IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2259 & SC06-2305

ANGEL NIEVES DIAZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

AMENDED BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On January 25, 1984, Defendant was charged by indictment with one count of first degree murder, five counts of armed robbery, six counts of armed kidnapping, one count of attempted armed kidnapping, one count of attempted armed robbery and one count of possession of a weapon during a criminal episode. (DAR. 1-8a)[1] Defendant was tried between December 19, 1985, and December 21, 1985. He was found guilty of all of the charges except for one count of armed robbery. (DAR. 252-261) Defendant was adjudicated in accordance with these findings and after a penalty phase proceeding was sentenced to death for the murder. (DAR. 263-65, 319-30)

The historical facts are:

> One of three Spanish-speaking men shot and killed the bar manager during the December 29, 1979, holdup of a Miami bar. No one witnessed the shooting. The majority of the patrons and employees had been forcibly confined to a restroom. A dancer hiding under the bar did not see the triggerman. Angel Diaz was charged with the crimes and convicted of first-degree murder, four counts of kidnapping, two counts of armed robbery, one count of attempted robbery, and one count of possessing a firearm during the commission of a felony. Diaz conducted his own defense with standby counsel from the opening statements through conviction. He was represented by counsel during jury selection and the sentencing phase. The trial court

[1] The symbol "DAR." will refer to the record on direct appeal. The symbols "PCR." and "PCR-SR." will refer to the record and supplemental record from the initial post conviction appeal, respectively. The symbol "PCR2." will refer to the record in the present appeal.

> sentenced Diaz to a total of 834 years of imprisonment and imposed the jury's recommended sentence of death.
>
> * * *
>
> Candice Braun testified that on the night of December 29, 1979, Diaz returned to their home and told her that Angel Toro shot a man during the robbery. Gajus, however, who occupied the neighboring cell during Diaz's pre-trial incarceration, provided evidence that Diaz shot the victim. He testified as follows:
>
> > [Diaz] indicated that he shot the man.
> >
> > Q. Where did he indicate he shot the man?
> >
> > A. In the chest.
> >
> > Q. Did he ever come out and say to you in the words, "I shot the man in the chest"?
> >
> > A. No, he did not.
> >
> > Q. You were inferring that from his indications?
> >
> > A. Yes.

Diaz v. State, 513 So. 2d 1045 (Fla. 1987)(“Diaz I”).

This Court affirmed Defendant’s convictions and sentences on direct appeal. *Diaz v. State*, 513 So. 2d 1045 (Fla. 1987), *cert. denied*, 484 U.S. 1079 (1988). On August 29, 1989, the Governor signed Defendant’s first death warrant, scheduling Defendant’s execution for October 29, 1989. Defendant then sought post conviction relief in state and federal court, to no avail. *Diaz v. Sec’y for the Dept. of Corrections*, 402 F.3d 1136 (11th Cir.), *cert. denied*, 126 S. Ct. 803 (2005); *Diaz v. Crosby*, 869 So. 2d 538 (Fla. 2003), *cert. denied*, 543 U.S. 854

(2004); *Diaz v. Moore*, 797 So. 2d 585 (Fla. 2001); *Diaz v. Dugger*, 719 So. 2d 865 (Fla. 1998), *cert denied*, 526 U.S. 1100 (1999).

On September 25, 2006, Defendant filed a successive motion for post conviction relief in the lower court. (PCR2. 38-54) In this motion, Defendant asserted that Florida's statutes regarding lethal injection are unconstitutional because the authority to develop the procedure to carry out a lethal injection is delegated to the Department of Corrections without requiring compliance with the Administrative Procedures Act and that lethal injection is unconstitutional because it is cruel and unusual. *Id.* Defendant did not clearly indicate whether he was claiming that the motion was based on newly discovered evidence or a fundamental change of constitutional law that had been made retroactive. *Id.* However, Defendant did cite to a research letter regarding lethal injection published in the Lancet in April 2005, the United States Supreme Court's decision in *Hill v. McDonough*, 126 S. Ct. 2096 (2006), and litigation occurring in federal district courts regarding lethal injection. *Id.*

On October 5, 2006, the State filed a response to the motion. (PCR2. 288-303) In its response, the State asserted that the motion was insufficient in that it did not allege a basis

for the filing of an untimely, successive motion for post conviction relief and did not provide the required information regarding witnesses and documentary evidence. *Id.* The State also argued that the motion was untimely because the *Hill* decision and federal district court litigation were neither newly discovered evidence or fundamental changes of constitutional law that applied retroactively and the Lancet article had been published more than a year before the motion was filed and this Court had already determined that it was too speculative to constitute newly discovered evidence. *Id.* The State also asserted that the claims were meritless as they had previously been raised and rejected by this Court. *Id.*

On October 10, 2006, the lower court set this matter for hearing on November 1, 2006. (PCR3. 193)[2] When the parties appeared at the November 1, 2006 hearing, Defendant filed requests for additional public records pursuant to Fla. R. Crim. P. 3.852(i), directed to the Office of the Attorney General, the Governor, the Florida Department of Corrections, the Medical Examiner for the Eighth District and Florida State Prison. (PCR2. 787-92, PCR3. 194-228) All of these requests were dated October 31, 2006. *Id.* Defendant also filed a copy of the State's response to the All Writs Petition in *Rutherford v. McDonough*,

[2] The symbol "PCR3." will refer to the documents contained in the record on appeal received today.

SC06-2023, a copy of a newspaper article regarding a decision by the Governor of South Dakota to postpone an execution and a copy of the transcript of an evidentiary hearing conducted in *Morales v. Hickman*, No. C06-219-F (N.D. Cal). (PCR2. 305-786)

Defendant then moved to amend his motion orally to include a claim that Florida had allegedly changed its lethal injection protocol. (PCR2. 831) The State argued that oral amendments were contrary to Fla. R. Crim. P. 3.851(f)(4), and that this Court had already rejected a claim based on the allegedly new protocols. (PCR2. 831) Defendant acknowledged that he had not complied with Fla. R. Crim. P. 3.851(f)(4) but insisted that he was incapable of proceeding without the amendment and requested that the proceeding be reset so that he could comply with the Rule. (PCR2. 832) Because this Court had already rejected the claim, the lower court decided to allow Defendant to argue regarding the alleged change in protocol. (PCR2. 833)

The State also argued that the lower court should not order compliance with the public records requests because this Court had already determined that the requests should be denied. (PCR2. 833-34) Defendant argued that this Court's repeated rejection of the lethal injection claims did not preclude an evidentiary hearing and that his case was different because he was not under a warrant. (PCR2. 833-34) The lower court decided

it would give the agencies 15 days to file responses concerning whether the requests should be granted and would hold a further hearing on the issue on November 29, 2006. (PCR2. 836-37)

The lower court then decided that it would require Defendant to file a formal amended motion but would consider argument on the initial motion. (PCR2. 839-40) Defendant then argued that because sodium pentothal was a short acting anesthetic and Defendant would subsequently be given a paralytic, it was possible he might regain consciousness during the course of the execution and feel the pain of being given potassium but be unable to communicate that pain. (PCR2. 840-44) He acknowledged that a full evidentiary hearing had been held in *Sims*, but claimed that new evidence might be available from looking at data allegedly collected during prior executions and that the Lancet article evidenced that there might be a problem that had not been detected because the inmate's level of consciousness was not being sufficiently monitored. (PCR2. 844-45)

