IN THE SUPREME COURT OF FLORIDA

ROBERT GORDON,

Appellant,

vs. **CASE NO. SC02-1212**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE

Trial Court Proceedings:

Gordon and his co-Defendant, Meryl McDonald were indicted for the murder of Dr. Louis Davidson on April 27, 1994. Gordon and McDonald were tried together, and both were found guilty of first degree murder. A joint penalty phase resulted in a jury recommendation of death for both Gordon and McDonald by identical votes of 9 to 3.

The sentencing order found in aggravation that the murder was committed during the course of a felony; the murder was committed for pecuniary gain; the murder was especially heinous, atrocious or cruel; and the murder was committed in a cold, calculated and premeditated manner without any pretense of moral justification (R. 2531-35). The court rejected the statutory mitigating factors of age and that the appellant was a relatively minor actor in the murder and the nonstatutory mitigating factor of being a caring parent (R. 2539-41). The judge gave very little weight to the appellant's "totally unremarkable" family background and some weight to his religious devotion (R. 2540-41). She discussed extensively the mitigating circumstance of Denise Davidson's life sentence, concluding that it was entitled to a modest amount of weight (R. 2537-39, 2541-42). Ultimately, Gordon was sentenced to death on November 16,

1995.

Appellate Proceedings:

Gordon's judgment and death sentence were affirmed by this Court in January of 1998. Gordon v. State, 704 So. 2d 107, 118 (Fla. 1997). Gordon did not file a Petition for Writ of Certiorari in the United State Supreme Court.

Post-conviction Proceedings:

On February 18, 1999, Gordon filed a Motion for Post Conviction Relief pursuant to Fla.R.Crim.P 3.850 and 3.851. (PC-R I/1-20). On March 11, 1999, the trial court entered an order requiring the State to show cause why the relief requested by Gordon should not be granted. (PC-R I/31). The State filed its Response to Order to Show Cause on May 24, 1999. (PC-R I/32-200).

A hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), was held on August 9, 1999. Subsequently, on March 23, 2000, the trial court entered an Order granting, in part, and denying, in part, an evidentiary hearing. The hearing was limited to "...issues 3, 4, as it pertains to the DNA evidence, 5 and 9." All other claims were denied; with the trial judge leaving the explanation for said denial to the Order following an evidentiary hearing. (PC-R III/411-412).

The evidentiary hearing took place on February 15-16, 2001. Written closing arguments were received on March 13, April 5, and May 2, 2001. (PC-R III/413-436). The Order Denying Defendant's Motion for Post Conviction Relief was filed on April 20, 2002. (PC-R III/437-488). A Notice of Appeal was filed May 8, 2002. (PC-R III/489). This appeal ensued.

STATEMENT OF FACTS

Trial:

In its opinion affirming Gordon's conviction and death sentence, this Court set forth the salient facts as follows:

> Dr. Louis A. Davidson and his wife Denise were in the midst of a bitter custody battle and divorce. Both were engaged to other people at the time of Dr. Davidson's murder; Mrs. Davidson was engaged to another codefendant, Leonardo Cisneros.
>
> Mrs. Davidson and Cisneros arranged for McDonald and Gordon to kill her husband. To that end, they made several trips from Miami to Tampa in late December 1993 and early January 1994, where several witnesses, including Gordon's friend Clyde Bethel, (FN2)
>
> > (FN2.) Bethel was one of at least five people who drove Gordon and McDonald from Miami to Tampa in the weeks and months preceding the murder. The other individuals who, along with Bethel, testified to these trips at trial were Patricia Vega, Maurice Dixon, Brenda King, and Claudia Williams.
>
> testified that they met Cisneros, met with a lady about some money they were owed, drove past a hospital to see an emergency room, and went to the Thunder Bay Apartments to see about renting an apartment.
>
> On January 24, 1994, McDonald and Gordon hired Susan Shore to drive them from Miami to Tampa so that they could visit a friend and "pick up a piece of paper." (FN3)
>
> > (FN3.) The "piece of paper" may have been letters from Mrs. Davidson to Dr. Davidson or vice versa. A fellow employee of Mrs. Davidson's, Pam Willis, spent the night of January 25, 1994, at Mrs. Davidson's home.

> That was the same day Dr. Davidson was murdered. While at Mrs. Davidson's house, Willis smelled smoke and saw burnt ashes in the bathroom. The next day, Mrs. Davidson told Willis "that that was old letters that she didn't want anybody to read from the doctor that she had burned."

Upon arriving in Tampa, they met with a lady Shore later identified as Mrs. Davidson and someone named "Carlos," whom Shore later identified as Cisneros. After McDonald, Gordon, and Shore checked into a Days Inn, Cisneros came by and left with McDonald and Gordon. McDonald and Gordon returned later than night.

Early the next morning, January 25, 1994, they drove to Thunderbay Apartments in St. Petersburg to "where their friend lived," presumably Dr. Davidson. While they waited for Dr. Davidson to return from his night shift at Bayfront Hospital, McDonald got out of the car and said he was going jogging. Shore and Gordon played catch with a cricket ball on the apartment grounds. When Dr. Davidson pulled into the parking lot a short time later, Gordon told Shore, "Here is my friend. You can go sit in the car now." While Gordon went over and talked to Dr. Davidson, Shore sat in the car and read a newspaper. Shore testified that Davidson and Gordon then walked toward Davidson's apartment, with Gordon following Davidson. She last saw Davidson and Gordon going underneath the stairwell immediately adjacent to Davidson's apartment door. Gordon came back to the car about twenty to twenty-five minutes later; McDonald returned five to ten minutes after Gordon. McDonald told Gordon that "he had the piece of paper." McDonald patted his stomach and Shore heard something crinkle.

Shore testified that as they drove back to the hotel, McDonald called "Carlos" on his cell phone and said "he had it." "Carlos" came to the hotel, talked with McDonald and Gordon, and then left. "Carlos" later returned with the lady they had met with upon their arrival in Tampa. Shore identified a picture of Mrs. Davidson as the lady she had seen. A short time

later, Shore, McDonald, and Gordon drove back to Miami.

Dr. Davidson's body was discovered later that day by his fiancee, Patricia Deninno. She found him blindfolded, bound, gagged, and hogtied, lying face down in a bathtub full of bloody water. He was tied with a vacuum cleaner cord and a cashmere belt. Pieces of towel were wrapped around his head and used as a gag. The toilet bowl had been broken off its foundation and the resulting water leak had partially flooded the apartment. Blood was spattered on the bathroom walls and the apartment had been ransacked. There was no indication of forced entry. Shoe prints were found on a tiled floor in the apartment. Dr. Davidson's watch, a camera, and a money clip with several hundred dollars were missing. Although the apartment had been ransacked, $19,300 in cash and some credit cards remained.

The police placed Mrs. Davidson under surveillance shortly after Dr. Davidson's murder. Using the name "Pauline White," Mrs. Davidson subsequently made numerous trips to Western Union. Evidence was later presented that twenty-one money transfers were made, both before (FN4)

> (FN4.) Mrs. Davidson began sending Gordon and McDonald money as early as August 1993.

and after the murder, with nineteen going to Gordon. (FN5)

> (FN5.) At oral argument, the State estimated that the amount transferred from Mrs. Davidson to Gordon and McDonald exceeded $15,000. On rebuttal, Gordon's counsel did not challenge that figure. The State further noted that Gordon and McDonald also received an undisclosed amount of money on each of the four trips they made from Miami to Tampa.

McDonald's girlfriend, Carol Cason, picked up two of the transfers at his request.

The police also obtained phone records which showed numerous contacts among the codefendants both prior to and after the murder. The records showed that on the day of the murder, Mrs. Davidson called McDonald's beeper fifty times during a period of two and a half hours. Mrs. Davidson also bought a cell phone and gave it to McDonald and Gordon, which was then used repeatedly to make hang-up calls to Dr. Davidson's home and place of work. Several Thunder Bay employees testified that McDonald and Gordon were in the management office on January 18, 1994, and received a copy of the floor plan to Dr. Davidson's apartment. Gordon's friend, Clyde Bethel, confirmed that McDonald and Gordon visited Dr. Davidson's apartment complex that day.

Physical evidence was also recovered from the Days Inn where McDonald, Gordon, and Shore spent the nights of January 24-25, 1994. A sweatshirt and a pair of tennis shoes were found in their room. The tennis shoes had the same sole pattern as the shoeprints found in Dr. Davidson's apartment. Flecks of human blood were found on the shoes, but the sample was too small to match. The sweatshirt contained fibers from Dr. Davidson's carpet and Deninno's cashmere belt, as well as hairs that matched McDonald's. Dr. Davidson's blood sample matched the DNA found in stains on the sweatshirt. Receipts confirmed that on the day before the murder, Denise Davidson had purchased a pair of sneakers, a gray sweatshirt, and a purple sweatshirt.

The associate medical examiner, Dr. Marie Hansen, testified that Dr. Davidson had bruises on his face and shoulders, three broken ribs, and multiple lacerations on the back of his scalp, probably caused by a blunt object. The cause of death was drowning. The medical examiner could not determine whether Dr. Davidson was conscious when he died, saying it was possible that he was knocked unconscious by the first blow to his head. Dr. Hansen also testified that from the multiple bindings on his wrists, Dr. Davidson had probably freed one of his wrists during the altercation, only to be re-tied with the belt.

After a jury trial, both defendants were found guilty of first-degree murder. During the penalty

phase, Gordon's sister, Norma Rose, testified that he was a concerned and loving brother and a kind and loving parent to his children. Gordon's mother, Estella Stuckey, testified that they had a good relationship and that Gordon was a kind and loving son. Finally, Gordon's pastor testified that he attended his church regularly from late 1991 to late 1992 and led some home Bible studies. The State did not present any further evidence during the penalty phase.

The jury recommended death sentences for both defendants by a vote of nine to three. Before Gordon's sentencing, co-defendant Denise Davidson was convicted in a separate trial of first-degree murder, received a life recommendation from the jury, and was sentenced to life imprisonment. (FN6)

> (FN6.) Cisneros remains a fugitive, while Shore had the charges against her reduced to accessory after the fact, for which she received probation after agreeing to testify for the State.

The trial judge held two Spencer (footnote omitted) hearings prior to sentencing Gordon to death on November 16, 1995. (footnote omitted).

Gordon v. State, 704 So. 2d 731, 108-110.

Evidentiary Hearing:

Appellee generally accepts and adopts Defendant's Statement of Facts resulting from the evidentiary hearing held below, with the following notable exception.

The State objects to Defendant's characterization of the colloquy which took place between Judge Schaeffer and Attorney Schwartzberg during the latter's testimony at the evidentiary hearing. (IB 17). As such, the following facts are offered for this Court's consideration.

Judge Schaeffer inquired of Attorney Schwartzberg concerning Defendant Gordon's understanding of his waiver of his alibi defense. Schwartzberg was present in the trial court the day that Gordon withdrew his alibi defense. (PC-R VI/803). The withdrawal of the alibi defense left no basis for Schwartzberg's motion to sever. (PC-R VI/804).

Both McDonald and Gordon had control over what they wanted done. Their lawyers informed them they had some decisions they could make and there were other decisions for the lawyers to make. (PC-R VI/804).

It was Gordon's decision, not Attorney Love's, to withdraw the alibi defense. Schwartzberg had no question that Gordon understood that he withdrew the defense, that the trial would be severed if he pursued the alibi defense, and that the alibi

defense was not going to fly. (PC-R VI/805).

