IN THE SUPREME COURT OF FLORIDA

JASON DIRK WALTON,

Appellant,

v. **Case No. SC07-704**
Lower Tribunal No. CRC83-0630CFANO

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

References to Walton's resentencing record will be designated by "RS" followed by the appropriate page number. The instant post conviction record will be cited as "PCR" with the appropriate volume and page numbers (PCR V#/page#); there are two addenda which will be cited as "1APCR and 2APCR" with the appropriate volume and page numbers (_APCR V#/page#).

At pages 3-6, 26 and 37-38 of his initial brief, Walton quotes from the separate appellate records of co-defendants, Terry Van Royal and Richard Cooper. Walton's cross-references to separate appellate records should be stricken.[1] See Johnson v. State, 660 So. 2d 648, 653 (Fla. 1995) (disapproving intertwining separate records and noting that any future attempt to cross-reference separate records may be stricken).

[1] Walton's Initial Brief cites to the Cooper record at R416-418 and R1577-1579, and to the Van Royal record at R1882 and R2229. The trial court's final order attached these excerpts from Cooper and Van Royal: Exhibit 3: Cooper Penalty Phase Transcript, pp. 9-40, 65-67, 151-57; Exhibit 4: Cooper Sentencing Transcript, pp. 9-52, 75-77; Exhibit 5: Van Royal Penalty Phase and Sentencing Transcript, vol. I, pp. 107-08, 121, 131, 136, 142-43, 146, 158, 169; vol. II, pp. 55-56, 65-66. (See, PCR 5/638-825; 6/826-1026; 7/1027-1226; 8/1227-1426; 9/1427-1626; 10/1627-1694).

STATEMENT OF THE CASE AND FACTS

Procedural History

This is an appeal from the trial court's summary denial of Jason Dirk Walton's *successive* Rule 3.851 motion to vacate. The trial court's final order summarized the procedural history of this case as follows:

> The Defendant was convicted in the above-styled case of three counts of murder in the first degree on February 9, 1984, and was sentenced to death on all counts on March 14, 1984. The Florida Supreme Court affirmed the Defendant's convictions on direct appeal, but reversed and remanded for a new penalty phase. See Walton v. State, 481 So. 2d 1197 (Fla. 1985). A second penalty phase was conducted following remand, and the Defendant was again sentenced to death on all three counts on August 29, 1986. The Florida Supreme Court affirmed the Defendant's death sentences in a mandate filed with this court on October 11, 1989. See Walton v. State, 547 So. 2d 622 (Fla. 1989).
>
> The Defendant filed his original Motion to Vacate Judgments of Conviction and Sentence pursuant to Florida Rule of Criminal Procedure 3.850 on December 17, 1990. A final order denying the Defendant's Motion to Vacate was entered on February 28, 1991. On appeal, the Florida Supreme Court remanded to this court for consideration of public records issues and granted leave to the Defendant to file any new postconviction motions within thirty days. Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993). After conducting evidentiary hearings as to the public records claims, this court found the disputed records to be exempt from public disclosure, but granted the Defendant leave to amend his postconviction motion in light of the fact that additional documents had been provided. The Defendant subsequently filed an Amended Motion to Vacate Judgment of Convictions and Sentence on July 12, 1995, a Second Amended Motion to Vacate Judgment of Convictions and Sentence on April 1, 1996, and a Third Amended Motion to Vacate Judgment of Convictions and Sentence on November 6, 1998. This court entered

> an order denying these motions on January 12, 2001, and the Florida Supreme Court affirmed this court's decision in Walton v. State, 847 So. 2d 438 (Fla. 2003).
>
> The Defendant thereafter filed the instant Successive Motion to Vacate and amendment thereto. Additionally, the Defendant filed his Motion for Production of Additional Public Records and Demand for Additional Public Records on February 13, 2006, which this court denied in an order entered on November 8, 2006. A hearing was conducted on January 16, 2007, wherein this court heard argument from the defense and the State regarding whether it was necessary to conduct an evidentiary hearing on the Defendant's motions. Thereafter, this court concluded that all claims are conclusively refuted by the motions, files, and the record in this case so that it is unnecessary to conduct an evidentiary hearing on these claims. Fla. R. Crim. P. 3.851(f)(5)(B). This court's specific findings are set forth below.
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> (PCR 5/626-627)

Trial and Direct Appeal:
Walton v. State, 481 So. 2d 1197 (Fla. 1985) [Walton I]

On direct appeal, Walton v. State, 481 So. 2d 1197 (Fla. 1985) [Walton I], this court affirmed Walton's convictions for first-degree murder, but reversed the death sentences because the confessions of Walton's co-perpetrators, Cooper and McCoy, were introduced at Walton's penalty phase without either being available for cross-examination.[2] Walton I, 481 So. 2d at 1200-

[2] Two co-defendants, Terry Van Royal, Jr., and Richard Cooper, were also tried and convicted of these three murders. Van Royal was sentenced to death, but his sentence was vacated because the trial judge failed to justify his reasons for imposing the death sentence in accordance with section 921.141(3), Florida Statutes (1981). Van Royal v. State, 497 So. 2d 625 (Fla. 1986). This Court affirmed Cooper's conviction and death sentence in Cooper

01. In affirming Walton's convictions, this Court set forth the following summary of facts:

> On June 18, 1982, police discovered the bodies of three men killed by shotgun blasts lying face down on the living room floor of the home shared by two of the victims. The victims' wrists had been bound with duct tape. Victim Steven Fridella's eight-year-old son, who summoned police, had been bound and locked in the bathroom but was otherwise unharmed. Six months after the murder, Fridella's ex-wife supplied police with information that led to the arrest of one of appellant's codefendants, and subsequently to the appellant, with whom she was romantically involved.
>
> Following his apprehension, appellant initiated a conversation with detectives who were transporting him from the courthouse to jail. Although the detectives responded that appellant's attorney had admonished them not to discuss the case with appellant, appellant informed the detectives that he wished to talk and signed a waiver form. He then told the detectives that he did not shoot the victims. In response to a detective's further inquiry as to whether appellant wished to give a statement, appellant replied, "Well, yes, I would like to but I don't really want to," and answered the detectives' subsequent questions. Appellant told the detectives that he and codefendants Terry Van Royal and Richard Cooper planned to rob the victims of money and cocaine and entered the victims' house wearing ski masks. Appellant stated he carried a handgun and Van Royal and Cooper armed themselves with shotguns as "insurance"; that they did not intend to kill anyone; that when appellant entered the house, one of the victims asked, "Is that you, J.D.?"; that Fridella's son was placed in the bathroom so he would not be harmed; that he ransacked the house and, failing to find money or cocaine, returned to the living room where he observed Van Royal and Cooper

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v. State, 492 So. 2d 1059 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987). Jeffrey McCoy, the fourth participant, pleaded guilty to three counts of first-degree murder and agreed to testify against the others in exchange for life imprisonment with a mandatory minimum 25 year sentence. See, Walton v. State, 547 So. 2d 622, 623 (Fla. 1989) [Walton II].

> pointing shotguns at the victims, who were lying face down on the floor; that he stated, "Let's get out of here"; and that he heard several gunshots as he exited the house. Appellant concluded his statement by noting that Fridella had been involved in a custody battle with his ex-wife, and that she told appellant she and Fridella might reconcile. Appellant repeated his statement on tape.
>
> After appellant gave this statement, codefendant Cooper revealed that appellant's brother, Jeffrey McCoy, also took part in the incident. After obtaining a waiver of rights, detectives interrogated appellant concerning his failure to mention McCoy's participation in his earlier statement. Appellant responded that McCoy had bound the victims but was in the car when the shootings occurred. Appellant then admitted that he had initiated the idea for the robbery and also stated that before entering the house, he tested his weapon but that it had misfired. Both statements were introduced at trial. The jury found appellant guilty of all three counts of first-degree murder.
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> Walton, 481 So. 2d at 1198-99 (emphasis supplied)

Resentencing Proceedings and Appeal:
Walton v. State, 547 So. 2d 622 (Fla. 1989) [Walton II]

On Walton's resentencing appeal, this Court affirmed the death penalty and set forth the following summary of the facts presented at resentencing:

> The facts at resentencing revealed that an eight-year-old boy summoned the police to a home, and, upon arrival, the police found three dead men lying face down on the living room floor, their wrists bound with duct tape. The boy was unharmed but had been bound and locked in the bathroom during the commission of the crimes. Each of the victims had been shot from a distance of three to six feet, and shotgun wounds were the sole causes of death. At the time of Walton's arrest, he was living with the ex-wife of one of the victims, who was also the mother of the eight-year-old

boy. The boy was present at the time of Walton's arrest.

The state presented Walton's confession to the jury. There, he admitted being present at the time of the homicides, denied any part in the shootings, and stated that he, Richard Cooper, and Terry Van Royal, Jr., went to the residence to rob the victims because he had heard that one of them had a lot of money and cocaine. Further, Walton indicated that they entered the residence, with each carrying a gun. All three victims were brought into the living room, the young boy was placed in the bathroom, and the apartment was searched for drugs and money. Afterwards, Walton stated that he turned on the television full blast to prevent the neighbors from hearing the victims scream and that he heard shotgun blasts as he left. Later, he acknowledged that his younger brother, Jeffrey McCoy, also participated in the robbery.

