IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-830

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was charged, along with codefendants Pablo San Martin and Pablo Abreu, in an indictment filed on February 18, 1992, in the Eleventh Judicial Circuit in and for Dade County, Florida, with: (1) the premeditated or felony murder of Raul Lopez; (2) the attempted premeditated or felony murder with a firearm of Danilo Cabanas, Sr.; (3) the attempted premeditated or felony murder with a firearm of Danilo Cabanas, Jr.; (4) the attempted robbery with a firearm of Lopez and the Cabanases; all of which occurred during an ambush-style robbery attempt on December 6, 1991; (5) the grand theft of a motor vehicle belonging to Young Kon Huh; (6) the grand theft of a motor vehicle belonging to Anthony Docal; and (7) the use of a firearm during the commission of the murder, attempted murders, and/or the attempted robbery. (R. 1-5)[1] The historical facts of the case are:

> Danilo Cabanas, Sr., and his son, Danilo Cabanas, Jr., operated a check-cashing business in Medley, Florida. On Fridays, Cabanas Sr. would pick up cash from his bank for the business. After Cabanas Sr. was robbed during a bank trip, Cabanas Jr. and a friend, Raul Lopez, regularly accompanied Cabanas Sr. to the bank. The Cabanases were each armed with a 9mm handgun, and Lopez was armed with a .32 caliber gun.
>
> On Friday, December 6, 1991, the Cabanases and

[1] The symbol "R." refers to the record on direct appeal, Florida Supreme Court Case No. 83,116. The symbol "T." refers to the trial transcript.

Lopez drove in separate vehicles to the bank. Cabanas Sr. withdrew about $25,000 in cash and returned to the Chevrolet Blazer driven by his son. Lopez followed in his Ford pickup truck. Shortly thereafter, the Cabanases were cut off and "boxed in" at an intersection by two Chevrolet Suburbans. Two occupants of the front Suburban, wearing masks, got out and began shooting at the Cabanases. When Cabanas Sr. returned fire, the assailants returned to their vehicle and fled. Cabanas Jr. saw one person, also masked, exit the rear Suburban.

Following the gunfight, Lopez was found outside his vehicle with a bullet wound in his chest. He died at a hospital shortly thereafter. One bullet hole was found in the passenger door of Lopez's pickup. The Suburbans, subsequently determined to have been stolen, were found abandoned. Both Suburbans suffered bullet damage--one was riddled with thirteen bullet holes. The Cabanases' Blazer had ten bullet holes.

[Defendant's] confession was admitted at trial. When police initially questioned [Defendant], he denied any knowledge of the Lopez shooting. However, when confronted with photographs of the bank and the Suburbans, he confessed. [Defendant] explained that he had learned from Fernando Fernandez about the Cabanases' check cashing business and that for three to five months he and his codefendants had planned to rob the Cabanases. He described the use of the stolen Suburbans, the firearms used, and other details of the plan. [Defendant] admitted that he had a .357 or .38 revolver. Codefendant San Martin had a 9mm semiautomatic, which at times jammed, and codefendant Abreu had a Tech-9 9mm semiautomatic, which resembles a small machine gun. [Defendant] stated that San Martin and Abreu drove in front of the Cabanases and [Defendant] pulled alongside them so they could not escape. Once the gunfight began, [Defendant] claimed that the pickup rammed the Cabanases' Blazer and Lopez opened fire. [Defendant] then returned fire in Lopez's direction.

San Martin refused to sign a formal written statement to police. However, San Martin orally confessed and, in addition to relating his own role in

the incident, detailed [Defendant's] role in the planning and execution of the crime. San Martin admitted initiating the robbery attempt and shooting at the Blazer but not shooting at Lopez's pickup. He placed [Defendant] in proximity to Lopez's pickup, although he could not tell if [Defendant] had fired his gun during the incident. San Martin initially claimed that the weapons used in the crime were thrown off a Miami Beach bridge, but subsequently stated that he had thrown the weapons into a river near his home, where they were later recovered by the police. San Martin did not testify at trial, but his oral confession was admitted into evidence over [Defendant's] objection.

A firearms expert testified that the bullet recovered from Lopez's body was consistent with the .357 revolver used by [Defendant] during the attempted robbery. He said the same about a bullet recovered from the passenger mirror of one of the Suburbans and a bullet found in the hood of the Blazer. The rust on the .357, however, prevented him from ruling out the possibility that the bullets may have been fired from another .357 revolver.

The jury found [Defendant] guilty as charged and recommended the death penalty for the first-degree murder conviction by a nine-to-three vote. The trial court followed the jury's recommendation and found four aggravators: (1) prior violent felony convictions, see § 921.141(5)(b), Fla. Stat. (1995); (2) murder committed during the course of an attempted robbery, *see id.* § 921.141(5)(d); (3) murder committed for pecuniary gain, *see id.* § 921.141(5)(f); and (4) murder committed in a cold, calculated, and premeditated manner. *See id.* § 921.141(5)(i). The court found no statutory mitigating circumstances and two non-statutory mitigating circumstances: (1) [Defendant] had a poor family background and deprived childhood, including abandonment by his mother, the death of his mother, and being raised by a man who was a drug addict and alcoholic; and (2) [Defendant] was a caring husband, father, brother, and provider. The court sentenced [Defendant] to death on the first-degree murder charge; life imprisonment on the two attempted murder charges; fifteen years imprisonment

> on the attempted robbery and second grand theft charge; and five years imprisonment on the first grand theft charge and unlawful firearm possession charge. All sentences were ordered to run consecutively.

Franqui v. State, 699 So. 2d 1312, 1315-16 (Fla. 1997), *cert. denied*, 523 U.S. 1040 and 523 U.S. 1097 (1998).

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

> I.
>
> THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS FOR SEVERANCE BASED UPON THE EXTRAORDINARY DEGREE TO WHICH HE WAS PREJUDICED BY THE INTRODUCTION AT THIS JOINT TRIAL OF HIS NON-TESTIFYING CO-DEFENDANTS' POST-ARREST CONFESSIONS, WHICH ALTHOUGH REDACTED, DIRECTLY INCRIMINATED HIM, THEREBY VIOLATING THE DEFENDANT'S RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION.
>
> II.
>
> THE TRIAL COURT ERRED IN FAILING TO EXCLUDE PORTIONS OF THE DEFENDANT'S ROBBERY CONFESSION FOR WHICH THE STATE FAILED TO PROVE THE CORPUS DELICTI THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.
>
> III.
>
> THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING VOIR DIRE EXAMINATION OF THE JURY RELATIVE TO SPECIFIC MITIGATING CIRCUMSTANCES AND IN DENYING ACCESS TO THE JURY QUESTIONNAIRE, THEREBY PRECLUDING THE DEFENDANT FROM EFFECTIVELY EXERCISING HIS CHALLENGES, BOTH FOR CAUSE AND PEREMPTORY, AND DENYING THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR AND IMPARTIAL JURY.
>
> IV.
>
> THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A

DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. The Trial Court Erred in Finding that the Homicide was Committed in a Cold, Calculated and Premeditated Manner Without any Pretense of Moral or Legal Justification.
B. The CCP Instruction Given the Jury was Unconstitutionally Vague, Ambiguous, and Misleading.
C. The Trial Court Erred in Failing to Credit the Defendant With the Non-Statutory Mitigating factors that he was of Marginal if not Retarded Intelligence and that he was Brain-Damaged, and in Rejecting Impaired Capacity and Age as Statutory Mitigating Factors, Refusing Even to Instruct the Jury on the Latter.
D. Death is a Disproportinate Penalty to Impose on [Defendant] in Light of the Circumstances of this Case and Constitutes a Constitutionally Impressible Application of Capital Punishment.
E. The Trial Court Erred in Prohibiting the Defendant From Informing the Jury of the Court's Power to Impose Consecutive Sentences and the Likelihood Of Lifelong Imprisonment as an Alternative to Death, as Well As in Failing to So Instruct the Jury Upon its Own Inquiry.
F. The Death Penalty is Unconstitutional on its Face and as Applied to [Defendant] and Violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as Well as the Natural Law.

SUPPLEMENT BRIEF

THE TRIAL COURT ERRONEOUSLY GRANTED THE STATE'S MOTION IN LIMINE AND DENIED [DEFENDANT] THE RIGHT TO CROSS-EXAMINE ABOUT THE SUBSTANCE OF AN EXCULPATORY STATEMENT MADE SUBSEQUENT TO THE CONFESSION THE STATE INTRODUCED IN ITS CASE-IN-CHIEF WHERE THE DEFENSE ARGUED THAT FAIRNESS AND "COMPLETENESS" COMPELLED ITS ADMISSION, THEREBY VIOLATING FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

SECOND SUPPLEMENTAL BRIEF

[DEFENDANT'S] CONVICTIONS ON COUNTS II AND III OF THE INSTANT INDICTMENT MUST BE REVERSED DUE TO THE LIKELIHOOD THAT THOSE CONVICTIONS WERE FOR THE NON-

EXISTENT CRIME OF ATTEMPTED FELONY MURDER.

The Court affirmed Defendant's convictions and sentences, with the exception of the convictions for attempted first degree murder. *Franqui*, 699 So. 2d at 1329. This Court determined that the State had presented a sufficient corpus delicti to present Defendant's confession. *Id.* at 1316-17. It held that the admission of San Martin's confession was error but harmless. *Id.* at 1317-22. It determined that the trial court had not abused its discretion in refusing to permit Defendant to pretry his case during voir dire and that the issue regarding access to jury questionnaires was barred and meritless. *Id.* at 1322-23. It found that the sentencing issues were without merit. *Id.* at 1323-29. However, this Court found that the convictions for attempted first degree murder had to be vacated under *State v. Gray*, 654 So. 2d 552 (Fla. 1995). *Id.* at 1323.

Both the State and Defendant sought certiorari review in the United States Supreme Court. The Court denied the State certiorari on March 23, 1998, and Defendant certiorari on April 27, 1998. *Florida v. Franqui*, 523 U.S. 1040 (1998); *Franqui v. Florida*, 523 U.S. 1097 (1998).

On October 15, 1998, the State sent notices of affirmance to the Office of the State Attorney and the Department of

Corrections. (PCR-SR. 7-10)[2] The Office of the State Attorney sent its notices of affirmance to the Miami-Dade Police Department, the Florida Department of Law Enforcement (FDLE), the City of Hialeah Police Department and the City of Miami Police Department on November 4, 1998. (PCR-SR. 11-18) On January 12, 1999, the Office of the State Attorney notified the Office of the Attorney General that the Dade County Department of Corrections and Rehabilitation, the Sweetwater Police Department, the Dade County Medical Examiner's Office and the FBI had information pertinent in this matter. (PCR-SR. 19-20) The Office of the Attorney General sent notices to produce the information to the Dade County Department of Corrections and Rehabilitation, the Sweetwater Police Department and the Dade County Medical Examiner's Office on January 25, 1999. (PCR-SR. 26-31) The Office of the Attorney General also sent a notice to the court that day that the FBI was not covered by Fla. R. Crim. P. 3.852 and would not be noticed. (PCR. 338-39)

In December 1998 and January 1999, the Office of the State Attorney and the Department of Corrections filed notices of compliance and notices that they had provided exempt materials to the repository. (PCR. 333-37, PCR-SR. 21-25) The other

[2] The symbols "PCR.," "PCT." and "PCR-SR." will refer to the record on appeal, transcript of post conviction proceedings and supplemental record on appeal in this appeal, respectively.

agencies subsequently complied with the public records notices. (PCR. 327-32, 340-48, PCR-SR. 32-34)

On January 15, 1999, Defendant filed a motion for post conviction relief. (PCR. 37-129) Other than a claim regarding the constitutionality of execution by electrocution, the motion did not allege facts and asserted that it was incomplete because of a lack of public records. *Id.* However, the motion did not identify any agency that had not complied with its public records obligations. *Id.* After filing this motion, Defendant still did nothing to obtain the records. Instead, the lower court forced the State to move to compel the records by granting the codefendant an extension of time to seek additional records and indicating that it would continue to do so unless the State moved to compel. (PCT. 29-38) During the hearing on the State's motion to compel, the codefendant requested an *in camera* inspection of the exempt materials. (PCT. 38-41) Because the *in camera* review of the materials from the State Attorney's office applied to both Defendant and the codefendant, the State noticed Defendant of the hearing at which the lower court was scheduled to open the sealed materials. (PCR-SR. 35) The lower court then received the exempt materials from the repository for review. (PCT. 63-70)

On January 7, 2000, Defendant appeared before the lower

court and requested an extension of time to file his amended motion for post conviction relief. (PCT. 86-88) He claimed that the additional time was necessary because he was still retrieving records from the repository. *Id.* However, when the lower court attempted to determine what records were still outstanding, Defendant was unable to give a specific answer. (PCT. 88-89) The lower court indicated that it had ordered Defendant to either file an amended motion that day or have a detailed motion for continuance indicating exactly what had been done and what still needed to be done. (PCT. 89) After discussing whether it should order the repository to arrange for copies of the records to be made and sent to Defendant, the lower court agreed to give Defendant additional time. (PCT. 89-95, 97-98)

Thereafter, the judge assigned to the case recused himself *sua sponte* because he and one of the original prosecutors were close, personal friends. (PCT. 115) After the case was eventually assigned to a qualified judge, Defendant, on March 17, 2000, moved for another extension of time to file his amended motion. (PCR. 130-33) In this motion, Defendant claimed to have only received 12 of 34 boxes of materials from the repository. *Id.* He further asserted that he needed public records from the Miami-Dade Police Department, the Hialeah

Police Department, the Medical Examiner's Office, the Department of Corrections, the FBI, FDLE, the Dade County Department of Corrections, Jackson Memorial Hospital, the North Miami Police Department, the Office of the Attorney General and the City of Miami Police Department. *Id.* He further complained that the *in camera* review of the exempt materials had not been completed. *Id.* He further asserted that counsel's mother had recently died. *Id.* The lower court granted Defendant a 30 day extension exclusively because of the death of counsel's mother. (PCT. 147)

On April 18, 2000, Defendant filed his amended motion for post conviction relief, raising 10 claims:

> I.
> THE LAW REQUIRES THAT THIS COURT ASSESS THE CUMULATIVE IMPACT OF ALL THE "NEW FACTS IN THIS CASE WHETHER THEY ARE NEWLY DISCOVERED, SUPPRESSED BY THE PROSECUTION, OR IGNORED DUE TO DEFENSE COUNSEL'S FAILINGS.
>
> II.
> FAILURE TO CALL EXPERTS AT THE PENALTY PHASE BY COUNSEL WAS INEFFECTIVE AND DENIED [DEFENDANT] A FAIR TRIAL. [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 AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.
>
> III.
> [DEFENDANT] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

IN THAT NO REQUEST FOR CHANGE OF VENUE WAS MADE BY HIS COUNSEL. [DEFENDANT'S] CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE OF COUNSEL'S FAILURE TO MOVE FOR A CHANGE OF VENUE AND COURT'S FAILURE TO PROVIDE FOR SUCH A CHANGE IN VIOLATION OF [DEFENDANT'S] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

IV.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHT TO AN ADVERSARIAL TESTING AND THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, THUS RENDERING UNRELIABLE THE RESULTING DEATH SENTENCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

V.

