IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,199

JOHN D. FREEMAN

Appellant

v.

STATE OF FLORIDA

Appellee

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

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF TYPE STYLE AND SIZE

This proceeding involves the appeal of the circuit court's summary denial of Mr. Freeman's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The type size and style in this brief is 12 pt. New Courier.

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ARGUMENT I
THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S BRADY CLAIM.

The lower court concluded that no Brady[1] violations occurred in this case because, as to the majority of the evidence alleged in Mr. Freeman's Rule 3.850 motion, the Court believed that defense counsel had the information or could have obtained it through the exercise of due diligence (PC-R. 426-427). However, if defense counsel knew or should have known of the evidence, Mr. Freeman received ineffective assistance of counsel. The evidence was not presented to the jury. Either the State suppressed it or defense counsel knew about it yet failed to present it. In either event, Mr. Freeman would be entitled to relief. State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1995)["In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the Rule 3.850 hearing was discoverable through due diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel"]. The allegations contained in Mr. Freeman's motion are not "mutually inconsistent" in terms of establishing a cognizable claim for relief. Mr. Freeman was denied an adversarial testing. State v. Gunsby. At a minimum, an evidentiary hearing is warranted because there is a factual dispute.

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[1]Brady v. Maryland, 373 U.S. 83 (1963).

The lower court further observed that "[a]ny ineffective assistance of counsel argument is also without merit because Defendant is trying to avoid a procedural bar" (PC-R. 428). The lower court's conclusion is erroneous as a matter of fact and law. There is no procedural bar applicable to this claim. The legal bases for these allegations are claims that are **only** cognizable in a collateral attack. Mr. Freeman alleged that he was denied an adversarial testing at the guilt phase due to either ineffective assistance of counsel or the suppression of evidence by the State. Claims of ineffective assistance of counsel are properly brought in a Rule 3.850 motion, and in fact, may only be pursued in a collateral attack. Claims involving Brady violations also can only be brought in a collateral proceeding because they involve facts which are not "of record." See, Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992)(claims arising under Brady are proper in a Rule 3.850 motion); Breedlove v. State, 580 So.2d 605 (Fla. 1991)(extensive discussion of Brady in post-conviction setting); Demps v. State, 416 So. 2d 808, 810(Fla. 1982)(Brady violations properly brought in a Rule 3.850 motion); Gorham v. State, 597 So. 2d 782 (Fla. 1992)(defendant's conviction and death sentence reversed in post-conviction and new trial ordered due to Brady violations).

It is unclear from the record whether defense counsel could have discovered the Brady evidence. It appears he did not have access to the information. The state's response is based entirely on the assumption that defense counsel had access to

Kathryn Mixon's statements; had information that showed the medical examiner's conclusions were wrong; and had photographs that corroborated that Mr. Freeman's version of the facts because he made a pre-trial discovery request. The trial court made the same mistake in its order. A pro forma discovery request pretrial is not proof that rebuts Mr. Freeman's allegation. It only proves that defense counsel diligently requested discovery.

The state's case depended on the testimony of police and neighbors as to the location of the struggle, the point of injury to the victim, what the victim said, and observations of the incident. The state's argument at trial shows that defense counsel probably did not have access to the photographs that would have corroborated Mr. Freeman's argument because the State argued that he did not have proof.

A. The Photographs

Defense counsel argued that the victim hit his head on the concrete step as the two fell from the house during a struggle over a gun the victim drew on Mr. Freeman. It appears that defense counsel made this argument without any independent evidence to support his claim. He only drew inferences from the evidence he had been given. This glaring weakness was exploited at every opportunity by the state.

> Mr. Stetson: Number eight, he said that the victim hit his head on the front steps. That's how he got hurt like this, another lie. All you have got to do for that is take these photos of the dead man back there and look at the ears of this man and the multiple injuries all over -- located all over his head. That tells you the truth about the statement of the defendant fell down and hit himself on the steps. They

> are lies. The defendant is trying to figure out a way where he is not guilty (R2. 1482).
>
> * * *
>
> Detective DeWitt: I examined the step outside the front and determined there was no blood on that step. (R2. 1355).