The state introduced a taped statement given by Jeffrey McCoy. McCoy stated that the plan to rob the victims had first been discussed about two weeks prior to the incident; that Walton had complained that one of the victims had stolen some marijuana from his trailer; that Walton believed the victims had a great deal of money and cocaine; that the four carefully devised a plan concerning the robbery, making sure that the child was placed in the bathroom so he would not witness the robbery and that it took place on a rainy night to prevent tire tracks from being left behind. He testified that the participants decided to bring weapons, but stated that the purpose of the weapons was to scare the victims, preventing resistance to the robbery. To his knowledge, no plan to shoot anyone existed. McCoy testified that Walton and the others entered the house and gathered each of the victims into the living room and, at Cooper's direction, McCoy taped the victims' wrists behind their backs. McCoy then left the house to start the car and wait. Upon starting the car, he heard a series of shots. After returning to the car, Cooper gestured to McCoy that the victims were dead.

Another state witness testified that Walton was experiencing problems in his relationship with the ex-wife of one of the victims and that Walton had once

> said that "the only way he could get [the victim] off his back was to waste him." The state presented a psychiatrist's testimony, indicating that the boy suffered a post-trauma stress reaction to the incident and that it would not be in the boy's best interest to appear in court and testify.
>
> The defense presented evidence that Walton had never been convicted of a crime. A coworker testified that Walton was quiet, kind, considerate, and nonviolent. Further, she visited him at the prison and determined that he had adjusted very well and would pose no threat of violence to others. A friend of the family testified that Walton was a friendly, nonviolent person, who was a follower rather than a leader; that Walton had been in the army and was honorably discharged; and that Walton had a positive attitude toward prison. The prosecution questioned these two witnesses about whether Walton had shown any remorse for the homicides. The defense also presented testimony from Walton's mother, who stated that Walton had a normal childhood; that he had joined the army at age seventeen, receiving awards and an honorable discharge; and that he had adjusted very well to incarceration and would not be a threat to anyone.
>
> In rebuttal, the state presented a witness who testified that he had purchased marijuana from Walton on three occasions and that he had seen Cooper carrying a fifty-pound bale of marijuana towards Walton's house. Another witness testified that he had seen Walton sell marijuana; that Walton never expressed any remorse for his actions; and that Walton purchased a truck owned by one of the victims from that victim's father after the murders.
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> Walton II, 547 So. 2d at 623-624.

On Walton's resentencing appeal, this Court reiterated that the evidence showed that Walton originated the plan to rob the victims on a rainy night, Walton armed the group prior to the robbery, and Walton was the only defendant involved who knew the

location of the victims' residence. See Walton II, 547 So. 2d at 623-24.

Walton's petition for writ of certiorari was denied on January 8, 1990. Walton v. Florida, 493 U.S. 1036 (1990).

Prior Post Conviction Proceedings and Appeals:
Walton v. State, 634 So. 2d 1059 (Fla. 1993) [Walton III]
Walton v. State, 847 So. 2d 438 (Fla. 2003) [Walton IV]

After remand for litigation of Walton's public records claims in Walton v. State, 634 So. 2d 1059 (Fla. 1993) [Walton III], Walton returned to the trial court for further post conviction proceedings. After filing his third amended motion to vacate, post conviction relief was denied (PCR 5/627). This Court affirmed the denial of post conviction relief in Walton v. State, 847 So. 2d 438 (Fla. 2003) [Walton IV].[3]

[3] As summarized by this Court in Walton's prior post conviction appeal, Walton IV, 847 So. 2d at 442-443, n. 1 and n. 2, "[t]he substantive claims asserted in Walton's original 3.850 appeal, were: (1) the jury received improper instructions regarding statutory aggravating circumstances; (2) the trial court erred in allowing a codefendant's mental health expert to testify at Walton's evidentiary hearing; (3) Walton was denied the effective assistance of counsel; (4) the trial court failed to independently weigh the aggravating and mitigating circumstances; (5) Walton's second sentencing proceeding was contaminated with the same evidence that was determined to have been inappropriately presented at his first sentencing proceeding; (6) Walton's sentence is devoid of a finding of his individual culpability; (7) Walton's sentence is disproportionate, disparate, and invalid because an equally culpable codefendant received a life sentence; (8) the jury was improperly instructed; (9) Walton's conviction should be reversed because new law now mandates a holding that his statements should have been suppressed; (10) Walton's absence from a portion of the proceedings prejudiced his resentencing;

Walton's Instant Successive 3.851 Motion:

On February 10, 2006, Walton filed a successive Rule 3.851 motion to vacate,[4] asserting four claims for relief: (1) his due process rights allegedly were violated where the State allegedly withheld material and exculpatory evidence or presented misleading evidence pertaining to jail inmate Paul Skalnick, (2) his constitutional rights were violated where the State allegedly used inconsistent theories to secure the death sentence, (3) execution by electrocution or lethal injection allegedly is cruel and unusual punishment and (4) Fla. Stat. 119.19 and Fla. R. Crim. P. 3.852 are allegedly unconstitutional (PCR 1/1-26). The State filed its written response on March 2,

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(11) Walton's death sentence rests upon the unconstitutional aggravating circumstance of lack of remorse; (12) the trial court unconstitutionally shifted the burden of proof in its instructions at sentencing; and (13) the application of Florida Rule of Criminal Procedure 3.851 violated Walton's constitutional rights." Walton IV, 847 So. 2d at 442, n. 1. "Walton's new post conviction claims are: (1) Walton was denied effective assistance of counsel when his attorney failed to adequately investigate and prepare for trial; (2) the State prejudiced Walton by withholding exculpatory and impeachment evidence in violation of Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); (3) Walton was denied his fundamental rights to confrontation, due process, and a reliable and individualized hearing when a codefendant's mental health expert testified as a witness for the State at the postconviction hearing; and (4) newly discovered evidence tending to show that Walton was not the leader of the group committing the murders at issue mandates a new trial." Walton IV, 847 So. 2d at 443, n. 2.

[4]On September 29, 2004, Walton filed a federal habeas petition in the U.S. District Court, Middle District of Florida. (Case No. 8:04-cv-2176-T-26TBM). Walton's federal habeas case remains currently pending.

2006 (PCR 3/232-55). On November 9, 2006, Walton filed a motion for leave to file an amendment to his motion for post conviction relief, adding a fifth claim based on the ABA report issued on September 17, 2006 (PCR 4/571-77). Contemporaneously, Walton filed his proposed amendment, alleging that "newly discovered evidence" in the form of an American Bar Association report purportedly demonstrated that his conviction and sentence constitute cruel and unusual punishment (PCR 4/571-624). On November 14, 2006, the State filed its objection to the ABA report amendment, arguing that this Court's decisions in Rolling v. State, 944 So. 2d 176 (Fla. 2006) and Rutherford v. State, 926 So. 2d 1100 (Fla. 2006) foreclosed relief (PCR 4/563-567). At the status hearing on November 15, 2006, the trial court granted Walton's motion to amend (to add the ABA report claim), and the case management conference was scheduled for December 21, 2006 (PCR 10/1756-57).

However, on December 15, 2006, Walton filed a motion to continue the case management conference and alleged that he "expects to seek leave to amend his pending motion for post-conviction relief" based on the events surrounding the execution of Angel Diaz (2APCR 6/2985-88). The case management conference was continued to January 16, 2007, over the State's objection (PCR 4/568-70, 625). Although Walton announced his intention to

do so, Walton never submitted any proposed amendment based on the events surrounding the execution of Angel Diaz.[5]

Public Records Litigation:

Pursuant to Fla. R. Crim. P. 3.852(i), on February 13, 2006 Walton filed motions for additional public records directed to the Department of Corrections [DOC], the Attorney General and the Office of the State Attorney (2APCR 1/1858-60, 1870-74).

In the request to DOC and the Attorney General, Walton sought records from both agencies relating to "all information that in any way relates to lethal injection. . . ." (2APCR 1/1860). Walton set forth sixty-one (61) paragraphs of requested items, encompassing "any and all writings and documents" ever produced or possessed by DOC concerning execution by lethal injection (2APCR 1/1858-69, 1889, 1899). Walton's demand also sought detailed personnel information from DOC, including time sheets and wages for every single employee who worked at the state prison during every execution by lethal injection ever undertaken in Florida (2APCR 1/1867).

In the request to the State Attorney, Walton sought all documents relating to co-defendant Cooper's post conviction

[5] In October of 2007, Walton filed a motion to relinquish jurisdiction in this Court for the ostensible purpose of filing a new lethal injection claim in the trial court; Walton's motion was denied *without prejudice* in December of 2007 (SC07-704). Walton's motion to relinquish was based upon the Diaz execution, Department of Corrections protocols and Baze v. Rees, 128 S. Ct. 1520 (2008).

proceedings (2APCR 1/1870). Walton also sought "all" records, files, documents, notes, pleadings, memorandum, statements, and/or transcripts" relating to Paul Skalnick (2APCR 1/1871). Included in the Skalnick demand Walton sought "all" records in 38 criminal cases, including cases where Skalnick was a party and cases where he "may" have been a witness (2APCR 1/1871-72).

In March of 2006, DOC, the Attorney General and State Attorney filed objections (2APCR 1/1877-1898, 1909-18). The agencies objected that Walton failed to demonstrate, as required by the rules, that the records requested were relevant to the subject matter of the post conviction proceedings or reasonably calculated to lead to the discover of admissible evidence (2APCR 1/1880, 1891, 1913-15). Moreover, the agencies objected that the requests were overly broad and unduly burdensome (2APCR 1/1884-1885, 1895-96, 1915-16). The State Attorney also objected as non-exempt records on Paul Skalnick had been previously provided to Walton (2APCR 1/1913).

A hearing on Walton's public records demands was held on July 28, 2006. The prosecutor explained that the non-exempt records pertaining to Paul Skalnick had previously been provided to CCRC. Between the years of 1993-95, over 30,000 pages of documents were provided to Walton (PCR 10/1706). Furthermore, the exempt documents relating to Skalnik had been reviewed *in camera* and the exemptions were upheld (PCR 10/1707).