[DEFENDANT'S] CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE COUNSEL FAILED TO PRESENT THE TESTIMONY OF [DEFENDANT'S] WIFE AT THE MOTION TO SUPPRESS WHICH WOULD HAVE SUPPORTED [DEFENDANT'S] INVOCATION OF COUNSEL IN VIOLATION OF [DEFENDANT'S] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

VI.

[DEFENDANT'S] CONVICTIONS AND SENTENCES ARE UNRELIABLE BECAUSE OF COUNSEL'S FAILURE TO INVESTIGATE AND THE STATE'S INTENTIONAL FAILURE TO DISCLOSE BRADY MATERIAL CONCERNING PABLO ABREU'S TESTIMONY IN VIOLATION OF [DEFENDANT'S] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

VII.

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

VIII.

[DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHT [sic]

AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATES [sic] AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAD RECEIVED PUBLIC RECORDS MATERIALS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

IX.

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

X.

[DEFENDANT'S] SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR BECAUSE THE JURY RECEIVED INADEQUATE GUIDANCE CONCERNING THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED. FLORIDA'S STATUTE IN [sic] JURY WAS MISLED BY SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACTUALLY [sic] VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO UNITED STATS [sic] CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE N [sic] FAILING TO OBJECT TO THESE ERRORS.

(PCR-SR. 37-83, 314)

That same day, Defendant also moved to disqualify Judge Ferrer. (PCR-SR. 304-13) The alleged basis for the disqualification was that one of the prosecutors was now a judicial colleague of Judge Ferrer and that he would be called upon to judge her credibility based on Defendant's *Brady* claim. *Id.* On April 28, 2000, the State filed a response, asserting

that the motion was untimely and facially insufficient. (PCR-SR. 315-21) At the hearing on the motion, Judge Ferrer determined that he did not believe that he could fairly determine the credibility of a sitting judge in evaluating the codefendant's claim that she had coerced a witness to lie. (PCT. 165-76) As a result, he decided to recuse himself and to discuss with the Chief Judge whether this Court should be contacted about having a judge from a different circuit hear this matter by designation. (PCT. 176-78)

On August 18, 2000, Defendant filed a pleading entitled, "Amended Exhibits to Motion for Post Conviction Relief Pursuant F.R.CR.P. §3.850." (PCR. 357-59) The pleading attached an affidavit from Fernando Fernandez and asserted that Defendant was adopting a claim from San Martin's motion for post conviction relief concerning Pablo Abreu. *Id.*

That same day, Defendant filed a motion to compel public records. (PCR. 360-419) In the motion, Defendant claimed that the City of Miami Police Department, the Hialeah Police Department, the FBI, FDLE, Dade County Department of Corrections, Jackson Memorial Hospital, North Miami Police Deparment, the Office of the Attorney General and the Sweetwater Police had not provided public records. *Id.* He further complained that his medical records were sealed and that the *in*

camera review of the exempt materials from the State Attorney's Office had not been completed. *Id.* He additionally attempted to request medical records concerning Pablo Abreu from the Department of Corrections. *Id.*

Defendant made no attempt to schedule this motion for hearing. Instead, on December 14, 2000, the State noticed the *Huff* hearing for January 8, 2001. (PCR-SR. 322-23)

At the beginning of the *Huff* hearing, Defendant indicated that he wanted to have his motion to compel heard and to have the *Huff* hearing continued. (PCT. 208-09) He acknowledged that records about his case were at the repository under his name and the codefendant's name. (PCT. 209-10) However, he claimed to have found a report from the Sweetwater Police despite their claim to have no records and asserted that he needed medical records about Abreu. (PCT. 210-11) He also complained that the *in camera* review had yet to be completed. (PCT. 211)

The State responded that Defendant lacked diligence in seeking public records by waiting more than two years after this Court's mandate to file a motion to compel. (PCT. 213) The State further asserted that the agencies had complied with their public records obligations and that Defendant was seeking to compel records that had never been requested. (PCT. 213) Further, the State asserted that the matter should not be

delayed because of the *in camera* review as Defendant would be entitled to amend if he had any new claim based on anything disclosed after the *in camera* review. (PCT. 213)

Defendant replied that some of the State agencies had been late in complying and that he had not sought public records earlier because he had been given an extension of time to file his motion. (PCT. 214-16) The State then asserted that compliance had been completed long ago, that Defendant had lacked diligence by failing to move to compel and that Defendant had failed to comply even with the extended deadlines. (PCT. 216-17) The State further pointed out that Defendant had never even served the Sweetwater Police with his motion to compel and had failed to seek records diligently. (PCT. 217) Defendant claimed that he had been diligent because he had been to the repository and looked at records. (PCT. 218) He claimed that from this review, he had indications that he did not have all the records. (PCT. 218-19)

When the lower court asked for specifics, Defendant asserted that there was an issue about the Sweetwater Police. (PCT. 219) When the lower court pointed out that they had certified that they had no records, Defendant insisted that he had seen some record of an interview with his wife in May 2000. (PCT. 219) When the lower court inquired why Defendant had not

waited until January 2001 to seek to have the matter heard, Defendant asserted that he had filed a motion to compel in August and did not know which judge was hearing the matter thereafter. (PCT. 219-20) When the lower court pointed out that it had been assigned for months and available for hearings, Defendant then blamed the State for not setting his motion for him. (PCT. 219-22)

The lower court also explained that the motion to compel was not even noticed for the hearing, which Defendant again blamed on the State because it had noticed the *Huff* hearing. (PCT. 223) The State reiterated that Sweetwater had certified that it had no records a year before the motion to compel was filed and that the motion to compel had not been served on Sweetwater. (PCT. 224-29)

The lower court then inquired if there were any other outstanding public records requests. (PCT. 230) Defendant responded that he had mentioned medical records of Pablo Abreu in his motion to compel but acknowledged that he had not made any public records requests. (PCT. 230-31) The State responded that there was no outstanding request for Abreu's medical records and that the time for filing such a request had long since expired. (PCT. 231) The State further pointed out that Abreu's medical records were not public records and were

privileged. (PCT. 233) After listening to further argument from Defendant about how he had expected the State to do all the public records litigation for him without his participation, the lower court denied the motion to compel, finding it was a delaying tactic. (PCT. 233-41)

Defendant then sought to delay the *Huff* hearing until the *in camera* review was complete. (PCT. 243) However, the lower court decided that the *Huff* hearing would proceed and that it would consider any additional issue that arose from any document it determined should be disclosed after the *in camera* review was complete. (PCT. 243-44)

Regarding the *Huff* hearing, Defendant argued that counsel had been ineffective because they had presented Dr. Toomer at the penalty phase, had not present Dr. Fisher and had not questioned the venire about mitigation. (PCT. 247-49) He further asserted that the State had committed misconduct by coercing Abreu's testimony at the penalty phase, as demonstrated by the affidavits of Abreu and Fernandez. (PCT. 249) He further asserted that counsel was ineffective for failing to attempt to impeach Abreu about the full nature of his plea agreement with the State and to investigate Abreu's mental state as potential impeachment. (PCT. 250-52)

He asserted that counsel was ineffective for failing to

present testimony from Vivian Gonzalez regarding an alleged request for an attorney before the confession and Defendant's condition on the day he confessed. (PCT. 252) During this argument, Defendant asserted that Vivian had testified at the suppression hearing but that both her testimony and Defendant's testimony about the circumstances of his confession should have been presented to the guilt phase jury. (PCT. 252) He also asked the lower court to reconsider this Court's determination that the presentation of San Martin's confession was harmless. (PCT. 253-54)

The State responded that the assertions of ineffective assistance of counsel during voir dire, ineffective assistance of counsel regarding Defendant testifying and coercion of Abreu were not properly before the court, as they had not been plead in the motion. (PCT. 255) However, the State asserted that it had no objection to allowing Defendant to participate in the evidentiary hearing it had conceded should be held on San Martin's claim about Abreu being coerced. (PCT. 255-56)

The State further argued that the severance issue was barred. (PCT. 256) The State asserted that claim of ineffective assistance of counsel at the penalty phase was insufficiently plead regarding anything but Dr. Fisher and that there was no prejudice from the failure to present Dr. Fisher or attempt to

impeach Abreu about his mental state. (PCT. 256-57) It argued that the issue about the extent of Abreu's plea had been fully litigated at the time of trial and was barred. (PCT. 257-58) The State also asserted that the issue about the comments in closing was also barred. (PCT. 258-59)

On January 21, 2001, Defendant moved to compel records from the Sweetwater Police Department. (PCR. 461-71) In the motion, Defendant asserted that Sweetwater had to have records because the State Attorney's file contained reports from the Sweetwater Police about an interview with Vivian Gonzalez concerning whether a participant in the Van Ness kidnapping had also been involved in the Bauer murder. *Id.* At the hearing on the motion, it was confirmed that Sweetwater had no documents other than those from the State Attorney's file, and the motion to compel was denied. (PCT. 287-91)

On January 7, 2002, the lower court entered its order on the *Huff* hearing. (PCR. 478-657) In the order, the lower court summarily denied all of the claims in Defendant's motion for post conviction relief but allowed him to participate in the evidentiary hearing it had ordered regarding claims raised by the codefendant.[3] (PCR. 478-88) It also entered its order on

[3] San Martin's motion for post conviction relief is included in the supplemental record on appeal. (PCR-SR. 84-301) The claims upon which San Martin was granted an evidentiary in which

the *in camera* review that same day and determined that all of the materials were not subject to disclosure. (PCR-SR. 324-25)

On September 18, 2002, the lower court held a status hearing. (PCT. 295-310) At the status hearing, Defendant asked for leave to file supplemental claims based on *Ring v. Arizona*, 536 U.S. 584 (2002), and *Atkins v. Virginia*, 536 U.S. 304 (2002), within 30 days, which was granted. (PCT. 301) The lower court then set the evidentiary hearing for December 18, 2002. (PCT. 304-09)

On October 18, 2002, Defendant filed his supplement to his motion for post conviction relief. (PCR-SR. 326-42) The supplement added two claims:

> I.
> [DEFENDANT] WAS DENIED HIS RIGHT TO DUE PROCESS BECAUSE SECTION 921.141, FLORIDA STATUTES, IS UNCONSTITUTIONAL, IN THAT IT DOES NOT REQUIRE AGGRAVATING CIRCUMSTANCES TO BE CHARGED IN THE INDICTMENT, DOES NOT REQUIRE SPECIFIC, UNANIMOUS JURY FINDINGS OF AGGRAVATING CIRCUMSTANCES, AND DOES NOT REQUIRE A UNANIMOUS VERDICT TO RETURN A DEATH RECOMMENDATION.
>
> II.
> [DEFENDANT] WAS DENIED HIS RIGHT TO BE FREE FROM CRUEL AND/OR UNUSUAL PUNISHMENT OR EXCESSIVE PUNISHMENT UNDER ARTICLE I, SECTION 17, FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, IN THAT IT IS UNCONSTITUTIONAL TO SUBJECT AN INDIVIDUAL TO EXECUTION WHERE SAID INDIVIDUAL SUFFERS FROM SUBSTANTIAL LIMITATIONS IN PRESENT FUNCTIONING AND/OR HAD SIGNIFICANTLY

Defendant was allowed to participate were Claims V and VI of that motion. (PCR-SR. 126-35)

SUBAVERAGE GENERAL INTELLECTUAL FUNCTIONING.

Id. In support of the second claim, Defendant asserted that he had been diagnosed as demonstrating "borderline intellectual abilities and neuropsychological deficits, particularly in memory and executive functioning." (PCR-SR. 339) He asserted that the "precise level of intelligence was in dispute" at trial but that he was either "'retarded' or close to it." *Id.* He asserted that the trial court had erred in rejecting claims of mental mitigation. *Id.* He then noted the existence of *Atkins* and §921.137, Fla. Stat. and asked that his sentence be vacated. (PCR-SR. 339-41)

On October 30, 2002, the State filed its response to Defendant's supplemental claims. (PCR-SR. 343-62) The State argued that the retardation claim was facially insufficient, as Defendant had not alleged the elements of retardation and noted that Defendant's own expert had determined that his IQ on the WAIS was 83 and that the score of 60 had been obtained on a Beta IQ test. (PCR-SR. 356-58) The State further noted that Defendant had claimed retardation as mitigation, that the claim had been expressly rejected, that the rejection had been expressly raised on appeal and that the rejection had been expressly affirmed. (PCR-SR. 358-61)

The evidentiary hearing commenced on December 18, 2002.

