IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-2373

JOSE ANTONIO JIMENEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

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

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

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

Defendant appealed his conviction and sentence to this Court, raising 9 issues:

I.

[1] The symbols "R." and "T." will refer to the record on direct appeal and transcripts of proceedings, Florida Supreme Court Case No. 85,014.

DEFENDANT ENTITLED TO NEW TRIAL WHERE HE REQUESTED DISCHARGE OF HIS COURT-APPOINTED COUNSEL PRIOR TO TRIAL AND COURT CONDUCTED INSUFFICIENT HEARING THEREON

II.

DEFENDANT WAS DENIED A FAIR TRIAL DUE TO HIS ABSENCE FROM, AND LACK OF PARTICIPATION IN, SIDEBAR CONFERENCES DURING THE VOIR DIRE PROCEEDINGS WHERE CAUSE CHALLENGES OF PROSPECTIVE JURORS WERE MADE BY THE ATTORNEYS AND RULED UPON BY THE TRIAL COURT

III.

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IV.

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V.

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTIONS OF FIRST DEGREE MURDER AND BURGLARY

VI.

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

VII.

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

VIII.

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

IX.

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

On October 30, 1997, this Court affirmed Defendant's convictions and sentences. On December 29, 1997, rehearing was denied. *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997). In affirming Defendant's convictions and sentences, this Court outlined the facts of the case as follows:

> On October 2, 1992, [Defendant] beat and stabbed to death sixty-three-year-old Phyllis Minas in her home. During the attack her neighbors heard her cry, "Oh God! Oh my God!" and tried to enter her apartment through the unlocked front door. [Defendant] slammed the door shut, locked the locks on the door, and fled the apartment by exiting onto the bedroom balcony, crossing over to a neighbor's balcony and then dropping to the ground. Rescue workers arrived several minutes after [Defendant] inflicted the wounds, and Minas was still alive. After changing his clothes and cleaning himself up, [Defendant] spoke to neighbors in the hallway and asked one of them if he could use her telephone to call a cab.
>
> [Defendant's] fingerprint matched the one lifted from the interior surface of the front door to Minas's apartment, and the police arrested him three days later at his parents' home in Miami Beach.
>
> * * *
>
> [Defendant's] fingerprints were found on the inside of the front door. This is consistent with the neighbors' testimony that the door was pushed shut when they tried to get in to help Minas. Further, while the neighbors were blocking the front door, [Defendant] was seen jumping from the rear balcony next to Minas's, and the sliding glass doors leading to her balcony were open. Finally, [Defendant] told Rochelle Baron that the police wanted to talk to him about a stabbing when the police never mentioned a stabbing. They told [Defendant] they wanted to talk to him about some burglaries.

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

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

> CLAIM NO. 1
> THE DEFENDANT, JOSE JIMENEZ, WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF THE TRIAL, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BY THE FAILURE OF HIS TRIAL COUNSEL TO CALL WITNESSES ON HIS BEHALF.
>
> CLAIM NO. 2
> THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BY COUNSEL'S FAILING TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE; INCLUDING INVESTIGATING WHETHER THERE WAS AVAILABLE EVIDENCE TO ARGUE THE APPLICABILITY OF MENTAL HEALTH MITIGATING EVIDENCE, FAMILY RELATED, AND OTHER TYPES OF MITIGATING EVIDENCE.
>
> CLAIM NO. 3
> TRIAL COUNSEL WAS INEFFECTIVE IN THAT THEY FAILED TO OBJECT TRIAL AND PRESERVE ISSUES ON APPEAL. THIS CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.
>
> CLAIM NO. 4
> DEFENDANT'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, AND THE OUTCOME THEREOF WAS MATERIALLY UNRELIABLE BECAUSE THERE WAS NOT AN ADEQUATE AMOUNT OF ADVERSARIAL TESTING DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL.
>
> CLAIM NO. 5
> DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE WHERE DEFENDANT AND HIS LAWYER MR. KASSIER HAD A CONFLICT OF INTEREST AND COUNSEL'S

PERFORMANCE AT THE PENALTY PHASE WAS CONSTITUTIONALLY DEFICIENT.

CLAIM NO. 6

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

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

On June 8, 2000, the lower court denied Defendant's motions for post conviction relief. (PCR. 91-112) The lower court found that the alleged ineffectiveness regarding the witness was refuted by the record. (PCR. 96-100) It also held that the alleged penalty phase ineffectiveness was insufficiently plead and refuted by the record. (PCR. 100-105) As to claims 3 and 4, the lower court found that they were insufficiently pled. (PCR. 105-06) The lower court stated that claim 5 had been raised on direct appeal and was procedurally barred. (PCR. 106-07) The electrocution claim was found to be moot. (PCR. 108) With regard to the *Delgado* claim, the lower court held, *inter alia*, that *Delgado* was inapplicable to this matter as it was not

[2] The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal from the denial of the first motion of post conviction, Florida Supreme Court case no. SC00-1436.

retroactive and no consent defense, or evidence of consensual entry, was presented at trial. (PCR. 108-10)

Defendant appealed the denial of his motion for post conviction relief to this Court, raising one issue:

> Whether the trial court committed reversible error in denying appellant's petition for relief under F.R.Cr.P. 3.850 where this court in it's opinion in Delgado v. State, SC 88638, __ So. 2d __ (Fla. Aug., 2000) reinterpreted the rules pertaining to burglary and receded from it's previous opinion in Jimenez v. State, 703 So. 2d 437 (Fla. 1999) which opinion affirmed appellant's conviction on the burglary count. Appellant Jimenez under this court's Delgado opinion was entitled to relief on the burglary count as well as a new trial on the first degree murder count where the State relied on the doctrine of felony murder in order to obtain a death sentence as a result of appellant's conviction on the first degree murder count.

On September 26, 2001, this Court affirmed the denial of the motion for post conviction relief, holding that *Delgado* did not apply retroactively to this case. *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001). Defendant filed a *pro se* motion for rehearing. Pursuant to an order from the Court, the State responded to the motion, asserting that the motion should be stricken because Defendant was represented by counsel or that, alternatively, the motion should be denied as meritless. The Court denied the motion for rehearing.

Defendant sought certiorari review of the affirmance of the denial of the first motion for post conviction relief. The

United States Supreme Court denied certiorari on May 13, 2002. *Jimenez v. Florida*, 536 U.S. 1064 (2002).

During the pendency of the appeal from the denial of the first motion for post conviction relief, Defendant filed a *pro se* pleading in the lower court entitled Petition for Writ of Habeas Corpus, Seeking a Belated Appeal. (PCR2. 24-35)[3] In this motion, Defendant complained about the quality of representation by registry counsel and sought the appointment of new counsel. On June 15, 2001, the lower court entered an order summarily denying the motion without notice to the State and without holding a *Huff* hearing. (PCR2. 36) When the State learned of the entry of this order, the State moved to rescind the order, pointing out that the lower court did not have jurisdiction because of the pendency of the appeal from the denial of the first motion for post conviction relief. (PCR2. 44-46) The lower court rescinded the order.

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

[3] The symbol "PCR2." will refer to the record on appeal in Florida Supreme Court Case No. SC01-1660.

After certiorari was denied on Defendant's first motion for post conviction relief, the State arranged for the lower court to hold a hearing on Defendant's *pro se* writ of habeas corpus in the trial court. At the hearing, Defendant personally stated that what he wanted was new counsel appointed to represent him in further post conviction proceedings. Louis Casuso stated that he no longer wished to represent Defendant. As such, the lower court discharged Mr. Casuso, appointed new counsel, and struck the *pro se* pleading. Defendant did not seek to appeal that order.

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

> CLAIM I
>
> [DEFENDANT] WAS DEPRIVED OF HIS STATUTORY RIGHT TO EFFECTIVE REPRESENTATION IN COLLATERAL PROCEEDINGS.
>
> A. Florida Provides a Substantive Right to Effective Assistance of Collateral Representation in Capital case.
>
> B. [Defendant's] Collateral Counsel's Representation Failed to Deliver the Effective Representation That Had Been Promised.
>
> 1. Refused to meet with client.
> 2. Denigrate Client to fact tribunal.
> 3. Violated confidentiality obligation.
> 4. Waived without consent client's Chapter 119 rights.
> 5. Abandoned any advocacy on [Defendant's] behalf.
> 6. Abandoned all of [Defendant's] appellate issues.
> 7. Waived without consent the right to seek habeas relief.

C. [Defendant] Must Be Afforded the Same Relief Afforded Others Who Were Deprived of Adequate Collateral Representation.

CLAIM II

[DEFENDANT] WAS DEPRIVED OF DUE PROCESS WHEN JUDGE ROTHENBERG ENGAGED IN EX PARTE CONTACT WITH LOUIS CASUSO AND CONSIDERED ONLY MR. CASUSO'S SIDE WITHOUT PERMITTING [DEFENDANT] TO BE HEARD.

A. Notice and Opportunity To Be Heard.

B. Fair and Impartial Judge.

CLAIM III

THE FLORIDA CAPITAL SENTENCING PROCEDURES AS EMPLOYED IN [DEFENDANT'S] CASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE A JURY RETURN A VERDICT ADDRESSING HIS GUILT OF ALL THE ELEMENTS NECESSARY FOR THE CRIME OF CAPITAL FIRST DEGREE MURDER.

