

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2007

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JOHN D. FREEMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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REPLY BRIEF OF APPELLANT

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**ARGUMENT IN REPLY**

**ARGUMENT I**

A. The McCleskey Claim

In Issue I of its Answer Brief, Appellee has characterized the prosecutor's refusal of Mr. Freeman's offers to plead guilty in both the Epps and Collier cases in exchange for the maximum non-capital sentences as an assertion of "a reverse McCleskey claim." (Answer Brief, p. 9) See McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). However, Appellant more specifically has argued that, under the specific evidence presented at the evidentiary hearing through the testimony of the prosecutor and the trial attorneys, Mr. Freeman's claim falls squarely within the ambit of improper prosecutorial discretion acknowledged by McCleskey as forbidden by both the federal and Florida Constitutions. Further, under the specific circumstances and facts which Mr. Freeman presented at his evidentiary hearing, Mr. Freeman has established that he is entitled to relief from his death sentence. Thus, although Appellee has attempted to marginalize Mr. Freeman's claim as "novel" (Answer Brief, p. 6), Appellee has too lightly dismissed or overlooked an abundance of specific evidence tendered to support Mr.

Freeman's claim that unconstitutional factors entered into the prosecution's decision to pursue the death penalty against Mr. Freeman.

Ignoring the unmistakably race-based substance of the prosecutor's statements to the trial attorney who tendered the plea offers, Appellee has also adopted the lower court's characterization of the prosecutor's statements regarding his race-based motivation for pursuing death as a "retort" and would minimize the powerful testimony from the prosecutor and from the trial attorneys, which establishes that the prosecutor's motive for refusing the plea offers and for pursuing the death penalty in both cases was that Mr. Freeman was white and the decedents were black and that the prosecution believed that Mr. Freeman himself was, at least in part, motivated by racial hatred.

At the evidentiary hearing, the prosecutor starkly admitted that he needed to get his white-on-black numbers up. (EHT. 90) Further, the prosecutor admitted that he had to respond to community opinion. (EHT. 37-38)

In urging this Court to accept the lower court's erroneous characterization of the prosecutor's statements over the substance of the testimony, Appellee, like the lower court, has relied on the prosecutor's only non-race-based

explanation for seeking the death penalty and refusing to plea bargain, which is, essentially, that Mr. Freeman was charged with two killings, then arguing that any time there are two killings it is obviously a death-penalty case. (EHT. 19) To this startling but unsubstantiated argument regarding the prosecution's responsibility to exercise discretion in seeking to impose the ultimate penalty, Appellant replies that Appellee's argument falls short of the constitutionally mandated analysis that is required, where only specific, statutorily authorized aggravators are to be considered.

Appellee repeatedly asserts that this was a death penalty case regardless of race, despite the fact that the actual record contains explicit evidence of the prosecutor's improper race-based motivation in seeking Mr. Freeman's death. In effect, Appellee argues that the prosecutor's rationale for the exercise of his discretion is apparent from the record (Answer brief, p. 19), to which Appellant replies that there is simply no statutory provision for obvious or automatic imposition of the death penalty in federal or Florida law and that this argument, that the prosecutor was just doing his duty and that the facts and circumstances necessarily demanded the imposition of the death penalty, is unconvincing when the

actual record is fairly and fully considered.

B. The Trial Court's Order

The lower court wrote, regarding the prosecutor's statement to trial attorney McGuinness, that "the response was nothing more than a somewhat ill-considered retort to the then existing allegations of racial discrimination in the application of the death penalty by prosecutors..." (Order p. 2)

Appellee, while reiterating that this was a "retort," fails to note that the record clearly establishes that race was, in fact, a motive of the prosecutor in seeking the death penalty and refusing the authorized plea bargain proposed by Mr. McGuinness. The immediate dismissal of the non-refuted and highly probative substance of the statement, "we have to get our numbers up," cannot obfuscate or minimize the plain meaning of the prosecutor's words: we have to seek the death penalty because Mr. Freeman is white and because his victims are black. McCleskey, thus, is directly applicable to the facts and circumstances established by the record.

