IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1848

MARSHALL LEE GORE,

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

Defendant was charged by indictment, filed on March 21, 1990, with the first degree murder of Robyn Novick and the armed robbery of her car, jewelry, credit cards and keys. (R2. 1-3)[1] The first degree murder count was charged alternatively as premeditated and felony murder. (R2. 1) The crimes were alleged to have been committed between March 10, 1988, and March 17, 1988. (R2. 1-3) The matter proceeded to trial on May 3, 1995, and Defendant was convicted and sentenced to death for the murder. (R2. 9) Defendant appealed his convictions and sentences to this Court. This Court reversed Defendant's convictions and sentences and remanded for a new trial because improper evidence was admitted and improper comments were made. *Gore v. State*, 719 So. 2d 1197 (Fla. 1998).

On remand, the matter proceeded to retrial on January 26, 1999. (R2. 13) The jury found Defendant guilty of first degree murder and robbery with a deadly weapon. (R2. 389-90, T2. 2699-2700) The jury did not specify under which theory Defendant was found guilty of the murder. (R2. 389-90, T2. 2699) The trial court adjudicated Defendant in accordance with the jury's verdict. (R2. 479-80, T2. 2704)

[1] The symbols "R2." and "T2." will refer to the record on appeal from Defendant's convictions and sentences after retrial, FSC Case No. SC96,127.

After a penalty phase proceeding at which Defendant represented himself, the jury unanimously recommended that Defendant be sentenced to death. (R2. 408, T2. 3285) The trial court sentenced Defendant to death in accordance with the jury's recommendation. (R2. 459-78, 483-85) The trial court found 3 aggravating circumstances: prior violent or capital felonies, including the first degree murder, kidnapping and robbery of Susan Roark, the attempted first degree murder, armed burglary, armed robbery and armed kidnapping of Tina Coralis and the armed kidnapping of Jimmy Coralis - very great weight; during the course of a robbery and for pecuniary gain, merged - great weight; and cold, calculated and premeditated (CCP) - great weight. (R2. 460-68) The trial court found no statutory mitigating circumstances. (R2. 469-72) The trial court found 3 non-statutory mitigating circumstances: Defendant's hearing loss - minimal weight; Defendant's migraine headaches - minimal weight; and Defendant stopping an altercation between Raul and Marisol Coto - minimal weight. (R2. 473-78) The trial court also imposed a life sentence for the armed robbery, to be served consecutively to all other sentences in this case and all other cases. (R2. 478, 483-85)

Defendant again appealed his convictions and sentences to this Court, raising the following issues:

> (1) the Double Jeopardy Clause of the United States and Florida Constitutions prevented the State from retrying [Defendant] for first-degree murder and armed robbery; (2) the trial court erred in denying his motion for a mistrial following the State's questioning of Jessie Casanova about whether she had an "intimate relationship" with [Defendant]; (3) the trial court erred in denying [Defendant's] motion for a judgment of acquittal on charges of first-degree murder and armed robbery; (4) the trial court abused its discretion in excluding reverse *Williams* rule evidence pertaining to the murder of Paulette Johnson, which allegedly supported [Defendant's] hypothesis of innocence; (5) the State introduced improper collateral crime evidence during the penalty phase; (6) the trial court erred in finding and weighing the CCP aggravating circumstance; (7) the trial court erred in permitting [Defendant] to represent himself during the guilt phase closing argument and during the penalty phase of trial; and (8) [Defendant] received ineffective assistance of counsel during the penalty phase.

Gore v. State, 784 So. 2d 418, 426 n.6 (Fla. 2001). This Court affirmed Defendant's convictions and sentences on April 19, 2001. *Id*. at 423. In affirming the convictions and sentences, this Court found that the facts presented at trial were:

> Police discovered Novick's nude body in a rural area of Dade County on March 16, 1988. Her body was hidden by a blue tarpaulin-like material. Novick suffered stab wounds to the chest and had a belt tied around her neck. According to the medical examiner, Novick died as a result of the stab wounds and mechanical asphyxia. He estimated that Novick was killed between 9 p.m. and 1 a.m. on March 11 into March 12, 1988.
>
> Novick was last seen alive on March 11, 1988, leaving the parking lot of the Redlands Tavern in her yellow Corvette. A witness testified that Novick left with a man, whom the witness identified as [Defendant].
>
> In the early morning of March 12, [Defendant] was seen driving Novick's automobile. David Restrepo, a

friend of [Defendant's], testified that [Defendant] arrived at his home driving a yellow Corvette with a license plate reading "Robyn." Restrepo had not seen the car before and stated that when he last saw [Defendant] in February 1988, [Defendant] was driving a black Mustang. [Defendant] told Restrepo that his girlfriend had loaned him the Corvette and asked Restrepo to call him "Robyn." [Defendant] also asked Restrepo to accompany him to Coconut Grove.

On the way to Coconut Grove, [Defendant] lost control of the vehicle and "wrecked" the Corvette. [Defendant] attempted to drive the vehicle away from the scene of the accident, but abandoned the vehicle a few blocks away. Restrepo testified that shortly after the accident a marked police vehicle was coming towards them, at which time, [Defendant] told him to "run" because the car was stolen. [Defendant] also told Restrepo that he had left jewelry in the car. When the police arrived on the scene, they recovered credit cards, a driver's license and a cigarette case, all belonging to Novick, as well as a "power of attorney" executed by [Defendant].

Jessie Casanova, who was thirteen years old at the time of Novick's murder, testified that [Defendant] came to her home in the early morning hours of March 12, driving a yellow Corvette. [Defendant] had been staying with Casanova, her mother, and her mother's friend since February 1988. According to Casanova, [Defendant] returned to her home later that day, stating that he had been injured in a car accident. At that time, [Defendant] gave Casanova the keys to the Corvette. FBI Special Agent Carl Lowery testified that Novick's body was recovered "within a few hundred feet" from this house.

The following night, March 13, [Defendant] went to the house of a friend, Frank McKee, and asked him if he could borrow some money and stay the night. [Defendant] stated that the police were looking for him. [Defendant] also informed his friend that he had recently been in a car accident involving a yellow Corvette and that he had lost some jewelry. McKee refused to allow [Defendant] to spend the night and [Defendant] subsequently left in a cab.

In its case-in-chief, the State also introduced ***Williams*** [FN2] rule evidence that [Defendant] committed similar crimes against Roark and Coralis.

The State presented evidence that [Defendant] had murdered Roark shortly after her disappearance in January 30, 1988, by inflicting trauma to her neck and chest. In addition, evidence established that [Defendant] stole Roark's black Ford Mustang and other personal property, then left her nude body in a rural area used as a trash dump. Similarly, the State presented evidence that [Defendant] attacked Coralis on March 14, 1988, two days after the murder of Novick. Coralis herself testified against [Defendant], stating that he beat her with a rock, raped, choked and stabbed her, and left her for dead on the side of the road near the scene where Novick's body was found. [Defendant] proceeded to steal Coralis's red Toyota sports car and personal property.

FBI agents finally arrested [Defendant] in Paducah, Kentucky on March 17, 1988. At the time of his arrest, [Defendant] was in possession of Coralis's red Toyota automobile and he had her bank and credit cards in the pocket of his jacket. Police officers subsequently questioned [Defendant] regarding the Coralis and Roark crimes. According to the police, [Defendant] denied knowing Roark or Coralis and denied all involvement in the crimes. [Defendant] also denied knowing Novick. When police prepared to show [Defendant] a photograph of Novick, Gore stated "just make sure it is not gory" because his "stomach could not take it." At the time that [Defendant] made such statements, the police had yet to inform [Defendant] that Novick was dead. Detective David Simmons of the Miami-Dade Police Department testified that when [Defendant] looked at Novick's picture, [Defendant's] eyes "swelled with tears." [Defendant] also stated that "if I did this, I deserve the death penalty."

In his defense, [Defendant] took the stand and testified on his own behalf. [Defendant] claimed that prior to his interrogation by police in Miami concerning the Novick murder, reporters previously had told him upon his arrest that Novick was dead. He also claimed that during his interrogation, police had placed gruesome photographs of the murders all over the interview room. Moreover, [Defendant] stated that police had given him a polygraph examination, which he claimed he had passed. [FN3]

[Defendant] testified that he was the owner of an escort service and claimed that Coralis, Novick,

Roark, and Restrepo all worked for the escort business. [Defendant] maintained that Novick worked for him as a nude dancer and he admitted that he was with Novick at the Redlands Tavern on the evening of March 11, 1988. [Defendant], however, denied killing her. [Defendant] explained that he was driving Novick's Corvette and that he had arranged for both Novick and Coralis to work as escorts that night. [Defendant] claimed that after leaving the Redlands Tavern, he drove Novick to a club where Coralis worked. According to [Defendant], Novick, Coralis, and another woman left the club with three men in a Mercedes. [Defendant] claimed that he followed this group in Novick's vehicle to a warehouse in Homestead, Florida. [Defendant] stated that he called the warehouse later that night and that the phone was answered by a member of a pro-Castro group, with which one of the men was affiliated.

[Defendant] testified that he spoke with Novick later that night and informed her about the accident and told her to report the car stolen so that she could collect the insurance proceeds. During this conversation, Novick told [Defendant] that Coralis had left in the middle of the night because there were "problems" with the three clients who were angry about missing drugs and drug money. [Defendant] claimed that he knew that Coralis previously had sold some drugs and used the proceeds to buy a new car.

[Defendant] also testified that he spoke with Coralis a few days later, and that she was scared because someone was looking for her. [Defendant] claimed that Coralis wanted a gun and that he had arranged a meeting with her in an effort to assist Coralis in selling the remainder of her drugs. Furthermore, [Defendant] claimed that he later saw the men who were with Novick and Coralis on the night of the Novick murder and they told him that Novick "was picked up" from the warehouse.

Addressing his relationship with Susan Roark, [Defendant] admitted that he knew her for many years. He acknowledged that he was with Roark on the last night that she was seen alive. He stated, however, that Roark had visited him during his incarceration in Miami, indicating that it was impossible for him to have murdered Roark. [Defendant] also asserted that Dr. William Maples, a forensic anthropologist, could

> testify that Roark had been dead for only three weeks when her remains were recovered and that [Defendant] had been in jail for six months at that time. Furthermore, [Defendant] asserted that the evidence found at the site where Roark's body was found did not link him to the crime.
>
> On cross-examination, [Defendant] admitted that he previously had been convicted of committing fifteen felonies. [Defendant] denied trying to kill Coralis and claimed that her injuries were the result of her jumping out of a moving car. [Defendant] also asserted that all of the State witnesses had lied and he refused to explain why he was in possession of the property of people who were either killed or attacked.
>
> Ana Fernandez testified on [Defendant's] behalf. Fernandez worked for [Defendant] in 1984 or 1985 when she was fifteen years old, answering phones for the escort service. Fernandez claimed to have known Roark, Coralis, and Novick through her association with [Defendant]. However, she could not state when, where, or how many times that she had met Coralis or Novick and was unable to describe them. Moreover, when presented with a photograph of several women, she could not identify Coralis.
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> [FN2] ***Williams v. State***, 110 So. 2d 654 (Fla. 1959).
>
> [FN3] [Defendant's] claims concerning the officers' use of gruesome photographs and that he was given a lie detector test were refuted by Detective Steven Parr and Detective Lou Passaro of the Miami-Dade Police Department. Both testified during the State's rebuttal.

Id. at 423-26. Defendant did not file a motion for rehearing. He also did not seek certiorari review in the United States Supreme Court.

On May 21, 2001, the Office of the Attorney General sent its Notices of Affirmance to the Office of the State Attorney for the Eleventh Judicial Circuit and the Department of

Corrections. (PCR2-SR. 2-5)[2,3] The Office of the State Attorney then notified the Miami-Dade Police Department and the City of Miami Police Department of the affirmance on June 5, 2001. (PCR2-SR. 6-9) On August 6, 2001, the Department of Corrections notified the State that it had complied with the Notice of Affirance and had sent exempt materials to the records repository. (PCR2-SR. 10-13)

On August 10, 2001, R. Glenn Arnold was appointed to represent Defendant in the post conviction proceedings in this matter. (PCR2-SR. 14) At the time, Mr. Arnold was already representing Defendant regarding post conviction litigation in Defendant's other capital case. (PCR2-SR. 40)

On August 15, 2001, the Miami-Dade Police filed an objection, asserting that since Defendant had requested these records in connection with his other capital case before the change in Fla. R. Crim. P. 3.852 required the agencies to pay the costs of public records production, he should be required to

[2] The symbols "PCR2.," "PCR2-SR." and PCT2." will refer to the record on appeal and supplemental record on appeal in this appeal, FSC Case No. SC05-1848.

[3] The record on appeal does not include documents related to public records production and the status of Petitioner's counsel, and the State is moving to supplement the record with these documents contemporaneously with the filing of this brief. As such, the page numbers are estimates.

bear the costs here.[4] (PCR2-SR. 15-25) On August 16, 2001, the City Of Miami Police sent its Notice of Compliance. (PCR2-SR. 26) On August 27, 2001, Defendant served a demand for public records that asked the repository, the State Attorney's Office, the Public Defender's Office and "all other persons, entities, or agencies" having nonexempt public records to sent them to him. (PCR2-SR. 27-29) On September 10, 2001, the Office of the State Attorney sent its Notices of Compliance and delivery of Exempt Materials. (PCR2-SR. 30-33)

On September 27, 2001, Mr. Arnold filed a motion for payment of attorney's fees, the affidavit attached to which indicated that Mr. Arnold had received a CD-Rom from the records repository and two boxes containing the record on appeal. (PCR2-SR. 34-39) On November 13, 2001, Mr. Arnold moved to withdraw from representing Defendant in this matter because Defendant had created a conflict of interest by filing repeated complaints about his representation in the other capital case. (PCR2-SR. 40-49) On January 11, 2002, CCRC-South filed a notice stating that it could not assume representation of Defendant because of its existing case load and its employment of an attorney that Defendant had previously discharged based on a conflict during

[4] On September 19, 2002, the Miami-Dade Police sent its Notice of Compliance, which showed that it had withdrawn its prior objection. (PCR2-SR. 63-66)

the post conviction proceedings in Defendant's other capital case. (PCR2-SR. 50-56) On January 15, 2002, the lower court discharged Mr. Arnold and decided to find Defendant a new registry attorney rather than appointing CCRC-South. (PCR2. 23) In its written order, the lower court stated it was not basing its decision on the conflict on Defendant's complaints but on the breakdown in the attorney/client relationship those complaints had caused. (PCR2-SR. 57-58) On January 17, 2002, the lower court entered an order appointing Steven Hammer to represent Defendant. (PCR2. 23, PCR1.[5] 15) The order directed Mr. Arnold to provide Mr. Hammer with his records regarding the litigation of this case to Mr. Hammer. (PCR1. 15) Mr. Hammer filed a Notice of Appearance on January 22, 2002. (PCR2-SR. 59-60)

On June 4, 2002, Defendant filed a motion for extension of time in which to file a motion for post conviction relief, seeking an additional year to file such a motion. (PCR1. 16-19) In the motion, Defendant admitted that Mr. Hammer had received files from Mr. Arnold and the records repository. (PCR1. 17) Defendant noticed this motion for hearing on June 20, 2002, before Judge David Miller, despite the fact the Judge Leslie

[5] The symbol "PCR1." will refer to the record on appeal from Defendant's attempt to appeal the striking of his shell motion, FSC Case No. SC02-2285.

