IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-383

NOEL DOORBAL,

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

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

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STATEMENT OF CASE AND FACTS

Defendant was charged by indictment with conspiracy to commit racketeering, racketeering, two counts of first degree murder, two counts of kidnapping, attempted extortion, grand theft auto, attempted first degree murder, armed kidnapping, armed robbery, burglary of an unoccupied dwelling, second degree grand theft, first degree arson, extortion and conspiracy to commit a first degree felony. (R. 61-111)[1] Jury selection commenced on February 2, 1998. (R. 1756) After hearing the evidence, the jury found Defendant guilty as charged on all counts. (R. 2704-08, T. 13681-83) The trial court adjudicated Defendant in accordance with the verdict. (R. 2856-58, T. 13695)

This Court summarized the evidence adduced at trial as:

> The criminal charges in this case are related to the abduction, extortion, and attempted murder of Marcelo (Marc) Schiller, and the abduction, attempted extortion, and murders of Frank Griga and Krisztina Furton.
>
> *Abduction, Extortion, and Attempted Murder of Marc Schiller* [FN1]
>
> In the early 1990's, Marc Schiller, a wealthy Miami businessman, owned an accounting firm, Dadima Corporation. His business expanded into providing services that were reimbursed by Medicare. Schiller hired Jorge Delgado [FN2] to assist with his business pursuits, and the two became close friends. Delgado often visited Schiller's home for both business and

[1] The symbols "R.," "T." and "SR." will refer to the record on appeal, transcripts of proceedings and supplemental record on appeal from Defendant's direct appeal, FSC Case No. SC93988.

social reasons. Eventually, Schiller sold the Medicare-related portion of his business to Delgado, along with the name "Dadima Corporation." Schiller selected a new name for his accounting business of "D.J. & Associates." After selling the Medicare portion of his business to Delgado, Schiller continued to perform consulting work for Delgado and Dadima Corporation. [FN3]

Delgado exercised at Sun Gym in the Miami area, where [Defendant's] codefendant, Daniel Lugo, was employed. [FN4] Delgado and Lugo became good friends, and at times Lugo would even accompany Delgado on visits to Schiller's home. Through this association, Delgado also came to know [Defendant]. Schiller viewed Lugo as an unsavory character, and expressed his concern to Delgado.

By 1994, a rift had developed between Schiller and Delgado. Schiller had been questioning Delgado's accounting practices with regard to Dadima Corporation, and he was also concerned with transactions involving some bank accounts. During a meeting with a banker at a local restaurant, the conflict expanded as Delgado refused to respond to Schiller's questions and became very angry. Thereafter, Schiller and Delgado severed all business ties and on the advice of Lugo, Delgado hired John Mese to be his replacement accountant. [FN5]

In the September-October 1994 time frame, Lugo advised Delgado of his belief that Schiller had been cheating Delgado with regard to the billing operations that Schiller had been performing for Delgado and the Medicare business. Delgado testified that Lugo showed him documentation which purported to prove that Schiller had been cheating Delgado. Lugo informed Delgado that Schiller had also been cheating Lugo. When Delgado confronted Schiller with allegations of cheating in the billing operation, Schiller flatly denied the accusations.

Lugo enlisted [Defendant] and several other individuals in a plot to kidnap Schiller, with the goal of forcing him to sign over assets equivalent in value to that which Delgado and Lugo believed to be owed to them. [FN6] Delgado asked Lugo to do whatever was necessary to recover the value he believed Schiller owed to both of them, but Delgado expressed a desire that he not be personally involved in any of

the scheming. Nevertheless, Delgado did become deeply involved in a plan to kidnap Schiller. He informed Lugo, [Defendant], and two men recruited by Lugo from Sun Gym (Stevenson Pierre and Carl Weekes) of details concerning Schiller's home, [FN7] family, cars, and personal habits. [Defendant] and others recruited for the plot were promised that they would share in the bounty taken from Schiller. The group agreed to secretly observe Schiller to learn his daily routine to implement the plan. Testimony at trial established that Lugo was the unquestioned mastermind of the plan to abduct and extort money from Schiller. Stevenson Pierre observed Lugo's role to be that of a general in a military operation. Pierre described [Defendant] as "[s]econd in command." The group eventually purchased or otherwise procured handcuffs, walkie-talkies, and a stun gun (among other items) to aid in the execution of the abduction plan.

After several failed attempts to locate and capture Schiller, on November 15, 1994, the group finally succeeded in abducting him from the parking lot of the delicatessen restaurant he owned in the Miami area. [Defendant] and Weekes grabbed Schiller, and Weekes proceeded to subdue Schiller by shocking him with the stun gun. Another participant, Sanchez, assisted [Defendant] and Weekes in forcing Schiller into a waiting van. Inside the van, Schiller was handcuffed and duct tape was placed over his eyes. A gun was placed at Schiller's head, and his wallet and jewelry removed as the van proceeded to a warehouse that Delgado had previously rented. Schiller received additional shocks with the stun gun and was kicked repeatedly as the plan unfolded. Lugo arrived at the warehouse shortly after [Defendant] and the others arrived with Schiller.

Schiller's captors demanded a list of his assets which Schiller initially refused to provide. The refusal resulted in his being slapped, shocked with the stun gun, and beaten with a firearm. Weekes questioned Schiller about his assets, based on information provided by Lugo and Delgado. Schiller testified that after he again refused to provide the requested information, he was told that he was going to engage in a game of Russian Roulette. A gun was placed to his head, the cylinder was turned, and the trigger was pulled twice but the weapon did not fire.

[FN8] Schiller's captors proceeded to read a highly accurate list of his assets to him, demanding that he corroborate what they already knew, and that he add to the list assets of which they were not aware. The captors also apprised Schiller that they knew the alarm code for entry into his home. Because his assailants possessed such detailed knowledge of his assets and his home, Schiller surmised that Delgado must have been involved in the plot. Schiller also came to recognize Lugo's voice, despite Lugo's efforts to disguise his identity. Schiller testified that Lugo's speech often had a very recognizable lisp-like trait.

The captors further threatened that if Schiller did not cooperate, his wife and children would also be abducted and his wife raped in his presence. Schiller was eventually compelled to agree to cooperate, but only if his wife and children were allowed to leave the country unharmed. In the ensuing days, Schiller began signing over his assets, including a quitclaim deed for his home, various documents granting access to his checking, [FN9] savings, and IRA accounts, and authorization for changing the beneficiary of his million-dollar insurance policies. [FN10]

During Schiller's captivity, [Defendant] and Lugo entered Schiller's home and removed many furnishings and other items. Lugo, Delgado, and Weekes also began charging thousands of dollars to Schiller's credit cards. Money from the safe in Schiller's home was divided among [Defendant], Weekes, and Pierre. Three weeks into Schiller's captivity, [Defendant] and Delgado convinced Lugo that Schiller must be killed, because he had likely surmised the identities of some, if not all, of his captors. A plan was then developed to kill Schiller but to give the appearance that Schiller's death resulted from the operation of his automobile under the influence of alcohol. In the fourth week, Schiller was forced to consume large amounts of alcohol to make him intoxicated. Lugo drove Schiller's Toyota 4-Runner into a utility pole on a Miami-area street to create the impression that Schiller had been involved in an accident resulting from driving while intoxicated. [Defendant] and Weekes also participated in this episode and Schiller was placed in the front seat of the 4-Runner after it had been driven into the pole. Lugo and [Defendant] then

poured gasoline on the vehicle and set it ablaze. Lugo, [Defendant], and Weekes had planned to exit the scene in another vehicle that Weekes had driven to the scene, but they noticed that Schiller had somehow managed to exit his burning vehicle, and was staggering in the roadway. Schiller had not been securely bound in the seat of the vehicle. At the urging of Lugo and [Defendant], Weekes used his vehicle to strike and run over Schiller. The three left the scene of these events believing they had killed Schiller. Lugo later instructed Stevenson Pierre to drive by the scene of their handiwork to determine if there was any police activity.

Miraculously, Schiller survived this attempt to take his life and he was rescued. He remembered awakening in a Miami hospital with a broken pelvis, ruptured bladder, bruises and burns, and temporary paralysis. Lugo and the others eventually learned that Schiller had survived, so they visited the hospital where they thought Schiller was recuperating, with a plan to suffocate him as he lay in his hospital bed. Unknown to Lugo and the others, based upon a well-founded fear for his safety, Schiller had already arranged to be airlifted to a New York hospital to complete his recuperation. Lugo, [Defendant], and some of the other captors proceeded to empty Schiller's home of the remaining furnishings and valuables. A black leather couch and computer equipment were among the articles pilfered.

Schiller's testimony at trial included not only a description of the events surrounding his abduction and captivity, but also testimony as to the assets that had been extorted from him and his attempts to recover those assets. He also stated that while he signed an agreement with Lugo and [Defendant], indicating that the events surrounding his "abduction" were actually the result of a failed business deal, he had always intended to report the incident to the police. [FN11] It was his belief that signing the agreement was an expeditious way to recover as much of the value of the assets that had been extorted from him as possible. Schiller further testified that he never willingly gave any of his assets to Lugo, [Defendant], Mese, Torres, or anyone associated with them. He noted that the quitclaim deed to the home that he and his wife owned was forged, because on the

date indicated for his wife's purported signature, she was actually in South America.

Schiller identified several items of property that belonged to him or his wife which police found in Lugo's possession. Among the items were computer equipment, furniture, and keys to a BMW automobile. [FN12] He also stated that drafts on his checking account, which were payable to John Mese or to entities related to Sun Gym, must have been those signed by him when he was blindfolded during his captivity because he never willingly signed the drafts. [FN13] A forensic accountant confirmed that after an extensive review of records pertaining to corporations and accounts controlled by Lugo, [Defendant], or Mese, it was clear that money and assets formerly in Schiller's control had been laundered through these methods. [FN14]

Abduction, Attempted Extortion, and Murders of Frank Griga and Krisztina Furton [FN15]

Frank Griga was also a wealthy Miami-area businessman, who accumulated much of his fortune from "900" lines in the telephone industry. He and his girlfriend, Krisztina Furton, were both of Hungarian heritage. [Defendant's] girlfriend at the time provided information to him about Griga. [Defendant] was quickly enthralled when shown a picture of a yellow Lamborghini owned by Griga and when he learned of Griga's enormous wealth. [Defendant] determined that Griga would be a prime target for kidnaping and extortion, and he soon convinced Lugo to participate in the crime with him. Delgado was aware that Lugo and [Defendant] intended to kidnap and extort assets from a rich "Hungarian couple." Lugo was a full participant in the plot and he even told his girlfriend, Sabina Petrescu, that he intended to kidnap a Hungarian who drove a yellow Lamborghini or Ferrari. Lugo also fabricated an identity, which he related to Petrescu, that he worked for the Central Intelligence Agency (CIA), and that [Defendant] was a killer who assisted him in his CIA missions. Petrescu testified that Lugo and [Defendant] had at their disposal a suitcase with handcuffs and syringes [FN16] to use in the kidnaping.

Through an intermediary, Lugo and [Defendant] arranged a business meeting with Griga to discuss

Griga's interest in investing in phone lines in India. The Indian investment scheme was totally bogus and designed as a means for Lugo and [Defendant] to ingratiate themselves with Griga and to gain his confidence. At the first meeting, Griga indicated his lack of interest but Lugo and [Defendant] persisted.

In May 1995, Lugo and [Defendant] gathered the suitcase containing handcuffs and syringes and made another visit to Griga's home, under the guise of presenting a computer to him as a gift. [FN17] Lugo and [Defendant] each had a concealed firearm during this visit as they intended to execute the abduction plan at this time. This first attempt was aborted after only a fifteen-minute stay. [Defendant] was irate that Lugo had not followed through with the abduction, but was placated with the news that Lugo had arranged another meeting with Griga for later that day.

When Lugo and [Defendant] returned to Griga's home on May 24, 1995, they had concocted the scheme of inviting Griga and Furton to dinner, with the further goal of luring them to [Defendant's] apartment, where the abduction and extortion would begin. [FN18] Between 10 and 10:30 p.m., [FN19] Judi Bartusz, a friend and neighbor of Griga's, saw Lugo and [Defendant] leave Griga's home in a gold Mercedes, while Griga and Furton left in the Lamborghini. [FN20]

On May 25, Delgado met Lugo and [Defendant] at [Defendant's] apartment. Lugo informed him that Griga was already dead: [Defendant] had killed Griga after the two became involved in a scuffle in and around the downstairs computer room in [Defendant's] apartment. [FN21] Griga's body had been placed in a bathtub in [Defendant's] apartment. Lugo related that when Furton had heard the scuffling between [Defendant] and Griga, she rose from her seat in the living room and began to scream when she realized that Griga had been seriously injured. Lugo restrained her and subdued her with an injection of Rompun. Lugo expressed his anger toward [Defendant] for having killed Griga before the extortion plan had been completed.

Lugo and [Defendant] then turned their focus toward Furton. They suspected that she knew the code to enter Griga's home. Knowledge of the code would allow Lugo and [Defendant] to enter Griga's home with the hope of gaining access to valuables and, most

importantly, to bank account information for access to much of his wealth. [Defendant] carried Furton down the stairs from the second floor of the apartment. Furton was barely clad, wearing only the red leather jacket that she had worn when she left Griga's home the night before and a hood covered her head. Not long after [Defendant] placed Furton near the bottom of the stairs, although handcuffed, she began screaming for Griga. At Lugo's direction, [Defendant] injected Furton with additional amounts of horse tranquilizer, causing her to scream again. Lugo and [Defendant] then questioned Furton about the security code for Griga's home. Eventually, Furton refused to answer more questions. [Defendant] injected her yet again with additional horse tranquilizer. Delgado testified that at this point, corrections officer John Raimondo arrived to "take care of the problem." Lugo informed Delgado that Raimondo had been solicited to kill Furton and to dispose of her body along with Griga's, but Raimondo did neither. He left [Defendant's] apartment, referring to Lugo and [Defendant] as "amateurs."

Armed with what he believed to be the access code for Griga's home security, Lugo took Petrescu to attempt entry while [Defendant] and Delgado stayed behind. After failing to gain access to Griga's home, Lugo called [Defendant] on his cellular phone. As the two talked, Petrescu heard [Defendant] say, "the bitch is cold," which she believed was [Defendant's] indication that Furton was dead. [FN22] Lugo returned to [Defendant's] apartment, carrying some mail he had taken from Griga's mailbox. Lugo instructed Delgado to return home, but to bring a truck to [Defendant's] apartment the next morning.

When Delgado arrived with the truck on the morning of May 26, he noticed that Griga's body had been placed in a black leather couch that had been removed from the home of Marc Schiller. [FN23] Furton's body was placed in a transfer box and the couch, along with the transfer box, was loaded onto the truck. Neither Griga's nor Furton's body had been dismembered at this point.

Lugo, [Defendant], and Delgado proceeded with the bodies to a Hialeah warehouse. Delgado noticed a yellow Lamborghini stored there. [FN24] He served as a lookout while Lugo and [Defendant] went to purchase

items including a chain saw, hatchet, knives, buckets, flint (for igniting a fire), fire extinguisher, and a mask respirator. [FN25] When they returned, Lugo and [Defendant] began dismembering the bodies of Griga and Furton. They used both the chain saw and the hatchet. [FN26]

[Defendant] received a message on his pager and had to leave the warehouse, so Delgado drove him to his apartment. When Delgado returned to the warehouse, Lugo was attempting to burn the heads, hands, and feet of Griga and Furton in a metal drum. This attempt was largely unsuccessful and resulted in such a large amount of smoke that the fire extinguisher was used to smother the fire. Lugo and Delgado next went to [Defendant's] apartment to remove everything, including the blood-stained carpeting, from the area where [Defendant] and Griga had struggled. The items removed also included computer equipment stained with Griga's blood. The items were placed in the storage area of Lugo's apartment. [FN27]

By May 27, 1995, Lugo had left on a trip to the Bahamas, in an attempt to access money that Griga had deposited in bank accounts there. His efforts were unsuccessful and he returned to Miami. On May 28, 1995, Lugo, [Defendant], and Mario Gray [FN28] disposed of the torsos and limbs of Griga and Furton. Lugo subsequently fled on a second trip to the Bahamas, where he was captured in early June 1995. [FN29] He was apprehended in part due to information supplied to the police by his girlfriend, Sabina Petrescu. After [Defendant's] apprehension, he, like Lugo, faced a multitude of serious criminal charges, including first-degree murder (two counts), attempted first-degree murder, racketeering, kidnaping (two counts), and armed kidnaping.