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

On January 20, 2004, Defendant filed a petition for writ of habeas corpus in federal court. Among the claims raised in that petition were claims that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the involvement of a private investigator hired by the paramour of the victim of another murder Defendant committed in the investigation of both cases, information about a cab driver and information showing that Jeffery Allen was a police informant

and failed polygraphs. (PCR3-SR.[4] 119-34)[5] Defendant also asserted that counsel was ineffective for failing to call Off. Cardona to impeach Mr. Merriweather's and the detectives' testimony, failing to attempt to impeach Ms. Baron with her desk calendar, failing to present evidence that the residents of the apartment complex knew Ms. Minas had been stabbed, failing to investigate whether Defendant had been in Ms. Minas's apartment, failing to preserve adequately restrictions on cross examination or to question the witnesses properly when they were called by the defense, failing to impeach Mr. Merriweather properly and failing to present the testimony of the cab driver.(PCR3-SR. 134-42) He also claimed that the State knowingly presented perjured testimony by misleading the defense regarding the circumstances of listing Jeffery Allen as a witness, misleading the defense regarding the involvement of the other victim's investigator and misleading the trial court regarding the reason for a trip to California. (PCR3-SR. 148-53) In responding to a motion to dismiss the petition as untimely, Defendant claimed that the factual circumstances of these claims could not have

[4] The symbols "PCR3." and "PCR3-SR." will refer to the record on appeal and supplemental record on appeal in the instant matter.
[5] The State is filing a motion to supplement the record with the notice of filing that accompanied its response in the lower court. As such, the page numbers for the supplemental record are estimates.

discovered until June 12, 2002, when his first post conviction counsel was discharged.

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

> I.
> [DEFENDANT'S] CONVICTION FOR BURGLARY VIOLATES HIS RIGHTS TO DUE PROCESS AND TO NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD, AS WELL AS THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> II.
> [DEFENDANT'S RIGHT TO CONFRONTATION WAS VIOLATED AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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

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

> [DEFENDANT] WAS DEPREVIED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR KNOWINGLY PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE, AND/OR THE FAVORABLE EVIDENCE CONSTITUTES NEWLY DISCOVERED EVIDENCE OF INNOCENCE WHICH UNDERMINES CONFIDENCE IN THE RELIABILITY OF THE TRIAL CONDUCTED WITHOUT THE EVIDENCE PRESENTED.

(PCR3. 68-94) On May 18, 2006, the State responded to the motion, asserting it was untimely, successive and without merit. (PCR3. 410-33) On July 12, 2005, the lower court issued an

order, scheduling a *Huff* hearing for 9:00 a.m. on July 25, 2005. (PCR3. 434)

At the *Huff* hearing, Defendant failed to appear on time. (PCR3. 543) When he did appear, he admitted that cab driver Anwar Ali had been interviewed by the defense prior to trial, that he had been listed as a defense witness at that time and that Mr. Ali was refusing to respond to subpoenas at the time of trial. (PCR. 543-47) He asserted that he was diligent in presenting this claim, even though he had raised this claim in prior proceedings in state and federal court because he did not locate Mr. Ali until April 2005. (PCR3. 547-48) The State responded that the motion was insufficient because it did not assert that the claim regarding Mr. Ali was based on evidence that could not have been discovered through an exercise of due diligence within one year of filing the motion. (PCR3. 549) Moreover, the record showed that Defendant had been raising this claim for more than a year and refuted any notion that the claim could not have been raised earlier. (PCR3. 549) Further, there could be no *Brady* violation, as the defense had been aware of this information before trial. (PCR3. 550) The claim of ineffective assistance of counsel was barred as successive and the assertion of ineffective assistance of post conviction counsel did not lift the bar. (PCR3. 550-51) Additionally, the

State contended that the assertions regarding Ali would not show prejudice. (PCR3. 551)

Defendant insisted that he had asserted diligence in presenting the claim, as he had alleged that post conviction counsel had not spoken to Mr. Ali until April 2005. (PCR3. 552-54) He also insisted that there could still be a *Brady* violation even if he knew of the evidence and that he had no records of the State subpoenaing Mr. Ali. (PCR3. 554-55) Defendant asserted that Mr. Ali's testimony that he pickup someone in the area of the apartment complex at some point after the crime who was not Defendant established a reasonable probability that Defendant did not commit the crime, particularly if one considered Ms. Brandt to be available to testify that Defendant was on a different floor of the building at the time. (PCR3. 557-59)

The State responded that the evidence that Mr. Ali picked up a fare somewhere in the area of the apartment complex at some point on the night of the murder did not establish a reasonable probability that Defendant would not have been convicted in light of Defendant's fingerprint and his identification as the person leaping from the balcony at the time of the crime. (PCR3. 560-61) Further, given that Defendant knew of Mr. Ali and the substance of his testimony pretrial, there could be no

Brady violation. (PCR3. 561) Moreover, the claim regarding Ms. Brandt had already been considered and rejected and the record from the time of trial showed that counsel made a strategic decision not to call Ms. Brandt. (PCR3. 561-62)

On September 9, 2005, the State appeared at a hearing about which it had received notice. (PCR3. 580-83) At the beginning of the hearing, the lower court announced that Defendant would not be appearing but that it was entering an order denying the motion for post conviction relief "after an evidentiary hearing." (PCR3. 582) Upon hearing the phrase "after an evidentiary hearing," the State noted that there had been no evidentiary hearing.[6] *Id.* The lower court noted that the order would be corrected and served on the State. (PCR3. 582) The lower court subsequently entered an order denying the motion, finding the assertion procedurally barred and without merit. (PCR3. 435-42)

On October 5, 2005, Defendant moved for rehearing, asserting that the lower court had improperly denied his *Brady* claims based on his knowledge of the allegedly withheld material and based on an erroneous application of *Brady*. (PCR3. 443-48) That same day, he also moved to disqualify Judge Ward based on

[6] Contrary to Defendant's suggestion, nothing in this transcript suggests that the State was provided with a copy of the order at the hearing. In fact, it was not.

an alleged ex parte communication between the State and Judge Ward. (PCR3. 449-55) Defendant asserted that he had learned of the entry of the order denying post conviction relief when he received a pleading from the State informing the court presiding over Defendant's federal habeas petition of the order on September 23, 2005, and spoke to attorney Todd Scher regarding the fact that he had seen the State at the courthouse on the day of the September 9, 2005 hearing. *Id.*

Apparently, Defendant also moved the lower court to order payment of his attorney's fees in connection with this matter on October 5, 2005. (PCR3. 460-64) The motion was served on the Department of Financial Services but not the State. *Id.* The motion indicated that a prior motion for attorney's fees had been filed, which again was not served on the State, and an attachment to the motion indicated that Defendant had chosen not to set the prior motion for hearing. (PCR3. 460-64, 479)

On October 19, 2005, the State responded to the motion for rehearing, asserting that it was simply improperly rearguing matters that had already been presented. (PCR3. 493-94) The State also responded to the motion for disqualification, asserting that the motion was untimely and insufficient. (PCR3. 495-99) In doing so, the State explained that it had appeared at the hearing on September 9, 2005, that it had expected

Defendant to appear, that the lower court had informed it that Defendant would not be appearing and that there had been no substantive discussions at the hearing. *Id.*

On November 4, 2005, Defendant filed a "motion to get facts," in which he asserted that an evidentiary hearing was necessary regarding what occurred at the September 9, 2005 hearing. (PCR3. 500-01) Defendant also filed a reply to the response to the motion to disqualify, insisting that his motion was timely despite his prior allegations in his motion. (PCR3. 502-06)

By orders dated November 1, 2005, the lower court denied Defendant's motions for rehearing and disqualification. (PCR3. 507-08) Said orders were rendered on November 7, 2005. *Id.* The lower court also denied the motion to get fact in an order dated November 21, 2005. (PCR3. 527) On December 2, 2005, Defendant filed his notice of appeal. (PCR3. 528-29)

On January 5, 2006, Defendant filed a petition for writ of mandamus or prohibition in this Court. Petition, FSC Case No. SC06-16. The petition was not served on the State and contained no arguments in support of a writ of prohibition. Instead, the only mention of any matter that might properly be the subject of a prohibition petition were two footnotes asserting an intention to raise an issue regarding the denial of the motion for

disqualification on this appeal. *Id.* The remainder of the petition complained that the lower court had not ruled on Defendant's motions for payment of attorney's fees. *Id.*

On February 13, 2006, this Court requested responses to petition from Judge Ward, the Department of Financial Services and the State and served the State with a copy of the petition. After the responses were served and each noted Defendant's failure to set his fee motions for hearing, Defendant moved to stay these proceedings, claiming that reimbursement for fees and costs was not forth coming. On May 4, 2006, this Court entered an order treating the petition exclusively as a petition for mandamus and denying it without prejudice. *Jimenez v. State*, 931 So. 2d 900 (Fla. 2006). This Court also denied the motion to stay. On June 16, 2006, Defendant filed an unopposed motion for costs, which was granted. (PCR3. 569-71, 579)

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied Defendant's successive motion for post conviction relief, as the claims were procedurally barred and meritless. The procedurally barred and meritless claims do not show that Defendant is innocent or provide any basis to ignore the procedural bar. They also do not show that Defendant was denied due process. Moreover, the lower court properly denied Defendant's untimely and facially insufficient motion for disqualification.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED DEFENDANT'S PROCEDURALLY BARRED AND NONMERITORIOUS CLAIMS.