Rothenberg had been both the trial judge and the judge before whom all of the prior post conviction matter had been heard. (PCR2-SR. 61-62) On June 18, 2002, Defendant filed a shell motion for post conviction relief. (PCR1. 22-50)

At the hearing on June 20, 2002, Defendant admitted that he had filed a shell motion to toll the time for filing a federal habeas petition. (PCR1. 89) He also asked Judge Miller to treat the motion for extension as a motion for leave to amend the motion a year in the future. (PCR1. 89) Defendant claimed that he needed the additional time because Mr. Arnold had withdrawn, Mr. Hammer had not been appointed until January and Defendant was still obtaining records from the repository. (PCR1. 90) Judge Miller granted Defendant a nine month extension of time to amend his motion. (PCR1. 94)

The State pointed out that Judge Rothenberg had been handling the matter and that the Chief Judge would have to appoint Judge Miller to this matter if he was going to hear it. (PCR1. 94-95) Defendant claimed Judge Rothenberg's office had told him that she was not handling the case. (PCR1. 95) Judge Miller stated that he would contact the Chief Judge and determine which judge was assigned to this matter. (PCR1. 96) Judge Miller subsequently announced that the case was assigned to Judge Rothenberg. (PCR1. 142-43)

On June 28, 2002, the State moved to strike the shell motion as improper. (PCR1. 51-58) As part of the motion, the State pointed out that trial courts were not authorized to grant extension of time to file motion for post conviction relief and that the provisions on amending motions did not authorize granting prospective leave to amend. (PCR1. 56-58)

On August 14, 2002, Judge Rothenberg held a hearing on the State's motion to strike. (PCR1. 101-39) The State argued that the motion was an improper shell motion and explained that the reason why it had not informed Judge Miller that he could not grant an extension or prospective leave to amend was that the assistant state attorney handling the June 20, 2002 hearing did not realize this was a new rule case. (PCR1. 103-09) Defendant responded that his counsel had not had sufficient time to file a proper motion because he was appointed only after prior counsel was discharged and he had not had sufficient time to obtain and review records. (PCR1. 109-17) In the course of presenting this argument, Defendant stated that the only record Mr. Arnold had provided to Mr. Hammer was a copy of the record from direct appeal. (PCR1. 113) However, Defendant had been able to obtain the public records produced in this matter directly from the repository. (PCR1. 113-14) Defendant also asserted that the State had waived the right to move to strike the shell motion

because it had not done so in the one day between the service of the shell motion and the hearing on the motion for extension, even though the State had refused to agree to have the shell motion heard at the hearing. (PCR1. 126-32) The lower court then granted the State's motion to strike and noted that Defendant could seek an extension to file a proper motion from this Court. (PCR1. 135) On August 23, 2002, it entered a written order in conformity with this ruling. (PCR1. 59)

Defendant attempted to appeal this order. However, this Court treated the appeal as a motion for extension and granted Defendant sixty days from March 10, 2003, to file a proper motion. *Gore v. State*, 841 So. 2d 466 (Fla. 2003).

On May 9, 2003, Defendant filed what he entitled an Amended Motion for Post Conviction Relief. (PCR2. 75-149) This pleading was not verified by Defendant but was accompanied by a motion requesting a competency determination. (PCR2. 150-52)

At a hearing held after this motion was filed, Defendant brought up his request for a competency evaluation. (PCR2. 203) The State indicated that it did not believe that Defendant had sufficiently alleged that there were issues that required Defendant's input but agreed to have Defendant evaluated in an abundance of caution. (PCR2. 204) During a discussion regarding which experts to appoint, the fact that Defendant had been

repeatedly evaluated for competency in connection with his cases and was claiming that he was incompetent at the time of trial was discussed. (PCR2. 205-12) The State and lower court indicated that it might be better to appoint experts who had evaluated Defendant previously under these circumstances. *Id.* However, Defendant indicated that he preferred to have an expert who did not know Defendant's history. *Id.* The lower court decided to give the parties three weeks to submit recommendations of experts. (PCR2. 212) At the next hearing, the State recommended Dr. Sonia Ruiz and Dr. Enrique Suarez. (PCR2. 223-25) Defendant indicated that he had not yet determined whom to recommend but that he expected to have a name within a couple of days. (PCR2. 226-28) On June 18, 2003, the lower court entered an order appointing Dr. Ruiz, Dr. Suarez and Dr. L. Alison McInnes. (PCR2. 218-20)

Dr. Ruiz and Dr. Suarez conducted their evaluations on September 19, 2003, and subsequently issued reports finding Defendant competent. (PCR2. 236-50) Dr. Suarez found that Defendant was not mentally ill but did diagnose Defendant with personality disorder, not otherwise specified with antisocial, obsessive-compulsive, narcissistic and paranoid features. (PCR2. 236-41) Dr. Ruiz found that somewhat distrustful, very manipulative and domineering and highly intelligent. (PCR2. 248-

50) She noted that any lack of cooperation was the result of a volitional choice by Defendant. *Id.*

Dr. McInnes conducted her evaluation on October 21, 2003, and subsequently issued a report finding Defendant incompetent. (PCR2. 253-58) She did not have sufficient information to reach a diagnosis but believed that Defendant was delusional and probably was brain damaged. *Id.* She did not believe Defendant was malingering. *Id.*

At the competency hearing, Dr. Suarez, a psychologist with extensive experience in conducting competency evaluations in the criminal justice system, testified consistently with his report. (PCT2. 56-85) During cross examination of Dr. Suarez, questions were asked regarding the timing of the various aspects of the evaluation and a lunch break. (PCT2. 90-104) During this questioning, Dr. Suarez indicated that he had eaten lunch with two other people. (PCT2. 90) The lower court had assumed that Defendant was one of these people and asked questions about what was occurring as they were eating. (PCT2. 93-94) Dr. Suarez clarified that he had eaten lunch outside the prison with Dr. Ruiz and one of Defendant's attorneys. After the clarification was made, Defendant commented that "[i]t would have been nice" to have joined the group for lunch. (PCT2. 94)

Dr. McInnes, a psychiatrist who had conducted one

competency evaluation, opined that Defendant did not believe he was facing the death penalty because he told her that he did not know what would happen if he was found incompetent, that he would not be found incompetent because he was not mentally ill and that he would eventually be exonerated because Jeb Bush had been a client of his escort service. (PCT2. 172) When Dr. McInnes testified about Gov. Bush, Defendant interrupted to proceedings to state that he had never claimed Gov. Bush was a client and that he had merely stated that Gov. Bush's phone numbers were in the phonebook seized from him at the time of his arrest. (PCT2. 173)

Dr. McInnes also opined that Defendant exhibited loosening of associations and incoherence in his speech. (PCT2. 174) She defined loosening of associations as responding to questions with a large amount of information that was not directly relevant to the question and then forgetting what the question was. (PCT2. 174) Her example of this was Defendant drafting pleadings that his attorneys believed were irrelevant. (PCT2. 175) Her example of incoherence was that Defendant complained that his attorneys did not draft the motion for post conviction correctly because the facts supporting the claims were not specified. (PCT2. 174) Dr. McInnes believed this was incoherent because she did not understand the comment. *Id.*

Dr. McInnes also believed that Defendant exhibited profound paranoia and delusional thought processes. (PCT2. 175) Her example for this conclusion was that Defendant claimed that he was framed, he asserted that the husband of a woman he had sex with was responsible and he believed his lawyers were not representing him properly. (PCT2. 175-76)

Dr. McInnes did not believe that Defendant had the capacity to assist counsel. (PCT2. 179) She based her opinion on the fact that Defendant distrusted his attorneys and felt they were being ineffective. (PCT2. 180) She also believed that distrust of counsel meant that Defendant could not understand the proceedings or convey information to counsel. (PCT2. 182-83)

During cross examination, Dr. McInnes admitted that Defendant might be manipulative and that he was bright. (PCT2. 193) However, she did not believe that actions such as Defendant’s refusal to come to the evaluation initially to be attempts at manipulation because it was not in his interests. (PCT2. 195) When the lower court inquired if it might be in Defendant’s interest by delaying the proceedings, Dr. McInnes originally stated that she did not think that delaying things was to Defendant’s benefit. (PCT2. 195-96)

Dr. Ruiz, a psychologist with extensive experience conducting competency evaluations in the criminal justice

system, also testified consistently with her report. (PCT2. 207-26) After the attorneys finished questioning Dr. Ruiz, Defendant personally questioned Dr. Ruiz about whether Dr. McInnes might have observed loosening of associations because Defendant was under stress prior to her evaluation that was not present when Dr. Ruiz and Dr. Suarez evaluated him. (PCT2. 247-51) Dr. Ruiz acknowledged that stress and anxiety levels could have such an effect. *Id.*

After considering this evidence and the argument of counsel, the lower court found Defendant competent. (PCT2. 265) It noted that Defendant was intelligent and was able to question Dr. Ruiz appropriately. (PCT2. 265-66) It further found that Defendant was manipulative and was voluntarily choosing not to assist his counsel. (PCT2. 266-67)

On June 1, 2004, Defendant filed his amended motion for post conviction relief, raising 10 claims:

> I.
> [DEFENDANT] IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF TIME AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POST-CONVICTION PLEADING, AND THE UNPRECEDENTED WORKLOAD ON PRESENT COUNSEL, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN VIOLATION OF *SPALDING V. DUGGER*.
>
> II.
> [DEFENDANT'S] CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT

MATERIAL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT, IN VIOLATION OF [DEFENDANT'S] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

III.

[DEFENDANT] WAS DENIED HIS RIGHTS UNDER *AKE v. OKLAHOMA* AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT IN VIOLATION OF [DEFENDANT'S] RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS.

IV.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE, FAILED TO PROVIDE THE MENTAL HEALTH EXPERTS WITH THIS MITIGATION, AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, [DEFENDANT'S] DEATH SENTENCE IS UNRELIABLE.

V.

[DEFENDANT] WAS INCOMPETENT AT THE TIME OF TRIAL AND IS INSANE TO BE EXECUTED IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

VI.

[DEFENDANT'S] SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

VII.

> [DEFENDANT] IS BEING DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS BEING DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE THE RULES PROHIBITING [DEFENDANT'S] LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.
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> VIII.
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> THE FLORIDA CAPITAL SENTENCING PROCEDURES AS EMPLOYED IN [DEFENDANT'S] CASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE A UNANIMOUS JURY RETURN A VERDICT ADDRESSING HIS GUILT OF ALL THE ELEMENTS NECESSARY FOR THE CRIME OF CAPITAL FIRST DEGREE MURDER.
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> IX.
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> THE APPLICATION OF THE NEW RULE 3.851 TO [DEFENDANT] VIOLATES HIS RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION.
>
> X.
>
> [DEFENDANT'S] INDICTMENT WAS DELAYED BY ALMOST TWO YEARS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

(PCR2. 341-415, 450-52)

Also on June 1, 2004, Defendant sent the lower court a motion to discharge his counsel and have new counsel appointed along with a letter indicating that he did not wish to file the motion at the time but wanted the lower court to compel his attorneys to amend claim X of his motion in accordance with his wishes. (PCR2. 321-40) The proposed motion regarding counsel alleged that counsel had a conflict of interest because he had previously been a partner of Neil Dupree, the Capital Collateral Regional Counsel for the Southern Region and counsel was ineffective because he had claimed Defendant was delusional and

had not drafted the post conviction motion in accordance with Defendant's wishes. *Id.*

On July 26, 2004, Defendant attempted to file a "supplement" to claim X of the motion, without seeking leave to amend his motion. (PCR2. 453-63, PCT2. 284-85) The State objected that Defendant had not properly moved for leave to amend and that there was no good cause for leave to amend. (PCT2. 286) Defendant claimed that he was not required to move for leave to amend because he had requested prospective leave to amend in his motion. (PCT2. 286) The State responded that the rule precluded motions for prospective leave to amend. (PCT2. 286-88) The lower court indicated that it needed to see the State's arguments regarding leave to amend in writing. (PCT2. 288)

During the hearing the State announced that it would be filing its response to the motion for post conviction relief that afternoon. (PCT2. 286) The lower court then set the *Huff* hearing for September 17, 2004. (PCT2. 291)

That afternoon the State filed its response to the motion for post conviction relief. (PCR2. 464-508) It included in its response its argument regarding leave to amend. (PCR2. 476-78) The State attached to its response the reports of the numerous mental health evaluations of Defendant done in connection with

Defendant's cases, the order finding him competent to proceed with the post conviction litigation in his other capital case, the transcript of the competency hearing from that case and the memorandum that trial counsel had presented to the trial court at the time Defendant discharged his penalty phase counsel regarding the investigation into mitigation and the reasons why witnesses were not being called. (PCR2. 509-817)

The lower court then sent the State and defense counsel copies of Defendant's June 1, 2004 letter to the court with its attached proposed motion to discharge counsel. (PCT2. 295-97) The State then set the proposed motion for hearing and arranged for Defendant to appear telephonically. (PCR2. 820, 862) At the hearing, Defendant asserted that his complaint about counsel would be resolved by allowing the supplement to be considered. (PCT2. 305-07) As such, the lower court decided to grant leave to amend. (PCT2. 307) The State then filed a response to the supplemental motion on August 24, 2004. (PCR2. 863-71)

At the beginning of the *Huff* hearing, Defendant moved to continue the hearing because he needed more time to investigate his claims in order to be able to name witnesses to support them. (PCT2. 316-19) The State objected to the continuance of the *Huff* hearing but did agree that Defendant could file his witness list after the hearing. (PCT2. 319-22) The trial œurt

decided that it would not continue the *Huff* hearing but would give Defendant 60 days after the *Huff* hearing to file his witness list. (PCT2. 322-23)

