IN THE SUPREME COURT OF FLORIDA

JOHN D. FREEMAN,

Appellant,

CASE NO. SC01-2007

v.

STATE OF FLORIDA,

Appellee.

______________________/

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JOHN D. FREEMAN, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a denial of a post-conviction motion following an evidentiary hearing in a capital case. The facts of the crime, as related in *Freeman v. State*, 563 So.2d 73 (Fla. 1990), are:

> Collier's neighbor, Harold Hopkins, testified that on November 11, 1986, he heard a shot, a loud crack, and then Collier calling for help. He looked across the street and saw a man repeatedly striking Collier on the head with an object as Collier was trying to crawl away. Hopkins called the police. When the police arrived, Collier told them that he had walked in his house and had been jumped by a man behind the front door. Collier said he and the man then fought on the front porch, and Collier believed he had been shot. The police searched the house and found it had been ransacked.
>
> A short time later, Freeman was apprehended hiding under a dock down the street from Collier's home. A man who had been standing on the dock testified that Freeman told him that he had had a fight with someone down the street and that the police were looking for him. After being arrested and advised of his rights, Freeman was driven back to Collier's home where Hopkins identified Freeman as Collier's assailant. Freeman then told the police that he had broken into the house and stolen a few items. He stated that Collier surprised him when he entered the house and that he thought Collier was going to shoot him. He said they struggled, a shot was fired, and they then struggled out the front door where Collier hit his head on the concrete.
>
> Later, at the police station, Freeman waived his rights and admitted to burglarizing the house. He stated that Collier surprised him and then pointed a gun at him to keep him from leaving. Freeman said that he grabbed the gun, struggled with Collier, and then the gun discharged. They fell out of the house into the yard where Freeman said he hit Collier twice with the gun and then fled. The medical examiner testified that Collier was struck around the head approximately twelve times but had not been shot. Collier died from profuse bleeding several hours after the assault.

Freeman, 563 So.2d at 75.

At the penalty phase, defense counsel presented four witnesses. Freeman's mother and brothers testified that he was abused by his stepfather, possessed artistic ability, and

particularly enjoyed playing with children. Freeman's best friend, Mr. Sorrells, prior testimony from the penalty phase in the Epps trial was read to the jury. A clinical psychologist testified that Freeman had a below average I.Q. and a fourth grade achievement level. *Freeman v. State*, 761 So.2d 1055, 1060 (Fla. 2000).

The trial judge imposed the death sentence after a nine-to-three jury recommendation of death. In his sentencing order, the judge found three aggravating circumstances, specifically: (1) Freeman had previously been convicted of the crimes of first-degree murder, armed robbery, and burglary to a dwelling with an assault, all of which had been committed just three weeks before the killing of Collier;[1] (2) the murder occurred while Freeman was committing a burglary to a dwelling; and (3) the murder was committed for pecuniary gain. The judge found the second and third aggravating factors merged into one. Although the judge did not find any statutory mitigating factors to be present, he did find in nonstatutory mitigation that Freeman was of low intelligence, had been abused by his stepfather, possessed some artistic ability, and enjoyed playing with children. *Freeman*, 563 So.2d at 75.

This Court affirmed the first-degree felony murder conviction, the burglary with an assault conviction and the death sentence. *Freeman v. State*, 563 So.2d 73 (Fla. 1990).

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[1] The facts of the prior murder conviction are recounted in *Freeman v. State*, 547 So.2d 125 (Fla.1989). The Epps murder occurred on October 20, 1986, less than a month before the instant murder which occurred on November 11, 1986.

Freeman filed a motion for post-conviction relief which the trial court summarily denied. While this Court affirmed the summary denial of many of the claims, this Court remanded for an evidentiary hearing on some of the claims. *Freeman v. State*, 761 So.2d 1055 (Fla. 2000). This Court remanded for a hearing on the following claims: 1) ineffectiveness in the penalty phase of the proceedings for failing to investigate and present mitigating evidence from neighbors and friends; 2) ineffectiveness for failing to present the live testimony of Sorrells; 3) ineffectiveness for failing to have the mental heath expert review Freeman's family history; 4) ineffectiveness for failing to present evidence of alcohol and drug abuse and 5) ineffectiveness for failing to argue the State's pursuit of the death penalty was based upon improper racial considerations. *Freeman*, 761 So.2d at 1065. Justice Wells dissented from the part of the opinion reversing for an evidentiary hearing.

SUMMARY OF ARGUMENT

ISSUE I

Freeman asserts a reverse *McCleskey* claim.[2] Freeman argues that the prosecutor's refusal to plea bargain in a case where the defendant is white and the victims were black is a violation of equal protection. The State respectfully disagrees. The prosecutor testified that this was a death case regardless of race. The defendant killed the two victims during burglaries of their homes. The two murders occurred within 22 days of one another. One of the victims was repeatedly stabbed and the other victim was beaten to death with a gun. This prosecutor, if he had no knowledge of the race of the victims, would have refused to negotiate a plea where the defendant killed two people within a month. Hence, regardless of any statement by the prosecutor during the plea offer, this case is properly a death case. The prosecutor's retort that if he agreed to a plea bargain, the defense bar would use this case as an example of the State not seeking death in a case where it should, is not a statement showing racial bias. The prosecutor is saying he is not going to engage in any racial discrimination both because it would violate his duty and because it would be used against the death penalty (and him). This statement is a statement of lack of intent to discriminate. Thus, the trial court properly found that the prosecutor did not improperly use race as factor.

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[2] *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

ISSUE II

Freeman asserts that his trial counsel was ineffective for failing to file a motion to preclude the death penalty based on his equal protection claim. Counsel's performance was not deficient because a reverse *McCleskey* claim is a novel claim that no court in any jurisdiction had addressed. Counsel is not ineffective for failing to litigate such a unique claim. Moreover, there is no prejudice. The proper motion is a motion to disqualify the prosecutor, not a motion to preclude the death penalty. If a motion to disqualify the prosecutor had been granted, another prosecutor would have also sought the death penalty. A motion to disqualify would not be "successful" in the sense of getting the new prosecutor to agree to accept counsel's plea offer. This would have remained a death case based on the aggravators if a new prosecutor was assigned to the case. Therefore, there is no deficient performance nor prejudice and hence, no ineffectiveness. Thus, the trial court properly denied relief.

ISSUE III

Freeman asserts his trial counsel was ineffective for failing to present additional evidence of his stepfather's abusive behavior towards him; his head injury as a child; sexual abuse of his sister by his stepfather; his drug and alcohol abuse and his depression following his arrest. The State respectfully disagrees. Trial counsel presented evidence regarding the defendant's abusive childhood at the penalty phase. The

additional testimony, mainly from neighbors, was merely cumulative of that presented at trial. Trial counsel reasonably choose not to present the evidence regarding the head injury because it was not supported by medical records or testimony. The information regarding the sexual abuse was not available to trial counsel at the time of the trial. Moreover, the sexual abuse of his sister has little or no mitigating value because there was no evidence that the defendant witnessed or even knew of the sexual abuse of his sister. Trial counsel did not want to present evidence of drug and alcohol abuse because it is often viewed negatively by jurors. Trial counsel did not consider Freeman's depression as compelling evidence of mitigation. Thus, counsel was not ineffective and the trial court properly denied relief.

ISSUE IV

Freeman asserts that he was denied his due process rights to a mental heath expert established in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Freeman is not actually raising an ineffective assistance of counsel claim; rather, he is raising an ineffective assistance of expert claim. Freeman claims that Dr. Legum, the mental health expert who testified at his trial, did not perform an adequate mental health evaluation because he failed to perform neurological testing that would have revealed an "organic motor disorder". There is no such claim as ineffectiveness of mental health expert. Moreover, to the extent that Freeman is raising an

actual ineffectiveness claim for failure to provide the mental health experts with requested records, this claim was conclusively rebutted by the testimony of trial counsel as the trial court properly found. Thus, the trial court properly denied relief.

ISSUE V

Freeman asserts that trial counsel was ineffective for failing to present the live testimony of his best friend, David Sorrells, as mitigating evidence due to counsel's failure to subpoena him. Counsel presented Sorrells' mitigating testimony albeit not as live testimony. The former testimony of Sorrell's given in the Epps trial was read to the jury in this trial. There can be no deficient performance or prejudice under these facts.

ARGUMENT

ISSUE I

DID THE PROSECUTOR'S REFUSAL TO PLEA BARGAIN IN A CASE WHERE THE DEFENDANT WAS WHITE AND THE VICTIMS WERE AFRICAN-AMERICAN VIOLATE EQUAL PROTECTION? (Restated)

Freeman asserts a reverse *McCleskey* claim.[3] Freeman argues that the prosecutor's refusal to plea bargain in a case where the defendant is white and the victims were black is a violation of equal protection. The State respectfully disagrees. The prosecutor testified that this was a death case regardless of race. The defendant killed the two victims during burglaries of their homes. The two murders occurred within 22 days of one another. One of the victims was repeatedly stabbed and the other victim was beaten to death with a gun. This prosecutor, if he had no knowledge of the race of the victims, would have refused to negotiate a plea where the defendant killed two people within a month. Hence, regardless of any statement by the prosecutor during the plea offer, this case is properly a death case. The prosecutor's retort that if he agreed to a plea bargain, the defense bar would use this case as an example of the State not seeking death in a case where it should, is not a statement showing racial bias. The prosecutor is saying he is not going to engage in any racial discrimination both because it would violate his duty and because it would be used against the death penalty (and him). This statement is a statement of lack

[3] *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

of intent to discriminate. Thus, the trial court properly found that the prosecutor did not improperly use race as factor.