At trial, the State presented more than ninety witnesses. [Defendant] presented no witnesses or evidence on his behalf during the guilt-innocence phase. The trial judge denied [Defendant's] motion for judgment of acquittal.

* * * *

FN1. The criminal charges that flow from these facts are referred to as the "Schiller counts."

FN2. Jorge Delgado was a codefendant with Daniel Lugo. In exchange for sentences of fifteen and five years, respectively, for his roles in the attempted murder of Schiller and the murders of Griga and Furton, he testified for the State.
FN3. At various times, [Defendant's] codefendant, Daniel Lugo, performed some billing work for both Schiller and Delgado.
FN4. Both Lugo and [Defendant] were avid bodybuilders.
FN5. Mese was Lugo's codefendant, along with [Defendant]. All three were tried together, though a separate jury decided the fate of [Defendant] and Mese.
FN6. Prior to creating the plot to kidnap Schiller, Delgado had expressed concerns to Schiller that the Medicare-related business that Delgado had purchased from Schiller might have been involved in Medicare fraud when Schiller was the owner. Delgado feared that he might have been inadvertently involved in continuing the fraud after he purchased the business from Schiller. Schiller denied that he was ever involved in Medicare fraud. Delgado indicated that he rejected the idea of suing Schiller for the money he claimed because a legal action brought against Schiller might expose the fraudulent activity.
FN7. Schiller had previously told Delgado the code for the alarm system at his home.
FN8. Schiller did not know if the gun was loaded or not. He also had tape over his eyes during these incidents, as he did for the vast majority of his captivity. On another occasion, Schiller's captors placed a gun in his mouth.
FN9. These documents included drafts on his checking account.
FN10. The beneficiary was changed to the name of Lillian Torres, Lugo's ex-wife. Torres was also listed as the putative "owner" of Schiller's home when the quitclaim deed was executed. At the time of Lugo's trial and conviction, Torres had not been charged with any crime. The quitclaim deed and the change in beneficiary for the life insurance policies were notarized by codefendant John Mese.
FN11. Miami-area police agencies became thoroughly involved in the investigation of the crimes.
FN12. When police executed search warrants at Lugo's apartment, they found the following items: a set of

keys for a BMW automobile, an executed deed for Schiller's home, and a letter concerning a wire transfer from one of Schiller's accounts. When warrants were executed at [Defendant's] apartment, police found the following: computer equipment and jewelry belonging to Schiller, receipts for purchases on Schiller's credit card, a receipt relating to the changing of locks at Schiller's home, and handcuffs.

FN13. Certain documents listed John Mese as president and secretary of Sun Gym.

FN14. Lugo and Mese were charged with money laundering; [Defendant] was not.

FN15. We will refer to the criminal charges that stemmed from these facts as the "Griga-Furton counts."

FN16. Lugo and [Defendant] injected a substance known as Rompun, a tranquilizer sometimes given to horses, to subdue Griga and Furton later in the kidnaping episode.

FN17. Petrescu rode with Lugo and [Defendant] to Griga's home. At trial she supplied many of the details of what happened during this visit.

FN18. Lugo and [Defendant] had also rented a warehouse facility in which to hold Griga and Furton captive for an indefinite period if necessary.

FN19. Later, Delgado received a call from Lugo inquiring whether Delgado knew how to drive a Lamborghini, because Lugo was having trouble attempting to do so.

FN20. Bartusz testified that Griga was wearing jeans, crocodile boots, and a silk shirt. Furton was wearing a red leather dress, red jacket, and red shoes, and was carrying a red purse. These items, along with other incriminating evidence discussed *infra,* were subsequently discovered after police executed a search warrant at Lugo's apartment.

FN21. Delgado eventually noticed that blood was not only on the walls and carpet of the computer room, but also on much of the equipment and furnishings. The record also reflects that at some point before he was killed, Griga was injected with Rompun. Dr. Allan Herron, a veterinarian, provided expert testimony that the presence of horse tranquilizer in Griga's brain and liver indicated that he was alive when he was injected. Rompun slows respiration and heart rate, and causes salivation, vomiting, and a burning sensation.

Dr. Herron stated that there are no clinical uses for Rompun in humans.
Medical examiner Dr. Roger Mittleman testified that Griga was a homicide victim. While he could not pinpoint the exact cause of death, he opined that Griga died from one or more of the following causes: an overdose of horse tranquilizer; asphyxia from strangulation, with the overdose of horse tranquilizer contributing to the asphyxiating effect; or blunt force trauma to his skull and the consequent bleeding (exsanguination) from this blunt force.
FN22. Dr. Mittleman, the medical examiner, opined that the effects from horse tranquilizer were consistent with the cause of Furton's death. He also stated that her death was consistent with asphyxia.
FN23. Lugo gave this black leather couch as partial payment to Mario Gray for his assistance in disposing the bodies of Griga and Furton and other items. Lugo knew Gray from Sun Gym.
FN24. Police eventually found Griga's yellow Lamborghini abandoned far off a Miami-area roadway.
FN25. Upon executing a search warrant at the warehouse in June 1995, police found the following items: a fire extinguisher, flint, an owner's manual for a chain saw, and a mask respirator. They also found Griga's auto club card and numerous receipts with his name on them.
FN26. Delgado served as a lookout while Lugo and [Defendant] dismembered the corpses. He noticed that Lugo and [Defendant] were packing the body parts tightly into drums. He also noticed a collection of heads, hands, and feet in a bucket. He was certain that the chain saw had been used. He surmised that the hatchet must also have been employed, because he heard several loud thumps consistent with those made by a hatchet. Expert testimony confirmed that the corpses were indeed at least partially dismembered by use of a hatchet.
FN27. When police executed a search warrant at Lugo's apartment, they found not only the blood-stained computer equipment, but also the following items covered with blood: a television, gloves, towels, carpet and padding, and clothing. The blood on these items was matched to Griga. During the search, police also found a computer printout listing Griga's bank accounts, Griga's driver's license, thirty syringes

> (some filled and some not), a vial marked "Rompun," a stun gun, duct tape, binoculars, and several firearms and ammunition.
> Further, police found the following incriminating items when they executed search warrants at [Defendant's] apartment: Rompun and several foreign passports bearing Lugo's photograph but names other than "Daniel Lugo."
> FN28. Gray assisted in disposing of the torsos and limbs (legs and arms) of both Griga and Furton, which were tightly packed in 55-gallon drums. He also found the site in southern Dade County where the body parts would be disposed of. The drums were placed about 100 meters apart.
> FN29. On June 9, 1995, one day after being apprehended in the Bahamas, Lugo led police to the spot where the torsos and limbs were buried. He did not give any indication, however, of the location of the heads, hands, and feet of Griga and Furton.
> In July 1995, acting on an anonymous tip, police found a collection of human heads, hands, and feet in the Everglades off Interstate 75, along with a knife and a hatchet. The appendages were matched to Griga and Furton. Although Lugo and [Defendant] had attempted to pull all of the teeth out of the heads to prevent police from positively matching them to Griga and Furton, a single tooth remained in one of the heads. The tooth and head were matched to Griga. [Defendant] had also related to Delgado that he and Lugo had chopped off the fingertips from each of the hands, to deter police further from matching the hands to Griga and Furton. Expert testimony confirmed that the fingertips had indeed been separated from the hands.

Doorbal v. State, 837 So. 2d 940, 944-51 (Fla. 2003).

A penalty phase proceeding commenced on June 1, 1998. (R. 138434) The State presented only victim impact evidence at the penalty phase. (T. 13878-13901) Defendant presented the testimony of family and friends. (T. 13909-14203) After considering the evidence, the jury recommended that Defendant be

sentenced to death, by a vote of 8 to 4, for each of the murders. (R. 2940-41, 14311-12) The trial court followed the jury's recommendation and imposed death sentences for each of the murders. (R. 3462-85) The trial court found 5 aggravators applicable to both murders: prior violent felonies, including the contemporaneous murder of the other victim and the kidnapping, robbery and attempted murder of Schiller; during the course of a kidnapping; avoid arrest; for pecuniary gain; and CCP. (R. 3462-72) The trial court also found the heinous, atrocious and cruel (HAC) aggravator applicable to the Furton murder. (R. 3468-71) The trial court also sentenced Defendant to 30 years imprisonment for the conspiracy to commit RICO, RICO, arson and extortion, life imprisonment for the kidnappings and attempted first degree murder, life imprisonment with a 3 year minimum mandatory provision for the armed robbery and armed kidnapping, 15 years imprisonment for the burglary, grand theft and conspiracy to commit a felony, and 5 years imprisonment for the attempted extortion and grand theft auto. (R. 3484) All of the sentences were to be served consecutively. (R. 3485)

Defendant appealed his convictions and sentences to this Court, raising ten issues: 1) admission of character evidence, 2) & 3) improper comments during the State's guilt phase closing argument, 4) denial of a motion to suppress physical evidence,

5) exclusion of evidence at the penalty phase, 6) improper comments during the State's penalty phase closing argument, 7) failure to merge the during the course of a kidnapping and for pecuniary gain aggravators, 8) failure to merge the CCP and avoid arrest aggravators, 9) sufficiency of evidence to support CCP and 10) sufficiency of evidence to support the avoid arrest aggravator. Amended Initial Brief of Appellant, FSC Case No. 93,988. This Court affirmed Defendant's convictions and sentences. *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003). Defendant moved for rehearing, claiming that Florida's capital sentencing scheme violated *Ring v. Arizona*, 536 U.S. 584 (2002), because the aggravating circumstances do not have to be charged in the indictment, the jury does not have to specify what aggravators it found, and the jury recommendation of a death sentence did not have to be unanimous. This Court issued a revised opinion addressing the *Ring* claim and denied rehearing. *Id.* Defendant sought certiorari review in the United States Supreme Court, which was denied on June 27, 2003. *Doorbal v. Florida*, 539 U.S. 962 (2003).

Because Defendant's direct appeal was pending when the DPRA was enacted, the State sent notices to produce public records to the Department of Corrections (DOC), the Miami-Dade Police Department and the Golden Beach Police Department in January

2000. (PCR-SR.[2] 445-50)[3] The Office of the State Attorney also noticed the Office of the Attorney General that the Miami-Dade County Medical Examiner's Office had additional public records. (PCR-SR. 451-52) The Office of the Attorney General then noticed the Medical Examiner. (PCR-SR. 453-54) In response to these notices, DOC and the Medical Examiner sent their records to the repository in March and April 2000. (PCR-SR. 455-49) Because this Court declared the DPRA unconstitutional, public records production then ceased.

On January 30, 2003, this Court issued an order appointing CCRC-South to represent Defendant in his post conviction proceedings. (PCR-SR. 29) On February 3, 2003, the Chief Judge of the Eleventh Judicial Circuit issued an order appointing Judge Alex Ferrer, the trial judge, to preside over the post conviction proceedings. (PCR-SR. 31) That same day, the Office of the Attorney General notified the Office of the State Attorney and DOC of the issuance of mandate. (PCR-SR. 460-63) The Office of the State Attorney then notified the Miami-Dade Police, the Golden Beach Police, the Hialeah Police, the City of Miami Police, the Florida Department of Law Enforcement (FDLE)

[2] The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal in this case.

[3] The record on appeal does not include numerous documents. As such, the State is filing, simultaneously with this brief, a motion to supplement with the documents. As such, the page numbers regarding these documents are estimates.

and the Federal Bureau of Investigations (FBI) to produce public records. (PCR-SR. 464-69)

On March 27, 2003, Defendant moved to disqualify Judge Ferrer, claiming that he had a fear Judge Ferrer would not be impartial because Judge Ferrer had testified at Schiller's federal sentencing hearing and Judge Ferrer might need to be deposed regarding why he testified. (PCR-SR. 7-19) Defendant acknowledged that the fact Judge Ferrer had testified was published in a local newspaper in January 2000. (PCR-SR. 8) On April 18, 2003, Defendant supplemented his motion with the transcript of Judge Ferrer's testimony from February 5, 1999. (PCR-SR. 470-81) The State responded to the motion to disqualify, asserting that the motion was untimely and facially insufficient. (PCR-SR. 20-27) The motion was denied, and the lower court later stated that the motion was untimely and facially insufficient. (PCR. 94, PCR-SR. 66)

Prior to the first status hearing on the case, only DOC, the Medical Examiner and Hialeah Police had responded to the requests. Yet, no motion to compel was filed. Instead, Defendant wrote to the Office of the Attorney General on July 15, 2003, complaining that public records compliance had not occurred. (PCR-SR. 483-84)

At a status hearing on July 25, 2003, the Office of the

State Attorney explained that there had been a miscommunication in its office regarding the shipment of the public records but that the records had been sent. (PCR. 826-28) The lower court inquired why Defendant had not informed anyone of the noncompliance earlier and ordered Defendant to determine the status of all of the requests within 30 days. (PCR. 828) The State then informed the lower court that FDLE had sent its records, that Miami-Dade was behind in copying because of the affirmance of two large cases at the same time, that City of Miami and Golden Beach had misplaced their notices but were now attempting to comply immediately and that the FBI notice was sent in error as the FBI was not covered by Fla. R. Crim. P. 3.852. (PCR. 829) Defendant then requested an extension of time to seek additional public records, which the lower court refused to grant at that time but indicated it would consider at the next hearing if Defendant demonstrated diligence. (PCR. 830-33)

On September 2, 2003, Defendant wrote to the lower court, acknowledging that he had received public records from the Golden Beach Police and that the State Attorney's records were at the repository but complaining that the repository was still processing the State Attorney's records and that Miami-Dade Police and City of Miami Police had not responded. (PCR-SR. 488-90) At the next status hearing on September 19, 2003, the State

informed the court that the Miami-Dade Police records were at the repository and that City of Miami Police had indicated it had no records. (PCR-SR. 47-48) The lower court then agreed to extend the time for seeking additional records for a period of time equivalent to the difference between when the records were due to be sent to the repository and when the records were sent but warned Defendant that this might leave him insufficient time to receive additional records and to file his motion timely. (PCR-SR. 49-56)

At the next status hearing on December 19, 2003, Defendant moved the lower court to conduct an in camera review of the exempt materials that had been sent to the repository. (PCR. 843) The lower court agreed to conduct the review and signed on order to have the records transported. (PCR. 843-45)

On February 19, 2004, CCRC-South filed a motion to withdraw, asserting that both of the lead attorneys assigned to the case had resigned and that reassigning the case would be difficult given its size. (PCR-SR. 32-35) Defendant further contended that the second chair attorney felt he had a conflict because his family's business had been litigating against one of the banks through which money had been laundered and a relative worked for another bank from which records had been requested. *Id.*

On February 23, 2004, Defendant served requests for additional public records on the Office of the State Attorney, the Miami-Dade Police Department, FDLE, the Miami-Dade Department of Corrections, the Broward County Sheriff's Office and the Florida Highway Patrol. (PCR-SR. 497-555) Defendant made no attempt to distinguish between requests made pursuant to Fla. R. Crim. P. 3.852(g) and (i), and did not include the required affidavit for the (i) requests. *Id.* The requests quoted the required language from the rule concerning a diligent search of the repository and relevance to the proceeding but made no attempt to show why that was true. *Id.* The requests were all phrased in the form of requesting "any and all" records. *Id.* The requests to the State Attorney and the Miami-Dade Police each contained an 8-page single spaced list of name about whom Defendant was requesting "any and all" records without any explanation of who the people were. (PCR-SR. 497-529) The State objected to the requests as improper. (PCR-SR. 36-39)

