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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-2466

COREY SMITH,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

TAMARA MILOSEVIC
Assistant Attorney General
Florida Bar No.93614
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
Email:tamara.milosevic@myfloridalegal.com
PH. (305) 377-5441
FAX (305) 377-5655

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STATEMENT OF CASE AND FACTS

Defendant was charged by indictment with conspiracy to commit racketeering, racketeering (RICO), conspiracy to traffic cannabis, conspiracy to traffic cocaine, conspiracy to murder Leon Hadley, first degree murder of Leon Hadley, first degree murder of Melvin Lipscomb, conspiracy to murder Cynthia Brown, first degree murder of Cynthia Brown, conspiracy to murder Jackie Pope, first degree murder of Jackie Pope, second degree murder of Marlon Beneby, conspiracy to murder Anthony Fail and first degree murder of Angela Wilson. (R1/47-94) The matter proceeded to trial on October 4, 2004. (R1/2) After considering the evidence presented, the jury found Defendant guilty of the manslaughter for Lipscomb and Beneby murders and otherwise guilty as charged. (R20/2694) The trial court adjudicated Defendant in accordance with the verdicts. (R21/2803-07) This Court summarized the evidence adduced at trial as:

> The State's witnesses during the guilt phase of trial fell into three categories: (1) professional witnesses such as police officers and investigators, crime scene technicians, medical examiners, and forensic experts; (2) witnesses who provided legal identification of the homicide victims or who had personal knowledge of the circumstances surrounding the various homicides and acts of violence; and (3) members of the John Doe organization or [Defendant's] associates who connected him to the homicides and the drug enterprise. Because [Defendant's] trial involved a number of separate charges, the facts regarding each will be discussed separately below, including the facts pertinent to [Defendant's] appellate claims.

These facts were developed through witness testimony and evidence presented at trial.

Drug Enterprise and Organization

A number of witnesses who had been involved in John Doe testified about the organization and operation of the seven drug holes. According to their testimony, [Defendant] was the head of John Doe, Latravis Gallashaw was the second-in-command, and Julian Mitchell was the third. [Defendant] started out as a member of the Lynch Mob, a drug group that predated John Doe in the same neighborhood. The leader of this group was Mark Roundtree, who had both a friend and mentor relationship with [Defendant]. [Defendant] opened his own drug hole across the street from his mother's house on Northwest 58th Street and 15th Avenue in 1994. [Defendant] engaged in intimidation and violence to take over other drug spots or to run competitors out of business.

Each drug hole employed a number of workers, including a "bombman" who sold the drugs, a "watchout" who looked out for the police and marketed the drugs by yelling slogans to potential customers, a "gunman" who kept the peace and enforced the rules, and a "street lieutenant" who dropped off drugs and collected money. In addition, John Doe also employed "tablemen" who processed and packaged the drugs for street sale, "turnover lieutenants" who tracked the money to provide a count for paying the workers, and "enforcers" or "hit men" who carried out the group's violence. The employees worked regular shifts at their jobs and were paid in cash by the lieutenants.

Various witnesses and documentary evidence also revealed a type of accounting system through tally sheets which enabled John Doe to keep track of how much and what kind of drugs were sold and how much money was collected and paid out. Letter codes were used to indicate the type of drug and the size of the bags. Witnesses also testified that workers at the drug holes were permitted to buy guns that they might be offered by individuals and pay for them with John Doe money. The guns were kept by the workers at the holes. However, the workers had to get special permission to buy machine guns, which were stashed in a special location and not kept by the general drug hole workers.

When a drug unit officer attempted to conduct a

controlled buy at the residence of Antonio Allen in September 1998, Allen was alerted when the officer's radio made a transmission. Allen was arrested with over 500 bags of cocaine, a .380-caliber semiautomatic gun with a four-inch barrel, and $922 in cash. Allen admitted the possession of these items. In September 1998, the wiretap revealed that a sack of narcotics was going to be delivered to the residence of Charles Clark. The search produced over 100 bags of crack cocaine, $846 in cash, two handguns and ammunition, and rubber bands for bundling cash. The task force executed search warrants for various residences of John Doe members in late October and early November of 1998. The search of [Defendant's] mother's residence revealed two homemade grenades in the attic, a 9-millimeter pistol in [Defendant's] room, various boxes of ammunition, magazines, and clips, a bullet-proof vest, a loaded derringer in the mother's bedroom along with $850, drug residue in the kitchen, and a copy of the police report in the Johnson case in the nightstand of [Defendant's] bedroom. The search of the home of Todra Smith and William Austin, [Defendant's] sister and brother-in-law, uncovered several bricks of marijuana, hundreds of small bags of marijuana, a loaded 9-millimeter semiautomatic pistol, a .25-caliber pistol and magazine, and a variety of drug paraphernalia. The search of Latravis Gallashaw's house uncovered various paraphernalia for processing and packaging cocaine, including scales and thousands of empty bags for packaging, tally sheets of packaging and sales, two bricks of marijuana, rock and powder cocaine, empty kilo wrappers in the garbage, and $16,000 in cash. The search of the residence that [Defendant] shared with his girlfriend Crystal Boyd uncovered a radio frequency detector to detect bugs or wires, a phone guard that was supposed to detect wiretaps, a diamond-studded Rolex watch, $500 in cash in [Defendant's] shorts pocket, a bag containing $185,724 in cash bundled with rubber bands, an AK-47 drum that can hold up to 75 rounds of ammunition, and a small amount of marijuana. In November 1998, a search of the Steady Mobbin' Car Wash on Northwest 17th Avenue uncovered a number of weapons in a locked storage room, including a .357 handgun, a Mac-10 semiautomatic handgun, a Rueger Mini-14 rifle, and a Mac-90 rifle. There was also a ski hat in the storage

room.

On December 11, 1998, the John Doe "hitmen" Jean Henry, Julius Stevens, and Eric Stokes did a drive-by shooting of the Northwest 98th Street residence of Patricia Harvey, who is related to Anthony Fail. There were a number of adults and children at the residence that day, as they were celebrating the "Soul Bowl" football game between Miami Northwest High School and Jackson High School. There were thirty-seven bullet holes in the front of the Harvey house and other bullets struck the trees in front of the house. Two of the bullets actually went through the Harvey house and struck a duplex behind it.

Based on this shooting, the crime suppression team of the Metro Dade police conducted surveillance of the residence of Eric Stokes and Jean Henry at 1255 Northwest 100th Terrace. The officers observed black males getting into two different vehicles at this location. The officers observed that the individuals in each car were armed. A white station wagon containing Julian Mitchell and Eddie Harris traveled to the west and led the officers on a high-speed chase for about ten minutes. The officers observed items being thrown from the vehicle. The chase ended at a Costco Warehouse approximately sixty blocks away. Eric Stokes, Jean Henry, and Julius Stevens left in a blue LeSabre and fled at a high speed. The three men abandoned their vehicle and then fled on foot. The police officers were able to arrest them after being alerted by a resident on 74th Street that the men were running through his house. The police found a loaded .44-caliber Colt pistol in a holster and a blue Dickie shirt that had been dumped over a fence as the men fled on foot. The police got court authorization for a search of the house on Northwest 100th Terrace. In Stokes' bedroom, the police found a 9-millimeter assault rifle and a bullet-proof vest. In Stevens' bedroom, they found a total of $23,000 in cash and ammunition. A small amount of marijuana debris was found in the kitchen and living room. Numerous boxes of ammunition of different calibers were found in a garbage can.

In January 1999, the task force executed warrants for the residences of Julius Stevens and Ketrick Majors. In Stevens' house, the search uncovered a number of boxes of ammunition and loose rounds, tally

sheets, a triple-beam scale, a bullet-proof vest, a ski mask, and small bags of cocaine. In Major's house, the search uncovered empty bags for packaging drugs, an AK-47 magazine and clip, six boxes of ammunition, a box of .22-caliber long rifle rounds, and a ski mask.

Leon Hadley Murder

Testimony showed that Leon Hadley was shot and killed on the morning of August 21, 1995, outside a store on the corner of 14th Avenue and 61st Street in Miami-Dade County. Hadley suffered six gunshot wounds, with a fatal wound to his head. His wounds did not show stippling that would indicate that he was not shot at a close distance. Eleven shell casings and one live round were found at the murder scene. Hadley had a preexisting gunshot wound to his right leg and had a cast on his leg. Based on witness statements, a BOLO issued for a dark, late model vehicle with a black male driver.

Various witnesses testified about the relationship between the defendant [] and Hadley and what they knew about Hadley's murder. These witnesses included Julian Mitchell, Carlos Reynolds, Phil White, Eric Mitchell, Anthony Fail, Antonio Allen, and Herbert Daniels, all members of John Doe, and [Defendant's] girlfriend Tricia Geter. Hadley had been an enforcer for a drug organization that predated John Doe. Hadley's younger brother Eric operated a drug hole just around the corner from the first drug hole that [Defendant] opened. [Defendant] was concerned that Eric was "short stopping" potential customers, i.e., taking customers away from the John Doe hole. [Defendant] forced Eric to close his hole. Hadley confronted the members of the Lynch Mob about this situation and it appeared to be resolved.

However, a short time later Hadley got into a fight with Keevon Rolle at a Lynch Mob birthday celebration in the neighborhood. When Hadley pursued Rolle as he left the area of the fight, Rolle pulled out a gun and shot Hadley in the leg. A few days later, Hadley confronted members of the Lynch Mob who were sitting on the corner of Northwest 61st Street and 14th Avenue outside the store. Hadley warned them not to sit there when his leg healed because he planned to "spray up the corner" and kill Lynch Mob members. Shortly after this, [Defendant] and two other individuals were spotted walking through an alley in

the area one night and wearing all black clothes, which was indicative of "going to war" or going to kill someone.

Phil White testified that he witnessed [Defendant] and Kelvin Cook shoot Hadley. [Defendant] had shown up at White's house early on the morning of Hadley's shooting. [Defendant] was driving a dark burgundy Delta 88. [Defendant] and Cook were both dressed in black and had black ski masks or "scullies." [Defendant] had an Uzi-type gun and Cook had an AK-47 rifle. [Defendant] enlisted White to help him find Hadley. [Defendant] stated that he had a dream that Hadley had killed him. The trio drove around for thirty to forty-five minutes before they spotted Hadley on the corner at the store. [Defendant] stated his intent to kill Hadley and changed seats with White in the car. White was actually driving the vehicle when the shooting took place. White observed [Defendant] put on a ski mask, jump out of the car, and shoot Hadley. When [Defendant's] gun jammed, Cook began shooting. After the shooting, the trio picked up [Defendant's] car and drove both vehicles to a warehouse. They wiped down the vehicle used in the shooting and removed its tag.

Tricia Geter also testified about the bad blood between Hadley and [Defendant]. [Defendant] told Geter that Hadley had threatened to kill him and that he was going to kill Hadley first. [Defendant] left Geter's house early in the morning on the day that Hadley was killed. When [Defendant] returned, he appeared nervous and had abrasions on his knee and elbow. He told Geter that he "did it" and described how his gun had jammed during the shooting. Geter testified that [Defendant] called his mother and Roundtree to tell them about the shooting as well. Geter stated that [Defendant] was "well-feared" after killing Hadley and took over the area that had been controlled by Hadley. Geter also testified that she had been approached by [Defendant] before the instant trial. [Defendant] wanted Geter to testify that he had been home with her on the morning that Hadley was shot. Anthony Fail also testified that [Defendant] felt threatened by Hadley and had admitted that he had killed Hadley along with Cook and that White was the driver of the car.

Mark Roundtree had previously been convicted for Hadley's murder and sentenced to life. Various

individuals testified that they either saw [Defendant] make payments to Roundtree's family on a weekly basis after he was arrested or they were ordered to give money to Roundtree's family when the family came to the drug holes. Herbert Daniels overheard [Defendant] and Roundtree talking about Hadley's murder at one point. [Defendant] told Roundtree, "You didn't do it; why are you worried?" Antonio Allen testified that [Defendant] told him that Roundtree took the blame for Hadley's murder. Tricia Geter testified that [Defendant] paid for Roundtree's attorney and sent his mother Willie Mae Smith to the trial to bring back reports about the proceeding. Anthony Fail testified that [Defendant] stated that Roundtree had nothing to do with Hadley's murder.

Roundtree gave inconsistent statements about his involvement in Hadley's shooting. In a statement made in April 1996, Roundtree totally denied any involvement. However, the polygraph operator noted deception in Roundtree's negative response to the question, "Do you know who shot Hadley?" Sometime during the investigation of John Doe, Detective Frank Alphonso learned that Roundtree might be innocent of Hadley's murder and interviewed him about the incident in December 2000. The sole witness against Roundtree also recanted her trial testimony that Roundtree had shot Hadley.

After Roundtree had exhausted all appeal and postconviction proceedings regarding his conviction for Hadley's murder, Roundtree gave another statement in January 2001. Roundtree stated that [Defendant] told him that [Defendant], Cook, and White were in the car together, and had shot Hadley. After having a brief discussion with Detective Alphonso, Roundtree amended his statement and said that he had also been in the car and had shot Hadley with an AK-47, which was consistent with the forensic evidence about the shooting.

In July 2004, Roundtree apparently changed his story again. This statement is the subject of one of [Defendant's] claims on appeal and will be discussed more fully in the analysis of that issue below. This time Roundtree stated that he had not been in the car and had not shot Hadley. He explained that he made this up to make himself a better witness for the State at [Defendant's] trial in hopes of receiving a reduced

sentence in exchange for his testimony. Pursuant to a postconviction motion, Roundtree's murder conviction and sentence were vacated in December 2004. Roundtree pled guilty to conspiracy to commit Hadley's murder, based on his admission that he tried to locate Hadley for [Defendant]. Roundtree was sentenced to nine years in prison, with credit for time served, and was released.

Jackie Pope Murder

Jackie Pope, a thirty-six-year-old deaf man who served as a watch out for John Doe, was shot to death because he gave a deposition about the New Year's Eve 1997 shooting of Miami police officer Ricky Taylor. Various witnesses testified that lots of people in the neighborhood were shooting their guns in celebration of the new year. Taylor was the passenger in a marked police vehicle that was patrolling the neighborhood. He was shot from a third floor balcony of an apartment building at 1370 Northwest 61st Street, which was one of the John Doe drug hole locations known as the "dormitories." Officer Taylor had a penetrating wound to the left side of his head at the hairline, but survived the shooting. The crime scene technician recovered hundreds of casings from the scene. Charlie Brown, a member of John Doe, was identified as the individual who shot Officer Taylor. Brown pled guilty to the shooting and was sentenced to thirty years in prison.

Jackie Pope was shot sixteen times after midnight on March 31, 1998, in the vicinity of 14th Avenue and 62nd Street. A firearms expert from the Miami-Dade Police Department testified that the casings from the scene and projectiles from the body indicated that Pope had been shot by two guns. The medical examiner testified that three of the gunshot wounds to Pope's torso were lethal because they did extensive damage to his organs, including his lungs, heart, spleen, liver, left kidney, and intestines. There was no stippling of the wounds that would indicate Pope was shot from a close range.

Carlos Walker testified that he found out that Jackie Pope was a witness against Charlie Brown several weeks before Pope was shot. [Defendant] showed Walker Pope's deposition, in which Pope stated that he saw Brown shooting from the third floor of the building when Officer Taylor was shot. Walker

described [Defendant] as being very angry about Pope's deposition. Tricia Geter testified that [Defendant] told her that Brown had shot the police officer on New Year's Eve. She also said [Defendant] told Brown to turn himself in because the police kept hitting the John Doe holes in search of Brown and it was hurting business. [Defendant] promised to get an attorney for Brown. Anthony Fail testified that [Defendant] discussed Brown's case with him and told him about a deposition in which Jackie Pope "snitched" on Brown. Fail testified that [Defendant] offered him $25,000 to kill Pope. Charles Clark testified that he saw Pope shortly before he was shot. Clark also saw several of the John Doe hitmen in the same vicinity, including Eric Stokes, Jean Henry and Julius Stevens. Clark then saw Pope being summoned to the alley where the hitmen were sitting. A short time later he heard a series of shots from the alley. Later, Clark saw Pope's body in that same area. At the penalty phase of trial, Detective Alphonso testified that Julius Stevens had admitted that he and Eric Stokes shot Jackie Pope. Stevens had also stated that he shot Pope because [Defendant] ordered him to shoot him because Pope had served as a witness on Charlie Brown's case.

