IN THE SUPREME COURT OF FLORIDA

MANUEL ANTONIO RODRIGUEZ,

Appellant,

v. **CASE NO. SC05-859**
L.T. No. F93-25817B

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the records and transcripts will be designated as follows: the record on direct appeal will be cited throughout this Brief as “R” with the appropriate page numbers (R. page#); the transcripts on direct appeal will be cited as “T” with the appropriate page numbers (T. page#). The post conviction record will be cited as “PCR” with the appropriate volume and page numbers (PCR V#/page#); supplemental volumes will be cited as “SPCR” with the appropriate volume and page numbers (SPCR V#/page#); the exhibits from the post conviction proceedings are contained in a single volume (1 of 1) and will be cited by their appropriate page numbers (PCR Exhibit page#).

STATEMENT OF THE CASE AND FACTS

In accordance with Fla. R. Crim. P. 3.851(b)(2), this appeal from the order denying Defendant's motion for post conviction relief is being pursued concurrently with his Petition for Writ of Habeas Corpus. *Rodriguez v. State*, FSC Case No. SC07-1314. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

POST CONVICTION PROCEEDINGS

Public Records Litigation: On June 1, 2001, Defendant sent over twenty demands for additional public records to numerous state and local agencies. (SPCR 2/1638-1725). The majority of agencies filed objections to Defendant's requests. (SPCR 2/1726-27, 1730-31, 1744–58, 1763-67).

Defendant filed his initial claim for post conviction relief on September 14, 2001. (SPCR 3/1775-46). Defendant's motion indicated it was "incomplete" as the investigation on his behalf had not concluded due to "public records [which] remain[ed] outstanding." (SPCR 3/1776). However, Defendant never attempted to set a hearing on the objections or move to compel compliance by any agency. Instead, on November 6, 2001, the State Attorney requested a public records hearing and status hearing. (SPCR 3/1848).

On December 11, 2001, the court held a status hearing. At the hearing, Defendant moved to inspect confidential records and that request was granted. A public records hearing was then scheduled for January 10, 2002. (PCR 2/185).

At the public records hearing, the Court struck a number of Defendant's requests as improperly filed but permitted Defendant to refile. (PCR 6/737, 739-41, 744-45, 749, 761-62, 767, 772-75, 789, 803, 813, 820, 823-24, 831, 835-36)[1]. Defendant's requests were not made pursuant to Fla. R. Crim. P. 3.852(i) and did not comply with the requirements of that rule. The court instructed Defendant to comply with the rule, provide the agencies with more information, and establish the relevancy of the public records sought.

In March 2002 Defendant refiled his request to Miami-Dade Police Department. (SPCR 1908-52).[2] In May 2002 Miami-Dade filed its objections, arguing the request was overly broad and provided insufficient information establishing how the records sought were relevant. (SPCR 3/1879-95)[3]. In July 2002 The State

[1] Court Order Re: Public Records at SPCR 3/1896-1902 issued January 10, 2002.
[2] The Miami-Dade request became the focus of subsequent hearings.
[3] The request sought information regarding over 250 named individuals and over 100 Miami-Dade employees. These objections were similar to those Miami-Dade filed in response to Defendant's initial June 1 request (SPCR 2/1750-54).

Attorney requested another public records hearing. (SPCR 3/1903).

A hearing was set for November 25, 2002. At the hearing the court informed Defendant that his request to Miami-Dade for all public records regarding more than 250 named individuals was improper and that Defendant would need a better explanation of how records regarding those individuals were relevant to the proceedings. (PCR 7/877-82). The court explained that Defendant was not entitled to public records for those individuals whose only connection to the case was that their fingerprints had been compared to latents lifted from the scene. Defendant was given 30 days to resubmit his request. (PCR 7/881-82). Because there was insufficient time to complete the hearing, the hearing was continued until December 23, 2002. (PCR 7/893).

At the December 23, 2002 hearing, Defendant and Miami-Dade requested additional time to comply with the court's orders. (SPCR 12/3209). Defendant served his amended request on January 22, 2003. (SPCR 4/1953-94). This request did not eliminate individuals and appeared to be substantially the same as the last request. On February 6, 2003, Miami-Dade again objected to the request. (SPCR 4/1996-2011).

On April 23, 2003, Defendant reargued the same issues that had been argued at the November 25, 2002 hearing. The court

again made the same rulings. (SPCR 12/3226-28, 3230, 3232, 3234-38).

After Judge Rothenberg left the bench, this matter was assigned to Judge Victoria Sigler and a public records hearing was scheduled for December 19, 2003. (SPCR 4/2014-18). The December 19 hearing was deferred until January 29, 2004, after Judge Sigler granted in part and denied in part Defendant's requests. (PCR 1/30). The court disposed of all pending public records requests on February 6, 2004 and ordered Defendant to file his amended motion for post conviction by April 16, 2004.[4] (PCR 1/34-34; SPCR 4/2028). Defendant filed his amended motion for post conviction relief on April 16, 2004 raising 22 Claims and various subclaims:

> CLAIM 1
>
> MR. RODRIGUEZ' CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING BY THE STATE OF MATERIAL EXCULPATORY OR IMPEACHMENT EVIDENCE, AND THE EXISTENCE OF NEWLY DISCOVERED EVIDENCE, IN VIOLATION OF MR. RODRIGUEZ' RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.
>
> Claim 1.A.
>
> Trial counsel failed to competently present evidence that Mr. Rodriguez did not commit the crimes
>
> Claim I.B.
>
> Luis and Isidoro left Orlando, FL together to commit the crimes
>
> Claim 1.C.

[4] On February 6 Miami-Dade filed its public records notice of compliance. (SPCR 4/2023-27).

Luis knew of Mrs. Joseph and commented on her jewelry prior to the date of the crimes

Claim 1.D.

Isidoro was threatened by police to testify against Mr. Rodriguez

Claim 1.E.

The bag of jewelry was found inside Luis and Isidoro's mother's trailer

Claim 1.F.

Eyewitness's description of perpetrator consistent with Isidoro's

Claim 1.G.

Evidence that refutes the State alleged motive for the crime

Claim 1.H.

Luis' family possessed jewelry taken from the victims

Claim 1.I.

Jewelry belonging to the victims was sold

Claim 1.J.

State agents encouraged, knew of, and allowed Luis to have sex with his wife at the police station

Claim 1.K.

The State promised to assist Luis on obtaining early release from prison

Claim 1.L.

Police threatened Luis with bogus "indictments" against his family

Claim 1.M.

Failure to impeach Luis' testimony about his conviction for battery upon a law enforcement officer

Claim 1.N.

The State failed to disclose that police were investigating Isidoro for major narcotics-related crimes

Claim 1.O.

The State failed to disclose that a business partner and relative of Isidoro was a law enforcement officer with Metro-Dade Police Department

Claim 1.P.

The State failed to disclose evidence that the State agreed to reduce Raphael Lopez's 5-year prison sentence to community control and probation

Claim 1.Q.

Trial counsel ineffectively opened the door to allow evidence of alleged prior crimes and acts of violence

Claim 1.R.

The State failed to disclose other material exculpatory and impeachment evidence

Claim 1.S.

Trial counsel failed to object Luis' alleged prior consistent statement to Raphael Lopez

Claim 1.T.

Trial counsel was ineffective in challenging the admissibility of Mr. Rodriguez statements to police and in not presenting evidence of the facts surrounding his statement to the jury

Claim 1.U.

Trial counsel was ineffective for failing to object to improper victim impact evidence and comments

Claim 1.V.

Trial counsel was ineffective for failing to object to improper closing arguments

Claim 1.W.

Failure to object and move for a mistrial when prosecutor to strongly inferred to jury that Mr. Rodriguez exercised his right to remain silent when he terminated a police interview

CLAIM 2

MR. RODRIGUEZ' CONVICTION AND SENTENCE WERE OBTAINED IN VIOLATION HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN TRIAL COUNSEL'S CONFLICT OF INTEREST DEPRIVED HIM OF THE RIGHT TO COUNSEL AND THE RIGHT TO A FAIR TRIAL.

CLAIM 3

MR. RODRIGUEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE AND IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE THE DEFENSE CASE AND CHALLENGE THE STATE'S CASE. THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT MR. RODRIGUEZ' CONVICTIONS ARE UNRELIABLE.

CLAIM 4

MR. RODRIGUEZ WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY BY PREJUDICIAL PRETRIAL PUBLICITY, BY THE LACK OF A CHANGE OF VENUE, AND BY THE EVENTS IN THE COURTROOM DURING THE TRIAL. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD AND/OR THE TRIAL COURT ERRED.

CLAIM 5

MR. RODRIGUEZ IS INNOCENT OF FIRST-DEGREE MURDER. EVIDENCE THAT WAS NOT PRESENTED TO THE JURY DUE TO STATE MISCONDUCT AND TRIAL COUNSEL'S INEFFECTIVENESS, AS WELL AS NEWLY DISCOVERED EVIDENCE PROVES THAT MR. RODRIGUEZ IS INNOCENT.

THE JURY WAS DEPRIVED OF EVIDENCE NECESSARY TO ITS DETERMINATION IN THE GUILT PHASE OF MR. LOWE'S TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM 6

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

CLAIM 7

MR. RODRIGUEZ 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 MR. RODRIGUEZ' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

CLAIM 8

MR. RODRIGUEZ IS INNOCENT OF THE DEATH PENALTY. MR. RODRIGUEZ WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM 9

MR. RODRIGUEZ'S SIXTH RIGHT OF CONFRONTATION WAS VIOLATED DURING THE PENALTY AND SENTENCING PHASES WHEN THE STATE WAS PERMITTED TO CALL DURING THE PENALTY POLICE OFFICERS TO TESTIFY TO STATEMENTS MADE TO POLICE BY VARIOUS WITNESSES WHO WERE NOT CALLED TO TESTIFY AT THE PENALTY AND THEREFORE NOT SUBJECT TO CROSS-EXAMINATION.

CLAIM 10

MR. RODRIGUEZ WAS ABSENT FROM CRITICAL STAGES OF THE TRIAL IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM 11

MR. RODRIGUEZ'S CONVICTION AND SENTENCE ARE UNCONSTITUTIONAL UNDER RING V. ARIZONA.

CLAIM 12

MR. RODRIGUEZ WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED MR. RODRIGUEZ EFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM 13

MR. RODRIGUEZ' SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR BECAUSE THE JURY RECEIVED INADEQUATE GUIDANCE CONCERNING THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED. FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBOARD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM 14

MR. RODRIGUEZ IS BEING DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS BEING DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING MR. RODRIGUEZ' LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

CLAIM 15

MR. RODRIGUEZ WAS DENIED HIS RIGHT TO A FAIR TRIAL, HIS RIGHT TO COUNSEL, AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN HE WAS RENDERED INCOMPETENT TO PROCEED DUE TO MEDICATION AND HIS MENTAL CONDITION; THE TRIAL COURT AND TRIAL COUNSEL FAILED TO PROTECT HIS RIGHTS BY FAILING TO ORDER OR MOVE FOR A COMPETENCY EVALUATION DURING THE PROCEEDINGS.

CLAIM 16

MR. RODRIGUEZ'S GUILTY VERDICT AND JURY RECOMMENDED DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE TRIAL COURT ERRONEOUSLY INSTRUCTED MR. RODRIGUEZ' JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT SHOULD HAVE BEEN WITHIN THE PROVINCE OF THE COURT.

CLAIM 17

MR. RODRIGUEZ' SENTENCE OF DEATH IS BEING EXACTED PURSUANT TO A PATTERN AND PRACTICE OF FLORIDA PROSECUTING AUTHORITIES, COURTS AND JURIES TO DISCRIMINATE ON THE BASIS

OF RACE IN THE ADMINISTRATION OF THE RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM 18

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

CLAIM 19

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

CLAIM 20

MR. RODRIGUEZ IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHT 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 MR. RODRIGUEZ' CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA.STAT. MR. RODRIGUEZ CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

CLAIM 21

MR. RODRIGUEZ IS INSANE TO BE EXECUTED.

CLAIM 22

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

(PCR 1/43-167).

The State filed its response on June 15, 2004. (PCR 2/171-335).

***Huff* Hearing**: A *Huff*[5] hearing was held on August 24, 2004. (PCR 7/915-39. The State conceded that an evidentiary hearing was

[5] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

warranted on six subclaims of Defendant's Claim I. (PCR 7/929). There was not an agreement regarding Defendant's conflict of interest claim. (PCR 7/930). The court heard argument from Defendant and the State, Defendant opting to rely on his pleadings for the majority of his claims. (PCR 7/930-39). At the conclusion of the hearing, the lower court granted an evidentiary hearing on the six subclaims of Defendant's Claim I. (PCR 5/590; 7/939; 8/1041-1042).

The six subclaims can be summarized as follows: Claim I.B. trial counsel was ineffective for failing to present evidence that Luis had told his girlfriend that he planned to travel from Orlando to Miami with another person to commit this crime, and that Isidoro picked up Luis on the day of the crime; Claim I.F. trial counsel was ineffective for failing to present available testimony from a witness that he saw a man pull a woman into the apartment and that the description of the man he saw matched Isidoro; Claim I.H. trial counsel was ineffective for failing to present evidence that Luis, Raphael Lopez and other family members possessed jewelry taken from the victims; Claim I.J. the State "knowingly presented false evidence" that the police knew Luis was planning to have sex with his wife in the police station and encouraged him to do so; Claim I.K. that the State "knowingly presented false evidence" that it had not promised to

assist Luis in getting parole; and Claim I.L. that the State "knowingly presented false evidence" that it did not threaten Luis into confessing by stating that it planned to charge his family with crimes and confronting Luis with papers that were allegedly indictments against the family.

Evidentiary Hearing: At the evidentiary hearing Defendant called six witnesses: Edgar Baez, a gentleman questioned regarding the murders in 1984; Assistant State Attorney Abraham Laeser; Defendant's trial counsel Richard Houlihan and Eugene Zenobi; Luis Rodriguez's counsel Art Koch; and Luis Rodriguez. (PCR 8 & 10)[6].

Mr. Baez recalled giving a statement in 1984 and a deposition in 1994. (PCR 8/963-65, 972-73, 978). When questioned, he was unable to swear to the accuracy of either.

Assistant State Attorney Abraham Laeser, the lead prosecutor in Defendant's case, was called by Defendant (PCR 8/985). Laeser testified unequivocally that he did not knowingly present false testimony. (PCR 8/1014). Laeser was asked to identify various depositions, a witness statement and a photograph. (PCR 8/983-990, 992-993, 994). In regard to the trial, Laeser testified that Defendant's trial counsel appeared to be prepared on each witness (PCR 8/982). Defendant entered

[6] PCR Volume 9 is substantially a duplicate of PCR Volume 8.