At a status hearing on March 4, 2004, the State objected to allowing CCRC-South to withdraw because there was no good cause and Defendant would be prejudiced. (PCR-SR. 69) The lower court indicated that it was willing to allow the withdraw, as a new attorney would have to learn the case even if CCRC-South remained and further delay would be avoided if another attorney

left CCRC-South. (PCR-SR. 70) The lower court then ensured that CCRC-South had consulted with Defendant, made him aware of the ramifications of the withdrawal and secured Defendant's agreement to it. (PCR-SR. 70-74) The lower court then indicated that it was willing to grant the motion to withdraw. (PCR-SR. 74)

The State requested that the lower court determine whether the requests for additional public records should be stricken as improper before allowing the withdrawal. (PCR-SR. 74) The lower court stated that it believed the requests were improper but that it was inclined to allow the requests to stand and to have the newly appointed attorney decided whether to adopt the requests. (PCR-SR. 74-75) The State then informed the court that three of the requests were only proper under Fla. R. Crim. P. 3.852(i), and under that subsection, the lower court needed to rule within 30 days on the propriety of the requests. (PCR-SR. 75) The lower court then struck the demands without prejudice to new counsel filing proper requests for additional public records. (PCR-SR. 75) On March 26, 2004, the lower court appointed Defendant's present counsel to represent him. (PCR-SR. 98)

At the end of a hearing on June 1, 2004, Defendant filed two motions to unseal the sealed records from the repository,

without conducting an in camera review, and a demand for additional public records from the State's Attorney's Office. (PCR. 156-67, 874-75) Immediately upon receipt of the pleadings, the State argued that Defendant was entitled to have an order entered to have the records transported to the lower court for in camera review but was not entitled to release of the records unless and until the lower court found them subject to disclosure. (PCR. 875) The State Attorney's Office agreed to provide a response to the public records request within the time periods established by the rule. (PCR. 876) The lower court informed Defendant that it would order the records produced for in camera review. (PCR. 875-76) Defendant insisted that he wanted the records released to him without an in camera review, which the lower court refused to do. (PCR. 876-77)

On June 15, 2004, Defendant filed his motion for post conviction relief, raising 21 claims:

> I.
> FLA. R. CRIM. P. 3.851 (1998) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED AND IT VIOLATES ART. I, SECTION 24 OF THE FLORIDA CONSTITUTION AND CORRESPONDING FLORIDA CASE LAW AS WELL AS [DEFENDANT'S] FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS RIGHT TO DUE PROCESS AND ACCESS TO THE COURTS.
>
> II.
> FLA. STAT. 119.19 AND FLA. R. CRIM. P. 3.852 (1998) ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED AND THEY VIOLATE ART. I, SECTION 24 OF THE FLORIDA CONSTITUTION AND CORRESPONDING FLORIDA CASE LAW AS

WELL AS [DEFENDANT'S] FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS RIGHT TO DUE PROCESS AND ACCESS TO THE COURTS.

III.

[DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHERE ACCESS TO FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.851 MOTION UNTIL HE HAD RECEIVED PUBLIC RECORDS MATERIALS AND HAD BEEN AFFORDED SUFFICIENT TIME IN PROPROTION TO THE NUMBER OF RECORDS REVIEW THOSE MATERIALS AND AMEND HIS PETITION.

IV.

THE STATE WITHHELD EVIDENCE MATERIAL AND EXCULPATORY AND/OR PRESENTED FALSE AND/OR MISLEADING EVIDENCE AT BOTH PHASES OF [DEFENDANT'S] CAPITAL TRIAL IN VIOLATION OF [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTIONS. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE STATE'S CASE IN VIOLATION OF *GIGLIO* and *BRADY* AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION. [DEFENDANT] WAS DENIED HIS RIGHT TO FAIR TRIAL WHEN THE STATE, TO SECURE A CONVICTION IN THIS CASE, INTENTIONALLY, KNOWINGLY AND WILLINGLY USE A WITNESS WHO LIED TO THE COURT, TO THE JURY AND TO [DEFENDANT'S] TRIAL COUNSEL DURING DEPOSITION. THE STATE DEPRIVED [DEFENDANT] OF BRADY MATERIAL, INCLUDING NAMES OF PERSONS AND EVIDENCE THAT [DEFENDANT] CAN USE TO IMPEACH THE STATE'S WITNESS AND CHALLENGE HIS CONVICTIONS AND SENTENCES. [DEFENDANT] IS ENTITLED TO A NEW TRIAL.

V.

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT WHEN TRIAL COUNSEL FAILED TO MOVE

TO WITHDRAW PRIOR TO TRIAL DUE TO CONFLICTS OF INTEREST WHICH RENDERED COUNSEL INCAPABLE OF FOCUSING ON HIS DUTIES OF REPRESENTING [DEFENDANT] AND FAILED TO REQUEST FURTHER CONSTINUANCES IN ORDER TO ATTEND TO COUNSEL'S EMOTIONAL NEEDS WHERE COUNSEL'S FATHER HAD DIED IMMEDIATELY PRIOR TO TRIAL, COUNSEL'S MOTHER WAS SERIOUSLY ILL PRIOR TO AND THROUGHOUT [DEFENDANT'S] TRIAL AND COUNSEL WAS CONTINUING TO EXPERIENCE SEVERE FINANCIAL HARDSHIP AND PERSONAL CRISES AS A DIRECT RESULT OF HIS REPRESENTATION OF [DEFENDANT]. [DEFENDANT] IS ENTITLED TO A NEW TRIAL.

VI.

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN TRIAL COUNSEL FAILED TO OBJECT TO "BAD CHARACTER" EVIDENCE THAT THE STATE IMPROPERLY ELICITED, TO PROSECUTORIAL CONDUCT DURING THE STATE'S CLOSING ARGUMENT WHERE THE STATE IMPROPERLY COMMENTS ON [DEFENDANT'S] DECISION TO EXERCISE HIS RIGHT TO REMAIN SILENT AND TO EGREGIOUS PROSECUTORIAL MISCONDUCT "WALKING THE EDGE OF REVERSIBLE ERROR" WHEN THE STATE IMPROPERLY USED THE "GOLDEN RULE" ARGUMENT TO THE JURY DURING THE GUILT PHASE. [DEFENDANT] WAS DEPRIVED OF HIS RIGHT TO BE ASSISTED BY AN ATTORNEY, AND HE IS ENTITLED TO A NEW TRIAL.

VII.

[DEFENDANT'S] TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

VIII.

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN TRIAL COUNSEL FAILED TO INVESTIGATE AND CHALLENGE THE STATE'S CASE OR TO RETAIN EXPERTS AND DEVELOP EVIDENCE TO ASSIST [DEFENDANT] AT TRIAL. AS A RESULT OF PERSONAL CONFLICTS AND CRISES, TRIAL COUNSEL FAILED TO

INVESTIGATE CLAIMS OF INNOCENCE PERTAINING TO THE SCHILLER COUNTS, DEVELOP DEFENSES TO ATTEMPTED FIRST DEGREE MURDER AND KIDNAPPING, AND TO ENGAGE EXPERTS TO EXAMINE EVIDENCE AND TESTIFY ABOUT EVIDENCE THAT SUPPORTS CLAIMS OF INNOCENCE. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. [DEFENDANT] IS ENTITLED TO A NEW TRIAL.

IX.

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN TRIAL COUNSEL FAILED TO INVESTIGATE AND CHALLENGE THE STATE'S CASE OR TO RETAIN EXPERTS AND DEVELOP EVIDENCE TO ASSIST [DEFENDANT] AT TRIAL. AS A RESULT OF PERSONAL CONFLICTS AND CRISES, TRIAL COUNSEL FAILED TO INVESTIGATE CLAIMS OF INNOCENCE PERTAINING TO THE GRIGA/FURTON COUNTS, DEVELOP DEFENSES TO FIRST DEGREE MURDER, AND TO ENGAGE EXPERTS TO EXAMINE EVIDENCE AND TESTIFY ABOUT EVIDENCE THAT SUPPORTS CLAIMS OF INNOCENCE. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. [DEFENDANT] IS ENTITLED TO A NEW TRIAL.

X.

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS TRIAL ATTORNEYS WERE INEFFECTIVE DURING THE GUILT AND PENALTY PHASES IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN NEITHER OF [DEFENDANT'S] COURT APPOINTED COUNSELORS AT LAW PROPERLY PROFFERED LETTERS WRITTEN TO [DEFENDANT] BY CO-DEFENDANT DANIEL LUGO. TRIAL COUNSEL WERE RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. [DEFENDANT] IS ENTITLED TO A NEW TRIAL, OR IN THE ALTERNATIVE, A NEW SENTENCING PHASE.

XI.

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

CONSTITUTION, AS WELL AS HIS RIGHT UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

XII.

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATION EVIDENCE, FAILED TO PROVIDE THE MENTAL HEALTH EXPERT WITH THIS MITIGATION, AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL FAILED TO OBJECT TO EGREGIOUS PROSECUTORIAL CONDUCT DURING THE STATE'S CLOSING ARGUMENT WHERE THE STATE IMPROPERLY INVOKED THE "GOLDEN RULE." COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, [DEFENDANT'S] DEATH SENTENCE IS UNRELIABLE.

XIII.

[DEFENDANT] WAS DENIED HIS RIGHT TO CONSULAR ACCESS AS A CITIZEN OF TRINIDAD AND TOBAGO IN VIOLATION OF INTERNATIONAL TREATIES. [DEFENDANT'S] COUNSEL WAS INEFFECTIVE WHEN COUNSEL FAILED TO SECURE CONSULAR ACCESS AND WHEN IT FAILED TO OBJECT TO THE STATE'S DENIAL OF CONSULAR ACCESS TO [DEFENDANT].

XIV.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

XV.

[DEFENDANT'S] CONVICTIONS AND SENTENCES TO DEATH ARE UNCONSTITUTIONAL UNDER RING V. ARIZONA.

XVI.

[DEFENDANT'S] SENTENCES TO DEATH VIOLATE THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW SHIFTING THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE. THE TRIAL EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING [DEFENDANT]. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

XVII.

[DEFENDANT] IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND UNDER INTERNATIONAL LAW BECAUSE EXECUTION BY ELECTROCUTION AND/OR LETHAL INJECTION IS CRUEL AND UNUSUAL PUNISHMENT.

XVIII.

[DEFENDANT] WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN TRIAL COUNSEL FAILED TO SUCCESSFULLY MOVED FOR SEVERANCE OF CLAIMS, SEVERANCE OF DEFENDANTS AND BIFURCATION OF JURIES. THE TRIAL COURT ERRED IN DENYING [DEFENDANT'S] MOTION FOR SEVERANCE OF DEFENDANTS. [DEFENDANT] IS ENTITLED TO A NEW TRIAL.

XIX.

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, [DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT DENIED [DEFENDANT'S] MOTION FOR A 30 DAY CONTINUANCE WHEN TRIAL COUNSEL'S FATHER DIED IMMEDIATELY BEFORE TRIAL, WHEN IT DENIED TRIAL COUNSEL'S MOTION TO WITHDRAW DUE TO FINANCIAL HARDSHIP AND CONFLICTS OF INTEREST, WHEN IT DENIED MOTIONS TO SUPPRESS ILLEGALLY SEIZED EVIDENCE, WHEN IT DENIED [DEFENDANT'S] MOTION TO ADMIT INTO EVIDENCE LETTERS WRITTEN BY CO-DEFENDANT LUGO TO [DEFENDANT], WHEN IT DENIED [DEFENDANT'S] MOTION FOR NEW TRIAL AND WHEN IT DENIED [DEFENDANT'S] MOTION TO RULE THAT THE FLORIDA DEATH PENALTY STATUTE, ON ITS FACE AND AS APPLIED, IS UNCONSTITUTIONAL. [DEFENDANT] IS ENTITLED TO A NEW TRIAL.

XX.

[DEFENDANT] IS DENIED HIS FIRST, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POST CONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING [DEFENDANT'S] LAWYER FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

XXI.

PROSECUTORIAL ARGUMENT AND INADEQUATE JURY INSTRUCTIONS MISLED THE JURY REGARDING ITS ABILITY TO EXERCISE MERCY AND SYMPATHY, THEREBY DEPRIVING [DEFENDANT] OF A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TO THE EXTENT COUNSEL FAILED TO REQUEST THAT THE JURY BE INSTRUCTED THAT MERCY AND SYMPATHY ARE PROPER CONSIDERATION IN THE PENALTY PHASE OF A CAPITAL MURDER TRIAL AND WHEN COUNSEL FAILED TO OBJECT TO THE STATE'S IMPROPER CLOSING ARGUMENT CALLING FOR NO MERCY. [DEFENDANT] RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

(PCR. 178-253) At the same time, Defendant filed a motion to depose Assistant State Attorneys Gail Levine, David Weinstein, Mary Cagel and Joel Rosenblatt. (PCR. 480-82) The motion was merely stated that Defendant had raised a ***Giglio*** claim and that he wanted to depose the State Attorneys to find additional support of his claim. *Id.*

Also on June 15, 2004, the State filed an objection to the request for additional public records from the State Attorney's Office and a motion for sanctions against Defendant, as he had his investigator request the personnel file of Gail Levine directly from the State Attorney's office without complying with Fla. R. Crim. P. 3.852. (PCR 483-84) On July 9, 2004, Defendant filed a response, claiming that the investigator had not been directed to request anything from the State Attorney's Office and that he had made the request on his own based on a

miscommunication concerning obtaining records from the clerk's office. (PCR. 488-93) However, Defendant also claimed that the request was proper as Fla. R. Crim. P. 3.852 was unconstitutional. *Id.*

At the hearing on the motions, Defendant asserted that the State must have agreed to his motion to depose because it had not filed a written response. (PCR. 886-87) The lower court informed Defendant that a written response was not required. (PCR. 887) The State then argued that under *State v. Lewis*, 656 So. 2d 1248 (Fla. 1995), Defendant needed to show good cause to obtain leave to take a deposition and had not done so. (PCR. 888)

The lower court inquired what in the e-mail Defendant had attached to his motion made him believed there was good cause to take depositions. (PCR. 888-89) Defendant insisted that the e-mail established that the State had a materially different statement from a Don Jones that it did not provide to him, that the State had knowledge of a flip in New Jersey that it did not disclosure and that the State was communicating with the United States Attorney's Office. (PCR. 889-90) The lower court inquired if Defendant was attempting to learn the meaning of the e-mail or already had an interpretation of the e-mail that made it relevant. (PCR. 890) Defendant asserted that the e-mail

definitively showed that the State had lied in stating that it did not know Schiller was guilty of medicare fraud, misrepresented its knowledge of medicare fraud scheme and failed to disclose the existence of the New Jersey flip. (PCR. 890-92) Defendant claimed that the depositions were necessary to determine the extent of the State's knowledge of medicare fraud and the timing of the State's knowledge. (PCR. 892)

The State responded that Don Jones had been the attorney for codefendant John Raimondo and had informed the State that he had evidence in his office. (PCR. 893) The State had seized this evidence (which was hair) pursuant to a search warrant from Mr. Jones' office and took a statement from him concerning how he came into possession of the hair. (PCR. 893) The statement had been disclosed, and neither Mr. Jones nor the evidence seized from his office was presented at trial. (PCR. 893-94)

The State indicated that paragraph (2) of the e-mail concerned the State's attempts to convince the federal government not to give a plea bargain to codefendant Delgado. (PCR. 894) It further asserted that everyone involved in the case was aware of the federal medicare fraud, the identity of the federal prosecutor heading that investigation and the identity of Gloria Vasquez, who the State believed was the flip in New Jersey. (PCR. 894) It further asserted that it had acted

to Schiller's detriment by arranging for him to return to the country to testify at the sentencing hearing so that he could be arrested by the federal government. (PCR. 895) The State asserted that Schiller was probably aware of the investigation as he had hired an attorney and was questioned during deposition in this matter about medicare fraud but that the State gave Schiller no benefit. (PCR. 896-97)

The lower court indicated that it fully recalled that the defense was aware of the investigation at the time of trial and did not understand the alleged *Brady* violation. (PCR. 897) Defendant insisted that the flip in New Jersey was actually an associate of Vasquez named John Mathewson, and that Schiller's attorney had claimed that Schiller was aware of the investigation when he sought bond for Schiller after his arrest. (PCR. 898) The lower court indicated that nothing Defendant had said change the fact that Defendant was aware of the investigation before trial and that there was no withholding of information. (PCR. 898-99) Defendant insisted it did because the State had not disclosed the identity of Mathewson and had lied to the court. (PCR. 899) Based on these arguments, the lower court found no good cause for depositions and denied the motion. (PCR. 900)

On its motion for sanction, the State argued that the

prosecutor involved in the case had been notified that her personnel file had been requested by a private investigator as a matter of policy in the State Attorney's Office. (PCR. 903) After investigating the source of the request, the State learned it concerned this matter and moved for sanction as it was a violation of §119.19, Fla. Stat. (PCR. 904-05) The State also pointed out that this Court had already rejected Defendant's constitutional challenge to the provision. (PCR. 905) Defendant insisted that his challenge was proper, that the request was a mistake caused by the investigator lack of knowledge of the rules and that a 3.852 request was pending. (PCR. 905-06) When the trial court indicated that it did not understand why an investigator would be sent while a request was pending and that it seemed that Defendant was arguing mistake only as a hedge against a finding of impropriety, Defendant argued that the State had attempted to mislead the court by not mentioning the pending request, that the investigator had only requested one personnel file and not everything that Defendant had directed him to get and that the State should have responded to the initial request by telling the investigator to speak to Defendant's attorney. (PCR. 906-08) After considering this argument, the lower court found that Defendant had violated the law and was subject to sanctions but deferred determination of

the appropriate sanction. (PCR. 909)

At the conclusion of the hearing, the lower court addressed a request for additional public records Defendant had served on the Miami-Dade Department of Corrections. (PCR. 508-11, 909-10) The lower court struck the request as improper under Fla. R. Crim. P. 3.852(i). (PCR. 910-10) Defendant subsequently refiled the request with the required affidavit. (PCR-SR. 561-66)

On July 22, 2004, Defendant served a motion for rehearing of the denial of the motion to depose the State Attorneys. (PCR-SR. 567-81) However, Defendant then filed an interlocutory appeal of the denial of the motion, which this Court dismissed without prejudice without requesting a response from the State. *Doorbal v. State*, 888 So. 2d 621 (Fla. 2004).

