IN THE SUPREME COURT OF FLORIDA

BARRY HOFFMAN,

Appellant,

CASE NO. 94,072

v.

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On Sunday, September 7, 1980, Barry Hoffman and James White murdered Frank Ihlenfeld and Linda Parrish in a Jacksonville Beach motel room. Hoffman v. State, 474 So.2d 1178, 1180 (Fla. 1985). After the murders, Hoffman fled the area and was arrested in Michigan in October 1981. Id. Hoffman confessed and, after plea negotiations, pled guilty to two counts of first-degree murder in exchange for two life sentences. (ROA I 73 et seq.).[1] This plea was conditioned on Hoffman's testifying truthfully against Lenny Mazzara, the man who ordered that Ihlenfeld be killed. (ROA I 74).

At Mazzara's trial, however, Hoffman denied killing anyone. (ROA III 93, 99). The prosecutor stated that, due to Hoffman's failure to testify truthfully, the plea agreement was "null and void" (ROA III 96) and announced the state's intention to try Hoffman "for both first degree murders." (ROA III 97). The trial court subsequently granted Hoffman's motion to withdraw his pleas (ROA I 50) and allowed Richard Nichols, Hoffman's first appointed counsel, to withdraw and appointed Jack Harris to replace him. (ROA I 56).

Thereafter, the state tried Hoffman on two counts of first-degree murder and one count of conspiracy to commit murder. The

[1] "ROA I 73" refers to page 73 of volume I of the record on appeal in Hoffman's direct appeal of his convictions and sentences to this Court, case no. 63,295. Hoffman v. State, 474 So.2d 1178 (Fla. 1985).

jury found Hoffman guilty of first-degree murder for Ihlenfeld's death, second-degree murder for Parrish's death, and conspiracy. (ROA I 120-21). The trial court agreed with the jury's nine-to-three recommendation and sentenced Hoffman to death, finding that the four aggravators (prior conviction of violent felony; heinous, atrocious, or cruel (HAC); cold, calculated, and premeditated (CCP); and pecuniary gain) outweighed the mitigators (no significant criminal history and the co-conspirators' sentences of life imprisonment). (ROA I 134-36).

Hoffman raised the following issues on direct appeal to the Florida Supreme Court: 1) denial of Hoffman's motion to suppress his confession and admission of that confession at trial; 2) failure to find confession was voluntarily made before admitting it into evidence; 3) improper exclusion of prospective jurors; and 4) death penalty was improper due to: a) improper prosecutorial argument; b) consideration of the contemporaneous conviction of second-degree murder as a prior violent felony aggravator; c) consideration of the manner of Parrish's death as a nonstatutory aggravator; d) finding HAC applicable to Ihlenfeld's death; e) the state's seeking the death penalty in retaliation for Hoffman's refusal to testify against Mazzara; and f) the co-conspirators' lesser sentences. This Court considered each of these issues and, finding no error, affirmed Hoffman's convictions and sentence of death. Hoffman v. State, 474 So.2d 1178 (Fla. 1985).

Hoffman filed a motion for postconviction relief in October 1987, which the circuit court summarily denied. On appeal this Court reversed and directed that a hearing be held, that Hoffman be given public records access to the state attorney's files, and that he be permitted to amend his postconviction motion. Hoffman v. State, 571 So.2d 449 (Fla. 1990). In June 1991 Hoffman filed an amended postconviction motion, which the circuit court summarily denied. This Court again reversed in December 1992 and directed that its 1990 mandate be followed. Hoffman v. State, 613 So.2d 405 (Fla. 1992).

After four years of status conferences and public records disclosure (e.g., S I 21, 79, 127, 160, 168, 172)[2], the circuit court directed that Hoffman file a second amended motion for postconviction relief by January 1, 1997. (I 97).[3] Hoffman filed that motion (II 99), and the state filed its response. (II 223). In a case management order dated February 26, 1997, the court set a Huff hearing[4] for April 11 and an evidentiary hearing, if needed, for April 29, 1997. (II 263). After hearing the parties on April 11, the circuit court decided that an evidentiary hearing would be

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[2] "S I 21, . . ." refers to page 21 of the single volume of supplemental record (I) filed in the instant case.

[3] "I 97" refers to page 97 of volume I of the record filed in the instant case.

[4] Huff v. State, 622 So.2d 982 (Fla. 1993); Fla.R.Crim.P. 3.851(c).

held on three issues (II: Brady[5] violation; IV and V: ineffectiveness) and summarily denied the other issues, finding them procedurally barred or moot. (II 275-77).

On April 11, 1997 collateral counsel moved to reset the evidentiary hearing set for April 29 because Hoffman's second chair attorney and investigator were working on another case. (II 269). The court denied that request. (II 278). Counsel filed an amended motion to reset four days later (II 283), which the court also denied. (II 282). On April 24, 1997 collateral counsel filed a motion asking that Jacksonville/Duval County be directed to pay the costs of the evidentiary hearing because his agency had exhausted its budget. (III 308). The circuit court denied that motion (III 303), and counsel appealed to this Court. This Court did "not disagree that the deficit may be the result of irresponsible planning," but stayed the evidentiary hearing until the new fiscal year. Hoffman v. Haddock, 695 So.2d 682, 684 (Fla. 1997). Thereafter, the circuit court reset the evidentiary hearing for July 15, 1997. (III 324).

The hearing took place on July 15 and 16, 1997. After hearing the testimony and argument of the parties, the circuit court issued an order denying all relief. (III 351).

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

SUMMARY OF ARGUMENT

ISSUE I.

The record supports the circuit court's conclusions that no Brady violation occurred and that, if the state had withheld any evidence, there was no reasonable probability that such evidence would have changed the outcome of the trial or sentencing.

ISSUE II.

The circuit court correctly found that Hoffman did not demonstrate ineffective assistance by trial counsel during the penalty phase.

ISSUE III.

Hoffman failed to demonstrate that his trial counsel was ineffective during the guilt phase, and the circuit court's ruling should be affirmed.

ISSUE IV.

The circuit court properly found the public records complaint to be moot.

ISSUE V.

The circuit court did not err in denying an evidentiary hearing on the procedurally barred claims.

ARGUMENT

ISSUE I

WHETHER THE CIRCUIT COURT CORRECTLY DENIED HOFFMAN'S BRADY CLAIM.

Hoffman argues that the state withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). The circuit court granted an evidentiary hearing on this claim. (II 275). Following that hearing, however, the court found that Hoffman failed to demonstrate a Brady violation. (III 351-53).

The test for determining if a Brady violation has occurred "is whether there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985); Kyles v. Whitely, 514 U.S. 419 (1995); Young v. State, 739 So.2d 553 (Fla. 1999); White v. State, 729 So.2d 909 (Fla. 1999). To meet this test, one must prove that: (1) the state possessed favorable evidence; (2) the evidence was suppressed; (3) the defendant did not possess the favorable evidence and could not obtain it with reasonable diligence; and (4) there is a reasonable probability that, had the evidence been disclosed, the outcome would have been different. Downs v. State, 740 So.2d 506 (Fla. 1999); Haliburton v. State, 691 So.2d 466 (Fla. 1997); Cherry v. State, 659 So.2d 1069 (Fla. 1995); Hegwood v. State, 575 So.2d 170 (Fla. 1991). However, "[t]here is no Brady violation where the [allegedly exculpatory] information is equally accessible to the

defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993); Roberts v. State, 568 So.2d 1255 (Fla. 1990); James v. State, 453 So.2d 786 (Fla.), cert. denied, 469 U.S. 1098 (1984). Hoffman's Brady claim fails to meet these standards.

As he did in his second amended motion for postconviction relief (II 122), Hoffman argues that Brady violations occurred regarding the following: (1) hair evidence; (2) Rocco Marshall's deal with the state; (3) other suspects; (4) blood found at the scene; and (5) his post-plea statements to the prosecutor. As the circuit court held, however, there is no merit to this claim.

