IN THE SUPREME COURT OF FLORIDA

ERNEST CHARLES DOWNS,

Appellant,

v. Case #: **90,510**

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

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK S. DUNN
Assistant Attorney General
Florida Bar #0471852

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 414-4580

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

FLORIDA STATUTES

OTHER

STATEMENT OF THE CASE AND FACTS

I. Procedural History

Downs was originally convicted of First Degree murder and Conspiracy to Commit First Degree Murder, and was sentenced to death in ***1977***.[1] On direct appeal to this Court, Downs raised the following issues:

> 1. the trial court erred in admitting into evidence diagram GE #11 prepared by witness Johnson outside the courtroom for use in the courtroom;
>
> 2. the prosecutor's interruptive outburst attacking defense counsel during defense reply summation deprived Downs of due process;
>
> 3. the four day delay and nonsequestering of the jury between the end of the guilt phase and the beginning of the penalty phase deprived Downs of due process;
>
> 4. the trial court erred in failing to instruct the jury that life imprisonment meant a minimum of 25 years with no parole;
>
> 5. Downs was deprived of his right to an impartial

---

[1] Appellant was the Defendant in the trial court below. Appellee, THE STATE OF FLORIDA, was the prosecution. Henceforth, Appellant will be identified as "Downs" or Defendant. Appellee will be identified as the "State". References to the Record and Transcript in Downs' original direct appeal will be designated "R" and "T" respectively. References to the record in Downs' appeal from the denial of his post-conviction motions will be designated "PCR"; and references to the record and transcript in Downs' appeal from resentencing will be designated by "R2" and "T2" respectively. All references will be followed by appropriate page numbers. References to the record in ***this cause*** shall be by volume and page number. Thus, II/30 refers to volume II, page 30 of the current record. The supplemental record will be "S" followed by the page number. Thus, S/20 refers to supplemental volume, page 20. "p" designates pages of Downs' brief. All emphasis is supplied unless otherwise indicated.

jury under the Sixth and Fourteenth Amendments and the *Witherspoon* doctrine;

6. Section 921.141 violates the Eighth and Fourteenth Amendments as applied in this case and as applied in all capital cases under Florida law because it prevents the sentencers from considering any mitigating circumstances except the seven statutory mitigating circumstances;

7. the prosecutor's unbridled and unchecked grant of immunity to one co-murderer while demanding death for the alleged second co-murderer violates the cruel and unusual punishment clause of the Eighth Amendment, the due process clause of the Fourteenth Amendment, and the equal protection clause of the Fourteenth Amendment;

8. Downs was deprived of due process by not being allowed to take depositions on videotape;

9. the trial court's curtailment of defense inquiry deprived Downs of his right to cross examine a witness;

10. Downs was deprived of his right to have compulsory process for obtaining witnesses in his favor by the Court's quashing subpoena and excluding certain evidence;

11. the trial court erred in admitting Downs' statements into evidence these admissions were not voluntary;

12. the trial court erred in admitting into evidence the hypothetical question propounded by the medical examiner;

13. the trial court invaded the province of the jury by commenting on the evidence;

14. the evidence was insufficient to support the jury verdicts and judgments of guilt;

15. the death sentence was inappropriate in the case.

This Court affirmed the judgments and sentence. *Downs v. State*

[*Downs I*], 386 So.2d 788 (Fla.), *cert. denied*, 449 U.S. 976 (1980).

Downs filed two post-conviction motions in the trial court. On June 21, 1982, Downs filed his first motion, raising the following claims:

> 1. ineffective assistance of trial counsel during the guilt phase;[2]
>
> 2. the contingent fee arrangement between Downs and his counsel created a conflict of interest which violated Downs' right to the effective assistance of counsel;
>
> 3. Downs' statements were improperly admitted at trial because they were extracted from him in an impermissibly coercive manner;
>
> 4. Downs was not tried by an impartial jury drawn from a fair cross section of the community;
>
> 5. "death-qualified" jurors were improperly excused under *Witherspoon*;
>
> 6. the manner in which Johnson was awarded immunity cast too big a shadow on his testimony to meet the reliability standard;
>
> 7. Downs' death sentence was neither proportionate nor consistent;
>
> 8. the disparity of the fates of the co-conspirators requires that Downs not be sentenced to death;
>
> 9. ineffective assistance of trial counsel at sentencing;

---

[2] Specifically, Downs alleged trial counsel "made only a meager pre-trial investigation of the facts, presented an unreal theory for a defense in his brief opening statement, mishandled his dealings with the prosecution during its case and, most importantly and tragically, forsook his opportunity to present an affirmative defense." (PCR 736)

10. the trial court improperly limited the mitigating circumstances the jury could consider and limited itself to considering only statutory mitigation;

11. the prosecutor argued the applicability of the heinous, atrocious, or cruel (HAC) aggravating factor, and the trial court instructed the jury on same, even though the court later found that HAC was not present;

12. the jury and the trial court improperly considered "prior record of violent crime" as an aggravating circumstance when this aggravating factor did not exist;

13. Downs' death sentence was disproportionate.

14. the jury did not know that Barfield had received a life sentence;

15. Downs' trial counsel was reprimanded by the Florida Bar;

16. the State failed to disclose the contents of Johnson's polygraph test and tapes of statements of the murder victim;

17. a psychiatric evaluation and other materials were submitted *ex parte* to this Court. (PCR 712-826)

On April 11, 1983, Downs filed a second supplemental post-conviction motion, arguing that numerous actions by the prosecutor constituted such impermissible misconduct as to deprive him of due process. (PCR 1839-48)

Downs received evidentiary hearings on his motions in October, 1982 and January, 1983. The trial court denied the motions, addressing each claim in detail in its order of denial (PCR 1915-20). On appeal from the order of denial, Downs argued:

> that a statement made by the prosecutor to the trial judge at sentencing tainted the sentencing process; that sentencing him to death violates the rule for proportionality of sentences; that he should get a new sentencing hearing because the prosecutor informed the jury that Barfield was going to trial for First Degree Murder; that he should not have been sentenced to death because the manner in which immunity was awarded to Johnson cast a shadow on the reliability of Johnson's testimony; that his death sentence should be vacated because of erroneous jury instructions on aggravating and mitigating factors; that the trial court erred in denying him reasonable expenses to employ experts to prove that the death penalty is being imposed unconstitutionally in Florida; that the jury that convicted him was not fair and impartial and was "death qualified" under Witherspoon standards; and that his statement implicating him in the murder was not voluntary and that there was insufficient evidence upon which to convict him.

Downs v. State [*Downs II*], 453 So.2d 1102, 1103 (Fla. 1984). This Court declined to "consider these issues because they were or could have been raised on direct appeal and are not proper grounds for post-conviction collateral proceedings." *Id.* at 1103-04. This Court further opined:

> Downs raises several other points which are appropriate grounds for collateral attack. He argues that he was denied effective assistance of counsel at the guilt and penalty phases of his trial; that the contingent fee contract between him and his defense counsel created a conflict of interest which violated his right to effective assistance of counsel; and that his sentence should be vacated because his counsel was privately reprimanded by the Bar for conduct in this case. Downs also alleges several *Brady* violations. Finally, he maintains that he is entitled to a de novo post-conviction hearing before a new judge because the present trial judge is biased against him. We find no merit to any of these claims and

hold that the trial court ruled correctly.

Id. at 1104 (footnote omitted).

Downs filed a Petition for Writ of Habeas Corpus with this Court, alleging that he received ineffective assistance of appellate counsel and that appellate review had been based on an improper record. The Court held that Downs had failed to allege specific acts or omissions of appellate counsel that constituted a serious deficiency in his performance, and had failed to establish prejudice. This Court found Downs' second claim to be without merit. Accordingly, this Court denied the petition. *Downs v. Wainwright* [*Downs III*], 476 So.2d 654 (Fla. 1985).

Under warrant, Downs petitioned this Court for a stay of execution and for a writ of habeas corpus. In *Downs v. Dugger* [*Downs IV*], 517 So.2d 1069 (Fla. 1987), this Court granted the writ, stayed the execution, and remanded for a new sentencing hearing based upon *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

Upon resentencing, the trial court followed the jury's recommendation and again imposed the death sentence. On direct appeal to this Court, Downs raised these issues:

> 1. the trial court erred in failing to find any mitigation and/or in not stating with clarity what mitigation it found;
>
> 2. Downs' death sentence was disproportionate;
>
> 3. the Court erred in admitting the former testimony of Johnson;
>
> 4. the Court erred in quashing Downs' subpoena of

> the State Attorney so that Downs could question him regarding his granting Johnson immunity;
>
> 5. the Court erred in excluding the perpetuated deposition testimony of Betty Jo Michael which allegedly would have shown that Downs was not the triggerman;
>
> 6. the trial court erred in not instructing the jury that they could consider any doubt they had that Downs was the triggerman as a mitigating factor;
>
> 7. the trial court erred in excluding several mitigating facts from the jury's consideration which denied Downs a fair resentencing;
>
> 8. the trial court erred in improperly instructing the jury that Downs would be given credit for the time he had already spent in prison;
>
> 9. the trial court erred in not requiring Downs' presence during the discussion regarding a question the jury asked;
>
> 10. the trial court erred in retrospectively applying the cold, calculated, and premeditated (CCP) aggravating factor.

This Court affirmed Downs' second death sentence. *Downs v. State* [*Downs V*], 572 So.2d 895 (Fla. 1990).

On September 6, 1994, Downs filed his second amended motion for post-conviction relief, which is the subject of this appeal (I 1-94). His claims were as follows:

> 1. files and records maintained by State agencies have been withheld from Downs;
>
> 2. the State has denied Downs access to his own trial file;
>
> 3. the State withheld material and exculpatory evidence from Downs, and as a result, defense counsel was ineffective;

4. the trial court improperly instructed the jury on CCP;

5. the trial court improperly instructed the jury on Downs' previous conviction of a violent;

6. the trial court improperly instructed the jury on the pecuniary gain aggravating factor;

7. the trial court improperly instructed the jury that one single act supported two separate aggravating factors;

8. the mental health expert who evaluated Downs for resentencing failed to conduct professionally competent and appropriate evaluations;

9. ineffective assistance of counsel during pretrial and the guilt/innocence phase of Downs' trial;

10. newly discovered evidence establishes that Downs' conviction and sentence are unreliable;

11. ineffective assistance of trial counsel at resentencing;

12. the trial court and this Court failed to address the existence of statutory and nonstatutory mitigation established by evidence in the record;

13. the trial court improperly shifted the burden of proof in its instructions to the jury;

14. the trial court erred by failing to conduct an adequate *Faretta* inquiry into whether Downs voluntarily, knowingly, and intelligently waived his right to counsel;

15. Downs' conviction and resentence were unreliable due to the ineffective assistance of counsel, withholding of exculpatory or impeachment material, newly discovered evidence, improper rulings by the trial court, or all of the preceding;

16. cumulative fundamental error based on

procedural and substantive errors. (I/1-94)

As with Downs' original post-conviction motions filed in 1983, the trial court denied this latest motion, addressing each claim in detail in its order of denial (II/175-190). This appeal follows.

The trial court's order of 3/13/97 denying Downs' motion for post-conviction relief is attached hereto as Exhibit "A". The trial court's order of 8/4/94 denying Downs' motion to compel on Sheriff Office and State Attorney 119 materials is attached as Exhibit "B".

II. Facts On Resentencing

The facts as found by this Court, Barkett, J., on Downs' appeal of resentencing were as follows:

> Evidence presented by the state at the resentencing trial showed that Forrest Jerry Harris, Jr., a Jacksonville bank executive, was shot at a clandestine location in Jacksonville in April 1977. His body was not discovered until August 1977. Medical testimony revealed that Harris had been shot four times in the head and once in the midsection of the body with a .25-caliber gun. Any of the wounds could have been fatal.
>
> The murder resulted from a conspiracy formed by Ron Garelick, who plotted to kill Harris so that he could collect proceeds from an insurance policy. The conspiracy involved at least six people at various times. (footnote omitted) It started in 1976 with Garelick, John Barfield, Gerry Ralph Sapp, and Huey Austin Palmer. After those individuals failed to kill Harris, Barfield approached Downs on April 18, 1977, and offered him $5,000 to kill Harris. Downs agreed and enlisted the help of Larry Johnson. Barfield subsequently met with Downs and Johnson. Barfield told them Harris expected a telephone call from a man named

Green. On April 23, 1977, Johnson, identifying himself as Green, called Harris and arranged to meet him at the end of a dirt road. There is a dispute among the parties as to what happened next.[3]

Johnson had testified for the state under a grant of full immunity in the guilt phase of Downs's [sic] first trial in 1977. Johnson was unavailable to testify in the resentencing proceeding in 1989, so the state read to the jury Johnson's prior sworn testimony. Johnson said that he did not want to kill Harris. Instead, he said, Downs insisted that he call Harris to lure him to meet at the dirt road. Downs drove Johnson to the end of the dirt road, dropped him off, gave him a .45-caliber

---

[3] On his original appeal, this Court found as follows:

> The record in the present case establishes that Johnson and Downs were not equally situated and reveals that Downs accepted the contract to kill, formulated the scheme, solicited Johnson's participation, and shot the victim, although Johnson had attempted to dissuade him from going through with the killing and even told Downs that he was not going to help him with the killing. Johnson testified that because he was fearful that Downs might shoot him, he went along with Downs, but again informed Downs that he was not going to kill Harris but Downs would have to do the killing himself. When Downs left Johnson with a machine gun, at the end of the dirt road to await Downs' and Harris' return, Johnson testified that he hid the gun under some boards because he had no intention of using it.
>
> Later, while Downs was in Alabama, Johnson came forward and advised a detective for the Jacksonville [S]heriff's [D]epartment of the murder. He testified that he had not come forward before because he was afraid that Downs would take revenge on him or his family and because he feared he would be arrested for murder. With Downs far removed in Alabama, he no longer feared Downs' revenge. ...

Downs I, at 796.

> machine gun, and went to pick up Harris. Downs returned with Harris shortly thereafter, Johnson said. When Harris started talking to Johnson, Downs pulled out a .25-caliber automatic pistol and fired at Harris, Johnson said. Downs stumbled and fell, righted himself, fired three more times, fell into the side of the truck, spun around, fired three times more, and stumbled to the ground. Johnson said Harris staggered and fell. Downs went over to Harris, put the gun to his head, and fired again. Johnson said he and Downs dragged Harris's body to the woods nearby, where they emptied his pockets. Then, Johnson testified, Downs wanted to shoot Harris again, so Downs loaded another shell into his pistol and fired a final shot into Harris's chest. The next morning, Johnson said, he and Downs went to Barfield's house. Downs showed Barfield Harris's [sic] driver's licence [sic] to prove that he killed Harris. Barfield gave Downs $500 at that time, and later made two more payments of $1,000 and $2,700, respectively.
>
> Johnson's testimony was corroborated in part by various witnesses. Sapp testified that he heard Downs discuss the conspiracy with Barfield. He said Downs remarked that he was going to kill a man for $5,000; that Barfield distrusted Johnson; and that Downs agreed to show Barfield proof of the killing. Investigator Pat Miles and Detective Leroy Starling testified that in 1977 Barfield told them he solicited Downs to do the killing; that Downs agreed to kill Harris for $5,000; and that Downs presented Harris's [sic] driver's licence [sic] as proof of the murder.

Downs V, at 897.

SUMMARY OF THE ARGUMENT

I.

All public records Downs was entitled to were provided to him. As regards the State Attorney files, Downs received all 119 materials, except those which the trial court determined, after an *in camera* inspection, were exempted. Similarly, all 119 materials from the Sheriff's Office were provided, and Downs failed to show there were any other materials other than those which he received.

II.

The State did not withhold *Brady*[4] material. The claim is procedurally barred. This Court has previously determined trial counsel provided effective representation during resentencing. Downs attempts to circumvent the procedural bar by alleging ineffective assistance of counsel.

III.

Downs never raised a vagueness challenge to his CCP instruction at his resentencing. The claim is procedurally barred. He attempts to circumvent the procedural bar by alleging ineffective assistance of counsel. The murder was CCP under any definition of the terms.

IV.

Downs never raised a vagueness challenge to his instruction on

---

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

prior violent felony. The claim is procedurally barred. He attempted to circumvent the procedural bar by alleging ineffective assistance of counsel. The aggravator existed no matter how defined.

V.

Downs never raised a vagueness challenge to his pecuniary gain instruction. The claim is procedurally barred. He attempted to circumvent the procedural bar by alleging ineffective assistance of counsel. The aggravator existed no matter how defined.

VI.