After the State filed its response to the motion for post conviction relief, the lower court held a *Huff* hearing on November 9, 2004. (PCR. 513-82, 931-1058) At the beginning of the *Huff* hearing, the lower court indicated that it had received the sealed records for in camera review and that it would release Defendant's medical records to him on production of a signed released and would review the remainder of the exempt materials. (PCR. 949-55)

Defendant insisted that all of his claims required factual development and that an evidentiary hearing was necessary on

each claim. (PCR. 956) When the lower court inquired what facts needed to be developed regarding the first two claims, Defendant asserted that she wished to establish the size of the case and the facts regarding the appointment of post conviction counsel. (PCR. 956-63) The lower court indicated that these were not nonrecord facts that needed to be developed. *Id.* Regarding the public records issue, the State pointed out that the claim was insufficient as Defendant did not specify which agency was not in compliance or how and that the lower court had already ruled on the outstanding public records requests. (PCR. 963) Defendant admitted that he had no specific information on noncompliance but wanted a hearing to determine if there was something missing. (PCR. 964-68) The lower court determined an evidentiary hearing was not necessary. (PCR. 968)

Regarding the *Brady/Giglio* claim, Defendant insisted that the e-mail evidenced that the State knew that Schiller was lying. (PCR. 969) The State responded that this issue had been raised in the motion for new trial and was barred and that the e-mail evidenced the State was acting to the detriment of Delgado, which was not favorable information for the defense. (PCR. 969-70) Defendant acknowledged that the e-mail evidenced an attempt to act to Delgado’s detriment but insisted that the State must have had a reason to do so, which needed to be

explored. (PCR. 970-73) The lower court inquired whether the issue should not have been raised on direct appeal, and Defendant insisted that counsel did not have the e-mail, which he believed showed the State knew Schiller was lying about being involved in medicare fraud. (PCR. 974-77) The lower court indicated it did not believe that the e-mail changed anything and refused to grant an evidentiary hearing. (PCR. 977-78)

With regard to the claim that counsel should have moved to withdraw, Defendant asserted that his trial counsel should have withdrawn when his father died and the prejudice was that issues were unpreserved for appeal. (PCR. 978) The lower court stated that the claim was more properly brought as a claim that counsel was ineffective for failing to preserve than a claim regarding why counsel might have done so and summarily denied the claim. (PCR. 979) On the claim that counsel was ineffective for failing to preserve, the lower court recognized that prejudice could not be shown in light of the rejection of the claims on direct appeal and summarily denied it as well. (PCR. 980-83) The lower court also found that the cumulative error claim did not involve factual disputes. (PCR. 983-84)

When the lower court addressed the claims that counsel was ineffective for failing to investigate and present evidence of innocence, it repeatedly gave Defendant the opportunity to

explain what evidence he was alleging was not presented. (PCR. 984-1001) Defendant initially merely stated that no witnesses were called by the defense at trial, he then made vague allegations concerning a timeline and he finally stated that he was investigating and needed more time to file a proper motion. *Id.* The lower court determined that the claims were insufficient and denied them. *Id.* With regard to the Lugo letters, Defendant acknowledged that counsel had attempted to admit them but claimed that counsel should have argued that they showed Defendant capable of forming relationships and acting independently. (PCR. 1001-05) The lower court indicated that there was no need for an evidentiary hearing on that claim and that Defendant's proffer of the use of the letters was harmful to Defendant's case. *Id.*

With regard to the claim that *Ake* was violated, Defendant insisted that he had experts who would testify at an evidentiary hearing and had provided reports. (PCR. 1006) The State pointed out that the record reflected that Defendant had been evaluated pretrial and that the alleged reports, which were dated the day before the *Huff* hearing, merely stated that the experts were reviewing information. (PCR. 1006-08, PCR-SR. 271-74) Defendant insisted that a letter agreeing to review information was an expert report and acknowledged that the experts had just been

retained. (PCR. 1008-09) The lower court indicated that the claim was insufficiently pled but granted an evidentiary hearing on it in an abundance of caution. (PCR. 1037)

With regard to the failure to investigate and present mitigation, the lower court again noted that the claim was insufficiently plead and inquired regarding what mitigation was not presented. (PCR. 1010) Defendant then proceeded to proffer that counsel should have called more witnesses to testify regarding the matters that had been presented at the penalty phase, that counsel should have impeached Defendant's own witnesses and that Defendant was still investigating the claim. (PCR. 1010-18) Because Defendant failed to proffer anything that was not cumulative or harmful, the lower court indicated an evidentiary hearing was not necessary. (PCR. 1018)

On the Vienna Convention claim, Defendant asserted that he was attempting to get the Government of Trinidad to raise the claim. (PCR. 1018) As such, the lower court denied it. *Id.* On the constitutionality of the death penalty statute, Defendant asserted that he needed an evidentiary hearing to show that not everyone charged with murder faced the death penalty and not all the codefendants in this case faced the death penalty. (PCR. 1019-23) The lower court determined that this was not a factual issue and also rejected Defendant's assertion that remaining

claims required factual development. (PCR. 1023-37)

Defendant then requested an extension of time to amend his motion for post conviction relief and a continuance of the *Huff*. (PCR. 1039) The State objected that prospective leave to amend was improper and that the only provision for a continuance was a continuance of the evidentiary hearing that had to be held within 90 days. (PCR. 1039-40) During argument on the motion, Defendant included a request that the evidentiary hearing be continued for 90 days. (PCR. 1043) The lower court indicated that it was inclined to grant a continuance of the evidentiary hearing but not to set the hearing off for six months. (PCR. 1043-46) After listening to argument, the lower court granted Defendant until January 10, 2005, to provide the State with reports from his experts and set the evidentiary hearing for February 14, 2005. (PCR. 1046-53)

When the lower court ordered the Department of Financial Services (DFS) to pay Defendant's attorneys fees outside of the schedule provided in §27.711, Fla. Stat., the Department appealed. (PCR. 612-13) Defendant then moved to stay the post conviction proceedings pending that appeal. (PCR-SR. 582-83)

At the December 21, 2004 hearing on the motion, Defendant argued that she had gained weight because of the stress of handling the case and that she needed time to exercise and to

develop other sources of income. (PCR. 1073-77) The State attempted to explain to the lower court that appeal was the result of the lower court's order requiring payment outside of the schedule. (PCR. 1077) The lower court indicated that it did not care why the appeal had occurred. (PCR. 1077-78) The State then suggested that the proper course of action was moving to lift the automatic stay pending DFS's appeal pursuant to Fla. R. App. P. 9.310(b)(2) rather than seeking to stay the post conviction proceedings contrary to the language and spirit of Fla. R. Crim. P. 3.851. (PCR. 1078-79) When the lower court indicated that it appeared that the State's suggestion was appropriate, Defendant accused the State of lying and DFS of taking an improper appeal to delay payment. (PCR. 1079-86) When the lower court was unmoved by these accusations, Defendant then began to scream at the lower court. (PCR. 1086-88) When the lower court was still unmoved, Defendant requested a 90 day continuance because he had still not provided records to his experts or had his experts evaluate Defendant. (PCR. 1090-96) After listening to the arguments, the lower court denied the motion to stay the proceedings or to continue the evidentiary hearing. (PCR. 1096)

When dealing with a cost issue later in the hearing, the lower court informed the parties that it planned to leave the

bench by February 28, 2005. (PCR. 1105) Defendant then objected that he should not be denied a continuance merely because a judge was leaving the bench. (PCR. 1105-06) He asserted that he could not be prepared for an evidentiary hearing by that time. (PCR. 1106) The lower court responded that it had already set the hearing for February 14, 2005, because Defendant insisted that he needed additional time and that it would not have granted a continuance even if the judge was staying on the bench. (PCR. 1106)

At the conclusion of the December 21, 2004 hearing, the State asked the lower court to address the motion for rehearing of the motion to depose the State Attorneys. (PCR. 1109-10) The lower court asked why the motion needed to be reheard. (PCR. 1111) Defendant insisted that he had new facts but merely asserted that the State had argued at one point that it had not disclosed its knowledge of a federal indictment because it was bound by the provisions of the Federal Rules regarding grand jury secrecy and did not completely cite the rule. (PCR. 1111-13) Defendant also claimed that the motion needed to be granted so that an ethic investigation of the prosecutors could be conducted. (PCR. 1113-15) The lower court indicated that it heard no new facts in the assertions and continued to hear no new facts despite its repeated requests for Defendant to explain

what the new facts were. (PCR. 1115-19) The lower court then denied the motion because there was no basis for rehearing. (PCR. 1119-24)

Later that day, Defendant moved to lift the stay of the payment order, claiming that the stay was causing Defendant's attorney to experience financial hardship. (PCR. 608-09) DFS conceded that the stay could be lifted. (PCR. 1130) As such, the lower court lifted the stay. (PCR. 610, 1130-31)

On January 3, 2005, the lower court entered an order on the in camera inspection. (PCR. 614) It found that the documents were not subject to disclosure. *Id.* At a status hearing on January 10, 2005, Defendant indicated that he had just begun to have Defendant evaluated on January 7, 2005, and that the evaluations were not complete. (PCR. 1144-45) When the State requested that Defendant be ordered to provide copies of the records Defendant had provided to his experts, Defendant agreed to provide the records but asserted that he still had not provided the records to his experts. (PCR. 1144-48) The State then asked that Defendant be ordered to provide copies of the portions of Defendant's trial counsel's file regarding mental mitigation. (PCR. 1149-50) The lower court ordered Defendant to make the files available for copying by the following Tuesday. *Id.* Defendant then moved for continuance again, which was again

denied. (PCR. 1154-56)

On January 18, 2005, Defendant filed a motion for leave to amend his motion for post conviction relief, attaching a proposed amended motion. (PCR. 668-72, PCR-SR. 95-170) Defendant claimed that the reason why the amendment was necessary was that counsel had filed the initial motion before investigating the claims, that counsel was still investigating the claims and that counsel had delayed investigating the claims while pursuing the depositions of the State Attorneys. (PCR. 668-72) Most of the proposed amendments sought to add conclusory allegations of prejudice.[4] (PCR-SR. 95-170)

Defendant also again moved for a continuance. (PCR. 673-74) Defendant asserted the continuance was necessary because his experts had not completed their reports and because this was a death case. *Id.*

At a status hearing that morning, Defendant claimed that he had provided the documents given to his experts as part of the

[4] From the State's review of the proposed amendment, it appears that Defendant was attempting to add paragraphs 9 and 10 to claim I, paragraphs 4 and 5 to claim II, paragraph 3 and an additional sentence in paragraph 4 in claim III, paragraphs 45-54 in claim IV, paragraphs 32-34 in claim V, paragraph 6 in claim VI, paragraphs 3 and 4 in claim VII, paragraphs 7, 15 and 16 in claim VIII, paragraphs 4, 5, 7,and 15 in claim IX, paragraphs 14-17 and 19 in claim X, paragraph 4 in claim XII, paragraphs 5, 6 and 9 in claim XIII, paragraph 4 in claim XIV, paragraphs 3-5 in claim XV, and paragraphs 3 and 4 in claim XVII. Defendant also seeks to delete phrases from a sentence in paragraph 14 of claim VIII and to rewrite claim XI.

appendix to the proposed amended motion, which had been mailed to the State. (PCR. 1162-63) Defendant then stated that he had not provided the State with the portion of trial counsel's file about mental health issues because he did not understand that he had been ordered to do so. (PCR. 1163-64) Defendant was then ordered to provide copies of all of the attorney's notes from trial counsel's file that day. (PCR. 1164-65)

The State responded to the motion for leave to amend, asserting that the request was untimely and that there was no good cause for leave to amend. (PCR. 675-81) At the hearing on the motion, Defendant asserted that he had only sent investigators to Trinidad 10 days before the hearing. (PCR. 1177) The lower court granted leave to amend claim XI and denied leave to amend the other claims. (PCR. 1179) The lower court also denied the motion for continuance. (PCR. 1179-80)

Defendant then provided a statement to the court, asserting that he would not be calling any witnesses at the evidentiary hearing because none of the experts were prepared to reach any conclusions. (PCR. 687-88) The lower court then had Defendant personally brought before the Court and explained to him that by refusing to call witnesses at the evidentiary hearing that had been granted, he would automatically lose that claim. (PCR. 1187) Defendant stated that he was in agreement with counsel's

decision not to proceed. (PCR. 1187) The lower court explained to Defendant that the tactical decision not to proceed could be viewed as a waiver of the claim, and Defendant insisted that this was still how he wanted to proceed. (PCR. 1187-90) Defendant then admitted that some of the records that the experts claimed to need might not exist and had not been located. (PCR. 1191) The lower court ordered Defendant to provide affidavits from the experts, which included their CV's, materials they reviewed, opinions they reached and their availability at the time of trial. (PCR. 1191-1201) Defendant subsequently filed affidavits from the experts that did not address the majority of issues the court had ordered addressed and attached bills showing the most of the expert evaluations commenced in January 2005. (PCR. 745-74)

On February 9, 2005, the lower court again colloquied Defendant about his decision not to proceed with the evidentiary hearing and again warned Defendant that he would be waiving his post conviction claim by doing so. (PCR-SR. 84-86) Defendant again affirmed that he was in agreement with not proceeding to the evidentiary hearing. *Id.* Based on Defendant's refusal to proceed and the rulings at the *Huff* hearing, the lower court orally denied the motion for post conviction relief. (PCR-SR. 90)

On February 16, 2005, the lower court entered its written order denying the motion. (PCR. 776-77) The order stated that all of the claims except Claim XI had been denied at the *Huff* hearing and that Claim XI was denied based upon Defendant's failure to carry his burden by refusing to present evidence at the evidentiary hearing. *Id.* The State moved for clarification, because the order did not include findings regarding the claims other than claim XI. (PCR. 778-79) The lower court then entered an amended order specifying for each of the other claims that they were denied because they were procedurally barred, facially insufficient and/or without merit as a matter of law. (PCR. 782-84) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the motion to disqualify it, as the motion was untimely and facially insufficient. The lower court also did not abuse its discretion in refusing to permit depositions of the State Attorneys, as no good cause was shown. The *Brady* and *Giglio* claims were properly summarily denied as procedurally barred. The lower court's order properly explains why the claims were properly summarily denied. Moreover, since these claims were procedurally barred, insufficiently plead and without merit as a matter of law, they were properly summarily denied. The lower court did not abuse

its discretion in denying leave to amend all but one claim. The lower court did not abuse its discretion in denying a continuance, as it had already extended the time for the holding of the evidentiary hearing and Defendant was dilatory. The lower court's order denying the claim upon which an evidentiary hearing was granted properly explains why this claim was denied. Moreover, the claim was properly denied, as Defendant waived the claim by refusing to proceed with the evidentiary hearing.