Cynthia Brown Murder

Cynthia Brown died from asphyxia after being smothered by a pillow in a room at the Tradewinds Motel at 4525 Southwest 8th Street. Brown checked into the hotel with her boyfriend Chazre Davis on the evening of July 23, 1998, and her body was found at midday the next day. Brown's and Davis's prints were found on a mirror in the motel room.

The medical examiner testified that Brown had petechial hemorrhages in her eyes, inside her upper lip, and on her epiglottis. Brown had small abrasions under her left nostril and on her upper lip. Her lungs were full of fluid due to pulmonary edema. She also had postmortem cuts on the left side of her neck. The bed pillow had small smears of blood on the right side from Brown's face, which was consistent with the small abrasions on her face. The medical examiner stated that all of these findings were consistent with death from asphyxia caused by being smothered with the bed pillow. Toxicology showed that Brown had both cocaine and alcohol in her body at the time of death. However, both the medical examiner and the forensic

toxicologist testified that the levels were not life-threatening and Brown did not die from an overdose.

During cross-examination, the defense asked the medical examiner about autoerotic asphyxia and if the victim could have died from this rather than being smothered by a pillow. When the defense asked the medical examiner to explain autoerotic asphyxia, the State objected and the court sustained that objection. The court ruled that the defense could ask the medical examiner if it applied in this case, but would have to call its own expert to explain this. The medical examiner opined that it was possible but unlikely that the victim in this case died during a sex act. The defense's inability to question the medical examiner more thoroughly on this topic is one of [Defendant's] claims in this appeal. The legal propriety of this limitation will be discussed in the analysis of that issue below.

Brown was the sole witness against [Defendant] in the murder of Dominique Johnson, a nineteen-year-old drug seller who was shot to death in the early morning hours of November 7, 1996, at Northwest 12th Parkway and 62nd Street. Johnson was shot twice in his arms and once through his temple. The gun was one to three inches away when Johnson was shot in the head. Johnson was transported from the scene and pronounced dead at the hospital. No gunshot residue was found on Johnson's hands, indicating that he did not fire a gun. While several people apparently witnessed Johnson's shooting, only Cynthia Brown came forward and identified Smith to the police.

Smith was scheduled to be tried for Johnson's murder on July 28, 1997. David Waksman, the prosecutor in Johnson's case, testified in the instant trial that he had to dismiss the charges against [Defendant] when Brown was discovered dead less than a week before the Johnson trial. Waksman testified that Brown was the State's sole witness in the Johnson case.

At [Defendant's] trial in the instant case, Shaundreka Anderson, who worked with Johnson at a rival drug hole, testified that she saw [Defendant] and Johnson arguing over money earlier in the day on which Johnson was shot. [Defendant] approached Anderson that night and wanted to know where Johnson was. [Defendant] had a Glock 9 gun in his hand. [Defendant] entered the drug hole where Johnson was

located and Anderson heard shots. Anderson found Johnson after he was shot. At the scene, Cynthia Brown told Anderson that she knew who killed Johnson because she had been standing behind a pole when it occurred. Anderson told Brown to mind her own business and advised her not to talk. Anderson testified that she was approached by a number of individuals who said that [Defendant] wanted to see her. [Defendant] offered her $2500 to help him. A few days later, Anderson gave a statement to the police in which she falsely identified another individual as Johnson's shooter. Anderson was so fearful for her safety that she cut off her dreadlocks and shaved her head as a disguise. She also left the area.

Demetrius Jones testified that he overheard a heated argument between [Defendant] and Johnson and looked out of his bedroom window to see [Defendant] pull a gun out of his waistband. Jones heard multiple shots and saw Johnson on the ground. Within seconds Brown approached him and said she saw who shot Johnson. Jones also advised Brown to keep silent for her safety. Neither Jones nor Anderson remained at the scene to talk to the police, but Brown did. After [Defendant] was charged with Johnson's murder, Jones agreed to "help" [Defendant] with his case and gave a deposition to the state attorney in which he lied about [Defendant's] involvement. Jones also admitted that he lied to [Defendant's] defense attorney about the Johnson murder. After Jones gave his deposition and [Defendant] was awaiting trial, Jones did not have to work and was given money from the drug holes.

Several witnesses testified that [Defendant] wanted to get rid of the only witness who was going to testify against him in the Johnson murder case. Anthony Fail overheard a conversation between [Defendant] and his mother about how to kill a woman without shooting her. They discussed poison and strangulation. Fail also testified that [Defendant] offered him $50,000 to kill Brown. However, [Defendant] was adamant that he did not want Brown shot and that he did not want the evidence leading back to him. [Defendant] told Fail that the "junkie bitch had to go," referring to Brown. Fail did not agree to kill Brown because of this limitation and because he was on house arrest and could not move freely about the community. Fail testified that

[Defendant] put aside $20,000 to pay Brown's boyfriend for killing her. Herbert Daniels overheard a conversation between [Defendant] and Brown's boyfriend Davis shortly before Brown was killed. Daniels heard Davis ask [Defendant] what he wanted him to do about Brown.

Carlos Walker testified that [Defendant] talked to him about Brown "snitching" on him. [Defendant] claims that there was a discovery violation by the State relating to Walker's testimony. This is discussed in more detail below. [Defendant] told Walker that Brown had to "come up dead for him to win his trial." Walker also heard [Defendant] telling Davis to either suffocate or strangle Brown because he did not want bullets, casings, or other evidence at the scene. Walker admitted that he lied to both [Defendant's] defense attorney and the prosecutors at his deposition when he said that [Defendant] never discussed the Johnson case with him. Walker said he lied out of fear for his life. He said "look what happened to Jackie Pope."

Tricia Geter testified that Demetrius Jones had been paid by [Defendant's] friend Peggy King to testify on [Defendant's] behalf at the Johnson murder. Geter also testified that [Defendant] asked her if she could obtain pure heroin that could be given to Brown to kill her. [Defendant] stated that he was going to take Brown's life because she was trying to take his.

After Brown was killed, [Defendant] told Julian Mitchell that he had to have her killed in order to win his case and now they "wouldn't be able to take him." The day after the Johnson case was dismissed, Walker heard [Defendant] say that the State could not hold him and that Davis had handled his business. Geter testified that she saw Davis seeking payment from [Defendant] after Brown was killed.

Detective Alphonso testified that he discovered a copy of a deposition and the police report from the Johnson case in the nightstand of [Defendant's] bedroom when he executed a search warrant based on the John Doe investigation. The police report was introduced to prove [Defendant's] knowledge that Brown was the witness against him and his motive for wanting her killed. The trial court denied the defense's hearsay objection to the admission of the report, finding that the report was not admitted to prove the

truth of the matter asserted in it, i.e., that [Defendant] shot Johnson. However, the court did agree to redact certain parts of the report. The defense originally refused the court's offer of a limiting instruction to explain how the jury should consider the report. Five days later, the defense asked the court for a limiting instruction and asked that the whole report, rather than the redacted version, be admitted. There was a sidebar discussion of the wording of the limiting instruction and the jury was instructed. The admission of the police report is one of [Defendant's] claims on appeal. The nature of the report and the instruction given is more fully discussed in the analysis of that issue below.

Angel Wilson Murder

Angel Wilson was shot multiple times with a semiautomatic assault rifle while she was driving her car down 69th Street in the early morning hours of December 1, 1998. A witness saw someone in a dark older model car with tinted windows pull up beside Wilson's vehicle and heard multiple shots. A number of witnesses saw or heard the dark vehicle speeding away from the shooting. Witnesses also heard a series of multiple shots in rapid succession. Seventeen shell casings were recovered from the scene. The bullets entered the driver's side of the vehicle and struck Wilson sixteen times. Six of these wounds were fatal. The bullet wounds also caused extensive tissue damage, ripping off Wilson's left breast and part of her ankle. She was also struck by metal fragments as the bullets pierced her vehicle. She died on the scene from massive internal injuries. The medical examiner testified that Wilson's lungs were "peppered" with pieces of the projectiles that fragmented in her body. A home in the vicinity was also struck by bullets that pierced the front door and struck an inside wall.

Wilson was not the intended victim of this shooting. Her boyfriend Anthony Fail was being sought by members of John Doe who intended to kill him. Wilson and Fail were together in Wilson's car just before the shooting when they arrived at the home of Fail's stepbrother James Harvey. Harvey testified that on the night of Wilson's murder a car occupied by John Doe members Julius Stevens, Eric Stokes, Jean Henry, and "Eddie Bow" drove by his residence ten or eleven times. When Fail and Wilson arrived at Harvey's house,

Harvey warned them about the car. Fail sent Wilson home because he feared for her safety. Fail learned the next morning that Wilson had been shot to death. At the penalty phase of trial, Detective Alphonso testified that Julius Stevens admitted that he and Eddie Harris had shot Wilson.

Carlos Walker testified that Eddie Harris borrowed his Grand Marquis on the day of Wilson's murder. The car was returned by Harris and Eric Stokes the next day and they warned Walker that he should "lay low" with this car. Shots were fired at Walker the next time he drove his car and his toe was blown off.

Various witnesses described the history between Fail and John Doe that led to these events. Fail testified that he met [Defendant] in 1996 after Fail was released from prison. [Defendant] had taken over Fail's drug hole on 61st Street during Fail's incarceration. Initially, [Defendant] and Fail worked out an arrangement about the drug hole-Fail would receive money from the operation of the hole and was given permission to get drugs and money from the hole. However, this arrangement ended when [Defendant] ordered John Doe workers to cut Fail off. Fail had heated arguments with both Latravis Gallashaw and [Defendant] about being cut off. Fail responded by robbing John Doe holes and shooting at the holes. Fail and his friends were also shot at by John Doe members.

Julian Mitchell, Charles Clark, Eric Mitchell, Antonio Allen, Tricia Geter, and Herbert Daniels each related the same account of a falling out between [Defendant] and Fail over money, which resulted in Fail robbing the John Doe holes. Mitchell was given instructions to watch out for Fail and to kill him. Daniels was instructed to look for Fail and actually rode up and down the block looking for Fail on the day Wilson was killed. Mitchell was instructed by [Defendant] and others to shoot Fail on sight. Allen heard [Defendant] discuss the Fail problem with Julius Stevens at the Steady Mobbin' Car Wash. Geter heard [Defendant] instruct Stevens to deal with Fail because he had been robbing his drug holes. According to Mitchell, the shooters were amused by a television report on the morning after Wilson's murder that named Fail as a suspect in her shooting.

Mitchell and Fail also described a shooting that

occurred outside the Foxy Lady Club at 79th Street and 17th Place in June 1998. In a purported gesture to end the dispute with Fail and his friends, Gallashaw gave Fail money to go out clubbing. Fail and his friends ended up at the Foxy Lady Club that night. While they were leaving the club, someone began shooting at them. Fail's companion Kenwan Maynard was killed. Mitchell testified that he drove a number of John Doe individuals to a night club where Fail had been spotted. These individuals had machine guns and opened fire on someone outside the club. Maynard had seven gunshot wounds from a high-velocity weapon. Police recovered multiple casings from semiautomatic assault rifles. Based on eyewitnesses to the shooting, the police put out a BOLO for a large dark four-door vehicle with three males in ski masks and armed with weapons. The State filed a *Williams* rule notice about the Foxy Lady Club shooting. The evidence was introduced to prove that John Doe was looking for Fail and intended to shoot him.

Melvin Lipscomb Manslaughter

Melvin Lipscomb, a twenty-two-year-old customer of John Doe, was killed in the early morning hours of August 27, 1996, at 1527 Northwest 58th Street. The testimony showed that Lipscomb sustained eleven gunshot wounds, including three fatal shots to the head and one to his chest. At least one of the head wounds was at close range. Lipscomb also had scrapes on the right side of the face, right elbow, and right knee, indicative of falling to the pavement. Lipscomb was found face down on the pavement. Toxicology reports indicated that Lipscomb had alcohol and cocaine in his system at the time he was shot.

Various witnesses testified that Lipscomb was standing in line at the 58th Street drug hole, across the street from [Defendant's] mother's house. Lipscomb apparently broke the drug hole rules by talking loudly. He also got into an argument with Antonio Godfrey, who was a gunman at this drug hole. Godfrey fired his gun at Lipscomb and chased him down the stairs and across the street. Julian Mitchell testified that he was the lieutenant at the hole the night that Lipscomb was killed. Mitchell saw Godfrey chasing Lipscomb and saw him shoot Lipscomb in [Defendant's] yard across the street from the drug hole. He also testified that [Defendant] advised

Godfrey to lie low in order to avoid the police. Tricia Geter testified that [Defendant] told her about Lipscomb's murder. [Defendant] heard someone calling his name and pleading outside his house. When [Defendant] came outside, his workers told him that Lipscomb had "disrespected the hole." [Defendant] responded to "do his ass" and Godfrey shot him.

Marlon Beneby Manslaughter

Marlon Beneby died in the hospital on August 21, 1998, from complications of a gunshot wound to his upper back on July 23, 1998. Beneby was shot once in the back, and the bullet lodged in the fourth and fifth cervical vertebrae, causing him to become a quadriplegic. When Beneby arrived at the hospital he was able to communicate, but unable to move. He also had abrasions and some blunt force injuries. Necrosis spread from his spinal cord to his brainstem and he lost the ability to breathe in the first week after the shooting. He developed severe bronchitis in his lungs.

Beneby worked as a "bombman" for John Doe. Herbert Daniels, Eric Mitchell, Carlos Walker, Antonio Allen, and Danny Dunston all testified that Beneby was suspected of selling his own drugs at the John Doe hole. When confronted about this, Beneby blamed the tablemen Dunston and Jeffrey Bullard for supplying these drugs. When Latravis Gallashaw found out that Beneby was "stealing from the table" by selling his own drugs at the John Dole hole, he shot Beneby. Walker testified that he saw the argument between Beneby and Gallashaw on the night of the shooting. Walker heard a shot, saw Beneby on the ground, and saw Gallashaw hide a gun in his waistband. After the shooting, Walker heard Beneby say, "I know I was wrong for what I did. I don't want to die." Tyree Lampley, who was not a member of John Doe, saw Gallashaw shoot Beneby with a 9-millimeter gun. Allen testified that he heard the shot as he was riding up on his bicycle and then saw Beneby on the ground. Allen also admitted that he helped move Beneby from the front yard of the house to the sidewalk and helped clean up the blood in the yard. The John Doe members who were present agreed to act as if Beneby had been riding Allen's bike when he was shot in a drive-by. The officers and emergency personnel who responded to the shooting testified that it appeared as if someone had tried to wash away blood

> from the scene.
>
> Charles Clark testified that Gallashaw admitted to him that he had shot Beneby. Mitchell also testified that during the time that Beneby was in the hospital Gallashaw attempted to pay Beneby to be quiet about the shooting.

Smith v. State, 7 So. 3d 473, 480-89 (Fla. 2009)(footnotes omitted).