(PCT. 312-14) At the beginning of the evidentiary hearing, Defendant asked the lower court to rule on the supplemental claims. (PCT. 316-17) The State reiterated its assertion that the claim was estopped because it had been raised and rejected at trial and on direct appeal. (PCT. 319-20) Defendant responded that the true nature of his claim was that counsel had been ineffective for failing to present the claim properly. (PCT. 321) The lower court decided to proceed with the evidentiary hearing and address legal arguments subsequently. (PCT. 322)

San Martin then called Monica Jordan, his post conviction investigator, to testify. (PCT. 348-51) When San Martin attempted to ask about Jordan's visit to Abreu, the State objected that it appeared that San Martin was attempting to elicit hearsay. (PCT. 351) San Martin responded that he was attempting to admit Abreu's affidavit. (PCT. 351) The State replied that the affidavit was inadmissible hearsay. (PCT. 351-52) The lower court ruled that the affidavit was inadmissible but that San Martin could ask questions about the circumstances under which it was procured. (PCT. 352-53) Jordan then testified that he visited Abreu in December 1999 and March 2000, and obtained an affidavit from him on the second visit. (PCT. 354)

On cross, Jordan admitted that she did not speak Spanish and that Abreu spoke Spanish more fluently than English. (PCT. 355-56) No interpreter was used in Jordan's discussions with Abreu. (PCT. 356)

After Jordan testified, Defendant attempted to call his investigator to testify regarding an affidavit procured from Fernando Fernandez, which allegedly bolstered Abreu's recantation. (PCT. 357) After considering argument on the fact that the evidentiary hearing had been ordered on San Martin's claim that Abreu testified falsely because of pressure by the State and on the fact that the affidavit was inadmissible hearsay, the lower court informed Defendant that attempting to present his investigator to describe the circumstances under which the affidavit was obtained was premature. (PCT. 357-66)

The State then informed the lower court that it had reason to believe that Fernandez's testimony might result in him incriminating himself and that it had learned that Fernandez's counsel had not been notified that Defendant intended to call his client. (PCT. 367-68) As a result, the lower court asked Defendant to contact Fernandez's counsel. (PCT. 368)

San Martin next called Abreu. (PCT. 370-432) Abreu testified that he was involved in the planning and execution of these crimes. (PCT. 372-74) The day that Abreu, Defendant and

San Martin stole the cars, they did not discuss killing anyone. (PCT. 374) However, the day that the crimes were committed, Abreu, Defendant and San Martin drove around in Abreu's van, the plan was again discussed and the fact that Defendant would kill the bodyguard while Abreu and San Martin took the money was discussed. (PCT. 374-76) Abreu stated that this discussion occurred a half an hour or so before the crimes were committed. (PCT. 376) Abreu stated that he had informed the State of this discussion and its timing before trial. (PCT. 376-77) He recalled his trial testimony having been the same as his evidentiary hearing testimony. (PCT. 382-83) When asked if the State had ever asked him to change his testimony, Abreu responded that he had always been consistent in his statements. (PCT. 383)

On cross, Abreu stated that he had also been truthful in his testimony and meetings with the State. (PCT. 384-85) He stated that he was not threatened. (PCT. 385) No one ever suggested that he testify in a particular manner. (PCT. 385) Abreu acknowledged that the plan always called for Defendant, San Martin and Abreu to be armed and they always knew there was a bodyguard. (PCT. 387-88) He stated that Defendant had originally planned to run the bodyguard off the road. (PCT. 388) He averred that the morning of the crime, he, Defendant

and San Martin drove through the route they expected the Cabanases to take leaving the bank after the bank opened at 8 a.m. (PCT. 389) During this time, Defendant announced that he was going to shoot the bodyguard in everyone's presence. (PCT. 389)

After this discussion, the group picked up the cars they had stolen to use in the crimes. (PCT. 390) Abreu acknowledged that he did not have a watch and that the discussion about killing the bodyguard may have occurred a couple of hours before the Cabanases were accosted. (PCT. 390-91) He acknowledged that the crimes were committed according to the plan except that the group did not expect the Cabanases to be armed, as well as their bodyguard. (PCT. 391)

Abreu stated that Jordan had spoken to him in English even though he only knew a little English and could neither read nor write in English. (PCT. 391-92) Abreu believed that the affidavit he had signed said that he had fired a gun during the crimes but had not personally killed Mr. Lopez. (PCT. 392-93) Abreu did not know that the affidavit said that the police and State had told him what to say during his testimony and that he had been threatened. (PCT. 394) Abreu denied being threatened. (PCT. 394-95)

On questioning by Defendant's counsel, Abreu repeatedly

stated that the plan was for Defendant to fire at the security guard because they expected the security guard to fire at them. (PCT. 401-04) Abreu characterized this as acting in self-defense. (PCT. 401-04) Abreu acknowledged discussing his testimony with the State before trial but denied that the State insisted that he testified that the defendants fired first. (PCT. 405-08)

Abreu denied being under mental health treatment at or near the time of trial. (PCT. 410) He stated that he had never discussed this case with Fernandez. (PCT. 411-12) He denied telling Fernandez he had testified falsely in this case. (PCT. 412) Instead, he claimed that Fernandez attempted to get him to provide false testimony about Defendant in the Bauer case. (PCT. 412)

On redirect by San Martin, Abreu acknowledged that there had been a discussion of shooting the bodyguard at a meeting at a house a day or two before the crimes occurred. (PCT. 420-21) He then said that only stealing the car was discussed at this meeting. (PCT. 421-22)

On recross, Abreu stated that Defendant had stated that he was going to act first to prevent the bodyguard from firing. (PCT. 428) Abreu equated such actions with acting in self-defense. (PCT. 428)

Defendant then attempted to call Fernando Fernandez. (PCT. 439-43) However, Fernandez invoked his privilege against self-incrimination and refused to testify. *Id.* Defendant then called Robert White, Fernandez's attorney. (PCT. 445) Mr. White explained that he had been appointed to represent Fernandez in litigating Fernandez's post conviction motion regarding the Bauer murder. (PCT. 445-46) Mr. White stated that the State had made it clear to him the previous week that it was considering whether Fernandez should be charged in this matter. (PCT. 446) Mr. White stated that he was unaware that Fernandez was going to be called in this case. (PCT. 446-49)

On cross, Mr. White acknowledged that he had argued that the court considering Fernandez's motion should not believe the State's evidence against Fernandez in the Bauer case because the evidence that implicated Fernandez in that matter had also implicated Fernandez in this matter but the State had not charged Fernandez in this matter. (PCT. 449) He admitted that the State had responded by asserting that it was considering whether it should file charges against Fernandez in this matter. (PCT. 450)

Defendant next called Juan Miranda, his investigator, and attempted to admit the affidavit from Fernandez. (PCT. 452-55) However, the lower court sustained the State's hearsay

objection. *Id.*

The State called Marilyn Milian, one of the prosecutors at Defendant's trial. (PCT. 499-500) Ms. Milian testified that the State decided to offer Abreu a plea in exchange for his testimony before trial. (PCT. 500) The details of the plea agreement were disclosed to the defense. (PCT. 500-01)

During the course of entering into the plea agreement and in preparing for trial, Ms. Milian met with Abreu and discussed his testimony. (PCT. 501) During these discussions, Ms. Milian never instructed Abreu to testify in a particular manner. (PCT. 501) She also denied ever threatening any cooperating codefendant in any case, particularly Abreu in this case. (PCT. 501-02)

On cross examination by San Martin, Ms. Milian acknowledged that Abreu's plea agreement required Abreu to testify truthfully and contained a definition of what Abreu's truthful testimony would be. (PCT. 503-05) She explained that the definition of the truthful testimony was based on a proffer Abreu had provided to the State and had agreed was truthful. (PCT. 505-06) She admitted that the State could have sought to revoke the plea if Abreu had changed his testimony. (PCT. 506)

Ms. Milian stated that she did not independently recall Abreu stating that killing Mr. Lopez had always been part of the

plan in this case but had seen notes indicating that Abreu had told the State that information. (PCT. 506-07) Ms. Milian did not recall Abreu having told Det. Fabrigas that killing Mr. Lopez was not part of the plan at the time of his arrest. (PCT. 507) However, she did not find it surprising that a defendant would have attempted to have minimized his culpability in a statement to the police. (PCT. 507-08)

On questioning by Defendant's counsel, Ms. Milian acknowledged that the Bauer case was high profile, that this case was tried first so that it would be an aggravator in the Bauer case and that the agreement with Abreu was motivated by a desire to have as many aggravators as possible in the Bauer case. (PCT. 510-13) However, Ms. Milian denied that entering into a plea agreement with anyone was necessary in this case. (PCT. 513) Ms. Milian acknowledged that Abreu's plea agreement covered both this case and the Bauer case and stated that the State obtained a proffer directly from Abreu before entering into the agreement. (PCT. 514-16) She stated that one reason why an agreement would have been offered to Abreu and not the other defendants was that the State believed Abreu was the least culpable. (PCT. 530)

While Ms. Milian did not recall when Abreu testified at the time of trial, she believed that he was only called during the

penalty phase. (PCT. 523) Ms. Milian stated that even during the guilt phase, the State was still considering whether to call Abreu at that phase. (PCT. 535) She stated that part of the decision about when to call Abreu would have been that he was a cooperating codefendant and such witnesses generally have credibility issues. (PCT. 536)

Based on this evidence, Defendant argued that he was entitled to a new penalty phase because Abreu had given an inconsistent statement to the police at the time of his arrest, a different version in his confession, a slightly different version at trial and characterized the plan to kill Mr. Lopez as self defense at the evidentiary hearing. (PCT. 575-79) As such, Defendant argued that Abreu should not be considered credible. (PCT. 579-81) He further asserted that the fact that Abreu had a medical history should make him incredible. (PCT. 581-82)

The State responded that Defendant's argument that Abreu was not credible meant he automatically lost because Defendant had the burden of proving that the either the State suppressed evidence or presented false testimony through Abreu. (PCT. 582) The State averred that Abreu had reiterated that the murder was planned and his characterization of the murder as self defense was legally incorrect. (PCT. 583) Further, the State asserted

that the minor inconsistency regarding how long before the crimes began the plan was made did not affect the outcome, as even the changed testimony supported CCP. (PCT. 583)

Regarding the supplemental claim, Defendant asserted that he was standing on his pleading. (PCT. 585) The State responded that the issue was collaterally estopped. (PCT. 585) Defendant insisted that his prior assertions about his mental state should be ignored because they were presented as mitigation. (PCT. 585-86) The State replied that Defendant had never even presented any evidence of the adaptive functioning and onset before 18 prongs of retardation and that the record refuted that Defendant had adaptive functioning deficits. (PCT. 586-88)

At the conclusion of closing argument, the lower court granted Defendant 30 days to file any additional closing argument he desired in writing. (PCT. 592-93) On March 19, 2003, Defendant filed what he entitled as an "additional supplement." (PCR. 721-31) In this pleading, Defendant asserted that the lower court should consider his claim based on *Atkins* because counsel may have been ineffective, new tests might become available and he might suffer from a degenerative condition. (PCR. 723-25) Defendant also argued that he was entitled to relief based on San Martin's claims about Abreu

because Abreu had characterized Defendant's plan to shoot Mr. Lopez as a plan to act in self defense. (PCR. 725-28) He further asserted that the lower court should consider the affidavits of Abreu and Fernandez as evidence because he had allegedly shown that the State pressured Fernandez not to testify at the evidentiary hearing. (PCR. 728-31)

The State responded that the claim based on *Atkins* was still insufficiently plead, that the new tests mentioned in the motion had nothing to do with retardation and that a degenerative condition would not, by definition, render Defendant retarded. (PCR. 740-43)

Regarding San Martin's Abreu claims, the State asserted Defendant had failed to prove any claim, as Abreu had characterized the plan to kill Mr. Lopez as self defense at trial, the characterization of why the plan was made did not negate the fact there was a plan and the characterization was legally incorrect. (PCR. 743-47) The State further asserted that the exclusion of Fernandez's affidavit was proper and that the contents of the affidavit would not support a granting of relief even if it was admissible. (PCR. 747-50)

On March 31, 2005, the lower court entered orders denying Defendant's supplement claim based on *Ring* and San Martin's claims about Abreu. (PCR. 752-60) Regarding San Martin's

claims, the lower court found that Defendant had failed to prove that Abreu testified falsely at trial, that the State forced Abreu to testify in a particular manner, that the State knew that Abreu's testimony was false or that the arguable inconsistency regarding the timing of the discussion of the plan was material. (PCR. 754-59) The lower court did not enter an order on Defendant's claim based on *Atkins*, and Defendant did not ask the lower court to do so. Instead, on April 29, 2005, Defendant filed a notice of appeal, appealing the lower court's March 31, 2005 order denying his post conviction motion. (PCR. 764)

On July 20, 2007, Defendant moved this Court to hold this appeal in abeyance and relinquish jurisdiction back to the lower court for the purpose of allowing him to file and litigate a motion pursuant to Fla. R. Crim. P. 3.203. In the motion, Defendant complained that the lower court had not entered an order on the supplemental claim based on *Atkins*, and asserted that he should now be able to file a motion under Fla. R. Crim. P. 3.203 as a result. The only factual assertion in support of the claim that Defendant is retarded was a statement that there had been testimony at sentencing that he had an IQ score less than 60.