Defendant conceded that claims I and V through IX did not require an evidentiary hearing. (PCT2. 325, 358-59) He did request an evidentiary hearing regarding the other claims. (PCT2. 326-66) However, when confronted about the insufficiency of his pleadings on these claims, Defendant merely responded that he should not be required to plead prejudice, that he did not have space in his motion to plead his claims proper and that he needed additional time to plead his claims properly. (PCT2. 338-48) During the course of the argument, the State concede an evidentiary hearing on the claim that counsel was ineffective for failing to investigate and present mitigation at the *Spencer* hearing in an abundance of caution. (PCT2. 354-57) After listening to all of the arguments, the lower court granted an evidentiary hearing on the claim of ineffective assistance of counsel at the *Spencer* hearing and summarily denied the remaining claims. (PCT2. 366-37, PCR2. 908-09) It set November 16, 2004, as the deadline for the exchange of witness lists. (PCT2. 368, PCR2. 908-09)

On October 21, 2004, Defendant filed a *pro se* motion for rehearing of the summary denial of his guilt phase claims, for

amendment of his motion and for substitution of counsel. (PCR2. 880-900) The motion claimed that his counsel had failed to consult with him after the State responded to the supplemental claim and reargued matters asserted in that claim. *Id.*

On October 25, 2004, Defendant's counsel served a motion to compel. (PCR2. 902-05) In the motion, counsel sought to compel Frank Tassone, the attorney representing Defendant in his other capital case, to allow counsel to have access to 80 boxes of materials regarding that case in Tassone's possession. *Id.* Tassone had refused to allow access because Defendant objected to counsel seeing the materials. *Id.*

At the hearing on the motion, Defendant indicated that he objected to his counsel reviewing the materials. (PCT2. 380) He complained that the State had used materials from his other capital case against him and that the attorneys from the other case had a conflict of interest at the time the materials were generated because he was suing them. (PCT2. 380-81) He also asserted that some of the documents that had been gathered in the other case had been obtained based on fraudulent waivers. (PCT2. 385-86) Thus, he did not want any of this materials used. *Id.* Tassone stated that he was abiding by Defendant's wishes about Defendant's files, as he felt ethically bound to do so. (PCT2. 382-83) However, he believed that there was information

in the materials that might be helpful in this case. *Id.*

The lower court suggested that Tassone could possibly segregate those documents that he believed might be helpful in this matter, show them to Defendant and ensure that Defendant knew exactly what he was preventing his counsel from seeing. (PCT2. 386-87) Tassone agreed to prepare a list of the materials. (PCT2. 391) The lower court indicated that it was inclined to deny the motion if Defendant continued to refuse to provide access to his files after knowing exactly what was in those files. (PCT2. 391-92) Counsel objected, asserting that while Mr. Arnold provided him with the information he received about this case, counsel would have had access to the materials gathered in the other case directly had he been the first attorney appointed on this case. (PCT2. 392-93) The lower court then deferred ruling while Tassone prepared the list and conferred with Defendant. (PCT2. 393-94)

During the course of the hearing, Defendant mentioned his *pro se* motion, which had not been served on counsel or the State and which the lower court had not seen. (PCT2. 382, 394) The State asked that it be served with the *pro se* motion, but Defendant claimed to be unable to serve his motion because of the cost of copying. (PCT2. 394, 396-97) As such, the lower court indicated that it would attempt to locate the motion and

provide copies to the State and counsel. (PCT2. 397)

The State then reminded the lower court that the evidentiary hearing had to be held within 90 days of the *Huff* hearing. (PCT2. 400) Counsel indicated that he would be seeking an extension of that time period because he had only recently reviewed the records in this matter and realized that he did not have records. (PCT2. 400-01) The State responded that the reason that counsel did not have records was that counsel had never requested any public records and, by failing to do so diligently, Defendant had waived his right to public records production. (PCT2. 401) Counsel responded that he was entitled to these records because he allegedly would have received them had Arnold sent him the records that had been gathered in the other case instead of sending them to Tassone. (PCT2. 402-03) He further asserted that he was entitled to control the course of the litigation against his client's wishes. (PCT2. 403-04)

During this argument, counsel admitted that Defendant had refused to execute any waivers so that he could obtain the records directly. (PCT2. 404) The State then pointed out that the need to obtain waivers indicated that counsel would not have been able to obtain these records even if he had been the first post conviction attorney. (PCT2. 404-05) The lower court indicated that it believed that Defendant's actions were

intended to delay the proceeding. (PCT2. 405) The State responded that Defendant had done so continually throughout the litigation of all of his cases and that the lower court should not continue to indulge the behavior. (PCT2. 405) Counsel indicated that he believed that Defendant's actions were the result of his incompetence. (PCT2. 405-06)

Counsel then moved to extend the time period for the filing of his witness list because he had not had access to the records and had not finished investigating the case. (PCT2. 406-07) The State objected because the investigation should have been completed before the motion, which was already filed years after the convictions were affirmed, was filed. (PCT2. 407-08) As such, the State asserted that Defendant should not be allowed to continue to delay this litigation. (PCT2. 408) The lower court refused to extend the deadline. (PCT2. 408)

On November 16, 2004, the parties filed their witness lists. (PCR2. 906-07) Defendant's list included categories of witnesses he intended to call, with some names listed as examples of individuals falling in the categories but no other identifying information. (PCR2. 911-13) The State immediately objected to Defendant's witness list. (PCT2. 417) Defendant asserted that he had done the list in that manner because he still did not know who his witnesses would be and was seeking to

preserve the right to call anyone. (PCT2. 417-18) Counsel asserted that he needed access to the files from Tassone and claimed that they should not have been sent to Tassone. (PCT2. 418-19) The State responded that the files had been properly sent to Tassone as they had been collected in connection with Tassone's case and not this one. (PCT2. 419-20) The lower court indicated that it found that Defendant's actions were intentionally delaying this case. (PCT2. 420) Counsel responded that he was entitled to do what he believe was appropriate in this matter without regard to Defendant's wishes. (PCT2. 421) The lower court found that Defendant was entitled to control the presentation of his case and that he was intentionally delaying the proceedings. (PCT2. 421-22) The lower court also found the witness list insufficient and gave Defendant two weeks to file a proper witness list with addresses for the witnesses. (PCT2. 423) It also set the evidentiary hearing for the week of January 24, 2005. (PCT2. 424)

On November 18, 2004, the lower court entered an order requiring Tassone to segregate the documents that he determined were relevant to this case, review those documents with Defendant, provide those documents to which Defendant did not object to counsel and provide those documents to which Defendant did object to the lower court for an *in camera* inspection within

30 days. (PCR2. 914) On November 24, 2004, Tassone moved for rehearing because the order did not comport with the oral ruling at the hearing on the motion to compel, regarding Tassone needing to get approval for payment for this work. (PCR2. 915-16) On November 30, 2004, Defendant moved for additional time to file his amended witness list. (PCT2. 953-54) He claimed that he had been unable to obtain addresses for his witnesses. *Id.*

At the December 8, 2004 hearing on Tassone's motion, Tassone complained that he did not have the time or money to comply with the order. (PCT2. 431-33) The State responded that Tassone should not be required to do any review of the files because it was Defendant who was blocking access to the files. (PCT2. 433-35) Counsel again took the position that the files should have been provided to him instead of Tassone and that he was entitled to control the litigation without regard to Defendant's wishes. (PCT2. 435-38) The lower court reiterated that it wanted a review of the materials with Defendant and an index before it determined whether anything should be compelled. (PCT2. 441) It indicated that it would reset the matter for December 29, 2004, to determine who would pay Tassone for his work on this matter. (PCT2. 441-44) At the conclusion of the hearing, the lower court addressed Defendant's motion for extension of time to file his witness list properly. (PCT2. 447)

It granted the extension until December 29, 2004. (PCT2. 447-48) On December 29, 2004, Defendant filed his amended witness list. (PCR2. 957-62)

At the hearing held that day, Tassone indicated that he had received authorization for the court that appointed him to prepare the index. (PCT2. 453) Defendant then indicated that he wanted to see the index before it was distributed, and the lower court assured him he would. (PCT. 454-55) Tassone indicated that he could prepare the index by January 20, 2005, and a privilege log thereafter. (PCT2. 459-60) The State indicated that the evidentiary hearing was set for January 24, 2005, and that it objected to any continuance of the evidentiary hearing. (PCT2. 460) Counsel requested a continuance of the evidentiary hearing, and the lower court granted it. (PCT2. 460) It then ordered the index prepared by January 20, 2005, and the privilege log prepared by January 28, 2005. (PCT2. 460) It gave the parties until February 15, 2005, to file any responses to these documents and set a hearing regarding these pleadings for February 22, 2005. (PCT2. 460-61)

Defendant then asked the lower court to consider his motion for reconsideration or new counsel. (PCT2. 455) The lower court indicated that it was not reconsidering its ruling and would not appoint new counsel. (PCT2. 455) Defendant then stated that

counsel was not being effective because he was not representing Defendant in his noncapital case and doing so would support claim X in the motion for post conviction relief. (PCT2. 456) Defendant requested that the appointment of counsel to represent him in the noncapital case. (PCT2. 456) The lower court denied the request. (PCT2. 457)

When counsel subsequently provided the State with the witness list, Defendant indicated that he wanted the names of all of his family members removed for the list. (PCT2. 465-67) Counsel insisted that he was entitled to decide how to proceed even if Defendant objected. (PCT2. 467-68) The lower court indicated that it was striking the family members unless counsel could provide authority for his position. (PCT2. 468)

On January 12, 2005, Tassone moved for an extension of time to prepare the index and privilege log. (PCR2. 966-67) Over the State's objection, the lower court granted the motion, extended the time for filing the index until February 22, 2005, extended the time for filing the privilege log until March 22, 2005, and reset the hearing on disclosure of documents until March 22, 2005. (PCR2. 968-69)

On February 14, 2005, Tassone served a notice of filing the index under seal and request for hearing on disclosure of the index. (PCR2. 977-78) He also filed a motion to seal the index.

(PCR2. 970-71) These documents were accompanied by an affidavit by Defendant, claiming that disclosing the index would disclose the existence of privileged materials. (PCR2. 973-75, 979-81) On February 17, 2005, Tassone filed a motion for clarification of the order regarding the privilege log. (PCR2. 982-83) In the motion, Tassone stated that Defendant was insisting that he could not make a decision regarding whether any of the materials should be disclosed without reviewing each document. *Id.*

At the hearing on the motion for clarification, Defendant insisted that he had to review each of the documents before he could decide what he wanted counsel to see. (PCT2. 486) Tassone indicated that doing so was not logistically possible given the amount of documents and Defendant's incarceration. (PCT2. 486-88) The lower court indicated that it believed the entire issue regarding the materials was being raised as a delaying tactic, as it did not believe the information was privileged. (PCT2. 488-89) Defendant stated that his concern was that his attorneys had written notes on the documents that would not otherwise be privileged. (PCT2. 489-90) Tassone indicated that most of the materials had been received during public records production in the other capital case and that there were notes on some of these documents. (PCT2. 490-91) Tassone indicated that he did have some notes regarding what documents had been annotated.

(PCT2. 491-92)

The State asserted that Defendant had waived any attorney/client privilege regarding his attorneys by repeatedly claims that they were all ineffective. (PCT2. 492-93) It further contended that the reason why Defendant was making the claims of privilege was to delay the proceedings and that since Defendant was entitled to decide what he wanted to claim under case law, the lower court should cease indulging him. (PCT2. 493-94) Counsel insisted that if the documents were not privileged, he was entitled to them and was entitled to control the litigation even if it was against his client's wishes. (PCT2. 494-97) Tassone agreed with the State that Defendant had the right to make decisions about the course of the litigation. (PCT2. 497) The State then presented case law showing that Defendant was entitled to control the course of the litigation. (PCT2. 498-99) At that point, the lower court gave Defendant 30 days to decide what, if any, documents he agreed could be disclosed, with no further extensions. (PCT2. 500-01) It found that Defendant was entitled to make the decision regarding what documents counsel should receive. (PCT2. 500) It set a hearing for April 13, 2005, to finalize the matter. (PCT2. 502)

On March 21, 2005, Tassone served a pleading entitled "Status of Inventory List and Privilege Log." (PCR2. 991-94) In

this pleading, Tassone indicated that he had been unable to communicate with Defendant regarding the prior order, in part because Defendant had refused to communicate. *Id.* As such, Tassone had prepared a new inventory list that did not include his opinions regarding the materials listed. *Id.* He filed this new list with a motion that new list too be sealed. (PCR2. 995-97)

At the April 13, 2005 hearing on these pleadings, counsel indicated that Defendant had met with him and agreed to disclosure of some of the documents in Tassone's possession. (PCT2. 509) Defendant agreed that he had prepared a list of what he was now willing to have disclosed. (PCT2. 509-10) Over the State's objection, the lower court then gave Defendant and Tassone two days to get the list into the mail, and counsel until May 16, 2005, to review the documents and prepare any motion for leave to amend the motion for post conviction relief that he might have. (PCT2. 512-19)

On May 16, 2005, Defendant appeared before the lower court and asserted that he was still in the process of reviewing the materials. (PCT2. 523) He contended that the process was slow because of the manner in which the materials were being provided and because he had already expended all of his funds for costs. (PCT2. 523-26) The lower court indicated that it believed that

both of these issues arose because of Defendant's own conduct. (PCT2. 526-27) Defendant insisted that his own conduct had not caused the problem because the public records obtained in the other case should have been sent to counsel handling this case. (PCT2. 527-28)

The State responded that the position in which Defendant found himself was the result of his own lack of diligence in seeking records production. (PCT2. 530-32) It pointed out that Defendant had not filed a single pleading requesting a single record from a single source until October 2004, despite the fact that his convictions had been final since 2001. *Id.* Defendant insisted that he had raised issues about the lack of records with the lower court from the beginning of the case and that it was not his fault that he had not received the materials. (PCT2. 532-34) The State then pointed out that even the withdrawal of Defendant's first post conviction counsel was a result of Defendant's own conduct. (PCT2. 534) Defendant argued that there should be no concern with the delay in this matter because Defendant had a death sentence in his other case. (PCT2. 534-35) Counsel also asserted that he still believed that Defendant's actions were the result of his incompetency. (PCT2. 535) The lower court indicated that it had already rejected that argument and found that Defendant was intentionally delayed the

proceedings. (PCT2. 535-36) As such, it refused to provide Defendant with any additional time. (PCT2. 536-38) The lower court then set the evidentiary hearing for July 8, 2005, and asked the State to prepare an order recounting the history of the case, finding that Defendant had intentionally delayed the proceedings and indicating that no further extensions would be allowed. (PCT2. 537-42)

On May 27, 2005, the lower court held a hearing for the purpose of reviewing the proposed order. (PCT2. 546-47) Defendant then asked the lower court to reconsider its order denying further extensions. (PCT2. 547) In support of the request, Defendant simply reargued that he had not had sufficient time to review the materials from Tassone and asked the lower court to ignore that the problem with receiving the materials from Tassone were the result of Defendant's own conduct. (PCT2. 547-57) The lower court denied reconsideration. (PCT2. 558)