Ultimately, the undisclosed material was not relevant since Skalnick was not a witness at Walton's guilt phase or resentencing (PCR 10/1707).[6]

With regard to Walton's demand for the post conviction records of co-defendant Cooper, the State maintained that there were no records subject to production (PCR 10/1708). Any post conviction filings and proceedings were contained in the court file and, thus, not subject to Fla. R. Crim. P. 3.852 (PCR 10/1707-08). The State also objected to the request for work product and lodged an objection based on relevance (PCR 10/1708). Lastly, the State argued that Fla. R. Crim. P. 3.852 could not be used as a vehicle to re-litigate issues or to allow for the reproduction of documents (PCR 10/1709-10, 1723).

Walton responded that the State could no longer claim a work-product exemption, that the argument that he failed to meet the requirements of Rule 3.852 was not appropriate and that while CCRC was in possession of 14 boxes of documents relating to Paul Skalnick, the sealed documents that Cooper's federal habeas attorneys reviewed may include material not provided (PCR

[6] Lastly, the State also noted that co-defendant Cooper's counsel reviewed the sealed/exempt Skalnik records in relation to Cooper's federal case in 2005. At the time of Walton's post conviction hearing; and as of the filing of this Answer Brief, there still has been no filing in Cooper v. Crosby, Case No. 8:04-CV-1447-T-27MSS based on the sealed Skalnik records. (PCR 10/1708-09).

10/1710-12, 1715-17). Further, Walton argued that Paul Skalnick was relevant because information attributed to him was included in Walton's resentencing order, and the Skalnick information allegedly "seeped into Mr. Walton's case through the back door because of State misconduct." (PCR 10/1718).

With regard to the lethal injection records demands, the Department of Corrections objected that Walton's demands were overbroad and unduly burdensome (PCR 10/1727). The Attorney General's Office voiced the same objections and also argued that Walton failed to meet the requirements of Rule 3.852, in that he failed to demonstrate the records he sought were relevant to a post conviction claim or appeared reasonably calculated to lead to the discovery of admissible evidence for a colorable claim for relief (PCR 10/1727-28; 1730-32, 1734).

Walton maintained that this Court's ruling in 2000[7] regarding the constitutionality of lethal injection was not controlling because of new scientific evidence suggesting that the drugs used in execution could constitute cruel and unusual punishment and because 16 executions had taken place since 2000 (PCR 10/1737-42). Walton maintained that he would present experts who would be able to look at the requested records and assess the risk of unnecessary pain during execution (PCR

[7] Sims v. State, 754 So. 2d 657 (Fla. 2000).

10/1742). The trial court took the matter under advisement (PCR 10/1728-29).

On November 8, 2006 the trial court issued an order denying Walton's demand for additional public records (2APCR 4/2497-2500). The trial court held that the requests to DOC and the Attorney General were "overly broad in its scope" and "unduly burdensome" (2APCR 4/2498). The trial court also noted that based on the decisions of this Court upholding lethal injection, Walton failed to establish the documents related to a "colorable claim" for relief (2APCR 4/2498).

"With regard to the documents relating to Paul Skalnick, [the] court [found] that these documents were requested by postconviction counsel previously and the documents were found to be statutorily exempt from production." (2APCR 4/2498). The trial court ruled that it "shall abide" by that order (2APCR 4/2498). "With regard to those documents relating to Richard Cooper's post-conviction proceedings, [the] court [found] that [Walton] has failed to demonstrate that these records are relevant to the claims set forth in his motion to vacate or are reasonably calculated to lead to the discovery of admissible evidence in these proceedings." (2APCR 4/2499).

The Huff[8] hearing took place on January 16 2007. Regarding the Skalnik claim, Walton asserted that his successive motion was based on newly discovered evidence: affidavits which were filed in co-defendant Cooper's federal habeas case and "discovered" in February 2005 (PCR 10/1764-65). Walton maintained that even though the Skalnick claim was previously pled and ruled upon by this Court, this additional evidence allegedly could support his pending claim and, thus, an evidentiary hearing should be granted (PCR 10/1764-65, 1777). Addressing the State's argument that Walton failed to present any basis as to why Walton did not discover these affiants in a diligent manner, Walton claimed that the post conviction rule did not have a due diligence provision (PCR 10/1778).

The State also noted that a Skalnick claim had been presented previously and ruled upon by the trial court and this Court (PCR 10/1794). Further, the affidavits concerning events which occurred in 1985 did not constitute newly discovered evidence (PCR 10/1794). Lastly, the State underscored the fact that Paul Skalnick had not testified against Walton at his guilt phase or resentencing; and, therefore, any claim relating to Skalnik would be neither material nor relevant (PCR 10/1794-95).

Regarding the "inconsistent theories" claim, Walton argued that the United States Supreme Court allegedly recognized a due

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

process violation in June, 2005 (PCR 10/1765). Walton argued that when trying the Cooper and Van Royal cases, the prosecutor argued that Walton did not dominate the co-defendants into committing the murders, and questioned that he was the "mastermind" (PCR 10/1780-1782). But, in Walton's trial, the State argued that Walton was the "ringleader" and "planner" of the murders (PCR 10/1782). Walton claimed that Bradshaw v. Stumpf[9] was "new law" that stood for the proposition that the State's argument was inconsistent and a due process violation (PCR 10/1784, 1791). When questioned by the trial court if the State argued that Walton was the ringleader in Walton's trial and then argued that Cooper was the ringleader in Cooper's trial, Walton answered in the negative, but Walton nevertheless claimed that the State had argued inconsistent theories by arguing Walton was the ringleader during his trial and by disputing Walton was the ringleader at Cooper's trial (PCR 10/1788-89). Walton argued that while this was a legal issue not necessarily requiring an evidentiary hearing, one was warranted since the State used Cooper's expert, Dr. Merin, in Walton's post conviction proceedings (PCR 10/1790-92). However, Walton acknowledged that this Court found the trial court did not rely on Dr. Merin's testimony in Walton's case (PCR 10/1792).

[9] 545 U.S. 175, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005)

The State emphasized that this issue was procedurally barred, having already been ruled upon by this Court (PCR 10/1796). The State disputed Walton's "inconsistent theory" claim because arguing that Walton was the "ringleader" was not inconsistent with asserting that the co-defendants were not entitled to the mitigation of having acted under duress of domination (PCR 10/1797). Furthermore, the State disputed that Bradshaw v. Stumpf established any "new law" entitled to retroactive application in post conviction (PCR 10/1798).

Regarding lethal injection, Walton argued his claim was supported by an article in *The Lancet* Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412 (2005) and an American Bar Association [ABA] report (PCR 10/1765, 1766). Walton sought an evidentiary hearing regarding the ABA report, with ABA commission members testifying (PCR 10/1815-16). Walton maintained that Florida's lethal injection system violated the Eighth Amendment (PCR 10/1806-1810). However, Walton also asserted that his lethal injection claim was not ripe because after the creation of the Governor's lethal injection commission "there is not really a protocol in Florida right now. . ." (PCR 10/1767). Walton

argued that Sims v. State[10] was no "longer good law" after the Diaz execution (PCR 10/1766-67).

The State responded that lethal injection remained a constitutional method of execution and Walton's claims were procedurally barred and meritless (PCR 10/1769). Walton's claims regarding *The Lancet* article and the ABA report had been rejected by this Court (PCR 10/1769-70, 1818). The "all writs" petition of Ian Deco Lightbourne, then pending in this Court, did not divest the trial court of jurisdiction to address the lethal injection claim (PCR 10/1776). The trial court held that the Governor's commission and its review of lethal injection did not affect this Court's binding precedent (PCR 10/1771-72).

After hearing all arguments, the trial court took the matter under advisement (PCR 10/1827). On March 12, 2007 the trial court entered an order summarily denying all relief (PCR 5/626-37). The trial court's final order (PCR 5/626-37) denying Walton's successive motion to vacate also attached the following exhibits: Exhibit 1: Resentencing Order; Exhibit 2: Walton Penalty Phase Transcript, pp. 3-13, 143-86; Exhibit 3: Cooper Penalty Phase Transcript, pp. 9-40, 65-67, 151-57; Exhibit 4: Cooper Sentencing Transcript, pp. 9-52, 75-77; Exhibit 5: Van Royal Penalty Phase and Sentencing Transcript, vol. I, pp. 107-08, 121, 131, 136, 142-43, 146, 158, 169; vol. II, pp. 55-56,

[10] 754 So. 2d 657 (2000).

65-66 (PCR 5/638-825; 6/826-1026; 7/1027-1226; 8/1227-1426; 9/1427-1626; 10/1627-1694).

Walton filed a motion for rehearing on March 26, 2006, alleging that he "was in the process of drafting a motion for leave to amend based on newly discovered evidence premised upon the events surrounding the execution of Angel Diaz" (PCR 10/1665-80). Rehearing was denied on March 29, 2006 (PCR 10/1681), and the trial court's order denying rehearing stated, in pertinent part:

> In the instant motion, the Defendant requests that this court rehear his Successive Motion to Vacate Judgments of Conviction and Sentence, which was denied on March 12, 2007. However, the issues raised in the Motion for Rehearing impermissibly raise new grounds for relief, are not relevant, or were considered by this court in its previous ruling. After considering the motion, this court will not grant a rehearing.

(PCR 10/1681) (emphasis supplied)

Walton now appeals from the trial court's order denying his successive motion for post conviction relief (PCR 10/1683-94).

