IN THE SUPREME COURT OF FLORIDA

JAMES EUGENE HUNTER,

Appellant,

v. CASE NO. 82,312

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE

With the following corrections, the Statement of the Case set out in Hunter's brief is substantially correct.

The photographs of the defendant referred to on p. 3 of Hunter's brief were the subject of a detailed hearing. (TR 918-943). In denying Hunter's motion for a mistrial, the trial court expressly found that the photos were not exculpatory because they did not show the clothing worn by any of the subjects. (TR 943).

It is inaccurate to describe the trial court's ruling on Hunter's mid-trial motion to determine competence as a summary denial. The report of Dr. Rotstein, upon which that motion was based, had been prepared seven days before the motion was actually filed. (TR 1210; 1202). That report reached a determination of incompetence based upon Dr. Rotstein's opinion that Hunter had one agenda and his attorney had another. (R 726). The trial court denied Hunter's motion after placing explicit findings on the record. (TR 1214-15).

## STATEMENT OF THE FACTS

With the following additions and corrections, the statement of the facts contained in Hunter's brief is substantially correct.

Hunter was convicted for the robbery of Reggie Barkley. (R 845-846). Mr. Barkley identified Hunter as the perpetrator of that robbery (TR 656), and also identified the car in which Hunter was apprehended as the vehicle involved in that robbery. (TR 659). After robbing Barkley in DeLand, Hunter decided to go to Daytona Beach. (TR 678). Hunter directed the driver of the car to Daytona and, upon arrival, to their destination. (TR 678; 781). Once in Daytona, Hunter and his confederates observed the victims near the Bethune Cookman College campus. (TR 783). Hunter instructed the driver of the car to park a few blocks from where the victims had been spotted. (TR 679). Hunter shot all four victims after taking their clothes and/or personal effects and directing them to lie face down on the sidewalk. (TR 720-721; 749-54; 787; 817-818). Hunter was identified as the trigger-man by the three surviving victims (TR 718; 752; 817), and by Bruce Pope, one of his cohorts. (TR 787). Hunter also admitted the shooting to the driver of the car (TR 682) and to his court-appointed mental state expert. (TR 1424). The victim, Wayne Simpson, died as a result of a gun shot wound which entered his back and caused massive bleeding. (TR 843; 862). The path of the projectile is consistent with the shooter standing over a prone victim. (TR 865). The slug recovered from the victim's body was .25 caliber (TR 860), a caliber that is consistent with the description of Hunter's weapon. (TR 778).

After Hunter and the others were stopped in Ormond Beach (following the murder), the driver of the vehicle consented orally and in writing to a search of the vehicle. (TR 636-638). The murder weapon has never been found (TR 644), even though it was unquestionably in Hunter's possession during the immediate flight from the murder scene. (TR 682).

Following Hunter's conviction of first degree murder, the State introduced, by stipulation, certified judgments and sentences establishing Hunter's prior felony convictions to be the following: aggravated battery, shooting or throwing a deadly missile into an occupied vehicle, aggravated battery, and attempted armed robbery. (R 846; TR 1246-1248). The victim of one of those aggravated batteries sustained a broken nose and serious facial cuts as a result of a single punch. (TR 1254; 1255-56).

Dr. Erlich, Hunter's psychologist, testified that Hunter's IQ score was in the normal range, but that he was smarter than his score indicated. (TR 1301). Dr. Erlich further testified that there was no basis for a diagnosis of mental illness. (TR 1304). He further testified that Hunter enjoys committing robberies and that Hunter admitted having a gun at the time of this robbery. (TR 1304-1305). Dr. Erlich testified that Hunter meets the criteria for anti-social personality disorder and for narcissistic personality disorder. (TR 1306). Dr. Erlich's final diagnosis was mixed personality disorder with anti-social and narcissistic elements. (TR 1307).