The State responded that while Defendant had mentioned

Atkins in his supplemental claim, a review of the pleadings and argument on the supplemental claim showed that Defendant had really asserted that his counsel was ineffective for failing to investigate and present mental health mitigation and not that Defendant actually met the definition of retardation. It asserted that there had been a ruling on that claim. The State further argued that even if Defendant had actually claimed to be retarded, he had waived the claim by appealing without obtaining a ruling and that Defendant's failure to comply with the deadline set in Fla. R. Crim. P. 3.203 barred any claim under that rule. Finally, the State pointed out that Defendant had not alleged that there was even a basis to raise a claim under that rule.

On November 30, 2007, this Court entered an order granting the motion "only to the extent that jurisdiction [] is relinquished [] to allow the trial court to enter an order." On February 21, 2008, the lower court entered its order denying the claim. (PCR-SR. 363-66) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the claim based on *Atkins* that was presented to it. The claim was not sufficiently plead and was refuted by the record. Moreover, Defendant was given ample opportunities to plead the claim sufficiently. Leave to proceed pursuant to Fla. R. Crim. P. 3.203 is not warranted, as the claim is now barred.

The lower court properly denied the claim concerning comments in closing, as the claim is barred and meritless. The lower court properly denied the claim concerning ineffective assistance of counsel regarding the presentation of experts at the penalty phase as it was insufficiently plead. The same is true of the claim of ineffective assistance of counsel for failing to call Vivian Gonzalez. The claims related to an alleged recantation of trial testimony by Pablo Abreu was properly denied, based on a failure of proof after an evidentiary hearing

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED THE *ATKINS* CLAIM PRESENTED TO IT AND THE REQUEST TO PROCEED UNDER FLA. R. CRIM. P. 3.203 IS BARRED.

Defendant first asserts that the lower court erred in summarily denying his claim in which he relied upon *Atkins v. Virginia*, 536 U.S. 304 (2002). He contends that he should be entitled to file and litigate the claim pursuant to Fla. R. Crim. P. 3.203. However, his request for leave to file a motion pursuant to Fla. R. Crim. P. 3.203 should be rejected because relief under that rule is barred. Moreover, his request for relief under *Atkins* was properly denied.

Instead of addressing the claim he raised in the lower court, Defendant relies on Fla. R. Crim. P. 3.203 and cases about it and asserts that he should be permitted the opportunity to seek relief under that rule. *E.g.*, *Rodriguez v. State*, 919 So. 2d 1252, 1263-67 (Fla. 2005)(affirming denial of claim that counsel was ineffective for failing to present evidence of retardation but stating that defendant may file motion under Fla. R. Crim. P. 3.203); *Phillips v. State*, 894 So. 2d 28, 37-40 (Fla. 2004)(affirming denial of claim that counsel was ineffective for failing to present evidence of retardation but stating that defendant was free to file motion under Fla. R. Crim. P. 3.203); *see also Connor v. State*, 979 So. 2d 852, 867

(Fla. 2008)(affirming denial of retardation claim "without prejudice to seeking any remedy he may still have available under" Fla. R. Crim. P. 3.203).[4] However, in making these assertions, Defendant ignores that under Fla. R. Crim. P. 3.203(d)(4)(C), he had until 60 days after October 1, 2004, to file a motion under that rule. Defendant did not do so. This Court has held that individuals, such as Defendant, who did not file their motions within the time limits set forth in Fla. R. Crim. P. 3.203(d)(4) are barred from attempting to file such motions. *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006). As such, Defendant's request for leave to proceed under Fla. R. Crim. P. 3.203 should be rejected as barred.

Moreover, when defendants have could have, but did not, file motions in compliance with Fla. R. Crim. P. 3.203, this Court has treated the *Atkins* claims like other post conviction claims and allowed them to be summarily denied. *Foster v. State*, 929 So. 2d 524, 531-33 (Fla. 2006); *see also Zack v. State*, 911 So. 2d 1190, 1201-02 (Fla. 2005). Treated as any other post conviction claim, the claim was properly summarily denied.

The definition of retardation, such that a defendant cannot

[4] Defendant also relies upon an unpublished order from *Thompson v. State*, SC05-279. However, unpublished orders have no precedential value. *Dept. of Legal Affairs v. District Court of Appeal, Fifth District*, 434 So. 2d 310, 312 (Fla. 1983).

be executed, is contained in both Fla. R. Crim. P. 3.203 and §921.137, Fla. Stat. According to this definition:

> the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B-4.032 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

Fla. R. Crim. P. 3.203(b); *see also* §921.137(1), Fla. Stat. This Court has determined that this definition must be construed in accordance with its plain meaning. *Jones v. State*, 966 So. 2d 319, 325-27 (Fla. 2007); *Cherry v. State*, 959 So. 2d 702, 712-13 (Fla. 2007).

In accordance with this plain language construction, this Court has determined that there are three elements to a claim of retardation: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) which has manifested during the period from conception to age 18. *Phillips v. State*, 33 Fla. L. Weekly S219, S220 (Fla. Mar. 20, 2008); *Jones*, 966 So. 2d at 325; *Cherry*, 959 So. 2d at 711; *Brown v. State*, 959 So. 2d 146, 148-

49 (Fla. 2007); *Burns v. State*, 944 So. 2d 234, 245 (Fla. 2006); *Rodgers v. State*, 948 So. 2d 655, 666-67 (Fla. 2006); *Trotter v. State*, 932 So. 2d 1045, 1049 (Fla. 2006); *Johnston v. State*, 960 So. 2d 757, 761 (Fla. 2006); *Foster*, 929 So. 2d at 531-32. If any of these elements is not shown, a defendant is not retarded. *Cherry*, 959 So. 2d at 713 (where first element not met, other elements not considered); *Johnston*, 960 So. 2d at 761-62 (upholding rejecting of retardation claim where experts did not consider second and third elements because first element not satisified).

In order to meet the first prong, a defendant must establish that his IQ score is 70 or below to meet the requirement that the score be two standard deviations below the mean. *Phillips*, 33 Fla. L. Weekly at S220; *Cherry*, 959 So. 2d at 711-14 (finding that section 921.137 provides a strict cutoff of an IQ score of 70); *Zack*, 911 So. 2d at 1201 (finding that to be exempt from execution under *Atkins*, a defendant must meet Florida's standard for mental retardation, which requires he establish that he has an IQ of 70 or below); *see also Jones*, 966 So. 2d at 329 ("[U]nder the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below."). Moreover, in accordance with the plain language construction of the statute

and rule this Court has adopted, that IQ score must have been obtained on an approved IQ test. Pursuant to Fla. Admin. Code. 65G-4.011:[5]

> The test shall consist of an individually administered evaluation, which is valid and reliable for the purpose of determining intelligence. The tests specified below shall be used.
>
> (a) The Stanford-Binet Intelligence Scale.
>
> (b) Wechsler Intelligence Scale.
>
> (2) Notwithstanding this rule, the court, pursuant to Section 921.137, F.S., is authorized to consider the findings of the court appointed experts or any other expert utilizing individually administered evaluation procedures which provide for the use of valid tests and evaluation materials, administered and interpreted by trained personnel, in conformance with instructions provided by the producer of the tests or evaluation materials. The results of the evaluations submitted to the court shall be accompanied by the published validity and reliability data for the examination.

In order to satisfy the second element, a defendant must submit evidence regarding his adaptive functioning from the same time frame as the time at which the IQ test was administered that resulted in the score that satisfied the first element. *Jones*, 966 So. 2d at 325-28; *see also Phillips*, 33 Fla. L. Weekly at S221. This Court has noted the planning necessary to show that CCP applies negates the concept that a defendant is mentally retarded. *Phillips*, 33 Fla. L. Weekly at S221-22.

[5] The Florida Administrative Code provisions have been renumbered.

Here, Defendant did not allege these elements in the lower court. When he first sought relief under *Atkins v. Virginia*, 536 U.S. 304 (2002), he asserted that Defendant had "substantial limitations of present functioning and/or significant subaverage general intellectual functioning." (PCR-SR. 339) The only "facts" alleged in support of this conclusory assertions were that Dr. Toomer had found that Defendant "had an IQ less than 60," that he did badly in school, that he dropped out in the 8th grade, that he "had difficulty communicating," that he "suffered a number of deficits," and that "his insight and judgment were impaired." (PCR-SR. 339-40) While Defendant did not mention that type of IQ test that Dr. Toomer used to find Defendant had an IQ score less than 60, a review of the testimony Defendant referenced shows that the IQ test was the Revised Beta. (T. 3133-35) The Revised Beta is not an approved test and Defendant did not provide the published validity and reliability data such that it was meet the requirements to be accepted. Further, Defendant did not include facts about his present adaptive functioning. Given these pleading failures, the lower court properly determined that the claim was insufficiently plead and denied it as such. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Moreover, the lack of pleading is particular important, as

the record is replete with evidence that refutes the claim. In addition to the reliance on the Revised Beta that does not qualify to support a claim of retardation, Dr. Toomer also administered the WAIS-R, a qualified IQ test, to Defendant at the time of trial. (T. 3198) On this test, Defendant's full scale IQ was 83. *Id.* This IQ score well exceeds the cutoff score of 70 and refutes the notion that Defendant is retarded. *Phillips*, 33 Fla. L. Weekly at S221; *Jones*, 966 So. 2d at 329; *Cherry*, 959 So. 2d at 714; *Trotter*, 932 So. 2d at 1049-50; *Johnson*, 960 So. 2d at 761; *Zack*, 911 So. 2d at 1201-02. Moreover, the trial court found, and this Court affirmed, the finding of CCP in this case based on Defendant's many months of planning in commission of this crime. *Franqui*, 699 So. 2d at 1323-24; (R. 1185-87) The trial court also noted that Defendant had engaged in planning regarding his two prior violent felony convictions in rejecting the extreme mental or emotional disturbance mitigator. (R. 1189-92) As this Court noted in *Phillips*, 33 Fla. L. Weekly at S221-22, such planning shows that a defendant does not have deficits in adaptive function. Evidence was also presented that while Defendant may have not done well in school, he obtained employment, including holding as many as three jobs at once, and was considered a good worker at jobs where he showed initiative. (T. 2780-81, 2784, 2871,

2881, 2885-86, 3349-52) He was also capable of maintaining a marital relationship and caring for his children. (T. 2778-79, 2886-88) Again, this Court has noted that such evidence of the ability to engage in employment and life skills negates the assertion of deficits in adaptive functioning. *Phillips*, 33 Fla. L. Weekly at S221-22; *Rodgers*, 948 So. 2d at 667-68. Under these circumstances, the claim was properly denied. *Owen v. State*, 33 Fla. L. Weekly S305, S306-07 (Fla. May 8, 2008). It should be affirmed.

Further, Defendant relied exclusively on the evidence presented by Dr. Toomer at the penalty phase in support of the allegations he did make in seeking relief under *Atkins*. (PCR-SR. 339-40) However, he ignored that the trial court rejected Dr. Toomer's testimony on credibility grounds:

> The court has considered the results of Dr. Toomer's test as concerns the defendant's IQ. Since it is impossible for the court to verify the accuracy or validity of such a test, the court must consider it in light of the facts known to the court. In making this analysis the court is conscious of the fact that although an individual's performance on such a test may be unable to exceed his true abilities it may easily reflect less than his best efforts.
> The defense suggests that this court should accept, as a non-statutory mitigating factor the fact that, according to Dr. Toomer, [Defendant] is mentally retarded. Every piece of evidence presented in this trial, penalty phase and sentencing hearings, with the exception of Dr. Toomer's testimony, definitively establishes that [Defendant] is not mentally retarded. The crimes he has committed, as described above, reflect an unshakable pattern of premeditation,

> calculation and shrewd planning that are totally inconsistent with mental retardation. [Defendant's] "good employment background" (one of the asserted non-statutory mitigating circumstances) as established by witness Michael Barecchio shows that he was not only a good employee but that on many occasions he displayed initiative and a capacity to finish his assigned tasks and move on to others without direction or supervision. His ability to establish a meaningful relationship with a woman, to have and raise children with her and to support a family further suggest that he is not mentally retarded.
>
> In order to find that this defendant is mentally retarded the court would have to accept Dr. Toomer's test result and ignore the clear and irrefutable logic of the facts in this case. The court is unwilling to do this and therefore rejects the existence of this non-statutory mitigating circumstance.

(R. 1195-96) This Court affirmed that finding on direct appeal:

> As his next claim, [Defendant] argues that the trial court erred in failing to find the non-statutory mitigators of marginal or retarded intelligence and brain damage and the statutory mitigators of age and impaired capacity. See § 921.141(6)(f), (g), Fla. Stat. (1991).
>
> A mitigating circumstance must be "reasonably established by the greater weight of the evidence." *Nibert v. State*, 574 So. 2d 1059, 1061 (Fla. 1990) (quoting *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990)).
>
> The trial court's sentencing order rejected low intelligence as a mitigator in the following fashion:
>
> > The court has considered the results of Dr. Toomer's test as concerns the defendant's IQ. Since it is impossible for the court to verify the accuracy or validity of such a test, the court must consider it in light of the facts known to the court. In making this analysis the court is conscious of the fact that although an individual's performance on such a test may be unable to exceed his true abilities it

> may easily reflect less than his best efforts.
>
> The defense suggests that this court should accept, as a non-statutory mitigating factor the fact that, according to Dr. Toomer, [Defendant] is mentally retarded. Every piece of evidence presented in this trial, penalty phase and sentencing hearings, with the exception of Dr. Toomer's testimony, definitively establishes that [Defendant] is not mentally retarded. The crimes he has committed, as described above, reflect an unshakable pattern of premeditation, calculation and shrewd planning that are totally inconsistent with mental retardation. [Defendant's] "good employment background" (one of the asserted non-statutory mitigating circumstances) as established by witness Michael Barecchio shows that he was not only a good employee but that on many occasions he displayed initiative and a capacity to finish his assigned tasks and move on to others without direction or supervision. His ability to establish a meaningful relationship with a woman, to have and raise children with her and to support a family further suggest that he is not mentally retarded.
>
> In order to find that this defendant is mentally retarded the court would have to accept Dr. Toomer's test result and ignore the clear and irrefutable logic of the facts in this case. The court is unwilling to do this and therefore rejects the existence of this non-statutory mitigating circumstance.