(1) Hair Evidence

Long before Hoffman's trial the state filed a motion to compel Hoffman to provide hair samples because several hairs had been found in the female victim's hands. (ROA I 10). In response to a demand for discovery filed by Richard Nichols (ROA I 12) the state responded that there were reports on the autopsies, fingerprinting, and blood and hair analysis. (ROA I 15). Hoffman's complaint that this was not sufficient disclosure to Harris, the attorney who represented him at trial (initial brief at 32), ignores the testimony at the evidentiary hearing. At that hearing Nichols testified that he filed the discovery demand, recalled the prosecutor telling him that hairs had been processed, and turned

his complete file over to Harris. (V 346-48). Harris testified that he knew about the hairs, that Nichols had received a discovery response, and that Nichols gave him all of his files, which he reviewed. (V 255, 257-58).

At trial Harris asked Detective Dorn if blood, hair, and saliva samples had been taken from Bones Merrill, Rocco Marshall, and Lenny Mazzara. (ROA IX 880). On cross-examination of FDLE serologist Platt, he elicited the fact that hairs had been collected from the murder scene (ROA VII 581) and that the witness could not state with certainty that Hoffman had ever been in the motel room where the victims were murdered. (ROA VII 587). He later asked another FDLE expert if he had processed the hairs taken from the victim's body. (ROA IX 898). In closing argument Harris pointed out that blood, hair, and saliva samples had not been taken from all of the suspects. (ROA X 1084). Thus, it is obvious that the defense knew about the existence of the stray hairs found on Parrish's hands.

As Hoffman points out (initial brief at 30-32), the circuit court mistakenly stated that "the hair complained of so vigorously in the petition was not from the hand of the victim as set forth in the petition, but, on the contrary, was an unidentified hair found on the hotel room floor." (III 352). This misstatement, however, does not lead to Hoffman's conclusion that "the records not only contradict the lower court's finding, but also negates any

possibility that the hair was deposited from anything other than a struggle with the real killer." (Initial brief at 32). Instead, both the record and common sense support the circuit court's conclusion that any hairs were immaterial and inconsequential.

Regarding the hair, the court went on to state that

> its existence in the room proves nothing other than the fact that someone other than the defendant, James White, and the two victims at some point deposited a hair on the floor of a hotel room at Jacksonville Beach, Florida. The presence of this hair in the room has very little or no meaning in regard to this case, and there is absolutely no reasonable probability that its existence, had it been made known to the jury, would have changed the outcome of the trial or the sentencing hearing in any way. By the very physical nature of hair comparison evidence, a hair sample can never identify a person. The most it can ever do is to eliminate a person from consideration, or to put the person within a group of many people who could be included. Therefore, the existence of this unknown hair on the floor of a hotel room in Jacksonville Beach, Florida on a holiday weekend could have had little or no impact on the jury in this case.

(III 352). Detective Dorn testified that Parrish's body had been dragged back away from the door in response to Harris' questioning him about the murder scene. (ROA VII 522). As former prosecutor Obringer testified at the evidentiary hearing, there was no way of knowing how long the hairs had been in the motel room. (V 295). According to a defense exhibit introduced at the hearing, FDLE could not identify the source of the hairs, although numerous people, including Hoffman and Bubba Jackson, were eliminated as the

source. (V 282, 290). As the circuit court pointed out, hair samples cannot identify a specific person. Instead, they can only be used for elimination. Also, as the circuit court pointed out, it should surprise no one that stray, unidentifiable hairs might be found in a motel room.

Given the evidence against Hoffman, including his several confessions, there is no reasonable likelihood that more information about the hairs found on the victim's hands would have convinced the jury not to convict him. The court correctly found no relief warranted on this claim.

2. Rocco Marshall

Hoffman argues that Rocco Marshall's agreement with the state "was for specifically described testimony and not for truthful testimony" and that his true position as "an important member of the Provost Organization" was not disclosed to the defense. (Initial brief at 34-35). The circuit court found that Hoffman failed to demonstrate a Brady violation regarding Marshall:

> The identity of Rocco Marshall and the extent of his knowledge about this case were well known to the defense throughout the discovery and pretrial stages of the case. The defendant's trial counsel vigorously cross-examined Mr. Marshall at trial and established a number of effective points which might damage his credibility with a jury. These facts could only have been known to defense counsel at trial as the result of adequate, and indeed thorough, pretrial discovery. The specific circumstances of his incentives to testify were well known to the defense, and were talked about at trial.

(III 352-53). The record supports the court's conclusion.

The state disclosed Marshall's name to the defense on November 5, 1981. (ROA I 14). At a pretrial conference on December 31, 1982 the prosecutor stated that he had interview Marshall numerous times and that he would give defense counsel any recordings or transcriptions that existed. (ROA IV 143). In cross-examining Dorn, Harris established that Marshall was not truthful in his statements to the authorities until he was given immunity. (IX 870-71). Harris also closely cross-examined Marshall at trial and established that he carried a knife (ROA VIII 715); that, at first, he lied to the police about the murders (ROA VIII 718); that he had been granted total immunity (ROA VIII 719, 727); that his wife's debt had been wiped out and that he had gained possession of the PA system (ROA VIII 721-22); that he used drugs and dealt them to help support his wife and himself (ROA VIII 722-26); that Merrill and Hoffman had a lawn maintenance business (ROA VIII 728); that Hoffman and Merrill both worked for Mazzara and Jimmy Provost (ROA VIII 729-30); and that Marshall had given numerous depositions (ROA VIII 738).

Hoffman's claim of a Brady violation is mere speculation. Harris obviously had considerable information about Marshall and argued strongly to the jury that it should not believe Marshall's self-serving testimony. (ROA X 1075-79, 1084). Hoffman has demonstrated neither that any material evidence was withheld nor a

reasonable probability that any undisclosed "evidence" would have changed the outcome. Downs; Young; Haliburton.

3. Other Suspects

Hoffman also argues that the state withheld material information about Bubba Jackson, Bones Merrill, Clarence Robinson, and Meade Haskins. (Initial brief at 36-40). As the record of both the trial and the evidentiary hearing show, however, there is no merit to this claim.

At the evidentiary hearing Hoffman introduced exhibits showing (1) that a confidential informant, David Jack, and his wife stated that Bubba Jackson told them that he killed the victims and (2) that Bones Merrill told his wife that he was the "look-out" man for the victims' killers. Hoffman also introduced an exhibit, however, in which Bones said that he and Bubba were in Melbourne, Florida, when the murders occurred and that Hoffman told him that he and White committed the murders.

Obringer testified at the evidentiary hearing that Bubba and Bones were investigated intensively, an investigation that led to Hoffman and White, and that there was no physical evidence against anyone but Hoffman and White. (V 286-87, 290-91, 298). At the hearing Dorn summarized the leads followed by the police and testified that doing so led to Hoffman. (V 203, 209-10).

At trial Harris, during cross-examination, elicited from Marshall the fact that Bones and Hoffman were in business together

–- both their lawn maintenance operation and for Mazzara. (ROA VIII 728-30). Moreover, Dorn testified at trial that Bones was interviewed extensively. (ROA IX 881). Thus, it is obvious that Harris knew there had been other suspects in the case.

There is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Moore v. Illinois, 408 U.S. 786, 795 (1972). This Court has recognized that the state is not required to give the defense every piece of information about other suspects. Swafford v. State, 569 So.2d 1264, 1267 (Fla. 1990); Medina v. State, 690 So.2d 1241, 1249 (Fla. 1997) ("Brady does not require disclosure of all information concerning preliminary, discontinued investigations of all possible suspects in a crime"); Spaziano v. State, 570 So.2d 289, 291 (Fla. 1990) ("The fact that Tate was a suspect early in the investigation . . . is not information that must be disclosed under Brady"); see Melendez v. State, 498 So.2d 1258, 1260 (Fla. 1986) ("Most of the alleged nonpreservation of evidence in this case occurred prior to the time appellant became a suspect").

