appeal was pending, Defendant then filed the successive motion for post conviction relief on whose allegations he is relying on July 13, 2015. As such, the lower court was correct that it lacked jurisdiction over this motion and should be affirmed.

Additionally, the lower court would have been correct in summarily denying the claim in the successive motion had it done so. This is true because the claim was not properly filed, procedurally barred, insufficiently plead and refuted by the record.

While Defendant labeled his second motion for post conviction relief as either a successive motion or an amendment to his initial motion, the motion was neither sworn as required by Fla. R. Crim. P. 3.851(e)(1) (2014), for an amendment to the initial motion, see *Lukehart v. State*, 70 So. 3d 503, 514-17 (Fla. 2011), nor did not include the statement required by Fla. R. Crim. P. 3.851(e)(1)(F) (2015), for a successive motion. Instead, it includes a statement that:

[Defendant's counsel] has informed [Defendant] in person and in letters that she intended to file a successive motion or an amendment to the initial rule 3.851 motion raising a claim of ineffective assistance of counsel in the penalty phase. On July 8, 2015, a CCRC-South investigator and [] counsel traveled to UCI with a draft of the motion for [Defendant] but he refused both visits. [C]ounsel has not been able to have a rational conversation or discussion with [Defendant] whether due to the legal conflict of

interest or due to his continued his [sic] mental illness or both. [C]ounsel believes that [Defendant] is not capable of acting in his own best interest. [C]ounsel has complied with Rule 4.14 of the Rules of Professional Conduct, and this motion is filed in good faith.

(PCR-SR. 26) Moreover, the reason for the alteration of this required statement is evident. As Defendant admitted in the successive motion, Defendant did not want the mitigation that his post conviction counsel claimed trial counsel was ineffective for failing to investigate presented and fired attorneys to prevent them from doing so. (PCR-SR. 9-10) Defendant continued to refuse to cooperate in presenting this evidence even during the post conviction proceedings. (PCR. 2218, 2248, 2284-86, 2118-27, PCR-SR. 204-24) Since it is evident that Defendant has never, and would never, agree to the presentation of this claim, the lower court would have properly rejected this motion as improperly filed if it had jurisdiction. *See Hernandez-Alberto v. State*, 126 So. 3d 193, 199-203 (Fla. 2013).

Further, the claim is also procedurally barred. As this Court has recognized, claims cannot be presented in a successive motion where the basis for raising the claim was available when an earlier motion was pending. *Wright v. State*, 857 So. 2d 861, 869 (Fla. 2003). Further, a successive motion filed more than one year after a conviction became final is only timely if the

motion is based on newly discovered evidence or a retroactive change in constitutional law. *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008). A defendant must satisfy the conditions to file a successive motion even when he attempts to amend a claim in an initial motion after the claim had been denied. *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002).

Here, in his initial motion, Defendant did not make allegations regarding either deficiency or prejudice in his initial motion for post conviction relief. Instead, he simply outlined the evidence that had been presented in mitigation at trial and provided statements regarding what he asserted was the legal requirements for investigating and presenting mitigation. (PCR. 1177-86) When he filed his successive motion after the trial court had denied the initial motion, Defendant did not claim that the motion was based on newly discovered evidence or a fundamental, retroactive change in constitutional law. Instead, he attempted to blame the State for his alleged inability to have fully plead his claim earlier because there was a period of time when DOC was not allowing out of state psychologists to visit inmates while calling themselves psychologists. (PCR-SR. 3)

However, the United States Supreme Court has made clear that the deficiency and prejudice prongs of a claim of

ineffective assistance of counsel present distinct analytical issues. *Sears v. Upton*, 561 U.S. 945, 954 n.10 (2010). This Court has made clear that counsel cannot be found deficient simply because a defendant presents a new expert in post conviction proceedings. *Whitton v. State*, 161 So. 3d 314, 333 (Fla. 2014); *Hoskins v. State*, 75 So. 3d 250, 255 (Fla. 2011); *Card v. State*, 992 So. 2d 810, 818 (Fla. 2008); see also *Mendoza v. State*, 87 So. 3d 644, 657-60 (Fla. 2011). Thus, DOC's actions could not have prevented Defendant from alleging deficiency. Since Defendant had no excuse for failing to plead deficiency in his initial motion, the lower court would have properly denied the motion as successive if it had jurisdiction.