STANDARDS OF REVIEW

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits summary denial of a successive motion for post conviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Williamson v. State, 961 So. 2d 229, 234 (Fla. 2007). Post conviction claims may be summarily denied

when they are facially or legally insufficient, procedurally barred, or refuted by the record. See Connor v. State, 2007 Fla. LEXIS 2173, 32 Fla. L. Weekly S 729 (Fla. Nov. 15, 2007). In order to support summary denial, "the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims." Nixon v. State, 932 So. 2d 1009, 1018 (Fla. 2006).

Here, as in Rose v. State, 2008 Fla. LEXIS 378, 33 Fla. L. Weekly S 195 (Fla. Mar. 13, 2008), the trial court complied with Fla. R. Crim. P. 3.851 in disclosing the basis for denial of relief to provide for meaningful appellate review. Id., citing Nixon, 932 So. 2d at 1018. The factual and legal correctness of the trial court's rulings will be addressed within the individual claims raised on appeal.

SUMMARY OF THE ARGUMENT

Post conviction claims that are either procedurally barred, conclusively refuted by the record, facially or legally insufficient as alleged, or without merit as a matter of law may be summarily denied. See Knight v. State, 923 So. 2d 387, 391-392 (Fla. 2005).

The trial court properly summarily denied Walton's successive post conviction motion, which was predicated on (1) the State's alleged use of "inconsistent theories" at sentencing, (2) Paul Skalnik, who did not testify at Walton's guilt phase or resentencing, (3) lethal injection, and (4) the ABA report. Walton's successive post conviction claims were procedurally barred and also without merit. In addition, the trial court correctly denied Walton's successive public records demands as overbroad, unduly burdensome, unrelated to any colorable claim for relief, untimely, and/or involving records which previously were determined to be statutorily exempt from production and irrelevant to Walton's motion to vacate.

ARGUMENT

ISSUE I

THE "INCONSISTENT THEORIES" CLAIM

In his first issue, Walton argues that the State allegedly used "inconsistent theories" in seeking the death penalty against Walton and two of his co-defendants, Cooper and Van Royal.[11] For the following reasons, the trial court correctly denied Walton's "inconsistent theories" claim as untimely, successive, procedurally barred, and, alternatively, without merit.

In 1984, Walton was convicted of three counts of first-degree murder.[12] At Walton's trial, the evidence showed that although Walton was not the actual "shooter," Walton was the one

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[11] As previously noted, Van Royal was originally sentenced to death, but his sentence was vacated because the trial judge failed to justify his reasons for imposing the death sentence in accordance with section 921.141(3), Florida Statutes (1981). Van Royal v. State, 497 So. 2d 625 (Fla. 1986). This Court affirmed Cooper's conviction and death sentence in Cooper v. State, 492 So. 2d 1059 (Fla. 1986). Walton's younger brother, Jeffrey McCoy, was the fourth participant. McCoy entered guilty pleas to three counts of first-degree murder and agreed to testify against the others in exchange for life imprisonment with a mandatory minimum 25 year sentence. See Walton v. State, 547 So. 2d 622, 623 (Fla. 1989) (Walton II).

[12] The three victims, Steven Fridella, Bobby Martindale and Gary Peterson, all died from shotgun wounds. Gary Peterson had one shotgun wound to his back, which struck his heart and aorta. (RS 542-543). Bobby Martindale was shot twice, and the wound to his head would have caused virtually instantaneous death (RS 544). Steven Fridella had three shotgun wounds; each of which would have been fatal (RS 540; 550).

who initiated the plan to rob the victims, at gunpoint, of money and cocaine. The evidence at Walton's resentencing included the first-hand account of Walton's younger brother, Jeffrey McCoy (RS 661-690), Walton's post-Miranda confessions to law enforcement (admitting that each of the intruders wore gloves and masks and armed themselves in advance) (RS 573—580), Walton's incriminating statements to his co-worker, John Gray, Jr. (admitting that Walton was involved in the crimes, but when Walton pulled the trigger on his [.357] gun to "scare the victims," his gun didn't go off); and Walton's prior statements to Bruce Jenkins (that the only way Walton could get Steve Fridella off his back was to "waste him") (RS 642). Walton was the only one who had been inside the victims' residence before (RS 664); and, at Walton's resentencing, the State presented

> . . . Walton's confession to the jury. There, he admitted being present at the time of the homicides, denied any part in the shootings, and stated that he, Richard Cooper, and Terry Van Royal, Jr., went to the residence to rob the victims because he had heard that one of them had a lot of money and cocaine. Further, Walton indicated that they entered the residence, with each carrying a gun. All three victims were brought into the living room, the young boy was placed in the bathroom, and the apartment was searched for drugs and money. Afterwards, Walton stated that he turned on the television full blast to prevent the neighbors from hearing the victims scream and that he heard shotgun blasts as he left. Later, he acknowledged that his younger brother, Jeffrey McCoy, also participated in the robbery.
>
> The state introduced a taped statement given by Jeffrey McCoy. McCoy stated that the plan to rob the

> victims had first been discussed about two weeks prior to the incident; that Walton had complained that one of the victims had stolen some marijuana from his trailer; that Walton believed the victims had a great deal of money and cocaine; that the four carefully devised a plan concerning the robbery, making sure that the child was placed in the bathroom so he would not witness the robbery and that it took place on a rainy night to prevent tire tracks from being left behind. He testified that the participants decided to bring weapons, but stated that the purpose of the weapons was to scare the victims, preventing resistance to the robbery. To his knowledge, no plan to shoot anyone existed. McCoy testified that Walton and the others entered the house and gathered each of the victims into the living room and, at Cooper's direction, McCoy taped the victims' wrists behind their backs. McCoy then left the house to start the car and wait. Upon starting the car, he heard a series of shots. After returning to the car, Cooper gestured to McCoy that the victims were dead.
>
> Another state witness testified that Walton was experiencing problems in his relationship with the ex-wife of one of the victims and that Walton had once said that "the only way he could get [the victim] off his back was to waste him."

Walton II, 547 So. 2d at 623-624.

In rejecting Walton's claim that the Supreme Court's decision in Bradshaw v. Stumpf, 545 U.S. 175 (2005) allegedly constituted "new law" and entitled Walton to post conviction relief, the trial court set forth the following comprehensive analysis:

> [T]he Defendant alleges that his sixth, eighth, and fourteenth amendment rights were violated when the State used inconsistent theories to secure death sentences against Defendant Walton and his co-defendants, Richard Cooper and Terry Van Royal. The Defendant further alleges that this claim is timely filed because it is based on a due process right newly

established in Bradshaw v. Stumpf, 545 U.S. 175 (2005). See Fla. R. Crim. P. 3.851(d)(2)(B).

The Defendant contends that the State took inconsistent positions in the co-defendants' trials by arguing in Defendant Walton's first penalty phase proceeding that he ordered co-defendants Cooper and Van Royal to shoot the victims, but then arguing in Cooper and Van Royal's trials that they were not acting under extreme duress or substantial domination by Walton at the time of the murders. Additionally, the Defendant takes issue with the fact that the State argued against Dr. Sidney Merin's opinion presented at Cooper's Spencer hearing, wherein Dr. Merin opined that Cooper did not act under duress or domination by Walton [fn3], and also argued in Van Royal's sentencing proceeding that Van Royal did not act out of fear or substantial domination by Walton. Finally, the Defendant argues that the State continued its use of inconsistent theories by arguing at Defendant Walton's second guilt phase proceeding that Walton was the ringleader of the murders. The Defendant contends that these inconsistencies resulted in actual prejudice to him because the State relied on his role as ringleader in arguing for a death sentence, and that ringleader role became the basis for this court's decision to sentence Defendant Walton to death.

[fn3] The Defendant also appears to raise a claim regarding the improper use of Dr. Merin's testimony at the Defendant's postconviction proceedings due to the fact that Dr. Merin testified on behalf of co-defendant Cooper. However, this claim was raised previously in the Defendant's 1998 Third Amended Motion to Vacate Judgments of Conviction and Sentence. This claim was denied by this court and the denial was affirmed on appeal in Walton v. State, 847 So. 2d 438, 446 (Fla. 2003). Accordingly, it is barred as successive and will not be given further consideration by this court.

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Pursuant to Florida Rule of Criminal Procedure 3.851(d)(2), "No motion shall be filed or considered pursuant to this rule if filed beyond the time

limitation provided in subdivision (d)(l) unless it alleges that...(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(l) and has been held to apply retroactively." **Although the Defendant cites to Justice Thomas's concurrence in Bradshaw as proof that the U.S. Supreme Court has announced a new fundamental constitutional right in that case, this court is unable to discern any such affirmative declaration from Bradshaw, nor has any such right been held to apply retroactively. Accordingly, this court finds that this claim is procedurally barred as untimely**.

Even if this claim were not barred procedurally, this court finds that the theories presented by the State in the Walton, Cooper, and Van Royal trials were not inconsistent. At the outset of its analysis, this court notes that this argument was submitted as a claim of ineffective assistance of counsel in a previous postconviction motion by the Defendant, as indicated by the State in its response to the instant motion, and was denied previously by this court. In the Florida Supreme Court's opinion affirming this court's denial of that claim, the Court called the alleged inconsistent statements challenged by the Defendant "somewhat insignificant" and noted, "Evidence introduced at Walton's trial showed that Walton originated the plan to rob the victims on a rainy night, Walton armed the group prior to the robbery, and Walton was the only defendant involved who knew the location of the victims' house. In the face of this overwhelming evidence, it is clear that the introduction of two statements by a state attorney in a codefendant's trial would not have been overly persuasive. Certainly, non-introduction of this evidence does not undermine our confidence in the outcome." Walton, 847 So. 2d at 456.