Hoffman has not demonstrated that any material evidence about other suspects was withheld in violation of Brady. This claim has no merit and should be denied.

4. Blood

A small amount of type O blood was found at the murder scene, and Hoffman argues that the state's failure to disclose the blood type of other suspects violated Brady. (Initial brief at 41-42). There is no merit to this claim.

Harris explored this subject during his cross-examination of the FDLE serologist. That examination revealed that: Ihlenfeld had type B blood, both Parrish and White had type A, and Hoffman had type AB; some type O blood was found at the scene; and Bubba Jackson had type A blood. (ROA VII 577-80). In closing Harris argued that at the time the murders were committed, possibly by someone with type O blood, Hoffman was miles from the scene of the murders. (ROA X 1094).

Harris obviously knew that some stray blood was found at the scene. At the evidentiary hearing Hoffman did not show that the state withheld anything regarding that blood. No Brady violation has been demonstrated.

5. Post-plea Statements

As his last Brady complaint, Hoffman argues that the prosecutor wrongfully failed to disclose to the defense the substance of his post-plea statements. There is no doubt, however, that Harris knew the substance, if not each and every detail, of those statements.

Harris moved for rehearing of the motion to suppress all of Hoffman's statements and secured the prosecutor's promise that he would not use Hoffman's post-plea statements at trial. (ROA IV 149). At the evidentiary hearing Obringer testified that there were no notes or tape-recordings of Hoffman's post-plea statements, but that the depositions Hoffman gave to Mazzara and White's attorneys were recorded. (V 274-75). In those depositions Hoffman confessed to being the principal in Ihlenfeld's murder, an aider and abettor to Parrish's, and to being a member of a conspiracy to murder them. (V 275). Obringer also stated that he told Harris the substance of the post-plea statements, he met with Harris many times, Harris had copies of the depositions, there were no differences between the post-plea statements and Hoffman's confessions, and neither the post-plea statements nor the depositions were used at trial. (V 275, 285-86). It is obvious that no Brady violation occurred regarding the post-plea statements.

Hoffman has failed to show that the state withheld material, exculpatory evidence. Any information that was not disclosed to the defense was not of such nature and weight that confidence in the outcome of the trial has been undermined. There is, thus, no merit to Hoffman's Brady claim, and no relief is warranted on this issue.

ISSUE II

WHETHER THE CIRCUIT COURT CORRECTLY FOUND TRIAL COUNSEL NOT TO HAVE BEEN INEFFECTIVE AT THE PENALTY PHASE.

Hoffman argues that Harris rendered ineffective assistance at the penalty phase because he did not present testimony by mental health experts and family members and friends about his long-standing abuse of drugs and did not convince the jury and judge that he was under the domination of Lenny Mazzara. There is no merit to this claim.

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

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

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

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

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

While the standard for a postconviction movant claiming counsel was ineffective is a demanding one, competent trial counsel must perform at a minimum level, not a maximum one. "The test has nothing to do with what the best lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at the trial." White, 972 F.2d at 1220; see also Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995) (Strickland v. Washington requires only minimal competence); Teffeteller v. Dugger, 24 Fla.L.Weekly S110, S117 n.14 (Fla. March 4, 1999) ("the legal standard is reasonably effective counsel, not perfect or error-free counsel"). When considering ineffectiveness claims, a court "need not determine whether counsel's performance was deficient when it is clear that the alleged deficiency was not prejudicial." Williamson v. Dugger, 651 So.2d 84, 88 (Fla. 1994); Valle v. State, 705 So.2d 1331, 1333 (Fla. 1997) (to establish prejudice, a movant must show "a reasonable probability that but for the deficiency, the result of

the proceeding would have been different"); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) (same).

As the circuit court found, Hoffman failed to demonstrate that Harris rendered ineffective assistance at the penalty phase.

At the evidentiary hearing, Hoffman presented the testimony of psychiatrist Robert Fox, psychologist Michael Gelbort, his cousin and aunt (the Mindels), a friend of his brother's (Richman), and a friend and fellow drug abuser (Sirodi). After the hearing, the circuit court found that counsel was not ineffective. The court made the following findings:

> The allegation that Mr. Harris was ineffective because he did not call Fred Sirodi, Karl Mindel, Leah Mindel, or Pat Richmond [sic] was also not proven by the evidence in this hearing. These witnesses show that the defendant had, in fact, abused drugs during his lifetime, from over-the-counter cough syrup to barbiturates at various times. Only Mr. Sirodi testified that he saw the defendant use codeine cough syrup, barbiturates, diordin, and heroin. All of the other witnesses observed the defendant using only over-the-counter cough syrup, and even Mr. Sirodi testified that he never saw the defendant use cocaine or dilaudid, which was the drug on which Dr. Fox based a great deal of his opinion. Most of the testimony concerned the consumption of "Brown's Mixture" an over-the-counter cough remedy found in the neighborhood in which the defendant and his family members grew up. There was no evidence offered that "Brown's Mixture" contained any narcotic or controlled substance.
>
> Pat Richman's testimony contradicts the testimony of other witnesses that the defendant's mother treated his brother, Sheldon, better than she treated the

defendant, and that she showed his brother, Sheldon, more attention. In fact, she testified that the mother did not give Sheldon any more affection or attention, that the defendant gave his mother more problems than his brother, Sheldon, did, and that she herself treats her two sons differently. The Court fails to see how the conflicting testimony of these witnesses would have influenced the outcome of the trial so seriously as to make their absence constitute the deprivation of a fair trial.

In fact, Mr. Harris did conduct extensive interviews of the defendant's wife, the defendant himself, and his girlfriend, on many of these issues. He called the wife to the stand and she testified in the guilt phase of the trial. He testified that he believed her testimony in the penalty phase would have been cumulative at best, and this it was his recollection that she did not want to return for the penalty phase of the trial, and felt she had nothing further to add. He did, however, call the girlfriend to the stand in the [guilt] phase, and she did, in fact, testify to some of these things. Mr. Harris testifies, and the Court agrees, that he did bring out the defendant's abuse of drugs over a period of several years at the trial. Mr. Harris testified that he made a tactical decision, with the defendant, and based on what the defendant had told him, that the defense would be that the defendant did not commit the crime and that he did not confess to the crime, or at least did not confess in the words the State was saying he did. Mr. Harris testified that at the time, based on numerous conversations and contacts with the defendant, he did not feel that the defendant's mental health was impaired. He felt that there would be more negative effect than positive effect which would have occurred from the jury learning more about a long-standing drug addiction. He testified that he felt that with a local jury in a conversative community, the testimony about the defendant's addiction would have aggravated rather than

mitigat[ed] the facts. This is a reasonable tactical decision by a competent attorney based upon his knowledge of the local community. Most telling of all in this issue of effective or ineffective assistance regarding the calling of these witnesses is the statement of the defendant in the sentencing phase of the trial (p. 1180). The defendant stated, "I just thought I'd tell you that I didn't do it. My friends don't want to get involved and the people who care about me you did not believe." This was the status of the mitigation evidence available to the defendant and to his counsel, Mr. Harris, at the time of the trial, and we hear it from the defendant's own words. The evidence fails to meet the burden of proof with regard to Claim IV.