Defendant first asserts that the lower court erred in summarily denying his successive motion for post conviction relief. However, the lower court properly denied the motion as the claim was untimely, successive, facially insufficient and refuted by the record.

In order for a claim to be properly asserted in a successive motion for post conviction relief that is filed more than one year after a conviction became final, it is necessary for the defendant to allege and prove that the claim is either based on newly discovered evidence that could not have been discovered through an exercise of due diligence or that the claim is based on a fundamental change of constitutional law that applies retroactively to cases that are final. Fla. R. Crim. P. 3.851(d)(2). Moreover, the basis of the claim must not have been available at the time a prior proceeding was pending. *See Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994). The claim must also be filed within one year of when the claim became available through due diligence. *Swafford v. State*, 828 So. 2d 966 (Fla. 2002); *Mills v. State*, 684 So. 2d 801, 804-05 & n.7 (Fla. 1996); *Bolender v. State*, 658 So. 2d 82 (Fla. 1995). For a change in law to be characterized as a fundamental,

retroactive change in law, it must meet the standard adopted in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See Chandler v. Crosby*, 916 So. 2d 728 (Fla. 2005).

Here, while Defendant asserts that his allegations regarding the timeliness of his motion were not accepted as true, Defendant ignores that his motion was devoid of such allegations. In his motion, Defendant made no argument that any of his claims were based on a fundamental change of constitutional law that met the *Witt* retroactivity test. (PCR3. 68-75) Moreover, the motion contained no allegations that any of the evidence was unknown to the trial court, Defendant or his attorney and could not have been discovered through an exercise of due diligence before April 25, 2004. *Id.* In fact, regarding the assertions in the motion, Defendant argued that post conviction counsel was ineffective for failing to present the claims earlier, at least alternative. However, as this Court noted in *Sireci v. State*, 773 So. 2d 34, 40 n.11 (Fla. 2000), allegations of ineffective assistance of counsel are "logically inconsistent" with allegations of newly discovered evidence. Given the lack of allegations regarding why the claims were properly brought in an untimely and successive motion for post conviction relief, the claim was properly denied.

Instead of alleging that the evidence was unknown and

unknowable through an exercise of due diligence, Defendant admitted that Mr. Ali had been interviewed by the defense prior to trial and had been listed as a witness in pretrial discovery. (PCR3. 75-76) In what Defendant appears to believe were allegations of due diligence, Defendant then asserted:

> As to Anwar Ali, [Defendant], a death row inmate, was not provided with the resources to locate Mr. Ali until recently. He was not located and interviewed until during the month of April, 2005. [Defendant], a death row inmate, was deprived of resources to interview the other witnesses as well after public records disclosures were reviewed and significant new favorable information was learned therein. The attorney provided in 1998, Louis Casuso refused to obtain the public records until after the 3.850 was filed in 2000. Then he did not review the records. In this action, he was not acting as [Defendant's] counsel, but as a contractor with the State serving the State's interest. Since Mr. Casuso did not review the public records and did not provide them to [Defendant], no investigation could be conducted on [Defendant's] behalf into the favorable information appearing therein. After [Defendant] obtained the services of new counsel, the State blocked funding for counsel in state court proceedings and initially was successful in opposing funding for investigative services in federal proceedings. [Defendant's] counsel learned on March 24, 2005, that funding for investigative services had been approved, and immediately commenced the investigation that led to the interview with the witnesses identified herein.

(PCR3. 91) However, these allegations do not show that the evidence was newly discovered.

As seen above, the "allegations" address only when Mr. Ali was located and interviewed. In suggesting that these allegations show that the claims were based on newly discovered

evidence, Defendant ignores that this Court has defined newly discovered evidence as requiring a showing that the "asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)(quoting *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)). Applying this definition, this Court has affirmed the denial of a claim, finding that the evidence was not newly discovered, when the defendant had information from which he could have located a witness years earlier even though the defense claimed not to have discovered the witness until recently. *Swafford v. State*, 828 So. 2d 966, 974-77 (Fla. 2002); *see also Wright v. State*, 857 So. 2d 861, 868-69 (Fla. 2003)(requiring a showing that new evidence was not known and could not have been known to be considered in successive motion). Since Defendant did not assert when the facts underlying his claims could have been discovered through an exercise of due diligence, the lower court properly found that the claim was not sufficiently alleged in an untimely and successive motion for post conviction relief. It should be affirmed.

While Defendant seems to believe that alleging that his

prior post conviction counsel failed to investigate and present these claims properly satisfies the showing of diligence, it does not. As previously noted, asserting ineffective assistance of counsel in failing to present a claim is "logically inconsistent" with claiming the evidence is newly discovered. *Sireci*, 773 So. 2d at 40 n.11. As such, by asserting that prior counsel was ineffective in failing to present the claim in the initial motion for post conviction relief, Defendant refutes the assertion that the claim is based on new evidence or new law. As the claim was not based on either, it was properly denied.

Moreover, allegations of ineffective assistance of post conviction counsel do not provide a basis for allowing the presentation of the claim in an untimely and successive motion for post conviction relief. In *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002), this Court held even additional factual support and allegations could not be added to an initial motion for post conviction relief after a *Huff* hearing unless the allegations met the requirements for a successive motion for post conviction. As noted earlier, the grounds for a successive motion for post conviction relief are limited to newly discovered evidence and fundamental changes of constitutional law that are retroactive. Fla. R. Crim. P. 3.851(d). Ineffective assistance of prior post conviction counsel is not a

ground. Moreover, in *Brown v. State*, 894 So. 2d 137, 154 & n.11 (Fla. 2004), this Court rejected the argument that ineffective assistance of post conviction counsel provided any basis for relief, either substantively or procedurally. *See also Kokal v. State*, 901 So. 2d 766, 777 (Fla. 2005); *Spencer v. State*, 842 So. 2d 54, 72 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 215 (Fla. 2002); *Carroll v. State*, 815 So. 2d 601, 609 n.8 (Fla. 2002); *Foster v. State*, 810 So. 2d 910, 917 (Fla. 2002); *King v. State*, 808 So. 2d 1237, 1245 (Fla. 2002); *Waterhouse v. State*, 792 So. 2d 1176, 1193 (Fla. 2001); *State v. Riechmann*, 777 So. 2d 342, 346 n.22 (Fla. 2000); *Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999); *Downs v. State*, 740 So. 2d 506, 514 n.11 (Fla. 1999); *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 408 (Fla. 1998); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). These holdings are in accordance with United States Supreme Court precedent. *Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991); *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). In fact, in *Coleman*, the Court rejected the argument that post conviction counsel ceased to be an agent of the defendant and became an agent of the state when he was ineffective, an assertion that Defendant made in his motion. *Coleman*, 501 U.S. at 753. As such, the lower court properly determined that the assertions of

ineffective assistance of post conviction counsel were irrelevant to the issue of whether the evidence was newly discovered or based on a fundamental, retroactive change of constitutional law. It properly determined that the motion did not sufficiently allege any basis for the filing of an untimely and successive motion for post conviction relief and denied the motion as such. It should be affirmed.

Even if Defendant had sufficiently alleged that the evidence was newly discovered, the lower court would still have properly denied the claim summarily. The record conclusively refutes the allegations. In *Diaz v. State*, 945 So. 2d 1136, 1147 (Fla. 2006), this Court determined that a claim of newly discovered evidence was properly found not to be based on newly discovered evidence, where the same claim had been asserted in a prior post conviction proceeding filed years earlier.

Similarly here, Defendant has been raising the claims that he asserts are based on newly discovered evidence for years. In his first motion for post conviction relief, filed on January 31, 2000, Defendant asserted that counsel was ineffective for failing to call Ms. Brandt to testify. (PCR. 30-31) In his first state habeas petition filed on December 11, 2002, Defendant raised issues regarding the failure to call Ms. Brandt and Mr. Ali, the failure to seek to challenge the fingerprint

evidence and the failure to attempt to impeach Ms. Baron. In his federal habeas petition filed on January 20, 2004, Defendant raised his *Brady* claims, his claims of ineffective assistance of counsel and his claim that the State knowing presented false testimony. (PCR3-SR. 119-53) He also raised the claims regarding the investigator for the paramour of his other victim in a motion for post conviction relief in the lower court regarding his other case filed on June 18, 2004. (PCR3-SR. 182-84) Since Defendant has actually been raising these claims for more than a year, the record refutes that the claims are based on newly discovered evidence. The lower court properly rejected the claim under *Diaz* and should be affirmed.

The record also refutes Defendant's claim about the lack of funding. The record does not reflect a single motion for costs that was denied. In fact, the record does not reflect that a single motion for costs was even made in state court[7] between the time that Defendant's present counsel was appointed and June 16, 2006, after the motion had been denied and was on appeal. While Defendant did not receive any rulings on his motions for attorney's fees, only one such motion was filed before the motion was denied and in an attachment to the second motion for fees filed after the successive motion for post conviction

[7] The federal court granted a motion for investigative costs on April 28, 2004. (PCR3. 427)

relief was denied, Defendant admitted that he chose never to set that motion for hearing. (PCR3. 479) Since the record reflects that any lack of funding was due to Defendant lack of diligence in making motions for costs and setting motions for attorney's fees for hearing, the allegations regarding lack of funding were properly rejected. The denial of the motion as barred should be affirmed.