In addition, the State's expert witness, Dr. Mutter, expressly rejected Dr. Toomer's findings and opined that [Defendant] was not mentally retarded. Dr. Mutter also found that Dr. Toomer's reliance on the Beta IQ test result was questionable, since it was inconsistent with both the Wechsler test result and with the mental status examination which he conducted.

* * * *

As set out above, we find that there was competent, substantial evidence to support the trial court's

> conclusion that the non-statutory mitigators of low intelligence and organic brain damage were not established.

Franqui, 669 So. 2d at 1325-26.

This Court has previously recognized that when a defendant was raising a claim of retardation based on evidence that was previously presented and rejected, a trial court may properly summarily deny the claim. *Foster*, 929 So. 2d at 531-33; *Zack*, 911 So. 2d at 1201-02; *Bottoson v. State*, 833 So. 2d 693, 695 (Fla. 2003). Under these circumstances, the claim was properly denied.

Defendant insists that the fact that his claim depended entirely on evidence that had already been rejected should be ignored because he did not have the opportunity to present any other evidence and the lower court erred in finding that he did. However, the record supports the finding that Defendant had the opportunity to show that there were new facts to support his claim.

When the lower court heard argument on the first version of his supplemental claim at the beginning of the evidentiary hearing, Defendant asserted that the lower court should consider the claim as one of ineffective assistance of counsel for failing to present the issue of Defendant's intelligence properly. (PCT. 321) He did not assert that he had new

evidence or offer any explanation of why counsel could have been deemed ineffective. *Id.* When the lower court again heard argument on the issue more than a month later, Defendant again merely relied on Dr. Toomer's testimony and did not suggest that there was any additional evidence on the subject. (PCT. 585-88) Thus, Defendant was given two separate opportunities to proffer additional evidence.

Defendant was then given a third opportunity to present any claim of additional evidence in his supplement to the claim filed after the evidentiary hearing. (PCR. 723-24) Instead of proffering any evidence, Defendant merely noted that additional evidence might exist because counsel might have been ineffective or new tests might exist and he might have a degenerative condition. *Id.* Not only was no evidence offered but the assertions about "new tests" or a "degenerative condition" were nonsensical. The only "test" used to determine retardation is an intelligence test such as the WAIS or Stanford-Binet, which have clearly existed for years as Defendant took the WAIS pretrial. Moreover, one of the three elements of retardation is onset before the age of 18, such that Defendant could not have "become" retarded after his sentencing.

Additionally, in this pleading, Defendant claimed that he was being tested in the hope of developing relevant evidence.

(PCR. 724) As evidenced by the transcripts of hearings regarding the codefendant in the record from the two years between the filing of this supplement and the issuance of the lower court's orders, Defendant could have pursue any testing or presented any evidence he wanted to support his claim. (PCT. 600-50) Thus, Defendant had yet another opportunity to proffer any relevant evidence.

Finally, Defendant had the opportunity to comply with Fla. R. Crim. P. 3.203(d)(4)(C), and file a motion pursuant to that rule until 60 days after October 1, 2004. Given all of these opportunities Defendant had to present his claim and proffer evidence in support of it below, the lower court was correct in faulting Defendant for not doing so. *Johnson v. Edwards*, 569 So. 2d 928 (Fla. 1st DCA 1990)(proper to dismiss with prejudice where repeated opportunities to amend had already been provided); *Hirlinger v. Stelzer*, 222 So. 2d 237 (Fla. 2d DCA 1969)(same); *see also Diaz v. Bushong*, 619 So. 2d 1020 (Fla. 3d DCA 1993)(proper to dismiss complaint where party did not comply with the court order). His request to do so now, years after the time for doing so expired, should be rejected. The denial of the claim should be affirmed.

II. THE DENIAL OF THE CLAIM CONCERNING COMMENTS IN CLOSING SHOULD BE AFFIRMED.

Defendant next asserts that the lower court erred in summarily denying his claim that the State made improper comments during closing argument and that his counsel was alleged ineffective for failing to object to these comments. However, the lower court properly summarily denied this claim as it was procedurally barred and meritless.

In *Robinson v.* State, 707 So. 2d 688, 697-99 (Fla. 1998), the defendant contended, as Defendant does here, that his counsel was ineffective for failing to object to allegedly improper comments in closing both at the guilt and penalty phases of trial. *Id.* at 697 & n.17 & 18. In response to a claim that the lower court had improperly summarily denied the claims, this Court stated, "[a]s a matter of law, we find that [the] claims . . ., are procedurally barred because they could have been raised on direct appeal." This holding is in accordance with this Court's well established precedent, holding that a defendant cannot seek to overcome a procedural bar by couching the claim in the guise of ineffective assistance of counsel. *See Miller v. State*, 926 So. 2d 1243, 1256 (Fla. 2006); *Rodriguez v. State*, 919 So. 2d 1252, 1262 (Fla. 2005); *Zack v. State*, 911 So. 2d 1190, 1210 (Fla. 2005); *Pietri v. State*, 885 So. 2d 245, 255-56 (Fla. 2004); *Owen v. Crosby*, 854

So. 2d 182, 190 n.10 (Fla. 2003); *Arbelaez v. State*, 775 So. 2d 909, 915 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 663 (Fla. 2000); *Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000); *Robinson v. State*, 707 So. 2d 688, 697-98 (Fla. 1998); *Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995); *Hardwick v. Dugger*, 648 So. 2d 100, 106 (Fla. 1994); *Bryan v. State*, 641 So. 2d 61, 65 (Fla. 1994); *Lopez v. Singletary*, 634 So. 2d 1054, 1056-57 (Fla. 1993); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Woods v. State*, 531 So. 2d 79, 83 (Fla. 1988). As such, this claim was properly summarily denied as procedurally barred.

While Defendant insists that this well established precedent should not apply because he allegedly could not have raised the claim on direct appeal, this is untrue. This Court has held that it will review issues regarding comments in closing even where the issue is unpreserved because the defendant did not object to the comments at the time of trial if the comments are sufficiency egregious to rise to the level of fundamental error. *See Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007); *Brooks v. State*, 762 So. 2d 879, 899 (Fla. 2000). This Court has equated the harm needed to show fundamental error from comments in closing with the prejudice needed to prove a claim of ineffective assistance of counsel for failing to object to comments in closing. *Chandler v. State*, 848 So. 2d 1031,

1045 (Fla. 2003). Thus, if the comments were truly sufficiently egregious to present a cognizable claim of ineffective assistance of counsel, they could have been raised on direct appeal. Thus, Defendant's claim that an issue about the arguments could not have been raised on direct appeal should be rejected, and the finding of procedural bar was proper. The denial of the claim should be affirmed.

Even if the claim was not barred, the claim would still have been properly denied. In order to present a facially sufficient claim of ineffective assistance of counsel a defendant must allege both that his counsel was deficient and that he was prejudiced as a result of that defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 694-695. Even if a criminal defendant shows that particular errors of defense counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense in order to establish ineffective assistance of counsel. The test for prejudice requires the defendant to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

Here, Defendant failed to show either of these prongs. Regarding the guilty phase, counsel did object to one of the comments about which Defendant complains and the remaining comments were proper when read in context.

During his initial closing argument at the guilt phase, Defendant admitted that the State had proven the cars had been stolen, that the Cabanases and Mr. Lopez went to the bank on the day of the crimes, that they were later involved in a shootout that day and that Mr. Lopez was shot to death. (T. 2322-25) However, he argued that there was no proof of premeditation because Defendant claimed to have fired his gun in response to Mr. Lopez firing at him and the Cabanases did not see Defendant fire his gun. (T. 2325-26) He averred that the State had not proved that there was an attempt to commit an armed robbery because there had been no demand for money before shots were

fired, no attempt to take the money after the shootout and Defendant's confession to committing an attempted armed robbery was unreliable. (T. 2326-27)

Defendant asserted that the State had failed to show that the gun he used fired the fatal bullet and that it was possible that there was another perpetrator involved in these crimes who fired the fatal bullet. (T. 2327-31) He further asserted that there was no proof that he was one of the perpetrators because the surviving victims had not identified him, they had not been able to describe the perpetrators and there was no fingerprint evidence. (T. 2331-32) He also claimed the jury should have a reasonable doubt because the State had not presented evidence to explain a bullet hole in the passenger door of Mr. Lopez's truck or how Mr. Lopez's gun ended up in a holster when it was placed in the Cabanases' Blazer after the crime. (T. 2332-34)

Defendant asserted that based on these alleged failures of proof, the jury should have a reasonable doubt that he was guilty. (T. 2334-36) However, he claimed that even if the jury did believe "there was some proof beyond a reasonable doubt," it was the jury's "prerogative" to determine that Defendant was only guilt of a lesser included offense. (T. 2335) In making this argument, Defendant offered no explanation of what evidence allegedly supported a conviction on which lesser. (T. 2335-36)

San Martin then argued that commission of these crimes was not only a tragedy for the victims but also a tragedy for him. (T. 2336-37) He asserted that there was a lack of evidence because the Cabanases did not have an adequate opportunity to observe the perpetrators because of the circumstances of the crimes and the fact that the perpetrators were wearing masks. (T. 2337-38) He also relied on the lack of fingerprint evidence to assert that there was a reasonable doubt. (T. 2338)

San Martin asserted that the jury should not believe Det. Santos' testimony about San Martin's confession because they should examine Det. Santos' motive for testifying. (T. 2339-40) He also asserted that the jury should question the voluntariness of his confession. (T. 2340-42) As part of this argument, San Martin stated that homicide detectives were "the elite" and "cream of the crop." (T. 2340)

San Martin pointed out that the ballistics and crime scene evidence showed that 29 rounds were fired during this crime. (T. 2342) However, the evidence also showed that only four rounds were connected with the gun San Martin had and two were still live rounds. (T. 2342-43) He suggested that this may not have been an attempted armed robbery. (T. 2343-44) As part of this argument, San Martin asserted:

> Just a few months earlier, August of 1991 Mr. Cabanas Senior had been robbed at gun point in the parking lot

> of Republic National Bank, and I believe it was approximately 70 thousand dollars that were taken from him at that time. That's a lot of money.
>
> And he also had a lot of money on December 6th, 1991 when this incident happened no wonder Detective Nabut had doubts.
>
> Business is usual [sic] when they deal in such heavy cash resort to things of this, such as an armor truck from Wells Fargo or Brinks –
>
> [The State:] Objection.
>
> THE COURT: Sustained.
>
> [San Martin's counsel:] Pardon me?
>
> THE COURT: Proceed.
>
> [San Martin's counsel:] Thank you, Judge.
>
> You have seen armored trucks, Wells Fargo Brinks, whatever company it is. Bringing money to and from businesses. These people were supposedly running a check cashing business, thousands and thousands and thousands of dollars.
>
> I am not going to speculate as to what and why but think about that.
>
> [The State:] Objection, Your Honor, that is exactly what Counsel is doing.
>
> THE COURT: Sustained.
>
> [The State:] I ask for a curative.
>
> THE COURT: Move only [sic] Counsel.

(T. 2343-44)

During its closing argument, the State responded that the fact there was a question about whether there was an attempted robbery before the confessions were made showed that the defendants planned to kill the victims first and then take their money and was not evidence that there was no attempted robbery. (T. 2345-48) As part of this responsive argument, the State asserted:

> They went out there that day to take someone else's hard earned money. There is no indication in this case anywhere that that was anything but hard

> earned money. It is not enough that the Cabanas's had to see their best friend shot dead. It is not enough that had they not ducked, they too would be dead and wouldn't be here to tell about it. Now they have to suffer the indignity of the accusations that [San Martin's counsel] is making in his closing remarks to you.

(T. 2347-48)

The State then read the jury the instruction on the law of principals and discussed how it made both defendants guilty of all of the crimes regardless of who actually did what during the commission of the crime. (T. 2348-49) As part of this discussion, the State commented:

> Who are these guys saying, what did these guy[s] say in their confession? One for all and all for one, just like we talked about in the jury selection and each of you had said not only can I follow that law, I think that it is a good law because the legislature had decided that when criminals get together and decide we're going to do this this way, you do this, your do that do you this, they make it that much more likely that they are going to be successful in their crimes, and they overwhelm the victim because there is more of them.
>
> So, we are not going to hear you say later, Mister, oh, I am not responsible for my partner's crimes, I am not responsible for what he did, no Mr. Defendant, you are treated as if you had done everything that your partner in crime did.

(T. 2348-49)

The State then discussed the law on the substantive charges and explained how the evidence met the elements of the offenses. (T. 2349-71) As part of this discussion, the State responded to the defendants' claim that there was a lack of proof because the

surviving victims could not identify the defendants:

> Masks. If I hear one more time that these people were not identified, I don't know what I'm going to do. How could the victims identify these men when they wore stockings? Not just according to the victims we find this in the truck that he was in and you heard Mr. Hugh, this does not belong to him.
>
> Furthermore, [Defendant] says in his confession, yeah. Abreu and San Martin wore nylons on their heads. [Defendant] doesn't have to so that of course because he cowardly was going to make his shots from the driver's seat of his two tone gray Suburban that he stole.
>
> What a price, that there is no identification, let's see they take the extra measure to hide their identify and the brazenness of it all I mean this doesn't occur on some dead end street where nobody would see. No, this is right next to the Palmetto Expressway.
>
> We want to make sure, nobody coming down that expressway will be able to identify us just in case if we are able to take these guys down so let's put these stockings on. Right in broad daylight.
>
> The brazen nature of their actions you know, and that's supposed to adhere to their benefit? So that he had the gall to do this with masks, that goes to be a benefit for them at trial that the victims didn't identify them?