<u>The trial court's ruling</u>

The prosecutor testified at the evidentiary hearing that he refused to negotiate in this case because he saw this case as a death case. (EH 37). The prosecutor testified that defense counsel McGuinness called him, as he typically did, and tried "to get me to come off the death penalty." (EH 16). Defense counsel made an "impassioned and eloquent plea" asking the prosecutor the abandon the death penalty. (EH 16). After listening, the prosecutor said no, but unable to resist the opportunity to be "sarcastic" and "witty", he pointed out to defense counsel that if he were to agree the defense bar "would turn around and use this decision as the basis for your argument that's made often, which is that the State improperly seeks the death penalty based upon race." (EH 18).[4] The prosecutor explained that the argument he was referring to was defense attorneys saying if the defendant is black and kills a white, then the State is statistically more likely to seek death than if the defendant is white and kills a black. (EH 18). The prosecutor noted that the defense bar would use the case as an example of a case where we should have sought death but didn't because the defendant was white and killed two African Americans. (EH 19). The prosecutor noted that he was personal

[4] The prosecutor, not surprisingly, could not recall his exact words. (EH 19).

affronted by the argument that the State only seeks death when the defendant is black. (EH 37-38). The prosecutor testified that race was a factor in the sense that you consider the way the community will perceive the way the prosecutors are doing their job. (EH 37). It was important that the public perceive that prosecutor did their job without any improper racial bias. (EH 38). The prosecutor was concerned that if he agreed to plea bargain it would be perceived as he was not being fair and neutral in regards of race. (EH 39).

The prosecutor testified that this "was obviously a death penalty case regardless of race" (EH 19). The fact that the defendant killed two individuals in their own homes during home burglaries and had a prior criminal record made it a death case when you looked at both case together. (EH 19). The prosecutor noted that the most aggravated factor of all in this case was the prior Epps murder. (EH 35,36). Under the totality of all the circumstances, the decision to seek death was a "no-brainer". (EH 21). The State's evidence of guilt was strong because the defendant was caught nearby the murder scene, shortly after the crime, with blood all over him. (EH 34). So, the defendant was basically caught red handed. (EH 34).

While the defendant's racial bias was considered, the case was a death case without the racial motive. (EH 20-24,30). The prosecutor choose not to present the racial motive of the crime because the case was very strong without it. (EH 36).

The prosecutor discussed the case with the Homicide Committee which consisted of five to seven prosecutors and the committee

agreed that death was appropriate. (EH 25). This decision was then discussed with Ed Austin, the elected State Attorney. (EH 25).

Ed Austin, the elected State Attorney at the time of the crime, testified. (EH 42-43). He was personal involved in the charging decisions of all first degree murder case involving the death penalty. (EH 43,46). Mr. Austin was quoted in a newspaper article, relating to the Dougan case where he was the prosecutor, as saying "what worst motive could you have but to hate a man purely for the color of his skin". (EH 44)[5] During his tenure, there were a lot of newspaper articles in which his office was criticized for prosecuting too many black but on the other hand, he was also criticized for not prosecuting enough to protect black victims. (EH 47). These criticisms had nothing to do with the decision to prosecute a case which was done on the basis of law and the facts of the case. (EH 47-48). Prosecutions were not based on public opinion. (EH 52). Prosecutions were not based on race but he was aware of the

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[5] At the evidentiary hearing, post-conviction counsel referred to several other Duval County cases where a white defendant killed black victims and the State sought the death penalty including *Asay*, *Dougan* and *Ellis* but the prosecutor in this case, Brad Stetson, was not familiar with these cases. (EH 29, 31, 32-33). The murder in the *Dougan* case occurred in 1974 which was over a decade prior to the instant murders. *Barclay v. State*, 343 So.2d 1266 (Fla. 1977). The murders in the *Ellis* case occurred in 1978; however, the defendant was not charged until 1989. *Ellis v. State*, 622 So.2d 991, 993 (Fla. 1993). The murders in the *Asay* case occurred in 1987. *Asay v. State*, 580 So.2d 610, 610 (Fla. 1991). The State Attorney was familiar with one death penalty case with a white defendant and an African-American victim because he tried it but was not familiar with the other cases. (EH 53-54).

consequences in both the African-American and white communities. (EH 48). The only prosecutions based on race were those involving racial hatred because it is an element of the crime. (EH 50). He personally prosecuted a death penalty case where the defendant was white but the victim was black. (EH 53). The Homicide Unit, which was staffed with seasoned prosecutors, would make a collective recommendation. (EH 51-52).

Patrick McGuiness, who was lead defense trial counsel in this case, testified that he made a plea offer to the prosecutor. (Eh 88,90). He testified that the prosecutor responded that normally he would consider it but he could not in this case because they had to get their numbers up on whites killing blacks. (EH 90). He referred to the *McCleskey* case.[6] McGuiness found the prosecutor's statement "ironic". (EH 91) However, he noted that the prosecutor had some arguably valid aggravators. (EH 104). He admitted that he himself had criticized the prosecutor's office for racial disparity in seeking the death penalty. (105).

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[6] *McCleskey* was pending in the United States Supreme Court at the time. It was decided April 22, 1987. The Eleventh Circuit had decided the case in 1985. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985)(en banc). The Epps murder occurred in October, 1986, and the instant murder occurred in November, 1986. Freeman was arrested that night near the scene. The trial of this case occurred in September of 1988. Neither the prosecutor nor defense counsel testified at the evidentiary hearing to the approximate date of plea conversation. Assuming that the plea conversation occurred within five months of arrest, *McCleskey* was pending at the time.

Ann Finnell, an Assistant Public Defender, who was co-counsel in the Epps case,[7] testified that at the time of trial there was a case before the Eleventh Circuit involving whether prosecutors were prosecuting more blacks for killing whites. (EH 55, 57). She testified that lead counsel told her that the prosecutor was unwilling to negotiate because this case involved the opposite and the prosecutor wanted to even out the playing field by prosecuting a white defendant for killing a black victim. (EH 57). She also testified as to a conversation in Judge Parson's chamber, who was the presiding judge in the Epps case, with the judge and the prosecutor. (EH 59). The judge stated that he thought that race was part of the defendant's motive for the murder and the prosecutor agreed. (EH 60). She testified that the prosecutor urged the judge to consider the defendant's racial motive as a reason to override the jury's life recommendation in the Epps case. (EH 64). She admitted that the aggravating circumstances were such that death was a possible penalty. (EH 75).

The trial court found that the prosecutor response to the plea offer was a "somewhat ill-considered retort" to the then existing allegations of racial discrimination regarding the death penalty failed to demonstrate a racially motivated purpose in pursuing the death penalty in this case. (R. I 156-157). Rather, the trial court found the decision was based on a review of the facts and the aggravating factors. The trial court noted

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[7] Janine Sasser was co-counsel in this case, the Collier murder. (EH 57)

that this case was the second case in which the defendant went into the home of an innocent homeowner and then brutally murdered the home owner while committing the burglary. The trial court explained that the individual prosecutor's decision was reviewed "Homicide Team" which would make a recommendation to the State Attorney, Ed Austin, who testified that his office never prosecuted a defendant because they were white or black. (157).[8]

Procedural bar

This issue is procedurally barred. The trial court found the issue to be procedurally barred, in the original order, prior to the remand. The prior order stated: "[f]raming his argument in effective assistance of counsel language will not avoid the procedural bar. (R. III 433)[9] This Court remanded this case for an evidentiary hearing on the ineffectiveness claim, not as an equal protection or due process claim. *Freeman*, 761 So.2d at 1068. Here, defense counsel, as he admitted at the evidentiary hearing, was aware of the prosecutor's statement refusing to plea bargain prior to the trial. Any due process, equal protection, or Eighth Amendment claim regarding the statement should have be litigated on direct appeal. While a straight equal protection claim could be properly litigated in collateral

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[8] The trial court referred to this claim as a due process claim rather than an equal protection claim. (R. 155). *McCleskey* involved an equal protection and an Eighth Amendment claim.

[9] This record cite is to the prior record on appeal. The original order was entered on July 29, 1996.

proceeding if the statement was not discovered until later, here, the statement was known prior to trial. The basis of the claim was known at the time of the direct appeal and should have been litigated then. *Asay v. State*, 769 So.2d 974, 979 (Fla. 2000)(finding claim of judicial bias to be procedurally barred because the judge's statements that formed the basis of the claim were known at the time of the direct appeal and distinguishing *Porter v. State*, 723 So.2d 191, 194 (Fla.1998), where the statements were unknown at the time of the direct appeal). Any pure equal protection claim is procedurally barred and Freeman is limited to litigating this issue as an ineffectiveness claim.

The standard of review

Whether the prosecutor is engaging in selective plea bargaining in violation of the equal protection clause is a pure question of law reviewed *de novo*. *United States v. Webster*, 162 F.3d 308,333 (5th Cir. 1998)(reviewing de novo a selective prosecution claim based on racial discrimination in the charging decision in a federal death penalty case). However, the trial court's credibility determinations are factual findings subject to the clearly erroneous standard of review.[10]

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[10] The trial court's order while not explicitly stating that it found Judge Stetson's testimony regarding what he said, *i.e.*, any such decision would be used against him, more credible than the testimony that the prosecutor actually said that he "needed to get his numbers up", implicitly found this. The trial court's statement "even assuming that Mr. Stetson responded to the plea offer as Mr. McGuiness indicted" is an alternate argument, not a finding that the prosecutor actually

Merits

This is a reverse *McCleskey* claim. Freeman is arguing that at one time, or more correctly in Georgia in the 1970's where the Baldus study was conducted, he would have been unlikely to have received the death penalty because he is a white defendant who murdered an African-American. Therefore, he claims that the prosecutor refusing to plea bargain in his case violates equal protection.

In *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), a African-American capital defendant, who had killed a white victim, sought habeas relief alleging that Georgia's capital sentencing scheme was being applied in a racially discriminatory manner. McCleskey involved a statistical study regarding the imposition of death sentences in murder cases in Georgia during the 1970's that concluded that decisions to seek and the imposition of the death penalty were racially skewed. The study found that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence as defendants charged with killing African-Amercian victims. *McCleskey* 481 U.S. at 287, 107 S.Ct. at 1764. The study also found that prosecutors seek the death penalty much more often in cases involving black defendants with white victims than in cases involving white defendants with black victims.[11] The

used the phase “needed to get his numbers up.”