CLAIM V

Looking at Claim V, the Court found no evidence that demonstrated that Mr. Harris' performance as defense counsel at trial was deficient due to the absence of a mental health expert at the penalty phase of the trial to testify to the defendant's drug abuse, and/or the failure to present evidence or an instruction to the effect that the defendant was under the domination of Mr. Mazzara. The Court reiterates the findings it has previously made related to Claim IV, supra. The evidence presented during this hearing by the defense fails utterly in any attempt to prove that the defendant was under the domination of Frank Mazzara. There is absolutely no evidence showing that the defendant "would have done anything to please these people" other than the allegations contained in the motion itself, the argument of counsel, and pure unadulterated speculation of Dr. Robert Fox, wherein he opined that because the defendant was willing to commit murder for five thousand dollars, that meant that he was willing to do anything that Mazzara, Provost, etc., told him to do in order to get drugs from them. It is unclear to the undersigned how that testimony would

> have become admissible in court at the time of the penalty phase, but assuming arguendo that the jury would have heard this evidence, it is highly unlikely that it would have influenced the jury to recommend or the judge to impose a sentence of life imprisonment rather than death under these circumstances. Therefore, the issues of ineffective assistance at the penalty phase related to drug abuse and domination of another which are raised in Claim V have not been proven by the evidence in this hearing. The evidence presented falls far short of meeting the burden of passing the test set forth by the Florida Supreme Court in Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986), and Harris v. State, 528 So.2d 361 (Fla. 1988).

(III 354-57). The record supports these findings.

Hoffman testified at trial that he started using drugs at age eighteen and became addicted to heroin at eighteen to nineteen. (ROA IX 955-56). He stated that he got clean when he was nineteen or twenty and that he was not addicted to any drugs when these murders were committed. (ROA IX 956). By the time he was arrested in Michigan in 1981, however, he testified that his drug use was "terrible" because he was injecting dilaudid, using cocaine and Qualudes, and smoking marijuana constantly. (ROA IX 962-63). He reiterated that he was not using such drugs in such amounts in September 1980. (ROA IX 963-64). During the penalty phase, Hoffman made a narrative statement in which he protested that he was innocent and stated: "As you can tell, I don't have a big list of character witnesses coming up and saying what kind of a good person I am. Most of my friends didn't want to get involved. The

few people that cared for me, you didn't believe them in the first place." (ROA XI 1180). In his penalty-phase closing argument Harris argued, among other things, that Hoffman was just a regular guy who led a productive life for thirty-five years before being sidetracked and getting involved in the drug world. (ROA XI 1194).

At the evidentiary hearing Hoffman's cousin and aunt, Carl and Leah Mindel, testified that Hoffman drank a lot of cough medicine and that they knew he supposedly used drugs. (IV 140; 149). Pat Richman, a good friend of Hoffman's brother Sheldon, testified that Sheldon told her Hoffman used drugs. (IV 156). Fred Sirodi, a childhood friend of Hoffman's, testified that they did drugs together and that Hoffman drank cough medicine and used unnamed antihistamines and barbiturates. (IV 124-25). He stated that he met Hoffman years later at a drug treatment center (sometime between 1969 and 1971), that Hoffman was there for about six months, but that Hoffman was doing heroin when he saw him in 1979 or 1980. (IV 128-32). Sirodi also admitted that he was still using drugs. (IV 134).

At the penalty-phase charge conference Harris announced that he would be arguing "that he was a normal guy up until he got involved with these conspirators and that his drug use began and drug dependence began about this time. He had been using drugs and selling drugs since earlier that year." (ROA XI 1166). During the evidentiary hearing, Harris testified that the defense position was

that Hoffman was not guilty and that he did not confess. (V 246). He also testified that he prepared for the penalty phase by "extensive consultation" with Hoffman, his wife, and his girlfriend. (V 244).

The testimony by family and friends at the evidentiary hearing would have conflicted with the theory of defense –- in both phases of trial –- and would have directly contradicted Hoffman's own testimony. Most of these witnesses were rather nonspecific about the timeframe relevant to their knowledge and had had little or no recent contact with Hoffman at the time of the murders. Given Hoffman's age at the time of the murders (thirty-five) and his testimony, it is unlikely that this currently produced testimony would have been helpful if presented at the penalty phase. See Rose v. State, 617 So.2d 291 (Fla. 1993); Cave v. State, 529 So.2d 293 (Fla. 1988).

As set out earlier, Hoffman testified that he was not using hard drugs at the time of the murders and that he had been off heroin for fifteen years. Sirodi's testimony that Hoffman unsuccessfully underwent a drug treatment program and was still using heroin in 1979 or 1980 would have done more harm than good and undermined the defense strategy. As Harris testified at the evidentiary hearing, he did not believe long-standing drug use would play well with the jury: "We are a pretty conservative community. I'm not sure that a jury in Duval County would excuse

a person for the effects of voluntary drug addiction no matter how longstanding it was. I'm not sure that would have been taken as a mitigating factor by a jury in Duval County." (V 253). Because Hoffman continually maintained his innocence, Harris' strategy was sound, as this Court has previously recognized. Correll v. State, 558 So.2d 422, 425 (Fla. 1990) ("In view of the fact that Correll continued to insist that he was not guilty of the crimes, we can understand why counsel may not have wanted the jury to believe that he was an alcoholic and a drug addict").

The testimony by Gelbort and Fox at the evidentiary hearing also presents problems. Gelbort testified that he thought Hoffman had "organic brain syndrome" and that drug use "could be in large part an explanation of why he has cognitive deficits." (V 324, 335). He also admitted, however, that he could only testify to the results of tests given to Hoffman more than fourteen years after the murders and could not testify how drugs might have affected Hoffman's behavior in 1980. (V 338).

Fox's testimony was similarly flawed. Fox opined that two statutory mitigators applied, i.e., that Hoffman's capacity to appreciate the criminality of his conduct was diminished because of longstanding drug use and that Hoffman was under the substantial domination of Mazzara and Provost because they gave him drugs. (IV 55-57). However, Fox then admitted that his assessment of diminished capacity applied only to Hoffman's state at the time of

his arrest in October 1981, not to his condition in September 1980 when these murders were committed. (IV 95). He also stated that, because Hoffman denied any involvement in the murders, it was "not possible to examine him directly as to his mental state in regard" to the murders. (IV 111). His opinion as to the diminished capacity mitigator, therefore, is totally unsupported.

Moreover, as the circuit court found, Fox's opinion on the substantial domination mitigator was "pure unadulterated speculation." Fox's knowledge of Hoffman's dealing with Provost and Mazzara conflicted with Hoffman's trial testimony. In view of his assumptions regarding the alleged domination, one would have expected Hoffman to use the $5,000 he received for killing Ihlenfeld to purchase drugs. Fox, however, admitted that he knew that, instead, Hoffman used the money to leave town and evade capture. Moreover, Hoffman testified at trial that he only began working for and became dependent on Provost after the murders. (ROA 957 et seq.).

The testimony of both Fox and Gelbort was controverted by the state in cross-examination and the circuit court's rejection of this testimony was justified. Kokal v. State, 718 So.2d 138 (Fla. 1998); Bottoson v. State, 674 So.2d 621 (Fla. 1996); Rose. As Harris testified at the evidentiary hearing, he had many conversations with Hoffman and a strategy of defense was decided on and employed. Now, after that strategy did not work and Hoffman

was sentenced to death, collateral counsel have invented another theory that they fault trial counsel for not employing. Failing to persuade the judge and jury to accept the defense point of view, however, is not ineffectiveness. Teffeteller v. Dugger, 24 Fla.L.Weekly S110 (Fla. 1999); Haliburton v. State, 691 So.2d 466 (Fla. 1997); Ferguson v. State, 593 So.2d 508 (Fla. 1992). As this Court has stated: "The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial." Rivera v. Dugger, 629 So.2d 105, 107 (Fla. 1993); Mills v. State, 603 So.2d 482 (Fla. 1992); Jennings v. State, 583 So.2d 316 (Fla. 1991).