Moreover, DOC's actions could not even be said to have prevented Defendant from raising his claims of prejudice. DOC only prevented out of state psychologists from visiting defendants while calling themselves psychologists beginning after April 2014 and ending on January 12, 2015. Thus, Defendant had about a year from the time that CCRC-South first started representing him before DOC acted to have Dr. Schaich visit him and additional time while his motion was still before lower court after DOC changed its position. (PCR. 1582-84 & n.1, 1866) Thus, had Defendant acted with diligence in conducting the evaluation, it could have done so while his first

motion was pending. Further, it should be remembered that Defendant actually refused to be evaluated by Dr. Schaich. (PCR-SR. 204-24) Thus, as his report reflects, his conclusions are based on his review of records. *Id.* Since DOC's actions did not prevent Dr. Schaich from reviewing records, its actions cannot be said to have prevent him from reaching his conclusions. Given all of these circumstances, Defendant could have raised any claim of ineffective assistance of counsel properly in his initial motion for post conviction relief because it was available to him when that motion is pending. His attempt to reraise the claim in a successive motion was barred. The lower court should be affirmed.

Further, the claim was also insufficient plead in light of the record. A defendant claiming ineffective assistance of counsel must identify the specific acts or omission of counsel that are alleged to have been deficient. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Here, Defendant made no attempt to explain how counsel was deficient in failing to investigate and present mitigation in this case. (PCR-SR. 6-13) Instead, he simply made assertions regarding his beliefs regarding what a mitigation investigation should include without explaining what counsel failed to do in his investigation in this case. *Id.* The lack of specifics was important in this case

because the record reflects that Defendant's trial counsel sought and received the appointment of mental health experts. (R2/192-93, R5/569-76, R11/1371-72) At least some of these experts conducted evaluations of Defendant. (R3/303-04, R153/2966-72) Counsel also obtained Defendant's medical, school and incarceration records. (R15-18/1870-2407, R153/2973) Moreover, counsel not only arranged for Defendant's family to be interviewed but also hired a second investigator to assist with the interviews when the family was reluctant to cooperate with the first investigator. (R26/3407) Given all the investigation that the record reflects counsel did conduct, Defendant's failure to identify what counsel allegedly failed to do rendered his claim insufficiently plead. As such, it would have been properly summarily denied.

Defendant's assertion that someone should have argued that Defendant should not have been permitted to fire attorneys and represent himself based on *Indiana v. Edwards*, 554 U.S. 164 (2008), did not cure this defect. As this Court has long recognized, counsel cannot be deemed ineffective for failing to anticipate a change in the law. *Seibert v. State*, 64 So. 3d 67, 82 (Fla. 2010). Here, Defendant's trial proceedings ended when he was sentenced to death on October 15, 2007. (R28/3695-3706) *Edwards* was not decided until June 19, 2008. *Edwards*, 554 U.S.

at 164. As this was after Defendant's trial proceedings had ended, no one could have relied upon it for anything.

Further, *Edwards* only permitted a state to refuse to allow a defendant to represent himself when the defendant suffers from a "severe mental illness." *Edwards*, 554 U.S. at 178. As a result, this Court has limited the ability of Florida courts to refuse to accept a decision to waive counsel to those defendants who have a severe mental illness. Fla. R. Crim. P. 3.811(d)(3); see also *In re Amendments to Florida Rule of Criminal Procedure 3.111*, 17 So. 3d 272, 274 & n.3 (declining to extend *Edwards* beyond the severely mentally ill). Here, there has been no showing that Defendant suffers from a severe mental illness even now. Dr. Werner found that Defendant did not suffer from any mental illness, and Dr. Mings found paranoid personality characteristics. (PCR-SR3. 14-28) While Dr. Schaich stated that bipolar disorder should be ruled out, he admitted that he could not make a diagnosis of such a condition because Defendant would not speak to him. (PCR-SR. 223-24) Instead, he diagnosed Defendant only with a personality disorder. *Id.* As this Court has made clear, such personality disorders are not even legally mental illnesses. *Diaz v. State*, 945 So. 2d 1136, 1150-51 (Fla. 2006); *Patton v. State*, 878 So. 2d 368, 375-76 (Fla. 2004). Thus, any reliance on *Edwards* would not support a claim of

ineffective assistance of counsel even if *Edwards* had been available. *Lukehart v. State*, 70 So. 3d 503, 513 (Fla. 2011); *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla. 1992). The lower court should be affirmed.

Moreover, Defendant's complaint about a lack of waiver colloquy would also provide no basis for relief. As this Court held, issues regarding the adequacy of a mitigation waiver colloquy are procedurally barred in post conviction proceedings because the issue should have been raised on direct appeal. *Eaglin v. State*, 176 So. 3d 900, 906-07 (Fla. 2015). Moreover, this Court has only required a mitigation waiver colloquy when the defendant refuses to present all mitigation. *Id.*; *Boyd v. State*, 910 So. 2d 167, 188 (Fla. 2005). Here, Defendant presented some mitigation. *Braddy*, 111 So. 3d at 828. Thus, Defendant's complaint about the lack of a waiver colloquy was barred and without merit as a matter of law. The lower court should be affirmed.