Additionally, a careful review of the guilt and sentencing phase proceedings in the Walton, Cooper, and Van Royal trials reveals that the State's theories advanced in each of these proceedings were legally consistent with one another. During Walton's second penalty phase proceeding following remand [fn4], the State argued in its opening and closing statements that Walton was the leader of the burglary and

subsequent murders in that he recruited his codefendants to commit the burglary, provided firearms to his co-defendants prior to the burglary, and was the only co-defendant who knew the location of the residence to be burglarized. See Exhibit 2: Walton Penalty Phase Transcript, pp. 3-13, 143-86. At no time during this proceeding did the State argue that Walton forced his co-defendants to shoot the victims. **Rather, the argument advanced by the State was that Walton was the first defendant to attempt to fire at the victims and, after his handgun misfired, the other co-defendants followed his lead and shot the victims.** See Exhibit 2, p. 156. **This theory is in no way inconsistent with the State's argument at the Cooper and Van Royal proceedings that those defendants were not acting under extreme duress or the substantial domination by Walton when they shot the victims** [fn5]. See Exhibit 3: Cooper Penalty Phase Transcript, pp. 9-40, 65-67, 151-57; Exhibit 4: Cooper Sentencing Transcript, pp. 9-52, 75-77; Exhibit 5: Van Royal Penalty Phase and Sentencing Transcript, vol. I, pp. 107-08, 121, 131, 136, 142-43, 146, 158, 169; vol. II, pp. 55-56, 65-66.

[fn4] In his successive motion, the Defendant also argues that the State utilized inconsistent theories in Defendant Walton's first penalty phase proceeding. However, because this penalty phase proceeding was deemed invalid by the Florida Supreme Court in Walton I and remanded for a new penalty phase proceeding, this court fails to see any relevance in the first penalty phase proceeding. In any event, this court notes that the State advanced in the first penalty phase proceeding a theory similar to the one taken in the second penalty phase, and that argument likewise was not inconsistent with those theories advanced in the Cooper and Van Royal trials.

[fn5] On February 27, 2007, the Defendant filed on order from the U.S District Court, Middle District of Florida in Fotopoulos v. Crosby, dated January 29, 2007. This opinion reversed and remanded the case for a new sentencing phase proceeding due, in part, to the State's use of inconsistent statements during the proceedings of

> Fotopoulos and his co-defendant, Deidre Hunt. This court finds the Fotopoulos opinion to be inapposite.[13] In that case, the State argued in Hunt's trial that she was a willing participant to the murders, did not act under duress, and was not dominated by Fotopoulos. However, the State directly contradicted that theory in Fotopoulos's trial by portraying Hunt as a battered woman who had been dominated by Fotopoulos. As outlined above, there was no such direct contradiction in the State's theories in the Walton, Cooper, and Van Royal trials.
>
> **Based on the foregoing record evidence, it is clear to this court that there were no inconsistencies in the State's theories in the Walton, Cooper, and Van Royal trials which would constitute a due process violation in this case**. Raleigh v. State, 932 So. 2d 1054, 1065-67 (Fla. 2006); Jennings v. State, 718 So. 2d 144, 154 (Fla. 1998). Accordingly, this claim is denied.

(PCR 5/631-34)(emphasis supplied).

For the following reasons, Walton's wholesale reliance on Bradshaw v. Stumpf, 545 U.S. 175 (2005) is misplaced; and the trial court correctly denied Walton's "inconsistent theories" claim as untimely, successive, procedurally barred, and, alternatively, without merit. In Bradshaw, the criminal defendant, Stumpf entered a guilty plea to a capital murder committed during a robbery. Id. at 179. At Stumpf's sentencing hearing, the prosecutor argued that Stumpf was the triggerman and also argued that the death penalty was appropriate even if

[13] After the trial court below rejected Walton's reliance on the federal district court's decision in Fotopoulos, the Eleventh Circuit reversed the district court's order in Fotopoulos. See, Fotopoulos v. Secretary, Department of Corrections, 516 F. 3d 1229 (2008).

Stumpf was not the shooter, "because the circumstances of the robbery provided a basis from which to infer Stumpf's intent to cause death." Id. at 180. Stumpf received a death sentence. After Stumpf was sentenced, the State then obtained information that Stumpf's co-defendant, Wesley, admitted to a fellow inmate that he had shot the victim during the robbery. The prosecution used the inmate's testimony in order to seek the death penalty against Wesley. At Wesley's trial, Wesley emphasized the prosecutor's contradictory position in Stumpf's trial and sentencing, and Wesley was sentenced to life imprisonment. Id.

In Bradshaw, the Supreme Court concluded that "the precise identity of the triggerman was immaterial to Stumpf's conviction for aggravated murder" and reversed the Sixth Circuit's habeas decision invalidating Stumpf's guilty plea based on the new evidence. Id. at 187. However, the Supreme Court determined that "it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination." Id. Because it was "not clear whether the Court of Appeals would have concluded that Stumpf was entitled to resentencing had the court not also considered the conviction invalid," the Supreme Court remanded for reconsideration of the effect of the inconsistencies on the sentence. Id.

In this case, the trial court properly found no new fundamental constitutional right had been established in Bradshaw and, therefore, Walton's claim was untimely and procedurally barred under Fla. R. Crim. P. 3.851. Furthermore, as the Eleventh Circuit recently held in Fotopoulos v. Secretary, Department of Corrections, 516 F.3d 1229 (2008), "the Bradshaw Court did not hold that the use of inconsistent theories in the prosecution of two defendants violates due process." Fotopoulos, 516 F.3d at 1235 (emphasis supplied). Walton's "inconsistent theories" claim is predicated solely on the face of the trial record. Thus, the trial court correctly ruled that Walton's claim was untimely, successive, and procedurally barred in post conviction. Furthermore, as noted by the trial court, Walton pursued a variation of this same argument as an ineffective assistance claim in his prior post conviction proceeding (PCR 5/633). Relief was denied by the trial court and this Court affirmed on appeal and explained:

> Walton first contends that his counsel rendered ineffective assistance because he did not attempt to rebut the prosecution's arguments and evidence tending to show that Walton organized and led the robbery that ended in the murders here. In support of this assertion, Walton identifies certain statements made by the State's attorney during codefendant Cooper's trial in which the State argued that Cooper was not under the direction of Walton. In particular, Walton cites two statements during the prosecution's closing argument in which the State asserted that it was "absolutely ludicrous" to say that Walton was at fault for Cooper's actions, and there was no evidence to

> support the "incredible proposition" that Walton dominated Cooper during the crime.
>
> * * *
>
> [T]he two small statements ignored by trial counsel in the instant case are somewhat insignificant. Thus, under the reasoning recently adopted by this Court in Fotopoulos, Walton has failed to make the required showing to fulfill the Strickland performance prong. Additionally, Walton cannot show prejudice here. Evidence introduced at Walton's trial showed that Walton originated the plan to rob the victims on a rainy night, Walton armed the group prior to the robbery, and Walton was the only defendant involved who knew the location of the victims' house. See Walton II, 547 So. 2d at 623-24. In the face of this overwhelming evidence, it is clear that the introduction of two statements by a state attorney in a codefendant's trial would not have been overly persuasive. Certainly, non-introduction of this evidence does not undermine our confidence in the outcome.

Walton IV, 847 So. 2d at 456 (emphasis supplied).

Now, Walton attempts to resurrect these *identical statements* under the guise of an "inconsistent theories of prosecution" claim. Appellant's Initial Brief at 26. However, claims raised and disposed of in Walton's first 3.850 are procedurally barred from consideration in this successive motion. Francis v. Barton, 581 So. 2d 583, 584 (Fla. 1991); see also Valle v. State, 705 So. 2d 1331, 1336 (Fla. 1997)(inappropriate to use different argument to relitigate same issue).

Furthermore, Walton's current claim of alleged "inconsistent theories of prosecution" is not one which is based

on a particularly new or novel legal theory. To the contrary, variations of alleged "inconsistent theories of prosecution" claims have been prevalent during the preceding twenty years. See Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc) (Clark, J., specially concurring), cert. denied, 478 U.S. 1020 (1986); Parker v. Singletary, 974 F.2d 1562, 1577 (11th Cir. 1992); Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000); Jennings v. State, 718 So. 2d 144, 154 (Fla. 1998) (ruling, on direct appeal, that the fact that the State argued in co-defendant Graves' trial that Graves was the "leader" in the robbery was not necessarily inconsistent with the argument (and the trial court's finding) that Jennings was the actual murderer). As such, Walton could have raised this same issue in his appeal after resentencing. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Smith v. State, 445 So. 2d 323, 325 (Fla. 1983).