Luis Rodriguez's plea agreement into evidence. (PCR 8/990-991; PCR Exhibit 16-23). Defendant also entered into evidence a letter written by Laeser.[7]

Richard Houlihan, Defendant's first chair trial counsel, testified that he was licensed to practice in 1977, and was a veteran criminal defense attorney. (PCR 8/1026-28). Prior to Defendant's case, Houlihan had represented defendants in capital cases thirty or forty times. (PCR 8/1027-28). Houlihan and Zenobi had tried one capital case together prior to Defendant's, where the defendant was spared the death penalty and sentenced to life. (PCR 8/1030-31).

In this case, Houlihan's responsibility was primarily for the guilt phase of the trial and Zenobi, the penalty phase. (PCR 8/1029-30). Zenobi, a lecturer for the State Bar on the topic of voir dire, was considered more effective in this area and conducted voir dire. (PCR 8/1032, 1070). Both attorneys prepared and discussed the case frequently. (PCR 8/1030, 1068-69). Houlihan specifically noted that he reviewed all police reports

[7] After trial, Detectives Crawford and Smith were investigated regarding whether they allowed Luis Rodriguez to have sexual relations with his wife while in custody. Laeser testified that he wrote a letter in support of Detectives Crawford and Smith. (PCR Exhibit 25-27). Laeser wrote the letter outlining their fine police work, and maintaining that they were not responsible for any tryst that may have taken place. But, instead, were tricked by Luis who secreted himself and his wife for what Luis claimed was a "very brief moment of pleasure." (PCR 1006-07; PCR Exhibit 26).

and depositions more than once. (PCR 8/1038, 1043, 1049, 1050, 1053). Houlihan and Zenobi conferred on matters of trial strategy. (PCR 8/1054, 1056).

Houlihan's memory of Defendant's ten-year-old case was limited. (PCR 8/1029, 1031, 1036, 1037, 1040, 1046-47, 1048, 1050). At the hearing, Houlihan could not recall if he was aware of the claim that Luis and his wife were allowed to engage in sexual relations nor was he able to recall whether he was aware Luis was allowed to have birthday parties at the police station. (PCR 8/1042-43, 1045-46).[8]

Eugene Zenobi, licensed to practice law since 1970, was also a veteran criminal defense attorney. (PCR 8/1066-67). Prior to Defendant's case, Zenobi had tried twenty or thirty capital cases. (PCR 8/1067). Zenobi stated the defense theory of the case was that Defendant was not the perpetrator. (PCR 8/1069-70). Zenobi's recollection of the case was also limited. (PCR 8/1074-77, 1079, 1080).

Art Koch, Luis Rodriguez's counsel, was called to testify regarding Defendant's trial counsel. (PCR 10/1223-25, 1233, 1235). Koch testified that trial counsel was aware of privileges

[8] Houlihan in fact cross-examined Luis regarding relations with his wife while in custody. (PCR 8/1058-60).

Luis was afforded but could not recall if they were aware of photographs taken of Luis and his family.[9] (PCR 10/1238-39).

Koch did not testify that any false evidence was presented, did not testify that the State withheld evidence, and did not testify Defendant's trial counsel acted ineffectively.

Luis Rodriguez, who was seeking to withdraw his plea and who refused to answer numerous questions at the evidentiary hearing, testified regarding his initial interview with the police, his plea agreement, and visits with family members. (PCR 10/1246, 1247, 1260-63, 1275-76, 1278, 1279). Luis claimed that during his initial interview police showed what appeared to him to be indictments and confessions of Defendant, his mother and brother. (PCR 10/1261). Luis did not testify he told the State this occurred.

Luis did testify that while in custody he was able to have sexual relations with his wife. (PCR 10/1270,1274). Luis claimed that he was told by Det. Smith to place a piece of paper over the peep hole if he wanted privacy with his wife. (PCR 10/1271-72). However, he also testified that he did not know whether or not the officers knew that he had sex with his wife. (PCR 10/1271). Luis did not testify that he told the State Attorney's

[9] At trial, Crawford, Smith and Luis were all cross-examined regarding accommodations Luis received. (T. 2342-47, 2876-77, 3178-80, 3183-85, 3204).

Office this occurred. In fact, he admitted on cross-examination that he had not told Assistant State Attorney Laeser prior to trial. (PCR 10/1283). When asked if Laeser had instructed him to lie about his visits with his wife, Luis responded Laeser did not. (PCR 10/1283). Luis also testified that he was taken to a local McDonalds to visit with his family while in custody. (PCR 10/1262-63).

In regard to his plea agreement, Luis claimed that the State had promised him in off-the-record discussions that he would be released early. (PCR 10/1275-76). However, Luis later admitted on cross-examination that no one from the State had ever made such a statement. Instead, he believed it was implied.[10] (PCR 10/1285).

In response, the State called two witnesses, Miami-Dade Homicide Investigators Gregory Smith and Jarrett Crawford.

Both Crawford and Smith denied that they ever showed Luis any false indictments. (PCR 10/1289, 1304). Crawford and Smith both denied ever giving consent to Luis to engage in any sexual activity with his wife activity (PCR 10/1290-92, 1308). Crawford and Smith both denied Luis was allowed to go to McDonalds while in custody. (PCR 10/1301, 1306-07).

[10] Luis directly testified at trial that no one from the State had promised to help him obtain parole. (T. 2855-56, 2948).

At the conclusion of the detectives' testimony, Defendant rested his case. (PCR 10/1311).

Record on Appeal and Motions to Disqualify:[11] After the evidentiary hearing in this case, Defendant filed a Motion to Reconstruct the Record. The State and Defendant then filed suggestions to correct inaccuracies in the transcript. The lower court held two hearings on the matter. At the conclusion of the hearings the record was submitted to this Court.

During the course of the efforts to reconstruct the record, Defendant filed a Motion to Disqualify Judge Sigler claiming she was a material witness based upon her meeting with the court reporter regarding the record. The motion was denied. Defendant later filed a second Motion to Disqualify Judge Sigler based on her actions in another case that was reported in the Miami Herald. The motion was denied.

On May 3, 2005 the lower court entered an Order Denying Motion for Postconviction Relief. (PCR 5/590-634).

Defendant now appeals to this Court.

SUMMARY OF THE ARGUMENT

Defendant failed to prove the claims upon which he was granted an evidentiary hearing. The remaining claims were

[11] The facts surrounding these matters are more fully outlined below in response to Argument II.

insufficiently plead, procedurally barred or without merit. The lower court properly denied relief.

As to those claims Defendant has failed to brief, Defendant has waived these issues.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIMS REGARDING LUIS'S, ISIDORO'S AND DEFENDANT'S CONFESSION.

The bulk of Defendant's first argument centers around the claim he is entitled to a new trial due to violations of *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963), and due to the ineffective assistance of counsel.

Legal Standard for *Brady* and *Giglio* Violations:

In order to establish that the State violated *Brady*, 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)). "[A] *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000). To establish prejudice

under *Brady*, a defendant must demonstrate "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." *Smith v. State*, 931 So. 2d 790 (Fla. 2006)(quoting *Strickler*).

In *Giglio*, the United State Supreme Court extended *Brady* claims where a key witness gives false testimony that was material to the trial. *Giglio*, 405 U.S. at 153-154. In order to prove a *Giglio* claim, Defendant must show: (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). In *Robinson v. State*, 707 So. 2d 688, 693 (Fla. 1998) this Court quoted *Routly* and observed that "'the thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury.'" *Robinson*, 707 So. 2d at 693. Once the first two prongs are established, the evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. *Guzman v. State*, 941 So. 2d 1045, 1051 (Fla. 2006).

Legal Standard for Ineffective Assistance of Counsel Claim:

In order to prove a claim of ineffective assistance of counsel, Defendant must demonstrate both that counsel's

performance was deficient, and that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *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 694-95.

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, or, alternatively stated, whether there is a reasonable probability that, absent the errors, the fact finder

would have had a reasonable doubt respecting guilt. *Strickland*, 466 U.S. at 694.

The claims that were properly before the post conviction court were rejected following an evidentiary hearing.[12] The lower court's rulings were correct and no basis for reversal has been offered in Defendant's brief.

The standard of review to be applied to a court's ruling on a post conviction motion following an evidentiary hearing recognizes that as long as the court's findings are supported by competent substantial evidence, a reviewing court will not substitute its judgment for that of the post conviction court on questions of fact, the credibility of the witnesses, or the weight to be given to the evidence by the lower court. *Melendez v. State*, 718 So. 2d 746 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997); *Huff v. State*, 762 So. 2d 476, 480 (Fla. 2000) (standard of review for ineffective assistance of counsel claim requires deference to factual findings of trial court), *cert. denied*, 531 U.S. 1082 (2001). Where, as here, the lower court correctly applied the law to supported factual findings, the lower court's rulings must be upheld.

[12] A number of claims were summarily denied by the court as procedurally barred, insufficiently plead, or nonmeritorious, and will be discussed in response to Defendant's claims that the trial court erred in summarily denying these claims.

Defendant first asserts that the lower court erred in rejecting a number of claims regarding Luis Rodriguez. Specifically, Defendant asserts that the State knowingly presented false testimony or failed to disclose favorable evidence about the number of visits Luis was allowed to have with his family while in pretrial detention, the location and conditions of these visits, the motivation for allowing these visits, letters from an inmate named Willie Sirvas, whether the police allowed Luis to have sex with his wife during these visits, whether the police showed Luis "bogus indictments" to induce his confession and whether the State had agreed to assist Luis in obtaining his parole for his sentences. He also asserts that his counsel was ineffective for failing to impeach Luis's testimony about having permission to have sex properly and for failing to impeach Luis's testimony about his prior conviction. However, Defendant is entitled to no relief, as the lower court properly denied these claims.

While Defendant now claims that the State presented false testimony concerning the number of visits that Luis had with his family and about the motivation for these visits and that the State failed to disclose information about the prosecutor's motive for not objecting to the visits and the plea deal, these claims were not properly raised below. Instead, the claims

raised below were that the State knowingly presented false testimony about Luis having permission to have sex and the State having promised Luis assistance in obtaining parole. Thus, Defendant's present allegations change the factual or legal bases of the claims raised below. However, attempts to do so result in the claims being procedurally barred. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002); *Thompson v. State*, 759 So. 2d 650, 668 n.12 (Fla. 2000); *see also Brown v. State*, 894 So. 2d 137, 154 (Fla. 2004) (disapproving of attempts to raise new claims in post hearing memorandum). These claims should be rejected.

Even if Defendant had properly presented these claims below, he would still be entitled to no relief. While Defendant now claims that the State lead the jury to believe that Luis only had one visit with his family, the record reflects that the State presented testimony about more than one visit between Luis and his family. (T. 2292, 2310-11, 2758, 2766-67). In fact, the very comment from closing argument that Defendant contends misled the jury to believe that there had been one visit, mentioned two separate visits: one on Luis's daughter's birthday

and another for Christmas. (T. 3367).[13] Thus, the record refutes any notion that the State misled the jury regarding the number of visits, and Defendant's contrary claim should be rejected.

The claim regarding the motivation about the visits is based on a difference in Det. Crawford's trial testimony concerning his motivation for agreeing to the visits and Laeser's statement regarding why he did not object to the visits being allowed. However, a defendant has to show that someone actually lied to establish a *Giglio* claim; mere inconsistencies are not enough. *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994); *Maharaj v. State*, 778 So. 2d 944, 956 (Fla. 2000). When the allegedly false testimony can be attributed to differences of opinions between people, there is no false testimony. *Riechmann v. State*, 32 Fla. L. Weekly S135 (Fla. Apr. 12, 2007). Here, Defendant's claim is based on such inconsistencies and differences of opinion. Motives are based on an individual's state of mind, which is personal to the individual. *See Taylor v. State*, 855 So. 2d 1, 18-19 (Fla. 2003). As such, the fact that Crawford and Laeser each had

[13] To the extent Defendant is asserting improper argument by the State, any claim is procedurally barred as it should have been raised on direct appeal. *See Melton v. State*, 949 So. 2d 994, 1009 (Fla. 2006) (arguing false statement in closing argument barred).

their own motives does not show that anyone lied and is merely a difference of opinion. Thus, the claim is without merit.

Any claim that the State violated *Brady* by failing to disclose the prosecutor's statements is also without merit. Defendant advances no theory on how evidence regarding Laeser's motive in not objecting Luis's family visits would have been admissible, particularly as Laeser was not a witness. Inadmissible information does not support a *Brady* claim. *Wood v. Bartholomew*, 516 U.S. 1 (1995). Thus, the claim should be properly denied.

Further, the record reflects that Defendant was aware of the details of Luis's plea agreement. Defendant was present when Luis entered his plea agreement. (R. 24). Since Defendant knew of this information, any belated claim that the State failed to disclose this information is without merit. *Maharaj*, 778 So. 2d at 954. The claim should be denied.

The claims that were actually raised below also provide no basis for relief. The claim of ineffective assistance of counsel concerning impeaching Luis regarding the facts of his prior conviction was properly summarily denied. In asserting the claim about the prior, Defendant failed to allege what portion of Luis's testimony about the prior was subject to impeachment or what admissible evidence could have been used to impeach this

testimony. Instead, he merely made conclusory allegations Luis's version of the prior was false and should have been impeached with unidentified evidence. However, such conclusory allegations are insufficient to state a claim for post conviction relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). The claim was properly summarily denied.

Moreover, the record reflects that counsel did attempt to impeach Luis about his version of the prior. (T. 2919-22). To the extent that Defendant was suggesting that counsel should have attempted to present extrinsic evidence to support the impeachment, the claim is without merit. Extrinsic evidence cannot be presented to impeach a witness on a collateral matter. *Caruso v. State*, 645 So. 2d 389, 394-95 (Fla. 1994); *Correia v. State*, 654 So. 2d 952 (4th DCA 1995). An issue is considered collateral unless "the proposed testimony can be admitted into evidence for any purpose independent of the contradictions." *Dupont v. State*, 556 So. 2d 457, 458 (Fla. 4th DCA 1990). Here, the only alleged purpose of presenting extrinsic evidence is to contradict Luis's version of his prior. Thus, the evidence would not have been admissible. Counsel cannot be deemed ineffective for failing to make a nonmeritorious attempt to admit this inadmissible evidence. *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). The claim was properly denied.

The claim of ineffective assistance of counsel for failing to attempt to impeach Luis about having permission to have sex was properly summarily denied for the same reasons. Again, counsel did attempt to impeach Luis about having permission to have sex. (T. 2877-78). Moreover, to the extent that Defendant is suggesting that counsel should have called Luis's wife as impeachment, the issue is again collateral, as any statement by Luis's wife would be used only for its contradiction. *Dupont*, 556 So. 2d at 458. Again, extrinsic evidence is not admissible to impeach a witness regarding a collateral matter. *Caruso*, 645 So. 2d at 394-95. Again, counsel cannot be deemed ineffective for failing to make a nonmeritorious attempt to admit inadmissible evidence. *Breedlove*, 595 So. 2d at 11. The claim was properly summarily denied.