ARGUMENT

I. THE LOWER COURT DID NOT ERR IN DENYING THE UNTIMELY AND FACIALLY INSUFFICIENT MOTION TO DISQUALIFY IT.

Defendant first asserts that the lower court erred in denying his motion to disqualify the post conviction judge because he had testified at the federal sentencing hearing regarding Mr. Schiller. However, the lower court did not err in denying the motion to disqualify as it was untimely and insufficient.[5]

In order for a motion to disqualify to be considered timely, it must be filed within ten days of when the information on which it is based was learned. Fla. R. Jud. Admin. 2.160(e); *see also Willacy v. State*, 696 So. 2d 693 (Fla. 1997). When the

[5] This Court reviews the determination that a motion for disqualification was legally sufficient de novo. *Chamberlin v. State*, 881 So. 2d 1087, 1097 (Fla. 2004).

grounds for disqualification did not arise until after the matter was no longer before the lower court judge, the motion may be made in a subsequent proceeding before the same lower court judge. *See Asay v. State*, 769 So. 2d 974 (Fla. 2000). However, the motion must still be timely filed even when it is cognizable in a post conviction proceeding. *See Waterhouse v. State*, 792 So. 2d 1176, 1193-94 (Fla. 2001).

Here, the Florida Supreme Court issued its mandate returning this matter for post conviction proceedings on January 30, 2003. Judge Ferrer was assigned to conduct the post conviction proceedings on February 3, 2003. (PCR-SR. 31) Yet, the motion to disqualify was not filed until March 27, 2003. (PCR-SR. 7-19) Defendant acknowledged in his motion to disqualify that the fact lower court judge had testified at Schiller's sentencing was published in a local newspaper in January 2000. Pete Collins, *Pain & Gain, Part 3*, MIAMI NEW TIMES, Jan. 6, 2000.

In *Rivera v. State*, 717 So. 2d 477, 481 n.3 (Fla. 1998), this Court determined that a motion for disqualification was untimely when it was based on information published in a newspaper years before the motion was filed. Here, the fact that Judge Ferrer had testified at Schiller's sentencing hearing was published in a local newspaper more than three years before the

motion to disqualify was filed. Moreover, the motion was filed almost two months after this Court issued its mandate and appointed post conviction counsel for Defendant and after the order appointing Judge Ferrer to preside over the post conviction proceedings. As all of these time periods exceed 10 days, the motion was untimely and was properly denied as such.

In an attempt to make it seem as if the motion was timely, Defendant now asserts that the motion was filed within 10 days of when Defendant's counsel decided to read the newspaper article. Initial Brief at 59 n.10. However, no such assertion was made below. Instead, in his motion for disqualification, Defendant asserted that his motion was timely because it was filed within ten days of when counsel chose to file his notice of appearance in the lower court. (PCR-SR. 8) Defendant made no assertion of when he actually became aware of the fact that Judge Ferrer had testified. (PCR-SR. 7-19) As such, Defendant's present assertion that the motion was timely because counsel first learned of the judge's testimony is unpreserved. *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). Thus, it should be rejected.

Moreover, accepting Defendant's assertion would render the time limit under Fla. R. Jud. Admin. 2.160(e) meaningless, by

encouraging litigants to either bury their heads in the sand or claim they did. Defendant was represented to counsel at trial and on direct appeal, and this Court immediately appointed counsel for Defendant when it issued mandate. The record reflects that Defendant was aware of Schiller's arrest on the medicare fraud charges in July 1998, and was asserting at that time that information regarding those charges was highly relevant to his case. (R. 3495-3501) As such, he had every reason to be monitoring the progress of Schiller's prosecution. The State also informed Defendant in its response to the motion for rehearing that Schiller had pled guilty and was awaiting sentencing. (R. 3770) Moreover, there is no reason why a defendant (and his attorneys) would not be aware of press coverage of his own case. Thus, there is no reason why Defendant could not and should not have known of the judge's testimony in 2000. If a defendant could avoid the 10 day limit for filing motions to disqualify by simply claiming that they did not bother to read the newspaper or follow the events in a case they deemed relevant and important, the time limit would be meaningless. Thus, Defendant's claim that the motion was timely simply because he chose to acquaint himself with the facts until less than 10 days earlier should be rejected even if it was preserved.

Moreover, the grounds upon which Defendant claimed timeliness below are equally unavailing. Defendant had counsel at trial and on appeal. This Court appointed counsel to represent Defendant in his post conviction litigation on January 30, 2003. Counsel chose to delay filing a notice of appearance until March 18, 2003, and then claimed that disqualification was timely because it was filed on March 27, 2003. (PCR. 7-19) However, allowing Defendant to base the timing of a disqualification motion on when he chose to file a pleading would allow him to manipulate the disqualification rule. The suggestion that such is proper should be rejected.

Even if the motion had been timely, Defendant would still be entitled to no relief. First, contrary to the facts presented in the brief, the only allegations presented in the motion to disqualify were that Schiller would likely be a witness in the post conviction proceedings, that testifying at Schiller's sentencing hearing indicated that Judge Ferrer was incapable of determining Schiller's credibility and that it was foreseeable that Judge Ferrer might need to be deposed regarding "the circumstances in which he became a witness," and when he learned of Schiller's criminal activities and the investigation regarding it. (PCR-SR. 7-9) There was no allegation that Judge Ferrer violated an cannon of candor toward the tribunal by not

informing the federal court that Schiller had denied involvement in medicare fraud, no allegation that Judge Ferrer prearranged to testify on Schiller's behalf prior to the hearing on the motion for new trial,[6] no allegation that Judge Ferrer had acted improper by not providing notice of his being called and no allegation that Judge Ferrer's testimony was part of some conspiracy with the State to benefit Schiller.[7] As such, none of these allegations are properly before the Court and should be

[6] In fact, it appears that Defendant is arguing based on nonrecord information, which is highly improper. *Altchiler v. State, Dept. of Professional Regulation*, 442 So. 2d 349 (Fla. 1st DCA 1983)("That an appellate court may not consider matter outside of the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.").

[7] Moreover, the State's comment in its response to the motion for new trial are perfectly reasonable when one considers that the law generally only permits witnesses to be impeached with criminal convictions and a limited exception for State witnesses under pending or threatened investigation or prosecution is based on the specter that the witness might get a benefit for providing the testimony. *Breedlove v. State*, 580 So. 2d 605, 607-09 (Fla. 1991). When that law is considered and the statement in the motion for new trial is considered in context, the State was merely asserting that not only had it provided no benefit to Schiller but also that it did not intend to provide such a benefit in the future and had, in fact, acted to Schiller's detriment by facilitating his federal arrest by having him return to the jurisdiction to testify. (R. 3770) The analogy to a plea bargain is inapt. When the State enters into a plea bargain, it agrees to inform the court, before whom it is a party, of what sentence it believes should be imposed based on the cooperation as an officer of the court. Here, the State was not prosecuting Schiller and was merely indicating that it did not intend to benefit Schiller in a federal court. Thus, Defendant's assertions that the statement evidences some form of conspiracy is baseless.

rejected as such. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *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).

Moreover, the mere fact that Judge Ferrer testified at Schiller's sentencing hearing did not provide a basis for recusal. This Court has repeatedly held "[t]he fact the judge has made adverse rulings in the past, or that the judge has previously heard the evidence or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt, **even where it is alleged that the judge discussed his opinion with others**,' are generally legally insufficient reasons to warrant the judge's disqualification." *Rivera v. State*, 717 So. 2d 477, 481 (Fla. 1998)(emphasis added); *see also Waterhouse v. State*, 792 So. 2d 1176, 1194 (Fla. 2001); *Jackson v. State*, 599 So. 2d 103, 107 (Fla. 1992). Here, a review of the transcript of Judge Ferrer's testimony shows that he described what had occurred to Schiller based on the evidence presented at Defendant's trial and commented on Mr. Schiller's demeanor while testifying. In fact, his testimony is remarkably similar to the finding regarding the prior violent felony aggravating circumstance in the sentencing order in this case. (R. 3463) Given that Judge Ferrer's testimony merely reiterated what he found concerning

the prior violent felony aggravator, it merely shows that he had previously ruled adversely to Defendant and that he had previously heard the evidence regarding what happened to. Schiller. Thus, the motion for disqualification was facially insufficient and properly denied.

II. THE *BRADY* AND *GIGLIO* CLAIMS AND THE REQUEST TO DEPOSE THE PROSECUTORS WERE ALL PROPERLY DENIED.

Defendant asserts that the lower court abused its discretion in denying him leave to depose the prosecutors and erred in denying his claims that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), by failing to disclose evidence concerning medicare fraud and knowingly presenting false testimony concerning it. However, Defendant is entitled to no relief.

With regard to the *Brady* and *Giglio* claims, the lower court properly denied these claims as procedurally barred. In *State v. Riechmann*, 777 So. 2d 342, 363 (Fla. 2000), this Court held that a *Brady* claim was procedurally barred, where the issue of the discoverability of evidence was known and litigated before the defendant was convicted.

Here, the record reflects that the trial court had ruled that information regarding medicare fraud was not discoverable in February 1996, when the issue had been raised after an initial deposition of Schiller. (T. 1681) When the issue was

again raised concerning the deposition of Delgado in October 1997, the trial court again considered the discoverability of information regarding medicare fraud and determined that discovery on this subject would be limited to whether Delgado was involved in medicare fraud with Schiller or any of the codefendants in this case, when that involvement occurred, whether the motive for the crimes against Schiller was a belief that Schiller had cheated the others in connection with this activity and how much money Schiller was believed had taken from them.[8] (T. 1681-1723) The trial court specifically found that Defendant was not entitled to discovery concerning the other participants or victims of the medicare fraud scheme or any other specifics of the scheme. (T. 1719-21) Since the lower court had ruled that other information regarding the medicare fraud scheme was not discoverable pretrial, any claim that Defendant was not provided with this information (such as the identity of anyone who could have been the "flip in NJ") during discovery could have and should have been raised on direct appeal and is now barred under *Riechmann*.

Moreover, Defendant claimed that the State had violated *Brady* by failing to disclose information about the medicare fraud scheme and the investigation of it in his motion for new

[8] The trial court also permitted this same limited information to be elicited from Schiller. (R. 1530-31)

trial. (R. 3495-99) At the hearing on that motion, Defendant argued that the State had also knowingly allowed the presentation of false testimony when it allowed Schiller to testify that he was not involved in medicare fraud at trial. R. 3926-27, 3936) After considering Defendant's argument, the lower court found that there was no *Brady* violation and rejected the claim regarding the knowing presentation of false testimony. (R. 3931, 3937-38, 3743) As such, both the *Brady* and *Giglio* claims could have and should have been raised on direct appeal.[9] Thus, the lower court also properly found these claims procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). It should be affirmed.

While Defendant appears to assert that the bar should have been lifted because he had new evidence that he claims is inconsistent with the position the State took at the time of trial, this is not true. The allegedly new evidence consists of an e-mail from one of the prosecutors to her supervisor dated October 31, 1996. (PCR. 482) The e-mail raised two numbered issues. The first concerned a request for a meeting by an attorney representing Don Jones concerning the possibility that Jones might be charged with perjury because he had given

[9] In fact, codefendant Lugo did raise the issue of the denial of the motion for new trial, and this Court rejected it. *Lugo v. State*, 845 So. 2d 74, 104-05 (Fla. 2003).

inconsistent statements.[10] *Id.* The second stated:

> Alicia Valle AUSA called and told me the[y] got the Flip in NJ. They do NOT need Delgado to make the case. BUT, Jack Denaro came to her office and asked her for a plea and she is thinking about making it CONCURRENT. Just what I don't want. Last Week when I spoke to Ms. Rundle about the Natale matter, she told me to make sure the Feds did not mess me up. That they can just wait because our case was so much more important. She told me whatever help I needed she would do. I thought that if we gave the Feds more info so they didn't need Delgado that they would give him Consecutive time. I really think that we need to stand firm on this even if you or Ms. Rundle have to call the powers that be over there. They just seem like they will plead anyone out---But Schiller. That's the only person they care about even though Delgado is in this for over a million. By the way the deal will also save his entire family. He is looking worse and worse for me. Do the words Sal and Willie mean anything to them?? I rather he be pending charges when I try the case then this cush deal.

Id.

While Defendant asserts that this e-mail is inconsistent with the position the State took pretrial and during the proceedings on the motion for new trial, this is not true. Beginning at the October 1997 hearing regarding the scope of discovery regarding medicare fraud and continuing through new trial proceedings, the State consistently took the position that it was aware that there was an investigation into medicare fraud concerning Delgado, that Schiller was being implicated in that

[10] At the hearing on the motion to depose the prosecutors, the author of the e-mail stated that this discussion had nothing to do with medicare fraud and concerned evidence that was not presented in this matter. (PCR. 893-94)

investigation and that all of the defendants were aware of this information. (T. 1682, 1685, 1686, R. 3770) While Defendant insists that the sentence in the State's response to the motion for new trial that the State was not privy to the federal investigation or its evidence is inconsistent with the e-mail, Defendant ignores the very next sentence in the response: "However, the State was made aware by counsel to Delgado **and Federal Authorities** that Delgado was indeed a target of the same Medicare fraud scheme and was speaking to Federal authorities." (R. 3770)(emphasis added). At the hearing on the motion, the State acknowledged that it "shared with the Federal Government" information provided by Delgado that he committed medicare fraud with Schiller and gave the federal authorities access to Schiller's records. (R. 3833, 3834) The e-mail merely confirms that the State was aware of the medicare fraud investigation of Delgado, that it assumed that Schiller was implicated and that it provided information to the federal government to assist their investigation. (PCR. 482) Since the e-mail is consistent with the position the State always espoused, it does not provide a basis to lift the bar. The claims were properly denied.

Moreover, Defendant's analysis of the alleged materiality of the alleged *Brady* violation is seriously flawed. Both this Court and the United States Supreme Court have recognized that

withholding inadmissible information does not constitute a *Brady* violation. *Wood v. Bartholomew*, 516 U.S. 1 (1995); *Breedlove v. State*, 580 So. 2d 605 (Fla. 1991). Here, Defendant's claim is that disclosure of specific information about Schiller's commission of medicare fraud would have permitted him to present evidence to contradict Schiller's denial of having committed medicare fraud. However, extrinsic evidence is not admissible for impeachment on a collateral issue. *Dupont v. State*, 556 So. 2d 457, 458 (Fla. 4th DCA 1990). Moreover, an issue is collateral unless "the proposed testimony can be admitted into evidence for any purpose independent of the contradictions." *Id.*

Further, a witness may not be questioned about specific acts of misconduct that have not resulted in a conviction. §§90.404, 90.609, 90.610, Fla. Stat. While there is a limited exception for State witnesses under pending investigation or charges, that exception is based on the expectation of a benefit to the witness from the State. *Breedlove*, 580 So. 2d at 607-09. Here, Defendant had present nothing indicating such a benefit or expectation of a benefit and instead relies on information that the State was acting to the detriment of Delgado and Schiller. Thus, the limitations on discovery and the rejecting of the *Brady* materiality prong were proper. Moreover, while Defendant asserts that evidence that Schiller was actually involved in

medicare fraud would have affected Defendant's motive in committing the crime, he does not explain how this is true as motive concerning a defendant's state of mind or how bolstering the State's motive evidence would be favorable to him. *See Wood v. State*, 733 So. 2d 980, 987 (Fla. 1999). The lower court should be affirmed.

