IN THE SUPREME COURT OF FLORIDA

JOHN D. FREEMAN,

Appellant,

CASE NO. 89,199

v.

STATE OF FLORIDA,

Appellee.

____________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

1. Case No. 86-11599CF (Collier Murder)

An indictment filed December 4, 1986, charged Freeman with the first-degree murder of Leonard Collier (count I) on November 11, 1986, and with burglary of Collier's dwelling with an assault (count II). (ROA I 12-14).[1] The following facts were adduced at Freeman's trial, September 13-15, 1988:

Darrell Hopkins lived across the street from Collier. (ROA XXXVII 1149). Hopkins was working in his garage at 10:00 a.m. on November 11, 1986, when he heard both a shot and Collier calling for help. (ROA XXXVII 1151). Looking across the street, he saw someone strike Collier ten to twelve times about the head with some object. (ROA XXXVII 1153). Collier was on the ground trying to crawl away from his assailant. (ROA XXXVII 1156). Hopkins went inside to call the police (ROA XXXVII 1159) and, when he went back outside, saw that Collier's attacker was gone. (ROA XXXVII 1160). Collier stumbled out to the street and fell. (ROA XXXVII 1161).

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[1] "ROA" refers to the record in case no. 86-11599CF (volumes I through XLIII, pages 1 through 1785). "PC" refers to the record in the instant case (volumes I through III, pages 1 through 447), and "PC SR" refers to the supplemental record in the instant case (volumes I through III, pages 1 through 571). Pages of the record in case no. 87-3527CF, Freeman's trial for killing Alvin Epps, are in this record at PC SR III 445-51.

The police arrived within minutes and found Collier lying on the pavement, in pain and covered in blood. (ROA XXXVII 1161, 1163; 1230-31; 1285-86; 1300). Collier told Officer Tyson that, when he entered his house, a man hiding behind the door jumped him. (ROA XXXVII 1232, 1241). Collier said that he and the man fought from the front porch into the yard and that he believed he had been shot. (ROA XXXVII 1164, 1232). Hopkins testified that Collier did not appear to be any threat to his assailant because Collier was on the ground with the assailant standing over him. (ROA XXXVII 1183, 1157-58). Hopkins also testified that it looked like Collier was trying to get away from his assailant. (ROA XXXVII 1158).

Officer Tyson testified that he searched the house after speaking with Collier and trying to stop the bleeding. (ROA XXXVII 1233). Police officers found a handgun, checkbook, keys, and a pool of blood on the ground between Collier's car and the front porch. (ROA XXXVII 1234; 1286-87; 1300). After calling for an air unit (ROA XXXVII 1286), the officers left to search for the suspect near the river bank. (ROA XXXVII 1301).

Tommy Cohen, Officer Tyson's son, was riding with his father when Tyson responded to Collier's residence. (ROA XXXVIII 1347). He saw Collier lying on the side of the road bleeding and stayed with Collier, holding a towel to his head in an attempt to stop the

bleeding. (ROA XXXVIII 1348-49). Collier told Tommy that he was attacked when he opened the door and that he fell off the porch. (ROA XXXVIII 1350).

Evidence technician Juan Anstette arrived at the scene at 10:30 a.m. and determined the point of entry into the house to have been a rear bedroom window. (ROA XXXVII 1258). He found a key, gun, checkbook, and calculator on the ground near the driveway (ROA XXXVII 1261); the gun and checkbook had blood on them. (ROA XXXVII 1268, 1270). One live round and one spent round were in the gun. (ROA XXXVII 1268). There was a circle of blood in the yard (ROA XXXVII 1261) and blood on the door handle and inside the driver's door of Collier's car. (ROA XXXVII 1265). No blood was found inside the house. (ROA XXXVII 1294-95).

Homicide Detective William DeWitt testified that he viewed the crime scene and looked for bullet holes inside the house. (ROA XXXVIII 1355). He examined the porch area and found no blood on the step. (ROA XXXVIII 1355). He testified that there was a large circle of blood in the front yard and, on cross-examination, that he did not recover any bullets from the house. (ROA XXXVIII 1368). DeWitt stated that neutron-activation tests were not performed on Freeman and Collier because Freeman had been in the river, which would have contaminated the test, and the pre-surgery sterilization

procedures performed on Collier would have negated the test results. (ROA XXXVIII 1357-58).

Police officers apprehended Freeman hiding under a dock down the street from Collier's residence. (ROA XXXVII 1266; 1301). Vernon Johnson testified that he was fishing from his dock shortly after 10:00 a.m. when he noticed a police helicopter circling overhead. (ROA XXXVII 1277). He saw a man jump into the river and then hide in the grass. (ROA XXXVII 1277-78). When Johnson asked what he was doing, the man said he was looking for flounder. (ROA XXXVII 1278). As Johnson started to leave the dock, the man said he had been in a fight down the street and that the police were looking for him; he asked Johnson not to tell the police where he was. (ROA XXXVII 1279). Johnson went to the front of his house and signaled the helicopter. (ROA XXXVII 1279). Officer Kirkland arrived, and he and Johnson walked out on the dock and saw Freeman crouched beneath it. (ROA XXXVII 1280; 1288). Kirkland drew his weapon, and Freeman came out from under the dock. (ROA XXXVII 1280).

Officers Kirkland and Gorsage arrested Freeman, searched him, and seized a small pocket knife and some change from his front pants pocket. (ROA XXXVII 1289, 1292; 1302). Freeman was wet and muddy and had blood on his underwear. (ROA XXXVIII 1330). After

being advised of his rights, Freeman told Kirkland that his name was John Jackson, that he lived on the south side of town, and that he hitchhiked to the area. (ROA XXXVII 1291). When Kirkland said he was investigating a burglary, Freeman denied any knowledge of it. (ROA XXXVII 1291). The officers returned Freeman to the crime scene (ROA XXXVII 1291; 1305) where he told Gorsage that his name was John Jackson and that he broke into the house through a rear bedroom window and took some change and a checkbook from a dresser. (ROA XXXVII 1306). A shot was fired and he and the victim struggled out the front door. (ROA XXXVII 1306). Freeman said that Collier hit his head on the concrete corner of the porch (ROA XXXVII 1307) and that he thought Collier was going to shoot him. (ROA XXXVII 1308).

On cross-examination Gorsage testified that Freeman did not resist arrest. (ROA XXXVII 1308). He also stated that Freeman told him he was surprised when Collier entered the house and that he thought Collier was going to shoot him. (ROA XXXVII 1309; XXXVIII 1320). He reconfirmed that Freeman said Collier hit his head on the porch and testified that the door was broken from the inside and that there was blood near the porch steps. (ROA XXXVIII 1322-23).

DeWitt testified that he interviewed Freeman at the police station about noon and advised him that he was charged with burglary and aggravated assault. (ROA XXXVIII 1358-60). DeWitt stated that Freeman did not appear to be injured or intoxicated, but Freeman said he smoked a marijuana cigarette about 10:00 a.m. (ROA XXXVIII 1359). Freeman waived his rights and admitted the burglary. (ROA XXXVIII 1363). He said that Collier surprised him and pointed the gun at him to keep him from leaving. (ROA XXXVIII 1363). Freeman told DeWitt that he grabbed the pistol and that it discharged and that he and Collier fell through the door onto the porch and then into the yard. (ROA XXXVIII 1363). Freeman said he hit Collier twice and then fled the scene. (ROA XXXVIII 1363).

Freeman's statement was read to the jury. (ROA XXXVIII 1366). Freeman said he knocked on the door of Collier's house to see if anyone were home. He removed the screen from a rear window and crawled inside. After being inside for thirty minutes, a man came in and startled Freeman. Freeman started for the front door, but the victim pointed a gun at him. Freeman grabbed the gun and the two men struggled. When Freeman managed to get the gun, he hit the victim two or three times in the head, then threw the gun down, and ran to the river where he hid under a dock until he was arrested.