(T. 2361-62)

After discussing the charged offenses, the State addressed the lesser included offense and why the evidence showed that the defendants were guilty of the charged offenses instead of the lessers. (T. 2371-75) As part of this discussion, the State discussed the inapplicability of manslaughter:

> Manslaughter is if the victim, if the victim's death is cause by some type of culpable negligence. Let me give you an example.
>
> I am cleaning my gun and I think that it is

> totally unloaded and my sister walks in and I look at her joking around and I say bang bang and it turned out that it was loaded and my bullets kill her. I didn't mean to kill her, I have no evil or malice involved but I wasn't acting responsibly toward another human being, that is manslaughter.
>
> Do we have that in this case? No. This has nothing to do with manslaughter. Don't kid yourselves Folks, that would be a big win for the defense on the evidence in this case. Big win. This is not a second degree murder. This is not a manslaughter. Either this is a first degree murder, whether it is premeditated or felony murder, either there is a first degree murder or we have the wrong guys on trial.
>
> Either they are guilty or they are the wrong guys on trial.

(T. 2372-73) After the State had finished explaining what all of the lesser were and how they did not apply, the State asserted:

> The lessers are a joke in this case but they have to be read to you by law. So the lesser have nothing to do with this case and don't let them argue to you somehow that their clients should be found guilty of some lesser included offense because they is totally inconsistent with their theory of the case.
>
> This case is all or nothing.

(T. 2374-75)

The State then responded to particular claims that the defendants had made during their arguments. (T. 2375-87) This included the defendants' assertions that their confessions should be ignored. (T. 2378-87) In response to San Martin's assertion about the officers who testified about his confession, the State averred:

> What are the chances that Pablo San Martin didn't

> really confess? Let's see, Detective Santos is lying, for one case he's going to come up into here and risk his reputation, he's going to come in here and commit perjury, and he's going to lie about one case?

(T. 2385) Defendant's counsel objected to this comment and moved for a mistrial. (T. 2385) The trial court overruled the objection and denied the motion for mistrial. (T. 2385) The State then discussed the evidence that showed that San Martin had confessed. (T. 2385-86) It also discussed the reliability of the confessions:

> So let's discuss the second possibility, that you should look at the circumstances surrounding the confession because it is unreliable. There is no evidence whatsoever in this case that that confession is unreliable.
>
> I mean, just like he said, they are the best in the business, the homicide cops scrupulously honor these defendant's rights. All they did was read them. I am marveled that they confessed. All they did was read them rights over and over again. There is no evidence that these confessions were anything but voluntary.

(T. 2386)

As can be seen from the forgoing, counsel did object to the State's comment in response to San Martin's assertion that the officer who took his confession was incredible. As counsel did object, he cannot be deemed ineffective for failing to do so. *Griffin v. State*, 866 So. 2d 1, 16 (Fla. 2003). The claim was properly denied, and the denial should be affirmed.

Moreover, counsel cannot be deemed ineffective for failing

to object to the remaining comments because the comments were not objectionable. *See Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). As such, the claim was properly denied because it lacked merit.

The comment about the indignity to the victims of San Martin's comments about them was proper as fair response. As seen above, San Martin attacked the victims' character during his closing argument by suggesting that they had to be involved in some illegal business because of the manner in which they obtained cash to run their business. (T. 2343-44) Given these comments, it was proper for the State to respond that these comments were unsupported by the evidence and improper. *Walls v. State*, 962 So. 2d 1156, 1166 (Fla. 2006)("A prosecutor's comments are not improper where they fall into the category of an 'invited response' by the preceding argument of defense counsel concerning the same subject."); *see also Stephens v. State*, 975 So. 2d 405, 421 (Fla. 2007). Since the comments were proper, counsel was not ineffective for failing to claim that they were. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

The same is true regarding the comments about the

defendants not being identified by the victims and the comments about the police being the best in the business. As seen above, both defendants repeatedly harped on the fact that the surviving victims could not identify them. (T. 2331-32, 2337-38) Moreover, both defendants asserted that their confessions were somehow unreliable, and San Martin directly stated that his confession was unreliable because the officers taking the confession were "the elite" and "cream of the crop," who knew how to get people to confess. (T. 2326-27, 2340-42) Given these comments, it was not improper for the State to respond that the reason for the lack of identification was the defendants were wearing of masks and that the fact the homicide detectives were experienced did not show that the confessions were unreliable. *Dailey v. State*, 965 So. 2d 38, 44 (Fla. 2007); *Rogers v. State*, 957 So. 2d 538, 548 (Fla. 2007); *Barwick v. State*, 660 So. 2d 685, 694 (Fla. 1995). Since the comments were proper, counsel cannot be deemed ineffective for failing to object to them. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

While Defendant seems to suggest that the prosecutor offered her personal opinion about the law of principal, Defendant has taken the comment out of context. As seen above, the prosecutor did not state her personal opinion. Instead, she

reminded the jurors that they had all stated during voir dire that they both would follow the law of principals and agreed that the law of principals was appropriate. (T. 2348-49) Reminding the jury of its commitment and duty to follow the law is not improper. *Rodriguez v. State*, 919 So. 2d 1252, 1283-84 (Fla. 2005). Thus, the comment was proper, and counsel cannot be deemed ineffective for failing to claim that it was not. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Further, the comments about the lessers were also not improper. In *Gonzalez v. State*, 786 So. 2d 559, 568 (Fla. 2001), the defendant claimed that the State had made an improper comment by stating that the jury would be given instructions that had "nothing to do with the case." This Court found that the comment did not merit reversal, stating "When read in context, this comment on the instructions appears to be the prosecutor's attempt to call into question the propriety of the mitigation evidence presented. He in essence said that despite an instruction on mental health mitigators, the evidence presented does not support their existence." *Id.* Similarly here, the State's comments about the lessers in this case, when read in context, were merely pointing out that the lessers were inconsistent with the facts of the case. (T. 2372-73, 2374-75)

Moreover, it should be remembered that Defendant asked the jury to consider convicting him of lessers even though he agreed with the facts concerning the manner in which the crimes were committed, presented a defense based on a lack of connection between him and the crime and did not ever offer any explanation of what evidence would support a conviction on any lesser. (T. 2335-36) Given these circumstances, there was nothing improper in the comments about the lessers. *Gonzalez*, 786 So. 2d at 568; *Walls*, 962 So. 2d at 1166. As such, counsel could not be deemed ineffective for failing to object to this comment either. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

The claim is also meritless with regard to the comments during the penalty phase closing. While Defendant asserts that his counsel did not object to any of the comments in closing, the record belies this assertion. Counsel objected when the State commented concerning the jury understanding why the State had sought the death penalty, when the State suggested that the jury had a duty to recommend death if the aggravators outweighed the mitigators and when the State asserted that his argument that his grandmother did not adequately discipline him was not mitigating because he would claim it was mitigating if she had (T. 3361, 3362, 3399) Moreover, at the conclusion of the

State's argument, he moved for a mistrial, asserting that the State's comments mentioning counsel, the decision to seek the death penalty and the lack of remorse were improper. (T. 3410-11) The lower court denied the motion. (T. 3413) Since counsel did actually object to these comments, his claim that his counsel was ineffective for failing to do so was properly denied. *Griffin v. State*, 866 So. 2d 1, 16 (Fla. 2003).

While Defendant complains that the State commented about his criminal record, the attempt to kill the Cabanases and the pecuniary motive for these crimes, none of these arguments were improper. The proper function of a penalty phase closing argument is to discuss what aggravating and mitigating circumstances have been proven and what weight should be assigned to each. *See Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). Here, the State's arguments about Defendant's criminal record, the attempt to kill the Cabanases and the pecuniary motive for these crimes were all part of the State's argument that it had proven the aggravating circumstances of prior violent felonies, during the course of a felony, for pecuniary gain and CCP and why those aggravators were all entitled to great weight. (T. 3361, 3367-68, 3370, 3382, 3383) As such, there was nothing improper about the State's comments. *Rodriguez*, 919 So. 2d at 1283-84. Counsel cannot be deemed

ineffective for failing to claim that there was. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The denial of the claim should be affirmed.

The comments about remorse were also proper. This Court has held that it is entirely appropriate for the State to present evidence and argument about a lack of remorse when a defendant has asserted remorse or the ability to be rehabilitated as mitigation. *Singleton v. State*, 783 So. 2d 970, 978-79 (Fla. 2001); *see also Tanzi v. State*, 964 So. 2d 106, 114-15 (Fla. 2007); *Kormondy v. State*, 845 So. 2d 41, 51-52 (Fla. 2003). Here, both Defendant and San Martin presented evidence of remorse as mitigation.[6] (T. 2757-66, 2768-74, 2936, 3143-44) In fact, Defendant specifically requested that the trial court give the jury special jury instructions that remorse was a nonstatutory mitigator, the State informed Defendant it would be arguing lack of remorse when the instruction was discussed and the trial court indicated the argument was proper if Defendant claimed remorse. (R. 1087, T. 2674-75) Given that Defendant and San Martin presented remorse as mitigation, there was nothing improper about the State asserting that the facts

[6] A number of the comments about which Defendant presently complains were specifically addressed to San Martin and the evidence he presented and not Defendant. (T. 3368, 3378, 3388-89, 3395)

did not support the mitigation. Since the comments were proper, counsel could not be deemed ineffective for failing to object to them. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

The comment about blaming others and the comment discussing the fact that the lawyers had argued about the confessions in the guilt phase were proper in context. During his cross examination of Craig Van Ness, Defendant elicited testimony that suggested that Mr. Van Ness had caused himself to become a victim. (T. 2546-47) Defendant also presented testimony that he had been cooperative with the police by confessing to his crimes. (T. 2567-70) In fact, Defendant asked that the jury be instructed that the fact that he had confessed was a mitigator. (R. 1091) Given Defendant did attempt to blame others for his crimes and was claiming that his confessions were mitigating, it was not improper for the State to comment on these matters. *Rodriguez*, 919 So. 2d at 1283-84. Thus, counsel could not have been ineffective for failing to claim that it was *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Finally, the comment about Dr. Toomer would not entitle Defendant to any relief. During the penalty phase, Dr. Toomer had opined that Defendant committed these crimes under an

extreme mental or emotional disturbance because he had been "abandoned" by his mother, father and brother. During its closing argument, the State pointed out that this opinion was not consistent with the facts of the case:

> Dr. Toomer, Dr. Toomer's world is that abandonment by your father here, your death of your brother, and the abandonment by your father lead to deranged killers. That's the world of Dr. Toomer.
>
> Even though he knew – this is what is unbelievable. Even though he knew that these things happened ten years ago and in those ten years in eight of those ten years the Defendant had no maladptive behavior. He committed no crime. He used no drugs or alcohol. He got married. Had children. Maintained steady employment. These are all normal thing that we expect of each other and of other human beings. Yet by Dr. Toomer's opinion, this abandonment that happened in ten years was preying on him, working like a cancer that's going to create this explosion in crime.
>
> That's the world of Dr. Toomer Folks. Through the looking glass Disney World. Make believe. Use your common sense.
>
> Is a person who plans this crime for six months, obtains all the things, all the details that he did in planning this crime, is this a person suffering from extreme mental or emotional disturbance? Has a personality disorder? Sure. Gambling is a personality disorder, I mean, they went so far as to don walkie talkies. I think I already told you that I mean it just doesn't exist.
>
> You should categorically reject the opinion of Dr. Toomer because it is baseless in fact.

(T. 3405-06) It is not improper for the State to comment that an expert's opinion was incredible because it did not comport to the facts. *See Shellito v. State*, 701 So. 2d 837, 841 (Fla. 1997); *Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997); *Craig*

v. State, 510 So. 2d 857, 865 (Fla. 1987). Thus, counsel could not have been deemed ineffective for failing to claim that it was. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The denial of the claim should be affirmed.

III. THE CLAIM REGARDING THE MANNER IN WHICH COUNSEL PRESENTED EXPERT TESTIMONY AT THE PENALTY PHASE WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in summarily denying his claim that his counsel was ineffective for failing to investigate and present mitigation. Specifically, Defendant complains about the failure to call Dr. Brad Fisher to testify that Defendant would make a good adjustment to prison life. However, the claim was properly denied, as the claim was insufficiently plead and refuted by the record. Moreover, the presentation of Dr. Fisher's testimony would not show prejudice.

In his motion for post conviction relief, Defendant asserted that his counsel was ineffective for failing to retain experts in "substance abuse, neuropharmocology, abusive behavior within families, Cuban culture, and mental retardation." (PCR-SR. 52) He further asserted that the experts who had evaluated him pretrial had performed inadequate evaluation and been improperly used by counsel. (PCR-SR. 52) He finally contended that counsel should have presented an expert, such as Dr. Fisher, who would have refuted the State's alleged theory that Defendant was an abuser of multiple substances who was also a sociopath and could not be rehabilitated. (PCR-SR. 52-53)

However, Defendant failed to allege what testimony could have been presented from the types of experts he suggested

should have been retained. (PCR-SR. 52-53) Because the motion did not include these allegations, the lower court properly found the claim insufficiently plead. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

The lack of specific allegations was particularly important here. Contrary to Defendant's assertion that the State's theory was not that Defendant was a substance abuser and sociopath who could not be rehabilitated. In fact, the evidence presented at trial through Defendant's statements to the police and the testimony of his father-in-law, uncle and the experts was that Defendant never used drugs or alcohol. (R. 91, 110, T. 2778, 2872, 3198, 3251, 3294) Moreover, the evidence showed that Defendant was not abused as a child. (T. 2785-86, 2882) Under these circumstances, there was no reason for Defendant to call experts about matters that did not exist and to rebut a theory that was not presented. The denial of the claim should be affirmed.