Finally, Defendant's claim that counsel was ineffective for failing to investigate and present mitigation is without merit as a matter of law. The United States Supreme Court has made clear that when the reason mitigation was not presented was that a defendant instructed his counsel not to present the mitigation, a defendant cannot show prejudice and it is proper

to summarily deny a claim of ineffective assistance of counsel. *Schriro v. Landrigan*, 550 U.S. 465, 475-81 (2007). Here, Defendant admitted that the reason why the mitigation was not presented was that Defendant refused to allow the mitigation to be presented and went so far as to fire attorneys to prevent the mitigation from being presented. (PCR-SR. 9-10) Thus, the lower court should be affirmed.

**IV. THE CLAIM REGARDING INEFFECTIVE ASSISTANCE
REGARDING COMMENTS IN CLOSING PROVIDES NO BASIS
FOR RELIEF.**

Defendant next contends that the lower court erred in denying his claims that his counsel was ineffective regarding comments in closing that Defendant contends were improper. He acknowledges that the issue of the propriety of the comments about which he complains was raised and rejected on direct appeal and argues that the result of the appeal would have been different had counsel preserved the issues. However, the lower court properly summarily denied the claims that were presented to it and the assertions that Defendant is presenting to this Court that were not raised below are not properly before this Court and are meritless.

As this Court has held, arguments in support of claims for post conviction relief that were not properly present in the motion for post conviction relief filed in the lower court are not properly presented in a post conviction appeal. *Kokal v. State*, 901 So. 2d 766, 778-79 (Fla. 2005); *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Hunter v. State*, 817 So. 2d 786, 796 (Fla. 2002); *Gudinas v. State*, 816 So. 2d 1095, 1101 n.4 (Fla. 2002); *Carroll v. State*, 815 So. 2d 601, 609 n.6 (Fla. 2002); *Thompson v. State*, 796 So. 2d 511, 515 n.5 (Fla. 2001); *Shere v. State*, 742 So. 2d 215, 218 n.7 (Fla. 1999). Here,

while Defendant asserted as part of his claims that counsel had been deficient during both the guilt and penalty phase that his counsel had been ineffective for failing to object to comments the State made in closing, he contended that the prejudice resulting from that alleged deficiency was that he was deprived of a fair trial whose results were reliable. (PCR. 1175-76, 1180-84) Yet, on appeal, Defendant attempts to claim that he was prejudice because the result of his direct appeal would have been different had his trial counsel objected and makes no mention of any alleged effect on the results of either the guilt or penalty phase. Since Defendant did not suggest that prejudice should be evaluated based on the effect on appeal in the lower court, his attempt to do so in this Court is improper and should be rejected as such.

Moreover, even if Defendant could alter the claims on appeal, he would still be entitled to no relief. As this Court has recognized, a defendant claiming ineffective assistance of trial counsel must show that the alleged deficiency created a reasonable probability of a different result at trial and cannot rely on an assertion that the result of an appeal might have been different. *Carratelli v. State*, 961 So. 2d 312, 320-23 (Fla. 2007); see also *Thompson v. State*, 990 So. 2d 482, 488-89 (Fla. 2008). Thus, an assertion that a defendant was prejudiced

by an alleged deficiency of trial counsel because the result of an appeal might have been different without showing how the alleged deficiency created a reasonable probability of a different result at trial does not even sufficiently allege a claim of ineffective assistance of trial counsel. Defendant's attempt to rely on such assertions regarding the result of his direct appeal here should be rejected.

Further, the lower court properly summarily denied the version of the claims that was presented to it. As this Court has recognized, a defendant cannot show the prejudice necessary to prove an ineffective assistance of counsel claim when this Court considered whether the alleged error was fundamental error on direct appeal and found that it was not. *Chandler v. State*, 848 So. 2d 1031, 1045-46 (Fla. 2003); *see also Lowe v. State*, 2 So. 3d 21, 37-38 (Fla. 2008); *Gonzalez v. State*, 990 So. 2d 1017, 1028 n.8 (Fla. 2008); *Rogers v. State*, 957 So. 2d 538, 550 (Fla. 2007). Here, this Court considered the issue of whether the State's comments constituted fundamental error on direct appeal and found that they did not, either individually or cumulatively. *Braddy*, 111 So. 3d at 837-44, 846-56. Since any attempt to show prejudice was conclusively foreclosed, the lower court did not err in summarily denying these claims. It should be affirmed.

V. THE LOWER COURT PROPERLY SUMMARILY DENIED THE CLAIM REGARDING JUROR RAVELO.

Defendant next contends that he was deprived of his right to an impartial jury because a juror who had sat during the guilt phase was arrested between the guilt and penalty phases based on a photograph of the juror engaging in the activity that resulted in his arrest that Defendant's own allegations asserted was taken after the guilt phase. He avers that this information somehow shows that Juror Ravelo concealed information during voir dire. He also complains that the lower court denied his requests for public records regarding the jurors and that R. Regulating Fla. Bar 4-3.5(d)(4) precludes him from interviewing Ravelo. Finally, he avers that the State somehow committed a *Brady* violation regarding information about Ravelo. However, the lower court properly summarily denied the claim regarding Juror Ravelo because it was procedurally barred, insufficiently plead, refuted by the record and without merit as a matter of law.