Defendant also appears to contend that *Banks v. Dretke*, 540 U.S. 668 (2004), changed the law such that *Brady* claims can never been found to be procedurally barred. However, this too is untrue. *Banks* did not purport to recognize a new fundamental constitutional right. Instead, the Court claimed it was merely applying preexisting precedent regarding *Brady* claims and the determination under federal law of the existence of cause to excuse a procedural default in a federal habeas proceeding, an issue that the United States Supreme Court has characterized as an issue of federal law that does not have to depend on a constitutional claim. *Murray v. Carrier*, 477 U.S. 478, 489 (1986). Moreover, Defendant has not shown that *Banks* has been held to be retroactive. As such, *Banks* does not meet the requirements of the second condition for filing a successive motion.

Moreover, Defendant is incorrect regarding the United States Supreme Court's holding in *Banks* about what constitutes cause to overcome a procedural default. In *Banks*, the Court based its finding that the defendant had shown cause on three factors:

> "(a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the [State] confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government."

Banks, 540 U.S. at 692-93 (quoting *Strickler v. Greene*, 527 U.S. 263, 289 (1999)). The Court then stated that it had not decided "whether any one or two of these factors would to sufficient to constitute cause" and was not doing so in *Banks*. *Id.* at 693 n.13 (quoting *Strickler*, 527 U.S. at 289). The language that Defendant relies upon is contained in a discussion of Texas' argument regarding cause after the Court had already found cause as discussed above. *Banks*, 540 U.S. at 696. Given that Defendant's argument is basically that he only needs to satisfy part (a) of the reasons the Court found cause and the Court directly stated that it was not deciding that question, Defendant's reliance on *Banks* is misplaced.

This is particularly true when one considers the fact that, in *Strickler*, the case the Court quoted regarding the issue of

cause in *Banks*, the Court expressly noted "[w]e do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." *Strickler*, 527 U.S. at 288 n.33. Moreover, this Court has consistent found that a *Brady* claim is meritless when the defense was aware of the information before trial. *Davis v. State*, 928 So. 2d 1089, 1116 (Fla. 2005); *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)("Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.")(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). This Court has also determined that a *Brady* claim is properly found to be barred, when the information was available in time to be raised in a prior proceeding. *Smith v. State*, 931 So. 2d 790, 805-06 (Fla. 2006); *Davis v. State*, 928 So. 2d 1089, 1113-14 (Fla. 2005).

Here, the record reflects that Defendant did know of the alleged *Brady* material regarding Mr. Ali prior to trial. Mr. Ali was listed as a witness in the State's initial discovery

response. (R. 32) Det. Ojeda's supplementary report dated October 6, 1992 was also disclosed to the defense during pretrial discovery. (R. 36) This report disclosed that a call had been received by the cab company from a person named Jose, that a cab had been dispatched and that no one named Jose was picked up in connection with that call. (PCR3. 109) This information is in accordance with the allegations in Defendant's motion that Mr. Ali was dispatched to the murder scene to pick up a fare named Jose but found no such person. (PCR3. 74-75) Finally, Defendant acknowledged in his motion that the defense interviewed Mr. Ali pretrial. (PCR3. 76) Since the record does reflect that Defendant had the alleged *Brady* material pretrial, the lower court properly rejected Defendant's claim. *Davis*, 928 So. 2d at 1116; *Maharaj*, 778 So. 2d at 954.

Moreover, the lower court properly determined that the allegedly suppressed information would not support a *Brady* violation even if it had been suppressed. According to the motion, Mr. Ali's testimony would be that after he responded to the dispatch to the murder scene and did not find anyone, Mr. Ali was subsequently flagged down on 6th Avenue between 135th and 151th Streets by someone who stated that he had been mugged and who was bleeding from the face. (PCR3. 74-75) The mere fact that someone was picked up by a cab in a 16 block area of

Miami at some point on the night of a murder does not in anyway even connect that person to the crime. This is particularly true when one considers that Ms. Taranco testified that the police were not called for "a good fifteen minutes" after the door to Ms. Minas' apartment had been slammed in her face and the first officer did not arrive until a few minutes later. (T. 635-36) Defendant did not ask to use Ms. Taranco's phone to call the cab until the police were arriving. (T. 625) Some period elapsed while Mr. Ali was dispatched in response to Defendant's call, arrived at the apartment complex and waited in vain for Defendant. It was only after Mr. Ali left the apartment complex that he was later flagged down in the 16 block area by the bleeding person. As such, for a jury to infer that this person was involved in the crime, they would have to believe that despite having escape the crime scene undetected, this person did not leave the area or attend to his injury for more than 30 minutes and instead chose to call attention to himself by hailing a cab. Under these circumstances, the lower properly determined that the allegedly suppressed testimony of Mr. Ali was not exculpatory or material. *See Maharaj v. State*, 778 So. 2d 944, 953-54 (Fla. 2000); *Way v. State*, 760 So. 2d 903, 908-15 (Fla. 2000). The lower court should be affirmed.

Defendant next complains that the lower court rejected his

allegations regarding Ms. Brandt as procedurally barred. However, the lower court's rejection of the claim was proper. Defendant did not attempt to assert that the facts supporting this claim could not have been discovered through an exercise of due diligence. Moreover, any attempt would have been futile. Ms. Brandt was deposed prior to trial. (PCR. 74-90) In fact, in his first motion for post conviction relief, Defendant asserted that his trial counsel was ineffective for failing to call Ms. Brandt as a witness. (PCR. 30-31) Since the grounds for this claim were available at the time of the first motion for post conviction relief, the lower court properly determined that the claim was barred. *Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994). It should be affirmed.

Moreover, while Defendant suggests that the lower court did not consider the merits of his claim, this is simply untrue. After pointing out that the claim had been available earlier, the lower court expressly adopted its prior ruling on this claim:

> In rejecting Defendant's claim, the trial court stated that the decision not to call Ms. Brandt was a tactical decision, and therefore Defendant's trial attorney was not ineffective. *See*, Judge Leslie Rothenberg's Order of June 8, 2000. The trial court reasoned that:
>
> > Ms. Brandt's testimony not only corroborates that of the witnesses who did testify but also would have supplied additional harmful testimony against the Defendant. Ms.

> Brandt's testimony would have filled in the "missing link" or "gap" between Mr. Merriweather's seeing the Defendant drop down from the balcony to the ground and Ms. Taranco and Ms. Ponce's conversation with the Defendant later on the second floor. Had Mr. Brandt testified, we would have known that after killing Ms. Minus, the Defendant dropped off the balcony, to an elevator to the third floor, went into his apartment where he could have cleaned himself off, change clothes, hidden the murder weapon, composed himself and then presented himself to the ladies to find out what they may have learned about his deeds before making a hasty exit.

(PCR3. 437-38) Moreover, the lower court had already addressed the merits of this claim when it was raised in Defendant's first motion for post conviction relief:

> Ms. Anna Brandt was listed by the State as a witness who may have relevant information about the case. In preparation for trial, the Defendant's trial attorney deposed Ms. Brandt and listed her as a potential witness who may be called to testify on behalf of the Defendant (see deposition taken by the Defendant on March 23, 1993, attached). Ms. Brandt was, however, not called to testify by either the State or the Defense. At the Spencer hearing, the Defendant expressed his objection to the fact that Ms. Brandt had not been called by his lawyers, wherein he claimed that based upon Ms. Brandt's deposition, if she had been called she would have testified that she had seen the Defendant stepping out of an elevator on the third floor at the time the actual murderer was in Ms. Minus' second floor apartment, closing Ms. Minus' door "in the faces of Victoria Ponce, Virginia Toranco and Mary Griminger" (T., pg 1124). Therefore, the Defendant claimed Ms. Brandt would have provided an alibi for him at the time of the murder.
>
> During the Spencer hearing, the Defendant also stated that his attorneys and he discussed whether or not to call Ms. Brandt as a witness and that his

attorneys “refused to call her to the stand for reasons of their own, regardless of what I wanted” (T., pg 1124)

It is clear from this record that the Defendant’s trial lawyers were aware of Anna Brandt, had deposed her, were aware of what she would testify to if called by the Defendant, considered the worth of her testimony in light of all the evidence and then made a calculated tactical decision not to call her.

A review of the deposition and the trail testimony reflect that contrary to the Defendant’s claims, Ms. Brandt’s testimony would not have supported an alibi defense, but instead would have corroborated the testimony of the State’s witnesses.

Ms. Brandt testified that she lived on the third floor. Her apartment was on the north side of that floor and the Defendant’s was on the south side of the same floor. On the day of Ms. Minus’ murder, she testified that she heard Mary Griminger come upstairs and then heard Virginia Taranco call up to Mary Griminger (deposition, pg. 5, lines 5-7). This testimony is consistent with Virginia Taranco’s testimony who testified that when they (Ms. Taranco and Ms. Griminger) returned from shopping, they proceeded to Ms. Taranco’s apartment on the second floor, talked for a few minutes and then Ms. Griminger slowly made her way up the stairs to her apartment on the third floor. Moments later, Ms. Toranco heard a loud thud and thought Ms. Griminger had fallen and called out to her. It is this call which Ms. Brandt heard and is consistent with the trial testimony.

