IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-708

MICHAEL SEIBERT,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

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STATEMENT OF CASE AND FACTS

Defendant was charged by indictment with the first degree murder of Karolay Adrianza on April 1, 1998. (R. 1-2) On January 11, 2002, Defendant filed a motion to suppress all evidence. (R. 121-26)[1] In the motion, Defendant asserted that the police had no credible evidence of an emergency to justify entering the apartment and that the search of the apartment exceeded the scope of the emergency. *Id.* After conducting a suppression hearing, the trial court denied the motion. (T. 1074-1312) The trial court expressly found that the police had reason to believe that it was an emergency based on the report of the potential suicide and the barricading of the front door and that the officers' actions did not exceed the scope of the emergency, particularly given that it was a small studio apartment and the officers barely moved when they saw the foot. (T. 1311-12)

The matter proceeded to trial on October 28, 2002. (R. 199) The facts presented at trial, as found by this Court, are:

> On March 16, 1998, Karolay Adrianza, an eighteen-year-old high school student, was picked up from her home by Danny Korkour Navarres at approximately 10 p.m. The Navarres and Adrianza families were friends, and according to the trial testimony of Adrianza's sister, Adrianza and Navarres had been dating. Adrianza's

[1] The symbols "R." and "T." will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, FSC Case No. SC03-800.

sister also testified that Adrianza and Navarres had planned to go out in Miami Beach on the evening of March 16.

On March 16, William "Ace" Green, who had lived with [Defendant] for approximately three weeks, left [Defendant's] apartment at 1136 Collins Avenue in Miami Beach at approximately 10:30 p.m. Green testified that [Defendant] was the only person in the apartment at the time he left. When he returned a few hours later, at about 12:30 a.m., Adrianza and Navarres were at the apartment with [Defendant]. Green recognized the two because he had seen them at the apartment several times in the prior week. Green testified that the three of them were using cocaine when he arrived at the apartment, and they each continued to use cocaine in equal amounts throughout the night. Green snorted one line of cocaine and estimated that the other three consumed all together more than an eight ball (three and a half grams) of cocaine throughout the night. Testimony at trial revealed that the cocaine was likely "cut," or diluted, with Lidocaine.

Green testified that he thought that [Defendant] was interested in Adrianza because of the way [Defendant] acted around her. He stated that there was some rivalry between Navarres and [Defendant] because both were flirting with Adrianza, but he could not point to any specific examples to demonstrate this rivalry.

At about 3 a.m., Navarres and Green left in Navarres' car to get beer and cigarettes after [Defendant] asked Green to go and Navarres offered to drive. The errand took approximately five to ten minutes, and upon their return, Navarres dropped Green off at the apartment building, explaining that he had another place to go and that he would return later. When Green returned to the apartment, Adrianza asked where Navarres was, and upon learning that he had left, began using the apartment phone continuously, apparently in an attempt to reach Navarres. Evidence at the trial revealed that [Defendant's] phone was used to dial Navarres' cell and home phones nearly 100 times between 3:09 a.m. and 5:48 a.m. A half hour

later, [Defendant] asked Green to go downstairs in the apartment building and to call him if he saw Navarres return. Green went downstairs and looked around, and then returned to the apartment.

At around 4 or 5 a.m., [Defendant] asked Green to leave to give him some time alone with Adrianza. Green left and went to a laundry where a friend of his worked, which was located behind the apartment building. Green proceeded to call [Defendant] at home and on his pager five or six times in an attempt to convince Seibert to let him return to the apartment. At some point, Green spoke with [Defendant]. Green testified that [Defendant] told him to relax and then indicated that he needed a few more minutes with Adrianza because he thought he had an opportunity to have intercourse with her.

At 6:30 a.m., Marsha Hill, who lived below [Defendant], heard a noise like someone was rolling on the floor in [Defendant's] apartment. This noise lasted for about six to seven minutes. A minute or so later, Hill heard a female voice scream for help twice. [FN1] Green left the laundry sometime between sunrise and 8:15 a.m. and went back to the apartment a few times. He testified that he would knock on the door and make calls from the payphone outside of the apartment building, but [Defendant] refused to let him in. [Defendant's] next-door neighbor, Jeanette Sosa, testified that at around 7:15 a.m., she left her apartment for work and saw Green outside the door of [Defendant's] apartment. Green asked her whether [Defendant] was home and told her that he had been knocking on [Defendant's] door for some time.

Arcelis Korkour, Navarres' aunt, with whom he was living in March of 1998, testified that three calls were received at her house in the early morning of March 17, 1998. At 5 a.m., following the third call, she called the number from which she had received the calls, and her husband spoke with the person who answered the phone, whom he identified as an American male. Then a woman got on the phone, identifying herself as "Patricia," but Korkour testified that her husband recognized the voice to be that of Adrianza. After her husband hung up the phone, he went to check

on Navarres. Korkour testified that his bedroom door was locked from the inside and that Navarres always locked it when he was home but would leave it open when he was out. She testified that Navarres did not open the door when her husband knocked.

On Green's final attempt to speak with [Defendant] and enter the apartment much later that morning, [Defendant] asked him to leave and buy cigarettes. When Green refused, [Defendant] began to act erratically and stated that Green looked crazy and that he did not want to open the door for Green. [Defendant] then told Green that he ([Defendant]) was crazy and was going to kill himself. After this conversation, at 10:55 a.m., Green called 911.

At 11 a.m., Miami Beach Police Department (MBPD) Officer Douglas Bales and Sergeant Howard Zeifman were dispatched to [Defendant's] apartment in response to the 911 call from Green. When the officers arrived, they spoke with Green, who was waiting on the sidewalk in front of the apartment building when the officers arrived. Green led them to the apartment that he shared with [Defendant], which was on the second floor of the building. The officers knocked on [Defendant's] door and, after realizing that someone was in the apartment, told [Defendant] that they had received a suicide call and that they had to see that he was all right. After four or five minutes of knocking on the door by the officers, [Defendant] opened the door approximately three or four inches so that the officers could only see [Defendant's] torso but not his arms or his legs. [Defendant] told the officers that he was okay and that they could leave. He then shut the door. The officers decided to knock again because they had not fully seen [Defendant]. After another two to three minutes of the officers attempting to persuade [Defendant] to open the door, [Defendant] again opened the door. Sergeant Zeifman stuck his baton in the door so that [Defendant] could not shut it again, and the officers entered the apartment. The officers told [Defendant] to sit down on a bed in the studio apartment. Officer Bales testified that he wanted to ensure that [Defendant] was alone, so when he asked [Defendant] whether anyone else was in the apartment, he backed up, glancing

around to ensure that there was no one else in the room. As he was backing up, he saw, to his right and through the bathroom door that was slightly open, a severed foot on the edge of the bathtub. He shouted to Sergeant Zeifman a signal indicating that there was a homicide, and [Defendant] ran out of the apartment. The officers were able to apprehend [Defendant] in the hallway and placed him under arrest.

After [Defendant] was taken to the police station, he stated that he was not under the influence of drugs or alcohol. He also told Detective Michael Jaccarino that Navarres had nothing to do with the crime. He said at one point that there were other people in the apartment who had knocked him out and that he did not know what had happened. When he was told that he was under arrest for murder, [Defendant] said that he had messed up and then stated, according to Detective Jaccarino, "I guess I am going to prison."

Dr. Emma Lew, the Deputy Chief Medical Examiner for Miami-Dade County, examined the scene of the murder on March 17. The victim's body, later identified as Adrianza, was in the bathtub. Dr. Lew testified that although the bathtub area was very bloody, the rest of the bathroom was clean, and that the rugs, trash can, soap, and a plant from the bathroom were placed in a closet. Most of the soft tissue from the waist down had been removed from the body. Also, parts of the abdominal wall and the bowels were gone. The police did not recover any of these portions of the body, and the State theorized in its closing statement that [Defendant] had flushed these body parts down the toilet. The left hand, left foot, and left ankle had been severed from the body. Adrianza was approximately five feet tall, and Dr. Lew estimated that she weighed between 140 and 150 pounds before her murder. Her body weighed 101 pounds after it was recovered from the crime scene. Dr. Lew determined the cause of death to be mechanical asphyxiation caused by the killer's hands, although a shoelace and blue thread were wrapped around Adrianza's neck. There was a large knife that had been placed in the chest of the victim's body, although Dr. Lew testified that this was most likely done after the

victim's death. The victim had blunt trauma injuries to her head, eyes, mouth, ears, back, and arms. There were also many sharp force injuries on the body, but Dr. Lew could not determine whether those injuries occurred before or after death. The time of death was estimated to have been between 4:30 a.m. and 9 a.m. on March 17.

Jennifer McCue, a forensic DNA analyst who worked for the Florida Department of Law Enforcement (FDLE), testified that there was a significant amount of semen in the victim's vaginal slides, cervical slides, vaginal swabs, and cervical swabs. This semen was consistent with [Defendant's] DNA sample. [Defendant] had blood on the jeans he was wearing when he was arrested that was consistent with Adrianza's DNA. A fingernail scraping performed on the victim revealed material which was consistent with the victim's DNA, and no material matching [Defendant's]. Adrianza had a blood alcohol concentration of .05 percent and also had a breakdown product of cocaine in her blood.

[Defendant's] theory of the case at trial was that Navarres actually killed Adrianza. Korkour, Navarres' aunt, testified that Navarres' parents came from Venezuela upon learning about what had happened to Adrianza, and took Navarres back to Venezuela with them about a week after the murder. Korkour stated that she had not been able to reach Navarres since he left for Venezuela. Navarres never provided DNA samples, although he was fingerprinted and questioned. His car was searched, and nothing of evidentiary value was discovered. Chris Whitman, a crime laboratory analyst with FDLE, testified that all of the exhibits submitted, including several items from the apartment unrelated to the murder, were consistent with the DNA samples provided by Green, [Defendant], and Adrianza, and there were no foreign DNA profiles present.

* * * *

[FN1] Hill testified that the female either screamed "help, please" or "help, [police]."