Dr. Jack Rotstein, a psychiatrist who also examined Hunter, likewise diagnosed narcissistic personality disorder. (TR 1415). Hunter admitted the shootings to Dr. Rotstein, who testified that Hunter talks about shooting people "like most people talk about going to a restaurant." (TR 1425). Hunter is not mentally ill, (TR 1425), and has an IQ of 91. (TR 1439).

Hunter testified on his own behalf that he made money as a drug dealer and had no need to commit robberies. (TR 1476). Hunter denied any involvement in the murder (TR 1452; 1466), and likewise stated that he was shot in Palatka over a drug deal, not as the result of a drive-by incident. (TR 1482).

In rebuttal, the State called Dr. Umesh Mhatre. (TR 1578). Dr. Mhatre testified that Hunter has a mixed personality disorder with anti-social and narcissistic traits. (TR 1586). Dr. Mhatre also testified that Hunter is not mentally ill (TR 1594), and that mixed personality is not unusual. (TR 1588). Finally, Dr. Mhatre is of the opinion that no statutory mental state mitigators apply to Hunter (TR 1598), and that Hunter has attempted to appear mentally ill when, in reality, he is not. (TR 1599).

The State also called John Ladwig, an investigator with the State Attorney's Office, to testify in rebuttal. (TR 1603-1604). Investigator Ladwig interviewed Hunter shortly after his arrest. (TR 1604). During that interview, Hunter initially denied the Daytona Beach robbery. (TR 1609). Ultimately, Hunter admitted involvement, but said that he was armed only with a BB gun. (TR 1610). Investigator Ladwig had overheard Hunter tell one of his

co-defendants to blame a third co-defendant, and confronted Hunter with that statement. (TR 1610). In response, Hunter stated "maybe you better give me the death penalty because I will never change." (TR 1610-1611).

## SUMMARY OF ARGUMENTS

Point I. Hunter's motion for a mistrial based upon a claimed Brady violation was properly denied by the trial court because the purportedly exculpatory material was not in fact exculpatory, nor would it likely have led to any exculpatory evidence. The facts, as found by the trial court, rebut Hunter's claim.

Point II. Hunter's motion for a continuance, which was made on the morning of trial, was properly denied by the trial court, and that denial by the court was not an abuse of discretion. Hunter had approximately ten months to prepare for trial, and the record itself rebuts Hunter's claim that he was not prepared to go forward.

Point III. Hunter was competent to stand trial, and the trial court properly found that Hunter was capable of understanding the charges against him and the possible penalty, and that he had a sufficient present ability to consult with his attorney with a reasonable degree of rational understanding. Hunter cannot demonstrate any abuse of discretion by the trial court, and is not entitled to relief.

Point IV. Hunter's mid-trial motion for a competency determination was correctly resolved by the trial court because Hunter has not demonstrated any reasonable grounds to believe that he may not be mentally competent to proceed. The trial court had ample opportunity to observe Hunter's behavior in the courtroom, and properly resolved this issue against Hunter.

Point V. No error occurred when the trial court instructed the jury as to a statutory aggravating circumstance, but ultimately

did not find that aggravator to exist in the final sentencing order. The cold, calculated and premeditated aggravator was amply supported by the evidence, and the jury was properly instructed on that aggravator.

Point VI. The death penalty is proportionate to the facts of this case given that Hunter has prior convictions for eleven violent felonies, and committed this murder during the course of a robbery. Both of those aggravating circumstances are compelling aggravators, and, when compared to the virtually non-existent non-statutory mitigation, there is no doubt that the aggravating circumstances outweigh the mitigators.

Point VII. Hunter is not entitled to relief on his claim that the state's mental state expert improperly testified as to Hunter's credibility because, when Hunter objected, the trial court sustained that objection and instructed the jury to disregard that statement. Juries are presumed to follow their instructions, and, under the facts of this case, the prompt curative instruction was sufficient to obviate any error.