When the lower court inquired if Defendant would believe the protocol was adequate if it called for 4 grams of sodium pentothal, Defendant responded that he could not ethically recommend an acceptable protocol. (PCR2. 845) Defendant then

suggested that the problem was the use of sodium pentothal at all and not the amount. (PCR2. 847)

The State then responded that Defendant was arguing the same issue that was presented to the courts in *Sims* and that his new claim was not supported by either newly discovered evidence that could not have been discovered until less than a year before the motion was filed or a fundamental change in constitutional law that applied retroactively. (PCR2. 848-49) The State also pointed out that this Court had already rejected the claim based on the Lancet article and separation of powers argument about the manner in which the protocols were adopted. (PCR2. 849)

Defendant replied that he was not basing his claim on a fundamental change of constitutional law but was only asserting that the claim was based on newly discovered evidence. (PCR2. 849) He asserted that the new evidence was "continuing to come out." (PCR2. 849-50) He stated that it consisted of the Weisman letter and information from lethal injection litigation in other jurisdictions. (PCR2. 850) The State asserted that litigation in other jurisdictions was not newly discovered evidence and that the Weisman letter was merely speculation about why the speculation in the Lancet article might be true based on a 1950

study. (PCR2. 851) As such, it was not newly discovered evidence either. (PCR2. 851-52)

Defendant insisted that the lower court was not bound by this Court's prior rejections of his claims because this Court had not considered the Weisman letter, this Court also considered the effect of the sodium pentothal and his case was not under warrant. (PCR2. 852) The State responded that whether the cases were decided under warrant was irrelevant. (PCR2. 852)

On November 2, 2006, the lower court entered an order requesting the agencies upon which Defendant had served public records requests to file responses regarding the propriety of ordering them to comply with the requests by November 16, 2006, and setting another hearing for November 29, 2006. (PCR2. 793-94) It entered a second order reserving ruling on Defendant's motion and ordering that he file any amendment within 7 days of the order. (PCR2. 795-96)

On November 9, 2006, Defendant filed an amendment to his motion for post conviction relief. (PCR3. 229-46) The amendment continued to assert the same argument previously presented and included allegations that the Department of Corrections had changed the lethal injection protocol in August 2006, and that he had learned of the alleged change when the State filed the protocol as part of the *Rutherford* litigation. *Id.*

On November 14, 2006, a death warrant was issued, scheduling Defendant's execution for December 13, 2006. (PCR2. 1548) On November 15, 2006, this Court entered an order requiring that all matters pending in the lower court be resolved by November 22, 2006. *Id.*

On November 15, 2006, the State filed a response to the amended motion, asserting that there was no change in the lethal injection protocol and that the claim remained without merit, as this Court had already rejected claims that the alleged change in protocol warranted an evidentiary hearing. (PCR2. 798-805) The agencies also filed objections to being required to respond to the public records requests because they were untimely, overly broad and were not calculated to lead to discovery of a colorable claim for post conviction relief. (PCR2. 806-26, PCR3. 247-56)

On November 16, 2006, the lower court entered an order setting the matter for hearing for November 17, 2006 at 10:00 a.m. (PCR2. 1439) The order also required that Defendant file any emergency pleadings by November 16, 2006 at 4:00 p.m. and stated that argument on any such matters would be heard at the November 17, 2006 hearing. *Id.*

Pursuant to that order, Defendant filed a motion for stay of execution and a motion for leave to amend his amended motion

for post conviction relief. (PCR2. 856-66, 1356-62) The proposed amendment attached to the motion for leave to amend sought to add two new claims: 1) the ABA report on capital punishment in Florida showed that the death penalty was unconstitutional and 2) Defendant was exempt from execution because he was allegedly mentally ill. (PCR2. 1356-62) The motion for leave to amend, acknowledged that Fla. R. Crim. P. 3.851(f)(4) required that a defendant show good cause to be entitled to amend. (PCR2. 856-62) However, the motion only argued that leave to amend should be liberally granted and that the ABA report was released on September 17, 2006, before Defendant filed the initial version of his motion. *Id.*

On the morning of November 17, 2006, the State served responses to the motion to stay, the motion for leave to amend and the amendment to the amended motion. (PCR2. 1363-71, 1377-83) The State asserted that there was no good cause for leave to amend, as the bases of Defendant's amended motion were available when he filed his initial motion and when he last amended his motion. (PCR2. 1380-83) The State also asserted that the claims were without merit, as this Court had already rejected them and the "mental illnesses" Defendant asserted were personality disorders, which are not legally mental illnesses. (PCR2. 1363-71)

At the hearing on November 17, 2006, Defendant attempted to file an addendum to his motion for post conviction relief to provide witness information regarding his lethal injection claim, which he asserted he had not previously provided because the requirements of Fla. R. Crim. P. 3.851(e)(2)(C), allegedly did not apply to newly discovered scientific evidence. (PCR2. 1372-76, 1443) Defendant also attempted to file public records requests on the Office Of The Attorney General, the Office Of The State Attorney For The Eleventh Judicial Circuit, the Florida Department Of Law Enforcement, the Miami-Dade Police Department, the Dade County Medical Examiner's Office, the Florida Department Of Health, the Judicial Qualifications Commission, the Miami-Dade Department Of Corrections And Rehabilitative Services, the Florida Department Of Corrections, the Florida Department Of State, Division Of Elections, and the Office Of Executive Clemency. (PCR2. 1384-1438, 1443) The requests to the State Attorney, the Florida Department of Corrections, the Florida Department of Health, the Dade County Medical Examiner's Office, the Miami-Dade County Police Department, the Florida Department of Law Enforcement, the Miami-Dade County Department of Corrections, and the Office of Executive Clemency[3] stated that they are being made pursuant to

[3] In support of the request to the Office of Executive Clemency,

Article I, Section 24 of the Florida Constitution, Fla. R. Crim. P. 3.852(h)(3), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickler v. Greene*, 527 U.S. 263 (1999). (PCR2. 1386-91, 1396-98, 1411-38) None of the requests purportedly made pursuant to Fla. R. Crim. P. 3.852(h)(3) alleged, much less demonstrated, that the agencies had been the subject of a prior public records request. *Id.* The requests to the Office of the Attorney General, the Judicial Qualifications Commission, and the Florida Department of State, Division of Elections stated that they are being made pursuant to Article I, Section 24 of the Florida Constitution, Fla. R. Crim. P. 3.852(i), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickler v. Greene*, 527 U.S. 263 (1999). (PCR2. 1392-95, 1399-1410) Each of the requests sought any and all documents in the custody of the particular agency regarding Defendant and/or other trial participants. (PCR2. 1386-1438)

The State objected to the belated attempt to file these documents, as the Court had entered an order setting a filing deadline for Defendant of 4:00 p.m. the day before the hearing. (PCR2. 1443) When the trial court inquired why it should not find the documents untimely, Defendant asserted that the public records requests were timely because Fla. R. Crim. P. 3.852(h)(3) gave him 10 days to make the requests and this

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Defendant also cites to *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). (PCR2. 1429-31)