Defendant's analysis of the *Giglio* claim is similarly flaw and internally inconsistent. Defendant asserts that his knowledge of the investigation into Schiller's medicare fraud is irrelevant to whether a *Giglio* violation occurred. He further asserts that he is not claimed that the State knew Schiller was guilty of medicare fraud. However, a defendant's knowledge of the purportedly false testimony is relevant, and negates, a *Giglio* claim. *Routley v. Singletary*, 33 F.3d 1279, 1286 (11th Cir. 1994). Moreover, the allegedly *Giglio* violation is that the State did not correct Schiller's testimony that he did not knowingly engage in a fraudulent medical supply business or engage in illegal business with Delgado while acknowledging that he had medical supply companies that billed medicare. (T. 7548-50, 7624-25) As such, if the State could not know that Defendant was guilty of medicare fraud, it could not know that Schiller's denial of such guilt was false. However, proof that the State knew the testimony was false is required to show a *Giglio*

violation. *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991); *see also Maharaj v. State*, 778 So. 2d 944, 956 (Fla. 2000).

Moreover, the State did present evidence that Schiller was guilty of medicare fraud through Delgado. (T. 11606-30, 11643, 12030-32, 12043) Further, the fact that Mr. Schiller was kidnapped and what occurred during the kidnapping were confirmed by Pierre, Sanchez and Delgado. The property taken from Schiller was found in the possession and control of Defendant and his codefendants, and Schiller received medical treatment for the injuries he sustained. Under these circumstances, it cannot be said that any alleged *Giglio* violation was material. *Guzman v. State*, 31 Fla. L. Weekly S449 (Fla. Jun. 29, 2006). The lower court properly denied the claim.

With regard to the claim that the lower court abused its discretion in refusing to grant permission to depose the prosecutors, Defendant is entitled to no relief. In *State v. Lewis*, 656 So. 2d 1248 (Fla. 1994), this Court addressed the ability of trial court to allow post conviction discovery and found:

> that it is within the trial judge's inherent authority, rather than any express authority found in the Rules of Criminal Procedure, to allow limited discovery. In this vein, we find the procedures established in *Davis* persuasive and adopt the following paragraph as our own:
>
> In most cases any grounds for post-

> conviction relief will appear on the face of the record. On a motion which sets forth good reason, however, the court may allow limited discovery into matters which are relevant and material, and where the discovery is permitted the court may place limitations on the sources and scope. On review of an order denying or limiting discovery it will be the [moving party's] burden to show that the discretion has been abused.
>
> 624 So. 2d at 284. The trial judge, in deciding whether to allow this limited form of discovery, shall consider the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts. See *People ex rel. Daley v. Fitzgerald*, 123 Ill. 2d 175, 526 N.E.2d 131, 135, 121 Ill. Dec. 937 (Ill. 1988). This opinion shall not be interpreted as automatically allowing discovery under rule 3.850, nor is it an expansion of the discovery procedures established in rule 3.220. We conclude that this inherent authority should be used only upon a showing of good cause.

Id. at 1249-50. This Court has held that it reviews ruling regarding whether to permit post conviction discovery for an abuse of discretion. *Reaves v. State*, 31 Fla. L. Weekly S585, S587 (Fla. Sept. 14, 2006). This Court has held that it is not an abuse of discretion to deny discovery where the discovery sought would not prove the claim. *Id.* This Court has held that denial of discovery is not an abuse of discretion when Defendant had other access to the information sought, such as the provision of affidavits or conversations with the witnesses. *Rodriguez v. State*, 919 So. 2d 1252, 1279-80 (Fla. 2005).

Here, Defendant's motion for deposition was merely a boilerplate motion that relied on the same e-mail and asserted that Defendant wanted to seek "additional information" to support the barred claims. (PCR. 480-82) It made no attempt to explain why there was good cause for discovery and did not address any of the factors under *Lewis.* Only after the motion was denied on July 9, 2004, did Defendant attempt to add allegations through a motion for rehearing to show good cause. (PCR-SR. 567-81) However, attempting to add allegations in a motion for rehearing is improper. *See Vining*, 827 So. 2d at 211-13; *Brennan v. State*, 754 So. 2d 1, 6 n.4 (Fla. 1999). Moreover, Defendant then elected to appeal that decision to this Court without obtaining a ruling on the motion. By doing so, Defendant abandoned the motion for rehearing. *In re Forfeiture of $104,591*, 589 So. 2d 283 (Fla. 1991). Thus, the motion for deposition was insufficient, and the lower court did not abuse its discretion in denying it.

Moreover, the lower court did not abuse its discretion under *Reaves* or *Rodriguez*. When the lower court attempted to determine why the depositions were necessary light of the fact that the *Brady* and *Giglio* claims had been raised in the motion for new trial and rejected based on Defendant's knowledge of the allegedly withheld information and what information Defendant

hoped to elicit through the depositions, Defendant responded that the e-mail already established the *Brady* and *Giglio* claims and that he now wanted to question the prosecutors about what specific information they had regarding the medicare fraud and when they obtained that information. (PCR. 889-92, 897-900) However, this information felt squarely in what the lower court determined was not subject to discovery prior to trial. Moreover, the State explained the meaning of the email to Defendant. (PCR. 893-97) Under these circumstances, the lower court did not abuse its discretion under in denying the motion to depose under *Reaves* and *Rodriguez*. The claim should be denied.

III. THE LOWER COURT'S ORDER SUMMARILY DENYING CLAIMS THAT WERE PROCEDURALLY BARRED, FACIALLY INSUFFICIENT AND WITHOUT MERIT AS A MATTER OF LAW WAS PROPER.

Defendant next asserts the lower court erred in denying 20 of his claims for post conviction relief summarily. While Defendant does not even identify the claims with specificity or assert why the claims required evidentiary development, he does appear to argue that the summary denial was inappropriate because the lower court did not explain its rationale or attach portions of the record. However, the lower court's order does explain why the claims were denied, and these reasons were proper. As such, Defendant is entitled to no relief.

In *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993), this Court stated that a trial court's order summarily denying a claim would be deemed proper if the trial court either attached portions of the record or explained its rationale for denying a claim. Based on this holding, this Court had held that a summary denial can be upheld even where a trial court did not attach portions of the record if the lower court has "clearly spelled out" the reason for the denial in its order. *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000). Moreover, this Court has affirmed the summary denial of claims presented in a motion filed after the amendment to Fla. R. Crim. P. 3.851, when the claims presented were procedurally barred or insufficiently plead even over the defendant's claim that an evidentiary hearing was necessary. *Bryant v. State*, 901 So. 2d 810 (Fla. 2005).

Here, the lower court's order complied with these requirements. The lower court explained that it was denying Claims I and II, which challenged the constitutionality of Fla. R. Crim. P. 3.851 & 3.852, because this Court had already rejected these claims. (PCR. 783) It stated that Claim III, regarding disclosure of public records, Claim VIII and IX, regarding general allegations of ineffective assistance at the guilt phase, and Claim XII, concerning ineffective assistance

for failing to investigate and present mitigation, were facially insufficient. *Id.* It denied Claim IV, concerning alleged *Brady/Giglio* violations regarding Schiller's involvement in medicare fraud, were procedurally barred and refuted by the record. *Id.* It found that Claim V was merely repetitious of claims raised elsewhere in the motion. *Id.* It found that Claim VI, regarding the failure to object to issues that this Court had rejected on direct appeal, did not present a sufficient claim for relief. *Id.* It found that Defendant lack standing to raise the Vienna Convention claim (Claim XIII), and that the claim was procedurally barred. *Id.* It found that Claim X, regarding the exclusion of Lugo's letters to Defendant, was procedurally barred and facially insufficient. *Id.* It found that the claims that Florida capital sentencing scheme is unconstitutional and violates *Ring*, Claims XIV and XV, and the lethal injection claim, Claim XVII, were without merit as a matter of law. (PCR. 784) The burden shifting claim (Claim XVI), the severance claim (Claim XVIII), and the claim regarding sympathy and mercy (Claim XXI) were all procedurally barred and without merit. *Id.* The jury interview claim (Claim XX) was rejected as procedurally barred and insufficiently pled. *Id.* Claim XIX, alleging trial court error, was found to be procedurally barred. *Id.* Finally, the lower court determined

that the cumulative error claim (Claim VII) was insufficiently pled and without merit. (PCR. 783)

Thus, the lower court's order does explain the reasons for summarily denying the claims that were summarily denied. It complies with *Anderson* and *Patton*. Defendant's assertion to the contrary should be rejected.

To the extent that Defendant is attempting to claim that any of these individual reasons were improper for the rejection of any of the particular claims, he is entitled to no relief. In presenting this issue, Defendant does not attempt to explain why any of the reasons provided for summarily denying his claims was wrong. Instead, Defendant merely recites that he elected to file a motion for post conviction relief within a year after his convictions and sentences became final because he did not wish to violate the federal habeas statute of limitations and that he then "attempted to investigate and clarify" the issues presented. Defendant then generally discusses law regarding summary denials and claims the order is insufficient.

However, this Court has made clear that the "purpose of an appellate brief is to present arguments in support of the points on appeal." *Duest v. State*, 555 So. 2d 849, 852 (Fla. 1990). Thus, this Court has required defendants to present arguments that explain why the lower court erred in its rulings. *See Shere*

v. State, 742 So. 2d 215, 217 n.6 (Fla. 1999). Merely referring to the arguments presented below is insufficient to meet the burden of presenting an argument on appeal. *Duest*, 555 So. 2d at 852. Moreover, the arguments must be presented in more than a cursory fashion. *Bryant v. State*, 901 So. 2d 810, 827-28 (Fla. 2005); *Cooper v. State*, 856 So. 2d 969, 977 n.7 (Fla. 2003); *Reeves v. Crosby*, 837 So. 2d 396, 398 (Fla. 2003); *Lawrence v. State*, 831 So. 2d 121, 133 (Fla. 2002). When an issue is not sufficiently briefed, it is considered waived. *Bryant*, 901 So. 2d at 827-28; *Duest*, 555 So. 2d at 852. Since Defendant has not presented any argument regarding why the lower court improperly denied these claims, they are waived.

Even if Defendant had not waived all of these issues by failing to properly brief them, Defendant would still be entitled to no relief. The record and the law fully support the lower court's denial of each of these claims. This Court has repeatedly rejected challenges to the constitutionality of Fla. R. Crim. P. 3.851. *Vining v. State*, 827 So. 2d 201, 215 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2000). This Court rejected Defendant's challenge to the constitutionality of Fla. R. Crim. P. 3.852 when it adopted that rule. *In re: Amendments to Fla. R. Crim. P. – Capital Postconviction Public Record Production*, 683 So. 2d 475, 475-76 (Fla. 1996). Thus, the

rejections of Claims I and II were proper. The lower court should be affirmed.

This Court has held that to state a facially sufficient claim of denial of public records production, a defendant must identify the specific agencies that have not complied, and where an agency has provided records, identify with specificity the documents that have not been produced. *Thompson v. State*, 759 So. 2d 650, 659 (Fla. 2000). Here, Defendant's motion for post conviction relief did not comply with these requirements, and Defendant admitted at the *Huff* hearing that he could not met these requirements. (PCR. 192-95, 964-68) Thus, the determination that Claim III was facially insufficient was proper.

The denial of Claim IV was addressed in Issue II. For the reasons asserted under that issue, the denial was proper and should be affirmed.

Claim V asserted that the case was a financial burden on counsel and that counsel had personal problems during the pendency of the case. (PCR. 206-11) However, as this Court has recognized a claim of ineffective assistance of counsel focuses on what counsel did or failed to do and how those actions or inactions prejudiced the defendant and not why counsel did or failed to do anything. *Bryan v. State*, 753 So. 2d 1244 (Fla.

2000). As the allegedly deficient actions or inactions of counsel were raised and addressed elsewhere in the motion, the lower court properly determined that this alleged explanation added nothing to the motion and denied it.

Further, while Defendant mentioned a conflict of interest under this claim, it was still properly denied. In *Mickens v. Taylor*, 535 U.S. 162, 174-76 (2002), the Court made clear that it had never apply the special standard of review for claims of conflict of interests to any conflicts but those resulting from multiple concurrent representation of defendants and that logically the special rule did not apply to other alleged conflicts. *See also Knight v. State*, 923 So. 2d 387, 392 n.9, 403, 417 (Fla. 2005). The Court reasoned that applying the special conflict of interest standard to other conflicts would allow application of the special rule to supplant *Strickland*. Here, Defendant did not assert a conflict of interest based on dual representation. As such, the lower court properly rejected the claim.

In Claim VI, Defendant complained that counsel was ineffective for failing to object to the allegedly improper admission of character evidence and to allegedly improper comments during the State's guilt phase closing argument. (PCR. 212-16) However, these issues had been raised and rejected on

direct appeal because any error in the admission of the evidence or the comments was not fundamental. *Doorbal*, 837 So. 2d at 954-58. In *Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003), this Court held that a defendant could not show prejudice, where the issue underlying the claim had been rejected on direct appeal and this Court had found no fundamental error. Thus, the lower court properly rejected this claim under *Chandler*.[11]

Claims VIII and IX generally alleged that trial counsel was ineffective during the guilt phase for failing to present evidence of Schiller's involvement in medicare fraud, for not presenting any witnesses and for failing to impeach Delgado. (PCR. 218-23) However, Defendant did not assert what evidence was available or admissible. *Id.* He did not name any witnesses or state what these unnamed witnesses would have offered. *Id.* Having not identified any evidence, any witnesses or the substance of any proposed testimony, Defendant, of course, did not explain how any of this unidentified information would create a reasonable probability of a different result at trial. Instead, Defendant merely asserted in conclusory terms that he was prejudiced. When pressed repeatedly for specifics at the

[11] Moreover, this Court has repeatedly held that such attempts to relitigate claims under the guise of ineffective assistance to be procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995); *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990).

Huff hearing, the only thing that Defendant offered was that his ex-wife and codefendant Cynthia Elledge could testify regarding a "timeline." (PCR. 984-1001) Defendant refused to explain what the timeline was or how testimony about it would have affected the outcome of trial, given that the planning of began in September 1994 and the crimes were not completed until the end of May 1995. *Id.*

However, this Court has held that conclusory allegations are insufficient to require an evidentiary hearing. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). In *Nelson v. State*, 875 So. 2d 579 (Fla. 2004), this Court also required that a defendant claiming that counsel was ineffective for failing to present witnesses at trial must identify the witnesses, provide the substance of their testimony, explain how that testimony would have affected the outcome of the trial and state that the witnesses would have been available to testify at the time of trial. Since Defendant failed to do any of these things, the claims were properly denied as facially insufficient.[12]

[12] Moreover, Delgado was impeached with his plea agreements, his involvement in Medicare fraud and his earnings from that involvement. (T. 11643, 11860-62, 11880-81, 118898-118907, 11918-22, 12021-22, 12024, 12030-31,12033-34, 12037-41, 12051, 12124-26, 12141-47) Evidence of Schiller's specific acts of misconduct would not have been admissible. *Dupont v. State*, 556 So. 2d 457, 458 (Fla. 4th DCA 1990)(extrinsic evidence not admissible to impeach a witness on a collateral issue); *Fulton*

Claim X asserted that counsel was ineffective for failing to convince the trial court to admit the letters Lugo had written to him. However, the record reflects that counsel attempted to admit the letter at both the guilt and penalty phase. (T. 12516-74, 13780-13800, 13847-52, 14143-60) On direct appeal, this Court rejected the claim that the exclusion of the letters provided grounds for reversal. *Doorbal*, 837 So. 2d at 959. As such, Defendant was merely attempting to relitigate the issue in the guise of a claim of ineffective assistance, and the lower court properly found the claim barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995); *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990).