Point VIII. The trial court properly allowed the state to present evidence concerning the armed robbery committed by Hunter shortly before his commission of the murder at issue in this case. The facts of that armed robbery are inextricably intertwined with the present offense, and that evidence was properly admitted to inform the jury of the context of this murder.

Point IX. The trial court properly denied Hunter's motion to suppress evidence because, under the circumstances, and taking

into account the facts known to the arresting officer, it is clear that the car in which Hunter was riding was stopped based upon a well-founded and reasonable suspicion. The initiating agency stopped the car in which Hunter was riding in objective reliance on a BOLO issued by another police department, and there is no error. The search of the automobile itself was properly conducted pursuant to a valid consent to search, and also is valid because the search falls squarely within the Carroll v. United States exception to the warrant requirement.

Point X. Hunter's claim that he was prohibited from exercising a peremptory strike to backstrike a prospective juror is not preserved for review because Hunter did not attempt to exercise a backstrike. Alternatively and secondarily, this claim lacks merit because Hunter had exhausted his peremptory challenges, and received one additional peremptory challenge, long before the entire panel was seated.

Point XI. The state did not introduce evidence of a collateral crime because the evidence about which Hunter complains did not establish any other criminal offense. Moreover, even if that evidence did in fact establish another crime, that evidence was relevant to establish that Hunter was in possession of the murder weapon after the shootings, and also to establish the context of the criminal transaction itself.

Point XII. Hunter's cross-examination of a state witness was not improperly restricted because Hunter sought to cross-examine that witness about matters that were outside the scope of direct examination, and did not even remotely address any credibility

matters. Moreover, those questions were not calculated to develop information that modified, supplemented, contradicted, rebutted or clarified the direct testimony given by the witness.

Point XIII. Hunter's claim that a Richardson violation occurred is rebutted by the record because the evidence established that there had been no nondisclosure by the state concerning any prior contact between the defendant and the state's mental state expert. The trial court further found that, even if this amounted to a nondisclosure, the information was in the possession of Hunter's attorney, and any failure to disclose by the state was a direct result of Hunter's own actions. Moreover, the trial court found that, if there was in fact a nondisclosure, it was a trivial one because the state's expert did not recall treating Hunter, and based no part of his opinion in this case on any prior contact with the defendant. The trial court further found that any non-disclosure by the state was inadvertent because the state could not have developed that information until the defendant provided the state with the records which revealed that information to begin with. Finally, the trial court found that Hunter cannot demonstrate any prejudice to his trial preparation because the state's expert did not recall any prior treatment.

Point XIV. In his challenge to the constitutionality of section 921.141, Hunter claims that there is some defect with the especially heinous, atrocious and cruel and the cold, calculated and premeditated aggravating circumstances. Those aggravators are not present in this case and any reference to them is mere

surplusage. To the extent that Hunter raises a claim of error based upon Caldwell v. Mississippi, that claim is not preserved for review. To the extent that Hunter raises a claim concerning the Tedder Rule and the "hinder governmental function" aggravating circumstance, those claims are also not present in this case. To the extent that Hunter challenges the propriety and sufficiency of this court's review, that claim is utterly without merit. To the extent that Hunter raises any other claim in his challenge to the constitutionality of the Florida Death Penalty Act, those claims are barred because they were not raised by timely objection at trial. Moreover, even had those claims been properly preserved, they would not entitle Hunter to relief because they are utterly meritless.

## ARGUMENT

### POINT I

THE TRIAL COURT PROPERLY DENIED HUNTER'S MOTION FOR MISTRIAL BASED UPON A CLAIMED BRADY VIOLATION.

On pp. 16-19 of his brief, Hunter argues that the trial court erroneously denied his motion for a mistrial based upon a claimed Brady v. Maryland, 373 U.S. 83 (1963) violation which dealt with certain photographs taken of the defendant. This claim does not entitle Hunter to relief because it is based upon an incorrect factual premise.