Schwartzberg had tried 62 first degree murder cases, and three to four hundred criminal cases. In all that time, he had seen only two alibi defenses work, and did not consider that to be a strong defense. Moreover, an alibi from a girlfriend or sister was weaker than one provided by strangers. This is especially true where the sister initially told police she did not know where the defendant was or when she had seen him last, but then later recalled the alibi. (PC-R VI/806).

Schwartzberg was also concerned that Shore would testify she waited in the car while McDonald and Gordon went in to the victim's apartment on the day of the murder, and that Clyde Bethel, another friend of theirs, had scouted out the place with them. (PC-R VI/807). Based on this information, as well as the cell phone records, Schwartzberg sought a severance when confronted with the possible alibi defense. Schwartzberg also thought he had to concede his client was present at the victim's apartment in view of this testimony. (PC-R VI/809). And, both Schwartzberg and Love told Gordon what they thought of his alibi. (PC-R VI/808).

In his dealings with Gordon, Schwartzberg found Gordon understood English and was a bright guy, as was McDonald. (PC-R VI/808). In fact, Schwartzberg never doubted that Gordon's

responses in court regarding withdrawal of his alibi defense were consistent with the decisions the lawyers had made. (PC-R VI/808).

As to the DNA issue, in order to pursue a defense involving the unknown DNA, Schwartzberg could not challenge the DNA match to his client. Therefore, the decision not to seek to suppress the DNA was a strategic decision of both Schwartzberg and Love. (PC-R VI/809-811).

Both Gordon and McDonald wanted to get to trial. Any severance would have delayed their trials. (PC-R VI/812). Based on the information that he would have his trial delayed if he pursued the alibi, Gordon knowingly waived his alibi. (PC-R VI/813). This decision was made after discussion with Schwartzberg, Love and McDonald, and that was confirmed in court. (PC-R VI/813-814).

PRELIMINARY STATEMENT

Standard of Review

Defendant seeks review of the denial of his motion for postconviction relief. His argument in support of collateral relief relies on twelve claims of ineffective assistance of counsel. In reviewing these claims, this Court must apply the following standard of review:

> In order to establish an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient and that there is a reasonable probability that but for the deficiency, the outcome would have been different. See Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Stephens v. State, 748 So. 2d 1028 (Fla. 1999), this Court established the standard of review for ineffective assistance of counsel claims:
>
> > Ineffectiveness is not a question of "basic, primary, or historical fact." Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement ... both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.
>
> [Strickland, 466 U.S.] at 698[, 104 S.Ct. 2052] (citations omitted) (emphasis supplied).

See Huff v. State, 762 So. 2d 476, 480 (Fla. 2000)(emphasis supplied). Thus, ineffective assistance of counsel claims

present a mixed question of law and fact subject to plenary review based on the Strickland test. This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. See Rolling v. State, 825 So. 2d 293, 296 (Fla. 2000), citing Stephens, 748 So. 2d 1028, 1033.

To elaborate, the Strickland test requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569. A proper

analysis requires that counsel's performance be reviewed with a spirit of deference; there is a strong presumption that counsel's conduct was reasonable. 466 U.S. at 689.

This Court discussed these standards in Blanco v. State, 507 So. 2d 1377, 1381 (Fla. 1987):

> A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omissions and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on the claimant to show otherwise. Second, the claimant must show the inadequate performance actually had an adverse affect so severe that there is a reasonable probability the results of the proceedings would have been different but for the inadequate performance.

It is this heavy burden which Defendant must meet in seeking collateral relief based upon claims of ineffective assistance of counsel.

Statement Regarding Procedural Bar

Defendant raises a number of claims which are procedurally barred as claims which could have or should have been raised on

direct appeal and are, therefore, not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994); Johnson v. State, 593 So. 2d 206 (Fla.), cert. denied, 506 U.S. 839 (1992); Raulerson v. State, 420 So. 2d 517 (Fla. 1982); Christopher v. State, 416 So. 2d 450 (Fla. 1982); Alvord v. State, 396 So. 2d 194 (Fla. 1981); Meeks v. State, 382 So. 2d 673 (Fla. 1980). An express finding by this Court of a procedural bar is also important so that any federal courts asked to consider the defendant's claims in the future will be able to discern the parameters of their federal habeas review. See Harris v. Reed, 489 U.S. 255 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977).

To counter the procedural bar to some of these issues, Defendant has couched his claims in terms of ineffective assistance of counsel in failing to preserve or raise those claims. This Court has repeatedly held that issues which could have been, should have been and/or were raised on direct are procedurally barred in the post-conviction proceeding and that "allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." Thompson v. State, 759 So. 2d 650, 663-64 (Fla. 2000) (quoting, Teffeteller v. Dugger, 734 So. 2d

1009, 1023 (Fla. 1999)).

SUMMARY OF ARGUMENT

The sum total of Defendant's collateral attack on his conviction and sentence for the murder of Dr. Louis Davidson amounts to mere second guessing of the trial strategy employed by defense attorneys Schwartzberg and Love. Such second guessing cannot justify a new trial. Judge Schaeffer's Order Denying Postconviction Relief must be affirmed.

Taking each issue in the order presented in Defendant's Initial Brief, first, summary denial of the claim asserting ineffective assistance of counsel with regard to jury selection was appropriate. Trial counsel did object to the all white venire and this issue was raised on direct appeal which renders this claim procedurally barred. Substantively, this claim also fails where Defendant failed to make a prima facie showing that a particular race is systematically excluded from venires of a particular county.

Second, trial counsel was not ineffective for failing to move to exclude or suppress the testimony of Susan Shore or for failing to impeach her. The trial court properly denied this claim summarily where Defendant provided no legal or factual basis for suppressing Shore's testimony. Additionally, Shore's relationship with the State was fully explored during her testimony. Therefore, counsel cannot be deemed ineffective for

not adequately impeaching Shore where the jury was properly informed on the topic.

Next, after the evidentiary hearing, the trial court properly denied the claim of ineffective assistance dealing with the failure of counsel to pursue an alibi defense. Defense counsel testified to the strategy he elected to pursue and to the fact that Defendant's various alibis were wholly unbelievable and not supported by any credible testimony. Moreover, the record showed that Defendant knowingly and intelligently agreed to waiving any alibi defense.

After the hearing, the trial court also properly denied the claim dealing with defense counsels' failure to seek a Frye hearing on the admissibility of DNA evidence showing the victim's and an unknown person's DNA on codefendant McDonald's shirt. Both defense attorneys testified that the DNA testing in this case supported their defense theory that Gordon and McDonald were framed for the murder after merely taking a document from the victim's apartment. Additionally, the trial court pointed out that a Frye hearing would have been futile.

The evidentiary hearing testimony also involved the fifth claim of ineffective assistance asserting counsel failed to move to sever Defendant's trial from codefendant McDonald's. Defendant withdrew his alibi defense in open court leaving

Defendant with no grounds to sever. Defendant also refused the idea of any continuances and severance would have led to a delay in his trial against his wishes. Under these circumstances, this claim was properly denied.

In Issue VI, summary denial was appropriate. The testimony of Mary Anderson and Detective Celona regarding the location of codefendant Denise Davidson's cell phone during certain calls did not require expert assistance. Thus, the claim was properly denied.

For Issue VII, summary denial was warranted for the claim that counsel was ineffective for failing to seek a separate penalty phase jury. Defendant provides no legal argument in support of this argument. Rather, his claim that other alibis, such as mere presence or lesser participation, would have been available in a separate penalty phase is wholly discounted by Defendant's own testimony at the evidentiary hearing that he was in Miami at the time of the murder.

In Issue VIII, no prosecutorial misconduct supported a claim of ineffective assistance in this case. Summary denial was proper where this Court ruled that the challenged prosecutorial closing remarks were not fundamental error . See McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999).

Following the evidentiary hearing, Issue IX, stating that

counsel failed to thoroughly investigate and prepare, was properly denied. The lower court's Order detailed the preparation of defense counsel. On that basis, the trial court determined that Defendant received effective assistance of counsel at trial.

In Issue X, Defendant, once again, challenges counsel's performance with regard to the DNA evidence. While claiming error stemming from the destruction of the sample during the DNA testing, Defendant has failed to demonstrate bad faith on the State's part. Thus, no prejudice can be shown, and relief was properly denied.

Issue XI dealt with an alleged violation of the Vienna Convention because Defendant is a Jamaican citizen. Summary denial was appropriate.

Finally, in Issue XII, no relief is warranted on the claim that the government conspired to present false testimony against the Defendant. Summary denial was appropriate.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT APPROPRIATELY SUMMARILY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN JURY SELECTION. (AS RESTATED BY APPELLEE).

Initially, Defendant complains that the trial court should have held a hearing on his claim that counsel was ineffective in handling an objection to the racial makeup of the venire. However, Defendant candidly notes that trial counsel did object to the all white venire below, (T 27-28), and that this issue was raised and rejected on direct appeal to this Court. See Gordon v. State, 704 So. 2d 107, 110-112 (Fla. 1997). As such, this claim was properly summarily denied. See Hardwick v. Dugger, 648 So. 2d 100, 103 (Fla. 1994)(Issues raised on direct appeal are procedurally barred and cannot be raised in a postconviction motion).

Moreover, as to the substance of this claim, the trial court properly determined that the Defendant had failed to carry his burden to make a prima facie case in his postconviction motion. As noted in the lower court's Order, "The Florida Supreme Court permits a summary denial of this claim when the defendant fails to make a prima facie showing in his motion that "blacks are systematically excluded from venires" of a particular county. Robinson v. State, 707 So. 2d 688, 699 (Fla. 1998)." (PC-R

III/439).

In resolving this issue on direct appeal, this Court discussed the requirements necessary for obtaining relief.

> The United States Supreme Court has set clear guidelines to ensure that juries are drawn from a fair cross section of society. In Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 702, 42 L.Ed.2d 690 (1975), the Court held that "petit juries must be drawn from a source fairly representative of the community [although] we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." To that end, while defendants are not entitled to a particular jury composition, "jury wheels, pools of names, panels, or venires from which juries are drawn *must not systematically exclude distinctive groups in the community* and thereby fail to be reasonably representative thereof." Id., at 538, 95 S.Ct. at 702 (emphasis added). Accordingly, the Court invalidated those sections of Louisiana's constitution and criminal procedure code which precluded women from serving on juries unless they expressly so requested in writing.
>
> Several years later under slightly different facts, the Court invalidated a Missouri statute which provided an automatic exemption for any woman that asked not to serve on jury duty. Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). To give effect to Taylor's fair cross-section requirement, the Court established a three-prong test for determining a prima facie violation thereof. Id., at 364, 99 S.Ct. at 668. The proponent must demonstrate:
>
> > (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) *that this underrepresentation is due*

> *to systematic exclusion of the group in the jury-selection process*.

