IN THE SUPREME COURT OF FLORIDA

MICHAEL COLEMAN,

Petitioner,

v.

BILL McCOLLUM, Attorney General
&
WALTER A. McNEIL, Secretary, DOC
State of Florida,

Respondents.

Case No. SC09-92

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Respondents, the Attorney General and the Secretary of the Department of Corrections, pursuant to this Honorable Court's Order dated February 26, 2009, submits the following in opposition to the Petition for Writ of Habeas Corpus filed January 20, 2009 ("Petition").[1]

OVERVIEW

Coleman's Petition raises three claims. CLAIM I asserts ineffective assistance of appellate counsel in which Coleman improperly raises direct-

[1] Respondents refer to the records using the same symbols employed in the State's Answer Brief filed April 20, 2009, in SC04-1520. In addition, "IB/1990," "AB/1990," and "RB/1990" will reference the Initial Brief, Answer Brief, and Reply Brief filed in this Court in 1990 in the direct appeal in this Court's case number 74,944. "Pet" references the 2009 Petition for Writ of Habeas Corpus to which this pleading responds. Symbols will be followed by volumes and/or page numbers, where appropriate. Emphasis is indicated the same way as in the April 20, 2009, Answer Brief.

appeal issues, including claims that this Court already has rejected on direct appeal; appears to violate a Circuit Court order by relying upon documents that the Circuit Court ordered sealed; asserts facts that the record does not support; and otherwise fails to meet the requirements of Strickland v. Washington, 466 U.S. 668 (1984). See Rutherford v. Moore, 774 So.2d 637 (Fla. 2000)("[t]he criteria for proving ineffective assistance of appellate counsel parallel the *Strickland* standard for ineffective trial counsel"), quoting Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

CLAIM II improperly argues a direct appeal issue of cruel and unusual punishment and improperly relies upon purported postconviction evidence; even improperly considering Coleman's habeas assertions, they are not supported by the postconviction record and do not constitute grounds for relief.

CLAIM III asserts that Coleman was unlawfully convicted of Attempted Felony Murder, which, as a direct-appeal type of claim, is procedurally barred, and even improperly considering it now, this claim improperly relies upon a case that is not retroactive, as the State discussed in its Answer Brief in case number SC04-1520. In any event, this matter is inconsequential to the outcome of this case.

STATEMENT OF THE CASE AND FACTS AND NOTICE OF MOTION TO STRIKE

Respondents reject the Petition's Statement of the case (Pet 6-13) as argumentative, unsupported by the trial record, and relying upon purported facts that have been sealed by Circuit Court order.

Examples of argumentative and unsupported "facts" include the assertion that "identifications were not particularly credible" (Pet 7 n.7); however, in fact, witnesses, without equivocation identified Coleman (See, e.g., R/VII 1193-94, 1296-97, 1307, 1320; R/VIII 1366-67, 1372-73; R/IX 1619-22). Coleman asserts that "all of the victims had been injecting cocaine" (Pet. 8), but, to Respondents knowledge, there was no evidence that Amanda Merrill had injected any cocaine (See, e.g., R/VII 1232; R/VIII 1359). Coleman contends that "[e]ach of the three defendants presented different defenses" (Pet 7), but in fact, Coleman presented an alibi defense, he(R/VIII 1492-1518)and his mother (R/VIII 1457-82) testifying he was in Miami, and Robinson presented an alibi defense, testifying he was in New Jersey (R/IX 1554-90; see also R/VIII 1536-47). Coleman's Petition says that "case … came down to survivor, Amanda Merrill's identification of Mr. Coleman" (Pet. 7), but additional evidence included Tina (Darlene Crenshaw also identifying Coleman (R/VII 1193-94; R/IX 1619-22), Coleman giving one of his girlfriends jewelry (See R/VI 1148-49; R/VII 1170-74) that had been stolen at the mass murder scene (See R/VII 1175-77, 1305-13066), and accomplices referring to Coleman as "Max" or "Mack" (See R/VII 1294-1304, 1310, 1331, 1334, 1335, 1343; R/VIII 1361-64, 1368) and Coleman was, in fact, known as "Mack George" (See R/IV 680, 704, 717; R/VI 1147).

The current Petition discusses and attaches documents that were proffered at the 2001 postconviction evidentiary hearing and that were sealed by the Circuit Court (PCR/VI 834-36; sealed envelope in PCR/VIII and

labeled as "pages 1145-68"). To the best of undersigned's knowledge, there has been no court order unsealing these documents. Therefore, Respondents hereby move and move through their Motion to Strike, filed at about the same time as this Response, to strike the Petition, seal this Court's original and copies of the Petition, and require that the Petition be re-filed with all such references redacted and without any of the sealed documents attached.

Further, Coleman has attached to his habeas Petition what appears to be a newspaper article and a press release. These are beyond the scope of the applicable record, hearsay, and should be stricken. See, e.g., 90.801, 90.802, Fla. Stat.; Dollar v. State, 685 So.2d 901, 903 (Fla. 5th DCA 1997) ("unaware of any hearsay exception permitting introduction of out of court statements by way of a newspaper article. A newspaper article, introduced to prove the truth of out of court statements contained therein, constitutes inadmissible hearsay") rev. denied 695 So.2d 701.

Further, through the exhibits attached to the Petition, Coleman essentially has attempted to introduce evidence in this Court, which is improper. See, e.g., Rutherford v. Moore, 774 So.2d 637, 646 (Fla. 2000)("Appellate counsel cannot be deemed ineffective for failing to investigate and present facts in order to support an issue on appeal. The appellate record is limited to the record presented to the trial court").

Further, none of the exhibits is relevant to any of the claims. Any evidence of intoxication is not relevant unless and until ineffectiveness

is demonstrated and the ineffectiveness is linked to the intoxication, rendering Attachments A through G irrelevant. See Blackwood v. State, 946 So.2d 960, 967-68 (Fla. 2006); Bryan v. State, 753 So.2d 1244, 1247-50 (Fla. 2000); Bryan v. State, 748 So.2d 1003, 1009 (Fla. 1999); Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir.1987); discussed in ISSUE II of case number SC04-1520. Whatever supposedly happened in Alan Crotzer's case is irrelevant here, also rendering Exhibits H and I, and the Petition's discussions of Crotzer, irrelevant.

In contrast to Coleman's "facts," this Court's direct-appeal opinion summarized the facts of the murder as follows:

> Michael Coleman, Timothy Robinson, and brothers Bruce and Darrell Frazier were members of the 'Miami Boys' drug organization, which operated throughout Florida. Pensacola members of the group moved a safe containing drugs and money to the home of Michael McCormick from which his neighbors Derek Hill and Morris Douglas stole it. Hill and Douglas gave the safe's contents to Darlene Crenshaw for safekeeping.
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> Late in the evening of September 19, 1988 Robinson, Coleman, and Bruce Frazier, accompanied by McCormick, pushed their way into Hill and Douglas' apartment. They forced Hill and Douglas, along with their visitors Crenshaw and Amanda Merrell, as well as McCormick, to remove their jewelry and clothes and tied them up with electrical cords. Darrell Frazier then brought Mildred Baker, McCormick's girlfriend, to the apartment. Robinson demanded the drugs and money from the safe and, when no one answered, started stabbing Hill. Crenshaw said she could take them to the drugs and money and left with the Fraziers. Coleman and Robinson each then sexually assaulted both Merrell and Baker.
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> After giving them the drugs and money, Crenshaw escaped from the Fraziers, who returned to the apartment. Coleman and Robinson then slashed and shot their five prisoners, after which they and the Fraziers left. Despite having had her throat slashed three times and having been shot in the head, Merrell freed herself and summoned the authorities. The four other victims were dead at the scene.

> Merrell and Crenshaw identified their abductors and assailants through photographs, and Coleman, Robinson, and Darrell Frazier were arrested eventually. A grand jury returned multiple-count indictments against them, charging first-degree murder, attempted first-degree murder, armed kidnapping, armed sexual battery, armed robbery, armed burglary, and conspiracy to traffic. Among other evidence presented at the joint trial, the medical examiner testified that three of the victims died from a combination of stab wounds and gunshots to the head and that the fourth died from a gunshot to the head. Both **Crenshaw and Merrell identified Coleman**, Robinson, and Frazier at trial, and **Merrell identified a ring Coleman gave to a girlfriend as having been taken from her at the apartment. Several witnesses testified to drug dealing in Pensacola and to the people involved in that enterprise.** Coleman and Robinson told their alibis to the jury with Coleman claiming to have been in Miami at the time of these crimes and Robinson claiming he had been in New Jersey then.
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> Merrell, Crenshaw, and Arabella Washington … identified Coleman through photographs initially and in person at trial. *** [T]hese witnesses unhesitatingly identified the codefendants when given groups of photographs containing theirs, and none of these witnesses picked out anyone other than the codefendants.