Ms. Brandt testified that she then heard voices which she identified as Virgnia, Mary and Lucrecia’s voices (Ms. Toranco, Ms. Griminger and Ms. Ponce, deposition, pg. 12, lines 4-22, attached). This, too, is consistent with Ms. Taranco and Ms. Ponce’s testimony at trial wherein they stated that after hearing the first thud which they identified as coming from Ms. Minus’ apartment, they each left their own apartments, went into the hallway and talked about the noises they heard. When they heard the second noise and Ms. Minus calling out for help, they tried to get into Ms. Minus’ apartment, had the door slammed and locked in their faces, tried to call Ms. Minus on a cellular phone, summoned help and kept calling out to Ms. Minus. These clearly are the voices Ms. Brandt

heard, so again Ms. Brandt's testimony corroborates that of the witnesses called by the State at trial.

Ms. Brandt testified it was after hearing the voices that she saw the Defendant coming off the elevator on the third floor (deposition, pg 12, lines 4-22). This testimony, if offered, would have corroborated the trial testimony as the murderer was initially in Ms. Minus' apartment and was heard by Ms. Taranco and Ms. Ponce in the act of killing Ms. Minus. They tried to get into Ms. Minus' apartment, whose door was ajar, but were unable to because the murderer closed the door in their faces and locked it. The murderer then dropped off the second floor balcony where he was seen by Mr. Merriwether, who identified him as the Defendant, then took the elevator up to the third floor, where the Defendant, who lived on the third floor, was seen by Ms. Brandt.

Ms. Brandt further testified that the Defendant stayed in his apartment for "a little while" and then came out again, looked over the balcony, and then pressed the elevator button to go down. While she did not see the Defendant get on the elevator, she assumed he took it down (deposition, pg. 5, line 12-21, attached). This, too, is consistent with the trial testimony wherein Ms. Taranco and Ms. Ponce testified that while they were waiting for the police to arrive the Defendant came to the second floor, asked them what was going on and called a cab from Ms. Taranco's apartment.

Ms. Brandt's testimony, if she had been called to testify, would have totally corroborated the trial testimony. The Defendant was seen by Ms. Taranco and Ms. Griminger in the parking lot when they returned from shopping. Ms. Taranco and Ms. Griminger went to the second floor and into Ms. Taranco's apartment where they remained for five or six minutes talking. Ms. Griminger then went up to her apartment on the third floor. During this time, the Defendant had gained entrance to Ms. Minus' apartment on the second floor, was confronted by her and began attacking her. Ms. Taranco heard Ms. Minus fall to the floor and then cry out. She then heard a second thud and went into the hallway where she met Ms. Ponce who had heard the second thud. They talked, called out to Ms. Minus and tried to get into Ms. Minus' apartment to find out if Ms. Minus was okay. The Defendant slammed the door in

> their faces, locked the door and fled onto Ms. Minus' balcony and then onto the next apartment's balcony. When he dropped from the balcony down to the ground, he was seen by Mr. Merriwether. The Defendant quickly took the elevator up to his apartment on the third floor so as not to be seen on the stairway by the ladies outside Ms. Minus' apartment on the second floor. When he got off the elevator, he was seen by Ms. Brandt, who had heard the commotion on the second floor. After a few minutes, the Defendant left his apartment, went down to the second floor, asked the ladies what was going on, heard they had called the police and called a cab from Ms. Taranco's apartment (even though he could have called one from his own apartment moments before) and hastily left the area.
>
> Ms. Brandt's testimony not only corroborates that of the witnesses who testified but also would have supplied additional harmful testimony against the Defendant. Ms. Brandt's testimony would have filled in the "missing link" or "gap" between Mr. Merriwether's seeing the Defendant drop down from the balcony and Ms. Taranco and Ms. Ponce's conversation with the Defendant later on the second floor. Had Ms. Brandt testified, we would have known that after killing Ms. Minus, the Defendant dropped off the balcony, took the elevator to the third floor, went into his apartment where he could have cleaned himself off, changed his clothes, hidden the murder weapon, composed himself and then presented himself to the ladies to find out what they may have learned about his deed before making his hasty exit.
>
> The Court, therefore, finds beyond all doubt that the Defendant's lawyers' decision not to call Ms. Brandt was a tactical decision demonstrating a careful review of Ms. Brandt's deposition, a careful consideration of the trial testimony and a wise decision not to call her as a witness. Ms. Brandt's testimony not only did not provide an alibi for the Defendant, it would have added several nails to the proverbial coffin.

(PCR. 96-100) As such, Defendant has had not one but two considerations of the lack of merit of this claim by the lower court. His claim to the contrary presents no basis for

reversal.

Moreover, the lower court's findings regarding the lack of merit of this claim are amply supported by the record. Defendant did inform the trial court at the *Spencer* hearing that he and his attorneys had discussed the issue of calling Ms. Brandt as a witness and the attorneys had decided against doing so. (T. 1123-24) Moreover, Ms. Brandt did testify during deposition that Ms. Griminger had come to the third floor been called by Ms. Taranco, left to see Ms. Taracano and while Ms. Griminger was gone the second time, Ms. Brandt saw Defendant exit the elevator on the third floor, go to his apartment briefly and then leave again. (PCR. 78) Ms. Brandt was unable to provide a time when this sequence of events occurred. *Id.* Ms. Brandt stated that she heard voices coming from the second floor before Defendant came up to the third floor on the elevator. (PCR. 81-82, 85) As the findings are supported by the record, they should be affirmed.

While Defendant complains that these findings were made after a review of the record instead of after an evidentiary hearing, this does affect the validity of the findings. The United States Supreme Court has held that findings made based on a review of a record are just as valid as findings made after an evidentiary hearing. *Sumner v. Mata*, 449 U.S. 539, 545-47

(1981). Moreover, this Court has permitted trial judges to deny motions for post conviction relief, where the claims are refuted by the record. Fla. R. Crim. P. 3.850(d); Fla. R. Crim. P. 3.851(f)(5)(B). To make that determination, a trial court must review the record and make findings regarding its content. As that is what occurred here, there was no error in finding the claim meritless in light of the record, as was done here. The lower court should be affirmed.

Defendant next complains that the lower court did not address his assertions that it was common knowledge in the apartment complex that Ms. Minas had been stabbed. However, Defendant ignores that his claim was based on statements from Ms. Brandt's deposition and Ms. Taranco. (PCR3. 79-80) The lower court found that claims regarding these two individuals were barred because they were available earlier. (PCR3. 437, 438) In fact, the record supports this finding. The statement from Ms. Brandt on which Defendant relies was from her pretrial deposition. (PCR. 83) Moreover, Ms. Taranco was also available since before trial. As such, the lower court properly determined this claim was not based on newly discovered evidence and was barred. *Swafford*, 828 So. 2d at 974-77; *see also Wright*, 857 So. 2d at 868-69. It should be affirmed.

Moreover, the record also refutes this claim. Ms. Taranco

testified at trial that she was unable to see what kind of injuries Ms. Minas had on the evening of the murder.[8] (T. 627) She stated that she was unaware that Ms. Minas had been stabbed until she gave a sworn statement to the police on October 7, 1992. (T. 627, 645-46) Moreover, Ms. Brandt also does not support Defendant's position. Ms. Brandt does not say when she learned that Ms. Minus was stabbed. (PCR. 83) All she says is that after everything was over and Defendant had left, Ms. Griminger told Ms. Brandt that Ms. Minus had been murdered and that at some point she stated that Ms. Minus had been stabbed. As such, this claim is without merit and was properly denied.

Defendant next asserts that the lower court erred in rejecting his claim that his counsel was ineffective for failing to present evidence that Defendant had previously been in Ms. Minas's apartment as an explanation of the presence of his fingerprint there. However, the claim was properly denied. First, as the claim involves the actions of Defendant personally, it is clear that he would have known that he had been in Ms. Minas' apartment at the time of trial. As such, the evidence could not be considered to be newly discovered. Moreover, while Defendant complains that he could present

[8] [8]Ms. Taracano also testified at trial that Petitioner had left the building before the police opened Ms. Minas's door and she had the opportunity to see anything. (T. 626-27)

testimony to demonstrate whether his counsel asked him if he had ever been in Ms. Minas' apartment or investigated the issue to show that the evidence was newly discovered, Defendant ignores that the newly discovered evidence requires that the evidence be unknown by party as well as his attorney and the trial court to be considered newly discovered. *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)(to be considered newly discovered evidence, the "asserted facts 'must have been unknown by the trial court, **by the party**, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'")(emphasis added). As such, whether Defendant's counsel asked him or not, Defendant's personal knowledge of his actions would preclude a finding of newly discovered evidence. Thus, the lower court properly found that this claim was procedurally barred and should be affirmed.

Moreover, the lower court properly determined that Defendant's claim was meritless. While Defendant complains about the manner in which the lower court expressed itself, the lower court's determination that Defendant could not show prejudice was proper. As the lower court noted, Hurricane Andrew occurred on August 24, 1992, and this crime did not occur until October 2, 1992, at least five weeks later. From the photograph of the door and the print, Mr. McQuay was able to

identify the position of the hand when the finger print was placed on the door. (T. 677) Looking at the latent print, it appears to be a full print of the bottom surface of the right pinkie through the first joint of the finger and not a partial print. (R. 378-79) The fingerprint expert explained at trial that fingerprint evidence degrades over time. (T. 680-81) No identifiable fingerprints of any other individual except Ms. Minas were found in Ms. Minas's apartment. Given the fingerprints location and clarity, Mr. Merriweather's testimony and Defendant's statement to Ms. Baron, there is no reasonable probability that Defendant would not have been convicted had counsel attempted show that Defendant had been in Ms. Minas' apartment more than a month earlier. *Strickland v. Washington*, 466 U.S. 668 (1984). The claim was properly denied.