Collier died the afternoon of November 11, and Dr. Bonafacio Floro, the medical examiner, performed a autopsy on the body the following day. (ROA XXXVII 1192). According to Floro, the cause of death was exsanguination due to multiple lacerations of the head. (ROA XXXVII 1198). Floro said Collier's eyes were blackened and identified cuts on Collier's face, skull, and ears. (ROA XXXVII 1193). He stated that one doctor who treated Collier described an injury on the left side of Collier's head where "blood was gushing out like a pump," indicating severe hemorrhaging. (ROA XXXVII 1198-99). Floro testified that Collier suffered arterial vessel lacerations and that this type of injury causes profuse bleeding. (ROA XXXVII 1199). When asked if Collier's injuries were consistent with hitting his head on the corner of the porch, Floro responded no because the concrete porch would have caused greater damage than just scalp lacerations. (ROA XXXVII 1203-04). Floro said the wounds were consistent with Collier's being hit on the head with a gun. (ROA XXXVII 1203-04). On cross-examination Floro was asked to look at a photograph of the front step showing blood around it. (ROA XXXVII 1213-14). Floro also explained that the profuse bleeding resulted in a lack of oxygen to Collier's brain that, if not treated, would lead to unconsciousness within several minutes and, eventually, death. (ROA XXXVII 1198-1200).

In Floro's opinion Collier experienced pain. (ROA XXXVII 1200). On redirect examination Floro testified that Collier's head had twelve lacerations and four bruises caused by a dozen separate blows (ROA XXXVII 1221-22), thereby substantiating Hopkins' testimony that he saw Freeman hit Collier ten to twelve times. (ROA XXXVII 1153). Collier sustained no gunshot or stab wounds. (ROA XXXVII 1207). Floro also stated that Collier's injuries could have been less severe than he estimated if Collier remained conscious for a longer period of time. (ROA XXXVII 1224-26).

When the state rested its case, the defense presented no witnesses. The jury returned verdicts finding Freeman guilty of first-degree felony murder and burglary with an assault as charged in the indictment. (ROA XXXIX 1564; I 182-83).

When the penalty phase began on September 16, 1988, Freeman moved for a continuance to locate David Sorrells, Freeman's best friend who testified at the penalty proceedings in the Epps case. (ROA XXXIX 1569). The trial court proposed using Sorrells' former testimony because, if Sorrells' testimony would be used to corroborate family members' testimony, it would be cumulative. (ROA XXXIX 1574). The court denied the motion for continuance (ROA XXXIX 1580-81) and allowed the defense to read Sorrells' prior testimony to the jury. (ROA XXXIX 1682-87).

Debra Epps, the state's first penalty-phase witness, testified that her husband was murdered at home on October 20, 1986. (ROA XXXIX 1613). Her husband was stabbed six times and bled to death in the master bedroom. (ROA XXXIX 1614). Freeman entered the home through a side bedroom window and stole a number of items from the home. (ROA XXXIX 1614). Epps positively identified Freeman as the person convicted of murdering her husband. (ROA XXXIX 1615). On cross-examination she said she had no personal knowledge of the murder because she was at work when it occurred. (ROA XXXIX 1615-16).

Detective DeWitt testified that he obtained a copy of the judgment and sentence in case no. 87-3527CF (the Epps murder), that Freeman was the defendant in that case as well as the instant one, and that the murders occurred within a mile of each other. (ROA XXXIX 1616-18). On cross-examination DeWitt stated that Freeman told him he had nothing to do with the Epps murder. (ROA XXXIX 1621). The state rested after DeWitt's testimony. (ROA XXXIX 1626).

Mary Freeman, the defendant's mother, testified that he never knew his real father, Charles Jewell; that she married Charles Freeman when the defendant was three-and-one-half years old; and that Freeman was a harsh disciplinarian of the five children they

raised. (ROA XXXIX 1627-31). Freeman never showed affection for the defendant, but she loved her son and he loved her. (ROA XXXIX 1632). Even though the defendant used Freeman as his last name, his stepfather never adopted him. (ROA XXXIX 1633). On cross-examination she said she knew that her son had been convicted of another first-degree murder and that this was the second time she was asking for mercy for him. (ROA XXXIX 1633).

Freeman's older, full brother, Robert Jewell, recalled several occasions where their stepfather disciplined both him and the defendant and testified that Freeman paid them little attention, calling them "stupid" or "dumb" when he did. (ROA XXXIX 1637). Jewell testified that he was afraid of Freeman and that his brother could only read and write at a third-grade level. (ROA XXXIX 1638). Jewell identified photographs of himself and his brother and drawings that the defendant had done. (ROA XXXIX 1639-40). Jewell stated that his brother was good with children and was helpful and handy around the house. (ROA XXXIX 1640-41). On cross-examination Jewell testified that his stepfather abused both brothers, but that he had never been convicted of murder or burglary and that he was confident that the defendant did not kill one of their neighbors. (ROA XXXIX 1642).

Dr. Lewis Legum, a psychologist, testified that he interviewed Freeman for four to five hours on July 7, 1987, and gave him a number of psychological tests. (ROA XXXIX 1645-47). With an IQ of 83 Freeman fell within the dull-normal range and knew the difference between right and wrong. (ROA XXXIX 1649). Legum described Freeman as a little slow, but not retarded. (ROA XXXIX 1658). He testified that Freeman's learning disability was exacerbated by stress and that possible parental abuse could have influenced Freeman's difficulties with relationships and in dealing with problems. (ROA XXXIX 1659). Legum stated that Freeman talked about the murders and specifically denied killing Epps. (ROA XXXIX 1660).

On cross-examination Legum said that Freeman admitted burglarizing the Epps home and hitting Epps several times, but said that Epps was alive when he left. (ROA XXXIX 1661). Freeman told Legum that while he was burglarizing Collier's home, Collier disturbed him and that during a struggle he struck Collier several times and then left. (ROA XXXIX 1661). Legum testified that Freeman did not meet the criteria for the mental mitigators, suffered from no substantial impairment, and had the ability to be cunning. (ROA XXXIX 1660, 1669, 1674). He stated that all abused children do not become murderers, but that a high percentage of

abused children develop pathological patterns that include committing crimes of the types charged against Freeman. (ROA XXXIX 1674-75).

On redirect examination Legum said that Freeman was not insane and did not try to fake insanity and that he found Freeman to be candid and straight forward. (ROA XXXIX 1676).

After Legum's testimony, Freeman renewed his motion for a continuance so that he could locate Sorrells. (ROA XXXIX 1678). Defense counsel told the court that Sorrells' prior testimony referred to a burglary not in evidence in the instant case, and the state agreed to strike that reference. (ROA XXXIX 1679-80). The court instructed the jury that Sorrells was unavailable, but that his testimony had been given under oath and should be accepted as if Sorrells were testifying in person. (ROA XXXIX 1681).

The transcribed testimony, reported at ROA XXXIX 1682 through 1685, reflected that Sorrells had known Freeman for eight years and that they were good friends. They attended junior high together and Sorrells recalled two incidents when Freeman showed the marks of having been beaten. Freeman did carpentry work, was a good worker, and got along well with children. Freeman was very fond of his girlfriend's son, who thought of Freeman as his father. On cross-examination Sorrells testified that Freeman was capable of

working and taking care of himself. Sorrells knew that Freeman had been convicted of burglarizing and robbing Alvin Epps, but did not know that he had been convicted of killing Epps. Knowing that, however, would not change Sorrells' opinion of Freeman.

In closing argument defense counsel argued that Freeman always denied killing Epps (ROA XL 1734) and that, because Collier's murder was not deliberate, planned, or premeditated, death was inappropriate. (ROA XL 1738). Counsel argued that the jury should recommend life imprisonment based on Freeman's age, his fourth-grade ability, his artistic abilities, physical and mental abuse by his stepfather, and because he could spend a long time in jail as well as making the following statement:

> In the next twenty-five years he will have time to relive those two minutes of madness on Carbondale Drive over six million times. It is a very, very long time, and each of those days he will be told when to wake, when to dress, when to shower, when to eat, what to read, what you may read.
>
> We are now some two thousand years after the birth of Christ, and I am standing in front of twelve people asking for a man's life but not so very much mercy. Life imprisonment. It is not so merciful. I ask you to consider John Freeman's age, his immaturity, his intellectual limitations. I ask you to consider how and why Leonard Collier died, and I ask you to consider the lack of premeditation in this case. I submit to you the weight to be powered into those factors outweigh the aggravation in this case.

(ROA XL 1744).