Id. (emphasis added). Since the Court in Taylor had already found that women "are sufficiently numerous and distinct from men," 419 U.S. at 531, 95 S.Ct. at 698, Duren only needed to satisfy the last two prongs of the test. He did this by presenting statistical data which showed that women comprised over fifty percent of the relevant community but only approximately fifteen percent of the jury venires, Duren, 439 U.S. at 364-66, 99 S.Ct. at 668-69, and demonstrating that this large discrepancy "occurred not just occasionally, but in every weekly venire for a period of nearly a year." Id., at 366, 99 S.Ct. at 669. The Court concluded that this undisputed trend "manifestly indicates that the cause of the underrepresentation was systematic--that is, inherent in the particular jury-selection process utilized." Id. Thus the Court instituted the procedures for establishing a prima facie violation of the Sixth Amendment's fair cross-section requirement. [footnote omitted]

In this case, there is no evidence in the record that Gordon followed these procedures in challenging the venire. Indeed, beyond some general objections about the venire's composition, the issue was only briefly raised and then without supporting data. Since counsel was presumably aware of the fair cross-section requirement and the Duren test for establishing a prima facie violation, it made no sense to claim, off the cuff, that there was an unrepresentative venire if, first, counsel did not have any supporting data and, second, counsel was aware of the random method from which venires were generated in his county. (FN12)

> (FN12.) Gordon does not explain how the trial judge was supposed to conclude, under Duren, that his venire was not a fair cross-section of the relevant community, since he did not provide her with any data from which to make such an informed decision.

Counsel made no attempt to comply with the Duren procedures for substantiating a fair cross-section violation, not to mention Florida Rule of Criminal Procedure 3.290, which requires that "[a] challenge to the [jury] panel shall be in writing and *shall specify the facts constituting the ground of the challenge*." (Emphasis added.)

Instead, after the venire entered the courtroom, McDonald's counsel simply commented to the court that "despite the fact that both of our clients are black, there are no blacks on the jury panel." Counsel objected that the venire did not represent "a fair cross section of Pinellas County." After Gordon's counsel joined in the objection, the trial judge noted that:

Counsel on both sides are well aware that the jurors are selected at random in Pinellas County by computer and they are likewise selected at random as a panel downstairs. I'm sure there are some black ones downstairs, but if I started plucking them out, that would be just as wrong. In other words, I have no reason to doubt that these folks were picked totally at random by the computer selection and at this point in time, I'm sure we may be adding to the group, so your motion is noted. It's overruled because there's nothing I can do about it. But as I said, if there's any change, why I will make sure that the record reflects that there are some blacks to be added to the panel. [footnote omitted]. (Emphasis added.) Neither McDonald's nor Gordon's counsel challenged the factual basis of the trial judge's ruling that the venire was randomly selected by computer, nor did either of them follow any of the procedures established in Duren or required by Florida Rule of Criminal Procedure 3.290 for substantiating a prima facie violation of the fair cross-section requirement.

Similarly, on appeal, Gordon does not challenge the process from which the venire is generated in Pinellas County. Indeed, Gordon acknowledges that the venire was selected randomly when he suggests in his brief that "[i]f there were no blacks there that day, the court could have reconvened the next day and *used*

> *the same random procedure* it used to get these first fifty." (Emphasis added.)
>
> Accordingly, we agree with the State that our decision in Johnson v. State, 660 So. 2d 648 (Fla. 1995), is dispositive of this issue. [footnote omitted]. In Johnson, the defendant claimed that he was not tried by a representative jury since, in his four separate cases, only two out of one hundred sixty venire members were black. We dismissed Johnson's claim, finding no error since it was unrebutted that the venire was randomly generated by computer. Id. at 661. Since that is precisely the situation here, we find no error in the trial court's denial of Gordon's motion. Therefore, we decline to employ a Duren analysis since Gordon made no factual showing to the trial court from which such an analysis could be made.

See Gordon, 704 So. 2d 107, 110-112

Given that Defendant was fully informed by this Court as to what would be necessary to proceed on this claim, the trial court properly denied this claim in postconviction where Defendant failed to meet these requirements. As explained in the trial court's Order denying postconviction relief,

> The only document collateral counsel added to appellate counsel's argument was a statistical showing that based on the 1990 population census count, the make-up of Pinellas County in 1990 was 7.73% black. Collateral counsel made no effort to find out what the make-up of the entire venire was on the date the Gordon jury was chosen. Collateral counsel made no effort to try to show that what this court said at Gordon's trial, and again at the *Huff* hearing was untrue. The truth, as believed by this court, then and now, is that Pinellas County jurors are randomly selected by computer from the entire available pool of jurors, probably registered voters at the time of Gordon's trial in 1995. A sufficient number of

> randomly selected jurors are summoned to accommodate seven circuit judges who handle criminal felony trials and six county judges who handle criminal misdemeanor trials in Pinellas County on any given trial day. When a judge requests a particular number of jurors for a given trial, the jury coordinator has the computer randomly select the number of jurors requested by the judge from the entire venire in attendance. These randomly selected jurors are then sent to the individual judge's courtroom to begin the voir dire process. Since this is the way jurors are selected in Pinellas County, there can be no systematic exclusion of black people from Pinellas County juries. See *Gordon v. State*, 704 So. 2d 107, 112 (Fla. 1997); *Johnson v. State*, 660 So. 2d 648, 661 (Fla. 1995).
>
> Even though trial counsel may have been ineffective in not following Florida Rule of Criminal Procedure 3.290, at the time he raised this issue at trial, he could not have satisfied the requisite *Duren* procedures any more than collateral counsel has. *Duren v. Missouri*, 439 U.S. 357 (1979). Therefore, no relief would have been afforded at trial had the Rule been complied with, and no collateral relief can be afforded either. Simply put, a prima facie showing of the systematic exclusion of black jurors must be shown to warrant an evidentiary hearing on this issue, and then proof of a systematic exclusion must be proved at the evidentiary hearing to warrant a new trial with a different, and properly constituted venire. No prima facie showing has been made, and summary denial is, therefore, appropriate. *Robinson v. State*, 707 So. 2d 688, 699 (Fla. 1998).

(PC-R III/439-440). See also Arbelaez v. State, 775 So. 2d 909, 913(Fla. 2000)(summary denial appropriate), citing Roberts v. State, 568 So. 2d 1255, 1259 (Fla. 1990) (stating that claim of ineffective assistance of counsel will warrant an evidentiary hearing only where the defendant alleges "specific facts which

are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant").

ISSUE II

WHETHER THE TRIAL COURT APPROPRIATELY SUMMARILY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILURE TO MOVE TO EXCLUDE OR SUPPRESS THE TESTIMONY OF SUSAN SHORE. (AS RESTATED BY APPELLEE).

While Defendant argues that trial counsel was ineffective in failing to suppress the testimony of Susan Shore, he provides no legal or factual basis for doing so. Defendant simply argues that the State did not have a strong case against Shore as a principal in this murder.

More importantly, in the motion filed below Defendant did not raise the arguments now set forth on appeal. The lower court's order summarized the Defendant's position below as follows:

> In his Motion, 6-8, the defendant suggests that trial counsel was ineffective for his failure to file and argue a Motion to Exclude and/or Suppress the testimony of state's witness, and indicted co-defendant, Susan Shore. Collateral counsel suggests that the prosecutor violated Federal bribery laws and Rule 4-3.4 of the Rules Regulating the Florida Bar by making an agreement with witness Susan Shore to reduce her charges in exchange for her truthful testimony. For his proposition, he cited in the defendant's motion two Federal cases that were not in existence at the time and *U.S. v. Lowery*, Case No. 97-368-CR-ZLOCH (USDC So. D. Fla. August, 1998). Both of these cases had been reversed by the time of the *Huff* hearing. *U.S. v. Singleton*, 165 F.3d 1297 (10th Cir. 1999); *U.S. v. Lowery*, 166 F.3d 1119 (11th Cir. 1999).

(PC-R III/441). These arguments were rejected by the lower

court for several reasons.

First, where Singleton and Lowery were reversed, trial counsel cannot be found ineffective for failure to anticipate an appellate decision not in existence. Bottoson v. Singletary, 685 So. 2d 1302, 1304 (Fla. 1997). (PC-R III/441). Secondly, the State did not violate any law or ethical provision where the State "simply chose the least culpable defendant and entered into a plea bargain with her in exchange for her cooperation by testifying truthfully against other co-defendants." (PC-R III/441). The Florida Supreme Court recognizes both the right and necessity of this common practice. Hunt v. State, 613 So. 2d 893 (Fla. 1992); State v. Benitez, 395 So. 2d 514 (Fla. 1981). See also Kight v. State, 784 So. 2d 396 (Fla. 2001)(appropriate to plea co-defendant to lesser as part of plea agreement where co-defendant gave names of witnesses against defendant to State).

Thus, the trial court concluded summary denial was appropriate where "[t]here was no basis at the time of the trial, and there is none now, that would have sustained trial counsel's motion to suppress/exclude Susan Shore's testimony in Mr. Gordon's trial. Trial counsel is not required to file futile motions." (PC-R III/442).

In comparison, the arguments now raised by Defendant on

appeal are different than those set forth below. Here, Defendant makes no mention of any illegal conduct on the part of the State with respect to Shore's plea deal. Rather, Defendant now argues trial counsel was ineffective for failing to sufficiently challenge Shore's credibility. Where this issue was not specifically raised in the lower court, it is barred from consideration here. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

Substantively, this claim is also without merit. Initially, on direct examination by the State, Shore revealed she had also been charged with first degree murder along with the other codefendants. (T1617-1618). At the time of her trial testimony, the State had offered to allow Shore to plea to the lesser included offense of accessory to murder, but she had not decided whether to accept the plea because she continued to maintain her innocence. (T1618). She had been incarcerated for ten months and was on house arrest at the time of Gordon's trial. (T1616-1617). She also explained that she understood that a conviction would lead to her deportation from the United States. (T1619).

On cross-examination, Shore admitted that she knew she had been charged with first degree murder prior to fleeing to Jamaica. (T1623). She also understood the penalty for first

degree murder in Florida would be either twenty five years in prison or the electric chair. (T1623-1624). Shore further testified that she was offered a plea deal to the lesser of accessory and was released from prison to house arrest. However, she claimed not to know whether her cooperation with authorities led to her release, but she admitted to cooperating and agreeing to testify in court. (T1626-1627).

Consequently, Shore's relationship with the State was fully explored during her testimony. Therefore, counsel cannot be deemed ineffective for not adequately impeaching Shore where the jury was properly informed on the topic.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILING TO PRESENT AN ALIBI. (AS RESTATED BY APPELLEE).

Next, Defendant challenges the denial of his claim of ineffective assistance based upon Attorney Love's decision not to pursue one of the three untenable alibis urged by the Defendant.[1] Following an evidentiary hearing on this matter, the trial court found no deficiency in counsel's performance where the alibi was not supported by the evidence and Defendant knowingly waived pursuit of an alibi.

Judge Schaeffer explained the facts leading up to Defendant's withdrawal of his alibi defense as follows:

> ...[T]rial counsel filed a Notice of Intent to Claim Alibi and listed the following witnesses in support of the defense: Flovia Patricka Tyrell, Robert Zelaya, and Scott Barnes. He [Defendant] states that these witnesses would have testified that at the time state witness Susan Shore testified Gordon was at the victim's apartment, he was in Miami, Florida and couldn't have been involved in the murder of Dr. Davidson.
>
> Defendant acknowledged that after he filed his notice that he would rely on an alibi as a defense, the co-defendant, Meryl McDonald filed a motion to sever his trial from Gordon's. At the hearing on McDonald's Motion to Sever, scheduled by the court on the morning the trial was to begin, Gordon

[1]It appears that Defendant has put forth at least three different alibis claiming he was in Miami at the time of the murder. Alternatively, he was either with Tyrell at the beach, at the dogtrack or getting her tires changed at Tire Kingdom.