As this Court has repeatedly held, claims of juror misconduct are procedurally barred in post conviction proceedings because such claims could have and should have been raised on direct appeal. *Diaz v. State*, 132 So. 3d 93, 104-05 (Fla. 2013) (claim that juror failed to disclose prior arrest during voir dire barred); *Tanzi v. State*, 94 So. 3d 482, 493-94

(Fla. 2012); *Troy v. State*, 57 So. 3d 828, 838 (Fla. 2011); *Elledge v. State*, 911 So. 2d 57, 77 n.27 (Fla. 2005); see also *Knight v. State*, 923 So. 2d 387, 391 n.6 (Fla. 2005). Since the claim is procedurally barred, the lower court properly summarily denied it and should be affirmed.

Even if the claim was not barred, it was still properly summarily denied as insufficiently plead. While Defendant asserts that a juror's failure to disclose information justifies post conviction relief as a matter of law, this is not true. In *State v. Rodgers*, 347 So. 2d 610 (Fla. 1977), this Court considered and rejected a claim that a defendant was entitled to a new trial based on the fact that a juror had lied about her age and work experience during voir dire and that the juror would have been unqualified to serve had the correct information been revealed. It held that "in the absence of evidence that the defendant was not accorded a fair and impartial jury or that his substantive rights were prejudiced by the participation and misconduct of the unqualified juror, he is not entitled to a new trial." *Id.* at 613.

In *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998), this Court recognized an exception to *Rodgers* for cases in which a juror was under prosecution by the State at the time of his jury service. However, the Court made clear that it did "not overrule

Rodgers; [it was] simply carving out an exception based on the unique circumstances presented." *Id.* at 1370; see also *Coleman v. State*, 718 So. 2d 827, 830 (Fla. 4th DCA 1998). It subsequently made clear that the statutory disqualification only applied when a juror was actually being prosecuted at the time of the jury service. *Johnston v. State*, 841 So. 2d 349, 356-57 (Fla. 2002).

While Defendant cites to *Chester v. State*, 737 So. 2d 557 (Fla. 3d DCA 1999), as support for his position, it does not do so. While Defendant pretends that *Chester* was decided by this Court, it is actually a decision of the Third District Court of Appeal.¹⁰ *Id.* at 557. The Third District could not overrule *Rodgers* or *Lowery*. See *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); see also *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980). Thus, it is *Rodgers* and *Lowrey* that control this claim.

Under *Rodgers* and *Lowrey*, Defendant needed to allege that Mr. Ravelo's conduct caused him to be actually biased against him or that he was permitted to continue to serve on the jury after he was under prosecution. Since Defendant did not allege

¹⁰ Again, Defendant's citation to *Chester* as being a decision of this Court is particularly inappropriate. The State pointed out that *Chester* was a Third District decision in its post conviction response. (PCR. 1260) At the *Huff* hearing, Defendant acknowledged the citation was incorrect and claimed it was a typo. (PCR. 2438) Yet, Defendant, again, proceeds to cite to *Chester* as a decision of this Court twice in his brief. Initial Brief at 77-78, 79.

either that Mr. Ravelo was actually biased or that he continued to serve on the jury after he was under prosecution, the claim was insufficiently plead and properly denied as such.

Moreover, the record refutes any notion that Mr. Ravelo did continue to serve after he came under prosecution. Before the penalty phase began, the trial court informed the parties that Mr. Ravelo had called the court and informed the bailiff that he had been arrested since he began serving on the jury. (R152/2856) It noted that a person under pending charges was not qualified to serve on the jury and that it might have to discharge him and place one of the alternates on the jury. (R152/2856-57) However, it noted that it needed to question Mr. Ravelo first and that he had yet to arrive that morning. (R158/2857-58) The State then checked the criminal justice information system (CJIS) regarding the case against Mr. Ravelo and provided the information to Defendant before Mr. Ravelo arrived. (R152/2860-61) The trial court indicated that the CJIS information showed that Mr. Ravelo had been arrested for violating Florida's littering law, which was listed as a third degree felony, and suggested he had been booked into the jail as a result. (R152/2864)

When Mr. Ravelo arrived, the trial court brought him in outside the presence of the other jurors. (R152/2867-68) Under

questioning by the trial court, Mr. Ravelo revealed that he had been arrested for littering on August 23, 2007, based on pictures taken by someone almost a month earlier, and that the case was still pending. (R152/2868-69) The trial court then indicated that it was going to discharge Mr. Ravelo. (R152/2869) When it asked if Defendant had anything further on the issue, counsel asked about the offense date. (R152/2869) When the trial court indicated that it believed it was irrelevant, he withdrew the question. (R152/2869-70) The trial court then discharged Mr. Ravelo. (R152/2870-71) Thus, the record refutes any notion that Mr. Ravelo was permitted to continue to serve after he came under prosecution. The claim was properly summarily denied, and the lower court should be affirmed.

