IN THE SUPREME COURT OF FLORIDA

ERNEST CHARLES DOWNS

Appellant,

v. CASE NO. SC04-345

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

PRELIMINARY STATEMENT

Appellant, Ernest Charles Downs, appeals the November 18, 2003, summary denial of his motion for post-conviction relief. References to appellant will be to "Downs" or "Appellant," and references to appellee will be to "the State" or "Appellee." The record on appeal from Downs' original conviction and sentence shall be referred to a "TR" followed by the appropriate volume and page number. The record on appeal from his original post-conviction proceedings will be referred to as "PCR" followed by the appropriate volume and page number.

The record on appeal from his second sentencing proceedings held shall be referred to as "2SP" followed by the appropriate volume and page number. The record on appeal from Downs' first successive post-conviction proceedings shall be referred to as "SPCR" followed by the appropriate volume and page number. The two volume record on appeal in the instant case shall be referred to as "2SPCR" followed by the appropriate volume and page number. The initial brief in the instant case will be referred to as "IB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The procedural history of this case dates back to 1977. Ernest Charles Downs was born on August 11, 1948. He was 28 years old when he murdered Forrest Jerry Harris, Jr.

The relevant facts surrounding the April 23, 1977, murder are set forth in this court's opinion on direct appeal as follows:

> ... In April, 1977, John Barfield approached Downs with an offer of five thousand dollars if Downs would kill Harris. The record indicates a man by the name of Ron Garelick formed a conspiracy to murder Harris for the purpose of collecting insurance proceeds. Downs accepted the contract to kill Harris and enlisted the assistance of Larry Johnson. On April 23, 1977, at Downs' insistence, Johnson phoned Harris and identified himself as Joseph Green, from whom Harris was expecting a call, and told Harris that he wanted to talk to him about flying contraband. They arranged a meeting in Jacksonville. Downs drove down a dirt road and left Johnson there to await Downs' return with Harris. Downs picked up Harris and drove to the location where he had left Johnson. Harris exited the car and approached Johnson at which time Downs shot Harris four times in the head with a .25 caliber automatic pistol. Together, Downs and Johnson dragged the body off the road into the bushes where Downs fired another shot into Harris' chest to make sure that he was dead.

Downs v. State, 386 So.2d 788 (Fla. 1980); Downs v. State, 740 So.2d 506 (Fla. 1999).

Contrary to his pleas, Downs was convicted of murder in the first degree and conspiracy to commit murder. After the penalty phase, the jury recommended Downs be sentenced to death. The trial judge followed the jury's recommendation and sentenced Downs to death. The trial judge sentenced Downs to thirty years for his conviction for conspiracy to commit murder.

Downs appealed, raising fifteen claims: (1) the trial judge erred in allowing a diagram prepared by Johnson outside the courtroom; (2) Downs was denied due process by the prosecutor's interruption of defense counsel during defense reply summation; (3) Downs was deprived of due process by the four day delay and non-sequestering of his jury between the guilt and penalty phase; (4) the trial judge erred in failing to instruct the jury that a life sentence would mean that Downs would serve at least 25 years without the possibility of parole; (5) Downs was denied an impartial jury; (6) Florida's capital sentencing scheme is unconstitutional because it precludes consideration of mitigation evidence except for the seven statutory mitigating circumstances; (7) the prosecutor improperly granted immunity to a co-murderer while seeking death against Downs; (8) Downs was deprived of due process by not being allowed to take depositions on videotape; (9) the trial judge erred by curtailing the defendant's cross-examination of witnesses; (10) Downs was deprived of compulsory process; (11) Downs' admissions were improperly admitted into evidence; (12) the trial judge erred in allowing the prosecutor to pose a hypothetical question to the medical examiner; (13) the trial judge invaded the province of the jury by commenting on the evidence; (14) the evidence was insufficient to support the conviction, and (15) a death sentence is disproportionate.

On May 22, 1980, this Court rejected each of Downs' claims and affirmed his conviction and sentence to death. Downs' motion for rehearing was denied on September 12, 1980. Downs v. State, 386 So.2d 788 (Fla. 1980).

Downs filed a petition for writ of certiorari. The United States Supreme Court denied review on November 3, 1980, and denied a petition for rehearing on January 19, 1981. Downs v. Florida, 449 U.S. 976 (1980).

On June 21, 1982, Downs filed an initial motion for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. Downs filed a supplemental motion raising additional claims. After an evidentiary hearing in October 1982 and January 1983, the collateral court denied his motions and Downs appealed.

On appeal, Downs raised numerous claims: (1) a statement made by the prosecutor to the trial judge at sentencing tainted the sentencing process; (2) his death sentence is disproportionate; (3) he is entitled to a new sentencing hearing because a co-defendant was going to trial for first-degree murder; (4) he should not have been sentenced to death because the manner in which immunity was awarded to Johnson casts a shadow on the reliability of Johnson's testimony; (5) his death sentence should be vacated because of erroneous jury instructions on aggravating and mitigating factors; (6) the trial court erred in denying him reasonable expenses to employ experts to prove that the death penalty is being imposed

unconstitutionally in Florida; (7) the jury that convicted him was not fair and impartial and was "death qualified" under Witherspoon standards; (8) his statement implicating him in the murder was not voluntary; (9) there was insufficient evidence upon which to convict him; (10) he was denied effective assistance of counsel at the guilt and penalty phases of his trial; (11) a contingent fee contract between him and his defense counsel created a conflict of interest which violated his right to effective assistance of counsel; (12) his sentence should be vacated because his counsel was privately reprimanded by the Bar for conduct in this case; (13) the State committed several Brady violations, and (14) he is entitled to a *de novo* post-conviction hearing before a new judge because the present trial judge was biased against him. Downs v. State, 453 So.2d 1102, 1103-1104 (Fla. 1984).