Court's order requiring that all matters be resolved by November 22, 2006, applied only to those matters that were already pending at the time the order issued and that he was free to file whatever he wanted thereafter without being governed by this Court's order. (PCR2. 1444) The State pointed out that Fla. R. Crim. P. 3.851(h) allowed a trial court to accelerate all time periods under a warrant and that the lower court's order had done so. (PCR2. 1445-46) It further pointed out that the requests were improperly overbroad even if they were timely. (PCR2. 1445) The lower court took the matter under advisement. (PCR2. 1445)

With regard to the October 31, 2006 public records request, the State asserted that the requests were overly broad, that Defendant had some of the documents he was requesting, that the requests were untimely and that the request would not lead to discovery of evidence for a colorable claim from post conviction relief. (PCR2. 1447) Defendant insisted that the requests were not for documents he already had, were timely made because he could not have filed a public records request without a motion for post conviction relief pending, were not overly broad and were relevant to his lethal injection claim. (PCR2. 1447-49, 1460-63) The State responded that a motion for post conviction relief did not have to be pending. (PCR2. 1460)

Defendant also argued that the protocol had changed because 5 grams of sodium pentothal was not the same as 2 syringes containing no less than 2 grams. (PCR2. 1449) He further asserted that the evidence presented in California showed that there was still a risk that Defendant might not be unconscious even with 5 grams but that the paralytic masked the potential suffering of the inmate. (PCR2. 1449) He insisted that monitoring was necessary for the protocol to be constitutional. (PCR2. 1449-50) The State responded that Florida's protocol had been repeatedly upheld, that the protocol had not changed and that the claim regarding the allegedly new protocol had been rejected. (PCR2. 1450-51) Defendant insisted that his claim relied upon new evidence that had not been presented when the claim was previously rejected. (PCR2. 1451)

When the lower court asked Defendant to articulate exactly what evidence was new, Defendant pointed to the American Veterinarian Medical Association report, information from the Board of Anesthesiology, the testimony presented at a California lethal injection hearing and the Weisman letter. (PCR2. 1451-57, 1464) Defendant also asserted he was sure that evidence to support his claim would be found in the public records he requested if they were produced. (PCR2. 1459-60) The State responded that the reports had been presented and that the

testimony from California was not newly discovered evidence. (PCR2. 1452-58, 1464-65) The State asserted that the Weisman letter was merely speculation concerning why the speculative results in the Lancet article might occur based on 1950's data. (PCR2. 1465-66) As such, it was not newly discovered evidence either. (PCR2. 1466)

On the motion for leave to amend, Defendant asserted that the claims were based on the ABA report from September 17, 2006 and an ABA resolution from August 2006. (PCR2. 1467) He asserted that he should be given leave to amend because he was filing the amendment within one year of the issuance of the report and resolution. (PCR2. 1467-68) The State responded that motions were supposed to be fully pled when filed and that there was no good cause for leave to amend because the report and resolution existed before Defendant initially filed his successive motion for post conviction relief. (PCR2. 1468) The State further noted that claims had already been rejected by this Court and should be summarily denied even if leave to amend was granted. (PCR2. 1468) Defendant insisted that he did not have to assert all available claims when he filed his motion and could instead wait to file the claims within a year of when they could have been discovered. (PCR2. 1468-69) He insisted that this was so because

he needed time to evaluate the merits of his claims after the report and resolution were released. *Id.*

Defendant further insisted that his case was distinguishable from the cases in which the claims had previously been rejected because he had related the ABA report to his case. (PCR2. 1470) The State pointed out that the matters that were alleged to show that the ABA report applied to Defendant were claims that had previously been raised and rejected. (PCR2. 1471) During a discussion of the fact that the matters Defendant asserted as showing the ABA report applied to him had been rejected, Defendant insisted that the determination of the merits of his claims did not affect his assertion that the mere fact that he raised the claim showed the system was broken. (PCR2. 1471-84)

On the motion to stay, the State asserted that since there were no meritorious claims, there was no reason for a stay. (PCR2. 1474-75) Defendant insisted that he had made sufficient allegations for an evidentiary hearing and that a stay should be issued. (PCR2. 1475)

On November 20, 2006, Defendant moved to compel the Office of the Attorney General and the Office of the State Attorney to provide him with a copy of a motion for post conviction relief filed by Angel Toro, his codefendant. (PCR2. 1491-93) In the

motion, Defendant admitted he had been aware of the existence of the motion and had been attempting to obtain a copy from the clerk's office since March 2006. *Id.* The State responded to the motion to compel, asserting that Defendant's motion had no basis in law and was late. (PCR2. 1536-40) The State also pointed out that Toro's motion did not concern any of the participants in Defendant's trial. *Id.* The agencies also filed objections to the additional public records requests, asserting that they were overly broad and nothing more than fishing expeditions. (PCR2. 1541-47)

On November 21, 2006, the lower court again conducted a hearing on this matter. (PCR2. 1494-1518) At the hearing, Defendant asserted that he moved to compel the Office of the Attorney General and the Office of the State Attorney to provide him a copy of Toro's post conviction motion because he had attempted to obtain a copy of the motion from the clerk's office on several occasions but was told the file was unavailable, at times because it was in the presiding judge's chambers. (PCR2. 1495-97) He claimed that after the warrant was signed, he sought a copy of the motion from a Boston attorney connected with Toro and was told that he needed to contact Toro's Florida attorney. (PCR2. 1497) Toro's Florida attorney claimed to be unable to locate a copy of the motion because she had just begun

representing Toro. (PCR2. 1497-98) The State responded that since Defendant was aware of the proceeding since March, he should have brought his inability to locate the file to the lower court's attention before November 20, 2006. (PCR2. 1500) The lower court agreed with the State that Defendant should have sought the motion sooner but permitted Defendant to review the court file, in which he found Toro's post conviction pleadings. (PCR2. 1500-02)

The lower court then considered the objections to the November 17, 2006 public records requests. (PCR2. 1503) The State argued that all of the public records requests were untimely, as filed after the pleading deadline, and improper fishing expeditions. (PCR2. 1503-06) Defendant asserts that the State should not be permitted to represent the agencies. (PCR2. 1506-09) The lower court decided that the State was permitted to represent the agencies and that the requests were untimely. (PCR2. 1509-10) The lower court then announced that it was denying leave to amend and the motion for post conviction relief because they too were untimely. (PCR2. 1513) The lower court entered written orders denying all relief. (PCR2. 1519-35) Defendant filed his notice of appeal from the denial of these pleading on November 22, 2006, despite the fact that it was not

due under this Court's scheduling order until November 27, 2006. (PCR2. 1548-50)

On November 27, 2006, Defendant filed a third motion for post conviction relief, asserting that he had newly discovered evidence in the form of an affidavit from Gajus. (PCR2. 1555-82) According to the affidavit (which is dated November 19, 2006), Defendant never told Gajus that he was a shooter, Defendant spoke English poorly and Gajus had a plea agreement. (PCR2. 1584-85) Defendant also moved this Court to relinquish jurisdiction so that the lower court could consider this motion.