According to the state's testimony, no blood was present on the front step area, only a pool of blood five to six feet from the house. It is obvious from this testimony and the state's closing argument that defense counsel could not prove that there was blood on the step that was consistent with Mr. Freeman's story.

The state suggests that the photographs were turned over based on a discovery request by defense counsel. But, there is no evidence in the record that shows which photos were disclosed to the defense. The only photographs in the record are those introduced at trial.

The defense introduced some photographs at trial that showed blood in the grass near the step, the same photos discussed by Detective DeWitt. But, these photographs did **not** prove Mr. Freeman's claim. They provided a basis for defense counsel to draw the inference that the victim could have hit his head on the step. If counsel had the photograph of the blood on the concrete step, he would have introduced it at trial. The logical conclusion was that he did not present the evidence because he did not have it.

The trial court's recitation of the defense attorney's opening statement does not prove that he had the photograph Mr.

Freeman is now claiming as a Brady violation (PC-R. 427). It only proves that defense counsel was attempting to make the argument without the Brady information. This factual dispute is not resolved by the record and an evidentiary hearing should have been granted on this claim.

The state does not offer an explanation as to how defense counsel could have been more diligent than he had already been. He requested discovery of the photographs and any exculpatory information. The state simply did not disclose the information.

Neither the trial court nor the state can explain how defense counsel could been more diligent in seeking the diagram, or police report other than making a discovery request that he did. The photograph, diagram and police report could have shown that the source of the more serious wounds to the victim was not the gun, but rather the concrete step. The state concedes that these Brady violations "might tend to support Mr. Freeman's version of the events." State's Answer Brief at page 28. In fact, it would have been the independent supporting evidence that defense counsel needed to prove his case.

B. The medical examiner's testimony

Neither the trial court nor the state can show how the record refutes Mr. Freeman's claim that withholding the police report, photograph, diagram and Mixon statement prevented him from effectively challenging the state's medical examiner. The cause of death listed by the medical examiner was that the victim bled to death. With the undisclosed evidence, defense counsel

could have challenged the state's cause of death and the inconsistencies in the medical examiner's testimony.

The jury did not know that the victim's injuries should not have been fatal if the injuries were external, as the State said. Dr. Floro, the state's medical examiner, testified that there was no evidence of internal bleeding, hemorrhaging, broken skull bone, or bruising (R2. 1197). The injuries were entirely external. A rescue unit responded to the scene almost immediately and transported the victim to University Hospital of Jacksonville. The victim was in the hospital by 10:30 a.m. on November 11, 1986 and was combative while being treated. He died at 4 p.m. that afternoon purportedly from external bleeding.

Had defense counsel been provided with the diagrams, police reports and photographs depicting the bloody area, he could have cross-examined Dr. Floro on the inconsistency of his testimony and his conclusions. If defense counsel had the information, he would have realized that an independent medical expert would have been helpful in refuting the state's cause of death.[2] He would have been able to present evidence that the victim should not have bled to death while under the immediate care of doctors if his injuries were only external.

[2]To the extent that defense counsel failed to consult an expert based on the evidence he did have, his performance was deficient and he was ineffective for not investigating this issue. Mr. Freeman was prejudiced by the jury's failure to consider this information in the context of weighing the evidence against him.

At an evidentiary hearing, collateral counsel would have presented evidence that the victim's injuries should not have been fatal unless some intervening factor occurred that was not recorded in the records or cited in Dr. Floro's testimony.

The state argues that this information "would have made no difference." State's Answer Brief at page 27. But, the information would have gone to the issue of guilt and would have affected the weight of the evidence the jury considered in sentencing. If the jury knew that the victim died because of accidental injury on the step or because of some malfeasance by the medical staff in not treating the victim properly, then it certainly would have affected the weight of the evidence presented by the state. The jury was entitled to know the facts of the case.