A penalty phase commenced on February 8, 2005. (R1/14) After considering the evidence presented, the jury recommended life sentences for the murders of Hadley and Pope, death sentences for the murders of Brown by a vote of 10 to 2 and death for the murder of Wilson by a vote of 9 to 3. (R22/3009-12) The trial court followed the jury's recommendations. (R23/3078-3118) In doing so, it found 4 aggravators applicable to the Brown murder[1] and 3 aggravators applicable to the Wilson murder.[2] In mitigation regarding both murders, the trial court found (1) no significant criminal history-little weight; (2) extreme mental or emotion disturbance-light weight; (3) age-little weight; (4) raised in a bad neighborhood-little weight; (5) raised in a gang controlled community-little weight; (6) good family man-some weight; (7) good behavior in court-little

[1] The aggravators are (1) prior violent felony-great weight; (2) pecuniary gain-no weight; (3) hinder a governmental function-great weight; (4) cold, calculated and premeditated (CCP)-great weight. (R23/3081-92)

[2] The aggravators are (1) prior violent felony-great weight; (2) pecuniary gain-great weight; and (3) CCP-great weight. (R23/3100-08)

weight; (8) exposed to violence in youth-little weight; and graduated from high school-little weight. (R23/3092-3100, 3108-15) It also found that the facts that Defendant has not personally shot Wilson and that Defendant had intended to kill Anthony Fail were mitigation entitled to little weight regarding that murder. (R23/3112, 3116)

Defendant appealed his convictions and sentences to this Court, raising 9 issues, "(1) the security measures ordered by the trial court were prejudicial and violated his right to a fair trial; (2) the trial court erred in striking the jury panel that had been exposed to the out-of-court comment by [Defendant's] mother; (3) the trial court erred in permitting a member of the John Doe organization to testify about the meaning of terms in the recorded conversations; (4) the trial court erred in admitting into evidence a police report concerning the Johnson murder that was found in [Defendant's] bedroom; (5) the trial court erred in limiting defense cross-examination of three State witnesses; (6) the trial court erred in not granting a mistrial after the State solicited the medical examiner's opinion on an improper hypothetical question after two defense objections to this hypothetical question had been sustained; (7) the trial court erred in denying a new trial based on the State's failure to disclose a witness statement that was

materially favorable to the defense; (8) the trial court erred in not holding a hearing to determine whether the State failed to disclose that a witness would testify inconsistently with his deposition and to determine whether the defense was prejudiced by this failure; and (9) the trial court erred in not granting a new trial based on prosecutorial misconduct. Smith, 7 So. 3d at 492. On March 19, 2009, this Court affirmed Defendant's convictions and sentences. Id. at 511. It determined that Issues 1-7 and 9 were meritless. Id. at 492-504, 507-09. It also found that Issue 3 was unpreserved. Id. at 495-96. Regarding Issue 8, it found the trial court had erred but that the error was harmless. Id. at 504-07. Defendant did not seek rehearing or certiorari review in the United States Supreme Court.

On April 21, 2009, the Attorney General sent notices of affirmance to the State Attorney and the Department of Corrections (DOC). (PCR. 127-30) On June 3 and 4, 2009, the State Attorney sent notices of affirmance to the Medical Examiner's Office, the City of Miami Police Department (Miami PD), the Florida Department of Law Enforcement (FDLE), and the Miami-Dade Police Department (MDPD). (PCR. 134-41)

On May 12, 2009, CCRC-South moved to withdraw as counsel, alleging that budgetary reductions made it unable to handle the case. (PCR. 131-33) At the July 9, 2009 hearing on the motion,

CCRC-South argued that it had too much work to handle this matter as well. (PCR. 1299-1303) The State did not object to the motion. (PCR. 1303-05) The lower court found that CCRC-South had not identified a conflict of interest and denied the motion to withdraw. (PCR-SR. 93-97) CCRC-South filed a petition for interlocutory review of that order with this Court but subsequently voluntarily dismissed that petition. (PCR. 286)

DOC served its notice of compliance and notice of delivery of exempt materials on July 21, 2009. (PCR. 144-47) FDLE and the Medical Examiner served their notice of compliance on August 19, 2009. (PCR. 244-45, PCR-SR. 98)

On November 19, 2009, Defendant served a motion for extension of time to file requests for additional public records. (PCR. 246-49) In this motion, Defendant complained that the State Attorney had been late in sending its notices of affirmance to the law enforcement agencies, that the Medical Examiner had been late in sending its records to the repository and that Miami PD had not complied. Id. He also averred that while some of the State Attorney's records had been sent on time, additional records had been submitted late. Id. Defendant requested an additional 90 days to file public records requests not only because the delays in public records production but also because Defendant had yet to review his direct appeal

record, his trial counsel's file and records regarding Defendant's conviction in federal court. Id. However, Defendant made no attempt to compel any records. The lower court granted Defendant an additional 90 days to request additional records. (PCR. 264, 1313-19)

On January 11, 2010, Defendant moved to compel Miami PD to produce its records. (PCR. 266-69) On February 23, 2010, Miami PD responded to the motion, indicating that it had sent its records to the repository on February 9, 2010, and that its delay in sending the records was due to the volume of materials that it had been required to produce. (PCR. 270-84) It simultaneously filed its notice of compliance. (PCR. 285)

On April 30, 2010, Defendant sent requests for additional public records to the Medical Examiner, FDLE, the Governor's Office, Miami PD, DOC, the Medical Examiner's Commission, the Judicial Qualifications Commission (JQC), the Attorney General's Office, the Miami-Dade Department of Corrections and Rehabilitation (Dade DOC), the Department of Juvenile Justice, the Division of Elections, MDPD and the State Attorney. (PCR. 288-305, PCR-SR. 99-207) The Division of Elections and Department of Juvenile Justice complied. (PCR. 699-705, PCR-SR. 208-09) All of the other agencies objected. (PCR. 311-17, 95-

400, 402-27, 431-672, 675-98, 706-08, PCR-SR. 217-289)[3]

On May 28, 2010, Defendant filed an initial motion for post conviction relief, raising 8 claims:

> I.
> [DEFENDANT] IS BEING DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING LAW BECAUSE HE IS BEING DENIED ACCESS TO PUBLIC RECORDS.
>
> II.
> REQUIRING THE APPLICATION OF RULE 3.851 TO [DEFENDANT] VIOLATES HIS RIGHTS TO DUE PROCESS AND EUQAL PROTECTIONS.
>
> III.
> [DEFENDANT'S] CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED AT THE GUILT PHASE DUE TO THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, THE STATE'S WITHHOLDING OF MATERIAL, EXCULPATORY OR IMPEACHMENT EVIDENCE, THE STATE'S KNOWING PRESENTATION OF FALSE TESTIMONY AND/OR THE EXISTENCE OF NEWLY DISCOVERED EVIDENCE, IN VIOLATION OF [DEFENDANT'S] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.
>
> A. Ineffective Assistance of Counsel
>
> 1. Failure to preserve [Defendant's] right to a speedy trial
> 2. Failure to object to manslaughter instruction and convictions despite the running of the statute of limitations
> 3. Failure to object to discovery violation and/or request a Richardson Hearing
> 4. Failure to utilize an expert in forensic pathology
>
> B. *Brady/Giglio* Evidence
>
> 1. Secret Dockets

[3] The State filed a motion to supplement the record with the following documents: attachments to rule 3 motion and Medical Examiner's Commission objection. To the date of the filing of this brief the record has not been supplemented. As such, the record cites are based on an estimate.

2. Geter Tapes
3. Mark Roundtree Statement
4. Testimony of Carlos Walker

C. Newly Discovered Evidence

IV.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTEH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

V.

DUE TO AN INCOMPLETE RECORD, [DEFENDANT] WAS DENIED A FULL AND FAIR DIRECT APPEAL OF HIS CONVICTIONS AND DEATH SENTENCES, APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE AND [DEFENDANT] IS NOT BEING PROVIDED DUE PROCESS IN POSTCONVICTION PROCEEDINGS CONTRARY TO FLORIDA LAW AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

VI.

[DEFENDANT'S] DEATH SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VII.

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITES STATES CONSTITUTION.

VIII.

[DEFENDANT] IS BEING DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISION OF THE FLORIDA CONSTITUTION BECAUSE OF THE RULES PROHIBITING [DEFENDANT'S] LAWYERS FROM INTERVIEWING JURORS TO INVESTIGATE CONSTITUTIONAL ERROR EVIDENCED IN THE RECORD.

(PCR. 318-94) On July 29, 2010, the State filed its response, conceding an evidentiary hearing on Defendant's newly discovered evidence claim. (PCR. 709-48)

On July 23, 2010, Judge Bernstein, who had presided over Defendant's trial, sua sponte recused himself, and the case was then assigned to Judge Bertilla Soto. (PCR. 753-54) On November 3, 2010, Defendant again requested additional records from the JQC and Division of Elections. (PCR. 758-66) The Division of Elections complied and the JQC objected. (PCR. 820-26, 828-35)

On November 5, 2010, Defendant finally had the issues regarding his public records requests heard. (PCR. 1320-1441) Defendant acknowledged that the Department of Juvenile Justice had complied but indicated that he believed he should be entitled to review the records because he had provided a release for some of the records and was allowed to view others because they were his. (PCR. 1325-28) Juvenile Justice acknowledged that it had received a waiver and had no objection to Defendant viewing the document covered by the waiver. (PCR. 1328) However, it had received other records from the courts under a confidentiality agreement that it could not waive. (PCR. 1329) Defendant indicated that he planned to request an in camera review in the future during which that issue could be addressed. (PCR. 1329-30)

Defendant also acknowledged that JQC was correct that its files were not subject to disclosure. (PCR. 1330-31) However, he indicated that he had just sent another request. (PCR. 1331-32)

FDLE argued that the demand to it pursuant to section g was meritless as it had already sent its records regarding Defendant and the case to the repository in response to the notice of affirmance and that the request for all records regarding more than 90 individuals was overly broad and not calculated to lead to the discovery of admissible information. (PCR. 1334-35) It averred that the request for records regarding lethal injection would not lead to a colorable claim because this Court had found the lethal injection protocols constitutional. (PCR. 1336) Regarding the request to the Medical Examiner's Commission, it asserted that the request was not related to a colorable claim because the causes of death were generally not disputed in this case. (PCR. 1336) Defendant responded that he needed records about the medical examiners simply because they had worked on the case and pointed out that there had been some dispute about the cause of Cynthia Brown's death. (PCR. 1337-38) After considering further argument, the lower court ordered the Medical Examiner's Commission to disclose records related to any complaint against the three doctors involved in the Brown autopsy and denied the rest of the request. (PCR. 1338-43) Regarding the list of 90 names, the lower court ordered FDLE to provide information about two jurors who Defendant claimed had criminal histories to it for an in camera review and Defendant

to provide specific identifying information and a proffer regarding relevancy regarding the individuals who were not jurors within 90 days. (PCR. 1343-59, 1362-63) It also required production of internal affairs files of officers involved in the case. (PCR. 1359-60) It denied the request for records about lethal injection. (PCR. 1360-62)

DOC argued that it had provided nonconfidential information regarding other individuals but could not provide confidential information because Defendant had not provided releases from these other individuals. (PCR. 1364-66) It also asserted that Defendant's request for information about informants was improper because it sought the creation of a record rather than the production of an existing record. (PCR. 1366-67) Defendant admitted he had received what he was entitled to regarding the identified individuals, that he was not entitled to the confidential information and that he could review what he had to make a proper request for the production of documents instead of information. (PCR. 1367-71) The lower court denied the request for records regarding lethal injection. (PCR. 1371-73)

Dade DOC objected to the lack of specificity of the request and the lack of confidentiality waivers but indicated that it had produced some jail records. (PCR. 1374-75) The lower court sustained the objections to further production. (PCR. 1377)

The Attorney General and the Governor objected to the requests for records regarding lethal injection because they would not lead to a colorable claim for post conviction relief. (PCR. 1378) The lower court denied the requests. (PCR. 1378-79) The Attorney General also objected to the request for other records direct to her because the Attorney General's Office was not involved in the arrest and prosecution of Defendant until he filed his notice of direct appeal. (PCR. 1379-81) Defendant admitted that generally the Attorney General's Office only had the direct appeal record and its work product to which he was not entitled. (PCR. 1382-83) As such, the lower court denied that request as well. (PCR. 1383)

Miami PD argued that it had provided its complete file in response to the notice of affirmance and that the request was overly broad. (PCR. 1384-85, 1388-95) Defendant acknowledged that the issue regarding the lists of names in the request was the same as the issue that had been raised by FDLE. (PCR. 1385) The lower court adopted its ruling regarding FDLE and required Defendant to provide specific identifying information and a proffer regarding relevancy regarding the individuals who were not jurors within 90 days. (PCR. 1386) Defendant also complained that he had been provided with photocopies of photographs. (PCR. 1386) Miami PD explained that the actual photographs would have

been given to the State prior to trial but agreed to check if it had any electronic copies. (PCR. 1387) Defendant also agreed that it was appropriate for him to identify the roles in the investigation of the officers whose personnel files he was requesting and to limit the production to internal affairs summaries at this point. (PCR. 1399-1400) MDPD adopted the same arguments, and the lower court adopted the same ruling. (PCR. 1402-1409)

The State Attorney argued that the request regarding jurors was overly broad and directed to the wrong entity. (PCR. 1409-18) The lower court only ordered production of the files regarding the criminal cases of the two jurors whom Defendant claimed had a criminal history. (PCR. 1414, 1417-18) Regarding the other request, the State Attorney asserted that she had provided voluminous records, which it believed covered the records that had been requested, and suggested that Defendant review what it had provided and produce a specific request that included a proffer on relevancy. (PCR. 1418-23) Defendant was given 90 days to do so. (PCR. 1423-24)

On February 3, 2011, Defendant submitted a memorandum in support of his requests for additional public records. (PCR. 786-819) In this pleading, Defendant contended that he needed the records regarding any contact his codefendants may have had

with the criminal justice system to determine if there was some basis to challenge the determination that he was a leader of the John Doe gang and a principal to crimes they committed. Id. He asserted that he needed records regarding individuals who testified against him in either state or federal court to determine if there was a basis to impeach them that was not disclosed or used. Id. He averred that he also needed records of individuals who did not testify but had been identified as potential witnesses, victims or gang members because it might include impeachment information. Id. He provided a brief description of each person named. Id. He also insisted that he needed information the training and misconduct about the law enforcement personnel involved in the investigation as potential impeachment and provided a brief description of each officers involvement. Id.

At a public records hearing on February 18, 2011, the JQC reminded the court that it had already agreed that its records were not subject to disclosure, and the lower court again denied the request. (PCR. 1442-46) The State Attorney argued that Defendant's memo did not change its response that the records that Defendant claimed to need were included in the records it had previously provided. (PCR. 1447-48) Defendant acknowledged that he had seen that the State Attorney had provided files

regarding the codefendants and others. (PCR. 1448-52) When the lower court indicated that it believed that Defendant had asked for information about individuals who were not involved in the prosecution of this case, Defendant admitted that he had done so. (PCR. 1451-52) The lower court indicated that it did not believe that records regarding individuals who were not codefendants, witnesses at trial or victims in this case were relevant. (PCR. 1454) It also indicated that it needed to know what records Defendant already had about these individuals to determine whether the request for additional records was proper. (PCR. 1456) Defendant insisted that he needed all the records about everyone he had listed to see if there was some basis to challenge the determination that he was the leader of the gang. (PCR. 1457-58) The lower court rejected this position and indicated that it would only order disclosure of records regarding the codefendants, victims, trial witnesses and Defendant's mother and sister and only concerning prosecutions of such individuals. (PCR. 1459-62)

Miami PD pointed out that Defendant was still requesting the full internal affairs and personnel files for 68 of its officer even though a number of the officers were only tangentially involved in the case, their personnel files would not contain relevant information and most of the internal affair

information would be irrelevant. (PCR. 1464-67) The lower court agreed that the personnel files would not be relevant but stated that it believed that substantiate internal affairs complaints would be. (PCR. 1468) Miami PD indicated that it had a brief internal affairs summary that could be reviewed first to determine if there was even a basis to look at the file. (PCR. 1468) Defendant agreed that looking at the summary first was appropriate. (PCR. 1469) The lower court then applied the procedure to FDLE and MDPD as well. (PCR. 1472) FDLE responded that its agents had no internal affairs files. (PCR. 1472-73)

When FDLE indicated that it was unsure who would be included in the list of people who qualified as codefendants, witnesses and victims, Defendant agreed to check the Florida criminal histories of these individuals and provide specific case information. (PCR. 1476-80) On March 24, 2011, Defendant filed a supplement to his memo regarding public records listing the names, case numbers and arresting agency regarding the individuals who files the lower court had ordered produced. (PCR. 836-47)

On April 15, 2011, Defendant sent new requests for additional public records regarding lethal injection to DOC, the Attorney General and the Governor based on news reports about the shortage of sodium thiopental. (PCR. 848-71) All of these

agencies again objected to the requests. (PCR. 872-905)

On July 11, 2011, Defendant filed a letter he had sent to Miami PD. (PCR. 906-1041) Defendant attached to the letter the internal affairs summaries he had reviewed and highlighted the files he was requesting. Id. At a hearing on September 11, 2011, Defendant indicated that he had received the documents he needed from Miami PD but had an issue with compliance by the State Attorney and wanted to have a hearing on his new lethal injection requests, which the trial court set for December 13, 2011. (PCR. 30-34)

On November 9, 2011, Defendant served a pro se motion for leave to amend, in which he sought to add two claims:

> IX.
> INEFFECTIVE ASSISTANCE OF COUNSEL-COUNSEL'S FAILURE TO OBJECT TO PRINCIPAL INSTRUCTION IN CONNECTION WITH CONSPIRACY CHARGE
>
> X.
> TRIAL COUNSE FAILURE TO OBJECT TO THE ERRONEOUS MANSLAUGHTER INSTRUCTIONS AND CONVICTIONS AS IT PERTAINS TO COUNTS 6 AND 12 OF THIS INDICTMENT, WHICH IS CLEARLY A *MONTGOMERY* VIOLATION.