The photographs at issue were the subject of argument by counsel and testimony by witnesses during Hunter's capital trial. (TR 918-943). Hunter's claim, as understood by the State, is that the prosecution failed to disclose a photograph taken of Hunter which depicts him in clothing different from that described by eyewitnesses. From the record, it appears that a photo was taken of Hunter at the time of the initial contact by the Volusia County Sheriff's Office and attached to a field interview (FI) card. (TR 942-944). The trial court found that the FI cards were disclosed to Hunter (TR 944) and that the attached photo was not. (TR 943).[1]

However, the trial court went on to state:

> . . .
>
> Looking at these photos, and they'll be made a part of the record, they're

[1] The FI card has a place on it to describe the clothing worn by the individual being interviewed. (TR 933).

> photos of these gentlemen unclothed. Basically head shots.
>
> I see nothing in these photos that would be exculpatory or likely to lead to exculpatory evidence. Had they shown any clothing, Mr. Burden, I would not hesitate for one moment to grant you your mistrial.
>
> These photos, had you had them in your possession, had you known about them at the beginning of this trial or six months ago, I don't think in any way would have affected your cross-examination, or Mr. Quarles [counsel for co-defendant Boyd], or in any way your preparation for the case.
>
> And this in no way denied Mr. Hunter or Mr. Boyd a fair trial or effective assistance of counsel during that trial.
>
> So your Motion for Mistrial is denied.

(TR 942-943).

Hunter has pointed to nothing in the record which suggests that the trial court inaccurately described the photographs in question, or was otherwise mistaken as to some factual matter. Likewise, Hunter has failed to allege any abuse of discretion by the trial court in denying a mistrial. In fact, the trial court left no doubt that a mistrial would have been ordered if any clothing had appeared in the photographs. Id. Because the photographs at issue did not show the clothing worn by the subjects, Hunter's claim fails because the factual basis for the claim does not exist. Because the photographs did not show any clothing, they cannot be exculpatory. Under these facts, it is impossible, by definition, for a Brady violation to exist. In any event, Hunter cannot claim that he was deprived of anything

because he had the FI cards which described his clothing as of the time of his first contact with law enforcement immediately following the murder. The premise of Hunter's argument is rebutted by the facts and he is not entitled to any relief.

## POINT II

THE TRIAL COURT PROPERLY DENIED HUNTER'S MOTION TO CONTINUE.

On pp. 20-25 of his brief, Hunter argues that the trial court abused its discretion by denying a motion for continuance made on the morning of trial. Under the facts of this case, it is clear that there was no abuse of discretion by the trial court.

The murder for which Hunter was convicted occurred during the early morning hours of September 17, 1992. (TR 715 et seq). Hunter was arrested on September 23, 1992 and indicted on October 6, 1992. (R 44-49). The Volusia County Public Defender was appointed to represent Hunter on shortly thereafter. Trial began on August 2, 1993. (TR 314). Under any view of the chronology of events, the public defender represented Hunter for roughly ten months before the trial started. That length of time is more than sufficient to prepare for trial, especially in a relatively straight-forward case such as this.

To the extent that Hunter claims that he did not have sufficient time to gather mitigating evidence, that claim fails for two reasons. First, counsel had ten months to prepare for trial and, as the trial court stated, it appears that the motion to continue was filed for purposes of delay. (TR 9). Second, the extent and character of the mitigation evidence presented by Hunter belies his claim of unpreparedness. Hunter presented two experts and four lay witnesses at the penalty phase of his capital trial, and that extensive presentation is set out in his

brief and argued as a basis for reversal of the death sentence. See, e.g. Appellant's Brief at 8 et seq., 41 et seq. When that mitigating evidence is considered, there is no doubt that Hunter was ready to go to trial.