Coleman v. State, 610 So.2d 1283, 1284-87 (Fla. 1992)

A case history was provided in the State's Answer Brief filed April 20, 2009, in Case number SC04-1520, but, due to the assertion here of ineffective assistance of appellate counsel claims, the State notes additional details concerning the direct appeal in Case number 74,944 resulting in the opinion reported at Coleman v. State, 610 So.2d 1283 (Fla. 1992). Coleman (Fla. 1992) discussed five issues:

I DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SEVER AND THE RENEWALS THEREOF?

II DID THE TRIAL COURT ERR IN FAILING TO ANSWER A JURY QUESITON, READ THEM TESTIMONY OR GRANT MISTRIAL?

III DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO PEREMPTORILY CHALLENGE A BLACK JUROR WITHOUT AN ADEQUATE RACE-NEUTRAL EXPLANATION?

IV DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS IN COURT IDENTIFICATION?

V DID THE TRIAL COURT ERR IN OVERRIDING THE JURY RECOMMENDATION AND IMPOSING THE DEATH PENALTY?

Coleman (Fla. 1992), affirmed Coleman's convictions and the sentences of death.

The following table shows the current Petition's claims that re-raise direct-appeal issues, the corresponding direct-appeal (Case number #74,944) issue number, and this Court's conclusion as to each direct-appeal issue:

PETITION, CASE #SC09-92	**APPEAL CASE #74,944**	**RESOLUTION OF EACH ISSUE IN COLEMAN V. STATE, 610 SO.2d 1283 (FLA. 1992)**
I.B. regarding **jury question**	II	"The judge, therefore, correctly told the jurors that they would have to rely on their collective recollection of the evidence." 610 So.2d at 1286.
I.C. regarding **severance**	I	"[T]he trial judge did not abuse his discretion by denying the motions for severance." 610 So.2d at 1285.
I.D. regarding **Batson**	III	"[T]he court correctly found the State's explanation of why it excused these prospective jurors to be race neutral. Coleman has shown no abuse of discretion in the trial court's disagreement with him on this issue." 610 So.2d at 1286.
I.F. regarding **jury override**	V	"[A]ny sentence for Coleman other than death would be disproportionate. *** That Frazier received a lesser sentence does not make Coleman's death sentence disproportionate. The record demonstrates that he was less involved and less culpable than Coleman or Robinson. In addition, the jury convicted Frazier of first-degree murder of only one of the victims and second-degree murder of the other." 610 So.2d at 1287-88.

Coleman v. State, 610 So.2d 1283 (Fla. 1992), also rejected direct-appeal ISSUE IV:

> "We agree that the initial identifications were not tainted and that these witnesses' testimony did not need to be suppressed. Although shown photographs of numerous individuals, these witnesses unhesitatingly identified the codefendants when given groups of photographs containing theirs, and none of these witnesses picked out anyone other than the codefendants. The photographic lineups were not impermissively suggestive, and there is no merit to this point on appeal." 610 So.2d at 1286-87.

ARGUMENT IN OPPOSITION TO HABEAS GROUNDS

CLAIM I – IAC OF APPELLATE COUNSEL: HAS APPELLANT MET HIS BURDENS OF DEMONSTRATING THAT APPELLATE COUNSEL WAS STRICKLAND DEFICIENT RESULTING IN STRICKLAND PREJUDICE? (PET 13-38, RESTATED)

"Habeas petitions are the proper vehicle by which to raise ineffective assistance of appellate counsel claims, and the analysis of these claims follows the two-pronged analysis of *Strickland* [Strickland v. Washington, 466 U.S. 668 (1984)] as to both deficient performance and prejudice." Davis v. State, 875 So.2d 359, 372-73 (Fla. 2003), citing Rutherford v. Moore, 774 So.2d 637, 642 (Fla. 2000).

"The object of an ineffectiveness claim is not to grade counsel's performance." 466 U.S. at 697. The standard is also not whether counsel would have had "nothing to lose" in pursuing a matter. See Knowles v. Mirzayance, 2009 U.S. LEXIS 2329, Slip op. No. 07-1315, March 24, 2009.

"[A]ppellate counsel [cannot] be deemed ineffective for failing to prevail on an issue that was raised and rejected on direct appeal." Lowe v.

State, 2 So.3d 21, 42 (Fla. 2008), citing Spencer v. State, 842 So.2d 52 (Fla. 2003). Thus, a "'Petitioner's contention that [the point] was inadequately argued merely expresses dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner'" and therefore does not constitute a viable claim in a habeas proceeding. Thompson v. State, 759 So.2d 650, 657 n.6 (Fla. 2000)("We therefore decline petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court"), quoting Routly v. Wainwright, 502 So.2d 901, 903 (Fla. 1987), quoting Steinhorst v. Wainwright, 477 So.2d 537, 540 (Fla.1985). As Rutherford v. Moore, 774 So.2d 637, 645 (Fla. 2000), citing Routly, 502 So.2d at 903, Steinhorst, 477 So.2d at 540, and Grossman v. Dugger, 708 So.2d 249, 252 (Fla. 1997), put it: "if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal." Rutherford, 774 So.2d at 643, also noted that "claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion."

Accordingly, Jones v. Moore, 794 So.2d 579, 582-83 (Fla. 2001)(most footnotes omitted), summarily rejected claims like claims I.B, I.C, I.D, and I.F here:

> Jones's trial counsel and appellate counsel were the same individual, Clifford L. Davis. This Court affirmed the conviction and sentence on direct appeal. … Jones subsequently filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 for

> postconviction*583 relief. The trial judge denied the motion. We affirmed. *See Jones v. State*, 732 So.2d 313 (Fla.1999) (*Jones II*). Jones now files this habeas corpus petition raising seven issues challenging the legality of his conviction and death sentence. We find several issues to be procedurally barred without the need of elaboration.[fn6]
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> > [fn6] We find issues five and seven to be procedurally barred because these issues were adversely decided against Jones on direct appeal. *See Parker v. Dugger*, 550 So.2d 459, 460 (Fla. 1989) (habeas is not proper to relitigate issues that could have been or were raised on direct appeal).

Appellate counsel's performance also is not deficient if the legal issue that appellate counsel failed to raise was meritless or would have had "little or no chance of success." Spencer, 842 So.2d at 74. Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. Thompson v. State, 759 So.2d 650, 656, n.5 (Fla. 2000)[2], citing Cave v. State, 476 So.2d 180, 183 n.1 (Fla. 1985).

For prejudice, the petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. Rutherford, 774 So.2d at 643. The prejudice prong of Strickland requires a showing that the appellate court would have afforded

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[2] Thompson's history continued concerning a mental retardation claim as reflected in Thompson v. State, 3 So.3d 1237 (Fla. 2009), which also "summarily den[ied] as without merit Thompson's remaining claims stricken by the trial court." See also Thompson v. Sec'y for the Dep't of Corr., 517 F.3d 1279, 1280 (11th Cir. 2008)(history of Thompson summarized).

relief on appeal. United States v. Phillips, 210 F.3d 345, 350 (5th Cir. 2000).

A federal habeas petitioner cannot prevail on ineffective assistance of appellate counsel unless the issue was a "dead bang winner." Moore v. Gibson, 195 F.3d 1152, 1180 (10th Cir. 1999).

Respondents maintain a continuing objection to the Petition's reference to sealed material throughout CLAIM I. Further, the sealed material is irrelevant to any IAC/appellate counsel claim because it has failed to demonstrate the prerequisite ineffectiveness for considering the material.

A. IAC/APPELLATE COUNSEL: SUFFICIENCY OF EVIDENCE (PET 15-22).

CLAIM I.A improperly solicits this Court to evaluate the credibility of witnesses and the weight of the evidence against Coleman; like a closing argument to a jury, the Petition improperly contends that this Court should disregard the eyewitness testimony and other evidence and rely solely on the absence of a DNA identification of Coleman and essentially find Coleman not guilty. The Petition also improperly asserts that the Crotzer case is pertinent here and improperly throws in sealed, irrelevant character attacks on appellate counsel; Respondents are moving to strike the Petition's use of the documents, see also separate Motion to Strike.