[11] The study found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims, 32% of the cases involving white defendants and white victims, 15% of the cases involving black defendants and black victims, and 19% of the cases involving white defendants and

McCleskey Court held that a capital defendant must prove that the decision makers in his case acted with discriminatory purpose. *McCleskey*, 481 U.S. at 292, 107 S.Ct. at 1767. The *McCleskey* Court defined discriminatory purpose, explaining that it implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker selected or reaffirmed a particular course of action, at least in part because of, not merely in spite of, its adverse effects upon an identifiable group. The Court explained that McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect. *McCleskey*, 481 U.S. at 298, 107 S.Ct. at 1770. The Court rejected McCleskey's claim because he offered no evidence specific to his own case to support an inference that racial considerations played a part in his sentence. The Court found the Baldus study to be insufficient to support an inference that the decision makers in McCleskey's case acted with purposeful discrimination. See *Foster v. State*, 614 So.2d 455, 463 (Fla.1992)(holding that no evidentiary hearing was required to explore a claim of racial bias in the State Attorney’s Office where there was nothing to suggest that the state attorney's office acted with purposeful discrimination in seeking the death penalty in the particular case, relying on *McCleskey*).

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black victims. *McCleskey*, 481 U.S. at 287, 107 S.Ct. at 1764.

Here, the prosecutor gave a completely race neutral explanation for seeking the death penalty. The prosecutor testified that this was a death case regardless of race. Freeman had a prior murder conviction (the Epps murder) that involved the same type of facts. The defendant killed the two victims during burglaries of their homes. The two murders occurred within 22 days of one another. One of the victims was repeatedly stabbed and the other victim was beaten to death. Additionally, the State's evidence of guilt murder was strong because Freeman was caught nearby, shortly after the murder, with blood on him. Freeman was basically caught red handed (or clothed). He confessed to the burglary and to beating the victim. These are the precise considerations the Supreme Court identified as proper and legitimate grounds for such a decision. *McCleskey*, 481 U.S. at 297, 107 S.Ct. at 1769(noting that because a legitimate and unchallenged explanation for the decision is apparent from the record, namely, that McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty). Here, as in *McCleskey*, a legitimate and unchallenged explanation for the decision is apparent from the record: Freeman committed an act for which the United States Constitution and Florida laws permit imposition of the death penalty. The jury's death recommendation and the trial court's findings in aggravation attest to these objective considerations. *United States v. Webster*, 162 F.3d 308,335 (5th Cir. 1998)(rejecting a selective prosecution challenge to the federal Death Penalty Act because

a non-discriminatory explanation for seeking the death penalty was evident from the facts, the objective circumstances of the crime and the sufficiency and availability of evidence justify the decision and the verdict attests to the objective considerations). This prosecutor, if he had no knowledge of the race of the victims, would have refused to negotiate a plea where the defendant killed two people within a month. Hence, regardless of any statement by the prosecutor during the plea offer, this case is properly a death case.

Furthermore, this prosecutor did not act alone. His decision to seek the death penalty was reviewed by the Homicide team composed of other prosecutors with death penalty experience. The case was also personally reviewed by the elected State Attorney. Ed Austin testified that his decision was not based on race. He testified that the decision was based on the law and the facts of the case. (EH 47-48). Additionally, there were a "number of blacks on the jury". (XXXVI 1070). This racially balanced jury recommended death. The prosecutor, of course, did not impose the death penalty; rather, a racially balanced jury recommended death and the judge imposed it.

Regardless of what the prosecutor said, it is not sufficient to establish a selective plea bargaining claim. To establish such a claim the defendant must show both (1) that other similarly situated capital defendants have had prosecutors accept their plea offers of life and (2) that the refusal to

accept the plea was based on an impermissible racial motive.[12] Even if the prosecutor's statement is viewed as satisfying the second prong, Freeman did not establish the first. Freeman's selective plea bargaining claim fails because he did not introduce evidence that similarly situated defendants are treated differently. Freeman needed to establish that the prosecutor would accept a plea to life in cases with a defendant who killed two victims. The only evidence of other cases, where a white defendant killed two African-Americans in Duval County introduced at the evidentiary hearing, were *Asay v. State*, 580 So.2d 610 (Fla. 1991) and *Ellis v. State*, 622 So.2d 991 (Fla.1993). In both cases, the death penalty was imposed. So, the Duval prosecutors in both those cases also refused to agree to a plea to life. Freeman did not establish that he was treated differently.[13]

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[12] *Cf United States v. Armstrong*, 517 U.S. 456, 469, 116 S.Ct. 1480, 1487, 134 L.Ed.2d 687 (1996)(requiring the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, to establish a selective prosecution claim which requires a showing of both discriminatory effect and discriminatory intent); *Jones v. White*, 992 F.2d 1548, 1571-1572 (11th Cir. 1993)(explaining that to show selective prosecution, a petitioner must demonstrate two requirements: (1) he has been singled out for prosecution although others similarly situated who have committed the same acts have not been prosecuted and (2) the government's selective prosecution of him was motivated by constitutionally impermissible motives such as race, religion or his exercise of constitutional rights); *State v. A.R.S.*, 684 So.2d 1383, 1385 (Fla. 1st DCA 1996).

[13] Actually, it is not clear who is "similarly situated" - other white defendants who killed two African-American victims or, for purpose of a reverse discrimination case, an African-American who killed African-American victims or the completely opposite combination of an African-American defendant who killed

Similarly situated defendants are treated the same. Any defendant of whatever race who killed two victims of any race is likely to receive the death penalty. Baldus' 230-variable model divided cases into eight different aggravation levels. *McCleskey*, 481 U.S. at 285, n.5, 107 S.Ct. at 1763. n.5. According to the Baldus study, the effects of race were present in the mid-range cases; by contrast, in highly aggravated cases, the effects of race went away. Highly aggravated cases included those that involved torture or multiple victims. Basically, defendants, regardless of their race, received the death penalty for killing multiple victims, regardless of the victim's race. Defendants got the death penalty when they killed more than one person, just like Freeman did.

The prosecutor's retort that if he agreed to a plea bargain, the defense bar would use this case as an example of the State not seeking death in a case where they should, is not a statement showing racial bias. The prosecutor is saying he is not going to engage in any racial discrimination both because it would violate his duty and because it would be used against the death penalty (and him). The prosecutor is explaining the adverse consequences of any plea agreement and saying that this

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two whites. Freeman completely fails to identify any group. Another possible group is one formed regardless of race. It is probably the killing of two victims that is the similarly situated group. Similarly situated should probably not include race because it is the baseline. Moreover, the strength of the governments case is also part of similarly situated. *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000). Thus, the "similarly situated" group are defendants who kill two victims and confess to one of the murders.

is why he will not do so. This statement is a statement of lack of intent to discriminate. Thus, Freeman has not shown purposeful discrimination in his case.

In *State v. Courchesne*, 2001 WL 1569981, *2 (Conn. Super. 2001)(unpublished opinion)[14], the Connecticut Superior Court denied a reverse *McCleskey* claim. The defendant, Courchesne, is white, and the two victims were black. Courchesne filed a motion to prohibit a death penalty hearing. Courchesne argued that the prosecutor's decision to seek the death penalty was improper based on the race of the victims. He asserted that the prosecutor indicted that there would be no plea bargaining because the victims were black. The Court rejected this claim reasoning that recognition by a prosecutor that the victims of a capital felony are from a minority group and the individual charged with capital felony for the murder of those victims is white and that those facts would rebut previous claims of racial unfairness in the imposition of the death penalty is not

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[14] Unpublished opinions are persuasive authority. *United States v. Futrell*, 209 F.3d 1286, 1289 (11th Cir. 2000)(explaining although an unpublished opinion is not binding, it is persuasive authority citing 11th Cir. R. 36-2). There is a controversy about the constitutionality of rules prohibiting parties from citing unpublished opinions. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000)(holding that Eighth Circuit rule, 28A(I), which prohibits the citation of unpublished opinions is unconstitutional under Article III), *vacated as moot in Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir.2000; *But see Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir.2001); *Symbol Technologies, Inc. v. Lemelson Medical*, 277 F.3d 1361, 1368 (Fed. Cir. 2002)(upholding the Circuit rule, Fed. Cir. R. 47.6(b), prohibiting unpublished opinion being cited as authority). This Court has no rule prohibiting the citing of unpublished opinions.

purposeful racial discrimination. The Court noted that the claim of racial discrimination in *McCleskey* involved the assertion that African-Americans who were convicted of murdering white victims were more likely to suffer the death penalty. Clearly, these claims of purposeful racial discrimination can be distinguished from the case at hand. The evidence does not exist in the present case to show any discriminatory intent. Neither are the actions of the State's Attorney irrational, arbitrary or capricious. Rather, it appears that the State's Attorney in Waterbury vigorously pursues capital felony convictions and thereafter seeks the death penalty on a consistent and regular basis and does so because the current statutes of Connecticut allow such prosecutions. The Court concluded that the defendant's claims, even if uncontradicted, are not sufficient for the Court to bar the death penalty. The Court accepted the credibility of both parties but also noted the prosecutor's testimony that his decision to proceed with the death penalty was not based on the race of the victims. The status of the evidence is not sufficient to show any abuse of prosecutorial discretion. No unconstitutional discrimination has been proven. Accordingly, the Court denied the motion.

Here, likewise, the trial court noted that the allegations in McCleskey were "of an opposite nature to the instant facts" (R. 156). Here, as in *Courchesne*, recognition by a prosecutor that the victims of a capital felony are from a minority group and the individual charged with capital felony for the murder of those victims is white and that those facts would rebut previous

claims of racial unfairness in the imposition of the death penalty is not purposeful racial discrimination.