To demonstrate penalty-phase ineffectiveness, Hoffman "must demonstrate that but for counsel's errors he would have probably received a life sentence." Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995), citing Strickland v. Washington, 466 U.S. at 694. He has failed to do this, however. As shown above, no statutory mitigators due to Hoffman's drug use existed, and any nonstatutory mitigation that such use would have supported would be outweighed by the aggravators in this case, i.e., prior violent felony; heinous, atrocious, or cruel; cold, calculated, and premeditated; and pecuniary gain. There is, therefore, no reasonable probability that Hoffman would have been sentenced to life imprisonment if the

currently tendered evidence had been presented at trial. See Rutherford v. State, 727 So.2d 216 (Fla. 1998); Haliburton.

Hoffman failed to demonstrate that Harris performed in a substandard manner at the penalty phase that prejudiced him. The circuit court's denial of this claim should be affirmed.

ISSUE III

WHETHER COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE GUILT PHASE.

Hoffman argues that both Nichols and Harris rendered ineffective assistance before trial and during the guilt phase. There is no merit to this claim.

Hoffman first complains that Harris should have secured and presented expert and lay testimony regarding his long-term drug addiction at the suppression hearing. He relies on the evidentiary hearing testimony of psychiatrist Robert Fox and inmate Robert Golden in making this claim. As the circuit court found, however, neither was a credible witness:

> [Dr. Fox's] testimony is further damaged by the fact that it depends in whole cloth upon complete reliance upon the statements of the defendant to Dr. Fox, and the affidavit of Robert Golden, (the most unreliable and least credible witness this finder of fact has ever observed in twenty-four years on the trial bench), to reach his conclusions. In addition, Dr. Fox's testimony seemed to indicate that he believed that the defendant was suffering from both withdrawal symptoms and mental clouding of consciousness and reduced ability to understand due to using

controlled substances at the same time, on the day he was interrogated and first confessed to the crime. Further, the doctor testified on cross-examination that he was not aware that the defendant testified during the trial that he was not using drugs at the time of the murder. Dr. Fox also admitted on cross-examination that he was not aware of the FBI agent's observations of the defendant at the time of arrest or interrogation and was not aware of the details of the defendant's confession at that time. In fact, Dr. Fox took the defendant at his word that he did not confess to the FBI. The Court finds that many of Dr. Fox's opinions are based upon factual assumptions and beliefs that the Court finds to be untrue or not credible.

Moving to the testimony of Robert Golden, this Court cannot fail to comment that no competent self-respecting attorney would ever call Robert Golden to the stand as part of his case and attempt to represent to a jury or a Court that his testimony was worthy of belief. During his testimony, Mr. Golden, among other things, made the following statements: "They seem to thing I'm crazy. They put me on psychotic medication . . . . It seemed to work . . . . I was found incompetent, then not guilty by reason of insanity . . . . Three felony convictions . . . . My mind controls everything I do . . . . I write poetry . . . . It deals with reality . . . . I can see the overall view of things because of my mind . . . . I'm enjoying being here." Mr. Golden, by his admission, was incompetent at the time of the occurrence of the events about which CCR would have him testify before a jury. Mr. Golden also admitted to being a drug addict both before, during and after the period in question, and this Court saw ample evidence of his current incompetency in his behavior and demeanor during this hearing. For any lawyer to suggest that Mr. Harris, the defendant's defense counsel at trial, should have placed Mr. Golden on the stand, is ludicrous. In fact, there was an abundance of evidence at the suppression hearing and at trial that the

> defendant was lucid, clear, and not under the influence of any drugs or alcohol at the time of his confession, and all of the other evidence in the case corroborates the statement that he originally gave.

(III 353-54).

The record supports the court's conclusions. The description of Fox's testimony is accurate. (IV 97 et seq.). If anything, the full transcript of Golden's testimony (IV 166 et seq.) shows him to be even less credible and competent than the circuit court stated. At the suppression hearing secured by Harris, FBI Agents Polaski and Lukepas and Detective Dorn testified that Hoffman confessed freely and did not appear to be under the influence of drugs or alcohol. (ROA V 171-233). In his opening statement Harris argued that Hoffman's confession "was obtained from him while he was addicted to narcotics and while he was under the influence of drugs." (ROA VII 476). In closing argument he urged the jury to reject the agents' trial testimony about the confession because Hoffman had been using drugs when he confessed. (ROA X 1080-81).

As this Court has long recognized: "It is almost always possible to imagine a more thorough job being done than was actually done." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986); Bryan v. Dugger, 641 So.2d 61 (Fla. 1994); White v. State, 559 So.2d 1097 (Fla. 1990). Hoffman testified at both suppression hearings and at trial that he was under the influence of drugs when he confessed. Given the officers' testimony to the contrary,

however, it is mere speculation that testimony about the effect of drugs would have resulted in the trial court's suppressing the confession or in the jury's finding that confession involuntary, especially if Fox and Golden are typical of the witnesses that Harris should have presented. Given the evidence that Hoffman killed Ihlenfeld, Harris cannot be faulted for failing to convince the jury otherwise. Cf. Teffeteller, 24 Fla.L.Weekly at S113 (after vigorously litigating an issue, counsel's failure to prevail on it "does not constitute ineffective assistance"); Haliburton v. State, 691 So.2d 466, 471 (Fla. 1997) (counsel not ineffective for failing to persuade the judge and jury to accept the defense's position); Ferguson v. State, 593 So.2d 508, 511 (Fla. 1992) ("Although in hindsight one can speculate that a different argument may have been more effective, counsel's argument does not fall to the level of deficient performance simply because it ultimately failed to persuade the jury").

Hoffman has failed to demonstrate that no reasonable attorney practicing in Jacksonville in 1982-83 would have failed to produce witnesses such as Fox and Golden on the suppression issue. Moreover, as set out in issue VA, infra, the underlying substance of this claim, i.e., suppression, was raised on direct appeal and found to have no merit. This claim of ineffectiveness, thus, is little more than a thinly veiled attempt to raise a procedurally barred claim under the guise of ineffectiveness. As this Court has

held, the prejudice part of the Strickland v. Washington test cannot be met when this Court holds that the substance of a claim has no merit, Teffeteller, 24 Fla. Law Weekly at S113, and counsel cannot be deemed ineffective for any supposed failure regarding a nonmeritorious issue. Turner v. State, 614 So.2d 1075 (Fla. 1992); Melendez v. State, 612 So.2d 1366 (Fla. 1993).

Hoffman also argues that Harris was ineffective for not investigating other suspects, for not impeaching Rocco Marshall's testimony sufficiently, and regarding the hairs found on the female victim's hands. He raised all of these things, alternatively, as Brady violations. As explained in issue I, supra, however, no Brady violations occurred. Moreover, Harris cross-examined Marshall extensively and knew about the hairs and other suspects.

Hoffman has failed to show substandard performance that prejudiced him. Given the evidence against him, a few unidentified hairs found on the hands of a murder victim who had been dragged across the carpet in a motel room would not have persuaded the jury to find Hoffman not guilty. Additionally, Harris' responsibility was to present a defense, not to prove who else might have committed these murders. Thus, Hoffman has not shown that Harris rendered ineffective assistance in the guilt phase. Mills v. State, 684 So.2d 801, 804 n.4 (Fla. 1996) (the standard for meeting the materiality part of the Strickland v. Washington test of ineffectiveness "is the same as the standard for proving prejudice

under Bagley: prejudice is shown only if there is a reasonable probability that 'but for counsel's unprofessional error, the result of the proceedings would have been different'") (quoting Strickland, 466 U.S. at 694)).

Finally, Hoffman argues that Nichols was ineffective for abandoning him after he made his guilty plea. As set out in issue VB, however, the substance of this claim is procedurally barred and the claim of Nichols' ineffectiveness is insufficient to overcome the procedural bar. Raising the claim again in this issue is an improper attempt to secure a second appeal. E.g., Teffeteller.