(PCR. 1092-1100)

On December 12, 2011, CCRC-South filed another motion to withdraw as counsel. (PCR. 1104-06) In this motion, CCRC-South claimed that it had a conflict of interest and could not divulge the basis of the conflict. Id. However, it averred that the alleged conflict implicated R. Regulating Fla. Bar 4-1.16(b)(2),

concerning a client's insistence on taking an action with which the attorney fundamentally disagrees, and R. Regulating Fla. Bar 4.16(a)(1), concerning continued representation causing a violation of the bar rules. Id.

At a hearing on December 13, 2011, CCRC indicated that it disagreed with Defendant about how the case should proceed and needed to withdraw. (PCT. 39, 45-46) The State argued that the information provided did not show a conflict of interest and that if the nature of the disagreement simply concerned a strategic decision, there was no basis to permit CCRC to withdraw. (PCT. 46-48) CCRC insisted that the conflict concerned more than strategy but insisted that it did not need to disclose the nature of the alleged conflict. (PCT. 48-49) Defendant indicated that he agreed that CCRC should withdraw. (PCT. 49-50) The lower court granted the motion and indicated that it would appoint a new attorney. (PCT. 50)

On February 23, 2012, Defendant served a second, pro se motion for leave to amend, in which he sought to add two more claims:

> XI.
> INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL'S FAILURE TO RAISE THE DENIAL OF SEVERANCE MOTION ON DIRECT APPEAL.
>
> XII.
> INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, COUNSEL'S FAILURE TO OBJECT TO THE INCOMPLETE AND MISLEADING

JURY INSTRUCTION AS IT PERTAINS TO THE RICO COUNT AND CONVICTION.

(PCR. 1100-28)

On April 13, 2012, the lower court appointed Charles White to represent Defendant and scheduled the Huff hearing for July 5, 2012. (PCR. 1130) On June 12, 2012, Defendant moved to continue the Huff hearing. (PCR. 1159-61) As grounds for the motion, Defendant asserted that his new counsel had been informed by his old counsel that the motion for post conviction relief had been filed simply to comply with the time limitations for filing a motion and might need to be amended with information received through public records litigation since it was filed. Id. As such, Defendant requested that the Huff hearing be continued indefinitely while counsel decided whether to seek leave to amend. Id. The State responded that the motion was insufficient because Defendant had failed to show that he had been diligent in seeking the records he allegedly needed to review, that there was a meritorious basis to seek leave to amend or that he would be prejudiced by the denial of a continuance, as he could still seek leave to amend up to 30 days prior to the evidentiary hearing the State had conceded was needed on his newly discovered evidence claim. (PCR. 1162-70)

At the hearing on the motion, Defendant argued that the motion for post conviction relief that had been filed was filed

just to toll the federal habeas statute of limitations. (PCT. 78-80) He acknowledged that public records litigation was complete and asked that the case be continued indefinitely while he reviewed the records and determined whether there was any basis to amend. (PCT. 80-81) When the lower court inquired what amendment would be properly presented, Defendant asserted that he would be seeking to add some claim regarding the presentation of mitigation. (PCT. 81-83) The State pointed out that the record already showed that Defendant had refused to be evaluated by a mental health professional and that this claim would not be dependent on public records production such that amending this claim would not be proper. (PCT. 84) It also noted that Defendant would still have time to amend after the Huff hearing because it had agreed to an evidentiary hearing. (PCT. 85) The lower court indicated that it would be willing to consider an amendment but denied the motion to continue the Huff hearing. (PCT. 85-86)

At the Huff hearing, Defendant acknowledged that he had received the public records that were the subject of Claim I and that Claim II provided no basis for relief. (PCT. 90-92) Defendant insisted that an evidentiary hearing was necessary to determine whether Defendant agreed to toll the speedy trial time. (PCT. 92-93) The State responded that the claim was

meritless given the circumstances surrounding the speedy trial demand and the fact that a notice of expiration was filed. (PCT. 93-94) The lower court determined an evidentiary hearing was not needed. (PCT. 94)

Regarding the claim regarding the manslaughter instruction, the State explained that because the legislature had extended the statute of limitations in 1996, made the extension retroactive and the statute of limitations had not expired at the time of the extension, the statute of limitations had not expired. (PCT. 95-96) The lower court granted an evidentiary hearing because the State had conceded one in its initial response to the motion. (PCT. 96)

Defendant insisted that an evidentiary hearing was needed on the claim that trial counsel had been ineffective for failing to object to a discovery violation regarding Carlos Walker and a related Brady claim to determine when the State knew that Walker would change his deposition testimony. (PCT. 97-100) The State responded that Defendant's arguments were meritless because counsel had sufficiently objected and there was no Brady violation as a matter of law. (PCT. 98, 100) The lower court found that no evidentiary hearing was necessary. (PCT. 100)

Regarding the claim concerning using a pathologist, Defendant admitted that his counsel had hired one and consulted

with him but insisted that an evidentiary hearing was necessary so that counsel could explain why he did not call the doctor. (PCT. 101-01) The lower court indicated that an evidentiary hearing was not necessary because Defendant had failed to plead what testimony the pathologist could have provided. (PCT. 102)

Regarding the claim about secret dockets, Defendant insisted that the State should be required to show that no secret dockets existed. (PCT. 102-03) The State responded that Defendant bore the burden of alleging and proving a claim, which he had not carried. (PCT. 103-04) The lower court found that a hearing was not necessary. (PCT. 103)

Regarding the Geter tapes, Defendant insisted that his motion for new trial was still pending despite the fact that he appealed after filing the motion without having it heard. (PCT. 104-06) The State argued that filing a notice of appeal while a motion for new trial was pending abandoned the motion for new trial and that the post conviction claim was insufficiently plead. (PCT. 106-07) The lower court found that an evidentiary hearing was not needed. (PCT. 107)

Defendant averred that an evidentiary hearing was needed regarding the Roundtree statements even though the claim had been considered and rejected on direct appeal in case there was some basis for relief on a cumulative analysis. (PCT. 108-09)

The State responded that this Court had already rejected the claim, finding the statements were not favorable. (PCT. 109-10) The lower court found that no hearing was needed. (PCT. 110) The lower court then accepted the State's concession to an evidentiary hearing on the newly discovered evidence claim. (PCT. 110-11)

Regarding the claim of ineffective assistance of counsel at the penalty phase, Defendant indicated that he might seek to amend later. (PCT. 111) The State responded that Defendant had waived mental health mitigation at the time of trial. (PCT. 111-12) Regarding the claim about the direct appeal record, Defendant insisted that he was entitled to a new trial if the record was incomplete. (PCT. 112) The State responded that the claim was not cognizable in a motion for post conviction relief and that Defendant needed to show that a potential meritorious claim could not be raised to obtain any relief. (PCT. 112) The lower court agreed with the State. (PCT. 113) Defendant admitted that an evidentiary hearing was not needed on Claim VI. (PCR. 113) It rejected Defendant's assertion that an evidentiary hearing was necessary on lethal injection or the rule regarding contacting jurors. (PCT. 113-14) The lower court then granted Defendant 45 days to provide a witness list and set the evidentiary hearing for September 24, 2012. (PCT. 114-16)

At the beginning of the evidentiary hearing, Defendant asked the lower court to address a pro se motion for leave to amend he had filed. (PCR. 121) The State responded that Defendant's pro se motion should be stricken because it was filed while he was represented. (PCT. 121) Defendant's counsel insisted that he should be permitted to adopt the pro se pleadings, and the lower court took issue under advisement. (PCT. 121-23)

Defendant then called Chazre Davis. (PCT. 124) Davis testified that he was currently serving a 40 year sentence. (PCT. 125) In October 2009, when he was pending trial in this matter, he wrote an affidavit, which Defendant attempted to admit. (PCT. 125-26) However, the State objected that the affidavit was inadmissible hearsay, and the trial court sustained the objection. (PCT. 126)

Davis then testified that he dated Ms. Brown from around 1991 until her death in 1997. (PCT. 126-27) He knew Defendant by the nickname Bubba but claimed not to have discussed killing Ms. Brown with him. (PCT. 127-28) He averred that Carlos Walker was angry with him because he would flirt with Walker's girlfriend while selling marijuana in front of her apartment. (PCT. 128-29) He believed Defendant's mother lived with his grandmother a block from where he was living in 1997, but claimed to have

never been to the house and to have never conspired with Defendant to murder Ms. Brown. (PCT. 129-30)

Davis stated that he was interviewed by the police in 1997, 1998, and 2000. (PCT. 130-31) During these interviews, the police attempted to get him to confess to murdering Ms. Brown at Defendant behest, said they were going to do anything to see that Defendant was convicted, promised him leniency if he did so and threatened to have him executed if he did not. (PCT. 131-32) Davis refused to make a statement and was charged with Ms. Brown's murder. (PCT. 132) He provided this information to Defendant's attorneys when he spoke to them while in prison in the last year. (PCT. 132) He had written the affidavit earlier while he was still in jail and believed that he had sent to affidavit to the State Attorney's Office. (PCT. 132-33) He entered a plea agreement in this matter because his attorneys forced him by showing him that Defendant's death sentences had been affirmed. (PCT. 133)

On cross, Davis admitted that he had pled guilty to second degree murder of Ms. Brown and to conspiring with Defendant to commit the first degree murder of Ms. Brown. (PCT. 134) He acknowledged that he had signed the affidavit before he entered his plea and claimed that he had done so without the assistance of any attorney or anyone associated with Defendant. (PCT. 134-

35)

Davis admitted that he had made statements denying involvement in the John Doe Gang, denying that Defendant had conspired with him to murder Ms. Brown and accusing the police of misconduct before writing the affidavit. (PCT. 135-36) He was questioned by the police about Ms. Brown's murder shortly after she died when he was arrested for cocaine possession. (PCT. 136-37) However, he denied providing a transcribed statement even when shown a copy of the statement. (PCT. 137-39) He did admit that he had told the police at the time about his relationship with Ms. Brown, about taking Ms. Brown to the hotel where she died, about renting the hotel room, about what happened in the room and about Ms. Brown allegedly being alive when he left. (PCT. 139-41) He admitted that he had denied being involved in Ms. Brown's murder and knowing Defendant at that time. (PCT. 141-42)

Davis denied speaking to the police again on September 10, 1998, but admitted that his initials were on a Miranda waiver form dated on September 10, 1998. (PCT. 143-44) He claimed that he had signed three Miranda waiver forms in 1997. (PCT. 144-45)

Davis admitted that he had been to a parole revocation hearing. (PCT. 145) He claimed to have intentionally gotten intoxicated so that his parole would be violated because he

wanted to be in prison and away from the police. (PCT. 145) He stated that he did not remember Det. Alfonso and Det. Aguerro being present at his revocation hearing and denied asking to speak to them at the end of the hearing. (PCT. 145-46) He did admit that the detectives took him from the prison to the police station on November 18, 1998. (PCT. 146-47) However, he denied that he signed a Miranda waiver, spoke to the police or visited with his father at the police station at that time. (PCT. 147-48) He averred the visit with his father at the police station occurred in 1997. (PCT. 147-48) He did admit that he signed a Miranda waiver on January 1, 2000. (PCT. 148) He also acknowledged that he had consistently denied involvement in Ms. Brown's murder and conspiring to kill Ms. Brown in his statements to the police. (PCT. 148-49)

Davis insisted that he was forced to enter his guilty plea. (PCT. 149) He stated that he told the court that he was not threatened or coerced and that no promises were made to him during the plea colloquy because he had to do so. (PCT. 149)

On redirect, Davis stated that the police approached him about this matter on numerous occasions but that he only spoke to them the first time. (PCT. 150-52) He averred that he had voluntarily written the affidavit in an effort to clear himself. (PCT. 152) He insisted that he had never been involved in the

John Doe Gang because he had been in prison part of the time and working the rest of the time. (PCT. 153-56) After Davis testified, Defendant rested. (PCT. 159)

In rebuttal, Sgt. Francisco Alfonso testified that he had been a police officer for 27 years and had been assigned to the homicide division in 1997. (PCT. 160) Cynthia Brown had been the only eyewitness willing to testify against Defendant regarding the murder of Dominick Johnson. (PCT. 161) Sgt. Alfonso had interviewed Davis and taken a sworn, taped statement from him regarding Ms. Brown's murder on July 26, 1997. (PCT. 161-63) During that statement, Davis denied that he was involved in Ms. Brown's murder and did not implicate Defendant. (PCT. 164)

Sgt. Alfonso was subpoenaed to testify at Davis' parole revocation hearing but did not have to do so because Davis admitted the violation at the hearing. (PCT. 165) At the time of the hearing, Sgt. Alfonso had a brief meeting with Davis that resulted in Davis being interviewed on September 10, 1998. (PCT. 165) During this interview, Davis again stated that he had no knowledge of anyone involved in Ms. Brown's murder. (PCT. 166) He also interviewed Davis on November 18, 1998, which resulted in the same denials. (PCT. 166-68) Sgt. Alfonso stated that Davis initiated the September and November interviews. (PCT. 170-71)

Sgt. Alfonso denied that he threatened or coerced Davis or made promises to Davis during his interviews. (PCT. 168-69) He averred that he never stated that Defendant would die in prison or that he would do whatever it took to make sure Defendant died in prison. (PCT. 168) He was deposed before Defendant's trial and testified about Davis' statements during that deposition. (PCT. 169)

On cross, Sgt. Alfonso admitted that the police were aware that Davis had dated Ms. Brown and suspected that he and Defendant had been involved in her murder. (PCT. 171-72) He acknowledged that the police had hoped to get a statement regarding who was involved in the murder when they interviewed Davis. (PCT. 172) He stated that Davis' cocaine possession arrest was based on Davis' admission that he had brought cocaine into the hotel room where Ms. Brown's body was found. (PCT. 172-73)

Sgt. Alfonso explained that Davis contacted the police and offered to provide information. (PCT. 176) However, he wanted promises the police did not have the power to give in exchange. (PCT. 176) He averred that he never made any statements to Davis about what was happening or he expected to happen to Defendant. (PCT. 176-77) He stated that he was not the lead detective on Davis' case and did not know what the status of Davis' case was

at the time of Defendant's trial. (PCT. 178)

On redirect, Sgt. Alfonso stated that Det. Aguerro was the lead detective in the Brown murder and was present during the interviews with Davis. (PCT. 178-79) Det. Aguerro did not threaten or coerce Davis nor did he make any promises to Davis. (PCT. 179)

On September 28, 2012, the State filed a memo regarding the propriety of Defendant's belated attempt to adopt Defendant's pro se motions for leave to amend. (PCR. 1212-20) The State argued that the pro se motions were a nullity because they were filed while Defendant was represented by counsel, that the attempt to adopt them at the beginning of the evidentiary hearing was untimely, that there was no good cause to amend and that the claims Defendant wanted to add were insufficiently plead and without merit as a matter of law.