The state argues that obtaining a medical expert to testify about the inconsistencies in Dr. Floro's testimony is not a Brady violation. State's Answer Brief at page 26. Mr. Freeman never said it was. Rather, withholding the diagram, photographs, statements and police report that show the inconsistencies in the cause of death would have put defense counsel on notice to retain such an expert to assist him. By failing to disclose the information, defense counsel was rendered ineffective by the state's action. See, Kyles v. Whitley, 115 S. Ct. 1555 (1995). It was not up to the state to determine whether defense counsel should use the withheld evidence. It was up to Mr. Freeman and his counsel to decide how to use exculpatory information. The

state's duty is to disclose **any** material that could be construed as favorable for the defense. See, Kyles v. Whitley, supra.

Whether it was a Brady violation or ineffective assistance of counsel, Mr. Freeman is entitled to relief. The trial court failed to properly evaluate this evidence under Lemon. The record on appeal cannot refute this claim. An evidentiary hearing should have been granted.

C. Withheld statement of Kathryn Mixon

The state suggests that defense counsel should have known about the withheld statement of Kathryn Mixon because she was listed as a witness on the state's witness list. State's Answer Brief at page 25. This is not the standard for disclosing exculpatory evidence to the defense. The state is required to disclose to the defense any evidence "that is both favorable to the accused and material either to guilt or punishment." United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). The state also suggests that defense counsel should have known about the statement because his client, who was suicidal and on psychotropic medication, said so. This is not the standard for determining whether an exculpatory statement should be disclosed. Even if it was, failure to use the statement was ineffective assistance of counsel.

On March 24, 1987, Ms. Mixon was interviewed at the State Attorney's office by Mr. Stetson and Detective Moneyhun.

> Q But you're sure that John D. Freeman tell [sic] you that the only reason he shot and killed the man was because the man--I'm sorry--that he beat and killed the man was because the man shot at him first;

right? That is what he told you.

A Now, do what? Don't get me confused, please.

Q You're certain that John told you that the only reason that he killed the man -- beat him and killed him was because the man shot at him first?

A He didn't -- he said he did not intentionally to kill the man. He just fought back because the man shot at him.

Q And the only reasons he fought back is because the man shot at him first?

A Shot at him.

(Statement of Kathryn Grace Mixon, March 24, 1987).

Had defense counsel known there was independent corroboration of Mr. Freeman's version of the facts, he could have used the information. He also would have had evidence to rebut the state's case on premeditation at guilt phase and aggravation at penalty phase.

The state argues that the jury had already heard Mr. Freeman's version of the facts and "just didn't believe it." Id. This is exactly why independent corroborative evidence in the form of photographs, statements, police reports and diagrams were so important. They were not self-serving statements by the defendant nor were they merely inferences drawn by defense counsel during opening or closing arguments. The lack of this supporting evidence gave the jury no other alternative than to sentence Mr. Freeman to death.

The state suggests that the inconsistencies in the medical examiner's testimony and the omission of the photograph of the step would not have made a difference in the outcome of the trial

because Mr. Freeman would still be guilty of felony murder. See, State's Answer Brief at page 27. If Mr. Freeman had access to the Brady material, he would have been able to prove that it was not his intention to kill the victim. He would have been able to show the jury without question that the concrete step caused a serious injury to the victim. If Mr. Freeman had access to an independent medical examiner's opinion, he could have shown the jury that the victim's injuries should not have been fatal. All of these factors go to the weight of the evidence presented and would have affected the outcome of the sentencing at trial. It does not matter whether the state actively mislead the court and jury as to the existence of this evidence or whether defense counsel simply failed to discover it. The result was that the jury did not hear this important information. The lower court erred in procedurally barring the claim. There were substantial factual disputes remaining on this claim. An evidentiary hearing was required under Lemon v. State, 498 So.2d 923 (Fla. 1986).