C. Improper Racial Considerations

Mr. Freeman has established that the prosecution sought

the death penalty for unconstitutional reasons and subsequently conducted, or refused to conduct, its plea bargain negotiations on an arbitrary and discriminatory basis.

The record shows that but for improper racial considerations by the prosecutor, Mr. Freeman could have plead guilty and been spared the death sentence.

Unlike the facts of McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), and numerous cases attempting to demonstrate racial prejudice through the introduction of evidence of statistical analysis alone, Mr. Freeman presented evidence in the record that establishes the State's discriminatory intent in his case. Importantly, Mr. Freeman has not attacked the statutory provisions pursuant to which he was sentenced to death, but, rather, he has challenged the statutory provisions as they were applied to him in his specific case.

At the evidentiary hearing, Prosecutor Stetson testified that he recalled a pre-trial conversation with Patrick McGuinness, Mr. Freeman's trial attorney, regarding the race of the victims. (EHT. 16) Stetson recalled this took place over the phone and that McGuinness was offering a life plea. (EHT. 17) Stetson didn't recall his exact words but "added some sarcasm." (EHT. 17) He did remember telling McGuinness that

if he agreed to the plea, McGuinness would use it against him to argue that the State seeks death against white defendants rather than black defendants. (EHT. 18) This is a race-based, non-statutory aggravator inappropriate to the prosecutor's decision to pursue Mr. Freeman's death.

The Appellee contends this is an "obvious" death penalty case. Appellee, like the lower court, relies on the testimony of State Attorney Ed Austin, but Mr. Austin did not provide a succinct, statute-based analysis of the specific aggravators which make the case "obvious," or a "no-brainer." Appellee reiterates repeatedly that there were two victims and implies that the prosecutor's duty was to seek death based on that fact alone. However, the record establishes that race was the unspoken and unwritten aggravator which motivated the prosecutor's exercise of discretion.

In going beyond the bounds of proper prosecutorial considerations, Mr. Stetson testified that he believed racism was a "motive" for the murder and that he considered Mr. Freeman's alleged racism when deciding to seek death. (EHT. 21-22) However, this racism was not brought out at trial because Mr. Stetson feared the appellate implications. (EHT. 22) Stetson nevertheless urged Judge Parsons, in Epps, to override the jury recommendation of life. (EHT. 64)

Ann Finnell, one of the trial attorneys in Epps, testified that McGuinness told her that Freeman could not be pled out "because of a race factor." (EHT. 57) Finnell also recalled Stetson urging Judge Parker to sentence Mr. Freeman to death because of Mr. Freeman's racial attitudes. (EHT. 58) Ultimately, in his sentencing order Judge Parsons cited race as a motivating factor for the Epps murder. (EHT. 64, Defense Exhibit 3)

McGuinness testified unequivocally that the plea negotiations took place at the copy center of the public defender's office. (EHT. 89) McGuinness stated that he had authorization to accept consecutive sentences of life without parole for twenty-five years in exchange for guilty pleas in both Epps and Collier and argued for acceptance of the offer on the basis of finality and mutual benefit. (EHT. 90) Stetson responded "that normally he would consider it, but he couldn't in this instance because they had to get their numbers up on whites killing blacks." (EHT. 90) McKleskey was pending at this time. (EHT. 90) McGuinness mentioned this conversation to Finnell (EHT. 92), who remembers him talking to her about it. (EHT. 75)

Considering the evidence on the record, Appellee's Answer Brief ignores the substantial credible evidence in the record

by opining that the prosecutor's race-based response was a "statement of lack of intent to discriminate." (Answer Brief, p. 9)

Because of Mr. Freeman's race, of the race of his victims, and of the prosecutor's erroneous and unfounded beliefs regarding Mr. Freeman's racism, the prosecutor abused his discretion in seeking the death penalty and in refusing to plea bargain. Mr. Freeman's treatment was unequal and arbitrary.

#### D. The Applicable Legal Standard

Appellee's Answer Brief acknowledges that Mr. Freeman is alleging racial discrimination by the State. However, Appellee has addressed neither the pertinent Supreme Court precedent nor the applicable precedent under the Florida Constitution and this Court's cases. That precedent establishes that the legal underpinnings of Mr. Freeman's claim are neither new nor novel.