Seibert v. State, 923 So. 2d 460, 463-66 (Fla. 2006). After considering this evidence, the jury found Defendant guilty as charged. (R. 299, T. 3831) The trial court adjudicated Defendant in accordance with the verdict. (R. 316-18, T. 3838)

On January 27, 2003, the penalty phase commenced. (R. 484) The State presented a victim impact statement, certified copies of Defendant's prior convictions for attempted kidnapping and burglary and attempted first degree murder and kidnapping, testimony regarding the facts of the cases underlying these convictions and testimony of Dr. Emma Lew regarding the suffering Ms. Adrianza endured before her death. (T. 4109-65) Defendant presented testimony from Sgt Paul Acosta regarding Defendant's appearance and statements after his arrest, testimony of Green regarding Defendant's use of drugs in the weeks before the murder, the testimony of Dr. Ronald Wright regarding Ms. Adrianza's suffering, the testimony of Sgt. Arthur Clemons regarding Defendant's behavior while in pretrial detention, the testimony of Myra Torres, a friend of Defendant, regarding Defendant's state in the weeks before the murder, the testimony of Dr. Bill Mosman, a psychologist, regarding Defendant's family history and mental health, and the testimony of Dr. Brad Fisher, another psychologist, regarding Defendant potential for future dangerousness. (T. 4179-4854) In

rebuttal, the State presented the testimony of Dr. Daniel Martell, a psychologist, regarding Defendant's family history and mental health. (T. 4960-5037)

After considering this evidence and the parties' argument, the jury returned a 9-3 recommendation of a death sentence. (R. 625, T. 5179) The trial court followed the jury's recommendation and sentenced Defendant to death. (R. 792-818)

In doing, the trial court found that the State had proven two aggravating factors: prior violent felony convictions, based upon the attempted first degree murder and kidnapping of Katherine Jones and the kidnapping and burglary of Michelle Kendricks - great weight; and heinous, atrocious and cruel (HAC) - great weight. *Id.* In mitigation, this Court found emotional problems, including having a personality disorder and history of substance abuse - some weight; Defendant would be a nonviolent prisoner - moderate weight; Defendant's adoption and family history - little weight; psychological history - moderate weight; history of substance abuse - little weight; Defendant was a good friend - minimal weight; and Defendant behaved appropriately in court - minimal weight. *Id.* It also considered and rejected as mitigation that Defendant was under extreme mental or emotional disturbance at the time of the crime, that Defendant's ability to appreciate the criminality of his conduct

or conform his conduct to the requirements of the law was substantial impaired, that Defendant's age was 30, that the victim was a participant in Defendant's conduct or consented to the act, and that Defendant was intoxicated at the time of the crime. *Id.*

Defendant appealed his convictions and sentences to this Court, raising six issues:

> I.
> THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS, WHERE THE NON-CONSENSUAL, WARRANTLESS POLICE ENTRY INTO THE DEFENDANT'S HOME WAS NOT JUSTIFIED BY SUFFICIENT EXIGENT CIRCUMSTANCS KNOWN TO THE POLICE AND WHERE THE OFFICERS' SUBSEQUENT SEARCH OF THE DEFENDANT'S HOME WAS UNREASONABLY EXPANSIVE, IN VIOLATION OF ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION AND THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.
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> II.
> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL THAT WERE PREMISED UPON THE STATE'S EFFORT TO ELICIT IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF THE DEFENDANT'S INVOLVEMENT IN COLLATERAL CRIMINAL ACTIVITY, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
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> III.
> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL, WHICH WAS PREMISED UPON THE PREJUDICE SUFFERED BY THE DEFENDANT AS A CONSEQUENCE OF QUESTIONS ASKED BY THE PROSECUTOR OF DETECTIVE JACCARINO, WHICH IMPLIED THAT THE DETECTIVE WAS OF THE OPINION THAT THE KORKOURS HAD BEEN TRUTHFUL IN PROVIDING AN ALIBI FOR DANNY NAVARRES, THEREBY IMPROPERLY BOLSTERING THE CREDIBILITY OF THE KORKOURS ON THAT IMPORTANT ISSUE.

IV.

UNDER THE CIRCUMSTANCES OF THIS CASE, THE DEATH SENTENCE IMPOSED UPON THE DEFENDANT IS DISPORTIONATE AND CONSTITUTES "UNUSUAL" PUNISHMENT IN VIOLATION OF ART. I, SECTION 17, OF THE FLORIDA CONSTITUTION.

V.

THE PROSECUTOR'S IMPROPER AND PREJUDICIAL REFERENCE TO IRRELEVANT CRIMINAL ACTIVITY CONSTITUTED AN EFFORT TO ELICIT EVIDENCE OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE AND SERVED TO DENY THE DEFENDANT AN OPPORTUNITY TO HAVE THE JURY FAIRLY CONSIDER ITS SENTENCING RECOMMENDATION.

VI.

FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL BECAUSE IT PERMITS IMPOSITION OF A DEATH SENTENCE WITHOUT FIRST REQUIRING THAT JURY UNANIMOUSLY FIND THE EXISTENCE OF SUFFICIENT AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Amended Initial Brief of Appellant, FSC Case No. SC03-800. This Court affirmed Defendant's conviction and sentence, finding all of his issues meritless and sufficient evidence to sustain the conviction. *Seibert*, 923 So. 2d at 466-74. Defendant sought certiorari review in the United States Supreme Court, which was denied on October 2, 2006. *Seibert v. Florida*, 127 S. Ct. 198 (2006).

While Defendant was seeking certiorari, the Office of the Attorney General sent its notices of affirmance of Defendant's death sentence to the Office of the State Attorney for the Eleventh Judicial Circuit and the Department of Corrections

(DOC) on May 25, 2006. (PCR-SR. 10-13)[2] On June 9, 2006, the State Attorney's Office sent its notices of affirmance to the Florida Department of Law Enforcement (FDLE), the Hollywood Police Department, the Miami Beach Police Department, the North Miami Beach Police Department, the Broward County Sheriff's Office and the Office of the State Attorney for the Seventeenth Judicial Circuit. (PCR. 32-43) That same day, the State Attorney's Office notified that Office of the Attorney General that the Miami-Dade Department of Corrections and Rehabilitation (Dade DOC) and the Dade County Medical Examiner's Office had pertinent information. (PCR. 30-31) The Office of the Attorney General notified Dade DOC and the Medical Examiner's Office to produce public records on June 12, 2006. (PCR-SR. 14-17) By October 12, 2006, all of the agencies notified by the State had complied with their notices. (PCR. 44-45, 52-53, 56-57, 63, PCR-SR. 18-25, PCT. 9) The State Attorney's Office and DOC had also indicated that they had sent exempt materials to the records repository by October 3, 2006. (PCR. 46-51, 54-55, 58-61)

On January 16, 2007, Defendant sent demands for additional public records to DOC, the State Attorney's Office, FDLE, the Hollywood Police, the Miami Beach Police, the North Miami Beach

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

Police, the Office of the State Attorney of the Seventeenth Judicial Circuit, the Broward County Sheriff's Office, the Office of the Attorney General, the Medical Examiner's Office, Dade DOC, the Department of Health, the Office of the Medical Examiner for the Eighth District, the Office of the Inspector General for the Department of Corrections, the Medical Examiner's Commission of FDLE, the Governor's Office, the Bay Harbor Islands Police Department, Miami Beach Fire Rescue and the Agency for Health Care Administration (ACHA). (PCR-SR. 26-97)

On January 22, 2007, the State reminded the lower court that requests to the Department of Health, the Office of the Medical Examiner for the Eighth District, the Office of the Inspector General for the Department of Corrections, the Medical Examiner's Commission of FDLE, the Governor's Office, the Bay Harbor Islands Police Department, Miami Beach Fire Rescue and the Agency for Health Care Administration (ACHA) were made pursuant to Fla. R. Crim. P. 3.852(i) and were not effective until the lower court entered an order permitting the request. (PCT. 17-18) The State also reminded the lower court that the order was supposed to be entered within 30 days of the filing of the request. (PCT. 18) However, after Defendant indicated that he wanted to wait to see if there were objections to his

requests pursuant to Fla. R. Crim. P. 3.852(g), the parties agreed to waive the 30 day requirement and set the public records hearing for March 29, 2007. (PCT. 18-20) The State suggested that the lower court require Defendant to notice the agencies for the March 29, 2007 hearing but the lower court insisted that the clerk's office would do so. (PCT. 24-25)

Defendant also moved the lower court to conduct an in camera inspection of the exempt materials from the above agencies and the Medical Examiner's Office. (PCR-SR. 100-02, PCT. 22) The lower court agreed to do so, without objection by the State, that same day and entered an order requiring the transmittal of the exempt records from the repository to the clerk's office. (PCR. 65, PCT. 22)

On January 19, 2007, the Hollywood Police Department sent a re-notice of compliance, indicating that it had nothing responsive to Defendant's Demand. (PCR-SR. 98-99) The North Miami Beach Police did the same on January 25, 2007. (PCR-SR. 103-04) The Broward County Sheriff's Office served a notice of compliance on February 21, 2007. (PCR-SR. 108-09) The Office of the State Attorney for the Seventeenth Judicial Circuit served a notice of compliance on March 15, 2007. (PCR-SR. 110-12)

On February 5, 2007, the Office of the State Attorney for the Eleventh Judicial Circuit objected to the request. (PCR-SR. 105-07) On March 19, 2007, DOC, FDLE and the Medical Examiner's Commission of FDLE served objections to the requests. (PCR-SR. 113-27) On March 21, 2007, the Office of the Attorney General, the Governor's Office, the Department of Health and the Medical Examiner for the Eighth District also filed objections to the requests. (PCR-SR. 128-55)

On March 29, 2007, a public records hearing was held. (PCT. 27-87) However, the only agencies represented at the hearing were the State Attorney's Office, DOC, the Office of the Attorney General, the Governor's Office, the Office of the Medical Examiner for the Eighth District and the Department of Health. (PCT. 29-30) The remainder of the agencies had not been noticed of the hearing, and the lower court refused to consider any argument about requests to them as a result. (PCT. 39-41, 42, 43-45, 46, 47-48) Instead, it indicated that it would hear these issues at another hearing after Defendant noticed the agencies. (PCT. 47-49)

After hearing argument, the lower court ruled the State Attorney needed to provide NCIC/FCIC printout for the witnesses who testified at trial and a printout from the clerk's office docketing system for those individuals, other than jurors, who

did not testify at trial and to determine whether it was possible to run a computer check on whether these individuals had ever been witnesses or victims in other cases. (PCT. 50-64) It also ruled that the Department of Health was only required to produce public records showing that any of the doctors had been disciplined. (PCT. 73-81, PCR-SR. 156-57) The lower court also ruled, with the agreement of DOC, that it would provide an update regarding Defendant's own records. (PCT. 81)