The State responded to the motion to relinquish jurisdiction, asserting that there was no reason to relinquish jurisdiction as the record already conclusively refuted this claim. On November 29, 2006, this Court relinquished jurisdiction to the lower court. (PCR3. 88-89)

The State immediately filed a response to the third motion, asserting that it did not meet the pleading requirements of Fla. R. Crim. P. 3.851(e)(2)(C), that the record showed that Defendant had been making the same assertions about Gajus as a part of a *Brady* claim since the initial motion for post conviction relief filed in 1989, and that the claim was without merit because Gajus' statements would not create a probability of a different outcome. (PCR3. 52-73)

After the State served its response, Defendant filed a renewed motion for stay and two new requests for public records directed to the Miami-Dade Police Department and the Office of the State Attorney. (PCR3. 38-51) From both agencies, Defendant sought records regarding Gajus. (PCR3. 38-42, 47-51) Defendant also sought records regarding the prosecutor from the State Attorney. (PCR3. 47-51) The State filed a response, opposing the stay on the grounds the claim lacked merit. (PCR3. 80-82) The agencies objected to the public records requests on the grounds that they were overly broad and untimely. (PCR3. 74-79, 83-87)

On November 30, 2006, the lower court conducted a *Huff* hearing regarding this motion. (PCR3. 149-81) At the hearing, Defendant argued that his public records requests were not overly broad because they only asked for all records regarding one person, that a Miami Herald article about "secret dockets" indicated a need for additional documents and that there was no timeliness requirement because he had requested the records pursuant to Fla. R. Crim. P. 3.852(i), which allowed requests to be made at any time. (PCR3. 151-53) The State responded that the State Attorney had provided access to its files (which would have included information about Gajus' connection with this case) in 1989, that Fla. R. Crim. P. 3.852(i) included a

requirement that the request be made in a timely and diligent fashion, that any request for "any and all" information was overly broad, and that this Court had indicated even before 3.852 was promulgated that defendants were not entitled to litigate public records issues in connection with a successive motion for post conviction relief when those issues should have been litigated in connection with an initial motion for post conviction relief. (PCR3. 152-53)

With regard to this third motion for post conviction relief, Defendant argued that while he had previously raised claims concerning Gajus' testimony, his allegations were conclusory and insufficient because he did not have an affidavit from Gajus, and he did not have the information that Gajus was presently providing. (PCR3. 156-63) He contended that his prior allegations about Gajus did not show that Gajus had provided new information that contradicted his trial testimony. *Id.* Defendant asserted that this allegedly new information would have probably produced an acquittal at trial or a lesser sentence because this Court had affirmed the case on direct appeal because it assumed Defendant was the shooter. *Id.*

The State responded that this Court's direct appeal opinion showed that it had assumed Defendant was not the shooter in affirming his convictions and sentence. (PCR3. 163-64) It

pointed out that defense counsel had made the same assertions regarding the terms of a plea Gajus was receiving and an expectation of a benefit before trial. It argued that the lower court and this Court had been required to accept the allegations in Defendant's initial motion for post conviction relief as true in denying the claim in the original motion for post conviction relief even without an affidavit and that the allegations in that motion were broader that the present claim. As such, the prior presentation of this claim refuted any notion that the claim was based on newly discovered evidence. It contended that since the lower court and this Court had found that the claim did not satisfy the lower standard of prejudice applicable to a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), when Defendant presented the Gajus claim in the initial motion for post conviction relief, Defendant could not show that it met the higher standard of prejudice applicable to claims of newly discovered evidence. (PCR3. 164-67)

On December 1, 2006, the lower court issued written orders summarily denying the post conviction motion, denying the renewed motion for stay and refusing to order compliance with the public records requests. (PCR3. 91-100) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied Defendant's amended second

motion for post conviction relief because his motion was untimely and without merit. The lower court also did not abuse its discretion in denying leave to amend, as the bases of all of Defendant's claims were available before he ever filed the original version of his successive motion for post conviction relief. The claim regarding the Gajus affidavit is without merit. The lower court also did not abuse its discretion in refusing to order compliance with any of Defendant's public records requests. The requests were untimely and overly broad.

ARGUMENT

I. THE LETHAL INJECTION CLAIM WAS PROPERLY DENIED.

Defendant first asserts that the lower court erred in summarily denying his claim that lethal injection constitutes cruel and unusual punishment and that the manner in which the Department of Corrections is permitted to adopt a protocol for lethal injection violates separation of powers. However, the lower court properly rejected these claims.

To the extent Defendant asserts that this Court should reverse the summary denial of this claim because the lower court did not attach records to its order denying the claim, Defendant is entitled to no relief. In *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993), this Court stated that a trial court's order summarily denying a claim would be deemed proper if the trial

court either attached portions of the record or explained its rationale for denying a claim. Based on this holding, this Court had held that a summary denial can be upheld even where a trial court did not attach portions of the record if the lower court has "clearly spelled out" the reason for the denial in its order. *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000). Here, the lower court's order denying this claim clearly spelled out its reasons for denying the claim. In its order denying the motion, the lower court explained that it was denying the claim because this Court had already affirmed the summary denial of the claim on several occasions. As the lower court explained its rationale for denying the claim, this Court should reject Defendant's assertion that the order is defective because it did not attach records.

In *Sims v. State*, 754 So. 2d 657 (Fla. 2000), this Court considered the constitutionality of lethal injection in Florida, after a full evidentiary hearing. This Court was presented with the arguments that allowing the Department of Corrections to adopt a lethal injection protocol violated separation of powers both because it was an improper delegation of legislative authority to the executive branch and because the Department was not required to comply with the Administrative Procedures Act, and that lethal injection was cruel and unusual punishment. *Id.*

at 754 So. 2d at 666 n.18, 665-68; *see also* Initial Brief of Appellant, *Sims v. State*, FSC Case No. SC00-295, at 82-85. This Court rejected these arguments. *Id.* at 665-70.

In *Rolling v. State*, 31 Fla. L. Weekly S667, S668 (Fla. Oct. 18, 2006), *Rutherford v. State*, 926 So. 2d 1100, 1113-14 (Fla. 2006), and *Hill v. State*, 921 So. 2d 579, 582-83 (Fla. 2006), this Court again considered claims that lethal injection in Florida was cruel and unusual and again rejected the claims. In those cases, all three defendants relied on the Lancet research letter, and Rutherford and Hill presented the veterinary euthanasia standards. Initial Brief of Appellant, *Hill v.* State, FSC Case No. SC06-2, at 18; Initial Brief of Appellant, *Rutherford v. State*, SC06-18, at 64. This Court determined that there was no reason to reconsider the determination that lethal injection was constitutional. *Rolling*, 31 Fla. L. Weekly at S668; *Rutherford*, 926 So. 2d at 1113-14; *Hill v. State*, 921 So. 2d at 582-83. In *Rutherford v. Crist*, 2006 Fla. Lexis 2375 (Fla. Oct. 17, 2006), and *Rolling v. McDonough*, 2006 Fla. Lexis 2573 (Fla. Oct. 19, 2006), this Court considered the assertion that an alleged change in Florida's lethal injection protocol should occasion new litigation about the constitutionality of lethal injection and this Court again determined that there was no reason for relitigation.

Here, Defendant has again presented the claim that lethal injection is unconstitutional. According to Defendant, the new evidence supporting this claim is the Lancet article, testimony presented at a lethal injection hearing in California, the AVMA euthanasia report and a letter to the editor of the Lancet written by Richard Weisman. However, as evidenced above, the Lancet article and AVMA report were before this Court when it previously rejected the lethal injection claim. Thus, the lower court properly summarily denied the claim pursuant to *Rolling*, *Rutherford* and *Hill*.