As the Supreme Court has declared, "the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct based on race." Washington v. Davis, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed. 597 (1976). Further, in Batson v. Kentucky, 476 U.S. 79, 106

S.Ct. 1712, 1718, 93 L.Ed.2d 69 (1986)(quoting Strauder v. West Virginia, 100 U.S. 303, 308, 25 L.Ed. 664 (1880)), the Court noted the perniciousness of racial discrimination within the judicial system because it is an impediment to equal justice.

McCleskey strongly reiterates the impropriety of race-based conduct by the State: "Because of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." McCleskey v. Kemp, 107 S.Ct. at 1775 (citation and footnote omitted).

Further, the Supreme Court has emphasized the particular danger of racial prejudice in the unique context of a capital case: "The risk of racial prejudice infecting a capital proceeding is especially serious in light of the finality of the death sentence." Turner v. Murray, 476 U.S. 1, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986).

Like the lower court, which apparently only considered a due process violation, Appellee has failed to consider that Mr. Freeman's equal protection claim is not based upon a facial challenge to the validity of a specific Florida statute but, rather, upon the State's administration and application of its laws. The equal protection clause of the Fourteenth

Amendment does not exclude such a challenge.

As the Supreme Court noted long ago, fair and impartial law can be applied and administered with an evil eye and unequal hand, so as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. Yick Wo v. Hopkins, 118 U.S. 356, 373-4, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886).

Mr. Freeman must, he concedes, prove discriminatory purpose. See e.g. Wayte v. United States, 470 U.S. 598, 608-9, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985)(selective prosecution claim); Personnel Administrator of Mass. V. Feeney, 442 U.S. 256, 271-72, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979)(claim of sex discrimination in state law giving victims lifetime preference in employment); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977)(racial demonstration against zoning plan); Washington v. Davis, 426 U.S. 229, 239-40, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976)(racial discrimination against employment test; and McCleskey v. Kemp, 107 S.Ct. at 1766)(defendant has burden of proving purposeful discrimination in capital punishment case).

A finding of discriminatory purpose requires an

examination of all the relevant surrounding circumstances and an inference of discrimination from them. Washington v. Davis, 426 U.S. at 242, 96 S.Ct. at 2049. Thus, determining whether discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. Arlington v. Metropolitan, 429 U.S. at 260, 97 S.Ct. at 564.

However, Mr. Freeman does not have to show that racial discrimination was the dominant motivation underlying the prosecution's actions, let alone the only motivation. Evidence that racial discrimination played any part in the State's decision is sufficient. As Arlington Heights interpreted Davis:

Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes . . . [R]acial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Arlington v. Metropolitan, 429 U.S. at 265-6, 97 S.Ct. at 563.

Further, Batson v. Kentucky makes clear that a pattern of discrimination is not required. Batson, 106 S.Ct. at 1722. Thus, McCleskey represents the rule that, when determining whether racial considerations have affected a prosecutor's

decision to seek the death penalty, the court must look primarily to the facts and circumstances surrounding the specific prosecutorial decision involved.

Admittedly, there is wide prosecutorial discretion regarding plea bargaining. See Lynch v. Overholser, 369 U.S. 705, 719, 82 S.Ct. 1063, 1072, 8 L.Ed. 211 (1962); Santobello v. New York, 404 U.S. 257, 263, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971); North Carolina v. Alford, 400 U.S. 25, 34-35, 91 S.Ct. 160, 166, 27 L.Ed.2d 162 (1970). The McCleskey court, however, provided the stark parameters of such discretion:

As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case . . . Of course "the power to be lenient [also] is the power to discriminate," K. Davis, Discretionary Justice 170 (1973), but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." Gregg v. Georgia, 428 U.S. [153] 200 n.5, 96 S.Ct. 2909, 2937-38 n. 5, 49 L.Ed.2d 859 [1976].

McCleskey v. Kemp, 107 S.Ct. at 1777.

Despite the breadth of discretion afforded the prosecution in charging and plea bargaining, such discretion is not absolute:

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and

institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits on its exercise.