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING THE INEFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE CLAIM.

At penalty phase of Mr. Freeman's trial, three defense witnesses were presented--his mother, brother and Dr. Legum. The trial court found two aggravating factors, no statutory mitigating factors and "only a few" non-statutory mitigating factors (R2. 257-58). The lower court concluded, without the benefit of an evidentiary hearing, that "[m]ore is not

necessarily better" (PC-R. 429). For this proposition, the court cited Hall v. State, 614 So. 2d 473 (Fla. 1993). Hall is a direct appeal case, not a postconviction appeal, and does not address the issues presented by Mr. Freeman, namely, trial counsel's duty to investigate, prepare and present mitigating evidence in a capital case. See, Rose v. State,675 So. 2d 567 (Fla. 1996)("It is apparent from the record that counsel never meaningfully attempted to investigate mitigation and hence violated the duty of counsel 'to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence'")(quoting Baxter v. Thomas, 45 F. 3d 1501 (11th Cir.), cert. denied, 116 S. Ct. 385 (1995)). See also, Hildwin v. Dugger, 654 So. 2d 107, 110 n.7(Fla. 1995).

The state argues that the presentation of these three witnesses satisfied defense counsel's duty to investigate and present mitigating evidence at penalty phase. Any other evidence, according to the state, would be cumulative to what these three witnesses said. State's Answer Brief at page 36-38.

This is inaccurate and a simplistic interpretation of Florida law. In Hildwin v. State, 654 So. 2d 107, 110 (Fla. 1995), this Court found that although some mitigation had been presented at trial, counsel's "failure to present abundant and available evidence amounted to constitutionally ineffective assistance of counsel." This decision underscored that it is the "quantitative" as well as "qualitative" value of the evidence

presented that must be evaluated by the lower court. See, Lara v. State, 581 So.2d 1288 (Fla. 1991); Phillips v. State, 608 So.2d 778 (Fla. 1992). This Court has traditionally found the statutory mitigating factors, particularly the mental health mitigators, to be the "weightiest" type of mitigation that can be presented. See Chaky v. State, 651 So.2d 1169 (Fla. 1995); Santos v. State, 629 So.2d 838, 840 (Fla. 1994). While more may not always be better, as the lower court stated in its order, more contemplates that "some" was presented in the first instance.

Here, the defense witnesses presented were not properly prepared to testify. Dr. Legum, the purported defense mental health expert, had so little background materials on Mr. Freeman that he could only testify about the intellectual deficits he observed. He relied largely on the self-report of a medicated and suicidal client. He failed to discover the information that would show him that statutory mitigation existed.

Dr. Legum did not know that when Mr. Freeman was 2, a car drove over his head and remained there long enough to leave tire marks on his head and chest. He did not know that Mr. Freeman's grades in school were well below average. His grades were so low by eighth grade he was failing **every** subject in all four grade periods.

Dr. Legum alluded to the child abuse Mr. Freeman suffered, but he did not have any independent corroboration or specific instances of abuse, even though they were readily available. See, Appellant's Initial Brief at pages 27-33. He did not know that

Mr. Freeman was tied to an oak bed with neckties and whipped with a belt until he was black and blue. He did not know that Mr. Freeman's father would fly off the handle and pound his fists into his son's head or take him out to the railroad tracks and beat him until he was bloody and bruised from head to toe.

Dr. Legum did not know that Mr. Freeman had attempted suicide while in Duval County Jail and that he was on heavy psychotropic medication such as Sinequan, Pamelor, Elavil. Jail records described Mr. Freeman's deterioration that eventually culminated in his admission to University Hospital in Jacksonville for depression and attempted suicide. The hospital records reflect that Mr. Freeman had a flat affect, poor coping skills, problems with insomnia, poor memory, and suicidal ideations. Yet, the testimony of Dr. Legum does not indicate that he was even aware of or provided with these medical records. Instead, he relied on the self-report of his client. It is difficult to reconcile this information as being cumulative to Dr. Legum's trial testimony when he was not even aware of its existence.

