IN THE SUPREME COURT OF FLORIDA

ERNEST CHARLES DOWNS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-2186

MOTION TO DISMISS AND RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 159089

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 EXT 4579
(850) 487-0997 (FAX)

COUNSEL FOR RESPONDENT

PRELIMINARY STATEMENT

Petitioner, Ernest Charles Downs, was the defendant in the trial court; this brief will refer to Petitioner as such, Defendant, or by proper name. Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State.

The Petition will be referenced as "Petition." Citations to it will be designated as "Pet," followed by any appropriate page number. This MOTION TO DISMISS AND RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS will be referenced as "Response," and citations to its appendix as "App," followed by any appropriate page number in the original document. Items in the Appendix appear in roughly the order in which they are first referenced in the text of this Response, with some exceptions.

In the interest of consistency and efficiency, the State will reference the record in a manner similar to the Petition: R2 indicating record of resentencing proceedings and R indicating record of record of Downs' first trial, except the volume numbers, as listed in the Index to the Record on Appeal, will also be provided.

The prior appellate decisions in this case will be referenced as follows:

Downs I:	Downs v. State, 386 So.2d 788 (Fla. 1980) (affirmed the convictions and death sentence) cert denied 449 U.S. 976 (1980);
Downs II:	Downs v. Austin, 389 So.2d 1109 (Fla. 1980) (denied a petition for writ of mandamus);
Downs III:	Downs v. State, 402 So.2d 609 (Fla. 1981) (denied habeas corpus);
Downs IV:	Downs v. State, 453 So.2d 1102 (Fla. 1984) (affirmed denial of 3.850 motion);
Downs V:	Downs v. Wainwright, 476 So.2d 654 (Fla. 1985) (denied habeas corpus petition "[a]lleging that he

was denied effective assistance of appellate counsel and that the appellate review was based on an improper record");

Downs VI: Downs v. Dugger, 514 So.2d 1069 (Fla. 1987) (granted habeas concerning death sentence on basis of Hitchcock error);

Downs VII: Downs v. Austin, 522 So.2d 931 (Fla. 1st DCA 1988) (reversed trial court denial of mandamus writ concerning "Downs['] ... right under the Public Records Act to examine and copy the records of Johnson's polygraph tests");

Downs VIII: Downs v. Austin, 559 So.2d 246 (Fla. 1st DCA 1990) (reversed "an order of the trial court denying his motion for attorney's fees") rev. denied 574 So.2d 140 (Fla. 1990);

Downs IX: Downs v. State, 572 So.2d 895 (Fla. 1990) (affirmed re-sentence to death), cert denied 502 U.S. 829 (1991);

Downs X: Downs v. Pate, 632 So.2d 1025 (Fla. 1994) (mandamus dismissed);

Downs XI: Downs v. State, 740 So.2d 506 (Fla. 1999) (affirmed summary denial of his second postconviction motion).

Therefore, the current proceeding is Downs XII.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

MOTION TO DISMISS

The State respectfully submits that the Petition should be dismissed with prejudice, alternatively, pursuant to the laches principle enunciated in McCray v. State, 699 So.2d 1366, 1368 (Fla. 1997), or Fla. R. App. P. 9.140(b)(6)(E) or both of these provisions.

A. The Petition should be dismissed because of laches.

McCray v. State, 699 So.2d 1366, 1368 (Fla. 1997), controls:

> [A]s a matter of law, ... **any petition for a writ of habeas corpus claiming ineffective assistance of appellate counsel**

> is presumed to be the result of an unreasonable delay and to prejudice the state if the petition has been filed more than **five years** from the date the petitioner's conviction became final. We further conclude that this initial presumption may be overcome only if the petitioner alleges under oath, with a specific factual basis, that the petitioner was affirmatively misled about the results of the appeal by counsel.

Here, "the petitioner's conviction became final" in 1980, See Downs I, 386 So.2d 788 (Fla. 1980), cert denied 449 U.S. 976 (1980), rendering the delay about **FOUR TIMES** the five-year period specified in McCray.[1] See also, e.g., Strange v. State, 732 So.2d 1117 (Fla. 5th DCA 1999) ("Strange was convicted some six and one-half years before he filed this petition *** his petition is barred by laches"), citing McCray; Hill v. State, 724 So.2d 610 (Fla. 5th DCA 1998) ("untimely and barred by laches *** This petition was filed in this court November 6, 1998, more than six years after his conviction became final"), citing McCray; Greer v. State, 741 So.2d 1159 (Fla. 5th DCA 1999), citing McCray; Lee v. Moore, 740 So.2d 16 (Fla. 1st DCA 1999), citing McCray; Brown v. Singletary, , 732 So.2d 364 (Fla. 1st DCA 1999), citing McCray; Gibson v. Singletary, 730 So.2d 854 (Fla. 3d DCA 1999), citing McCray; Perry v. State, 714 So.2d 584 (Fla. 5th DCA 1998), quoting McCray.

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[1] If Downs argues that the five years should not begin to run on the Petition's claims attacking his death sentence until the re-sentencing became final, his Petition should still be dismissed. Arguendo, even stretching McCray in this manner for Downs, the Petition was filed about ten years after the re-sentence became final. See Downs IX, 572 So.2d 895 (Fla. 1990), cert denied 502 U.S. 829 (1991). Under this interpretation of McCray, the Petition should still be dismissed.

Therefore, on the basis of McCray alone,[2] the State respectfully submits that the Petition should be dismissed with prejudice.

B. Alternatively, the Petition should be dismissed because it was not filed simultaneously with the initial brief in the appeal of the denial of his 3.850 motion, in violation of Fla. R. App. P. 9.140(b)(6)(E).

Fla. R. App. P. 9.140(b)(6)(E) requires:

> In death penalty cases, all petitions for extraordinary relief over which the supreme court has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for relief under Florida Rule of Criminal Procedure 3.850.

This provision became "effective January 1, 1997," Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773, 777 (Fla. 1996).

Here, the "the initial brief in the [most recent] appeal from the lower tribunal's order on the defendant's application for relief under Florida Rule of Criminal Procedure 3.850"[3] was filed in August 1997 (App K). The instant Petition was filed in October 2000, which is over three years past the Rule 9.140(b)(6)(E) deadline.

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[2] McCray stated, 699 So.2d 1368, that its laches limitation is enforceable independent of a procedural rule:

> [U]nder this [9.140(j)(3)(C)] rule, McCray has two years from January 1, 1997, to bring this petition. Nevertheless, this does not mean that we are prohibited from finding the petition to be time-barred. Indeed, we conclude that, under the doctrine of laches, McCray is barred from bringing this petition.

[3] "[T]he appeal from the lower tribunal's [most recent] order on the defendant's application for relief under Florida Rule of Criminal Procedure 3.850" was initiated by Notice of Appeal filed in April 1997 after the January 1 effective date of Rule 9.140(b)(6)(E).

Therefore, the State respectfully submits the Petition should be dismissed.

As represented by an officer of the Court, the State must acknowledge Robinson v. Moore, ___ So.2d ___, 25 Fla. L. Weekly S647, n. 1 (Fla. Aug. 31, 2000), which rejected the application of Fla. R. Cr. P. **3.851(b)(2)**'s provision that "petitions for writ of habeas corpus [] shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the rule 3.850 motion." Robinson relied upon Fla. R. Cr. P. **3.851**(b)(6), which expressly provided that "[t]his rule will govern the cases of all death-sentenced individuals whose convictions and sentences become final after January 1, 1994."

The State has found no appellate-rule provision, like 3.851(b)(6)'s, limiting the applicability of Rule 9.140(b)(6)(E). One can infer from the absence of such an appellate-rule provision that Rule 9.140(b)(6)(E) applies to operative procedural events occurring after its effective date, i.e., filing an appeal from the denial of a 3.850 Motion and the filing of a habeas petition in this Court. Cf. Sims v. State, 753 So.2d 66, 70-71 (Fla. 2000) (applied Fla. R. Cr. P. 3.852 to the event of requesting public records; did not look to the date that the conviction became final); McCray v. State, 699 So.2d at 1368 ("rule 9.140(j)(3)(C) provides that the time period set forth in rule 9.140(j)(3)(B) 'shall not begin to run prior to the effective date of this rule'; rule became effective January 1, 1997. As such, under this rule, McCray has two years from January 1, 1997, to bring this petition").

Accordingly, the Committee Note to Rule 9.140(b)(6)(E) not only indicates its adoption of Rule 3.851(b)(2), but also expressly states that it "supersedes" Rule 3.851(b)(2). More importantly, the Committee Note to the appellate rule does not indicate any adoption of Rule 3.851(b)(6). Thus, one can infer that the Note's express adoption Rule 3.851(b)(2), while omitting the adoption of Rule 3.851(b)(6), indicates the inapplicability of the latter to Rule 9.140(b)(6)(E).

Put simply, in August 1997, when Downs filed his initial brief in his appeal from the 3.850, Rule 9.140(b)(6)(E) was in effect and required that the instant petition be filed then, not three years later. He failed to file it "simultaneously," and in fact, missed the deadline by over three years.

Perhaps most importantly, however, applying Rule 9.140(b)(6)(E)'s deadline to defendants in Downs' situation enforces its purpose of moving cases along. Conversely, not enforcing 9.140(b)(6)(E) here would render the rule inapplicable to the cases that are in the greatest need of moving forward, i.e., older cases.