The claim regarding the Sirvas letters was also insufficient plead. Defendant did not assert what information Mr. Sirvas possessed. Instead, he argued only that certain letters "strongly suggest that Mr. Sirvas possessed material exculpatory or impeaching evidence," while acknowledging that he had never found or spoken to Sirvas. (PCR 1/69). However, the burden is on Defendant to allege and prove that Mr. Sirvas, in fact, possessed material evidence, what that evidence was and how it created a reasonable probability of a different result at

trial. *See Smith v. State*, 445 So. 2d 323 (Fla. 1983). As he failed to do so, his claim was facially insufficient under either a *Brady* or ineffectiveness theory. *Ragsdale*. The claim was properly denied.

The lower court denied the claims that the State knowingly presented false testimony about Luis having permission to have sex with his wife, the terms of Luis's plea agreement and the "bogus indictments" after an evidentiary hearing:

> Defendant alleges that the State knowingly presented false evidence that the state agents were unaware that Luis was having sex with his wife at the police station. Defendant also alleges that Luis' attorneys were aware he was having sex with his wife at the police station. Luis testified he lied to his lawyers about the police telling him to cover the peep hole. (T. 2777-2778). He testified that his lawyers did not know of the visits and when he told them, there did not believe him and asked for pictures. (T. 2765-2766). An evidentiary hearing was held on this issue.
>
> Luis testified at the evidentiary hearing that his wife visited him when he was in custody and that he had sex with her in the police station. Luis stated that Officer Smith was aware he was having sexual relations with his wife. He further testified that the sexual relations terminated after Internal Affairs became involved. He testified that he told his lawyers of his special treatment. Luis also testified that at all the visits, a police officer escorted him. He was not left alone.
>
> Art Koch testified that Luis enjoyed favorable treatment or privileges while incarcerated.
>
> Jared Crawford, an investigator for the homicide bureau of the Miami-Dade Police Department, and a police officer for 35 years, testified that he was not aware of the conjugal visits at the time they occurred. He was aware at the time of trial that he was accused of knowing of the conjugal visits and was the subject of an internal affairs investigation.

Officer Smith was with Miami-Dade Police Department for 30 years. He testified that he is aware of a claim that Luis was granted conjugal visits in the interview room of the police department He further testified that he is not aware of a system that allows the family member to be alone with a suspect.

Testimony was also presented that Luis received other favorable treatment, such as visits with his family at McDonalds. Luis testified that he visited with his family outside Dade County jail. He testified that after he was charged with murder and in custody, he met his family at McDonalds.

Officer Crawford testified that Luis requested to see his daughter when her birthday was coming up. He did not take Luis to McDonalds. Officer Smith also testified that he recalls a request from Luis to go to McDonalds with his family. The request was denied. Officer Smith testified that he never took Luis to McDonalds or the park. He would have had security concerns to let him go to McDonalds. Officer Smith did contact the State to see if they could take Luis from the jail to Miami Dade Police Department to visit with his family.

Evidence was also presented regarding photographs of Luis outside Miami-Dade Police Station. These photos were used at trial, according to the testimony of the prosecutor, Abraham Laeser. Mr. Laeser testified that he investigated the photo issue immediately and that Defendant's counsel was aware of the existence of the photos. Mr. Laeser also testified that Luis' wife brought Luis street clothes to wear. At that time, inmates didn't always wear jail issue clothing.

Gerald Houlihan, trial counsel for Defendant, testified that he does not remember if he knew Luis had sex with his wife. He recalls something about a piece of paper and peep holes. He did not recall if Luis got preferential treatment, or seeing the pictures of the birthday party. If he did know about the party, and could prove that the party did occur, he would have asked about it.

Eugene Zenobi, who was second chair at Defendant's trial, testified that he recalls Luis was allowed to have sex with his wife. The birthday party sounded familiar, but he was not sure about the party. He had no recollection about the pictures, or paper over the peephole. He further testified that he would have wanted to know of any favors given to Luis.

Defendant was represented by two fine trial attorneys with capital experience. Their recollection of this trial was limited. They both testified that they reviewed all materials available to them numerous times before trial. They both testified that they conferred on this case often and that they had worked together previously on a capital case, that of Kevin Bryant, who was found guilty but received a life sentence.

The court finds the testimony of the police officers credible and the testimony of Luis lacking in credibility. Luis testified that the officers left him alone at McDonalds, yet he also testified that at all visits, a police officer was present.

Defendant has failed to meet the burden of proof. This claim is denied.

* * * *

Defendant alleges that the State knowingly presented false evidence when Luis testified that state agents did not promise or suggest to him that the State would assist him in obtaining some form of early release. An evidentiary hearing was held on this claim.

Art Koch, who represented Luis, testified that Luis was charged with 2 counts of first degree murder. He pled guilty and received a life sentence. He stated that it was understood that the State would help Luis obtain an early release but was cryptic and did not provide details.

Luis testified he is appealing the denial of his motion to vacate his plea. It was his interpretation that he would be eligible for parole at this time.

This claim is denied. Luis was vigorously cross-examined regarding his motives for testifying against the Defendant. Additionally, Defendant cannot meet the prejudice prong of the *Strickland* test. Defendant admitted his involvement to the police. *Rodriguez*, 753 So. at 34. Defendant's girlfriend, Maria Malakoff, was impeached with her pretrial statement in which she said that Defendant told her he killed Sam Joseph when Joseph reached for a gun and that he made sure Luis killed Abraham. *Rodriguez*, at 35. Luis' brother Isidoro and his mother testified about the jewelry under the trailer and how Defendant and Malakoff came looking for it. *Rodriguez*, 753 So. 2d at 35. Luis was vigorously cross-examined by defense counsel to show his motives for testifying against the Defendant. The

result would not have been different if this allegation is correct and was known at the time of trial.

* * * *

Defendant alleges that the State knowingly presented false evidence and failed to disclose impeachment evidence to the defense when state law enforcement officers testified that, regarding discussion with Luis about Luis' family, police did nothing except talk about his family and tell him that police were going to talk to members of his family. He alleges counsel was ineffective for failing to know about the threats.

An evidentiary hearing was held on this issue. Art Koch testified that Luis was threatened with the indictments of his family if he did not testify against the Defendant. Luis testified he was shown documents of what looked like indictments of his family. Officer Smith testified that he did not threaten to arrest Luis' mother, brother, and wife. He further stated that he did not contact the family members.

Even if this allegation is correct, Defendant cannot meet the second prong of the ***Strickland*** test, as he cannot show prejudice. Defendant admitted his involvement to the police. ***Rodriguez***, at 34. Defendant's girlfriend, Maria Malakoff, was impeached with her pretrial statement in which she said that Defendant told her he killed Sam Joseph when Joseph reached for a gun and that he made sure Luis killed Abraham. ***Rodriguez***, at 35. Luis' brother Isidoro and his mother testified about the jewelry under the trailer and how Defendant and Malakoff came looking for it. ***Rodriguez***, 753 So. 2d at 35. Luis was vigorously cross-examined by defense counsel to show his motives for testifying against the Defendant. The result would not have been different if the threat of indictments was known.

(PCR 5/597-600)(emphasis supplied).

As can be seen from the foregoing, and as Defendant appears to admit tacitly, all of these claims were based on Luis's post conviction testimony. However, as seen above, the lower court denied these claims because it found Luis's post conviction

testimony incredible and the testimony of Det. Crawford and Det. Smith credible. The record contains ample support for these credibility determinations. Luis was insisting that the evidence provided largely from his own mouth at trial was lies. He was seeking to withdraw his own plea at the time of the evidentiary hearing and refused to answer numerous questions. He provided answers that contradicted his own testimony. As an example, he testified on direct that the State had promised to assist him in obtaining his early release from prison. (PCR 10/1275-76). However, he admitted on cross that no such promise had ever been explicitly made. (PCR 10/1285). Moreover, he had signed a plea agreement in which he directly acknowledged that the State had not made any explicit or implicit promises regarding when he would be released from prison. (PCR Exhibit 22). Under these circumstances, there is competent, substantial evidence to support the lower court's credibility finding, and this Court must accept it. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). Further, given this credibility finding, the lower court properly denied these claims. *Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004). The denial of these claims should be affirmed.

To the extent that Defendant is complaining that the lower court deprived him of the opportunity to prove his claims

regarding Luis having permission to have sex, the complaint is without merit. The only other evidence that Defendant attempted to present to support this claim was Luis's wife's deposition. However, depositions are not admissible as substantive evidence. *State v. Green*, 667 So. 2d 756 (Fla. 1995); Fla. R. Crim P. 3.220 (h)(1). As such, the lower court excluded the deposition and should be affirmed.

Moreover, the evidence also shows that the State did not knowingly present any false testimony. Laeser testified that he did not knowingly present any false testimony. (PCR 8/1014). Luis testified that he had told Laeser that the officers did not give him permission to have sex. (PCR 10/1283). He admitted that there had never been any statement made to him that the State would assist him in obtaining his release from prison and acknowledged in his plea agreement that no such agreement existed.[14] (PCR 10/1285; PCR Exhibit 22). Since evidence that the State knew the evidence it presented was false is necessary to prove a *Giglio* claim, the lack of such proof here also supports the denial of the claim. *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991).

[14] At trial, Luis testified consistent with the plea agreement that there was no agreement for him to get "out on parole." (T. 2855-56).

Even if Defendant had demonstrated the other elements of any of his claims regarding Luis, the claims would still have been properly denied for a lack of materiality or prejudice under any standard. Luis had confessed before the visits occurred or were ever discussed. (T. 2239, 2242, 2246, 2291, 2309, 2310, 3079, 3178, 3180). Further, the jury was told that Luis was permitted to have visits with his family, was allowed to wait to testify in the prosecutor's office and was given a meal that was not jail food. (T. 2124-29, 2758, 2766-67, 2876-78, 2917-19, 3176-84). The jury knew that Luis had entered into a plea agreement that spared his life and that he hoped to obtain an early release even from that sentence. (T. 2856, 2870-73, 2926). Luis was cross examined about the police threatening his family members and about the family visits. (T. 2869-72, 2876-77, 2899, 2926, 2935-36). The jury heard that Luis had originally lied about shooting Ms. Abraham and that he had allegedly previously plead guilty to a crime he claimed he did not commit. (T. 2748, 2860, 2919-22). The jury heard Defendant's admission to being involved in the murders and the five other versions of the events he had provided to the police. (T. 3130-35, 3139-45); *Rodriguez v. State*, 753 So. 2d 29, 34 (Fla. 2000). They heard evidence that the proceeds of the crimes were found under Luis's mother's trailer and that Defendant and Ms.

Malakoff had come looking for them. *Rodriguez*, 753 So. 2d at 35. They heard Ms. Malakoff's testimony about the false alibi and her impeachment with her prior statement that Defendant had admitted to committing the crimes. (T. 2723-25)*; Rodriguez*, 753 So. 2d at 35. Under these circumstances, there is neither a reasonable likelihood that the jury's verdict was affected by any of the matters Defendant claimed or a reasonable probability of a different outcome.[15] *Guzman v. State*, 941 So. 2d 1045, 1051 (Fla. 2006); *Smith v. State*, 931 So. 2d 790 (Fla. 2006). Thus, the lower court properly rejected these claims because of a lack of prejudice or materiality. It should be affirmed.

Defendant's reliance on *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004), does not bolster his case. In *Mordenti,* this Court noted the value of the impeachment evidence of Gail Mordenti, the *only* witness that was able to place the defendant at the scene of the crime. Even assuming the evidence Defendant cites above was impeachment evidence against Luis, Luis was not the sole link between Defendant and the murders. Defendant placed himself at the scene of the crime. (T. 3139-45); *Rodriguez,* 753 So. 2d at 34. Additionally, the mother of his child who

[15] While Defendant complains that the lower court cited to *Strickland* as providing the prejudice standard on some of his claims, the State would note that the *Strickland* and *Brady* prejudice standards are the same. Moreover, Defendant failed to show that the State knowingly presented any false testimony.

testified that "she did not believe Manuel was involved in the murders" was impeached with her sworn pre-trial statement that "Manuel told her he killed Sam Joseph . . . and that Manuel made sure they were all dead." *Rodriguez*, 753 So. 2d at 35. Thus, *Mordenti* does not support the granting of relief here. The lower court should be affirmed.

Defendant next alleges that the lower court erred in summarily denying a hearing on allegations that would have impugned the credibility of Isidoro. Defendant asserted below that his counsel was ineffective for failing to present evidence that the State had threatened Isidoro Rodriguez to obtain his testimony. Specifically, Defendant asserted that Det. LeClair had been providing protection to Isidoro as Isidoro was a witness in an unrelated case and that Leclair threatened to stop doing so. However, this claim is refuted by the record. Det. Ramish Nyberg testified that he and Sergeant Singleton interviewed Isidoro. (T. 2380-82).[16] As LeClair did not interview Isidoro he could not have threatened him. The claim that LeClair might have threatened Isidoro at a later time is unavailing as Isidoro had already given a statement. Moreover, Isidoro testified that he moved to the Orlando area in 1980 because he did not feel that he could raise a family in Miami after the

[16] Det. Smith confirmed that Singleton and Nyberg were assigned to interview Isidoro. (T. 3166).

Mariel Boatlift. (T. 2417). This is inconsistent with Defendant's claim that he fled to Orlando to hide. The claim was properly denied. *Kokal v. State*, 718 So. 2d 138, 143 (Fla. 1998); *Breedlove*, 595 So. 2d at 11.

Moreover, evidence that Isidoro was threatened into providing information to the police was presented by Defendant's counsel. Isidoro stated that Singleton threatened to arrest him if he did not give a statement. (T. 2494). He denied that they threatened to arrest his mother but stated that they did threaten to talk to her. (T. 2497). As such, evidence was presented that Isidoro's testimony was the product of police threats and counsel cannot be deemed ineffective for failing to present cumulative evidence of threats. *Henyard v. State*, 883 So. 2d 753, 759-60 (Fla. 2004); *Riechmann v. State*, 777 So. 2d 342, 356 (Fla. 2000).

As stated above, LeClair did not question Isidoro. As such, there was nothing to reveal to Defendant's counsel and thus no *Brady* violation. The trial court's denial of this claim should be affirmed.