Hoffman has failed to demonstrate that his guilt-phase ineffectiveness claims warrant any relief, and this issue should be denied.

ISSUE IV

WHETHER THE CIRCUIT COURT CORRECTLY FOUND THE PUBLIC RECORDS CLAIM TO BE MOOT.

In claim X of the second amended postconviction motion (II 100), Hoffman argued that the state attorney's office and the Duval County Sheriff's Office and Jail had not turned over all requested public records. The circuit court summarily denied the claim as moot. (II 276). In doing so, the court noted that public records litigation had been ongoing for three years and that it had ruled on all public records requests filed by Hoffman. (II 276).

Now, Hoffman argues that he should have been given the state attorney's wire-intercept file, a file containing exempt state attorney's documents, and files on other suspects. The circuit court, however, ruled on all of these claims before ordering Hoffman to file the second amended motion.

At a status conference on April 20, 1993, an assistant state attorney stated that he had copied the entire state attorney's file, separating out exempt materials that he would give to the court for in camera examination, and that he would turn the rest over to Hoffman as well as the entire public record produced by the Jacksonville Police Department. (S I 27-28). Hoffman's counsel acknowledged that an exact listing of the in camera materials would not be forthcoming. (S I 31). The court reviewed the claimed-exempt file during this hearing, ordered one document to be turned over, and found the other documents to be exempt. (S I 48-49).

Later that year, at another status conference, collateral counsel complained that the state attorney's office had told him that files on other suspects had been destroyed, but that he needed the destruct forms. (S I 89-90). Also at that hearing, counsel asked the court to use a form he submitted to list the exempt documents from the state attorney's office, which the court declined to do. (S I 95-97). The state argued that its wire-intercept file had been sealed and that, under section 934.09, it could not be opened unless good cause were shown. (S I 100).

Hoffman's counsel then admitted that the wire-intercept file could not be sought under the public records law. (S I 101). After further argument, the court directed the state to produce the file for in camera inspection and stated: "If it relates to the homicide charges against Mr. Hoffman, I'll order it produced. If it doesn't, then I'll rule that it is irrelevant to our purpose here." (S I 112).

In a December 1993 status conference the court stated that it was almost finished reviewing the wire-intercept file. (S I 138). Hoffman's counsel acknowledged that files and records were coming from the jail and that he had received destruction forms from the state attorney's office. (S I 146). At the Huff hearing in April 1997 counsel acknowledged that the public records claim was moot and that he reasserted it "simply for the purpose of not waiving it." (S I 272). Counsel also acknowledged that the court refused to overturn the wire-intercept file because it was not public record or Brady material. (S I 272-73).

As the circuit court held and as counsel admitted, the public records issue is moot. Hoffman has shown no abuse of discretion in the circuit court's rulings on the public records claims. See Downs, 24 Fla. Law Weekly S511 ("The trial court did not abuse its discretion in denying Downs' motion for production" of public records). The record shows that the state complied with Hoffman's public records requests. Haliburton v. State, 691 So.2d 466 (Fla.

1997). Therefore, this Court should affirm the circuit court's summary denial of this issue.

ISSUE V

WHETHER THE CIRCUIT COURT PROPERLY DENIED AN EVIDENTIARY HEARING ON HOFFMAN'S PROCEDURALLY BARRED CLAIMS.

In its post-Huff hearing order the circuit court held that eight of the claims in Hoffman's second amended motion for postconviction relief were procedurally barred because they could have been, should have been, or were raised on direct appeal. (II 275-77). Now, Hoffman argues that the court erred in not holding an evidentiary hearing on the procedurally barred claims. There is no merit to this issue.

Florida Rule of Criminal Procedure 3.850(c) provides that rule 3.850 "does not authorize relief based on grounds that could have been or should have been raised at trial and, if properly preserved, on appeal of the judgment and sentence." Thus, it is well settled that postconviction proceedings are not to be used as a second appeal. E.g., Teffeteller v. State, 24 Fla.L.Weekly S96 (Fla. March 4, 1999); Cherry v. State, 659 So.2d 1069 (Fla. 1995); Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995); Zeigler v. State, 654 So.2d 1062 (Fla. 1992); Bryan v. Dugger, 641 So.2d 61 (Fla. 1994); Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993); Chandler v. Dugger, 634 So.2d 1066 (Fla. 1994). Matters that were, or could

have been raised on direct appeal of the conviction and sentence cannot be raised in a postconviction motion. Raising a different argument to relitigate an issue raised and rejected on direct appeal is also inappropriate. E.g., Lopez, 634 So.2d at 1057; Teffeteller; Rivera v. State, 717 So.2d 477 (Fla. 1998); Valle v. State, 705 So.2d 1331 (Fla. 1997); Cherry; Brown v. State, 596 So.2d 1026 (Fla. 1992); Medina v. State, 573 So.2d 293 (Fla. 1990); Quince v. State, 477 So.2d 535 (Fla. 1985). Also, trial counsel cannot be branded ineffective for not raising meritless claims or claims with no reasonable probability of affecting the outcome. Teffeteller.

A. Miranda[6] Rights

Hoffman argues that his ingestion of drugs and his withdrawal symptoms rendered him unable to voluntarily waive his rights while being interrogated. This was claim III in the second amended motion. (II 131). The circuit court summarily denied this claim as procedurally barred because it was raised on direct appeal. (II 276).

Hoffman confessed to these murders after being arrested. On June 25, 1982 the court heard Hoffman's motion to suppress his post-arrest confession. During that hearing, Hoffman testified that he did not tell an FBI agent that he was involved in these murders (ROA III 55) and that he took drugs throughout the entire

[6] Miranda v. Arizona, 384 U.S. 436 (1966).

period of questioning. (ROA III 58-60). On cross-examination Hoffman admitted signing a waiver of rights form (ROA III 61), but denied making any incriminating statements (ROA III 62) and claimed that he requested counsel. (ROA III 63). The trial court denied the motion. (ROA III 66). Three days later, Hoffman pled guilty to two counts of first-degree murder in return for sentences of life imprisonment, conditioned on his testifying truthfully at Mazzara's trial. (ROA III 76-82).

After Hoffman's guilty plea was withdrawn, Harris moved for rehearing of the motion to suppress (ROA IV 145), and the court decided to hold another suppression hearing before the trial would start in January 1983. (ROA IV 146). At that hearing on January 10, 1983 FBI agents Earl Poleski and Stanley Lukepas and Detective Ray Dorn testified that Hoffman confessed freely and voluntarily and did not appear to be under the influence of drugs or alcohol. (ROA V 171-233). Hoffman repeated his former testimony and claimed to have been under the influence of drugs during questioning. (ROA V 234-49). The court again denied the motion to suppress. (ROA V 251).

On direct appeal Hoffman argued that the trial court erred both in failing to suppress his confession and in failing to find on the record that his confession was made voluntarily. This Court disagreed. Hoffman v. State, 474 So.2d 1178 (Fla. 1985). As to the suppression argument, the Court held that "whatever intention

Hoffman may have had about exerting his right to remain silent, his rights were knowingly and intelligently waived when he executed the written waiver." Id. at 1180-81. Because Hoffman raised the suppression issue on direct appeal, it is procedurally barred from consideration in collateral proceedings. Teffeteller; Cherry; Chandler; Medina.

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

B. Lack of Counsel

Hoffman argues that Richard Nichols, his first appointed counsel, abandoned him after he entered into the plea agreement, leaving him effectively without counsel during his post-plea discussions with the prosecutor, when he was called to testify at Mazzara's trial, and when he withdrew his guilty plea. He also claims that Nichols was ineffective and that the prosecutor's vindictiveness caused him to be severely punished. This issue was claim I in the second amended motion. (II 102). The circuit court found this issue procedurally barred and summarily denied it. (II 275).