Thus, Rule 9.140(b)(6)(E) applies, and the Petition clearly and substantially violated it. If deadlines are to mean anything, the Petition should be dismissed.[4]

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[4] Although Fla. R. App. P. 9.140(b)(6)(E) states that "[s]ubdivision (j) of this rule shall not apply to death penalty cases," it is instructive that the Petition also violates Fla. R. App. P. 9.140(j)(3)(B):

> A petition alleging ineffective assistance of appellate counsel shall not be filed more than two years after the conviction becomes final on direct review unless it

C. The application of laches and 9.140(b)(6)(E) are reasonable.

Downs may argue that laches cannot be applied under Article 1 §13 of the Florida Constitution. However, the "right to habeas relief, like any other constitutional right, is subject to certain **reasonable limitations** consistent with the full and fair exercise of the right," Haag v. State, 591 So.2d 614, 616 (Fla. 1992). McCray's application of laches, resulting in the denial of that habeas petition, indicates the reasonableness of its holding, given the weighty policies underlying laches.

Analogously, it is well-settled that the assertion of constitutional rights on appeal is conditioned upon the **procedural requirement** that the trial court was timely informed of the claim and provided an opportunity to rule upon it. See, e.g., Knight v. State, 746 So.2d 423, 433 (Fla. 1998) ("Knight never raised the confidentiality provision [of Fla. R. Cr. P. 3.211], Fifth Amendment [right against self-incrimination], or Sixth Amendment [right to counsel] issues in the trial court *** those sub-claims are procedurally barred"); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings "procedurally barred *** failed to object with the requisite specificity in the trial court"); Hill v. State, 549 So.2d 179, 182 (Fla.

> alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.

Fla. R. App. P. 9.140(j)(3)(C) indicates that the foregoing provision began to run on "the effective date of [the] rule," which was January 1, 1997, according to Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103, 1107 (Fla. 1996).

1989)("constitutional argument grounded on due process and Chambers was not presented to the trial court *** procedurally bars appellant from presenting the argument on appeal"); State v. Marshall, 476 So.2d 150, 153 (Fla. 1985) ("comments on silence are no longer considered to be fundamental error"), citing Clark v. State, 363 So.2d 331 (Fla.1978).

Just as there are substantial policy reasons for the contemporaneous objection rule, such as, the deterrence of sandbagging the trial court, See, e.g., Ferry v. State, 507 So.2d 1373, 1375 (Fla. 1987) ("would promote deliberate sandbagging"), the interests of finality and the presumptive prejudice to the State caused by delay are compelling policy reasons underlying McCray's laches and 9.140(b)(6)(E).

Thus, McCray itself, 699 So.2d at 1368, applied laches to the habeas petition there and discussed its substantial and reasonable policy foundation:

> This Court has implemented time restrictions in the filing of collateral relief petitions because inmates must not be allowed to engage in inordinate delays in bringing their claims for relief before the courts without justification and because convictions must eventually become final. As time goes by, records are destroyed, essential evidence may become tainted or disappear, memories of witnesses fade, and witnesses may die or be otherwise unavailable.

Here, about **TWENTY** years have elapsed since Downs' conviction became final and about **TEN** years since his re-sentencing became final -- far exceeding McCray's five-year limit. As in McCray, there has been no allegation "under oath, with a specific factual basis, that the petitioner was affirmatively misled ... ." Under the facts of this case, McCray reasonably bars this Petition, and, similarly,

the application of Rule 9.140(b)(6)(E) here would foster the policies that McCray enunciated.

ARGUMENT IN SUPPORT OF RESPONSE

A. The Petition should be denied on the basis of McCray and Fla. R. App. P. 9.140(b)(6)(E).

The State asserts the reasons in its Motion to Dismiss, supra, as grounds for denying the Petition, in the event that the Court deems dismissal inappropriate.

B. Applying additional pertinent principles and standards, the Petition should be denied.

In addition to McCray and Fla. R. App. P. 9.140(b)(6)(E), the State asserts a number of principles and standards in its responses to the twelve claims. Because a number of them are applicable to a more than one claim, they are discussed at this juncture and then briefly referenced under the pertinent claims.

In his Petition, Downs complains that his experienced appellate attorney, David A. Davis, rendered ineffective assistance of counsel. To prevail on such a claim, Downs must show that his attorney's performance was professionally deficient and that he was prejudiced by that deficiency. See Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988). The deficiency must be such that had it not occurred, the result of the proceeding would have been different. See 523 So.2d at 162-63.

In the words of Page v. U.S., 884 F.2d 300, 302 (7th Cir. 1989), the "threshold question is not whether trial counsel was inadequate but whether trial counsel was so **obviously inadequate** that

appellate counsel had to present that question to render adequate assistance." Page indicated that "**omitting a dead-bang winner**" would be an "obvious[]" inadequacy.

Freeman v. State, 25 Fla. L. Weekly S451 (Fla. June 8, 2000) recently summarized many of the applicable standards:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a **disguise to raise issues which should have been raised on direct appeal or in a postconviction motion**. In evaluating an ineffectiveness claim, the court must determine
>
> > whether the alleged omissions are of such magnitude as to constitute a **serious error or substantial deficiency** falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance **compromised the appellate process to such a degree as to undermine confidence in the correctness of the result**.
>
> *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986). *See also* Haliburton, 691 So. 2d 470 [Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997)]; Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994)]. The defendant has the **burden of alleging a specific, serious omission or overt act** upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So. 2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, **not simply harmless error**." Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was **not preserved for appeal** or where the appellate attorney chose not to argue the issue as a matter of strategy. *See Medina v. Dugger*, 586 So. 2d 317 (Fla. 1991); *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to **raise only the strongest points on appeal** and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Accordingly, Downs XI, 740 So.2d at 517 n. 18, indicated that "appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal." Accord Freeman (defense counsel's motions for special instructions; not ineffective for failing to raise non-meritorious issues); Provenzano v. Dugger, 561

So.2d 541, 548 (Fla. 1990) ("Trial counsel did not object to one of these, thereby precluding an effective argument on appeal"); Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989) (rejected ineffective assistance of appellate counsel claims as "not properly preserved for appeal by trial counsel, thus precluding appellate review"); Downs V, 476 So.2d at 657 ("appellate counsel cannot be considered ineffective for failing to raise issues which he was procedurally barred from raising because they were not properly raised at trial").

To be constitutionally effective, appellate counsel is not ineffective if the habeas claim was, in fact, "raised on direct appeal," Atkins v. Dugger, 541 So.2d at 1166-67. Accord Provenzano, 561 So.2d at 548 ("However, appellate counsel raised this claim on appeal, but it was rejected by this Court"). Therefore, quibbling with the manner how a claim was raised on appeal is not habeas-cognizable material. See Alvord v. Wainwright, 725 F.2d 1282, 1289 (11th Cir. 1984) (trial counsel; "reasonable effort to convince").

In addition to having been raised by appellate counsel, a claim that has been resolved in a previous review of the case is barred as "the law of the case." See Mills v. State, 603 So.2d 482, 486 (Fla. 1992).

Thus, "substantive claims are procedurally barred either because they were raised on direct appeal and rejected by this Court or could have been raised on direct appeal." Teffeteller v. Dugger, 734 So.2d 1009, 1025 (Fla. 1999)(footnotes omitted). Habeas claims "may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion," Rutherford v. Moore,

25 Fla. L. Weekly S891 (Fla. Oct. 12, 2000), citing Thompson v. State, 759 So. 2d 650, 657 n.6 (Fla. 2000); Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992). Claims properly raised in a previous motion for post-conviction relief are also procedurally barred. See Scott v. Dugger, 604 So.2d 465, 469-70 (Fla. 1992).

Likewise, successive habeas claims are not permissible, nor are claims that should have been raised in a previous habeas petition. See Johnson v. Singletary, 647 So.2d 106, 109 (Fla. 1994), citing Card v. Dugger, 512 So.2d 829 (Fla. 1987).

Appellate counsel need not raise every issue that might possibly prevail on appeal. See Provenzano, 561 So.2d at 548-49 ("it is well established that counsel need not raise every nonfrivolous issue revealed by the record"); Atkins v. Dugger, 541 So.2d at 1167 ("the point had so little merit that appellate counsel cannot be faulted for not raising it on appeal"; "the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points").

Second-guessing appellate counsel's choice of issues, or presentation of them, does not meet the Strickland standard. See Shere v. State, 742 So. 2d 215, 219 n.9 (Fla. 1999) (trial counsel); Card v. Dugger, 911 F.2d 1494, 1507, 1510-11 (11th Cir. 1990) ("consistently has refused to second-guess counsel's choice of the manner in which to present testimony relating to a defendant's background"). Appellate counsel Davis is not ineffective for failing to convince this Court to rule in Downs' favor. See Freeman ("cannot be ineffective for failing to convince the Court to rule in

Appellant's favor"), citing Swafford v. Dugger, 569 So.2d 1264, 1266 (Fla. 1990). Thus, 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) (trial counsel), but, that is not the test.

In assessing an ineffectiveness claim, "the distorting effects of hindsight" must be avoided" and the "circumstances of counsel's challenged conduct" must be reconstructed, "evaluat[ing] the conduct from counsel's perspective at the time." Shere, 742 So.2d at 219, citing Strickland.