> acknowledges he withdrew his defense of alibi. However, he says he did so on the advise of counsel, but without having been told by counsel that no physical evidence connected him to the scene. Motion, 8-9; HH. 27-40. This seems incongruous if, as the defendant claims, he was in Miami. If that were so, he would have known all along that there was no physical evidence connecting him to the scene of the crime.

(PC-R III/442-443).

Defendant pursued his assertion that he unknowingly waived his alibi defense at trial through the following evidentiary hearing testimony, as summarized in the trial court's Order:

> At the evidentiary hearing, the defendant called three witnesses, defendant's sister, Norma Rose, who was not listed on the defendant's list of alibi witnesses for trial, defendant's girlfriend and mother of his two children, Flovia Tyrell, who was listed on his list of witnesses to establish his alibi for trial, and the defendant testified as to his whereabouts on the day of the murder. He did not call Robert Zelaya, or Scott Barnes, two of the three witnesses whom he had listed on his alibi notice for his trial. (It appeared at the evidentiary hearing that Scott Barnes, Mr. Love's investigator, was listed in case the defendant wanted to pursue an alibi that he and Ms. Tyrell had been at the Tire Kingdom on the date of the murder. But this alibi did not pan out. It is still unknown to me who Robert Zelaya is. Perhaps he is someone from the horse track, where the defendant thought he might have been. This alibi did not pan out either.)
>
> The defendant's sister testified that the defendant and Ms. Tyrell arrived at her home in the afternoon between 3:00 p.m. and 4:00 p.m. and left between 7:00 p.m. and 8:00 p.m. They came to have dinner. EH. 134-135, 138. She concedes, however, she does not know that date of this dinner visit, but was told by Ms. Tyrell. EH. 135, 139. She stated she told Mr. Love this before the trial and at the trial. EH. 137, 139. On cross-examination, she admitted she

had talked to law enforcement about this case on several occasions. She states she told one of them, Detective Celona, the defendant had been with her " in the evening." EH. 145-147. However, during the state's case, they called Detective Noodwang, who had gone to see her shortly after the murder with Detective Celona. It was his testimony that although Ms. Rose did not think her brother could have committed a murder, she did not indicate he was with her, or at her house on the day of the murder. EH. 280-281, 284.

The fact that Ms. Rose does not know what date the defendant and Ms. Tyrell were at her house for dinner makes her ineffective as an alibi witness, as what she was told by Ms. Tyrell would be hearsay and inadmissible. Additionally, the fact that the detectives on the case visited with her soon after the murder, and she never indicated her brother had been at her house on the date of the murder would have been rebuttal impeachment testimony had the alibi defense been put on, and had this witness been called.

The defendant's girlfriend, Ms. Tyrell, testified the defendant picked her up on January 25, the day of the murder, between 9:30 a.m. - 10:00 a.m. They went to breakfast and then went to the beach. After a while, they came back to her house and then went by the defendant's sister's house in the afternoon or evening. They had dinner, and left about 8:30 in the evening. EH. 150-152. She says she talked to Mr. Love, the defendant's trial counsel, about defendant's alibi and produced a picture that was taken on the beach. EH. 152-154. She says it is a regular thing for her and defendant to go to the beach, but she didn't generally take pictures when they were at the beach EH. 154.

On cross-examination, Ms. Tyrell admitted she had been interviewed (she called it "terrorized") by various police officers about the case. EH. 155-156. She denied that she initially told the police that she did not know where the defendant was on the day of the murder, and that she didn't see him often, only when he occasionally stopped by to see their child. EH. 158. She didn't recall if she had ever stated that she and the defendant had gone to have her tires fixed on the date of the murder. EH. 160-161. She didn't recall discussing with the police a receipt from the

tire store that had a different date on it from the date of the murder. EH. 160, 161.

At the evidentiary hearing, Detective Noodwang testified. He indicated he had interviewed Ms. Tyrell soon after the murder on a minimum of three occasions. EH. 266. He indicated that during their first contact she was a little reluctant, but as they continued to meet, things got better and she actually invited him to come over "any time." EH. 269. The detective stated he asked this potential alibi witness if she knew of Gordon's whereabouts on the date of the murder and "she had no knowledge of his whereabouts. She couldn't even tell us the last time she had seen him." EH. 269-270. He said this is what she said on the first and second interview, the first being February 26, and the second being March 11. EH. 270-271, 273-274, 276. He further said Ms. Tyrell never told him that on the day of the murder, she was with Mr. Gordon. EH. 271.

On cross-examination, he wasn't certain if he asked the witness of the defendant's whereabouts at the first interview, EH. 274-275, 284-287, but he was certain he did inquire on the second interview. EH. 275-276, 287.

The detective put all the information he obtained from Ms. Tyrell in his police reports, and provided them to the state. EH. 269, 271.

Ms. Tyrell would have not have been an effective alibi witness. She had never told Detective Noodwang, even when asked, about the defendant being with her at the beach and his sister's house. Other detectives had been with Detective Noodwang and could have confirmed what he said, and what she did not say. EH. 275, 286. If the alibi defense had been put on, Detective Noodwang and the other detectives who had been present would have been called as rebuttal impeachment witnesses for the state. Additionally, the defendant, when he testified, agreed with Ms. Tyrell that they go to the beach often, but disagreed with her statement that she didn't generally take pictures when they went to the beach. He said that Ms. Tyrell "always takes pictures, everywhere"; "[W]e always, when we go to the beach, you Honor, right....Flo has a camera." EH. 224, 226. Thus, even the defendant contradicts Ms. Tyrell.

Robert Gordon was the last witness to testify at

the evidentiary hearing about his alibi. He said he was in Miami on the date of the murder, with "my children's mother." EH. 163, 178, 182, 202. He said he had picked up Ms. Tyrell about 9:45-10:00, and went and bought some Pampers for his young son. EH. 182. Then he went to a supermarket, and then to "some Jamaican restaurant." EH. 218. He appears to say they were at the beach. EH. 222-227, but he never mentions at the evidentiary hearing, nor apparently to his lawyer, since his sister was not listed as an alibi witness, that he was at his sister's having dinner.

What kind of a witness would Mr. Gordon have made in his own defense at his trial? To say that he would be a difficult witness for any lawyer to control on the stand would be an understatement. At the evidentiary hearing, he was often unresponsive, often rambling. One would have to read all his testimony, or a substantial part of it to see the frustration any lawyer, any court, and probably a jury would have with Mr. Gordon's style of testimony. EH. 162-229.

At the evidentiary hearing, he originally said he had never met Susan Shore, never had even talked to her, and that she was "lying" about him being at the Dr.'s apartment. EH. 166, 202, 205, 219. He later changed his testimony when it became apparent Mr. Schaub had a report from the British Consulate in Jamaica, which reported he had been there with Ms. Shore. EH. 219-220. He also agreed he had seen her at the racetrack in Miami, but maintains they were not friends, and "I had no dealings with her". EH. 220-221. He said he had never met and did not know co-defendants Denise Davidson or Leo Cisneros. EH.167, 205, 222. He said he was not with co-defendant Meryl McDonald on the date of the murder. EH. 167, but agrees he was with him "about two times" in Tampa. EH. 203. He said the testimony from Days Inn manager, Claire Dodd, who identified him as being at the Tampa Day's Inn hotel on the day of the murder and also on January 18, 1994 was "a lie". EH. 203-204. He said the neighbor of the victim, Jeanette Springer, who identified him as being outside the Thunderbay Apartments with Ms. Shore before Dr. Davidson arrived home on the day of the murder was "lying". EH. 204-205. Clyde Bethel testified at trial that he was asked and paid to come to Tampa on two occasions with Gordon and McDonald, and on both occasions, they all

three met with “Carlos”, whom he identified at trial as Leo Cisneros. At the evidentiary hearing, the defendant said Clyde Bethel never said it was he, only Mr. McDonald. EH. 206. Further, he said Patricia Vega, who testified at the trial that she came up to Pinellas County with Gordon and McDonald, dressed like a nurse, and was told to say she was Dr. Gordon’s assistant if anyone asked, hadn’t said that, and “I didn’t go anywhere with Ms. Vega.” EH. 206, and on and on EH. 207-212.

In essence, every piece of evidence that the state asked about at the evidentiary hearing that linked Mr. Gordon to this crime was untrue. He would have testified at trial and would have had to state to the jury that all this evidence, and much more he would have been asked about at trial, was not true, just as he did at the evidentiary hearing. And the defendant was clear at the evidentiary hearing that he wanted to testify and expected to testify and was quite angry when Mr. Love announced at the end of the state’s case that this would not happen, as he expected his alibi defense to be presented. EH. 173-174, 175, 177, 178, 182-185, 193, 196, 197, 198-199, 201-202.

The problem with defendant’s testimony is that it contradicts witness after witness who testified in the state’s case: Ms. Shore T. 1510-1663, Mr. Bethyl T. 1337-1414, Ms. Vega T. 1415-1469, Ms. Dodd T. 1070-1108, Ms. Springer, T. 587-620 and others he wasn’t asked about at the evidentiary hearing, but would have been asked about at trial, and would have had to deny what they said to support his alibi. He contradicts all of many witnesses who testified about the phone calls to and from a cell phone provided by Ms. Davidson to the defendants, and witnesses who testified about phone calls to a beeper provided by Ms. Vega to the defendants. He contradicts 19 of the money transfers from Ms. Davidson (who sent the money usually under the name of Pauline White) to Gordon, who signed for them in his own name, since identification had to be provided on the receiving end of a money transfer, and fingerprints of Gordon’s and Davidson’s found on some documents of transfer. His testimony, with all the contradictions, would have been before the jury. It would not have been a pretty sight.

(PC-R III/443-449).

While the trial court characterized the above testimony as problematic, at best, the more important question was whether Attorney Love's decision to abandon an alibi defense was a competent strategy to which Defendant knowingly and intelligently acquiesced. On that topic, the trial court concluded as follows.

> All of the above is pointed out to show why Mr. Love did not want to put on an alibi defense. As he stated numerous times at the evidentiary hearing, in his opinion, and everyone else's who was familiar with the case, the alibi defense had no chance of success. EH. 316, 319, 332, 335, 336-337, 341, 343-344, 345, 348, 354, 355, 397-398, 401, 453. Mr. Schwartzberg testified at the evidentiary hearing that he found the alibi defense so incredible, that he filed a motion to sever his client's trial from Gordon's trial which he intended to pursue until Gordon withdrew his alibi defense. EH. 294, 319, 324.
>
> While the above exercise was interesting to show the weakness of the alibi defense, and perhaps to show defendant's credibility problems should he have decided to testify, that is not the real issue. The real issue is did the defendant decide to abandon his alibi defense, after discussing the issue with his attorney(s). Mr. Love, the defendant's lead trial attorney, made it clear that the decision to put on an alibi defense was Gordon's, and that he continued to investigate the defense, even when he thought it was a doomed defense. He eventually filed the Notice of Intent to Claim Alibi at his client's insistence. He made it clear, also, that it was his client's decision to withdraw his alibi defense, and proceed to a joint trial with co-defendant McDonald, presenting a joint and compatible defense. Love testified that he and the defendant, and sometimes the co-defendant and his attorney, had strategy sessions, and ultimately, Gordon decided to waive the alibi defense. He made it

clear that if his client had not wanted to withdraw his defense, he would have proceeded with it at a separate trial, as McDonald had filed a Motion to Sever in the event Gordon insisted on going forward with his alibi defense. EH. 330-342, 343-348, 353-356, 397-400.