Trial counsel testified that the prosecutor said that normally he would consider a plea offer of life but he couldn't in the case because they had to get their numbers up on whites killing blacks. (EH 90). "Would consider it" is not sufficient to establish a selective plea bargaining claim. Freeman must show that the prosecutor normally would accept his plea offer. For Freeman to show an injury, he must show that the plea offer would likely be accepted, not just considered and then rejected. If the prosecutor considered and then rejected the plea offer, the defendant would still have received a death sentence and he is in no different position.

Assuming, merely for the sake of argument, that the prosecutor actually said he needed to get his numbers up, while this is a statement showing racial motivation, consideration of race in a remedial fashion does not violate equal protection principles. While it was impermissible for race to be the sole motivation, the Government could consider race as a factor under then existing equal protection law. For example, consideration of race was permitted in admissions to graduate school;[15] in public employment;[16] and the granting of broadcast licences.[17] The

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[15] *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)(holding race may be one of a number of factors considered by medical school in admissions).

[16] *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987)(holding that a 50 percent promotion requirement for state troopers did not violate the equal

prosecutor, here, like the government actors in those cases, was allowed to consider race in a remedial fashion.[18]

Additionally, the prosecutor, here, if he made the statement about getting the numbers up, did exactly what Justice O'Connor suggested that prosecutors do to solve any discrimination issue at the *McCleskey* oral argument.[19] She suggested that the way to solve the problem was for prosecutors to seek the death penalty more often when the victims are African-American. Indeed, capital defendants have asserted that the Government's lack of

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protection clause because it was justified by compelling governmental interest in eradicating discrimination

[17] *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990)(holding FCC policies do not violate equal protection because their minority preference policies are substantially related to the achievement of the important governmental objective of broadcast diversity).

[18] In *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), the United States Supreme Court overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) and held that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed under strict scrutiny. However, some uses of race as a factor by the government have meet the compelling interest test required by the strict scrutiny standard. *Hunter ex rel. Brandt v. Regents of University of California*, 190 F.3d 1061 (9th Cir. 1999)(holding use of race and ethnicity as factor in admissions policy of research-oriented elementary school dedicated to improving quality of education in urban public schools did not violate the Equal Protection Clause because such a program was a compelling state interest). A prosecutor's use of race could conceivably meet the current strict scrutiny standard as well. However, at the time of the plea conversation in 1987, the standard was not required. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

[19] The oral argument in *McCleskey* is available at http://oyez.org/cases/cases.cgi?command=show&case_id=233

an affirmative action program in the death penalty context is evidence of purposeful discrimination. *United States v. Webster*, 162 F.3d 308, 334 (5th Cir. 1998)(contending that the failure of the Government to 'affirmatively act' to overcome racially discriminatory application of the federal death penalty amounted to purposeful discrimination).

There is a fundamental difference between capital sentencing and other areas - the death penalty is not a zero sum endeavor. A prosecutor's decision to seek death if the victims are African-American does not disadvantage or burden any other racial group. A capital defendant raising a reverse discrimination claim is akin to a plaintiff bringing a reverse discrimination suit against an open enrollment college that has an affirmative action program. Because an open enrollment college accept all applicants, no one is injured if such a college uses race as a factor in their admissions.[20]

Thus, even if the prosecutor stated that he needed to get his numbers up, this consideration of race was remedial, and therefore, permissible. This remedial use of race is not a violation of the Equal Protection Clause.

Freeman improperly relies on the evidence of his racial bias to show the prosecutor's racial motive. As the State Attorney, Ed Austin, testified, a prosecutor considers race when it is an

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[20] Because there are no innocent persons harmed, legislative or judicial findings probably are not necessary. *Regents of the University of California v. Bakke*, 438 U.S. 265, 307-308, 98 S.Ct. 2733, 2757, 57 L.Ed.2d 750 (1978)(requiring judicial, legislative, or administrative findings prior to approving racial classifications because one group is help at the expense of another group).

element of the crime. When a prosecutor presents evidence that part of the defendant's motive for a murder was the defendant's racial animus, this is not evidence that the prosecutor himself is racially biased. Consider, for example, a prosecutor deciding whether to prosecute a hate crime. Obviously, and by definition, the decision to prosecute a hate crime depends on racial considerations. Both this Court and the United States Supreme Court have upheld the constitutionality of hate crimes. *State v. Stalder*, 630 So.2d 1072 (Fla. 1994)(holding Florida's hate crime statute, § 775.085(1), is constitutional); *Wisconsin v. Mitchell*, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993)(recognizing that a statute aimed at constitutionally unprotected conduct may single out a particular motive, such as racial animus, for enhanced punishment). This Court has held that a prosecutor may refer to the defendant's racial motive in a capital case. *Asay v. State*,580 So.2d 610, n.1(Fla. 1991)(finding no merit to the claim that racial prejudice was injected in the trial in a case where a white defendant shot two African-American based on racial hatred). Under Freeman's logic, any prosecutor who prosecutes a hate crime or a capital case where the defendant's motive is racial is subject to an equal protection claim because he made a charging decision based on race. When a prosecutor properly considers the defendant's racial motive for the crime in her charging decision, that cannot be used as evidence of an equal protection violation. A prosecutor may properly consider a case with a racial motive more aggravated without being accused of being prejudiced

himself. Indeed, this type of evidence establishes nothing about the prosecutor's personal beliefs. Cf. *Billings v. Madison Metropolitan School Dist.*,259 F.3d 807, 815(7th Cir. 2001)(explaining that when a person violates the obligation to act non-racially, a court may be required to take race into account yet again to undo the action); *Brown v. City of Oneonta*, 221 F.3d 329, 338-339 (2nd Cir. 1999)(holding that police officer's investigation of suspect because of their race did not violate equal protection because description of the suspect originated, not with the state, but with the victim and the officer's actions did not involve any discriminatory intent). Moreover, here, the prosecutor did not present such evidence he merely considered presenting it but specifically testified that without the defendant's racial motivation, the case was still a death case. The defendant's racial motivation may be presented, by a prosecutor, in a racially motivated crime, without violating equal protection.

The *McCleskey* Court defined discriminatory purpose, explaining that it implies more than intent as volition or intent as awareness of consequences. *McCleskey*, 481 U.S. at 298, 107 S.Ct. at 1770. Awareness of the consequences is not purposeful discrimination. Thus, the prosecutor's testimony at the evidentiary hearing that he considered race in the sense that you consider the community's perceptions is not evidence of purposeful discrimination. (EH 37,48). The trial court properly found that the prosecutor's "somewhat ill-considered retort" was

not evidence of purposeful discrimination and that the State did not improperly use race as a factor.

Eighth Amendment

Freeman's Eighth Amendment claim is a non-starter. Eighth Amendment analysis looks only to objective criteria. *McCleskey*, 481 U.S. at 309, 107 S.Ct. at 1775(rejecting a race based disproportionate claim because his sentence was based on the particularized nature of the crime and the particularized characteristics of the individual defendant, the death sentence was not wantonly and freakishly imposed, so his sentence was not disproportionate within any recognized meaning under the Eighth Amendment). It is not arbitrary and capricious to impose the death penalty in a case where the victim was beaten to death which also involves a prior capital felony as an aggravator in which the earlier victim was stabbed to death. What matters for Eighth Amendment purposes, is the facts of the crime, not any statement by the prosecutor. The objective facts of the crime and the serious aggravation mean that imposing death is neither arbitrary nor capricious. Thus, the death penalty does not violate the Eighth Amendment.

ISSUE II

WHETHER DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO PRECLUDE THE DEATH PENALTY BASED ON THE REVERSE *McCLESKEY* CLAIM? (Restated)

Freeman asserts that his trial counsel was ineffective for failing to file a motion to preclude the death penalty based on his equal protection claim. Counsel's performance was not deficient because a reverse *McCleskey* claim is a novel claim that no court in any jurisdiction had addressed. Counsel is not ineffective for failing to litigate such a unique claim. Moreover, there is no prejudice. The proper motion is a motion to disqualify the prosecutor, not a motion to preclude the death penalty. If a motion to disqualify the prosecutor had been granted, another prosecutor would have also sought the death penalty. A motion to disqualify would not be "successful" in the sense of getting the new prosecutor to agree to accept counsel's plea offer. This would have remained a death case based on the aggravators if a new prosecutor was assigned to the case. Therefore, there is no deficient performance nor prejudice and hence, no ineffectiveness. Thus, the trial court properly denied relief.

The trial court's ruling

Patrick McGuiness, who was lead defense trial counsel in this case, testified that he had never encountered this situation before and did not know the proper vehicle to address it. (EH 91, 109). He noted that prosecutors have a great deal of discretion and that there were proper aggravating factors. (EH

91). He did not file any motion raising the issue in this case. (EH 92). Trial counsel did not think that a motion to disqualify the prosecutor's office would be successful. (EH 104). He raised the race issue at the defendant's Clemency hearing. (104). The trial court did not address the issue as an ineffectiveness claim; rather, the trial court analyzed the claim as a due process allegation. (R. I 155).

Standard of Review

The standard of review of an ineffectiveness claim is *de novo. Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. Haley*, 209 F.3d 1243, 1247 (11th Cir. 2000).