Bordenkirker v. Hayes, 434 U.S. 357, 365; 54 L.Ed.2d 604, 669 (1978), quoting Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962). These cases go on to explicitly state that prosecution selection in enforcement cannot be deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification. 434 U.S. at 364, 98 S.Ct. at 668. See also, Wayte v. United States, 470 U.S. 598, 608-9, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985); U.S. v. Batchelor, 442 U.S. 114, 125, 99 S.Ct. 2198, 2205, 60 L.Ed.2d 755 (1979).

McCleskey, in the context of a challenge to a prosecutor's decision to seek the death penalty, reaffirmed the principle that racial considerations must play no part in a prosecutor's exercise of his discretion, explicitly noting that the court "has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race." 107 S.Ct. at 1775 n. 30 (citing Wayte v. United States, United States v. Batchelor, and Oyler v. Boyer. See also United States v. Lee, 786 F.2d 951, 957 (9<sup>th</sup> Cir. 1986). The decision to reject a guilty plea and compel a defendant to submit to trial on a capital charge is thus indisputably subject to the

same constitutional rule as all other prosecutorial decisions: the decision may not be influenced in any measure by the race of the defendant.

In Batson, the Supreme Court reviewed a challenge to prosecutorial discretion based on the prosecutor's specific conduct. Batson held that the State's exercise of its traditional privilege to strike individual jurors through peremptory challenges is subject to the constraints of the equal protection clause. 10 S.Ct. at 1718-19. Defendants are entitled, the court ruled, to a reversal of their convictions if they can show that the prosecution exercised its peremptory challenges in a discriminatory manner. Id. at 1725.

Under Batson, Mr. Freeman's showing, that the prosecution's decision to reject his plea offers and to seek a capital sentence instead was racially motivated, would necessitate reversal of his death penalty.

In the context of a noncapital case, United States v. Moody, 778 F.2d 1380 (9<sup>th</sup> Cir. 1985), the Ninth Circuit reiterated the previously established limitations on a prosecutor's discretion in plea bargaining. The defendants in Moody claimed that the prosecution engaged in impermissible discrimination by affording a plea bargain to their co-conspirator and not to them. In rejecting defendant's claim,

the Court wrote:

We have held that a defendant who relies on contentions of impermissively selective prosecution must demonstrate "that he was selected for prosecution on the basis of an impermissible ground such as race, religion or exercise of the constitutional rights."

Id. At 1386 (emphasis supplied)(quoting United States v. McWilliams, 730 F.2d 1218, 1221 (9<sup>th</sup> Cir. 1984)(per curiam).

Subsequently, the Ninth Circuit, in the post-McCleskey context, considered the pertinent equal protection issue. Coleman v. Risely, 839 F.2d 434 (9<sup>th</sup> Cir. 1988). The dissent persuasively analyzed Mr. Coleman's equal protection claim:

While we concluded that the defendants in that case [Moody] did not show "that the government was motivated by considerations of race, religion, or any other impermissible ground," id., we nonetheless, made it clear that if the prosecution bases its plea bargaining decisions on the race of the defendants, the courts will intervene.

. . .

When reviewing a state's decision to reject a defendant's plea and seek the death penalty, we must keep in mind generally the importance of preserving the prosecution's traditional discretion in the particular case. If Coleman can show that racial consideration were a factor in the prosecutor's decision not to accept his proffered plea, he is entitled to prevail on his equal protection claim.

Coleman v. Risley, 839 Fd. 434, 470-472 (9<sup>th</sup> Cir. 1988).

Although this opinion was withdrawn in light of an en banc reversal of Mr. Coleman's death sentence on other grounds, the force of the equal protection analysis remains compelling.

Finally, this Court has recognized the same equal protection limitations upon prosecutorial discretion under both the federal and state constitutions. Bloom v. State, 497 So. 2d 2, 3 (1986); Article II, section 3, Florida Constitution. (Quoting United States v. Smith, 523 F.2d 771, 782 (5<sup>th</sup> Cir. 1975), cert. denied, 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976)).