The Petition demonstrates neither Strickland deficiency nor Strickland prejudice.

Coleman asserts that appellate counsel should have raised a sufficiency of the evidence claim on appeal. However, this Court reviews sufficiency in

all death-sentenced cases. See, e.g., Lowe v. State, 2 So.3d 21, 45 (Fla. 2008)("Although appellate counsel did not raise this issue, this Court 'independently reviews each conviction and sentence to ensure they are supported by sufficient evidence'"), quoting Hardwick v. Wainwright, 496 So.2d 796, 798 (Fla. 1986); Mora v. State, 814 So.2d 322, 331 (Fla. 2002)(even if Mora had not raised issue, would have still reviewed record under independent duty to ensure sufficiency of the evidence), citing Ferguson v. State, 417 So.2d 639, 642 (Fla.1982); Sexton v. State, 775 So.2d 923, 933 (Fla. 2000)("it is this Court's independent obligation to review the record for sufficiency of evidence"), citing Brown v. State, 721 So.2d 274, 277 (Fla.1998). Therefore, this Court in Coleman v. State, 610 So.2d 1283 (Fla. 1992), although not explicitly discussed in the opinion as such, has already reviewed the sufficiency of the evidence, and if the claim had been raised on appeal, it would have been explicitly rejected, thereby requiring the rejection of this IAC claim. See, e.g., Suarez v. Dugger, 527 So.2d 190, 193(Fla. 1988) (rejecting an ineffective assistance of appellate counsel for failing to raise the denial of his motion for judgment of acquittal on direct appeal because the evidence was legally sufficient).

In rejecting a similar IAC-appellate-counsel claim, Lowe, 2 So.3d at 45, recently noted evidence from this Court's direct appeal opinion in that case:

> In Lowe's direct appeal, although the Court did not expressly state in its decision that it found the evidence sufficient to affirm

> Lowe's convictions, it noted that Lowe's fingerprints had been found at the scene of the crime, his car was seen leaving the parking lot of the store immediately after the shooting, his gun had been used in the shooting, and his time card showed that he was clocked out from his place of employment at the time of the murder. These facts coupled with other evidence presented at Lowe's trial were sufficient to affirm the convictions. If appellate counsel had challenged the sufficiency of the evidence on direct appeal, the claim would have been found to be meritless. *See Reed v. State*, 875 So.2d 415 (Fla. 2004). As a result, appellate counsel cannot be deemed ineffective for failing to raise this issue on appeal. Habeas relief is denied on this claim.

Here, this Court's direct-appeal Coleman opinion highlighted several facts that incriminated Coleman:

- Michael Coleman, Timothy Robinson, and brothers Bruce and Darrell Frazier were members of the 'Miami Boys' drug organization, which operated throughout Florida *** Several witnesses testified to drug dealing in Pensacola and to the people involved in that enterprise;

- Merrell and Crenshaw identified their abductors and assailants through photographs *** Crenshaw and Merrell identified Coleman, Robinson, and Frazier at trial *** Merrell, Crenshaw, and Arabella Washington … identified Coleman through photographs initially and in person at trial;

- Merrell identified a ring Coleman gave to a girlfriend as having been taken from her at the apartment.

If an appellate claim of sufficiency of the evidence had been raised, the convictions would have benefitted from a favorable view of the evidence as well as favorable inferences from the evidence. See, e.g., Lynch v. State, 293 So.2d 44, 45 (Fla. 1974)(evidence viewed so that "every conclusion favorable to [the verdict] that a jury might fairly and reasonably infer from the evidence"); Reynolds v. State, 934 So.2d 1128, 1145-46 (Fla. 2006)(summarizing principle; collecting cases). As in Wheeler v. State, 2009 Fla. LEXIS 137, 34 Fla. L. Weekly S80 (Fla. Jan. 29, 2009),

"[t]his case is not circumstantial--the State presented … eyewitness testimony. … ." Thus, Coleman's self-gratuitous inferences against the verdict, including ones that the evidence contradicts, are improper.

Evidence showed that Coleman, Timothy Robinson, and others entered a victim's apartment to retrieve their "stuff" and said "they ain't playing" (R/VII 1186); "they kept wanting to know where the stuff was" and said "someone better start talking fast" (R/VII 1299).[3] When he entered with the others, Coleman was armed with a gun. (See R/VII 1186-88, 1294)

After "Tina" (Darlene) Crenshaw said she knew about some money, the intruders allowed Crenshaw to get dressed (R/VII 1187-88, 1299-1300), and some of the intruders took Crenshaw to her mother's house to retrieve the money (R/VII 1189-92; see also R/VII 1235-39), while Coleman and Robinson stayed at the apartment and raped and murdered. Robinson told Coleman that if anyone said anything else to "shoot them and to start with" Amanda Merrell. (R/VII 1299; see also R/VIII 1370-71) After the others took Tina Crenshaw away, Merrell was on the floor in the living room with her hands tied up behind her back, when Coleman put his hands between her legs and told Robinson that he "was going to get some of this." (R/VII 1300) Coleman then raped Merrell. (R/VII 1300, 1371) Robinson then raped another female victim, "Mildred." Robinson and Coleman then "decided they would change up"

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[3] For some background on the drug organization, see, e.g., R/IV 612-76, 703-707, 738-57.

and Robinson raped Merrell and Coleman appeared to rape Mildred. (R/VII 1301) Coleman raped Merrell twice in the living room. (R/VII 1331-32) Robinson kicked Derek, and Coleman stood Merrell up and took her to another room, untied her legs, kept her hands tied, and raped her a third time. (R/VII 1301) Coleman left the room after Robinson called him; "he" said, "I'm going to do this," and Merrell saw Coleman in the doorway with a knife. (R/VII 1302-1303)

Robinson told someone to "open up," and Coleman entered the bedroom and got onto Merrell's back, pulled her hair back, and cut her neck from left to right. (R/VII 1303) Some shots were fired, and Coleman re-entered the bedroom and cut Merrell's neck again, felt her neck and cut her neck again, making three times that Coleman slashed Merrell's neck. (R/VII 1304)

Mildred then begged for her life, and Robinson told her, "Get down, bitch," and another shot rang out. Someone then shot Merrell. (R/VII 1304) Merrell did not know who shot her. (R/VIII 1377-78) The killers left, and Merrell called 911. (R/VII 1304-1305)

One eyewitness's identification of Coleman was sufficient to support the conviction and reject an appellate claim attacking sufficiency. See, e.g., Sexton v. State, 775 So.2d at 933-34 (relied on the testimony from the defendant's children, whose versions of events were not mutually consistent yet still incriminated the defendant). Here, two eyewitnesses at the mass murder scene identified Coleman before the trial and during the trial. Prior to trial, Ms. Merrell looked through hundreds of photographs

and identified Coleman's and identified Coleman in court. Her identifications were positive, without any equivocation. (See R/VII 1296-97, 1307, 1320; R/VIII 1366-67, 1372-73; R/IX 1619-21) She said that Coleman's accomplices at the murder scene called Coleman "Max" or "Mack." (R/VII 1294-1304, 1310, 1331, 1334, 1335, 1343; R/VIII 1361-64, 1368) Others knew Coleman as "**Mack** George." (See R/IV 680, 704, 717; R/VI 1147)

Tina Crenshaw identified Coleman in court. (R/VII 1193-94) She also looked through numerous photographs and also identified Coleman. (R/IX 1621-22)[4]

As this Court also indicated, "Merrell identified a ring Coleman gave to a girlfriend as having been taken from her at the apartment." Thus, Coleman's girlfriend, Cassandra Pritchett, testified that prior to Thanksgiving in 1988, Coleman gave her a ring and a watch. (R/VI 1148-49) Law enforcement obtained the ring and watch from Pritchett and identified them as State's Exhibit #51. (R/VII 1170-74; see also R/VI 1149) Mary Grady identified the ring in State's Exhibit #51 as a ring that, prior to the murders, she had allowed Amanda Merrell to wear (R/VII 1175-76). Merrell identified State's Exhibit #51 as the ring that Mary Grady gave to her to

[4] When Crenshaw saw Coleman's photograph, she told the police that she was not "positive, positive," that is she was not absolutely and totally positive but that she could identify Coleman if she saw him in person. (R/IX 1627-28).

wear and that was taken from her at the scene of the murders. (R/VII 1305-13066)[5]

Contrary to Coleman's suggestion (Pet 20-21, 21 n.13), all the victims had **not** been injecting cocaine and all of them were not engaged in selling drugs. While the medical examiner testified that cocaine was found in the nasal passages or urine of the dead victims (R/VIII 1401-1403), surviving victim Amanda Merrell did not use drugs or even drink alcohol (See R/VII 1232; R/VIII 1359) and Respondents are unaware of any evidence to the contrary. Ms. Merrell's companions called her a "square." (R/VIII 1358) Even if she or other witnesses had used or sold cocaine, this would be a fact for the jury to weigh, not this appellate-level Court.