Merits

Post-conviction counsel asserts that trial counsel was ineffective for failing to raise this issue in a judicial forum. The defense vehicle of choice to raise a *McCleskey* claim is a motion to preclude the death penalty. *Foster v. State*, 614 So.2d 455, 463 (Fla. 1992)(addressing a motion to preclude the state attorney's office from seeking the death penalty based on an assertion of prosecutorial racial bias). Post-conviction counsel suggested at the evidentiary hearing that a motion to strike the death penalty was the proper vehicle. (109) However, the State would have objected to any such motion as an improper remedy and urged that a motion to disqualify the particular prosecutor or the entire office is the correct motion. Because selective or vindictive prosecutions cases are so rarely

successful, there is little available caselaw on the appropriate remedy but in the analogous area of judicial bias, a motion to disqualify the judge is the proper vehicle, not a motion to dismiss the charges. Moreover, the remedy of disqualification of the prosecutor "fits" the alleged wrong more than a motion to dismiss the charges or preclude the death penalty does. If the problem is the prosecutor, the solution is to get a new prosecutor, not let the defendant "walk" or get an automatic life sentence regardless of how deserved the death penalty is. A motion to disqualify the prosecutor is the correct motion and remedy.

There is no deficient performance. A reverse *McCleskey* claim is an innovative, unique claim, as the dearth of caselaw regarding the issue proves. Counsel is not required to be this innovative to be competent. *Steinhorst v. Wainwright*, 477 So.2d 537 (Fla.1985)(noting that the failure to present a novel legal argument not established as meritorious in the jurisdiction of the court to whom one is arguing is simply not ineffectiveness of legal counsel); *Pitts v. Cook*, 923 F.2d 1568, 1574 (11th Cir. 1991)(noting that lawyers rarely, if ever, are required to be innovative to be effective). Counsel is not required to go where no counsel has gone before. This Court requires defense counsel raise claim that are established as meritorious in Florida. This claim has not been established as meritorious in any jurisdiction. Indeed, the one jurisdiction that has addressed the issue found it not to be meritorious and that opinion was not available at the time of this trial. *State v.*

Courchesne, 2001 WL 1569981, *2 (Conn. Super. 2001). Counsel had no guidance from any court from any jurisdiction regarding this issue. This would be requiring counsel to go were no appellate court has gone either.

Furthermore, this area is outside defense counsel's area of expertise. Criminal lawyers are not familiar with affirmative action principles. They know *Miranda*,[21] not *Metro Broadcasting.*[22] If selective prosecution claims are rare birds, then a reverse selective prosecution claim is a unicorn. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999)(observing that even in the criminal-law field, a selective prosecution claim is "arara avis"). It is not surprising that trial counsel did not know how to litigate this claim.

Moreover, counsel is not ineffective because a motion to disqualify the prosecutor would not have been successful. If the motion to disqualify the prosecutor had been granted, any other prosecutor assigned to the case would have sought the death penalty also. A motion to disqualify would not be "successful" in the sense of getting the new prosecutor to agree to accept counsel's plea offer. This would have remained a death case based on the aggravators even if a new prosecutor was assigned to the case. Everyone involved in the case - the prosecutor, the Homicide Team, the elected State Attorney, lead

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[21] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[22] *Metro Broadcasting*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990)

defense counsel, co-counsel in the related Epps case and the Baldus study itself, acknowledged that this was a death case. Any newly assigned prosecutor merely would have joined this parade. Changing one prosecutor for another would have accomplished nothing for his client. Counsel is not ineffective for failing to file motion that, in the end, would be of no actual benefit. There is no prejudice and therefore, no ineffectiveness.

ISSUE III

WAS TRIAL COUNSEL INEFFECTIVE AT PENALTY PHASE FOR FAILING TO PRESENT ADDITIONAL MITIGATING EVIDENCE? (Restated)

Freeman asserts his trial counsel was ineffective for failing to present additional evidence of his stepfather's abusive behavior towards him; his head injury as a child; sexual abuse of his sister by his stepfather; his drug/alcohol abuse and his depression following his arrest. The State respectfully disagrees. Trial counsel presented evidence regarding the defendant's abusive childhood at the penalty phase. The additional testimony of abuse, mainly from neighbors, was merely cumulative of that presented at trial. Trial counsel reasonably choose not to present the evidence regarding the head injury because it was not supported by medical records or testimony. The information regarding the sexual abuse was not available to trial counsel at the time of the trial. Moreover, the sexual abuse of his sister has little or no mitigating value because there was no evidence that the defendant witnessed or even knew of the sexual abuse of his sister. Trial counsel did not want to present evidence of drug and alcohol abuse because it is often viewed negatively by jurors. Trial counsel did not consider Freeman's depression as compelling evidence of mitigation. Thus, counsel was not ineffective and the trial court properly denied relief.

The trial court's ruling

Ann Finnell, an Assistant Public Defender, who was co-counsel in the Epps case, testified that the office had a policy of "leaving no stone unturned" in regards to discovering mitigating evidence. (EH 71). They obtain the services of a confidential mental health expert. (EH 72). They talk with as many family members as they can find and who are willing to talk with them. (EH 72, 73). They obtain school records and medical records. (EH 72). They start from before birth and bring him right through life to find out as much positive information as possible.

The trial court found that the evidence of the stepfather's abuse of the defendant was "largely cumulative" to the testimony presented at trial (R. I 163). The trial court also found that the evidence regarding the sexual abuse was not available to trial counsel. The trial court found that trial counsel's decision not to present evidence of alcohol and illegal drugs use was a tactical decision, based on counsel's belief that jurors do not view such information favorably. (R. I 160).

<u>The standard of review</u>

The standard of review of an ineffectiveness claim is *de novo. Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. Haley*, 209 F.3d 1243, 1247 (11th Cir. 2000).

<u>Merits</u>

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's

performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. As to the first prong, the defendant must establish that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must 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. For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Spencer v. State*, 27 Fla.L.Weekly S323, 2002 WL 534441, *3 (Fla. April 11, 2002), citing *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Eleventh Circuit, in an en banc decision, discussed the performance prong of *Strickland*. *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000)(en banc). The *Chandler* Court noted that the cases in which habeas petitioners can properly prevail are few and far between. The standard for counsel's performance

is reasonableness under prevailing professional norms. The purpose of ineffectiveness review is not to grade counsel's performance; rather, the purpose is determine whether the adversarial process at trial, in fact, worked adequately. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. Counsel does not enjoy the benefit of unlimited time and resources. Every counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial. Thus, no absolute duty exists to investigate particular facts or a certain line of defense. And counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. For example, counsel's reliance on particular lines of defense to the exclusion of others--whether or not he investigated those other defenses-- is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable. Because the reasonableness of counsel's acts (including what investigations are reasonable) depends critically upon information supplied by the petitioner or the

petitioner's own statements or actions, evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims. Counsel is not required to present every non-frivolous defense; nor is counsel required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy.

Considering the realities of the courtroom, more is not always better. Stacking defenses can hurt a case. Good advocacy requires winnowing out some arguments, witnesses, evidence, and so on, to stress others. No absolute duty exists to introduce mitigating or character evidence. The reasonableness of a counsel's performance is an objective inquiry. Because the standard is an objective one, that trial counsel admits that his performance was deficient matters little. When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger. Even the very best lawyer could have a bad day. No one's conduct is above the reasonableness inquiry. Just as we know that an inexperienced lawyer can be competent, so we recognize that an experienced lawyer may, on occasion, act incompetently. However, experience is due some respect. No absolute rules dictate what is reasonable performance for lawyers. The law must allow for bold and for innovative approaches by trial lawyers. And, the Sixth Amendment is not meant to improve the quality of legal representation, but simply to ensure that criminal defendants receive a fair trial. These principles

guide the courts on the question of reasonableness, the touchstone of a lawyer's performance under the Constitution. *Chandler*, 218 F.3d at 1312-
1319.

In *Bell v. Cone*, 122 S.Ct. 1843 (May 28, 2002), the United States Supreme Court, in a capital case, held that *Strickland,* not *Cronic,* governed a claim that counsel was ineffective for failing to present any mitigating evidence and waiving closing argument at the penalty phase. Cone murdered an elderly couple during a 2-day crime spree during which he also committed robbery, shot a citizen and shot a police officer. Defense counsel conceded that the defendant committed the crimes. His defense that he was not guilty by reason of insanity due to substance abuse and post-traumatic stress disorders related to his Vietnam military service. The defense was supported by expert testimony about his drug use and by his mother's testimony that he returned from Vietnam a changed person. The jury found him guilty on all charges. At the penalty phase, counsel gave a short opening argument referring to the mitigating evidence introduced during the guilt phase. Counsel presented no witnesses at the penalty phase. The State gave a low-key closing argument. Defense counsel waived closing argument forcing the State to waive its rebuttal argument. The jury voted for death. The Sixth Circuit found that defense counsel had entirely failed to subject the prosecution's case to meaningful adversarial testing and therefore, *Cronic*, applied. The United States Supreme Court disagrees holding that

Strickland applied. The Court found counsel was not ineffective for failing call any witnesses or for waiving closing argument in the penalty phase.

The Supreme Court repeatedly has held that counsel who fails to present any mitigating evidence whatsoever - even when such evidence was available - is not *per se* ineffective. *Burger v. Kemp*, 483 U.S. 776, 788-759, 107 S.Ct. 3114, 3123-3126, 97 L.Ed.2d 638 (1987)(counsel was not ineffective in failing to present any mitigating evidence even when the defendant had an "exceptionally unhappy and unstable childhood"); *Darden v. Wainwright*, 477 U.S. 168, 182-84, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)(finding no ineffectiveness where counsel relied on a simple plea for mercy from the defendant himself rather than presenting other mitigating evidence). Counsel does not have to interview everyone that might have some mitigating evidence, does not have to call every mitigating witness available and does not have to present every type of mitigating evidence available. Rather, counsel may properly limit his investigation of mitigating evidence, may properly limit the number of witnesses he presents and may properly decline to present a particular type of mitigating evidence.