Dr. Legum was not qualified to testify about the effects of Mr. Freeman's alcohol and drug abuse on his organic brain damage. He could not testify to any of these illnesses because he was not a neuropsychologist trained in administering the tests that would show these effects. He also did not have the documentary evidence to support his findings. Dr. Legum could not find any statutory mitigating evidence because he did not have the

material on which to base his opinion.

At an evidentiary hearing, Mr. Freeman would have presented the testimony of Dr. Toomer and Dr. Larson. See, Appellant's initial brief at page 36. They would have testified that statutory mitigating factors were present based on independent evidence of family histories, neuropsychological testing and medical records. Dr. Legum evaluated Mr. Freeman for competency and sanity--two completely different standards than evaluating a client for mitigation.

The lower court was bound under Lemon and Rule 3.850 to take these facts as alleged in the affidavits as true. None of these facts are refuted by the record. If the lower court found the paltry smattering of mitigation presented by counsel to prove "a few" non-statutory mitigating factors, then imagine the impact of a significant amount of independent factual evidence that established statutory mitigation. The jury was entitled to hear this evidence and evaluate its credibility because it is a co-sentencer under Florida law. Espinosa v. Florida, 113 U.S. 26 (1992).

In its answer brief, the state argues that counsel's failure to subpoena Mr. Freeman's childhood best friend, David Sorrells, to testify before the sentencing phase of trial was more beneficial than simply reading his testimony from the prior trial. See, State's Answer Brief at page 36. At trial, defense counsel conceded the importance of having Mr. Sorrell's live testimony.

> I think from reviewing this -- and I have reviewed the past record -- that David Sorrells is absolutely crucial for us to put on in the sentencing hearing because he knew John Freeman growing up. He can corroborate that John Freeman was the victim of child abuse because he saw the scars.
>
> He also knew what kind of person John Freeman was, what his work habits were and what -- everything Mr. McGuinness has said which I won't repeat, but given 24 hours we can get Mr. Sorrells here. The fact we have not gotten him here so far is because we did not know where he was, but we have located him now. It's just a matter of being able to get him into court.

(R2. 1569-73) (emphasis added).

The only reason Mr. Sorrells did not testify in person was because counsel failed to timely subpoena him to trial. Common sense dictates that live testimony of a witness is preferable to reading the testimony into the record. Jurors are able to assess the credibility of witnesses more fully if they are able to see and hear the witness testify. It is analogous to this Court's preference for oral argument in addition to the submission of briefs. It is difficult to assess the credibility of a witness purely from testimony read by a disinterested party.

At page 37, the state concedes that a "more extensive and detailed" information was not presented at trial. More importantly, defense counsel did not even present the detailed evidence that Mr. Freeman's mother and brother could have testified to. Because defense counsel had not properly prepared his witnesses or explained what was mitigating evidence, a wealth of information that was available was never discovered or presented to the jury.

Affidavits were cited in Appellant's initial brief from Mary

Freeman and Robert Jewell with anecdotes describing what Mr. Freeman endured throughout his life. See, Appellant's Initial Brief at pages 26, 28, 30-32. These facts must be taken as true and they are not cumulative to the testimony presented during trial. See, Hildwin, supra.

Next, the state suggests that defense counsel could not challenge the prior murder that was used as an aggravating circumstance because it may have introduced "lingering doubt." See, State's Answer Brief at page 38. This is incorrect.

A defendant has the right in penalty phase of a capital trial to present any evidence that is relevant to, among other things, the nature and circumstances of the offense. Cf. Skipper v. North Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Mr. Freeman was entitled to introduce evidence to rebut the weight of the aggravators against him. Downs v. State, 572 So.2d 895 (Fla. 1990). Had defense counsel done a thorough investigation he would have learned that evidence existed that someone other than Mr. Freeman committed the Epps murder–the crime that was used as an aggravating circumstance in this case.