Defendant next alleges the trial court erred in summarily denying a hearing on the allegation that Isidoro and his wife were the targets of a narcotics investigation. Defendant failed

to state a proper claim to the court below, as the lower court found:

> Defendant alleges that the State failed to disclose relevant impeachment evidence that Isidoro was being investigated for narcotics related offenses. Defendant does not state when the investigation occurred, what the results were, if Isidoro even knew he was under investigation, and how an alleged investigation by law enforcement in Seminole County is related to this case. Conclusory allegation [sic] do not support a claim for postconviction relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

(PCR 5/600)

Furthermore, this information would have been inadmissible. A defendant does not have an absolute right to cross examine a State witness regarding the fact that the witness is under criminal investigation. *Breedlove v. State*, 580 So. 2d 605, 609 (Fla. 1991). Instead, a defendant may only inquire about investigations that are not too remote and are related to the matter at hand. *Id.* Moreover, the theory under which this evidence is admissible is that the questioning is relevant to the witness' bias because he may be trying to curry favor with the State. *Breedlove,* 580 So. 2d 605 at 607-08. Thus, for this bias to arise, the witness must know about the investigation and have reason to believe that he can curry favor with his testimony. *See Sanchez-Velasco v. Moore*, 287 F.3d 1015, 1032 (11th Cir. 2002); *Breedlove*, 580 So. 2d at 607.

Here, Defendant did not allege when the investigation was conducted and what the status of the investigation was either at the time Isidoro initially gave a statement to the police about this case or at the time of trial. He does not even allege that Isidoro knew he was being investigated, much less that he thought assisting the Dade County State Attorney's Office would benefit him in a Seminole County investigation. Thus, he has not alleged any facts that would show that the narcotics investigation could have been used to impeach Isidoro. The lower court's denial of this claim should be affirmed.

Defendant next alleges that the lower court erred in summarily denying a hearing on the subclaim that the State failed to disclose that a business partner and relative of Isidoro was a law enforcement officer with Metro-Dade Police Department. Defendant failed to state a proper claim to the court below. As noted by the court:

> Defendant alleges that Isidoro's wife's cousin was a Metro-Dade Police Officer at the time of the investigation and trial and that this information could have been used for impeachment purposes. The Defendant fails to provide the details of what would have been admissible regarding the relationship. This claim is facially insufficient. ***Ragsdale v. State***, 720 So. 2d 203, 207 (Fla. 1998).

(PCR 5/601)

Furthermore, this information would not have been admissible. The manner in which a witness may be impeached is

limited. §90.608, Fla. Stat.; *Rose v. State*, 472 So. 2d 1155, 1157-58 (Fla. 1985). Here, the fact that Isidoro's wife's cousin was a police officer and that they did business together was not inconsistent with Isidoro's or Luis's trial testimony, it did not show that Isidoro or Luis was biased, it did not bear on their reputation for truthfulness in the community, it did not show that they had previously been convicted of a crime, it did not affect their ability to observe, remember or recount their testimony and it was not proof of a material fact. Under these circumstances, it was not admissible as impeachment. Failure to disclose this inadmissible information does not support a claim of a *Brady* violation. *Wood v. Bartholomew*, 516 U.S. 1 (1995). The claim was properly denied and the judgment of the lower court should be affirmed.

Defendant next alleges that Defendant was prevented from establishing his ineffective assistance of counsel claim due to the lower court sustaining the State's objections. Defendant contends that he "was blocked from making his case at every turn." The "case" Defendant asserts he was attempting to establish was that trial counsel was ineffective by "*failing to: present evidence that Luis and Isidoro left Orlando together to commit the crimes; call an eye witness, Edgar Baez, whose description of the perpetrator was consistent with Isisdoro's*

appearance; and present evidence that Luis Rodriguez's family possessed jewelry taken from the victims."

Defendant asserts that questions regarding closing argument and the organization of the file were relevant to whether counsel made a strategic decision and read the depositions. This was not the argument presented to the lower court when the objections were made. Instead, Defendant argued that the lower court had to consider evidence regarding claims on which it had not granted an evidentiary hearing in order to conduct a cumulative error analysis. (PCR 8/1039, 1041-42, 1072). Thus, this issue is not preserved. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982).

In regard to the depositions, Defendant attempted to enter into evidence the depositions of persons not before the court while questioning his own witnesses. Defendant sought to admit these documents as substantive evidence. However, hearsay documents are not admissible at an evidentiary hearing. *Randolph v. State*, 853 So. 2d 1051, 1062 (Fla. 2003). Moreover, if Defendant was attempting to impeach his own witnesses, the depositions of others could not have been used to impeach trial counsel. Fla. R. Crim. P. 3.220 (h)(1); *see also Lightbourne v. State*, 644 So. 2d 54, 56-57 (Fla. 1994) (rejecting claim that

trial court should have admitted hearsay documents at post conviction hearing).

Defendant was not blocked from presenting this evidence by the lower court. But instead, Defendant wholly failed to present evidence and instead attempted to rely on inadmissible evidence. As to the claim that Luis and Isidoro left Orlando together to commit the crimes, Luis was called to testify but no testimony was presented that he and Isidoro left Orlando to go anywhere. Counsel failed to ask a single question on this issue.[17] As to the claim regarding Edgar Baez, Baez could not recall any testimony that would have been relevant to these proceedings. He merely recalled giving a statement in 1984 and a deposition in 1994. (PCR 8/963-65, 971, 972-73, 978). He was unable to swear to the accuracy of either. As such, any attempt to introduce these even as past recollection recorded would have been fruitless. *Montano v. State*, 846 So. 2d 677, 680 (Fla. 4th DCA 2003)(predicate requires witness to testify that the information was accurate at the time it was recorded); *see also* Fla. Stat. §90.803(5). Defendant failed to carry his burden in presenting

[17] To the extent that the witness who allegedly could have testified to these facts was Cathy Sundin, Zenobi testified that counsel chose not to call Ms. Sudin because she was unstable. (PCR 8/1077, 1081). Given Zenobi's testimony that this was a strategic decision, Defendant cannot carry his burden of proof. *Strickland.* Further, Sundin's deposition was properly excluded. *Green*, 667 So. 2d at 760 n.2. Post conviction counsel made no attempt to call Sundin.

this claim.[18] (PCR 5/596). Regarding the jewelry, a hearing was held on this issue. Counsel presented no evidence that Luis or any of his family members possessed the victims' jewelry. Counsel failed to ask a single question on this issue.

A hearing was granted below on six claims. Three of these claims dealt with ineffectiveness of trial counsel. They were: *1. trial counsel was ineffective for failing to present evidence that Luis had told his girlfriend that he planned to travel from Orlando to Miami with another person to commit this crime, and that Isidoro picked up Luis on the day of the crime, 2. trial counsel was ineffective for failing to present available testimony from a witness that he saw a man pull a woman into the apartment and that the description of the man he saw matched Isidoro, and 3. trial counsel was ineffective for failing to present evidence that Luis, Raphael Lopez and other family members possessed jewelry taken from the victims.* Counsel argues the lower court erred in sustaining objections as beyond the scope of the hearing. Defendant highlights objections that were sustained where counsel attempted to inquire into the areas of closing argument and discovery. As to the three ineffectiveness claims, these questions were beyond the scope of the hearing and did not tend to prove any fact in support of Defendant's claims.

[18] As discussed previously Baez's deposition was not admissible.

The lower court properly excluded depositions presented below and properly limited questions that were beyond the scope of the hearing. Defendant was not unable to present his case *not* due to any action of the lower court, *but* instead due to his inability to present evidence in support of his claims.

Defendant alleges next that the lower court erred in denying a hearing on the claim that Manuel Rodriguez was denied his rights under the Fifth Amendment to the United States Constitution due to the ineffective assistance of counsel and/or government misconduct. In regard to Defendant's claim that counsel was ineffective in litigating the suppression of Defendant's statements, this claim was properly summarily denied by the lower court. To the extent that Defendant asserts that counsel was ineffective for failing to provide evidence about his mental state at the time of his statement to police, this claim is procedurally barred and without merit. First, Defendant did not allege below that counsel was ineffective for failing to present an expert during the motion to suppress. (PCR 1/72). He, thus, is procedurally barred from asserting it here for the first time.[19] *Griffin*, 866 So. 2d at 11 n.5. Moreover, Defendant's state of mind when he made the statements would have

[19] Further, the record refutes Defendant's suggestion that counsel failed to request the assistance of mental health experts. The trial court appointed two mental health experts at Defendant's request. (R. 36, 482).

been relevant only if there was actual police coercion. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (coercive police activity predicate to finding statement involuntary). The trial court found that Defendant's statements were *not* the product of police coercion. Defendant's state of mind therefore was not relevant. (R. 356, 361, 363-64).

Defendant's assertion below was that his counsel was ineffective for failing to move to suppress his statements to the police on the grounds that the statements were coerced. (PCR 1/72). Defendant contended that the statements were coerced because the police arranged for Defendant to be moved to Florida State Prison, to be kept in a strip cell without food and to be harassed by prison officials before he was arrested in this case and that they arranged for these conditions to continue after Defendant was brought back to Miami. However, this claim was meritless, refuted by the record and properly denied. The judgment below should be affirmed.

Defendant's counsel did move to suppress, claiming that Defendant's statements were coerced. (R. 47-49). He thoroughly questioned the detective about the fact that Defendant's conditions of incarceration changed. (T. 270-78, 386-87, 405-13, 418-19). In fact, Defendant's counsel succeeded in having the trial court suppress the statement Defendant made to the

detectives at the prison. (R. 363). As counsel did move to suppress and did advance this theory, he cannot be deemed ineffective for failing to do so. *Strickland*.

Moreover, this claim is refuted by the record. Both Detectives Smith and Crawford denied having requested any change in the conditions of Defendant's incarceration. (T. 200, 270, 276-78, 325, 386-87, 405-13, 418-19, 4063-64). Dr. Donald Larned, a psychologist at the prison where Defendant was incarcerated when the police sought to interview him, stated that Defendant was placed into confinement the day before he was interviewed in prison. (T. 3995, 4001-03). He stated that was done as a matter of policy with any inmate suspected of murder. (T. 4003). He stated that Defendant was moved to an isolation cell the day after the interview because Defendant told the prison staff that he was suicidal. (T. 4005-07). Defendant was taken out of the isolation cell when he admitted that he was not suicidal but had only claimed to be to get out of confinement. (T. 4009-10, 4012). Given this testimony, the record conclusively reflects that the State did not have the conditions of Defendant's confinement changed to "soften Defendant up" for questioning as Defendant claimed.[20]

[20] Defendant was booked into Dade County jail after questioning at the prison. (T. 207-223, 2314-19, 3111-23). As any treatment in the Dade County Jail system occurred after any statement that

Lastly, Defendant failed to properly state a claim:

> Defendant alleges that trial counsel was ineffective in challenging the admissibility of his statements to police when counsel failed to present available evidence that police had prison officials abuse him. Defendant does not state what this evidence is or who would testify to it. Conclusory allegation [sic] do not support a claim for postconviction relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

(PCR 5/605)

Defendant also asserted that counsel was deficient in not presenting evidence to the jury of (what he alleges to be) the involuntary nature of his statements. (PCR 1/72). However, any attempt to present this evidence at trial would have been more harmful than helpful. In order to present this evidence, Defendant would have exposed that he was in prison. Moreover, it would have exposed that Defendant admitted that he claimed to be suicidal because he did not want to be in confinement, which would have supported the State's assertions that Defendant was feigning mental illness.[21] Given that presenting this evidence would have exposed that Defendant was in prison and had feigned being suicidal, there is no reasonable probability that Defendant would not have been convicted had counsel attempted to present this evidence at trial. *Strickland*; *Breedlove v. State*,

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was admitted, it could not have been to "soften him up" to give a statement.

[21] The State wanted to present that Defendant had been incarcerated when he spoke to police but the trial court refused to allow the presentation of that evidence. (T. 573-77).

692 So. 2d 874 (Fla. 1997)(counsel not ineffective for failing to present claim that would have opened the door to harmful information). No hearing was required on this meritless claim.[22]

Defendant next alleges that trial counsel's performance was deficient in failing to object to the prosecutor's comments on the right to remain silent. This claim is procedurally barred. On direct appeal, Defendant asserted that Det. Venturi's testimony commented on his right to remain silent and that the State improperly commented on his right to remain silent in closing. (Initial Brief of Defendant, Case No. 90,153, at 48-56). In fact, in his reply brief, Defendant asserted that Venturi's testimony indicated that Defendant was only claiming to be ill. (Reply Brief of Defendant, Case No. 90,153, at 4-5). Defendant now attempts to support this claim by referring to a different portion of the State's argument. However, this Court has held that such claims that could have been raised on direct appeal are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). As such, this claim was properly denied.

[22] Defendant alleges in footnote 20 of his brief that he was entitled to a hearing regarding the effectiveness of counsel during voir dire as counsel "asked no questions on voir dire regarding confessions". This claim was not raised below and is barred. (PCR 1/86-87).

Moreover, the State's argument was not improper. This Court held that Venturi's testimony about Defendant being ill diminished the taint of Venturi's statement that Defendant refused to continue the interview. *Rodriguez*, 753 So. 2d at 36. Venturi's testimony was that getting sick meant Defendant was shaking, crying, bowing his head, and saying he was epileptic and his medication was affecting him adversely. (T. 2193-94). The State's comment was that "defendant drops his head, starts to cry, starts to shake, claims that he is too sick." (T. 3356). As the comment mirrors the testimony, it did not "erase any curative effect" of Venturi's explanation as Defendant claims. Counsel cannot be deemed ineffective for failing to claim that it did. *Kokal*, 718 So. 2d at 143; *Breedlove*, 595 So. 2d at 11. The claim is procedurally barred, without merit and was properly denied.

Defendant's next claim of Argument I is that the lower court failed to consider the cumulative effects of counsel's deficient performance. Defendant claims the lower court failed in this consideration as the court summarily denied hearings on some of his ineffectiveness of counsel claims. As discussed above, the claims were properly denied. Deficient performance was not shown. Moreover, Defendant failed to establish "that confidence in the outcome of [his] original trial has been

undermined and that a reasonable probability exists of a different outcome." *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996); *see also Bryan v. State*, 748 So. 2d 1003, 1008 (Fla. 1999)(cumulative effect properly denied where allegations of error were without merit). Where the individual errors alleged are either procedurally barred or without merit, the claim of cumulative error also fails. *Vining v. State*, 827 So. 2d 201, 209 (Fla. 2002); *see also Riechmann v. State*, 32 Fla. L. Weekly S135 (Fla. April 12, 2007)(where claim is barred or without merit, evidence not allowed merely by claiming cumulative error).

To the extent Defendant is again arguing the summary denial of his claims as error, Appellee relies on its argument above as to those summary denial claims Defendant has already raised. Defendant here alleges that the lower court erred in denying additional ineffectiveness of counsel claims without a hearing. Defendant lists a variety of claims that were summarily denied.[23] However, Defendant is entitled to no relief as he has waived this issue and the claims were properly denied.