Further, in raising this claim, Defendant did not attempt to explain what counsel could have done to convince the lower court to admit the letters or how the failure to do so created a reasonable probability of a different result. (PCR. 223-25) Instead, Defendant merely made conclusory allegations that counsel should have convinced the lower court to admit the letters and that he was prejudiced as a result. However, such conclusory allegations are insufficient to state a basis for relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). The

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v. State, 335 So. 2d 280 (Fla. 1976)(specific acts of misconduct by a witness are not admissible to impeach).

denial of the claim should be affirmed.

In Claim XII, Defendant asserted that his counsel was ineffective for failing to investigate mitigation. (PCR. 229-32) However, other than asserting that counsel should have investigated Defendant's mental state because he abused steroids, Defendant did not assert what counsel failed to investigate, what would have been found had counsel conducted an investigation or how the finding and presentations of this unspecified information would have created a reasonable probability of a different result.[13] When the lower court attempted to get Defendant to assert what the allegedly undiscovered mitigation was, Defendant asserted it was that Defendant failed in school,[14] left school at 15, was born to a 13 year old and lived in a shack. (PCR. 1011) When the State pointed out that Defendant had presented this evidence at the penalty phase, Defendant insisted there were more family members

[13] The record reflects that counsel did have Defendant's mental health evaluated and did investigate the effects of Defendant's steroid use. (R. 1721-24, PCR-SR. 210-11, 261-65) Counsel also spoke to Defendant's family and school teachers, sent an investigator to Trinidad and investigated Defendant's social background. (T. 1557-58, R. 1609-14, PCR-SR. 212-17, 222-38) In fact, the State even provided Defendant's school records in discovery. (R. 1549)

[14] The IQ test given to Defendant pretrial showed that his full scale IQ was 100. (PCR-SR. 262) The school records noted that Defendant was the "most disruptive student deserving of the worst conduct marks possible" and an "extremely difficult student who deliberately to set out to disrupt good order in the school." (PCR. 193, 194)

who could have testified to these same areas and Defendant's grandmother could have been impeached about her employment. (PCR. 1012-13) However, this Court has held that a claim of ineffective assistance of counsel for failing to investigate and present mitigation is facially insufficient when it does not assert what counsel failed to investigate, what mitigation could have been found or how the failure to present that evidence created a reasonable probability of a different result. *Vining v. State*, 827 So. 2d 201, 212 (Fla. 2002). This Court has also held that counsel cannot be deemed ineffective for failing to present cumulative evidence. *Holland v. State*, 916 So. 2d 750, 757 (Fla. 2005); *Gorby v. State*, 819 So. 2d 664, 675 (Fla. 2002); *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997). As the claim was insufficient in the motion and the evidence mentioned at the *Huff* hearing was cumulative, the lower court properly summarily denied this claim.

In *Maharaj v. State*, 778 So. 2d 944, 959 (Fla. 2000), this Court rejected a claim that a defendant was entitled to post conviction relief because the State had failed to comply with the Vienna Convention on Consular Relations because the claim was barred and the defendant lacked standing. The United States Supreme Court had recently stated that it is proper for states to bar Vienna Convention Claims. *Sanchez-Llamas v. Oregon*, 126

S. Ct. 2669 (2006). Thus, the lower court properly determined that Claim XIII was procedurally barred and Defendant lacked standing to raise it.

This Court had repeatedly rejected claims that Florida's capital sentencing scheme is unconstitutional. *Johnson v. State*, 660 So. 2d 637, 647-48 (Fla. 1995); *Wuornos v. State*, 644 So. 2d 1012, 1020 & n.5 (Fla. 1994); *Fotopolus v. State*, 608 So. 2d 784, 794 & n.7 (Fla. 1992); *Arango v. State*, 411 So. 2d 172, 174 (Fla. 1982). This Court determined that *Ring* was not violated in this case on direct appeal. *Doorbal*, 837 So. 2d at 963. This Court has also repeatedly found claims that the penalty phase jury instructions shift the burden of proof procedurally barred and devoid of merit, and the United States Supreme Court had recently reaffirmed that such claims do not show that a capital sentencing scheme is unconstitutional. *Kansas v. Marsh*, 126 S. Ct. 2516 (2006); *Randolph v. State*, 853 So. 2d 1051, 1067 (Fla. 2003); *Lynch v. State*, 841 So. 2d 362, 378 (Fla. 2003); *Asay v. Moore*, 828 So. 2d 985, 993 (Fla. 2002). This Court had repeatedly rejected claims that lethal injection is unconstitutional. *Hill v. State*, 921 So. 2d 579, 582-83 (Fla. 2006); *Griffin v. State*, 866 So. 2d 1, 17 (Fla. 2003). This Court has held that claims that the bar rules preventing juror interviews are unconstitutional are procedurally barred in post

conviction proceedings. *Spencer v. State*, 842 So. 2d 52, 71 (Fla. 2003); *Young v. State*, 739 So. 2d 553, 555 n.5 (Fla. 1999). Moreover, this Court has required a showing that a juror was unqualified or that some juror misconduct occurred before juror interviews are permissible. *Griffin v. State*, 866 So. 2d 1, 20-21 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 216 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2001); *Kearse v. State*, 770 So. 2d 1119, 1127-28 (Fla. 2000); *Johnson v. State*, 593 So. 2d 206, 210 (Fla. 1992). Defendant made no such showing in Claim XX. (PCR. 247-48) As such, Claims XIV through XXVI and Claim XX were all properly summarily denied. The lower court should be affirmed.

As Defendant acknowledged in his motion for post conviction relief, counsel did repeatedly move for severance of counts and defendants. (PCR. 244-45) Counsel cannot be deemed ineffective for failing to convince the trial court to rule in his favor. *See Brown v. State*, 846 So. 2d 1114, 1126 (Fla. 2003); *Haliburton v. Singletary*, 691 So. 2d 466, 472 (Fla. 1997); *Sims v. Singletary*, 622 So. 2d 980, 981 (Fla. 1993); *Douglas v. State*, 373 So. 2d 895, 896 (Fla. 1979). This is particularly true here, as this Court determined that the motions were properly denied when the codefendant raised the issue on direct appeal. *Lugo v. State*, 845 So. 2d 74, 92-97, 101-02 (Fla. 2003).

Thus, the summary denial of Claim XVIII was proper.

Claims that could have and should have been raised on direct appeal are procedurally barred in post conviction litigation. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). In Claim XIX, Defendant asserted that the trial court improperly denied a motion for continuance of trial, "motions" to withdraw made by counsel, motions to suppress evidence, a motion for new trial and motions to declare Florida's capital sentencing scheme unconstitutional. (PCR. 245-47) Each of these issues could have and should have been raised on direct appeal. *Griffin v. State*, 866 So. 2d 1, 16 (Fla. 2003)(motion to suppress); *Jones v. State*, 855 So. 2d 611, 615 n.4 (Fla. 2003)(motion to withdraw); *Asay v. State*, 828 So. 2d 985, 988 n.6 (Fla. 2002)(denial of motion for continuance); *Byrd v. State*, 597 So. 2d 252 (Fla. 1992)(constitutionality of death penalty statute); *Preston v. State*, 528 So. 2d 896, 898 (Fla. 1988)(motion for new trial). As such, Claim XIX was properly denied as procedurally barred.

The same is true of issues regarding jury instructions and comments in closing. *Thompson v. State*, 759 So. 2d 650, 667 (Fla. 2000); *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997). Moreover, both this Court and the United States Supreme Court

have held that it is proper to inform the jury that mere sympathy and mercy are not to be considered as mitigation in the penalty phase. *Saffle v. Parks*, 494 U.S. 484 (1990); *California v. Brown*, 479 U.S. 538 (1987); *Zack v. State*, 753 So. 2d 9, 23-24 (Fla. 2000). Because Claim XXI asserted that comments and jury instructions that mere sympathy or mercy were not mitigation were improper (PCR. 249-51), the lower court properly denied this claim as procedurally barred and without merit.

Finally, this Court has held that a facially sufficient cumulative error claim alleges the alleged errors that should be considered cumulatively. *See Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002). Moreover, this Court has held that when the individual errors asserted are procedurally barred or without merit, the cumulative error claim fails as well. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). In Claim VII, Defendant did not allege the asserted errors that should be considered cumulatively. (PCR. 216-18) Moreover, as argued throughout this pleading, the individual claims of error are procedurally barred and without merit. As such, the lower court properly determined that Claim VII was facially insufficient and without merit. It should be affirmed.

IV. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEAVE TO AMEND.

Defendant next asserts the lower court erred in striking

his amended motion for post conviction relief, except for the portion concerning Claim XI. However, the lower court did not strike the amended motion and did not abuse its discretion[15] in refusing to grant Defendant leave to amend his other claims.

Florida Rule of Criminal Procedure 3.851(f)(4) provides:

> A motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown. The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason the claim was not raised earlier and attaches a copy of the claim sought to be added. Granting motion under this subdivision shall not be a basis for granting a continuance of the evidentiary hearing unless a manifest injustice would occur if a continuance was not granted. If amendment is allowed, the state shall file an amended answer within 20 days after the amended motion is filed.

Moreover, this Court has stated that motions for post conviction relief should be fully plead when filed. *Vining v. State*, 827 So. 2d 201, 212-13 (Fla. 2002). As such, this Court has held that where a defendant does not make a facially sufficient claim and does not even proffer facts to make the claim facially sufficient until after a *Huff* hearing has been held and a claim summarily denied, the defendant must meet the standard for filing a successive motion to have the added facts considered. *Id.* Moreover, in *Moore v. State*, 820 So. 2d 199, 205-06 (Fla. 2002), this Court held that a lower court did not abuse its

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

discretion in refusing to accept an amended motion, where the amendment was not based on information that had recently been provided to the defendant. This Court has also rejected a claim that a change in counsel is grounds for leave to amend a pleading. *Brown v. State*, 894 So. 2d 137, 153-54 (Fla. 2004).

Here, Defendant elected to file a motion for post conviction relief that contained nothing but claims that were facially insufficient, procedurally barred or without merit as a matter of law on June 15, 2004, despite being aware of this Court's ability to grant an extension of the filing deadline if Defendant felt unprepared to file a proper motion because Defendant wanted to meet the federal habeas statute of limitations. When the *Huff* hearing was held almost five months later on November 9, 2004,[16] Defendant was still unable to proffer facts that made the facially insufficient claims sufficient despite the lower court's repeated urging that Defendant provide such facts. (PCR. 984-1018) As such, the lower court summarily denied all but Claim XI of the motion for post conviction relief.[17] At that time, the lower court immediately extended the 90 day period for the holding of an evidentiary

[16] Contrary to Defendant's suggestion, the record reflects that the *Huff* hearing was held on November 9, 2004, not November 16, 2004. (PCR. 79, 931-1058)

[17] The lower court noted that this claim too was facially insufficient but granted a hearing on it in an abundance of caution. (PCR. 1037)

hearing provided in Fla. R. Crim. P. 3.851(f)(5)(i) and set the evidentiary hearing for February 14, 2005. (PCR. 1039-53)

Defendant was aware on December 21, 2004, that the lower court would not be continuing the evidentiary hearing or staying the proceedings. (PCR. 1090-96) Moreover, at that time, Defendant was made aware that the lower court judge would be leaving the bench on February 28, 2005, and that the denial of the continuance was **not** based on the judge's plans. (PCR. 1105-06)

Despite being aware of the February 14, 2005 hearing date since November 9, 2004 and the denial of a continuance since December 21, 2004, Defendant did not attempt to serve his request for leave to amend until Saturday, January 15, 2005. The request for leave to amend was not filed with the lower court until January 18, 2005, and Defendant did not have this motion hearing until January 21, 2005. The only grounds asserted for leave to amend were that counsel had rushed to file the initial motion rather than seek an extension to file a proper motion, that substitute counsel was not appointed until March 2004, and that counsel was still investigating mitigation because counsel had devoted her time to litigating the motion to depose the State Attorneys. (PCR. 668-72) The motion did not even attempt to identify what the amendments Defendant was seeking to make.

Id.

Because the motion for leave to amend was not even filed more than 30 days before the evidentiary hearing, it was untimely under Fla. R. Crim. P. 3.851(f)(4). While Defendant seems to assert that the rule was unclear that the motion needed to be filed more than 30 days in advance of the evidentiary hearing, the rule very clearly requires a motion and leave of court before an amendment can be made. Defendant does not explain how serving a motion on a Saturday would present a motion to a court such that it could even be considered. As Defendant waited until Saturday, January 15, 2005, to serve the motion, the motion clearly was not presented to the court more than 30 days in advance of the evidentiary hearing as the rule requires. As such, the motion for leave to amend was properly denied as untimely.

Moreover, all of the claims, except for Claim XI, had been summarily denied at the ***Huff*** hearing on November 9, 2004. Under ***Vining***, Defendant was required to meet the requirements for a successive motion to amend these claims. Defendant made no attempt to meet this standard in his motion for leave to amend. As such, the lower court did not abuse its discretion in denying leave to amend these claims.

Further, while Defendant now asserts that significant

mitigation could not have been timely discovered through an exercise of due diligence, he did not make this argument in his motion for leave to amend. (PCR. 668-72) As this ground was not properly presented below, it is not properly before this Court. *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). Thus, it does not show that the lower court abused its discretion.

Further, while Defendant complains that between the time that his present counsel was appointed and the time the motion was filed he barely had time to read the record, Defendant's argument ignores that he had counsel appointed to represent him when this Court issued its mandate.[18] (PCR-SR. 29) Under *Brown*, the mere fact that there was a change of counsel does not provide good cause to amend. Thus, the lower court did not abuse its discretion in rejecting this argument.

Moreover, Defendant does not explain why did not investigate and present the information included in the amendment in time for the *Huff* hearing, which was held almost five months after the initial motion was filed. Further, the

[18] While counsel intimates, based on nonrecord material, that prior counsel did nothing on the case, the record reflects that counsel had reviewed materials sufficiently to create an 8-page-long list of names allegedly culled from the public records. (PCR-SR. 497-529)

record reflects that Defendant did not even hire experts to evaluate him until just before the *Huff* hearing. (PCR. 1006-09, PCR-SR. 271-74) Moreover, Defendant did not have these experts begin to conduct their evaluations of Defendant until January 2005. (PCR. 1144-45) He did not provide materials to these experts until after they had seen Defendant. (PCR. 1144-48) He did not even send investigators to Trinidad until January 2005. (PCR. 1177) In the fact, Defendant admitted in his motion for leave to amend that he had delayed investigating mitigation because he was concentrating on deposing the State Attorneys. (PCR. 671) However, this assertion ignores that the perfunctory motion to depose the State Attorneys was made in June 2004, and denied on July 9, 2004. (PCR. 480-82, 900) As such, the record reflects that Defendant was dilatory in investigating these claims. The lower court did not abuse its discretion in refusing to permit an amendment based on Defendant's own delays. *See Moore*.

Finally, while Defendant complains that the refusal to allow him to amend prevented him from presenting "significant mitigation," he ignores that only Claims X, XI and XII of either of his motions even addressed the presentation of mitigation. Of these claims, the amendment only attempted to add new

information to Claim XI.[19] (PCR-SR. 137-51) The lower court permitted this claim to be amended. (PCR 1179) Since the lower court permitted the portion of the amendment that included the claim regarding substantial mitigation, Defendant's assertion that he belatedly provided this information does not show that the lower court abused its discretion in refusing leave to amend the other claims. The lower court should be affirmed.

V. THE LOWER COURT DID NOT ABUSE IS DISCRETION IN DENYING THE MOTION FOR CONTINUANCE.

Defendant next asserts that the lower court abused its discretion in refusing to grant a continuance of the evidentiary hearing. However, the lower court did not abuse its discretion[20] in denying the continuance as the lower had already granted Defendant an extension of the time period in which to hold the evidentiary hearing and Defendant's failure to be prepared was the result of his own dilatory actions.