#### E. Factual Findings By The Lower Court

The lower court's order states that plea offers were made because of the strength of the evidence in both Epps and Collier. (Order p.2) Nevertheless, Appellee's Answer Brief maintains that the prosecutor decided that he could not consider the plea in Collier because of the prior violent felony, despite the facts that Freeman had not been convicted of the Epps murder and that Epps was a weaker case.

Also, the lower court found that both the defense and the state were aware of the "pending Federal litigation in which

studies were used to support an allegation that prosecutors were seeking the death penalty disproportionately against black defendants." (Order p.2) The Answer Brief of the Appellee nevertheless maintains that the equal protection claim was so novel that McGuinness should not have raised the issue of the prosecutor's statements and therefore could not have been ineffective under Strickland v. Washington, 466 U.S. 668 (1984). Further, the fact that Stetson was aware of the issue provides a logical reason as to why he would be motivated to consider race in exercising his discretion and why he would mean exactly what his language clearly indicates.

Thirdly, Appellee's Brief disputes whether the lower court found that Mr. McGuinness's and Ms. Finnell's testimony more credible than Stetson's testimony. (Answer Brief, p. 16 fn.10) However, the lower court, in indicating that Mr. Stetson's response "was nothing more than a somewhat ill-considered retort to then-existing allegations of racial discrimination in the application of the death penalty by prosecutors" and in erroneously concluding that the evidence "not only failed to demonstrate a racially motivated purpose in pursuing the death penalty in this case (Collier) but rather, it demonstrated that the State Attorney's Office did

not pursue the death penalty based on the race of this defendant (who is white)" is explicitly addressing the substance of the versions of events provided by the trial attorneys. (The lower court is also arguably rejecting the claim because the Defendant is white, an analysis which misses the precise point of the claim.)

Fourthly, the Appellee and the lower court erroneously both rely on the testimony of Ed Austin, then State Attorney, who admittedly did not recall the case but testified to general office policy. (EHT. 43-44) However, the holding of McCleskey is that such general evidence, such as statistics, can't establish specific discrimination. Conversely, neither should general office policy support a denial of the specific, un-refuted testimony of Stetson, McGuinness, and Finnell.

#### F. The Record Establishes That Race Was A Motivating Factor

Prosecutor Stetson did not recall his exact words but states that he rejected a plea offer over the phone and added some "sarcasm." (EHT. 17) The reason he says he gave McGuinness for rejecting the plea offers was that if he agreed

to the pleas, McGuinness would use it against him to argue that the State seeks death against white defendants less often than against black defendants. (EHT. 18) He testified that this was an obvious death penalty case and that he had a duty to seek death. (EHT. 19-20) He admitted that he believed racism was a motive and he considered the perceived racism when deciding to seek death. (EHT. 21-22)

Clearly, race was a factor in the State seeking the death penalty, and in rejecting the plea offer in the instant case. The record establishes that Mr. Stetson thought that both Epps and Collier were death cases, that he was aware of and offended by the McCleskey argument, that he rejected the plea offers authorized by Mr. Freeman to get the numbers of death sentences imposed on whites who kill blacks up, that the only reason he gave McGuinness for rejecting the plea offers was racial, that he believed these killings were racially motivated hate killings. Interestingly, he concedes he did not argue this point in Epps because of appellate prospects, and he argued off record in Epps that Freeman should get a death sentence despite the jury's life recommendation on the non-statutory aggravating ground of race hatred.

In sum, Appellee, like Stetson, has provided no analysis of another reason he refused the plea offer except that,

because there were two cases, they were obviously and automatically death cases.

Appellee contends, like the lower court, that Stetson's remark to McGuinness was a "retort," and argues that the testimony of McGuinness, Finnell, and Stetson regarding Stetson's statement, does not constitute "racial bias." (Answer Brief, p. 9) Appellee seems to imply that, because Stetson feels that plea bargains would be used "against the death penalty (and him)" that "the statement is a statement of lack of intent to discriminate." This argument, however, focuses on the victim's race and implies that Stetson would not discriminate against the victims. Further, this is not a proper argument as to why the cases are death cases under the Florida statute. Race is simply an improper prosecutorial consideration and the victim's race is not an aggravator under the statute, just as Mr. Freeman's race should not be a factor. Appellee even concedes that "race was a factor in the sense that you consider the way the prosecutors are doing their job." (Answer Brief, p. 11) This is also not a fact upon which to seek death or refuse a rational plea offer to consecutive sentences at the non-death maximum. Appellee nevertheless argues that the State had strong guilt-phase evidence, and this makes the decision to seek death "a no-

brainer." (Answer Brief, p. 11)

Appellee further concedes that the defendant's racial bias was considered and that race was a factor in the sense that community will perceive the way the prosecutor is doing his job. (Answer Brief, p. 11) These are both further evidence of the prosecutor's improper consideration of race as a factor in deciding to seek death.