Moreover, Rutherford and Hill presented their claims within one year of the release of the Lancet article; Defendant did not. As such, the claim was barred. *Stewart v. State*, 495 So. 2d 164 (Fla. 1986); *Christopher v. State*, 489 So. 2d 22 (Fla. 1986); *Webber v. State*, 662 So. 2d 1287 (Fla. 5th DCA 1995). The summary denial was proper and should be affirmed.

Further, in *Glock v. Moore*, 776 So. 2d 243, 250 (Fla. 2001), this Court determined that the republication of existing information in a new form did not make the information newly discovered. Further, in *Coppola v. State*, 938 So. 2d 507 (Fla. 2006), the fact that litigation in another matter occurred and even resulted in a disposition that might be favorable to the defendant did not constitute newly discovered evidence. The

testimony presented in the California lethal injection hearing was merely the representation of evidence that had previously existed. The Weisman letter offered speculation that the reason why the data presented in the Lancet article might be true was that inmates were not ventilated during lethal injections and might be going into acidosis. Even that speculation was based on a study conducted in the 1950's. Thus, both the California testimony and the Weisman letter merely present the republication or presentation of old information. Thus, the lower court properly found that they were not new evidence under *Glock* and *Coppola*. The summary denial was proper and should be affirmed.

Additionally, the Weisman letter was speculation about the speculation in the Lancet article. This Court rejected the claim based on the Lancet article because it was too speculative. *Rolling*, 31 Fla. L. Weekly at S668; *Rutherford*, 926 So. 2d at 1113-14; *Hill v. State*, 921 So. 2d at 582-83. Speculation regarding a possible reason why the original speculation might exist does not make the original speculation any less speculative. Under these circumstances, the lower court properly summarily denied the claim pursuant to *Rolling*, *Rutherford* and

Hill. The claim should be denied.[4]

II. THE ABA REPORT CLAIM WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in rejecting his claim that the ABA report either constituted newly discovered evidence that capital punishment in Florida was unconstitutional or made it apparent on the face of the record that his sentence was illegal. However, the lower court did not abuse its discretion in denying leave to amend[5] and properly denied this claim.[6]

Pursuant to Fla. R. Crim. P. 3.851 (f)(4), leave to amend a motion for post conviction relief should only be granted for good cause shown. In *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002), this Court held that motions for post conviction relief should be fully pled when filed and that amendments

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[4] The Kentucky Supreme Court recently rejected the lethal injection claim. *Baze v. Rees*, 2006 Ky. Lexis 301 (Ky. Nov. 22, 2006).

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

[6] Again, Defendant's argument concerning the attachment of records is without merit. As stated previously, this Court has held that a lower court's order will be affirmed even if the lower court did not attach records. *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000); *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993). Here, the lower court explained in its order that it was denying leave to amend to present this claim. It also stated that it was denying the claim because this Court had already rejected the claim. Under these circumstances, the lower court's order was proper regardless of whether it attached records.

should only be allowed once a *Huff* hearing has been held if the claims the defendant sought to add could meet the requirements for a successive motion. In order to meet the requirements for a successive motion, the claims must be based on newly discovered evidence or a fundamental change of constitutional law that applies retroactively. Fla. R. Crim. P. 3.851(d). Moreover, claims that were available at the time of a prior motion cannot be asserted in a successive motion. *See Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994).

Here, Defendant admitted in his motion for leave to amend that the ABA report on which he based this claim was issued on September 17, 2006. Defendant filed his second motion for post conviction relief on September 25, 2006, but did not include any claims regarding the ABA report. When the lower court conducted a *Huff* hearing on this motion on November 1, 2006, Defendant moved for leave to amend to include a claim that Florida had allegedly changed its lethal injection protocol. However, he did not seek to add a claim based on the ABA report. After leave to amend was granted regarding the alleged change in the lethal injection protocol, Defendant filed his amended motion on November 9, 2006. It was not until November 16, 2006, that Defendant sought leave to amend to add a claim based on the ABA report. As can be plainly seen by the foregoing, the ABA claim

was available both before Defendant filed the initial version of his motion and his first amendment. As such, the lower court did not abuse its discretion in finding that the ABA report claim did not meet the standard for a successive motion under *Johnson* and did not abuse its discretion in finding no good cause for leave to amend to add this claim under *Vining* and Fla. R. Crim. P. 3.851(f)(4). The denial of leave to amend should be affirmed.

Even if the lower court had abused its discretion in denying leave to amend, the denial of the claim should still be affirmed. As the lower court properly acknowledged, this Court had already rejected the assertions that the ABA report was either newly discovered evidence or that it made it apparent on the face of the record that his sentence was illegal. *Rolling v. State*, 31 Fla. L. Weekly S667, S668-69 (Fla. Oct. 18, 2006); *Rutherford v. State*, 31 Fla. L. Weekly S647, S648 (Fla. 2006). In fact, this Court stated:

> We agree with the circuit court's conclusion that the ABA Report is not "newly discovered evidence." The ABA Report is a compilation of previously available information related to Florida's death penalty system and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches. See ABA Report at ii ("The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty" and the assessment team's findings "are intended to serve as the bases from which [the state] can launch [a] comprehensive self-examination[].").

Rutherford, 31 Fla. L. Weekly at S648. Moreover, this Court determined that the report did not show that Florida's capital punishment system was unconstitutional, on the face of the record or otherwise. *Id.* at S648. As such, this Court affirmed the dismissal of a motion under Fla. R. Crim. P. 3.800(a). *Id.* The claim was properly rejected, and the lower court affirmed.

III. THE MENTAL ILLNESS AS AN EXEMPTION OF EXECUTION CLAIM WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in summarily rejecting his claim that he was exempt from the death penalty because he was allegedly "mentally ill," because he suffers from personality disorders. Defendant asserts that being mentally ill is sufficiently similar to being mentally retarded or a juvenile to exempt him from execution. However, the lower court did not abuse its discretion in denying leave to amend to add this claim and properly summarily denied this claim. [7]

As previously argued, a trial court does not abuse its

[7] Again, Defendant's argument concerning the attachment of records is without merit. As stated previously, this Court has held that a lower court's order will be affirmed even if the lower court did not attach records. *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000); *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993). Here, the lower court explained in its order that it was denying leave to amend to present this claim. It also stated that it was denying the claim because this Court had already determined that personality disorders did not amount to mental diseases or defects. Under these circumstances, the lower court's order was proper regardless of whether it attached records.

discretion in denying leave to amend when the claim was available prior to the conducting of a *Huff* hearing on the motion to which the claim is sought to be added under *Johnson*, *Vining* and Fla. R. Crim. P. 3.851(f)(4). Here, the alleged bases on this claim were an August 2006 resolution by the ABA, the June 20, 2002 opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), the March 1, 2005 decision in *Roper v. Simmons*, 543 U.S. 551 (2005) and the opinions rendered by Defendant's experts in connection with his 1989 initial motion for post conviction relief, on which an evidentiary hearing was conducted on December 4-6, 1992. As can be clearly seen by these dates, the bases of this claim were available when Defendant filed the initial version of his second motion for post conviction relief on September 25, 2006, when the initial *Huff* hearing was held on November 1, 2006, and when Defendant filed his first amendment to his second motion for post conviction relief on November 9, 2006. Thus, under *Johnson*, *Vining* and Fla. R. Crim. P. 3.851(f)(4), the lower court did not abuse its discretion in finding no good cause why this claim was not asserted earlier. It should be affirmed.