When the lower court began to address the request for records pertaining to lethal injection, Defendant asked the lower court to defer consideration of the requests because of what was occurring in the *Lightbourne* litigation. (PCT. 81-82) The lower court decided to do so with the agreement of the State and the agencies. (PCT. 82-86) After the hearing, the Department of Health, the Office of the State Attorney and DOC complied with the requests for additional public records in accordance with the lower court's rulings. (PCR-SR. 158-61, 194-95)

On June 4, 2007, Defendant served a second set of demands for additional public records on DOC, FDLE, the Office of the Attorney General and the Governor's Office. (PCR-SR. 162-78) On June 14, 2007, the Office of the Attorney General and the

Governor's Office objected to these requests as well. (PCR-SR. 179-92)

At the June 15, 2007 public records hearing, the agencies argued that the requests to them were overly broad, were unduly burdensome, had been repeatedly rejected by this Court and sought work product. (PCT. 110-12, 126, 127) Defendant replied that this Court had not ruled that requests for any and all documents were overly broad and unduly burdensome and that he could not specifically identify the documents because he did not know what records the agencies had. (PCT. 112-13) DOC also indicated that records were being disclosed in the *Lightbourne* litigation. (PCT. 120-22) Defendant responded that he believed that the judge in *Lightbourne* was committing error in its orders on the records and that litigating the issues in this case could result in a different ruling because there was a different judge. (PCT. 122-23, 124-25, 144)

When the lower court indicated that it was inclined to find the requests improper, Defendant asserted that disclosure of this information was required under *Brady*. (PCT. 128-30, 203-04) The State responded that the materials would never be *Brady* materials as they did not exculpate Defendant from guilt of the murder, mitigate his sentence or impeach a witness at trial. (PCT. 131) After considering these arguments, the lower court

ruled that while it did not believe the request was proper, it was going to require the agencies to review their public records and "see if there's something in there that shows that there's something that people knew ahead of time that the protocol was not going to be successful." (PCT. 135-38) The lower court stated it was making this ruling "under a Brady type finding." (PCT. 136)

Regarding the request to the Medical Examiner's Commission and the Agency for Health Care Administration, the lower court ruled in accordance with its ruling regarding the Department of Health and additionally rejected the request regarding Dr. Wright. (PCT. 175-81, 195) It denied the request for background checks of 40 named individuals because Defendant received NCIC information from the State Attorney. (PCT. 181-83) It limited the request for personnel files to disciplinary information. (PCT. 183-85) It found the request for documentation about the lab overly broad and denied it. (PCT. 185-88) It required Defendant to show what documents he received from the Miami Beach Fire Rescue Department before he could request additional records. (PCT. 195-99) It granted the request for any additional police reports from the Bay Harbor Island Police Department regarding Defendant's prior conviction but denied the request regarding a witness to that crime. (PCT.

199-200) It denied the request to the Dade DOC. (PCT. 202-03) It granted the request for the autopsy reports of the three executed inmates that Defendant did not already have. (PCT. 204-05)

During the course of the June 15, 2007 hearing, the lower court decided to defer consideration of the June 4, 2007 requests to another hearing. (PCT. 114-18) Defendant also complained about the lack of an *in camera* inspection. (PCT. 191) The lower court indicated that it had never received the sealed records from the repository. (PCT. 191-92) The State suggested that the reason why the records had never been sent was that Defendant had failed to have the order to send the records served on the repository. (PCT. 191-94) Once the order was finally served, the repository sent the records to the lower court on June 19, 2007. (PCR-SR. 193)

On June 22, 2007, the lower court heard the issue regarding the remaining public records requests. FDLE argued that the records requested from it did not appear to be relevant but agreed to produce them because the request was small. (PCT. 213-16)

The remaining agencies argued that Defendant was not entitled to drafts of the protocol and already had the finalized protocol. (PCT. 218-21) The lower court agreed. *Id.*

Regarding the communications among the agencies and with experts, the agencies argued that the request concerned work product. (PCT. 221-23) Defendant insisted that since the communications may have had a purpose beyond litigation, they were discoverable. (PCT. 222-24) The lower court originally ruled that those documents that were prepared to assist in the preparation of the protocols in addition to being prepared for litigation were discoverable but that those that were exclusive for litigation were not. (PCT. 227-34) The agencies then pointed out that this Court had consistently rejected requests for these documents regarding every other version of the protocols. (PCT. 234-36) Defendant insisted that since there was now a new protocol, these cases did not apply. (PCT. 236-38) After considering these arguments, the lower court found Defendant's requests to be overly broad and unduly burdensome. (PCT. 243) Defendant then argued that anything that "would demonstrate problems with the new protocol" would constitute *Brady* material. (PCT. 244) The agencies responded that the United States Supreme Court had limited the definition of *Brady* material and that this information would not fit the limited definition even though the State would never adopt a protocol that it expected to fail. (PCT. 245) The lower court then determined that any documentation showing flaws in the protocols

would be *Brady* material. (PCT. 245-46, 252, 254-55) The agencies asked the lower court to provide a written order, and the lower court directed the agencies to prepare the order, without objection from the defense. (PCT. 246)

Regarding the remainder of the request to DOC, the lower court ruled that the requests that sought information that would reveal the identities of the execution team members were denied. (PCT. 247-49, 253) However, it did require DOC to disclose any materials it received during training by the federal government and documents about the consciousness assessment. (PCT. 247-48, 249-50)

On September 11, 2007, the lower court heard argument on a dispute about proposed order. (PCT. 91-102) It also indicated that it had received the exempt materials from the repository and was reviewing them. (PCT. 90-91) That same day, Defendant served his motion for post conviction relief, raising 11 claims:

> I.
> [DEFENDANT] IS BEING DENIED HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CORRESPONDING LAW BECAUSE HE IS BEING DENIED ACCESS TO PUBLIC RECORDS IN HIS CASE, UNDER FLA. R. CRIM. P. 3.852, WHICH IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.
>
> II.
> REQUIRING THE APPLICATION OF RULE 3.851 TO [DEFENDANT] VIOLATES HIS RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

III.

[DEFENDANT] IS BEING DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE OF THE RULES PROHIBITING [DEFENDANT'S] LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

IV.

EVIDENCE OF JUROR MISCONDUCT ESTABLISHED THAT THE OUTCOME OF [DEFENDANT'S] TRIAL WAS UNRELIABLE AND VIOLATED HIS DUR PROCESS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY UNDER THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

V.

[DEFENDANT'S] ABSENCE FROM CRITICAL STAGES OF HIS CAPITAL TRIAL VIOLATED THE FUNDAMENTAL FAIRNESS PRINCIPLES OF THE DUE PROCESS CLAUSE; FLA.R.CR1M.P. [sic] 3.180; AS WELL AS [DEFENDANT'S] FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION REQUIRING REVERSAL OF HIS CONVICTION AND DEATH SENTENCE.

VI.

[DEFENDANT] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL, AS HIS RIGHTS UNDER THE SIXTH, AND EIGHTH AMENDMENTS.

VII.

[DEFENDANT] WAS DENIED AN ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VIII.

NEWLY DISCOVERED EMPIRICAL EVIDENCE DEMONSTRATES THAT [DEFENDANT'S] CONVICTION AND SENTENCE OF DEATH CONSTITUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT [sic] TO THE UNITED STATES CONSTITUTION.

IX.

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

X.

[DEFENDANT] IS EXEMPT FROM EXECUTION UNDER THE EIGHTH AMENDMENT BECAUSE HE SUFFERS FROM SUCH SEVERE MENTAL ILLNESS THAT DEATH COULD NEVER BE AN APPROPRIATE PUNISHMENT.

XI.

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

(PCR. 67-142)

The public records claim was based on the fact that the lower court had not entered a written order regarding his demands for additional public records to DOC, the Office of the Attorney General and the Governor's Office and on the fact that the *in camera* review was not complete. (PCR. 70-73) Claim VI asserted that counsel was ineffective for failing to argue the motion to suppress sufficiently to convince the lower court to rule in his favor. (PCR. 84-102) Claim VII asserted that counsel was ineffective for failing to object to the admission of testimony concerning the facts of his prior convictions on grounds that it was hearsay and violated the Confrontation Clause so that a claim based on *Crawford v. Washington*, 541 U.S.

36 (2004), would have been preserved for appeal. (PCR. 102-10) The allegedly newly discovered evidence argued in support of Claim VIII was the ABA report on capital punishment in Florida. (PCR. 110-24)

On September 12, 2007, the lower court entered its order regarding the additional public records requests to DOC, the Office of the Attorney General and the Governor's Office. (PCR. 614-17) In the order, the lower court found that, with the exception of certain specific requests to DOC, the requests were "overly broad and unduly burdensome," noting that "Defendant has received a copy of the protocols and can raise any lethal injection challenge based on it." (PCR. 614-15) It, nonetheless, ordered the agencies "to review their public records for matters considered in adopting the 2006 or 2007 protocols that show the protocols will fail and to disclose those documents." (PCR. 615) The lower court based this ruling on the principles announced in *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.*

On September 20, 2007, the lower court entered its order on the *in camera* review and found that none of the exempt materials were subject to disclosure. (PCR. 618) On October 10, 2007, the State filed a petition for review of the September 12, 2007 order regarding public records. (PCR. 742-55)

On November 13, 2007, the State responded to Defendant's motion for post conviction relief, asserting that all of the claims were procedurally barred, insufficiently plead or without merit as a matter of law. (PCR. 621-95)

On January 24, 2008, the lower court conducted the *Huff* hearing. (PCT. 281-330) Regarding the public records claim, Defendant acknowledged that the State had sought interlocutory review of the September 12, 2007 order and asked that he be allowed to amend his motion if he prevailed in the petition and received additional records. (PCT. 285) The State responded that Defendant already had any records that would be responsive to the order from the *Lightbourne* litigation. (PCT. 286) Defendant insisted that the State must have more documents because it was maintaining its petition, and the State responded that it did not and was maintaining its petition because of the nature of the ruling and its effect on other cases. (PCT. 286) Defendant asserted that he did not have all the documents because the Dyehouse memos had been sealed by the *Lightbourne* trial court. (PCT. 287) The State replied that Defendant did have the documents. (PCT. 288)

Defendant admitted that Claims II, VIII and X had been repeatedly rejected. (PCT. 289, 323, 328) He claimed to be asserting it for preservation purposes. *Id.*

Regarding Claims III and IV, Defendant asserted that he needed to do juror interviews because there had been juror misconduct at the penalty phase. (PCT. 289-93) However, he acknowledged that there had been interviews at the time of the misconduct. (PCT. 290-92) The State responded that both claims were procedurally barred and meritless. (PCT. 291-93)