Even if Defendant was correct about the standard, his claim would still have been properly summarily denied. Under the standard Defendant asserts should have been used, Defendant needed to show (1) the information the juror allegedly failed to disclose was relevant and material to jury service in the case; (2) the juror concealed the information during questioning; and (3) the failure to disclose the information was not attributable to a lack of diligence on his party. *Lugo v. State*, 2 So. 3d 1, 13 (Fla. 2008) (quoting *De la Rosa v. Zequeira*, 659 So. 2d 239

(1995)).

Information about prior involvement with the court system is not automatically material. *Roberts v. Tejada*, 814 So. 2d 334, 341-42 (Fla. 2002). Instead, the determination of materiality is based on the nature of the juror's prior involvement and its relationship to the case. *Id.* at 342. This Court has rejected claims that information about a juror's involvement in a criminal case was material when the crimes in the juror's cases were different than the crimes with which the defendant was charged and when the juror was a defendant, which made him similarly situated to the defendant. *Johnston v. State*, 63 So. 3d 730, 739 (Fla. 2011); *Lugo*, 2 So. 3d at 13-14.

Additionally, the Court has stressed that the determination of whether a lack of disclosure was due to a lack of diligence depends on the nature of the explanation of the information sought. *Lugo*, 2 So. 3d at 15. It has found diligence lacking where the court asked about an issue generally and counsel failed to ask follow up questions. *Id.* at 14-16.

Applying that standard, Defendant had not sufficiently alleged a claim. Defendant made no attempt to suggest that the crime with which Mr. Ravelo was charged bore any relationship to the crimes in this case. In fact, Defendant merely states that it was a third degree felony, which is fundamentally different

that the serious violent crimes with which Defendant was charged. Thus, Defendant has not alleged that there was anything about Mr. Ravelo's experience that was material to his jury service. His entire claim that Mr. Ravelo concealed anything is based on speculation that because Mr. Ravelo was arrested on August 23, 2007, based on photos taken within a month of that date, he might have been involved in criminal activity earlier and might have been under investigation. However, speculation is insufficient to support a post conviction claim. *Maharaj v. State*, 778 So. 2d 944, 952 (Fla. 2000). Finally, while Defendant noted that the trial court stressed the importance of honesty during voir dire and associated that honesty with a question regarding whether a juror had been arrested or accused of the crime, he offered nothing to suggest that the trial court explained that the answer to the question would include situations in which a juror had yet to be arrested or accused or to suggest that counsel did anything to follow up on any information that was revealed. As such, Defendant failed to plead a sufficient claim even under the standard he proposes, which is not the correct standard. The claim was properly summarily denied.

Further, the record refutes any notion that Defendant can meet even his standard. As seen above, Mr. Ravelo was arrested

for littering as a third degree felony. That crime involves dumping trash for a commercial purpose, dumping an excessive amount of trash or dumping hazard waste on a road, body of water or private property.¹¹ §490.413(6)(c), Fla. Stat. It involves a discrete act; not a course of conduct. Since Mr. Ravelo stated that his arrest was based on a picture of him committing the crime that was taken less than a month before his August 23, 2007 arrest, the earliest the crime could have even been committed was after July 23, 2007. By that date, both voir dire and the guilt phase had been concluded. Moreover, the record shows that Mr. Ravelo himself informed the court of his arrest before the penalty phase began. As such, the record refutes any notion that Mr. Ravelo concealed anything.

Further, dumping trash bears no relation to murder, attempted murder, kidnapping, burglary, child neglect or attempted escape. The question the trial court asked concerned being arrested or accused of a crime and was tied to a computer search of arrests and cases. (R131/21-23, 82-83) The record also reflects that Defendant did not question venire members about their involvement with the criminal justice system regardless of how that involvement was disclosed. (R131/177-78, R132/258-59, 268-300, R135/700, 717, R136/780-86, 915-17, 971,

¹¹ The record shows that Mr. Ravelo was a landscaper. (R140/1383)

R137/1044, 1060, R138/1084, 1110-21, 1123-26, 1127-34, R141/1493-94, 1496-1506) He made no attempt to excuse venire members who had contact with the criminal justice system even when they only disclosed their prior involvement with the system when confronted by the court. (V132/258-59, 277-79, 304-05, 326-27, 1136-37) In fact, he even objected to the excusal of venire members who did not initially disclose their involvement with the system. (R132/255, 271-72, 302-03, R138/1135, R141/1528-29) Additionally, he allowed Jesus Velasquez, Tracy Walker and Shakeiva Mims to serve as jurors despite prior involvement with the system. (R138/1096-97, 1123-26, R139/1218-19, R141/1540-41) Moreover, while he initially sought to ask about the date of Mr. Ravelo's offense, he later withdrew the question. (R152/2869-70) Thus, the record also refutes that involvement with the system was material and that Defendant was diligent. *Lugo*, 2 So. 3d at 14-15. The claim was properly denied.