On October 1, 2012, Defendant filed a motion to adopt the pro se motion for leave to amend. (PCR. 1221-25) In this motion, Defendant insisted that the pro se pleadings he filed while represented were not a nullity because he believed that he and his counsel had a conflict of interest even though no motion to withdraw or discharge counsel had been filed. Id.

On October 5, 2012, Defendant filed a motion for leave to amend and a proposed amendment. (PCR. 1226-46) In his motion for

leave to amend, Defendant made no real attempt to show good cause pursuant to Fla. R. Crim. P. 3.851(f)(4). (PCR. 1239-46) Instead, he insisted that he was entitled to leave to amend simply because he and his counsel had spoken after the Huff hearing, he told his counsel that he did not believe his prior counsel had adequately reviewed the motion for post conviction relief with him and he wanted the new claims raised. Id. Without admitting the motion was untimely, Defendant's counsel apologized for the late filing but claimed it was necessary because counsel had been busy after meeting with Defendant. Id.

In the proposed amendment, Defendant sought to change his theory on Claim III(A)(1) to be that trial counsel was ineffective because counsel informed the trial court that he had not objected to tolling his speedy trial demand to have a motion to dismiss the indictment considered. (PCR. 1226-38) He also sought to change his theory regarding Claim III(A)(4) from a claim that counsel was ineffective for failing to hire a forensic pathologist to a claim that counsel was ineffective for failing to utilize the information counsel obtained from the forensic pathologist he did hire properly. Id. He sought to add an argument under Claim III(B)(2) that he had not abandoned any issue about the Geter tapes that he raised in a motion for new trial by filing a notice of appeal before receiving a ruling on

the motion. Id. Finally, he sought to add a new claim that the State had suppressed the fact that Demetrious Jones had been impeached during Defendant's federal trial regarding an issue about which he did not testify in this case and had not been charged with a crime nor had a plea agreement revoked as a result. Id.

By order rendered on October 10, 2012, the lower court denied post conviction relief. (PCR. 1247-61) It determined that while Defendant had not shown good cause to amend his motion, it would consider pro se Claims IX and X. Id. It found that Claims I, II, III(A)(1), III(A)(3), III(A)(4), III(B)(4), IV, VI, VII and X were without merit as a matter of law or refuted by the record. It also determined that Claims II, III(A)(4), III(B)(1), III(B)(2) and IV were insufficiently plead. Id. It held that Claims III(A)(3), III(B)(3), V, VI, VII, VIII and IX were procedurally barred. Id. It found that Defendant had failed to carry his burden of proof regarding Claims III(A)(2) and III(C). Id.

On October 17, 2012, the lower court denied counsel's motion for leave to amend, finding the proposed amendment untimely. (PCR. 1262) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court did not abuse its discretion in denying a

continuance because Defendant was not diligent, did not show that delay would have produced substantial evidence and did not show prejudice. The lower court did not abuse its discretion in denying a leave to amend as Defendant's motion was untimely, he failed to show good cause and the claims sought to be altered or added were meritless.

The lower court properly denied the newly discovered evidence claim and the claim of ineffective assistance of counsel regarding the statute of limitations and the manslaughter instruction because Defendant did not carry his burden of proof at the evidentiary hearing.

The lower court also properly denied the claims regarding speedy trial, the discovery violation, the utilization of a forensic psychologist, "secret" dockets, the Geter tapes, the constitutionality of the death penalty, the principal jury instruction and the propriety of the manslaughter instruction. Defendant's attempt to reserve the right to challenge the method of execution later is without merit.

ARGUMENT

I. THE LOWER COURT DID NOT ABUSE IS DISCRETION IN DENYING THE MOTION FOR CONTINUANCE. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEAVE TO AMEND.

Defendant asserts that the lower court abused its discretion in denying his motion to continue the Huff hearing

and denying the motion for leave to amend that he filed after the evidentiary hearing. However, the lower court did not abuse its discretion in denying these motions.[4]

In arguing that the lower court abused its discretion in refusing to continue the Huff hearing, Defendant seems to suggest that a continuance was required because Defendant had been unhappy with his prior counsel because counsel had not adequately consulted with him, this unhappiness somehow made it appropriate for new counsel to change the post conviction motion after speaking to Defendant, new counsel prioritized other matters before this case and the lower court's denial of the continuance somehow prevent counsel from seeking leave to amend anything other than the claim of ineffective assistance of counsel at the penalty phase. However, these assertions are not even properly before this Court. As this Court has held, grounds not asserted in support of a request for relief below cannot be raised on appeal. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Here, the only grounds asserted in the motion for continuance were that Defendant's prior counsel had told Defendant's present counsel that the motion for post conviction

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

relief had been intentionally filed containing incomplete claims to toll the federal habeas statute of limitations, that public records had been received after the motion was filed, that review of those records might reveal additional claims and that counsel planned to speak to Defendant about what was in post conviction motion. (PCR. 1159-61) As such, the new grounds for a continuance that Defendant is attempting to add on appeal are not properly before this Court and should be rejected.

Moreover, the lower court properly denied a continuance on the grounds that were presented below. This Court has recognized that a party seeking a continuance must show prior diligence in seeking to obtain the information allegedly needed, additional time to seek the information is likely to produce substantial, admissible evidence and denial of additional time will cause material prejudice. See Geralds v. State, 674 So. 2d 96, 99 (Fla. 1996); see also Mosley v. State, 46 So. 3d 510, 524-26 (Fla. 2009); Doorbal v. State, 983 So. 2d 464, 486-89 (Fla. 2008). Since Defendant failed to meet these requirements, the lower court did not abuse its discretion in denying a continuance.

The record refutes the notion that Defendant was diligence in seeking the information he allegedly needed. Despite the fact that the mandate was issued on April 13, 2009 and that OAG

office sent its notices of affirmance on April 21, 2009 (PCR. 127-30), Defendant took no action regarding the production of the records until November 19, 2009. At that point, Defendant simply asked for an additional time to seek additional records. (PCR. 246-49) Defendant then waited until January 11, 2010 to serve his motion to compel directed only to the Miami PD and until February 24, 2010 to have the motion heard. (PCR. 266-69)

When Defendant requested additional public records on April 30, 2010 (PCR. 288-305, PCR-SR. 99-207), he made the requests in a vague and overbroad manner that this Court had repeatedly held was improper. Dennis v. State, 109 So. 3d 680, 699 (Fla. 2012); Rodriguez v. State, 919 So. 2d 1252 (Fla. 2005). Defendant then waited until November 5, 2010, to make the issue regarding the impropriety of these requests heard. (PCR. 1320-1425) At the hearing, Defendant requested as additional 90 days to provide the information showing the records he requested were relevant even though he knew or should have known for this Court's precedent that he needed to provide that information. (PCR. 1343-59, 1362-63) As a result, this information was not provided until February 2011. (PCR. 786-819) As such, Defendant failed to show due diligence in seeking public records.

Furthermore, Defendant did not show that the delay would have produced substantial evidence or even a valid basis to

amend the motion. In his motion, merely suggested that a review of the public records he had received might provide a basis for leave to amend and that Defendant might want to change the motion after discussing it with new counsel. (PCR. 1159-61) At the hearing on the motion, Defendant's only suggestion regarding what amendment he thought he could make concerned the presentation of mitigation. (PCT. 81-83) However, this Court has held that leave to amend is only properly granted when a defendant shows that the amendment was based on information that the defendant could not have discovered earlier. Tanzi v. State, 94 So. 3d 482, 495 (Fla. 2012); Lugo v. State, 2 So. 3d 1, 19 (Fla. 2008). It has also held that a defendant is not entitled to leave to amend after public records are produced when the amendment is not connected to the public records. Moore v. State, 820 So. 2d 199, 205 (Fla. 2002). This Court has also made it clear that the fact that a defendant gets new counsel does not provide a basis for adding arguments and claims. Brown v. State, 894 So. 2d 137, 153-54 (Fla. 2004). Since any information Defendant could have provided would necessarily be information that was available before the motion was filed, the mitigation claim would not have related to public records production and Defendant could not identify any claim that could be properly

amended, Defendant also failed to show that a continuance would have produced any substantive change in the proceedings.

Further, it should be remembered that Defendant could have properly sought leave to amend even after the lower court refused to continue the Huff hearing. Pursuant to Fla. R. Crim. P. 3.851(f)(4), leave to amend can be sought until 30 days before an evidentiary hearing. The State had conceded an evidentiary hearing on the newly discovered evidence claim in its response. (PCR. 732-33) As such, Defendant also did not show that he was prejudiced by the denial of a continuance of the Huff hearing.

Additionally, any suggestion that a continuance should have been granted because Defendant claimed that he intentionally filed an incomplete motion simply to comply with a deadline would permit Defendant to benefit from his own misconduct. This Court specifically amended rule 3.851 to outlaw the practice of filing motions merely to comply with the filing deadline. See Bryant v. State, 901 So. 2d 810, 819 (Fla. 2005). It has made it clear that motions for post conviction relief are supposed to be fully plead when filed. Vining v. State, 827 So. 2d 201, 211-13 (Fla. 2002). Given these circumstances, Defendant's suggestion that he should have been entitled to continue to delay this matter indefinitely based on his own violations of the law

should be rejected. See Wike v. State, 698 So. 2d 817, 820-21 (Fla. 1997).

Given these circumstances, the lower court did not abuse its discretion in denying the continuance on the grounds presented to it. It should be affirmed.

Defendant would also be entitled to no relief based on the grounds that he is attempting to add. While Defendant repeatedly attempted to file pro se pleadings that he could not properly file (PCR. 1092-1128); Smith v. State, 31 So. 3d 187 (Fla. 3d DCA 2010)(dismissing pro se petition for belated appeal regarding this case), he never informed the lower court of any issues he was having with his counsel. Thus, Defendant did not diligently inform the lower court of any problems with his prior counsel. Rather than notifying the lower court of any problems with the post conviction motion counsel filed, Defendant verified the motion, swearing under penalty of perjury that he had read the motion and it was true and correct. (PCR. 394) Thus, allowing Defendant leave to amend in these circumstances would not only have been inconsistent with the principle that motions cannot be amended based on information in a defendant's possession when the motion was filed, but would also reward a defendant for his own misconduct. See Wike, 698 So. 2d at 820-21; see also Franqui v. Florida, 638 F.3d 1368, 1373-74 & n.8

(11th Cir. 2011). Given these circumstances, Defendant's present statements about his prior counsel do not provide a basis for finding that the lower court should have granted a continuance.

Moreover, Defendant's assertion that the lower court somehow limited his ability to seek leave to amend by denying the motion to continue the Huff hearing is belied by the record. Not only did the lower court in no way limit the issues on which Defendant could seek leave to amend at the hearing on the motion to continue the Huff hearing (PCT. 76-88), but also it actively invited Defendant to seek leave to amend claims other than the claim regarding mitigation during the Huff hearing. (PCT. 94-95, 96, 107) Further, the fact that additional hearings might have been necessary did not preclude the matter from going forward. Fla. R. Crim. P. 3.851(f)(4). As such, the lower court did not abuse its discretion in denying the continuance of the Huff hearing. It should be affirmed.

The lower court also did not abuse its discretion in denying Defendant leave to amend. Pursuant Fla. R. Crim. P. 3.851(f)(4), a motion for leave to amend must be presented to the lower court more than 30 days prior to the evidentiary hearing. Here, Defendant did not file his motion for leave to amend until 11 days after the evidentiary hearing. (PCR. 1226-46) As such, the lower court did not abuse its discretion in

denying the untimely request for leave to amend. Doorbal v. State, 983 So. 2d 464, 484 (Fla. 2008). This is all the more true as Defendant's case had been final for more than 3 years by that time and his initial motion had been pending for more than 2 years.

Moreover, Defendant did not have good cause to obtain leave to amend. None of Defendant's proposed amendments were based on recently produced public records or other information that Defendant did not possess when initial motion was filed. In fact, several of the proposed amendment was based on the assertion that the claims as plead in the initial motion, which Defendant swore was true and correct under penalty of perjury, were false. (PCR. 1229-34) The only reason Defendant gave for needing to amend was that he had new counsel. (PCR. 1239-46) Since leave to amend is not properly granted based on information a defendant possessed at the time the original motion was filed, provision of new counsel is not grounds for leave to amend and Defendant should not be permitted to benefit from his own misconduct, the lower court did not abuse its discretion in denying leave to amend. Tanzi, 94 So. 3d at 495; Lugo, 2 So. 3d at 19; Brown, 894 So. 2d at 153-54; Wike, 698 So. 2d at 820-21. It should be affirmed.

Defendant's reliance on Spera v. State, 971 So. 2d 754

(Fla. 2007), Boule v. State, 86 So. 3d 1185 (Fla. 5th DCA 2012), Woldseth v. State, 974 So. 2d 423 (Fla. 2d DCA 2007), and Woods v. State, 963 So. 2d 348 (Fla. 4th DCA 2007), is misplaced. First, each of these cases concerned motions pursuant to Fla. R. Crim. P. 3.850, which does not contain a provision equivalent to Fla. R. Crim. P. 3.851(f)(4). While Defendant insists that he should be treated the same as a noncapital defendant, this Court has rejected this argument. Vining, 827 So. 2d at 215.

Moreover, Spera, 971 So. 2d at 761, Boule, 86 So. 3d at 1186, and Woods v. State, 963 So. 2d at 349, concerned giving a defendant an opportunity to add missing allegations to a claim that was found facially insufficient. Further, this Court expressly noted that the time period to fix the defects should not exceed 30 days from when the court determines the claim is facially insufficient. Spera, 971 So. 2d at 761. Here, Defendant was not attempting to fix defects in claims found insufficiently plead but to alter the claims entirely. Moreover, since a finding that a claim is insufficient is made at a Huff hearing, requiring the defendant to file any amendment more than 30 days before an evidentiary hearing set 90 days after the Huff hearing is not inconsistent with Spera. The denial of leave to amend should be affirmed. The denial of leave to amend should be affirmed.

Finally, this Court has held that a lower court does not abuse its discretion in denying leave to amend when the claim, even as amended, does not provide a basis for relief. Lugo, 2 So. 3d at 19-21; Doorbal, 983 So. 2d at 485. Here, Defendant presents arguments regarding why all but one of the claims in the amendment allegedly entitled him to relief in support of Issues III, VI and VIII. As argued in response to those issues, this is not true. As such, the lower court did not abuse its discretion in rejecting the amendment.

The sole remaining claim in the amendment asserted that the State had failed to disclose that Demetrious Jones had been impeached during a federal trial regarding an issue unrelated to his testimony in this matter and was not charged with a crime as a result. Defendant suggested that this established a violation of Brady v. Maryland, 373 U.S. 83 (1963). However, this Court has made it clear that a defendant cannot establish a Brady violation when he possessed the information that was allegedly not disclosed by the State. Maharaj v. State, 778 So. 2d 944, 954 (Fla. 2000). Here, the Eleventh Circuit's opinion regarding the trial at which Jones testified shows that Defendant was a jointly tried codefendant who would have had possession of the transcript of that trial. United States v. Allen, 302 F.3d 1260 (11th Cir. 2002). Moreover, the record in this case reflects

that the State did provide Defendant was a transcript of Jones' federal testimony pretrial, and Defendant used that transcript in impeaching Jones. (R2/191-92, R52/3837-38) Defendant also had Jones admit during cross examination that he had perjured himself "to the people who offered [him] a plea bargain" and that he did not expect to be charged with any more crime. (R52/3821, 3857) Given that Defendant admits that the alleged perjury concerned a matter about which Jones did not testify in this case and this Court actually affirmed the sustaining of an objection to Defendant's attempt to have Jones testify about prior bad acts he had committed, Smith, 7 So. 3d at 498-500, this claim would have been nonmeritorious had it been added. The denial of leave to amend should be affirmed.