Defendant fails to present any argument regarding why the denial of each of the various claims were improperly summarily denied. Instead, he simply cites to the claims and states he

[23] Five claims relate to ineffectiveness of trial counsel, two relate to *Brady*.

should have been granted a hearing. Such a presentation is insufficient to present an issue in this appeal and the issues have been waived. *Bryant v. State,* 901 So. 2d 810, 827-28 (Fla. 2005); *Duest v. State*, 555 So. 2d 849, 842 (Fla. 1990). Even if Defendant had sufficiently presented the issues in this appeal, Defendant would still be entitled to no relief.

Counsel opening the door to prior bad acts. Defendant's position, as laid out in his opening, was that Luis was lying about his involvement in this matter because, *inter alia*, he disliked him. (T. 1741-42, 1743, 1749-50). This theory had the benefit of explaining why Luis would have blamed Defendant for this crime. However, this theory required that counsel get Luis to admit that he disliked Defendant, as he did. (T. 2896). However, it was this question that this Court ruled opened the door to evidence of Defendant's prior bad acts. *Rodriguez*, 753 So. 2d at 41-43. Defendant has not proposed any alternative theory of the case, and no other theory of the case would have explained why Luis implicated Defendant. As such, counsel had no choice but to open this door, and the claim that counsel was ineffective for doing so is without merit. Moreover, the trial court substantially limited Luis's testimony on this issue; the statement concerning Defendant's bad acts was brief (T. 2973-2980). This Court found the admission of this testimony not to

be in error. *Rodriguez*, 753 So. 2d at 42-43. Under these circumstances, there is no reasonable probability that Defendant would not have been convicted had counsel not asked Luis if he liked Defendant. *Strickland*. The claim was properly denied.

Failure to object to Luis's alleged prior consistent statement to Rafael Lopez. In this case, Defendant continually asserted throughout trial that Luis's testimony was influenced by his plea agreement. He also implied that Luis's testimony was based on the fact that the police allowed him to visit his family at the police station, that the police allowed him to have sex with his wife during one of these visits and that the State continued to provide Luis with special treatment through trial, including allowing him to wait to testify in the prosecutor's office and giving him lunch other than jail food when he was testifying. (T. 2859-37). All of this occurred *after* Luis made any statement to Lopez. As such, the testimony of Luis's prior consistent statement was admissible to rebut the claim that Luis was fabricating his testimony based upon on any deal or special treatment. *Chandler v. State*, 702 So. 2d 186 (Fla. 1997). The claim counsel was ineffective for failing to object is meritless.

Failure to present evidence of alibi. Defendant did present testimony that Defendant, Ms. Malakoff and her children had gone

to the Enchanted Forest on the night of the murders, that the apartment had been fumigated, that they spent the night at Defendant's mother's home and that they took Natasha to the hospital. (T. 2723-25). As this evidence was presented, counsel cannot be deemed ineffective for failing to present it or for failing to present cumulative evidence regarding this issue. *Henyard*, 883 So. 2d at 759-760. *Riechmann*, 777 So. 2d at 356. Since the record refutes this claim it was without merit and was properly denied.

Failure to present evidence about Landi that would have refuted motive. Defendant asserted that his counsel was ineffective for failing to present evidence that Landi was in school on the day of the murders and that Defendant had never done any work for Mr. Joseph for money. Defendant asserted that this evidence would have been inconsistent with the State's theory of the case.

The State's theory of the case was that Defendant planned the robbery a week in advance. (T. 3330). As such, the State's theory was not based on any dispute about the work that Landi did, or did not do, for Mr. Joseph that day. The State's evidence indicated that the Josephs were killed between 6:30 and 7:00 p.m. (T. 1814-1815, 1756, 1759, 2621, 2644). The type of work that ten-year-old Landi allegedly did for Mr. Joseph was

washing his car, and there would have been ample time between the end of school and the time of death for Landi to have done so. (T. 2691). Given all of these circumstances, counsel cannot be deemed ineffective for failing to present evidence that Landi was in school on the day of the murders. *Kokal*, 718 So. 2d at 143; *Breedlove*, 595 So. 2d at 11.

Moreover, evidence was presented that Defendant did not work for the Josephs. Ms. Malakoff testified that Defendant never worked for the Josephs. (T. 2691). As the evidence was presented, counsel cannot be deemed ineffective for failing to present it. *Strickland*. This claim was properly denied.

Failure to object to victim impact evidence.[24] The State's theory of the case was that Defendant and Luis forced their way into the apartment without displaying a gun and that Luis had the gun with him while he searched the back room of the apartment while Defendant held the victim in the dining room area unarmed. To explain Defendant's ability to enter the apartment and maintain control of the victims without a gun, the State presented evidence (and indicated in opening that it would do so) that the victims' were elderly and in poor health. As such, evidence of the Josephs' age and health status was relevant and admissible.

[24] Defendant's cite to T. 3016-22 is to Rafael Lopez's testimony where he testified that Luis described the victims as "[t]wo old ladies and an old man". (T. 3021).

§90.402, Fla. Stat. As this testimony was admissible, counsel cannot be deemed ineffective for failing to object to its admission. *Kokal*, 718 So. 2d at 143; *Breedlove*, 595 So. 2d at 11.

With regard to the testimony concerning the number of children and grandchildren the victims' had and the length of Ms. Abraham's marriage, Defendant is entitled to no relief. The Florida Supreme Court has held that the admission of brief humanizing testimony is harmless error. *Franqui v. State*, 699 So. 2d 1332, 1334 n.4 (Fla. 1997); *Stein v. State*, 632 So. 2d 1361, 1367 (Fla. 1994). Here, the discussion of these issues was brief. Any error in the admission of this testimony and the making of these comments would be harmless. As such, Defendant cannot show that there is a reasonable probability that Defendant would not have been convicted had counsel objected to them. *See Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003). The victim impact claim was properly denied.

Defendant's ineffectiveness of counsel claims were without merit, viewed individually and in toto. A "cumulative" analysis of these claims would have been fruitless. Defendant is entitled to no relief from this Court.

Hearing on the *Brady* claim that Rafael Lopez received a reduced prison sentence. Defendant asserted that the State had agreed to

reduce Mr. Lopez's sentence in exchange for his testimony. Defendant contends that even if the agreement did not occur until *after* Defendant was convicted, a *Brady* violation occurred.

Here, Lopez came forward with his information in March 1992. (T. 2223, 3021). Lopez was not arrested until a couple of months before May 1996. (T. 547). Lopez's trial testimony was limited to the issue of a statement Luis had made to him in 1984 or 1985. (T. 3015-29). Lopez was deposed in July 1994, and testified consistently about this statement. (SPCR 5/2086, 2088-97). Moreover, evidence was presented that Mr. Lopez had three felony convictions and was serving a sentence. (T. 3016). Given that Lopez had provided consistent statements before his arrest, the limited extent of his trial testimony, the impeachment evidence that had been presented, Luis's inculpatory testimony and Defendant's inculpatory statement, any evidence of a deal is not reasonably likely to have affected the jury's verdict. *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003).

Defendant also asserted that he is still entitled to relief even if the State did not agree to reduce Lopez's sentence until after the trial. Where the prosecution had not agreed to assist a witness before the witness testifies, there is no *Brady* violation even where the witness subsequently receives a

benefit. *State v. Riechmann*, 777 So. 2d 342, 363 (Fla. 2000). Denial of this claim was proper.

Hearing on the claim the State failed to disclose a memo that indicated a person named Joseph Thomas committed the crimes.

The lower court found "Defendant fails to show how this memorandum would have been admissible, or how it would have lead to admissible material. As Defendant has failed to show this, there is no *Brady* violation." (PCR 5/603). In order to show that evidence the State allegedly failed to disclose was material such that *Brady* is violated, a defendant must show that the evidence was admissible or at least would have lead to the discovery of admissible evidence. *Wood v. Bartholomew*, 516 U.S. 1 (1995). The lower court properly denied a hearing on this claim.

II. THE LOWER COURT PROPERLY DENIED DEFENDANT'S MOTIONS TO DISQUALIFY AND THE CLAIM REGARDING THE RECORD IS WITHOUT MERIT.

The standard of review of a trial judge's determination on a motion to disqualify is de novo. *Chamberlain v. State*, 881 So. 2d 1087, 1097 (Fla. 2004), *cert. denied*, 544 U.S. 930 (2005). Whether the motion is legally sufficient is a question of law. *Barnhill v. State*, 834 So. 2d 836, 843 (Fla. 2002). The standard for determining whether a motion is legally sufficient is whether "the facts alleged would place a reasonably prudent

person in fear of not receiving a fair and impartial trial." *See MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1335 (Fla. 1990).

On February 10, 2005, Defendant moved to reconstruct the transcripts of the evidentiary hearing. (PCR 3/389-92). In his motion, Defendant failed to identify errors in the transcript that would affect his appellate rights. Instead, Defendant merely stated in conclusory terms errors existed.

On March 3, 2005, the lower court held a hearing on Defendant's motion to reconstruct the record. At that hearing, the court attempted to determine what errors Defendant was claiming existed in the transcript and how those errors should be corrected. However, Defendant, based on his apparent belief that the hearing was merely a scheduling hearing, claimed that he was not prepared to have the motion heard. (PCR 10/1410-14). The State suggested that the appropriate procedure for a motion to reconstruct the record was for Defendant to identify the corrections that he sought in writing, that the State be allowed to review the corrections and respond in writing and that a hearing then be held to settle any disputes about the corrections. The court adopted this procedure, without any objection from Defendant, and the parties submitted the appropriate pleadings. (PCR 3/393-424; 10/1414, 1416).

On April 8, 2005, the hearing on the written pleading began with Defendant indicating that the corrections should be reviewed to determine whether any testimony would even be necessary. (PCR 11/1422). The court then indicated that there were corrected transcripts and that it had informed Defendant's counsel that the transcripts were being corrected. (PCR 11/1422-23). Because Defendant was insisting that special court reporting procedures be employed, the court reset the matter for April 22, 2005, so that the type of court reporting that Defendant was requesting could be used. (PCR 11/1433-35).

At the beginning of the hearing on April 22, 2005, Defendant attempted to call court reporter Stacy Boffman to testify. (PCR 11/1438). When asked why Boffman's testimony was necessary, Defendant indicated that he wished to call Boffman to testify about whether she considered the transcript accurate and about her training and abilities as a court reporter. (PCR 11/1438-40). Defendant claimed that such testimony was necessary to show that the transcript was not accurate. The State responded that it agreed that the transcript contained inaccuracies and that it saw no purpose in having Boffman testify about the matters proposed. (PCR 11/1440). The court indicated that it would take the issue of Boffman's testimony

under advisement and would proceed first to address the corrections to the transcript. (PCR 11/1440).

Defendant then filed a written motion for continuance so that he could prepare a motion to disqualify the court since the court was now a material witness. (PCR 11/1441-43; 1445). After reviewing the written motion (clearly having been prepared in advance of the hearing), the State argued that a continuance was not necessary because the court had revealed the alleged basis for the proposed motion to disqualify at the April 8, 2005, hearing and any motion would be untimely. (PCR 11/1445-46).

On April 29, 2005, Defendant served his *first* motion to disqualify. (SPCR 5/2229-38). The motion was denied as untimely and legally insufficient. (SPCR 5/2239-40). The motion claimed that the court was a material witness because it had discussed the corrections to the transcript that it has previously ordered with the court reporter, that the court had allegedly evidenced bias against Defendant's attorneys and that the court considered issues beyond the legal sufficiency of the motion to disqualify when it listened to (but deferred ruling on) the State's argument that any motion to disqualify would be untimely.[25]

[25] Defendant now argues on appeal that the trial court improperly met with the court reporter without the parties present. This was not his basis for disqualification below. Nevertheless, the actions of the court in correcting typographical and grammatical errors where Defendant requested correction cannot he held to be

Florida case law has long defined "material witness", as would lead to a judge's disqualification, as a two pronged test. First, that the judge possessed relevant information affecting the merits of the cause, and second, that no other witness might similarly testify. *Van Fripp v. State*, 412 So. 2d 915 (Fla. 4th DCA 1982); *State ex rel. Slora v. Wessel*, 403 So. 2d 496 (Fla. 4th DCA 1981) (Hurley, concurring); *Wingate v. Mach*, 117 Fla. 104, 175 So. 421 (Fla. 1934).

In describing how these requirements are met in a capital post conviction case, this Court has held that a defendant must show that the trial judge's testimony is "absolutely necessary to establish factual circumstances not in the record." *State v. Lewis*, 656 So. 2d 1248, 1250 (Fla. 1994).

Defendant's own motion showed that the lower court does not meet this standard. To the extent that the instructions of Judge Sigler to Ms. Boffman in the preparation of the transcript affected the merits of the proceeding, Judge Sigler is not the only witness to this conversation: Ms. Boffman is available. As

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in error. This is especially true where Defendant had no objection to the corrected version at the hearing on the record's adequacy. (PCR 11/1486, 1543, 1551, 1562, 1573, 1578, 1580).

such, Judge Sigler did not qualify as a material witness and disqualification would be improper.[26]

With regard to the claim of bias predicated on this Court's ruling that a request to correct the spelling of one's name was "petty," by Defendant's own admission, this remark was made on April 8, 2005, in open court. As such, any motion to disqualify based on that remark had to be made no later than April 18, 2005. Defendant did not file the motion for disqualification until April 29, 2005. As such, any request for disqualification based on this remark was untimely and properly denied. Fla. R. Jud. Admin. 2.160(e); *see also Willacy v. State*, 696 So. 2d 693 (Fla. 1997). Moreover, this remark would not serve as a basis for a motion to disqualify even if it was timely. In *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998), a trial court had referred to a defendant's post conviction claims as "bogus," "a sham" and "nothing but abject whining" in the course of ruling on those claims. This Court found that these comments did not serve as a basis for recusal. Here, Judge Sigler's statement that requesting correction of the spelling of one's name was "petty" was made in the course of explaining this Court's ruling

[26] Regarding the proposed corrections to the transcripts, there were any number of witnesses who could testify about what was said: Defendant's two counsel, Defendant, the bailiff, the clerk, the three attorneys representing the State or witness present during any disputed correction.

on the proposed corrections. (PCR 11/1432-33). As such, it did not provide a basis for a motion to disqualify under *Ragsdale*.

Defendant's claim that the court considered issues beyond the legal sufficiency of the motion to disqualify when it listened to the State's argument that any motion to disqualify would be untimely is refuted by the record. The lower court did not rule on the State's motion, but instead reset the matter to order the transcript of the August 8 proceeding and give Defendant an opportunity to properly file his motion to disqualify. (PCR 11/1446-1551). As the court simply listened to the argument, without making any ruling, it did not consider matters beyond the sufficiency of the motion. The lower court's denial of Defendant's first Motion for Disqualification was proper and should be affirmed.