CLAIM I (Restated)
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO ARGUE THAT DOWNS' FIFTH AMENDMENT RIGHTS WERE VIOLATED BY THE PROSECUTOR'S CROSS-EXAMINATION OF DOWNS AND BY THE PROSECUTOR'S CLOSING ARGUMENT?

As the alleged basis for his first claim, Downs points to (Pet 7-8) two excerpts of the 1989 resentencing proceeding (R2 XII 983 App F, XIII 1093-94 App H) and, relying upon State v. Hoggins, 718 So.2d 761 (Fla. 1998), and Whitton v. State, 649 So.2d 861, 865 (Fla.1994), argues (Pet 12) that his "trial attorney's failure to object does not preclude raising this claim on direct appeal." The State has several alternative responses in opposition to this claim.

First, for his argument on the merits as well as his assertions that a contemporaneous objection was unnecessary to preserve post-arrest silence on direct appeal and that the error was not harmless, Downs relies upon (Pet 9. 11, 12, 13, 14) cases decided after the 1990 direct appeal. Downs' vision, armed with the hindsight of these

cases, is not the test for the constitutional effectiveness of appellate counsel. In 1990, these cases did not exist.

Second, the State disputes Downs' reliance upon Hoggins and Whitton (Pet 12) for his argument that no contemporaneous objection was needed for appellate counsel to successfully raise a post-arrest silence claim on direct appeal. Downs' quote from Hoggins, 718 So.2d at 772, concerned this Court's harmless error analysis, having already decided that there was error in another matter, **to which there was a sufficient objection**:

> we find that Hoggins' objection and the subsequent discussion of Rodriguez sufficiently alerted the trial court to the possibility of a violation of the defendant's rights guaranteed by the Florida Constitution. *Cf. Spivey v. State*, 529 So.2d 1088, 1093 (Fla.1988); *Williams v. State*, 414 So.2d 509, 511 (Fla.1982); *Castor v. State*, 365 So.2d 701, 703 (Fla.1978).

718 So.2d at 764 n. 5. In contrast, here, there was no objection at either juncture here. (R2 XII 983 App F; R2 XIII 1093 App H) Without an objection, any direct appeal post-arrest silence claim was unpreserved, and as such, would not have prevailed. See, e.g., Knight v. State, 746 So.2d 423, 433 (Fla. 1998) ("confidentiality provision [of Fla. R. Cr. P. 3.211], Fifth Amendment [right against self-incrimination], or Sixth Amendment [right to counsel] *** procedurally barred"); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings "procedurally barred because defense counsel failed to object with the requisite specificity in the trial court"); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)(""[f]ailure to present the [constitutional due process] ground below procedurally bars appellant from presenting the

argument on appeal"); Parker v. Dugger, 537 So.2d 969, 970 (Fla. 1988) (claim that "pretrial statement given to Metro Dade policemen was obtained in violation of his fifth and sixth amendment rights to counsel *** procedurally barred because petitioner failed to object at trial and did not preserve the issue for appeal"); State v. Marshall, 476 So.2d 150, 153 (Fla. 1985) ("comments on silence are no longer considered to be fundamental error"), citing Clark v. State, 363 So.2d 331 (Fla.1978).

Appellate counsel was not ineffective for failing to raise an unpreserved claim. Indeed, appellate counsel properly winnowed out such a claim that was less than weak – it was an obvious loser as unpreserved.

Third, on its merits, even if erroneously judged under current case law and even overlooking the critical lack of timely objections and lack of trial court ruling, the first habeas claim must establish at a minimum that the appellate attorney could have clearly overcome the rigorous abuse-of-discretion standard of appellate review concerning admissibility. Compare Jent v. State, 408 So. 2d 1024, 1029 (Fla. 1982) ("trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed") with Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) (to establish an abuse of discretion, Appellant must show that the trial court's ruling was "arbitrary, fanciful, or unreasonable"). Accordingly, the prosecutor's argument was a fair comment on that evidence and thereby proper. See Chandler v. State, 702 So.2d 186, 191 n. 5 (Fla. 1997) ("prosecutor's comment that

Chandler never told his daughters or son-in-law that he was innocent was a fair characterization of the evidence"); Breedlove v. State, 413 So.2d 1 (Fla. 1982) (upheld: "because of the purse Breedlove knew that a woman lived there" as a "permissible inference"); Blair v. State, 406 So.2d 1103, 1107 (Fla. 1981) (“there was a basis in the record for the allegedly unsupported statements”); Jackson v. State, 522 So.2d 802, 809 (Fla. 1988)(grounded in "logical analysis of the evidence").

Moreover, the claim (alleged comments on post-arrest silence) underlying the ineffectiveness allegation is entirely groundless. Downs' Petition fails to show that he exercised his right to remain silent, on which it might have been improper for the prosecutor to cross-examine or comment. See Ragland v. State, 358 So.2d 100 (Fla. 3d DCA 1978) ("We do not believe that comment upon the failure to answer a single question was violative of appellant's constitutional right, when said constitutional right was not invoked"), approved Valle v. State, 474 So.2d 796 (Fla. 1985), reversed on other ground 476 U.S. 1. To the contrary, even looking only to the re-sentencing transcript, Downs testified on direct examination that he affirmatively wanted to talk with law enforcement (R2 XII 965-66, App F), and he himself elicited from another witness that he waived his Fifth Amendment rights, talked, then and subsequently refused to say anything (See R2 IX 426 App G).

Further, the prosecutor's cross-examination was well within the scope of direct examination. Downs' direct examination indicated that he wanted to reveal information to law enforcement concerning this murder. (R2 XII 965) See also Knight, 746 So.2d at 433

(rejecting, inter alia, Fifth Amendment claim, "State persuasively argues that the defense opened the door to Dr. Miller's rebuttal testimony by addressing the issue of Knight's competence and referencing Dr. Miller's competency examination report itself"). Further, Downs himself had already elicited testimony from detective Starling more damaging than what he targets now:

> Q {by Downs pro se] And did I not say when I come back I would tell you of everyone involved in this case?
> A Yes. And during the trip back from Bay Minette to Jacksonville, at various times we attempted to get into the investigation, gave you your rights, you said that you would talk to us when you got back to Jacksonville, refused to say anything to us at all about it.

(See R2 IX 426 App G)

Indeed, Downs should not be heard to complain on appeal or now concerning the prosecutor's pursuit of a matter that Downs himself fought to interject into the trial. (See also R2 IX 415-28, XI 686-96 App G: prosecution's attempts to exclude Detective Starling's testimony, elicited by Downs, concerning Downs' statements to him)

Moreover, harmless error analysis applies to "a comment on a defendant's remaining silent," See State v. DiGuilio, 491 So.2d 1129, 1130 (Fla. 1986). Downs discussion (Pet 13-15) of harmless error overlooks the evidence he himself elicited and this Court's prior conclusion that the evidence was "overwhelming," 572 So.2d at 899-900. Accordingly, other evidence corroborated Johnson's version of what happened:

> 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 driver's licence as proof of the murder.

Downs v. State, 572 So.2d 895, 897 (Fla. 1990). In reviewing the significance of an error of excluding defense evidence that Downs was not the triggerman, this Court reasoned and held:

> Downs succeeded in presenting his theory of penalty defense, and he supported it with various witnesses whose testimony contradicted Johnson's version of the killing in a manner not inconsistent with Michael's perpetuated testimony. We find in the record **overwhelming proof** to render the error of excluding the grandmother's cumulative testimony harmless beyond a reasonable doubt in this case.

572 So.2d at 899-900. That same "overwhelming proof" renders any supposed error here also harmless.

Finally, for the foregoing reasons, even if the underlying post-arrest silence claim had been arguable in the 1990 appeal, its omission from the appeal was certainly not so compelling to constitute Strickland-magnitude deficiency or prejudice.

CLAIM II (Restated)

WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT REVERSIBLY ERRED IN DENYING A DEFENSE REQUEST FOR A MERCY SPECIAL JURY INSTRUCTION?

Appellate counsel was not Strickland deficient by not arguing that the trial court erred in not giving a defense special instruction (R2 II 281). Such a claim would have been meritless for two primary reasons: (1) the trial court gave the standard instruction, which has been repeatedly upheld and which covers the subject area of the special instruction, and (2) the requested instruction misstated the law, thereby independently justifying its denial.

First, the trial court instructed the jury:

> Among the mitigating circumstances you may consider if established by the evidence are:
> 4. Any other aspects of the defendant's character or record, and any other circumstance of the offense.

(R2 XIII 1136-37 App J) This Court has repeatedly upheld this instruction as covering other mitigation, such as "mercy" claimed here. Thus, this Court dispositively resolved this type of claim in Downs XI, 740 So.2d at 51718, 518 n. 18, by upholding the trial court's use of the standard jury instruction, thereby barring this claim

Mendyk v. State, 545 So.2d 846, 849 (Fla. 1989), rejected a special jury instruction claim and thereby held that "there is no requirement that a jury be instructed on its pardon power." Ferrell v. State, 653 So.2d 367, 370 (Fla. 1995), collected some of the additional cases that appellate counsel would have had to overcome and held: "[A]s Ferrell's brief concedes, there is no 'requirement in Florida law for the trial court to give the special requested instructions.'"