In Downs, it was error for the lower court on resentencing to refuse to allow alibi evidence to rebut the state's allegation that Mr. Downs was the triggerman in the crime.

> There is no basis in this record to believe, as the state claims, that the issue to which Michael testified in 1982 was limited merely to Down's guilt. Rather, Downs solicited Michael's testimony in 1982 regarding counsel's failure to adequately challenge the proof of guilt and to mitigate the severity of Down's

> culpability in the penalty phase. [citation omitted]...Even if the primary focus of Michael's testimony at the rule 3.850 hearing had been guilt, the fact at issue here would have been valid mitigating evidence, which Downs was constitutionally entitled to present.

Downs v. State at 899, n. 4. The guilt issues were so "inextricably intertwined" with penalty issues that the alibi evidence was found to be relevant and admissible.

The same is true in this case. Significant evidence existed that Mr. Freeman was not the man who committed the Epps murder. See, Appellant's initial brief at pages 41-47. The defense never presented evidence that pointed to Darryl McMillion, not John Freeman, as being the one responsible for the murder. The jury was entitled to know that when McMillion was arrested in North Carolina and extradited to Florida, he had a knife on his person, a knife that disappeared upon his arrival in Jacksonville (R1. 1588). The knife that was used to commit the murder of Mr. Epps was never recovered.

Approximately one month after Mr. Freeman was convicted of the Epps murder, a hearing on a Motion for New Trial Based on Newly Discovered Evidence was held. During that hearing, Mr. Freeman presented the testimony of four witnesses who came forward after the guilty verdict. These witnesses testified that they had seen McMillion in Jacksonville immediately before the Epps murder. This contradicts his trial testimony and casts serious doubt on his alibi. Once again, another critical piece of information that corroborated other substantial evidence against McMillion was never revealed to Mr. Freeman's penalty

phase jury.

Moreover, despite assertions by McMillion and the prosecution to the contrary, promises and undisclosed deals were made with McMillion and were not disclosed to Mr. Freeman's defense counsel or jury. McMillion's relationship with the prosecutors did not end after Mr. Freeman was convicted. A letter to McMillion's attorney indicates that the State, after learning of McMillion's arrest warrant in Bartow, recommended that the warrant be recalled.

Immediately following Mr. Freeman's conviction, witness Dudley Andrew Gang surfaced. Mr. Gang met with the detectives on the Epps case and State Attorney Blazs, on the eve of a Motion for New Trial Based on Newly Discovered Evidence. Mr. Gang told police and the prosecutor that he had shared a cell in the Duval County Jail with McMillion.

According to Gang, McMillion told him after the trial that the prosecutors were giving him good deals to testify, and that he had lied about his whereabouts at the time of the Epps murder.[3] He also told Gang that he had submitted a false employment application at a McDonald's in Tulsa, Oklahoma because he was running from the authorities. McMillion admitted that he was in Jacksonville when the Epps murder occurred, and that he had given the stolen Epps property to John Freeman. (Jacksonville Sheriff's Office Notes, November 17, 1987).

[3]McMillion claimed to be in Tulsa, Oklahoma on October 20, 1986, the date of the Epps murder in Jacksonville.

Mr. Gang never testified at any proceeding related to Mr. Freeman's conviction for the Epps murder. It is unclear what, if anything, Mr. Freeman's defense counsel knew about Mr. Gang and what he had to say.[4] What is clear, however, is that the jury that sentenced Mr. Freeman to die never knew of this evidence that cast serious doubts on the Epps conviction. This is mitigating evidence that the jury was entitled to hear.

Contrary to the state's argument, this claim is not procedurally barred because the state relied on the facts of the Epps case to support its assertion that Mr. Freeman deserved the death penalty. Under Downs and its progeny, Mr. Freeman was entitled to present evidence to rebut the weight of this aggravating circumstance. If the state wants to use a prior violent felony as an aggravator, it bears the risk that defense counsel may rebut the weight of the aggravator. The lower court erred as a matter of fact and law in failing to afford Mr. Freeman an evidentiary hearing. Mills v. Dugger, 559 So. 2d 578 (Fla. 1990).