Appellee argues that Mr. Freeman is claiming that under McCleskey "at one time, or more correctly in Georgia in the 1970's," Mr. Freeman would have been unlikely to receive the death penalty. However, this argument mis-states both the requirements of McCleskey and Appellant's argument. Rather, Mr. Freeman claims that the prosecutor sought death and refused rational plea bargains at least in part based on improper racial considerations under McCleskey as well as under the Florida Constitution. The Baldus study is not at issue, as the Appellee suggests. The rejection of McCleskey's claim by that court is inapposite to the instant cause, as in Foster v. State, 614 So. 2d 455 (Fla. 1992), because neither McCleskey nor Foster offered the specific evidence of improper racial considerations which are presented in this record. The prosecutor's and Appellee's statement that this is a death case regardless of race is not necessarily dispositive either,

where the lower court has accepted the testimony of McGuinness and Finnell, as Stetson does not recall his exact words but does not deny saying something which, even in the best light, was "ill-considered." Also, it is not true that at the time of Mr. Stetson's actions, Mr. Freeman had a prior murder conviction. Neither case had been tried and the plea offers were to resolve both cases.

Appellee's argument that Mr. Freeman committed an act for which imposition of death is proper and that, therefore, Mr. Stetson's racial motivation would not matter, assumes the argument which it is being asserted to prove. The fact is that there are no automatic death cases and that, as this Court has repeatedly stated, the imposition of the death penalty is to be reserved for the "worst of the worst cases."

Mr. Stetson's and the State's rather cavalier attitude toward his motivation for seeking death in this case seems to consist exclusively of the fact that there are two cases. However, in Epps, the jury recommended life, and this Court struck the trial judge's override, which was biased in part on race. Mr. Stetson prosecuted and argued, according to Finnell, that race was a reason to impose death in Epps.

Appellee's argument that these were obviously death cases, ignores Stetson's own testimony and endorses an

automatic two-murder aggravator.

Appellee's reliance upon U.S. v. Webster, 162 F.3d 308, 335 (5<sup>th</sup> Cir. 1998), fails to consider the record evidence of explicit improper considerations in the record in this specific case. Appellee's argument that this prosecutor, and, it seems, any prosecutor, would have rejected the plea offers where the defendant had killed two people in a month and that this is automatically and obviously a death case is not supported by the record.

Further, where the prosecutor "regardless of any statement by the prosecutor" (EHT. 19), expressed an improper racial motivation, there is no "harmless error" analysis under McCleskey, or Batson, or under the Florida Constitution. As McCleskey notes, prosecutors can be lenient in any case. McCleskey, *supra*.

Appellee's assertion that the prosecutor did not act alone and that there was a Homicide Team (of which Stetson was the head) are not evidence of any specific review or determination. Mr. Austin had no direct memory of this case. Further, the Appellant fails to see any relevance to Appellee's argument that there were a number of blacks on the jury or that the "racial balance" of the jury supports Appellee's position. The argument that the prosecutor himself

did not impose the death sentence is as similarly irrelevant as it is obvious. (Answer Brief, p. 19).

To argue, as the Appellee does (Answer Brief, p. 20) that, "[R]egardless what the prosecutor said," Mr. Freeman can't establish a selective plea bargain claim or is procedurally barred is also inapposite since the allegations of what he said were the basis for the remand for a hearing on the issue. Similarly, Appellee's reliance upon United States v. Armstrong, 517 U.S. 456, 469, 116 S. Ct. 1480, 1487, 134 L. Ed. 2d 687 (1996); Jones v. White, 992 F.2d 1548, 1571-1572 (11<sup>th</sup> Cir. 1993); and State v. A.R.S., 684 S.2d 1383, 1385 (Fla. 1<sup>st</sup> DCA 1996), is misplaced as the defendants in those cases do not have the same evidentiary support as the instant record provides to Mr. Freeman.