The jury voted nine to three to recommend death (ROA II 216), and the court sentenced Freeman to death, finding two aggravators (committed during a burglary/pecuniary gain and previous conviction of a capital felony) and the following mitigators and conclusions:

> The court finds the defendant is of low intelligence and that he has been abused at various times in his life by his step-father.
>
> The court further finds, as pointed out by defense counsel, that Mr. Freeman does appear to have some artistic ability, and the evidence shows the defendant enjoys playing with children.
>
> The court finds from a reasoned weighing of the above findings, there exist at least two statutory aggravating circumstances; no statutory mitigating circumstances and only a few non-statutory mitigating circumstances.
>
> Wherefore, the court finds sufficiently compelling aggravating circumstances exist to justify and require under the law the imposition of the death penalty on the defendant, John D. Freeman.

(ROA II 257-58).

Freeman raised four issues on appeal to this Court: 1) whether his death penalty was proportionate; 2) whether the introduction of victim impact evidence violated his rights; 3) whether the instruction on the heinous, atrocious, or cruel (HAC) aggravator was improper; and 4) whether reversal of Freeman's convictions in

the Epps case would require resentencing. This Court affirmed Freeman's convictions and sentence. Freeman v. State, 563 So.2d 73 (Fla. 1990). In finding Freeman's death sentence proportionate, the Court stated:

> Following the merger of pecuniary gain and burglary, there remained two statutory aggravating circumstances. One of these was a prior murder. There were no statutory mitigating circumstances, and the nonstatutory mitigating circumstances were not compelling. The trial judge carefully weighed the aggravating and mitigating circumstances and concluded that death was the appropriate penalty. It is not this Court's function to reweigh these circumstances. Freeman's death sentence is not disproportionate to other cases.

Id. at 77 (citations omitted).

In his second issue Freeman argued that it was error for the state to have presented Debra Epps' testimony at the penalty phase and that the prosecutor made impermissible comments during closing argument. The Court stated the following in addressing the first part of this claim:

> We agree that Ms. Epps should not have been called to testify concerning her husband's death. While the details of a prior felony conviction are admissible to prove this aggravating factor, Perri v. State, 441 So.2d 606 (Fla. 1983), Ms. Epps was not present when her husband was killed and, therefore, her testimony was not essential to this proof. However, defense counsel objected only to the content of Ms. Epps' testimony concerning her

> employment and children and not to the fact that Ms. Epps herself was testifying to the prior conviction. The trial judge issued a curative instruction concerning this point. Most significantly, we note that Ms. Epps' testimony concerning her husband's death was brief, straightforward, and very general. We conclude beyond a reasonable doubt that without Ms. Epps' testimony the jury would still have recommended the death penalty, and the trial judge would have imposed it.

Id. at 76 (footnote omitted). As to the second part of the issue, the Court held:

> We have carefully reviewed the closing argument and cannot say that reversible error was committed. The prosecutor's repeated comparison of the Epps and Collier murders was legitimate. His references to Collier and Epps as homeowners were little more than innocuous comments on the evidence. He should not have referred to Ms. Epps' children, but defense counsel's objection was sustained, and the trial judge instructed the jury to disregard the comment. We do agree that in asking the rhetorical question of "How many times is this going to happen to this defendant?" following a discussion of the Collier and Epps murders, the prosecutor impermissibly implied that Freeman was likely to commit future crimes if not incarcerated. However, there was no objection to the comment, and its potential for prejudice falls far short of the circumstances which require this Court to reverse for a new sentencing proceeding.

Id. (citation omitted).

Turning to Freeman's claim that the jury instruction on the HAC aggravator was unconstitutionally vague under Maynard v. Cartwright, 486 U.S. 356 (1988), the Court stated:

> When defense counsel initially objected to the instruction on this factor, the trial judge agreed to modify the instruction based on the language of State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Because no further objection was made, this issue was not properly preserved for appeal. Further, we find the instruction did sufficiently limit the jury's discretion.

Id.

Finally, the Court addressed Freeman's last claim:

> Freeman's final claim is that his sentence must be vacated and remanded if his prior conviction is reversed by this Court. This claim is now moot because we have affirmed Freeman's prior conviction. Freeman, 547 So.2d at 125.

Id. at 77. The United States Supreme Court denied certiorari review on June 28, 1991. Freeman v. Florida, 501 U.S. 1259 (1991).

Freeman filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, dated June 29, 1992. (PC I 12). The state responded to that motion on March 5, 1993. (PC SR I 3). After receiving the circuit court's permission to do so, Freeman filed a reply to the state's response, dated May 14, 1993. (PC SR I 84). On October 25, 1994, Freeman filed an amended postconviction motion. (PC II 178). The state moved to dismiss

that motion for lack of verification. (PC II 319). The circuit court granted that motion without prejudice and directed Freeman to file a properly verified amended motion. (PC III 378). Freeman filed a verified amended motion, dated October 23, 1995 (PC SR II 185), and the state filed its response the following month. (PC SR III 372). The circuit court held a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), on May 29, 1996 (PC SR III 529) and summarily denied Freeman's motion for postconviction relief on July 29, 1996. (PC III 424). After the court denied rehearing (PC III 440), Freeman filed his notice of appeal on October 7, 1996. (PC III 442).

<u>2. Case No. 87-3527CF (Epps Murder)</u>

In October 1987, a jury convicted Freeman of the first-degree felony murder of Alvin Epps, burglary with an assault, and robbery with a deadly weapon and, in the penalty phase, recommended that he be sentenced to life imprisonment. The trial court, however, sentenced Freeman to death. Freeman's defense at trial was that Darryl McMillion, rather than Freeman, committed the crimes, and information about McMillion formed the basis for two motions for new trial that the trial court denied.

Freeman raised ten issues in appealing his convictions and sentence. This Court found no merit to any of the seven guilt-phase issues, including the two claims that the trial court erred in denying the motions for new trial. In rejecting those claims the Court stated:

> In his sixth and seventh points, Freeman contends he was entitled to a new trial because newly discovered evidence showed that Darryl McMillion could have been in Jacksonville, Florida, on the day the victim was murdered. Florida Rule of Criminal Procedure 3.600 sets forth the grounds for a new trial based on new and material evidence as follows:
>
>> (a) The court shall grant a new trial if any of the following grounds is established:
>>
>> * * * *

> (3) That new and material evidence, that if introduced at the trial would probably have changed the verdict or finding of the court, and that the defendant could not with reasonable diligence have discovered and produced upon the trial, has been discovered.
>
> We find the trial judge acted within his discretionary authority in concluding that this proposed newly discovered evidence did not meet the test of probably affecting the verdict, given the record in this cause.

Freeman v. State, 547 So.2d 125, 128 (Fla. 1989). Although this Court affirmed Freeman's convictions, it vacated his death sentence and remanded for the imposition of a life sentence after concluding "that no clear and convincing facts have been presented in this record to warrant imposition of the death penalty over this jury's recommendation of life imprisonment." Id. at 129. This Court released its opinion regarding the Epps murder on July 27, 1989, and no further litigation occurred regarding that case.

SUMMARY OF ARGUMENT

ISSUE I.

Freeman has failed to demonstrate that the circuit court erred in summarily denying his claim that the state withheld exculpatory evidence.

ISSUE II.

The trial court properly denied Freeman's claim that counsel were ineffective at the penalty phase because Freeman failed to show substandard performance that prejudiced him.

ISSUE III.

The jury misinstruction claim is procedurally barred.

ISSUE IV.

Because there is no merit to Freeman's automatic-aggravator claim, counsel were not ineffective.

ISSUE V.

The prosecutorial misconduct claim is procedurally barred, and counsel were not ineffective.

ISSUE VI.

The circuit court properly denied Freeman's complaint about his prior conviction in summary fashion because this claim is procedurally barred.

ISSUE VII.

There is no merit to the burden-shift claim, so counsel could not have been ineffective regarding it.

ISSUE VIII.

The claim of ineffectiveness at Freeman's first trial is both time and procedurally barred.

ISSUE IX.

Freeman has shown no error in the circuit court's summary denial of his improper prosecution claim.

ISSUE X.

The circuit court did not err in summarily denying the cummulative-error claim.

ISSUE XI.

Because the circuit court stated its rationale for summarily denying Freeman's postconviction motion, the court did not have to attach portions of the record.