Accordingly, Elledge v. State, 706 So.2d 1340, 1346 (Fla. 1997), upheld the trial court's rejection of a special instruction and upheld standard jury instruction given here as sufficient: "jury was given the standard instruction which states it should consider 'any other aspect of the defendant's character or record, and any other circumstances of the offense.'" Similarly, Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992), held that "the standard jury instruction on nonstatutory mitigators is sufficient, and there is no need to give separate instructions on individual items of nonstatutory

mitigation." And, Jackson v. State, 530 So.2d 269, 273 (Fla. 1988), upheld as adequate an instruction that jury "could consider any other aspect of the defendant's character or record, or any other circumstances of the offense." See also Kilgore v. State, 688 So.2d 895, 901 (Fla. 1996) ("Kilgore argues that the trial court erred in denying his proposed jury instruction on nonstatutory mitigating factors. We have repeatedly ruled that the standard jury instructions are sufficient. The trial court was well within its discretion to deny a special instruction"); Finney v. State, 660 So.2d 674, 684 (Fla. 1995) ("This Court has repeatedly rejected Finney's next claim that the trial court must give specific instructions on the non-statutory mitigating circumstances urged").

Further, the proposed special jury instruction was erroneous, further justifying the trial court's refusal to give it and justifying appellate counsel's omission of such a meritless claim. See, e.g., Parker v. State, 641 So.2d 369, 376 (Fla. 1994) ("All of the requested instructions are either adequately covered by the standard instructions, misstate the law, or were not supported by the evidence *** not err in denying them"); Mendyk v. State, 545 So.2d at 849 (upheld rejection of special jury instruction because it was "not ... an entirely correct statement of the law"); Garmise v. State, 311 So.2d 747 (Fla. 3d DCA 1975)("Incomplete and/or misleading instructions are properly denied"); U.S. v. Caporale, 806 F.2d 1487, 1514 (11th Cir. 1986) ("we will reverse only if the proposed instruction is an accurate statement of the law, is not covered in substantial part by the instructions given"); U.S. v. Sans, 731 F.2d 1521, 1530 n. 10 (11th Cir. 1984)(requested

instruction "at its best, ... correct, but misleading"). As indicated in Cal. v. Brown, 479 U.S. 538, 541 (1987) (Pet 16), the jury is not vested with unbridled discretion to afford a defendant mercy upon a whim, unsupported by any evidence and any law. Thus, the jury was not "**always** free to afford Ernest Downs mercy ..." (R2 XIII 1048)

This claim also attacks the prosecutor's closing argument at re-sentencing as "compound[ing] the error in failing to give the "mercy" instruction. The State has several responses.

First, there was no error to "compound": The instructions, as given, were proper, as discussed supra.

Second, a major aspect of the closing arguments concerned whether Downs deserved mercy; as such, the prosecutor was entitled to advocate the State's position that Downs was not deserving of mercy, given the evidence in this case. Third, accordingly, a major feature of defense counsel's argument was that Downs deserved mercy, and, indeed, defense counsel used the standard instruction on "other aspects of the defendant's character ..." here to his advantage in making that argument. (See R2 XIII 1124-34 App I) Thus, defense counsel concluded his litany of "aspect[s] of the defendant's character or record, and any other circumstances of the offense" (R2 XIII 1124 App I), with

> I will ask you to spare a human life, not out of hate, but out of mercy. If you will err, err on the side of mercy.

(R2 XIII 1134 App I) The benefit of the proper jury instruction to Downs, "compounded" by defense counsel's argument, "cured" any purported problem averred in Claim II, See Foster v. State, 614

So.2d 455, 461-62 (Fla. 1992) (attack on jury instruction as "creat[ing] a substantial risk that the jury believed that they could only find the mental health evidence to be mitigating if it rose to the statutory level"; claim rejected based upon standard instruction on "any aspect of the defendant's character and background or any other circumstance presented in mitigation ..." and defense counsel's argument discussing mental health mitigation).

Fourth, on appeal, it would have been **at least** arguable that the prosecutor's argument was proper; this would not have been an obviously winning issue. Taken as a whole, the prosecutor's argument did not tell the jury to reject all mercy or sympathy as a factor in its decision. Instead, the prosecutor argued that any sympathy/mercy considerations for Downs or the victim must be based upon evidence and the jury instructions. The following is the context for the argument Downs attacks:

> [Y]ou-all indicated that you could render a true verdict according to the law and the evidence so help you God. [the sympathy argument that is attacked here] *** You are here, ladies and gentlemen, to make a determination from the evidence, and apply it to the law as Judge Pate gives it to you, and then make that determination.
>
> You're supposed to recommend – to make your recommendation to Judge Pate in this case based wholly on the evidence that came from the witness stand and the exhibits, and this evidence pertains to what is known as aggravating and mitigating circumstances.
>
> Now, in this particular penalty proceeding it's **totally appropriate** ... for the defendant to go last, and literally ask, or **beg you-all for his life**. [R2 XIII 1057-58 App H] [Discussion of aggravators and mitigators] ***
>
> Now, the last mitigating circumstance ..., you will be instructed by the Court, any other aspects of the defendant's character or record, and any other circumstance of the offense. [Prosecutor then argued that evidence presented by Downs did not outweigh aggravators] [R2 XIII 1090-92, App H]

Thus, not only was the prosecutor properly asking the jury to limit their considerations to the evidence and the law, but he reinforced Downs' right to plead for mercy based upon the evidence.

And, fifth, there was no objection to the prosecutor's argument targeted here. Especially given the context of the prosecutor's argument, it certainly was nothing approaching fundamental error.

Teffeteller v. Dugger, 734 So.2d 1009, 1028 (Fla. 1999), is on point:

> ... Teffeteller contends that appellate counsel was ineffective for failing to argue that the prosecutor improperly led the jury to believe that **sympathy** towards the defendant was an inappropriate consideration. However, appellate counsel was not ineffective in this regard for two reasons. First, the complained-of comments were **never objected to** by trial counsel and thus not preserved for appellate review. Second, this **claim has been decided adversely to Teffeteller's contentions**. *See Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (finding that defendant was not entitled to federal habeas relief based on claim that instruction during penalty phase telling the jury to avoid any influence of sympathy violated the Eighth Amendment).

As in Teffeteller, the instant sympathy claim was not subjected to objection, and the attempt of the prosecutor to advocate that the defendant was not entitled to unsupported sympathy was proper. Indeed, the argument was entirely proper in meeting head-on the prosecutor's concession that the jury could consider the defendant begging for his life. The prosecutor properly argued that **the evidence** did not support such a consideration and that the aggravators still outweighed any mitigation.

Downs also argues (Pet 16) that the "State Attorney also told the jury panel that they must 'set aside any feelings of anger or sympathy.'" The foregoing arguments pertain to this sub-claim. The

context of the statement (See R2 VIII 264-73. See also R2 VIII 237-38, 243, 343-45) was that the jury should base its decision on the evidence and the law, rather than some amorphous feeling that would be unarticulated and thereby irrational and unbridled. Further, defense counsel interposed an objection, but Downs, at the time, represented himself pro se and reiterated his desire for self-representation in discussing the objection, referring to it as "voicing his [defense counsel's view]," rather than adopting it as his own. (See R2 VIII 273-75) Thus, there was no proper objection on which to base an appellate point.

In contrast to Downs' claim based upon a special jury instruction that was **not** given, Downs (Pet 16) attempts to rely upon Cal. v. Brown, 479 U.S. 538, 107 S.Ct. 837 (1987), which upheld a jury instruction that was given. Brown highlights the propriety of the events attacked in CLAIM II. As noted supra, Brown disapproved of "unbridled discretion in determining the fates of those charged with capital offenses," 479 U.S. at 541. Here, the jury instruction (and prosecutor's comments) provided the jury with some proper guidance for the exercise of its discretion. Brown continued: "[E]ven though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his "'character or record and any of the circumstances of the offense,'" Id.; viewing the jury instruction on "other aspects of the defendant's character ..." and the prosecutor's comments as a whole, the jury was allowed to consider all mitigating **evidence**. Here, as in Brown, "[r]eading the instruction as a whole," 479 U.S. at 543, the jury was allowed to

consider sympathy and mercy that was supported by some evidence, rather than create it in an act of unbridled discretion.

Further, given the foregoing arguments and the "overwhelming" evidence supporting the death sentence, 572 So.2d at 899-900, any purported deficiency was not harmful.

In conclusion,[5] an appellate claim based upon the Petition's arguments would have failed. Downs' creative teasing (Pet 16-18) of arguments from cases that do not hold that he would have been entitled to relief on appeal are not the litmus of Strickland ineffectiveness. Here, the parties advocated for and against applying mercy in this case, given the evidence and the law, which included the instruction that the jury could consider any aspect of Downs character, Downs' record, and any "other circumstance of the offense." Here, given the evidence and the law, the jury rejected mercy, which this Court affirmed on appeal. An adverse result is not ineffectiveness.

CLAIM III (Restated)

WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT REVERSIBLY ERRED IN DENYING A DEFENSE REQUESTS FOR A SPECIAL JURY INSTRUCTION CONCERNING THE LENIENT TREATMENT OF CODEFENDANTS AND LINGERING DOUBTS ABOUT THE IDENTITY OF THE TRIGGER PERSON?