Defendant next asserts that the lower court erred in denying his claim that trial counsel was ineffective for failing to call Off. Cardona. However, the claim was properly denied because it is procedurally barred and without merit.

In his motion, Defendant admitted that his claim was based on Off. Cardona's pretrial deposition and was a claim of ineffective assistance of counsel. As the claim is based on information that was available before trial, it was not based on newly discovered evidence. *Swafford*, 828 So. 2d at 974-77; *see*

also Wright, 857 So. 2d at 868-69. Moreover, as this Court has stated, claims of ineffective assistance of counsel are logically inconsistent with being newly discovered. *Sireci*, 773 So. 2d at 40 n.11. Thus, the claim was barred and properly denied.

Moreover, the claim also had no merit. While Defendant suggests that he did not need to show that the van was present when Mr. Merriweather saw Defendant drop off the balcony to show prejudice, Defendant ignores the nature of his claim. Defendant claims that the presence of the van would impeach Mr. Merriweather's testimony that he did not see the van. However, the methods of impeachment are limited in Florida and it appears that the only type of impeachment that Defendant's claim would satisfy is that a material fact was not as testified to by Mr. Merriweather. *See* §§90.608-90.610, Fla. Stat. However, if the van was not in the parking lot when Mr. Merriweather was observing the parking lot and only arrived later, evidence of the van's presence at a later time would not contradict Mr. Merriweather's testimony and be admissible to impeach him.[9] *See Cantero v. State*, 612 So. 2d 634, 635 (Fla. 2d DCA 1993)(evidence that defendant could not have been in mall on one

[9] Moreover, it does not appear that the presence of the van at any time was a material fact, such that extrinsic evidence could have been admitted as impeachment. *See Foster v. State*, 869 So. 2d 743 (Fla. 2d DCA 2004).

particular day not admissible to contradict testimony that defendant had been in mall some time during week). Because counsel cannot be deemed ineffective for failing to present inadmissible evidence, the lower court properly determined that the claim was meritless because Defendant did not establish Off. Cardona's testimony would have been admissible. *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004). The claim was properly denied.

Moreover, counsel did actually establish that the van was present at the time the police arrived. Both Off. Sidd and Off. Korland testified that the van was there. (T. 690-91, 845) In fact, Defendant attempted to impeach Mr. Merriweather with the assertion that Mr. Merriweather had previously stated that the person had dropped off the balcony onto a van, and called Off. Korland in an attempt to show that such a statement had been made. (T. 730-32, 846-58) As such, counsel cannot be deemed ineffective for failing to present cumulative evidence. *State v. Riechmann*, 777 So. 2d 342, 356 (Fla. 2000); *see also Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990). The claim was properly denied.

While Defendant further claims that Off. Cardona could have testified that Mr. Merriweather did not speak to her and that

she did not recognize Defendant as a burglary as impeachment, the claim was also properly rejected as meritless. Mr. Merriweather admitted that he saw a uniformed officer walk past him but that the only police official to whom he spoke was a detective. (T. 723, 729-30) As Mr. Merriweather admitted he did not speak to any uniform officer, Off. Cardona's testimony that she, a uniformed officer, did not speak to him would not have impeached his testimony. *See Morton v. State*, 689 So. 2d 259, 262 (Fla. 1997)(to be admissible as impeachment, statement must be inconsistent); *Alexander v. Bird Road Ranch & Stables*, 599 So. 2d 229 (Fla. 3d DCA 1992)(same). Moreover, none of the other officers mentioned Defendant being known to Off. Cardona as a burglar or otherwise. (T. 493-568, 682-94, 738-72, 835-68, 872-74) The only testimony concerning Off. Cardona's statements to the other officers about Defendant was that she had seen him at the apartment complex on the night of the murder and that he matched Mr. Merriwether's description of the person who dropped off the balcony. (T. 765) Thus, evidence that Off. Cardona did not tell other officers that he was a known burglar would not have impeached their testimony.[10] *See Morton v. State*, 689 So.

[10] Moreover, since there was no testimony presented that Off. Cardona knew Defendant was a burglar, there could be no knowing presentation of false evidence on the issue. *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991)(requiring showing that false testimony was presented to jury to support a *Giglio* claim); *see*

2d 259, 262 (Fla. 1997)(to be admissible as impeachment, statement must be inconsistent); *Alexander v. Bird Road Ranch & Stables*, 599 So. 2d 229 (Fla. 3d DCA 1992)(same). As such, counsel cannot be deemed ineffective for failing to present this inadmissible and cumulative evidence through Off. Cardona. *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004); *State v. Riechmann*, 777 So. 2d 342, 356 (Fla. 2000); *see also Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990). The claim was properly denied.

Further, while Defendant suggests that Off. Cardona could have been called to testify that her description of the clothes Defendant was wearing when she saw him to show that it was inconsistent with the clothing descriptions given by the other witnesses, this issue is not properly before this Court. In the lower court, Defendant did not mention Off. Cardona's description of the clothing she saw Defendant wearing. (PCR3. 80-81) Instead, Defendant claimed that counsel should have called Off. Cardona to testify that she interviewed the occupants of the van, learned that they had not observed anyone[11]

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also United States v. Ruiz, 536 U.S. 622, 629 (2002)(noting that disclosure of impeachment material relates to the fairness of the trial).

[11] Testimony concerning the content of any interview with the van's occupants would have been inadmissible as hearsay and

and did not obtain their names or license plate number, knew Defendant from a prior domestic violence call but not as a burglar and did not speak to Mr. Merriweather. *Id.* The claim that Off. Cardona should have been called to provide a description of the clothes that she saw Defendant wearing is being raised for the first time on appeal. However, this Court has held that it is improper to present grounds for post conviction relief for the first time on appeal and that attempting to do so results in the claims being procedurally barred. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). As such, this assertion provides no basis for reversal.

Defendant next complains that the lower court rejected his claims regarding the investigator hired by the paramour of his other murder victim. However, as the lower court found, this claim is not based on newly discovered evidence. The record reflects that Defendant has been aware of the investigator since before he even committed this crime, as he was interviewed by the investigator on March 11, 1991 and July 8, 1991. (PCR3. 261, 264) Moreover, the record reflects that as of July 11, 1996, Defendant was aware that the investigator had prepared reports that had not been disclosed. (PCR3. 243-65) The record also

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would not support an ineffective assistance claim. *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004).

reflects that Defendant was aware that the investigator had been in contact with the investigators in this case and that Jeffrey Allen who had previously provided information on other defendants had provided information that Defendant had confessed to both murder since at least December 13, 1995. (PCR3. 124-144) The record further reflects that Defendant was aware that Jeffrey Allen possessed information about this case since April 29, 1993. (R. 78-79) Since Defendant had been aware of all of this information for years, the lower court properly determined that this claim was procedurally barred. *Swafford*, 828 So. 2d at 974-77; *see also Wright*, 857 So. 2d at 868-69. While Defendant asserts that his knowledge of this information does not negate a *Brady* claim, this Court has held to the contrary. *Maharaj*, 778 So. 2d at 954-55. Thus, the lower court properly denied this claim.

Even if the claim was not barred, Defendant would still be entitled to no relief. Defendant's assertion is that this information could have been used to impeachment the professionalism of the investigation. However, this Court has held that it is improper for a defendant to attempt to impeach the professionalism of investigators. *Rose v. State*, 472 So. 2d 1155, 1157-58 (Fla. 1985). Since it does not appear that this information would have been admissible, it was not material.

See Wood v. Bartholomew, 516 U.S. 1, 5-6 (1995). Moreover, attempting to present this evidence at trial would have opened the door to information about Defendant's commission of the Debas murder.[12] Given the negative information that would have been presented, it cannot be said that but for the State's alleged failure to disclose this information, there is a reasonable probability that Defendant would not have been convicted. *See Johnson v. State*, 921 So. 2d 490, 505-06 (Fla. 2005). The claim was properly denied.

While Defendant has asserted that the alleged suppression of this information also constitutes a violation of *Giglio v. United States*, 405 U.S. 150 (1972), this is not true. None of the information that Defendant suggests was false was provided to the jury. Instead, Defendant suggests that the State mislead him and a trial judge regarding a cost order. However, a defendant must establish that the State knowingly presented false evidence to a jury to demonstrate a *Giglio* claim. *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991)(requiring showing that false testimony was presented to jury to support a *Giglio*

[12] Defendant pled guilty to second degree murder in connection with the Debas murder and all post conviction relief has been denied. *Jimenez v. Sec'y for the Dept. of Corrections*, Case No. 06-12090, Order Denying Certificate of Appealability (11th Cir. Aug. 7, 2006); *Jimenez v. Crosby*, Case No. 05-20572, Order Affirming and Adopting Magistrate's Report and Recommendation (S.D. Fla. Mar. 1, 2006); *Jimenez v. State*, 888 So. 2d 643 (Fla. 3d DCA 2004).

claim); *see also United States v. Ruiz*, 536 U.S. 622, 629 (2002)(noting that disclosure of impeachment material relates to the fairness of the trial). As such, the claim was properly denied.[13]

Defendant next complains that the lower court rejected the portion of his claim that counsel was ineffective for failing to present evidence that Ms. Baron made a note of her conversation with Defendant on the block for a different date on her desk calendar. Defendant offered no explanation of why this claim could not have been pursued earlier. In fact, Ms. Baron had disclosed in her pretrial deposition that the notation on her calendar was not under the date on which the conversation occurred. (R. 213) Again, claims of ineffective assistance of counsel are logically inconsistent with being newly discovered. *Sireci*, 773 So. 2d at 40 n.11. Under these circumstances, the claim was properly denied as procedurally barred. *See Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994).