Defendant filed a second Motion to Disqualify on March 15, 2007.[27] (SPCR 13/3274-3373). The motion was denied as legally insufficient. (SPCR 13/3374). Defendant alleges that denial of this motion was improper. Defendant does not provide argument as to why denial was improper but instead simply cites to his motion.[28] (Defendant's Initial Brief p. 75). By failing to

[27] A hearing was set on the motion wherein Defendant opted to stand on his pleadings rather than present argument. (SPCR 13/3379).

[28] Defendant's statement that Judge Sigler had denied a hearing regarding allegation that Isidoro was an informant is false. The

properly present an argument on appeal, Defendant has waived this issue. *Bryant*, 901 So. 2d at 827-29. Nevertheless, denial was proper. Defendant's suggestion that Judge Sigler should have recused herself due to the reference to her actions (an undocketed plea) in an entirely unrelated case in a newspaper does not establish a legal basis for recusal. Actions in another matter, with no link to Defendant, cannot form the basis of a motion to disqualify. *Arbelaez v. State*, 898 So. 2d 25, 37-38 (Fla. 2005).

Defendant's entire theory seems to be based on the speculation that if Judge Sigler ordered sealing of information in a different court file, she must have done so here. However, this Court has stated that post conviction relief and motions to disqualify are not to be based on speculation. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000); *Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995). Moreover, there is no evidence that Judge Sigler took any action in any prior case involving Isidoro or any other witness. The second motion was properly denied.

Mr. Rodriguez was denied his due process right to an accurate transcript of the evidentiary proceedings

Defendant asserts that he is entitled to relief because he does not have a complete record of the proceedings.

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denied claim was that "Isidoro was threatened by police to testify against Mr. Rodriguez." (PCR 1/54).

Specifically, Defendant complains that the transcripts of the *Huff* hearing and evidentiary hearing contain errors and that the transcripts of several hearings are missing.[29] However, the issue is largely unpreserved and entirely without merit.

In order to seek relief based on errors or omissions from a record on appeal, a litigant must have sought to correct the errors or omissions pursuant to Fla. R. App. P. 9.200 and had that attempt prove unsuccessful. *See Craig v. State*, 510 So. 2d 857, 860-61 (Fla. 1987); *see also Felton v. State*, 523 So. 2d 775 (Fla. 3d DCA 1988). Here, while Defendant availed himself of that procedure regarding the evidentiary hearing transcript, he never made any such attempt regarding the *Huff* hearing transcript or any of the transcripts that he claims were missing. This is true despite the facts that Defendant was clearly aware of the procedure, it took Defendant two full years from the filing of the notice of appeal to get the final version of the record prepared, and this Court twice relinquished jurisdiction for Defendant to have the record corrected and supplemented. Under these circumstances, any claim regarding the *Huff* hearing transcript or allegedly missing transcripts should be rejected.

[29] Defendant specifically mentions hearings held on 12/11/01, 10/31/03, 11/13/03, 11/25/03, 12/19/03, 1/29/04 and 2/6/04.

Moreover, the issue also lacks merit. In order for Defendant to be entitled to relief here, Defendant must demonstrate "that there is a basis for a claim that the missing transcript would reflect matters which prejudice [him]." *Jones v. State*, 923 So. 2d 486, 489 (Fla. 2006). This requires Defendant to identify a potential meritorious claim that cannot be resolved because a portion of the record is unavailable. *Id.* at 489-90. Here, other than a vague complaint that there are "errors that were not pointed out" when the evidentiary hearing transcript was reconstructed and a vague allegation that he cannot "fully brief" an issue regarding public records, Defendant does not offer any explanation of any impact on the appellate process. (Appellant's Initial Brief at 3 n.1, 96). With regard to the complaint about the evidentiary hearing transcript, Defendant admitted at the time the transcript was reconstructed that the state of the transcript did not affect his rights, stated that he was satisfied with the corrections and voiced no objection to the corrections made. (PCR 3/393; 11/1423-24, 1504, 1580; SPCR 13/3379-80, 3393; 11/1470, 1480, 1481, 1482, 1485, 1486, 1487, 1488, 1492, 1494, 1498-99, 1496, 1501-02, 1503, 1508, 1512, 1519, 1541, 1543, 1545, 1548, 1551, 1553, 1554, 1555-57, 1559-61, 1563, 1567, 1562, 1572, 1573, 1586, 1587, 1580, 1589, 1590; SPCR 13/3382, 3383-84, 3385-87,

3388, 3394-95). With regard to the public records issue, the record is more than sufficient to reflect that Defendant failed to seek public records diligently, that he failed to identify any missing records in his motion for post conviction relief and that the requests that were denied were not properly made. Under these circumstances, Defendant's complaints about the record are without merit and should be rejected.

III. DEFENDANT'S JURY WAS FAIR AND IMPARTIAL AND TRIAL COUNSEL WAS EFFECTIVE DURING VOIR DIRE.

Trial counsel failed to preserve the record regarding the refusal to allow the Defendant to make a peremptory challenge.

Defendant alleged that counsel's error prejudiced him on direct appeal, not at trial. (PCR 1/87). Defendant thus failed to meet the requirements of *Strickland* and denial of this claim was proper. *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007).

Nonetheless, Defendant would still be entitled to no relief because the claim has no merit. There is no reasonable probability that the trial court would not have disallowed the peremptory challenge to Mr. Borges, let alone a reasonable probability of a different result at trial, had counsel claimed that Mr. Arzuaga was Hispanic.[30]

[30] The lower court partly denied this claim based on the fact the Defendant failed to name the juror in question, thus failing to provide a detailed allegation as required by Fla. R. Crim. P. 3.851(e)(1)(D). The fact the State identified the juror in its brief does not alleviate Defendant's burden.

As this Court noted on direct appeal, the trial court's refusal to allow this challenge was based on far more than the fact that Defendant did not challenge Mr. Arzuaga:

> In his second claim, [Defendant] asserts that the trial court erroneously refused one of his peremptory challenges. During jury selection, [Defendant] tried to exercise a peremptory challenge against a venireperson. The State objected, noting that the venireperson was Hispanic. [Defendant] justified the challenge by stating that the venireperson had been charged and arrested for carrying a concealed firearm and that the charges were eventually dropped. [Defendant] sought to challenge the venireperson, stating that he feared the venireperson would feel a debt of gratitude to the State. The trial court determined that the explanation was racially motivated and pretextual because other venirepersons on the panel who had prior arrests and were similarly situated were not challenged. According to [Defendant], there is no basis in the record to support the trial court's conclusions, especially given that one of the other similarly situated venirepersons was also Hispanic.
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> The record reflects that just before the peremptory challenge at issue, [Defendant] sought to peremptorily challenge a thirty-six-year-old Latin male. The court allowed the strike based on [Defendant] explanation that the prospective venireperson had indicated that the justice system is unjust. Two venirepersons later, [Defendant] sought to strike the venireperson at issue, a thirty-six-year-old Latin male, based on the following: a prior arrest for which he went through some sort of program, which purportedly indebted him to the State; his purported low intelligence and youth; and because "just looking at the composition of the jury as I understand it trying to see who's who I don't feel comfortable with him." The court found that these reasons appeared to be both racially motivated and pretextual because other venirepersons, whom [Defendant] had accepted, also had been accused of crimes. The court additionally noted that no questions had been asked of the venireperson regarding any special feelings the venireperson had toward the State and that he did not appear to be "slow." On this record, we cannot say that the trial court's ruling was clearly erroneous. This is

> especially true given that we cannot determine the absence of pretext where the similarly situated venireperson used by [Defendant] to support his argument was never identified as Hispanic. *Cf. Davis v. State*, 691 So. 2d 1180 (Fla. 3d DCA 1997) (failure to identify race of venireperson makes it impossible for appellate court to review question of pretext).

Rodriguez, 753 So. 2d at 39-40. As can be seen from the foregoing, the peremptory challenge was disallowed not only because there were similarly situated veniremembers that Defendant had not challenged but also because the reasons asserted for the challenge had no basis in the record.

Defendant based his challenge on the assertions that (1) Mr. Borges had been charged with an offense, went through a program and had the charges dismissed, which may have caused Mr. Borges to feel indebted to the State; (2) he was slow and unintelligent; and (3) counsel did not feel comfortable with Mr. Borges on the jury given its composition. (T. 1645-46). However, there was no support in the record for these reasons.

Mr. Borges stated that he had been arrested for having a gun in his car for protection but was not convicted. (T. 1285-86). He never explained why he was not convicted, much less that he had been placed in a program and had his charges dismissed. Defendant never asked him about why he was not convicted. (T. 1493-1580, 1584-1634). As there was no evidence that Mr. Borges ever was placed in a program, there was further no evidence to

support Defendant=s assertion that Mr. Borges felt indebted to the State for placing him in such a program. Mr. Borges responded to the questions in a coherent and appropriate manner. (T. 1285-87, 1460, 1493-1580, 1584-1634). The trial court found that there was no indication that Mr. Borges was slow. (T. 1648). As there was no record support for the ethnically neutral reasons given for the challenge, the trial court properly refused to allow Defendant to exercise it. *See Dorsey v. State*, 868 So. 2d 1192 (Fla. 2003). Thus, counsel cannot be deemed ineffective for failing to make a meritless claim that this challenge was proper. *Kokal*, 718 So. 2d at 143; *Breedlove*, 595 So. 2d at 11. The claim was properly summarily denied.

Defendant alleges the lower court erred in denying a hearing on the claim that trial counsel was ineffective for failing to seek a change of venue. This claim was properly denied as it was facially insufficient and without merit.

In order to make a showing of prejudice with regard to this claim, the defendant must, at a minimum "bring forth evidence demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if [defense] counsel had presented such a motion to the court." *Meeks v. Moore*, 216 F.3d 951, 961

(11th Cir. 2000); *see also Provenzano v. Dugger*, 561 So. 2d 541, 545 (Fla. 1990).

> The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977); *see also Rolling v. State*, 695 So. 2d 278, 284 (Fla. 1997). In applying this test, a trial judge must evaluate two prongs: (1) the extent and nature of the pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. *Rolling*, 695 So. 2d at 285. In applying these criteria, a number of circumstances must be considered, including:

> (1) when it occurred in relation to the time of the crime and the trial; (2) whether the publicity was made up of factual or inflammatory stories; (3) whether the publicity favored the prosecution's side of the story; (4) the size of the community; and (5) whether the defendant exhausted all of his peremptory challenges.

Chandler, 848 So. 2d at 1036.

Here, Defendant’s allegations regarding these issues are facially insufficient and refuted by the record. As such, the claim was properly denied.

With regard to the nature and extent of the pretrial publicity, the entirety of Defendant’s allegations are that there was overwhelmingly extensive pretrial publicity, that it

was a highly publicized case, as the victim Genevieve Abraham and her husband were prominent members of the Miami-Dade community, and that there was extensive publicity at the time of the crime. (PCR 1/88). However, Defendant did not explain whether this publicity was inflammatory or factual, or whether the publicity favored the State. In fact, the Defendant did not describe the nature of the coverage at all. Moreover, he asserts only that the publicity was extensive at the time of the crime, which was almost 12 years before trial. Defendant's allegations were wholly conclusory. As such, they were facially insufficient to state a claim. *Ragsdale,* 720 So. 2d at 207.

Even if the claim was facially sufficient regarding the nature and extent of pretrial publicity, the claim should still be summarily denied as refuted by the record. The record shows that there had been no media coverage of the matter in the months preceding trial. (T. 614). At the time of trial, there was only one article about the matter. (T. 852-53, 3151, R. 536). The article was brief and published in a side column. (R. 536). Even the publicity at the time of the crime was described as no more than normal and not extensive. (T. 1952-53). As such, the record refutes Defendant's allegation that the nature and extent of the publicity was such that a change of venue should have been granted. *Chandler*.

Moreover, Defendant made no allegations about the difficulty in selection a jury. Instead, he asserts that many panel members had extensive knowledge of new reports about the case. (PCR 1/89). Again, the allegation is conclusory, which renders the claim facially insufficient. ***Ragsdale.***

Even if the claim was sufficient, the claim is meritless, as the record reflects that there was no difficulty in selecting a jury because of publicity. Of the 112 veniremembers examined, only 18 had been exposed to any media coverage of the case at all.[31] (R. 530-31, 538-39, 540; T. 623-25, 1116-17, 1219, 1392-93). Of these 18, only four had read of the case within the year preceding trial. (T. 640, 644, 652, 656, 668, 1140-87, 1228, 1403-04). Most of the veniremembers who had heard about the case only had vague memories of the coverage or recalled that Ms. Abraham had been murdered. (T. 640, 642, 644-45, 652-53, 657, 667-68, 1140-41, 1148, 1152, 1156, 1157, 1161-62, 1164, 1165, 1174, 1183-84, 1228-29, 1404, 1472). Of the 18 veniremembers who had heard of the case, only two stated that they had formed an opinion about the case and would be influenced by what they

[31] Another veniremember indicated that he knew about the case. However, on individual questioning by the trial court, he indicated that his knowledge came from being a personal friend of the Josephs. (T. 646-47). That veniremember was excused for cause. (T. 680).

read.[32] (T. 640, 642, 644-45, 653, 657, 668-69, 1149, 1153, 1156, 1158, 1163, 1164, 1166, 1229, 1404, 1472). Those two indicated that their opinion was based on sympathy for Ms. Abraham, and they were excused for cause.[33] (T. 1142-43, 1190, 1210). The remaining veniremembers agreed to decide the case based on the evidence presented and set aside what they had read. (T. 642, 645, 654-56, 657, 668-69, 1150, 1153, 1156, 1229, 1473). Of the remaining veniremembers who knew of the case, Defendant only attempted to challenge one of them for cause because of publicity exposure, and while the trial court denied the cause challenge on that basis, it excused the veniremember for cause on other grounds. (T. 685-687, 1075-1076). At the conclusion of voir dire, Defendant had only used nine of his ten peremptory challenges. (R. 530-31, 538-39, 540).

Thus, the record reflects that there was no difficulty selecting a jury because of pretrial publicity. Thus, there was no basis to move for a change of venue, and counsel cannot be deemed ineffective for failing to claim otherwise. *Patton v.*

[32] A third veniremember, Ms. Price, stated that she might be influenced by what she read if something occurred during trial that caused her to remember the media coverage. (T. 1184-88).
[33] The State attempted to excuse Ms. Price for cause based on the media issue and her views about the death penalty. (T. 1206-07). Defendant objected to excusing her for her media exposure. (T. 1207). The trial court excused her only based upon her views on the death penalty. (T. 1207-1208).

State, 784 So. 2d 380, 389-90 (Fla. 2000). The claim was properly summarily denied.