ARGUMENT

ISSUE I

WHETHER THE CIRCUIT COURT ERRED IN SUMMARILY DENYING FREEMAN'S BRADY CLAIM.

As his first issue, Freeman argues that the circuit court erred in denying his claim that the state violated Brady v. Maryland, 373 U.S. 83 (1963), by withholding exculpatory information or, alternatively, that defense counsel had the information and was ineffective for not presenting it to the jury. (Initial brief at 5-19). There is no merit to this claim.

Freeman raised this issue in his amended motion for postconviction relief claiming Brady violations occurred in three areas: Kathy (Freeman) Mixon's statement that Freeman told her that he did not intend to kill Collier; the medical examiner's opinion as to the cause of death; and reports and photographs that would corroborate Freeman's claim that Collier hit his head on the porch. (PC SR II 190-206). The circuit court found that no evidentiary hearing was warranted on this claim because the record conclusively demonstrated that the claim has no merit:

> Defendant's second claim alleges that the State committed Brady violations that denied Defendant a fair trial. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Alternatively, Defendant argues that his counsel was ineffective for failing to discover the exculpatory evidence. In

Williamson v. Dugger, 651 So.2d 84, 88 (Fla. 1995), the Florida Supreme Court stated that the claim of failure to disclose material exculpatory evidence and the claim of ineffective assistance of counsel are mutually inconsistent. "Counsel cannot be considered deficient in performance for failing to present evidence which allegedly has been improperly withheld by the state." Roberts v. State, 568 So.2d 1255, 1259 (Fla. 1990). Notwithstanding the inconsistent nature of the claims, Defendant has failed to put forth facts which would merit a hearing or relief.

There is no Brady violation where the alleged exculpatory information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence. See, e.g., Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993); James v. State, 453 So.2d 786 (Fla.), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984). Defendant alleges three (3) different Brady violations: (1) Kathy Freeman's statement that Defendant told her he had not intended to kill Collier, (2) the State failed to test and collect physical evidence, and (3) reports and pictures which would corroborate Defendant's claim that Collier hit his head on the porch.

The state listed Kathy Freeman in its initial discovery response in the Epps case. (Epps record at 13). Also, the State listed Kathy Freeman in its second response, dated April 16, 1987. (Epps record at 26). Defendant, himself, listed Kathy Freeman in his reciprocal discovery. (Epps record at 40). Thus, no Brady violation occurred because Defendant could have discovered Kathy Freeman's statement with due diligence. See, e.g., Provenzano v. State, 616 So.2d 428 (Fla. 1993).

Defendant's contention that the state failed to collect and test physical evidence is not truly a Brady claim. Complaints about the State's treatment of physical evidence could have been raised on direct appeal; thus, his contentions are procedurally barred in a 3.850 motion. See, e.g., Koon v. Dugger, 619 So.2d 246 (Fla. 1993); Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990).

Defendant's [sic] contends that the state suppressed a photograph showing blood on the porch step which would support his theory of defense that Collier died because his head struck the porch. Defendant concedes that he does not know if the photograph was used at trial or if his counsel possessed the photograph. Defense counsel's opening statement shows that he knew of photographs depicting blood on the step:

> They fell through the door. There is a screen door here. They fell through the door breaking it. Mr. Collier struck his head on one of the stoops, *and you will see the photographs*. Look if you will to the blood in that area. (Emphasis added).

(T 1144). Obviously, the defense possessed photographs which would have shown blood on the porch step; thus, there is not a reasonable probability that the outcome of this case would have been different had the complained-about photograph not been allegedly withheld. See, e.g., Hunter v. State, 660 So.2d 244 (Fla. 1995); see also Cherry v. State, 659 So.2d 1069 (Fla. 1995) (finding the Defendant's allegations that the State withheld photographs of shoe treads to not be a Brady violation where Defendant had a series of photographs depicting footprints in the sand). Any ineffective assistance of counsel

> argument is also without merit because Defendant is trying to avoid a procedural bar. See, e.g., Bates v. Dugger, 604 So.2d 457 (Fla. 1992). Claim two (2) merits neither a hearing nor relief.

(PC III 426-28). The record supports the trial court's ruling, and Freeman has not shown that the court erred in denying relief.

The test for determining if a Brady violation has occurred "is whether there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). To meet this test, one must prove that: (1) the state possessed favorable evidence; (2) the evidence was suppressed; (3) the defendant did not possess the favorable evidence and could not obtain it with reasonable diligence; and (4) there is a reasonable probability that, had the evidence been disclosed, the outcome would have been different. Haliburton v. State, 691 So.2d 466 (Fla. 1997); Cherry v. State, 659 So.2d 1069 (Fla. 1995); Hegwood v. State, 575 So.2d 170 (Fla. 1991). However, "[t]here is no Brady violation where the [alleged exculpatory] information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993); Roberts v. State, 568 So.2d 1255 (Fla. 1990);

James v. State, 453 So.2d 786 (Fla.), cert. denied, 469 U.S. 1098 (1984). Freeman's Brady claim fails to meet these standards.

Freeman knew or could have known about Kathy Freeman's statement through the exercise of due diligence. Combined discovery occurred in case no. 86-11599CF (Collier) and case no. 87-3527CF (Epps).[2] The state listed Kathy Freeman in its initial discovery response. (PC SR II 426). In its second response, dated April 6, 1987 (thirteen days after she made the allegedly suppressed statement), the state again listed Kathy Freeman along with the notation that "defendant told Kathy Freeman that a man named McMillion (first name starts with a D) killed the victim and sold the property. Defendant also admitted committing the other murder [Collier], but said he didn't do this one [Epps]." (PC SR II 428). Freeman listed Kathy Freeman in his reciprocal discovery. (PC SR II 429). Thus, it is apparent that Freeman could have discovered what Kathy said if due diligence had been exercised. Moreover, because Freeman allegedly told Kathy that he did not intend to kill Collier, that information was, obviously, as accessible to him as it was to the state. Therefore, it is clear that no Brady violation occurred.

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[2] Brad Stetson and John Jolly prosecuted both cases, and Patrick McGuinness and Jeanine Sasser represented Freeman in both.

Even if one had, however, Freeman cannot show that the result would have been different. In his opening statement counsel argued that Freeman was guilty of no more than manslaughter. (ROA XXXVII 1146). Officer Gorsage testified that Freeman told him that he thought Collier was going to shoot him. (ROA XXXVIII 1320). Detective DeWitt testified that Freeman told him the gun discharged while he was struggling with Collier. (ROA XXXVIII 1363). Freeman's statement, in which he claimed that Collier surprised him and that the gun went off while they were fighting, was read to the jury. (ROA XXXVIII 1366). Freeman was charged with felony murder, and, "when a person is killed during the commission of a felony, the felon is said to have the intent to commit the death -- even if the killing was unintentional." State v. Gray, 654 So.2d 552, 553 (Fla. 1995); see also State v. Enmund, 476 So.2d 165, 168-69 (Fla. 1985) (Shaw, J; specially concurring) (explaining the felony murder rule). Thus, even if the jury had heard that Freeman told Kathy he did not intend to kill Collier, it still would have convicted him of felony murder.

The state's alleged failing to test and collect physical evidence was the subject of cross-examination of Detective DeWitt (ROA XXXVIII 1368 et seq.) and Officer Anstette (ROA XXXVII 1275) and is not truly a Brady claim. Complaints about the state's

treatment of the physical evidence could have been raised on direct appeal and are, therefore, procedurally barred in collateral proceedings.

The allegation that collateral counsel has found a medical expert that would testify "regarding the inconsistencies in Dr. Floro's trial testimony" (initial brief at 16) do not establish a Brady violation. Moreover, explaining to the jury "the incongruence of death by exsanguination given the facts that the bleeding was wholly external, the only artery affected was a minor one, and the wounds were attended to almost immediately" (initial brief at 15-16) would have had no effect on the outcome given the overwhelming evidence presented by the state, including Freeman's confessions and eyewitness testimony of the victim's being beaten that resulted in twelve lacerations and four bruises. Numerous witnesses testified to the amount of blood that Collier lost. Officer Tyson testified that Collier's "whole head and face and whole body was covered in blood" and that he had never before seen someone in such bad shape that was still moving around. (ROA XXXVII 1231). Officer Anstette was "amazed" at the amount of blood on the gun. (ROA XXXVII 1269). Officer Kirkland testified that Collier was "completely covered in blood" and that he was "obviously severely injured." (ROA XXXVII 1286). Tommy Cohen

testified that Collier was "bleeding extremely bad." (ROA XXXVIII 1349). Additionally, Hopkins' testimony that he saw Freeman hit Collier ten to twelve times on the head (ROA XXXVII 1153) and Floro's counting twelve cuts and four bruises on Collier's head (ROA XXXVII 1221-22) corroborate each other. The currently tendered evidence would have made no difference.