This Court declined to consider the first nine issues, ruling these claims were procedurally barred as they either were, or could have been, raised on direct appeal. This Court concluded that, as such, they are not proper grounds for post-conviction collateral proceedings. Downs v. State, 453 So.2d at 1103-1104.

As to the latter five issues, this Court concluded the claims were properly brought in post-conviction proceedings. However, this Court found no merit in any of the claims and affirmed the trial court's denial of post-conviction relief. Downs v. State, 453 So.2d 1102, 1109 (Fla. 1984).

Downs next filed a petition for writ of habeas corpus. In his petition, Downs requested this Court permit him to brief and argue his post-conviction appeal anew. He also raised various claims of ineffective assistance of counsel. On August 29, 1985, this Court denied Downs' petition. Downs' motion for rehearing was denied on November 4, 1985. Downs v. Wainwright, 476 So.2d 654 (Fla. 1985).

On August 18, 1987, the Governor signed Downs' death warrant. Downs petitioned this Court for writ of habeas corpus and stay of execution, alleging a change in the law regarding mitigating circumstances.

This Court granted the writ, stayed the death warrant, and vacated Downs' sentence of death with instructions for the trial court to hold a new sentencing proceeding in accordance with the Supreme Court's decision in Hitchcock v. Dugger, 481 U.S. 393, 95 L.Ed.2d 347, 107 S.Ct. 1821 (1987) (holding that trial court must consider both statutory and nonstatutory mitigating factors). Downs v. Dugger, 514 So.2d 1069 (Fla. 1987).

Downs' defense at the resentencing proceeding focused on establishing he was not the triggerman and did not deserve the death penalty.[1] Downs testified that Johnson drove him to the dirt road and dropped him off. Downs said he had changed his mind about participating in the murder, so he left the scene and went to the

[1] These facts regarding Downs' second sentencing proceedings were outlined by this Court on direct appeal. Downs v. State, 572 So.2d 895 (Fla. 1990).

home of his grandmother, Bobbie Jo Michael. When Johnson found Downs at Michael's house later that night, Johnson was carrying Harris's driver's license and money he took from the body. The next day, he and Johnson visited Barfield who paid Johnson $500 in partial payment for the murder. Downs v. State, 572 So.2d 895 (Fla. 1990).

Downs offered the testimony of various witnesses to support his theory that Johnson -- not Downs -- was the triggerman. Barfield testified that on the day after Harris died, Johnson presented Harris's driver's license as proof of the killing. Barfield also testified that Johnson admitted at that time that he was the one who killed Harris. However, Barfield conceded that in his own trial in 1978, he testified that he had no knowledge of Harris's murder. Downs' sister, Darlene Shafer, also testified that Johnson told her he had killed Harris.

Downs introduced character evidence to show that when he was a child, his father drank, beat his mother and the children, then abandoned the family, leaving Downs, the eldest child, to help care for everyone his father left behind. At sixteen, Downs joined the Army. The Army discovered that he enlisted while under age, so it relegated Downs to kitchen-type duties. Downs went AWOL, but eventually was honorably discharged. While AWOL, Downs returned to his family in Kansas, where he committed an attempted robbery and a robbery using a toy gun. He was put on probation. Subsequently,

Downs was sent to prison for violating probation because he left the foster home where he was living and returned to his mother and grandmother.

In prison, Downs earned a high school graduate equivalency diploma and learned some construction skills. After his release in 1970, Downs went to the Jacksonville area where he married his first wife, had a daughter, and worked hard to provide for his family, even after divorcing his first wife. While in prison he helped his daughter to deal with her emotional problems, and he has remained friends with her mother. Several of Downs' former employers and business partners testified that they liked and trusted Downs, and that they would rehire him if he was released from prison. Richard Dugger, Secretary of the Department of Corrections, provided mitigating testimony, which the trial court sealed.

A forensic psychologist, Dr. Harry Krop, testified that Downs was insecure about his manhood and lacked self-respect. His emotional problem surfaced when, around the time of Harris's murder, Downs discovered photographs that revealed his second wife's infidelity and involvement with homosexual activity and pornography. Seeing those photographs "was basically demasculating . . . bringing forth a lot of his feelings of inadequacy, which he had a lot from childhood," Dr. Krop said. That caused Downs extreme stress, altering his personality and emotional state, and

impairing his cognitive and emotional faculties at about the same time he joined the murder conspiracy. Based on his evaluation of Downs, interviews, and his review of testimony in this case, Dr. Krop concluded that Downs had strong potential for rehabilitation. However, Dr. Krop also concluded that Downs was not suffering from extreme mental or emotional disturbance at the time of the murder, and that he did have the capacity to appreciate the criminality of his conduct.

After hearing all the evidence, the jury voted eight to four to recommend the death sentence. The trial court found three aggravating circumstances: (1) Downs had a prior conviction for a felony involving the use or threat of use of violence; (2) the murder was committed for pecuniary gain, and (3) the murder was cold, calculated, and premeditated. The trial court merged the second and third aggravating circumstances, reasoning that each would have to be established in every case of contract murder.

As to mitigation, the trial court concluded that it could "not find mitigating factors to offset or overcome the aggravating circumstances in this case." The trial judge followed the jury's recommendation and sentenced Downs to death. Downs v. State, 572 So.2d 895 (Fla. 1990).