Defendant then moved the lower court to continue the date for the evidentiary hearing because his counsel were planning to go on vacation. (PCT2. 558-59) Because one of the prosecutors was also unavailable on the date chosen, the lower court reset the evidentiary hearing until August 19, 2005. (PCT2. 559-61)

The State then requested that Defendant be required to

submit a witness list that indicated the witnesses Defendant actually intended to call at the evidentiary hearing. (PCT2. 562-63) Defendant agreed to provide such a list and to include a proffer of the witness's proposed testimony. (PCT2. 563-65) The lower court ordered that this new witness list be provided to the State by July 25, 2005. (PCT2. 567)

During the course of discussing the text of the proposed order, Defendant asserted that the materials held by Tassone should have been provided directly to counsel when Arnold withdrew and that the reason they were not was that Arnold inadvertently sent them to Tassone. (PCT2. 578-80) The lower court indicated that it did not have evidence before it to support such a finding. (PCT2. 580) Additionally, the State pointed out that Arnold continued to represent Defendant on the other case after he was allowed to withdraw in this case so that there was no support for counsel's assertion. (PCT2. 581)

On July 14, 2005, Defendant moved to continue the status hearing set for July 25, 2005, at which Defendant was supposed to provide the new witness list because counsel had just realized he was not available that day. (PCR2. 1022-23) The lower court granted the motion and reset the status hearing and due date for the witness list until July 28, 2005. (PCR2. 30)

On July 28, 2005, Defendant filed his witness list, which

did not include any proffers and included the names of family members whom Defendant had already indicated should not be called. (PCR2. 1025-33) At the hearing that morning, the State objected to the lack of proffers and the listing of witnesses Defendant refused to have presented. (PCT2. 616) Counsel insisted that he was entitled to decide how to litigate the case and that identifying each witness was a proffer. (PCT2. 616-17) The lower court indicated that it found the proffers insufficient and the listing of witnesses Defendant refused to allow to testify inappropriate. (PCT2. 616-20) As such, it struck all members of Defendant's immediate family, required counsel to obtain Defendant's position on the remaining family member and required Defendant to provide better proffers. (PCT2. 616-17, 620-21)

On August 4, 2005, the lower court held another status conference at which Defendant was present telephonically so that it could determine which witnesses Defendant considered to be members of his family that he did not want called. (PCT2. 625) At the beginning of the hearing, the State asserted that it had attempted to contact witnesses and had found that much of the contact information listed was incorrect or out of date. (PCT2. 627-33) Moreover, the witnesses whom it had been able to contact did not appear to have any relevant information. ***Id.*** When the

lower court asked why witnesses were listed without knowing that they were available, Defendant indicated that he had hoped that he would be able to locate them because information in files suggested they might be helpful. (PCT2. 634) The lower court found that the listing of witnesses in this manner was improper and indicated that it was inclined to exclude witnesses if they were not properly listed so that the State could prepare for the hearing. (PCT2. 634-36)

When the lower court attempted to address the issue of the family members on the witness list with Defendant personally, Defendant indicated that he was not prepared for the hearing because he had only recently received the witness list and because he had filed *pro se* motions that he had never served and that he wanted heard first. (PCT2. 638-41) When the lower court stated that it believed Defendant's statements belied any assertion that he was unprepared, Defendant asserted he had filed actions in other courts to stay the proceedings and did not want to proceed. (PCT2. 641-42) The lower court stated that it was proceeding and inquired about an allegation Defendant had made that he had filed a motion to disqualify the lower court that no one had ever seen. (PCT2. 642-43) Defendant insisted that he had filed a motion to disqualify the judge because the judge had been a supervisor in the State Attorney's Office at

the time of his first trial on April 14, 2005. (PCT2. 643) A review of the court file revealed no such motion. (PCT2. 646-50) As such, the lower court informed Defendant he would have to file such a motion. (PCT2. 650-51)

When the lower court again attempted to determine which members of his family Defendant wanted excluded, Defendant asserted that his desire not to have witnesses called extended beyond his family and that he needed to discuss the witnesses with counsel before proceeding. (PCT2. 651-52) As such, the lower court decided to reset the hearing until it had the pleadings and Defendant had an opportunity to speak to counsel. (PCT2. 651-52)

On August 8, 2005, Defendant's *pro se* motion to disqualify the lower court was filed. (PCR2. 1035-53) In the motion, Defendant asserted that Judge Miller had been intimately involved in his prosecutions and might have been the prosecutor's supervisor. *Id.* He further contended that his counsel was ineffective because he was refusing to challenge Defendant's noncapital conviction. *Id.*

At the hearing that day, the State asked the lower court to inquiry whether counsel was adopting the motion to disqualify since Defendant could not file *pro se* motions while he was represented. (PCT2. 658, 663) Defendant insisted that he should

not be required to have his counsel adopt the motion because he was also complaining about his counsel. (PCT2. 663) The lower court then stated that it was denying the motion as legally insufficient even if it was adopted. (PCT2. 663-64)

With regard to Defendant's complains about counsel, Defendant asserted that he wanted the lower court to reconsider its summary denial of claim X. (PCT2. 665) The State responded that claim X had been properly summarily denied and that Defendant was not entitled to litigate a motion for rehearing *pro se* as he was represented. (PCT2. 665-67) The lower court denied the motion. (PCT2. 667)

When the lower court attempted to return to the issue of the witnesses Defendant wanted removed from the witness list, Defendant asserted that he did not want any witnesses called at all. (PCT2. 668-69) Defendant then averred that he would not participate any further in the post conviction litigation in this case. (PCT2. 669) The State then asked the lower court to colloquy Defendant about the fact that his refusal to allow the presentation of evidence in support of his claim would result in a waiver of the claim. (PCT2. 669) Defendant responded that he refused to allow the proceedings to continue because he believed the lower court had acted improperly in denying him relief on his other claims and motions. (PCT2. 670) He further asserted

that he did not wish to pursue claims about his sentence because he wanted to be released from prison. (PCT2. 671) When the lower court then asked if Defendant wanted counsel to continue pursuing the claim as best he could or wanted counsel to withdraw the claim, Defendant asserted that he wanted counsel to stop pursuing the claim and that he wanted new counsel. (PCT2. 671) He then stated that he wanted counsel to appeal the rejection of his guilt phase claims immediately. (PCT2. 672)

Counsel then asserted that the lower court should allow him to proceed to the evidentiary hearing against his client's wishes. (PCT2. 672-74) Defendant responded that he wanted to waive counsel. (PCT2. 674) The State suggested that the lower court should then conduct a *Faretta* inquiry but that proceeding *pro se* would not be in Defendant's interest as he would be unable to secure witnesses for the evidentiary hearing. (PCT2. 675-76) Defendant responded that his only interest was in appealing the denial of his guilt phase claims and that he was uninterested in proceeding with the evidentiary hearing or pursuing any penalty phase claims. (PCT2. 675) When the lower court inquired if Defendant wished to represent himself, Defendant responded that he did not. (PCT2. 676) However, he did want to discharge counsel so he could appeal the denial of his *pro se* motion for disqualification. (PCT2. 676) The lower court

stated that it found no basis to discharge counsel. (PCT2. 676) The lower court then found that Defendant had prevented the evidentiary hearing from proceeding through his actions, so it was going to denying the motion for post conviction relief. (PCT2. 677-78)

The State then asked the lower court to conduct a more extensive *Nelson* inquiry into Defendant's complaints about counsel. (PCT2. 678) When the lower court attempted to do so, Defendant simply complained about his trial counsel's failure to have the *Williams* rule evidence excluded, to challenge the sufficiency of the evidence and to attack Tina Corolis' testimony and the fact that post conviction claims regarding these issues had been denied. (PCT2. 678-80) Counsel responded that he was aware that Defendant had been unhappy with the manner in which the guilt phase claims were plead but that he had no additional factual information to add to the claims. (PCT2. 681-84) The lower court then found that counsel was not being ineffective. (PCT2. 685) Defendant then asserted that his counsel had to be deemed ineffective because some of his claims had been denied as insufficiently pled. (PCT2. 685) He further asserted that counsel had agreed to move for leave to amend if Defendant presented him with additional claims. (PCT2. 686) Counsel stated that he had so agreed but that Defendant had not

presented any additional claims. (PCT2. 687) The lower court reiterated its denial of the request to discharge counsel. (PCT2. 687)

The lower court then stated that it saw no point in going forward with the evidentiary hearing as Defendant was preventing the presentation of evidence at the hearing. (PCT2. 687-88) The State agreed so long as Defendant understood that by precluding the presentation of evidence, he was waiving his claim. (PCT2. 688) Defendant responded that he would not go forward with his present counsel. (PCT2. 688) As such, the lower court denied the motion for post conviction relief. (PCT2. 688)

On August 22, 2005, Defendant moved to reconsider the denial of his motion for post conviction. (PCR2. 1056-65) He further sought additional time to investigate post conviction claims and prospective leave to amend his motion. *Id.* In the motion, Defendant basically argued that the lower court had erred in determining that Defendant was entitled to control access to the files in Tassone's possession and the evidence that would be presented at the evidentiary hearing. *Id.* He further asserted that the lower court should have given him more time to review the documents from the Tassone materials that Defendant eventually allowed counsel to see and to amend his motion for post conviction relief. *Id.*

The State responded that the lower court's decision that Defendant was entitled to control the course of the litigation was proper and that counsel had waived any right to access to records by failing to pursuit records diligently. (PCR2. 1068-72) The State further asserted that there was no good cause for leave to amend and that a motion for prospective leave to amend was improper. *Id.*

On August 30, 2005, Defendant filed a supplement to his motion for reconsideration to which he attached a *pro se* documents entitled factual supplement to list of claims in which Defendant sought to revise his motion for post conviction relief. (PCR2. 1085-1118) On September 8, 2005, the lower court entered its written order denying the motion for post conviction relief. (PCR2. 1125-28) It based the denial on Defendant's refusal to allow the presentation of evidence at the evidentiary hearing. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly found that Petitioner had waived his claim of ineffective assistance of counsel at the *Spencer* hearing by refusing to allow the presentation of evidence. The refusal to order access to public records from Defendant's other case was proper. The lower court properly denied the claim that counsel was ineffective for failing to investigate and present

mitigation at the penalty phase. The lower court properly summarily denied claims that were procedurally barred, facially insufficient, without merit as a matter of law and refuted by the record. The lower court properly denied the claims related to Defendant's competency at the time of trial and did not abuse its discretion in finding Defendant competent to proceed with the post conviction litigation. The lower court also did not abuse its discretion in striking Defendant's shell motion. The *Ring* and sanity to be executed claims were properly rejected.

ARGUMENT

I. THE LOWER COURT PROPERLY FOUND THAT DEFENDANT WAIVED HIS CLAIM OF INEFFECTIVE ASSISTANCE AT THE *SPENCER* HEARING.

Defendant first asserts that the lower court erred when it determined that Defendant had waived his claim of ineffective assistance of counsel for failing to investigate and present mitigation at the *Spencer* hearing. Defendant appears to claim that his decision to preclude the calling of witnesses was not voluntary because he was mentally ill and was not based on full information, and the lower court did not conduct *Nelson* and *Faretta* inquiries. However, the lower court acted properly and should be affirmed.

This Court has held that a defendant who is granted an evidentiary hearing and who does not present evidence in support

of his claims at such a hearing waives the claim for post conviction relief. *Ferrell v.* State, 918 So. 2d 163, 173-74 (Fla. 2005); *Owen v. Crosby*, 773 So. 2d 510, 515 (Fla. 2000). Moreover, this Court has held that a defendant has a right to control how his case will be presented. *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988); *see also Boyd v. State*, 910 So. 2d 167, 189-90 (Fla. 2005); *Grim v. State*, 841 So. 2d 455, 461 (Fla. 2003); *Mora v. State*, 814 So. 2d 322, 331-33 (Fla. 2002). Here, the record reflects that Defendant refused to allow his counsel to call any witnesses at the evidentiary hearing because he was uninterested in pursuing any penalty phase claims. As such, the lower court properly ruled that Defendant waived the claim. It should be affirmed.

While Defendant suggests he was not competent to make the decision, the lower court had already had a full competency hearing and found Defendant competent. (PCT2. 56-183) As argued in response to Issue VI, the lower court's finding of competency should be affirmed. Moreover, both the United States Supreme Court and this Court have held that there is no special level of competency required to make decisions that waive rights. *Godinez v. Moran*, 509 U.S. 389 (1993); *Porter v. State*, 788 So. 2d 917, 927 (Fla. 2001). Since Defendant was, in fact, competent, Defendant's assertion that his mental state precluded him from

validly deciding not to pursue his claim should be affirmed.

While Defendant asserts that the record reflects that Defendant did not actually want to refuse to present witnesses about the claim on which an evidentiary hearing had been granted, this assertion is based on a selective reading of the record. While Defendant asserts that he merely withdrew the witnesses because he had not consulted with counsel about them, the record reflects that Defendant had insisted that his family members not be witnesses on December 29, 2004, more than seven months before the hearing at which Defendant refused to allow any witnesses.[6] (PCT2. 465-68) Moreover, the witness list that provoked the hearing at which Defendant withdrew his witness was filed on July 28, 2005. (PCR2. 1025-33) The lower court had ordered the hearing with Defendant about this witness list on that date. It first attempted to hold that hearing on August 4, 2005. (PCT2. 625) However, the hearing did not proceed at that time, in part because Defendant insisted he needed more time to review the list with counsel. (PCT2. 638-41) Thus, the hearing was reset for August 8, 2005. (PCT2. 651-52)

When the lower court asked Defendant about the first witness, Defendant did stated that he objected to the witnesses

[6] This refusal to allow access to his family members was consistent with his rejection of them as witnesses at trial and his refusal to speak about them with the competency evaluators.

because counsel had not told him what each witness would say. However, Defendant then stated that he would not permit any witnesses to be called because he did not want to participate in the proceedings any further. (PCT2. 669) He further indicated that he did not want to pursue the claim because he wanted to appeal immediately the denial of his guilt phase claims and stated that he was not interested in obtaining relief regarding the penalty phase.[7] (PCT2. 670-71, 672, 675, 688) Moreover, while Defendant insists that his *pro se* pleadings filed after the lower court had ruled show that he wanted to pursue the claim, they do not. (PCR2. 1073-84, 1087-1118) Instead, everything Defendant discussed in these pleadings concerned the guilt phase. *Id.* In fact, Defendant directly stated that he only wanted mental health evidence presented regarding the guilt phase. (PCR2. 1081) Thus, the record fully supports the lower court's finding that Defendant did understand what he was doing in refusing to allow witnesses to be presented regarding the penalty phase claim. It should be affirmed.