The court correctly found no Brady violation regarding a photograph showing blood on the porch step. In a December 23, 1986, memorandum to an assistant state attorney defense counsel asked that all photographs be made available for duplication. (ROA I 19). Presumably, they were because page 8 of the index to the record of case no. 86-11599CF includes twenty-one photographs and diagrams on the state's list of exhibits and eight photographs on the defense's list. Moreover, defense counsel's opening statement positively demonstrates that he knew of photographs showing blood on the step. Counsel told the jury that Collier hit his head "on one of the stoops, and you will see the photographs. Look at the blood in that area." (ROA XXXVII 1144). Even if the now-complained-about photograph exists and even if the defense did not have it, it is obvious that it had others that depicted the same thing.

All of the Brady claims boil down to one thing, i.e., they might tend to support Freeman's version of events. The jury was well aware of Freeman's version of the struggle. Both DeWitt (ROA XXXVIII 1355, 1368) and Floro (ROA XXXVII 1203, 1205, 1213 et seq.) were examined and cross-examined about the cause of Collier's injuries. In his opening statement the prosecutor told the jury that Freeman told the police that Collier's injuries occurred when he hit his head on the porch. (ROA XXXVII 1140). Defense counsel reinforced this in his opening statement by telling the jury that Collier had no damage or injury to his brain, no skull fracture, only "superficial wounds to the skin. He had one injury already from the porch step." (ROA XXXVII 1146). As stated before, the jury was aware of Freeman's theory -- it just did not believe it.

Freeman has not shown a reasonable probability that the result of his trial would have been different if the complained-about material had been presented to this jury. Haliburton; Mills v. State, 684 So.2d 801 (Fla. 1996); White v. State, 664 So.2d 242 (Fla. 1995); Atkins v. State, 663 So.2d 624 (Fla. 1995); Cherry; Jennings v. State, 583 So.2d 316 (Fla. 1991); Melendez v. State, 612 So.2d 1366 (Fla. 1992); Swafford v. Dugger, 569 So.2d 1264 (Fla. 1990).[3] Because Freeman suffered no prejudice regarding the

[3] This Court affirmed the summary denial of Brady claims in Mills; White; Atkins; Cherry; Melendez; and Swafford.

alleged Brady material, he has failed to establish ineffective assistance of counsel. Mills, 684 So.2d at 804, n. 4 (the standard for meeting the materiality part of the Strickland v. Washington, 466 U.S. 668 (1984), test of ineffectiveness "is the same as the standard for proving prejudice under Bagley: prejudice is shown only if there is a reasonable probability that 'but for counsel's unprofessional errors, the result of the proceeding would have been different'") (quoting Strickland, 466 U.S. at 694)). As the circuit court found, the files and record conclusively demonstrate that no relief is warranted on this issue. That court, therefore, did not err in summarily denying Freeman's claim, and this Court should affirm the circuit court's denial of relief.

ISSUE II

WHETHER THE CIRCUIT COURT ERRED IN SUMMARILY DENYING FREEMAN'S CLAIM THAT COUNSEL WERE INEFFECTIVE AT THE PENALTY PHASE.

Freeman claims that the trial court committed reversible error by denying his claim of penalty-phase ineffectiveness without an evidentiary hearing. (Initial brief at 19-49). There is no merit to this claim.

To prove that counsel rendered ineffective assistance, Freeman must demonstrate both that counsels' performance was deficient, i.e., that counsel made such serious errors that they did not function as the counsel guaranteed by the Sixth Amendment, and that the deficient performance prejudiced him, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687 (1984). A postconviction movant must make both showings, i.e., both incompetence and prejudice. Id.; Kimmelman v. Morrison, 477 U.S. 365 (1986); Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, but rather whether there was both a deficient performance and a reasonable probability of a different result.") (emphasis in original). This standard "is highly demanding." Kimmelman, 477 U.S. at 382. Only those postconviction movants "who

can prove under Strickland that they have been denied a fair trial by the gross incompetence of their attorneys will be granted" relief. Id.; Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994) (cases granting relief will be few and far between because "[e]ven if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is show that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one.") (emphasis supplied).

Moreover, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland v. Washington, 466 U.S. at 688. Strickland v. Washington also contains the following admonition:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct

> falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted). Thus, counsel should be presumed competent, and second-guessing counsel's performance through hindsight should be avoided. Strickland v. Washington; Kimmelman; White v. Singletary, 972 F.2d 1218 (11th Cir. 1992); Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992); White v. State, 664 So.2d 242 (Fla. 1995); Phillips v. State, 608 So.2d 778 (Fla. 1992).

While the standard for a postconviction movant claiming counsel was ineffective is a demanding one, competent trial counsel must perform at minimum level, not a maximum one. "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at the trial." White, 972 F.2d at 1220; see also Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995) (Strickland v. Washington requires only minimal competence). When considering ineffectiveness claims, a court "need not determine whether counsel's performance was deficient when it is clear that the alleged deficiency was not prejudicial." Williamson v. Dugger, 651 So.2d 84, 88 (Fla. 1994); Kennedy v. State, 547 So.2d 912 (Fla. 1989).

In his amended motion for postconviction relief Freeman argued that his counsel were ineffective at the penalty phase regarding: 1) the manner of the victim's death; 2) the failure to secure David Sorrells' in-person testimony; 3) presenting Freeman's character and background as mitigation; and 4) use of the prior capital conviction for his killing Epps in aggravation. (PC SR II 206-47, 313-24). In summarily denying this claim the circuit court held as follows:

> Defendant's claim three (3) asserts that his counsel rendered ineffective assistance at the penalty phase of his trial. In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance was deficient, and (2) there is a reasonable probability that the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Moreover, a court considering a claim of ineffective counsel need not determine whether counsel's performance was deficient when it is clear that the alleged deficiency was not prejudicial. See, e.g., Williamson v. Dugger, 651 So.2d at 88; Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). Defendant claims that his counsel was ineffective regarding (1) the manner of Collier's death, (2) David Sorrells not being present as a witness at the penalty phase, (3) more evidence could have been presented regarding Defendant's character and background, and (4) use of the prior capital conviction in aggravation.
>
> Defendant's allegation regarding the State's withholding of the photographs of the step and Defendant's testimony from a new

medical examiner repeats most of his allegations which have been considered and responded to in claim two (2) *supra*. The record conclusively refutes any ineffective assistance of counsel allegation as to these issues. See, e.g., Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). Defendant's counsel was not ineffective for not issuing a subpoena for David Sorrells. Defendant has demonstrated no prejudice that resulted from not having Sorrells testify in person. Sorrells' testimony from the penalty phase of the Epps case was read to the jury. (T 1687). Defendant has submitted no proof which would indicate that Sorrells' live testimony would have been more beneficial than his transcribed testimony. Certainly, there is no reasonable probability that the outcome of the advisory sentence would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defendant's contention that more mitigating evidence should have been presented does not render his counsel ineffective. More, is not necessarily better. See Hall v. State, 614 So.2d 473 (Fla. 1993). Defendant's argument that his counsel should have attacked the prior conviction is without merit because not only would any current attack on the Epps conviction be time barred, but Defendant also fails to recognize that Defendant's prior violent felony conviction is a fact which his counsel would not have been able to suppress. See, e.g., Eutzy v. State, 541 So.2d 1143 (Fla. 1989); Johnson v. State 536 So.2d 1009 (Fla. 1988). Thus, there is no reasonable probability that the outcome would have been different had defense counsel attacked the Epps conviction. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Claim three (3) is without merit.

(PC III 428-29). Freeman does not challenge the circuit court's finding that counsel was not ineffective regarding the state's alleged Brady violations, and that holding should be affirmed. As to the other three instances of claimed ineffectiveness, Freeman does nothing but repeat the arguments made in his amended motion for postconviction relief. He presents nothing demonstrating error in the court's summary denial of this claim.