Furthermore, Walton's reliance on Raleigh v. State, 932 So. 2d 1054 (Fla. 2006) and Van Poyck v. State, 961 So. 2d 220 (Fla. 2007) is misplaced for the following reasons. First, unlike the instant *successive* post conviction proceedings, Raleigh involved a first Rule 3.851 post conviction proceeding which was based, in part, on an intertwined claim under Giglio v. United States, 405 U.S. 150 (1972). Second, in Raleigh, this Court found no

similar due process concerns; and, unlike Stumpf, the State did not first try Raleigh as the principal actor in the victim's murder and then inconsistently prosecute a co-defendant as the principal actor in the same death. Instead, the State argued consistently in both trials that Raleigh was a principal actor in the victim's death. Raleigh, 932 So. 2d at 1066. Third, although Van Poyck admittedly involved a successive motion to vacate, this Court had previously determined, in Van Poyck's prior post conviction case, that "new evidence" on the identity of the triggerman would not create a reasonable probability of a lesser sentence. In squarely rejecting Van Poyck's claim that this Court's previous post conviction ruling should be reconsidered in light of Bradshaw, this Court explained:

> Bradshaw is largely limited to its facts and procedural posture. Its mandate was simply to reconsider the effect of the new evidence on the sentence, an issue the lower court had not reached because it had erroneously reversed the conviction. In addition, Bradshaw involves a due process claim grounded in inconsistent positions taken by the prosecution in trials of codefendants, which is not an aspect of this case. [n4] To the extent that Bradshaw has any bearing on this case, it stands for the proposition that new evidence concerning the identity of the triggerman is "material" to a death sentencing determination. This Court's 2005 opinion in this case includes the same acknowledgment: We do not hold . . . that it makes no difference in the capital sentencing process which of two codefendants actually committed the killing. Rather, we determine only that under the circumstances of this case involving a murder of a prison guard in a brutal armed attack planned by Van Poyck and carried out with Valdez, DNA evidence indicating that Van Poyck was not the

> triggerman would not have created a reasonable probability of a lesser sentence. Van Poyck IV, 908 So. 2d at 330. Therefore, Bradshaw does not require reconsideration of the 2005 decision.

Van Poyck, 961 So. 2d at 227 (emphasis supplied)

Lastly, Walton's "inconsistent theories" claim is also without merit. As the trial held, the State's arguments were not inconsistent. First of all, the State never advanced inconsistent theories as to the triggerman's identity. As the trial court recognized below, in both the Cooper and Van Royal trials, the defense asked for and received (over the State's argument) a charge regarding the mitigating circumstance of acting under duress or domination (PCR 7/1149-52, 1220, 9/1526, 1613). Their respective juries were instructed that they could consider as a mitigating circumstance whether the Cooper and Van Royal acted under duress or under the domination of Walton (PCR 7/1220, 9/1613). It was plainly proper for the State to argue that Cooper and Von Royal were not entitled to this statutory mitigation. This is not inconsistent with the State's argument that Walton was guilty as the perpetrator who planned, led and facilitated these murders, (even though he did not fire any of the fatal shots). As this Court found "extensive evidence was before the trial court which supports its conclusions regarding Walton's leadership of the criminal venture which resulted in the deaths of three victims." Walton IV, 847 So. 2d at 448.

In an attempt to give credence to his procedurally-barred Bradshaw claim, Walton alleges inconsistent theories used by the State tainted the resentencing proceeding by (1) inserting facts from the first trial into the court's resentencing order; (2) suppressing information regarding Robin Fridella; (3) improperly attempting to discredit co-defendant Van Royal; and (4) using expert Dr. Merin. Appellant's Initial Brief at 27-28. Each of these issues was raised and rejected in Walton's prior post conviction proceedings. As such, they are procedurally barred from consideration in this successive motion. Francis, 581 So. 2d at 584.

Regarding Walton's claim concerning the sentencing order, the trial court found:

> The State correctly notes that the argument regarding the "contamination" of the second sentencing order by Skalnik's testimony was previously raised by the Defendant in his Third Amended Motion to Vacate Judgments of Conviction and Sentence, but in the context of an ineffective assistance of counsel claim. This claim was denied by this court and this court's denial was affirmed by the Florida Supreme Court. In affirming this court's decision, the Supreme Court noted that, although there was some mention in the trial court's resentencing order of Defendant Walton grabbing the victim's hair, which did not appear in the record on resentencing, "[T]he inclusion of one errant phrase by the trial court in its sentencing order is not significant evidence that the trial court relied upon the original confessions of McCoy and Cooper [and, thus, the testimony of Skalnik] in sentencing Walton to death. Clearly, taken in conjunction with the presence of the overwhelming evidence before the court supporting its conclusions as to Walton's leadership role in the burglary

> planning, this mistaken statement by the trial court within its final order was harmless. Certainly, the trial court's final sentencing decision did not hinge upon whether Walton actually placed his hands upon a victim's hair or not. Thus, this error did not contribute to Walton's sentence, and we conclude that it is harmless under State v. Diguilio, 491 So. 2d 1129 (Fla. 1986)." Walton v. State, 847 So. 2d 438, 448 (Fla. 2003).

(PCR 5/630-31)(emphasis supplied).

Regarding Walton's Robin Fridella claim, Walton concedes "[t]his Court considered and rejected Mr. Walton's Brady claim regarding [Robin Fridella] in his appeal of the 3.850." He adds though "these facts were only being presented to establish the State's use of inconsistent theories infected the entire process." Appellant's Initial Brief at 34 n. 9. Again this claim, raised and disposed of in Walton's first 3.850 proceeding,[14] is procedurally barred from consideration in this successive motion. Francis, 581 So. 2d at 584. Walton's successive attempt to inject and relitigate this claim under the guise of establishing an inconsistent theories claim should be rejected. Valle, 705 So. 2d at 1336; see also Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990) (procedural bar cannot be avoided by couching barred claim in terms of ineffective assistance of counsel).

Walton also appears to argue that the State has taken inconsistent positions regarding Van Royal's credibility and

[14] Walton IV, 847 So. 2d at 452-54.

such supports his Bradshaw claim.[15] Specifically, Walton asserts the State took the "untenable position that a 'co-defendant's version [Walton was not the ringleader] of how the crime occurred is not newly discovered evidence'". Appellant's Initial Brief at 41. Walton argues this is inconsistent with the State arguing Walton was the ringleader. First, the State's argument in post conviction proceedings concerning the *same* defendant certainly does not support an inconsistent theories claim under Bradshaw. Second, Van Royal never testified at Walton's resentencing. Furthermore, in rejecting Walton's newly discovered evidence claim, this Court stated "[w]hat Walton has presented as 'newly discovered evidence' is simply a new version of the events from a witness/participant [Van Royal] who presented multiple stories since the time of the occurrence of the events themselves." Walton IV, 847 So 2d 454-455. This Court later referred to Van Royal as an "extremely untrustworthy person". Walton IV, 847 So. 2d at 455.

Lastly, with regard to Walton's claim that the State's use of Dr. Merin (who was appointed as an expert to co-defendant Cooper) was a conflict of interest that violated his constitutional rights, this Court previously held that "[w]hile

[15] In his motion below, Walton recognized the Van Royal claim was considered and rejected by this Court but presented the "facts" for the purpose of demonstrating the due process violation in the context of Bradshaw v. Stumpf." (PCR 1/17 n. 17).

it was error for the trial court to allow a mental health professional with an obvious conflict of interest to testify during the post conviction proceedings below, any error was harmless beyond a reasonable doubt because the trial court did not actually rely upon Merin's testimony in reaching its decision." Walton IV, 847 So. 2d at 446; PCR 5/631-32 n.3 (order rejecting Dr. Merin claim barred). Walton's successive claims regarding the sentencing order, Robin Fridella, Van Royal and Dr. Merin are procedurally barred, without merit, and do not offer Walton any legitimate basis for successive post conviction consideration under Bradshaw. The trial court's order summarily denying Walton's successive motion to vacate should be affirmed.

ISSUE II

THE PAUL SKALNICK CLAIM

Next, Walton asserts that the trial court erred in denying his successive post conviction claim based on Paul Skalnik, a jailhouse informant who testified against co-defendant, Cooper. Paul Skalnik did not testify at Walton's guilt phase or resentencing. Nevertheless, Walton claimed that the State allegedly withheld evidence tending to prove that Skalnik purportedly was a state agent, and Walton has "newly discovered" evidence to prove a Brady violation. Walton's alleged "new evidence" consists of three affidavits filed in co-defendant Cooper's federal proceedings in 2005. For the following reasons, the trial court correctly denied Walton's successive post conviction claims and successive records demands predicated on Paul Skalnik.

Walton first asserts the trial court erred in denying his successive public record demands. Walton sought "all" records, files, documents, notes, pleadings, memorandum, statements, and/or transcripts" relating to Paul Skalnick (2APCR 1/1871). He also sought all documents relating to co-defendant Cooper's post conviction proceedings (2APCR 1/1870). This Court has held that trial courts do not abuse their discretion in denying requests for additional public records that are overly broad and unduly burdensome. See Moore v. State, 820 So. 2d 199, 204

(Fla. 2002) ; Parker v. State, 904 So. 2d 370, 379 (Fla. 2005)(request properly denied where defendant failed to show officer's files relevant to his case). This Court has held that requests that seek "any and all" records are overly broad and unduly burdensome. Mills v. State, 786 So. 2d 547, 551-52 (Fla. 2001). This Court has noted that the requirement that defendants specify the additional records they are seeking and show that they have some relevance to a colorable post conviction claim is intended to ensure that requests for additional public records are not used for "fishing expeditions." See Glock v. Moore, 776 So. 2d 243, 253 (Fla. 2001)(the production of public records is "not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief") (*quoting* Sims v. State, 753 So. 2d 66, 70 (Fla. 2000)).

Here, the trial court properly denied Walton's successive requests for the Cooper post conviction records because they were made in an overly broad and unduly burdensome manner without any showing of relevancy to the case (2APCR 4/2499). The Skalnick records were not relevant as Skalnik did not testify at Walton's resentencing. Moreover, the non-exempt Skalnick records were previously provided to Walton; and the additional documents requested were found to be exempt from production (10/1706, 1712; 2APCR 4/2498). The trial court did

not abuse its discretion in denying Walton's successive records demands, and should be affirmed. See also Fla. R. Crim. P. 3.852(h)(3)(not authorizing renewed access to documents previously provided).