With the benefit of counsel Hoffman pled guilty in the summer of 1982 after the court denied his motion to suppress his confession. (ROA III 66). At the plea colloquy the court informed Hoffman of all the rights he would be giving up by pleading guilty. (ROA III 77). Hoffman acknowledged his understanding of those

rights and that he was pleading guilty because he was guilty. (ROA III 79). The court emphasized to Hoffman that the plea was conditioned on his testifying at Mazzara's trial and that his failure to uphold the bargain would have dire consequences:

> [I]n order to accomplish this you must testify candidly and truthfully at the trial of Mr. Mazzara.
>
> Do you understand?
>
> MR. HOFFMAN: Yes, sir.
>
> THE COURT: Your failure to do that will mean that the "deal" is off and you will go to trial and then the chips will fall where then may.
>
> Do you understand?
>
> MR. HOFFMAN: Yes, sir.

(ROA III 81).

After the plea, the prosecutor and Hoffman had several discussions during which Hoffman made incriminating statements. When called at Mazzara's trial, however, Hoffman refused to uphold his part of the plea agreement, after which he was allowed to withdraw his guilty plea. (ROA III 89-95). At a subsequent pretrial hearing the prosecutor stated that he would not use the post-plea "statements in my case in chief, cross examination or rebuttal" (ROA IV 149), and those statement were not used at Hoffman's trial.

Hoffman cites no cases that hold that a defendant who enters a conditional guilty plea has a right to counsel after entering

that plea. In a similar situation, however, this Court has stated that "the policy of fostering frank discussion between prosecution and defense" does not "require extending protection to statements made in fulfillment of an agreed-to bargain." Groover v. State, 458 So.2d 226, 228 (Fla. 1984). The same reasoning applies to a defendant's lack of need, after a plea is entered, for the protection that counsel can provide, i.e., guilt has been established and there is no need for further protection.

Hoffman argues that he "has been severely punished as a result of exercising his constitutional rights." (Initial brief at 78). He and he alone, however, held his fate in his hands. His willful refusal to uphold his part of the bargain led directly to his current situation. As this Court stated in discussing Hoffman's claim of prosecutorial vindictiveness:

> Hoffman had the choice of abiding by the plea agreement or not. When he refused to go along, the agreement became null and void as if it had never existed. A defendant cannot be allowed to arrange a plea bargain, back out of his part of the bargain, and yet insist the prosecutor uphold his end of the agreement.

Hoffman, 474 So.2d at 1182; see also Lopez v. State, 536 So.2d 226 (Fla. 1988); Groover; Brown v. State, 367 So.2d 616 (Fla. 1979).

Hoffman also argues that a hearing is needed on his claim of prosecutorial vindictiveness. Hoffman raised this claim on direct appeal by arguing that "the state improperly sought the death penalty to punish him for not giving testimony against a co-

defendant." Hoffman, 474 So.2d at 1182. The Court found no merit to this argument, Id., and the claim is now procedurally barred.

Postconviction movants are procedurally barred from raising an issue presented on direct appeal by changing the ground upon which the issue is presented. E.g., Teffeteller. Hoffman's current assertion that he was without counsel is a poorly veiled attempt to raise again the issue of prosecutorial vindictiveness. As such, it is procedurally barred. E.g., Teffeteller; Rivera. The claim of ineffectiveness is insufficient to overcome the procedural bar and allow Hoffman a second appeal on this issue. Therefore, the circuit court's finding this issue to be procedurally barred should be affirmed.

C. Prosecutorial Argument

Hoffman argues that the prosecutor's arguments in both the guilt and penalty phases "so infected the proceedings with unfairness as to make the ultimate sentence of death unconstitutional." (Initial brief at 80). This was claim VI in the second amended motion (II 137), and the circuit court summarily denied it because it had been raised on direct appeal and found to have no merit. (II 276).

Hoffman points to two areas of concern: 1) the prosecutor's referring to Parrish's murder in arguing that Hoffman should be sentenced to death for killing Ihlenfeld; and 2) explaining why Hoffman deserved the death penalty and White did not. The trial

court, as well as the prosecutor, relied on the facts of Parrish's death to support the death sentence. When challenged on direct appeal, this Court held:

> The judge's finding that Hoffman had previously been convicted of a violent felony was based upon Hoffman's conviction for the second-degree murder of Ms. Parrish. Hoffman argues this finding is in error because the evidence showed that James White, and not he, committed the murder of Ms. Parrish. This argument ignores the fact that as Mr. White's accomplice, Hoffman was a principal to the murder of Ms. Parrish. His conviction of second-degree murder, standing alone, is sufficient to show the existence of this aggravating circumstance.
>
> Hoffman next complains that the trial court erred in considering the manner of Ms. Parrish's death in making his findings. The judge did not consider the manner of Ms. Parrish's death as a separate aggravating circumstance, but rather considered it in support of his finding that Hoffman had previously been convicted of a violent felony. Although this evidence was not necessary to support the judge's finding, since a conviction for second-degree murder inherently involves violence to another person, we find no error in the judge's having considered it.

Hoffman, 474 So.2d at 1181-82.

As to any harm in explaining White's role in these murders, the Court held:

> Finally, appellant argues that the sentence of death here violates his right to equal protection of law in view of the fact that Mazzara, who procured the murders, and White, who was appellant's accomplice in carrying them out, each received consecutive sentences of life imprisonment for their roles in the crimes. State's witness Marshall

> received immunity from prosecution. Appellant relies on Slater v. State, 316 So.2d 539 (Fla. 1975), but his case is not like Slater. The decisions of this Court make clear that it is permissible to impose different sentences on capital codefendants whose various degrees of participation and culpability are different from one another. Moreover, the exercise of prosecutorial discretion in granting immunity to a less culpable accomplice, co-conspirator, or aider and abettor, does not render invalid the imposition of an otherwise appropriate death sentence.

Id. at 1182 (citations omitted).

Because he challenged the prosecutor's comments on direct appeal, this claim is procedurally barred. LeCroy v. State, 727 So.2d 236 (Fla. 1998); Ragsdale v. State, 720 So.2d 203 (Fla. 1998). Moreover, rearguing an issue on different grounds is also procedurally barred. E.g., Teffeteller.

Hoffman also argues that trial counsel was ineffective for failing to object to the prosecutor's comments that he complains about now. Review of the prosecutor's argument, however, reveals that the complained-about comments were not error, did not prejudice Hoffman, were fair comments on the evidence, and were made to rebut defense comments. The comments were not improper, and, therefore, counsel's failure to object was not the result of ineffectiveness. Cf. Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982) ("Whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonably competent

counsel."). The allegation of ineffectiveness, therefore, is insufficient to overcome the procedural bar. Ragsdale.

The circuit court's order finding this issue procedurally barred should be affirmed.

D. Cold, Calculated, and Premeditated Aggravator

Hoffman argues that the cold, calculated, and premeditated (CCP) aggravator "is unconstitutionally vague, overbroad, arbitrary, and capricious on its face, and as applied here" (initial brief at 86) and that his jury was improperly instructed on the aggravator. (Initial brief at 89). This was claim VII in the second amended motion (II 169), and the circuit court summarily denied it as procedurally barred because it could have been raised on direct appeal.[7] (II 276).

The complaint about the constitutionality of the CCP aggravator is procedurally barred because Hoffman did not object on that ground at trial and raise the issue on direct appeal. Downs v. State, 740 So.2d 506 (Fla. 1999); Bush v. State, 682 So.2d 85 (Fla. 1996); Jackson v. State, 648 So.2d 85 (Fla. 1994); Chandler. The complaint about the constitutionality of the instruction is also procedurally barred because Hoffman did not object to the wording of the instruction at trial and raise the issue on direct

[7] Hoffman states that during his "direct appeal this Court did not then have the benefit of Maynard v. Cartwright, 108 S.Ct. 1853 (1988)." (Initial brief at 85). However, no claim as to the CCP aggravator was raised in the direct appeal.

appeal. Downs; Bush; Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995); Crump v. State, 654 So.2d 545 (Fla. 1995); Chandler.