At the evidentiary hearing, the defendant testified regarding this. While collateral counsel tried valiantly to pursue this issue as claimed in his motion, that is that the defendant didn't know about all the physical evidence, and thus could not make a knowing, intelligent waiver, the defendant, while acknowledging the truth of that statement, when directly asked, continued to state that he did not believe he had withdrawn or waived his alibi defense, and was quite surprised, actually angry, when he heard Mr. Love announce that he was going to rest and not call any witnesses. He indicated he at all times wanted to testify and pursue this alibi defense, and did not waive it. He indicated there had been no strategy sessions where this was discussed. He stated when I discussed his waiver with him in open court before the beginning of trial, he did not understand what he (or I, apparently) was saying, because he wanted to testify and pursue his alibi at trial, and thought that was what was going to happen. In essence, his testimony was in complete conflict with his trial counsel. EH. 173-185, 188-200, 201-202, 464.

While often times this court has only the testimony of the defendant and his attorney in these post conviction motions, in this case there is other testimony and record evidence on this issue. At the evidentiary hearing, the state called Mr. Michael Schwartzberg, who had been the lead trial counsel appointed for co-defendant McDonald. Schwartzberg's testimony was consistent with Love's. EH. 292-295, 298-301, 309-312, 313-319, 323-325.

Additionally, as to the withdrawal of the alibi defense, and the subsequent withdrawal of the motion to sever, this court discussed this in open court with the defendant, in the presence of Mr. Love, Mr. Schwartzberg, and Mr. McDonald. T.3-6, attached as Exhibit B. There is no doubt in anyone's mind, except the defendant's, that he was doing exactly what had been discussed, and agreed to previously. EH. 319, 324-325, 400-402. Although the defendant says he

> didn't really understand, both Mr. Love and Mr. Schwartzberg thought the defendant to be intelligent, quite capable of understanding the English language, and being able to understand what he was doing when he agreed to withdraw the alibi defense. EH. 344-345, 319. This court also notes that during the course of the defendant's testimony at the evidentiary hearing, that while the defendant might be considered a difficult client to handle, in that he wants to go where he wants to go rather than answering the attorney's questions, he had no problems understanding the questions that were asked. See entire transcript of the defendant's evidentiary hearing testimony. EH. 16-228, 462-465.
>
> Finally, regarding Mr. Gordon's right to testify, his lawyer says they discussed this. EH. 348, and although Mr. Gordon denies the court made any inquiry about his testifying or not, EH. 201-202, the court clearly asked both Mr. McDonald and Mr. Gordon, outside the presence of the jury, if either one of them wanted to testify. Mr. Gordon, after acknowledging that he understood this was his decision, stated it was his desire not to testify. T. 1962-1965, attached as Exhibit C.
>
> In conclusion, the defendant has made no showing that counsel was ineffective for not putting on an alibi defense. First, it was not a good alibi, but more importantly, the defendant clearly waived his right to both testify and have alibi witnesses called in his defense. It was his decision. He made it, after good advice of counsel. He cannot now be heard to complain for his own decisions. This issue is denied.

(PC-R III/449-452)(emphasis supplied). See Sweet v. State, 810 So. 2d 854, 861 (Fla. 2002), citing Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000) (holding that counsel's strategic reason not to call alibi witness could not constitute deficient performance); Rose v. State, 675 So. 2d 567, 570 (Fla. 1996) (same).

Even assuming trial counsel was deficient, Defendant could not have been prejudiced by the failure to pursue an alibi which flew in the face of eyewitness testimony from numerous individuals placing Defendant at the victim's apartment on the date of the murder. As such, this issue was properly denied.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILING TO SEEK A FRYE HEARING ON THE ADMISSIBILITY OF DNA EVIDENCE. (AS RESTATED BY APPELLEE).

Here, Defendant merely second guesses the trial strategy adopted by Attorneys Love and Schwartzberg. Both defense attorneys testified at the evidentiary hearing that they made a strategic, informed decision not to challenge the DNA evidence which showed the victim's blood on co-defendant McDonald's shirt. Their theory was that Gordon and McDonald went to the scene to retrieve a document from the victim. After they left the scene, Leo Cisneros killed the victim and later planted the DNA evidence on McDonald's shirt. Given this defense theory, the DNA evidence was not an issue. In fact, the additional presence of unknown DNA on McDonald's shirt served to bolster their claim of a set up.

Nevertheless, Defendant now claims that counsel was ineffective for pursuing this strategy and not challenging whether the population genetics used in the statistical testimony was generally accepted in the scientific community. Again, this is mere second guessing of the strategy employed, and cannot serve as a basis for granting postconviction relief. See Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(standard

is not how current counsel would have proceeded in hindsight).

The trial court's order reflects the inadequacy of Defendant's position on this matter. First, had the defense attorneys sought a Frye hearing, the trial court would have ruled against them.

> Based on the totality of the experts' testimony, had they been called as experts in a *Frye* hearing, I would have found that the problem of ethnic substructure affecting the population frequency calculations, which had caused the *Vargus* court, *Vargus v. State*, 604 So. 2d 1139 (Fla. 1st DCA, 1994) to conclude that *Frye* could not be met in 1990 in a case involving a Puerto Rican defendant, had been sufficiently cleared up before Gordon's 1995 trial to admit Agent Vick's testimony. In other words, had Mr. Love requested a *Frye* hearing, and had the testimony before this court been what it was at the evidentiary hearing, I would have found that there was, in 1995, the time of Gordon's trial, general acceptance in the scientific community (forensic population genetics), to permit Agent Vick's DNA testimony, including his population frequency testimony. EH. 21-126. Accordingly, Gordon's counsel cannot be deemed ineffective for not pursuing a motion which would have been denied.

(PC-R III/453).

On appeal, Defendant only challenges the trial court's reliance on the State's expert testimony in reaching the conclusion that the population statistics met the Frye standard. Specifically, Defendant urges error because the trial court relied on only one biased expert opinion without referring to any Florida judicial opinions, or scientific or legal

publications. However, the trial court also heard the testimony of the defense expert who generally agreed with the State expert's opinion on the databases relevant to this specific case. (PC-R IV/615). Further, Defendant provides no opinions or publications of any kind in support of his current position. As such, the trial court's conclusion regarding the outcome of a Frye hearing on this matter is soundly based in the expert opinion presented at the evidentiary hearing.

Moreover, regardless of the likelihood of success of a challenge to the admissibility of the DNA evidence, the trial court additionally found no Strickland error based on this claim.

> However, this *Frye* analysis is not the only thing regarding this issue which causes this court to resolve it against the defendant.
>
> If is clear from the testimony of Mr. Love, and Mr. Schwartzberg, attorney for co-defendant McDonald, that they made a strategic choice that the small amount of blood on a sweatshirt that may have been worn by Mr. McDonald, or as also contended by the defense, planted at the motel room by co-defendant Cisneros, whom the defense told the jury may have been the actual killer, was more helpful to their case than harmful. The reasons for this strategic choice were several:
>
> 1. McDonald and Gordon were placed on the grounds of the victim's apartment at or near the time of the murder by co-defendant Susan Shore, and Gordon was additionally placed on the grounds by a neighbor, Ms. Springer, who saw Shore and Gordon together on the grounds before the doctor came home. Others saw a white, blond woman, and a black man playing catch with a small ball (a cricket ball,

according to Shore), but did not get a good enough look to make a positive identification. Shore testified that when the doctor came home, Gordon went off with him toward his apartment, and was not seen again for approximately 20 minutes. It was the state's theory, corroborated by the medical examiner, that this is when the doctor was killed. Shore's testimony was very difficult to deny since it was corroborated on several fronts.

2. The circumstances leading up to the homicide showed the defendants, Gordon and McDonald, coming to the Tampa/St. Petersburg area and meeting with co-defendants Cisneros and Davidson on several occasions. Additionally, on one occasion, Gordon, McDonald, and state's witness, Clyde Bethyl, went to the Thunderbay Apartments to see an apartment exactly like the doctors, and passed themselves as father, son, and cousin who expected to purchase a similar unit. Not only did Bethyl testify to this, but Lisa Gubov, leasing agent of Thunderbay Apartments, confirmed this and identified Gordon and McDonald. A maintenance man also identified Gordon as being in the clubhouse. This ruse gave them an opportunity to see the actual layout of the doctor's apartment, and they left with a sight plan of the apartment grounds, and a floor plan of the doctor's unit. This testimony, and identification, corroborated Clyde Bethyl's, who was a friend of the defendants, and testified at the trial regarding this and many other incriminating events. It would have been difficult to deny or explain this testimony, except to not challenge it and infer they needed this information to get the paper they were sent to retrieve.

3. Susan Shore, co-defendant, testified when Gordon and McDonald returned to the car, presumably from the doctor's apartment, they were not out of breath, were not wet and had no blood on them that she could see, giving rise to the defense contention that they

went to the apartment to get a paper regarding the divorce/custody battle of the Davidson's. Furthermore, Shore testified that McDonald actually patted his stomach when he returned to the car, said "I've got it", or "I've got the piece of paper" and she heard a paper crinkle under his shirt where he rubbed it. This testimony fit quite nicely with the defense theory that they had gone to the victim's apartment to retrieve a piece of paper or a document that Mrs. Davidson wanted, and that they left the apartment after they got the piece of paper, and someone else came in after them and killed the doctor. The lawyers were able to effectively argue that if they had been involved in the murder, where signs of quite a struggle were apparent, that they would have been wet, had blood on them, and showed signs of a struggle, such as being out of breath, etc.

4. A friend and co-worker of Mrs. Davidson, Pam Willis, went to stay with her the night of the murder. She smelled smoke and asked what it was. At first she was told it was Leo smoking. However, later, she went to the bathroom and found ashes from paper on the floor, with a match nearby, and cleaning fluid. She asked Davidson the next day about his, and was told it was old letters from the doctor that she didn't want anyone to read. This fit in with the defense theory that it was the paper that Ms. Davison had wanted, and that the paper is what the defendants were hired to get.

5. Gordon was seen at the Days Inn hotel in Tampa on the day of the murder. He was identified at trial by Claire Dodd, manager of the Days Inn, who said a blond white woman had come in to rent a room on the day of the murder. Her records indicated Ms. Shore (not the name she used) had checked in at 11:02 a.m. There were no rooms cleaned at 11:00 a.m., but Ms. Shore said she would take a dirty one, as all she needed it for was to take a shower. About an hour after

Shore checked in, she saw a man she identified as Gordon in the lobby, with a man she had seen the week before at the hotel, again with Gordon, who had signed in on January 18th as R. Gordon. The reason she knew it was the same man she had seen with Gordon the week before was because the man had been wearing a purple striped jacket the week before when he was there. The jacket was quite distinctive, and was identified at trial as belonging to McDonald. It was taken into evidence by the police, and the jacket was identified at trial by Ms. Dodd, although she could not positively identify McDonald. The room rented to and identified by Susan Shore was the room where the sneakers and gray sweatshirt, purportedly purchased by Ms. Davidson the night before the murder, and worn by McDonald the day of the murder, were left behind, recovered by the police and ultimately checked for blood, hairs, and fibers. The shoes had specks of human blood on them, but the specks were too small to test. The sweatshirt had the victim's DNA on it. It also had hair that matched McDonald's hair on it, and fibers that matched the bathrobe and sash found at the Davidson murder sight. The sash had been used to bind the doctor. This evidence was documented by guest registrations, eye witness testimony, and expert testimony. The defendants couldn't say all this was untrue, so they had to fit it into their strategy that they were at the apartment to retrieve a document, and someone else, maybe Cisneros, had done the murder.