The record conclusively shows that counsel were not ineffective for not subpoenaing David Sorrells and that the trial court did not abuse its discretion in denying the defense motion for continuance. Turning to the second part of this claim first, it is obvious that not receiving the continuance is an appellate issue. It was not raised on direct appeal, however, and is procedurally barred now. E.g., Medina v. State, 573 So.2d 293 (Fla. 1990). Wike v. State, 596 So.2d 1020 (Fla. 1992), provides no basis for relief because it is factually distinguishable. Wike asked for a continuance so that his mother and ex-wife could testify for him. Under the facts of Wike this Court held that the trial court abused its discretion in not granting a continuance. No such abuse occurred here -- the jury heard Sorrells' testimony. Contrary to the statement that "the defense had not secured the presence of other witnesses for the penalty phase" (initial brief

at 25), Freeman's mother and brother and a mental health expert testified at the penalty phase. Claims that counsel was ineffective cannot revive a procedurally barred claim. Medina v. State, 573 So.2d 293 (Fla. 1990).

Moreover, Freeman has demonstrated no prejudice that resulted from not having Sorrells testify in person. In Sorrells' testimony that was read to the jury Sorrells said he did not know that Freeman had been convicted of first-degree murder, but, knowing that would not change his opinion of Freeman. (ROA XXXIX 1687). If Sorrells had testified at the second trial, he might well not have reached the same conclusion knowing that Freeman had been convicted of a second murder. Freeman's contention that live testimony from a friend who took the time to testify on behalf of a friend (initial brief at 24) is suspect because Sorrells apparently knew the defense wanted him to testify at the second trial, but he did not appear freely. Freeman has produced no affidavits or other proof that Sorrells' live testimony would have been more beneficial than his transcribed testimony. Freeman's current suppositions and speculations do not establish that counsel's failure to subpoena Sorrells prejudiced Freeman. See Rivera v. Dugger, 629 So.2d 105, 107 (Fla. 1993) (conjecture and second-guessing do not demonstrate ineffective performance).

Freeman also complains that counsel could have found and presented much more evidence about his character and background. This argument ignores the evidence presented at the penalty phase. Among other things, Freeman's mother testified that he never knew his real father and that his stepfather mistreated him. (ROA XXXIX 1627-31). Robert Jewell and David Sorrells corroborated and elaborated on Mrs. Freeman's testimony as did Dr. Legum. Freeman now claims that he could present more testimony from family members and from two other doctors who have examined him. More, however, is not necessarily better. The currently tendered witnesses would have been cumulative to those presented at the penalty phase, and their testimony would add more quantity than quality. Counsel cannot be branded ineffective for not presenting cumulative testimony. Rutherford v. State, no. 89,142 (Fla. Dec. 17, 1998); Valle v. State, 705 So.2d 1331 (Fla. 1997); Card v. State, 497 So.2d 1169 (Fla. 1986); see also Hall v. State, 614 So.2d 473 (Fla. 1993) (trial court did not abuse its discretion in refusing to let several family members testify where their testimony would be cumulative, repetitious, and redundant to other witnesses' testimony). Counsel tried to humanize their client and succeeded in convincing the trial court that several nonstatutory mitigators had been established. (ROA II 258). This was not ineffective

assistance even though unsuccessful in producing a sentence less than death. Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997). Moreover, the fact that Freeman has new experts does not necessarily mean that their testimony would have produced a better result or that counsel was ineffective. E.g., Rutherford v. State, no. 89,142 (Fla. Dec. 17, 1998); Turner v. Dugger, 614 So.2d 1075 (Fla. 1992); Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Correll v. Dugger, 558 So.2d 422 (Fla. 1990).

This is not a case where counsel failed to investigate. Cf., Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla. 1994). Instead, this is a classic postconviction claim where collateral counsel argues that trial counsel were ineffective based on more extensive and detailed information gathered years after the fact. As this Court has stated: "The fact that a more through and detailed presentation could have been made does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorough job being done." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986); see also Bryan v. Dugger, 641 So.2d 61 (Fla. 1994); Turner v. Dugger, 614 So.2d 1075 (Fla. 1992).

Applying the Strickland v. Washington admonition not to evaluate claims such as this through hindsight, it is obvious that counsel adequately prepared and presented Freeman's life history.

Freeman has failed to demonstrate substandard performance that prejudiced him.

Freeman also argues that counsel should have attacked his conviction for murdering Epps and should have prevented its being used to aggravate his sentence. Counsel objected to allowing Debra Epps to testify, and, on appeal, her testimony was found to be harmless. Counsel could not have done much more because he was confronted with a fact -- Freeman had been convicted previously of a violent felony. Freeman's complaint, especially about counsel's not convincing the jury that Darryl McMillion killed Epps, is really a lingering doubt argument. Lingering doubt, however, is not proper mitigation. Bogle v. State, 655 So.2d 1103 (Fla. 1995); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992). It is equally improper to argue lingering doubt about a crime other than the one for which a defendant is being sentenced. Failing to present an improper argument cannot be ineffective assistance. To the extent that this claim attempts to attack Freeman's conviction for murdering Epps, it is time barred and cannot be revived by alleging that counsel was ineffective.

Freeman has demonstrated no error in the circuit court's determination that the files and records conclusively show that counsel were not ineffective at the penalty phase. The circuit

court's summary denial of relief on this claim was proper and should be affirmed.

ISSUE III

WHETHER FREEMAN'S JURY WAS PROPERLY INSTRUCTED ON THE AGGRAVATORS.

Freeman argues that his jury received inadequate instructions on the felony murder, pecuniary gain, and heinous, atrocious, or cruel (HAC) aggravators. (Initial brief at 49-50). This issue is procedurally barred and should be summarily denied.

Freeman raised this claim in his amended motion for postconviction relief (PC SR II 248-58), and the circuit court denied the claim as follows:

> Defendant's fourth claim alleges that Defendant was denied his right to a reliable capital sentence because (1) his sentencing jury did not receive instructions guiding and channeling its sentencing discretion, and (2) the aggravating circumstances were improperly argued and imposed. At trial, Defendant objected under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), that the "heinous, atrocious, and cruel" (HAC) aggravator was too vague and that the facts did not support its use in this case. (T 1586). This Court incorporated language from State v. Dixon, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), into the HAC instruction by telling the jury:

> Four, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel. Especially wicked, atrocious, or cruel is defined as follows. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the normal capital felonies. The conscienceless or pitiless crimes which is unnecessarily torturous to the victim. (sic)

(T 1746-47). On direct appeal, the Florida Supreme Court held that because Defendant made no further objection, any complaint about the wording of the HAC instruction had not been preserved for appeal. Freeman v. State, 563 So.2d 73, 76 (Fla. 1990), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991). Also, the Florida Supreme Court found that the instruction did sufficiently limit the jury's discretion. Id. A defendant may not relitigate issues in a post-conviction motion that were raised on direct appeal. See, e.g., Bates v. Dugger, 604 So.2d 457 (Fla. 1992). Defendant's similar criticisms of the pecuniary gain and felony murder instructions are likewise procedurally barred because Defendant did not object to the adequacy of the jury instructions either at trial or in his original direct appeal. See, e.g., Sims v. Singletary, 622 So.2d 90 (Fla. 1993); Melendez v. State, 612 So.2d 1366, 1369 (Fla. 1992), *cert. denied*, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), *cert. denied*, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992). Thus, claim four (4) is without merit.

(PC III 429-30).

Freeman has demonstrated no error in the court's ruling. As the circuit court pointed out, Freeman challenged the HAC instruction on direct appeal, Freeman, 563 So.2d at 76, and could have challenged the other instructions if his complains about them had been preserved.[4] Postconviction proceedings are not to be used as a second appeal, and matters that were, or could or should have been, raised on direct appeal are procedurally barred when raised in a motion for postconviction relief. Blanco v. State, 702 So.2d 1250 (Fla. 1997); Bottoson v. State, 674 So.2d 621 (Fla. 1996); Chandler v. Dugger, 634 So.2d 1066 (Fla. 1994).

Therefore, this claim should be summarily denied.