Claim III is based upon two proposed special jury instructions concerning the relative culpability of accomplices (at R2 II 277,

[5] Claim II also mentions (Pet 18) the trial court's refusal to give a special instruction on the lenient treatment of codefendants, which is the subject of Claim III. The State asserts here, for reasons in Claim III infra, that this argument is meritless and not a basis for appellate ineffectiveness.

279-80), which the trial court denied (R2 XIII 1049, 1028-30). However, the standard jury instructions highlighting as mitigation "any other circumstances of the offense" (R2 XIII 1137 App J) and the "relatively minor" "participation" of the defendant (R2 XIII 1136 App J) covered the topics of these special instructions,[6] rendering any appellate claim based on this argument meritless.

Moreover, contrary to Downs habeas assertion, the special instruction concerning "lingering doubt" about Downs being the triggerman was actually raised on direct appeal of the resentencing. (See Initial Brief of Appellant 43-46 App A) Claim III therefore is quibbling over the manner in which this matter was argued, thereby barring Claim III here. Further barring Claim III is this Court's rejection of the argument. See Downs IX, 572 So.2d at 900 and authorities cited there.

Accordingly, Downs' 1997 appeal from the denial of one of his 3.850 motion raised (Initial Brief of Appellant 63 App K) the denial of the immunity instruction: "The circuit court refused Mr. Downs' request to instruct the jury on the mitigating factor of 'immunity and deals with other defendants' (R2. 1049)." Although this Court did not explicitly address this argument, it pointed to the case law that negates claims that it is ineffective not to challenge standard jury instructions. See Downs XI, 740 So.2d 517-18. Therefore, the State asserts that this holding is the law of the case and bars Claim III.

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[6] As illustrated by several cases cited in Claim II, a special instruction is not required if otherwise covered by the standard instructions. See, e.g., Mendyk; Ferrell; Elledge; Jones.

Further, as argued under Claim II supra, the standard jury instructions have been repeatedly upheld, and, as such, those on "any other [mitigating] circumstances of the offense" (R2 XIII 1137 App J) and the "relatively minor" "participation" of the defendant (R2 XIII 1136 App J) covered the topic. See Downs XI, 740 So.2d at 517 n. 18 (use of standard instruction). See also Melton v. State, 638 So.2d 927, 930 (Fla. 1994) (prosecutor affirmatively told the jury that it "should not consider disparate treatment of codefendants in their sentencing recommendation"; affirmed based in part on jury instruction that it "could consider in mitigation 'any other aspect of the defendant's character or record and any other circumstances of the offense'").

In addition to the trial court's proper administration of the pertinent standard jury instructions, counsel for the State (R2 XIII 1068-75, 1082-89, 1092-1102 App H) and the defendant (R2 XIII 1106-13 App I) assured that accomplice relative culpability and treatment was a major factor for the jury to consider. See Ragsdale v. State, 609 So.2d 10, 13-14 (Fla. 1992) (in part relied upon jury instruction and "closing arguments of both parties" in rejecting claim that jury did not know that it could consider accomplice's sentence in its recommendation).

In this claim, Downs also complains (Pet 24-26) about short snippets within the prosecutor's closing argument. However, no objection was interposed, rendering any appellate claim fruitless. Further, in his role as an advocate that relative culpability vis-a-vis treatment of accomplices does not outweigh the aggravation (See

R2 XIII 1099 App H), the prosecutor repeatedly emphasized that Downs was the triggerman:

> But today, 1989, Mr. Downs would have you believe that Larry Johnson was the one, all the way through he's the one who did this.
> Everything Mr. Johnson testified to under oath has been corroborated ***
> ***
> It would make no sense for Larry Johnson to come in to the police and say, by the way there's a murder involved, where he was the triggerman? But it does make sense where he had a lesser role *** [R2 XIII 1068-69 App H]
> ***
> The only witnesses ... who indicate that Larry Johnson killed Mr. Harris and not Ernest Downs is Mr. Barfield [R2 XIII 1074 App H]
> ***
> The evidence shows that this defendant not only was a major participant in getting Harris down there to get him killed, but he squeezed the trigger, shot Mr. Harris four times in the head, and then once in the chest to make sure that was good measure.
> This mitigating circumstance just does not apply *** [R2 XIII 1084 App H]
> ***
> And talking about the treatment of the codefendants, *** that is a significant mitigating circumstance you should consider. [R2 XIII 1097 App H]
> The bottom line with respect to the treatment of codefendants under the facts and circumstances of this case are that they are not mitigating *** the treatment of the codefendants *** in no way outweighs these three aggravating circumstances *** [R2 XIII 1099 App H]

Thus, given the correct jury instructions that covered Downs' relative culpability/treatment position in the trial court and given defense counsel's lengthy argument on the subject, appellate counsel was not ineffective for allegedly not pursuing the arguments in Claim III here. Indeed, the gravamen of much of this claim was actually raised and rejected, barring it here.

Furthermore, given all of the foregoing arguments and given this Court record-grounded conclusion that the "overwhelming," 572 So.2d at 899-900, evidence supported the death sentence, any purported

error was harmless and not supportive of reversible error if it had been raised on appeal.

CLAIM IV (Restated)
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT REVERSIBLY ERRED IN CONSIDERING CONTESTED HEARSAY AS NON-STATUTORY AGGRAVATION?

Claim IV contests several items in the presentence investigation (psi) as hearsay or inaccurate (Pet 27-28) and then concludes that they constituted "nonstatutory aggravation" (Pet 29). Appellate counsel was not ineffective for failing to raise such a claim. It would have been folly. The trial court announced that it would not consider the psi contested here (R2 VIII 184-85 App L), and Downs has failed to meet his burden of establishing that the trial court did consider it. Appellate counsel cannot be faulted for failing to raise a claim on a matter that was a non-factor at the trial level. See,, e.g., Provenzano v. Dugger, 561 So.2d 541, 548 (Fla. 1990) ("no jury was present at the time this testimony was given because the jury had already rendered its penalty recommendation the week before. Therefore, the point would not have resulted in the reversal of Provenzano's sentence even if it had been raised"). Thus, Downs has also failed to establish Strickland-level prejudice; indeed, the record affirmatively indicates no prejudice whatsoever. Because this claim is devoid of even a scintilla of merit, the State does not pursue any additional analysis of this claim at this juncture.

CLAIM V (Restated)

WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT REVERSIBLY ERRED IN DENYING A DEFENSE REQUEST FOR A JURY INSTRUCTION CONCERNING THE LAW OF PRINCIPALS?

Claim V argues (Pet 29-32) that the re-sentencing jury should have been made aware that the guilt-phase jury may have found him guilty of First Degree Murder based upon a principal theory. The State has several responses. First, this claim is insufficient on its face because it does not designate a record cite where the trial court ruled on the defendant's motion for this jury instruction. Instead, it references "R2. 133" for the trial court's reflex reaction to Downs' request, then baldly states that the trial court denied Downs' motion. However, an examination of the pages surrounding Downs' only record cite to "R2. 133" indicates that the trial court reserved ruling on his motion to instruct the jury on principals. (See R2 VI 133-37 App M) And, although it is incumbent upon the movant to demonstrate on the face of his habeas Petition grounds for relief, and not the duty of the respondent to comb the record for a record cite supporting an opponent's claim, the State has reviewed page-by-page the portion record containing orders dated on and shortly after the October 5, 1988, hearing on Downs pro se motion for the principal jury instruction and found no order denying that motion. (See R2 I 184-200, II 201-241)

Indeed, in early 1989 at approximately the time of the resentencing proceedings, when Downs pro se presented his package of proposed jury instructions, the law of principals was not included (See R2 II 277-82), and this matter was not raised at the jury instruction conference during the resentencing proceedings (See

R2 XIII 1023-54) Thus, this claim appears to have been abandoned at the trial level, fatally undercutting any appellate argument, thereby negating Strickland-level deficiency and prejudice. Indeed, a prerequisite to appealing a trial court ruling is establishing that there was, in fact a ruling. See Armstrong v. State, 642 So.2d 730 (Fla. 1994) ("trial judge reserved ruling on this issue and apparently never issued a ruling ..., this issue is procedurally barred"); Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983) ("appellant did not pursue his" objection "even though the judge did not rule on" it; "Under these circumstances, appellant has not preserved the issue for appeal").

Further, the ground Downs asserted to the trial court for giving this instruction concerned "prosecutorial misdiscretion" in treating Downs differently from others who were involved. (See R2 VI 135-36) This "prosecutorial misdiscretion" argument does not match the one that he now wishes that appellate counsel to have advocated. As such, the ground asserted in the habeas claim was not preserved, thereby procedurally barring it on direct appeal. See Hamilton v. State, 678 So.2d 1228, 1230 (Fla. 1996) ("Because the defense did not object to this particular statement on hearsay grounds, that issue now is procedurally barred"); Hill v. State, 549 So. 2d 179, 181-82; Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982)(at trial, defense argued credibility as ground for cross-examination whereas on appeal defendant argued development of a "a viable defense theory"); Tillman v. State, 471 So.2d 32, 35 (Fla. 1985)("did not present to the court the specific argument relied upon here that the testimony came within an exception to the hearsay rule.").