On appeal, Downs raised numerous issues: (1) The trial court erred in excluding a portion of the prior sworn testimony of his grandmother, Bobbie Jo Michael, whose testimony was perpetuated in

a deposition in 1982, shortly before she died of cancer;[2] (2) the trial judge committed fundamental error when, without objection, it admitted the prior sworn testimony of Larry Johnson, who had testified in the guilt phase of the 1977 trial; (3) the trial court erred in excluding several specific mitigating facts from the jury's consideration, including the testimony of Richard Brown, the attorney who represented Downs in 1977, who testified before the jury that he had never seen Downs show signs of violence or brutality during their time together; (4) the trial court erred in quashing his subpoena to compel State Attorney Ed Austin to testify about the deals made with Downs' alleged coconspirators, particularly Johnson; (5) the trial judge erred in refusing to instruct the jury they could consider any lingering doubt they may have had about Downs being the triggerman; (6) the trial judge erred in responding to a jury question whether Downs would get credit for time served if he was sentenced to life imprisonment; (7) the trial court erred by not requiring his presence when the trial court, in the presence of defense counsel and the prosecutor, addressed a question the jury asked during deliberations; (8) the trial judge's discussion of Downs' mitigating evidence was inadequate; (9) application of the cold, calculated and

[2] Ms. Michael's testimony was introduced into evidence at Downs' initial post-conviction proceedings in support of his claim that trial counsel was ineffective for his failure to adequately challenge the proof of guilt and to mitigate the severity of Downs' culpability in the penalty phase.

premeditated (CCP) violated constitutional protections against ex post facto laws, and (10) Downs sentence to death was disproportionate.

While concluding the trial judge erred in excluding the perpetuated testimony of Downs' grandmother and, as well as the testimony of Downs' former defense attorney from the jury's consideration, the Court found these errors to be harmless. This Court found Downs' death sentence to be proportionate and affirmed. Downs v. State, 572 So.2d 895 (Fla. 1990).

Downs filed a petition for a writ of certiorari in the United States Supreme Court. On October 7, 1991, the United States Supreme Court denied review. Downs v. Florida, 502 U.S. 829 (1991).

On November 30, 1992, Downs filed a first successive 3.850 motion, raising sixteen claims. After a Huff hearing, the collateral court summarily denied the motion, ruling that Downs' claims were either conclusively refuted by the record or procedurally barred. Downs appealed.

On appeal, Downs raised fourteen claims: (1) the trial court denied Downs' access to public records and failed to hold an evidentiary hearing; (2) the State withheld material, exculpatory evidence;[3] (3) the trial court improperly instructed the jury on

[3] Downs' Brady allegation stemmed from an alleged handwritten memorandum withheld by the State that revealed a police investigation into a possible link between Harris's death and his

the cold, calculated and premeditated aggravator in violation of Espinosa v. Florida, 505 U.S. 1079 (1992), and trial counsel rendered ineffective assistance by not objecting; (4) the trial

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involvement in illegal banking activities at the American National Bank, where he was employed as vicepresident. Apparently, Harris had entered into a plea agreement with federal authorities regarding the illegal banking transactions and had agreed to cooperate with them by identifying other wrongdoers, including a man by the name of Harold Haimowitz. Downs argued that the memorandum would prove that, until Johnson came forward with the story that Downs killed Harris, the State focused their investigation on Harris's involvement in the illicit banking transactions and Haimowitz' possible connection to this murder. Further, Downs claims this evidence would show that Johnson, not Downs, was the triggerman. Downs v. State, 740 So.2d 506, 512 (Fla. 1999).

This Court rejected that claim. This Court concluded that Downs did not show this claim could not have been raised in his initial 3.850 motion. This Court also concluded that Downs has not demonstrated this allegedly withheld memorandum could not have been discovered through the exercise of due diligence prior to the time the initial motion was filed. This Court noted the record in this case affirmatively demonstrates that both Downs and his attorney were familiar with Haimowitz' alleged involvement in this case, as well as the police investigation into this matter, and that Downs' attorney had conducted investigations into the veracity of this purported defense theory. This Court also concluded that despite the untimeliness of the claim and that the evidence revealed the substance of Haimowitz' alleged involvement was actually known to the defense before trial, Downs failed to establish a Brady violation occurred.

This Court agreed with the collateral court that even if the jury had heard evidence of Haimowitz' involvement, such evidence would merely have indicated that Haimowitz, and not Ron Garelick, ordered the murder of Harris. This Court concluded the evidence does not change the fact the jury found Downs guilty of first-degree murder for his participation in the shooting incident. This Court went on to note that Downs failed to explain how this evidence proves Johnson, and not Downs, was the triggerman. Downs v. State, 740 So.2d 506, 513 (Fla. 1999).

court erred in instructing the jury on the previous conviction of a violent felony aggravator in violation of Espinosa and trial counsel rendered ineffective assistance by not objecting; (5) the trial court improperly instructed the jury on the pecuniary gain aggravator in violation of Espinosa and trial counsel rendered ineffective assistance by not objecting; (6) the trial court improperly instructed the jury that a single act could support two separate aggravating factors and trial counsel rendered ineffective assistance by not objecting; (7) Downs was denied a competent mental health evaluation; (8) Downs was denied effective assistance of counsel at the pretrial and guilt phases of the trial; (9) Downs is entitled to a new trial based on newly discovered evidence; (10) Downs was denied effective assistance of counsel at resentencing; (11) the trial court failed to address the existence of statutory and non-statutory mitigating evidence at the resentencing hearing; (12) the jury instructions improperly shift the burden of proof in violation of Downs' rights to due process; (13) the trial court failed to conduct an adequate inquiry under Faretta v. California, 422 U.S. 806 (1975), and (14) cumulative errors committed during the trial court proceedings denied Downs a fair trial.