The lower court also properly denied the claim to the extent it was asserting that counsel was ineffective for failing to call Dr. Fisher. The presentation of Dr. Fisher's testimony would not have created a reasonable probability of a different sentence. As such, the claim was without merit and properly denied. *Owen v. State*, 33 Fla. L. Weekly S305, S306-07 (Fla.

May 8, 2008).

In his motion for post conviction relief, Defendant asserted that his counsel should have called Dr. Fisher to testify, as he had at deposition, that Defendant would make a good adjustment to prison life and would not commit any acts of violence while incarcerated because he had not done so during the time he had been incarcerated pretrial. (PCR. 152) However, in that same deposition, Dr. Fisher admitted that Defendant had been in a highly secure environment for all but one week of his pretrial detention. (PCR. 283-84) Thus, Dr. Fisher's opinion only provided weak mitigation because it was based largely on speculation.

Moreover, while Defendant attempts to downplay the significant contradictions between Dr. Fisher's opinion and Dr. Toomer's opinion, the lower court properly found that significant contradictions existed. Dr. Toomer opined that Defendant exhibited a lifelong condition under which Defendant would make poor decision regarding how to behave because Defendant had a low IQ, deficits in intellectual functioning and organic deficits. (T. 3115-16, 3126-31, 3138-41, 3211-13) Dr. Toomer also stated that Defendant had problems communicating. (T. 3115) Dr. Fisher stated that he had no difficulty communicating with Defendant and observed nothing in his

interaction with Defendant that indicated that Defendant had any problems in intellectual functioning and no sign of mental illness. (PCR. 309-10) Further, Dr. Fisher believed that the problem that Defendant's upbringing caused in him was limited to the effects of a lack of discipline. (PCR. 310) Moreover, Dr. Fisher directly answered that he did have an opinion about Defendant's level of intelligence that was contrary to Dr. Toomer's opinion:

> Q. And due to your numerous hours of work in the field of clinical psychology, I know you can get a gut feeling in terms of somebody's intelligence level. **Did you form an opinion that he had an average intelligence level?**
> A. **Yes, I think his judgment, his intelligence is probably average.**

(PCR. 309) Thus, far from stating that he was only giving a gut feeling, Dr. Fisher admitted that he had formed an opinion and his opinion was inconsistent with Dr. Toomer's opinion. Additionally, Dr. Fisher admitted that the lack of problems with judgment and intellectual level was far from irrelevant to his opinion. In fact, he stated that if Defendant did have problems with impulsivity and mental illness, it would negatively impact his opinion. (PCR. 276-80) Thus, not only was Dr. Fisher's opinion itself weak, it would have been significantly at odds with the testimony counsel did present from Dr. Toomer. Under these circumstances, the lower court properly determined that

the presentation of this testimony would not create a reasonable probability of a different result. *Breedlove v. State*, 692 So. 2d 874, 877 (Fla. 1997)(counsel not ineffective for failing to present evidence that would have been more harmful than helpful).

The lack of prejudice is particularly acute when the aggravation is considered. Here, Defendant had killed Mr. Lopez during an attempt to rob the Cabanases by shooting first without even asking for their money. Defendant had been involved in the planning of these crimes for months and had announced his plan to kill Mr. Lopez to prevent him from interfering with the attempted robbery before the Cabanases even went to the bank. He killed Mr. Lopez before Mr. Lopez was able to fire a single shot, as he and his codefendants fired a hail of bullets at the Cabanases and Mr. Lopez. Moreover, Defendant had already been convicted of participating in a plan to rob an elderly bank guard and of kidnapping and attempting to rob Craig Van Ness. As was true of this crime, the attempted robbery of the bank guard was achieved by firing a gun repeatedly at the guard.

These facts fully support the finding of the prior violent felony, during the course of a felony, for pecuniary gain and CCP aggravators. (R. 1184-87) Moreover, the only mitigation found at trial was two nonstatutory mitigators that Defendant

experienced hardships as a child and that Defendant was a loving family member. (R. 1193-1202) In weighing these factors, the trial court stated:

> This court finds that the aggravating circumstances far outweigh the mitigating circumstances. The aggravating circumstances in this case are, the defendant's previous convictions for violent crimes, the fact that the murder herein was committed during the commission of an attempted robbery and for pecuniary gain and the cold calculated and premeditated manner in which the murder was committed, greatly outweigh the relatively insignificant non-statutory circumstances established by this record. Even in the absence of the cold, calculated and premeditated aggravator the court would still feel that the remaining two aggravators seriously outweighed the existing mitigators.

(R. 1202-03) Given these findings, adding the speculative testimony of Dr. Fisher concerning Defendant's potential for adjusting to imprisonment and having it contradict Dr. Toomer's opinion would not create a reasonable probability of a life sentence. *Strickland*, 466 U.S. at 694. The claim was properly denied, and the denial should be affirmed.

IV. THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL VIVIAN GONZALEZ WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in denying his claim that his counsel was ineffective for failing to call Vivian Gonzalez at the suppression hearing and the trial to testify regarding her meeting with Defendant on the day of his confession. However, the lower court properly denied this claim because it was insufficiently plead and refuted by the record.

In order to plead a claim that counsel was ineffective for failing to present witness testimony, a defendant must allege the identity of the witness who was purportedly not called, the substance of the testimony that witness would have provided, the fact that the witness would have been available to testify at the time of trial and an explanation of how the failure to present this testimony would create a reasonable probability of a different result. *Nelson v. State*, 875 So. 2d 579, 581-83 (Fla. 2004). Further, conclusory allegations are insufficient to state a claim. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Here, while Defendant outlined the testimony of Det. Nabut and Defendant regarding Defendant's meeting with Ms. Gonzalez, Defendant offered no allegations about the substance of Ms.

Gonzalez's testimony. (PCR. 160-64) Instead, he only made conclusory allegations that because Det. Nabut had stated that he had not heard Defendant discuss an attorney with Ms. Gonzalez and Defendant had stated that he had discussed the issue with Ms. Gonzalez, she was a "necessary witness" at both the guilt and penalty phases and that she could have testified about Defendant's "condition." (PCR. 162-63) Having failed to allege what Ms. Gonzalez would say about either of these areas, Defendant also failed to explain how the presentation of her testimony would create a reasonable probability of a different result. At the *Huff* hearing, Defendant alleged that Ms. Gonzalez's testimony would be "that [Defendant] asked for a lawyer," and that she could testify about his "condition." (PCT. 252) However, he still failed to offer any explanation of how this testimony would have affected the outcome. (PCT. 252-53) Given the failure to plead the proposed substance of Ms. Gonzalez's testimony and to provide, at anytime, an explanation of how the failure to present this testimony prejudiced Defendant, the claim was insufficiently plead and properly summarily denied. *Nelson*, 875 So. 2d at 581-83; *Ragsdale*, 720 So. 2d at 207; *see also Bryant v. State*, 901 So. 2d 810, 821-22 (Fla. 2005).

Moreover, the failures of pleading were particularly

important given the law. While Defendant suggests that Ms. Gonzalez should have been called at the penalty phase, Defendant has only ever hinted that her testimony would concern his meeting with her on the day he confessed. In Defendant's post conviction appeal in his other case, Defendant asserted that his counsel was ineffective for failing to present evidence about the circumstances of the day he confessed at resentencing. *Franqui v. State*, 965 So. 2d 22, 31 (Fla. 2007). This Court affirmed the denial of this claim, stating:

> We find no error in the trial court's rejection of the argument that trial counsel was ineffective for failing to present this issue to the resentencing jury. Since such evidence would presumably have been used to cast doubt upon the admissibility or veracity of [Defendant's] confession to establish his guilt, it would not have been relevant to sentencing issues or admissible in the sentencing phase. *See Way v. State*, 760 So. 2d 903, 916 (Fla. 2000)("[T]his Court has previously rejected the argument that evidence that would serve only to create a lingering doubt of the defendant's guilt is admissible as a nonstatutory mitigating circumstance.")(citing *Preston v. State*, 607 So. 2d 404, 411 (Fla. 1992); *King v. State*, 514 So. 2d 354, 358 (Fla. 1987)). [Defendant] has made no showing in this appeal of the relevancy of such evidence for purposes of sentencing.

Id. at 31-32. Thus, it does not appear that Ms. Gonzalez's testimony would have been admissible at the penalty phase. Counsel cannot be deemed ineffective for failing to present inadmissible evidence. *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004). Thus, the portion of the claim about the penalty

phase was properly denied.

With regard to the suppression hearing or the guilt phase, the relevance of the testimony is still tenuous.[7] Statement to others or by others concerning counsel are not invocations of one's right to counsel. *See Keen v. State*, 504 So. 2d 396, 400 (Fla. 1987)(telling employee to call an attorney to arrange bail not an invocation of the right to counsel); *Ledo v. State*, 557 So. 2d 891, 893 (Fla. 3d DCA 1990)(telling brother not to speak to police and to let counsel handle matter not an invocation of right to counsel); *see also United States v. Posada-Rios*, 158 F.3d 832, 867 (5th Cir. 1998)(asking mother to call third person so that third person could call attorney not an invocation of rights). Instead, this Court has required that attempts to invoke one's right to counsel must be unequivocally made by the defendant. *State v. Owen*, 696 So. 2d 715 (Fla. 1997)(requiring that an invocation of *Miranda* rights be unequivocal); *see also Davis v. United States*, 512 U.S. 452, 459 (1994). Moreover, this Court has held that a defendant can only invoke his Fifth Amendment right to counsel during the course of a custodial interrogation. *Sapp v. State*, 690 So. 2d 581 (Fla. 1997).

Here, while Defendant asserted in his post conviction

[7] Defendant also raised the same claim about presenting witness testimony at the suppression hearing in his other case and was granted an evidentiary hearing on it, only to later abandon the claim. *Franqui*, 965 So. 2d at 27-31.

motion and at the *Huff* hearing that the meeting with Ms. Gonzalez occurred before his statement (PCR. 160, PCT. 252), Defendant, himself, testified at the suppression hearing that he had already provided a full verbal confession before he met with Ms. Gonzalez. (T. 368) This testimony was confirmed by the testimony of Det. Nabut that Defendant began to confess almost immediately after he entered the room at 6:45 p.m. and that he remained in the room with Defendant until 9:00 p.m. (T. 149, 152, 197-98) Moreover, Defendant testified that he was unaware the police could overhear his conversation with Ms. Gonzalez, which occurred in a closed room, and Det. Nabut testified that he did not tell Defendant that the conversation could be overheard. (T. 154, 204, 368) Given these circumstances and the law, any statement Defendant may have made to Ms. Gonzalez could not be deemed an invocation of his right to counsel. Thus, it does not appear that the presentation of any such testimony would have affected the outcome of the case, particularly as Defendant had already provided an oral confession. *Strickland*, 466 U.S. at 694. Thus, any allegation Defendant was attempting to make that Ms. Gonzalez's alleged testimony would have been prejudicial because it would have resulted in the suppression of his confession was without merit and properly denied.

Further, to the extent that Defendant was attempting to claim that Ms. Gonzalez's testimony would have been prejudicial because it would have impeach Det. Nabut's testimony about what he overheard, the claim was still properly denied. Det. Nabut's testimony was that he was initially unaware that the room was monitored and did not overhear the entire conversation between Defendant and Ms. Gonzalez. (T. 155, 204-05) Thus, it is possible for Ms. Gonzalez to testify that Defendant asked her to call his lawyer and Det. Nabut to testify that he never overheard such a request without creating any conflict in their testimony. Thus, this construction of Defendant's vague allegations also does not show that there is a reasonable probability of a different result. *Strickland*, 466 U.S. at 694.

Further, while Defendant asserted that Ms. Gonzalez was available to testify (PCR. 162), the record reflects the contrary. At trial, Ms. Gonzalez's father testified that Ms. Gonzalez was not present because "she would have a fit and she would pass out." (T. 2780) Thus, the record shows that Ms. Gonzalez was not available to testify, and counsel cannot be deemed ineffective for failing to call her. *Nelson*, 875 So. 2d at 581-83.

Given all of these circumstances, the claim was properly summarily denied. The lower court should be affirmed.

Finally, while Defendant expends most of his argument criticizing the lower court for find that Ms. Gonzalez did testify at the suppression hearing, he ignored that he was the one who told the lower court that Ms. Gonzalez had testified at the suppression. At the *Huff* hearing, Defendant directly asserted:

> Vivian was not used at the first phase, although she – she was used at the motion to suppress.

(PCT. 252) Given that Defendant was the person who asserted that Ms. Gonzalez testified at the suppression hearing, he should not be heard to complain about an error he invited. *San Martin v. State*, 705 So. 2d 1337, 1347 (Fla. 1997). The denial of the claim should be affirmed.

V. THE DENIAL OF THE CLAIMS CONCERNING ABREU'S TESTIMONY SHOULD BE AFFIRMED.

Defendant finally asserts that the lower court erred in denying him relief based on codefendant Pablo San Martin's claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), in presenting the testimony of Pablo Abreu. However, Defendant is entitled to no relief as the lower court properly found that Defendant failed to prove his claim after an evidentiary hearing.

In order to establish a *Giglio* violation, a defendant must prove: "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material." *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). To demonstrate perjury, a defendant must show more than mere inconsistencies. *Maharaj v. State*, 778 So. 2d 944, 956 (Fla. 2000); *see also United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994); *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). False testimony is material if there is a reasonable likelihood that it contributed to the verdict. *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003). *Giglio* violations are mixed questions of fact and law and reviewed de novo after giving deference to the lower court's factual findings. *Sochor v. State*, 883 So. 2d 766, 785 (Fla.

2004).