Appellee's argument that "any defendant of whatever race who killed two victims of any race is likely to receive the death penalty" is unsupported and unsupportable. The entirety of Eighth Amendment jurisprudence is based on assurances that the death penalty will not be arbitrarily and capriciously imposed. Appellee's argument that, "[B]asically, defendants, regardless of race, received the death penalty for killing multiple victims, regardless of the victim's race" relies on the Baldus study, which McCleskey rejected as sufficient

evidence in that case. Further, Appellee's attitude toward imposition of the death penalty is disturbingly nonchalant, and its argument that the "similarly situated group" are people who kill two victims (Answer Brief, fn. 13), is also not dispositive to the issue in this case and ignores the weight of the evidence.

Even State v. Courchisni, 2001 WL 1569981, 2 (Con. Super 2001)(unpublished opinion), is procedurally distinguishable and otherwise not persuasive because, in that case, there was a pre-trial motion and hearing and the evidence (far weaker than the instant case) was that the parties to the plea both testified that the plea bargain offer could not be considered because of improper racial reasons.

The Courchisni rationale, as Appellee summarizes it, that racial discrimination against a white man would rebut or remedy past prejudice where the victims are black, is simply not supported by any federal court or by the explicit language of McCleskey.

Finally, inquiry into Appellee's belabored analysis of civil equal protection rulings is inapposite. Thus, it is unnecessary to understand what "the death penalty is a zero sum endeavor" (Answer Brief, p. 21) means to urge this Court to reject Appellee's argument, that, assuming the prosecutor

rejected the plea offers simply "to get his [white-on-black] numbers up," that such an action would be merely remedial, wrongly looks at the race of the victims, would be a proper consideration in a capital case.

## ARGUMENT II

Appellee's contention that the McCleskey claim is an ineffective assistance of counsel claim under the Sixth Amendment and Strickland v. Washington, 466 U.S. 668 (1984) and that the claim is novel so that the trial attorney should not have raised it misreads this Court's opinion remanding the claim for a hearing. Freeman v. State, 761 So. 2d 1065 (Fla. 2000). This Court explicitly relied upon McCleskey and Bloom in ordering the hearing. Id.

Further, the record establishes that trial attorney McGuinness was well aware of the issues in McCleskey. (Order, p. 2) Further, the claim is in fact not novel such that the prosecution should not have been aware of the issue. It is notable that attorney Finnell, in Epps, immediately put her concerns with Stetson's advocacy of the alleged race issue in the record. Finally, the prejudice to Mr. Freeman is clear, as the proper remedy, he contends, would be imposition

of a life sentence by motion to preclude the death penalty, as Appellee notes. (Answer Brief, p. 31); see, Foster v. State, 614 So. 2d 455, 463 (Fla. 1992).

The Appellee's analogy to a "motion to disqualify the judge" is distinguishable as that motion is explicitly provided for procedurally and does not involve a violation of the defendant's constitutional rights by the prosecuting party.

Finally, Appellant re-asserts his earlier arguments against Appellee's intentions that this was so obviously a death case that "any newly assigned prosecutor would have joined the parade." (Answer Brief, p. 33)

#### **ARGUMENT III**

Regarding Issue III, as restated by Appellee, counsel will rely on his initial brief.

#### **ARGUMENT IV**

Regarding Issue IV, as restated by Appellee, counsel will rely on his initial brief.

#### **ARGUMENT V**

Regarding Issue V, as restated by Appellee, counsel will rely on his initial brief.

#### **CONCLUSION**

Based upon the foregoing arguments and upon the record,

Mr. Freeman respectfully urges the Court to vacate his sentences and to remand the case for a new trial, sentencing, or such other relief as the Court deems proper.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Charmaine Millsaps, Assistant Attorney General, The Capitol-PL-01, Tallahassee, Florida 32399, on this \_\_\_\_\_ day of September, 2002.

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