The State has two responses to Coleman's argument (Pet 20-21) regarding the lack of a DNA identification on Coleman. First, DNA identification is not necessary for a conviction where there is other competent substantial evidence supporting the convictions, as in the evidence outlined above. Second, on re-direct examination, the DNA expert clarified:

> Q. Dr. Forman, the fact that you did not find a DNA match between Michael Coleman's blood and the DNA from the vaginal swabs, can you draw a conclusion as to whether or not he participated in any sexual activity with … the people from whom those vaginal swabs were taken?
>
> A. No, we cannot.
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> Q. You cannot do that?

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[5] Arabella Washington identified Coleman as among those who were in a black mustang shortly after the murders. (See R/VI 1068-75, 1098-99; see also R/VI 1122-24, 1128-34, 1140-41)

A. No.

Q. Why not?

A. Well, we can only say that we did not receive any samples that indicated that his DNA was present in any of the samples that we received, but there are a number of reasons why you would not get anything out of a second extract in a situation of sexual activity.

Q. So there could be sexual activity and you not get DNA from an individual?

A. That's correct.

(R/VI 1053-54) On re-cross, the expert indicated that she "could make no conclusion about the presence of Michael Coleman's DNA in any of the evidence that was provided." (R/VI 1056)

As purported support for this claim, Coleman cites to four cases, none of which remotely comes close to supporting relief here.

Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987)(Pet 16), found IAC concerning a Fifth Amendment issue, not present here. Concerning sufficiency of the evidence, it held:

> [T]here was strong, though not overwhelming, evidence of a premeditated killing, and while the weight of the evidence favored Matire on the insanity issue, there was clearly sufficient evidence to support the jury verdict. Thus, we conclude that there was sufficient evidence, and that appellate counsel's failure to raise the issue is not a Sixth Amendment violation.

811 F.2d at 1433 n.2. In Matire, a couple of eyewitnesses testified concerning the events of the shooting; the evidence here is stronger. Contrary to Coleman's assertion (IB 16), his **guilt** "leaped out" of the record, and here it need not "leap," but rather, need only be sufficient enough to exclude IAC.

Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985)(Pet 16-18),"grant[ed] petitioner's request for writ of habeas corpus and grant[ed] him a new direct appeal on the merits of his convictions and sentence." However, there the deficient appellate counsel, at oral argument, expressly conceded the defendant's guilt of premeditated murder as "overwhelming," and, when this Court ordered supplemental briefing on the death penalty, defendant's appellate counsel simply provided a "descriptive listing of cases in which this Court had discussed the two aggravating factors in dispute and a passing reference to one possible statutory mitigating circumstance." Further, there, the facts suggested Second Degree Murder, as a dissenter in the direct appeal disclosed: "The defendant shot his father and stabbed his cousin during the course of a domestic quarrel between the defendant and Earline Wilson." Wilson v. State, 436 So.2d 908, 913 (Fla. 1983). In contrast, here Coleman entered the victim's apartment with gun drawn as part of a salvage and retribution "hit" for some of the victims stealing drugs, and Coleman proceeded to be an active participant in the multiple murders, rapes, kidnappings, and attempted murder at the apartment.

Coleman's attempted use (Pet 19-20; Appendices H & I) of a newspaper article and purported press release regarding Crotzer is inappropriate. A case should never be decided based upon the legally incompetent second, third, … hand hearsay that a newspaper reporter selects to print in another case, and Respondents move to strike Appendices H & I and references in the Petition to Crotzer. Further, even improperly accepting the content of the

appendices on their face, it is irrelevant under the facts of this case. The evidence against Coleman remains strong, and the absence of a DNA identification of Coleman may simply mean that Coleman did not ejaculate or simply reflect the state of DNA testing in the 1980's. As the DNA expert testified at trial, quoted supra, the absence of a DNA identification does not exclude "sexual activity." In any event, appellate counsel was not ineffective in 1990 for being "uninformed" of a **subsequent** 2006 article and a **subsequent** 2008 news release. Instead, in 1990, when the direct appeal briefs were filed, appellate counsel was informed by the 1989 trial record establishing Coleman's guilt.

Jackson v. Virginia, 443 U.S. 307 (1979)(Pet 21-22), included facts that shortly prior to the defendant shooting the victim, the police saw the defendant with the victim, saw a knife, and the defendant told the police that they (the defendant and the victim) "were about to engage in sexual activity."

> Her body was found in a secluded church parking lot a day and a half later, naked from the waist down, her slacks beneath her body. Uncontradicted medical and expert evidence established that she had been shot twice at close range with the petitioner's gun. She appeared not to have been sexually molested. Six cartridge cases identified as having been fired from the petitioner's gun were found near the body.

443 U.S. at 310. The defendant told the police that at the time of the shooting, he was "pretty high." He indicated that --

> the victim had attacked him with a knife when he resisted her sexual advances. He said that he had defended himself by firing a number of warning shots into the ground, and had then reloaded his revolver. The victim, he said, then attempted to take the gun from him, and the gun 'went off' in the ensuing struggle.

443 U.S. at 310-11. Here, in contrast, there is no evidence that Coleman accidentally participated in invading the apartment with his gun drawn, accidentally participated in the mass murderer of four people, accidentally participated in the attempted murder in which he slit Amanda Merrell's throat three times, and accidentally participated in the rape of Ms. Baker and three-times rape of Ms. Merrell. And, there is no corroboration by police testimony of indicia of an accident.

Most importantly, Coleman overlooks Jackson's holding: "we hold that a rational trier of fact could reasonably have found that the petitioner committed murder in the first degree under Virginia law." 443 U.S. at 326. The case against Coleman included direct evidence corroborated by circumstantial evidence. The case against Coleman was stronger than in Jackson. Therefore, Jackson supports the reasonableness of appellate counsel not attacking the sufficiency of the evidence.

In sum, regardless of his physical condition, appellate counsel not presenting a sufficiency-of-evidence issue on direct appeal was a reasonable "winnow[ing] out weaker arguments," Thompson. Indeed, it was a "winnow[ing] out" of a groundless argument. Appellate counsel was not Strickland deficient, and, if the issue had been included on appeal, it would have been rejected, thereby negating any Strickland prejudice.

B. IAC/APPELLATE COUNSEL: JURY'S DNA QUESTION (PET 22-25).

This claim was raised in the direct appeal as ISSUE II (IB/1990 10-12), and this Court explicitly reviewed and rejected it:

> During deliberations, the jury asked if the vaginal swabs taken from the sexual battery victims matched Coleman's DNA. After discussing the question with the parties, the court refused the defense request to tell the jury 'no' and, instead, told the jurors to rely on their recollection of the evidence. Coleman now argues that refusing to answer the question constituted reversible error.
>
> A trial court need only answer questions of law, not of fact, when asked by a jury and has wide discretion in deciding whether to have testimony reread. *Kelley v. State*, 486 So.2d 578 (Fla.), *cert. denied*, 479 U.S. 871 (1986). The judge, therefore, correctly told the jurors that they would have to rely on their collective recollection of the evidence. [fn4] We find no abuse of discretion in refusing to have Merrell's testimony reread.
>
> > [fn4] The evidence is not as clear cut as Coleman alleges. The doctor who examined and interpreted the tests done on the swabs testified that failing to match Coleman did not mean that sexual activity had not occurred. Moreover, Merrell testified that Coleman, as well as Robinson, raped her.

Coleman, 610 So.2d at 1286. (See also discussion of rapes and DNA in CLAIM I.A supra)[6]

Thus, the Petition's re-packaging of this issue is simply a request for re-briefing and not a proper basis for an ineffective assistance of appellate counsel claim. See Lowe, 2 So.3d 21; Thompson, 759 So.2d 650; Rutherford, 774 So.2d 637; Jones, 794 So.2d 579. Moreover, the holding of Coleman, 610 So.2d at 1286, is law of the case.