> In order to prove a *Brady* claim, a defendant must show:
>
> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Way v. State, 760 So. 2d 903, 910 (Fla. 2000)(quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). To show prejudice, the defendant must show that but for the State's failure to disclose the evidence, there is a reasonable probability that the results of the proceeding would have been different. *Guzman*, 868 So. 2d at 506. The question of whether the evidence is exculpatory or impeaching is a question of fact, as is the question of whether the State suppressed the evidence. *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003). Questions of fact are reviewed to determine if they are supported by competent, substantial evidence. *Way*, 760 So. 2d at 911. The question of whether the undisclosed information is material is a mixed question of fact and law, reviewed *de novo*, after giving deference to the lower court's factual findings. *Rogers v. State*, 782 So. 2d 373, 377 (Fla. 2000); *Stephens v. State*, 748 So. 2d 1028, 1032-33 (Fla. 1999).

Here, the lower court denied these claims after an evidentiary hearing, finding:

CLAIM V

* * * *

San Martin has alleged that the State coerced Pablo Abreu to falsely incriminate him (and the Defendant) by presenting perjurious testimony to the jury during the penalty phase in order to establish the cold, calculated and premeditated aggravator. Mr. Abreu testified during the penalty phase that a meeting regarding stealing cars to be used during the robbery took place a couple of days before the shooting. When asked about what the Defendant was going to do about the bodyguard (the victim, Raul Lopez), Mr. Abreu responded, "First he was going to crash against him and throw him down the curb side, and then he would shoot him, but he didn't do it that way." *Trial Transcript, pp. 2717-2718*. Later in his testimony, Mr. Abreu was asked about the discussion he had with the Defendant and San Martin about killing the bodyguard that occurred before the cars were stolen. Mr. Abreu indicated that [Defendant] told him that he was going to run the bodyguard off the road then shoot him. *Trial Transcript, pp. 2727-2728*.

During the evidentiary hearing, Mr. Abreu stated that the killing was discussed the day of the robbery while he, the Defendant and San Martin were driving around in his van before the robbery. Mr. Abreu testified on direct that this discussion occurred thirty minutes before the robbery. On cross-exam, he testified that this discussion could have taken place several hours before the robbery. Mr. Abreu testified that his testimony on this subject had always been consistent and truthful. *Transcript, p. 60, 66-68, 88, 102-04*.

In order to prove that the State intentionally presented perjurious testimony to the jury, the Defendant must show:

1. that the testimony was false;
2. that the State knew the testimony was false; and
3. that the statement was material

Routly v. State, 590 So.2d 397, 400 (Fla. 1991).

Based on the record and the testimony of the witnesses at the evidentiary hearing, this Court finds that San Martin has failed to establish that the state

forced Pablo Abreu to present perjurious testimony to the jury. During the penalty phase, the question ask about what [Defendant] was going to do with the bodyguard did not actually have a time frame. San Martin's claim assumes that the discussion regarding stealing the cars which occurred several days before the robbery included the interchange about killing the bodyguard. Mr. Abreu's testimony during the penalty phase does seem to indicate that the discussion about killing the bodyguard took place before the cars to be used in the crime were stolen. The testimony from Abreu during the evidentiary hearing indicates that the discussion about the killing took place between thirty minutes and several hours before the robbery and the killing of the bodyguard. San Martin, at most, has shown that the difference between Mr. Abreu's trial testimony and the testimony during the evidentiary hearing was an arguable inconsistency. This Court finds that the San Martin and the Defendant did not prove that Mr. Abreu's testimony was false. Inconsistencies are insufficient to show that testimony is false. Maharaj v. State, 778 So.2d 944 (Fla. 2000).

Marilyn Milian, the trial prosecutor testified during the evidentiary that she only asked witnesses to truthfully relate what they knew. She stated, "Under no circumstances in this case or any other case would I ever tell a defendant who is flipping what to testify to or suggest to him that if he doesn't say it my way he won't have a plea agreement or force anybody to testify contrary to what it is truthfully happened." *Transcript, p. 171*. She further stated, "That is all we did and anything else would not only be unethical but suborning perjury. I never did that in my career and certainly not on this case either." *Transcript, p. 172*. Ms. Milian testified that she never witnessed John Kastrenakes suborn perjury or suggest that a witness testify a certain way or else. Transcript, p. 203. This Court finds that San Martin and the Defendant failed to prove that the State knew any testimony was false or that the State knowingly presented perjurious testimony.

The inconsistency in Pablo Abreu's testimony regarded the time that the plan to kill the bodyguard was discussed. During the penalty phase, Mr. Abreu testified that the discussion took place before the

cars were stolen and perhaps several days before the robbery. During the evidentiary hearing, Mr. Abreu testified that the discussion took place thirty minutes to several hours before the robbery, after the cars had been stolen. In either event, the time was sufficient to support the CCP aggravating circumstance. See Knight v. State, 746 So.2d 423,436 (Fla. 1998); Durocher v. State, 569 So.2d 997 (Fla. 1992); Valle v. State, 581 So.2d 40 (Fla. 1991). This Court finds that San Martin (and the Defendant) has failed to prove that the Mr. Abreu's statement was material. For the foregoing reasons, this claim is denied.

CLAIM VI

* * * *

San Martin claims that a Brady violation occurred because exculpatory evidence favorable to San Martin (and the Defendant) was suppressed by the State and the State presented false or misleading evidence to the jury. To prove a Brady violation occurred, the Defendant must proven:

1. that the State possessed evidence favorable to the defendant;
2. that the defendant does not possess the evidence nor could he obtain it for himself with reasonable diligence;
3. that the prosecution suppressed the favorable evidence; and
4. that had the evidence been disclosed to the defense a reasonable probability exists that the outcome of the proceedings would have been different.

Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992); Hegwood v. State, 576 So.2d 170, 172 (Fla. 1991)(quoting United States v. Meros, 886 F.2d 1304, 1308 (11th Cir. 1989), cert denied, 493 U.S. 932 (1989)).

Based on the record and the testimony of the witnesses during the evidentiary hearing, this Court finds that San Martin (and the Defendant) has failed to establish any of the Brady elements. As discussed above, Pablo Abreu testified that he was always truthful and that no one told him how to testify. The

> difference between Mr. Abreu's testimony during the penalty phase and the evidentiary hearing was slight, a mere inconsistency. No evidence was presented that the State suppressed or failed to disclose any evidence to San Martin or the Defendant. Because San Martin's motion and the Defendant's motion and the evidence failed to establish a Brady violation, this claim is denied. This claim is also denied for the Defendant for the same reasons.

(PCR. 755-59) Because the factual findings made in this order are supported by competent, substantial evidence and the legal conclusions based on those facts are correct, the denial of these claims should be affirmed.

With regard to the factual findings, they are supported by competent, substantial evidence. The penalty phase transcript does reflect that there was no time frame stated in the questions about Defendant stating that he would kill the bodyguard. (T. 2697-98) However, it also reflects that the subject was discussed during a larger discussion of a meeting that had occurred days before the crime occur. (T. 2693-98) Abreu did testify at the evidentiary hearing that the plan to kill the bodyguard occurred between a half hour and several hours before the crimes were actually committed. (PCT. 374-76 388-91) Abreu did testify that he had always been consistent in his statements, including when he spoke to the State pretrial, at trial and at the evidentiary hearing. (PCT. 382-83, 384-85, 405-08) He did testify that he was not told how to testify and

that he was not threatened. (PCT. 385, 394-95, 405-08) Ms. Milian did testify that she did not instruct Abreu regarding testifying in a particular manner or threatening Abreu about his testimony. (PCT. 501-02) Under these circumstances, the lower court's factual findings are supported by competent, substantial evidence and must be accepted by this Court. *Sochor*, 883 So. 2d at 785.

Moreover, given these factual findings, the lower court properly determined that Abreu's testimony was not false, that the State did not know Abreu's testimony would be false, and that the State did not possess any favorable evidence that it had suppressed. *Sochor*, 883 So. 2d at 785-86; *Maharaj v. State*, 778 So. 2d 944, 954, 956 (Fla. 2000)(State cannot be said to have suppressed evidence it did not have and inconsistencies insufficient to show false testimony). The denial of this claim should be affirmed.

Further, the lower court properly determined that the inconsistency in Abreu's testimony was not material. The only change in Abreu's testimony was that it appeared from the penalty phase testimony that the discussion of the plan to kill Mr. Lopez was discussed in the days before the crime while he stated at the evidentiary hearing that the plan was discussed the morning of the crime at some point between 30 minutes and

several hours before the plan was put into effect.[8] (T. 2713-18, PCT. 420-21, 435-36) However, under both versions of Abreu's testimony, the plan to kill Mr. Lopez was made in advance of the commission of any crime. This Court has upheld a finding of CCP when the time between the formulation of the plan and its execution did not extend for days. *Knight v. State*, 746 So. 2d 423, 436 (Fla. 1998)(CCP properly found even though defendant may not have decided to kill kidnapping victims until the drive from bank where defendant had force one victim to withdrawal money to secluded area); *Durocher v. State*, 569 So. 2d 997 (Fla. 1992)(CCP properly found where defendant thought about killing victim for a few minutes during robbery before doing so); *Valle v. State*, 581 So. 2d 40 (Fla. 1991)(CCP properly found where defendant decided to kill victim 2 to 5 minutes before doing so). As such, the lower court properly determined that the minor inconsistency regarding the timing of the plan was not material. The denial of the claim should be affirmed.

In an attempt to make it seem as if the lower court erred in denying the claim, Defendant asserts that he proved that Abreu changed his testimony to assert that there was no plan to kill Mr. Lopez and that Defendant acted in self defense. However, the record fully supports the lower court's finding

[8] However, Abreu did tell the jury at the penalty phase that the plan was discussed "when we went around." (T. 2726)

that Abreu did not recant his testimony about there being a plan to kill Mr. Lopez before the crimes were committed and that Abreu's evidentiary hearing testimony merely showed a minor, arguable inconsistency about the timing of the discussion of the plan. At the evidentiary hearing, Abreu repeatedly testified that Defendant did tell both Abreu and San Martin that Defendant planned to kill Mr. Lopez prior to the initiation of the crimes. (PCT. 374-76, 387-89, 401-04, 420-21, 428) As such, the record does fully support the finding that there was a plan, and this Court must accept that finding. *Sochor*, 883 So. 2d at 785.

Moreover, the record also shows that Abreu's characterization of this plan as a plan to act in self defense was not different than Abreu's trial testimony. At the penalty phase, Abreu characterized the defendants' actions as self defense. (T. 2710) Since Abreu made the same characterization of the defendants' actions at trial, any claim of a *Giglio* or *Brady* violation or of newly discovered evidence based on an alleged change in testimony is without merit. *Diaz v. State*, 945 So. 2d 1136, 1146 (Fla. 2006); *Sochor*, 883 So. 2d at 785-86; *Maharaj*, 778 So. 2d at 954, 956. The claim should be denied.

Moreover, contrary to Defendant's contention, Abreu's characterization of the defendants' actions as self defense does not negate CCP. This Court has repeatedly rejected the

assertion that CCP is negated merely by a defendant's subjective belief that his actions were justified. *Jackson v. State*, 704 So. 2d 500, 505 (Fla. 1998); ***Hill v. State***, 668 So. 2d 901, 907 (Fla. 1996); ***Walls v. State***, 641 So. 2d 381, 388 (Fla. 1994); ***Jones v. State***, 612 So. 2d 1370, 1375 (Fla. 1992); ***Cruse v. State***, 588 So. 2d 983, 992 (Fla. 1991); ***see also Dougan v. State***, 595 So. 2d 1, 6 (Fla. 1992)("While Dougan may have deluded himself into thinking this murder justified, there are certain rules by which every civilized society must live. One of these rules must be that no one may take the life of another indiscriminately, regardless of what that person may perceive as a justification."). This Court has also rejected the claim that CCP was negated by a claim that murder was a reflexive act during the commission of a felony when the evidence showed that the murder was planned in advance of the commencement of the felony. *Anderson v. State*, 863 So. 2d 169, 177 n.9 (Fla. 2003). Instead, this Court had required that for a claim of self defense to negate CCP, there must be evidence that victim had actually threatened the defendant. *Christian v. State*, 550 So. 2d 450, 451-52 (Fla. 1989); *Banda v. State*, 536 So. 2d 221, 224-25 (Fla. 1988). This Court has upheld the finding of CCP when there was no evidence that the victim had threatened the defendant and the only reason to believe the victim might threaten the defendant was because the defendant was stealing

from the victim. *Williamson v. State*, 511 So. 2d 289, 293 (Fla. 1987).

Here, despite Abreu's subjective characterization, the defendants were not acting in self defense nor was there any colorable claim that they were doing so. The defendants were in the course of attempting to commit an armed robbery. Moreover, the trial court found in support of CCP that the defendants fired immediately at the start of the attempted robbery. (R. 1186-87) The record fully supports this finding that the defendants fired first before Mr. Lopez, whose gun was found fully load and unfired, had a chance to attempt to prevent the attempted robbery. (T. 1727, 1999, 2198) Since the defendants were attempting to commit an armed robbery and Defendant was the initial aggressor, self defense was not legally available. §776.041(1), Fla. Stat.; §776.08, Fla. Stat.; *see Holland v. State*, 916 So. 2d 750, 761 (Fla. 2005). There was no evidence that Mr. Lopez even knew Defendant such that he could have threatened him and the only reason to believe that Mr. Lopez would be a threat was because Defendant was planning to steal from the Cabanases. As such, Abreu's subjective belief that the defendants were acting in self defense does not negate CCP. *Williamson*, 511 So. 2d at 293; *see also Jackson*, 704 So. 2d at 505 (Fla. 1998); *Hill*, 668 So. 2d at 907; *Walls*, 641 So. 2d at

388; *Jones*, 612 So. 2d at 1375; *Cruse*, 588 So. 2d at 992 (Fla. 1991). The denial of the claim should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Todd Scher**, 5600 Collins Avenue, #15-B, Miami Beach, Florida 33240, this 11th day of July 2008.

_____
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CERTIFICATE OF COMPLIANCE

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

_____
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