Regarding the claim about the right to be present, Defendant asserted that he had shown that he was absent from 18 proceedings and that the State should be required to show that he was not prejudiced. (PCT. 294-95) He did acknowledge that a number of the hearings were merely scheduling hearings but claimed that his absence from a hearing at which Dr. Mosman explained to need for a mitigation specialist was critical because Dr. Mosman discussed Defendant's childhood. (PCT. 295-96) The lower court indicated that it did not believe that Defendant could have been prejudiced by his absence from that hearing, as his motion was granted. (PCT. 296-97) Defendant asserted that the prejudice was from the number of hearings at which he was not present. (PCT. 297-99) The State responded that the claim was procedurally barred and without merit, as precedent required Defendant to show prejudice, which he had not done. (PCT. 299-300)

Regarding Claim VI, Defendant asserted that evidentiary development was necessary because he was claiming ineffective assistance and trial counsel had allegedly failed to develop the record regarding the officers' movements in the apartment. (PCT. 301-04) He averred that counsel should have asked the trial court to go to the apartment to show that the officers' testimony was impossible given the layout of the apartment and the allegation about the pocket door. (PCT. 304-07, 314-15) He further contended that counsel should have questioned Off. Bales about alleged inconsistencies between his description of the severed foot and its location and the crime scene photos. (PCT. 307-12, 315-16)

The State responded that Defendant was attempting to relitigate a claim that had been raised and rejected at trial and on direct appeal in the guise of an ineffective assistance claim, which was not proper. (PCT. 312) Further, the State pointed out that counsel had tried to convince the trial court that the officers had moved, through the introduction of photos and cross examination at the time. (PCT. 312-14) The State also pointed out that the crime scene photos were not taken close to the time the body was discovered because the police waited for a warrant after fire rescue checked the body. (PCT. 316)

Regarding Claim VII, Defendant admitted that counsel did attempt to exclude evidence about the facts of the prior at the penalty phase but claimed that counsel should have argued that the presentation of this evidence through hearsay violated the Confrontation Clause because *Crawford* was decided after trial. (PCT. 316-18) The State responded that counsel was not ineffective for failing to anticipate a change in the law and that there was nothing objectionable about the presentation of this hearsay at the time of trial. (PCT. 319-20) The State further pointed out that objecting as hearsay would simply have invited the State to present the same testimony from the actual witnesses. (PCT. 320)

Regarding lethal injection, Defendant asserted he was challenging the three drugs and the protocol. (PCT. 323) The State responded that the challenge to the drugs was barred and meritless and that the challenge to the protocol had been rejected by this Court. (PCT. 324) Defendant insisted that the lower court should ignore this Court's precedent because he did not get to litigate the way he wanted to in *Lightbourne*. (PCT. 325-28)

On February 7, 2008, this Court entered a stay of the proceedings regarding the petition for review of the non-final order on its own motion. (PCR. 704) On February 13, 2008,

Defendant moved the lower court to stay the post conviction proceedings based on this Court's stay of the petition. (PCR. 701-04) The State responded that the motion for stay should be denied, as the power to grant a stay rested in this Court and the outcome of the petition would not affect any of the proceedings in the lower court since the State had already disclosed the public records regarding lethal injection during the *Lightbourne* litigation. (PCR. 705-12)

On February 28, 2008, the lower court denied the motion to stay and entered its order denying Defendant's motion for post conviction relief. (PCR-SR. 196-222, PCT. 334-38) It found that Claim I was without merit because it had entered the orders complained about in this claim and because Fla. R. Crim. P. 3.852 was not unconstitutional. (PCR-SR. 200) It determined Claim II was without merit. (PCR-SR. 201) It determined that Claim III and IV were procedurally barred, insufficiently plead and meritless, as the juror misconduct mentioned in both claims had been the subject of juror interviews at the time it occurred. (PCR-SR. 201-02) It determined that the claim concerning the right to be present was procedurally barred. (PCR-SR. 202) It determined that the claim that counsel was ineffective regarding the litigation of the motion to suppress was barred, because the denial of the motion to suppress had

been raised and rejected on direct appeal. (PCR-SR. 203-07) It also found that Defendant's claims about evidence that should have been presented was refuted by the record. (PCR-SR. 207-08) It determined the claim that counsel was ineffective at the penalty phase was without merit as a matter of law because it was based on change in law. (PCR-SR. 208-09) It determined that the claims concerning the ABA report and lethal injection were without merit as a matter of law based on this Court's precedent. (PCR-SR. 209) It determined that claim about mental illness being a bar to execution was insufficiently plead, refuted by the record and without merit as a matter of law. (PCR-SR. 210) It rejected the cumulative error claim because there were no errors to have a cumulative effect. (PCR-SR. 210)

On February 29, 2008, the State served a notice of voluntary dismissal of its petition for review of the nonfinal order. (PCR. 780-81) Defendant then moved to compel the State and DOC to provide public records in accordance with the September 12, 2007 order. (PCR. 731-33) Defendant also moved for rehearing of the denial of his motion for post conviction relief, claiming that the State had failed to disclose public records in compliance with the September 12, 2007 order and that its filing of the petition and then seeking to dismiss it were an attempt to avoid complying with the order. (PCR. 735-40) He

also claimed that an evidentiary hearing was necessary because he believed that the State had to have additional public records. *Id.*

The State responded to these motions, asserting that there was no basis for rehearing because it was simply rearguing matters considered before the order was entered and reasserting that it had disclosed the responsive records in *Lightbourne*. (PCR. 782-91) It argued that Defendant's mere assertion that there must be additional records was insufficient to merit an evidentiary hearing. *Id.* It also explained that Defendant's allegations about the State's rationale for filing and dismissing the petition ignored that the State no longer needed to maintain its petition as it was now free to raise the issue by cross-appeal. *Id.*

On March 17, 2008, the lower court denied the motion for rehearing. (PCR. 792) This Court subsequently recognized the State's voluntary dismissal of its petition to review the non-final order. *State v. Seibert*, 980 So. 2d 1070 (Fla. 2008). This appeal and cross-appeal follow.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied the claim that counsel was ineffective regarding the suppression issue as procedurally barred and refuted by the record. Defendant was attempting to relitigate a claim that was raised and rejected at trial and on direct appeal in the guise of an ineffective assistance claim.

The lower court properly summarily denied the claim that counsel was ineffective for failing to raise an objection to the admission of testimony about his prior convictions on hearsay and confrontation grounds. The claim was predicated on a change in law that did not occur until after trial. Moreover, any claim that the evidence was not admissible under the law in effect at the time of trial is procedurally barred because it was not presented below and meritless.

The lower court properly rejected Defendant's lethal injection claim based on this Court's precedent. It also did not abuse its discretion in rejecting Defendant's public records claim. The lower court properly summarily denied claims that were procedurally barred and without merit as a matter of law.

The lower court abused its discretion in ordering the State to disclose information that did not exculpate Defendant, mitigate his sentence or impeach a State witness at trial under

the principals of *Brady*. *Brady* does not apply to such information.

ARGUMENT

I. THE CLAIM REGARDING THE MOTION TO SUPPRESS WAS PROPERLY DENIED AS PROCEDURALLY BARRED AND REFUTED BY THE RECORD.

Defendant first argues that the lower court erred in denying his claim that his counsel was ineffective for failing to argue the motion to suppress properly. Specifically, Defendant argued that counsel should have presented additional arguments and requested a viewing of the crime scene to convince the trial court that the officers had to have searched Defendant's apartment to have discovered Ms. Adrianza's severed foot. However, the lower court properly denied this claim as procedurally barred and refuted by the record.

This Court has repeatedly held that it is improper to seek to relitigate a claim that was raised and rejected on direct appeal under the guise of ineffective assistance of counsel. *See Miller v. State*, 926 So. 2d 1243, 1256 (Fla. 2006); *Rodriguez v. State*, 919 So. 2d 1252, 1262 (Fla. 2005); *Zack v. State*, 911 So. 2d 1190, 1210 (Fla. 2005); *Pietri v. State*, 885 So. 2d 245, 255-56 (Fla. 2004); *Owen v. Crosby*, 854 So. 2d 182, 190 n.10 (Fla. 2003); *Arbelaez v. State*, 775 So. 2d 909, 915 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 663 (Fla. 2000); *Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000); *Robinson v. State*, 707 So. 2d 688, 697-98 (Fla. 1998); *Cherry v. State*, 659

So. 2d 1069, 1072 (Fla. 1995); *Hardwick v. Dugger*, 648 So. 2d 100, 106 (Fla. 1994); *Bryan v. State*, 641 So. 2d 61, 65 (Fla. 1994); *Lopez v. Singletary*, 634 So. 2d 1054, 1056-57 (Fla. 1993); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Woods v. State*, 531 So. 2d 79, 83 (Fla. 1988). Here, this was precisely what Defendant was attempting to do.

Prior to trial, counsel did move to suppress both the physical evidence and Defendant's statements. (R. 122-33) He supported the motion to suppress with facts drawn from the depositions of Off. Bales and Sgt. Zeifman, the first officers on the scene and the officers who discovered Ms. Adrianza's body. (R. 122-23) He argued both that the officers had insufficient information to enter the apartment under the emergency exception to the warrant requirement and that their actions inside the apartment exceeded the scope of the emergency and constituted an unconstitutional search. (R. 123-25)

During the hearing on the motion, the trial court was given the opportunity to see the layout of the apartment and its dimensions. The State introduced photographs of the apartment as it appeared when the police entered it. (T. 1084-85, 1085-86, 1089-91) The State had Off. Bales describe the fact that the bathroom was in a small hallway. (T. 1087) Further, counsel questioned the amount that Off. Bales about his ability

to see into the bathroom:

> [Defense Counsel:] When you saw the door itself, I mean, this door is completely wide open, it wasn't like that?
> [Off. Bales:] As I recall it was close a little bit.
> [Defense Counsel:] It was almost like cracked open, you are saying you could see?
> [Off. Bales:] As I recall it would have been may be halfway close. Let's put you this way as I recall.
> [Defense Counsel:] You are saying you are right in here?
> [Off. Bales:] Yes, exactly.
> [Defense Counsel:] And you got to be pretty close to see, you are talking about a little space?
> [Off. Bales:] From here to the door.
> [Defense Counsel:] I am sorry?
> [Off. Bales:] From here to you, to where the door is, three feet.
> THE COURT: Okay, I mean, a little bit, properly about six feet. It was probably about six feet. You are saying three feet, but that is okay.