Further, State v. Riechmann, 777 So.2d 342, 365 (Fla. 2000), citing Coleman as authority, rejected a an IAC appellate counsel claim like this one even where appellate counsel did not raise the matter at all:

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[6] Respondents continue to dispute Coleman's characterization of the DNA testing as "inconsistent with Merrell's testimony."

> Riechmann asserts that appellate counsel was ineffective for failing to raise the issue regarding the manner in which the trial court responded to the jury's request for the transcript of the testimony of prostitute Dina Mohler and Kischnick's sister, Regina Kischnick.
>
> This claim is without merit. Trial judges have broad discretion in deciding whether to read back testimony. *See Henry v. State*, 649 So.2d 1361, 1365 (Fla.1994); *Coleman v. State*, 610 So.2d 1283, 1286 (Fla.1992). In the instant case, the judge met with both parties in chambers before responding to the jury's request.[7]

Here, this claim was also meritless on direct appeal, and it remains so now.

Infantes v. State, 941 So.2d 432, 434 (Fla. 3d DCA 2006), rejected this type of direct-appeal claim, reasoning:

> Under Florida Rule of Criminal Procedure 3.410, the trial court has wide latitude in the area of reading testimony to the jury. Indeed, '[a] trial court need only answer questions of law, not of fact, when asked by a jury and has wide discretion in deciding whether to have testimony reread.'*Coleman v. State*, 610 So.2d 1283, 1286 (Fla.1992)(no abuse of discretion found in refusing to reread testimony of witness and instructing jury to rely on collective memory of the evidence).

See also Roberts v. State, 970 So.2d 480, 481 (Fla. 5th DCA 2007)("no abuse of discretion").

Green v. State, 907 So.2d 489, 498 (Fla. 2005), endorsed both Coleman v. State, 610 So.2d 1283, 1286 (Fla. 1992), and the case on which it relied, Kelley v. State, 486 So.2d 578, 583 (Fla. 1986).

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[7] Riechmann also discussed the nature of the testimony as prejudicial to defendant but this discussion does not alter the main point that the matter falls within the discretion of the trial court.

Although unnecessary for the rejection of this claim, Respondents also dispute the assertion (Pet 24-25) that somehow the DNA results were confusing and that there was "a fifty-fifty chance that the jury believed that Mr. Coleman's DNA matched the male DNA on the vaginal swabs." Whatever confusion there might have been should have been asserted in an IAC trial counsel claim, not here. However, there actually was no such confusion. The expert clearly testified that Robinson's DNA matched (R/VI 1029, 1043, 1050-51) and that Coleman's DNA did not match and Coleman's trial counsel competently exploited this fact in the trial repeatedly (See R/VI 1027, 1052-53, R/X 1788-89).

Thus, this claim is procedurally barred by the direct appeal, which also established the law of the case, and it also fails to demonstrate Strickland deficiency or prejudice, this claim essentially contending that appellate counsel failed to argue a meritless claim for an additional page.

C. IAC/APPELLATE COUNSEL: SEVERANCE FROM CO-DEFENDANTS' TRIAL (PET 25-26).[8]

Appellate counsel argued severance on direct appeal (ISSUE I, IB/1990 7-9), which this Court rejected, thereby requiring the rejection of this IAC appellate counsel claim.

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[8] It interesting to note that in a one page argument (one-half page plus one-half page) argument, the Petition criticizes appellate counsel's three-page direct appeal argument concerning severance as "inadequate[]" (Pet 26). In contrast to the Petition, appellate counsel's Initial Brief discussed case law and an applicable rule of criminal procedure (IB/1990 7-9).

> As his first point on appeal, Coleman argues that the court erred in refusing to sever his trial from those of his codefendants because he was not involved in the drug conspiracy, his DNA did not match the sexual battery victims' vaginal swabs while Robinson's did, and his alibi defense was antagonistic to his codefendants'. All of the codefendants moved for severance at trial, but the trial court denied those motions. We find no error in the refusal to sever these trials.
>
> Severance can be granted when it 'is appropriate to promote a fair determination of the guilt or innocence of one or more defendants.' Fla. R. Crim. P. 3.152(b)(1)(i). Severance is not necessary, however, 'when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence.' *McCray v. State*, 416 So. 2d 804, 806 (Fla. 1982). A strategic advantage or hostility among defendants does not, by itself, require severance. *Id.*
>
> These codefendants did not blame one another for these crimes, nor did anyone confess. Coleman and Robinson raised alibi defenses, and Frazier held the State to its burden of proof by standing mute. The evidence of the facts and circumstances leading to these murders explained these murders and the drug conspiracy to the jury; the convictions did not depend on the use of antagonistic evidence by one defendant against the others. The jury's lack of confusion is illustrated by its finding Coleman and Robinson guilty of four counts of first-degree murder and Frazier guilty of only one count of first-degree murder and three counts of second-degree murder when the eyewitness, Merrell, testified that Coleman and Robinson slashed and shot the victims and played the major roles in these crimes. We see no undue prejudice caused by the refusal to sever the trials of the defendants and hold that the trial judge did not abuse his discretion by denying the motions for severance.

Coleman, 610 So.2d at 1285. Thus, as in several other claims here, CLAIM I.C is a request for re-briefing of a direct-appeal issue and not a proper basis for an ineffective assistance of appellate counsel claim. See Lowe, 2

So.3d 21; Thompson, 759 So.2d 650; Rutherford, 774 So.2d 637; Jones, 794 So.2d 579.[9] Moreover, Coleman, 610 So.2d at 1285, is law of the case.

Even if improperly reconsidered today, this claim would have no merit on direct appeal. Contrary to Coleman's contention (Pet 25-26), an emphasis of one defendant's counsel undermining the emphasis of another defendant's counsel is not grounds for a severance. See, e.g., Hunter v. State, 33 Fla. L. Weekly S745, 2008 WL 4352655, 12 (Fla.) (Fla. 2008)("Assuming that Hunter preserved the jury confusion and inconsistent defense bases for seeking severance, the trial court did not err in denying his motion"); Coleman, 610 So.2d at 1285; McCray v. State, 416 So.2d 804, 807 (Fla. 1982)("hostility among defendants or the desire of one defendant to exculpate himself by inculpating a codefendant are insufficient grounds, in and of themselves, to require separate trials").

As this Court's opinion held, block-quoted above, Coleman's and Robinson's defenses were not even antagonistic. They each asserted alibis, which were not in conflict. Coleman said he was in Miami (E.g., R/VIII 1498-1500), and Robinson said he was in New Jersey (E.g., R/IX 1556-65).

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[9] Jones, 794 So.2d at 586, explicitly rejected an IAC appellate counsel claim based on severance and concluded: "This Court previously has made clear that habeas is not proper to argue a variant to an already decided issue."

This claim is procedurally barred by the direct appeal and law of the case, and, arguendo, it demonstrates neither Stickland deficiency nor Stickland prejudice.

D. IAC/APPELLATE COUNSEL: BATSON (PET 26-27).

As in other habeas claims here, the Batson claim was resolved in the direct appeal:

> Coleman also argues that the State exercised two peremptory challenges in a racially discriminatory manner. The record, however, discloses that the court correctly found the State's explanation of why it excused these prospective jurors to be race neutral. Coleman has shown no abuse of discretion in the trial court's disagreement with him on this issue. *See Reed v. State*, 560 So. 2d 203 (Fla.), *cert. denied*, 498 U.S. 882, 112 L. Ed. 2d 184, 111 S. Ct. 230 (1990). We find no merit to this argument. [fn5]
>
> > [fn5] While not dispositive, it is interesting to note that at sentencing Robinson's counsel stated that eight of the twelve jurors were black.

Coleman, 610 So.2d at 1286. See also Farina v. State, 801 So.2d 44, 50 (Fla. 2001)("peremptory challenges are presumed to be exercised in a nondiscriminatory manner"); U.S. v. Dennis, 804 F.2d 1208, 1211 (11th Cir. 1986)(concluding that under all of the facts, there was no "inference of purposeful discrimination," relied heavily on the fact that the prosecutor did not strike two African-Americans from the panel); U.S. v. Ochoa-Vasquez, 428 F.3d 1015, 1047 (11th Cir. 2005)(unchallenged presence of six Hispanic jurors and the government's "anti-pattern" striking manner vitiates Ochoa's Batson claim"); U.S. v. Allison, 908 F.2d 1531, 1537 (11th Cir. 1990)("unchallenged presence of three blacks on the jury undercuts any

inference … seating of some blacks on the jury does not necessarily bar a finding of racial discrimination, but it is a significant fact").