This Court found issues six, seven, twelve and thirteen to be procedurally barred because they could have and should have been raised on direct appeal. This Court also rejected the remainder of his claims and affirmed the trial court's summary denial of Downs'

successive motion for post-conviction relief. Downs v. State, 740 So.2d 506 (Fla. 1999).

On October 18, 2000, Downs filed a petition for writ of habeas corpus raising twelve claims: Downs alleged his appellate counsel was ineffective for (1) failing to argue on appeal that the State improperly referred to Downs' post-arrest silence; (2) failing to argue on appeal that the trial court erred in refusing to instruct the jury that it could consider mercy during its deliberations; (3) failing to argue on appeal that the trial court erred in refusing to instruct the jury that it could consider the leniency given to the co-defendants and doubt as to whether Downs was the triggerman; (4) failing to argue on appeal that the trial court improperly considered a pre-sentence investigation report; (5) failing to argue on appeal that the trial court erred in refusing to instruct the jury on the law of principals; (6) raising the wrong argument on appeal concerning the denial of Downs' request to subpoena the State Attorney; (7) failing to argue on appeal that the trial court erred in denying Downs' request to disqualify the State Attorney's Office; (8) failing to properly brief the issue concerning the trial court's exclusion of Bobbie Jo Michael's deposition testimony; (9) failing to argue on appeal that the State improperly introduced evidence that Downs was carrying false identification at the time of his arrest; (10) failing to challenge improper comments by the prosecutor during closing argument; (11) failing to argue on

appeal that the trial court improperly denied Downs' motion to disqualify the court, and (12) failing to argue on appeal that the jury instructions improperly shift the burden of proof to the defense.

On September 26, 2001, this Court rejected Downs' claims and denied his petition for writ of habeas corpus. Downs' motion for rehearing was denied on December 3, 2001. Downs v. Moore, 801 So.2d 906 (Fla. 2001).

On May 30, 2003, Downs filed, *pro se*, a second successive motion for post-conviction relief. Downs raised three claims: (1) Downs' death sentence is illegal as set forth in his Rule 3.800 motion; (2) Downs' conviction must be overturned because the trial court, at his original trial, constructively amended the indictment and failed to properly address a juror question during deliberation; (3) his conviction and sentence to death are unconstitutional pursuant to Ring v. Arizona. (2SPCR Vol. I 1-19).

Downs did not raise any of the ineffective assistance of counsel claims he raises in the instant appeal. Likewise, Downs raised no Brady or Giglio violation claim. (2SPCR Vol. I 1-19). Despite failing to raise these claims before the collateral court in his second successive motion for post-conviction relief, Downs raises these as claims of error in the instant appeal.

In addition to his second successive motion for post-conviction relief, Downs filed a Rule 3.800(a) motion alleging his

sentence to death was illegal. In his Rule 3.800 motion, Downs raised the same claim he did in Claim II of his motion for post-conviction relief, specifically that the trial judge excluded from the jury's consideration whether or not he used a firearm. (2SPCR 22-62).

On November 18, 2003, the collateral court summarily denied his second successive motion for post-conviction relief. The court concluded that Downs had failed to comply with the requirements of Rule 3.850 and Rule 3.851 as Downs' motion was untimely and successive. (2SPCR Vol. II 349). Alternatively, the collateral court addressed each of Downs' three claims.

The collateral court denied Downs' first claim because Downs presented the claim in a separate, contemporaneously filed Rule 3.800 motion. The Court noted it would address Downs' claim in his ruling on that motion. (2SPCR Vol. II 348).

The collateral denied Downs' second claim alleging his conviction must be overturned because the trial court amended the indictment. The court ruled the claim was procedurally barred because it could and should have been raised on direct appeal. (2SPCR Vol. II 349). The collateral court also denied Downs' Ring claim citing, *inter alia*, to this Court's decisions in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), and King v. Moore, 831 So.2d 143 (Fla. 2002). (2SPCR Vol. II 349).

By separate order, the collateral court denied Downs' Rule 3.800 motion. (2SPCR Vol. II 359).[4] This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE ONE:

This claim is time and procedurally barred. Additionally, the invited error doctrine bars this claim. Downs' claim stems from an allegation of trial error in 1977. Downs could have and should have raised this claim on direct appeal. As Downs failed to do so, the claim is procedurally barred.

Moreover, the claim is without merit. Downs was charged in a two-count indictment with first degree murder and conspiracy to commit murder. The first count charged Downs with the premeditated murder of Forrest Jerry Harris, Jr., by shooting him with a pistol. Also contained within the first count of the indictment was language applicable to a three-year minimum mandatory sentence imposed if a defendant, *inter alia*, carries or uses a firearm during the commission of an enumerated felony. *Section 775.087, Florida Statutes (1976)*.

After a jury question about the sentencing enhancement language and upon stipulation of both counsel for the State and counsel for the defense, the trial judge removed the sentencing enhancement language from the jury's consideration. As a

[4] The denial of the Rule 3.800 motion was not raised as a separate issue in the instant appeal.

conviction for first degree murder required the defendant to be sentenced to either death or life without the possibility of parole, the sentence enhancement language was superfluous to the crime of first degree murder.

Pursuant to Rule 3.140, Florida Rules of Criminal Procedure, superfluous language may be stricken from an indictment or information. Downs failed to show his rights of due process were violated by striking the superfluous language.