6. Finally, as the attorneys for the defense opined at the *Huff* hearing, there was another small amount of blood on the sweatshirt that could not be identified by DNA testing as being the victim's blood, and thus, with this unidentified blood, they could tell the jury it might be Cisneros' blood, whom they suggested was the actual killer and who planted the sweatshirt at the hotel when he came with Ms. Davidson to

> visit with Gordon and McDonald after the murder. This evidence, or lack thereof, allowed them to bolster their strategy that Gordon and McDonald had gone to get the paper, but had not murdered Davidson.

With all this incriminating evidence, and much more, including cell phone and beeper records that would seem to verify what was said by Shore and others, regarding Gordon's and McDonald's whereabouts, defense counsel Love and Schwartzberg did not think they could contend their clients were not at the doctor's apartment, or at the Days Inn motel, but that they went to the doctor's apartment for the purpose of getting a piece of paper, which they did, and that another or others, perhaps Cisneros, actually killed the doctor. They then delivered the piece of paper to Davidson and Cisneros when they came to the Days Inn motel. The sweatshirt, with a few unnoticed specks of blood, and not wet (according to Shore) when the murder scene was very wet from water, and very bloody, actually helped, rather than hurt, the theory of defense, according to Love and Schwartzberg. Thus, neither of them wanted a *Frye* hearing to exclude what they thought helped the defendants' case. EH. 296-298, 298-309, 312-313, 319-322, Schwartzbert's testimony; EH. 349-352, 367-375, 394-397, 402-404, 406-408, 445-446, Love's testimony.

While there appears to be some question as to when Mr. Love saw the actual DNA report, this is of no consequence, since he knew from when he took over the case that a minuscule amount of blood, identified as coming from the victim, was on a sweatshirt which might have been worn by McDonald, and that fibers from articles inside the victim's residence were found on the same sweatshirt, as well as McDonald's hair. He also knew about the unidentified DNA. EH. 385-387, 388-393, 406, 426-427, 430-434, 439-441, 442-444.

Further, the FBI report on DNA was dated June 22, 1994. EH. Exhibit 4, and the report on fibers and hairs were dated June 9, 1994. EH. Exhibit 6. The DNA report was furnished to the Public Defender's office as additional discovery on July 29, 1994. EH. Exhibit 8. Mr. Love said he saw Exhibits 4 and 6 early on during his representation. EH. 436-440.

Whether or not the defendant had actually seen the

> reports is unimportant. The defendant knew what the blood, hair and fiber evidence showed from the date of his bond hearing. August 22, 1994, attended by the defendant. EH. 466; Exhibit 9, introduced at the evidentiary hearing. And, of course, if, as he suggests, he was in Miami at the time of the murder, he didn't need to be told there was no evidence linking him to the murder scene. He would have known it.
>
> The best strategy to be put forth by the defense is a decision that should be left to trained trial lawyers, not defendants. Even so, the strategy here appears to have been discussed with Mr. Gordon, and agreed to by him. To the extent that the testimony of the defendant and Mr. Love is in conflict, this court finds Mr. Love's testimony more credible.
>
> For all the reasons cited herein, Issue IV is denied.

(PC-R III/454-459)(emphasis supplied).

Thus, the trial court ultimately concluded that the defense attorneys made an informed strategic decision to which the Defendant agreed. Consequently, no ineffective assistance of counsel occurred. See Strickland v. Washington, 466 U.S. 668, 690 (1984) ("[s]trategic choices made after thorough review of law and facts relevant to plausible options are virtually unchallengeable.").

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILING TO MOVE TO SEVER. (AS RESTATED BY APPELLEE).

Defendant argues that he is entitled to a new trial because his lawyer did not seek to sever his trial from that of his co-

defendant, McDonald. In support of this argument, Defendant claims that severance would have permitted Attorney Love to pursue other alibis, such as "...not guilty by mere presence, a lesser included based on other facts or a non-death sentence based upon a lesser degree of participation...." (IB 44). However, this argument ignores Defendant's evidentiary hearing testimony wherein he denied being in Pinellas County at the time of the murder and claimed to have been in Miami. (PC-R V/706-707). These proposed theories also essentially mirror the defense which was presented, i.e., that Gordon and McDonald merely took a document from the victim and Cisneros killed the victim after they had left the scene. As such, no prejudice has been demonstrated.

Moreover, as the trial court found

> ... the defendant had an opportunity to have a separate trial once co-defendant McDonald filed a Motion to Sever based on Gordon's Notice of Intent to Claim Alibi. After discussion with is attorney(s), and McDonald and his attorney(s), Gordon decided to forego his alibi defense and withdrew it in open court. At that point, an agreed upon joint defense was to be presented. The defendant had no grounds to sever.
>
> Even the defendant presented his severance issue as part of the alibi issue. Motion, 12: HH. 79-81; Defendant's closing argument, 4. Without an alibi defense, there is no doubt that a severance motion by Gordon would have been denied.
>
> There is one additional reason, not previously discussed, however, that should be added. Had the defendant filed a motion for severance, McDonald would have been tried first. Gordon had waived speedy

> trial; McDonald had not. Love had been appointed only two months before the joint trial; Schwartzberg had been appointed longer than Love. As Mr Love testified, Gordon had told Mr. Love "no continuances." EH. 393. This may have been another motivation for Gordon's withdrawal of his alibi, and McDonald's consequent withdrawal of his Motion to Sever. EH. 295-296, 314-315, 323-325, 393-394, 401-402. (These EH. pages are just the pages dealing with the defendant not wanting a continuance and not having any grounds to sever without an alibi defense.)
>
> Since Mr. Gordon decided not to pursue his alibi defense for whatever his reasons were, his severance claim fails, as it is part and parcel of the Alibi issue.
>
> As an aside, the defendant is wrong to think that if a severance had been granted, the scientific evidence against McDonald would not have been admitted in his separate trial. The state's theory was that Gordon and McDonald had killed the doctor at the behest of Ms. Davidson, and Mr. Cisneros. They were all principals in the crime. All the evidence the state had against McDonald would have been admissible against Gordon, if his trial had been severed, just like it was all admissible against Ms. Davidson in her severed trial. (Ms. Davidson's trial was severed at the last minute because her attorney was ill, and unable to do to trial on the date scheduled. The state elected to go ahead with the trial of McDonald and Gordon, and tried Ms. Davison separately. In her separate trial, she was convicted of first degree murder. Before the illness, this court had denied her Motion to Sever, finding she had no grounds to do so.)

(PC-R III/460-461). As such, this claim was properly denied.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILURE TO OBJECT TO ALLEGED OPINION TESTIMONY OFFERED BY MARY ANDERSON AND DETECTIVE MICHAEL CELONA CONCERNING THE LOCATION OF CO-DEFENDANT DENISE DAVIDSON'S CELL PHONE DURING CERTAIN CALLS. (AS RESTATED BY APPELLEE).

Defendant suggests trial counsel was ineffective because he failed to object to testimony concerning the location of co-defendant Denise Davidson's cell phone during calls made to Gordon and McDonald. The trial court's order summarized this claim as follows:

> ...[D]efendant objects to the testimony of Mary Anderson and that part of the testimony of Detective Michael Celona who testified at trial regarding roaming areas, location of cell sites regarding cellular phones, and the location of individuals placing certain cellular phone calls.... [2]
>
> The gist of this issue is that this type of testimony required expert witnesses, and none of the three witnesses had the expertise to render the testimony they did. He says counsel was ineffective for failing to make objections to exclude this testimony.
>
> The state's Response, 14-17, is very thorough as to exactly what each witness testified to, and gave explicit record pages to support their response.
>
> It is apparent that Ms. Anderson simply assisted the jury in understanding Cellular One's billing

[2]In the trial court below, Defendant also challenged Detective Noodwang's testimony identifying the voice on certain evidentiary tapes of phone calls as being that of co-defendant, Meryl McDonald. However, this argument has not been raised on appeal to this Court; and is, therefore, barred from consideration.

> system, and Ms. Davidson's cellular phone billing in particular. She had been employed at Cellular One for 8-1/2 years, and was the director of security. T. 1804. While she probably could have been qualified as an expert, based on her training and experience, she was not offered as an expert. Counsel can't be faulted for not making an objection that she was not qualified as an expert when the state would simply have qualified her. But her testimony was really not expert testimony, but merely that of a fact witness explaining a part of the evidence in the case, i.e. the phone records.
>
> Detective Celona used the maps of Cellular One phone companies' cell site areas for Tampa and St. Petersburg, which had been identified by Ms. Anderson. T. 1820-1821, and compared them with the records of the cellular phone calls made from the cellular phone Ms. Davidson gave to Gordon and McDonald to determine the location of the actual phone from December 27, 1993 thru January 25, 1994. T. 1860, 1869-1888. He also found the location of the phone for the twenty-five calls made on January 25, 1994, the day of the murder. T. 1888-1899. This is not expert testimony, but testimony anyone could have given based on the phone billings and the maps. He, as the lead detective in this case, merely assisted the jury to understand what the evidence showed. There was no objection counsel could have made that would have been sustained.

(PC-R III/462-463).

Given the factual findings of the trial court on this claim, Defendant is not entitled to relief. The challenged testimony was properly admitted without the need of expert assistance. See e.g., Alvarez v. State, 792 So. 2d 1255, 1257 (Fla. 3d DCA 2001)(detective testified that cell phone was used to call victim's number on day of robbery); and Mackerley v. State, 754 So. 2d 132, 134 (Fla. 4th DCA 2000)(FDLE agent testified

regarding phone records).

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILING TO SEEK A SEPARATE PENALTY PHASE JURY. (AS RESTATED BY APPELLEE).

Defendant provides no legal grounds to support the argument that counsel should have sought a separate penalty phase jury. Rather, Defendant simply states that the fact that he could have used various defenses, such as mere presence and lesser participation, would have confused the jury in the joint penalty phase. This statement ignores the testimony of Attorneys Love and Schwartzberg concerning the strategy they chose to present to the jury. This claim also ignores the fact that the Defendant took the stand at the evidentiary hearing and testified that he was in Miami at the time of the murder. Therefore, no factual basis exists to allow Defendant to pursue any other alibi. Under these circumstances, this claim was properly summarily denied.

The trial court agreed there was no merit to this claim, explaining its ruling as follows:

> In defendant's Motion, 14, he argues that trial counsel should have requested a separate penalty phase jury from that of co-defendant McDonald. At the *Huff* hearing, I challenged collateral counsel to point me to a case that said I would have had to grant such a request. He was unable to do so. HH. 91-92. As this court stated at the *Huff* hearing, if McDonald and/or

> Gordon had timely requested separate penalty phase juries, that request would have been denied. HH. 90-95. While there might be circumstances to grant co-defendants separate penalty phase juries, there was no reason to do so in this case, and I would not have done so, even if requested. Counsel can't be faulted for not filing futile motions.
>
> Additionally, while the Florida Supreme Court did state that Gordon's identical request on appeal was procedurally barred, before they began that discussion, they stated that his request for not only a separate penalty phase jury, but also a separate jury for each defendant, was "without merit." *Gordon v. State*, 704 So. 2d 107, 113 (Fla. 1997), emphasis mine.
>
> This issue is summarily denied.