The trial court found Downs' sixth claim was patently false, procedurally barred, and devoid of merit. He attempted to circumvent the procedural bar by alleging ineffective assistance of counsel.

VII.

Doctor Krop conducted a proper investigation and evaluation of Downs' mental health. Simply because he has found a new expert who will say what he wants him to say, is insufficient grounds for relief. Dr. Krop's favorable mitigation testimony outweighed the single complaint Downs had regarding the same.

VIII.

Downs' claim concerning assistance of counsel at stages before and during the guilt phase of his original trial is procedurally barred as successive. Again, this Court has previously determined

Downs' original counsel was effective.

IX.

Downs' alleged new evidence was known at his original trial. His new evidence, if true, merely supplants one co-conspirator with another. He admitted he was involved in the conspiracy to commit murder. This Court determined that there was substantial, competent evidence to support the trial court's conclusion that Downs was the triggerman in a cold-blooded contract murder.

X.

This claim is procedurally barred. Downs elected to represent himself at resentencing. Much of what he complains was not presented in mitigation was, and anything else he would have presented would have been outweighed by overwhelming aggravation.

XI.

The trial court properly weighed all statutory and non-statutory mitigation in determining death was the appropriate sentence in this cause. This Court found the trial court applied the right rule of law, and competent evidence supported its determinations in this regard.

XII.

This claim is procedurally barred. The trial court properly instructed the jury on the burden of proof.

XIII.

This claim is procedurally barred. The trial court conducted

the proper inquiry, and determined that he was freely, voluntarily, and intelligently waiving counsel, before it allowed Downs to proceed *pro se*.

XIV.

This claim is procedurally barred. Downs received full due process of law at his resentencing, and it was free of any reversible error.

ARGUMENT

ISSUE I

THE TRIAL COURT CONDUCTED NUMEROUS HEARINGS REGARDING DOWNS' CHAPTER 119 CLAIMS AND IT ENSURED THAT THE DOCUMENTS TO WHICH HE WAS ENTITLED WERE PROVIDED TO HIM.

In its order denying Downs' second amended motion for post-conviction relief, the trial court addressed Downs' public records claims as follows:

> Hearings were held as to the defendant's public records claims (grounds one and two of the defendant's instant motion) on June 27, 1994 (T.6/27/94), July 11, 1994 (T.7/27/94), September 23, 1994 (T.9/23/94), December 16, 1994 (T.12/16/94), and May 12, 1995 (T.5/12/95).[5] A hearing was also held on August 2, 1996 (T.8/2/95)[6], pursuant to *Lopez v. Singletary*, 634 So.2d 1054 (Fla. 1993), at which time counsel were permitted to present arguments on all of the claims and to argue whether an evidentiary hearing would be necessary on each of the respective claims. No evidentiary hearing was held on any of the defendant's remaining claims, as the defendant's sworn motion and the record on appeal of the various proceedings held in this case to date adequately refute the defendant's claims without a need for any further hearings. *Lopez v. Singletary, supra; Swafford v. State*, 569 So.2d 1264 (Fla. 1990); *Kennedy v. State*, 547 so.2d 912 (Fla. 1989); *Delap v. State*, 505 So.2d 1321, 1322 (Fla. 1987). (II/176)

It specifically found, regarding Downs' Chapter 119 claims, as follows:

> In grounds one and two of his instant motion, the

---

[5] (II/229-372; III/374-398)

[6] (III/399-461)

> defendant claims that he was not provided with documents pursuant to his public records requests to several State agencies. As noted above, numerous hearings were held on these claims and this Court ensured that the documents to which the defendant was entitled were provided to him. (T.6/27/94, T.7/27/94, T.9/23/94, T.12/16/94, T.5/12/95, T.8/2/95)[7] Any documents that were claimed to be exempt from a public record disclosure were submitted to this Court for an ***in camera*** review by this Court pursuant to *Walton v. Dugger*, 634 So.2d 1059 (Fla. 1993). (T.6/27/94, pages 42-46.)[8] Based on the above, this Court finds the defendant's public records claims in grounds one and two are without merit. (Order filed on August 4, 1994, with attached exhibits.) *Mills v. Florida*, 21 Fla. L. Weekly S801 (Fla. December 4, 1996)[9]; *Atkins v. State*, 663 So.2d 624 (Fla. 1995). Further, this Court finds the defendant's claims that the failure to provide records caused collateral counsel to be ineffective and prevented the defendant from raising additional claims to be without merit. On May 12, 1995, the defendant was given an additional forty-five (45) days in which to file any amendments to his motion that he needed to make based on the additional information that this Court ensured was made available to him. No amendments nor amended motion was filed. (II/177)

A. <u>All Public Records Downs Was Entitled To Were Provided to Him</u>.

The State respectfully submits Downs' first claim is waived. *Lopez v. Singletary, supra*, at 1058. Downs filed his second amended motion for post-conviction relief on September 6, 1994 (I/1-94). As previously delineated by the trial court's order supra, it conducted numerous hearings on Downs' 119 requests prior

---

[7] (II/229-372; III/374-461)

[8] (II/270-74)

[9] *Mills v. State*, 684 So.2d 801 (Fla. 1996).

to and subsequent to the filing of the second amended motion. It specifically found:

> On May 12, 1995, the defendant was given an additional forty-five (45) days in which to file any amendments to his motion that he needed to make based on the additional information that this Court ensured was made available to him. No amendments nor amended motion [were] filed. (I/152; II/177)

In addition, an order by the Chief Circuit Judge, Donald R. Moran, issued August 24, 1995, found:

> 1. Defendant previously filed motions requesting extensions of time in order to file a ***Third*** Amended 3.850 Motion.
>
> 2. ***Defendant has represented to this Court that he has no basis on which to amend his previous motion and is, therefore, relying on the Second Amended 3.850 Motion filed on September 8, 1994.***[10]
>
> 3. No future amendments of said 3.850 Motion shall be filed without leave of the Court.
>
> 4. The State shall have thirty (30) days from this date to respond to the Second Amended 3.850 Motion.
>
> 5. A status hearing will be scheduled upon Judge Pate's return. (I/151)

Given Downs' admission to Judge Moran that he had no basis upon which to amend his September 6, 1994 motion, his first claim, if not waived, is most certainly moot.

On the merits, the trial court noted for the record, regarding Downs' public records requests, "numerous hearings were held on

---

[10] The date the second amended motion was filed was actually (9/6/94).

these claims ... (T.6/27/94, T.7/27/94,[11] T.9/23/94, T.12/16/94, T.5/12/95, T.8/2/95)." (II/177, 229-372; III/374-461). Pursuant to those hearings the trial court "***ensured that the documents to which the defendant was entitled were provided to him.***" (II/177) Documents for which exemptions were claimed were submitted to it "for an ***in camera*** review ...pursuant to *Walton v. Dugger*, [*supra*]. (T.6/27/94, pages 42-46)." (II/270-74) The trial court concluded "defendant's public records claims in grounds one and two are without merit." (II/177)

In reaching the conclusion that Downs' 119 claims were devoid of merit, the trial court cited to its own order of August 4, 1994, which read in pertinent part as follows:

> On the issue as to Jacksonville Sheriff's Office (hereinafter referred to as JSO) records, the Court has further considered Exhibits 1 and 2 and the testimony of Stephen Hicks. The Court finds the evidence uncontroverted that all records of JSO have been provided defense. ***Mere suspicion*** that there is more does not warrant an evidentiary hearing for discovery on this 3.850 proceeding.
>
> As to the records of the State Attorney, it was agreed to reserve ruling on any missing pages or documents with counsel to cooperate and insure all are provided. On the State's claim of exemptions dated July 5, 1994, the Court has made an ***in camera*** inspection (Court's Exhibit 1 -- August 1, 1994). [The trial court then recorded its findings pursuant to the *in camera* inspection.] (S/109-11)

The trial court's findings regarding public records from the

---

[11] The date of that hearing was actually 7/18/94 (S/1-108). Judge Pate in her order immediately following the hearing dated the same as occurring July 17, 1994. (S/109-110)

Jacksonville Sheriff's Office, and the State Attorney's notes were correct. *See Mills v. State, supra,* at 806 (No abuse of discretion in trial court's failure to order production of Leon County Sheriff's Department's records when there was no demonstration the records existed.); *Atkins v. State, supra,* at 626 (Notes of state attorney's investigations and annotated photocopies of decisional law concerning murder and kidnaping prosecution were not "public records" subject to disclosure under public records statute). Downs' first claim is devoid of merit.

B. <u>The JSO Records Custodian Testified As to 119 Compliance</u>.

The trial court found in its order as to this matter:

> The Court finds the evidence ***uncontroverted*** that all records of JSO have been provided defense. ***Mere suspicion*** that there is more does not warrant an evidentiary hearing for discovery on this 3.850 proceeding. (S/109)

The trial court's finding as to "***mere suspicion***" is based upon the following assertion during a telephonic conference conducted on July 11, 1994:

> MR. KISSINGER: As to the remaining issues, and actually we received from the state attorney's office a copy of the materials provided by the Duval County Sheriff's Office. I believe that ***I reviewed this material***. It consists in grand total of ***two inches of material. In my opinion there is no way that that is all the material held by the Duval County Sheriff's Office***.
>
> And I think if they are going to take the position that they have fully complied after that, we are going to require a Chapter 119 hearing, so that I can call witnesses and examine them as to

materials generated with regard to this case, and where those materials are.

I can go over a few things with the court just to give it -- I actually have about a couple of pages of materials that appears to be missing. Or we can simply have a hearing on it. Like I said, the sheriff's office file is just clearly incomplete. I also mentioned that out of two inches of material -- ***one inch of material was for the jail record.***

And so what the sheriff's position is that they generated ***one inch of material*** in an investigation of basically a murder which was the result of a conspiracy involving no less than five persons. (II/282)

Ms. Corey rejoined:

MS. COREY: Judge, I haven't made a listing of what the sheriff's office sent over. They did that purely as a convenience to Capital Collateral. On the date that Ms. Espinosa was supposed to come and pick up our records, the sheriff's office sent their records over so she can pick them up in one location.

I'm inclined to tell the court what I know from experience what the sheriff's office keeps on file. But I don't know where Mr. Kissinger would get the idea that they are withholding anything. They have no reason to.

All they would have, no matter how complicated the case is, is a set of police reports and that would be it. I can't think of anything else they would have. They certainly wouldn't have any depositions or any sort of bulky material such as that.

So if Mr. Kissinger has been provided with copies of -- and I can name the type of reports to which the sheriff's office would be holding on a case like this.

There would be general offense, a supplement report, homicide continuation report, evidence technician reports, and property control cards, and

considering that list, I don't know what else the sheriff's office would have. Anything they have from NCIC would be privileged and confidential. And that wouldn't be turned over to them. And Judge, I'm really not aware of any other types of bulky material that the sheriff's office would have.

All of the depositions, sworn statements and those sorts of things would be contained within the state attorney's file. (II/284)

The trial court inquired:

THE COURT: Yes, I had forgotten about that.

Let me ask; when you say that there is about two inches of police reports, I mean, that in and of itself doesn't put up a red flag in a murder case.

MR. KISSINGER: Maybe I should go over just a few of those specifics. For example, Detective Starling, Officer Williams, and Sergeant Mile were originally assigned to this case when Mr. Harris disappeared. They interviewed the following people: Elaine Harris, Robert Browning, Gary Holmes, Chris Pelluchi, Larry Johnson, Jerry Bett, John Barfield, and Ernest Downs.

We don't have any ***notes*** from any of these interviews. Another example --

THE COURT: Well, do you have the police reports reflecting those interviews?

MR. KISSINGER: Your Honor, I don't know about that. I know we don't have the ***handwritten notes***. Shane Shuber (phonetic) went along with the sheriff's office when Larry Johnson led them to the body of Jerry Garris. Mr. Shubert had also talked to Larry Johnson and has spoken to Mr. Downs on more than one occasion. And we don't have ***notes*** from any of those events or interviews.

MS. COREY: Excuse me. Your Honor, I am not aware of any provisions that allows them to obtain those. They are specifically excluded under the rule of discovery. I'm not sure where there is a change of

that under the public record law. (II/284-85)

Mr. Kissinger's representation is important for two reasons. First, he admitted ***he reviewed*** the 119 materials provided by the JSO. Second, he based his assertion that those materials were incomplete because he found they were only two inches thick, and conjectured from the police reports he reviewed that there ***may have been notes***, which ***may have been*** incorporated into those reports. Mr. Kissinger's "***mere suspicion***" that he had not been provided all of the materials simply because he felt they were not thick enough is insufficient grounds to conduct an evidentiary hearing; ***there must be some "showing" such notes existed***. *See Mills v. State, supra; Haliburton v. Singletary*, 691 So.2d 466, 471 (Fla. 1997); *Mendyk v. State*, 22 Fla. L. Weekly S749, S750 (Fla. December 11, 1997)("In the absence of a showing that such notes ... may have been made, the trial judge did not abuse his discretion in denying Mendyk's motion in this regard.").

On July 18, 1994, the trial court conducted a hearing as to 119 compliance by the JSO and the State Attorney's Office (S/1-107). Mr. Kissinger and Ms. Corey expressed their views in keeping with the telephonic conference which transpired on July 11, 1994. Also present was Bruce Page of the Office of the General Counsel for the City of Jacksonville (S/3-4). After Mr. Kissinger had provided a litany of last names he had obviously gleaned from his review of the 119 materials the JSO provided, Mr. Page responded as

follows:

MR. PAGE: Thank you, Your Honor. As to all of these last names, as the Court pointed out, and as Mrs. Corey has stated, this is the first time we've heard anything about any of these requests. It's not part of this hearing and, therefore, it shouldn't be considered. As I stated earlier, we claim no exemption, we have claimed no exemption, and it's our position and we are prepared to offer testimony that everything in the JSO file pertaining to this case, which was requested, has been provided and we know of nothing that's been held back. Mr. Kissinger went through his soliloquy of some missing items. I wrote down the word "notes" about 12 times. The law on notes can best be summed up under the *Shevin v. Byron, et al.* a Supreme Court case at 379 So.2d 633, January 17, 1980, which says in part, that under the public records all matters which would not be public records are rough drafts, notes to be used in preparing some other document in the documentary material and tapes or notes taken by a secretary as dictation.

That is generally the law. If the sheriff or any individual JSO member did not provide those notes, it's our position, ***if those notes in fact existed, and we have no evidence that any of them ever did,*** but if they did, they weren't discoverable under public records law because that's what the law is. We are put in the uncomfortable and unfortunate situation of having to prove a negative, Your Honor. We have here the barest allegations that Capital Collateral expects that there are some notes and there are some records out there which have not been disclosed. At the same time we are told that there are more than half a dozen people about whom they would like to do further research. We heard that for the first time today.

It's the sheriff's position, Your Honor, that we have complied with the public records request, we have provided every shred of material in those files that we have. We know of nothing that has not been turned over and on the chance that there is a document somewhere held by some officer from the investigation which took place approximately 17

> year[s] ago, that those records, if they exist, are not discoverable anymore. That's the ... substance and total of our position, Your Honor. (S/46-48)

Steve Hicks, Records Custodian for JSO, was called as a witness by the State, placed under oath, and subjected to cross-examination (S/53-63). He testified that true and correct copies of the requested 119 materials were provided to CCR on November 19, 1992 (S/53-59). As to Downs' representation on pp.7-8 of his initial brief as to Mr. Hicks testimony under cross-examination, such should be viewed in its entire context:

> Q You mentioned one thing, sir, which raised my curiosity. You said, to the best of your ability in 1992 -- your ability to compile records in 1992, these were the full and complete records. Has your ability to compile records changed since 1992 or do you follow new procedures?
>
> A It's probably increased a little bit for research purposes. A lot of our files are on microfilm. We have several systems to access.
>
> Q And they are easier to access at this time than they were?
>
> A Yes.
>
> Q Sir, basically what you are saying today, then, is that you can't testify, as a matter of your person[al] knowledge, that the Jacksonville Sheriff's department has turned over everything in its possession, can you?
>
> A No, sir, I cannot. (S/60)

The trial court inquired as follows:

> THE COURT: Are you going back on the files of 17 years old and using microfilm in relation to those files?

MR. HICKS: Right, on the offense reports filed, yes, ma'am.

THE COURT: I see. But not all --

MR. HICKS: Well, what comes from the records unit is the offense report and then the arrest file comes from the ID section and then the other units provide their case files and that's all that gets copied that is filed.

THE COURT: That was new to me -- part of that, to give me -- it was just curiosity.