Even if this issue were cognizable now, no relief would be warranted because the facts support finding CCP applicable to this brutal contract killing. E.g., Archer v. State, 673 So.2d 17 (Fla.), cert. denied, 519 U.S. 876 (1996); Mordenti v. State, 630 So.2d 1080 (Fla.), cert. denied, 512 U.S. 1227 (1994). Moreover, this Court has repeatedly upheld the constitutionality of the CCP aggravator. E.g., Hunter v. State, 660 So.2d 244 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996); Fennie v. State, 648 So.2d 95 (Fla.), cert. denied, 513 U.S. 1159 (1995).

The circuit court's finding this issue to be procedurally barred should be affirmed.

E. Ineffectiveness Regarding the Stipulated-to Mitigators.

Hoffman argues that trial counsel was ineffective regarding the stipulated-to mitigators of no significant criminal history and the co-conspirators' sentences. This was claim VIII in the second amended motion (II 179), and the circuit court denied it as procedurally barred. (II 276).

At the penalty-phase charge conference the parties stipulated that the jury should be told that Hoffman had no significant criminal record and that Leonard Mazzara and James White received sentences of life imprisonment in connection with these murders. (ROA XI 1150-56). As a preliminary matter, the court instructed

the jury on those stipulations. (ROA XI 1178-79). During closing argument, the prosecutor mentioned the stipulated-to mitigators (ROA XI 1182, 1187), but urged the jury to find that the aggravators warranted Hoffman's being sentenced to death. (ROA XI 1190-91). Defense counsel, on the other hand, argued that with the mitigators, especially the disparate treatment of White, Marshall, and Mazzara, Hoffman should not be sentenced to death. (ROA XI 1192-95). The trial court made the following findings as to these mitigators:

> (a) The Defendant has no significant history of conviction of prior criminal activity. However, the Defendant did take the witness stand and admit to making his living in whole or in part by selling drugs both before and after the murder.
>
> * * *
>
> (c) The jury was informed, as a mitigating circumstance, that the two co-conspirators, who were each convicted separately of first degree murder, received sentences of life imprisonment, and the Court so finds. The Court also notes, however, that James White was extremely young, had little criminal record, and took a secondary role in the murders, and that Leonard Mazzara did not participate directly in the murders, but acted merely as a "procurer," and he therefore did not come under several of the aggravating circumstances which exist for Mr. Hoffman.

(ROA I 135). The court then weighed the aggravators and mitigators as follows:

> 14. While these two mitigating circumstances exist, they are far outweighed in quality and substance by the aggravating

> circumstances which are found in the record. A reasoned weighing of the aggravating and mitigating circumstances found in the record herein clearly demonstrates that the qualitative balance scales tip heavily toward the side of aggravating circumstances.

(ROA I 136).

On direct appeal Hoffman argued that, in light of the treatment received by Mazzara, White, and Marshall, his death sentence constituted an equal protection violation. This Court found no merit to the claim. Hoffman, 474 So.2d at 1182. He did not challenge the court's findings as to the stipulated-to mitigators, however, or the argument about or instruction on those mitigators.

Now, Hoffman claims that counsel was ineffective for allowing the court to instruct the jury that it "may," rather than "must," consider the stipulated-to mitigators and for allowing the prosecutor to argue in derogation of those mitigators. If the merits of this claim had been raised on direct appeal, this Court would have found no error in the instruction, in the prosecutor's argument, or in the trial court's findings. Although the state stipulated to the existence of these mitigators, it did not stipulate to the weight to be given them and did not waive its right to argue that the aggravators warranted imposing the death penalty. None of the cases cited by Hoffman hold that the standard instruction given to the jury was incorrect or that the court had to give any certain weight to the stipulated-to mitigators.

Instead, this Court has repeatedly held that "the weight to be given a mitigator is left to the trial judge's discretion." Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992); Robinson v. State, 24 Fla.L.Weekly S393 (Fla. Aug. 19, 1999); Hill v. State, 727 So.2d 198 (Fla. 1998).

At Hoffman's trial the court properly instructed the jury, the prosecutor did not exceed the bounds of proper and permissible argument, and the court did not abuse its discretion in considering and weighing the stipulated-to mitigators. Because there is no merit to Hoffman's basic complaint, counsel cannot have rendered ineffective assistance. Turner v. Dugger, 614 So.2d 1075 (Fla. 1992); Melendez v. State, 612 So.2d 1366 (Fla. 11992). The claim of ineffectiveness is another instance of clothing a non-meritorious and procedurally barred claim in the guise of ineffectiveness in order to gain a second appeal. The circuit court's summary denial should be affirmed.

F. Jurors' Sense of Responsibility

Hoffman argues that his jurors' sense of responsibility was diluted in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). This was claim IX in the second amended motion. (II 189). The circuit court found the issue to be procedurally barred and summarily denied it. (II 276).

Hoffman did not object and raise this claim at trial and on appeal. It is, therefore, procedurally barred. Ragsdale; Bottoson v. State, 674 So.2d 621 (Fla. 1996); Cherry.

Hoffman also complains that counsel was ineffective for not objecting and raising this issue at trial. (Initial brief at 98). As this Court has held repeatedly, however, there is no merit to this issue. Kokal v. State, 718 So.2d 138 (Fla. 1998); Johnson v. State, 660 So.2d 637 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996); Turner; Kight v. Dugger, 574 So.2d 1066 (Fla. 1990). Because there is no merit to the basic complaint, counsel cannot be ineffective for failing to preserve this issue. Turner; Melendez; Kight.

This Court, therefore, should affirm the circuit court's denial of this claim.

G. Burden Shift

Hoffman argues that the penalty-phase jury instructions improperly shifted to him the burden of proving that life imprisonment rather than death was the appropriate sentence. He raised this as claim XI in the second amended motion (II 202), and the circuit court found it procedurally barred.

Trial counsel was concerned about the weighing instruction, but ultimately agreed that the standard instruction was proper. (ROA XI 1168-71). This issue was not raised on appeal and is procedurally barred in collateral proceedings. Downs; Young v.

State, 739 So.2d 553 (Fla. 1999); LeCroy; Ragsdale. Even if cognizable now, however, no relief would be warranted because, as this Court has held repeatedly, there is no merit to the burden-shifting argument. E.g., Johnson.

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

H. Heinous, Atrocious, or Cruel Aggravator

Hoffman argues that the trial court improperly found that the heinous, atrocious, or cruel (HAC) aggravator had been established. This was claim XII in the second amended motion. (II 207). The circuit court summarily denied it as procedurally barred because it had been raised on direct appeal. (II 277).

Hoffman argues that he had no notice that the HAC aggravator would be considered and found by the trial court. He claims that, "due to lack of adequate notice," he "was unable to advance argument to create a reasonable doubt that this was not an appropriate aggravator." (Initial brief at 101). This issue is procedurally barred because Hoffman attacked the applicability of the HAC aggravator on direct appeal, and this Court found no merit to the claim. Hoffman, 474 So.2d at 1182. Using a different argument to relitigate in collateral proceedings an issue raised and decided on direct appeal is inappropriate. Teffeteller. The circuit court's finding this issue procedurally barred should be affirmed.

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm the circuit court's denial of Hoffman's second amended motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail to Linda McDermott, Assistant Capital Collateral Regional Counsel, Office of the Capital Collateral Regional Counsel, Northern Region, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 14th day of February 2000.

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