Additionally, while Defendant accused the State of violating *Brady* by failing to disclose information regarding Mr. Ravelo's arrest, the claim was specious. In order to allege a *Brady* claim sufficiently, a defendant must allege that (1) the State possessed evidence that was favorable to him because it exculpated him regarding guilt, mitigated his sentence or

impeached a state witness at trial, (2) that the State suppressed that evidence and (3) that the evidence was material. *Davis v. State*, 136 So. 3d 1169, 1184-85 (Fla. 2014). To show materiality, he must demonstrate that there is a reasonable probability of a different result at trial had the evidence been disclosed. *Id.*

Here, Defendant made no attempt to suggest that information about Mr. Ravelo's conduct would exculpate him regarding any crime, would mitigate his sentence or would have impeached a state witness at trial. Nor did he suggest that the disclosure of the information would have created a reasonable probability of a different result. Instead, he acted as if *Brady* is violated simply because he might find information about Mr. Ravelo helpful in some way. However, the United States Supreme Court has held that this is an incorrect definition of *Brady* information. *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995). Applying the correct definition, this Court has held that claims about the State's failure to disclose information about a juror do not establish *Brady* violations. *Diaz v. State*, 132 So. 3d 93, 105-06 (Fla. 2013).

This is all the more true since this Court has recognized that a *Brady* violation cannot be sustained where the record reflects that the State disclosed the information during trial.

Tanzi v. State, 94 So. 3d 482, 494 (Fla. 2012). Here, the record reflects that the State provided Defendant with information about Mr. Ravelo's prosecution. As such, the claim was properly summarily denied.

Finally, while Defendant attempts to blame the law for his inability to plead the claim properly, the record reflects Defendant found himself in a trap of his own making. While R. Regulating Fla. Bar 4-3.5(d)(4) precludes a defendant's attorney from conducting an interview of a juror independently and without cause, Fla. R. Crim. P. 3.575 expressly provides a mechanism for a defendant to move for a juror interview if he has grounds to challenge the verdict based on allege juror misconduct. To be granted such an interview, a defendant must present sworn allegations, which, if true, would entitle him to a new trial. *Coday v. State*, 946 So. 2d 988, 1007 (Fla. 2007); *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001). As such, if Defendant's claim truly presented grounds to challenge the verdict, Defendant could have moved for a juror interview before filing his motion. Yet, he did not do so, and as noted above, he did not have grounds to challenge the verdict. The claim was properly summarily denied.

Finally, while Defendant complains that he was not provided with public records, the lower court did not abuse its

discretion in denying Defendant's requests given the manner in which Defendant made the requests. As this Court has recognized, Fla. R. Crim. P. 3.852 requires defendants to make their requests for additional public records in a manner that specifically identifies the records sought and does not make requests in a manner that is overly broad and unduly burdensome to prevent defendants from engaging in fishing expeditions through their public records requests. *Rimmer v. State*, 59 So. 3d 763, 774 (Fla. 2010); *Dennis v. State*, 109 So. 3d 680, 698-69 (Fla. 2012); *Moore*, 820 So. 2d at 204.

Here, Defendant made no specific request for records related to Mr. Ravelo's case or any other case regarding any juror. Instead, Defendant simply listed the jurors as individuals about whom he was requesting any record showing the individuals had been the "subject of an investigation, accused, charged and/or convicted of a crime, and/or a witness, suspect or victim" in requests to MDPD, the State Attorney and FDLE and "all materials contained in any and all civil or criminal cases" in another request to the State Attorney. (PCR. 284-85, 310-11, 315, 318-19) In the memo the lower court required Defendant to file in advance of the public records hearing after it found that the manner in which Defendant had made the requests was improper, Defendant merely identified the jurors as jurors

without offering any specific information regarding why any of the information he was requesting was relevant to a colorable post conviction claim. (PCR. 449-61)

During the public records hearing, Defendant made no attempt to limit his request or argue that the file regarding Mr. Ravelo was relevant. Instead, he admitted that he had done his own background checks on the jurors and claimed that he had found a different juror who had been charged with a crime about which the State had entered a nolle prosequi in 2002 and the information had not been discussed during voir dire. (PCR. 2623-24) He then suggested that this entitled him to have the agencies run criminal history checks for him. (PCR. 2624) On questioning by the court, the State indicated that it had run criminal history checks on the veniremembers during voir dire and that a criminal history question was included on the juror questionnaire. (PCR. 2624) It also suggested that the information might not have been discussed because the veniremember had been honest in response to the questionnaire. (PCR. 2624-25) Defendant then suggested that this Court had required him to make the request in *Buenoano v. State*, 708 So.2d 941 (Fla. 1998). (PCR. 2625, 2634) As a result, the lower court found that Defendant had failed to show that request sought relevant information. (PCR. 2626, 2634, 2639)

Since Defendant never specifically requested the information regarding Mr. Ravelo's case and instead proceeded to conduct a fishing expedition regarding information about the jurors, the lower court did not abuse its discretion in denying the requests. *Rimmer*, 59 So. 3d at 774; *Dennis*, 109 So. 3d at 698-69; *Moore*, 820 So. 2d at 204. It should be affirmed.