Do you have any reason to believe that records as to Ernest Charles Downs, that any [have] been withheld?

MR. HICKS: Not to my knowledge. (S/61)

Ms. Corey pointed out another important factor in this matter:

MS. COREY: No, ma'am. I just wanted to point out one thing that goes back to the argument we had before the sheriff was involved in these hearings. It had to do with duplicate copying of records from various agencies. They -- one of the things that CCR just mentioned, that they want the sheriff to produce polygraph results. Well, I just finished reading an opinion that says that the state attorney's office was ordered to produce those on a writ taken back in 1988, and they were ordered to produce them to Mr. Downs. So I don't understand why Capital Collateral is asking for materials that have been already ordered by the Florida Supreme Court to be produced to Mr. Downs. Why would they ask for material that they already have? And apparently they must have had them because the Court says that Mr. Austin said that we had them and there was a writ issued. So apparently someone didn't follow the Supreme Court's writ, or Mr. Downs passed the polygraph results. So why is he asking for them again?[12]

---

[12] Mr. Kissinger alleged they could not be found, although Mr. Austin represented he turned over all the records (II/650). Ms. Corey provided another example of such duplication in her response

The trial court later made the following observation:

> Because I think the problem I see and where we are right now is that although you filed your motion early, that ***the public records have been a very extensive -- it's put us into a different time frame, I believe, than that of which Supreme Court intended to allow.*** So that's just what I'm trying to do, get each of you sufficient time to do everything you need legally, but yet try to get it on track so we are moving towards certainty. [13] (S/105-06)

Merely because Mr. Kissinger did not think the JSO file was thick enough, does not mean an evidentiary hearing was required. The trial court correctly exercised its discretion regarding 119 materials. Even if his ***"mere suspicion"*** was correct, which the State does not concede, the trial court's failure to conduct a hearing on these alleged notes would be harmless error, in that, as Downs argued below, they were incorporated into the police reports. *See Mendyk v. State, supra.*

---

to the second amended motion for post-conviction relief: photographs entered into evidence and in possession of the clerk's office were duplicates of photos furnished to defense via discovery and/or were furnished from the files of the State Attorney's Office or the Jacksonville Sheriff's Office (I/157).

[13] On December 16, 1994, Mr. Kissinger represented he needed photographs and audio tapes (II/322). The trial court inquired whether he did not "already have these materials?" (II/323) That is "the tapes and photographs were all secured by defense counsel." (II/323-24) Mr. Kissinger alleged they were merely "photocopies" (II/324). The trial court corrected him, observing "that the photographs had been reproduced for defense counsel and should be available in your files." (II/324) Mr. Kissinger indicated he would ***reexamine*** his files, to which the trial court remarked: "You know, we're way over two years now on this thing." (II/324-35)

ISSUE II

THE STATE DID NOT WITHHOLD *BRADY* MATERIAL; THIS CLAIM IS PROCEDURALLY BARRED; AND DOWNS ATTEMPTS TO CIRCUMVENT THE BAR BY ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL.

Downs' second claim, found on pp.12-15 of his initial brief,[14] was his third claim in his motion for post-conviction relief, upon which the trial court ruled as follows:

> In ground three, the defendant claims that the State withheld exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 ... (1963), that would show that the victim's death was the result of the victim's cooperation with federal authorities into allegations that Harold Haimowitz and other persons associated with American National Bank were involved in violations of federal banking laws, and that the victim allegedly had a relationship with Haimowitz's wife. The defendant admits that he knew of these allegations from the point of his arrest and that he tried to tell the police and the jury, at the guilt phase of his trial, the "true story" of the victim's death. The defendant's claim is ***procedurally barred*** in that he could have, should have, and ***did*** [emphasis the Court's] raise this claim in prior proceedings (*Downs II, supra*, at 1105). *Cherry v. State*, 659 So.2d 1069 (Fla. 1995); *Chandler v. Dugger*, 634 So.2d 1066 (Fla. 1994); *Swafford v. State*, 569 So. 2d 1264 (Fla. 1990); *Straight v. State*, 488 So. 2d 530 (Fla. 1986). Further, since ***this Court has already entertained the evidence regarding this claim, at the guilt phase of the defendant's jury trial***, this Court would not be inclined to address it again. *Stano v. State*, 497 So.2d 1185 (Fla. 1986). Finally, in light of the overwhelming evidence of the defendant's guilt (*Downs I, supra*, at 792; *Downs V, supra*, at 899), there is ***no reasonably probability that the evidence would have resulted in an acquittal***. *Torres-Arboleda*, 636

---

[14] The State would note that in this argument, and all those that follow, Downs refers to facts without record citation.

So.2d 1321 (Fla. 1994); *Medina v. State*, 573 So.2d 293 (Fla. 1990).

At the August 2, 1996, hearing [III/413-15] the defendant attempted to get around the procedural bar by claiming that his first post-conviction counsel was ineffective for failing to raise the claim in the defendant's first Fla. R. Crim. P. 3.850 motion. The United States Supreme Court has repeatedly held that a defendant is not entitled to relief based on a claim of ineffective assistance of collateral counsel, *Coleman v. Thompson*, 501 U.S. 722 ... (1991); *Murray v. Gairratano*, 492 U.S. 1 ... (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and there is no ***constitutional*** [emphasis the Court's] right to post-conviction counsel under the constitution of this State. The Supreme Court of Florida has followed the United States Supreme Court's holding that there is no constitutional right to post-conviction counsel and has held that a claim of ineffective assistance of post-conviction counsel does not afford a defendant any relief. *Lambrix v. State*, [698 So.2d 247 (Fla. 1996)]; *Johnson v. State*, 536 So.2d 1009 (Fla. 1988). Further, the defendant's claim that his first collateral counsel rendered ineffective assistance of counsel is ***procedurally barred for two reasons. First***, as the defendant notes in his motion, the evidence of the defendant's "true story" of the victim's murder was in fact proffered to this Court during the guilt phase of the defendant's jury trial. Therefore, the alleged *Brady* violation could and should have been raised at trial and addressed in the defendant's direct appeal of his conviction. The defendant's guilt phase counsel obviously did not do that because the information was known to the defendant at least as well as it was to the State and therefore, no ***ethical*** [emphasis the Court's] *Brady* claim could have been made. *Cherry, supra,* at 1073; *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990). Counsel raised the only possible objection, the exclusion of the evidence and that objection was raised and rejected on appeal. *Downs II, supra*, at 1105. ***Second***, the defendant is prohibited from using a claim of ineffective assistan[ce] of counsel to avoid a procedural bar. *Cherry, supra; Chandler, supra; Lopez v. Singletary*, 634 So.2d 1054 (Fla.

1993); *Torres-Arboleda v. Dugger, supra; Swafford, supra; Medina, supra.* (II/178-79)

A. <u>The Alleged Harold Hamowitz Connection</u>

Downs alleges at p.12 of his brief "that the State withheld, and continues to withhold, material exculpatory evidence." The trial court recognized that alleged evidence as follows:

> ... the victim's death was the result of the victim's cooperation with federal authorities into allegations that Harold Haimowitz and other persons associated with American National Bank were involved in violations of federal banking laws, and that the victim allegedly had a relationship with Haimowitz's wife. (II/177-78)

The trial court found:

> The defendant admits that he knew of these allegations from the point of his arrest and that he tried to tell the police and the jury, at the guilt phase of his trial, the "true story" of the victim's death. The defendant's claim is ***procedurally barred*** in that he could have, should have, and ***<u>did</u>*** [emphasis the Court's] raise this claim in prior proceedings (*Downs II, supra,* at 1105). *Cherry v. State,* 659 So.2d 1069 (Fla. 1995); *Chandler v. Dugger,* 634 So.2d 1066 (Fla. 1994); *Swafford v. State,* 569 So. 2d 1264 (Fla. 1990); *Straight v. State,* 488 So. 2d 530 (Fla. 1986). (II/178)

The trial court also found that it had "***already entertained the evidence regarding this claim, at the guilt phase of the defendant's jury trial,***" and that it "would not be inclined to address it again. *Stano v. State,* [*supra*]." (II/178) Finally, the trial court held:

> ... in light of the overwhelming evidence of the defendant's guilt (*Downs I, supra,* at 792; *Downs V,*

> *supra*, at 899), there is no reasonable probability that the evidence would have resulted in an acquittal. *Torres-Arboleda*, 636 So. 1321 (Fla. 1994); *Medina v. State*, 573 So.2d 293 (Fla. 1990). (II/178)

Thus, Downs' *Brady* claim is ***procedurally barred*** in that it could have or should have been raised on direct appeal or his previous motion for post-conviction relief, and it ***was in fact raised***. *See Downs II*, 453 So.2d at 1105. In addition, the trial court did in fact entertain evidence regarding this claim during the guilt phase of Downs' trial.

On the merits, the State categorically denies that it ever withheld, or continues to withhold, material exculpatory evidence in violation of *Brady v. Maryland, supra*. The alleged Haimowitz connection was extensively litigated on direct appeal and on the initial motion for post-conviction relief, there is nothing new raised now, and there is no reason to revisit the matter. In *Downs I*, 386 So.2d at 789, this Court found:

> In April, 1977, John Barfield approached Downs with an offer of five thousand dollars if Downs would kill Harris. Downs accepted the contract to kill Harris and enlisted the assistance of Larry Johnson. On April 23, 1977, at Downs' insistence, Johnson phoned Harris and identified himself as Joseph Green, from whom Harris was expecting a call, and told Harris that he wanted to talk to him about flying contraband. They arranged a meeting in Jacksonville. Downs drove down a dirt road and left Johnson. Harris exited the car and approached Johnson at which time Downs shot Harris four times in the head with a .25 caliber automatic pistol. Together, Downs and Johnson dragged the body off the road into the bushes where Downs fired another

> shot into Harris' chest to make sure that he was dead.

Later, in that same opinion, this Court delineated why Downs' death sentence was proportionate despite the fact his accomplice, Johnson, did not receive the same sentence:

> The record in the present case establishes that Johnson and Downs were not equally situated and reveals that Downs accepted the contract to kill, formulated the scheme, solicited Johnson's participation, and shot the victim, although Johnson had attempted to dissuade him from going through with the killing and even told Downs that he was not going to help him with the killing. Johnson testified that because he was fearful that Downs might shoot him, he went along with Downs, but again informed Downs that he was not going to kill Harris but Downs would have do the killing himself. When Downs left Johnson with a machine gun, at the end of the dirt road to await Downs' and Harris' return, Johnson testified that he hid the gun under some boards because he had no intention of using it.
>
> Later, while Downs was in Alabama, Johnson came forward and advised a detective for the Jacksonville [S]heriff's [D]epartment of the murder. He testified that he had not come forward before because he was afraid that Downs would take revenge on him or his family and because he feared he would be arrested for murder. With Downs far removed in Alabama, he no longer feared Downs' revenge. ...

Downs I, at 796. In *Downs II*, 453 So.2d at 1104, the appeal of the denial of Downs' first motion for post-conviction relief, this Court acknowledged that he alleged "several" *Brady* violations and held: "We find ***no merit*** to any of these claims and hold that the trial court ruled correctly." However, even if there was merit to this successive claim, as the trial court found, "in light of the

overwhelming evidence of [Downs'] guilt, ... there is no reasonable probability that the evidence would have resulted in an acquittal." *Torres-Arboleda, supra; Medina v. State, supra.*

B. Trial Counsel's Effectiveness

The trial court addressed this matter as follows:

> First, as the defendant notes in his motion, the evidence of the defendant's "true story" of the victim's murder was in fact proffered to this Court during the guilt phase of the defendant's jury trial. Therefore, the alleged *Brady* violation could and should have been raised at trial and addressed in the defendant's direct appeal of his conviction. The defendant's guilt phase counsel obviously did not do that because the information was known to the defendant at least as well as it was to the State, and therefore, no ***ethical*** [emphasis the Court's] *Brady* claim could have been made. *Cherry, supra*, at 1073; *Roberts v. State*, 568 So.2d 1255 (Fla. 1990). Counsel raised the only possible objection, the exclusion of the evidence, and that objection was raised and rejected on appeal. *Downs II, supra,* at 1105. Second, the defendant is prohibited from using a claim of ineffective assistan[ce] of counsel to avoid a procedural bar. *Cherry, supra; Chandler, supra; Lopez v. Singletary,* [*supra*]; *Torres-Arboleda v. Dugger, supra; Swafford, supra; Medina, supra*. (II/179)

Downs II, 453 So.2d 1102 (Fla. 1984), the appeal of the denial of Downs' first motion for post-conviction relief, dealt extensively with the alleged ineffectiveness of his trial counsel, and this Court concluded:

> Applying the principles of *Strickland v. Washington* to this case does not require a different conclusion than was reached by the trial

> court.[15] The facts developed in the record make clear that the conduct of Downs' counsel was not unreasonable under the circumstances. The record reflects that counsel made a reasonable investigation and that his decisions now being challenged were not outside the range of professionally competent assistance. Moreover, even if we had found counsel's conduct to have been unreasonable, we would also have concluded that the counsel's deficiencies did not prejudice Downs.

Downs II, at 1109.

In that opinion this Court also found:

> The trial court correctly determined that Downs has failed to establish that trial counsel was ineffective at either the guilt or penalty proceedings and the record and evidence reflect that trial counsel conducted a reasonable pretrial investigation and that his decisions now being challenged were strategic trial matters.

Downs II, at 1105. This Court even included the trial court's actual findings on this issue in its opinion, followed with its conclusion that the trial court's findings were "supported by the record:"

> The evidence before this Court is that trial counsel was aware of and explored all possible -- and probable-- defenses with the Defendant prior to and during the trial. The attorney participated in over thirty (30) depositions or sworn statements of witnesses, filed discovery and other pre-trial Motions, obtained costs for employment of a private investigator and employed such an investigator to explore possible defenses, reviewed depositions taken by other attorneys of co-defendants, conducted legal research and talked with other attorneys representing co-defendants.
>
> After a review of all the evidence, the claims

---

[15] *Strickland v. Washington*, 466 U.S. 668 (1984).

that counsel was ineffective because he did not offer proof of an alibi or other defense are not supported by the evidence.

On the issue of alibi, the first mention of this important matter by the grandmother of the Defendant to the attorney was in late October 1977. At a sworn deposition taken December 6, 1977, the grandmother denied knowing where the Defendant was at the time of the murder. On December 5, 1977, Sharon Darlene Perry, a sister of the Defendant, was deposed. She testified that she did not have information where the Defendant was and that no one told her [emphasis the Court's] where he was.

The attorney had talked with these witnesses in August 1977. There was no mention of alibi by the relatives nor the Defendant until shortly before trial and then this was specifically denied by the grandmother at [the] time of her deposition in 1977.

On the issue of not putting the Defendant on the stand or presenting a defense of "withdrawal," it appears clear that this was a strategic decision of counsel. The "withdrawal" defense as raised by present counsel appear tenuous and legally insufficient.

On the issue of presenting other witnesses for [the] defense, trial counsel did attempt at the time of trial to offer proof that other persons had a motive to kill the deceased. This evidence was proffered to the Court and ruled inadmissible. This was reviewed at the time of appeal. The fact that family members were not presented as to the life history and good character of the Defendant in consideration of the State's evidence at trial and the right to two arguments to the jury by defense appears strictly a judgment call.

Defense counsel did present the testimony of family members and the Defendant at the penalty phase. Defendant's evidence at this proceeding was not restricted to the statutory matters but he was allowed to present what he wanted in mitigation.

The State objected to the testimony of Stephen

> Bernstein offered as an expert in capital cases. The Court found Mr. Bernstein qualified as an expert in this area but reserved ruling as to the weight of his testimony. The Court finds that Mr. Bernstein is qualified by his experience and training to testify as to his opinion. The weight to be given his testimony is lessened by several factors. One, Mr. Bernstein did not review the depositions or pre-trial work of trial counsel. Second, the manner of defending capital cases has markedly changed since December 1977 to this date. Many of the matters he assumed effective counsel would do simply was not normal nor standard procedure in 1977. The barrage of pre-trial defense motions had not yet been implemented in capital cases. Third, Mr. Bernstein had not fully considered the reasons why counsel took certain actions in the course of the trial by either talking with counsel or reviewing all of his testimony before this Court.
>
> It has been difficult in reviewing this record in distinguishing fact from allegation. This Court has attempted to consider all claims in light of the evidence and testimony presented at the hearings and the Court record.
>
> It is of interest that as of October 21, 1977, the Defendant made no mention of alibi at the time he executed a sworn statement for his attorney as to what happened in this case. As late as January 31, 1980, the Defendant alleged his defense to rest on the testimony of Edward Peters. At this hearing, the Defendant never mentioned such a defense.