Finally, Downs agreed to the striking of the language from the verdict form. (TR Vol. I 835). Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal.

ISSUE TWO:

This claim is procedurally barred as the claim was not presented to the collateral court in Downs' second successive motion for post-conviction relief. Additionally, the claim is time barred as Downs' claims of ineffective assistance of counsel were filed some sixteen years after the time to file the claims had expired.

ISSUE THREE:

This claim is procedurally barred as the claim was not presented to the collateral court in Downs' second successive motion for post-conviction relief. Additionally, the claim is time

barred as Downs' Brady and Giglio claims were filed some sixteen years after the time to file the claims had expired.

ISSUE FOUR:

This claim is procedurally barred. Downs presented this claim on direct appeal from his second sentencing proceeding. This Court affirmed and ruled Downs' claim was proportionate. Downs v. State, 572 So.2d 895 (Fla. 1990).

ISSUE FIVE:

This Court has held, in Johnson v. State, 904 So.2d 400 (Fla. 2005), that the United States Supreme Court's decision in Ring v. Arizona has no application to cases on collateral review. As Downs' conviction was final some 21 years before Ring was decided and Downs' sentence was final some 11 years before Ring was decided, Ring has no application to Downs' conviction and sentence. Moreover, one of the aggravators found to exist in this case was that Downs had previously been convicted of a violent felony. This Court has repeatedly rejected Ring claims upon a finding of the prior violent felony aggravator.

ARGUMENT

ISSUE ONE

WHETHER DOWNS' CONVICTION AND SENTENCE MUST BE OVERTURNED BECAUSE, DURING JURY DELIBERATIONS, THE TRIAL JUDGE AMENDED THE INDICTMENT AND ALTERED THE VERDICT FORM IN VIOLATION OF DOWNS' RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Downs alleges the trial judge improperly amended the indictment, at his original 1977 trial, by deleting the requirement that the jury consider whether Downs used a firearm in the course of murdering Mr. Harris. This Court may deny this claim for at least two reasons.

First, this claim is procedurally barred. As found by the collateral court, this claim could have and should have been raised in Downs' initial appeal that was decided on May 22, 1980. Consalvo v. State, 937 So.2d 555, 558 (Fla. 2006) (noting that Consalvo raised an issue regarding a constructive amendment to the indictment on direct appeal); Woodel v. State, 804 So.2d 316 (Fla. 2001)(considering but rejecting claim the trial court impermissibly allowed constructive amendment of the indictment); Hall v. State, 742 So.2d 225, 226 (Fla. 1999) (ruling that issue that could have been raised on direct appeal but were not cognizable claims through collateral attack).

Downs offers no logical explanation why he is entitled to litigate this claim some twenty-six years after it could have been

raised on his initial direct appeal. This Court should deny this claim as procedurally barred.

Second, this Court may deny this claim because it is without merit. At its core, the issue Downs places before this Court is whether the trial judge amended the indictment and, if so, did the amendment cause him harm.

The indictment alleged, in pertinent part, that Ernest Charles Downs unlawfully and from a premeditated design to effect the death of Forrest J. Harris, Jr., did kill the said Forest J. Harris Jr., by shooting him to death with a pistol, and in the course of committing said murder, carried a firearm or other deadly weapon, to wit: a pistol, contrary to Sections 782.04 and 775.087. (TR Vol. I 9).

The trial judge instructed the jury that the elements of premeditated first degree murder included: (1) Forrest J. Harris Jr. is dead; (2) the death was caused by the defendant; (3) the killing was wrongful and by the means stated in the indictment; (4) the killing was neither justifiable or excusable homicide, and (5) the defendant acted with a premeditated design to effect the death of the deceased. (TR Vol. XII 815). The jury was also instructed as to the meaning of premeditation. (TR Vol. XII 811-812).

Additionally, the trial court instructed the jury that "the punishment provided by law for the crime of murder is greater if, as charged in this case, the defendant, during the commission of

such crime, carries a firearm. Should you find the defendant guilty of murder of any degree, it will be necessary for you to find in your verdict whether it has been proven beyond a reasonable doubt that the defendant during the commission of the crime, did use a firearm." (TR Vol. XII 814).

Contrary to Downs' allegations, this "use of a firearm" language was not an element of first degree murder. Neither was it, as Downs alleges, a separate firearm charge. (IB 59). Instead, the language was a sentencing enhancement provision provided for in Section 775.087, Florida Statutes (1976).

After the instructions were given, the trial judge went over the verdict form with the jury. The court instructed the jury it was to first consider whether the defendant was guilty of first degree murder as charged, guilty of any lesser included offense, or not guilty. The Court told the jury that once it came to a decision on the charged offense, it must next consider if the defendant did or did not use a firearm. (TR Vol. XII 820). The "use of a firearm" entries were placed separately on the verdict form.

Some three hours into deliberation, the jury posed a question. The question was "in regard to the question as to whether the defendant did or did not use a firearm, must the defendant be guilty of actually pulling the trigger or is he guilty of using the

firearm through association of being an accomplice in a murder in which a firearm is used." (TR Vol. XII 828).

After discussion with both counsel and with the jury, the parties agreed the question concerned the minimum mandatory three-year sentencing enhancement language from Section 775.087, Florida Statutes (1976), that had been placed on the verdict form. (TR Vol. XII 833-834). After some additional discussion, the prosecutor informed the trial court that, after conferring, both the prosecution and the defense had agreed to simply delete the language from the verdict form. (TR Vol. XII 835). The trial court queried trial counsel whether he agreed. Trial counsel stated he did. (TR Vol. XII 835).