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

Defendant next contends that his counsel was ineffective during the guilt phase of trial. Specifically, Defendant asserts that counsel was deficient for failing to litigate the motion to suppress Defendant's statements adequately, for failing to retain a crime scene expert to challenge the chain of custody regarding evidence found in the trunk of the car Defendant was driving and for failing to retain a pathologist. However, the lower court properly summarily denied these claims as they were insufficiently plead and without merit as a matter of law.

The United States Supreme Court has held that a defendant seeking to claim that his counsel was ineffective for failing to seek suppression properly must show not only that the evidence would have been suppressed but also that there is a reasonable probability that the result of the trial would have been different had suppression been granted. See *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). Here, while Defendant asserted that counsel should have presented an expert to testify that lying to a suspect is a bad idea, should have questioned Det. Suco and Det. Chambers about Defendant's actions in volunteering to show them where Quatisha was and should have questioned Det. Smith about his awareness of precedent regarding

the use of force in finding a kidnap victim, he offered no explanation of how the presentation of this testimony would have caused his confession to be suppressed or how there is a reasonable probability that he would not have been convicted. As such, the claim was insufficiently plead and was properly summarily denied as such.

Even if Defendant had sufficiently plead this claim, it would still have been properly summarily denied. First, while Defendant insisted that it was "standard practice" to present confession experts, this Court has actually held that counsel cannot be deemed ineffective for failing to present such an expert because his testimony would not have been admitted. *Simmons v. State*, 105 So. 3d 475, 492-93 (Fla. 2012). It has openly questioned whether such testimony would ever be admissible and required the proponent of such testimony to show that it would have satisfied *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Derrick v. State*, 983 So. 2d 443, 451 n.7 (Fla. 2008); see *Williamson v. State*, 994 So. 2d 1000, 1008-11 (Fla. 2008). Thus, Defendant's suggestion that presentation of such testimony was "standard practice" was simply false.

Second, while Defendant seemed to suggest that calling a false confession expert would have "changed" Defendant's decision about testifying because "there was no one who could

present" his version of the events to the trial court, he offered no explanation of how this will be true. Even when an expert testifies in Florida and relies on hearsay to reach his conclusion, the expert may still not be used as a conduit to admit the hearsay as substantive evidence. *Mendoza*, 87 So. 3d at 666; *Linn v. Fossum*, 946 So. 2d 1032, 1037-38 (Fla. 2006). Thus, if Defendant wanted his version of the events before anyone, he would still have had to testify.

Third, while an expert might believe that lying to a suspect during an interrogation is a bad idea, the fact an officer lied to a suspect provides no basis for suppression. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Conde v. State*, 860 So. 2d 930, 952 (Fla. 2003). This is all the more true as Defendant does not even suggest that his confession was actually false.

Fourth, questioning Det. Smith about his awareness of precedent would not provide a basis for suppression as the case alluded to by Det. Smith does exist. In *Leon v. State*, 410 So. 2d 201 (Fla. 3d DCA 1982), the court upheld the admission of a confession by a defendant even though that statement was given after the defendant had made an inculpatory statement regarding the whereabouts of a kidnap victim in response to physical violence. As such, showing that Det. Smith was correct about

the law would not provide a basis for suppression.

Fifth, the record refuted any notion that presenting an expert to opine regarding his confession would create a reasonable probability of a different result at trial. The jury heard Shandelle Maycock's eyewitness account of the crimes. Her testimony was corroborated by Lawyer's testimony regarding hearing the struggle in the apartment and seeing Defendant leave with Quatisha shortly thereafter in the Lincoln, the DNA evidence from the trunk of the Lincoln, the mileage on the Lincoln and her physical condition after the crime. Quatisha's body, which showed that she had died a violent death off of Alligator Alley and had sustained scrapes and bruises consistent with Ms. Maycock's account of the jump from the car, was found completely independently of the police and Defendant. Further, Defendant's own wife's testimony showed that he was trying to destroy evidence immediately after the crime, and the jury heard of Defendant's reaction upon being informed that Ms. Maycock survived. In fact, a review of the closing arguments shows that Defendant made more use of the circumstances of his confession in arguing that the jury should acquit him than did the State. Given these circumstances, there is no reasonable probability that Defendant would not have been convicted had the confession been suppressed. *Simmons*, 105 So. 3d at 490-91, 492-93. The

lower court should be affirmed.