While Defendant suggests that the lower court did not hold proper *Nelson* inquiry, the record and law is to the contrary. This Court has held that a *Nelson* inquiry does not need to be

[7] Again, this assertion was consistent with Defendant's actions regarding the presentation of mitigation at trial and his statements to the competency evaluators in his other case. (PCR2. 532-33, 540)

any more specific that the defendant's complaints about his counsel. *Guardado v. State*, 965 So. 2d 108, 113 (Fla. 2007); *Cummings-el v. State*, 863 So. 2d 246, 255 (Fla. 2003); *Lowe v. State*, 650 So. 2d 969, 975 (Fla. 1994). Here, the lower court had before it Defendant's written motion requesting substitution of counsel in which Defendant did little more than reargue claim X of his motion for post conviction relief and assert that his counsel was being ineffective because he had not prevailed on the claim. (PCR2. 880-900) Moreover, when the lower court inquired about Defendant's complaints about counsel, Defendant merely iterated his arguments about claim X. (PCT2. 665-67) He then asserted that he wanted counsel to raise claims about his noncapital case and had lost the guilt phase ineffective assistance claim. (PCT2. 667, 678-80) Counsel responded that he had pled the claims as best he could, given the available facts. (PCT2. 681-84, 686-87) Given that Defendant's complaints were limited to the assertion that counsel was ineffective for failing to convince the court to rule in his favor, the inquiry the lower court had was sufficient. *Guardado*, 965 So. 2d at 113; *Cummings-el*, 863 So. 2d at 255; *Lowe*, 650 So. 2d at 975.

Moreover, the manner in which the lower court handled the State's request for a *Faretta* inquiry was proper. A *Faretta* inquiry is only required if a defendant makes an unequivocal

request for self representation. *Brooks v. State*, 762 So. 2d 879, 889 (Fla. 2000); *State v. Craft*, 685 So. 2d 1292, 1295 (Fla. 1996). Here, the State asked the lower court to conduct a *Faretta* inquiry only after Defendant had asked if it was possible to waive counsel. (PCT2. 674-75) However, when the lower court then inquired if Defendant wanted to represent himself, Defendant directly said that he did not. (PCT2. 676) Given that Defendant unequivocally asserted that he did not want to present himself, the lower court properly terminated the *Faretta* inquiry.

II. THE ISSUES RELATED TO ACCESS TO RECORDS SHOULD BE REJECTED.

Defendant next asserts that the lower court abused its discretion when it refused to order Defendant's attorney in his other capital murder case to provide his counsel in this matter with access to records that had been disclosed during the course of his post conviction litigation in the other case over Defendant's personal objection.[8] Defendant also asserts that the lower court abused its discretion in providing counsel with insufficient time to review those records that Defendant eventually agreed to allow him to access and to amend his motion

[8] A trial court's ruling with regard to the post conviction discovery issues are reviewed for an abuse of discretion. *Reaves v. State*, 942 So. 2d 874, 881 (Fla. 2006).

for post conviction relief.[9] However, the lower court did not abuse its discretion and should be affirmed.

While Defendant makes it appear as if the lower court refused to allow him access to public records, the record belies this assertion. Instead, the record reflects that the State's notices of affirmance were properly sent and that all of the agencies so noticed had responded by September 10, 2001. (PCR2-SR. 2-13, 15-22, 30-33) Defendant never requested any additional public records from the State and its agencies or moved to compel public records from anyone except to file one pleading in August 2001, asking that the records that be sent directly to him. (PCR2-SR. 27-29) Defendant never set that request or the objection he received from the Miami-Dade Police Department for hearing. Thus, the record reflects that any lack of receipt of public records from the State and its agencies is due to Defendant's lack of diligence in seeking such. This Court has held that a defendant who lacks diligence in seeking public records from the State and its agencies waives any right to seek such production. *Mungin v. State*, 932 So. 2d 986, 994-95 (Fla. 2006); *Pace v. State*, 854 So. 2d 167, 180 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 218-19 (Fla. 2002); *Reaves v. State*, 826

[9] A trial court's decision to grant or deny a continuance is reviewed for an abuse of discretion. *Gorby v. State*, 630 So. 2d 544, 546 (Fla. 1993).

So. 2d 932, 942-43 (Fla. 2002); *Cook v. State*, 792 So. 2d 1197, 1204 (Fla. 2001); *Thompson v. State*, 759 So. 2d 650, 658 (Fla. 2000). As Defendant here lacked diligence in seeking the records, he waived any claim about the lack of them. The rejection of the claim should be affirmed.

In an attempt to avoid the fact that he never sought public records in this matter, Defendant asserts his first post conviction counsel erroneously failed to provide them to new counsel after his withdraw. However, the record reflects Defendant's first post conviction counsel in this matter was already representing Defendant in connection with his other capital case at the time he was appointed in this matter. (PCR2-SR. 40) When the first post conviction attorney was permitted to withdraw, he was only ordered to send Defendant's present counsel the materials he obtained in litigating this case. (PCR1. 15) In seeking an extension of time to file his motion for post conviction relief, counsel admitted that he had received the first attorney's records from this case and the records sent to the repository in this case. (PCR1. 17) The records in Tassone's possession were mainly those materials gathered as a result of the public records litigation in that case. (PCT2. 490-91) It appears that the remainder of the materials were those records that counsel in the other case had

obtained through waivers of confidentiality that Defendant had executed in the other case but refused to execute here. (PCT2. 385, 404) Thus, the record shows that the records were not misdirected but were instead properly in the possession of the attorney handling the case in which they were received. Defendant's claim to the contrary should be rejected.

Moreover, even if the records did belong to this case, Defendant would still have shown a lack of diligence in seeking the records. The order requiring Defendant's first counsel to provide the records accumulated in this litigation to new counsel was entered on January 21, 2002. (PCR1. 15) No complaint about the lack of records was made until October 25, 2004. (PCR2. 902-05) By that time, Defendant had already filed three versions of his motion for post conviction relief, the lower court had already permitted an amendment to one of the claims in the third version, a *Huff* hearing had already been held and the matter was pending an evidentiary hearing on one claim. Again, this Court has held that a lack of diligence in seeking records waives the right to the records. *Mungin*, 932 So. 2d at 994-95; *Pace*, 854 So. 2d at 180; *Vining*, 827 So. 2d at 218-19; *Reaves*, 826 So. 2d at 942-43; *Cook*, 792 So. 2d at 1204; *Thompson*, 759 So. 2d at 658. Since Defendant lacked any diligence in not complaining about the lack of records from his first attorney

for more than two and a half years, the lower court did not abuse its discretion in not ordering the records turned over. It should be affirmed.

Moreover, the party who prevented Defendant's attorney from accessing these files was Defendant himself. It was Defendant who objected to having his counsel share the documents. (PCT2. 380-86) In fact, Tassone stated that his only object to providing the documents to Defendant's counsel in this matter was that Defendant objected. (PCT2. 382-83) This Court has recognized that a defendant cannot create an issue, particularly through his own obstreperous conduct, and then complain about the issue on appeal. *Wike v. State*, 698 So. 2d 817, 819-20 (Fla. 1997); *see also Knight v. State*, 932 So. 2d 387, 394 (Fla. 2005); *San Martin v. State*, 705 So. 2d 1337, 1347 (Fla. 1997); *Thompson v. State*, 648 So. 2d 692, 695 (Fla. 1994). Since any issue about accessing the files was created by Defendant's own obstreperous conduct in refusing to allow access to the material, the lower court should be affirmed.

Further, while Defendant appears to suggest that the lower court erred in viewing the files as Defendant's property, which he was entitled to control, the law is to the contrary. It is well settled in Florida that files prepared for an indigent defendant to litigate a criminal case are the property of the

client; not the attorney. *Long v. Dillinger*, 701 So. 2d 1168, 1169 (Fla. 1997); *Harris v. Webb*, 711 So. 2d 641 (Fla. 1st DCA 1998); *McCaskill v. Dees*, 698 So. 2d 628 (Fla. 5th DCA 1997); *Pearce v. Sheffey*, 647 So. 2d 333 (Fla. 2d DCA 1994); *Eichelberger v. Brueckheimer*, 613 So. 2d 1372, 1373 (Fla. 2d DCA 1993); *Thompson v. Unterberger*, 577 So. 2d 684, 685-86 (Fla. 2d DCA 1991); *Dubose v. Shelnutt*, 566 So. 2d 921 (Fla. 5th DCA 1990). Moreover, Florida law is clear that defendants have a right to decide how their cases should be litigated. *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988); *see also Boyd v. State*, 910 So. 2d 167, 189-90 (Fla. 2005); *Grim v. State*, 841 So. 2d 455, 461 (Fla. 2003); *Mora v. State*, 814 So. 2d 322, 331-33 (Fla. 2002). This Court has recognized that the defendant's right to control the course of the litigation applies even when the defendant is represented by counsel. *Boyd*, 910 So. 2d at 189-90; *see also Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). To the extent that Defendant is suggesting that he should not have been allowed to make this decision because he was not competent, the lower court properly found to the contrary, as argued more fully in response to Issue VI. Thus, the law shows that the lower court did not abuse its discretion in refusing to compel the disclosure of the information in Tassone's possession over Defendant's personal objection. It should be affirmed.

To the extent that Defendant is suggesting that the lower court abused its discretion in refusing to grant additional time to review the records that Defendant eventually allowed counsel to see and to amend the motion for post conviction relief,[10] Defendant is again entitled to no relief. The lower court did not abuse its discretion.

In *Scott v. State*, 717 So. 2d 908, 912 (Fla. 1998), this Court held that a trial court did not abuse its discretion in denying a motion to continue an evidentiary hearing when evidence was unavailable because the defendant had been dilatory in seeking the evidence. Moreover, this Court has stated that motions for post conviction relief should be fully plead when filed. *Vining v. State*, 827 So. 2d 201, 212-13 (Fla. 2002). As such, this Court has held that where a defendant does not make a facially sufficient claim and does not even proffer facts to make the claim facially sufficient until after a *Huff* hearing has been held and a claim summarily denied, the defendant must meet the standard for filing a successive motion to have the added facts considered. *Id.* Moreover, in *Moore v. State*, 820 So. 2d 199, 205-06 (Fla. 2002), this Court held that a lower court did not abuse its discretion in refusing to accept an amended

[10] Denials of motions for leave to amend after reviewed for an abuse of discretion. *Moore v. State*, 820 So. 2d 199, 205-06 (Fla. 2002); Fla. R. Crim. P. 3.851(f)(4).

motion, where the amendment was based on information that should have been available earlier, particularly where leave to amend had already been granted.

Here, by the time that the lower court denied the request for additional time, Defendant's convictions and sentences had already been final for almost four years. By that time, Defendant had already filed three versions of his motion for post conviction relief, he had already been permitted to amend a claim in the last version and a *Huff* hearing had already been held. Even at that point, the lower court did not determine that no further extensions would be granted for an additional seven months. Moreover, it only did so once it found that Defendant had intentionally delayed the proceedings through his obstreperous conduct with regarding to access to the files. (PCR2. 1003-13) Moreover, even when he moved for rehearing after the lower court had found that Defendant had waived the claim upon which an evidentiary hearing had been granted, counsel was still not able to identify any claims that needed to be amended or showed that any failure to have plead the claims fully at the time they were filed provided good cause for leave to amend. (PCR2. 1056-65) This was true despite the fact that Defendant had given his counsel access to some files more than four months earlier. Under these circumstances, the lower court did not

abuse its discretion in refusing to grant any further extensions of time or leave to amend under *Scott*, *Vining* and *Moore*. It should be affirmed.

III. THE REJECTION OF THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT MITIGATION SHOULD BE AFFIRMED.

Defendant next asserts that the lower court erred in summarily denying his claim that his counsel was ineffective for failing to investigate and present mitigation at the penalty phase. Defendant appears to claim that the lower court should not have found that Defendant waived his right to claim ineffective assistance of counsel by discharging counsel and proceeding *pro se* during the penalty phase because Defendant's decision to proceed *pro se* was allegedly not voluntary. However, the lower court properly denied relief and should be affirmed.

With regard to the claim that the lower court erred in finding that Defendant had waived any claim of ineffective assistance of counsel at the penalty phase before the jury, Defendant is entitled to no relief. Defendant represented himself at the penalty phase. (T2. 2760-69) As the United States Supreme Court stated in *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975), "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" Moreover,

this Court has recognized that a defendant who chose to represent himself at the penalty phase cannot thereafter complain that mitigation was not presented because counsel had not investigated it. *See Allen v. State*, 662 So. 2d 323, 328-29 (Fla. 1995); *see also Allen v. State*, 854 So. 2d 1255, 1257 n.3 & 1258 n.4 (Fla. 2003). Thus, the lower court properly found that Defendant had waived any claim of ineffective assistance of counsel for failing to investigate and present mitigation at the penalty phase before the jury.

In an attempt to avoid this holding, Defendant contends that his decision to represent himself at the penalty phase was not valid because Defendant was forced to choose between ineffective counsel and representing himself. However, this contention provides no basis for relief as it is not properly before this Court and is procedurally barred.

Issues raised for the first time on appeal are not properly before the Court and are considered waived and procedurally barred. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). Here, Defendant did not claim that the lower court should ignore the fact that he represented himself at the penalty phase because the decision to do so was involuntary in the lower court. Instead, he simply ignored the fact that he had represented himself in pleading

this claim. (PCR2. 363-69) At the *Huff* hearing, Defendant merely asserted that counsel could still be considered ineffective because he should have investigated the mitigation before he was discharged. (PCT2. 353-54) Thus, this argument was not presented to the lower court and is not properly before this Court.

Even if Defendant had presented the issue below, he would still be entitled to no relief. On direct appeal, Defendant claimed that the trial court had erred in allowing him to represent himself because Defendant only did so because he was confronted with a choice between self representation and ineffective assistance of counsel. Initial Brief of Appellant, FSC Case No. SC96127, at 36-41. This Court rejected this claim. *Gore v. State*, 784 So. 2d 418, 433-34, 436-37(Fla. 2001). Since this issue was actually raised and rejected on direct appeal, Defendant's attempt to relitigate this issue here is procedurally barred. *Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995). Because the claim that the decision to proceed *pro se* at the penalty phase was involuntary is procedurally barred, it provides no basis to avoid the fact that Defendant waived any claim of ineffective assistance of counsel at the penalty phase by doing so. The rejection of this claim should be affirmed.

To the extent that Defendant is claiming that the lower court erred in finding that Defendant waived his claim about the

Spencer hearing, Defendant is entitled to no relief. For the reasons asserted in response to Issue I, the lower court properly found that Defendant waived the claim by refusing to present evidence in support of the claim. *Ferrell v.* State, 918 So. 2d 163, 173-74 (Fla. 2005); *Owen v. Crosby*, 773 So. 2d 510, 515 (Fla. 2000). Thus, the rejection of this claim should be affirmed.