Ineffectiveness for presenting the same mitigating evidence

Trial counsel testified that he did not develop any additional mitigating evidence for the Collier penalty phase than that developed for the Epps penalty phase. (EH 102). He met with the main family mitigating witnesses, the defendant's mother and

brother, but they did not give him any new or additional information. (EH 102). Trial counsel testified that he decided to present the exact same mitigating in this case as that presented in the Epps case where the jury recommended life. (EH 347). It was the best mitigation available. (EH 347). However, as defense counsel recognized, there was a "500 pound gorilla" in this case that was not present in the Epps case - the prior first degree murder conviction. (EH 347).[23] The prosecutor referred to prior murder convictions as "the Cadillac" of aggravating circumstances and, as trial counsel noted, "unfortunately he's right" (EH 348). As trial counsel testified, "I can't think of an aggravating factor that is more likely to turn a jury against a man" (EH 348).

Post-conviction counsel faults trial counsel for "settling" for the "convenient path" of presenting the same mitigating evidence in this trial as he successfully presented in the Epps trial. Post-conviction counsel finds trial counsel decision's not to further investigate mitigating evidence "inexplicable." IB at 82-83. Further investigation is not required in a second trial when a full investigation was conducted before the first trial. Post-conviction counsel argues that something had to be discovered because the aggravation in this case was greater than in the Epps murder. Because the aggravation is greater does not mean that there is any significant, additional mitigating

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[23] The Epps and Collier murder which occurred within a month of each other, were, in Justice Wells words, "very similar criminal episodes." *Freeman v. State*, 761 So.2d 1055, 1073 (Fla. 2000)(Wells, J., dissenting).

evidence to be discovered. There is no connection between the two. This is a wish list, not an ineffective assistance of counsel claim. Counsel is not ineffective for not being able to pull a rabbit out of his hat or manufacture mitigating evidence. *Burris v. Farley*, 51 F.3d 655, 662 (7th Cir.1995)(noting that "lawyers are not miracle workers" and that "most convictions follow ineluctably from the defendants' illegal deeds").

Moreover, as Justice Wells observed, in his dissenting opinion in the remand of this case, "logic dictates that the difference in the jury recommendation for life in the first case and death in the second case was the heavy aggravation of this being appellant's second murder conviction in a substantially similar situation and was not the result of counsel's ineffectiveness in respect to the presentation of mitigation." *Freeman*, 761 So.2d at 1073. Counsel wisely concluded that he should not vary a winning strategy. Counsel had obtained a life recommendation in the earlier Epps trial with this mitigating evidence. A life recommendation is strong evidence of counsel's effectiveness. *Tarver v. Hopper*, 169 F.3d 710,715 (11th Cir. 1999)(noting that counsel's effectiveness at the sentencing stage is strongly evidenced by the jury's decision to recommend life, not death). Counsel was not ineffective for presenting the same mitigating evidence in this trial as he successfully presented in the earlier trial.

Stepfather's abusive behavior

Freeman called a number of witnesses at the evidentiary hearing including his sister, Deana Harrell; another sister, Elizabeth Rucker; his aunt, Sonja Ridgon, a neighbor, Mary Holliman, whose handicapped son was friends with the defendant; the handicapped son, James Holliman, her daughter, Bobbie Hart, his sister-in-law, Jesse Jewell; the daughter of Ms. Jewell, Sherry Raymond; another daughter of Ms. Jewell, Kelley Pelley; a neighbor, Dwayne Watson; a second neighbor, Zach Marchalleck; and a third neighbor, Mitchell Tanner, to support mitigating evidence of his abusive childhood and his drug use.[24]

Two of the witnesses who testified at the evidentiary hearing, the defendant's brother, Robert Jewell, and the defendant's best friend, David Sorrells, were called to testify at the penalty phase. Obviously, counsel cannot be ineffective for failing to present witnesses, that, in fact, he did present. Moreover, two of the witnesses presented at the evidentiary hearing while not called to testify at the penalty phase, had been interviewed by trial counsel. A former girlfriend, Faith Hickman, and Joann Sorrells, who was a neighbor of the Freeman family and the mother of David Sorrells, both were interviewed. (EH 222-223)[25] Trial counsel testified that he interviewed Joann Sorrells and

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[24] This is a list of the "new" witness, *i.e.*, witnesses that were neither interviewed by trial counsel nor presented at the penalty phase.

[25] James Holliman was probably interviewed as well. He could recall speaking with two ladies. (EH 229)

had the notes to document this interview.[26] However, trial counsel felt that her son, David Sorrells, was the better witness and that her testimony was cumulative to the sons. (EH 326). The choice of which witnesses is present is the epitome of a tactical decision. *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995)(en banc)(noting which witnesses to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess).

As the Eleventh Circuit as observed in *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995)(en banc), it is a common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions. But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance. That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. One may always identify shortcomings, but perfection is not the standard of effective assistance. The mere fact that other witnesses might have been available or that other

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[26] Joann Sorrells testified that the evidentiary hearing that she was not interviewed by any one from the PD's office. (IV 258). Counsel's notes documenting the interview clearly rebut this testimony. This further supports trial counsel's decision that her son was the better witness.

testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel. *Waters*, 46 F.3d at 1513-14. See also *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986)(explaining that the fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient and observing that it is almost always possible to imagine a more thorough job being done than was actually done).

This litany of additional witnesses is suspect. Part of the rationale for the constitutional right to a public trial is to encourage witnesses who have information relating to the case to come forward. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31 (1984); *Gannett Co. v. DePasquale*, 443 U.S. 368, 383, 99 S.Ct. 2898, 2907, 61 L.Ed.2d 608 (1979). None of these witnesses explained why they did not voluntarily contact the trial counsel themselves if they thought they had valuable information, they merely averred that no one contacted them. Surely, the average citizen would be aware that significant childhood abuse would be valuable information or least think it might be of some value and pick up the phone. None of these witness offered any explanation why they did not come forward at the time of the trial.[27]

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[27] The aunt, Sonja Rigdon, explained that she it not find out about the trial because she was living in Baltimore. (EH 284,285). However, the remaining witness all seemed to have lived in the area, and in the same neighborhood. One of witness testified that he knew of the murders from the T.V. news. (EH 262).

There is no deficient performance. Counsel made the reasonable decision to interview Freeman's best friend in the neighborhood and the mother of the best friend rather than all his friends and neighbors. It is perfectly reasonable for an attorney to limit his investigation of the defendant's background to close family and friends. Those closest to the defendant are the ones most likely to know of the nature and extent of the abuse. More distant family and friends would either not be aware of the abuse or would not be as familiar with the details of the abuse. *Cf. Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir.1999)(holding that counsel's investigation was reasonable when he did not interview the defendant's father because the defendant had not grown up with the father). Attorney do not have endless time, energy, or financial resources. *Williams v. Head*, 185 F.3d 1223,1237 (11th Cir.1999). Post-conviction counsel is faulting trial counsel for not interviewing and presenting every witness available. Counsel is not ineffective for not presenting every possible witness to testify to basically the same evidence.

Furthermore, there is no prejudice. The evidence of childhood abuse presented at the evidentiary hearing was cumulative of the evidence actually presented at the penalty phase. A petitioner cannot establish ineffective assistance by identifying additional evidence that could have been presented when that evidence is merely cumulative of the evidence that was actually presented. *Gudinas v. State*, 27 Fla. L. Weekly S279(Fla. 2002)(rejecting a claim of ineffectiveness for failing to

present an aunt who knew of specific events where counsel investigate the defendant's background and presented extensive evidence of his troubled childhood and where testimony was essentially cumulative of family background actually presented). Indeed, unlike *Gudinas*, some of this testimony is exactly the same as that presented at the penalty phase. The brother and best friend merely repeated the testimony that they gave during penalty phase at the evidentiary hearing. (EH 247). The brother, Robert Jewell, testified at penalty phase regarding being tied to the bunk bed and beaten; that his stepfather pulled a knife and a shotgun on him and pulled a steak knife on the defendant; and an incident on vacation when his stepfather punched the defendant with his fists. (XXXIX 1636). The stepfather never encouraged the defendant with praise. (1637). He also testified that the defendant had artistic ability; was good with children and helped him with house repairs. (1639,1641). The brother repeated the bunk bed incident, the steak knife incident and the being hit with fists at the evidentiary hearing. (EH 241-242).

Moreover, the trial court found his stepfather's abuse as a mitigator. *Freeman*, 563 So.2d at 75. Where counsel presents sufficient evidence to establish a mitigator to the trial court's satisfaction, counsel cannot be ineffective for failing to present additional evidence of that particular mitigator. *Gaskin v. State*, 2002 WL 1290883, *4 (Fla. June 12, 2002)(rejecting an ineffectiveness claim for failing to investigate and present mental mitigation because the trial

court found two mental mitigators); *Gudinas v. State*, 27 Fla. L. Weekly S279(Fla. 2002)(rejecting a claim of ineffectiveness for failing to present an aunt who know of specific events because the trial court found one substantial statutory mental mitigator as well as some twelve nonstatutory mitigators based on the mitigating evidence that counsel did present). Thus, counsel was not ineffective for presenting more evidence of the defendant's abuse at the hands of his stepfather.

Head injury

Trial counsel testified that the defendant's family informed him of a car accident where the defendant was hurt. (EH 97, 339). He attempted to obtain the medical records of the incident but could not. (EH 97-98). Trial counsel testified that the medical records of the defendant's head injury had been destroyed by the treating hospital. (EH 339). The treating physician did not have any recollection of the incident. (EH 34). A letter form the hospital stating that the 1966 records was destroyed during the microfilm process was introduced. (EH 342). Trial counsel explained that he could not connect it up to any behavior.