(T. 1090) Counsel also questioned Off. Bales extensively about the fact that Off. Bales was checking to see if someone else was in the apartment despite the fact that he had no information that anyone else was there and despite the fact that Defendant looked uninjured. (T. 1101-03) During this questioning, counsel attempted to get Off. Bales to state that he was searching the apartment and doing so in areas outside Defendant's reach. *Id.* However, Off. Bales rebuffed these attempts. *Id.* Counsel also attempted to elicit that Off. Bales had been reassured by Defendant that no one else was in the apartment. (T. 1104) However, Off. Bales' response was that he had asked Defendant if someone else was in the apartment as he

looked around himself but that he did not hear the response because he "got the shock of my life, shock of my life when I turned my head being a police officer for many years," when he saw the foot. (T. 1104)

During his testimony at the suppression hearing, Sgt. Zeifman confirmed that Off. Bales step back toward the bathroom area to ensure that no one else was in the apartment when he indicated that there had been a homicide. (T. 1199-1200) Counsel elicited from Sgt. Zeifman that Ace Green never mentioned anyone but Defendant being in the apartment. (T. 1211) He brought out that Sgt. Zeifman did not see any weapons within Defendant's reach at that time. (T. 1212)

Based on this evidence, counsel argued that responding to a suicide call did not create an emergency, that the police should have asked Defendant to come outside, and that the police should not have looked around the apartment once they saw Defendant was not injured or in possession of any weapon. (T. 1306-11) During this argument, counsel urged that the scope of the search exceeded the bounds of any emergency that might have existed because the police were making "a general exploratory search." (T. 1308) He added:

> [B]ut assuming, if you find they could either enter, these officers, Officer Bales said I could not see the bathroom crack as he described to you until he

> went back there. He couldn't see it from where he was.
>
> So, even if you find the entry was lawful, it does not hold the facts in our case and these cases are very, very, fact specific.
>
> Bales went further, Zeifman went further. They are making a general exploratory search for evidence.
>
> * * * *
>
> Okay. Bales is walking back, I'll be it in a little apartment, a studio apartment as the evidence here, couldn't see anything in there until he actually walks pretty much back there.
>
> He had no legal right to do that. The evidence was someone years ago jumped out, some other case somebody jumped out; therefore I thought I am protecting myself, it doesn't apply here both under Halloway and Newton.

(T. 1309-11)

Despite the fact that counsel presented the argument, the trial court rejected them. Instead, it found the police had reason to believe that it was an emergency based on the report of the potential suicide and the barricading of the front door. (T. 1311) It also found that the officers' actions did not exceed the scope of the emergency:

> [P]lus looking at photographs, we have a small studio. It is not like you have a five thousand foot house in Pine Crest where they have to go and find everything. The bathroom, the living room, and the kitchen, are such close proximity literally taking a step back for Office Bales, because he just wants to make sure. Right as they ask the question is there anyone else here, looking through the crack of the bathroom door sees a foot at which point he starts yelling the first 30, realizing that is wrong then he yells 31 stammering.
>
> I think with being presented with what information they had, it is sufficient under an emergency basis to enter the residence without a

> warrant, any actions that occurred inside were proper as far as the motion to suppress, that was subsequently gained inside the apartment studio, the motion to suppress most respectfully is denied.

(T. 1311-12) As such, it denied the motion to suppress physical evidence. (T. 1312)

On direct appeal, Defendant argued that the trial court had erred in denying the motion to suppress. Amended Initial Brief of Appellant, FSC Case No. SC03-800, at 58-71. He argued extensively that the entry into the apartment was not justified and that even if it was, the officers' actions once inside the apartment exceeded the scope of the emergency and constituted an illegal search. *Id.* This Court rejected this argument, and specifically found that the search did not exceed the scope of the emergency:

> We next consider whether the subsequent search that led to the discovery of the victim's body was constitutional. "As to what may be done by the police or other public authorities once they are inside the premises, this must be assessed upon a case-by-case basis, taking into account the type of emergency which appeared to be present." 3 Wayne R. LaFave, Search and Seizure § 6.6(a), at 400 (3d ed. 1996). The subsequent search following a warrantless entry must be "strictly circumscribed by the exigencies which justify its initiation." *Mincey*, 437 U.S. at 393 (quoting *Terry*, 392 U.S. at 26). Thus, as the Fifth District Court of Appeal stated, "if the police enter a home under exigent circumstances and, prior to making a determination that the exigency no longer exists, find contraband in plain view, they may lawfully seize the illegal items." *Davis v. State*, 834 So. 2d 322, 327 (Fla. 5th DCA 2003). "However, if the police determine the exigency that initially allowed their entry into

the residence no longer exists, any subsequent search is illegal and any contraband discovered pursuant to the illegal search is inadmissible." *Id.*

We affirm the finding of the trial court that this search was constitutional. Green testified that not much time passed between the officers' entry into the apartment until he heard [Defendant] running away. [FN7] The officers' quick look around the apartment was not an extensive search because they did not open any containers or even enter any other rooms. There has been no evidence that any pretense existed on the part of the police in this case. It was objectively reasonable for them to glance around to ensure that the apartment and [Defendant] were secure. Moreover, insufficient time had elapsed for the officers to determine that the exigency had passed. Although the officers observed upon their entry that [Defendant] appeared unharmed, the officers had not had sufficient time to determine that he was not preparing to harm himself.

The instant situation is different from that in *Mincey*, where the search was found unwarranted because no emergency existed when the officers began their search and all persons in the apartment had been located. *See* 437 U.S. at 393; *see also Anderson v. State*, 665 So. 2d 281, 283 (Fla. 5th DCA 1995)(although particular search exceeded limits of exigency because officer went through documents in plastic bag in apartment, "[t]he officer was entitled to examine what was in plain view while on the premises"). In the present case, the officer's look from the main room of the studio apartment into the open bathroom was a limited extension of the initial entry, and since that entry was permissible, the subsequent actions of the officers were also lawful.

* * * *

[FN7] At trial, Green stated that he "immediately" heard [Defendant] start running after the door was opened.

Seibert, 923 So. 2d at 470-71.

As can be seen from the foregoing, the issue of whether the

evidence was subject to suppression because the officers' actions after the entry to the apartment exceeded the scope of the emergency was extensively litigated at trial and on direct appeal. As such, this claim presented nothing more than an attempt to relitigate this issue under the guise of an ineffective assistance of counsel claim. As such, the lower court properly determined that the claim was procedurally barred. *See Miller*, 926 So. 2d at 1256; *Rodriguez*, 919 So. 2d at 1262; *Zack*, 911 So. 2d at 1210; *Pietri*, 885 So. 2d at 255-56; *Owen*, 854 So. 2d at 190 n.10; *Arbelaez*, 775 So. 2d at 915; *Thompson*, 759 So. 2d at 663; *Freeman*, 761 So. 2d at 1067; *Robinson*, 707 So. 2d at 697-98; *Cherry*, 659 So. 2d at 1072; *Hardwick*, 648 So. 2d at 106; *Bryan*, 641 So. 2d at 65; *Lopez*, 634 So. 2d at 1056-57; *Medina*, 573 So. 2d at 295; *Woods*, 531 So. 2d at 83. It should be affirmed.

Moreover, the lower court also properly found that the claim was refuted by the record. As seen above, counsel did raise the issue of whether Off. Bales was conducting a search of the apartment that exceeded the scope of the emergency when he saw the severed foot. He, in fact, argued that Off. Bales had to have walked back toward the bathroom to have seen the foot. Since counsel cannot be deemed ineffective merely because he did not convince this Court to rule in his favor, the lower court

properly found that claim was refuted by the record. *See Branch v. State*, 952 So. 2d 470, 482 (Fla. 2006); *State v. Lewis*, 838 So. 2d 1102, 1118 (Fla. 2002); *see also Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995)(rejecting claim that merely asserting that additional evidence should have been presented in support of an argument that was presented because such claims "usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.").

Moreover, the lower court properly found that Defendant's claim that counsel should have attempted to use the crime scene photographs to impeach Off. Bales because they did not show that foot on the side of the tub was refuted by the record. As the lower court found in announcing its order the blood smears visible in the crime scene photographs indicated where the foot had been. (PCT. 337) Moreover, while Defendant asserts that the photographs were taken "a short time" after the body was found, the record reflects that the photographs were not taken for many hours and that there had been activity around the tub that would have caused it to move. Det. Jaccarino testified that Defendant had been arrested by 11:30 a.m. (T. 2820) Sgt.

Zeifman testified that after Defendant had been arrested, fire rescue personnel were sent into the apartment to make sure that Ms. Adrianza was dead. (T. 2690) A search warrant for the apartment was not obtained until a little after 4 p.m. (T. 2843) Because the police were waiting for the search warrant, the crime scene technicians did not enter the apartment until after that time. (T. 3014-15) They did not take the photographs until after they entered. (T. 3015-16) Given the time lag in taking the photos, the activity around Ms. Adrianza's body during this time and the evidence in the blood smears showing where the foot had been, the lower court properly determined that any claim about the position of the foot in the photos was meritless in light of the record. The denial of the claim should be affirmed.

Defendant castigates the lower court for allegedly not understanding his argument concerning the importance of the pocket door. However, this attack is entirely unjustified. In both his motion, Defendant suggested that there was a pocket door that somehow impeded the view into the bathroom. (PCR. 94) He reiterated this claim at the *Huff* hearing. (PCR. 305) Given Defendant's insistence that there was a pocket door that somehow impeded the view into the bathroom, it was entirely appropriate for the lower court, after reviewing the evidence that showed

that no pocket door impeded the officer's view, to find that Defendant's claim was refuted by the evidence. The denial of the claim should be affirmed.

Defendant also seems to argue that an alleged change in the findings about Off. Bales' movements indicates that the denial of the claim was error. However, the alleged change in more illusory than real.

In denying the motion to suppress, the lower court found because "[t]he bathroom, the living room, and the kitchen, are such close proximity literally taking a step back for Office Bales, because he just wants to make sure." In denying the motion for post conviction relief, the lower court again relied on the proximity of the locations in the small apartment: "The layout clearly shows that the bathroom was in close proximity to the front door. All the officer had to do was the main room of the small studio apartment, take a couple of small steps, and turn his head to the see the bathroom." As can been seen from the forgoing, the lower court based both its findings on the small size of the studio apartment and the resulting proximity of areas in the apartment.