II. THE LOWER COURT PROPERLY DENIED THE NEWLY DISCOVERED EVIDENCE CLAIM REGARDING THE AFFIDAVIT OF CHAZRE DAVIS.

Defendant asserts that the lower court erred in denying the newly discovered evidence claim after conducting the evidentiary hearing. However, the lower court properly denied this claim as Defendant failed to meet his burden of proof and the evidence was not newly discovered.

This Court has held that to be entitled to relief based on a claim of newly discovered evidence a defendant must show that (1) the evidence was known by the trial court, the party, or

counsel at the time of trial and could not have known of it by the use of diligence and (2) the new evidence is of such nature that it would probably produce an acquittal on retrial. *Hurst v. State*, 18 So. 3d 975, 992 (Fla. 2009). In reviewing the denial of such a claim after an evidentiary hearing, this Court does not "substitute [its] judgment for that of the trial court on questions of fact, credibility of the witnesses, or the weight to be given to the evidence" where the trial court's decision is supported by competent, substantial evidence. *Id.* at 993.

Here, after conduct an evidentiary hearing on the claim, the trial court denied it, finding:

> Chazre Davis, a co-defendant in this case, was called by the Defendant. Davis testified that he knew of Defendant from the neighborhood, but they were not friends or gang associates. He testified that he did not kill Cynthia Brown, and that he did not conspire with the Defendant to kill Brown. Davis has been consistent in his statements regarding the Cynthia Brown murder from the time of the murder. He was with Brown at the hotel. He brought drugs, they used drugs, had sex, and she was alive when he left. At no point in time did he ever implicate himself or the Defendant in the murder of Brown.
>
> Davis testified that he took a plea last year was [sic] because the Florida Supreme Court affirmed the convictions and sentences in this case and he was afraid he would be sentenced to death if he was found guilty of murdering Cynthia Brown.
>
> Davis was not a credible witness as he has been in the past. He did not testify that he would have testified at Defendant's trial if called. Since charges were pending against him too in this case, he probably would have refused to testify based on his

Fifth Amendment rights. Even if he had testified at Defendant's trial, Defendant has not met the burden of proof that the result would have been different. Davis was not credible at the evidentiary hearing.

The testimony at trial was quite extensive that Defendant arranged to have Brown killed. As observed in Smith, 7 So. 3d at 486-487:

> Several witnesses testified that Smith wanted to get rid of the only witness who was going to testify against him in the Johnson murder case. Anthony Fail overheard a conversation between Smith and his mother about how to kill a woman without shooting her. They discussed poison and strangulation. Fail also testified that Smith offered him $50,000 to kill Brown. However, Smith was adamant that he did not want Brown shot and that he did not want the evidence leading back to him. Smith told Fail that the "junkie bitch had to go," referring to Brown. Fail did not agree to kill Brown because of this limitation and because he was on house arrest and could not move freely about the community. Fail testified that Smith put aside $20,000 to pay Brown's boyfriend for killing her. Herbert Daniels overheard a conversation between Smith and Brown's boyfriend Davis shortly before Brown was killed. Daniels heard Davis ask Smith what he wanted him to do about Brown.
>
> Carlos Walker testified that Smith talked to him about Brown "snitching" on him. Smith claims that there was a discovery violation by the State relating to Walker's testimony. This is discussed in more detail below. Smith told Walker that Brown had to "come up dead for him to win his trial." Walker also heard Smith telling Davis to either suffocate or strangle Brown because he did not want bullets, casings, or other evidence at the scene. Walker admitted that he lied to both Smith's defense attorney and the prosecutors at his deposition when he said that Smith never discussed the Johnson case with him. Walker said he lied out of

> fear for his life. He said "look what happened to Jackie Pope."
>
> Tricia Geter testified that Demetrius Jones had been paid by Smith's friend Peggy King to testify on Smith's behalf at the Johnson murder. Geter also testified that Smith asked her if she could obtain pure heroin that could be given to Brown to kill her. Smith stated that he was going to take Brown's life because she was trying to take his.
>
> After Brown was killed, Smith told Julian Mitchell that he had to have her killed in order to win his case and now they "wouldn't be able to take him." The day after the Johnson case was dismissed, Walker heard Smith say that the State could not hold him and that Davis had handled his business. Geter testified that she saw Davis seeking payment from Smith after Brown was killed.

Id.

This claim is denied.

(PCR. 1255-56) Because these findings are supported by competent, substantial evidence, the lower court's denial of the claim should be affirmed.

Both Davis and Sgt. Alfonso testified that Davis had been claiming since before trial that he had not conspired with Defendant to kill Brown. (PCT. 135-36, 139-41, 161-64, 166-68) Moreover, the record shows that Defendant actually presented at the penalty a deposition of one of Davis' former cellmate in which the cellmate averred that Davis had told him that Defendant was not involved in Brown's murder. (R22/2906-77) Additionally, Sgt. Alfonso testified that he had disclosed

Davis' denials to Defendant's attorneys during his pretrial deposition. (PCT. 169) A review of Davis' testimony shows that he never testified about whether he would have been willing to testify on Defendant's behalf at Defendant's trial. (PCT. 124-59) As such, the lower court's findings that regarding Defendant's knowledge of the evidence before trial and his failure to show that the evidence should not have been presented through an exercise of diligence are supported by competent, substantial evidence.

Its finding that Davis' testimony was not credible is also supported by competent, substantial evidence. Davis admitted that he had spoke to the police on several occasions before trial. (PCT. 130-31) However, he denied providing a sworn statement to the police even when shown the statement. (PCT. 137-39) He disputed when the conversation had occurred even when shown Miranda waiver forms with his signature on them. (PCT. 143-45) He attempted to explain his signature by claiming the police simply had him sign a number of waiver forms during his first interview. (PCT. 144-45) His claims that the police had threatened and harassed him about saying that Defendant was involved in Brown's murder was contradicted by Sgt. Alfonso's testimony that no such threats or harassment occurred and that Davis had actually initiated contact with the police in an

attempt to gain favorable treatment. (PCT. 131-32, 168-69, 176, 179) Davis admitted that he had plead guilty to murdering Brown and conspiring with Defendant to do so. (PCT. 134) By doing so, Davis confessed to the facts of those crimes. *United States v. Broce*, 488 U.S. 563, 569 (1989); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *McCrae v. State*, 395 So. 2d 1145, 1154 (Fla. 1981). Yet, he insisted that he had nothing to do with Brown's murder and did not know Defendant and claimed that he had lied to the trial court who took his plea about being coerced. (PCT. 149) Further, numerous witness had provided testimony at trial showing that Davis had killed Brown and conspired with Defendant to do so. (R37/1922-26, R43/2614-18, R48/3284-87, R52/3911-12, R58/4330) As such, the lower court's finding that Davis' testimony was not credible is supported by competent, substantial evidence.

In fact, the only statement in the lower court's order that is not supported by competent, substantial evidence is the speculation that Davis would have refused to testify had Defendant attempted to present him as a witness at trial. Not only did Defendant not present any evidence that Davis would have refused to testify at trial at asked, (PCT. 124-59) but also Defendant's entire claim was predicated on an affidavit

Davis signed in 2009. (PCR-SR. 217-289)[5] As Davis admitted at the evidentiary hearing, he was pending trial in this matter at that time. (PCT. 125-26) Since Davis was perfectly willing to waive his Fifth Amendment privilege in 2009, the lower court's speculation that Davis would not have been willing to do so despite having a Fifth Amendment privilege at the time of trial is not consistent with the record.

Given these circumstances, the lower court properly denied the newly discovered evidence claim. State v. Riechmann, 777 So. 2d 342, 361 (Fla. 2000); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). It should be affirmed.

Defendant attempts to suggest that the lower court erred because he believes that the lower court should have found Davis credible and that his testimony should have outweighed the numerous witnessed who provided contrary testimony at trial because the jury might have believed Davis. However, this argument provides no basis for reversal. This Court does not substitute its judgment for the judgment of the lower court on issues of credibility of witnesses or the weight of evidence. Hurst, 18 So. 3d at 993; Blanco, 702 So. 2d at 1252. The denial of the claim should be affirmed.

[5] The State filed a motion to supplement the record with the subject affidavit. Since the record has not been supplemented at the time of the filing of this brief, the record cites are based on an estimate.

III. THE LOWER COURT PROPERLY DENIED THE INSUFICIENTY PLEAD AND MERITLESS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING THE SPEEDY TRIAL ISSUE.

Defendant asserts that the lower court erred in denying his claim that his counsel was ineffective assistance for failing to preserve his speedy trial rights. However, this claim was properly denied as it was insufficiently plead and without merit.

To plead a facially sufficient claim of ineffective assistance of counsel, a defendant must allege both that his counsel was deficient and that he was prejudiced by the alleged deficiency. Strickland v. Washington, 466 U.S. 668, 687 (1984). To show deficiency, a defendant must allege that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. To show prejudice, a defendant must alleged "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The allegations must be more than conclusory. Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998). To meet this standard in the context of a claim related to an alleged violation of the speedy trial rule, Florida courts have required a particularized showing that the State would not have been able to proceed to trial before a motion to discharge would have been

meritorious. Hammond v. State, 34 So. 3d 58, 59-60 (Fla. 4th DCA 2010). Moreover, a defendant's allegations regarding these requirements cannot be refuted by the record. Foster v. State, 2013 WL 5659482, *13-*14 (Fla. Oct. 17, 2013).

In his motion for post conviction relief, Defendant did little more than note that the record on direct appeal did not contain either Defendant's demand for speedy trial or his notice of expiration, provide his version of what was reflected in the record regarding discussion of his speedy trial demand and asserted that his counsel was deficient for allegedly not filing a notice of expiration if he had not done so. (PCR. 331-35) He did not even make a conclusory allegation that there was a reasonable probability of different result, much less a particularized showing that the State would have been unable to bring him to trial. Moreover, the record showed both that Defendant filed a demand for speedy trial in open court on June 8, 2004, and a notice of expiration on September 23, 2004. (R1/23, 26, R3/367) Since the trial court had tolled the speedy trial period for 45 days on June 30, 2004 (R3/376), this Court had tolled the speedy trial period for nine additional days (PCR. 743-48) and the State was able to commence trial before the recapture period ended, the lower court properly denied this claim because it was facially insufficient and refuted by the

record. It should be affirmed.

In an attempt to avoid this result, Defendant attempts to rely on the allegations he included in his amended motion. However, a lower court cannot be said to have improperly summarily denied a claim, where the basis for arguing that the claim was improperly denied is an attempt to amend a claim that was rejected. See Vining v. State, 827 So. 2d 201, 211-13 (Fla. 2002). Here, as argued in Issue I, the lower court properly denied Defendant leave to amend. As such, Defendant's attempt to rely on his amended motion should be rejected.

Even if Defendant could rely on his amended allegations, Defendant would still be entitled to no relief. In his amendment, Defendant merely sought to change the allegation regarding deficiency to contend that counsel's agreement to the trial court tolling the speedy trial period for 45 days was ineffective because Defendant had not personally agreed to the toll. (PCR. 1229-31) However, he still failed to make even a conclusory assertion of prejudice. Given these circumstances, the claim remained facially insufficient and would still have been properly summarily denied.

This is all the more true, as Defendant's suggestion that his agreement was necessary for the trial court to have tolled the speedy trial time was legally incorrect. The United States

Supreme Court has made it clear that an attorney does not need his client's consent at all to make such decisions regarding the conduct of litigation. Florida v. Nixon, 543 U.S. 175, 187 (2004). Consistent with this decision, this Court has recognized that counsel can make decisions regarding speedy trial times. State ex rel. Gutierrez v. Baker, 276 So. 2d 470, 471 (Fla. 1973). As such, merely alleging that Defendant had not consented to tolling the speedy trial time did not show that counsel was deficient for doing so.

Moreover, a defendant who files a demand for speedy trial under circumstances that indicate that he is not actually ready to go to trial is not entitled to relief because of an alleged violation of the speedy trial rule. Fla. R. Crim. P. 3.191(g). Where a defendant has motions pending at the time the demand was filed, the demands have been found frivolous and subject to being stricken. Jones v. State, 449 So. 2d 253, 262 (Fla. 1984); State ex rel. Ranalli v. Johnson, 277 So. 2d 24, 25 (Fla. 1973). A demand is also considered frivolous when the circumstances under which it was filed indicate that the demand was filed for the purpose of seeking a speedy discharge and not a speedy trial. State v. Velazquez, 802 So. 2d 426, 428-30 (Fla. 3d DCA 2001). Additionally, a trial court is empowered to extend the speedy trial period when additional time is needed to hear

pretrial motions. Fla. R. Crim. P. 3.191(i)(4); State v. Embry, 322 So. 2d 515, 518 (Fla. 1975).

Here, the record reflects both that Defendant's demand was frivolous and that an extension of the speedy trial would have been properly granted even over Defendant's objection. On June 3, 2004, Defendant filed a motion to dismiss the indictment based on an alleged violation of the speedy trial period under the interstate agreement on detainers, even though Defendant had waived that speedy trial period, a fact that Defendant eventually admitted. (R2/267-73, R5/572-652, R14/25) Defendant only filed the speedy trial demand at the June 8, 2004 hearing when the trial court indicated that it would not force the State to litigate this motion until it had time to prepare. (R3/361-66) Even after filing the demand, Defendant personally indicated that he still wanted his frivolous motion to dismiss heard. (R4/440-41) At the hearing at which the speedy trial time was tolled, the State explained that the reason why more time was needed was that it was in the process of obtaining the transcripts needed to respond to the motion to dismiss. (R4/463-65) Given these circumstances, any attempt to object to extending the speedy trial period would not have been meritorious. As such, the lower court properly denied this claim. Bradley v. State, 33 So. 3d 664, 682 (Fla. 2010).

Defendant also attempts to avoid the rejection of this claim by making a conclusory assertion that he would have been entitled to a discharge. However, not only does Defendant's conclusory assertion of prejudice come too late, Griffin v. State, 866 So. 2d 1, 11 n.5 (Fla. 2003), but also it is insufficient to state a claim. Ragsdale, 720 So. 2d at 207.

Moreover, while Defendant cites to Lockhart v. Fretwell, 506 U.S. 364 (1993), and Robinson v. State, 913 So. 2d 514 (Fla. 2005), as if they somehow do not require him to show that there is a reasonable probability of a different result, neither case so holds. In Robinson, 913 So. 2d at 522 & n.7, this Court expressly stated that a defendant was required to show a reasonable probability of a different result to show prejudice and merely explained that this standard was not as rigorous as the standard for adjudicating newly discovered evidence claims.

In Fretwell, 506 U.S. at 366-68, the defendant has claimed that his counsel was deficient for failing to raise an issue based on a decision from an intermediate appellate court and that there was a reasonable probability of a different result because the trial court would have been required to decision at the time of his trial even though the United States Supreme Court had subsequently reversed the decision. Far from holding that the burden to show prejudice was minimal, the Court

actually held that showing a reasonable probability of a different result would be insufficient to show prejudice, where the defendant was seeking a windfall from an incorrect decision or other illegitimate conduct. Id. at 369-71. Moreover, the Court has subsequently explained that this heightened requirement to show prejudice does not apply outside of the windfall context. Williams v. Taylor, 529 U.S. 362, 391-95 (2000). Given these circumstances, neither of these cases show that a defendant can state a facially sufficient claim of ineffective assistance without showing a reasonable probability of a different result. Since Defendant has not made that showing, the lower court's denial of this claim should be affirmed.

IV. THE LOWER COURT PROPERLY DENIED THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING THE MANSLAUGHTER INSTRUCTION.

Defendant next asserts that the lower court erred in denying his post conviction relief because his trial counsel was allegedly ineffective in failing to object to the trial court instructing the jury on the lesser included offense of manslaughter with regarding to the Hadley and Lipscomb murders. However, any claim regarding the Hadley murder is unpreserved and the entire claim is meritless.