Downs II, at 1105.

These extensive findings by the trial court, which were accepted by this Court, demonstrate that Downs' claim is not only procedurally barred but devoid of merit as well. He is attempting to circumvent a clear procedural bar by alleging the State withheld *Brady* material. The trial court correctly found he can't

relitigate a claim by alleging ineffective assistance of counsel. *See Cherry, supra; Chandler, supra; Lopez v. Singletary, supra; Torres-Arboleda v. Dugger, supra; Swafford, supra; Medina, supra.* The trial court correctly denied Downs' motion as to this claim.

ISSUE III

DOWNS' CLAIM REGARDING THE CCP INSTRUCTION IS PROCEDURALLY BARRED, AND WITHOUT MERIT.

The trial court's ruling on this claim, found at pp.16-17 of Downs' initial brief, which was ground four (4) in his motion for post-conviction relief, was as follows:

> In ground four, the defendant claims that this Court erred in giving the jury instruction on the cold, calculated and premeditated [CCP] sentencing aggravator. This claim is ***procedurally barred*** in that it could and should have been raised in the defendant's direct appeal following his resentencing. *Jones v. State*, 22 Fla. L. Weekly S25 (Fla. December 26, 1996);[16] *Cherry, supra; Chandler, supra; Swafford, supra; Jennings v. State*, 583 So. 2d 316 (Fla. 1991); *Correl v. Dugger*, 558 So. 2d 422 (Fla. 1990). ***Further, the defendant did object to this Court's cold, calculated and premeditated jury instruction and the instruction was addressed in his direct appeal of his resentencing hearing.*** *Downs V, supra*. The defendant is ***procedurally barred from relitigating this issue*** by raising a different argument as to that issue in a subsequent proceeding. *Torres-Arboleda, supra; Medina, supra.* Finally, this Court finds that the facts brought out at the resentencing hearing established that the victim's murder was "...committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification," no matter how those terms are defined. Section 921.141(5)(I), Florida Statutes. *Larzelere v. State*, 676 So.2d 394 (Fla. 1996); *Wuornos v. State*, 676 So.2d 972 (Fla. 1996); *Archer v. State*, 673 So.2d 17 (Fla. 1996).
>
> In his motion and at the hearing on August 2, 1996, the defendant attempted to circumvent the procedural bar by arguing that resentencing counsel was ineffective for failing to object to the

---

[16] *Jones v. State*, 690 so.2d 568 (Fla. 1996).

> instruction, even under the existing case law, so as to preserve the claim for appellate review. First, resentencing counsel did object to this Court's cold, calculated and premeditated jury instruction. (Resentencing Record Transcripts, pages 1032-1037, 1142). Second, the defendant is prohibited from using an ineffective assistance of counsel claim in an attempt to circumvent a procedural bar. *Cherry, supra; Chandler, supra; Lopez v. Singletary, supra; Torres-Arboleda, supra; Swafford, supra; Medina, supra.* (II/179-80)

Downs' challenge to CCP, on the direct appeal of his resentencing, was addressed in footnote 6 of *Downs V*, 572 So.2d at 900 (Fla. 1990):

> FN6. In a claim related to the sentencing order, Downs argues that the trial court erred by applying the [CCP] aggravating circumstance in violation of the constitutional prohibition against *ex post facto* laws. Once before this Court found no *ex post facto* violation on this same question. *Combs v. State*, 403 So.2d 418 (Fla. 1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). Downs invites us to revisit that issue here in light of subsequent interpretations of the law. *See, e.g., Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). Downs also argues that the same error violated article X, section 9 of the Florida Constitution. However, we find no need to consider these claims under the facts in this record. The trial court's sentencing order combined the [CCP] aggravating circumstance with the pecuniary gain aggravating circumstance. See supra at 898 n.3. Thus, ***even if we were to hold invalid the [CCP] aggravating circumstance, the error would have made no difference because Downs did not contest the pecuniary gain aggravating circumstance.***

Clearly, as FN6 of *Downs V* demonstrates, Downs third claim concerning the CCP instruction is procedurally barred. His "vagueness" challenge is raised for the first time in this appeal,

and is, therefore, procedurally barred. *Swafford v. Dugger, supra; Correll v. Dugger, supra.* In addition, his only issue with regard to CCP at his resentencing was whether the trial court erred in applying this factor retrospectively to him, thereby rendering it an *ex post facto* violation. His reliance on *Jackson v. State*, 648 So.2d 85 (Fla. 1994), actually undermines his position: "Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless a ***specific objection*** is made at trial and pursued on appeal. *James v. State*, 615 So.2d 688, 669 n.3 (Fla. 1993)." *See also, Sochor v. Florida*, 504 U.S. 527 (1992). Downs never raised the vagueness challenge at his resentencing that he does now for the first time on appeal.

Downs' resentencing counsel, Mr. Arias, as well as his appellate counsel, can not be faulted for not predicting "evolutionary refinements" in criminal law. *See Stevens v. State*, 552 So. 2d 1082 (Fla. 1989); *See also, Henderson v. Singletary*, 617 So.2d 313 (Fla. 1993). *Jackson* issued in 1994, Downs was resentenced in 1988, and the initial brief in Downs' appeal from resentencing was filed in 1989. Further, claims of ineffective assistance of appellate counsel are not cognizable in a post-conviction motion. *Swafford v. Dugger*, 569 So.2d 1264 (Fla. 1990);

Middleton v. State, 465 So.2d 1218 (Fla. 1985).[17]

However, even if Downs' claim here was not procedurally barred, which the State does not concede, it would not have resulted in prejudice for two reasons. First, the murder was CCP under any definition as the trial court found:

> ...that the facts brought out at the resentencing hearing established that the victim's murder was "...committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification," no matter how those terms are defined. Section 921.141(5)(i), Florida Statutes. *Larzelere v. State*, 676 So.2d 394 (Fla. 1996); *Wuornos v. State*, 676 So.2d 972 (Fla. 1996); *Archer v. State*, 673 So.2d 17 (Fla. 1996). (II/179)

Further, this Court found in *Downs V*: "[T]here is substantial competent evidence in the record to support the trial court's conclusion that Downs was the triggerman in a cold-blooded contract murder." *Id.* at 901. Second, the trial court ***merged*** CCP with pecuniary gain, and Downs did not challenge that aggravator. *Id.* at 900, n.6.

Given the aforementioned precedent, and the fact that this cold contract murder was CCP under any definition, the trial court

---

[17] *See also, Suarez v. Dugger*, 527 So.2d 190 (Fla. 1988); *Card v. State*, 497 So.2d 1169, 1177 (Fla. 1986)(The failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance.); *Herring v. Dugger*, 528 So.2d 1176, 1177 (Fla. 1988)(Appellate counsel is not deficient for failing to raise an issue where controlling case law is adverse to his position.); *Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989)(Where a point has little merit, appellate counsel cannot be faulted for not raising it on appeal.)

was correct in summarily denying Downs' motion as to this claim. Further, as this Court recognized in FN6 of *Downs V*, at 900, because the trial court's sentencing order combined CCP with the pecuniary gain aggravator, "even if we were to hold invalid the [CCP] aggravating circumstance, the error would have made no difference because Downs did not contest the pecuniary gain aggravating circumstance."

ISSUE IV

DOWNS' CLAIM REGARDING THE INSTRUCTION ON THE PRIOR VIOLENT FELONY AGGRAVATOR IS PROCEDURALLY BARRED, AND WITHOUT MERIT.

Downs' fourth claim, found at pp.17-18 of his brief, was his fifth claim in his motion below, upon which the trial court ruled:

> In ground five, the defendant claims that this Court erred when it instructed the jury on the previous conviction of a violent felony sentencing aggravator. This claim is procedurally barred in that it could and should have been raised (if it had been preserved) in the defendant's direct appeal following his resentencing hearing. *Cherry, supra; Chandler, supra; Swafford, supra; Correll, supra; Adams v. State*, 543 So.2d 1244 (Fla. 1989). Further, this Court finds that the evidence brought out at the resentencing hearing of the defendant's previous robbery conviction would have established the prior felony conviction involving the use or threat of violence to some person sentencing aggravator, no matter how those terms are defined. *Larzelere, supra; State v. Salmon*, 636 So.2d 16 (Fla. 1994).
>
> In his motion and at the hearing on August 2, 1996, the defendant attempted to circumvent the procedural bar by arguing that resentencing counsel was ineffective for failing to object to the instruction, even under the existing case law, so as to preserve the claim for appellate review. The defendant is prohibited from using an ineffective assistance of counsel claim to circumvent a procedural bar. *Cherry, supra; Chandler, supra; Lopez v. Singletary, supra; Torres-Arboldea, supra; Swafford, supra, Medina, supra.* (II/180-81)

Downs makes the same arguments in this claim as he did in the previous claim regarding the CCP instruction, and the State's argument in the previous claim is equally applicable to this claim.

As the trial court found, this claim is procedurally barred

because it was not raised at the resentencing and was not raised on direct appeal. (Trial Court's citations) Claims raised for the first time on collateral attack are procedurally barred as a matter of law. (Trial Court's citations) On the merits, even if this claim were properly preserved, which it is not, the trial court found "that the evidence brought out at the resentencing hearing of the defendant's previous robbery conviction would have established" the prior violent felony aggravator "no matter how those terms are defined." (II/180)

As regards the ineffective assistance of resentencing counsel component of this claim, Downs can't circumvent the procedural bar by alleging ineffective assistance of counsel. (Trial Court's citations). Further, Mr. Arias can not be faulted for failing to raise a nonmeritorious objection. Ineffective assistance of appellate counsel claims are not cognizable in a post-conviction motion. *Swafford v. Dugger, supra; Middleton v. State, supra.* Even if the claim were not procedurally barred, there would be no prejudice because the factor existed no matter how it was defined. The trial court was correct in summarily denying Downs' motion as to this claim.

ISSUE V

DOWNS' CLAIM REGARDING THE INSTRUCTION ON THE PECUNIARY GAIN AGGRAVATOR IS PROCEDURALLY BARRED, AND WITHOUT MERIT.

This claim, argued at pp.19-20 of his brief, was Downs' ground six in his motion, upon which the trial court ruled:

> In ground six, the defendant claims that this Court erred in instructing the jury on the pecuniary gain sentencing aggravator. This claim is procedurally barred in that it could and should have been raised (if it had been preserved) in the defendant's direct appeal following his resentencing hearing. *Cherry, supra; Chandler, supra; Swafford, supra; Adams, supra.* Further, this Court finds that the evidence brought out at the resentencing hearing that the defendant was to be paid $5,000.00 for killing the victim was sufficient to establish the pecuniary gain sentencing aggravator, no matter how those terms are defined. *Larzelere, supra; State v. Salmon, supra.*
>
> In his motion and at the hearing on August 2, 1996, the defendant attempted to circumvent the procedural bar by arguing that resentencing counsel was ineffective for failing to object to the instruction, even under the existing case law, so as to preserve the claim for appellate review. The defendant is prohibited from using an ineffective assistance of counsel claim to circumvent a procedural bar. *Cherry, supra; Chandler, supra; Lopez v. Singletary, supra; Torres-Arboleda, supra; Swafford, supra; Medina, supra.* (II/180-81)

Downs makes the same arguments in this claim as he did in his previous two claims regarding the CCP and prior violent felony instructions, and the State's argument as to those claims is equally applicable to this claim.

As the trial court found, this claim is procedurally barred

because it was not raised at the resentencing and was not raised on direct appeal.[18] (Trial Court's citations) Claims raised for the first time on collateral attack are procedurally barred as a matter of law. (Trial Court's citations) On the merits, even if this claim were properly preserved, which it is not, the trial court found "the evidence brought out at the resentencing hearing that the defendant was to be paid $5,000.00 for killing the victim was sufficient to establish the pecuniary gain sentencing aggravator, no matter how those terms are defined." (II/181)(Trial Court's citations)

As regards the ineffective assistance of resentencing counsel component of this claim, Downs can't circumvent the procedural bar by alleging ineffective assistance of counsel. (Trial Court's citations). Further, Mr. Arias can not be faulted for failing to raise a nonmeritorious objection. Ineffective assistance of appellate counsel claims are not cognizable in a post-conviction motion. *Swafford v. Dugger, supra; Middleton v. State, supra.* Even if the claim were not procedurally barred, there would be no prejudice because the factor existed no matter how it was defined. The trial court was correct in summarily denying Downs' motion as to this claim.

---

[18] As previously delineated in the State's argument as to the CCP instruction, this Court noted Downs' failure to challenge the pecuniary aggravator in FN6 of *Downs V*, at 900.

ISSUE VI

DOWNS' CLAIM THAT HIS RESENTENCING JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED TWO SEPARATE AGGRAVATING FACTORS IS "PATENTLY FALSE," PROCEDURALLY BARRED, AND DEVOID OF MERIT.

At pp.19-22 of his brief, Downs argues instructions on CCP and pecuniary gain, constituted impermissible "doubling" because "both factors were supported by the fact that the murder was a contract murder." The trial court found:

> In ground seven, the defendant claims that this Court improperly instructed the jury that it could find the existence of the pecuniary gain sentencing aggravator and the [CCP] sentencing aggravator based on a single fact which would support both aggravators. This claim is ***procedurally barred*** in that it could and should have been raised (if it had been preserved) in the defendant's direct appeal following his resentencing hearing. *Cherry, supra; Chandler, supra; Swafford, supra; Jennings, supra; Correll, supra; Adams, supra.* Further, ***this claim is patently false***, in that this Court never instructed the jury that it could find two aggravating circumstances based on one fact. (Resentencing Record, pages 288-293; Resentencing Record Transcripts, pages 1134-1140) ***The jury had before it the fact that the defendant was to be paid $5,000.00 for killing the victim, to establish the pecuniary gain aggravator, and it had the facts of how the defendant himself planned and carried out the murder of the victim, to establish the [CCP] aggravator.*** *Larzelere, supra.* The jury did not have to rely, and this Court did not rely, on one factual circumstance to establish the two aggravators. Moreover, this Court combined the two aggravators, which this Court did not have to do, so that there is no possibility that one fact was used to support two aggravators.[19]

---

[19] *See* FN6 of *Downs V.*

> In his motion and at the hearing on August 2, 1996, the defendant attempted to circumvent the procedural bar by arguing that resentencing counsel was ineffective for failing to object to the instruction, even under the existing case law, so as to preserve the claim for appellate review. First, counsel was not ineffective in failing to object, because this Court did ***not*** [emphasis the Court's] improperly instruct the jury as the defendant asserts in his motion. Second, the defendant is prohibited from using an ineffective assistance of counsel claim in an attempt to circumvent a procedural bar. *Cherry, supra; Chandler, supra; Lopez v. Singletary, supra; Torres-Arboleda, supra; Swafford, supra; Medina, supra.* (II/181-82)

As with Downs' previous three claims, this claim is procedurally barred because it was not raised at the resentencing and was not raised on direct appeal. (Trial Court's citations) What's more, Downs' counsel on this claim, appears to have overstepped the bounds of zealous representation into professional misconduct. The trial court found that "***this claim is patently false***, in that [it] never instructed the jury that it could find two aggravating circumstances based on one fact."[20] (II/182) The trial court delineated how the fact that Downs was to be paid $5,000.00 for killing the victim established the pecuniary gain aggravator, and the facts of how Downs planned and carried out the murder established the CCP aggravator. It further delineated that the jury did not have to rely, nor did it rely, on one factual

---

[20] See Fla. Bar Code Prof. Resp. D.R. 3-4.3 "Misconduct and Minor Misconduct," R. Regulating Fla. Bar 4-4.1 "Truthfulness in Statements to Others," and R. REGULATING Fla. Bar 4-8.4 "Misconduct."

circumstance to establish the two aggravators. Finally, the trial court "combined the two aggravators, which this Court did not have to do, so that there is no possibility that one fact was used to support two aggravators."[21] (II/182)

As with the previous claims, Downs attempts to circumvent the procedural bar by arguing his resentencing counsel was ineffective for failing to object to the instruction. First, the trial court found Downs' resentencing counsel was not ineffective for failing to object, because it did ***not*** [emphasis the Court's] improperly instruct the jury. Second, as a matter of law, Downs may not circumvent a procedural bar by alleging ineffective assistance of counsel. (Trial Court's citations). Ineffective assistance of appellate counsel claims are not cognizable in post-conviction motions. *Swafford v. Dugger, supra; Middleton v. State, supra.* That Downs was not prejudiced by this alleged error is demonstrated in FN6 of *Downs V.* The trial court correctly summarily denied Downs claim.