Insofar as Hunter's other grounds for granting a continuance are concerned, they do not entitle him to relief, either. Hunter had sufficient time to review the documents provided through discovery prior to trial, and likewise should not be heard to complain about the State's supplemental witness list given that most of the individuals listed are jail employees who presumably would testify concerning Hunter's behavior in the Volusia County Detention Facility (R 592-593). Similarly, the inclusion of the victim's father on the State's witness list should not be a surprise to anyone (R 596). None of the witnesses listed on the supplemental list testified, and Hunter cannot demonstrate an abuse of discretion by the trial court, nor can he demonstrate any prejudice.

To the extent that Hunter complains that the case should have been continued to allow him to locate a missing witness, Hunter has not demonstrated, as the trial court found, that that witness was likely to be found in the near future. (TR 8). Because of that failure, Hunter is not entitled to relief. Gorby v. State, 630 So. 2d 544, 546 (Fla. 1993). In any event, the proffered affidavit of the witness is inconsistent with all other testimony and physical evidence. Hunter would have gained nothing by calling this witness, and is not entitled to relief.

Hunter has not demonstrated an abuse of discretion and has certainly not demonstrated that he did not receive effective assistance of counsel at his capital trial. This claim does not entitle Hunter to relief.

## POINT III

HUNTER WAS PROPERLY FOUND COMPETENT TO STAND TRIAL.

On pp. 24-29 of his brief, Hunter argues that he was not competent to stand trial. When the well-settled standard for competency is applied, and the expert testimony is fairly considered, it is clear that Hunter was properly found competent.

The standard for determining competency is whether the defendant has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the proceedings against him. See, e.g., Dusky v. United States, 362 U.S. 402 (1960). However, that is not a particularly high standard, and there is no doubt that Hunter met it. Based upon the evidence presented at the competency hearing, there is no question that Hunter understood the charges against him and the possible penalty he faced. (TR 74; 94; 123-124). Likewise, it is undisputed that Hunter has frequently been involved in the criminal justice system and has never been found incompetent (TR 69; 71). Moreover, only Dr. Rotstein suggested that Hunter could not consult with his attorney. Rotstein admitted that he had a difficult time evaluating Hunter (TR 86), was unable to determine if Hunter was malingering (TR 78; 83-86), and was also unable to determine whether Hunter was unable to assist his attorney or simply did not want to. (TR 91). The other mental health witnesses had no question that Hunter was

able to consult with his attorney. (TR 97; 126; 132; 156).[2] Moreover, Dr. Rotstein clearly stated that if Hunter would not talk to his attorney because he did not like him that would not render him incompetent. (TR 82).

Hunter's claim that a head-count of the experts supports a finding of incompetence begs the question. With the exception of the heavily qualified opinion of Dr. Rotstein, the evidence before the trial court is virtually unequivocal that Hunter is competent. Of course, the trial court is the ultimate decision-maker, and that decision will only be reversed for an abuse of discretion. Ponticelli v. State, 593 So. 2d 483, 487 (Fla. 1991). Hunter cannot demonstrate any abuse by the trial court, and is not entitled to any relief.

To the extent that Hunter criticizes the trial court for refusing to allow a continuance to obtain the presence of Dr. Erlich, that criticism is misdirected. The defendant did not subpoena Dr. Erlich even though the competency hearing had been on the docket for one month. (TR 94-95). It makes no sense to attempt to place the court in error because of something the defendant did not do, and it stands reason on its head to suggest that the trial court abused its discretion in denying a continuance. That is what Hunter must establish, and he has failed to even approach that standard. Gorby v. State, 630 So. 2d at 546. Hunter is not entitled to any relief.

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[2] Olney McLarty made no competency determination because Hunter refused to cooperate with any evaluation. (TR 135-138).

## POINT IV

HUNTER'S MID-TRIAL MOTION FOR COMPETENCY DETERMINATION WAS PROPERLY DENIED BECAUSE HE PRESENTED NO REASONABLE GROUNDS TO CALL HIS COMPETENCE INTO QUESTION.