Even if the lower court had improperly found that Defendant waived the claim, Defendant would still be entitled to no relief. While Defendant asserted that his counsel did not investigate mitigation and that Lee Norton, Dr. Barry Crown and Defendant's family members were available to present this mitigation, the record reflects that counsel did, in fact, investigate mitigation. At a hearing between the guilt and penalty phases, counsel stated that he was removing Defendant's sisters from the witness list because he had spoke to them and they had no beneficial information. (T2. 2722-23) Counsel also stated that he had spoken to Dr. Mhatre and Lee Norton and that they also had nothing mitigating to say about Defendant. (T2. 2732-33) Counsel attempted to have Defendant evaluated by Dr. Haber for the purposes of presenting mitigation but Defendant refused to meet with her on two occasions. (T. 2708-25) Counsel then filed a memo regarding his unsuccessful attempts to have

other experts who had previously evaluated Defendant present mitigation in this matter. (PCR2. 817) In the memo, counsel stated that he had spoken to Lee Norton and Dr. Crown and that both had refused to testify on Defendant's behalf. *Id.* The memo reflected that Dr. Norton had interviewed Defendant, his family and his friends but found nothing mitigating. (PCR2. 817) It also showed that Dr. Crown had conducted neuropsychological testing but found nothing useful since the results were invalid. *Id*. Based on this record evidence, this Court rejected Defendant's direct appeal claim that his counsel was ineffective for failing to investigate and present mitigation. *Gore*, 784 So. 2d at 438. Since Defendant's claim only proffer as mitigation that which counsel had actually investigated prior to trial, the claim was refuted by the record. It was properly denied.

IV. THE SUMMARY DENIAL OF DEFENDANT'S INSUFFICIENTLY PLEAD, PROCEDURALLY BARRED AND MERITLESS CLAIMS SHOULD BE AFFIRMED.

Defendant next asserts that the lower court erred in denying several of his claims summarily because they were insufficiently pled or without merit as a matter of law. However, the summary denial of claims was proper and should be affirmed.

Defendant first appears to claim that the lower court's order denying the claims that were summarily denied was improper

because it did not explain the lower court's rationale for denying the claims or attach records and was based on findings that claims were insufficiently pled, procedurally barred or insufficient as a matter of law. However, in *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993), this Court stated that a trial court's order summarily denying a claim would be deemed proper if the trial court either attached portions of the record or explained its rationale for denying a claim. Based on this holding, this Court had held that a summary denial can be upheld even where a trial court did not attach portions of the record if the lower court has "clearly spelled out" the reason for the denial in its order. *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000). Moreover, this Court has affirmed the summary denial of claims presented in a motion filed after the amendment to Fla. R. Crim. P. 3.851, when the claims presented were procedurally barred or insufficiently plead even over the defendant's claim that an evidentiary hearing was necessary. *Bryant v. State*, 901 So. 2d 810 (Fla. 2005). Here, the lower court's order explained that it was summarily denying claims because they were insufficiently plead, procedurally barred and without merit as a matter of law. (PCR2. 908-09) Since these were the lower court's rationale and they are proper reasons to summary deny claims, the lower court's order is not improper. This is particularly

true as the lower court liberally commented on the insufficiency of the claims that it found insufficient during the *Huff* hearing. (PCT2. 329-30, 331, 337-39, 341-43, 346, 348, 350-58) Thus, the lower court should be affirmed.

Moreover, the issues that the lower court summarily denied were properly summarily denied. In claim II, Defendant asserted that his counsel was ineffective for failing to relitigate the admissibility of *Williams* rule evidence before the second trial, for failing to cross examine the State's witnesses and present evidence and testimony of his own, for being a drug addict and for not objecting to an alleged nonrecord conversation between the trial court and the State. (PCR2. 349-57)

With regard to the claim about the *Williams* rule evidence, Defendant did not allege what evidence or argument counsel could have presented in support of the relitigation of the Williams rule issue or how taking these unidentified actions about have resulted in a reasonable probability that the result of the trial, or even the ruling on the *Williams* rule issue, would have been different. (PCR2. 351-54) Instead, he merely pointed out that counsel had refused to relitigate the issue because he was concerned that he would obtain a less favorable ruling had the issue been relitigated. *Id.* At the *Huff* hearing, Defendant acknowledged that he could not identify any additional matters

that should have been presented at a new *Williams* rule hearing and could not say that the ruling on the issue would have been different. (PCT2. 326-30). Given the nature of these allegations, the lower court did not err in finding the claim facially insufficient. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). It should be affirmed.

Moreover, the summary denial of this claim was also appropriate because the record reflects that counsel made an informed strategic decision not to relitigate the issue. This Court has held that strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected. *Brown v. State*, 894 So. 2d 137, 147 (Fla. 2004); *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000).

Here, the State provided notice of its intent to seek the introduction of *Williams* rule evidence before the first trial. (R1.[11] 44) At the hearing on the motion, the State indicated that it was seeking to admit evidence concern the Roark murder and the Corolis case. (SR1. 137) Counsel argued that the dissimilarities between Roark, Corolis and this matter and asserted that the similarity between the cases did not were not

[11] The symbols "R1.," "SR1." and "T1." will refer to the record on appeal, supplemental record on appeal and trial transcripts, respectively, from Defendant's original direct appeal, FSC case no. SC86,249.

sufficiently unique to allow the evidence to be admissible. (SR1. 145-52) The trial court ruled that the fact that Defendant was introducing himself to short, small women with some variant of the name Tony, attacking them, taking their cars and jewelry and using their car showed sufficient similarities even though the State could only show that Corolis was raped. (SR1. 154-55) However, counsel convinced the trial court to exclude evidence about what Defendant had done with Corolis' child. (SR1. 155-56)

Prior to the beginning of Defendant's second trial, Defendant asked the trial court to direct his counsel to file a motion for a new hearing on the admissibility of the *Williams* rule evidence. (R2. 119) Trial counsel repeatedly stated that he decided, as a matter of strategy, not to relitigate the issue because he believed the ruling was correct and was concerned that the State would be permitted to admit more collateral crimes evidence if the matter was reconsidered. (R2. 67, 70, 120, 206-07) Since the litigation of the issue before the first trial shows that counsel did know the issue and the record shows that counsel made a strategic decision not to relitigate the issue, the lower court would also have properly denied the claim as conclusively refuted by the record.

To the extent that Defendant is claiming that the strategic decision not to relitigate the issue was unreasonable, the claim

has no merit. Counsel refused to relitigate the issue because he believed the ruling was proper and because he feared a worse ruling if the matter was relitigated. Counsel was correct that the ruling was proper. This Court found that the evidence concerning Corolis was proper ***Williams*** rule evidence in the Roark case because the pervasive similarities between the cases outweighed any dissimilarities and the number of similarities showed uniqueness. ***Gore v. State***, 599 So. 2d 978, 983-84 (Fla. 1992). This Court focused on the fact that both women were small, that they were both introduced to Defendant as Tony, that binding and injury to the neck were involved in both crimes, that both victims were attacked only after Defendant had spent time with them, that both victim's car and jewelry were taken, that Defendant disposed of the jewelry of both victims but kept the cars, that Defendant claimed to have been loaned both car, that there were indications of a sexual motive for both crimes and that both victims were left remote trash piles. ***Id.*** at 983-84.

This crime shared these similarities with Roark and Corolis. Ms. Novick was also a small woman, whose body was found nude on a trash pile in a remote area with injuries to her neck and evidence she had been bound. (T2. 1055, 1057-59, 1061, 1078-79, 1092-94, 1302-04) She had been seen socializing with

Defendant at a bar for an extended period of time before she left with Defendant in her corvette. (T2. 1115-21) Defendant was seen with the corvette after Ms. Novick was killed and claimed that it had been loaned to him. (T2. 1286-87, 1132, 1327-31) Defendant also had possession of Ms. Novick's jewelry after the crime. (T2. 1145-46)

Since this crime fit the pattern of similarities that this Court had already determined were sufficient to allow the admission of the ***Williams*** rule evidence about Defendant's crimes, counsel was correct to believe that the original ruling on the ***Williams*** rule issue was proper. Thus, he cannot be deemed ineffective for failing to litigate the issue again. ***Kokal v. Dugger***, 718 So. 2d 138 (Fla. 1998)(counsel not ineffective for failing to raise meritless issue). The denial of the claim should be affirmed.

Moreover, while Defendant suggests that counsel should not have feared getting a worse ruling, counsel's fear was justified. While it is true that the State only sought to introduce evidence about Corolis and Roark and agreed not to present the evidence concerning Corolis' child at the time of the first hearing, the State did have additional collateral crimes evidence. ***See Gore v. State***, 784 So. 2d 418, 433 (Fla. 2001); ***Gore v. State***, 719 So. 2d 1197, 1200 (Fla. 1998); (T2.

3187-90). Given the existence of this evidence, counsel did have reason to fear that reopening the *Williams* rule issue might cause a less favorable ruling to be rendered. Thus, there was nothing unreasonable about counsel's strategic decision not to relitigate the issue. *See Griffin*, 866 So. 2d at 9. The rejection of this claim should be affirmed.

With regard to the claim about cross examination, Defendant did not name a single witness who could have been cross examined or a single question that could have been asked these unidentified witnesses on such cross examination. (PCR2. 354-55) As such, Defendant did not explain how any attempt to conduct such an unspecified cross examination would create a reasonable probability of a different result. Given the nature of these allegations, the claim was properly denied as facially insufficient. *Ragsdale*, 720 So. 2d at 207.

While Defendant suggested in conclusory terms that counsel was ineffective for failing to obtain a copy of the transcript of the first trial, he did not assert how obtaining a copy of the transcript would create a reasonable probability of a different result. (PCR2. 355) Moreover, the record reflects that counsel did, in fact, obtain a copy of the transcript before trial. (R2. 62) Thus, the lower court properly rejected this

claim because it was facially insufficient and refuted by the record. *Ragsdale*, 720 So. 2d at 207.

While Defendant suggested that counsel failed to present reverse *Williams* rule evidence about another murdered girl, Defendant did not assert what evidence counsel could have presented in an admissible form or explain how the failure to present this evidence created a reasonable probability of a different result at trial. Given the conclusory nature of these allegations, the lower court properly determined that the claim was insufficiently plead. *Ragsdale*, 720 So. 2d at 207. The lack of pleading was particularly important regarding this issue as counsel did attempt to present this evidence at trial. (T2. 1946-49) Moreover, this Court upheld the trial court's decision that the evidence was not admissible on appeal because of a lack of predicate. *Gore*, 784 So. 2d at 430-32. The lower court should be affirmed.

While Defendant made conclusory allegations about the failure to present a lab report concerning a white substance found in Ms. Novick's body that was negative for semen and about a lack of defense testing of the substance, Defendant did not offer any explanation of the relevancy of the report or the results of any defense testing. (PCR2. 355, PCT2. 337-42) As such, he did not explain how either the testing or the report

would create a reasonable probability of a different result at trial. *Id.* Thus, the lower court properly denied the claim as facially insufficient. *Ragsdale*, 720 So. 2d at 207. Again, the lack of pleading was particularly important. The substance had been tested pretrial and showed that no semen was present. (SR2. 5-6) The defense at trial was that Ms. Novick was killed by a client while on an escort assignment and that Defendant was framed by the client. (T2. 1890-1935) Thus, if Defendant's version of the events had been true, semen should have been present and evidence that it was not would have negated the defense. The denial of the claim should be affirmed.

With regard to the failure to call witnesses, Defendant did list a number of names of individuals who allegedly should have been called. (PCR2. 355-56) However, Defendant did not allege that any of these individuals would have been available to testify at trial. *Id.* He also did not allege the proposed substance of any these individuals testimony. *Id.* When confronted about the insufficiency of the pleading at the *Huff* hearing, Defendant merely asserted that he should not be required to make such allegations. (PCT2. 340-41) However, in *Nelson v. State*, 875 So. 2d 579 (Fla. 2004), this Court held that a defendant must name the witnesses, allege that they were available to testify and allege the substance of the witnesses'

proposed testimony to state a sufficient claim. Since Defendant did not include these allegations, the lower court properly denied the claim as facially insufficient.

Again, the lack of pleading was important. While Defendant asserted that no witnesses were called on Defendant's behalf at trial, the record belies that contention. (T2. 2206-97, 2364-2411) In fact, among the witnesses whom counsel called at trial were Ana Fernandez and Det. Otis Chambers, whom Defendant included in his list of uncalled witnesses. (T2. 2206-97, PCR2. 355-56) Thus, the claim was properly denied.

With regard to the alleged nonrecord discussion between the trial court and the State and the allegedly missing portions of the record, Defendant merely quoted one portion of the record[12] and asserted that portions of the transcript were missing. (PCR2. 357-58) However, he did not allege that he was not part

[12] Even this quote was taken out of context. On the morning of the penalty phase, Defendant claimed that he had not had access to witnesses and listed a number of individuals who had not previously been listed. (T2. 2827-37) While the trial court was attempting to determine if the witnesses had ever been provided to anyone previously, Defendant moved for a continuance based on the need for these witnesses. (T2. 2869-70) The trial court then made efforts to determine the relevancy of the proposed witnesses and when they had been disclosed. (T2. 2870-77, 2894-2901) After discussing the matter with extensively with Defendant and his standby counsel, the trial court asked the State for its position. (T2. 2901) The State then indicated that it had been discussing its position and was finalizing it. (T2. 2901) After doing so, the State then objected on the record. (R2. 2901-04) Thus, in context, the off record discussion was between the prosecutors and not with the trial court.

of the nonrecord discussion, suggest any action counsel should have taken based on the alleged discussion or assert how any nonrecord discussion or missing transcript created a reasonable probability of a different result. Moreover, the portion of the record to which Defendant referred concerned the penalty phase, at which Defendant was representing himself. Under these circumstances, the lower court properly rejected this claim because it was facially insufficient and without merit as a matter of law. *Faretta*, 422 U.S. at 834 n.46; *Thompson*, 759 So. 2d at 660.

With regard to the assertion that counsel was ineffective because he was a drug addict, this Court held in *Bryan v. State*, 753 So. 2d 1244, 1249-50 (Fla. 2000), that an attorney's alleged addictions were not relevant to a claim of ineffective assistance of counsel. As such, the lower court properly summarily denied this claim.