In his post conviction motion, Defendant only alleged that

his counsel had been ineffective for failing to object to a manslaughter instruction with regarding to the Lipscomb murder. (PCR. 335-37) He raised no claim regarding the Hadley murder. As such, any claim of ineffective assistance of counsel regarding the manslaughter instruction about the Hadley murder is unpreserved and procedurally barred.[6] Griffin v. State, 866 So. 2d 1, 11 n.5 (Fla. 2003).

With regard to the portion of the claim, Defendant is also not entitled to any relief. While Defendant acts as if the lower court summarily denied this claim because the statute of limitations had been extended, the lower court actually granted Defendant an evidentiary hearing on this claim. (PCT. 96) After Defendant failed to present any evidence regarding the claim at the evidentiary hearing, the lower court denied the claim based

[6] Moreover, Defendant offers no explanation of how the failure to object to the manslaughter instruction with regarding to the Hadley murder could have possibly prejudiced him. This lack of explanation is understandable because such a lack of objection could not possibly have done so. Defendant was convicted of first degree murder regarding Hadley after the jury was instructed on both that offense and the lesser included offenses of second degree murder and manslaughter. (R20/2695, R70/5991-97) This Court has recognized that any error in the giving of an instruction on a lesser included offense is harmless error when the lesser offense is two steps removed from the offense of which the defendant was convicted. *State v. Abreau*, 363 So. 2d 1063, 1064 (Fla. 1978). This Court has also recognized that an error regarding a jury instruction on a lesser will not support a finding of prejudice even where the error would have been harmful on direct appeal. *Sanders v. State*, 946 So. 2d 953 (Fla. 2006). Thus, the portion of the claim regarding Hadley is also meritless.

on Defendant's failure to prove his claim. (PCR. 1249) Having failed to present any argument regarding how that ruling was incorrect, Defendant has waived any claim regarding it. Shere v. State, 742 So. 2d 215, 217 n.6 (Fla. 1999). The lower court should be affirmed.

This is all the more true, as the lower court's ruling was correct. Defendant bore the burden of proving his claim of ineffective assistance of counsel. Wong v. Belmontes, 558 U.S. 15, 27 (2009). By presenting no evidence, Defendant failed to carry that burden. See Owen v. State, 773 So. 2d 510, 513-15 (Fla. 2000). The denial of the claim should be affirmed.

Further, even if Defendant has been correct about the basis of the lower court's ruling, he would still be wrong in asserting that the rejection of the claim was error. As this Court has long recognized, counsel cannot be deemed ineffective for failing to raise a meritless issue. Bradley v. State, 33 So. 3d 664, 682 (Fla. 2010). Here, any claim that the statute of limitation barred a manslaughter prosecution was meritless. State v. Calderon, 951 So. 2d 1031 (Fla. 3d DCA 2007). As such, the lower court properly denied Defendant's claim that his counsel was ineffective for failing to raise this meritless issue and should be affirmed.

In an attempt to avoid this result, Defendant argues that

applying an extension of a statute of limitations to him would violate the Ex Post Facto Clause. However, this Court, and other courts of this state have recognized that the legislature can extend the statute of limitation so long as the statute of limitations has not expired and the legislature indicates that it intends for the extension to apply to cases in which the statute of limitations has yet to expire. Reino v. State, 352 So. 2d 853, 861 (Fla. 1977)(holding that legislature could have retroactively extended statute of limitations applicable to murder offenses without violating ex post facto prohibition, but failed to act while previous statute allowed prosecution); Bryson v. State, 42 So. 3d 852, 854 (Fla. 1st DCA 2010); Scharfschwerdt v. Kanarek, 553 So. 2d 218, 220 (Fla. 4th DCA 1989); Andrews v. State, 392 So. 2d 270, 271 (Fla. 2d DCA 1980).

Here, the legislature amended the statute of limitations effective October 1, 1996, to provide that a prosecution for a felony that resulted in death could be commenced at any time and indicated its intent for this extension to apply retroactively. Ch. 96-145, Laws of Fla. (1996). At the time this occurred, the three year statute of limitation that had previously applied to manslaughter, §775.15(2)(b), Fla. Stat. (1995), had not expired regarding the killing of Lipscomb, which occurred on August 25, 1995. (R1/83) Since the statute of limitations had not expired

when the legislature extended it, Defendant's argument is meritless and should be rejected.

Defendant's reliance on Stogner v. California, 539 U.S. 607 (2003), is misplaced. In Stogner, the Court held that a statute that attempted to extend a statute of limitation after it had expired violated Ex Post Facto Clause. Id. at 632-33. The Court entire analysis of how this was true depended on the fact that the statute of limitations had expired before the new act sought to extend it. Id. at 611-18. In fact, the Court expressly noted that numerous courts had held that unexpired statutes of limitations could be extended and stated that it was not invalidating those decision. Id. at 618-19. As such, Defendant's suggestion that Stogner held an unexpired statute of limitations cannot be extended without violating the Ex Post Facto Clause is simply incorrect. The lower court should be affirmed.

V. THE LOWER COURT PROPERLY DENIED THE PROCEDURALLY BARRED AND MERITLESS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING THE FAILURE TO REQUEST A RICHARDSON HEARING.

Defendant asserts that the trial court erred in denying his claim that his counsel was ineffective for failing to request a Richardson inquiry when it became clear that the State had not disclosed Carlos Walker had reversed to his original statement incriminating Defendant after denying any knowledge during

deposition. However, the lower court properly denied this claim as procedurally barred and meritless.

It is well established that allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. Griffin, 866 So. 2d at 16. Attempts to relitigate claims under the guise of ineffective assistance are procedurally barred. Cherry v. State, 659 So. 2d 1069 (Fla. 1995); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995). Here, Defendant raised the claim that Defendant was entitled to a Richardson inquiry, and this Court rejected that claim, finding that Defendant had sufficiently a Richardson inquiry by moving for a mistrial, that the trial court had erred in not conduct such an inquiry and that the error was harmless. Smith, 7 So. 3d at 504-07. As such, the lower court properly denied this barred claim.

In his initial motion, Defendant argued that his counsel was ineffective because he did not request a Richardson hearing when he moved for a mistrial during Walker's testimony. However, on direct appeal, this Court determined that the motion for mistrial was sufficient to request a Richardson inquiry and that the trial court had erred in not conduct such an inquiry but that the error was harmless. Smith, 7 So. 3d at 504-07. Thus,

counsel's performance cannot be deemed deficient for failing to do what he actually did at trial. The claim was properly denied.

Moreover, this Court has held that a defendant cannot show prejudice to support a Strickland where this Court had already determined that an error had not harmed a defendant on direct appeal. Chandler v. State, 848 So. 2d 1031, 1046 (Fla. 2003). As noted above, this Court has already determined that Defendant was not harmed on direct appeal. Smith, 7 So. 3d at 504-07. Thus, this claim was properly denied under Chandler.

In his attempt to avoid this result, Defendant argues for the first time on appeal that this Court used the incorrect standard to determine the claim was harmless. However, as this Court has held that it is improper to present grounds for post conviction relief for the first time on appeal. This argument should be rejected. Griffin, 866 So. 2d at 11 n.5.

Even if this argument was properly before this Court, it would still have been rejected. While Defendant suggests that the proper standard to determine whether the failure to request a Richardson inquiry is found in Delaware v. Van Ardsall, 475 U.S. 673 (1986), this is not true. The issue in Van Ardsall was whether a trial court's restriction of cross examination of a witness was harmful. Id. at 679-84. Here, in contrast, the issue was merely whether the trial court should have held a hearing to

determine whether Defendant's trial strategy would have changed if he had know that Walker would revert to his original statements. Given these circumstances, Defendant's argument is meritless and should be rejected.

VI. THE INEFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING THE FAILURE TO UTILIZE THE SERVICES OF A FORENSIC PATHOLOGIST WAS PROPERLY DENIED AS IT WAS LEGALLY INSUFFICIENT AND REFUTED BY THE RECORD.

Defendant next asserts that the lower court erred in denying his claim that his counsel was ineffective regarding the utilization of a pathologist to challenge Brown's cause of death. However, this issue presents no basis for reversal because Defendant has waived the claim that was properly presented below and properly summarily denied. Moreover, the lower court properly denied leave to amend to present the claim Defendant attempts to present on appeal, which would have been properly summarily denied in any event.

While Defendant argues this claim on appeal as if he had claimed that counsel was ineffective for claiming that Brown died of a drug overdose in opening knowing that such a statement was not consistent with the evidence that could be presented, this is not true. Instead, the claim raised in the motion for post conviction relief was a claim that counsel was ineffective for failing to hire a pathologist to testify regarding Brown's

cause of death. (PCR. 339-42) The assertion that counsel was ineffective for making allegedly false statements regarding Brown's cause of death in opening was only raised in the amended motion that Defendant attempted to file after the evidentiary hearing was over. (PCR. 1231-34) As argued in Issue I, the lower court properly denied leave to amend to raise regarding this claim. As this Court has held, a lower court cannot be said to have improperly summarily denied a claim, where the basis for arguing that the claim was improperly denied is an attempt to amend a claim that was rejected. See Vining v. State, 827 So. 2d 201, 211-13 (Fla. 2002). The lower court should be affirmed.

Moreover, having failed to acknowledge the claim that was properly presented below, Defendant makes no argument regarding how the lower court erred in denying that claim. As such, Defendant has waived any issue regarding the denial of the real claim. Shere, 742 So. 2d at 217 n.6. The lower court should be affirmed.

Even if Defendant had attempted to brief the denial of the claim that was properly presented below, Defendant would still be entitled to no relief. The lower court denied this claim because the record refuted that counsel failed to hire a pathologist and because Defendant failed to allege prejudice sufficiently. (PCR. 1249-50) This Court has held that counsel

cannot be deemed ineffective for failing to retain an expert where the record shows that counsel did retain and consult with an expert. See Rodgers v. State, 113 So. 3d 761, 770-71 (Fla. 2013). Moreover, in order to allege prejudice sufficiently regarding a claim of ineffective assistance of counsel for failing to call a witness, a defendant must allege what testimony an available witness could have provided that would create a reasonable probability of a different result. Bryant v. State, 901 So. 2d 810, 821-22 (Fla. 2005); Nelson v. State, 875 So. 2d 579, 582-83 (Fla. 2004).

Here, the record shows that counsel retained Dr. John Marraccini, had him review materials related to Brown's death and consulted with Dr. Marraccini on two occasions. (R2/256, R3/357) Moreover, while Defendant noted the alternate theories of Brown's death that an expert could have explored in his post conviction motion, he never actually alleged what an expert would have testified about concerning these theories. (PCR. 339-42) As such, the lower court properly summarily denied Defendant's claim as refuted by the record and insufficiently plead. It should be affirmed.

Finally, even if Defendant should show that the lower court had abused its discretion in denying leave to amend to alter this claim, the lower court would still have properly denied the

claim summarily. In his attempt to amend the claim, Defendant admitted that counsel had retained his own expert and averred that his counsel knew his expert would not have provided supported his theories. (PCR. 1231-34) He then suggests that counsel should not have presented alternate theories for Brown's death because counsel was unable to support these theories. Id.

However, in making this argument, Defendant ignored the support for his theories that Defendant was able to elicit from the State's expert, Dr. Emma Lew. Dr. Lew herself testified that Brown had cocaine and alcohol in her system when she died and that the pulmonary edema she found in Brown's body could have resulted from a drug overdose. (R49/3491, 3541-42, 3479) She acknowledged that she had seen evidence that cocaine had been used in the room where Ms. Brown died. (R49/3511-12) Counsel had Dr. Lew admit that drug use can contribute to a cause of death even if it did not directly cause death itself, that cocaine can cause a fatal arrhythmia in the heart, that such an arrhythmia produces edema, that cocaine and alcohol can suppress breathing and that any level of cocaine and alcohol can produce death. (R49/3522-23, 3544-45, 3548-49) She also acknowledged that Brown's panties had a stain on them, that sexual asphyxia exists, that sexual asphyxia was a possible cause of death in this case and that drug and alcohol used made

asphyxiating during sex more likely. (R49/3569, 3551-53, 3556, 3567-68) In fact, this Court recognized on direct appeal that counsel have been able "to call into question the manner of death as homicide" through this questioning. Smith, 7 So. 3d at 500.

Given the support for his theories that counsel was able to elicit through cross examination, counsel cannot be deemed deficient for having done so. Riechmann, 777 So. 2d at 354-55. Moreover, it should be remembered that in pleading this claim in this manner, Defendant acknowledged that his counsel had thoroughly investigated the issue and knew that his own expert would not provide better support for his arguments. As such, Defendant's own pleading refuted any notion that counsel's decision to proceed as he did constituted deficient performance. Strickland v. Washington, 466 U.S. 668, 690-91 (1984). The denial of the claim should be affirmed.

Defendant's reliance on Robinson v. State, 702 So. 2d 213 (Fla. 1997), is misplaced. In Robinson, this Court did not reverse based on a finding of ineffective assistance of counsel at all. Instead, this Court reversed because the defendant had been denied a fair trial based on a combination "the administrative removal of the trial judge as a result of a criminal investigation after the penalty phase but before

sentencing, a questionable relationship between the trial judge and the attorney appointed by him to represent Robinson, and the improper conduct of that attorney." Id. at 214. Moreover, this Court explained that the misconduct of the attorney included soliciting money from the family of an indigent defendant that he stated he planned to use to bribe the judge, telling the jury in opening that the victim's son had hired people to kill his father and then telling the jury in closing that he had made up the theory about the victim's son to get their attention. Id. at 215-17. Even under those circumstances, this Court noted that "any one of these circumstances taken alone might be insufficient to warrant a new trial or be considered harmless error." Id. at 217. Given these circumstances, Robinson does not remotely support Defendant's claim. As such, the denial of the claim should be affirmed.

VII. THE LOWER COURT PROPERLY DENIED THE "SECRET DOCKETS" CLAIM.

Defendant asserts that the lower court erred in denying his claim that the existence of "secret dockets" suggested that the State may have withheld impeachment materials. However, this claim was properly denied as facially insufficient.

As this Court had held, a defendant must allege "(1) that favorable evidence—either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3)

because the evidence was material, the defendant was prejudiced" to state a claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963); Griffin v. State, 114 So. 3d 890, 904 (Fla. 2013)(citing Strickler v. Greene, 527 U.S. 263, 281–82 (1999)). Moreover, the allegations must be more than conclusory. Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998). A request for post conviction relief cannot rely on mere speculation. Rodriguez v. State, 39 So. 3d 275, 290-91 (Fla. 2010); Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000).

Here, as Defendant admits, he did not allege that the State actually possessed any favorable evidence that it suppressed. (PCR. 342-46) Instead, he relied entirely on speculation that because dockets had been sealed or altered in other cases, dockets might have been sealed or altered in his case. Id. Since such speculation is insufficient to support a claim for post conviction relief, the lower court properly denied this claim. It should be affirmed.

In an attempt to avoid this result, Defendant insists that the lower court should have shifted the burden of proof to the State to show that it did not suppress favorable evidence by having any dockets sealed or altered in this matter. However, the United States Supreme Court has made it clear that the burden of proving a *Brady* violation rests on the defendant.

Kyles v. Whitley, 514 U.S. 419, 460 (1995). It had held that it is improper to grant post conviction relief by shifting the defendant's burden to the State. See Wong v. Belmontes, 558 U.S. 15, 27 (2009). As such, the lower court properly rejected Defendant's request that it do so. The denial of the claim should be affirmed.

This is all the more true, as Defendant had the means to discharge his burden. Pursuant to Fla. R. Crim. P. 3.852, Defendant was provided with the complete files of both the prosecutor's office and the investigating police agencies without even having to request them. (PCR. 244-45, 246-49, 273-85, 435-672, 827, PCR-SR. 98) From the records produced, Defendant was clearly able to identify cases in which the individuals who testified against him had been investigated or prosecuted, as he did so when pressed by the lower court. (PCR. 836-46) While Defendant complains that there might be additional files that were not disclosed, he has presented no evidence to show that this is true. As this Court has recognized, a defendant claiming a lack of public records disclosure is entitled to no relief unless he can identify documents that have not been disclosed. Johnson v. State, 904 So. 2d 400, 404-05 (Fla. 2005). Given these circumstances, there is no reason for

the lower court to have shifted the burden. The denial of the claim should be affirmed.