While Defendant claimed at the *Huff* hearing that *Ross v. State*, 45 So. 3d 403 (Fla. 2010), showed that testimony from an expert on police tactics was admissible, this is not true. In *Ross*, this Court did not analyze whether testimony from an expert in interrogations was admissible. Instead, this Court merely mentioned that an expert had testified. *Id.* at 411 & n.5, 433, 434. This Court has held that the mere fact that an opinion mentions that an expert testified in a case without considering whether such testimony was properly admitted does not support the assertion that such testimony is admissible. *Mendoza*, 87 So. 3d at 665 n.20. As such, *Ross* does not support Defendant's claim.

Further, while Defendant asserted at the *Huff* hearing that the State created a factual dispute by citing to case law regarding the reasonableness of not presenting a false confession expert, this is again untrue. The United States Supreme Court has made clear that while issues regarding the actions counsel took are factual questions, the issue of whether those actions were reasonable is not. *Wood v. Allen*, 558 U.S. 290, 302-04 & n.3 (2010). Instead, whether counsel's actions were reasonable and, therefore, not deficient is a question of law. *Id.* The lower court should be affirmed.

The lower court also properly denied Defendant's claim regarding the failure to hire a crime scene expert because it was insufficiently plead. As this Court has held, a defendant must allege "what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have so testified prejudiced the case" to plead a claim of ineffective assistance of counsel sufficiently. *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004). Moreover, this Court has made clear that conclusory allegations are insufficient to plead a claim. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

While Defendant made conclusory asserts that counsel should have called a crime scene expert to contend that the evidence recovered from the trunk of the Lincoln was unreliable because of the manner in which the Lincoln was handled while in police custody, he did not allege what testimony a crime scene expert could have provided on this issue or explain how the presentation of that evidence would have created a reasonable probability of a different result. (PCR. 1168-71) Instead, he summarized the testimony that trial counsel had elicited showing the circumstances under which the car was seized, searched, returned to the rental car company, retrieved from the rental car company and searched again (PCR. 1168-71) In fact, the

record reflects that trial counsel used these facts to argue that the DNA evidence from the trunk of the Lincoln was unreliable in his closing argument. (R150/2711-13) As this Court has recognized, counsel is not ineffective for failing to call his own expert when counsel was able to show the weaknesses in the State's case through cross examining the State's witnesses. *State v. Riechmann*, 777 So. 2d 342, 354-55 (Fla. 2000). Thus, by pointing to nothing more than the evidence that counsel presented, Defendant has not only failed to plead a claim sufficiently but also refuted his own claim. This is all the more true as the record shows that counsel not only sought the appointment of a crime scene expert but also sought an expert in DNA testing. (R7/789-92, 796-99) The lower court should be affirmed.

Finally, the lower court also properly denied the claim about the pathologist because insufficiently plead in light of the record. Again, Defendant was required to plead what testimony a pathologist could have provided and explain how that testimony would create a reasonable probability of a different outcome. *Nelson*, 875 So. 2d at 583. However, Defendant again failed to do so. Instead, he simply made conclusory assertions that a pathologist could have provided testimony about Quatisha's time of death based on information regarding when

Quatisha last ate without indicating what that time alleged was and that an expert could have challenged testimony regarding when Quatisha sustained injuries without explaining what injuries or how. (PCR. 1171-73) He then offered no explanation of how the presentation of this uncertain evidence would have created a reasonable probability of a different result. As such, the lower court properly denied this claim as insufficiently plead.

This is all the more true as Ms. Maycock testified that Quatisha was alive and well before Defendant began to commit these crimes. Mr. Lawyer confirmed that Quatisha was alive and standing by Defendant's car with him after midnight. (R142/1695-98, 1645) Thus, Quatisha was alive when Defendant kidnapped her, and Defendant would be guilty of felony murder regardless of when Quatisha died thereafter. Moreover, Quatisha had a series of perimortem injuries caused by both alligators and fish.¹² (R149/2522, 2534-35) Thus, Quatisha had to have still been alive when thrown in the Everglades. The lower court should be affirmed.

Further, while he asserted that the failure to have

¹² It should be noted that trial counsel actually sought to exclude Dr. Perper's testimony that Quatisha's injuries were consistent with alligator bites as new and novel scientific evidence at trial, but the trial court denied the motion. (R22/2900-03, R149/2482-92)

challenged Quatisha's time of death resulted in aggravation of his death sentence, he offered no explanation of how that was true, especially as the trial court had rejected HAC as an aggravator. (R28/3696) Again, conclusory allegations are insufficient to plead claims. *Ragsdale*, 720 So. 2d at 207. The lower court should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to William M. Hennis, III, Assistant CCRC, hennisw@ccsr.state.fl.us, 1 East Broward Blvd, Suite 444, Ft. Lauderdale, Florida 33301, this 23d day of May 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New
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