In claim III, Defendant made conclusory allegations that counsel had been ineffective for failing to provide background materials to Dr. Haber. (PCR2. 358-63) However, Defendant did not identify what background materials were available that were not presented to Dr. Haber. Moreover, the only allegation of prejudice were the conclusory statements that giving the background materials "would have lead trial counsel to present

an insanity defense or at the very least, an incompetency to proceed hearing should have been held" and that "[e]vidence regarding [Defendant's] character and background; his early life marked by abandonment, abuse, emotional and educational deprivations, and head traumas, were not presented by counsel." (PCR2. 362)

To state a facially sufficient claim that counsel was ineffective for failing to provide background materials to an expert, a defendant must identify the background materials that were not provided and allege that the provision of these materials would have changed the expert's opinion in a beneficial manner in more than conclusory terms. ***Breedlove v. State***, 692 So. 2d 874 (Fla. 1997)(no prejudice shown where experts opinions did not change); ***Oats v. Dugger***, 638 So. 2d 20 (Fla. 1994). This is so because merely presenting a new expert with a more beneficial opinion will not show that counsel was ineffective. ***See Johnson v. State***, 769 So. 2d 990, 1005 (Fla. 2000).

Since the motion here did not do so, the lower court properly denied the claim as facially insufficient. This is particularly true as Defendant's conclusory allegation of prejudice was that counsel would have pursued an insanity defense or asked for a competency hearing if the materials had

been provided. However, the lower court had before it five evaluations of Defendant's competency at the time the issue was raised, the transcript of an evidentiary hearing from Defendant's other case and the order finding Defendant competent in that matter. The other four evaluators had discussed the background materials in their reports, which Dr. Haber had reviewed during her evaluation. Further, the lower court had the opportunity to interact with Defendant during pretrial hearings. Most of the experts had diagnosed Defendant merely with a personality disorder. However, a personality disorder is not a mental disease or defect that would support an insanity defense. *Patton v. State*, 878 So. 2d 386, 374-76 (Fla. 2004). The lower court should be affirmed.

In claim X, Defendant asserted that the indictment should have been dismissed because of preindictment delay. (PCR2. 411-13) In doing so, Defendant merely made conclusory assertions that evidence was lost and witnesses' memories faded between the time of the crime and the time of trial. *Id.* However, Defendant had raised the issue of preindictment delay in his motion for new trial. (R2. 433-41) At the hearing on the motion, Defendant argued that the State delayed the indictment in this case so that he would be charged just before the Roark trial and the jury pool would be prejudiced. (T. Vol. 26 at 5) He also

asserted that the State used the delay to prevent him from cross examining witnesses about pending charges and to prevent him from obtaining discovery in the Roark and Corolis cases. (T2. Vol. 26 at 2-7) The State responded that the alleged preindictment delay had no affect on Defendant's ability to gather evidence in his defense because he was charged and tried immediately in the Corolis case and then tried in the Roark case and the defense he was claiming applied to all three crimes. (T2. Vol. 26 at 21-23) Defendant responded that he was medicated at the time of the Corolis trial and that he attempted to present this information in the Roark case but was thwarted by ineffective assistance of counsel. (T2. Vol. 26 at 23-29) After listening to this argument, the trial court denied the motion. (T2. Vol. 26 at 29) Since the issue had been raised and rejected at the time of trial, it could have and should have been raised on direct appeal and was properly denied in the post conviction motion as procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991).

Even if the claim was not procedurally barred, it should still be denied. In *Rogers v. State*, 511 So. 2d 526, 531 (Fla. 1987), this Court outlined the test to be applied to claims of preindictment delay:

> When a defendant asserts a due process violation based on preindictment delay, he bears the initial burden of

> showing actual prejudice. . . . If the defendant meets this initial burden, the court then must balance the demonstrable reasons for delay against the gravity of the particular prejudice on a case by case basis. The outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play embodied in the Bill of Rights and fourteenth amendment.

This Court held that bare allegations that witnesses' memories had faded or that named alibi witnesses had disappeared were insufficient to meet the defendant's initial burden. *Id.* As Defendant's claim relied on the same bare allegations to support his claim, the lower court properly denied the claim as facially insufficient. It should be affirmed.

While Defendant asserts that the lower court erred in summarily rejecting claims I, V, VI, VII and IX, Defendant conceded at the *Huff* hearing that these claims did not require factual development and could be considered by the lower court based on the record. (PCR2. 325, 358-59) Having conceded that the claim was subject to summary disposition below, Defendant is now estopped from claiming that an evidentiary hearing was necessary. *See Ferrell v.* State, 918 So. 2d 163, 173-74 (Fla. 2005; *Owen v. State*, 773 So. 2d 510, 513-14 (Fla. 2000). Thus, the denial of the claims should be affirmed.

Even if Defendant had actually asked for an evidentiary hearing on these claims, they still would have been properly summarily denied. Thus, the lower court should be affirmed.

As more fully explained in response to issues IV and X, the lower court properly rejected the claims related to Defendant competency to stand trial and to be executed, which were the subjects of claim V. (PCR2. 369-72) The denial of the claim should be affirmed.

Claim I asserted that Defendant was being deprived of the effective assistance of post conviction counsel because his counsel was overworked, there was a one year time limit on post conviction motion and public records production was incomplete. (PCR2. 347-49) However, this Court has rejected the claim that Defendant is entitled to post conviction relief because his counsel was overworked and there is a one year time limit for post conviction motions, particularly in cases such as this where the motion was not filed for three years after the conviction became final. *Griffin v. State*, 866 So. 2d 1, 18 (Fla. 2003). Moreover, this Court has repeatedly held that allegations of ineffective assistance of post conviction counsel are not grounds for post conviction relief. *Spencer v. State*, 842 So. 2d 52, 72 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 215 (Fla. 2002); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996).

This Court also has held that to be entitled to relief based on a claim about public records production, a defendant

must specifically identify the agency allegedly withholding the records and the record allegedly being withheld. *Thompson v. State*, 759 So. 2d 650, 659 (Fla. 2000). Here, Defendant's entire allegations about public records production was a single phrase that "the imcompleteness of public records" was a circumstance preventing effective assistance of post conviction counsel. (PCR2. 349) Moreover, as argued in response to Issue II, Defendant never actually requested a single public record from the State or its agencies and never litigated a single issue with regard to the State's production of public records. Further, counsel's belated pursuit of any records was impeded by Defendant personally. Under these circumstances, the lower court properly denied claim I summarily. It should be affirmed.

Claim VI asserted that the venire had been improperly informed that it was required to recommend the death penalty, that the jury had been improperly informed its recommendation was a recommendation, that the jury instructions at the penalty phase improperly shifted the burden of proof and that counsel was ineffective for failing to object to each of these alleged errors. (PCR2. 372-81) However, this Court has repeatedly held that issues related to comments at trial and to jury instructions are procedurally barred in post conviction proceedings. *Griffin*, 866 So. 2d at 15; *Valle v. State*, 705 So.

2d 1331, 1335-36 (Fla. 1997). Moreover, this Court has held that couching such procedurally barred claims in terms of ineffective assistance of counsel does not lift the bar. *Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995). Thus, the lower court properly determined this claim was procedurally barred.

Moreover, in arguing that the jury had been told that it was required to recommend death, Defendant quoted to portions of the transcript in which no such comment was made. (PCR2. 374 (quoting T2. 391-93)) Moreover, Defendant did not explain how the failure to object to any unidentified comments created a reasonable probability of a different result. This Court has held that such pleading of a claim is insufficient to state a basis for relief. *Franqui v. State*, 965 So. 2d 22, 37 (Fla. 2007). Further, this Court has repeatedly held that such comments when they do exist constitute harmless error. *Franqui v. State*, 804 So. 2d 1185, 1191-94 (Fla. 2001); *Henyard v. State*, 689 So. 2d 239 (Fla. 1996). This Court has held that where a comment is harmless error, a defendant cannot show that there is a reasonable probability of a different result. *See Chandler v. State*, 848 So. 2d 1031, 1045 (Fla. 2003). Thus, the lower court also properly denied this portion of the claim as facially insufficient and without merit as a matter of law. It should be affirmed.

Moreover, this Court has repeatedly rejected claims that it is improper to inform the jury that its sentencing recommendation is a sentencing recommendation and that the jury instructions improperly shift the burden of proof. *Griffin*, 866 So. 2d at 14. Thus, the lower court properly denied these portions of the claim as without merit as a matter of law. The rejection of claim VI should be affirmed.

Claim VII asked that the bar rule prohibiting contact with jurors be declared unconstitutional or otherwise allow juror interviews but made no allegations that there had been juror misconduct in this matter. (PCR2. 381-84) This Court has repeatedly held that the claim regarding the rule is procedurally barred and without merit and repeatedly found that requests for juror interviews are insufficiently plead without an allegation of actual juror misconduct. *Griffin*, 866 So. 2d at 20-21; *Spencer v. State*, 842 So. 2d 52, 71 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 216 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2001); *Kearse v. State*, 770 So. 2d 1119, 1127-28 (Fla. 2000); *Young v. State*, 739 So. 2d 553, 555 n.5 (Fla. 1999); *Johnson v. State*, 593 So. 2d 206, 210 (Fla. 1992). Thus, the summary rejection of this claim was also proper and should be affirmed.

V. THE CLAIM OF CUMULATIVE ERROR SHOULD BE DENIED.

Defendant next asserts that the lower court erred in allegedly failing to consider the cumulative effect of the claims Defendant presented. In the course of presenting this issue, Defendant also reargues that the lower court erred in summarily denying claim II. For the reasons asserted in response to Issue IV, claim II was properly summarily denied. Moreover, this Court has repeatedly held that when the individual claims lack merit or are procedurally barred, any claim for relief based on the cumulative effect of the claims also lacks merit. *Griffin*, 866 So. 2d at 22. As argued throughout this brief, Defendant's individual claims all lack merit or are procedurally barred. As such, the claim regarding cumulative error should be denied.

VI. THE DENIAL OF THE COMPETENCY CLAIMS SHOULD BE AFFIRMED.

Defendant next asserts that the lower court abused its discretion in finding Defendant competent to proceed with his post conviction litigation and erred in denying his claims regarding his competency to stand trial. However, the lower court did not abuse its discretion in finding Defendant competent and did not err in denying the procedurally barred and facially insufficient claims.

With regard to the claim that post conviction competency, the lower court did not abuse its discretion. This Court has

held that a trial court's determination of competency is reviewed for an abuse of discretion. *Alston v. State*, 894 So. 2d 46, 54 (Fla. 2004). This Court has also stated that where there is sufficient evidence to support the lower court's judgment, its decision will not be disturbed on appeal. *Id.* This Court has noted that it is the trial court's duty to resolve conflicts in the evidence and that the reports of the experts are merely advisory with the court, which is to determine competency for itself. *Id.* Moreover, this Court has held that it is not necessary for a defendant to be mentally well to be competent. *Muhammad v. State*, 494 So. 2d 969, 973 (Fla. 1986). Instead, a defendant is competent if he "sufficient present ability to consult with counsel with a reasonable degree of rational understanding" and has a "rational as well as factual understanding of the proceedings." *Alston*, 894 So. 2d at 54.

Here, at the time that it found Defendant competent to proceed, the lower court had before it the reports and testimony of Dr. Suarez and Dr. Ruiz, who both found Defendant competent and manipulative and who both had extensive experience conducting forensic competency evaluation. (PCR2. 236-50, PCT2. 56-94, 207-51) They also both found that Defendant had no mental illness and only suffered from personality disorders. (PCR2. 236-50, PCT2. 80-85, 219) Moreover, the lower court had the

ability to observe Defendant as he made comments throughout the competency hearing, which indicated his acute awareness of the proceeding and ability to participate. (PCT2. 94, 172-74, 190, 192, 193, 194, 196-97, 200-01, 203, 204) It also saw Defendant competently question one of the experts, including asking appropriate follow up questions. (PCT2. 247-51) The only contrary information before the lower court was the opinion of Dr. McInnes. (PCR2. 253-58, PCT2. 163-96) However, this was only Dr. McInnes' second forensic competency evaluation. (PCRT. 166) Moreover, when pressed for examples of what caused her to believe that Defendant was incompetent, Dr. McInnes frequently exhibited her own lack of understanding of the process, rather than any lack of understanding by Defendant. (PCT2. 174, 195-96) Moreover, Dr. McInnes completely discounted the possibility that Defendant was malingering and being manipulative because she did not believe that Defendant could malinger. (PCT2. 176-79) Given this evidence, the lower court did not abuse its discretion in resolving the conflict in the evidence in favor of the opinions of the experienced evaluators and its own observations. Thus, its finding of competency should be affirmed.

With regard to the claims concerning competency at the time of trial, the lower court properly denied the claims. While Defendant appears to have convolved several different competency

related claims into one claim, it is important that these claims each be evaluated separately as each is governed by distinct legal standards. Defendant appears to be claiming that the trial court erred in the manner in which it conducted the competency proceedings, that he was in fact tried while incompetent and that his counsel was ineffective for failing to properly raise the issue of competence.

To establish a procedural incompetence claim that the trial court improperly handled the issue of competence, a defendant must allege and prove that the facts known to the trial court at the time of trial were such that a reasonable person would have had a bona fide doubt regarding the defendant's competence. *Pate v. Robinson*, 383 U.S. 375 (1966). Because this claim is dependent on the information known to the trial court at the time of trial and is dependent on the record, this claim is procedurally barred if it is not raised on direct appeal. *Medina v. Singletary*, 59 F.3d 1095, 1111 (11th Cir. 1995). Thus, this claim was properly rejected as procedurally barred. Its rejection should be affirmed.

To establish a substantive incompetence claim that the defendant was in fact tried while incompetent, a defendant must allege and prove that the defendant did not have a rational and factual understanding of the proceeding against him and could

not assist his attorney. *Dusky v. United States*, 362 U.S. 402 (1960). In considering such a claim, the court is not limited to record evidence. However, a prior determination of competency is a finding of fact. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990); *Maggio v. Fulford*, 462 U.S. 111, 117 (1983). As such, to state such a claim sufficiently, a defendant must allege "'clear and convincing evidence [raising] a substantial doubt' as to his or her competency to stand trial." *James v. Singletary*, 957 F.2d 1562, 1572 (11th Cir. 1992). In determining whether the evidence is sufficient, it must be remembered that "neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Medina*, 59 F.3d at 1107; *see also Muhammad*, 494 So. 2d at 973.

Here, the record reflects that on January 14, 1999, counsel received a letter from Defendant's attorneys in his other capital case, indicating that two experts had found Defendant incompetent. (R2. 55-56) Counsel immediately obtained the reports of these experts and raised the issue of competency with the trial court and State. (R2. 56) The State had responded by informing counsel of the fact that two other experts had found Defendant competent, that a competency hearing had been held and that a copy of the transcript of that hearing would be provided.