On pp. 30-35 of his brief, Hunter argues that he is entitled to a new trial because the trial court did not appoint experts and conduct a competency hearing. As set out below, the state understands this issue to address Hunter's motion for a determination of competency which was made after the guilt phase of the trial was concluded, but before the penalty phase of the trial began. If that is in fact the issue presented by this claim, and it is the only possible interpretation of that claim which retains any semblance of internal consistency, then Hunter is not entitled to relief because the trial court committed no error.

While not discernable from Hunter's brief, counsel for Hunter has informed the undersigned that this claim deals with the mid-trial motion for determination of competency to proceed. (TR 1210 et seq.). That motion was filed after one competency proceeding had been conducted, and virtually no new evidence was presented in connection with the second competency motion. Moreover, the report from Dr. Rotstein, upon which the motion was based, was based upon an evaluation conducted approximately one week before the motion was actually filed. (TR 1210). There is nothing to suggest that Hunter could not have filed that motion sooner.

Of course, the law is settled that when the defendant presents "ample and reasonable grounds" to believe that the defendant might be incompetent, a competency determination is required. See, e.g., Nowitzke v. State, 572 So. 2d 1346, 1349 (Fla. 1990). However, in this case, a second competency examination was not required because there were no "reasonable grounds to believe that the defendant is not mentally competent to proceed." Id. Instead, as the court stated, the trial judge had observed Hunter throughout the preceding days of trial and had seen no evidence to suggest that his competency was called into question. Moreover, as the trial court stated:

> Mr. Hunter, throughout this trial, has demonstrated to this Court his ability to appreciate the charges against him. He certainly, by his own statements and his conduct last week, indicated that he had a full and complete appreciation of the penalty and the ultimate penalty in this case. He has demonstrated his understanding and has assisted counsel during the trial and it's quite clear that he understands the adversary nature of the trial and his role in the trial, the attorneys' roles in the trial, the judge's role in the trial. I have observed him in the presence of the jury, assisting counsel, and suggesting to counsel questions and strategies outside the presence of the jury. He has indicated and-out loud where I have been able to hear the discussions and I find there is no demonstrated problem with any of these thinking processes. He has at all times in the presence of this Court manifested appropriate courtroom behavior. He indicated that he chose not to testify and I take it that was-and he advised me that that was after he had consulted with counsel and that was his choice.

(TR 1214-15). Under the circumstances of this case, Hunter has utterly failed to present any reasonable grounds to call his competency to proceed into question. Moreover, none of the cases relied upon by Hunter are controlling, because those cases do not address the situation which exists here. In this case, there is utterly no basis for concluding that Hunter might have become incompetent at some point during the trial.

In fact, Dr. Rotstein's report stated that he thought Hunter might be incompetent because Hunter had a different "agenda" from that of his attorney. Specifically, Dr. Rotstein opined that Hunter's attorney wanted to save his client's life, while Hunter wanted to prove how tough he was. (R 726). That is certainly not a basis for a finding of incompetence because it is based on a completely specious principle which is unsupported by any case law. Moreover, none of the statements contained in Hunter's motion even come close to establishing the possibility of incompetence, given the specific findings made by the trial court after a week's observation of the defendant during trial. While the State recognizes that the prior determination of competency does not control, Hunter has not established that the trial court erred by refusing to order a second competency proceeding after trial had begun.[3] This claim is without merit.

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[3] Subsequently, Dr. Rotstein testified that Hunter is not mentally ill (TR 1425) and is of normal intelligence. (TR 1439). In the absence of any mental illness (which is undisputed), there is no question that Hunter was (and still is) competent.

To the extent that Hunter may be challenging the trial the court's denial of his February 24, 1993 motions (R 333-336), the denial of those motions (R 339; R 349) as legally insufficient was mooted by the trial court's March 9, 1993 order for mental competency evaluation. (R 358-360). Even if the first motion was improperly denied (and Hunter has not indicated that that is his claim), any error was cured by later action of the trial court. To the extent that any other issue may be contained in claim 4, that issue is so obfuscated that it is not discernable. Regardless of what Hunter's claim really is, and it is most likely directed toward his mid-trial motion regarding competency, he is not entitled to relief.