ISSUE IV

WHETHER FREEMAN'S DEATH SENTENCE RESTS ON AN AUTOMATIC AGGRAVATOR.

Freeman argues that, because he was convicted of felony murder, applying the felony-murder aggravator to his case was improper and that trial counsel were ineffective for failing to raise this claim. The trial court correctly found this claim to be procedurally barred and that the allegation of ineffectiveness was insufficient to overcome the procedural bar. (PC III 430-31).

[4] There is no allegation of ineffective assistance of counsel in this claim.

Trial counsel challenged the application of an automatic aggravator in a pretrial motion (ROA I 30), and the court denied that motion. (ROA I 135). Freeman did not object to the jury's being instructed on the felony-murder aggravator and did not raise this claim on appeal. This issue is, therefore, procedurally barred in these proceedings. Rivera v. State, 717 So.2d 477 (Fla. 1998); Van Poyck v. State, 694 So.2d 686 (Fla. 1997); see Ferguson v. Singletary, 632 So.2d 53 (Fla. 1993) (raising a claim in a pretrial motion and not objecting at trial is insufficient to preserve that claim). There is also no merit to the claim. Blanco v. State, 706 So.2d 7 (Fla. 1997); Banks v. State, 700 So.2d 363 (Fla. 1997), cert. denied, 118 S.Ct. 1314 (1998); Johnson v. State, 660 So.2d 637 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996). Because there is no merit to it, counsel cannot have been ineffective regarding this claim. Melendez v. State, 612 So.2d 1366 (Fla. 1992).

Therefore, the trial court's denial of this claim should be affirmed.

ISSUE V

WHETHER PROSECUTORIAL MISCONDUCT RENDERED FREEMAN'S DEATH SENTENCE UNFAIR AND UNRELIABLE.

Freeman argues that the prosecutor improperly presented inflammatory evidence and made improper comments and arguments during the penalty phase and that trial counsel were ineffective for "failing to object to many of the improprieties and failing to present effective argument." (Initial brief at 52-62, quotation at 61). There is no merit to this issue.

Freeman raised this claim in his amended motion for postconviction relief. (PC SR II 263-78). The circuit court summarily denied the claim because the substance of the claim was raised and rejected on direct appeal and because the claim could not be relitigated under the guise of ineffectiveness. (PC III 431). Freeman has shown no error in the trial court's ruling.

As the court pointed out, the first part of this claim was raised on direct appeal, compare initial brief at 52-59 with appellate brief in case no. 73,299 at PC SR III 434-43, and rejected. Freeman, 563 So.2d at 75-76. Again, postconviction proceedings cannot be used as a second appeal, and allegations of ineffectiveness will not be allowed to circumvent that rule. Medina v. State, 573 So.2d 293 (Fla. 1990).

The second part of the claim as to the prosecutor's comments on mitigators (initial brief at 59-61) was not raised on direct appeal. However, this Court stated on appeal that it had

"carefully reviewed the closing argument and cannot say that reversible error occurred" and that the prosecutor's argument "fell far short of the circumstances" of Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984). Freeman, 563 So.2d at 76. Trial counsel did not object to the prosecutor's comments, but, in view of this Court's pronouncement that it studied the closing argument and found no reversible error, the failure to object does not constitute substandard performance that prejudiced Freeman. Ragsdale v. State, 23 Fla.L.Weekly S544 (Fla. October 15, 1998).

Freeman has failed to demonstrate error in the trial court's summary denial of this claim, and that denial should be affirmed.

ISSUE VI

WHETHER FREEMAN'S DEATH SENTENCE RESTS ON A UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION.

Freeman claims that his prior conviction for murdering Alvin Epps was unconstitutionally obtained because "[t]his Court did not know that the prior conviction rested on the perjured testimony of Darryl McMillion" and that his death sentence for killing Leonard Collier was wrongly aggravated by the Epps' conviction. (Initial brief at 62-66, quotation at 65). There is no merit to this claim.

Freeman raised this claim in his amended motion for postconviction relief. (PC SR II 278-84). The circuit court summarily denied this issue because the propriety of using the Epps' conviction to aggravate the sentence for Collier's murder had been raised on direct appeal and this claim was, therefore, procedurally barred in postconviction proceedings. (PC III 431). As the circuit court stated, this Court rejected this claim on direct appeal when it noted that Freeman's conviction for killing Epps had been affirmed. Freeman, 563 So.2d at 77.

Freeman has presented nothing in his brief on appeal to demonstrate that the circuit court erred regarding this claim. Instead, he merely repeats the argument from his amended postconviction motion.[5] This claim is procedurally barred and should be summarily denied.

ISSUE VII

WHETHER THE CIRCUIT COURT ERRED IN SUMMARILY DENYING FREEMAN'S BURDEN-SHIFT CLAIM.

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[5] No allegation of trial counsels' ineffectiveness is included in this claim. This Court's opinion affirming Freeman's conviction of the Epps' murder, Freeman v. State, 547 So.2d 125 (Fla. 1989), became final in August 1989. Any complaint in this issue about that conviction is time barred because it was raised more than two years after the Epps' conviction became final. Bundy v. State, 538 So.2d 445 (Fla. 1989); White v. Dugger, 511 So.2d 554 (Fla. 1987); see also Johnston v. State, 708 So.2d 590 (Fla. 1998).

In his amended postconviction motion Freeman argued that the penalty-phase jury instructions improperly shifted to him the burden of demonstrating that a sentence of life imprisonment was appropriate and that trial counsel was ineffective for not objecting to the instructions. (PC SR II 284-91). The circuit court found the merits of the claim to be procedurally barred and the allegation of ineffectiveness insufficient to overcome the procedural bar. (PC II 430-31). Freeman repeats the argument made in the amended motion, but has demonstrated no error in the circuit court's ruling.

Trial counsel raised the burden-shifting claim in a pretrial motion attacking the constitutionality of the death penalty. (ROA I 34). The trial court denied that motion (ROA I 135) during a motion hearing (ROA XXXVII 1122), but Freeman did not object when the court instructed the jury. (ROA XXXIX 1610; XL 1747). Because Freeman did not object to the complained-about instruction in a timely manner and raise this claim on direct appeal, it is procedurally barred. Ragsdale v. State, 23 Fla.L.Weekly S544 (Fla. October 15, 1998); Diaz v. Dugger, 23 Fla.L.Weekly S332 (Fla. June 11, 1998); see Ferguson v. Singletary, 632 So.2d 53 (Fla. 1993) (raising a claim in a pretrial motion and not objecting at trial is

insufficient to preserve that claim). The circuit court correctly found this claim to be procedurally barred.

Moreover, as this Court has held repeatedly, there is no merit to the burden-shifting claim. Demps v. Dugger, 714 So.2d 365 (Fla. 1998); Shellito v. State, 701 So.2d 837 (Fla. 1997), cert. denied, 118 S.Ct. 1537 (1998). Because the basic claim has no merit, counsel cannot have been ineffective regarding it. See Turner v. Dugger, 614 So.2d 1075 (Fla. 1992); Melendez v. State, 612 So.2d 1366 (Fla. 1992); Parker v. State, 611 So.2d 1224 (Fla. 1992). The circuit court correctly found that the claim of ineffectiveness should fail.

This Court should affirm the circuit court's holding this claim to be procedurally barred.

ISSUE VIII

WHETHER THE CIRCUIT COURT ERRED IN DENYING THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE AND THAT THE STATE WITHHELD EXCULPATORY EVIDENCES IN FREEMAN'S TRIAL FOR KILLING ALVIN EPPS.