Therefore, this claim is procedurally barred here and the law of the case precludes this claim. See Lowe, 2 So.3d 21; Thompson, 759 So.2d 650; Rutherford, 774 So.2d 637; Jones, 794 So.2d 579.

Further, Coleman argues that critical material was omitted from the direct-appeal's Initial Brief, but he fails to provide the material in his Petition, rendering the claim unpreserved here.[10] Indeed, not one cite to the record is included in this claim. See Simmons v. State, 934 So.2d 1100, 1111 n.12 (Fla. 2006)("Simmons' claim that the prosecutor made improper remarks concerning the mtDNA evidence on Simmons' car seat is waived because Simmons' counsel did not properly brief this issue for appeal"), citing Coolen v. State, 696 So. 2d 738, 742 n.2 (Fla. 1997)(stating that a failure to fully brief and argue points on appeal "constitutes a waiver of these claims"); Whitfield v. State, 923 So.2d 375, 378 (Fla. 2005)("we summarily affirm because Whitfield presents merely conclusory arguments");

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[10] Respondents also note that the direct appeal in this case was briefed prior to Melbourne v. State, 679 So.2d 759 (Fla. 1996), so appellate counsel cannot be Strickland ineffective for failing to argue that case or kindred cases. See State v. Lewis, 838 So. 2d 1102, 1122 (Fla. 2002) ("appellate counsel is not considered ineffective for failing to anticipate a change in law"), citing Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992) ("Defense counsel cannot be held ineffective for failing to anticipate the change in the law."); see also Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 841 (1993)(Strickland's prohibition against evaluating trial defense counsel's performance against hindsight is a protection for counsel).

Sweet v. State, 810 So.2d 854, 870 (Fla. 2002)("Sweet simply recites these claims from his postconviction motion in a sentence or two"; unpreserved); U.S. v. Wiggins, 104 F.3d 174, 177 n. 2 (8th Cir. 1997) ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention"); U.S. v. Williams, 877 F.2d 516, 518-19 (7th Cir. 1989) (failure to designate on appeal specific evidence contested waives the issue). If Coleman attempts to provide support for his argument in a reply, Respondents object; it should not be Respondents task to attempt to locate parts of the record that the petitioning party vaguely references with no citation to the record whatsoever.

Further, concerning venirepersons Velma Horne and Carolyn Freeman, the prosecutor did, in fact provide race neutral reasons for challenging each. Velma Horne knew Jocelyn Moltrie, who was a participant in the conspiracy, and detailed her involvement (See R/III 443); this was a race neutral reason.[11] Concerning Ms. Freeman, the prosecutor stated that she would have great difficulty recommending the death penalty (R/III 444). When the trial court had questioned her about following the court's instructions, she stated: "I guess if it was really, really, I guess I could follow it, but it has to be strongly." She then said she could follow the law, but amidst this assurance she significantly hedged: "Yes, I believe anything is

[11] While not using any magic words, the trial judge characterized it as an "explanation" (R/III 444).

possible." (R/III 439-41) In sustaining the challenge to Ms. Freeman, the Judge found the prosecutor's reasons sufficient and also noted her demeanor as equivocal and her facial reactions as showing difficulty. (R/III 445)

In sum, in addition to procedural bar and law of the case, even if all of Coleman's current jury-selection habeas claim I.D were added to the corresponding ISSUE III in the Initial Brief, it still would be meritless. Coleman has thereby palpably failed to demonstrate Strickland deficiency or prejudice.

E. IAC/APPELLATE COUNSEL: SHACKLING (PET 27-31).

This is the one habeas claim that this Court did not explicitly or implicitly resolve in Coleman's direct appeal. However, Robinson was tried with Coleman, and Robinson v. State, 610 So.2d 1288, 1290 (Fla. 1992), rejected this claim:

> Robinson also claims that the trial court's ordering the defendants to remain shackled during trial violated his due process rights. He objected to the shackling, but the court stated it was necessary due to unspecified information received by the court. Robinson, however, never asked the court to explain further, and we see no reversible error here. The court excused the jury and had Robinson's shackles removed before he took the witness stand. **A piece of cardboard placed under the defense table to hide the defendants' legs fell over during trial, but Robinson has not shown that the jurors noticed**, or were affected by, the shackles. We therefore find no merit to this issue.

Robinson, therefore, controls. Accordingly, the trial judge observed that the cardboard "didn't come down so far" (R/X 1876) and no one asserted what the jurors saw (see R/X 1876).

Here, as in Sireci v. Moore, 825 So.2d 882, 888 (Fla. 2002), "there is nothing in the record that leads us to conclude that the jury ever saw Mr.

Sireci in restraints. Indeed, the trial court here made every effort to keep the petitioner's restraints from being viewed by the jury…."[12] See also, e.g., Jones v. State, 998 So.2d 573, 588 (Fla. 2008)("Jones does not contend that any venire members who ultimately sat on his jury saw him in restraints. Absent allegations that the actual jurors were exposed to Jones in shackles, he cannot demonstrate prejudice"); Sireci, 825 So.2d at 888 ("brief exposure of the jury to the defendant in prison garb or restraints is not per se prejudicial so as to require a mistrial"), citing Singleton v. State, 783 So.2d 970, 976 (Fla. 2001), and Neary v. State, 384 So.2d 881, 885 (Fla. 1980).

Coleman also contends (Pet 28-29) that appellate counsel was ineffective because he did not assert that jurors saw him "handcuffed and manacled during closing arguments." For this assertion, Coleman cites to the trial record at "R. 1875." However, there is no documentation of such a claim at R/X 1875. Instead, the discussion of the cardboard barrier begins on the next page, a matter that this Court expressly held was meritless in the block-quote above, and remains meritless.

Moreover, Coleman's counsel did not voice an objection (See R/X 1876), thereby rendering any such claim unpreserved as to Coleman and thereby not providing the basis for a viable appellate claim.

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[12] Respondents also note that the cardboard supposedly "came down" after all of the incriminating evidence had been presented (See R/X 1876).

F. IAC/APPELLATE COUNSEL: JURY OVERRIDE (PET 31-38).

Coleman admits that appellate counsel briefed this issue (ISSUE V, IB/1990 22-26), and thus, this Court resolved it on direct appeal:

> Coleman now argues that the trial judge erred in overriding the jury's recommendation of life imprisonment. In making this argument Coleman relies on cases such as *Ferry v. State*, 507 So.2d 1373 (Fla. 1987), and *Carter v. State*, 560 So.2d 1166 (Fla.1990), in which the defendants presented overwhelming evidence in mitigation that provided reasonable bases for the juries' recommendations. **In contrast, the potential mitigating evidence presented in the instant case is of little weight and provides no basis for the jury's recommendation.** *Cf. Thompson v. State*, 553 So.2d 153 (Fla. 1989) (defendant killed friend who stole money from him, five aggravating factors), *cert. denied*, 495 U.S. 940, 110 S.Ct. 2194, 109 L.Ed.2d 521 (1990); *Bolender v. State*, 422 So.2d 833, 837 (Fla.1982) (defendants killed four drug dealers, but victims' livelihood did 'not justify a night of robbery, torture, kidnapping, and murder'), *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983); *White v. State*, 403 So.2d 331 (Fla.1981) (execution-style killing of six victims during a residential robbery), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). *Bolender*, especially, is on point with the instant case, and any sentence for Coleman other than death would be disproportionate. *See Correll v. State*, 523 So.2d 562 (Fla.) (four victims), *cert. denied*, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988); *Ferguson v. State*, 474 So.2d 208 (Fla.1985) (execution-style killing of six victims warrants death); *Francois v. State*, 407 So.2d 885 (Fla.1981) (same), *cert. denied*, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982). We reach this conclusion, even though we have struck one of the aggravators found by the trial court, because there is no reasonable likelihood that the trial court would conclude that the mitigating evidence outweighed the four remaining aggravators. Any error was harmless. *Holton v. State*, 573 So.2d 284 (Fla.1990), *cert. denied*, 500 U.S. 960, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991); *Bassett v. State*, 449 So.2d 803 (Fla.1984).
>
> That Frazier received a lesser sentence does not make Coleman's death sentence disproportionate. The record demonstrates that he was less involved and less culpable than Coleman or Robinson. In addition, the jury convicted Frazier of first-degree murder of only one of the victims and second-degree murder of the other. *See* n. 3, *supra*. *Scott v. Dugger*, 604 So.2d 465 (Fla.1992), is factually distinguishable and does not provide a basis for relief here.
>
> Therefore, we affirm Coleman's convictions and sentences of death.