---

[21] FN6 of *Downs V* recognized this fact, and clearly demonstrates the procedural bar as to this claim.

ISSUE VII

DOWNS' MENTAL HEALTH EXPERT AT RESENTENCING CONDUCTED A MORE THAN ADEQUATE INVESTIGATION AND EVALUATION OF HIS MENTAL HEALTH.

The trial court found regarding this claim:

> In ground eight, the defendant claims that he was denied his constitutional right to the professionally competent assistance of his mental health expert. The defendant makes this contention despite the fact that ***his mental health expert, Dr. Krop, was appointed at the defendant's specific request.*** (Resentencing Record Transcripts, pages 47-50.) The defendant initially contends that Dr. Krop failed to conduct a proper investigation into the defendant's mental health background. This claim establishes but one thing, that ***the defendant not only did not read the transcript of Dr. Krop's trial testimony, but that he did not even read the Supreme Court of Florida's summary of that testimony.*** *Downs V, supra*, at 898. Based on Dr. Krop's testimony at the resentencing hearing (Resentencing Record Transcripts, pages 855-893), this Court finds that Dr. Krop conducted an adequate investigation and evaluation of the defendant's mental health. *Roberts v. State*, 568 So.2d 1255 (Fla. 1990).
>
> The defendant goes on to argue that Dr. Krop improperly set his own "standard for mitigation" when he testified that he reserved the use of the term "extreme" for "individuals who are psychotic or organically impaired, or mentally retarded." (Resentencing Record Transcripts, at page 889.) The defendant contends that Dr. Krop's opinion was contrary to the "legal standard." This Court finds the defendant's claim to be without merit. Dr. Krop made it clear that he was expressing ***his*** [emphasis the Court's] opinion on the use of the term extreme, he did not state that his opinion constituted the legal standard for the use of the term. Further, even if Dr. Krop's opinion as to the use of the term extreme could somehow be said to have been erroneous, this Court finds that the error did not prejudice the defendant for two

> reasons. First, even if one of the attorneys had instructed Dr. Krop on what the "legal standard" was (*see, Johnson v. State*, 660 So.2d 637 (Fla. 1995); *Arbelaez v. State*, 626 So.2d 169 (Fla. 1993); *Provenzano v. State*, 497 So.2d 1177 (Fla. 1986)), a review of Dr. Krop's entire testimony makes it abundantly clear that Dr. Krop would still have expressed the opinion that the defendant was not under the influence of an extreme mental or emotional disturbance at the time the defendant ***committed*** [emphasis the Court's] the murder. Second, because the jury was also given evidence about the defendant's family and background information (which was presented to the jury through the defendant's witnesses and his exhibits in evidence), this Court instructed the jury on this statutory mitigator and the jury was free to come to its own conclusion about whether the totality of the evidence established that the defendant was under the influence of an extreme mental or emotional disturbance at the time the defendant ***committed*** [emphasis the Court's] the murder. (Resentencing Record Transcripts, pages 1041, 1136) ***Given the overwhelming evidence (brought forth at the resentencing hearing) rebutting any claim that the defendant committed the murder as a result of an extreme mental or emotional disturbance, the jury can hardly be faulted for concluding, as this Court and the Supreme Court of Florida have concluded, that the defendant clearly did not commit this murder as a result of being under the influence of an extreme mental or emotional disturbance at the time he committed the murder.*** (II/183-84)

The trial court's reference to the "Supreme Court of Florida's summary of [Dr. Krop's] testimony," is to the following findings in *Downs V*, at 898:

> A forensic psychologist, Dr. Harry Krop, testified that Downs was insecure about his manhood and lacked self-respect. His emotional problem surfaced when, around the time of Harris's murder, Downs discovered photographs that revealed his second wife's infidelity and involvement with

> homosexual activity and pornography. Seeing those photographs "was basically demasculating ... bring[ing] forth a lot of his feelings of inadequacy, which he had a lot from childhood," Dr. Krop said. That caused Downs extreme stress, altering his personality and emotional state, and impairing his cognitive and emotional faculties at about the same time he joined the murder conspiracy. Based on his evaluation of Downs, interviews, and his review of testimony in this case, Dr. Krop concluded that Downs had strong potential for rehabilitation. However, ***Dr. Krop also concluded that Downs was not suffering from extreme mental or emotional disturbance at the time of the murder, and that he did have the capacity to appreciate the criminality of his conduct.***

Downs' "claim of a due process violation collapses as soon as one seeks to identify the trial court's ruling that purportedly rendered petitioner's trial fundamentally unfair," *Clisby v. Jones*, 960 F.2d 925, 934 (11th Cir. 1992),[22] and in light of a review of Dr. Krop's testimony, a summary of which follows. On direct examination, Dr. Krop testified that Downs was competent to stand trial and was legally sane at the time of the offense (T2.866). Dr. Krop noted that Downs did not have a significant male role model in his life and suffered emotional and physical abuse at the hands of his father (T2.867) Dr. Krop also noted that Downs had engaged in his first antisocial behavior, i.e., robbery, while AWOL from the Army (T2.868). After being released from a correctional facility, Dr. Krop reported that Downs was "doing fairly well" until he found out that his second wife was unfaithful to him and

---

[22] *See also, Clisby v. Alabama*, 26 F.3d 1054 (11th Cir. 1994).

involved in pornographic activities (T2.870). Dr. Krop testified that Downs became obsessed with keeping track of his wife after this discovery (T2.871).

Dr. Krop also testified that Downs was a good candidate for rehabilitation (T2.872). Finally, Dr. Krop acknowledged that, at the time of the offense, Downs was emotionally distraught (T2.873), i.e., "he was suffering from what we would call an adjustment disorder with mixed emotional features, which means, depression, anxiety, obsessive kinds of qualities" (T2.875). On cross-examination, Dr. Krop repeated that Downs did not suffer from a mental illness at the time of the offense (T2.888-90). When Dr. Krop testified that Downs did not suffer from extreme emotional distress in 1977, he explained that he used the term "extreme" when persons were psychotic, organically impaired, or mentally retarded (T2.889).[23]

Downs also claims at p.24 of his initial brief, that "[a] competent mental health expert will now testify that Mr. Downs had both statutory and non-statutory mitigating mental health factors." The fact that Downs went expert "shopping", and found one who would say what he wanted him to say, does not warrant post-conviction relief. *See Provenzano v. Dugger*, 561 So.2d 541, 546 (Fla. 1990); *Engle v. Dugger*, 576 So.2d 696 (Fla. 1991); *Bryan v. Dugger*, 641 So.2d 61, 64 (Fla. 1994).

---

[23] Trial counsel did not object to this testimony by Dr. Krop.

The trial court's findings here are correct and require no further elucidation. Dr. Krop's testimony which contributed to Downs' mitigation vastly outweighed what he now alleges detracted from the same. The trial court was correct in summarily denying Downs' motion as to this claim for the reasons it stated, and upon the authorities it cited in its order.

ISSUE VIII

DOWNS' CLAIM REGARDING ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT PHASE OF HIS TRIAL IS PROCEDURALLY BARRED AS SUCCESSIVE, AND IS DEVOID OF MERIT.

The trial court found regarding this claim (IX in his motion for post-conviction relief) as follows:

> In ground nine, the defendant claims that his trial counsel rendered ineffective assistance of counsel at the pretrial and trial stages of the guilt phase of the defendant's jury trial by not investigating and presenting the true story of the murder of the victim: the alleged Harris/Haimowitz/American National Bank story. The defendant makes this claim despite the fact that he notes in his motion that his attorney ***did*** [emphasis the Court's] investigate this possible defense, that counsel ***did*** [emphasis the Court's] list the witnesses counsel intended to use to present this defense at trial, and, as noted previously in his motion, that the evidence of this alleged defense was proffered to this Court. (*See also, Downs II, supra*, at 1105.) First, the defendant has previously challenged the assistance of his guilt phase counsel testified at the evidentiary hearing held on that motion. (January 1982, Hearing Transcript) Therefore, the defendant's latest claim of ineffective assistance of guilt phase counsel is procedurally barred as an abuse of process in that the defendant could and should have raised this claim in his first Fla.R.Crim.P. 3.850 motion. *Zeigler v. State*, 632 So.2d 48 (Fla. 1993); *Foster v. State*, 614 So.2d 455 (Fla. 1992). Second, the ***defendant's guilt phase counsel was not ineffective, because he did investigate and attempt to present evidence of this story.*** (II/184-85)

As previously delineated in the State's argument to Downs' second claim, this Court incorporated the trial court's findings regarding his guilt phase counsel's performance in its opinion in *Downs II*,

453 So.2d at 1105-06, and concluded:

> The trial court correctly determined that Downs has failed to establish that trial counsel was ineffective at either the guilt or penalty proceedings and the record and evidence reflect that trial counsel conducted a reasonable pretrial investigation and that his decisions now being challenged were strategic trial matters.

Downs II at 1105.

The trial court correctly found this claim procedurally barred. It could have or should have been raised in his first motion for post-conviction relief, and ***was in fact raised***, albeit in different form, as demonstrated in *Downs II, supra*.

On the merits, the trial court correctly determined that counsel was in fact effective ***"because he did investigate and attempt to present evidence of this story"*** and observed that Downs, in his successive motion, acknowledged as much. Briefly, the facts warranting such a determination were as follows.

The State read the witness lists during voir dire (R.133), and asked the jury panel if it knew Harold B. Haimowitz (T.219). Defense counsel asked prospective juror Berkowitz if he knew Haimowitz, and Berkowitz responded affirmatively (T.396). At the bench, defense counsel explained his reason for wanting to excuse Berkowitz for cause as follows:

> Jerry Harris had an affair with Carol Haimowitz ... Harold Haimowitz' second wife, and when I attempt to introduce that into evidence, if it is admitted into evidence, this person might very well ... violate it with his relationship with Mr. Haimowitz one way or the other, and ... I don't see how he

could be a fair and impartial juror. (T.401).

The court denied the cause challenge, and defense counsel accepted the jury panel (T.403). Defense counsel then set the stage for Downs' defense in this opening statement, noting:

> Jerry Harris was a dope smuggler. You will find that he made enemies in his financial ventures, people that lost great amounts of money. That evidence will display that he was involved in various exploits with women and that he made enemies in that regard. (T.24)

The trial court correctly denied relief on this claim without an evidentiary hearing because it was procedurally barred, and Downs again attempted to circumvent the bar by alleging ineffective assistance of trial counsel.[24] *Cherry v. State, supra; Chandler v. State, supra; Lopez v. Singletary, supra; Torres-Arboldea v. State, supra; Swafford v. state, supra; Medina v. State, supra.* Even if the claim were not barred, it is devoid of merit because Downs' counsel did that which he presently alleges he did not do.

---

[24] In fn.5 of his brief at p.31, Downs argues: "In the event the Court determines that such allegations could reasonably have been presented in Mr. Downs' prior post-conviction motion, post-conviction counsel was ineffective. He is not entitled to relief based on a claim of ineffective assistance of collateral counsel. *Coleman v. Thompson,* 501 U.S. 722 (1991); *Murray v. Gairratano,* 492 U.S. 1 (1989); *Pennsylvania v. Finley,* 481 U.S. 551 (1987); *Lambrix v. State,* 698 So.2d 247, 248 (1988); *Johnson v. State,* 536 So. 2d 1009 (Fla. 1988).

ISSUE IX

THE ALLEGED NEW EVIDENCE OF THE HARRIS/HAIMOWITZ/ AMERICAN NATIONAL BANK STORY IS SIMPLY ***NOT*** NEWLY DISCOVERED EVIDENCE.

The trial court found regarding this claim (X in his motion for post-conviction relief) as follows:

> In ground ten, the defendant claims that he is entitled to a new trial due to newly discovered evidence. The "new evidence" is the alleged Harris/Haimowitz/American National Bank story. The defendant's motion makes it abundantly clear that the evidence regarding this claim was known to the defendant from the time of his arrest. Therefore, it is not newly discovered evidence. *Mills, supra; Bolender v. State*, 658 So.2d 82 (Fla. 1995); *Johnson v. Singletary*, 647 So.2d 106 (Fla. 1994); *Torres-Arboleda, supra.* Further, given the defendant's own sworn testimony at the hearings on his first Fla.R.Crim.P. 3.850 motion that he was involved in the conspiracy to kill the victim, the only effect of this "newly discovered" evidence would be to substitute Harold Haimowitz for John Barfield as the person who offered the money to have the victim killed. (January 12, 1983, Hearing Transcript, pages 221-252, 304-315)(Note: This Court only has the original transcripts of this hearing. An index to the record on appeal of the defendant's first motion suggest that the defendant's testimony consists of pages 812-981 of the transcripts on appeal.) That would still leave the defendant and Larry Johnson as the possible triggermen. ***The defendant's repeated contention throughout the various proceedings in this case that Larry Johnson, not the defendant, was the triggerman is contradicted by the defendant's own sworn statement to the police that Larry Johnson was a coward, and that he could not take a gun and kill someone in cold blood.*** (Ex. "A", pages 11, 30.) The defendant's sworn statement to the police further corroborates all of the other evidence establishing that the defendant was the triggerman. *Downs I, supra; Downs V, supra.* As the Supreme Court of Florida said in *Downs V, supra*, "...there

> is substantial competent evidence to support the trial court's conclusion that Downs was the triggerman in a cold-blooded contract murder." *Id.* at 901. Moreover, in the defendant's sworn testimony at the hearing on his first Fla.R.Crim.P. 3.850 motion, the defendant testified that at ***Barfield's*** [emphasis the court's] request, he asked Johnson to kill the victim and Johnson agreed to do so. (January 12, 1983, Hearing Transcript, at pages 221-222 of original transcript.) Therefore, there is no possibility, let alone a reasonable probability, that the "new evidence" would result in a different verdict or sentence. *Bottoson v. State*, 674 So.2d 621 (Fla. 1996); *Torres-Arboleda, supra; Medina, supra*. (II/185-86)

This claim is essentially the same as the previous claim but it is raised on a different legal basis. The alleged Harris/Haimowitz/ American National Bank connection is ***not*** newly discovered evidence, as the trial court correctly found.

Even if it were newly discovered evidence as maintained by Downs, the trial court correctly found "there is no possibility, let alone a reasonable probability, that this 'new evidence' would result in a different verdict or sentence." (II/186) *Bottoson v. State, supra; Torres-Arboleda v. State, supra; Medina v. State, supra*. The trial court explained why this is so, not the least of which is the fact that "the only effect of this 'newly discovered' evidence would be to substitute Harold Haimowitz for John Barfield as the person who offered the money to have the victim killed." (II/185) Downs admitted being involved in the conspiracy to kill the victim (II/185). Despite his contention that he was not the triggerman, this Court determined "...there is substantial

competent evidence to support the trial court's conclusion that ***Downs was the triggerman in a cold-blooded contract murder."*** ***Downs V,*** at 901. The trial court correctly summarily denied this claim.

ISSUE X

DOWNS WAS AFFORDED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING, AND THIS CLAIM IS PROCEDURALLY BARRED.

This claim was his eleventh below, of which the trial court found accordingly:

> In ground eleven, the defendant claims that resentencing counsel, Mr. Roberto Arias, was ineffective for failing to adequately investigate the defendant's background and in failing [to] present statutory and nonstatutory mitigating evidence based on that investigation. First, despite this Court's repeated warnings about the limitations that the defendant would face in representing himself, the defendant insisted on waiving counsel and exercising his constitutional right to represent himself.)Resentencing Record, page 73; Resentencing Record Transcripts, pages 16-71, 173, 377, 652-653.) The defendant assumed the ultimate responsibility for the investigation, preparation and defense of his case. The defendant was intimately familiar with all of the information set forth in this ground of the defendant's instant motion. The defendant did not withdraw his *pro se* status until ***after the State had presented its case*** [emphasis the court's] and the defendant himself had presented the testimony of ***seventeen defense witnesses*** [emphasis the courts]. (Resentencing Record Transcript, pages 1-851.) Having waived his right to counsel and having exercised his constitutional right to represent himself, the defendant has forever waived this claim. *State v. Tait*, 387 So.2d 338 (Fla. 1980).
>
> Second, a review of the testimony of the defense witnesses at the resentencing hearing reveals that a substantial majority of the information set forth under this ground was in fact presented to the jury through the defendant's witnesses and exhibits. To the extent that the remainder of the proffered information was not presented, this Court finds that the information would have been cumulative to the evidence that was presented, and that there is no reasonable probability that the outcome of the

sentencing proceeding would have been different had the proffered information been presented to the jury. *Ferguson v. State*, 593 So.2d 508 (Fla. 1992); *Johnson v. Dugger*, 583 So.2d 657 (Fla. 1991); *Tafero v. State*, 561 So.2d 557 (Fla. 1990); *Kennedy v. State*, 547 So.2d 912 (Fla. 1989); *Adams v. State*, 543 So.2d 1244 (Fla. 1989); *Card v. State*, 497 So.2d 1169 (Fla. 1986). The fact that the defendant has now found medical experts who would testify that based on information proffered in this claim they would render an opinion that the defendant was under the influence of an extreme mental or emotional disturbance at the time the defendant committed the offense is of no moment, as the jury and this Court would be free to disregard such an opinion in light of the overwhelming evidence rebutting such an opinion. *Engle v. State*, 576 So.2d 696 (Fla. 1991); *Correll v. State*, 558 So.2d 422 (Fla. 1990); *Provenzano v. State*, 497 So.2d 1177 (Fla. 1986); *Card v. State*, 497 So.2d 1169 (Fla. 1986).