ARGUMENT IX

THE STATE'S DECISION TO SEEK THE DEATH PENALTY FOR MR. FREEMAN WAS BASED ON RACIAL CONSIDERATIONS.

The state's argument sidesteps the test for determining whether an evidentiary hearing is necessary. Mr. Freeman alleged

[4]It is uncertain where the breakdown occurred with Mr. Gang. Either the prosecution withheld Mr. Gang's statements and violated Brady, or defense counsel failed to investigate this crucial information. An evidentiary hearing is warranted.

that the State seeking the death penalty on his case was based on improper racial considerations. The basis for the claim was a statement made by the state to Mr. Freeman's defense counsel that the State could not plead out the case because he needed a death penalty case to "get the numbers up" on seeking the death penalty in homicides involving white on black crime.

Under Lemon v. State, supra, these facts must be taken as true unless the record conclusively rebuts the claim. Neither the state nor the trial court can point to **any** factor in the trial record that rebuts this claim.

Instead, the state relies on the lower court's erroneous interpretation of what is necessary to prove racial discrimination. Even under the lower court's reasoning, Mr. Freeman met his burden.

Under the cases cited by the lower court, Mr. Freeman has shown that the "decisionmakers in his case," the state, "acted with a discriminatory purpose," when it told defense counsel they needed to get their numbers up on white on black cases where they sought the death penalty. Cf. McClesky v. Kemp, 481 U.S. 279, 292 (1987). These facts must be taken as true under Rule 3.850 in determining whether an evidentiary hearing should be granted on the issue. The State's statement clearly shows a discriminatory purpose. The inference that can be made here is that had Mr. Freeman been black or the victim white, the state would not have sought the death penalty. The record does not refute this claim.

Counsel was ineffective for failing to challenge this issue and preserve it for appellate review. This claim could not have been raised on direct appeal because defense counsel failed to preserve the issue for appeal. Therefore, the lower court was incorrect in summarily denying this claim because sufficient facts, when taken as true, merit an evidentiary hearing.

ARGUMENT XI

THE LOWER COURT ERRED BY NOT ATTACHING PORTIONS OF THE RECORD TO ITS ORDER.

The state relies on Anderson v. State, 627 So. 2d 1170 (Fla. 1993) as authority to abrogate Rule 3.850's requirement that the lower court attach portions of the record that rebut Mr. Freeman's claim. The state fails to mention that Anderson was remanded back to the trial court because public records litigation had not been completed. Therefore, the issue was moot in Anderson.

Even if the state were correct, the lower court has not carried out its duty. The lower court has not shown its "rationale for its decision." Instead, it has continually cited the incorrect standards for evaluating issues for an evidentiary hearing and has completely failed recognize cognizable claims in collateral proceedings. For example, in Argument IX, the lower court cites to no part of the record that rebuts Mr. Freeman's claim of improper racial considerations. In Argument I, the lower court cites to one discovery motion and one reference to defense counsel's opening statement as refuting the entire Brady claim. (PC-R. 426-28). In Argument II, the lower court cites to

the penalty phase record, almost in its entirety. The court's order does not comport with the requirements of Rule 3.850, nor does it comply with the purpose and spirit of the Rule.

Anderson is not dispositive on this issue. The statutory Rule 3.850 is. In this case, the state cannot rely on Anderson to salvage the lower court's mistake. An evidentiary hearing is required on Mr. Freeman's claims.

CONCLUSION

For the foregoing reasons, Mr. Freeman prays that this Court will reverse the trial court's order summarily denying his claims for postconviction relief and remand for a full evidentiary hearing or vacate the convictions and sentences, including his sentence of death, and remand for a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 24, 1998.

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