Further, the jury instruction, as requested, was erroneous:

> COMES NOW the Defendant, Ernest C. Downs in pro se, and moves this Honorable Court to take judicial notice of Florida Statute 777.011, and at the appropriate time upon request, instruct the jury to accept as a fact, the matter judicially noticed.

(R2 I 122) The instruction, at best confusing, appears to require the resentencing jury to accept that Downs was found guilty on a principal theory. Although the guilt-phase jury may have considered a principal theory, it is a leap of faith, not law, that the guilt jury actually convicted on that theory. As a misleading, if not erroneous instruction, it would have been wrong to give it, rather than a ground for reversible error to refuse to give it. Appellate counsel was not Strickland-deficient for not pursuing such a claim.

Moreover, in addition to the instructions given to the jury concerning mitigation through "any other circumstance of the offense" (R2 XIII 1137 App J) and mitigation through "the defendant's ... relatively minor" "participation" (Id. at 1136), the trial court also instructed the jury, at Downs' request:

> The fact that the defendant has been found guilty beyond a reasonable doubt of the crime of first degree murder is not itself a statutory aggravating circumstance.

(R2 XIII 1136 App J)

Given the special instruction on the prior finding of guilt and all of the other instructions, as well as the arguments of Downs' counsel,[7] given the "overwhelming" evidence supporting the death

[7] These instructions and counsel arguments address Downs' argument (Pet 32) that "the jury was instructed that it must accept the first-degree murder conviction." It is also noteworthy that Downs admitted to First Degree Murder in his testimony (R2 XII 950-51), then attempted to paint himself as less culpable.

sentence, and given that there is no evidence that the resentencing jury was misled by guilt-phase considerations, the failure to give the requested jury instruction was harmless, thereby rendering appellate counsel not ineffective for failing to raise this claim.[8]

CLAIM VI (Restated)
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT REVERSIBLY ERRED IN QUASHING DOWNS' SUBPOENA OF THE STATE ATTORNEY BECAUSE THE EVIDENCE WOULD HAVE REVEALED THE CONTEXT FOR THE STATE'S DEAL WITH JOHNSON?

Downs admits (Pet 33) that quashing the subpoena was raised on direct appeal. For example, the Initial Brief of Appellant (p. 31 App A) argued, in part: " Why the State was so lenient is the question Downs wanted answered. *** The State, without testifying, was able to say that it believed Johnson's testimony because it granted him immunity." The Reply Brief argued (p. 15), in part: "It is not the fact Johnson received immunity that was important, it was the reasons the state had used in granting it that was important." This argument looks much like the instant one: For example, "The jury would be inclined to believe that the State chose to deal with Johnson in their efforts to convict Mr. Downs because Johnson was in fact less culpable." (Pet 34) Accordingly, Downs IX, 572 So.2d at 900, specifically addressed and rejected, arguments concerning four polygraphs administered to Johnson and the relevancy of the prosecutor's opinion of Johnson. Thus, Claim VI was raised and rejected on direct appeal, barring it here.

[8] Thus, the State disputes Downs' speculation (Pet 32) that the principal instruction "would have resulted in a life recommendation."

Now, Downs, in hindsight, perhaps would like to re-package the claim presented on a appeal differently. Hindsighted re-writing of essentially the same claim is not the stuff of ineffective assistance of appellate counsel.

Downs must also confront the fact that Claim VI differs from what he raised before the trial court.[9] There, he wanted to subpoena prosecutors to establish "prejudice" (R2 VI 96-97) to support his requests for the trial court to "take judicial notice" that "Crucial Evidence relevant to Defendant's Defense was destroyed by the State" (R2 I 113) and to recuse the State Attorney's Office (R2 VI 94. See also Pet 36-37). Thus, the current claim is not grounded on the same argument raised below, thereby procedurally barring it on appeal.

Also, it is quite telling that even armed with ten years of hindsight, Downs has failed to cite a single case holding that the trial court's quashing was error. He should not expect more from appellate counsel, who has not had the leisure of the past ten years of hindsight. A fortiori, the Petition fails to make a prima facie case of "obvious," Page, success on appeal in 1990, which is a requisite Strickland test.

Moreover, as the State argued in its direct appeal, inquiring into the heart of prosecutorial discretion is improper and irrelevant to the issues at re-sentencing. Indeed, the analysis of prosecutorial discretion in Downs I, 386 So.2d at 795, remains dispositive, and at a minimum, rendered any argument inquiring into that discretion weak and worthy of omitting. In any event, given the

[9] Arguably, this claim also was not preserved for Downs XI.

fact that the jury was aware of the leniency afforded to Johnson and given the "overwhelming" evidence supporting the death penalty, the admission of any such context would have had no effect on the outcome. Indeed, even now, Downs has not established that revealing the context would be beneficial to him–it likely would have harmed him.

CLAIM VII (Restated)
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT THE CIRCUIT COURT ERRED IN DENYING DOWNS' MOTION TO DISQUALIFY THE STATE ATTORNEY'S OFFICE?

This claim is unsupported by its argument located under it, and the argument-text fails to cite any authority that it logically links to the claim, as stated.[10] Therefore, there is no prima facie showing that appellate counsel was Strickland deficient or that his omission of a disqualification issue Strickland-prejudiced Downs. Moreover, such a claim would have been meritless. Contrary to the unsupported allegation in Claim VII, the State Attorney's Office was the arm of government constitutionally empowered to handle this case at the circuit court level. See Art. 5 § 17, Fla. Const. ("Except as otherwise provided in this constitution, the state attorney shall

[10] If Downs attempts to buttress his Claim VII arguments through a Reply, the State objects. Most of the argument under Claim VII is a more of a list of legal conclusions and other rambling potshots than any support for Claim VII. At a minimum, the State was entitled to notice regarding the full nature and support of each of the list of conclusions so that it could respond accordingly. It would be unfair to require the State to guess what might support each conclusion and then require it to rebut its own guess. To some degree, the State's response hazards such guesswork, but the response is much more abbreviated than it would have been if any of the Petition's conclusions had been developed and supported with legal authority.

be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law"; "each judicial circuit"); §27.01, Fla. Stat. ("shall be a state attorney for each of the judicial circuits"); Office of State Attorney, Fourth Judicial Circuit of Florida v. Parrotino, 628 So.2d 1097, 1099 n. 2 (Fla. 1993) ("state attorney, while being a quasi-judicial officer, also shares some attributes of the executive. A judicial attempt to interfere with the decision whether and how to prosecute violates the executive component of the state attorney's office"); State ex rel. Ricks v. Davidson, 163 So. 588, 589 (Fla. 1935) ("prosecuting power in each judicial circuit should be in a state's attorney"), modified in State v. Miller, 313 So.2d 656, 657 (Fla. 1975) ("appointed assistant state attorneys ... now serve as the alter egos of the state attorney appointing them"). As pointed out supra, the analysis of prosecutorial discretion in Downs I, 386 So.2d at 795, remains viable, dispositive, and at least a reasonable ground for screening out of an appeal any argument to the contrary.

A desire to call a prosecutor as a witness is not a ground for disqualification of the prosecutor. See Thompson v. State, 25 Fla. L. Weekly S346 (Fla. April 13, 2000), citing Scott v. State, 717 So. 2d 908 (Fla. 1998). See also State v. Fitzpatrick, 464 So.2d 1185, 1185-88 (Fla. 1985) (government law offices *** [distinguished from] private law firms; State Attorney can only be disqualified if it were shown that as Public Defender he had actually gained confidential information from a prior attorney-client relationship with the defendant, which information would be usable in the new matter to defendant's prejudice). A fortiori, the State respectfully

submits that it is patently absurd to require that the **constitutionally empowered** arm of government must be disqualified because **inadmissible records** pertaining to the **prosecutor's motive** for negotiating with a defendant had been destroyed at some juncture in an **eleven-year period** (R2 I 130). There has been **no prima facie showing of bad faith**, and, indeed the extended nature of the eleven-year period suggests otherwise. See, e.g., Merck v. State, 664 So.2d 939, 942 (Fla. 1995) ("failure to preserve the khaki pants was not a denial of due process *** [because] [t]here is simply no showing that Detective Nestor acted in bad faith"), citing Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); Kelley v. State, 569 So.2d 754 (Fla.1990). See also McCray (laches).

It is also patently groundless that Downs should have the right to "a polygraph examination" (Pet 37). In addition to Downs providing no authority for such a proposition, this argument, on its face, requests a right to micromanage or otherwise micro-question the prosecution's constitutionally protected exercise of discretion. As this Court noted, the prosecutor "personal opinion about Johnson's credibility was not relevant to these proceedings," 572 So.2d at 900, barring any argument to the contrary now.

The text under Claim VII avers (Pet 37), without any supportive record citation, that the prosecutor bolstered Johnson's credibility "by referring to the polygraph examination." However, Downs fails to even attempt to show how this allegation supposedly supports disqualifying the State Attorney's Office. Moreover, a review of the prosecutor's closing argument reveals its **unobjected-to** emphasis on the properly admitted **evidence** that corroborated Johnson and

conflicted with Downs' version of events. (See R2 XIII 1056-1103) Any argument attacking a prosecutor reference to polygraph has not been shown to have a basis in the record, is logically inconsequential to Claim VII, harmless in light of the admitted evidence and other argument to the jury, and unpreserved and barred – each of which provide a basis for denying relief here.