With regard to Mr. Kennedy, this claim was properly denied as facially insufficient and without merit. Defendant did not allege the failure to move to exclude Mr. Kennedy created a reasonable probability of a different result at trial. To state a facially sufficient claim of ineffective assistance of counsel, a defendant must allege that but for counsel's allegedly deficient conduct, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*; *Carratelli.* As Defendant did not do so, this claim was facially insufficient and properly denied.

Moreover, the claim lacked merit. While Defendant appeared to assert that Mr. Kennedy should have been excused for cause, there was no basis to do so. This Court has held that the test for juror competence is "whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). Under this test, this Court has ruled that it is proper to deny cause challenges to veniremembers who knew either the defendant, the victim or their families, where the veniremembers stated they could be fair and impartial. *Foster v. State*, 614 So. 2d

455, 462 (Fla. 1992)(veniremember knew defendant from school and had a couple fights with him); *Mills v. State*, 462 So. 2d 1075, 1079 (Fla. 1985)(veniremember distant relative of victim and knew defendant and his family). Here, the record reflects that Mr. Kennedy did not really know Mr. Abraham and that he could be fair and impartial.

During the State's questioning, Mr. Kennedy volunteered that his father had worked for Anthony Abraham Chevrolet and that he had worked there for a couple of years. (T. 1441, 1469). He stated that he had worked for the dealership washing cars and helping his father with paperwork around 1973 or 1974. (T. 1470).

He had never met Ms. Abraham and had only met Mr. Abraham once. (T. 1441). Mr. Kennedy stated that neither his father's prior employment, his having met Mr. Abraham nor a brief conversation with his father about the murders would affect his ability to be fair in this case. (T. 1441-42, 1470). When Defendant asked how Mr. Kennedy would feel about sitting on the jury in this case, Mr. Kennedy stated:

> I was young at that time. I didn't have any association with him [Mr. Abraham]. My father was the main person dealing with Mr. Abraham. As far as what can I say, I have a lot of feelings. I don't know what to say.

(T. 1472).

Given the totality of Mr. Kennedy's responses, it is clear that he did not really even know Mr. Abraham. Moreover, he expressly stated that he could be fair and impartial. Under these circumstances, he would have been removed for cause had counsel attempted to challenge him. *Foster*; *Mills*. As the attempt to challenge Mr. Kennedy for cause would have been fruitless, counsel cannot be deemed ineffective for failing to do so. *Kokal*, 718 So. 2d at 143; *Breedlove*, 595 So. 2d at 11.

With regard to the claim that counsel should have sought to excuse him peremptorily, again the claim has no merit. There is no requirement, in any jurisdiction, that counsel must utilize all peremptory challenges in every case. Counsel's performance thus cannot be deemed deficient within the meaning of *Strickland*. *See also Muhammad v. State*, 426 So. 2d 533, 538 (Fla. 1982)(there is no deficient conduct, where a claim is based on a right that was not established at the time of trial).

Moreover, the record affirmatively reflects that counsel made a strategic decision to seat Mr. Kennedy. At the conclusion of jury selection, the trial court noted that Defendant had been consulting with his attorneys regarding the selection of the jury. (T. 1660). During the penalty phase, Defendant complained about the presence of Mr. Kennedy on the jury. (T. 3809-11). During this discussion, Defendant acknowledged that he and his

attorneys had agreed to seat Mr. Kennedy after discussing the issue. (T. 3811). The record reflects ample reason for this decision.

Mr. Kennedy stated that he did not like his father, who was associated with Mr. Abraham. (T. 1469). He also asserted that he had been dissatisfied with the manner in which the system handled a case in which he had been the victim of theft (T. 1266-67, 1369-71). Given that Defendant's defense was based on the assertion that the police had not properly investigated the case, such feelings were favorable to Defendant.

Moreover, Mr. Kennedy stated that if a person who had been involved in the crime and received a plea bargain testified, he would have to carefully consider whether the testimony was credible. (T. 1524). He testified that if the person with the plea bargain did not get a harsh punishment, it would not be fair. (T. 1537-38). Given that Luis Rodriguez's testimony was an important part of the State's case that Defendant was attacking, such feelings were favorable to Defendant.

Thus, the record reflects that counsel made a sound strategic decision to accept Mr. Kennedy.[34] Thus, the claim is refuted by the record and was properly denied. *Cherry v. State*,

[34] Exercising a peremptory challenge against Mr. Kennedy would have exhausted Defendant's peremptory challenges and left Defendant at the whim of the State regarding his last juror. (T. 530-31, 538-40).

659 So. 2d 1069, 1072-73 (Fla. 1995).

Lastly, Appellant alleges jurors were not fair and impartial as they were not attentive and one juror had already improperly expressed an opinion regarding the case. This new claim is procedurally barred as Defendant failed to present it to the lower court,[35] insufficiently pled as Defendant has failed to allege prejudice, and refuted by the record. *Ponticelli v. State*, 941 So. 2d 1073, 1104 (Fla. 2006); *Thompson v. State*, 873 So. 2d 481 (Fla. 2d DCA 2004). The trial court found the jurors were alert and attentive. (T. 3786, 3806-09, 3816). Regarding the claim a juror had already formed an opinion, the juror was questioned by the court and he stated he had not. (T. 3802-04). Defendant's claim is without merit.

IV. THERE WAS NO CONFLICT OF INTEREST.

Defendant contended that his counsel was under a conflict of interest because counsel Houlihan's wife represented Luis Rodriguez, because she allegedly assisted him in the case, because Defendant filed a bar complaint against Houlihan, because Houlihan had previously represented someone else who claimed to have information about the case and because counsel hired an investigator who allegedly had previously investigated

[35] *See Griffin*, 866 So. 2d at 11 n.5.

the case as a police officer. The claim was properly denied as it was facially insufficient and without merit.

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Court addressed the issue of whether a defendant would be entitled to post conviction relief if he showed that his counsel had a conflict of interest. The Court held that if the defendant showed that his attorney actually had a conflict of interest that adversely affected counsel's representation of the defendant, he was entitled to post conviction relief. *Id.* at 350. This Court has adopted this test and required both an actual conflict of interest *and* a showing of an adverse effect on representation before relief is granted. *Quince v. State*, 732 So. 2d 1059, 1064-65 (Fla. 1999). Moreover, in *Mickens v. Taylor*, 535 U.S. 162, 174-76 (2002), the Court made clear that *Cuyler* was a limited exception for conflicts of interest resulting from representation of multiple defendants. The Court pointed out that *Cuyler* was not intended to apply outside such a context and noted that it had never even applied the test to successive representation case, let alone other claims of conflict of interest. *Id.* at 175-76; *Knight v. State*, 923 So. 2d 387, 403 (Fla. 2005).

Here, of all of the alleged conflicts of interest that Defendant asserts, the only one that addresses multiple

concurrent representation of the type that *Mickens* states is cognizable is the claim regarding Ms. Georgi, who was employed by the Office of the Public Defender, represented Luis Rodriguez.[36] However, this Court has rejected the claim that a personal relationship between the attorneys in a case created an actual conflict of interest.[37] *Gamble v. State*, 877 So. 2d 706, 717-18 (Fla. 2004). This holding is in accordance with *Mickens*. As such, the mere fact that Mr. Houlihan was married to Ms. Georgi did not create a conflict of interest.

In an attempt to make it seem as if Mr. Houlihan was representing both Defendant and Luis, Defendant points to instances in the record of Ms. Georgi=s presence in the courtroom. However, when the first instance occurred, Mr. Houlihan stated on the record that he and Ms. Georgi had not discussed the case. (T. 1918). He stated that she had taken notes so that they could discuss effective opening statements after the case. (T. 1918). When the second incident occurred, Mr. Zenobi stated that Ms. Georgi was merely pulling cases that

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[36] The record reflects that Ms. Georgi never personally appeared on behalf of Luis Rodriguez. (R. 9-27). Instead, Luis was represented by Mr. Koch and Mr. Kramer. (R. 9-27; T. 3176).

[37] The pleadings in *Gamble* indicate that one of the codefendant=s attorneys was dating the Chief Assistant Public Defender and the codefendant's other attorney was married to a different Assistant Public Defender. Petition, *Gamble v. Moore*, Case No. SC02-1948.

the State had cited in a recently filed motion and that they had not discussed the matter. (T. 3263-64). In *Gamble*, one of the circumstances that the Court found indicated that there was no conflict was the fact that the parties had stated on the record that no information was exchanged between the lawyers. *Gamble*. Given these assurances on the record, the claim that Ms. Georgi's presence in court shows that there was a conflict of interest is without merit.

Moreover, the assertion that Mr. Houlihan had a conflict of interest because Defendant filed a bar complaint against him is without merit. Florida Courts have repeatedly rejected the assertion that a defendant can create a conflict of interest by filing a complaint against a lawyer. *Gaines v. State*, 706 So. 2d 47 (Fla. 5th DCA 1998); *Boudreau v. Carlisle*, 549 So. 2d 1073 (Fla. 4th DCA 1989).

Lastly, Defendant failed to show any adverse effect on his representation of Defendant. Instead, he merely asserted that counsel's representation was adversely affected. Such a conclusory assertion is facially insufficient to state a claim. *Ragsdale*; *see also Herring v. State*, 730 So. 2d 1264, 1267 (Fla. 1998)(must identify specific evidence in the record that suggests that interests were compromised to demonstrate conflict).

As Defendant failed to establish a conflict of interest affecting his rights, summary denial of this claim was proper.[38]

V. DEFENDANT'S SENTENCING PHASE CLAIMS ARE WITHOUT MERIT.

Defendant alleges that the trial court erred in summarily denying his penalty phase claims. Specifically, Defendant asserts that the lower court erred in denying his claims that counsel was ineffective for failing to present evidence of his mental state properly, that the penalty phase jury instructions were not adequate, that the State made improper comments in closing, that Florida's capital sentencing statute is unconstitutional, that Defendant is innocent of the death penalty and that Florida's capital sentencing scheme violates *Ring v. Arizona*, 536 U.S. 584 (2002). However, all of these claims were properly denied.

With regard to the claim that counsel was ineffective for failing to present evidence of his mental state properly, part of the claim was not properly presented below and all of the claim was properly summarily denied.[39]

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[38] Defendant also asserts that he was entitled to a hearing regarding the potential conflict of interest of which it was aware. However, the United States Supreme Court expressly rejected such a claim in *Mickens*, 535 U.S. 162, at 170-74.

[39] While Defendant asserted this claim twice in his motion for post conviction relief and labeled the second claim as an *Ake v. Oklahoma*, 470 U.S. 68 (1985) claim, he did not present a true *Ake* claim below. *Clisby v. Jones*, 960 F.2d 925 (11th Cir.

While Defendant argues on appeal that counsel was deficient for failing to properly present evidence regarding the effect the death of family members had on Defendant, evidence relating to mental illness in Defendant's family and evidence relating to his mental state at the time of the crime, he did not raise this claim below. (PCR 1/95-99). As such he is procedurally barred from asserting the claim here. *Griffin*, 866 So. 2d at 11 n.5.

Moreover, the claims, as phrased below, were facially insufficient. Defendant did not explain what counsel did to cause mitigation to be unpresented or why the experts were incompetent. He did not assert what information they were not given. Instead, Defendant merely asserted in a conclusory fashion that the experts were not competent and that counsel did not provide them with certain undescribed information. However, such conclusory allegations are insufficient to state a claim. *Ragsdale*.

Moreover, the Defendant's mental health claim is without merit and refuted by the record. Counsel had two experts appointed to evaluate Defendant. (R. 36, 482). Counsel also had

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1992)(an *Ake* claim requires a showing that the trial court denied a defendant access to a mental health expert). Having failed to recognize the true nature of an *Ake* claim, Defendant has not explained on appeal how that claim was improperly denied, and, therefore waived the claim. *Bryant*, 901 So. 2d at 827-28. Moreover, the claim was properly denied because it is procedurally barred. *Marshall v. State*, 854 So. 2d 1235, 1248 (Fla. 2003); *Cherry v. State*, 781 So. 2d 1040, 1047 (Fla. 2000).

Defendant's mental health records, which the record shows Dr. Mossman reviewed. (T. 582-97; R. 54, 1803). Dr. Mossman evaluated Defendant. (R. 54, 1803). Additionally, counsel presented the testimony of five mental health experts at trial. (T. 3627-45, 3663-85, 3733-44, 3758-77, 3817-41). He also presented the testimony of three family members regarding their knowledge of mental illness in Defendant and his mother. (T. 3718-27, 3873-75, 3879, 3902-04). Four experts had diagnosed Defendant with schizophrenia at various times **beginning in 1977 and continuing until 1991**. (T. 3628-40, 3742-43, 3758-63, 3817-41). **Evidence was presented that this was a lifelong disease.** (T. 3756, 3770-71). Four experts testified that they evaluated Defendant for brain damage, including performing EEGs and CAT scans, and found none. (T. 3647, 3650-57, 3700, 3747, 3782). One expert also testified that Defendant suffered from a depressive disorder. (T. 3770). Counsel had also stated that he had between 15 and 25 mental health witnesses available. (T. 582). Counsel stated that he did not call additional witnesses after speaking to all of the witnesses available because their testimony would be cumulative. (T. 3977). As counsel did investigate Defendant's mental health and did present evidence that Defendant suffered from schizophrenia and a depressive disorder that would have been present at the time of the crime, counsel cannot be deemed

ineffective for failing to do so.[40] *Henyard*, 883 So. 2d at 759-760.

Further, Defendant cannot show that he was prejudiced by counsel's failure to present additional evidence that he was schizophrenic and suffered from a depressive disorder. The facts of the case supported the finding of five aggravating circumstances: under a sentence of imprisonment; prior violent felonies; during the course of a burglary and for pecuniary gain, merged; avoid arrest and CCP. Defendant presented extensive evidence of his history of mental illness. While Defendant asserts that the presentation of additional evidence that his mental illness existed at the time of the crime would have caused the trial court to find the mental mitigators, this is not true. Defendant attempts to suggest that the trial court rejected mental mitigation due to the absence of evidence of state of mind at the time of the crimes. Defendant is incorrect. The trial court primarily rejected the existence of mental mitigation because the claims were inconsistent with Defendant's

[40] Counsel's presentation at the penalty phase refutes Defendant's assertion that counsel did not attempt to attack evidence of the CCP aggravator. Moreover, this Court held finding the murders to be CCP proper. *Rodriguez*, 753 So. 2d at 46-47. Defendant also alleges that the trial court did not properly instruct the jury. However, this is an issue for direct appeal and Defendant is barred from raising the issue here. (Defendant's Initial Brief p. 94). *See Rodriguez v. State*, 919 So. 2d 1252, 1280 (Fla. 2005).

actions at the time of the crime. (R. 1647-50). No amount of additional expert testimony would change the evidence of the acts Defendant committed. Given the aggravating circumstances presented in this case, the evidence in mitigation that was presented at the time of trial and the reason the trial court rejected this mitigation, there is no reasonable probability that Defendant would not have been sentenced to death had counsel presented cumulative evidence. *Strickland*; *Henyard*.