Even if the claim had not been procedurally barred, it would still have been properly denied as nonmeritorious. Ms.

[13] The lower court was also correct in rejecting the claim concerning the withdrawal of the public defender's office. The law is well settled that while defendants have a right to counsel, they do not have a right to a particular attorney. *Morris v. Slappy*, 461 U.S. 1 (1983); *Johnson v. State*, 921 So. 2d 490, 502 (Fla. 2005); *Koon v. State*, 513 So. 2d 1253 (Fla. 1987).

Baron explained during her deposition that she had simply written the note on her desk calendar where her hand fell on the calendar as she was speaking on the phone. (R. 212-13) However, she had recorded the exact date and time of her conversation with Defendant in her case notes. (R. 211) Given this objective reasonable explanation for the placement of the note on the desk calendar, the lower court properly determined that attempting to impeach Ms. Baron with the desk calendar would not create a reasonable probability of a different result. *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, the claim was properly denied.

While Defendant insists that the lower court should not have considered whether the alleged deficiency prejudiced Defendant because Ms. Baron's "explanation should have been evaluated by a jury," this is untrue. In *Strickland*, the Court stressed that the determination of prejudice should be based on the assumption of a decision maker that is conscientiously following the law and acting reasonably without consideration of the "idiosyncrasies of the particular decisionmaker." 466 U.S. at 694-95. Given this emphasis on a reasonable factfinder, it was entirely proper for the lower court to evaluate the likely affect on such a reasonable group of people of hearing the explanation. Moreover, given the completely reasonable

explanation of the placement of the note on the desk calendar, accompanied by the case notes that documented the exact time and date of the call, the lower court properly found that Defendant could not establish prejudice. The denial of the claim should be affirmed.

Defendant also faults the lower court for rejecting his assertions with regard to challenging the fingerprint evidence. However, the lower court properly rejected this claim. Defendant's entire allegation regarding this issue was:

> Additionally, new evidence reflected in the attachments is now available that demonstrates the scientific unreliability of fingerprint comparison. *See e.g. State v. Behn*, 2005 N.J. super. LEXIS 73 (N.J. Super. March 7, 2005)(new trial granted in light of new evidence demonstrating the unreliability of composition bullet-lead analysis). As a result, this new evidence further undermines confidence in the outcome of the proceedings against [Defendant].

(PCR3. 91-92) As can be seen from the foregoing, the allegations were merely conclusory and made a nonspecific reference to the attachments. However, this Court has held such conclusory claims that attempt to adopt other arguments by reference are insufficient to support a claim for relief. *Farina v. State*, 937 So. 2d 612, 617-18 (Fla. 2006). As such, the lower court properly rejected this claim.

Moreover, the only information attached to the motion was a copy of an order from a federal district court in Pennsylvania

regarding the admissibility of fingerprints under the federal standard for admission of scientific evidence that found opinion testimony about fingerprint identification to be inadmissible from January 2002. (PCR3. 362-409) As the date on the order suggests, any information about this order could have and should have been presented more than a year earlier. As such, the lower court properly determined the claim was barred. *Swafford*, 828 So. 2d at 974-77; *see also Wright*, 857 So. 2d at 868-69. This is particularly true as this claim was raised as an ineffective assistance of counsel claim, a claim that is logically inconsistent with being newly discovered. *Sireci*, 773 So. 2d at 40 n.11. It should be affirmed.

Further, Defendant offered no explanation below, and still offers no explanation now, of how the order in question, which was subsequently withdrawn by the court that issued it,[14] could have been used. The order concerned a hearing on the admissibility of fingerprint evidence under the federal standard for the admissibility of such evidence. However, this Court has steadfastly refused to adopt this standard and rejected claims based on federal cases under this standard. *Ibar v. State*, 938 So. 2d 451, 467-68 (Fla. 2006)(rejecting similar claim directed at shoe impression evidence); *Spann v. State*, 857 So. 2d 845,

[14] *United States v. Llera Plaza*, 188 F. Supp. 549 (E.D. Pa. 2002).

851-53 (Fla. 2003)(rejecting similar claim regarding handwriting analysis). Moreover, the one Florida court that has considered whether such evidence is admissible at trial despite its irrelevant to the question of whether fingerprint evidence is new or novel has determined that such evidence is not admissible at trial. *State v. Armstrong*, 920 So. 2d 769 (Fla. 3d DCA 2006); *see also Price v. State*, 931 So. 2d 1004 (Fla. 3d DCA 2006). Under these circumstances, the lower court properly determined that counsel was not ineffective for failing to attempt to present the order. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. It should be affirmed.

With regard to Defendant's assertion that the lower court erred in failing to consider the alleged cumulative effect of the barred claims, the lower court acted properly. In *Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002), this Court reiterated that a defendant was not entitled to relief based on a cumulative error analysis where the individual claims were procedurally barred or lack merit. This Court further directed that the cumulative error analysis only applied where the present claim had merit. *Id.*; *see also Wright*, 857 So. 2d at 871.

Here, the allegedly new claim was procedurally barred and

lacked merit. Moreover, the claims that Defendant asserts should be considered cumulatively are themselves procedurally barred and lack merit. Under these circumstances, there is no basis for relief based on cumulative error. The denial of the claim should be affirmed.

II. THE UNPRESERVED AND MERITLESS CLAIM THAT DEFENDANT IS INNOCENT PROVIDES NO BASIS FOR REVERSAL.

Defendant next asserts that his claims establish that he is "innocent" of the crime and complains that his first post conviction counsel was ineffective. However, this issue should be rejected because it is unpreserved and meritless.

First, this claim is not properly before this Court. In the lower court did not assert that the procedural limitations on his claims should be ignored because he proved that he was actually innocent. However, in order for an issue to be preserved, it must have been an actual ground presented below. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). As that is not true here, this issue has not been preserved and should be rejected.

Moreover, as argued in Issue I, all of Defendant's claims are not only procedurally barred but they are also meritless. As such, there is no reason to consider this issue. It should be rejected.

While Defendant suggests that this Court has given more rights to non-capital defendants than it has to capital defendants, this is simply untrue. At the time this Court decided S*teele v. Kehoe*, 747 So. 2d 931 (Fla. 1999), and amended

Fla. R. Crim. P. 3.850 to permit an exception to the time limit for filing motions for post conviction relief, Fla. R. Crim. P. 3.851 (1999) did not include an entirely separate procedure for capital defendants to file motions for post conviction relief. Instead, the rule merely contained limited provisions related to the fact that a one-year time limit and expressly stated "[t]he provisions of rule 3.850, to the extent they are not inconsistent with this rule, remain applicable to postconviction or collateral relief." Because Fla. R. Crim. P. 3.850 was applicable to capital defendants, it was not necessary for this Court to amend Fla. R. Crim. P. 3.851 to make the change effective with regard to capital defendants.

Moreover, when this Court did subsequently rewrite Fla. R. Crim. P. 3.851 so that capital defendants were now governed by its provisions and not the general provisions of Fla. R. Crim. P. 3.850, this Court expressly included a provision in accordance with the provision adopted in *Steele*. As such, Fla. R. Crim. P. 3.851(d)(2) (2001) provides:

> No motion shall be filed or considered pursuant to this rule if filed beyond the time limitations provided in subdivision (d)(1) unless it alleges that . . . (C) postconviction counsel, though neglect, failed to file the motion.

Thus, the existence of *Steele* does not indicate that noncapital defendants are afforded more rights that capital defendants.

Instead, both classes of defendants are permitted to file untimely motions for post conviction relief if their failure to file a motion on time was due to neglect of counsel.

Despite the fact that *Steele* and its amendment to post conviction procedures in Florida do, and always have, applied to capital defendants, Defendant is not entitled to any of the relief he seeks. *Steele* and the amendment it adopted merely permitted defendants to file belated initial motions for post conviction relief. It did not authorize the filing of successive motions or even the amendment of existing pleadings because arguments and issues that a defendant believed his counsel should have included were not included. In fact, this Court has refused to extent its precedent allowing belated motions for post conviction relief and belated appeals from the denial of post conviction relief to other claims of ineffective assistance of post conviction. *Brown v. State*, 894 So. 2d 137, 153 n.11 (Fla. 2004). Instead, these claims remain governed by this Court's precedent holding that claims of ineffective assistance of post conviction counsel are not cognizable. *Kokal v. State*, 901 So. 2d 766, 777-78 (Fla. 2005); *Peterka v. State*, 890 So. 2d 219, 241 (Fla. 2004); *Spencer v. State*, 842 So. 2d 52, 72 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 215 (Fla. 2002); *Carroll v. State*, 815 So. 2d 601, 609 N.8 (Fla. 2002);

Foster v. State, 810 So. 2d 910, 917 (Fla. 2002); *King v. State*, 808 So. 2d 1237, 1245 (Fla. 2002); *Waterhouse v. State*, 792 So. 2d 1176, 1193 (Fla. 2001); *State v. Riechmann*, 777 So. 2d 342, 346 n.22 (Fla. 2000); *Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999); *Downs v. State*, 740 So. 2d 506, 514 n.11 (Fla. 1999); *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 408 (Fla. 1998); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). As such, Defendant is entitled to no relief. The denial of his motion for post conviction relief should be affirmed.