Coleman, 610 So.2d at 1287-88. As such, the direct appeal opinion established the law of the case, and this claim is procedurally barred. See Lowe, 2 So.3d 21; Thompson, 759 So.2d 650; Rutherford, 774 So.2d 637; Jones, 794 So.2d 579. Therefore, CLAIM I.F distills to a hindsighted complaint (Pet 31-32) that appellate counsel should have argued Tedder v. State, 322 So.2d 908 (Fla.1975), more, which is not a valid IAC appellate counsel claim.

Coleman's argument (Pet 32-36) that the jury may have concluded that Coleman was not the triggerman[13] is inconsequential because, as discussed in CLAIM I.A supra and at length in the State's Answer brief filed last week, there was competent and probative evidence proving that Coleman entered the victim's apartment brandishing a gun, was a full accomplice with Robinson at the mass murder scene, raped Merrell three times, slit Merrell's throat three times, and gifted some of the booty from the carnage. Coleman's self-gratuitous assumptions regarding what the jury "could have decided" (Pet 36) are rank speculation and not a valid basis of any IAC. And, indeed, the direct-appeal Initial Brief (IB/1990 pp. 24-26) asserted that Coleman was not the triggerman. And, the mitigation was,

[13] Actually, at one point, Merrell testified that she did not know who shot her (R/VIII 1377) and she testified that "[f]rom what he [Coleman] done to me, I'm sure he could have" shot someone (R/VIII 1376).

indeed, weak in comparison with the overwhelming aggravation of multiple murders, HAC, CCP, and robbery/burglary/kidnapping.[14]

Finally, Coleman contends (Pet 37) that this Court's self-evaluation of its cases in 1984 and prior to 1984 somehow applies here, where this Court decided the direct appeal in 1992. The facial invalidity of such an argument speaks well of appellate counsel's winnowing ability.

In sum, the direct appeal procedurally bars this claim, and it remains meritless.

CLAIM II: IS COLEMAN ENTITLED TO HABEAS RELIEF BASED UPON HIS CLAIM THAT THE DEATH PENALTY AS APPLIED TO HIM IS CRUEL AND UNUSUAL PUNISHMENT? (PET 38-43, RESTATED)

This claim attempts to argue evidence adduced at the postconviction evidentiary hearing to contend that the death penalty is unconstitutionally applied to Coleman. In essence, this claim appears to contend that newly discovered evidence of deficient mental condition render the death penalty unlawful. Respondents have three responses, each of which require the denial of this claim.

First, a habeas proceeding is not the proper vehicle to argue newly discovered evidence. Such a claim belongs in postconviction proceedings, which are subject to timeliness and due diligence requirements and

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[14] Although not the test of IAC appellate counsel, the mitigation also even pales now after Coleman's hindsighted second attempt to present mitigation at the postconviction evidentiary hearing, as the State discussed in the Answer Brief in SC04-1520.

evidentiary testing. See, e.g., Rule 3.851(d)(2),(e)(2),(f). Indeed, this habeas proceeding should not be used as a means to expand this Court's otherwise very generous 100-page briefing allowance for postconviction briefs. Hildwin v. Dugger, 654 So.2d 107, 111 (Fla. 1995), succinctly stated the principle: "Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised in a 3.850 motion." See also Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987)("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material"); White v. Dugger, 511 So.2d 554, 555 (Fla. 1987)(death warrant; "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings").

Therefore, Mills v. Dugger, 559 So.2d 578, 579 (Fla. 1990), rejected an override issue and other issues presented in a habeas and reasoned:

> Mills raised most of these issues on direct appeal or in his 3.850 motion; others should have been raised, if at all, on appeal. Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised on appeal or in other postconviction motions.

Second, even if the postconviction record is improperly considered here, the record does not support the factual predicates for this claim. Coleman self-servingly relies on his expert's postconviction testimony (Pet 38-40) and ignores other evidence. Thus, this claim ignores the trial

court's finding that accredited defense attorney Stokes postconviction testimony:

> At the evidentiary hearing, Mr. Stokes testified that he believed the Defendant was 'very intelligent', streetwise, and mentally competent.
>
> ***
>
> Based upon the Defendant's trial testimony and performance under cross examination, as well as Mr. Stokes' testimony that he believed the Defendant was bright, competent and intelligent.
>
> ***
>
> Mr. Stokes also testified that the Defendant answered questions logically and coherently when questioned by the prosecutor under cross-examination.

(PCR/VIII 1292-94; some footnotes omitted)

In contrast to Coleman's self-serving reliance upon Dr. Toomer's testimony, the trial court accredited Dr. Larson's postconviction testimony and substantially rejected Dr. Toomer's. (See PCR/VIII 1295-96) Similarly, the trial court's mental-retardation order accredited Dr. Larson and emphasized the trial testimony that Dr. Larson reviewed, but not Dr. Toomer:

> The Court has reviewed the testimony of Defendant at trial, during both the penalty and guilt phases, [FN10: R/VIII 1492-1518; R/XI 2032-36] and makes a number of observations in that regard. During his trial testimony, Defendant was able to recall specific details regarding the physical appearance of another suspect in the case, and testified that he made 'large sums of money working' doing 'gambling and stuff like that.' [FN11: R/VIII 1496] Defendant's testimony was not shallow, awkward, or hesitant, but rather included confident multi-sentence explanations within his answers. At one point, in fact, Defendant accurately explained that his indictment had been amended. [FN12: R/VIII 1499] In testifying regarding his alibi defense, Defendant also detailed the thought process he pursued in determining where he was on the day of the murders. [FN13: R/VIII 1499-1502] Further, as noted by Dr. Larson, Defendant demonstrated the ability to quickly calculate mathematical figures in his head

during the course of his testimony. [FN14: R/VIII 1501] This Court also finds significant, as did Dr. Larson, that Defendant was able to make travel arrangements for himself to travel from Miami, Florida, to Moultrie, Georgia, and to fend off probing questions about such from the prosecutor on cross examination. [FN15: R/VIII 1511-14] Similarly, during his testimony at penalty phase, Defendant stated that he had been found guilty of crimes he knew 'nothing about,' and cogently explained his belief that the blood evidence and other physical evidence demonstrated his innocence. [FN16: R/XI 2032-36] Consequently, based on the totality of the evidence before the Court, the Court concludes that Defendant has not demonstrated significantly subaverage functioning either currently or manifesting before age 18.

***

With regard to Defendant's adaptive functioning, the vast majority of the credible evidence suggests that Defendant is not significantly diminished in terms of the 'effectiveness or degree with which Defendant meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.' [§921.137, Fla. Stat.] For example, his mother testified at trial that she had never seen 'nobody who can beat him yet' at cards and that he made 'quite a bit' of money playing cards,'[FN17: R/VIII 1462] describing him later at the evidentiary hearing as a 'magician' at cards. [FN18: PCR/V 682] This testimony is consistent with Defendant's representations at trial that he was making large sums of money by gambling. [FN19: R/VIII 1496] Defendant's mother, in her testimony at [the] evidentiary hearing in January 2001, also observed that Defendant was 'just the average child' in terms of his behavior. [FN20: PCR/V 662-63] Although she noted that Defendant had taken special education classes and had some difficulty academically, she appeared to relate those difficulties to an undiagnosed hearing problem rather than any mental deficit. [FN21: PCR/V 671-72] Dr. Larson observed at evidentiary hearing that absenteeism was in large part likely a contributor to Defendant's poor academic performance, an opinion bolstered by the testimony of Defendant's mother at the 2001 evidentiary hearing. [FN22: PCR/V 684]

In reaching its conclusion, the Court also considers Defendant's capabilities as an adult. At trial, Defendant testified extensively about how he travelled via airplane to Georgia to conduct 'business' with a bondsman, and agreed with the State's assertion that doing so was 'pretty easy.' [FN23: R/VIII 1511-14] Significantly, as pointed out by Dr. Larson, Defendant was perceived by his defense counsel as clearly intelligent. [FN24: PCR/V 697, 707] In fact, Defendant so thoroughly convinced his counsel that Defendant had reliable alibi witnesses that counsel told law enforcement he believed they had the

> wrong man in custody. [FN25: PCR/V 695, 717-19] Counsel stated that Defendant was able to communicate with him, remember events, describe his version of the sequence of events, and enumerate who would be able to testify as to his alibi. [FN26: PCR/V 717-19] Counsel also noted that Defendant was able to answer questions coherently and logically under both direct and cross examination, and that he had no difficulty in understanding or answering questions. [FN27: PCR/V 728-29] This is corroborated by Dr. Larson's observation that Defendant's level of vocabulary and communication skills were above what one would expect of an individual with impaired adaptive behavior. The Court finds credible Dr. Larson's assessment that Defendant does not suffer significant deficits in adaptive behavior, and cannot and does not place significant value on the results of the SIB-R as administered to Defendant and his mother. The Court's own observations of Defendant and the record evidence are completely at odds with the conclusion that Defendant is functioning at the level of a 13-year-old (Defendant's SIB-R results) or an eight-year-old (Defendant's mother's SIB-R results).
>
> Based on the totality of the evidence before the Court, the Court does not find that Defendant demonstrates concurrent deficits in adaptive behavior.