(PC-R III/464).

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILING TO SEEK A MISTRIAL BASED ON ALLEGED PROSECUTORIAL MISCONDUCT DURING CLOSING. (AS RESTATED BY APPELLEE).

Defendant argues that summary denial was inappropriate for his claim that the State argued facts not in evidence in closing. However, the trial court ruled that no objection would have been sustained. Moreover, Defendant candidly admits that trial counsel did object to the State's closing, (PP. 78), albeit unsuccessfully. Thus, no deficient performance or prejudice can be demonstrated on these facts.

The trial court summarized the context of all parties closing arguments as follows:

> In defendant's Motion, 15, he says trial counsel was ineffective for failure to object and ask for a mistrial during the state's closing argument, wherein Mr. Fred Schaub said "He knows where that murder weapon was and he knows what it is.....Gordon came out of Davidson's apartment, but he was by himself." He says, "These comments constitute prosecutorial misconduct as there was no evidence that established Gordon knew anything about a murder weapon nor had ever been in the victim's apartment." The Response, 19-20, suggests that Mr. Schaub, the lead trial assistance state attorney, was merely responding to Gordon's first closing argument, and his comment was an invited response.
>
> Because neither defendant put on any evidence, the closing argument order in the guilt phase was as follows:
>
> 1) Mr. Schwartzberg for co-defendant McDonald;

2) Mr. Love for co-defendant Gordon;
3) Mr. Schaub for the State;
4) Mr. Schwartzberg, rebutting closing for McDonald;
5) Mr. Love rebuttal closing for Gordon.

In his initial closing argument, Mr. Love stated that state's witness and co-defendant, Susan Shore, had testified that neither Gordon nor McDonald brought back any murder weapon that she saw, and Detective Celona had not found any murder weapon at the scene. T. 2070-2071. This, of course, fit with the defendant's strategy that Gordon and McDonald went to the doctor's apartment to retrieve a paper from Dr. Davidson, and someone else murdered him (and presumably took the murder weapon with him/her).

Mr. Schaub, in his closing, discussed the missing murder weapon and suggested Mr. McDonald may have thrown it in the lake behind the doctor's condo since he came back to the car after Gordon did. He also suggested that since a camera was missing from the doctor's apartment, but had not been seen by Ms. Shore, or recovered by the police, it might have been the murder weapon and it might have been thrown in the lake. T. 2114-2116. This was all fair comment on reasonable inferences from the evidence, and in response to Love's argument as to their being a lack of any murder weapon connected to Gordon or McDonald.

As to Gordon's complaint re Schaub stating that "Gordon came out from Dr. Davidson's apartment but he was by himself," T. 2114, there is no question it was the state's theory that both Gordon and McDonald were involved in the actual killing of Dr. Davidson. And the testimony that Gordon went with Dr. Davidson in the direction of Dr. Davidson's apartment, coupled with the murder scene which included binding, gagging beating, hog tying and eventual drowning of the victim supports the state's theory that it took at least two people to pull off this particular murder. As stated at the *Huff* hearing, HH. 100-102, this court found the heinous, atrocious and cruel aggravator as to defendant Gordon. HAC can't be found vicariously. The Florida Supreme Court upheld this aggravator as to Gordon, actually citing this court's order, which found both defendants were involved in the actual killing of the victim. *Gordon v. State*, 704 So. 2d

> 107, 116 (Fla. 1997). The Court, after reviewing this court's discussion of the heinous, atrocious and cruel aggravator, stated, "Our review of the record indicates that this is an accurate statement of the evidence adduced at trial." *Gordon*, 116. Schaub's closing argument complained of was, therefore, a reasonable inference from the evidence.
>
> Since there is no objection Gordon's counsel could have made that this court would have sustained regarding the specific argument complained of in defendant's Motion, counsel can't be deemed ineffective for filing to object. Issue VIII is summarily denied.

(PC-R III/464-466)(emphasis supplied).

Finally, the specific comments now challenged on appeal were addressed by this Court in McDonald v. State, 743 So. 2d 501, 505 n.9 (Fla. 1999). There, this Court determined that the comments neither rose to the level of fundamental error nor so tainted the jury's verdict so as to warrant a new penalty phase. See McDonald, 743 So. 2d 501, 505. Under these circumstances, summary denial was appropriate.

ISSUE IX

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILING TO THOROUGHLY INVESTIGATE AND PREPARE. (AS RESTATED BY APPELLEE).

Defendant maintains trial counsel was ineffective in investigating and preparing his case for trial. The lower court's order detailed the exact steps taken by Attorney Love in preparation for Defendant's trial.

> In his Motion, 15-17, defendant alleges ineffective assistance of counsel for failing to investigate and prepare for trial. He alleges counsel "barely met with the defendant to discuss trial strategy." He further states that "counsel was so deficient in his preparation that he was either unaware that no scientific evidence existed that placed defendant Gordon at the scene or failed to advise Gordon of this fact." Finally, he suggests that this "lack of knowledge and/or failure to communicate with the defendant resulted in the defendant waiving his alibi without a full, voluntary and intelligent understanding of the facts and evidence against him. As such, trial counsel was ineffective." Motion, 15-16.
>
> The state's Response, 20-23, lists the various things trial counsel did after being appointed to this case when the public defender withdrew. Most of this information comes from the Pinellas County Justice Information System - Case Progress Docket, which was attached to the state's Response as Exhibit 1.
>
> The court granted an evidentiary hearing on this issue as it intertwined with issues III - Alibi, IV - *Frye* hearing, and V - Severance. See Exhibit A, attached.
>
> Using the Case Progress Docket, we learn that originally, on March 1, 1994, the public defender's office was appointed to represent the defendant. The indictment was returned March 21, 1994. The public defender moved to withdraw and lead counsel Robert Love was appointed on April 6, 1995. Mr. Love

requested co-counsel, and Mr. Charles Holloway was appointed by the court on May 4, 1995.

The public defender's office demanded discovery on April 20, 1994 and it was provided. R. 16-31. After that, additional discovery was provided to either the public defender's office, or to Mr. Love on many additional occasions. R. 36-37, 42, 477-746, 1842-1844, 1864, 1885, 1888-1889, 1921.

The public defender's office took multiple depositions and filed twenty-three in the court file. See Case Progress Docket. They inspected the evidence. R. 1562. Mr. Love and Mr. Holloway took additional depositions, and filed fifteen in the court file. See Case Progress Docket.

The public defender had an investigator, Mr. Ralph Phleiger. He talked to the defendant on more than one occasion and thoroughly investigated defendant's various alibis, including that he was at the Gulfstream racetrack in Miami, along with Mr. McDonald where he had won money on a horse named Island Delay. It turned out the horse had not run on January 25, 1994, EH. 239-240. The defendant also thought he might have been at Tire Kingdom on the date of the murder. The only problem was that in checking out Tire Kingdom's records, they had invoices showing he had been there, or at least there was an invoice made out in his name for work on Ms. Tyrell's car on January 24, and January 26. 1994. EH. 242-243. He also check out the alibi that Mr. Gordon and Ms. Tyrell had been to the beach, but was unable to obtain anything to verify this, other than the statement of Ms. Tyrell and Mr. Gordon. EH. 249-253. The defendant, in his testimony denied <u>ever</u> meeting Mr. Phleiger. EH. 213-218. The court finds this testimony by Gordon incredulous.

Despite this thorough investigation by the public defender's office, Mr. Love filed motions for his own investigator. R. 1763-1764. Mr. Love's investigator, Mr. Barnes, rechecked the defendant's alibis. EH. 332-334.

Mr. Love explained at the evidentiary hearing that when he took over the case from the public defender's office, it was 70-80% prepared "as far as taking depositions and doing that type of work". EH. 329-330. He had access to the entire public defender's file, and read Phleiger's reports and talked to him

> and Mary Obermeyer, one of the public defenders assigned to the case, regarding defendant's alibi, as well as other parts of the case they had worked on. EH. 330-332, 334-335, 353-354, 356-357. Mr. Love spent a lot of time preparing the case for trial, EH. 338, but was limited to two months to prepare as he had been appointed April 6, 1995 and the trial began June 6, 1995, and Mr. Gordon told him "No continuances". EH. 393. He spoke to some of the potential alibi witnesses himself. EH. 375-376. Although Mr. Gordon was somewhat difficult to deal with, EH. 377-379, he saw him personally on several occasions (his request for attorney's fees say six times). EH. 379-380. Mr. Gordon acknowledges he saw Mr. Love on more than two occasions. EH. 188-189. He filed a Notice of Intent to Claim Alibi, but later withdrew it, both at his client's insistence. He developed his theory of the defense, in conjunction with his client, and with McDonald and counsel for McDonald. See, Issue IV, *supra*.
>
> Mr. Love billed the county for 241.50 hours on this case for which he was paid. R. 2547-2549, 2552, and Mr. Holloway, counsel for the penalty phase and co-counsel during trial, was paid for 153.50 hours of work on this case. R. 2511-2520.
>
> Mr. Love's preparation was hindered by his client's demand that the case not be continued. EH. 393-394; see also Issue V, *supra*. Gordon can't now be heard to complain that more time wasn't spent or more done for him.
>
> As to the Alibi, *Frye* Hearing, and Severance Issues, which are really what Issue IX principally complains of, this has been discussed in detail in this order. See, Issues III, IV, V, *supra*. Mr. Love and Mr. Holloway did the best they could to prepare a complicated case, for a difficult client who insisted they go to trial only two months and one month after they were appointed. Fortunately, with the joint defense, they had the benefit of the work also done by Mr. Schwartzberg and Mr. Watts, co-counsel for Mr. McDonald. This issue is denied.

(PC-R III/466-470). As such, the trial court determined that Defendant received effective assistance of counsel at trial.

Nonetheless, Defendant rehashes his arguments concerning the strategic choices of trial counsel in pursuing a defense that the murder happened after Defendant and codefendant McDonald left the scene and refusing to challenge to the DNA evidence linking McDonald to the scene in support of that defense. Once again, this is mere second guessing of the strategy employed by defense counsel.

With the benefit of hindsight, Defendant continues to urge that a defense of mere presence or participation in a lesser offense would have been the best course. However, Defendant is foreclosed from relying on these possible defenses where his testimony at the evidentiary hearing flatly claimed that he was in Miami and nowhere near the victim's apartment at the time of the murder. Consequently, Attorney Love cannot be found deficient for failing to pursue an obviously false theory of defense which is not even supported by the testimony of the Defendant himself.

ISSUE X

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED DEFENDANT'S INEFFECTIVE ASSISTANCE CLAIM FOR FAILING TO SEEK TO EXCLUDE RESULTS OF DNA TESTING WHERE THE MATERIAL WAS DESTROYED DURING TESTING. (AS RESTATED BY APPELLEE).

Once again, Defendant challenges his trial counsel's decision not to challenge the DNA evidence admitted during trial. While calling into question the credibility of FBI agent Michael Vick regarding the testing procedures employed because the samples were used up during the tests, Defendant has failed to state a claim for which relief might be granted.