Thereafter, the jury was instructed to simply delete, from their verdict form, the language "did use a firearm or did not use a firearm." (TR Vol. XII 836). The Court instructed the jury it was required only to render a verdict as to Count I and Count II. (TR Vol. XII 836).[5]

Though not entirely clear, it appears that Downs' complaint is that the trial judge removed an essential element of first degree murder from the jury's consideration and, as such, he was not

[5] The trial judge noted that it could not take back the verdict form at this point in the deliberations to strike the language herself. (TR Vol. XII 835-836). It is logical to conclude she made this decision in order to protect from disclosure any decisions already made by the jury and marked on the verdict form.

actually convicted of Mr. Harris' murder. Additionally, and apparently alternatively, Downs alleges the trial judge's instruction to disregard the separate firearm finding "effectively pled Downs guilty of murder as charged in the indictment." (IB 11). Downs does not explain how deletion of this language was the functional equivalent of a judicially imposed guilty plea.

Downs is not entitled to the relief he seeks. Rule 3.140, Florida Rules of Criminal Procedure, adopted in 1968, governs indictments and informations. The rule permits "surplusage", defined as "an unnecessary allegation" to be disregarded. The rule also allows the court, on motion of the defendant, to strike surplusage from the pleading.

The only two possible sentences upon conviction for first degree murder were life without the possibility of parole for twenty-five years or death. Had Downs not been sentenced to death, a minimum mandatory sentence of twenty-five years would have been imposed. Accordingly, a separate finding of whether Downs qualified for a minimum mandatory three year sentence enhancement because he carried or used a firearm was surplusage to the charge of first degree murder. Pursuant to Rule 3.140, Florida Rules of Criminal Procedure, the trial judge committed no error in deleting the language from the verdict form.

Additionally, the language was surplusage because the indictment alleged Downs killed Mr. Harris by "shooting him with a

pistol". (TR Vol. I 9). The trial judge's deletion of the separate finding regarding use of a firearm had no effect on the indictment's allegations regarding the means by which Downs effected Mr. Harris's death. As the jury found Downs guilty of first degree murder as charged, the jury concluded beyond a reasonable doubt that Downs murdered Mr. Harris by shooting him with a pistol. (TR Vol. I 9; 2SPCR Vol. I 44).

Finally, Downs agreed to the striking of the language from the verdict form. (TR Vol. I 835). Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal. Cox v. State, 819 So.2d 705, 715 (Fla. 2002); Norton v. State, 709 So.2d 87, 94 (Fla. 1997); Terry v. State, 668 So.2d 954, 962 (Fla. 1996); Czubak v. State, 570 So.2d 925 (Fla. 1990). In this case, the alleged error was fully discussed and agreed to by Downs' trial counsel. Even if the idea to strike the language from the verdict form did not originate with the defendant, his agreement with the procedure should preclude the relief he now seeks. This Court should deny his claim. [6]

[6] This claim is also time barred. Pursuant to Fla. R. Crim.P 3.850, the latest Downs could have raised this claim was January 1, 1987. Downs offers no exception to the Rule which would allow him to raise the claim sixteen years too late.

ISSUE II

WHETHER DOWNS WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL, DUE PROCESS OF LAW, AND EQUAL PROTECTION UNDER IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF FLORIDA'S CONSTITUTION

In Claim Two, Downs raises various issues of ineffective assistance of counsel during the guilt phase of Downs' capital trial. This claim should be denied for at least two reasons. First, none of these claims were presented to the collateral court in Downs' second successive motion for post-conviction relief. Downs provides no explanation why he brings these claims to this Court now, having failed to raise them below.

An issue that was not presented below during collateral proceedings is procedurally barred on appeal. Kokal v. State, 901 So.2d 766, 780 (Fla. 2005) (because Kokal failed to present a claim that the State violated his due process rights by failing to preserve evidence that could potentially have been subjected to DNA testing, the issue was not litigated below and, as such, it is procedurally barred on appeal). *See also* Walton v. State, 847 So.2d 438, 452 (Fla. 2003) (Walton's claim that Rule 3.850 prohibits the Governor of Florida from signing a death warrant until two years after a death sentence becomes final was not presented below and, as such, is procedurally barred); Cave v. State, 529 So.2d 293, 299 (Fla. 1988) (same); Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987) (ruling that "[i]n order to

preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court"). On this basis alone, this Court may deny this claim.

Downs' claims of ineffective assistance of counsel may also be denied because, even if he would have presented them below, all of his claims are time barred. Each of Downs' claims relate to the guilt phase of Downs' 1977 capital trial. Downs' conviction became final for the purposes of collateral review when the United States Supreme Court denied certiorari review on November 3, 1980, and denied a motion for rehearing on January 18, 1981. Downs v. Florida, 449 U.S. 976 (1980).[7]

Pursuant to Rule 3.850, Florida Rules of Criminal Procedure, (1985), any person whose judgment and sentence became final prior to January 1, 1985, shall have until January 1, 1987, to file a motion for post-conviction relief. Downs v. State, 740 So.2d 506 (Fla. 1999) (noting that Downs had until January 1, 1987, at the latest, to request post-conviction relief as far as the issue of guilt is concerned, unless he establishes the existence of newly discovered evidence). Had Downs actually brought these claims in his second successive motion on May 30, 2003, some sixteen years after the time for filing these claims had expired, the collateral court would have, properly, dismissed the claims as time barred.

[7] Rule 3.851(b)(1)(B), Florida Rules of Criminal Procedure.