(PCR-S2/III 1318-21)

Further, while Dr. Toomer opined at the postconviction proceeding that it is possible that Coleman has "organicity," no neurophysiological evidence was offered to support this opinion. Instead, Dr. Toomer substantially relied on "testing" that relied on answers provided by Coleman (See PCR/VI 797-818, 905-906, 908-909, 916-19), who has a track record of deceit (PCR/VI 856-57; see PCR/V 661, 667, 674), gambling prowess (see R/VIII 1462, 1501-1502, 1511, 1521), and ability to calculate monetary amounts on-the-fly (R/VIII 1500-1501). Coleman himself denied at trial that he is a follower (R/VIII 1502 L9-10), contrary to Toomer (quoted at Pet 39). Indeed, Dr. Toomer himself acknowledged the need for further testing regarding his "organicity" opinion: "Given these findings, a complete

neuropsychological evaluation is strongly recommended to determine the nature and extent of any underlying organic impairment." (PCR/VI 944, underlined emphasis in original) Coleman failed to submit for the Circuit Court's consideration this "complete neuropsychological evaluation."

Indeed, in contrast to Coleman's unsupported postconviction assertion of brain damage, Dr. Larson detailed how Coleman meets the criteria for antisocial personality disorder, including, for example:

- Coleman's "failure to conform to the social norms with respect to lawful behavior … clearly" exhibited by Coleman's "incarcerat[ion] numerous times as a juvenile and as an adult," including "this []as his third time in Department of Corrections" (PCR/VI 856);
- Coleman's "juvenile record that's replete with examples of misconduct, fighting, incorrigibility, not going to school, truancy" (PCR/VI 859); "the record is replete with physical fights and assaults"(PCR/VI 857);
- Coleman's "deceitfulness, as indicated, by repeated lying, use of aliases, conning others for personal profit and pleasure," including his "admitted … use[of] aliases, … he often told lies," and his deceiving his mother into thinking he was at school as "another example of that, pervasive pattern in this case starting early on in life" (PCR/VI 856-57);
- Coleman "making his living through criminal conduct" (PCR/VI 859);
- Coleman's actions at the mass-murder scene (See PCR/VI 858); and,
- Coleman's lack of remorse in this case (PCR/VI 859).

And, **third**, there is no per se rule that precludes the death penalty where a defendant is diagnosed with mental impairments. For example, Lawrence v. State, 846 So.2d 440, 452 (Fla. 2003), like here, included, "(1) … previously convicted of another capital felony or of a felony involving the use or threat of violence to the person …; and (2) the capital felony was a homicide and was committed in a cold, calculated, and

premeditated manner without any pretense of moral or legal justification (great weight)." Id. at 444. Here and in Lawrence, the prior violent felonies included "murder and attempted murder," 846 So.2d at 453. Moreover, here HAC was substantial. And, Lawrence's over-all mitigation was much more extensive, including statutory mental mitigation, than here at trial and even as supplemented at postconviction here. In Lawrence, "The experts testified that Lawrence had organic brain damage and schizophrenia." Id. at 444. In spite of substantially stronger evidence of his mental condition than Coleman has produced, Lawrence held that "Lawrence's death sentence is proportionate," Id. at 455. Coleman's death sentence is lawful. See also Lawrence, 846 So.2d at 455 (collecting cases). Coleman's death sentence is neither cruel nor unusual.

Robinson v. State, 761 So.2d 269 (Fla. 1999), included CCP and other aggravators, like here, but it did not included the very weighty prior violent/capital felony present in this case. Unlike here, Robinson included two mental mitigators. Unlike here, the trial judge in Robinson found he was brain damaged. Robinson upheld the death sentence as "proportionate to the facts," Id. at 278. It should be upheld here.

Smithers v. State, 826 So.2d 916 (Fla. 2002), involved two murders, whereas here there are four, and CCP and HAC. In Smithers the trial court found the two statutory mental mitigators, unlike here, and some non-statutory mitigation. Smithers upheld the "sentences of death [as] proportionate." 826 So.2d at 931. The death sentence is proportionate here.

Singleton v. State, 783 So.2d 970, 972-73, 979-80 (Fla. 2001), upheld a death sentence as proportionate where the trial court found prior violent felony and HAC aggravating factors and substantial mitigation, including extreme mental/emotional disturbance and impaired capacity, and age of sixty-nine. Other mitigation included under influence of alcohol and possibly medication at time of offense; alcoholism; mild dementia; attempted suicide; honorable military service; and model prisoner during prior sentence. Here, there is more aggravation and less mitigation, meriting affirmance of the death penalty.

Mills v. State, 476 So. 2d 172, 177 (Fla. 1985), was a jury override case with aggravators not as strong as those here. It upheld the death sentence, as it should be here.

Thus, under the facts of this case, even when improperly considering the postconviction evidence in this habeas proceeding, the death penalty was constitutionally applied to Coleman. It is not cruel and unusual, but rather, appropriate for Coleman's crimes.

ISSUE III: IS COLEMAN ENTITLED TO HABEAS RELIEF BASED UPON HIS CLAIM THAT HE WAS IMPROPERLY CONVICTED OF ATTEMPTED FELONY MURDER? (PET 43-45, RESTATED)

This claim is presented almost verbatim in Coleman's postconviction Initial Brief as ISSUE VII (Initial Brief pp. 98-100). As such, it is inappropriate here. See Hildwin, 654 So.2d 107; Blanco, 507 So.2d 1377; White, 511 So.2d 554; Mills, 559 So.2d 578, as cited and discussed supra in CLAIM II. Further, this is a direct-appeal type of claim, thereby

procedurally barring it here. See Lopez v. Singletary, 634 So.2d 1054, 1055 (Fla. 1993)("(8) the court applied an improper automatic aggravator" barred).

Arguendo, if the merits of this claim are reached here, Respondents submit, as the State did in its Answer Brief in SC04-1520, that Coleman is entitled to no relief. State v. Gray, 654 So.2d 552 (Fla. **1995**), is not retroactive; therefore, it does not apply here, where Coleman was tried in 1989 and where this Court affirmed the convictions in 1992. See State v. Woodley, 695 So.2d 297, 298 (Fla. 1997); State v. Wilson, 680 So.2d 411 (Fla. 1996); Van Poyck v. Singletary, 715 So.2d 930, 935 (Fla. 1998)("Because the crime of attempted felony murder was a valid offense when Van Poyck's convictions became final, he is not entitled to the relief requested"). Thus, Williamson v. State, 994 So.2d 1000, 1016 (Fla. 2008), recently reiterated that Gray was prospective, rather than retroactive: "The Court held that the *Gray* decision 'must be applied to all cases pending on direct review or not yet final.'"

In any event, as the trial court reasoned (PCR/VIII 1297-98), this conviction rests upon a viable alternative ground, here buttressed by overwhelming evidence of Coleman's premeditated persistence in attempting to kill Ms. Merrell by slitting her throat three times, and, in any event, the conviction contested in this claim is inconsequential to the death sentences.

CONCLUSION

Based on the foregoing discussions and those in Respondents' Motion to Strike, the State respectfully requests this Honorable Court disregard all references in the Petition to documents that the Circuit Court has sealed, disregard news reports of an irrelevant case, and disregard all discussion relying upon those documents, and, in any event, deny each aspect of the Petition and deny all relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on April 27, 2009:

MR. MARTIN J. MCCLAIN, ESQ.
McClain & McDermott P.A.
141 N.E. 30th Street
Wilton Manors, Florida 33334

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
BILL McCOLLUM, ATTORNEY GENERAL

_____

By: STEPHEN R. WHITE
Florida Bar No. 159089
Attorney for Appellee, State of Fla.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 (VOICE)
(850) 487-0997 (FAX)