Third, the information proffered is replete with common sense inconsistencies, and is diametrically opposed to counsel's argument during closing argument that the defendant is capable of rehabilitation and is not (and has not become) a sociopath. *Correll, supra*.

Finally, all of the proffered information and opinions drawn therefrom are rebutted by the overwhelming evidence presented at the resentencing hearing, which established that the defendant's commission of the murder was the result of but one thing - a ***cold, calculated, and premeditated*** [emphasis the court's] design, and that the murder was committed for one reason and one reason alone - pecuniary gain. *Cook v. State*, 542 So.2d 964 (Fla. 1989). (II/185-86)

Downs represents to this Court at p.37 of his brief:

Though Mr. Downs ***temporarily*** represented himself at the time of his resentencing for the limited purpose of proffering newly discovered evidence to demonstrate that he had been deprived of effective assistance of counsel at his original trial, his court-appointed attorney presented and argued the

penalty phase itself.

This representation is completely refuted by the trial court, which found that "despite [its] repeated warning about the limitations that the defendant would face in representing himself, the defendant insisted on waiving counsel and exercising his constitutional right to represent himself." (II/186) It further found:

> The defendant assumed the ultimate responsibility for the investigation, preparation and defense of his case. The defendant was intimately familiar with all of the information set forth in this ground of the defendant's instant motion. The defendant did not withdraw his pro se status until ***after the State had presented its case*** [emphasis the court's] and the defendant himself had presented the testimony of ***seventeen defense witnesses*** [emphasis the courts]. (Resentencing Record Transcript, pages 1-851.) Having waived his right to counsel and having exercised his constitutional right to represent himself, the defendant has forever waived this claim. *State v. Tait*, 387 So.2d 338 (Fla. 1980).

Clearly, Downs did more than "temporarily" represent himself at the Resentencing, and his claim of ineffective assistance of counsel is waived. *State v. Tait, supra.*

As regards the mitigation allegedly not presented at the Resentencing, the trial court determined that "a review of the defense witnesses at the resentencing hearing reveals that a substantial majority of the information set forth under this ground was in fact presented to the jury through the defendant's witnesses

and exhibits."[25] As to the proffered information, the trial court found it "would have been cumulative to the evidence that was presented, and that there is not reasonable probability that the outcome of the sentencing proceeding would have been different had the proffered information been presented to the jury." (Trial court's citations); *See also, Bryan v. Dugger, supra,* at 64.

At p.39 of his brief, Downs alleges: "Expert testimony is ***now*** available, based upon these materials, of substantial and compelling mitigation, both statutory and nonstatutory." As to this expert testimony, the trial court found:

> The fact that the defendant has now found medical experts who would testify that based on information proffered in this claim they would render an opinion that the defendant was under the influence of an extreme mental or emotional disturbance at the time the defendant committed the offense is of no moment, as the jury and this Court would be free to disregard such an opinion in light of the overwhelming evidence rebutting such an opinion. *Engle v. State,* 576 So.2d 696 (Fla. 1991); *Correll v. State,* 558 So.2d 422 (Fla. 1990); *Provenzano v. State,* 497 So.2d 1177 (Fla. 1986); *Card v. State,* 497 So.2d 1169 (Fla. 1986). (TT/187)

"The mere fact that [Downs] has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief." *Provenzano v. Dugger, supra,* at 546; *Engle v. Dugger, supra; Bryan v. Dugger, supra.*

---

[25] The State argued below, that most, if not all, of this evidence was presented at his Resentencing through the testimony of family, friends, and Dr. Krop (T2.750-52, 775-76, 779-81, 795-96, 840-42, 863-94, 863-94, 897-912, 924-69).

As further support for the trial court's summary denial of this claim, it correctly found Downs' proffered information to be "replete with common sense inconsistencies, and is diametrically opposed to counsel's argument during closing argument that the defendant is capable of rehabilitation and is not (and has not become) a sociopath." (II/187) *Correll v. State, supra.* It concluded by observing that "all of the proffered information and opinions drawn therefrom are rebutted by the overwhelming evidence presented at the resentencing hearing ... ." (II/187) This evidence was that "the murder was the result of but one thing - ***cold, calculated and premeditated*** design, and that the murder was committed for one reason and one reason alone - ***pecuniary gain.***" (II/187). Downs' claim here is waived, devoid of merit, and not grounds for an evidentiary hearing. *Roberts v. State,* 568 So.2d 1255 (Fla. 1990); *Kennedy v. State,* 547 So.2d 912 (Fla. 1989).

ISSUE XI

THE TRIAL COURT AND THIS COURT WEIGHED ALL STATUTORY AND NON-STATUTORY MITIGATING FACTORS IN DETERMINING DEATH WAS THE APPROPRIATE SENTENCE IN THIS CAUSE.

The trial court found regarding this claim (twelve below) as follows:

> In ground twelve, the defendant claims that this Court erred in refusing to instruct the jury (as a matter of law) that the jury should consider as mitigating circumstance that, "You may also consider as a mitigating factor the immunity and deals given to co-defendants," (Resentencing Record, page 277; Resentencing Record Transcript, page 1049), and that this Court erred in failing to consider this non-statutory mitigating factor. First, this claim is procedurally barred in that the claim could have been, should have been and, to a large extent, was considered in the defendant's direct appeal of his resentencing hearing. *Downs V, supra. See also, Cherry, supra; Chandler, supra; Swafford, supra; Straight, supra.* Second, this Court did not instruct the jury that it could not consider this non-statutory mitigating factor, and this Court allowed the defendant to argue this non-statutory mitigator to the jury. (Resentencing Record Transcripts, pages 1038-1054, 1104-1143). Further, this Court did consider ***all*** [court's emphasis] statutory and non-statutory mitigating factors in weighing the decision as to what sentence to impose. *Downs V, supra.* Therefore, this Court finds the defendant's claim to be without merit as well. (II/188)

This Court held, regarding the trial court's findings on mitigation, as follows:

> Downs also takes issue with the lack of discussion of mitigation in the sentencing order. (footnote omitted) We acknowledge that Downs did present substantial valid nonstatutory mitigating evidence. Nonetheless, after reviewing the record and the sentencing order in its entirety, we are

> satisfied that the trial court properly considered that evidence and conducted the appropriate balance, concluding that it could "not find mitigating factors to offset or overcome the aggravating circumstances in this case." (footnote omitted)

Downs V, 572 So.2d at 895.

The trial court correctly determined "this claim is procedurally barred in that the claim could have been, should have been and, to a large extent, was considered in the defendant's direct appeal of his resentencing hearing." (II/188) Specifically, as regards a requested instruction on "immunity and deals with the other defendants," it "did not instruct the jury that it could not consider this non-statutory mitigating factor, and this Court allowed the defendant to argue this non-statutory mitigator to the jury." (II/188; T2.1106-13) The trial court did instruct the jury that it could consider whether Downs "was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person, and the defendant's participation was relatively minor" and "any other circumstances of the offense." (T2.1136-37) In light of the procedural bar, and this Court's determination of the mitigation issue on the appeal of Resentencing in *Downs V*, the trial court was correct in summarily denying the motion as to this claim.

ISSUE XII

THE COURT PROPERLY INSTRUCTED THE JURY REGARDING THE BURDEN OF PROOF, AND THIS CLAIM IS PROCEDURALLY BARRED.

The trial court found:

> In ground thirteen, the defendant claims that the jury instructions shifted the burden of proof to him to prove that he should receive a life sentence. First, this claim is procedurally barred in that it could and should have been raised in the defendant's direct appeal following his resentencing hearing. *Cherry, supra; Chandler, supra; Chandler, supra; Chandler, supra; Swafford, supra; Adams, supra; Straight, supra.* Second, the defendant's claim is without merit, in that this Court instructed the jury that the State had to have proven an aggravating circumstance beyond any reasonable doubt before the jury even needed to consider any mitigating factors. (Resentencing Record, pages 288-293; Resentencing Record Transcripts, pages 1134-1140). (II/188)

First, the trial court correctly found this claim procedurally barred. (Trial court's citations.) Second, this claim is devoid of merit, as the following facts demonstrate.

At Downs' Resentencing, defense counsel requested some additions to the standard jury instructions (R2.279-82). The State objected, and the trial court sustained the objection, to the following addition, on the ground that the standard jury instructions addressed this point:

> The reasonable doubt standard is also applied to the aggravating circumstances as a whole. Unless you find that the State has shown beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors in this case, you cannot recommend a sentence of death. (R2.280; T2.1046).

The State had no objection to, and the trial court permitted, the following defense requested addition:

> The weighing of aggravating and mitigating circumstances is not just a counting process. You are free to assign whatever weight you find appropriate to the aggravating and mitigating circumstances which are proved, and then make your own independent moral judgment about the appropriate penalty. (R2.280; T2.1046-47)

Ultimately, the trial court instructed the jury to render:

> an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.[26]
>
> * * * *
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.[27] ... (T2.1034-36)

Downs complains both his trial counsel and appellate counsel were ineffective in their failure to challenge an alleged shift of the burden of proof.[28] Yet, there was no reason to object or raise

---

[26] Defense counsel requested this same instruction (R2.280). *See also*, Florida Criminal Laws & Rules *Jury Instructions* 1071 (West 1994).

[27] Defense counsel included this sentence in his requested jury instructions (R2.280). *See also*, Florida Criminal Laws & Rules *Jury Instructions* 1073 (West 1994).

[28] Ineffective assistance of appellate counsel claims should be raised in a petition for writ of habeas corpus, not in a Rule 3.850 motion for post-conviction relief. *See Swafford v. Dugger,*

an issue on appeal, as the instructions fully complied with existing law.[29] Therefore, there can be no serious contention that reasonable jurists, at the time Downs was resentenced, would have concluded that the instructions given was deficient. *Aldridge v. Wainwright*, 433 So.2d 988, 989 (Fla. 1993); *Vaught v. State*, 410 So.2d 147 (Fla. 1982). The trial court was correct in summarily denying a procedurally barred claim which was devoid of merit.

---

supra; Middleton v. State, supra.

[29] See fn.20 supra. *Suarez v. Dugger, supra; Card v. State, supra*, at 1177; *Herring v. Dugger, supra*, at 1177; *Atkins v. Dugger supra*, at 1167.

ISSUE XIII

THE TRIAL COURT CONDUCTED A PROPER *FARETTA*[30] INQUIRY, AND THIS CLAIM IS PROCEDURALLY BARRED.

The trial court found:

> In ground fourteen, the defendant claims that this Court failed to make an adequate inquiry, pursuant to *Faretta v. California*, ... into whether the defendant was knowingly, voluntarily and intelligently waiving his right to the assistance of counsel. First, this claim is procedurally barred in that it could and should have been raised in the defendant's direct appeal following the resentencing hearing. *Bundy v. State*, 497 So.2d 1209 (Fla. 1986). Second, the defendant's claim is without merit in that this Court did conduct an adequate inquiry into whether the defendant was knowingly, voluntarily and intelligently waiving his right to counsel. (Resentencing Record page 73; Resentencing Record Transcripts, pages 16-71, 173, 377, 652-653). *Hill v. State*, 21 Fla. L. Weekly S515 (Fla. November 27, 1996); *Rogers v. Singletary*, 21 Fla. L. Weekly S503 (Fla. November 27, 1996).[31] (II/189)

The trial court correctly determined Downs' *Faretta* claim is procedurally barred. *Muhammed v. State*, 603 So.2d 488 (Fla. 1992). On the merits, the record demonstrates the trial court conducted and extensive, comprehensive *Faretta* inquiry, notwithstanding Downs' representation at p.73 of his brief that "the record does not contain any appropriate *Faretta* inquiry or other evidence of a voluntary and knowing waiver of counsel."

On May 19, 1988, Downs wrote the court, advising it that he no

---

[30] *Faretta v. California*, 422 U.S. 806 (1975).

[31] *Hill v. State*, 668 So.2d 901 (Fla. 1996); *Rogers v. Singletary*, 698 So.2d 1178 (Fla. 1996).

longer had counsel (R2.55). On June 15, 1988, Downs again wrote the court, this time seeking a postponement until he had secured substitute counsel (R2.56). Finally, on June 25, 1988, Downs wrote the court, stating that he had been unable to retain counsel and that counsel's withdrawal had caught him "totally off guard" (R2.57).

On July 8, 1988, the record exhibits the following exchange transpired between the trial court and Downs:

> THE COURT: Mr. Downs, do you have any money to hire counselor yourself?
>
> DOWNS: No, Your Honor, I do not.
>
> Before we proceed with appointment of counsel, I request to make a statement that would take about two and-a-half minutes to be placed on the record.
>
> If the Court and State are worried about the lawyer not representing me at this point, I will waive it.
>
> THE COURT: I would prefer going ahead and appointing counsel for you.
>
> DOWNS: I waive appointment of counsel and move for self-representation in this matter.
>
> THE COURT: One step at the time. Few more questions about your financial situation. All right. Do you have any money to hire and [sic] attorney to represent you?
>
> DOWNS: No, ma'am.
>
> THE COURT: You have any assets at all that you could convert to cash?
>
> DOWNS: No, ma'am.
>
> THE COURT: I will find you insolvent. You would

be entitled to appointment of counsel. Do you wish counsel appointed for you?

DOWNS: No.

THE COURT: All right. And you understand everything has been tried for first degree murder and you have been convicted of that offense and previously sentenced to death for it and that you will be tried before a jury as to the sentencing part of that?

DOWNS: Talking about a Phase II proceeding?

THE COURT: That's correct, jury determination and the subsequent decision of the Court whether you would be sentenced to life or death?

DOWNS: Right.

THE COURT: What have you reached, the decision you wish to represent yourself?

DOWNS: Ask the Court to allow me to say something, like I said, take about two and-a-half minutes.

THE COURT: Okay. Let me ask this: Do you have any objection to my appointing counsel for you to talk with counsel regarding what you want to say to the Court, just in helping you make a decision on that?

DOWNS: I would agree to that, and like a ten-minute recess to confer with him and come back in.

THE COURT: What I will do, go ahead, I think you have already met Roberto Arias, had contact and he had indicated that he would be in agreement with being appointed.

Mr. Arias has been with the Public Defender's Office and is presently in private practice. He has many years of experience in these matters.

So, at this time I will -- wait a minute, wait a minute, no. At this time I will appoint Mr. Arias. I will take a ten-minute recess. Court's in recess ten minutes.

(Short Recess)

> THE COURT: ... Having conferred with Mr. Arias, do you wish to continue with appointment of counsel?
>
> DOWNS: I still wish to waive appointment of counsel. Still wish to read the statement into the record.
>
> THE COURT: Mr. Kunz? (T2.16-20)

At this juncture, Mr. Kunz, the prosecutor, advised the trial court as to the case law on self-representation and "the inquiry of Mr. Downs to determine whether his decision to represent himself is intently voluntarily made that he is knowingly waving his right to counsel." (T2.20-22)

The trial court conducted a complete *Faretta* inquiry with Downs, ultimately denying his motion to represent himself without prejudice to renew it at a later date. (T2.22-27) On August 19, 1988, Downs moved to be appointed co-counsel in his case (R2.42) He also requested to represent himself and to have standby counsel appointed (R2.45). The trial court concluded that Downs had freely and voluntarily waived his right to counsel, and appointed Mr. Arias as standby counsel (R2.47). Given the procedural bar, and these facts, the trial court was entirely correct in summarily denying the motion as to this claim.

ISSUE XIV

THIS CLAIM IS PROCEDURALLY BARRED; DOWNS RECEIVED FULL DUE PROCESS OF LAW, AND HIS RESENTENCING WAS FREE OF ANY REVERSIBLE ERROR.