Even if some of Downs' claims had included claims from his second sentencing proceeding, the claims still would have been time barred. Downs' sentence imposed after his second sentencing proceeding became final when the United States Supreme Court denied certiorari review on October 7, 1991. Downs v. Florida, 502 U.S. 829 (1991).

Pursuant to Rule 3.850, Florida Rules of Criminal Procedure (1991), Downs would have had two years to file a motion for post-conviction relief, or until on or about October 7, 1993. If Downs had actually filed any sentencing claims in the collateral court in his May 30, 2003, motion, the collateral court would have correctly

dismissed them as time barred.[8] Downs claims of ineffective assistance of counsel should be denied.[9]

ISSUE III

WHETHER THE STATE WITHHELD EXCULPATORY EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND PRESENTED FALSE TESTIMONY IN VIOLATION OF GIGLIO V. UNITED STATES

Downs alleges the State violated the dictates of Brady v. Maryland by withholding a tape recorded conversation between John Barfield and Harry Murray regarding Larry Johnson's role in the murder and by withholding the name of a Brady witness revealed by

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[8] Downs raised some of the claims her raises here, in previous pleadings and this Court has already denied relief. For instance, before this Court Downs alleged trial counsel was ineffective for entering into a contingent fee agreement with Downs. Downs claims this created an irrevocable conflict of interest. (IB 17). Over twenty-two years ago, this Court denied this claim in Downs v. State, 453 So.2d 1102, 1109 (Fla. 1984). Downs offers no explanation why he believes he can raise these claims anew.

Likewise, Downs alleges that an untraditional third person conflict caused trial counsel to abandon Downs' defense. Downs claims that an attorney named Harold Haimowitz pressured trial counsel in order to avoid being implicated in the crime. Downs raised several claims regarding Mr. Haimowitz in previous pleadings, including a Brady claim, a claim of newly discovered evidence and claims of ineffective assistance of counsel. This Court denied relief in Downs v. State, 740 So.2d 506, 512-514 (Fla. 1999). Once again Downs offers no explanation why he believes he can raise these claims anew.

[9] In presenting his argument in support of his claim trial counsel was ineffective, Downs quotes to the Eleventh Circuit Court of Appeals decision in Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000). (IB 48). By quoting to Chandler and inserting trial counsel's name within the quote, Downs implies the Eleventh Circuit found that Downs' trial counsel took some action that no objectively competent lawyer would have taken. This is not the case. The Eleventh Circuit in Chandler did not have before it any claim that Downs' trial counsel was ineffective.

the victim's wife during a deposition. (IB 49,54). This claim should be denied for at least three reasons.

As is the case with Downs' claims of ineffective assistance counsel, Downs did not present a Brady or Giglio claim to the collateral court in his second successive motion for post-conviction relief. (2SPCR Vol. I 1-19). Downs provides no explanation why he brings these claims to this Court now, having failed to raise them below.

An issue that was not presented below during collateral proceedings is procedurally barred on appeal. Kokal v. State, 901 So.2d 766, 780 (Fla. 2005) (because Kokal failed to present a claim that the State violated his due process rights by failing to preserve evidence that could potentially have been subjected to DNA testing, the issue was not litigated below and, as such, it is procedurally barred on appeal). *See also* Walton v. State, 847 So.2d 438, 452 (Fla. 2003) (Walton's claim that Rule 3.850 prohibits the Governor of Florida from signing a death warrant until two years after a death sentence becomes final was not presented below and, as such, is procedurally barred); Cave v. State, 529 So.2d 293, 299 (Fla. 1988) (same); Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987) (ruling that "[i]n order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court"). On this basis alone, this Court may deny this claim.

Downs' Brady and Giglio claims may also be denied because both claims are time barred. Both of Downs' claims relate to the guilt phase of Downs' 1977 capital trial. Downs' conviction became final for the purposes of collateral review when the United States Supreme Court denied certiorari review on November 3, 1980, and denied a motion for rehearing on January 18, 1981. Downs v. Florida, 449 U.S. 976 (1980).

Pursuant to Rule 3.850, Florida Rules of Criminal Procedure, (1985), any person whose judgment and sentence became final prior to January 1, 1985, shall have until January 1, 1987, to file a motion for post-conviction relief. Downs v. State, 740 So.2d 506 (Fla. 1991) (noting that Downs had until January 1, 1987, at the latest, to request postconviction relief as far as the issue of guilt is concerned, unless he establishes the existence of newly discovered evidence). Accordingly, absent an allegation of newly discovered evidence, Downs had until January 1, 1987, to file his Brady and Giglio claim.

Downs makes no claim of newly discovered evidence. In fact, in his brief, Downs acknowledges the information about which he complains was explored and litigated during the evidentiary hearing held on his initial motion for post-conviction relief in 1982 and 1983. (IB 49-56). Because Downs filed his second successive motion on May 30, 2003, more than sixteen years after the time for filing had expired, Downs' claims are time barred.

Finally, Downs' claim about the alleged undisclosed tape recordings between John Barfield and Harry Murray may be denied because the claim has already been litigated and rejected by this Court. On appeal from the denial of his initial motion for post-conviction relief, Downs alleged that Harry Murray had information to show that Johnson, not Downs, was the trigger man. (Case Number 64,184, Initial Brief at page 20). Downs made the same complaint and presented the same argument about the "secret tape recordings" he makes before this Court now. (Compare IB 49-53 with Case Number 64,184, Initial Brief at page 20-25). This Court rejected his claims and affirmed the trial court's order denying his motion for post-conviction relief. Downs v. State, 453 So.2d 1102 (Fla. 1984). Downs' attempt to relitigate this claim is barred by the law of the case doctrine. State v. McBride, 848 So.2d 287,290 (Fla. 2003).