Freeman claims that the state withheld exculpatory information in the Epps' trial regarding Darryl McMillion and his half-brother, Douglas Freeman, in violation of Brady v. Maryland, 373 U.S. 83 (1963). (Petition at 67-74). Although the title of the issue mentions ineffectiveness, the text of the issue contains no claim of trial counsels' ineffectiveness. Freeman raised this issue in his amended motion for postconviction relief. (PC SR II 291-305). The circuit court summarily denied this claim as time barred:

> Defendant's ninth claim asserts that the state withheld exculpatory evidence and thereby denied Defendant a reliable adversarial testing and effective assistance of counsel in his trial for killing Alvin Epps. Florida Rule of Criminal Procedure 3.850(b) states that no motion for post-conviction relief shall be filed or considered if filed, "more than 2 years after the judgment and sentence become final" unless (1) the facts on which the claim is predicated were "unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or (2) the fundamental constitutional right asserted was not established within the time provided and has been held to apply retroactively." Defendant was convicted of the first degree murder of Alvin Epps in case # 87-3527-CF. The Florida Supreme Court affirmed that conviction but reduced his death sentence to

> life imprisonment in 1989. Freeman v. State, 547 So.2d 125 (Fla. 1989). Defendant had until 1991 to file any claims for post-conviction relief regarding the Epps case. Fla.R.Crim.P. 3.850(b). Defendant did not file his post-conviction motion until June 29, 1992. Thus, any attack on Defendant's conviction in the Epps case is time barred because it was not filed within two (2) years of that conviction being final. See, e.g., Eutzy v. State, 541 So.2d 1143 (Fla. 1989); Johnson v. State, 536 So.2d 1009 (Fla. 1988).

(PC III 431-32). The circuit court correctly found that Freeman's complaints about his conviction of Epps' murder are time barred. Freeman has presented nothing that would overcome the procedural default, i.e., a valid claim of newly discovered evidence, and the circuit court's summary denial of relief should be affirmed. See Pope v. State, 702 So.2d 221 (Fla. 1997).

The circuit court also found this claim to have no merit:

> Even if claim nine (9) were not time barred, it has no merit. Defendant seeks an exception to the time bar due to "critical exculpatory evidence withheld from Mr. Freeman" including statements made by Darryl McMillion, Douglas Freeman, and Dudly Gang. Defendant knew about Darryl McMillion, as the state disclosed McMillion's name on September 1, 1987. (Epps record at 278). Defendant was granted his motion to have McMillion transported so that he could be deposed on September 3, 1987. (Epps record at 281). Douglas Freeman is the Defendant's half-brother and he is listed on both the State's and Defendant's discovery responses. (Epps record at 13, 26, 40). Defendant also knew about Dudley Gang immediately after trial.

> (Epps record at 460). Thus, with reasonable diligence Defendant could have obtained the information which he now asserts was withheld in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). There is no Brady violation where the alleged exculpatory information is equally accessible to the defense and the prosecution, or where the defense could have obtained it through the exercise of reasonable diligence. See, e.g., Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993); Roberts v. State, 568 So.2d 1255 (Fla.1990. Couching this issue in an ineffective assistance of counsel claim is also improper. See, e.g., Bates v. Dugger, 604 So.2d 457 (Fla. 1992). Defendant's claim nine (9) warrants neither a hearing nor relief.

(PC III 432). The record of the Epps' trial supports the circuit court's conclusions (PC SR II 445-51) and demonstrates that Freeman's current complaints are baseless. For example, Freeman now states that the circuit "court admits that the witness that the state hid during trial, Dudley Gang, was not revealed to trial counsel until after trial." (Initial brief at 73). As the record demonstrates, Gang was a defense witness whose name was given to the state after Freeman was convicted of killing Epps, but before he was sentenced for that crime. (PC SR II 445).

Freeman has shown no error in the circuit court's denial of this claim, and its ruling should be affirmed.

ISSUE IX

WHETHER THE STATE'S DECISION TO SEEK THE DEATH PENALTY FOR FREEMAN WAS BASED ON RACIAL CONSIDERATIONS.

Freeman argues that the state rejected his unilateral offer to plead guilty because it "wanted to 'get the numbers up' on seeking the death penalty in homicides involving white defendants and black victims." (Initial brief at 74). He includes a single-sentence statement that trial counsel was ineffective for not litigating this issue. (Initial brief at 76). He has failed, however, to demonstrate error in the circuit court's denial of this claim.

The circuit court stated the following in denying this claim:

> Defendant's tenth claim asserts that the State's decision to seek the death penalty was improperly based on racial considerations. The United States Supreme Court held that when proffering such a race discrimination challenge, the defendant "must prove that the decisionmakers in *his* case acted with discriminatory purpose." McClesky v. Kemp, 481 U.S. at 279, 292, 107 S.Ct. 1756, 1767, 95 L.Ed. 262 (1987) (rejecting defendant's claim because he offered no evidence specific to his own case to support an inference that racial considerations played a part in his sentence). Here, Defendant's claim suffers from the same defect. He has offered nothing to suggest that the state attorney's office acted with purposeful discrimination in seeking the death penalty in this case. See Harris v. Pulley, 885 F.2d 1354, 1375 (9th Cir. 1988), *cert. denied*, 493 U.S. 1051, 110 S.Ct. 854, 107 L.Ed.2d 848 (1990) (stating that a defendant is not entitled to an evidentiary hearing where he offered no proof that decisionmakers in his case acted with discriminatory

> purpose). Framing his argument in ineffective assistance of counsel language will not avoid the procedural bar. See, e.g., Bates v. Dugger, 604 So.2d 457 (Fla. 1992), Medina v. State, 573 So.2d 293 (Fla. 1990). Defendant's claim merits neither a hearing nor relief.

(PC III 433). This is the type of claim that can and should be raised on direct appeal. E.g., Foster v. State, 614 So.2d 455 (Fla. 1992). The circuit court, therefore, properly found the claim to be procedurally barred.

Freeman states that his allegations that the state refused to participate in plea negotiations and that his trial occurred in the same time period as a highly publicized trial are sufficient to establish a constitutional violation. (Initial brief at 75-76). As the court found, however, this claim is insufficiently pled as a matter of law, see Valle v. State, 705 So.2d 1331, 1334 (Fla. 1997, and the conclusory allegation of ineffectiveness is insufficient to overcome the procedural bar. This argument also ignores the fact that deciding who to prosecute for what crime, what sentence to seek, and whether to offer a plea are executive functions of a state attorney's office with which courts do not interfere. State v. Bloom, 497 So.2d 2, 3 (Fla. 1986) ("Under Florida's constitution the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute").

Freeman has shown no error in the circuit court's summary denial of this claim, and that court's order should be affirmed.

ISSUE X

WHETHER THE TRIAL COURT PROPERLY DENIED FREEMAN'S CUMULATIVE-ERROR CLAIM.

As the last issue in his amended motion for postconviction relief, Freeman claimed that his trial was fraught with errors that deprived him of a fair trial. (PC SR II 124-29). After noting that the claim contained "no particular allegations or citations to the record, nor any indication of the true nature of the claim," the circuit court summarily denied it: "By not specifically stating the basis for post-conviction relief, claim eleven (11) is facially insufficient and relief will be denied." (PC III 433). Freeman merely restates the claim on appeal (initial brief at 76-78), but has failed to demonstrate any error in the court's ruling.

Under rule 3.850 a postconviction movant must identify the claims that demonstrate the prevention of a fair trial. Conclusory allegations, however, are insufficient to plead a valid claim for relief. Valle v. State, 705 So.2d 1331 (Fla. 1997); Jackson v. Dugger, 633 So.2d 1051 (Fla. 1993); Phillips v. State, 608 So.2d 778 (Fla. 1992); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Smith v Dugger, 565 So.2d 1293 (Fla. 1990); Kennedy v. State, 547

So.2d 912 (Fla. 1989). The trial court properly denied this claim as insufficiently pled. See Rivera v. State, 717 So.2d 477 (Fla. 1998).

The circuit court's denial of this claim should be affirmed.

ISSUE XI

WHETHER THE CIRCUIT COURT ERRED BY NOT ATTACHING PORTIONS OF THE RECORD TO ITS ORDER.

Freeman argues that this case should be remanded for an evidentiary hearing because the circuit court did not attach portions of the record to its order. As this Court stated in Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), however: "To support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." Rather than attaching portions of the record, the circuit court stated its rationale for denying both an evidentiary hearing and relief for each claim that Freeman raised. (PC III 424-34). Freeman has demonstrated no error, and the circuit court's order should be affirmed. Diaz v. Dugger, 23 Fla.L.Weekly S332 (Fla. June 11, 1998); Demps v. Dugger, 714 So.2d 365 (Fla. 1998); Mills v. State, 684 So.2d 801 (Fla. 1996).

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm the trial court's denial of Freeman's motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Terri Backhus, Post Office Box 3294, 100 South Ashley Drive, Suite 1300, Tampa, Florida 33601-3294, this 17th day of December, 1998.

____

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