Even if the lower court had abused its discretion in denying leave to amend, the denial of the claim should still be affirmed. In *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006),

this Court addressed and rejected claims that allegedly being mentally ill exempted a Defendant from execution under *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002). Instead, this Court has held that *Atkins* and *Roper* only applied to defendants who actually met Florida's definition of retardation or who are actually under 18 at the time they committed their crimes. *Id.* Here, Defendant acknowledges that he is not retarded and that he was 28 when the crime was committed. As such, the lower court properly summarily denied this claim under *Hill*. It should be affirmed.

Moreover, the denial of this claim is even more appropriate here. In claiming that he was mentally ill, Defendant relied upon the opinions of his post conviction experts that he suffers from a variety of personality disorders. However, as this Court observed in *Patton v. State*, 878 So. 2d 368, 375-76 (Fla. 2004), personality disorders are distinct from mental illnesses. Moreover, not only was Defendant raising his claim after the deadline this Court set for raising claims of retardation but he was also raising it more than a year after the United States Supreme Court issued *Roper*, a case about which the State did not contest retroactive application. *See Dixon v. State*, 730 So. 2d 265 (Fla. 1999)(claims based on retroactive changes of constitutional law must be filed within one year of the

retroactive change). As such, the lower court properly summarily denied this claim.

IV. THE CLAIM CONCERNING THE GAJUS AFFIDAVIT IS WITHOUT MERIT.

Defendant next asserts that he has newly discovered evidence that would probably cause an acquittal at retrial or resentencing.[8] The alleged "newly discovered evidence" consists of an affidavit from Ralph Gajus in which Gajus asserts that Defendant never admitted to being the shooter and instead made hand motions, that Defendant spoke English poorly and that Gajus had a plea agreement. However, this claim is without merit, as the record already conclusively shows that the evidence is not newly discovered or would have affected the outcome.

While Defendant asserts that he is entitled to relief based on newly discovered evidence, he is not. The record conclusively refutes the assertion that the contents of the affidavit are newly discovered. The affidavit asserts that Gajus is prepared to testify that Defendant never told him that he was the shooter, that Gajus does not believe Defendant spoke English

[8] On Friday at almost 6 p.m., Defendant faxed a letter indicating that he had new evidence that he wished to present in a motion for rehearing but never did so. To the extent Defendant attempts to rely on this "new evidence," it is not properly before this Court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003). Moreover, it would not be properly presented in a motion for rehearing and would need to be undiscoverable through an exercise of due diligence before the end of the *Huff* hearing. *Vining*, 827 So. 2d at 210-13.

well and that Gajus had a plea agreement. However, Gajus testified at trial Defendant never told him that he was the shooter and that he had entered a plea. (DAR. 1121-22, 1123) As evidenced by the pretrial proceeding, the facts that Gajus had entered a plea, was required to testify against Defendant in the escape case in exchange for a reduction in charges from first degree murder to second degree murder and a 20 year sentence and expected a benefit from the State were known before trial. (DAR. 725-26, 743-56) Moreover, in the motion for post conviction relief filed in 1989,[9] Defendant asserted that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that it had a plea agreement with Gajus that existed before Gajus was even placed in a cell near Defendant. (PCR. 117-23) As part of that claim, Defendant asserted that "Gagus had informed current counsel that [Defendant] never admitted complicity to him and that [Defendant's] English was very, very poor -- facts contravening what he said at trial." (PCR. 118) In his brief from the denial of this claim, Defendant asserted that "Gajus now says that that [sic] [Defendant] never admitted complicity to him and that [Defendant's] English was very, very poor -- Facts contravening what he said at trial." Initial

[9] This motion was signed by Billy Nolas.

Brief of Appellant, FSC Case No. SC81584, at 33-37.[10] These statements conclusively refute Defendant's assertion that the claim is newly discovered.

In *Johnson v. Singletary*, 647 So. 2d 106, 110 (Fla. 1994), the case upon which Defendant relied, this Court upheld the summary denial of a claim of newly discovered evidence where the record showed that the defendant had raised a claim based on the same allegedly newly discovered evidence in a clemency petition about 4 years before he raised the claim in his post conviction motion. Here, the record reflects that Defendant began claiming that Gajus had admitted that the testimony he provided at trial was false as early as 1989, 17 years ago. He was aware that Gajus had a plea agreement under which he would be sentenced to 20 years imprisonment before trial. Defendant has claimed for the last 17 years that this is not the full extent of the plea. The fact that Gajus has now signed an affidavit to support the allegations that Defendant has made for years does not change anything. *See Valle v. State*, 705 So. 2d 1331, 1333-34 (Fla. 1997)(defendant not required to supply affidavit to state facially sufficient claim). Under these circumstances, the evidence is not newly discovered. The claim is barred and provides no basis for relief.

[10] This statement was made in a brief that identifies Todd Scher as one of Defendant's attorneys.

Even if the statements in Gajus' affidavit could be considered newly discovered evidence, Defendant would still be entitled to no relief. As this Court recently stated in denying a newly discovered evidence claim in *Rutherford v. State*, 926 So. 2d 1100, 1107 (Fla. 2006):

> In *Jones v. State*, 591 So. 2d 911 (Fla. 1991), this Court set forth the standard that must be satisfied in order for a conviction to be set aside based on newly discovered evidence. First, the "asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" *Id.* at 916 (quoting *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)). Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Jones*, 591 So. 2d at 915. In determining whether the evidence compels a new trial under *Jones*, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id.* at 916. This determination includes
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> > whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether this evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.
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> *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (citations omitted).

This Court recently described this standard as a "stringent" standard. *Melton v. State*, 2006 Fla. Lexis 2804, *36-37 (Fla.

Nov. 30, 2006). Here, the claim of newly discovered evidence fails for the same reason this same claim failed under the lesser standard of materiality when it was raised as a *Brady* claim in Defendant's first round of post conviction litigation; the evidence would not affect the outcome of the trial.

In his motion, Defendant did not attempt to explain how the evidence would create a probability of an acquittal during the guilt phase. Instead, Defendant argued that it would show that he was entitled to a lesser sentence because he was not the shooter. However, the statements in the affidavits would neither result in a probability of an acquittal or a lesser sentence.

Gajus' testimony was largely cumulative to the testimony of the eyewitnesses presented at trial regarding the location of the assailants before the crime and their descriptions, the physical evidence of Defendant and Toro's fingerprints on objects found at the location the assailants had occupied before the crime, Toro's fingerprints on the cigarette machine used to barricade the victims in a rest room during the crime and Candice Braun's testimony that she heard Defendant and the other assailants arguing about the crime after it was over, that Defendant admitted committing the robbery and that Defendant possessed a wallet matching the description of the wallet taken from one of the victims during the trial. The only information

that Gajus added was that he had inferred that Defendant was the shooter from his actions. Despite being aware of conflicting testimony concerning the identity of the shooter and that Angel Toro (who evidence suggested might be the shooter) had received a plea, the trial court adjudicated Defendant guilty and sentenced him to death. This Court affirmed those decisions while assuming that the evidence did not show that Defendant was the shooter. *Diaz v. State*, 513 So. 2d 1048, 1049 (Fla. 1987). Under these circumstances, it cannot be said that there is a probability that Defendant would have been acquitted or sentenced to life had the information in the affidavit been presented. The claim should be rejected.