Moreover, while Defendant suggests that *House v. Bell*, 126 S. Ct. 2064 (2006), shows that he should be permitted to show his actual innocence, *House* provides no support for Defendant's claims.[15] Under *House*, a defendant is required to produce "'new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial'" for a claim of actual innocence to be considered. *Id.* at 2077 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). Moreover, that new evidence must establish that "'it is more likely that not that no reasonable juror would have found petitioner guilty beyond a

[15] In fact, the federal district court rejected Defendant's claim that these same allegations presented a colorable claim of actual innocence when it denied Defendant's federal habeas petition. *Jimenez v. Crosby*, No. 04-20132, Order Denying Petition for Writ of Habeas Corpus at 7-10 (S.D. Fla. Jan. 30, 2006).

reasonable doubt'" in light of all of the available evidence. *Id.* at 2077 (quoting *Schlup*, 513 U.S. at 327)). Moreover, "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Moreover, the federal courts have required that defendants asserting actual innocence show that they have been diligent in presenting their claims. *See Gildon v. Bowen*, 384 F.3d 883, 887 (7th Cir. 2004); *Baker v. Norris*, 321 F.3d 769, 772 (8th Cir. 2003); *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003); *Flanders v. Graves*, 299 F.3d 974, 978 (8th Cir. 2003); *Molo v. Johnson*, 207 F.3d 773 (5th Cir. 2000).

Here, nothing in Defendant's claims relies on new, reliable evidence showing that he is factually innocent of the crime. Instead, he relies on evidence that has always been available that attacks the sufficiency of the State's evidence. As such, Defendant does not even meet the first requirement under *House* and would not be entitled to any relief under it if it applied. He is entitled to no relief.

Moreover, in *House*, the defendant was convicted of murder in the beating death of a woman based on evidence that the victim's child had heard someone with a deep voice, such as the defendant had, inform her mother that her father had been in an automobile accident and her mother leave with this person,

evidence that the defendant was seen in the area near where the body was found the morning after the murder, evidence that the defendant had injuries to his hands, evidence that the defendant provided false statements to the police concerning his whereabouts during the time of the crime and the clothes he had worn at that time, evidence that the victim had semen consistent with Defendant's blood type on her clothes and evidence that the pants the defendant actually wore at the time of the crime had blood consistent with the victim's blood type on them. The new evidence the defendant presented was DNA evidence conclusively showing that the semen was from the victim's husband, evidence that the blood collected from the victim had leaked at some point during its transportation for testing, probably contaminated the defendant's pants and more than likely accounted for the blood found on the pants given scientific evidence regarding the state of decomposition of the blood, evidence that the victim's husband had confessed to killing his wife accidentally during a fight and evidence that the victim's husband had attempted to establish a false alibi and had provided a false statement regarding his whereabouts on the night of the murder. Even with the new evidence, the Court stated that the question of whether the defendant had satisfied the actual innocence standard was a close question. *House*, 126

S. Ct. at 2086.

Here, despite Defendant's claim to the contrary, Ms. Brandt's deposition shows that she placed Defendant on the third floor after Ms. Minas was attacked and not during that attack. The remainder of his claims do not even reflect on Defendant's guilt but instead are meritless attempts to impeach the State's evidence. Under these circumstances, *House* does not provide a basis for relief even if it applied. The denial of the motion for post conviction relief should be denied.

Further, while Defendant suggests that the ABA report shows that capital litigation in Florida violates due process, this Court has held that the ABA report provides no basis for relief in successive motions for post conviction, such as this one. *Diaz v. State*, 945 So. 2d 1136, 1145-46 (Fla. 2006); *Rolling v. State*, 944 So. 2d 176, 181 (Fla. 2006); *Rutherford v. State*, 940 So. 2d 1112, 1117-18 (Fla. 2006). As such, the denial of Defendant's successive motion for post conviction relief should be affirmed.

III. THE REJECTION OF DEFENDANT'S PROCEDURALLY BARRED AND MERITLESS CLAIMS DOES NOT VIOLATE DUE PROCESS.

Defendant again asserts that the lower court erred in denying his claims, asserting it amounts to a violation of due process. He continues to complain that his initial post conviction counsel was allegedly ineffective and asserts that he was denied funding to investigate his claims. However, as argued in Issue I, all of the claims were properly denied because they were procedurally barred and without merit. Moreover, as also argued in Issue I, the allegations of ineffective assistance of post conviction counsel are not cognizable, and the record shows that the alleged denial of funds was due to Defendant's lack of diligence in seeking such funds. As such, for the reasons asserted in Issue I, the lower court's order should be affirmed.[16]

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[16] *See Thompson v. State*, 759 So. 2d 650, 656 n.5 (Fla. 2000)("Many of the issues raised in the habeas petition overlap with those presented in the motion for postconviction relief. In addition, many of the habeas issues are listed multiple times throughout the petition. We take this opportunity to remind counsel once again of their professional duty to 'winnow out weaker arguments in order to concentrate on key issues. We have noted an increasing tendency in death penalty cases toward longer briefs with more issues which submerge and dilute arguably meritorious issues.' *Cave v. State*, 476 So. 2d 180, 183 n.1 (Fla. 1985); *see also Jones v. Barnes*, 463 U.S. 745, 751-52, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983); *Demps v. Dugger*, 714 So. 2d 365, 368 (Fla. 1998)('By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing

IV. THE MOTION FOR DISQUALIFICATION WAS PROPERLY DENIED AS UNTIMELY AND FACIALLY INSUFFICIENT.

Defendant finally asserts that the lower court erred in denying a motion to disqualify it. However, the lower court properly denied the motion, as it was untimely and facially insufficient.

A motion for disqualification must be filed within 10 days of when the grounds upon which the motion was based are known. Fla. R. Jud. Admin. 2.160(e)(2003); *HIP Health Plan of Florida, Inc v. Griffin*, 757 So. 2d 1272, 1272-73 (Fla. 4th DCA 2000)(motion must actually be filed, not merely served, within 10 days); *see also Asay v. State*, 769 So. 2d 974, 980 (Fla. 2000). Here, Defendant, according to his own allegations, knew of the alleged ex parte contact between the State and the Court on September 23, 2005. However, he waited until October 3, 2005, to serve the motion for disqualification. The motion was not filed until October 5, 2005. Since more than 10 days elapsed before Defendant filed his motion for disqualification, it is untimely and properly denied as such.

Even if the motion was timely, Defendant would still be entitled to no relief. The Florida Supreme Court has repeatedly held that alleged ex parte communications about purely

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except to unnecessarily burden this Court with redundant material.')(quoting *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987))").

administrative matters do not provide a facially sufficient basis to disqualify a trial judge. *Rodriguez v. State*, 919 So. 2d 1252, 1274-76 (Fla. 2005); *Roberts v. State*, 840 So. 2d 962, 970 (Fla. 2002); *Florida Bar v. Carlon*, 820 So. 2d 891, 896 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000); *Rose v. State*, 601 So. 2d 1183, 1185 (Fla. 1992). Here, the alleged ex parte contact consisted of nothing more than this Court announcing its ruling at a scheduled hearing at which the State appeared and Defendant did not. Since this was purely an administrative matter, there is no basis to disqualify this Court. The motion was properly denied.

While Defendant asserts that the transcript of the September 9, 2005 hearing shows that the State had the opportunity to review the order before it was finalized, this is not true. Instead, the transcript reflects that at the beginning of the hearing, the lower court noted that it had set the hearing to enter its order and was doing so. The lower court stated that the order was "denying the defendant's motion for post conviction relie[f] after an evidentiary hearing." (PCR3. 582) The State merely heard this phrase and noted that there had not been an evidentiary hearing without having seen the order or having participated in its drafting. *Id.* As such, the record does not reflect that the State reviewed the order

before it was finalized.

Defendant's reliance on *Smith v. State*, 708 So. 2d 253 (Fla. 1998), is misplaced. In *Smith*, the judge engaged in ex parte communications with the State to ask the State to draft an order, to review the draft order with the State and to discuss a pending motion for disqualification. In determining that the contact was improper, the Court specifically noted that the trial court and the State had a discussion about the substance of the order and that the State had convinced the trial court to include something in the order that the trial court had originally planned on deleting. *Id.* at 255. Here, this Court did not engage in any ex parte discussions with the State concerning the drafting of the order. Instead, this Court merely announced its decision in open court. Under these circumstances, *Smith* is inapplicable to this matter. The denial of the motion should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying 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 **Martin J. McClain**, 141 N.E. 30th Street, Wilton Manors, Florida 33334, this 1st day of March 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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