Further, the findings indicated that the lower court was discussing the number of steps necessary to see the bathroom from different points in the apartment. In the post conviction

order, the lower court measured the number of steps from the front door. In denying the suppression motion, the lower court measured the number of steps from where Off. Bales was standing speaking to Defendant. As Defendant himself notes, Defendant was on a sofa on the far side of the apartment. Thus, the change in the language does not indicate a change in finding.

Moreover, it should be remembered that *Maryland v. Buie*, 494 U.S. 325, 334 (1990), allows the police to look around the immediate area they are in without probable cause or reasonable suspicion to ensure their safety. Here, whether Off. Bales to a step back or a couple of small steps forward, he was permitted to do so. The denial of the claim should be affirmed.

II. THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO TESTIMONY ABOUT THE CIRCUMSTANCES OF HIS PRIOR CONVICTIONS AS HEARSAY WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in denying his claim that his counsel was ineffective for failing to object to testimony about his prior convictions on the grounds that it was hearsay and violated his right to confrontation. However, the lower court properly denied this claim, as such an objection would have been meritless under the law as it existed at the time of trial and counsel cannot be deemed ineffective for failing to anticipate a change in the law.

In his motion for post conviction relief, Defendant claimed that his counsel was ineffective for failing to object to the introduction of hearsay testimony about his prior convictions. (PCR. 102-10) He averred that the prejudice from this failure to object was that such an objection would have preserved an issue regarding the admissibility of this evidence under *Crawford v. Washington*, 541 U.S. 36 (2004). *Id.* Defendant did not present any argument regarding how this information would not have been admissible under the law as it existed prior to *Crawford*. *Id.* At the *Huff* hearing, Defendant continued to claim that the hearsay and confrontation objections should have been made in anticipation of *Crawford*. (PCT. 316-18) When

questioned regarding how such an objection would have been proper under the law as it existed at the time of trial, Defendant merely argued that the evidence concerning what Andrea Henderson witnessed was unduly prejudicial and should have been excluded. (PCT. 321-22) However, Defendant admitted that counsel did object to this testimony on the grounds it was unduly prejudicial at the time of trial. (PCT. 317)

Given the manner in which Defendant presented his claim, the lower court properly considered the claim as an assertion that counsel should have anticipated *Crawford* and made an objection based on it at the time. (PCR. 208-09) Moreover, the lower court properly determined that the claim was without merit as a matter of law. This Court has made it abundantly clear that counsel cannot be deemed ineffective for failing to anticipate a change in the law. *Peede v. State*, 955 So. 2d 480, 502-03 (Fla. 2007); *Johnson v. State*, 903 So. 2d 888, 899 (Fla. 2005); *Nelms v. State*, 596 So. 2d 441, 442 (Fla. 1992); *Stevens v. State*, 552 So. 2d 1082, 1085 (Fla. 1989). Here, Defendant's penalty phase occurred in late January and early February 2003. *Crawford* was not decided until March 4, 2004. *Crawford*, 541 U.S. at 36. Thus, to have made an objection based on *Crawford*, counsel would have had to anticipate that *Crawford* would be decided as it was a year after counsel acted. Thus, the claim

was properly summarily denied.

To the extent that Defendant is now claiming that counsel should have objected to the testimony as hearsay under the law as it existed at the time of the trial, Defendant is not entitled to any relief. As seen above, Defendant did not present this argument to the lower court. As such, he is procedurally barred from presenting it now. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003). The denial of the claim should be affirmed.

Moreover, the lower court properly determined that a hearsay objection would have been meritless under the law as it existed at the time of Defendant's trial. In *Rodriguez v. State*, 753 So. 2d 29, 44-45 (Fla. 2000), this Court discussed the issue of having a police officer testify concerning the facts of a defendant's prior conviction and indicated a preference for having the testimony presented in this manner:

> We distinguish this case from those cases in which the police officer gave hearsay testimony concerning a defendant's prior violent felonies. *See Hudson v. State*, 708 So. 2d 256, 261 (Fla. 1998); *Clark v. State*, 613 So. 2d 412, 415 (Fla. 1992); *Waterhouse v. State*, 596 So. 2d 1008, 1016 (Fla. 1992). Details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial, provided the defendant has a fair opportunity to rebut any hearsay testimony. *See Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989); *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986).

In the case of prior violent felony convictions, because those details are admissible, it is generally beneficial to the defendant for the jury to hear about those details from a neutral law enforcement official rather than from prior witnesses or victims. In fact, we have cautioned the State to ensure that the evidence of prior crimes does not become a feature of the penalty phase proceedings. *See Finney v. State*, 660 So. 2d 674, 683-84 (Fla. 1995); *see also Duncan v. State*, 619 So. 2d 279, 282 (Fla. 1993)(stating that details of prior felony convictions should not be made a feature of the penalty phase proceedings); *Stano v. State*, 473 So. 2d 1282, 1289 (Fla. 1985) (same). Nonetheless, in many cases, any error in admitting the hearsay testimony has been considered harmless because the certified copy of the conviction itself conclusively establishes the aggravator. *See, e.g., Hudson*, 708 So. 2d at 261; *Tompkins*, 502 So. 2d at 420.

In addition, the defendant's interest in cross-examining the witness is less compelling where the testimony concerns a prior felony conviction. The defendant previously had the opportunity to cross-examine fact witnesses during the trial for the prior felony. The transcripts of the prior trial are also available to rebut the hearsay testimony describing the prior conviction. This is analogous to cases allowing a penalty phase witness to summarize prior testimony because the defendant had the opportunity to cross-examine the declarant during the original proceeding. *See Knight v. State*, 721 So. 2d 287, 293 (Fla. 1998); *see also Lawrence v. State*, 691 So. 2d 1068, 1073 (Fla. 1997).

In *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994), relying on *Waterhouse* and *Clark*, we found no error in the trial court's allowing a police officer to testify concerning prior threats made by the defendant to a witness. Although we have not previously required a showing of necessity as a threshold requirement for the admission of penalty phase hearsay admitted under section 921.141(1), we note that in *Spencer*, the witness was deceased, thereby giving rise to a good-faith reason for not calling the witness. We also found the testimony to be

> harmless. *See id.* To the extent that *Spencer* relied on cases involving an officer testifying to the defendant's prior felonies, we clarify that the mere fact that a defendant has an opportunity to cross-examine the witness who is testifying to the hearsay does not alone constitute a fair opportunity to rebut the hearsay statement.
>
> **We reaffirm our precedent allowing a neutral witness to give hearsay testimony as to the details of a prior violent felony because it tends to minimize the focus on the prior crime.**

(Emphasis added). Given this precedent, the lower court properly determined that any hearsay objection to the testimony concerning the facts of his prior conviction would have been meritless under the law as it existed at the time of trial. Counsel cannot be deemed ineffective for failing to raise a meritless hearsay objection. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). The summary denial of this claim should be affirmed.

In a belated attempt to make it seem as if the lower court improperly denied the claim, Defendant now asserts that the allowance of testimony concerning a prior felony through a police officer is predicated on the conviction for the prior felony having been obtained after a trial. Defendant asserts that since he plead to his prior offenses, these cases are inapplicable. However, Defendant is incorrect. This Court's

prior case law was not based on the prior conviction having been obtained after a trial. In *Hudson v. State*, 708 So. 2d 256, 261 (Fla. 1998), this Court rejected the argument that it was improper to have an officer testify about the facts of a prior conviction, while noting that the prior conviction had been the result of a plea. As such, Defendant's argument that this Court's case law about hearsay testimony is inapplicable because he elected to plead guilty and not challenge the State's evidence at the time of his prior conviction does not show that the evidence was not admissible.[3] The denial of the claim should be affirmed.

Moreover, while Defendant continuously complains about the introduction of testimony concerning what Andrea Henderson witnessed as being irrelevant and unduly prejudicial, these arguments do not show that the lower court erred in rejecting this claim. The record reflects counsel did attempt to exclude this evidence on the grounds that it was irrelevant and unduly prejudicial. Prior to the penalty phase, Defendant moved in limine to exclude evidence that he had sexually battered the victim in his prior attempted murder case, claiming it was

[3] In fact, this Court has noted that it is the opportunity to rebut the testimony that makes hearsay evidence admissible at a penalty phase, regardless of whether the defendant took advantage of that opportunity. *Owen v. State*, 986 So. 2d 534, 559 (Fla. 2008).

unduly prejudicial. (R. 486-89) At the hearing on the motion, Defendant specifically argued that testimony concerning what Ms. Henderson observed was irrelevant and unduly prejudicial. (T. 4025-30) As counsel did raise these objections, he cannot be deemed ineffective for failing to do so. *See Johnson v. Moore*, 837 So. 2d 343, 345 (Fla. 2002). This is particularly as Defendant does not offer any explanation of how the relevance or prejudice was affected adversely by the person who related this information to a jury. The denial of the claim should be affirmed.

Moreover, while Defendant suggests that a hearsay objection would have affected the outcome of the trial because such an objection would have prevented the introduction of any evidence about the facts of the prior conviction, this is not true. This Court has held that the State may present the facts of a prior conviction through a witness having direct knowledge of the facts so long as the witness only relates the facts with editorializing, using inflammatory rhetoric or displaying their emotions unduly. *Franklin v. State*, 965 So. 2d 79, 97 (Fla. 2007); *Cox v. State*, 819 So. 2d 705, 715-17 (Fla. 2002). Thus, merely objecting regarding hearsay and Confrontation violations would not have prevented the State from presenting evidence about Defendant's prior convictions by converting the evidence

presented into a feature of the penalty phase. This is particularly true as Sgt. Robert Hundevadt's testimony about the nature and extent of Ms. Jones' injuries and the crime scene were not based on hearsay but on his personal observation of Ms. Jones and the crime scene. (T. 4132-36) Since the State would still have been able to present the circumstances of Defendant's prior, the lower court properly summarily denied the claim. It should be affirmed.

III. THE LETHAL INJECTION CLAIM WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts that the lower court erred in summarily denying his claim that lethal injection is unconstitutional. However, the lower court properly summarily denied this claim based on this Court's precedent.