Because the claim has no merit in that it meets neither prong of *Jones*, there is no reason for this Court to conduct a cumulative error analysis. In *Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002), this Court reiterated that a defendant was not entitled to relief based on a cumulative error analysis where the individual claims were procedurally barred or lack merit. This Court further directed that the cumulative error analysis only applied where the present claim had merit. *Id.* Here, the "new" claim lacks merit. Moreover, the prior claims upon which Defendant relies have all been found to be procedurally barred

or without merit.[11] As such, Defendant is entitled to no relief based on cumulative error. The claim should be rejected.

V. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ORDER COMPLIANCE WITH DEFENDANT'S PUBLIC RECORDS REQUESTS.

Defendant finally asserts that the lower court abused its discretion in refusing to order compliance with his requests for public records regarding lethal injection, his belated requests for public records regarding his case and its participants, and his even more belated requests regarding Gajus and the prosecutors. However, the lower court did not abuse its discretion.[12]

With regard to the requests for information regarding lethal injection records, the lower court did not abuse its

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[11] As noted earlier, this Court rejected the claims regarding Defendant being the shooter and his sentence being disproportionate in light of Toro's plea on direct appeal, assuming that the evidence did not show that Defendant was the shooter. The claim regarding the alleged failure to disclose the prosecutor's memo has never been raised in state court as an *Brady* claim. Instead, Defendant raised it in his federal habeas petition in 1999, and it was found to be barred. *Diaz v. Sec'y for the Dept. of Corrections*, 402 F.3d 1136, 1147 (11th Cir. 2005). The claim of ineffective assistance of counsel for failing to investigate and present mitigation was rejected as meritless. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998); *see also Diaz*, 402 F.3d at 1147-48. Finally, while Defendant filed an affidavit from Gale Corfield with his 1989 motion for post conviction relief, he raised no claim about it. At this point, any claim his is attempting to assert based on this affidavit is barred. Fla. R. Crim. P. 3.851(d).

[12] This Court applies an abuse of discretion standard to lower court rulings on public records issues. *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006).

discretion. This Court has repeatedly held that trial courts have not abused their discretion in refusing to order further disclosure of records regarding lethal injection. *Rolling v. State*, 31 Fla. L. Weekly S667, S668 (Fla. Oct. 18, 2006)(rejecting request that serological samples be preserved for testing and for public records related to lethal injection because, *inter alia*, the records would not relate to a colorable claim since lethal injection is constitutional); *Rutherford v. State*, 926 So. 2d 1100, 1114 n.8, 1115-17 (Fla. 2006)(same); *Sims v. State*, 754 So. 2d 657, 665-68 (Fla. 2000)(finding disclosure of information about lethal injection sufficient and rejecting claim regarding constitutionality of lethal injection); *Bryant v. State*, 753 So. 2d 1244, 1250-53 (Fla. 2000). This Court has continued to so find, even in the face of defendants' claims that Florida allegedly changed its lethal injection protocol. *Rutherford v. Crist*, 2006 Fla. Lexis 2375 (Fla. Oct. 17, 2006); *see also Rolling v. McDonough*, 2006 Fla. Lexis 2573 (Fla. Oct. 19, 2006). Under these circumstances, the lower court did not abuse its discretion in following this Court's precedent. It should be affirmed.

This is particularly true when one considers that the requests were for any and all documents, "included but not limited to" those categories of records Defendant specified and

were served on the eve of the original setting of the *Huff* hearing in this matter and sought records that had been available for years. This Court has determined that requests that seek any and all records are overly broad. *Hill v. State*, 921 So. 2d 579, 584-85 (Fla. 2006)(rejecting request for all information on executions because, *inter alia*, the requests were overbroad); *Mills v. State*, 786 So. 2d 547, 551-53 (Fla. 2001). Further, while Defendant insisted that he could not request the records until he had a motion for post conviction pending, this Court has determined that requests for additional public records pursuant to Fla. R. Crim. P. 3.852(i) can be made "at any time if collateral counsel can establish that a diligent search of the records repository has been made and 'the additional public records are either relevant to the subject matter of the postconviction proceeding **or are reasonably calculated to lead to the discovery of admissible evidence**.'" *Tompkins v. State*, 872 So. 2d 230, 244 (Fla. 2003)(quoting *Sims v. State*, 753 So. 2d 66, 70-71 (Fla. 2000)). As such, it was not necessary for Defendant to wait until a motion for post conviction relief was pending to seek the records. Instead, Defendant could have sought the records at any time that he could have shown that the requests were calculated to lead to the discovery of evidence of a colorable post conviction relief.

Moreover, the propriety of seeking the records first is also demonstrated by the requirements of Fla. R. Crim. P. 3.851(e)(2)(C), and *Vining v. State*, 827 So. 2d 201, 211-12 (Fla. 2002). In *Vining*, this Court stated that it expected motions for post conviction relief to be fully pled when filed. Under Fla. R. Crim. P. 3.851(e)(2)(C), a defendant is supposed to provide witness information and attach documentary support to his successive motion for post conviction relief. Because of these requirements, Defendant should have sought the records he believes were necessary to plead his claim fully before he filed the claim and not have waited until the eve of the *Huff* hearing to do so. Thus, the lower court did not abuse its discretion in finding the requests overly broad and untimely. It should be affirmed.

With regard to the public records requests regarding his case and its participants, the lower court did not abuse its discretion in rejecting these requests. The lower court gave Defendant until November 16, 2006, to file any motions he wanted to present. Rather than file his public records requests within that time period, Defendant waited until the beginning of the November 17, 2006 hearing. While Defendant insists that the requests were timely filed because they were filed within 10 days of the signing of the warrant, he ignores that a trial

court has the authority to expedite proceedings pursuant to Fla. R. Crim. P. 3.851(h)(3). Given that this Court had ordered the lower court to complete all litigation before it by November 22, 2006, the lower court did not abuse its discretion in expediting the matter and refusing to consider matters that were not submitted in accordance with its scheduling order. It should be affirmed.

Even if the lower court should not have considered the fact that the requests violated the scheduling order, the lower court would still not have abused its discretion in determining that the agencies were not required to comply with the requests. In *Mills v. State*, 786 So. 2d 547, 551-52 (Fla. 2001), this Court determined that a trial court had not abused its discretion in sustaining objections to similar requests for additional public records:

> Mills argues the trial court erred in denying his requests for public records pursuant to Florida Rule of Criminal Procedure 3.852(h)(3). [FN2] On or about March 27, 2001, Mills filed demands for public records from a variety of state agencies pursuant to article I, section 24, Florida Constitution, Florida Rule of Criminal Procedure 3.852(h)(3) and (i), chapter 119, Florida Statutes (2000), *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and *Strickler v. Greene*, 527 U.S. 263, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999). [FN3] Mills supplemented these demands with a motion to compel filed on April 10, 2001. On April 12, 2001, the trial court held a hearing on Mills' motion to compel the production of public records for the purpose of resolving all pending public records requests and objections. On

April 18, 2001, the trial court denied Mills' motion for postconviction relief, including his public records claim. Relying on *Sims v. State*, 753 So. 2d 66 (Fla. 2000), the trial court found Mills' public records requests to be overly broad, of questionable relevance, and unlikely to lead to discoverable evidence. The trial court sustained objections to the production of public records and denied further disclosure of public records because Mills' demands "far exceed the limited purpose of subsection 3.853(h)(3)." Mills appeals the trial court's order denying relief.