Further, Claim VII-text's **passing reference to due process** (Pet 37), sans any cited authority, constitutes an insufficient prima facie showing of ineffectiveness concerning an inadmissible, discretionary matter (i.e., motive for negotiation). Moreover, it appears that due process concerning these matters was not preserved below (See R2 VI 90-100), and the Petition's text fails to disclose where or how it was preserved below, thereby making any such appellate claim fruitless. See, e.g., Hill, 549 So.2d at 182. Indeed, Downs, representing himself, explicitly stated "nowhere in this motion do I say I want to put this here before the jurors" (R2 VI 91).

In essence, the claim, as stated as such above and in the trial court, would require the disqualification of the State Attorney's Office so that evidence can be gathered in support of a claim to disqualify the State Attorney's Office. This is not ground for disqualification. It would have the practical effect of stripping the prosecutor of constitutionally empowered discretion and vesting it in the defendant by disqualifying the office based upon bare accusation of impropriety.

Further, in addition to roaming from the claim as stated and without any supportive argument and authorities, the argument section under this claim as a whole fails to show how its

accusations bear any real consequence to the outcome of the re-sentencing proceedings, especially given the jury's awareness of the immunity afforded to Johnson, counsel's arguments, the properly administered jury instructions, and the overwhelming evidence against Downs. Hence, harmlessness would have applied to any such appellate claims, and thereby no Strickland-deficiency or prejudice is established.

CLAIM VIII (Restated)
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE IN THE MANNER IN WHICH HE RAISED THE CLAIM ATTACKING THE EXCLUSION OF BOBBY JO MICHAEL's DEPOSITION?

Claim VIII quarrels with the manner in which appellate counsel argued that Downs was entitled to a new sentencing because Bobby Jo Michael's deposition should have been admitted into evidence. Downs now argues (Pet 38) that if appellate counsel had informed this Court "of the exact nature of Ms Michael's testimony, this Court would not have found its exclusion to be harmless error." This claim erroneously assumes that this Court blinds itself to the record sitting in front of it. Indeed, this Court affirmatively stated, "**We find in the record** overwhelming proof to render the error of excluding the grandmother's cumulative testimony harmless," 572 So.2d at 899-900.

Included in this Court's prior independent review of the record undoubtedly were Claim VIII's (Pet 38-39) "exact" aspects of Michael's testimony. Further, the Reply Brief of Appellant (p. 19) did argue the "little details" in Michael's testimony as assuming "big importance." Downs' current specification (Pet 38-39) of

Michael's description of Johnson as fidgety would not have made any difference, even if somehow this Court had totally ignored it.

In conclusion, Claim VIII is mere hindsighted second-guessing of how appellate counsel presented this argument and an attempt to revisit through habeas a matter that has already been fully considered and decided by this Court. It is improper and barred.

CLAIM IX (Restated)
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE THAT DOWNS GAVE A FALSE NAME TO THE POLICE WHEN HE WAS ARRESTED?

In 1990, this would have been, at best, an extremely weak claim. Downs cites (Pet 40, 41) to two cases decided well after the 1990 appeal. Moreover, Fenelon v. State, 594 So.2d 292 (Fla. 1992), is the watershed case that confined aspects of the prosecution's use of evidence allegedly showing consciousness of guilt. It was decided over a year after the appeal attacked here was final. Further, Fenelon cites to numerous cases that appellate counsel would have had to overcome in making the argument raised in Claim IX. See, e.g., Freeman v. State, 547 So.2d 125, 128 (Fla. 1989) ("fleeing the scene of the Collier murder, concealing himself, **providing a false name upon apprehension** ..."; at the time of his attempted escape *** evidence of flight is appropriate for both charges"). Appellate counsel was not ineffective for winnowing out this claim.

Even erroneously scrutinizing appellate counsel's omission of this claim under today's standards would indicate a lack of ineffectiveness. Prior to submitting the driver's license into evidence, at which there was an objection (R2 XII 1013 - XIII

1021), the same **information** attacked in Claim IX had already been introduced without objection. On cross-examination, Downs testified that when he was arrested, he was "using a different name, a different identification"; he "had a driver's license in the name of [his] deceased brother, Danny Lee Downs" with his (defendant's) picture on it. (R2 XII 984) Downs even authenticated the very exhibit (State's B) that he now contests. (See R2 XII 984) All of the information about which Claim IX complains had been introduced into evidence without objection, rendering any appellate claim as procedurally barred and at least absolutely harmless. Also, noteworthy is that the prosecutor did not emphasize this matter in his closing argument. (See R2 1056-1103 App H) Counsel properly did not raise this on appeal. There was no ineffectiveness for failing to raise such a losing claim.

Even overlooking all of the foregoing, the claim would have still been fruitless on appeal. The driver's license was introduced because Downs had made an issue of his appearance in that general era (See, e.g., R2 XII 943-45, XIII 1019) When defense counsel argued that there was no assurance regarding the exact date of the photo on the license, the trial court invited him to develop the point, but counsel's only response was "I would just object for the record," (R2 XIII 1019-20) thereby waiving any vintage-of-the photo argument. Moreover, defense counsel did not request a limiting instruction at the time. (See R2 XIII 1019-21)

Further, Downs presented the false name on the driver's license to law enforcement (R2 XII 983) when he was apprehended (R2 XII 966, 979-80). This subterfuge placed in context, and conflicted with, his

general story that he was cooperative with law enforcement when he was apprehended. (See R2 XII 965-68). Indeed, he admitted on cross-examination that he did not begin to cooperate until after he had been "stopped" and he had found out that "someone had turned [him] in" (See R2 XII 980). As such, the driver's license and the information on it were admissible. See Ross v. State, 601 So.2d 1190, 1191 (Fla. 1992) ("Several days later, he was apprehended by police, at which time he gave them a false name"; not addressed in opinion); Brown v. State, 756 So.2d 230, 231-32 (Fla. 3d DCA 2000) ("testimony that Brown gave a false name when the police stopped him two weeks after the alleged robbery") discussed Escobar v. State, 699 So.2d 988 (Fla.1997) and Thomas v. State, 748 So.2d 970 (Fla. 1999) ("admission of this evidence is within the trial court's discretion and will not be reversed unless the defendant demonstrates an abuse of discretion"); U.S. v. Wilson, 11 F.3d 346, 353 (2d Cir. 1993) ("use of false identification is relevant and admissible to show consciousness of guilt *** and to show the means used in the conduct of the conspiracy"); U.S. v. Boyle, 675 F.2d 430, 432 (1st Cir. 1982) ("use of a false name after the commission of a crime is, as the defendant acknowledges, commonly accepted as being relevant on the issue of consciousness of guilt").

The analysis of Straight v. State, 397 So.2d at 903, 908 (Fla. 1981), in Escobar v. State, 699 So.2d 988, 996 (Fla. 1997) (Pet 41), is instructive. It emphasized reasons for concealment other than showing consciousness of guilt. Here, when Downs was stopped, his focus was on one matter: This murder.

Moreover, as a question of admissibility, the standard of appellate review would have required appellate counsel to establish the trial court's ruling as unreasonable, which under the facts of this case would have been extremely difficult. Compare Jent with Canakaris.

Furthermore, even under today's standards, the admission of the driver's license was harmless error, given the "overwhelming" evidence supporting the death sentence and the lack of emphasis on this matter in front of the jury. See Rodriguez v. State, 753 So.2d 29, 41, 43 (Fla. 2000) (erroneous evidence "that Manuel had a police 'ID number'" and "that Manuel had used ten false names, when in fact he had used only two"; harmless).

CLAIM X (Restated)
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO ARGUE THE PROSECUTOR'S CLOSING STATEMENT TO THE JURY IMPROPERLY REFERRED TO THE CITIZENS OF FLORIDA?

Claim X targets a snippet from the prosecutor's closing argument. However, the Petition totally fails to address the obvious failure of trial counsel to preserve such a claim, thereby barring it on appeal. See, e.g., McDonald v. State, 743 So.2d 501, 504 (Fla. 1999) (rejected as unpreserved claims concerning prosecutor's arguments, including claim that "prosecutor improperly appealed to the emotions and fears of the jury to send a message to foreign citizens 'not versed in the "American" way of life'"); Urbin v. State, 714 So.2d 411, 418-12, 418 n. 8 (Fla. 1998) (long list of prosecutor misconduct; "State correctly points out that because there was no contemporaneous objection to the prosecutor's argument, this issue

should be procedurally barred"); Nixon v. State, 572 So.2d 1336 (Fla. 1991) (motion for mistrial at the end of the prosecutor's closing argument insufficient to preserve claim that prosecutor's argument violated "Golden Rule"); Rose v. State, 461 So.2d 84, 86 (Fla. 1984) ("commenting on Rose's silence"; "contemporaneous objection is necessary at the time an improper [prosecutor's] comment is made").