As Defendant acknowledges, this Court has determined that Florida's present lethal injection protocols are constitutional. *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007); *see also Hunter v. State*, 33 Fla. L. Weekly S745, S752 (Fla. Sept. 25, 2008); *Power v. State*, 33 Fla. L. Weekly S717, S718 (Fla. Sept. 25, 2008); *Smith v. State*, 33 Fla. L. Weekly S727, S730 (Fla. Sept. 25, 2008); *Sexton v. State*, 33 Fla. L. Weekly S686, S691 (Fla. Sept. 18, 2008); *Henyard v. State*, 33 Fla. L. Weekly S629, S631-32 (Fla. Sept. 10, 2008); *Schwab v. State*, 33 Fla. L. Weekly S431, S431 (Fla. Jun. 27, 2008); *Lebron v. State*, 982 So. 2d 649, 666 (Fla. 2008); *Woodel v. State*, 985 So. 2d 524, 533-34 (Fla. 2008); *Schwab v. State*, 969 So. 2d 318 (Fla. 2007). As Defendant also admits, the United States Supreme Court has also held that lethal injection is constitutional. *Baze v. Rees*, 128 S. Ct. 1520 (2008). Given this precedent, the lower court properly summarily denied this claim.

Despite these acknowledgments, Defendant insists that the lower court should have granted him an evidentiary hearing.

However, this Court has rejected the assertion that an evidentiary hearing is necessary on a lethal injection claim, where the defendant did not proffer any newly discovered evidence that was not considered and rejected in *Lightbourne*. *Schwab*, 33 Fla. L. Weekly at S431. Here, Defendant did not proffer any such evidence in his motion. (PCR. 124-34) At the *Huff* hearing, Defendant merely asserted that he wanted to present evidence such as the Dyehouse memos and testimony from the executioners that he was allegedly prevented from presenting in *Lightbourne*. (PCT. 324-28) However, this Court considered these matters in ruling in *Lightbourne*. *Lightbourne*, 969 So. 2d at 331-34, 352. The United States Supreme Court also considered and rejected the need for the monitor that was the subject of the Dyehouse memos. *Baze v. Rees*, 128 S. Ct. 1520, 1534-37 (2008). As such, the summary denial of this claim was proper. The lower court should be affirmed.

IV. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE PUBLIC RECORDS CLAIM DEFENDANT RAISED.

Defendant next asserts that the lower court in some way abused its discretion in its rulings about public records. He appears to contend that the lower court improperly found that DOC had complied with the lower court's order regarding public records concerning lethal injection and that he is entitled to a remand because the lower court allegedly never ruled on a motion to compel that Defendant filed after his motion for post conviction relief was denied. However, the lower court did not abuse its discretion in ruling on the public records.[4]

In his motion for post conviction relief, the only allegations contained in his public records claim concerning the need for records were that the lower court had not entered written orders concerning the request for public records regarding lethal injection and the *in camera* review of materials sent to the repository under seal. (PCR. 70-71) He also included assertions that Fla. R. Crim. P. 3.852 was unconstitutional.[5] (PCR. 72-73) On September 12, 2007, the lower

[4] Trial court decisions regarding the disclosure of public records are reviewed for an abuse of discretion. *Gonzalez v. State*, 33 Fla. L. Weekly S451, S456 (Fla. Jul. 3, 2008); *Johnson v. State*, 904 So. 2d 400, 405 (Fla. 2005).

[5] To the extent that Defendant is attempting to challenge the rejection of his claim about the constitutionality of Fla. R. Crim. P. 3.852, it was properly rejected. *In re: Amendments to*

court entered its written order on the requests concerning lethal injection. (PCR. 614-17) It entered its order regarding the *in camera* review on September 20, 2007. (PCR. 618-19) As such, Defendant's complaints about the lack of orders were moot by the time of the *Huff* hearing. As such, the lower court properly rejected the claim based on the lack of such orders.

At the *Huff* hearing, Defendant's only assertion regarding the need for public records was that since this Court had entered an order regarding public records about lethal injection, he wanted the lower court to allow him to amend if there were records responsive to the order that he did not have. (PCT. 285) In response, the State pointed out that Defendant had actually received any records that would have been responsive to the order in *Lightbourne*, as that court had ordered more extensive public records production than had been ordered in this case. (PCT. 260) Defendant's only response was that more records must exist because the State was challenging the lower court's order and that he needed the Dyehouse memos. (PCT. 260-61) However, Defendant's counsel actually received the Dyehouse memos in the *Lightbourne* litigation. *Lightbourne*, 969 So. 2d at 332.

This Court has held that a lower court does not abuse its

Fla. R. Crim. P. - Capital Postconviction Public Record Production, 683 So. 2d 475, 475-76 (Fla. 1996).

discretion in rejecting a public records claim summarily, where the State asserts that it has complied with its public records obligation and the defendant merely insists that additional records must exist without presenting any specific evidence that particular records do exist. *Johnson v. State*, 904 So. 2d 400, 404-05 (Fla. 2005); *Thompson v. State*, 759 So. 2d 650, 659 (Fla. 2000); *Downs v. State*, 740 So. 2d 506, 510-11 (Fla. 1999). As this is precisely what occurred here, the lower court did not abuse its discretion in rejecting this claim. The lower court should be affirmed.

With regard to the claim about the motion to compel, Defendant is entitled to no relief. While Defendant asserts that the lower court never entered an order on this motion and that this alleged failure to do so entitles him to relief, he is incorrect. First, if the lower court has actually not entered an order regarding the motion to compel, it would not entitled Defendant to a remand. Instead, the failure to obtain an order before appealing would result in Defendant having failed to preserve the issue for appeal and waiving the issue. *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983); *Rivera v. State*, 913 So. 2d 769 (Fla. 5th DCA 2005). As such, any lack of an order would not entitle Defendant to a remand.

Further, the record does show that the lower court ruled on

the issue. Defendant did not file his motion to compel until after the lower court had denied his claim. (PCR. 731-33) The only documents that Defendant identified as not being in his possession were the Dyehouse memos. *Id.* However, as noted above, Defendant's counsel had these memos from the *Lightbourne* litigation. Further, Defendant raised the same argument about public records in his motion for rehearing based on the same speculation about additional records he had presented at the *Huff* hearing. (PCR. 735-40) The lower court entered an order denying the motion for rehearing. (PCR. 782) By doing so, the lower court necessarily rejected Defendant's argument about the existence of additional records. As noted above, doing so was not an abuse of discretion. As such, the lower court should be affirmed.

V. THE LOWER COURT PROPERLY SUMMARILY DENIED CLAIM THAT WERE PROCEDURALLY BARRED AND WITHOUT MERIT AS A MATTER OF LAW.

Defendant next asserts that the lower court erred in denying his claims that he was denied his right to be present, his claim that he is exempt from execution because he is allegedly mentally ill, his claim that a report from the ABA shows that the death penalty is unconstitutional, his claim that Fla. R. Crim. P. 3.851 is unconstitutional, his claim that the rule regarding juror interviews is unconstitutional and his cumulative error claim. However, each of these claims was properly summarily denied.

With regard to the claim about the right to be present, the lower court properly determined that the claim was procedurally barred. This Court has repeatedly held that claims concerning the right to be present are claims that could have and should have been raised on direct appeal and are procedurally barred in post conviction proceeding. *Morris v. State*, 931 So. 2d 821, 832 n.12 (Fla. 2006); *Phillips v. State*, 894 So. 2d 28, 35 & n.6 (Fla. 2004); *Vining v. State*, 827 So. 2d 201, 217 (Fla. 2002); *Rutherford v. Moore*, 774 So. 2d 637, 647 (Fla. 2000); *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994). As such, the lower court properly denied this claim as procedurally barred.

With Defendant suggests that the summary denial might have

been improper because he might have raised a claim of ineffective assistance of counsel, the summary denial was proper. First, Defendant did not raise a claim of ineffective assistance of counsel regarding the right to be present in his motion for post conviction relief. (PCR. 79-84) Instead, the only mention of ineffective assistance was a passing reference at the *Huff* hearing. (PCT. 298) Even then, Defendant did not assert how he was prejudiced by the alleged deficiency and did not ask to amend his motion to raise an ineffective assistance claim. (PCT. 298-301) Since a claim of ineffective assistance was not properly raised below, the claim is now procedurally barred. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003).

Moreover, even if Defendant had referred to ineffective assistance of counsel in his motion, the lower court would still have properly denied the claim as procedurally barred. This Court has repeatedly held that merely recasting a procedurally barred claim in the guise of an ineffective assistance claim does not lift the bar. *Miller v. State*, 926 So. 2d 1243, 1256 (Fla. 2006); *Rodriguez v. State*, 919 So. 2d 1252, 1262 (Fla. 2005); *Zack v. State*, 911 So. 2d 1190, 1210 (Fla. 2005); *Pietri v. State*, 885 So. 2d 245, 255-56 (Fla. 2004). The lower court properly denied the claim as procedurally barred and should be affirmed.

With regard to the claim that Defendant's alleged mental illness exempts him for execution, the lower court properly determined that the claim was insufficient plead, refuted by the record and without merit as a matter of law. In his motion for post conviction relief, Defendant's entire allegations concerning the mental illness from which he allegedly suffered were that he "has suffered continuously from mental illness since before the time of the crime for which he was convicted and sentenced to death. He has been diagnosed with major depression and severe emotional disturbances since his early teenage years." (PCR. 135) However, this Court has held that such conclusory allegations are insufficient to state a claim for post conviction relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). As such, the lower court properly denied the claim as facially insufficient.

Moreover, at the time of trial, Defendant presented evidence concerning his alleged mental illness and history of mental health treatment. After considering this evidence and the State's rebuttal evidence, the trial court found that Defendant's mental condition as an adult was that he suffered from borderline personality disorder with antisocial features and a history of substance abuse. (R. 810, 815) At no point in his motion for post conviction relief did Defendant even allege

that there was additional evidence concerning his mental state that was not presented at trial. (PCR. 67-142) This Court has rejected the assertion that a personality disorder is even a mental illness. *Diaz v. State*, 945 So. 2d 1136, 1150 (Fla. 2006); *Patton v. State*, 878 So. 2d 368, 375 (Fla. 2004). Since the record shows that Defendant is not even mentally ill, the lower court properly denied this claim as refuted by the record.

Moreover, the lower court also properly denied this claim as devoid of merit, as a matter of law. This Court has held that allegedly being mentally ill does not exempt a defendant from execution. *Power*, 33 Fla. L. Weekly at S718-19; *Henyard*, 33 Fla. L. Weekly at S632; *Connor v. State*, 979 So. 2d 852, 867 (Fla. 2008); *Diaz*, 945 So. 2d at 1150-52. As such, the lower court properly determined that this claim was without merit as a matter of law. The denial of the claim should be affirmed.

While Defendant asserts that this Court was wrong to reach this conclusion because an ABA resolution constitutes evidence of the evolving standard of decency and seems to suggest that such resolution have previously resulted in other exemptions to execution, this is not true. Instead, the Court has held:

> Proportionality review under those evolving standards should be informed by "'objective factors to the maximum possible extent.'" We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."