The trial court found, regarding Downs' cumulative error claim (sixteen below), as follows:

> In ground sixteen, the defendant claims that the cumulative effects of the substantive and procedural errors at the defendant's guilt and penalty phase trials deprived him of a fair trial. First, this claim is procedurally barred in that it could and should have been raised in the defendant's direct appeals of his guilt and penalty phase trials. Second, as to the guilt phase trial, the Supreme Court of Florida, after conducting its full review of the record on appeal, said, "Downs received the full due process of law and a fair trial free of any reversible error." *Downs I, supra*, at 792. As to the penalty phase (resentencing) trial, not only was the defendant's sentence affirmed on direct review by the Supreme Court of Florida, *Downs V, supra*, this Court's review of the resentencing record (that went to the Supreme Court of Florida on appeal) demonstrates to this Court that the defendant also received a full and fair trial at the resententencing hearing. Therefore, this Court finds the defendant's claim that the cumulative effect of the alleged errors deprived him of a fair trial to be without merit. *Johnson v. Singletary*, 22 Fla. L. Weekly S31 (Fla. December 19, 1996).[32] (II/189-90)

In *Downs V, supra*, at 901, this Court found as follows:

> Finally we reject the claim that the death penalty is disproportional punishment. First, there is substantial competent evidence in the record to support the trial court's conclusion that Downs was the triggerman in a cold-blooded contract murder. This Court has affirmed the death sentence in similar cases where the trial court followed the

---

[32] *Johnson v. Singletary*, 695 So.2d 263 (Fla. 1996).

> jury's recommendation of death. (citations omitted) ... In this case, however, evidence in the record supports the trial court's conclusion that Downs was the triggerman and thus was more culpable than Johnson.
>
> Having found no reversible error, and having considered any possible cumulative effect of the harmless errors found above, we affirm the sentence of death.

First, this claim is procedurally barred. *Johnson v. Singletary, supra*. Second, Downs' argument that his trial court proceedings "were fraught with procedural and substantive errors which cannot be harmless," is without merit. *Id*.

CONCLUSION

Based upon the foregoing facts, authorities and reasoning, the State respectfully requests this Honorable Court to affirm the trial court's denial of Downs' second amended motion for post-conviction relief.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK S. DUNN
Assistant Attorney General
Florida Bar #0471852

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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 Greg Smith, CCRC Northern District, P.O. Box 5498, Tallahassee, FL, 32314-5498, this 12th day of February, 1998.

MARK S. DUNN
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

ERNEST CHARLES DOWNS,

Appellant,

v. CASE NO. **90-510**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK S. DUNN
ASSISTANT ATTORNEY GENERAL
Florida Bar #0471852

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

INDEX TO APPENDIX

INSTRUMENT
EXHIBIT

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 77-2874-CF
DIVISION: CR-A

STATE OF FLORIDA,
Petitioner,

v.

ERNEST CHARLES DOWNS,
Defendant.
_____/

ORDER DENYING DEFENDANT'S SECOND FLA.R.CRIM.P. 3.850 MOTION FOR POST-CONVICTION RELIEF

This matter came before this Court on the defendant's second Fla.R.Crim.P. 3.850 Motion For Post-Conviction Relief, filed on September 6, 1994, which the defendant has entitled "Defendant's Second Amended Motion To Vacate Judgment's Of Conviction And Sentence With Special Request For Leave To Amend."

The defendant was charged with Premeditated First Degree Murder and Conspiracy To Commit First Degree Murder for the contract murder of Forrest Jerry Harris, Jr. The defendant was tried by a jury and found guilty as charged. The defendant has now been sentenced to death twice after two separate jury recommendations that the death penalty be imposed. The facts and procedural history of this case are set forth in Downs v. State, 386 So. 2d 788 (Fla. 1980), cert. denied, 449 U.S. 976, 101 S.Ct.387, 66 L.Ed.2d 238 (1980) (Downs I); Downs v. State, 453 So. 2d 1102 (Fla. 1984) (Downs II); Downs v. Wainwright, 476 So. 2d 654 (Fla. 1985) (Downs III); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987) (Downs IV); and Downs v. State, 572 So. 2d 895 (Fla. 1990) (Downs V).

Exhibit "A"

In the defendant's instant motion he has raised sixteen (16) grounds for setting aside his conviction and death sentence. The State filed a written response to the defendant's motion on September 18, 1995. Hearings were held as to the defendant's public records claims (grounds one and two of the defendant's instant motion) on June 27, 1994 (T.6/27/94), July 11, 1994 (T.7/27/94), September 23, 1994 (T.9/23/94), December 16, 1994 (T.12/16/94), and May 12, 1995 (T.5/12/95). A hearing was also held on August 2, 1996 (T.8/2/95), pursuant to Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993), at which time counsel were permitted to present arguments on all of the claims and to argue whether an evidentiary hearing would be necessary on each of the respective claims. No evidentiary hearing was held on any of the defendant's remaining claims, as the defendant's sworn motion and the record on appeal of the various proceedings held in this case to date adequately refute the defendant's claims without a need for any further hearings. Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993); Swafford v. State, 569 So. 2d 1264 (Fla. 1990); Kennedy v. State, 547 So. 2d 912 (Fla. 1989); Delap v. State, 505 So. 2d 1321, 1322 (Fla. 1987). The records this Court has relied on in deciding this motion are: the record on appeal of the defendant's guilt phase trial (Downs I, supra), the record on appeal of the defendant's first Fla.R.Crim.P. 3.850 motion for post-conviction relief (Downs II, supra), the record on appeal of the defendant's penalty phase (resentencing) trial (Downs V, supra), a copy of a sworn statement the defendant gave to the police (which is labeled exhibit "A," and attached to this order), and the transcripts and orders, etc., that compose the proceedings on the defendant's instant motion. This Court incorporates above noted records as part of this order. Due to the volume of the record necessarily incorporated to fully address the defendant's sixteen claims in his instant motion, the full record can not be attached to this order. However, given that the stated records on appeal are maintained by the Supreme Court of Florida, and that copies of those records

have been provided to the defendant at the time of the respective appeals, there can be no prejudice in not physically attaching all of the records relied upon and referred to in this order.

In grounds one and two of his instant motion, the defendant claims that he was not provided with documents pursuant to his public records requests to several State agencies. As noted above, numerous hearings were held on these claims and this Court ensured that the documents to which the defendant was entitled were provided to him. (T.6/27/94, T.7/27/94, T.9/23/94, T.12/16/94, T.5/12/95, T.8/2/95) Any documents that were claimed to be exempt from a public records disclosure were submitted to this Court for an in-camera review by this Court pursuant to Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993). (T.6/27/94, pages 42 - 46.) Based on the above, this Court finds the defendant's public records claims in grounds one and two are without merit. (Order filed on August 4, 1994, with attached exhibits.) Mills v. Florida, 21 Fla. L. Weekly S527 (Fla. December 4, 1996); Atkins v. State, 663 So. 2d 624 (Fla. 1995). Further, this Court finds the defendant's claims that the failure to provide records caused collateral counsel to be ineffective and prevented the defendant from raising additional claims to be without merit. On May 12, 1995, the defendant was given an additional forty-five (45) days in which to file any amendments to his motion that he needed to make based on the additional information that this Court ensured was made available to him. No amendments nor amended motion was filed.

In ground three, the defendant claims that the State withheld exculpatory evidence, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that would show that the victim's death was the result of the victim's cooperation with federal authorities into allegations that Harold Haimowitz and other persons associated with American National Bank were involved in violations of federal banking laws, and that the victim allegedly had a relationship with

Haimowitz's wife. The defendant admits that he knew of these allegations from the point of his arrest and that he tried to tell the police and the jury, at the guilt phase of his trial, the "true story" of the victim's death. The defendant's claim is procedurally barred in that he could have, should have, and *did* raise this claim in prior proceedings (Downs II, supra at 1105). Cherry v. State, 659 So. 2d 1069 (Fla. 1995); Chandler v. Dugger, 634 So. 2d 1066 (Fla. 1994); Swafford v. State, 569 So. 2d 1264 (Fla. 1990); Straight v. State, 488 So. 2d 530 (Fla. 1986). Further, since this Court has already entertained the evidence regarding this claim, at the guilt phase of the defendant's jury trial, this Court would not be inclined to address it again. Stano v. State, 497 So. 2d 1185 (Fla. 1986). Finally, in light of the overwhelming evidence of the defendant's guilt (Downs I, supra at 792; Downs V, supra at 899), there is no reasonable probability that the evidence would have resulted in an acquittal. Torres-Arboleda, 636 So. 1321 (Fla. 1994); Medina v. State, 573 So. 2d 293 (Fla. 1990).

At the August 2, 1996, hearing the defendant attempted to get around the procedural bar by claiming that his first post-conviction counsel was ineffective for failing to raise the claim in the defendant's first Fla.R.Crim.P. 3.850 motion. The United States Supreme Court has repeatedly held that a defendant is not entitled to relief based on a claim of ineffective assistance of collateral counsel, Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Murray v. Gairratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990 (1987), and there is no *constitutional* right to post-conviction counsel under the constitution of this State. The Supreme Court of Florida has followed the United States Supreme Court's holding that there is no constitutional right to post-conviction counsel and has held that a claim of ineffective assistance of post-conviction counsel does not afford a defendant any relief. Lambrix v. State, No. 86,119 (Fla. September 12, 1996); Johnson v. State, 536 So. 2d 1009 (Fla.

1988). Further, the defendant's claim that his first collateral counsel rendered ineffective assistance of counsel is procedurally barred for two reasons. First, as the defendant notes in his motion, the evidence of the defendant's "true story" of the victim's murder was in fact proffered to this Court during the guilt phase of the defendant's jury trial. Therefore, the alleged Brady violation could and should have been raised at trial and addressed in the defendant's direct appeal of his conviction. The defendant's guilt phase counsel obviously did not do that because the information was known to the defendant at least as well as it was to the State, and therefore, no *ethical* Brady claim could have been made. Cherry, supra at 1073; Roberts v. State, 568 So. 2d 1255 (Fla. 1990). Counsel raised the only possible objection, the exclusion of the evidence, and that objection was raised and rejected on appeal. Downs II, supra at 1105. Second, the defendant is prohibited from using a claim of ineffective assistant of counsel to avoid a procedural bar. Cherry, supra; Chandler, supra; Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993); Torres-Arboleda v. Dugger, supra; Swafford, supra; Medina, supra.

In ground four, the defendant claims that this Court erred in giving the jury instruction on the cold, calculated and premeditated sentencing aggravator. This claim is procedurally barred in that it could and should have been raised in the defendant's direct appeal following his resentencing. Jones v. State, 22 Fla. L. Weekly S25 (Fla. December 26, 1996); Cherry, supra; Chandler, supra; Swafford, supra; Jennings v. State, 583 So. 2d 316 (Fla. 1991); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990). Further, the defendant did object to this Court's cold, calculated and premeditated jury instruction and the instruction was addressed in his direct appeal of his resentencing hearing. Downs V, supra. The defendant is procedurally barred from relitigating this issue by raising a different argument as to that issue in a subsequent proceeding. Torres-Arboleda, supra; Medina, supra. Finally, this Court finds that the facts brought out at the resentencing hearing established that the victim's murder was

"... committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification," no matter how those terms are defined. Section 921.141(5)(I), Florida Statutes. Larzelere v. State, 676 So. 2d 394 (Fla. 1996); Wournos v. State, 676 So. 2d 972 (Fla. 1996); Archer v. State, 673 So. 2d 17 (Fla. 1996).

In his motion and at the hearing on August 2, 1996, the defendant attempted to circumvent the procedural bar by arguing that resentencing counsel was ineffective for failing to object to the instruction, even under the existing case law, so as to preserve the claim for appellate review. First, resentencing counsel *did* object to this Court's cold, calculated and premeditated jury instruction. (Resentencing Record Transcripts, pages 1032 - 1037, 1142). Second, the defendant is prohibited from using an ineffective assistance of counsel claim in an attempt to circumvent a procedural bar. Cherry, supra; Chandler, supra; Lopez v. Singletary, supra; Torres-Arboleda, supra; Swafford, supra; Medina, supra.

In ground five, the defendant claims that this Court erred when it instructed the jury on the previous conviction of a violent felony sentencing aggravator. This claim is procedurally barred in that it could and should have been raised (if it had been preserved) in the defendant's direct appeal following his resentencing hearing. Cherry, supra; Chandler, supra; Swafford, supra; Correll, supra; Adams v. State, 543 So. 2d 1244 (Fla. 1989). Further, this Court finds that the evidence brought out at the resentencing hearing of the defendant's previous robbery conviction would have established the prior felony conviction involving the use or threat of violence to some person sentencing aggravator, no matter how those terms are defined. Larzelere, supra; State v. Salmon, 636 So. 2d 16 (Fla. 1994).

In his motion and at the hearing on August 2, 1996, the defendant attempted to circumvent

the procedural bar by arguing that resentencing counsel was ineffective for failing to object to the instruction, even under the existing case law, so as to preserve the claim for appellate review. The defendant is prohibited from using an ineffective assistance of counsel claim to circumvent a procedural bar. Cherry, supra; Chandler, supra; Lopez v. Singletary, supra; Torres-Arboleda, supra; Swafford, supra; Medina, supra.

In ground six, the defendant claims that this Court erred in instructing the jury on the pecuniary gain sentencing aggravator. This claim is procedurally barred in that it could and should have been raised (if it had been preserved) in the defendant's direct appeal following his resentencing hearing. Cherry, supra; Chandler, supra; Swafford, supra; Adams, supra. Further, this Court finds that the evidence brought out at the resentencing hearing that the defendant was to be paid $5,000.00 for killing the victim was sufficient to establish the pecuniary gain sentencing aggravator, no matter how those terms are defined. Larzelere, supra; State v. Salmon, supra.

In his motion and at the hearing on August 2, 1996, the defendant attempted to circumvent the procedural bar by arguing that resentencing counsel was ineffective for failing to object to the instruction, even under the existing case law, so as to preserve the claim for appellate review. The defendant is prohibited from using an ineffective assistance of counsel claim to circumvent a procedural bar. Cherry, supra; Chandler, supra; Lopez v. Singletary, supra; Torres-Arboleda, supra; Swafford, supra; Medina, supra.

In ground seven, the defendant claims that this Court improperly instructed the jury that it could find the existence of the pecuniary gain sentencing aggravator and the cold, calculated and premeditated sentencing aggravator based on a single fact which would support both aggravators. This claim is procedurally barred in that it could and should have been raised (if it had been

preserved) in the defendant's direct appeal following his resentencing hearing. Cherry, supra; Chandler, supra; Swafford, supra; Jennings, supra; Correll, supra; Adams, supra. Further, this claim is patently false, in that this Court never instructed the jury that it could find two aggravating circumstances based on one fact. (Resentencing Record, pages 288 - 293; Resentencing Record Transcripts, pages 1134 - 1140) The jury had before it the fact that the defendant was to be paid $5,000.00 for killing the victim, to establish the pecuniary gain aggravator, and it had the facts of how the defendant himself planned and carried out the murder of the victim, to establish the cold, calculated and premeditated aggravator. Larzelere, supra. The jury did not have to rely, and this Court did not rely, on one factual circumstance to establish the two aggravators. Moreover, this Court combined the two aggravators, which this Court did not have to do, so that there is no possibility that one fact was used to support two aggravators.

In his motion and at the hearing on August 2, 1996, the defendant attempted to circumvent the procedural bar by arguing that resentencing counsel was ineffective for failing to object to the instruction, even under the existing case law, so as to preserve the claim for appellate review. First, counsel was not ineffective in failing to object, because this Court did *not* improperly instruct the jury as the defendant asserts in his motion. Second, the defendant is prohibited from using an ineffective assistance of counsel claim in an attempt to circumvent a procedural bar. Cherry, supra; Chandler, supra; Lopez v. Singletary, supra; Torres-Arboleda, supra; Swafford, supra; Medina, supra.

In ground eight, the defendant claims that he was denied his constitutional right to the professionally competent assistance of his mental health expert. The defendant makes this contention despite the fact that his mental health expert, Dr. Krop, was appointed at the defendant's specific request. (Resentencing Record Transcripts, pages 47 - 50.) The defendant initially contends that Dr.