Although not cited in the Petition, the State addresses Ruiz v. State, 743 So.2d 1, 6 (Fla. 1999). Ruiz held that the particular appeal to citizenship there constituted fundamental error. However, there, unlike here, "Prosecutor Cox urged the jurors to do their duty as citizens just as her own father had done his duty for his country in Operation Desert Storm." Ruiz reasoned that the gravity of the prosecutor's comments arose from their personalization of the prosecutor through her father's devotion to duty so as to "gain[] sympathy for the prosecutor and her family" and it "it contrasted the defendant (who at that point had been convicted of murder) unfavorably with Ms. Cox's heroic and dutiful father." Neither of those factors are present in the instant case. Further, other substantial, improper arguments were present and subjected to objection in Ruiz – not the case here. Further, Ruiz was decided long after the appeal here; appellate counsel could not have gleaned any benefit from a case that did not yet exist.

The State does not concede that the prosecutor's argument was improper. Instead, it was directly linked to the jury's duty to properly weigh the aggravators and mitigators and aspects Downs' crime. (See R2 XIII 1101-1103 App H)

The Petition's citations to two cases (Pet 42) fails to meet its burdens here. In Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985), inter alia, "the prosecutor urged the jury to consider the message its verdict would send to the community at large, an obvious appeal to the emotions and fears of the jurors." (footnotes omitted) Here, the prosecutor did not play on fears or messages to others; instead, this argument was the culmination of page of argument in which he asked the jury to apply the law to the facts. (See App H)

Moreover, here, arguendo assuming misconduct, as in Bertolotti, "the misconduct ... [was not] so outrageous as to taint the validity of the jury's recommendation in light of the evidence of aggravation presented," 476 So.2d at 133, which here, this Court has characterized as "overwhelming," 572 So.2d at 899-900. A fortiori, here the primary focus of the prosecutor's argument was on analyzing the aggravators and mitigators and advocating the State's position based upon that analysis.

The other case the Petition cites is a Westbrook v. General Tire and Rubber Co., 754 F.2d 1233, 1238 (5th Cir. 1985), where counsel repeatedly appealed to a "community standard or expectation which would be disappointed unless the jury returned a large verdict in Westbrook's favor." However, in Westbrook, counsel objected, whereas here the claim was not preserved. There, not here, the arguments were repetitive. And there, the nature of the arguments included comments like "make this community proud" and "If you come up and write that figure in [$925,000], you can leave this courthouse proud and you don't have to go and be apologetic to anyone." Id. at nn. 2,

3. Here, there was no such appeal to the fears of the jurors that they would be confronted by the neighbors after jury duty.

Thus, and appellate use of Bertolotti and Westbrook would have been fruitless. It was not ineffective to not raise them.

CLAIM XI (Restated)

WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT DOWNS WAS DENIED HIS RIGHT TO A FAIR SENTENCING WHEN THE CIRCUIT JUDGE DENIED HIS MOTION TO DISQUALIFY THE JUDGE?

This claim (Pet 43-46) is devoid of one citation to anything in the record that indicates that the trial judge was biased by anything improper or presented the appearance of such a bias. Instead, much[11] of this claim essentially echoes the allegation below that "the Court should not be placed in such an untenable position of having to disregard evidence which it has already heard" and then, like the Motion below, points to the Johnson's polygraph

[11] In its response to Claim I, the State previously quoted from this Court's opinion that summarized evidence corroborating Johnson. Therefore, it disputes any suggestion (Pet 44) that the Claim XI makes that Johnson's testimony stood alone.

The State fails to see how any doubts that the "first jury" (Pet 45) may have had during its deliberations, prior to it resolving those doubts and recommending death, are relevant to this claim regarding the trial judge's recusal – or any other claim for that matter.

Further, the Petition (Pet 46) baldly accuses the State of "knowingly referr[ing] to inadmissible information," without any citation to the record, without any specification of the nature of this accusation, and without any showing that the information was improperly considered. In order to answer an accusation, the State is entitled to know what it is.

results as support.[12] This allegation is itself "untenable" as a matter of law.

The Motion to Disqualify, filed January 20, 1989, (R2 II 250) was successive and untimely. Substantially the same polygraph-biased allegation was made and rejected in 1983. (See App N) In 1984, Downs IV, 453 So.2d 1102, rejected the claim that Downs

> is entitled to a de novo post-conviction hearing before a new judge because the present judge was biased against him.

Downs IV bars this claim to the degree that it based upon similar allegations and to the degree that the same basis existed but was not claimed then.

If Downs attempts to point to differences between the bases of his prior motions to disqualify the judge and the one on which he now relies, he must still show that discovery of factual bases arose within thirty days[13] prior his January 20, 1989, Motion to Disqualify (App N). See §38.02, Fla. Stat. (30 days); Rivera v. State, 717 So.2d 477, 481 n. 3 (Fla. 1998) ("motion must be filed within 30 days after the movant learned of the alleged grounds for

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[12] To the degree that Claim XI raises matters other than the trial court hearing about the polygraph results in the prior sentencing (R2 II 252, 253, 254), denial of Downs' request for a polygraph (Id. at 254), and rulings adverse to Downs (Id. at 254), they are not preserved by the same arguments made to the trial judge in support of the Motion to Disqualify.

[13] Fla. R. Jud. Admin. 2.160(e) ("A motion to disqualify shall be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling"), became effective January 1, 1993. See The Florida Bar Re: Amendment to Florida Rules of Judicial Admin., 609 So.2d 465 (Fla. 1992).

disqualification, 'otherwise the ground, or grounds, of disqualification shall be taken and considered as waived'"; procedurally barred), citing Steinhorst v. State, 636 So.2d 498, 500 (Fla. 1994); Lightbourne v. Dugger, 549 So.2d 1364, 1366 (Fla. 1989) ("failed to demonstrate why these contentions were not made until 1989"; "procedurally barred by the provisions of rule 3.850").

Further, it is not a valid ground to recuse a judge simply because the judge became aware of facts that he/she should not consider in reaching a decision. The very nature of a judge is gatekeeper. In this role, the judge commonly considers whether facts should factor in a decision; this consideration necessarily involves knowing the facts. Moreover, it is generally desirable that a judge know the background of a case, even though some of it may not be properly considered in reaching a current decision. See, e.g., Haliburton v. Singletary, 691 So.2d 466, 469 (Fla. 1997) ("Although the Court advises the **original judge to act on a petition for rehearing** if possible, the Court does not prohibit the successor judge from denying the motion"). A motion for new trial, See Fla. R. Cr. P. 3.600(6), may concern evidence that was alleged to have been improperly admitted, yet the trial judge who knows of that evidence can validly rule on the motion. Granting of a motion for new trial or an appellate reversal does not per se necessitate disqualifying the trial judge. It would also be absurd to suggest that this Court would have to recuse itself if it became aware of evidence inadmissible in the defendant's case by reviewing an accomplice's case or through a previous review of the defendant's case. Simply

put, it is an integral part of a judge's job to become aware of facts that s/he is expected to disregard.

Also, Downs' complaints about this judge's prior adverse rulings are not grounds for disqualification. See Barwick v. State, 660 So.2d 685, 692 (Fla. 1995) (collecting authorities); Rivera v. State, 717 So.2d at 481 ("judge ... made adverse rulings in the past against the defendant, or ... judge ... previously heard the evidence, or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt, ... are generally considered legally insufficient reasons").

CLAIM XII (Restated)
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE JURY INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN OF PROOF?

The resolution of Claim XII in Downs XI, 740 So.2d at 517 nn. 5, 18 ("failure to object to burden shifting penalty-phase instructions ... without merit as a matter of law"; inter alia, because "trial court used the approved standard jury instructions," claim "would have been rejected on appeal"), bars this claim and also indicates its meritless nature.

It is well-settled that the standard jury instructions, used here, do not improperly shift the burden of proof. See Downs XI; San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997) (burden-shifting "claim has been rejected by both the United States Supreme Court and this Court"), citing Walton v. Arizona, 497 U.S. 639 (1990); Shellito v. State, 701 So.2d 837, 842 (Fla. 1997) ("we do not find that the standard instructions improperly shift the burden of

proof"); Harvey v. Dugger, 656 So.2d 1253, 1257 n. 5 (Fla. 1995) ("claim 9 ["penalty-phase jury instructions improperly shifted the burden"] to the extent it pertains to ineffective assistance of counsel is without merit as a matter of law"); Preston v. State, 531 So.2d 154, 160 (Fla. 1988) ("instructions given by the court did not shift the burden of proof to the defendant"); Arango v. State, 411 So.2d 172, 174 (Fla. 1982) (upheld standard jury instruction and rejected burden-shifting claim).

Thus, appellate counsel was not ineffective and this claim has been decided in this case, barring it here. See also discussions of Claims II & III supra.

CONCLUSION

Appellate counsel was not constitutionally ineffective. Based on the foregoing discussions, the State respectfully requests this Honorable Court dismiss the Petition for Writ of Habeas Corpus with prejudice and, in the alternative, requests that the Petition for Writ of Habeas Corpus be denied.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy of the MOTION TO DISMISS AND RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS, and its Appendix, have been furnished to Gregory C. Smith & Andrew Thomas, Capital Collateral Regional Counsel, Northern Region, P.O. Drawer 5498, Tallahassee, FL 32314-5498, by MAIL on December 14th, 2000.

Respectfully submitted and served,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
By: STEPHEN R. WHITE
Attorney for State of Florida/Respondent

Assistant Attorney General
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext 4579
(850) 487-0997 (Fax)

Florida Bar No. 159089

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IN THE SUPREME COURT OF FLORIDA

ERNEST CHARLES DOWNS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. SC00-2186

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