This Court recently addressed similar public records claims in *Glock v. Moore*, 776 So. 2d 243 (Fla. 2001), and *Sims v. State*, 753 So. 2d 66 (Fla. 2000). In both cases, the defendant made broad public records requests after the death warrant was signed. Likewise, in both cases, this Court affirmed the trial court's denial of the defendant's motion to compel. In *Sims*, we stated:

> The language of section 119.19 and of rule 3.852 clearly provides for the production of public records after the governor has signed a death warrant. However, it is equally clear that this discovery tool is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief. To prevent such a fishing expedition, the statute and the rule provide for the production of public records from persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey. The use of the past tense and such words and phrases as "requested," "previously," "received," "produced," "previous request," and "produced previously" are not happenstance.
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> This language was intended to and does convey to the reader the fact that a public records request under this rule is intended as an update of information previously

> received or requested. To hold otherwise would foster a procedure in which defendants make only a partial public records request during the initial postconviction proceedings and hold in abeyance other requests until such time as a warrant is signed. Such is neither the spirit nor intent of the public records law. **Rule 3.852 is not intended for use by defendants as, in the words of the trial court, "nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry."**

753 So. 2d at 70.

The record supports the trial court's finding that the demands filed in this case are overly broad, of questionable relevance, and unlikely to lead to discoverable evidence. Mills requested public records from fifteen different agencies, and in most of his demands, requested "[a]ll notes, memoranda, letters, electronic mail, and/or files, drafts, charts, reports, and/or other files generated or received by any and all members of your agency which are related to Gregory Mills." Interestingly, many of the records Mills requested were produced, although some over objection. Objections to the production of the remaining records were sustained after argument by the parties and consideration by the trial court at the public records hearing on April 12, 2001.

Based on the record before us, Mills did not make the requisite showing for the additional records. Accordingly, the trial court did not abuse its discretion in denying the request for further production of public records.

* * * *

[FN2] Florida Rule of Criminal Procedure 3.852(h)(3) provides:

> Within 10 days of the signing of a defendant's death warrant, collateral

> counsel may request in writing the production of public records from a person or agency from which collateral counsel has previously requested public records. A person or agency shall copy, index, and deliver to the repository any public record:
>
> (A) that was not previously the subject of an objection;
>
> (B) that was received or produced since the previous request; or
>
> (C) that was, for any reason, not produced previously.
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> The person or agency providing the records shall bear the costs of copying, indexing, and delivering such records. If none of these circumstances exist, the person or agency shall file with the trial court and the parties an affidavit stating that no other records exist and that all public records have been produced previously. A person or agency shall comply with this subdivision within 10 days from the date of the written request or such shorter time period as is ordered by the court.
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> [FN3] Mills requested public records from the following agencies: (1) Florida Department of Law Enforcement; (2) Florida Department of Corrections; (3) Orlando Police Department; (4) Office of the State Attorney, Eighteenth Judicial Circuit; (5) Office of Executive Clemency; (6) Florida Parole Commission; (7) Florida Department of State, Division of Elections; (7) Seminole County Sheriff's Office; (8) City of Sanford Police Department; (9) Seminole County Medical Examiner's Office; (10) Florida Attorney General's Office; (11) Seminole County Jail; (12) Florida Department of Children and Families; (13) Lancaster Youth Development Center; (14) Arthur G. Dozier School for Boys; and (15) Florida Department of Juvenile Justice.

(emphasis added). Under these circumstances, the lower court did not abuse its discretion in determining that Defendant was not

entitled to the public records he sought. It should be affirmed.

Moreover, the lower court also did not abuse its discretion in rejecting the requests regarding Gajus and the prosecutors. While Defendant argued that there was no timing requirement for requests made pursuant to Fla. R. Crim. P. 3.852(i), this is not true. That rule requires that a trial court find that a defendant "has made a timely and diligent search" for the records before it orders compliance with a request. Fla. R. Crim. P. 3.852(i)(2)(A). Moreover, in *Buenoano v. State*, 708 So. 2d 941, 952-53 (Fla. 1998), this Court determined that a defendant was not entitled to public records in connection with a third motion for post conviction relief, where the records should have been sought in connection with a first motion for post conviction relief. Here, Defendant has been raising claims regarding Gajus since his first motion for post conviction relief, he sought and received records from the State Attorney in connection with that motion, he litigated issues regarding their compliance at that time and he should have raised any issue regarding records about Gajus in connection with that motion at that time. Under these circumstances, the lower court did not abuse its discretion in finding that the requests were untimely.

The lower court also did not abuse its discretion in

finding the request to be overly broad. According to the requests, the purpose behind seeking documents about Gajus was to discover the "full extent" of the benefit Gajus allegedly received for testifying. However, Defendant requested "any and all" documents regarding Gajus in any manner, the complete personnel files of 5 former prosecutors and "any and all" documents regarding investigations of the "conduct or actions" of the 5 former prosecutors. This Court has held that requests for "any and all" documents are overly broad. *Mills*, 786 So. 2d at 551-52. As such, the lower court did not abuse its discretion in finding the requests overly broad.

Moreover, Defendant admitted that he has repeatedly spoken to Gajus over the years and that Gajus told him that he was sentenced to 20 years as the result of a plea agreement.[13] Defendant did not explain why Gajus would not know what benefit he received. This lack of explanation is particularly important when one considers that the reason why defendants are allowed to question state witnesses about their criminal histories beyond simply the number of convictions for felonies and crimes of dishonesty is that benefits they may be receiving are relevant to their motives to testify. *Breedlove v. State*, 580 So. 2d 605,

[13] The direct appeal record shows that Defendant knew that Gajus had been permitted to plead to second degree murder and was to receive a 20 year sentence before trial. (DAR. 753)

607-08 (Fla. 1991). As such, any alleged benefit unknown to Gajus would not be relevant. The lower court did not abuse its discretion in rejecting these requests. It should be affirmed.

VI. THE LOWER COURT PROPERLY DENIED A STAY AND THERE IS NO REASON FOR THIS COURT TO GRANT ONE.

Finally, while Defendant asserts that either the lower court should have granted him a stay of execution or this Court should do so, the lower court properly denied the request for stay, and this Court should do the same. As both this Court and the United States Supreme Court have held, a defendant must show that he has presented substantial grounds for relief from his conviction and sentence in order to be entitled to a stay. *See Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998); *see also Delo v. Sykes*, 495 U.S. 320, 321 (1990); *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983); *Bowersox v. Williams*, 517 U.S. 345 (1996). As argued above, Defendant did not present substantial grounds for relief in either the lower court or this Court. As such, the request for stay was properly denied below and should be denied here.

CONCLUSION

For the foregoing reasons, the denial of the motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by fax and U.S. mail to Suzanne Myers Keffer, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, this 4th day of December 2006.

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CERTIFICATE OF COMPLIANCE

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

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