While Downs' Brady claim regarding Ms. Harris's deposition was not brought during that same appeal, Downs' allegations, on their face, fail to state a claim under Brady v. Maryland. To establish a claim based on the State's withholding of material, exculpatory evidence in violation of Brady v. Maryland, Downs must establish the following factors: (1) the Government possessed evidence favorable to the defendant; (2) the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) the prosecution suppressed the favorable evidence,

and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. Downs v. State, 740 So.2d 506, 513 (Fla. 1999).

While Downs does not identify the Brady witness he alleges the State withheld, he implies it was Harold Haimowitz. (IB 55). Downs admits that trial counsel was present during the deposition. Downs also admits Ms. Harris revealed the name of the alleged Brady witness to all those in attendance. (IB 54). Even if the name was stricken from the deposition record as Downs claims, Downs' Brady claim must fail because Ms. Harris actually named the alleged witness. Suggs v. State, 923 So.2d 419, 429 (Fla. 2005) (ruling that the second and third prongs of the Brady standard were not met because the evidence showed defense counsel was actually in possession of the alleged Brady material).

In any event, this Court found, in Downs v. State, 740 So.2d 506, 513 (Fla. 1999), that "both Downs and his attorney were familiar with Haimowitz' alleged involvement in this case...". Id., at 512. Downs' Brady and Giglio claims should be denied.

ISSUE IV

WHETHER DOWNS SENTENCE TO DEATH IS DISPROPORTIONATE

In this claim, Downs seeks to relitigate his claim that his death sentence is disproportionate. Downs raised this claim on direct appeal from his second sentencing proceeding. This Court

concluded that there was substantial competent evidence in the record to support the trial court's conclusion that Downs was the triggerman in a cold-blooded contract murder. This Court also concluded that Downs' death sentence is not disproportionate. Downs v. State, 572 So.2d 895 (Fla. 1990). Downs offers no explanation why he should be allowed to relitigate this claim anew. As this Court has already determined Downs sentence to be proportionate, this Court should deny this claim.

ISSUE V

WHETHER DOWNS' SENTENCE TO DEATH IS UNCONSTITUTIONAL IN LIGHT OF UNITED STATES SUPREME COURT'S DECISION IN RING V. ARIZONA

Downs alleges his conviction and sentence to death are unconstitutional in light of the United States Supreme Court's decision in Ring v. Arizona. Downs alleges the trial judge's instruction, during the guilt phase of his 1977 trial, ensured the jury did not find beyond a reasonable doubt that Downs used a firearm. Downs avers this same instruction actually prevented the jury from finding and marking on the verdict form that Downs did not use a firearm. (IB 65).[10]

While Downs acknowledges this Court has found Ring not to be retroactive to cases on collateral review, Downs alleges these

[10] Downs' claim is not really a Ring claim at all. Even if Downs were correct in his assertion the jury did not find Downs used a firearm to murder Mr. Harris, use of a firearm was not, and could not have been, considered as a statutory aggravator.

decisions do not bar Ring's application to his case. Downs claims that because this Court did not issue mandate in 1980 when it affirmed his conviction and original sentence to death, his conviction and sentence have never become final. (IB "i", 66).

Downs is mistaken when he claims his conviction and sentence have never become final. For purposes of Rule 3.850 or Rule 3.851, Downs' conviction became final when the United States Supreme Court denied certiorari review on November 3, 1980, and denied a petition for rehearing on January 19, 1981.[11] Downs v. Florida, 449 U.S. 976 (1980). Even accepting the latter date as the date of "finality", Downs' conviction became final on January 19, 1981.

After Downs was resentenced in 1988, this Court affirmed. Downs v. State, 572 So.2d 895 (Fla. 1990). Mandate issued on February 4, 1991. Downs' sentence became final, for the purposes of collateral proceedings, when the United States Supreme Court denied certiorari review on October 7, 1991. Downs v. Florida, 502 U.S. 829 (1991).

As Ring was decided some 21 years after Downs' conviction became final and some 11 years after his second death sentence became final, Ring has no retroactive application to Downs' conviction and sentence to death. Johnson v. State, 904 So.2d 400 (Fla. 2005). On this basis alone, this Court may deny the claim.

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[11] Rule 3.851(b)(1)(B), Florida Rules of Criminal Procedure.

Even if this were not the case, one of the aggravators found to exist, after Downs' second penalty phase, was that Downs had been previously convicted of a violent felony. This Court had repeatedly relied on the presence of the prior violent felony aggravating circumstance to reject Ring claims on both direct appeal and on collateral review. Seibert v. State, 923 So.2d 460, 474 (Fla. 2006) (relying on prior violent felony aggravator to reject Ring claim in direct appeal); Jones v. State, 855 So.2d 611, 619 (Fla. 2003) (prior conviction of a violent felony is a factor which, under Apprendi and Ring, need not be found by the jury); Blackwelder v. State, 851 So.2d 650, 654 (Fla. 2003) (relying on prior violent felony aggravator to reject Ring claim in direct appeal).

Downs is not entitled to any relief from either his original conviction or his second death sentence as a result of the United States Supreme Court's decision in Ring. This Court should deny this claim.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of Downs' second successive motion for post-conviction relief.

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. Mail to Jefferson W. Morrow, 1301 Riverplace Boulevard, Suite 2600, Jacksonville, Florida 32207, this 30th day of November, 2006.

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

MEREDITH CHARBULA