Defendant's reliance on *Orme v. State*, 896 So. 2d 725 (Fla. 2005) is misplaced.[41] In *Orme*, counsel failed to investigate mental health mitigation. In contrast here, counsel had Defendant evaluated by at least two new experts at the time of trial. He also obtained the records of Defendant's prior evaluations and treatment for mental illness. Counsel stated that he had at least 40 witnesses involved in the evaluation and treatment of Defendant's alleged mental problems. He presented five mental health experts to testify that Defendant was schizophrenic and depressed, the same illnesses Defendant asserts that his counsel was ineffective for failing to present. Defendant did not identify any aspect of his mental health history of which counsel was unaware. Thus here, the record

[41] *Hovey v. Ayers*, 458 F.3d 892 (9th Cir. 2006) (failure to prepare mental health expert) is inapplicable here where, as detailed above, witnesses competently testified.

reflects that counsel did investigate and present the very mitigation claimed. As such, *Orme* does not apply.

Defendant's assertions that he was prejudiced because he was incompetent to stand trial and he could not form the intent to commit first degree murder were facially insufficient. Defendant merely asserted that he could have presented evidence that he suffered from schizophrenia and bipolar disorder at the time of the offense. However, competency is to be determined at the time of trial, which was almost 12 years after the crime in this case. *Dusky v. United States*, 362 U.S. 402 (1960). Further, Florida does not recognize a defense that a mental state other than insanity prevents a defendant from forming the intent to commit first degree murder. *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989); *Wheeler v. State*, 344 So. 2d 244 (Fla. 1977), *cert. denied*, 440 U.S. 924 (1979). Thus, the claims were properly summarily denied.

Defendant alleges that the trial court erred in denying a hearing regarding the prosecutor's comments. In regard to the prosecutor's comments, Defendant's claim is procedurally barred and was properly denied. Defendant's claim of ineffective assistance of appellate counsel was not cognizable below. *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000). The lower court properly denied these claims.

Defendant lastly alleges that the lower court erred in failing to conduct a hearing on Defendant's claims that Florida's death penalty statute is unconstitutional, Defendant is innocent of the death penalty and that Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002).

Defendant recited the claims he raised in the lower court and mentions the lower court's ruling but presents no argument regarding why the lower court erred in rendering its ruling. Since Defendant has not presented any argument concerning why the lower court erred, he has waived these claims. *Bryant*, 901 So. 2d at 827-28; *Duest*, 555 So. 2d at 852. The denial of post conviction relief should be affirmed.

Even if the issues were not waived, Defendant is entitled to no relief. Defendant's claim regarding Florida's death penalty statute was properly denied. This claim is procedurally barred as a claim that could have and should have been raised on direct appeal. *Byrd v. State*, 597 So. 2d 252 (Fla. 1992). Moreover, the claim is entirely devoid of merit, as it has been repeatedly rejected by this Court. *Johnson v. State*, 660 So. 2d 637, 647-48 (Fla. 1995); *Wuornos v. State*, 644 So. 2d 1012, 1020 & n.5 (Fla. 1994); *Fotopoulos v. State*, 608 So. 2d 784, 794 & n.7 (Fla. 1992); *Arango v. State*, 411 So. 2d 172, 174 (Fla.

1982).

As to Defendant's claim he is innocent of the death penalty, this claim was properly denied.

To prove a claim of actual innocence of the death penalty, a defendant must show "based on the evidence proffered plus all record evidence, a fair probability that a rational fact finder would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 346 (1992)(quoting *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991)). In applying this test to Florida's sentencing law, the Eleventh Circuit stated:

> a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body. That is, but for the constitutional error, the sentencing body could not have found any aggravating factors and thus petitioner was ineligible for the death penalty.

Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991)(en banc). This Court has also applied this test. *Griffin v. State*, 866 So. 2d 1, 17 (Fla. 2003).

Here, the trial court found six aggravating factors in support of Defendant's death sentence: under a sentence of imprisonment, prior violent felonies, during the course of a burglary, avoid arrest, pecuniary gain and CCP. Defendant did

not make any specific allegation regarding why any juror would have had a reasonable doubt about any of these aggravating circumstances. His claim was properly denied.

In order to allege a claim of innocence of the death penalty, Defendant had to present new evidence showing that a reasonable juror could not have found any aggravating circumstance in this matter. However, Defendant did not present any new evidence that negated any of the six aggravators found by the trial court.

Regarding Defendant's *Ring* claim, *Ring* is not retroactive. *See Johnson v. State*, 904 So. 2d 400, 402 (Fla. 2005)("We hold that . . . the United States Supreme Court's decision in *Ring v. Arizona* . . . does not apply retroactively in Florida.").[42] Defendant's *Ring* claim is without merit.

VI. THE LOWER COURT PROPERLY SUMMARILY DENIED THE REMAINDER OF MR. RODRIGUEZ'S CLAIMS.[43]

Defendant was denied access to public records.[44]

[42] As for Defendant's claim below that a unanimous jury vote is required, the jury recommended by a vote of 12-0 a sentence of death on all three murder counts. *Rodriguez*, 753 So. 2d at 35.
[43] To the extent Defendant has failed to present any argument in his brief he has waived these issues. *Bryant*, 901 So. 2d at 828 (citing *Duest v. Dugger*, 533 So. 2d. 849, 852 (Fla. 1990)).
[44] Defendant's argument he is unable to fully brief this issue due to missing transcripts is without merit. Appellee relies on its argument above in response to Defendant's transcript claim under Argument II.

Defendant asserted that he is entitled to post conviction relief because he was denied certain public records requests. However, this claim was summarily denied as facially insufficient. In his motion, Defendant did not allege what agencies have yet to provide public records or what public records remain outstanding. As such, his claim is facially insufficient and was properly denied. *Thompson v. State*, 759 So. 2d 650, 659 (Fla. 2000).

Notwithstanding, Defendant did not diligently seek the records. As outlined in the Statement of the Post Conviction Proceedings above, he was given repeated opportunities to refile his improperly filed requests and show the relevancy of the records he sought, but never said much more than this person's fingerprints had been checked against latents found at the scene. Defendant also did not even request additional public records for months and had the State set all of his public records hearings for him. Further, as the lower court found, the requests were overbroad. Defendant sought every record in existence regarding more than 250 people. The only link alleged between these people and this case is that the detectives had their prints checked against the latents and there was no match. He was told that he needed to explain why records regarding these people were relevant and he could not do so even though he

was given multiple opportunities. Defendant was not diligent in seeking public records, which waives the right to public records. *See Thompson v. State*, 759 So. 2d 650 (Fla. 2000).

Lastly, the lower court held numerous hearings on public records production. The issues were litigated. The lower court already ruled regarding Defendant's requests. Defendant did not present any grounds for revisiting those rulings. (PCR 5/633). Defendant is not entitled to any relief here.

Defendant had a right to be present at all critical stages of the trial. A claim that a defendant was denied his right to be present is a claim that could have and should have been raised on direct appeal. *Rutherford v. Moore*, 774 So. 2d 637, 647 (Fla. 2000); *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994). Claims that could have and should have been raised on direct appeal are procedurally barred in post conviction proceedings. *Francis*, 581 So. 2d 583. As such, this claim is procedurally barred and was properly denied.

Even if the claim was not procedurally barred, Defendant would still be entitled to no relief because the claim is refuted by the record and meritless. Defendant was present for his suppression hearing. (T. 22). He was present after lunch recess (T. 172). The other instances Defendant cited to where he was not present were times where only legal issues were

discussed and Defendant's right to be present was not implicated in these instances. *Rutherford v. Moore*, 774 So. 2d 637, 647 (Fla. 2000). The claim was properly denied.

Defendant was not competent to stand trial. Defendant asserted that he was entitled to post conviction relief because he was not competent to stand trial. He also asserted that his counsel was ineffective for failing to request a competency hearing and that the trial court should have held a hearing *sua sponte*. However, these claims were properly denied as procedurally barred and without merit.

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

of the proceeding against him and could not assist his attorney. *Dusky v. United States*, 362 U.S. 402 (1960). In considering such a claim, the court is not limited to record evidence. However, a prior determination of competency is a finding of fact. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990)("A state court's determination on the merits of a factual issue are entitled to a presumption of correctness on federal habeas corpus review. . . . We have held that a state court's conclusion regarding a defendant's competency is entitled to such a presumption."); *Maggio v. Fulford*, 462 U.S. 111, 117 (1983)(same). As such, to state such a claim sufficiently, a defendant must allege "'clear and convincing evidence [raising] a substantial doubt' as to his or her competency to stand trial." *James v. Singletary*, 957 F.2d 1562, 1572 (11th Cir. 1992). In determining whether the evidence is sufficient, it must be remembered that "neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995).

To allege a claim of ineffective assistance of counsel regarding a claim of incompetency, a defendant must allege specific factual deficiencies of counsel's performance. *Strickland.* Because a finding of incompetency will result in the

trial not being held until the defendant is restored to competency, the defendant must allege and prove that there is a reasonable probability that the trial court would have found the defendant incompetent but for counsel's alleged deficiency. *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989).

With regard to the procedural incompetence claim, this claim is procedurally barred. Defendant did not request a competency hearing at the time of trial. He did not assert that the trial court had erred in failing to have him evaluated for competency *sua sponte* on appeal. As such, this issue is procedurally barred. *Medina*, 59 F.3d at 1111. Even if the claim was not procedurally barred, Defendant would still be entitled to no relief. The record does not reflect that the facts known to the trial court would have caused it to have a bona fide doubt regarding Defendant's competence. At the time of trial, the trial court knew that Defendant had previously been found to be competent to proceed. (R. 350). It had appointed defense experts to evaluate Defendant and no motion regarding competence was filed after these evaluation. (R. 36, 54, 492). While Defendant asserted that the trial court should have realized Defendant was incompetent, this assertion is not in accordance with the record.

Instead, the record reflects that the trial court observed Defendant conversing with his attorneys. (T. 1660). The record also shows that Defendant responded in an appropriate and coherent fashion when the trial court addressed him. (T. 2965, 3209-3211, 3223, 3225-3227, 3233-3234, 3369-3371, 3453-3455, 3516-3523, 3731-3732, 3805-3815, 3959-3961, 3972-3979, 4078-4095, 4186-4194).

Defendant was able to name mental health experts whom he had seen in the past, where he had seen them and what they had done for him. (T. 3976-3977). Defendant accurately asserted that the State was claiming that he had been malingering to avoid responsibility for his criminal acts.[45] (T. 3977-3979).

[45] Defendant's statements also indicate a full awareness of what was happening at trial. He was able to remember the suppression hearing testimony at the time of closing argument and complain about his counsel's failure to make an argument based on it. (T. 3369-3371). He recognized that his attorneys had not mentioned a particular inconsistency in Luis's statements in closing. (T. 3453-3455). He accurately perceived that some of the jurors were having difficulty staying awake during the penalty phase and the actions of other jurors to keep everyone attentive. (T. 3805-09). He accurately recalled a juror's voir dire answers two months later during the penalty phase. (T. 3809-3812). He recognized that one juror's husband had been attending trial on a regular basis. (T. 4186-88). He understood the State's rebuttal to his penalty phase evidence. (T. 3977-79). He complained about the State's ability to present rebuttal evidence at the penalty phase. (R. 1225). As the record shows that Defendant did accurately perceive what was happening at trial, there is no reason for the trial court to have believed that he did not.

As can be seen from the foregoing, the record does not reveal that the trial court had any reason to have a bona fide doubt about Defendant's competence, and the claim that it should have ordered a competency hearing is without merit. *Pate*. The claim should be denied.

With regard to the substantive incompetence claim, the record refutes this claim and it was properly denied. Defendant's assertion of incompetence is based on the allegation that he was hallucinating and did not perceive what was occurring at trial. However, as outlined above, the record affirmatively demonstrates that Defendant did accurately perceive what was occurring at trial. Given that the record reflects Defendant did accurately perceive what was happening at trial, Defendant's assertion to the contrary does not present clear and convincing evidence that there was a substantial doubt about his competence. *Medina*.

With regard to the claim that counsel was ineffective for failing to claim that Defendant was incompetent, the claim was properly denied. As argued, the record shows that Defendant did accurately perceive what was happening at trial. Under these circumstances, there is no reasonable probability that Defendant would have been found incompetent had counsel raised the issue. *Futch*. The judgment of the lower court should be affirmed.

Racial discrimination in the imposition of the death penalty.

Claims that statistical studies show that race was a factor in seeking the death penalty are claims that could have and should have been raised on direct appeal. *See Foster v. State*, 614 So. 2d 455, 463-64 (Fla. 1992). Claims that could have and should have been raised on direct appeal are procedurally barred in post conviction proceedings. *Francis*, 581 So. 2d 583. As such, this claim was properly denied as procedurally barred.

Moreover, the claim is facially insufficient. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the United States Supreme Court considered a claim that imposition of the death penalty was unconstitutional because of the Baldus study, on which Defendant relies. The Court rejected the claim. The Court held that to prove a claim that a sentence was invalid based on racial discrimination, a defendant must show "that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 293. This Court has repeatedly relied upon *McCleskey* to reject claims of racial bias in imposition of the death penalty. *See*, *e.g.*, *Robinson v. State*, 773 So. 2d 1, 5-6 (Fla. 2000); *Foster v. State*, 614 So. 2d 455, 463-64 (Fla. 1992); *McCrae v. State*, 510 So. 2d 874, 879 (Fla. 1987).

Defendant proffered no evidence that the decisionmakers in his case acted with discriminatory intent. Instead, he relies on

the Baldus study and similar studies regarding the entire state. However, these studies are insufficient to raise this claim under *McCleskey*. The claim was properly denied.

Defendant is insane to be executed. This claim cannot be raised until an execution is imminent. *See Herrera v. Collins*, 506 U.S. 390, 405-06 (1993). Here, Defendant's execution is not imminent; no warrant had been issued for his execution, and no date has been set. As such, this claim was properly denied as not ripe for adjudication.

Defendant is entitled to a new trial due to cumulative error.

This claim was properly summarily denied, where, as here, the individual errors alleged are either procedurally barred or without merit. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999).

Lethal Injection. Defendant states he is preserving his right to bring a challenge to lethal injection under the Eighth Amendment. This Court has considered this claim and rejected same. *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's denial of Defendant's motion for post conviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Roseanne Eckert, Assistant Capital Collateral Regional Counsel, Office of the Capital Collateral Regional Counsel – Southern Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301-1162; the Honorable Victoria Sigler, Circuit Judge, Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130; and Christine Zahralban, Assistant State Attorney, E.R. Graham Building, 5th Floor, South Wing, 1350 Northwest 12th Avenue, Miami, Florida 33136-2111, on this ___ day of October, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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