Krop failed to conduct a proper investigation into the defendant's mental health background. This claim establishes but one thing, that the defendant not only did not read the transcript of Dr. Krop's trial testimony, but that he did not even read the Supreme Court of Florida's summary of that testimony. Downs V, supra at 898. Based on Dr. Krop's testimony at the resentencing hearing (Resentencing Record Transcripts, pages 855 - 893), this Court finds that Dr. Krop conducted an adequate investigation and evaluation of the defendant's mental health. Roberts v. State, 568 So. 2d 1255 (Fla. 1990).

The defendant goes on to argue that Dr. Krop improperly set his own "standard for mitigation" when he testified that he reserved the use of the term "extreme" for "individuals who are psychotic or organically impaired, or mentally retarded." (Resentencing Record Transcripts, at page 889.) The defendant contends that Dr. Krop's opinion was contrary to the "legal standard." This Court finds the defendant's claim to be without merit. Dr. Krop made it clear that he was expressing *his* opinion on the use of the term extreme, he did not state that his opinion constituted the "legal standard" for the use of the term, nor did anyone else suggest that his opinion constituted the legal standard for the use of the term. Further, even if Dr. Krop's opinion as to the use of the term extreme could somehow be said to have been erroneous, this Court finds that the error did not prejudice the defendant for two reasons. First, even if one of the attorneys had instructed Dr. Krop on what the "legal standard" was (see, Johnson v. State, 660 So. 2d 637 (Fla. 1995); Arbelaez v. State, 626 So. 2d 169 (Fla.1993); Provenzano v. State, 497 So. 2d 1177 (Fla. 1986)), a review of Dr. Krop's entire testimony makes it abundantly clear that Dr. Krop would still have expressed the opinion that the defendant was not under the influence of an extreme mental or emotional disturbance at the time the defendant *committed* the murder. Second, because the jury was also given evidence about the

defendant's family and background information (which was presented to the jury through the defendant's witnesses and his exhibits in evidence), this Court instructed the jury on this statutory mitigator and the jury was free to come to its own conclusion about whether the totality of the evidence established that the defendant was under the influence of an extreme mental or emotional disturbance at the time the defendant *committed* the murder. (Resentencing Record Transcripts, pages 1041, 1136) Given the overwhelming evidence (brought forth at the resentencing hearing) rebutting any claim that the defendant committed the murder as a result of an extreme mental or emotional disturbance, the jury can hardly be faulted for concluding, as this Court and the Supreme Court of Florida have concluded, that the defendant clearly did not commit this murder as a result of being under the influence of an extreme mental or emotional disturbance at the time he *committed* the murder.

In ground nine, the defendant claims that his trial counsel rendered ineffective assistance of counsel at the pretrial and trial stages of the guilt phase of the defendant's jury trial by not investigating and presenting the true story of the murder of the victim: the alleged Harris / Haimowitz / American National Bank story. The defendant makes this claim despite the fact that he notes in his motion that his attorney *did* investigate this possible defense, that counsel *did* list the witnesses counsel intended to use to present this defense at trial, and, as noted previously in his motion, that the evidence of this alleged defense was proffered to this Court. (See also, Downs II, supra at 1105.) First, the defendant has previously challenged the assistance of his guilt phase counsel in his first Fla.R.Crim.P. 3.850 motion. Both the defendant and his guilt phase counsel testified at the evidentiary hearings held on that motion. (January 1982, Hearing Transcript) Therefore, the defendant's latest claim of ineffective assistance of guilt phase counsel is procedurally barred as an

abuse of process in that the defendant could and should have raised this claim in his first Fla.R.Crim.P. 3.850 motion. Zeigler v. State, 632 So. 2d 48 (Fla. 1993); Foster v. State, 614 So. 2d 455 (Fla. 1992). Second, the defendant's guilt phase counsel was not ineffective, because he did investigate and attempt to present evidence of this story.

In ground ten, the defendant claims that he is entitled to a new trial due to newly discovered evidence. The "new evidence" is the alleged Harris / Haimowitz / American National Bank story. The defendant's motion makes it abundantly clear that the evidence regarding this claim was known to the defendant from the time of his arrest. Therefore, it is not newly discovered evidence. Mills, supra; Bolender v. State, 658 So. 2d 82 (Fla. 1995); Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994); Torres-Arboleda, supra. Further, given the defendant's own sworn testimony at the hearings on his first Fla.R.Crim.P. 3.850 motion that he was involved in the conspiracy to kill the victim, the only effect of this "newly discovered" evidence would be to substitute Harold Haimowitz for John Barfield as the person who offered the money to have the victim killed. (January 12, 1983, Hearing Transcript, pages 221 - 252, 304 - 315) (Note: This Court only has the original transcripts of this hearing. An index to the record on appeal of the defendant's first motion suggests that the defendant's testimony consists of pages 812 - 981 of the transcripts on appeal.) That would still leave the defendant and Larry Johnson as the possible triggermen. The defendant's repeated contention throughout the various proceedings in this case that Larry Johnson, not the defendant, was the triggerman is contradicted by the defendant's own sworn statement to the police that Larry Johnson was a coward, and that he could not take a gun and kill someone in cold blood. (Ex. "A," pages 11, 30.) The defendant's sworn statement to the police further corroborates all of the other evidence establishing that the defendant was the triggerman. Downs I, supra; Downs V, supra. As the Supreme

Court of Florida said in Downs V, supra, "...there is substantial competent evidence to support the trial court's conclusion that Downs was the triggerman in a cold-blooded contract murder." Id. at 901. Moreover, in the defendant's sworn testimony at the hearing on his first Fla.R.Crim.P. 3.850 motion, the defendant testified that at *Barfield's* request, he asked Johnson to kill the victim and Johnson agreed to do so. (January 12, 1983, Hearing Transcript, at pages 221 - 222 of original transcript.) Therefore, there is no possibility, let alone a reasonable probability, that this "new evidence" would result in a different verdict or sentence. Bottoson v. State, 674 So. 2d 621 (Fla. 1996); Torres-Arboleda, supra; Medina, supra.

In ground eleven, the defendant claims that resentencing counsel, Mr. Roberto Arias, was ineffective for failing to adequately investigate the defendant's background and in failing present statutory and nonstatutory mitigating evidence based on that investigation. First, despite this Court's repeated warnings about the limitations that the defendant would face in representing himself, the defendant insisted on waiving counsel and exercising his constitutional right to represent himself. (Resentencing Record, page 73; Resentencing Record Transcripts, pages 16 - 71, 173, 377, 652 - 653.) The defendant assumed the ultimate responsibility for the investigation, preparation and defense of his case. The defendant was intimately familiar with all of the information set forth in this ground of the defendant's instant motion. The defendant did not withdraw his pro se status until *after the State had presented its case* and the defendant himself had presented the testimony of *seventeen defense witnesses*. (Resentencing Record Transcript, pages 1 - 851.) Having waived his right to counsel and having exercised his constitutional right to represent himself, the defendant has forever waived this claim. State v. Tait, 387 So. 2d 338 (Fla. 1980).

Second, a review of the testimony of the defense witnesses at the resentencing hearing reveals

that a substantial majority of the information set forth under this ground was in fact presented to the jury through the defendant's witnesses and exhibits. To the extent that the remainder of the proffered information was not presented, this Court finds that the information would have been cumulative to the evidence that was presented, and that there is no reasonable probability that the outcome of the sentencing proceeding would have been different had the proffered information been presented to the jury. Ferguson v. State, 593 So. 2d 508 (Fla. 1992); Johnson v. Dugger, 583 So. 2d 657 (Fla. 1991); Tafero v. State, 561 So. 2d 557 (Fla. 1990); Kennedy v. State, 547 So. 2d 912 (Fla. 1989); Adams v. State, 543 So. 2d 1244 (Fla. 1989); Card v. State, 497 So. 2d 1169 (Fla. 1986). The fact that the defendant has now found medical experts who would testify that based on the information proffered in this claim they would render an opinion that the defendant was under the influence of an extreme mental or emotional disturbance at the time the defendant committed the offense is of no moment, as the jury and this Court would be free to disregard such an opinion in light of the overwhelming evidence rebutting such an opinion. Engle v. State, 576 So. 2d 696 (Fla. 1991); Correll v. State, 558 So. 2d 422 (Fla. 1990); Provenzano v. State, 497 So. 2d 1177 (Fla. 1986); Card v. State, 497 So. 2d 1169 (Fla. 1986).

Third, the information proffered is replete with common sense inconsistencies, and is diametrically opposed to counsel's argument during closing argument that the defendant is capable of rehabilitation and is not (and has not become) a sociopath. Correll, supra.

Finally, all of the proffered information and opinions drawn therefrom are rebutted by the overwhelming evidence presented at the resentencing hearing, which established that the defendant's commission of the murder was the result of but one thing - a *cold, calculated, and premeditated* design, and that the murder was committed for one reason and one reason alone - pecuniary gain.

Cook v. State, 542 So. 2d 964 (Fla. 1989).

In ground twelve, the defendant claims that this Court erred in refusing to instruct the jury (as a matter of law) that the jury should consider as a mitigating circumstance that, "You may also consider as a mitigating factor the immunity and deals given to co-defendants," (Resentencing Record, page 277; Resentencing Record Transcript, page 1049), and that this Court erred in failing to consider this non-statutory mitigating factor. First, this claim is procedurally barred in that the claim could have been, should have been and, to a large extent, was considered in the defendant's direct appeal of his resentencing hearing. Downs V, supra. See also, Cherry, supra; Chandler, supra; Swafford, supra; Straight, supra. Second, this Court did not instruct the jury that it could not consider this non-statutory mitigating factor, and this Court allowed the defendant to argue this non-statutory mitigator to the jury. (Resentencing Record Transcripts, pages 1038 - 1054, 1104 - 1143). Further, this Court did consider *all* statutory and non-statutory mitigating factors in weighting the decision as to what sentence to impose. Downs V, supra. Therefore, this Court finds the defendant's claim to be without merit as well.

In ground thirteen, the defendant claims that the jury instructions shifted the burden of proof to him to prove that he should receive a life sentence. First, this claim is procedurally barred in that it could and should have been raised in the defendant's direct appeal following his resentencing hearing. Cherry, supra; Chandler, supra; Chandler, supra; Swafford, supra; Adams, supra; Straight, supra. Second, the defendant's claim is without merit, in that this Court instructed the jury that the State had to have proven an aggravating circumstance beyond any reasonable doubt before the jury even needed to consider any mitigating factors. (Resentencing Record, pages 288 - 293; Resentencing Record Transcripts, pages 1134 - 1140).

In ground fourteen, the defendant claims that this Court failed to make an adequate inquiry, pursuant to Farretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975), into whether the defendant was knowingly, voluntarily and intelligently waiving his right to the assistance of counsel. First, this claim is procedurally barred in that it could and should have been raised in the defendant's direct appeal following the resentencing hearing. Bundy v. State, 497 So. 2d 1209 (Fla. 1986). Second, the defendant's claim is without merit in that this Court did conduct an adequate inquiry into whether the defendant was knowingly, voluntarily and intelligently waiving his right to counsel. (Resentencing Record page 73; Resentencing Record Transcripts, pages 16 - 71, 173, 377, 652 - 653). Hill v. State, 21 Fla. L. Weekly S515 (Fla. November 27, 1996); Rogers v. Singletary, 21 Fla. L. Weekly S503 (Fla. November 27, 1996).

In ground fifteen, the defendant contends that he was denied the effective assistance of counsel at the guilt and penalty (resentencing) phases of his trial. The defendant does not make any factual allegations or specific arguments in support of this conclusory statement, but rather, asserts that State agencies have deprived him of the records that would allow him to raise arguments under this ground. As noted above as to grounds one and two of the defendant's instant motion, this Court found the defendant's records claims to be without merit, and on May 12, 1995, this Court gave the defendant forty-five (45) days in which to file any amendments to his motion that he needed to make. No amendments nor amended motion was filed. Therefore, given that the defendant has raised several ineffective assistance of counsel claims in other grounds of his instant motion, and that the defendant did not file any further amendments or amended motions when given the opportunity to do so, this Court finds that the defendant has abandoned this claim. No further amendments will be considered.

In ground sixteen, the defendant claims that the cumulative effects of the substantive and

procedural errors at the defendant's guilt and penalty phase trials deprived him of a fair trial. First, this claim is procedurally barred in that it could and should have been raised in the defendant's direct appeals of his guilt and penalty phase trials. Second, as to the guilt phase trial, the Supreme Court of Florida, after conducting its full review of the record on appeal, said, "Downs received the full due process of law and a fair trial free of any reversible error." Downs I, supra at 792. As to the penalty phase (resentencing) trial, not only was the defendant's sentence affirmed on direct review by the Supreme Court of Florida, Downs V, supra, this Court's review of the resentencing record (that went to the Supreme Court of Florida on appeal) demonstrates to this Court that the defendant also received a full and fair trial at the resentencing hearing. Therefore, this Court finds the defendant's claim that the cumulative effect of the alleged errors deprived him of a fair trial to be without merit. Johnson v. Singletary, 22 Fla. L. Weekly S31 (Fla. December 19, 1996).

Based on the above, it is:

ORDERED AND ADJUDGED that the defendant's second Fla.R.Crim.P. 3.850 motion for post-conviction relief is **DENIED.** The defendant shall have thirty (30) days from the date that this order is rendered in which to take an appeal.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 13th day of March, 1997.

Dorothy H. Pate
SENIOR CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 77-2874-CF

DIVISION "CR-A"

STATE OF FLORIDA,

Plaintiff,

vs.

ERNEST CHARLES DOWNS,

Defendant.

Y. R.
THIS INSTRUMENT IN COMPUTER

FILED
AUG 04 1994
Henry W. Cook
CLERK CIRCUIT COURT

ORDER ON DEFENDANT'S MOTION TO COMPEL, FOR CONTINUANCE AND REQUEST FOR ORDER SETTING HEARING

THIS CAUSE came on for hearing on July 17, 1994. The Court has considered the argument of counsel and the authorities cited.

On the issue as to Jacksonville Sheriff's Office (hereinafter referred to as JSO) records, the Court has further considered Exhibits 1 and 2 and the testimony of Stephen Hicks. The Court finds the evidence uncontroverted that all records of JSO have been provided defense. Mere suspicion that there is more does not warrant an evidentiary hearing for discovery on this 3.850 proceeding.

As to the records of the State Attorney, it was agreed to reserve ruling on any missing pages or documents with counsel to cooperate and insure all are provided. On the State's claim of exemptions dated July 5, 1994, the Court has made an in camera inspection (Court's Exhibit 1 - August 1, 1994). The Court has marked each folder A through I. The Court finds:

Exhibit "B"

A. Notes and information in preparation for hearings are exempt except as noted:

(1) There is an undated note listing an address for Gary Sapp at Poke Correctional Institution, 3876 Evans Road, Box 50, Poke City, Florida, 33868.

(2) Also an undated list of addresses for apparent witnesses (**Exhibit "A"**) and notes of interview with a co-defendant October 28, 1977 (**Exhibit "B"**).

B. There is arrest and booking report for Defendant (Jail No. 77-16778-3) dated August 5, 1977, and FBI (rap sheet) report which the Court assumes Defendant has.

Except for **Exhibit "C"**, the Court finds other documents are exempt.

C and D. All exempt.

E. There are five pages of copies of picture of a car (undated) and eight pages (aerial and ground) of picture of scene marked copy 77. These would have been disclosed to defense in 1977.

One page provides information on Hidden Hills North Development Co. (**Exhibit "D"**).

The Court finds other documents exempt.

F, G and H. Exempt.

I. Four pictures which appear unrelated to this case. These were in with G. These are available to be seen by counsel at any hearing upon prior request.

It is, accordingly,

ORDERED AND ADJUDGED that:

1. Defendant's Motion for Continuance is granted and hearing on 3.850 motion scheduled for the week of August 15, 1994, is struck from the calendar.

2. Defendant's Motion for an evidentiary hearing on Chapter 119 public records is denied.

3. Defendant shall have 30 days to amend his 3.850 motion and the State 30 days to respond.

4. Status hearing is set for Friday, September 23, 1994, at 11:00 A.M., in Room 219, Duval County Courthouse, Jacksonville, Florida, to reschedule hearing on the Defendant's 3.850 motion. Appearance by counsel may be by telephone. Time allotted for this hearing is 15 minutes.

5. Motion to Compel is denied except for exhibits attached to this Order.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 4th day of August, 1994.

Dorothy H. Pate

SENIOR CIRCUIT JUDGE

Copies furnished to:

The Honorable Donald R. Moran, Chief Judge

The Honorable John D. Southwood, Circuit Judge

Stephen M. Kissinger, Esquire, Assistant CCR

Angela Corey, Esquire, Assistant State Attorney

Bruce Page, Esquire, General Counsel's Office - JSO