As summarized by the trial court's order,

> In his Motion, 17-18, defendant seems to say his counsel was ineffective in that he filed no motion regarding the "destruction" of the blood from the sweatshirt, consumed in the DNA tests.
>
> The Response, 23-26, and the trial testimony of Agent Vick, shows that the blood stains were very small and that some, for example the blood specks on the shoes that may have been worn by McDonald, were too small on which to conduct DNA tests, or even blood type. T. 1223, 1230. The sweatshirt that may have been worn by co-defendant McDonald had two small bloodstains that were tested. One had the DNA markings of Dr. Davidson, T. 1227, and the other had a combination of two blood sources, one which was similar to Dr. Davidson's and the other dissimilar to Dr. Davidson's, and thus, unknown. T. 1231. It should be noted that Agent Vick did not have any blood samples from any of the co-defendants to test against the unknown blood. T. 1231. The small amount of blood was totally consumed by the DNA analysis. T. 1236.
>
> This court is well aware that small amounts of blood which are tested for DNA are usually consumed in doing the test. However, the tests done on the blood

samples may still be available to be compared with anyone, including Gordon, should such a request be made. DNA tests produce actual printouts of the DNA markings which may have been kept by the FBI. However, no such request has been made, at least not to this court. Of course, as the state pointed out in the state's Response, 25, even if this blood was identified, and it was not Gordon's, this would not establish the defendant's innocence.

Assuming the actual blood from the gray sweatshirt is not now available for additional testing, this still does not give the defendant relief. It is his burden to show bad faith on the part of the state in destroying evidence. *Arizona v. Youngblood*, 488 US 51 (1988); *Merck v. State*, 644 So. 2d 939 (Fla. 1995). And where, as here, a chemist must use all the material available to perform his test, the courts have not found bad faith on the part of the state. *State v. T.L.W.*, 457 So. 2d 566 (Fla. 2d DCA 1984).

Although I did not grant an evidentiary hearing on this issue, collateral counsel asked Mr. Love, at the evidentiary hearing, if he considered a motion "to preserve evidence to do your own testing." Mr. Love testified that, as long as there was nothing to incriminate Mr. Gordon, he did not want to have anything tested. EH. 409-410. Perhaps he feared the results?

Since the blood was consumed during the DNA testing and this was not done in bad faith, the defendant has not shown anything defendant's counsel should have done. It must be remembered that the unknown blood sample was important to the joint defense that McDonald and Gordon went to the doctor's residence to get a paper and that someone else, maybe Leo Cisneros, murdered him. See, Issue IV, *supra*. If the DNA test on the unknown sample had been compared to the blood of McDonald or Gordon, which it never has been, and if a match had been obtained as to either of them, that would have been devastating to the defense. Mr. Love had nothing to gain and everything to lose to request that Gordon's (or McDonald's) blood be compared to the unknown blood.

Issue X is without merit and is denied.

(PC-R III/470-471).

Thus, where Defendant can demonstrate no prejudice resulting from the consumption of the DNA samples during testing, he is entitled to no relief.

ISSUE XI

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED DEFENDANT'S CLAIM THAT HIS RIGHTS PURSUANT TO THE VIENNA CONVENTION WERE VIOLATED. (AS RESTATED BY APPELLEE).

Defendant urges error resulted from the summary denial of his claim that as a Jamaican citizen he was denied the right to contact the Jamaican Consulate conferred by the Vienna Convention. This claim has been rejected by this Court. See Darling v. State, 808 So. 2d 145, 165-166 (Fla. 2002), citing Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000).

In Darling, this Court concluded as follows:

> It is unclear that the Vienna Convention creates individual rights enforceable in judicial proceedings. (FN19)
>
> > (FN19.) As observed by the Seventh Circuit in U.S. v. Lawal, 231 F.3d 1045 (7th Cir.2000):
> >
> > While some courts, including ours, have had the opportunity to decide whether Article 36 creates individual rights enforceable in judicial proceedings, all have sidestepped the issue. See Breard v. Greene, 523 U.S. 371, 376, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) (per curiam); United States v. Chaparro-Alcantara, 226 F.3d 616, 623-24 (7th Cir.2000); United States v. Cordoba-Mosquera, 212 F.3d 1194, 1196 (11th Cir.2000) (per curiam); United States v. Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir.2000) (en banc); United States v. Li, 206 F.3d 56, 60 (1st Cir.2000). Likewise, we need not decide the issue today because it does not affect our disposition of this case.

> Cf. Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000)(observing that Maharaj's claim that the State had failed to comply with its international obligation to inform the British Consul that a British citizen had been charged with a capital crime, as required under the Vienna Convention, failed not only because the issue was, in that case, procedurally barred, but also because Maharaj had "failed to establish that he has standing, as treaties are between countries, not citizens") (citing Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir.1990)). Indeed, the preamble to the treaty reflects the recognition "that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." Vienna Convention, preamble, 21 U.S.T. at 79.
>
> However, we need not reach that issue where, as here, Darling has failed to show that he was prejudiced by the claimed violation. As was stated in Breard v. Greene, 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998), "it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." Id. at 372, 118 S.Ct. 1352.

See Darling, 808 So. 2d 145, 165-166.

Similarly, in this case, the trial court noted that the State argued “defendant fails to allege how this prejudiced him or how the outcome would have been different had he been notified of the right or if he had contacted the Consulate and Ambassador.” Then, at the *Huff* hearing, collateral counsel said only this, “Judge, I’ll rest on what I have in my motion.” HH, 120. (PC-R III/472).

Now, on appeal, Defendant argues, alternatively, that a showing of prejudice is not required or that the prejudice came from the fact that conflict counsel was appointed for the Defendant prior to trial. Neither of these arguments have merit.

First, Defendant relies on a decision of the International Court of Justice (ICJ) in support of his argument that prejudice is immaterial with regard to a violation of the Vienna Convention. See *LaGrand Case* (Germany v. U.S.), 2001 I.C.J. 104, —(June 27, 2001). However, the LaGrand decision ruled only that the Vienna Convention confers individual rights which may be invoked in the ICJ by the national State of the detained person, (paragraph 77), and that procedural bars should not be used to prevent courts from considering the effect of a violation of the Vienna Convention on a defendant's trial.[3] (Paragraphs 90 and 91).

Further, the quotation cited in Defendant's brief stating it is immaterial whether the LaGrands would have followed

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[3] Notably, the ICJ also pointed out that the "procedural default" rule itself does not violate the Convention. (See Paragraph 90). As such, the State would submit that it can continue to properly rely on the procedural bar present in the instant case. See Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000)(an alleged violation of the Vienna Convention should have been raised on direct appeal, but since the issue was not timely pursued, it is procedurally barred).

through on their rights to contact their consulate is taken out of context. (IB, p.64). This assertion was made by the ICJ in rendering its conclusion that the United States had violated its international obligations to Germany under the treaty. (Paragraph 74). Nothing in the opinion suggests that a violation of the Vienna Convention is somehow a *per se* violation entitling Defendant to any relief in a state court criminal proceeding. See e.g., Bell v. Virginia, 563 S.E.2d 695, 706-707 (VA. 2002)(The ICJ did not hold that the Vienna Convention creates legally enforceable rights that a defendant may assert in a state criminal proceeding to reverse a conviction.)[4]

Here, the trial court ruled that no prejudice had been demonstrated as a result of any violation of the Vienna Convention. As such, the holding in the LaGrand decision does

[4]Additionally, in the event of a violation of the Vienna Convention, the ICJ would allow the United States to review the conviction and sentence, taking the violation into account, leaving the choice of means for carrying out the obligation of compliance to the United States. Thus, the ICJ acknowledged that procedural rules, such as harmless error analysis, would still govern any analysis of a Vienna Convention violation. See Bell, 563 S.E.2d 695, 706-707 (citations omitted). For example, if the authorities violated Bell's rights under the Vienna Convention by taking his statement prior to informing him of his rights to consular notice and access, any such error could still be deemed harmless in the face of overwhelming evidence of guilt. See Bell, 563 S.E.2d at 707. This same analysis applies equally to Defendant's case.

not apply to this case.[5]

Moreover, Defendant merely speculates that different counsel would have been better prepared. As the trial court failed to find any deficiency on the part of Attorney Love, no basis exists for arguing that another attorney could have done better. Moreover, to argue that some unknown attorney would have been more effective is nothing other than pure speculation which cannot support a finding that Defendant is entitled to a new trial. Consequently, the trial court properly summarily denied this claim.

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[5]Alternatively, should this Court determine that the LaGrand decision somehow applies to the instant case. The State would argue that the decision of the ICJ is not retroactive based on Witt v. State, 387 So. 2d 922, 931 (Fla. 1980), which would not allow "...an alleged change of law [to] be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." See also Valdez v. Oklahoma, 46 P.2d 703, 708-709 (OK 2002)(LaGrand decision not retroactive).

ISSUE XII

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED DEFENDANT'S CLAIM THAT THE STATE AND FEDERAL GOVERNMENTS CONSPIRED TO PRESENT FALSE TESTIMONY AGAINST HIM. (AS RESTATED BY APPELLEE).

Here, Defendant reiterates that Susan Shores's testimony was obtained through allegedly malicious prosecution, that the DNA evidence was improperly admitted and that Attorney Love should have moved to sever Defendant's case from McDonald's and pursued a different theory of defense. Each of these arguments has been addressed above.

Additionally, Defendant argued below that the State conspired to present false testimony against him through the testimony of Agent Vick. This claim was denied by the lower court as follows:

> In his Motion, 18-19, the defendant suggests that Agent Vick testified that certain evidence had been lost, but that the specific testimony about this does not appear in the trial transcript. Collateral counsel says, "The Defendant specifically alleges that his Due Process Rights have been violated based upon a conspiracy by and among the Office of the State Attorney and any and all state and federal law enforcement agencies involved in the arrest, investigation and prosecution of him. The Defendant further specifically alleges that the tapes of the trial testimony will specifically show that this testimony of Agent Vick will appear as stated in this paragraph and that the defendant is entitled to a new trial." Motion, 18-19 (emphasis in original motion).
>
> Not surprising, the state was uncertain what was being alleged, and thus, included the entire trial

> transcript of Agent Vick's testimony as an exhibit to their response, which indicated not that evidence was lost, but consumed in testing. Response, 28.
>
> At the *Huff* hearing, collateral counsel indicated the defendant was saying the transcript testimony was not correct and that "tapes" of the trial would establish this. HH, 122-126.
>
> Of course, no such "tapes" of the trial have been produced to date, nor is this court aware of the existence of any such tapes. Additionally, it has not been suggested just how whatever testimony was "lost" would require anew trial. Whatever the testimony of Agent Vick was, whether it was as in the transcript, or as Mr. Gordon remembers, the jury that convicted the defendant, and recommended he be sentenced to death heard whatever Mr. Vick said at the trial. The defendant discussed this at the evidentiary hearing, even though an evidentiary hearing was not granted on this issue. His testimony at the hearing seemed to be saying Mr. Vick "lied" because of the state of the case law in existence at the time. HE, 185-188. This testimony made little sense. This issue is without merit, and is denied.

(PC-R III/472-473). However, Defendant appears to have abandoned this claim on appeal. Thus, no relief is warranted.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Baron W. Given, P.O. Box 468, 1301 Sixth Ave. W., Suite 104, Bradenton, Florida 34206, this _____ day of January, 2003.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

COUNSEL FOR APPELLEE