(R2. 56) The trial court indicated that it had reviewed the reports of all of these experts, the transcript of the competency hearing from the other case and the order finding Defendant competent in that matter. (R2. 56-57) After reviewing these materials, the lower court decided to appoint Dr. Merry Haber to evaluate Defendant in an abundance of caution despite having no doubt that Defendant was competent. (R2. 57-58) However, Defendant had refused to see Dr. Haber because he believed the competency issue had been raised to cover up allegations he had made against a public defender that morning.[13] (R2. 55-56) The following morning, the trial court and counsel explained what had happened to Defendant, and Defendant agreed to be evaluated. (R2. 55-60) Counsel then indicated that he would have formally raised the issue of competency had the trial court not taken the action it did *sua sponte*. (R2. 58) After the evaluation was completed, Dr. Haber issued a report, finding that Defendant was competent, that he did not suffer from any mental illness and that he was manipulative. (PCR2. 511-15)

[13] At a hearing held that morning, Defendant had insisted that his counsel needed to file a pleading seeking to restrict the testimony of Jessie Casanova because he alleged that her aunt had been engaged to a public defender who had spoken to Defendant shortly after his arrest, obtained privileged information from Defendant and allegedly shared the information with Casanova's family. (R2. 133-37) When the issue was discussed, the trial court was informed by counsel that the issue had no legal support. *Id.*

The information that had been provided to counsel and the trial court from Defendant's other capital case showed that counsel in that case had moved for a competency hearing because Defendant was refusing to cooperate with counsel. (PCR2. 517) As a result, the other court ordered Defendant evaluated by Dr. Umesh Mhatre and Dr. Kevin Holbert in May 1998. (PCR2. 518) In his report, Dr. Mharte found that Defendant was competent and not mentally ill and implied that Defendant was malingering. (PCR2. 539-41) In a report based on a June 1998 evaluation co-authored by Dr. Richard Greer, Dr. Holbert also found Defendant was competent and diagnosed him with personality disorder not otherwise specified with narcissistic, paranoid and antisocial features. (PCR2. 530-37)

In addition to the court ordered evaluations, Dr. Harry McClaren and Dr. Terence Leland had evaluated Defendant for his counsel in the other case. (PCR2. 543-51) In his report, Dr. McClaren did not come to a diagnosis of Defendant but suggested Defendant be declared incompetent so that his paranoid ideations could be intensively evaluated and treated. (PCR2. 543-47) Dr. Leland diagnosed Defendant with delusional disorder, persecutory type and personality disorder not otherwise specified with paranoid, antisocial and narcissistic features. (PCR2. 549-51) He opined that Defendant was not competent because his delusions

prevented him from communicating with counsel. *Id.*

At the competency hearing in the other case, each of these doctors testified consistently were their reports. (PCR2. 553-809) Moreover, both Dr. McClaren and Dr. Leland admitted that they believed that Defendant met most of the competency criteria but that he was unable to consult with counsel. (PCR2. 676-79, 697) After considered these reports and testimony and its observations of Defendant, the lower court in Defendant's other case had found Defendant competent and manipulative but not delusional. (PCR2. 517-28)

In the face of this extensive evidence supporting the trial court's determination that Defendant was competent to proceed, Defendant merely asserted that he was never mentally well and asserted that Defendant suffered from personality disorders, paranoia, diminished emotional functioning and delusions. (PCR2. 370) Moreover, he merely cited to instances in the trial record where Defendant made unsupported assertions of fact to support his actions. (PCR2. 370-71) However, given that these actions were entirely consistent with the actions that lead to the competency proceedings that resulted in Defendant being found competent, they do not supply the clear and convincing evidence showing a substantial doubt about Defendant's competency. *James*,

957 F.2d at 1572; *see also Medina*, 59 F.3d at 1107; *Muhammad*, 494 So. 2d at 973. The claim was properly denied.

To allege a claim of ineffective assistance of counsel regarding a claim of incompetency, a defendant must allege specific factual deficiencies of counsel's performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ragsdale*, 720 So. 2d at 207. Because a finding of incompetency will result in the trial not being held until the defendant is restored to competency, the defendant must allege and prove that there is a reasonable probability that the trial court would have found the defendant incompetent but for counsel's alleged deficiency. *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989).

Here, Defendant's only allegations regarding counsel's alleged deficiency was that counsel failed to "protect [Defendant's] rights when it was blatantly obvious that he was incompetent," apparently based on the fact counsel learned that experts had opined that Defendant was incompetent. (PCR2. 370-71) However, such conclusory allegations are insufficient to show deficiency. *Ragsdale*, 720 So. 2d at 207. Moreover, as seen above, counsel did bring the issue of competency to the trial court's attention when he learned that experts had found Defendant incompetent. He provided the reports to the lower court and indicated that he would have requested another

evaluation had the trial court not already ordered one on its own. Since the record reflects that counsel raise the competency issue, he cannot be deemed ineffective for failing to do so. *See Branch v. State*, 952 So. 2d 470, 482 (Fla. 2006); *State v. Lewis*, 838 So. 2d 1102, 1118 (Fla. 2002). The denial of the claim should be affirmed.

Moreover, as noted above, Defendant has not shown that there is a reasonable probability that he would have been found incompetent had counsel continued to press the issue. As noted above, the lower court considered the reports of the other experts, their testimony at the competency hearing in the other case and the order that resulted from that hearing. It also had experience interacting with Defendant. The actions that Defendant suggests counsel should have relied upon to allege incompetence were entirely consistent with the actions that prompted the raising of the competency issue in the other case and that occurred during Defendant's initial refusal to see Dr. Haber. Moreover, while Defendant appears to suggest that Dr. Haber's evaluation was deficiency because she only spent an hour with Defendant and did not review background materials, Defendant does not suggest what additional materials Dr. Haber should have reviewed, as she had seen the other four experts competency reports and the order that resulted from those

reports or that spending more time or how reviewing more materials would have changed Dr. Haber's opinion of Defendant. Thus, the claim was not sufficiently plead. *Breedlove v. State*, 692 So. 2d 874, 877 (Fla. 1997); *see also Johnson v. State*, 769 So. 2d 990, 1004-05 (Fla. 2000). Under these circumstances, the lower court properly rejected the claim that counsel was ineffective for the manner in which he raised the competency issue. *Pardo v. State*, 941 So. 2d 1057, 1062-64 (Fla. 2006). It should be affirmed.

VII. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN STRIKING DEFENDANT'S SHELL MOTION AND FLA. R. CRIM. P. 3.851 (2001), IS CONSTITUTIONAL.

Defendant next asserts that the lower court abused its discretion in striking his shell motion. He also appears to assert that the 2001 version of Fla. R. Crim. P. 3.851 is unconstitutional because it outlaws the practice of filing shell motions. However, any issue with regard to the striking of the shell motion has been waived because Defendant has not properly briefed the issue. Moreover, the lower court did not abuse its discretion in striking Defendant's shell motion.[14] Finally, the lower court properly rejected Defendant's claim that Fla. R. Crim. P. 3.851 (2001), is unconstitutional.

[14] The standard of review regarding the granting of a motion to strike is abuse of discretion. *Bryant v. State*, 901 So. 2d 810, 818 (Fla. 2005).

With regard to Defendant's claim that the lower court erred in granting the State's motion to strike his shell motion, Defendant has failed to brief this claim properly. While Defendant mentions the fact that his shell motion was stricken, he does not present any argument regarding why the lower court abused its discretion in striking his motion. Instead, Defendant appears to concede that the filing of shell motions is not permitted under Fla. R. Crim. P. 3.851 (2001).[15] However, this Court has made it abundantly clear that the failure to present arguments regarding why a lower court's actions were improper results in a waiver of an issue on appeal. *See Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999); *Duest v. State*, 555 So. 2d 849, 852 (Fla. 1990). Since Defendant's brief presents no argument regarding why the lower court improperly stuck his shell motion, the issue is waived and should be rejected.

Even if Defendant had properly briefed the issue, he would still be entitled to no relief because the lower court did not abuse its discretion in striking the shell motion. In *Bryant v.*

[15] While Defendant suggests that he argued below that this version of the rule was not applicable to him because his case was affirmed on direct appeal before the effective date of this version of the rule (Initial Brief at 2-3 n.1), the record belies this contention. (PCR1. 101-39) Moreover, the rule is applicable under its plain language: "[This rule] shall apply to all postconviction motions file on or after October 1, 2001." Fla. R. Crim. P. 3.851(a); *Koile v. State*, 934 So. 2d 1226, 1230-31 (Fla. 2006); *Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998).

State, 901 So. 2d 810, 817-19 (Fla. 2005), this Court recognized that a lower court could properly strike a motion for post conviction relief that failed to comply with Fla. R. Crim. P. 3.851(e)(1). This Court particularly recognized that this was the proper course of action when a lower court was presented with a shell motion filed merely to meet a pleading deadline. *Id.* at 818-19.

Here, the motion that Defendant filed was clearly a shell motion. (PCR1. 22-50) While the motion listed headings for 28 claims, most of these headings were followed merely by the assertion that the claims regularly arose in post conviction litigation. *Id.* The only claims that had any substance to them at all were claims that counsel could not be effective in filing a motion for post conviction relief because of the time period for filing such motions and counsel's failure to have obtained and reviewed public records, a claim related to the bar rule prohibiting juror contact and a claim that Florida's capital sentencing statute was unconstitutional. (PCR1. 28-32, 39-41, 41-43) Even regarding these claims, Defendant did not include the required allegations regarding why the legal claims had not been filed early or any fact showing that any public record had not been provided. *Id.* Defendant admitted that he had filed this pleading merely to meet a filing deadline. (PCR1. 89) Since the

motion was a true shell motion, the lower court did not abuse its discretion in striking the motion.

To the extent that Defendant means to argue that the lower court abused its discretion in striking the motion without granting leave to amend, he is entitled no relief. In *Bryant*, this Court did hold that lower courts should allow Defendant to amend a defective motion within a reasonable time and should not dismiss a proper amendment as untimely. *Bryant*, 901 So. 2d at 817-19. However, this Court defined a reasonable time for an amendment as 10 to 30 days and stated that such leave to amend should not be used as a means of sanctioning the filing of a shell motion. *Id.*

Here, as noted above the motion Defendant filed was a true shell motion. Moreover, Defendant admitted that he needed more than six months from the time of filing the shell motion to file a proper motion. (PCR1. 89-94) In fact, it took Defendant almost a year to file the next version of his motion for post conviction relief. (PCR2. 75-149) Moreover, the lower court struck the motion without prejudice to Defendant seeking an extension of time to file a proper motion in this Court. (PCR1. 59, 135) Under these circumstances, the lower court did not abuse its discretion. It should be affirmed.

While Defendant asserts that Fla. R. Crim. P. 3.851 is unconstitutional, this Court has repeatedly rejected challenges to the constitutionality of this rule. *Vining v. State*, 827 So. 2d 201, 215 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2000). Moreover, this Court had a rational basis for amending Fla. R. Crim. P. 3.851 to eliminate the practice of filing shell motion. The time for processing post conviction motions in capital cases had become excessive. The adoption of a one year time limit had not curbed the excess because defendants were routinely filing shell motions. To curb these excesses, this Court required that defendants file motions for post conviction relief that would actually have some substance. This Court gave ample notice of the change by issuing an opinion on July 12, 2001, announcing its intention to eliminate shell motion as of October 1, 2001. *See Amendments to Fla. R. Crim. P. 3.851, 3.852, and 3.993*, 797 So. 2d 1213 (Fla. 2001). To avoid prejudicing the rights of those defendants who had already filed shell motion without notice that such filings would be deemed improper, this Court did not make the change applicable to those defendants. Given that this Court has a rational basis for banning shell motions, doing so does not violate equal protection or due process. The claim was properly denied.

Defendant further asserts that he is somehow being treated

differently than other defendants whose counsel fail to file a timely motion and are allowed belated review, relying on *Williams v. State*, 777 So. 2d 947 (Fla. 2000), *Medrano v. State*, 748 So. 2d 986 (Fla. 1999), and *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999). However, Defendant is, in truth, being treated no differently than any of these other defendants. In *Steele* and *Medrano*, this Court permitted defendant who had counsel to file post conviction motion and whose counsel failed to file a motion on a timely basis to obtain belated review of their motions. In *Williams*, the Court extended the rationale of *Steele* to those defendants whose counsel failed to appeal the denial of their motions for post conviction relief on a timely basis. Here, this Court granted Defendant a belated extension of time to file his motion for post conviction relief. *Gore v. State*, 841 So. 2d 466 (Fla. 2003). Thereafter the timeliness of his motion for post conviction relief was not challenged. As such, Defendant was not treated differently than other defendants whose counsel failed to file timely motions. His claim to the contrary should be rejected.

VIII. THE DENIAL OF THE *RING* CLAIM SHOULD BE AFFIRMED.

Defendant next asserts that he is raising a claim that his is entitled to relief pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002), to preserve it. However, the lower court properly

rejected the claim and should be affirmed.

Both this Court and the United States Supreme Court have held that *Ring* does not apply retroactively to cases that were final when *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). Here, Defendant's convictions and sentences have been final since approximately July 18, 2001, when the time for filing a petition for writ of certiorari from direct appeal expired without such a petition being filed. Sup. Ct. R. 13. *Ring* was decided on June 24, 2002. *Ring*, 542 U.S. at 348. As Defendant's case was final when *Ring* was decided, he is entitled to no relief.

IX. THE CLAIM REGARDING SANITY TO BE EXECUTED WAS PROPERLY DENIED.

Defendant next asserts that he is raising a claim regarding his sanity to be executed to preserve it. However, Defendant is entitled to no relief as the claim is insufficiently plead and is not ripe for review.

Defendant did not assert any facts to show that he will be incompetent to be executed. Instead, Defendant merely asserts in a conclusory fashion that he may be incompetent in the future and stated that he had never been mentally well as he is allegedly plagued by "personality disorders, paranoia, diminished emotional, and delusions." (PCR2. 370) Such assertions are facially insufficient to state a claim. *Ragsdale*,

720 So. 2d at 207. Further, this claim was not ripe. This claim cannot be raised until an execution is imminent. *See Herrera v. Collins*, 506 U.S. 390, 405-06 (1993)("[T]he issue of sanity [to be executed] is properly considered in proximity to the execution."); *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997)(same), *aff'd*, 523 U.S. 637 (1998). Here, Defendant's execution is not imminent; no warrant had been issued for his execution, and no date has been set. As such, this claim is not ripe for adjudication at this juncture and was properly summarily denied.

CONCLUSION

For the foregoing reasons, denial of the motion for post conviction relief 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 U.S. mail to Steven Hammer, 400 S. Andrews Avenue, Fort Lauderdale, Florida 33301, and Melissa Minsk Donoho, 700 S. Andrews Avenue, Fort Lauderdale Florida 33316, this 31st day of December 2007.

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CERTIFICATE OF COMPLIANCE

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

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