Post-conviction counsel argues that trial counsel should have introduced the evidence of the car accident and evidence that the medical records were destroyed to the jury to explain why there are no medical records to support the claim. While the destruction of the records explains to the jury why there are no medical records to support the claim, it does not affirmatively

establish the claim. There would be no medical testimony that the defendant was severely hurt or that the injury could account for his conduct. Defense counsel would be left only with lay witnesses with no medical training. The prosecutor could easily undermine these lay witnesses with their lack of medical knowledge. All these lay witness could do was establish that there was a car accident involving the defendant. Car accidents, even if the person involved is hurt, do not mitigate murders unless there is permanent brain damage as a result. Expert medical testimony is necessary to establish invisible, permanent damage. A jury is not going to recommend life for a defendant who committed two murders within a month of each other just because the defendant was in a car accident. This is no doubt what trial counsel meant by his expression that he could not "connect it up". Post-conviction counsel did not establish that there was any major, permanent damage from the accident at the evidentiary hearing either. Post-conviction counsel also failed to "connect it up". *Bottoson v. State*, 674 So.2d 621, 624-625 (Fla. 1996)(rejecting an ineffectiveness claim for failing to present a history of depression, in part, because the medical records to support such a claim were destroyed in a fire). A lawyer's election not to present mitigating evidence is a tactical choice accorded a strong presumption of correctness which is virtually unchallengeable. *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994). Counsel was not ineffective for failing to present medical testimony of

permanent brain damage resulting from the car accident where there were no records or experts to establish the claim.

Sexual abuse of his sister

Trial counsel testified that no one that he interviewed told him of the sexual abuse. (EH 96). Trial counsel noted that the sexual abuse did not involve the defendant. (EH 97). Elizabeth Rucker, the defendant's sister, testified at the evidentiary hearing. (EH 181). She testified that she was sexually abused by her stepfather. (EH 182,184). Her mother knew of the sexual abuse. (EH 185). She testified that she spoke with her brother Robert later in life about her being sexually abused. (EH 189). She testified that she was never interviewed by trial counsel. (EH 190). The brother, Robert Jewell testified that his sister did not tell anyone in the family about the sexual abuse until later. (EH 240). The brother learned of the sexual abuse when he was 21 years old which would have been in the early 80's. (EH 245). He was interviewed by trial counsel and testified at the penalty phase. (EH 246-247). The defendant did not testify at the evidentiary hearing and post-conviction counsel did not establish through other witnesses that the defendant either witnessed or knew about the sexual abuse during his childhood.

Counsel is not ineffective for failing to present testimony that he was not informed of during interviews. *Van Poyck v. Florida Dept. of Corrections*, 290 F.3d 1318, 1324 (11th Cir. 2002)(counsel not ineffective for failing to present mitigating evidence of abuse where counsel was not informed of the abuse

during interviews with the defendant and family members). The mother was aware of the sexual abuse but did not inform her son's trial attorneys. His brother, Robert Jewell, testified at the penalty phase. If he knew of the sexual abuse at the time of trial he also should have informed trial counsel. Moreover, it is unclear how this would actually be considered mitigating by a jury. The jury would naturally wonder how events that the defendant did not even know about, affected him or were mitigating in nature. Sexual abuse of a sibling is found mitigating when the defendant witnesses the abuse, but is not mitigating when the defendant is unaware of it. *Morris v. State*, 27 Fla. L. Weekly S163, n.4 (Fla. 2002)(finding as non-statutory mitigation the physical and sexual abuse of his mother and sisters where the defendant witnessed the abuse).

Drug and alcohol abuse

Trial counsel was aware of the defendant's alcohol and drug use. (EH 362). He was aware of Freeman's use of marijuana, cocaine and alcohol. (EH 98). Trial counsel testified that he did not want to present evidence of alcohol and illegal drug use to the jury. (EH 336,364). Portraying the defendant as a doper or drunk would not advance the cause. (EH 337). Trial counsel explained that there is a good segment of society that are not crazy about drug use. (EH 337). In his view, alcohol and illegal drug are not compelling mitigation. (EH 337, 362)

As trial counsel recognized, alcohol and illegal drug use are dangerous mitigation. *Tompkins v. Moore*, 193 F.3d 1327, 1338

(11th Cir.1999)(noting that alcohol and drug abuse is a two-edged sword which can harm a capital defendant as easily as it can help him at sentencing); *Clisby v. Alabama*, 26 F.3d 1054, 1056 (11th Cir.1994)(noting that many lawyers justifiably fear introducing evidence of alcohol and drug use); *Rogers v. Zant*, 13 F.3d 384, 388 (11th Cir.1994)(noting reasonableness of lawyer's fear that defendant's voluntary drug and alcohol use could be "perceived by the jury as aggravating instead of mitigating"); *Wade v. Calderon*, 29 F.3d 1312, 1318-19 (9th Cir. 1994)(holding counsel was not ineffective for failing to present evidence of petitioner's PCP use because of his belief that jury would use such evidence only in aggravation). Jurors do not view alcohol or drug use as mitigating. Cf. *Odom v. State*, 782 So.2d 510 (Fla. 1st DCA 2001)(Padovano, J., concurring)(explaining that counsel rarely is ineffective for failing to present an voluntary intoxication defense because such a defense rarely offers a realistic chance of success and observing that most experienced criminal lawyers and judges would be hard pressed to come up with a single example of a case in which the defense of voluntary intoxication succeeded). Some jurors view illegal drug use as aggravating rather than mitigating. Counsel is not ineffective for recognizing this reality and making a strategic decision based upon it.

Depression

Freeman asserts that counsel was ineffective for failing to present evidence that he was depressed in jail. Trial counsel

testified that he was aware of Freeman's depression. (EH 350). Trial counsel noted that anybody would be depressed at spending the rest of their life in jail and that anti-depressants were common for inmates. (EH 351). Freeman presented no testimony at the evidentiary hearing that he suffered from major depression.

While evidence that a capital defendant suffered from severe depression prior to the crime can be compelling mitigation, mild, situational depression arising from his arrest is not. This mitigating evidence is of dubious value. *Gorby v. State*, 27 Fla. L. Weekly S315 (Fla. April 11, 2002)(explaining that an attorney's reasoned tactical decision not to present evidence of dubious mitigating value does not constitute ineffective assistance).

While post-conviction counsel faults trial counsel for admitting these areas of mitigation, he does not address what areas trial counsel focused upon. Trial counsel testified that he focused on the defendant's intellectual limitations. (EH 333). He was trying to establish that the defendant, who functioned on a 4th grade level, while not actually mentally retarded, was close to it. Mentally retardation is a powerful mitigator. *Atkins v. Virginia*, 122 S.Ct. 2242 (June 20, 2002)(holding that executions of mentally retarded criminals were cruel and unusual punishments based on a trend of state legislature to prohibit it). He also wanted to avoid the area of anti-social personality, if possible, which he accomplished. (EH 334). Trial counsel properly focused on what he considered to be the most mitigating evidence rather than post-conviction

counsel’s kitchen sink approach. Thus, the trial court properly found that counsel was not ineffective in the penalty phase.

ISSUE IV

WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PROVIDE THE MENTAL HEALTH EXPERT WITH RECORDS? (Restated)

Freeman asserts that he was denied his due process rights to a mental heath expert established in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Freeman is not actually raising an ineffective assistance of counsel claim; rather, he is raising an ineffective assistance of expert claim. Freeman claims that Dr. Legum, the mental health expert who testified at his trial, did not perform an adequate mental health evaluation because he failed to perform neurological testing that would have revealed an "organic motor disorder". There is no such claim as ineffectiveness of mental health expert. Moreover, to the extent that Freeman is raising an actual ineffectiveness claim for failure to provide the mental health experts with requested records, this claim was conclusively rebutted by the testimony of trial counsel as the trial court properly found. Thus, the trial court properly denied relief.

The trial court's ruling

Dr. Legum, a forensic psychologist, testified at the penalty phase as a defense mental health expert witness. (XXXIX 1643). He testified that the defendant had an I.Q. of 83 which is at the lower end of average intellectual capability. (1648). The defendant is not mentally retarded but is definitely below average. (1648,1658). However, the defendant performed poorly

on the achievement tests. His results showed 4th grade level achievement. His scores on the achievement tests were equivalent to those of someone who was mentally retarded. (1649). On cross-examination the prosecutor asked him if he had talked with any of the witnesses in this case about the details of the crime. (XXXIX 1662). He responded no. He explained that he did not have access to the police reports. (EH 1673).

Trial counsel testified at the evidentiary hearing that he obtained the defendant's juvenile records and his school records. (EH 307). Trial counsel testified that he supplied Dr. Legum with these records and the background information he had in his files. (EH 327,329). He provided Dr. Legum with additional information as he acquired it. (EH 328). Trial counsel informed Dr. Legum that the defendant had been sent to the hospital and was on suicide watch. (EH 376). However, the hospital records show that the defendant denied any suicidal thoughts. (EH 379). Trial counsel obtained the defendant's school records. (EH 343). The school records contained information that his stepfather was cooperative and helpful which was contrary to the other mitigating evidence of the stepfather being abusive. (EH 343). Some of the comments contained in the records attributed the defendant's poor performance to being lazy. (EH 343-344). Post-conviction counsel introduced a packet containing various records at the evidentiary hearing including school and medical records as defense Exhibit No. 5 (EH 294-295). Trial counsel testified that he considered Dr. Legum to be a competent expert. (EH 344).

Dr. Larson testified at the evidentiary hearing. (EH 114). Dr. Larson testified that Freeman's capacity to conform his conduct was substantially impaired because he is a "comprised individual". (EH 135). He testified regarding tests performed by Dr. Haggerott, who is a neuropsychologist in his practice, who performed a neuropsychological battery of tests on the defendant which found "mild neuropsychological impairments" and a learning disability. (EH 120, 125). He diagnosed the defendant has having an "organic motor disorder" and a learning disability. (EH 165) Dr. Larson faulted Dr. Legum for not following up on his hunches regarding the learning disability with a neuropsychological battery to establish neurological impairments. (EH 169-170). The trial court inquired what the major differences between his diagnosis and Dr. Legum's diagnosis were, and Dr. Larson responded that while they both diagnosed learning disabilities, he, unlike Dr. Legum, established that the cause was an organic mental disorder rather than environmental factors. (EH 170).