VIII. THE LOWER COURT PROPERLY DENIED THE PROCEDURALLY BARRED, INSUFFICIENTLY PLEAD AND MERITLESS CLAIM RELATED TO GETER TAPES.

Defendant next asserts the lower court erred in summarily denied his claim regarding tape recordings of phone calls between himself, Trish Geter and Latravis Gallashaw. However, Defendant is entitled to relief regarding this claim.

In arguing this claim, Defendant insists that he was entitled to a post conviction evidentiary hearing simply because he had raised an issue regarding the tapes in a motion for new trial and appealed without obtaining a ruling on the motion. However, the claim raised in the post conviction motion upon which the lower court ruled was a claim that the State had violated Brady by failing to disclose the tapes until after trial and that the tapes somehow that Geter's testimony was false. (PCR. 346-47) The claim that Defendant was entitled to an evidentiary hearing simply because the claim had been included in an abandoned motion for new trial was included in the amended motion for post conviction relief Defendant attempted to file after the evidentiary hearing. (PCR. 1236-37) However, a lower court cannot be said to have improperly summarily denied a claim, where the basis for arguing that the claim was improperly

denied is an attempt to amend a claim that was rejected. See Vining, 827 So. 2d at 211-13. As such, Defendant's attempt to make such an argument here entitles him to no relief.

Moreover, Defendant is entitled to no relief regarding the claim that was actually the subject of the lower court's ruling. However, failed to acknowledge the true nature of the claim was properly before the lower court or the fact that the lower court denied the claim as insufficiently plead (PCR. 1251), Defendant presented no arguments regarding how that ruling was incorrect. As such, Defendant has waived any issue regarding that ruling. Shere, 742 So. 2d at 217 n.6.

Moreover, the lower court was correct to find the claim insufficiently plead. In his motion, Defendant merely made conclusory assertions that the 39 tapes of calls after trial included exculpatory statements by him, that the tapes constituted material evidence and that Geter's testimony had been false or misleading without any attempt to explain testimony was allegedly false or misleading, what information on the tapes could have been presented at trial or how presentation of that information would have created a reasonable probability. (PCR. 346-47) Conclusory assertions are insufficient to plead a post conviction claim. Ragsdale, 720 So. 2d at 207. Thus, the lower court properly denied this claim and should be affirmed.

This is all the more true as the few allegations Defendant did make refuted any notion that there was a Brady violation. Defendant asserted that he participated in the calls and that he made the exculpatory statements. As such, Defendant was necessarily aware of his statements, and a Brady claim cannot be sustained where the defendant knew of the information. Knight v. State, 923 So. 2d 387, 406 (Fla. 2005). Further, a defendant cannot admit his own statements through the testimony of another. Lott v. State, 695 So. 2d 1239, 1242-43 (Fla. 1997). A Brady claim cannot be based on inadmissible information. Wood v. Bartholomew, 516 U.S. 1, 5-8 (1995). As such, the lower court properly denied this claim and should be affirmed.

Even if Defendant could rely upon the assertions in a rejected amendment, he would still be entitled to no relief. Defendant's suggestion that he did not waive his motion for new trial by appealing without obtaining a ruling is incorrect. This Court has held that a defendant who appeals without obtaining a ruling on an issue waives that issue. Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983). This rule has been applied with all the more force to post judgment motions. In re Forfeiture of $104,591 in U.S. Currency, 589 So. 2d 283 (Fla. 1991); State ex rel. Faircloth v. District Court of Appeal, Third Dist., 187 So. 2d 890, 892 (Fla. 1966); State ex rel. Owens v. Pearson, 156 So.

2d 4 (Fla. 1963). As such, Defendant's suggestion that he did not waive his motion for new trial by appealing without obtaining a ruling on that motion is simply incorrect. The lower court should be affirmed.

Defendant's reliance on Jones v. State, 745 So. 2d 1061 (Fla. 2d DCA 1999), and Jarrett v. State, 654 So. 2d 973 (Fla. 1st DCA 1995), is misplaced. Neither Jones not Jarrett concern whether a defendant waives an issue by appealing without obtaining a ruling on an issue he had presented before appealing. Instead, Jones concerned an attempt to raise a claim of juror nondisclosure for the first time after an appeal had been filed and the State attempting to respond to that claim with evidence not presented below. Jones, 745 So. 2d at 1061-62. Moreover, the court simply affirmed based on the proceeding that were properly before it without prejudice to the defendant raising any cognizable claim he had in a timely motion for post conviction relief. Id. at 1062. Jarrett concerned whether a defendant who had failed to appear for a pretrial conference and trial date could be tried in absentia and appeal that it was improper to do so when he was in custody by the time the notice of appeal was due. Jarrett, 654 So. 2d at 974-76. As such, Defendant's suggestion that they show that he did not waive issues in his motion for new trial by appealing without

obtaining a ruling on that motion is incorrect. The lower court should be affirmed.

IX. THE LOWER COURT PROPERLY DENIED THE PROCEDURALLY BARED AND MERITLESS CLAIM REGARDING THE CONSTITUTIONALITY OF THE DEATH PENALTY.

Defendant next asserts that the lower court erred in denying his claim that the standard jury instruction regarding the role of the jury is unconstitutional and that a report from the ABA shows that. However, this claim was properly summarily denied.

This Court has held that challenges to the constitutionally of the death penalty and to the jury instructions are procedurally barred because any such claim could have been and should have been raised on direct appeal. Griffin, 866 So. 2d at 14-15; Byrd v. State, 597 So. 2d 252 (Fla. 1992). This Court has also rejected the assertion that the ABA report shows that Florida death penalty statute is unconstitutional. Foster v. State, 2013 WL 5659482 (Fla. Oct. 17, 2013). Further, this Court has held that the amendment to Fla. Std. Jury Instr. 7.11 does not show that the old instruction was unconstitutional. McCray v. State, 71 So. 3d 848, 879 (Fla. 2011). Since the claim is barred and meritless, the lower court properly denied it.

X. THE LETHAL INJECTION CLAIM WAS PROPERLY DENIED.

Defendant next asserts that he "reserves the right" to

challenge the method of execution once his death warrant is signed. However, the suggestion that Defendant can do so should be rejected.

This Court has held that challenges to a method of execution are procedurally barred unless they are raised on direct appeal. Douglas v. State, 2012 WL 16745, *14 (Fla. Sept. 13, 2012). This Court has only permitted later challenges when the challenge is based on an incident in a recent execution or a recent change in an execution protocol on the basis that the change or incident constitutes newly discovered evidence. Schwab v. State, 969 So. 2d 318, 321 (Fla. 2007). Even then, this Court has limited the relitigation of the protocol to issues related to the change only. Pardo v. State, 108 So. 3d 558, 563 (Fla. 2012). Further, this Court has recognized that claims based on newly discovered evidence are untimely in successive motions if they are not raised within one year of when the evidence could have been discovered through an exercise of due diligence. Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008). Since Defendant's direct appeal is already complete and he cannot show that there will be a change to the method of execution or an incident during an execution that will have occurred within one year of his execution, he cannot reserve the right to bring a challenge to the method of execution when his death warrant is

signed. His attempt to do so should be rejected.[7]

XI. THE LOWER COURT PROPERLY DENIED THE PROCEDURALLY BARRED AND INSUFFICIENTY PLEAD INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING THE FAILURE TO OBJECT TO THE GIVING OF THE JURY INSTRUCTION ON PRINCIPALS.

Defendant next asserts that the lower court erred in denying the claim of ineffective assistance of counsel for failing to object to the principal instruction in connection with conspiracy counts. However, this claim was properly denied as it was insufficiently plead.

In pleading his claim that his counsel was allegedly ineffective for failing to object to the giving of a principal instruction regarding the conspiracy charges, Defendant did simply stated that he had been charged with a variety of offenses that included RICO, conspiracies and substantive offenses, noted that his counsel had not objected when the trial court stated that it would give the standard jury instruction on principals during the charge conference and cited to cases that he claimed showed that giving a jury instruction on being a principal regarding a conspiracy charge was error and averred

[7] Further, any attempt to assert that the lower court erred in denying the method of execution claim he raised below is meritless because this Court has already determined that claim is meritless. Muhammad v. State, 2013 WL 6869010, *4-*12(Fla. Dec. 19, 2013); Pardo, 108 So. 3d at 561-65; Valle v. State, 70 So. 3d 530, 538-46 (Fla. 2011); Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007).

that he was entitled to relief because he had suffered the same "inconceivable effect." (PCR. 1092-94) However, he made no attempt to explain how there was a reasonable probability of a different result had counsel objected to jury instruction on principals. Given these circumstances, the lower court properly denied the claim because it was insufficiently plead. Ragsdale, 720 So. 2d at 207.

Moreover, the fact that Defendant cited cases in support of his claim does not change this result. None of the cases cited concerned a claim of ineffective assistance of trial counsel. Instead, the court in Ramirez v. State, 371 So. 2d 1063, 1065 (Fla. 3d DCA 1979), merely held that evidence that a defendant had been a principal to a substantive offense was insufficient to support a conviction for conspiracy to commit that offense. In both McKay v. State, 988 So. 2d 51, 51-52 (Fla. 3d DCA 2008), and Evans v. State, 985 So. 2d 1105, 1105-07 (Fla. 3d DCA 2007), the court held that appellate counsel had been ineffective for failing to raise a preserved claim that the trial court had erred in refusing to modify the principal instruction to make it clear that the instruction only applied to the substantive offenses. However, this Court has held that the standard for obtaining a reversal on appeal is lower than the standard for showing prejudice on a claim of ineffective assistance of

counsel regarding a jury instruction. Sanders v. State, 946 So. 2d 953, 959 (Fla. Fla. 2006). As such, a defendant who merely alleges that the giving of a jury instruction would have been a reversible error on appeal does not sufficiently allege prejudice. Id. at 959-60. As such, Defendant's citation to cases regarding trial court error was not sufficient to show prejudice. The denial of the claim should be denied.

This is all the more true, as State presented overwhelming evidence that Defendant was guilty of conspiracy. (R37/1831, 1924-25, 1931-32, 1935, 1941, 2004; R42/2532, 2586, 2544-52, 2552-55, 2556-57; R43/2611, 2613-18, 2617-18; R44/1289, 1311-13, 1318-19; R46/3131-39 R48/3283, 3378-80; R52/3772, 3810, 3905-13, 3889, 3900-04, 3913-16, 3918-22; R57/4300; R58/4307-08, 4310-12, 4418, 4335-39, 4335-39; R66/5434-5540; R59/4435-36; R61/6180, 6184; R41/2377-88; R58/4316-20; R40/2300-17; R37/1862-63, 1922-24; R43/2612-14; R44/1276-77; R48/3271-72, 3282-88, 3283-84; R54/3998-4009, 4016-24, 4060-66; R37/1901-16; R58/4326-27, 4330-31; R39/2124-25, 2120-22) Moreover, the principal instruction was not specifically tied to the conspiracy counts in any way. (R70/6029-30) As such, the lower court properly rejected this insufficiently plead claim. It should be affirmed.

XII. THE LOWER COURT PROPERLY DENIED THE MERITLESS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING THE ALLEGED MONTGOMERY VIOLATION.

Defendant finally asserts that the lower court erred in denying his claim regarding the jury instruction on manslaughter. However, Defendant is entitled to no relief.

In arguing this issue, Defendant admits that the claim raised below was a claim that counsel was ineffective for failing to object to the instruction on manslaughter based on State v. Montgomery, 39 So. 3d 252 (Fla. 2010), and the lower court denied the claim because Montgomery was not decided until after Defendant's convictions became final and counsel cannot be deemed ineffective for failing to anticipate a change in the law. He then argues that this Court should grant him relief not on the basis of any error in this ruling but by considering a distinct claim that the change in law in Montgomery should apply retroactively to his case. However, as this Court has held, it is not proper to attempt to raise a claim on post conviction appeal that was not properly presented in a motion for post conviction relief in the lower court. Griffin, 866 So. 2d at 11 n.5. As such, this attempt to alter the claim should be rejected.

In an attempt to avoid this result, Defendant suggests that this Court should nonetheless consider the new argument because

Defendant originally drafted the claim regarding Montgomery pro se and this Court should liberally construe the pro se pleading. However, in making this argument, Defendant ignores that this Court has held that represented capital defendants cannot file pro se pleadings raising any claim but a request to discharge counsel. Davis v. State, 789 So. 2d 978, 981 (Fla. 2001). In fact, this Court has held that pro se pleadings filed by represented defendants attempting to raise other claims are a nullity. Logan v. State, 846 So. 2d 472, 476-78 (Fla. 2003). As such, the claim was only properly before any court to the extend counsel chose to present. Counsel has an ethical duty not to present frivolous claims. R. Regulating Fla. Bar 4-3.1. Thus, if counsel believed, as he now seems to suggest, that the claim Defendant wanted presented was frivolous but a different claim should have been asserted, counsel should have done so when he chose to adopt the pro se pleading. Given these circumstances, Defendant's suggestion that this Court should construe his pleading as a claim that was not present should be rejected, and the lower court affirmed.

Even if Defendant could raised the claim regarding the retroactivity of Montgomery for the first time on appeal, Defendant would still be entitled to no relief. While Defendant cites to Witt v. State, 387 So. 2d 922 (Fla. 1980), and Teague

v. Lane, 489 U.S. 288 (1989), and recites part of the Witt standard, he offers no argument regarding how Montgomery would actually satisfy either retroactive test. As this Court has held such conclusory assertions are insufficient to present an issue on appeal. Doorbal, 983 So. 2d at 482-83. The lower court should be affirmed.

In an attempt to avoid this result, Defendant argues for the first time on appeal that Montgomery applies retroactively which entitles Defendant to a new trial. However, because it is improper to present grounds for post conviction relief for the first time on appeal, this claim should be rejected. Griffin, 866 So. 2d at 11 n.5.

Moreover, Defendant would not be entitled to relief even if he had properly brief the issue. To obtain retroactive application of a change in law, a defendant must show: (1) the change in law emanated from this Court or the United States Supreme Court; (2) was constitutional in nature; and (3) was of fundamental significance. Witt, 387 So. 2d at 929-30. To meet the third element of this test, the change in law must (1) "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (2) be of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter."

Id. at 929. Application of that three prong test requires consideration of the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001).

Here, this Court's decision in Montgomery was not based on any constitutional principle. Instead, it was based on an analysis of the statutory elements of manslaughter and of whether the jury instruction accurately reflected those elements. Montgomery, 39 So. 3d at 255-57. This Court has recognized that new cases based on such an analysis are not constitutional in nature and do not satisfy the second prong of the Witt standard. Delgado v. State, 776 So. 2d 233, 241 (Fla. 2000).

Moreover, Montgomery would also fail the third prong of the Witt standard. The standard jury instruction on manslaughter was amended to include the language this Court found erroneous in Montgomery in 1994. Standard Jury Instructions in Criminal Cases (93-1), 636 So. 2d 502 (Fla. 1994). Given these circumstances, a determination that Montgomery was retroactive would require the courts of this State to review decades worth of stale records and revisit numerous old cases. As such, the extent of reliance on the old rule and the effective on the administration of

justice militate against applying Montgomery retroactively. Reed v. State, 837 So. 2d 366, 370 (Fla. 2002). Since Montgomery does not satisfy either the second or third prong of Witt, Defendant's assertion that it should apply retroactively should be rejected, and the denial of post conviction relief affirmed.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

/s/Tamara Milosevic
TAMARA MILOSEVIC
Assistant Attorney General
Florida Bar No. 0093614
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Email:tamara.milosevic@
myfloridalegal.com
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to Charles G. White, cgwhitelaw@aim.com, this 3rd day of March 2014.

/s/Tamara Milosevic
TAMARA MILOSEVIC
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

/s/Tamara Milosevic
TAMARA MILOSEVIC
Assistant Attorney General