With regard to Walton's alleged Brady claim premised upon "newly discovered evidence", the trial court held:

> The Defendant alleges that his due process rights, as well as his rights under the fifth, sixth, and eighth amendments to the U.S. Constitution, were violated when the State withheld material and exculpatory evidence in his case in violation of Brady v. Maryland, 373 U.S. 83 (1963). The Defendant further contends that this Brady violation rendered his trial counsel's representation ineffective. Specifically, the Defendant alleges that the State withheld evidence tending to prove that Paul Skalnik, who was a jailhouse informant against the Defendant's co-defendant, Richard Cooper, was a State agent, and further claims that he has newly discovered evidence to prove this alleged Brady violation.
>
> The alleged new evidence which forms the basis of this claim consists of three affidavits filed in co-defendant Cooper's federal proceedings. The contents of the affidavits are as follows:
>
> First, Anthony Giovannielo, a former law enforcement officer with the Pinellas County Sheriff's Office, states that he once was a correctional officer at the Pinellas County Jail and, during that time, had a cordial relationship with jail inmate Paul Skalnik. Giovannielo further states that, during a conversation with Skalnik in the jail, Skalnik informed Giovannielo that he was working as an agent for the Sheriff's Department and the State Attorney's Office. Skalnik also informed him that he was given access to State files and computers and reported information from inmates to police detectives. Giovannielo further states that, in 1985, Skalnik again told Givannielo [sic] that he had worked as a state agent.

Second, Charles Felton, the director of the Pinellas County Jail from 1981 to 1992, states that he allowed police detectives "unimpeded access to inmates" and allowed inmates to assist law enforcement officers with their casework. He further avers that arrangements were often made by detectives for jailhouse informants to be housed with certain inmates. Felton further states that it was common practice to use jailhouse informants to assist detectives with their casework, and these informants were usually given sentencing consideration for their efforts. Felton's affidavit also states that Skalnik's name is "familiar to him," but does not state anything specific about Skalnik's alleged work as a jailhouse informant.

Third, Johnny Touchton, a former law enforcement officer with the Pinellas County Sheriff's Office and private investigator, states that he was contacted in 1985 by two Pinellas County Sheriff's Office detectives, who asked Touchton if he would employ Skalnik as a process server.

The Defendant contends that he was prejudiced by the State's alleged failure to disclose that Skalnik was a State agent due to the fact that Skalnik's testimony was presented at the Defendant's original penalty phase proceeding and, following remand for a new penalty proceeding, the resentencing order was "contaminated" by Skalnik's testimony.[fn2]

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In analyzing an alleged newly discovered evidence claim, the court must apply the two-prong Jones test. Robinson v. State, 770 So. 2d 1167, 1169 (Fla. 2000); Jones v. State, 709 So. 2d 512, 521 (Fla. 1998); Jones v. State, 591 So. 2d 911, 915-16 (Fla. 1992). The two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. Jones, 709 So. 2d at 521. "First, in order to be considered newly discovered, the evidence '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 [of it] by the use of diligence.'" Id., citing Torres-Arboldea [sic] v. Dugger, 636 So. 2d. 1321, 1324-25

(Fla. 1994). "Secondly, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Jones, 591 So. 2d at 915. Additionally, a claim based upon newly discovered evidence must be pled within one year of the date the evidence was discovered or could have been discovered through the exercise of due diligence. See Fla. R. Crim. P. 3.851(d); Glock v. Moore, 776 So. 2d 243, 251 (Fla. 2001).

> [fn2] More specifically, the Defendant alleged in his Third Amended Motion to Vacate Judgments of Conviction and Sentence, and continues to allege in the instant motion, that the resentencing court's factual findings were not supported by the record, in that the sentencing order referenced facts brought out in co-defendant Cooper's confession and Skalnik's testimony from the Defendant's first sentencing proceeding.

In order to establish a Brady violation, the Defendant has the burden of proving that 1) the State suppressed material, exculpatory information; 2) the information was not equally accessible to the defense and the prosecution, and the defense could not have obtained the information through the exercise of due diligence; and 3) this suppression resulted in prejudice to the Defendant so that confidence in the trial verdict was undermined. Way v. State, 760 So. 2d 903 (Fla. 2000), citing Stickler [sic] v. Greene, 527 U.S. 263 (1999).

At the outset, this court expresses some doubt as to whether the information contained in the three affidavits actually constitutes newly discovered evidence. Although these affidavits were executed in February 2005, and the Defendant claims that the existence of these affidavits was only recently discovered as filings in co-defendant Cooper's federal postconviction litigation, the facts on which the affidavits are based stem from events from the early-to-mid 1980's. The Defendant fails to allege in his motion that this information could not have been discovered through the exercise of due diligence, nor does he provide any explanation for why the information was able to be discovered by co-defendant Cooper, but not by Defendant Walton.

> Assuming, arguendo, that this information qualifies as newly discovered evidence, this court finds that this evidence fails to satisfy either the materiality or the prejudice prong of the Brady test. The Defendant's argument for both the materiality of this information and the resulting prejudice is attenuated at best: the Defendant argues that, although Skalnik did not present any testimony at either the guilt phase or the second penalty phase of the Defendant's trial, Skalnik's testimony at the first sentencing phase "contaminated" or "infected" the second sentencing phase, as evidenced by the fact that the resentencing court included small details about the commission of the crime that were found only in Skalnik's testimony at the first penalty phase proceeding. The State correctly notes that the argument regarding the "contamination" of the second sentencing order by Skalnik's testimony was previously raised by the Defendant in his Third Amended Motion to Vacate Judgments of Conviction and Sentence, but in the context of an ineffective assistance of counsel claim. This claim was denied by this court and this court's denial was affirmed by the Florida Supreme Court.
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> A second, independent review of the penalty phase transcript and resentencing order leads this court to the same conclusion it (and the Florida Supreme Court) reached in deciding this argument was without merit in the context of an ineffective assistance of counsel claim. See Exhibit 1: Resentencing Order; Exhibit 2: Walton Penalty Phase Transcript. Accordingly, this court finds that the Defendant's alleged newly discovered evidence, which purports to prove that Paul Skalnik was a state informant at the time he testified at the Defendant's first guilt phase proceeding, is not sufficiently material or prejudicial to warrant relief under Brady. Accordingly, this claim is denied.

(PCR 5/630-31).

In Brady, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request

violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. To establish a Brady violation, the defendant must demonstrate that (1) the evidence was favorable to the defendant, either because it was exculpatory or because it was impeaching; (2) it was suppressed by the State, either willfully or inadvertently; and (3) it was material, thereby causing prejudice to the defendant. See Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Ultimately, a "criminal defendant alleging a Brady violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict." Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003). As previously detailed in the trial court's comprehensive order denying post conviction relief, Walton has completely failed to establish any violation under Brady.

Walton's Giglio claim also fails here. To establish a valid claim under Giglio, a defendant must show that (1) some testimony at trial was false, (2) the prosecutor knew that the testimony was false, and (3) the testimony was material. Suggs v. State, 923 So. 2d 419, 426 (Fla. 2005). As there was no testimony given by Skalnick at Walton's guilt phase or resentencing, Walton's successive Giglio claim is both

procedurally barred and without merit. See also Smith v. State, 931 So. 2d 790, 800 (Fla. 2006).

Walton's claim regarding Skalnick purportedly acting as a state agent has previously been rejected by this Court. In co-defendant Cooper's post conviction appeal regarding Skalnik in Cooper v. State, 856 So. 2d 969 (Fla. 2003), this Court explained:

> As an initial matter, Cooper's contention that Skalnik was a de facto state agent at the time of their conversation in jail is refuted by the record. Under this Court's decision in Rolling v. State, 695 So. 2d 278 (Fla. 1997), the Sixth Amendment to the United States Constitution prohibits law enforcement officers from prearranging the questioning of defendants by incarcerated informants. See id. at 290. The principle is self-evident: the police may not sidestep constitutional protections by employing jail residents as independent contractors to interrogate defendants without the presence of an attorney. See United States v. Henry, 447 U.S. 264, 65 L. Ed. 2d 115, 100 S. Ct. 2183 (1980). However, a violation of the dictates of Rolling is only shown where the defendant establishes that the informant and the authorities had a preexisting plan for the informing witness to obtain a confession.
>
> In the instant case, the record refutes Cooper's contention that the State recruited Skalnik as an informant. Indeed, the entirety of the evidence before this Court supports the State's contention that Skalnik was upset by Cooper's bragging regarding the murders, and he subsequently contacted the authorities of his own accord. Skalnik had, at one time, been employed as a police officer in Texas, and this also motivated him to report what Cooper had told him. Because Cooper's claim that Skalnik was an agent of the State at the time of their jailhouse conversation is refuted by the record, we deny relief based thereon.

Cooper, 856 So. 2d 972-973 (emphasis supplied).

Where Skalnick did not testify at Walton's guilt phase trial or his resentencing, Walton's argument that his rights were violated by Skalnick is procedurally barred and without merit. The affidavits, although obtained in 2005, concern events from the 1980's and are procedurally barred as they do not meet the definition of newly discovered evidence. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)(evidence must be unknown, could not have known by use of diligence, and of nature that would have probably produced acquittal on retrial).

As to Walton's claim regarding the resentencing order, this issue was disposed of by this Court previously as discussed above. Walton offers no theory by which this issue should be revisited. The trial court's summary denial of Walton's successive motion to vacate was proper and should be affirmed.

ISSUE III

THE LETHAL INJECTION CLAIM

In this issue, Walton argues that the trial court allegedly erred in summarily denying his lethal injection claim and successive public records demands. For the following reasons, the trial court's rulings should be affirmed.

The denial of public records was proper.