The trial court found that trial counsel's testimony regarding the records refuted the ineffectiveness of failing to provide records and background information claim. (R. I 158). The trial court found that there were no significant records not provided to Dr. Legum by trial counsel. The trial court also found no prejudice because there was no reasonable possibility that the jury would have recommended life based on Dr. Larson's testimony regarding a mild neuropsychological impairment.

Merits

First, this issue is procedurally barred. *Ake* claims should be raised on direct appeal. *Moore v. State*, 27 Fla. L. Weekly S186, n.4 (Fla. March 7, 2002)(affirming summary denial of an *Ake* claim in a post-conviction motion because *Ake* claims should be raised on direct appeal and therefore, are procedurally barred in post-conviction litigation). Post-conviction counsel is attempting to avoid the procedural bar by improperly wrapping an ineffective assistance of counsel claim around the *Ake* claim.

There is no *Ake* violation. Freeman had a mental health expert testify in his behalf in the penalty phase. Dr. Legum testified on his behalf. The holding in *Ake* was simply that the failure to provide any evaluation did not comport with the Due Process Clause. Thus, Freeman's rights under *Ake* were not violated.[28]

Freeman's actual claim is not an *Ake* claim or an ineffectiveness of counsel claim; rather, it is an ineffective assistance of psychiatrist claim. Post-conviction counsel attempts to weave strains of *Ake* together with strains of *Strickland* because it cannot meet either test individually. As to the Sixth Amendment claim, there is no Sixth Amendment right

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[28] Indeed, it is not clear that *Ake* even applies in this situation. The prosecutor did not put Freeman's mental health at issue; he did. *Rogers v. Gibson*, 173 F.3d 1278, 1285(10th Cir. 1999)(finding no *Ake* right to a mental health expert in the penalty phase and explaining that it is only where the state attempts to present the defendant's mental health as an aggravating factor that the defendant is entitled to a mental health expert). Freeman may well have no *Ake* right to a mental health expert of any stripe.

to effective assistance of a mental health expert. The Sixth Amendment is a right to counsel guarantee. The basis of *Ake* was the Fifth Amendment due process right. *Wright v. Moore*, 278 F.3d 1245 (11th Cir. 2002)(noting that a Sixth Amendment right to a mental competency examination is a "non-starter"). There is no right to effective assistance of an expert witness. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.1998) (rejecting the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness); *Thomas v. Taylor*, 170 F.3d 466, 472 (4th Cir. 1999)(rejecting, yet again, the effort to recast a claim concerning the effectiveness of a court-appointed psychological expert as a claim of ineffective assistance of counsel); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir.1990)(explaining that the ultimate result of recognizing a right to effective assistance of a mental health expert would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis). The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.1998). Although *Ake* refers to an appropriate evaluation, the Due Process Clause does not prescribe a malpractice standard for a court-appointed psychiatrist's performance. *Wilson*, 155 F.3d at 401.

This Court does seem to recognize an ineffective assistance of a mental health expert claim. *Gorby v. State*, 2002 WL 534413, *6 (Fla. April 11, 2002)(finding the neuropsychologist's examination competent because it was not so grossly insufficient as to ignore clear indications of either mental retardation or organic brain damage); *Schwab v. State*, 814 So.2d 401, 418 (Fla. 2002)(rejecting an ineffective assistance of counsel claim for failing to ensure that the defendant had access to a competent mental health expert because counsel performed the essential tasks required by *Ake* when he presented the testimony of an expert in psychological evaluation). However, this Court fails to explain the basis for such a claim. Unless there are deficiencies that would be obvious to an attorney, such as having a license revoked, a legal expert cannot be responsible for the performance of an expert in another field. This Court should not entertain such claims.

Moreover, there is no prejudice. Dr. Larson did not testify that Dr. Legum's diagnosis was wrong or incorrect; rather, he merely testified that it could have been more thorough. Trial counsel is not ineffective for presenting a mental health expert who gives a more limited diagnosis merely because post-conviction counsel was able to obtain a more favorable mental health expert to testify at the evidentiary hearing. *Gaskin v. State*, 2002 WL 1290883, *4 (Fla. June 12, 2002)(holding counsel's reasonable mental health investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert and where the

expert’s opinion at the evidentiary hearing was cumulative opinion to one that was already presented to the trial court). Here, as in *Gaskin*, the two mental health experts were basically in agreement, the differences were of degree, not kind.

As for the failure to provide records, the trial court found that this claim of ineffectiveness was refuted by the testimony of trial counsel at the evidentiary hearing. Trial counsel testified that he gave Dr. Legum various records including school records. *Carroll v. State*, 27 Fla. L. Weekly S214, 2002 WL 352844, *8-*9 (Fla. March 7, 2002)(rejecting an ineffective assistance of counsel claim for failing to provide adequate background information to the mental health experts because counsel, in fact, provided many of the defendant’s records to the expert and the school records that counsel did not provide contained information that the experts were generally aware of through their own investigation, so there was no prejudice). Dr. Larson testified that while he could not recall exactly what records and background information Dr. Legum had, he did not think that he had school records. (EH 168). Dr. Larson, of course, can not have any personal knowledge of which records or background information trial counsel provided Dr. Legum. The failure to provide records was conclusively refuted at the

evidentiary hearing.[29] Hence, the trial court properly denied relief.

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[29] While this claim of ineffectiveness was completely refuted, even if Freeman had established that counsel failed to supply records, the failure to supply records is not sufficient to establish ineffectiveness. To establish ineffectiveness, Freeman would have to establish that the expert requested certain, particular records from counsel which were necessary to complete his evaluation and counsel failed to supply the critical records. Freeman did not establish that any request was made by his expert, nor did he identify any records that were critical to a correct diagnosis. If an expert needs additional records to complete his diagnosis, it is the expert's responsibility to inform counsel of the need for the records. Nor should counsel have to correctly guess which records the expert may need to complete his evaluation on pain of being held incompetent. A generalized claim of failure to supply records is not sufficient to establish either deficient performance nor prejudice.

ISSUE V

WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO SUBPOENA A MITIGATING WITNESS? (Restated)

Freeman asserts that trial counsel was ineffective for failing to present the live testimony of his best friend, David Sorrells, as mitigating evidence due to counsel's failure to subpoena him. Counsel presented Sorrells' mitigating testimony albeit not as live testimony. The former testimony of Sorrell's given in the Epps trial was read to the jury in this trial. There can be no deficient performance or prejudice under these facts.

The trial court's ruling

Mr. Sorrells testified at the Epps trial. When he was unavailable at this trial, his former testimony was read to the jury. The trial court explained to the jury that Mr. Sorrells was not available. (XXXIX 1681). The trial court instructed the jury that they should accept and rely upon the testimony "exactly as though Mr. Sorrells testified here in person." (XXXIX 1681). Mr. Sorrells testified that he and the defendant went to junior high school together. (1683). Mr. Sorrells saw the red marks when the defendant was beaten with a belt and observed the defendant's swollen cheek on another occasion. (1684). He testified that the defendant was a very hard worker, that he enjoyed children, and was very well mannered. (1684-1685).

Mr. Sorrells testified at the evidentiary hearing. (EH 231). He averred that he was not contacted to testify at this trial.

(EH 231). He testified that he was willing to testify. (EH 232). He stated that he would have testified similarly at this trial to his former testimony in the Epps trial (EH 232). He testified that the defendant's stepfather was a "pretty rowdy fella" who raised his voice. (EH 233). He testified at the evidentiary hearing that he would have come without a subpoena. (EH 235).

Trial counsel testified at the evidentiary hearing that often with cooperating witnesses, he does not serve them with subpoenas. (EH 320). Trial counsel explained that at that time, there was no discovery regarding penalty phase witnesses and if he did not subpoena a witness then the prosecutor would not know who his witnesses would be. (EH 320).

The trial court ruled that this was a tactical decision often used by the State as well as defense counsel and that there was no prejudice because Sorrells' former testimony was read to the jury. The trial court noted that the Sorrells' testimony at the evidentiary hearing did not involve any additional mitigation not testified to by the witness at the trial.

Merits

There is no deficient performance. Counsel did not normally subpoena cooperative witnesses. *Brown v. Easter*, 69 F.3d 543 (9th Cir. 1995)(rejecting an ineffectiveness for failing to subpoena an alibi witness because it is a reasonable tactical decision not to subpoena a favorable and cooperative witness). Sorrells

testified that he was willing to testify and would have done so without a subpoena.

Nor is there any prejudice. *Melendez v. State*, 612 So.2d 1366, 1368(Fla. 1992)(rejecting an ineffectiveness for failing to subpoena defense witnesses because when they failed to appear, trial counsel was able to get their testimony before the jury by way of stipulation). Freeman does not even attempt to establish that the live testimony would be different in content from the former testimony read to the jury. *Cf. Magwood v. Smith*, 791 F.2d 1438, 1445 (11th Cir.1986)(finding no prejudice from trial counsel's failure to subpoena members of the lunacy commission where the commission's report was introduced and where deposition testimony of favorable doctor was read to the jury in lieu of live testimony). The only additional testimony given by Mr. Sorrells at the evidentiary hearing was that the defendant’s step father was a “pretty rowdy fella” who raised his voice. (EH 233). This is hardly compelling mitigating evidence. Moreover, presenting the set testimony of a mitigating witness has the advantage of there being no surprises on cross-examination. *Freeman*, 761 So.2d at 1074. The Evidence Code views former sworn testimony as a proper substitute for live testimony. § 90.804(2)(a), Fla. Stat. (2002). Furthermore, the trial court instructed the jury to treat this testimony exactly as they would live testimony. In Justice Wells’ words, new trials should not result because of the difference between live testimony and transcripts. *Freeman*, 761 So.2d at 1074. Thus, the trial court properly found no prejudice.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Harry P. Brody, Assistant CCRC-N, 1533-B South Monroe Street Tallahassee, FL 32301 this 15th day of July, 2002.

____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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