Pursuant to Fla. R. Crim. P. 3.851(f)(5)(A), once a motion for post conviction relief has been filed and answered, a trial court must hold a *Huff* hearing within 90 days of the filing of the answer and hold an evidentiary hearing within 90 days of the

[19] The amendment to Claim X attempted to add additional arguments that counsel allegedly should have made to support the admission of Lugo's letters, and the amendment to Claim XII sought to add a conclusory allegation of prejudice. (PCR-SR. 139-41, 147-51)

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

Huff hearing. Subsection (f)(5)(C) of the rule permits a trial court to extend the time for holding of the evidentiary hearing for an additional period of up to 90 days on a showing of good cause.

Moreover, in *Scott v. State*, 717 So. 2d 908, 912 (Fla. 1998), this Court held that a trial court did not abuse its discretion in denying a motion to continue an evidentiary hearing when evidence was unavailable because the defendant had been dilatory in seeking the evidence. There, this Court had issued an opinion remanding the case for an evidentiary hearing on a claim that the State had committed a *Brady* violation regarding the statements of two witnesses on March 16, 1995. *Id.* at 910. A trial judge was assigned to conduct the evidentiary hearing on October 5, 1995, and set the evidentiary hearing for January 23, 1996. *Id.* Despite being aware of the need for the witnesses, Defendant did not seek to obtain their testimony until 13 days before the evidentiary hearing. *Id.* at 912. Because the testimony could not be obtained in such a short period of time, the defendant also sought a continuance of the evidentiary hearing, which was denied. *Id.* This Court affirmed the denial of the continuance because its need was occasioned by the defendant's dilatory actions.

Similarly here, Defendant had counsel appointed to

represent him in seeking post conviction relief on January 30, 2003. (PCR-SR. 29) His present counsel was appointed to represent him on March 26, 2004. (PCR-SR. 75) On June 15, 2003, Defendant filed his motion for post conviction relief. Claim XI of said motion asserted that trial counsel was ineffective for failing to obtain an adequate evaluation of Defendant's mental health. (PCR. 225-29) The entirety of the factual allegations presented in support of this claim was:

> 1. All other allegations and factual matters contained elsewhere in this and any prior motions are fully incorporated herein by specific reference.
> 2. It was widely known that [Defendant] abused steroids which affected his personality, mood and sexual behavior.
> 3. [Defendant's] counsel failed to evaluate [Defendant] for psychiatric and neuropsychological deficits which would have provided [Defendant] with a defense to charges against him and/or mitigating circumstances.
> 4. To the extent [Defendant's] counsel was rendered ineffective by trial court rulings denying funds for experts to assist [Defendant], the trial court erred.

(PCR. 225) The memorandum of law following these factual allegations made vague allegations that "powerful mitigation" was not discovered and presented but there was no allegation of what the allegedly "powerful mitigation" was. (PCR. 226-29)

In its response, the State pointed out that the claim of trial court error was barred, that the claim was insufficiently pled and that the lack of pleading was particularly important as the record reflected that counsel did have two different mental

health experts appointed to evaluate him, as well as a mitigation specialist, that records were sought and obtained and that counsel investigated brain damage and the effects of steroid abuse. (PCR. 567-71) At the *Huff* hearing, which was held on November 9, 2003, and not November 16, 2003, as Defendant claims, Defendant claimed to have experts and presented letters dated the day before from experts who had agreed to evaluate Defendant as evidence of the existence of these experts. (PCR. 1006-08) Defendant admitted that he had only recently retained the experts and claimed to have informed the experts of the limited time available. (PCR. 1009) Despite acknowledging the insufficiency of the pleading, the lower court granted an evidentiary hearing on this claim. (PCR. 1037)

Defendant then immediately requested prospective leave to amend and a continuance of the *Huff* hearing for 180 days. (PCR. 1039-45) When the lower court indicated that it would grant neither prospective leave to amend nor a continuance of the *Huff* hearing, Defendant asked that the evidentiary hearing not be set for 180 days because he now needed to investigate the claim upon which an evidentiary hearing was granted. (PCR. 1043) The lower court indicated that it did not believe that such an extended period of time was necessary, particularly considering that the doctors should have been hired months earlier. (PCR. 1043-46)

When the lower court stated that it believed the evaluations should be completed in the next month, Defendant objected and the lower court granted Defendant 60 days to have the evaluations completed and real reports prepared. (PCR. 1046-47) The lower court then set the evidentiary hearing for February 14, 2005. (PCR. 1053)

Despite being aware on November 9, 2004, of these deadlines, the record reflects that Defendant did not even have the first expert see Defendant until January 7, 2005. (PCR. 1144-45) On December 21, 2004, Defendant justified not have sent the experts to evaluate Defendant earlier on his desire to have the experts review records before see Defendant. (PCR. 1090-96) However, on January 10, 2005, Defendant claimed that he could not provide a copy of the records he provided to his experts because he wanted the experts to see Defendant before reviewing the documents. (PCR. 1144-48) Defendant did not send anyone to Trinidad to investigate Defendant's background until approximately January 11, 2005. (PCR. 1177) Instead, Defendant spent the time between November 9, 2004 and the beginning of January 2005, repeatedly seeking to delay the evidentiary hearing without success. (PCR. 1073-96, 1154-56, PCR-SR. 582-83) When Defendant filed his final motion for continuance on January 18, 2005, the only grounds asserted was that the experts had not

completed their evaluations. (PCR. 673-74) However, given that Defendant did not even have the experts begin to evaluate Defendant until approximately 60 days after the *Huff* hearing and on the eve of the due date for the experts' reports, such was not surprising.

As these facts show, the alleged need for a continuance arose because of Defendant's own dilatory actions. He made a claim that required expert evaluations and opinions to support in June. He waited until November to retain the experts. He was made aware of the February evidentiary hearing date at that time and knew that this time already included an extension of the time limit to hold an evidentiary hearing. Despite being aware of these dates, Defendant waited until just before the reports of his experts were due to have the experts begin see him and waited even longer to send his investigator to Trinidad and to provide background materials to the experts. Because the need for a continuance was occasioned by Defendant's own dilatory actions, the lower court did not abuse its discretion in denying the requests under *Scott*. It should be affirmed.

While Defendant attempts to assert that the denial of the continuance was based on the lower court's concern about the judge's own career and ignored the realities of the case, it is Defendant who ignored the record and the realities of the case

in making this claim. Moreover, this Court has cautioned defendants against making unsubstantiated attacks on the integrity of trial judges. In *Maharaj v. State*, 778 So. 2d 944, 951-52 (Fla. 2000), the defendant claimed that a judge who had been arrested for bribery had solicited a bribe from him based on a statement that a lawyer had made to the defendant that she could arrange for him to receive a bond based on her relationship with the judge. In rejecting the claim, this Court stated:

> To say that this contact was made for or at the behest of the judge is a serious allegation. Such a serious allegation must be demonstrated and cannot be left to surmise from differing interpretations. Maharaj has not demonstrated that Judge Gross was in fact involved in a bribery solicitation in this case. We cannot base our conclusions on such a serious matter on the fact that the judge was involved in bribery in some other matter.

Id. at 952. Here, Defendant engages in a serious attack on the integrity of the lower court judge that is not only based on nonrecord speculation but is contrary to the evidence in the record. When the lower court held the *Huff* hearing and set the evidentiary hearing, the lower court expressly considered the fact that the claim was insufficient, that an evidentiary hearing had only been granted on one claim and that Defendant should have investigated the claim before the *Huff* hearing. (PCR. 1037-46) It also informed Defendant that it intended to

follow the law. (PCR. 996-1001, 1017-18)

When Defendant first sought to delay the February 14, 2005 evidentiary hearing date by moving for a stay, the lower court, at a hearing on December 21, 2004, indicated that it had informed Defendant of the time limits when his present counsel had entered the case and that it was willing to assist Defendant in whatever way it could to get the hearing held on time but that it would not grant an indefinite stay. (PCR-SR. 582-83, PCR. 1073-89) Defendant then immediately requested a 90 day continuance because he had not had his experts evaluate him or provided documents to the experts, which he asserted had to be given to the experts before the evaluation. (PCR. 1090-91) When the lower court attempted to ascertain what work still needed to be done and why the input of an attorney was necessary to pull documents, Defendant stated that documents regarding what evaluations had been done at the time of trial needed to be found, copied and provided to the doctors, that Defendant had spoken to trial counsel at some point and received trial counsel's file and that documents needed to be pulled from that file. (PCR. 1093-96) After listening to this explanation, the lower court indicated that it still believed that the work could be completed prior to the evidentiary hearing and denied the continuance. (PCR. 1096)

When the lower court judge mentioned later in the hearing that he was leaving the bench on February 28, 2005, Defendant immediately objected that the judge's career plans should not influence the decision on the continuance. (PCR. 1105-06) The judge responded:

> No. I set this hearing in November. I set it -- I was setting it for January. You requested a later date.
>
> * * * *
>
> Initially we set it in the beginning of January and you had a problem and I set it at the ending of January and you had a problem with that, so I set it for February. Either way that works to your benefit. I backed it up over a month for you guys. **It doesn't mean that if I weren't going off of the bench February 28th I would grant you a continuance.**
>
> * * * *
>
> We are having a hearing on February 14th, [Defense Counsel]. I am trying to help you any way I can with anything else but this hearing was set in November and we will have it on February 14th.

(PCR. 1106)(emphasis added). Thus, the record refutes Defendant's assertions that the lower court set the hearing and ruled on the motion for continuance based on the judge's plans. Defendant's claim to the contrary should be rejected.

Further, while Defendant asserts that the ruling was contrary to the lower court's findings that the case was extraordinary, this is not true. The lower court expressly stated that it was finding the case extraordinary based on the

length of the trial and the amount of the evidence the State presented. (PCR. 1077) However, in *United States v. Cronic*, 466 U.S. 648, 663-65 (1984), the Court recognized that the length of the investigation by the government and the number of exhibits the government has do not correlate with the amount of time necessary to prepare a defense:

> Neither the period of time that the Government spent investigating the case, nor the number of documents that its agents reviewed during that investigation, is necessarily relevant to the question whether a competent lawyer could prepare to defend the case in 25 days. The Government's task of finding and assembling admissible evidence that will carry its burden of proving guilt beyond a reasonable doubt is entirely different from the defendant's task in preparing to deny or rebut a criminal charge. Of course, in some cases the rebuttal may be equally burdensome and time consuming, but there is no necessary correlation between the two. In this case, the time devoted by the Government to the assembly, organization, and summarization of the thousands of written records evidencing the two streams of checks flowing between the banks in Florida and Oklahoma unquestionably simplified the work of defense counsel in identifying and understanding the basic character of the defendants' scheme. When a series of repetitious transactions fit into a single mold, the number of written exhibits that are needed to define the pattern may be unrelated to the time that is needed to understand it.
>
> The significance of counsel's preparation time is further reduced by the nature of the charges against respondent. Most of the Government's case consisted merely of establishing the transactions between the two banks. A competent attorney would have no reason to question the authenticity, accuracy, or relevance of this evidence -- there could be no dispute that these transactions actually occurred. As respondent appears to recognize, the only bona fide jury issue

> open to competent defense counsel on these facts was whether respondent acted with intent to defraud. When there is no reason to dispute the underlying historical facts, the period of 25 days to consider the question whether those facts justify an inference of criminal intent is not so short that it even arguably justifies a presumption that no lawyer could provide the respondent with the effective assistance of counsel required by the Constitution.

Here, this analysis applies with all the more force. The State at the time of trial had to present sufficient evidence to show that three defendants were guilty of the crimes with which each had been charged in a 64 count indictment, which included RICO and money laundering counts. The State's job was further complicated by the fact that Defendant dismembered the victims' bodies and destroyed almost all of the traditional means of identification. Further, the State presented the testimony of a number of former codefendants and corroborated their testimony with physical evidence. Thus, the State presented the testimony of 90 witnesses and thousands of exhibits.

By the time Defendant filed his motion for post conviction relief, the issues available to him were only those issues that are cognizable in a post conviction motion. *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000)(claims of ineffective assistance of appellate counsel not cognizable in a post conviction motion); *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991)(claims that could have been, should have been or were raised on direct

appeal not cognizable in a post conviction motion). Defendant himself further narrowed these issues through the filing of motion. Moreover, at the *Huff* hearing, the lower court narrowed the issues to one: ineffective assistance of counsel for failing to have an adequate evaluation of Defendant's mental health conducted. This issue is routine in capital litigation and is largely independent of the facts of the crime. Under these circumstances, the lower court's finding that the case was extraordinary because the State presented a large quantity of evidence to show that Defendant was guilt lacks any correlation to the time necessary to prepare for the evidentiary hearing. Thus, Defendant's reliance on the finding that the case was extraordinary does not show that the lower court abused its discretion in denying the continuance. It did not and should be affirmed.

VI. THE LOWER COURT'S ORDER DENYING A CLAIM UPON WHICH DEFENDANT REFUSED TO PRESENT EVIDENCE WAS PROPER.

Defendant finally asserts that again that the lower court's order denying his motion for post conviction relief was insufficient because he does not believe that it adequately provides the lower court's rationale for denying his claims. He further complains about the treatment of the denial of the claim on which he was given an evidentiary hearing but refused to

proceed.

With regard to the portion of the amended order denying the claims other than Claim XI, the lower court's order was proper for the reasons provided in Issue III. For those reasons, the order should be affirmed.

With regard to the portion of the order denying Claim XI, the order provides proper grounds for denying this claim. While Defendant characterizes the lower court as having summarily denied this claim, it is not true. At the *Huff* hearing, the lower court granted an evidentiary hearing on this claim despite finding that it was insufficiently plead. (PCR. 1037) The lower court then attempted to proceed to the evidentiary hearing it had ordered. (PCR. 1043-53, 1144-56, 1162-65) However, Defendant refused to proceed and remained steadfast in that refusal. (PCR. 687-88, 1187-1201, PCR-SR. 84-86) It was based on this refusal and the resultant failure to carry his burden of proof that the lower court denied the claim. (PCR-SR. 90, PCR. 778-79) The order denying the motion fully explains that the lower court had granted an evidentiary hearing on this claim on November 10, 2004, and had set that hearing for February 14, 2005, that Defendant subsequently refused to present any evidence at that hearing, that Defendant was colloquied personally about his decision to proceed in this manner and the ramifications of that

decision and that by refusing to present any evidence at the evidentiary hearing, Defendant had failed to carry his burden of proof. (PCR. 782-83) Under these circumstances, it cannot be said that the claim was summarily denied. *See Owen v. State*, 773 So. 2d 510, 513-14 (Fla. 2000).

Further, denying the claim because Defendant refused to proceed with an ordered evidentiary hearing is entirely proper. This Court has held that defendants bear the burden of proof at post conviction hearing and that they must present evidence beyond mere speculation to carry that burden. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). In *Owen v. State*, 773 So. 2d 510, 513-14 (Fla. 2000), this Court held that a defendant who refuses to proceed and present evidence at an ordered evidentiary hearing waives the claims for relief upon which an evidentiary hearing was ordered. *See also Ferrell v.* State, 918 So. 2d 163, 173-74 (Fla. 2005). Here, the lower court granted Defendant an evidentiary hearing on Claim XI. Defendant refused to proceed with that hearing and present evidence. As such, he did not carry his burden of proof and waived this claim. The denial of the claim should be affirmed.

In an attempt to make it seem as if the order was insufficient, Defendant asserts that the order does not explain

why the lower court denied Defendant's repeated motions for continuance of the evidentiary hearing. However, Defendant does not cite to any authority that requires a trial court to explain why it denied a continuance of an evidentiary hearing and does not even assert why he believes that such an explanation is necessary. While this Court has required that trial court's explain their rationales for denying post conviction claims, the lower court did so, both orally and in writing. *See Dillbeck v. State*, 882 So. 2d 969, 971-73 (Fla. 2004). It denied the claim because Defendant willfully refused to proceed with the scheduled evidentiary hearing and therefore failed to carry his burden of proof. As the lower court's order complies with *Dillbeck*, the claim that the order is insufficient should be denied. The denial of relief should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying Defendant's motion for post conviction relief should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

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 Melodee Smith, 101 N.E. 3rd Avenue, Suite 1500, Ft. Lauderdale, Florida 33301, this 27th day of October 2006.

SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

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SANDRA S. JAGGARD
Assistant Attorney General