Atkins v. Virginia, 536 U.S. 304, 312 (2002). As such, the Court has stated that in determining whether the evolving standard of decency is violated, it "first review[s] the judgment of legislatures" and "then consider[s] reasons for agreeing or disagreeing with their judgment." *Atkins*, 536 U.S. at 313; *accord Roper v. Simmons*, 543 U.S. 551, 564 (2005). Thus, the ABA resolution does not constitute a reason to recede from this Court's precedent. The denial of the claim should be affirmed.

With regard to the claim that the ABA report constitutes newly discovered evidence that the death penalty in Florida is unconstitutional, the lower court properly determined that this claim was without merit as a matter of law. This Court has repeatedly rejected the claim that the ABA report constitutes newly discovered evidence that the death penalty is unconstitutional. *Diaz*, 945 So. 2d at 1146; *Rolling v. State*, 944 So. 2d 176, 181 (Fla. 2006); *Rutherford v. State*, 940 So. 2d 1112, 1117-18 (Fla. 2006). The denial of the claim should be affirmed.

While Defendant suggests the ABA report should have been considered newly discovered evidence because this Court allegedly considered a report by the Office of the Inspector General of the United States Department of Justice as newly

discovered evidence in *Trepal v. State*, 846 So. 2d 405 (Fla. 2003), this is not true. This Court actually affirmed the finding that the report in *Trepal* was not newly discovered evidence. *Trepal*, 846 So. 2d at 411-27. As such, Defendant's reliance on *Trepal* presents no basis for relief. The denial of the claim should be affirmed.

With regard to the claim about the constitutionality of Fla. R. Crim. P. 3.851, the lower court properly found that this claim was without merit as a matter of law. This Court has repeatedly rejected the claim that the rule is unconstitutional. *Gonzalez v. State*, 33 Fla. L. Weekly S451, S456 (Fla. Jul. 3, 2008); *Vining v. State*, 827 So. 2d 201, 215 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2000).

With regard to the claim about the constitutionality of the rule regarding juror contact, the lower court properly determined that the claim was procedurally barred because it could and should have been raised on direct appeal. This Court has repeatedly held that this claim is procedurally barred because it could have and should have been raised on direct appeal. *Israel v. State*, 985 So. 2d 510, 522 (Fla. 2008); *Suggs v. State*, 923 So. 2d 419, 440 (Fla. 2005); *Rodriguez v. State*, 919 So. 2d 1252, 1262 n.7 (Fla. 2005); *Elledge v. State*, 911 So. 2d 57, 77 (Fla. 2005); *Rose v. State*, 774 So. 2d 629, 637 n. 12

(Fla. 2000). The denial of the claim should be affirmed.

Further, while Defendant seems to suggest that the jurors should have been interviewed after an incident regarding a homophobic comment, the record reflects that such interviews were, in fact, conducted at the time of trial when the incident was reported. (T. 4578-4655) As such, this incident does not provide any basis to lift the bar. The denial of the claim should be affirmed.

With regard to the cumulative error claim, the summary denial was proper. In his motion for post conviction relief, Defendant did not actually identify any errors that alleged had a cumulative effect in this claim. (PCR. 139-40) Instead, Defendant merely made conclusory assertions about there having been many flaws in his case. However, this Court has held that such conclusory allegations are insufficient to state a claim for post conviction relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). Moreover, this Court has repeatedly held that where the individual errors are procedurally barred or without merit, a defendant is entitled to no relief based on a claim of cumulative error. *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003). As seen throughout this brief, the lower court properly determined that the individual claims were procedurally barred and meritless. As such, it properly denied this claim. It

should be affirmed.

VI. THE LOWER COURT ABUSED ITS DISCRETION IN ORDERING THE STATE TO PRODUCE RECORDS UNDER THE "PRINCIPLES OF *BRADY*."

The lower court abused its discretion[6] in ordering the Office of the Attorney General and the Governor's Office to disclose public records after it found that the requests were not proper under Fla. R. Crim. P. 3.852. As such, its September 12, 2008 order on public records should be reversed.

The requests to the agencies that were the subject of the lower court's order were made pursuant to Fla. R. Crim. P. 3.852(i). Pursuant to that rule, a trial court is only allowed to order production of records if it can find that the defendant has made a timely and diligent search of the records repository, that the request specifically identifies the records requested, that the records requested are relevant or calculated to lead to the discovery of admissible evidence and that the request if not overly broad or unduly burdensome. Fla. R. Crim. P. 3.852(i)(2).

Here, the lower court found that Defendant's requests did not meet that standard. (PCR. 614-15) That ruling was proper. In the requests, Defendant repeatedly requested "all public records," "all drafts," "any communications" and "any documents"

[6] Trial court decisions regarding the disclosure of public records are reviewed for an abuse of discretion. *Gonzalez*, 33 Fla. L. Weekly at S456; *Johnson v. State*, 904 So. 2d 400, 405 (Fla. 2005).

(PCR-SR. 33-35, 63-66, 86-89) This Court has repeatedly held that such requests are over broad and unduly burdensome and, therefore, improper. *Diaz v. State*, 945 So. 2d 1136, 1149 (Fla. 2006); *Rutherford v. State*, 926 So. 2d 1100, 1114 n.8, 1115-17 (Fla. 2006); *Hill v. State*, 921 So. 2d 579, 585 (Fla. 2006); *Mills v. State*, 786 So. 2d 547, 551-52 (Fla. 2001); *Sims v. State*, 754 So. 2d 657, 665-68 (Fla. 2000).

Despite having properly found that the requests were not proper under Fla. R. Crim. P. 3.852(i), the lower court nonetheless ordered the agencies to comply with the request to the extent that they had any documents that showed the lethal injection protocols were flawed or would fail. (PCR. 615) The lower court based this ruling on the principles of *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* In making this ruling, the lower court committed an error of law.

In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. The Court has included with the definition of evidence material to either guilt or punishment impeachment materials of state witnesses at trial, as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). However, the Court has made clear

that this principle does not extend to all information that might be useful to a defendant at any proceeding. *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Bagley*, 473 U.S. at 675; *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *see also Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Instead, the Court has carefully limited *Brady* to disclosure of "evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Bagley*, 473 U.S. at 675; *see also Ruiz*, 536 U.S. at 629, 633 (holding that *Brady* is not implicated by withholding of impeachment materials and evidence supporting affirmative defenses in connection with a plea bargain because the need for disclosure of such information is related to ensuring a fair trial). The Court has refused to expand the scope of the government's obligation under *Brady* because doing so "'would entirely alter the character and balance of our present systems of criminal justice.' *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (dissenting opinion)." *Bagley*, 473 U.S. at 675 n.7.

Here, the information that the lower court ordered disclosed did not meet the definition of *Brady* materials. Instead, the information concerned the formulation of the protocols for lethal injection, which were sought to pursue a post conviction challenge to those protocols. This information

had nothing to do with Defendant's guilt or the fairness of his trial. Moreover, the information also had nothing to do with mitigating Defendant's sentence. As the United States Supreme Court has held, challenges to methods of execution do not implicate the propriety of a death sentence. *Hill v. McDonough*, 547 U.S. 573 (2006); *Nelson v. Campbell*, 541 U.S. 637 (2004).

Because the information that the lower court ordered disclosed was not *Brady* materials, the lower court committed an error of law in finding that the principles of *Brady* required its disclosure. By committing an error of law, the lower court abused its discretion. *Johnson v. State*, 969 So. 2d 938, 949 (Fla. 2007)(quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). As such, the order should be reversed.

While Defendant has previously contended that the lower court's order should stand even though the information is not within the limited scope of materials actual covered by *Brady* under the principles underlying *Brady*, there is no basis for this argument. As noted above, the reason why the United States Supreme Court has limited the scope of *Brady* materials is that to do otherwise "'would entirely alter the character and balance of our present systems of criminal justice.' *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (dissenting opinion)." *Bagley*, 473 U.S. at 675 n.7. Moreover, expanding the scope of the State's *Brady*

obligation is especially inappropriate during public records litigation, as this Court has held that the scope of the State's public records obligations is a matter of substantive law, which is in the Legislature's area of power. *Allen v. Butterworth*, 756 So. 2d 52, 65-66 (Fla. 2000); *see also Kight v. Dugger*, 574 So. 2d 1066, 1068 (Fla. 1990). Thus, by allowing a trial court to order the production of records that it has already determined are not subject to disclosure under Fla. R. Crim. P. 3.852, this Court risks allowing the judicial branch to encroach on the power of the Legislature by expanding the scope of the State's public records obligations. Under these circumstances, Defendant's argument that the "principles of *Brady*" extend further than actual *Brady* materials should be rejected, and the lower court's September 12, 2007 order reversed.

To the extent that Defendant may claim *Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998), extended the State's *Brady* obligation to the information, this is not true. In *Johnson*, this Court merely stated that the State could not refuse to disclose information that fell within its *Brady* obligation because that information happened to be contained within materials that were not otherwise subject to public records disclosure. That decision in no way expanded the State's obligation under *Brady*. As such, it does not support

the lower court's order. Any contrary assertion should be rejected.

The same is true of Petitioner's citations to federal authorities regarding the "ongoing" nature of the government's *Brady* obligation. These cases merely discuss the fact that the State must turn over information that meets the limited definition of *Brady* material even if the information was not in the possession of the State until after the defendant's trial. *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997)(discussing disclosure of impeachment evidence of trial witness that became known to the State after trial); *Monroe v. Butler*, 690 F. Supp. 521, 525 (E.D. La.), *aff'd*, 883 F.2d 331 (5th Cir.), *cert. denied*, 487 U.S. 1247 (1988)(discussing evidence that another person may have committed the crime that became known to the State after trial); *People v. Garcia*, 17 Cal. App. 4th 1169, 1179-83 (Cal. Ct. App. 1993)(impeachment evidence that became known to the State after trial). In fact, in *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), the Court directly states, "the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information **material to the fairness of the trial**." *See also Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976)("At trial

this duty [to disclose favorable information] is enforced by the requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.”). Thus, none of these cases support Defendant’s argument. The order should be reversed.

CONCLUSION

For the foregoing reasons, the order denying the motion for post conviction relief of the lower court should be affirmed and the September 12, 2007 order on public records should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Leor Veleanu, Assistant CCRC, 101 NE Third Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this ____ day of October 2008.

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SANDRA S. JAGGARD
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CERTIFICATE OF COMPLIANCE

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

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