In the request to DOC and the Attorney General, Walton sought records from both agencies relating to "all information that in any way relates to lethal injection. . . ." (2APCR 1/1860). Walton set forth sixty-one (61) paragraphs of requested items, encompassing "any and all writings and documents" ever produced or possessed by DOC concerning execution by lethal injection (2APCR 1/186-18, 2008). Walton's demand also sought detailed personnel information from DOC, including time sheets and wages for every single employee who worked at the state prison during every execution by lethal injection ever undertaken in Florida (2APCR 1/1867).

Such general requests do not meet the requirements under Fla. R. Crim. P. 3.852. See Diaz v. State, 945 So. 2d 1136, 1148-50 (Fla. 2006) (rejecting "any and all" requests for lethal injection records as overbroad and unduly burdensome); 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, 786 So. 2d at 551-53. The trial court did not abuse its discretion, the denial of public records was proper as overbroad, unduly burdensome and as unrelated to a colorable claim for relief (2APCR 4/2498). Glock, 776 So. 2d at 253; Moore, 820 So. 2d at 204.

Walton's lethal injection challenge

In summarily denying Walton's lethal injection claim, the trial court ruled:

> Next, the Defendant alleges that his rights under the eighth and fourteenth amendments to the U.S. Constitution have been denied because execution either by electrocution or lethal injection constitutes cruel and unusual punishment. The Defendant further states that this claim is based on newly discovered, scientific evidence from a University of Miami study published in The Lancet in 2005, entitled Inadequate Anesthesia in Lethal Injection for Execution.
>
> This court is bound by recent Florida Supreme Court precedent holding that (1) The Lancet study cited in the Defendant's motion does not constitute newly discovered evidence; and (2) execution by lethal injection does not constitute cruel and unusual punishment. See Diaz v. State, 945 So. 2d 1136 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 179 (Fla. 2006); Rutherford v. State, 926 So. 2d 1100, 1113 (Fla. 2006); Hill v. State, 921 So. 2d 579, 583 (Fla. 2006).
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> Accordingly, this claim is denied.
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> (PCR 5/634)(emphasis supplied).

Walton's claim raised below was that an article published in *The Lancet* established that lethal injection constituted cruel and unusual punishment (PCR 1/20-22). On appeal Walton's

lethal injection claim is based upon the events surrounding the execution of Angel Diaz. Walton failed to submit any proposed amendment below based on the Diaz execution.[16] As such, these arguments were not presented to the court below and are barred. See Griffin v. State, 866 So. 2d 1, 11 n.5 (Fla. 2003).

Notwithstanding, Walton's lethal injection claims premised upon *The Lancet* or the Diaz execution are meritless based upon the decisions of this Court and the United Supreme Court.

Regarding *The Lancet* article, this Court has previously rejected claims based on this article and nothing Walton offers in his brief serves as a basis for reconsideration of this Court's holdings. In Rutherford v. State, 926 So. 2d 1100, 1113-14 (Fla. 2006) this Court rejected the argument that the *The Lancet* presented new scientific evidence that Florida's lethal injection procedure created a foreseeable risk of the gratuitous infliction of unnecessary pain on the person being executed); Rolling v. State, 944 So. 2d 176, 179 (Fla. 2006) (same); see also Hill v. State, 921 So. 2d 579 (Fla. 2006)

[16] On December 15 Walton filed a motion to continue the case management conference based on the events surrounding the execution of Angel Diaz (2APCR 6/2985-88). The case management conference was continued to January 16, 2007 (PCR 4/625). The trial court did not issue its order denying relief until March 12, 2007 (PCR 5/626-37). Despite the passage of almost three months, Walton never filed any proposed amendment in the trial court based upon the events surrounding the execution of Angel Diaz.

(holding *Lancet* article did not justify holding an evidentiary hearing); Diaz v. State, 945 So, 2d 1136, 1144-45 (Fla. 2006) (affirming summary denial of *Lancet* claim and rejecting Weisman letter as newly discovered evidence). The judgment of the trial court should be affirmed.

Walton asserts now on appeal that the events of the Diaz execution showed that lethal injection as administered in Florida is unconstitutional. In Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), this Court rejected the claim. In Schwab v. State, 969 So. 2d 318 (Fla. 2007), this Court upheld the summary denial of the same claim based on its holding in Lightbourne. In Baze v. Rees, 128 S. Ct. 1520 (2008), the United States Supreme Court recently affirmed the rejection of a similar challenge to a lethal injection protocol. The plurality noted that a state, such as Florida, with a substantially similar protocol would also have a constitutional protocol. Id. at 1537. Even the dissent noted that Florida had more safeguards than the protocol that was affirmed. Id. at 1567. As such, Walton's lethal injection claim is without merit and would have been properly summarily denied even if it had been timely raised below.

In an attempt to avoid the impact of these decisions, Walton asserts that he should not be bound by these decisions because he was not a party to the Lightbourne evidentiary

hearing. However, Walton ignores that Schwab was not a party to that hearing either. Yet, this Court affirmed the summary denial of Schwab's lethal injection claim because it had already decided that lethal injection was not unconstitutional. Schwab, 969 So. 2d at 323. Moreover, proceeding in this manner is entirely consistent with Florida law. When lethal injection was adopted, an evidentiary hearing was held in Sims v. State, 754 So. 2d 657, 668 (Fla. 2000), to determine its constitutionality. This Court then applied this decision to other defendants raising the same claim. See Diaz v. State, 945 So. 2d 1136 (Fla. 2006); Rolling v. State, 944 So. 2d 176 (Fla. 2006); Hill v. State, 921 So. 2d 579 (Fla. 2006); Rutherford v. State, 926 So. 2d 1100, 1113-14 (Fla. 2006); Bryan v. State, 753 So. 2d 1244 (Fla. 2000)[17]. As such, the fact that Walton was not a party to the Lightbourne evidentiary hearing does not make this Court's decision any less binding precedent.

To the extent that Walton may assert a *per se* challenge to lethal injection or to the Florida death penalty statute, any such claim is procedurally barred for the failure to timely raise it. Lethal injection became a method of execution in

[17] Similarly, when issues arose regarding the constitutionality of electrocution, an evidentiary hearing was held in Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999). This Court then applied that decision to other inmates raising the same claim. E.g. Suggs v. State, 923 So. 2d 419, 441 (Fla. 2005); Elledge v. State, 911 So. 2d 57, 78 (Fla. 2005); Rodriguez v. State, 919 So. 2d 1252, 1285 (Fla. 2005).

Florida in 2000 and Walton could and should have raised any *per se* challenge to lethal injection within one year of the decision in Sims v. State, 754 So. 2d 657 (Fla. 2000). See Fla. R. Crim. P. 3.851(d)(2).

Finally, in Woodel v. State, 2008 Fla. LEXIS 754, 26-27 (Fla. May 1, 2008), another capital defendant also challenged whether Florida's current protocol, including the three-drug cocktail, violates the Eighth Amendment. This Court rejected these same claims, based on both Lightbourne v. McCollum, 969 So. 2d 326, 353 (Fla. 2007) and Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007). Here, as this Court reiterated in Lebron v. State, 2008 Fla. LEXIS 756 (Fla. May 1, 2008), Walton is not entitled to relief based on lethal injection:

> Lebron also asserts that execution by lethal injection, as currently performed in Florida, constitutes cruel and unusual punishment in violation of the United States Constitution. We disagree. This Court has recently considered this claim in other cases and denied relief. See Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007) ("Given the record in Lightbourne and our extensive analysis in our opinion in Lightbourne v. McCollum, we reject the conclusion that lethal injection as applied in Florida is unconstitutional."); Lightbourne v. McCollum, 969 So. 2d 326, 353 (Fla. 2007) ("Lightbourne has failed to show that Florida's current lethal injection procedures, as actually administered through the DOC, are constitutionally defective . . . ."), petition for cert. filed, No. 07-10265 (U.S. Apr. 3, 2008). Likewise, Lebron is not entitled to relief on this claim.
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> Lebron v. State, 2008 Fla. LEXIS 756, 39-40.

ISSUE IV

THE ABA REPORT CLAIM

Lastly, Walton alleges that "newly discovered" evidence – the ABA report – establishes a constitutional violation. With regard to Walton's ABA claim, the trial court held:

> Once again, this court is bound by Florida Supreme Court precedent holding that (1) this report does not constitute newly discovered evidence; and (2) execution by lethal injection does not constitute cruel and unusual punishment. See Diaz v. State, 945 So. 2d 1136 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 181 (Fla. 2006). Additionally, although the Defendant raises multiple allegations as to how the conclusions in the ABA report render his individual sentence unconstitutional, these allegations cite only generalities noted in the report, and do not relate any specific way to the Defendant's death sentence. Accordingly, this claim is denied.

(PCR 5/635-37)(emphasis supplied).

Walton asserts that he is entitled to successive post conviction relief because the ABA report on the administration of the death penalty allegedly constitutes newly discovered evidence that the death penalty is unconstitutional. However, this Court has already held that the ABA report does not constitute newly discovered evidence and stated that nothing in the report caused it to reconsider its precedent that the death penalty is constitutional. Diaz v. State, 945 So. 2d 1136, 1146 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 181 (Fla. 2006); Rutherford v. State, 940 So. 2d 1112, 1117-18 (Fla. 2006).

The ABA Report is not any more persuasive now than at the time of Rutherford, Rolling or Diaz. Since this Court has repeatedly rejected this claim, the claim was properly summarily denied. The judgment of the trial court should be affirmed.

CONCLUSION

In conclusion, Appellee, State of Florida, respectfully requests that this Honorable Court affirm the denial of Walton's successive motion for post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Regular Mail to William M. Hennis III, Litigation Director, Capital Collateral Regional Counsel-South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301 and to Kristen Howatt, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33758-5028, this 8th day of May, 2008.

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).

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COUNSEL FOR APPELLEE