## POINT V

THERE WAS NO ERROR IN THE TRIAL COURT'S PENALTY PHASE JURY INSTRUCTIONS.

Hunter argues that he is entitled to relief because the jury was instructed on the cold, calculated and premeditated aggravator, but the sentencing judge ultimately did not find that aggravating circumstance. This claim does not entitle Hunter to relief.

Under the facts of this case, as stated by the trial court, there was sufficient evidence supporting the cold, calculated and premeditated aggravator to justify submitting it to the jury. (TR 1652; R 849). There is no question that the only component of that aggravator that is open to question is the "heightened premeditation" element (R 849), and that is a point that can be debated. See, e.g., Rogers v. State, 511 So. 2d 526 (Fla. 1987); Hamblen v. State, 527 So. 2d 800 (Fla. 1988); Thompson v. State, 565 So. 2d 1311 (Fla. 1990); Preston v. State, 444 So. 2d 939 (Fla. 1984). There is ample evidence to support the giving of the jury instruction, and Hunter is not entitled to relief. Modenti v. State, 630 So. 2d 1080, 1085 (Fla. 1994); see also, Stein v. State, 632 So. 2d 1361, 1367 (Fla. 1994).

Moreover, the jury was instructed that aggravating circumstances must be proven beyond a reasonable doubt. (TR 1767). Juries are presumed to follow their instructions, and, if the cold, calculated and premeditated aggravator was not proven beyond a reasonable doubt, the presumption is that it was not relied upon by the jury. Sochor v. Florida, 112 S. Ct. 2114, 2122 (1992).

Additionally, Hunter's argument is contrary to the reasoning of the numerous decisions by this Court which struck one or more aggravators and still upheld the death sentence. See, e.g., Sims v. State, 444 So. 2d 922 (Fla. 1983). Implicit in those decisions is the recognition that the sentencing recommendation of the jury is advisory only, and that the trial judge is the ultimate sentencer. Also implicit in those decisions is the recognition that this Court may properly correct an error of law on the part of the trial judge. Because that is the law, Hunter's argument collapses for want of any legal basis. To the extent that Hunter invokes Espinosa v. Florida, 112 S.Ct. 2926 (1992), that decision does not support his position. The trial judge is the capital sentencer in this state, and any claim to the contrary is foreclosed. Hunter's argument is without merit and does not entitle him to relief.

## POINT VI

THE DEATH PENALTY IS PROPORTIONATE IN THIS CASE.

Hunter argues that this case is no more than "a simple robbery 'gone bad.'" Appellant's Brief at 41. He further argues that the "prior violent felony" and "during the course of a robbery" aggravators are not particularly compelling, and that the mitigation outweighs the aggravation. This claim does not entitle Hunter to relief.

Hunter has prior convictions for eleven violent felonies. Specifically, Hunter has convictions for two separate aggravated batteries, shooting or throwing a deadly missile into an occupied vehicle, and attempted armed robbery. (R 846). In addition, Hunter has contemporaenous convictions for three attempted first degree murders, three armed robberies, and one attempted armed robbery. (R 845). All of those eleven convictions are properly considered in connection with this aggravator. See, e.g., King v. State, 390 So. 2d 315 (Fla. 1988); Elledge v. State, 346 So. 2d 998 (Fla. 1977); see also, LeCroy v. State, 533 So. 2d 750 (Fla. 1988). This aggravator, which is in fact quite compelling, is well-established beyond a reasonable doubt.

Likewise, there is no question that this murder occurred during the course of a robbery as defined in F.S. 921.141(5)(d). This aggravator is also well-established and is unquestionably valid. See, e.g., Lowenfield v. Phelps, 484 U.S. 231 (1988); Perry v. State, 522 So. 2d 817 (Fla. 1988); Melendez v. State, 498 So. 2d 1258 (Fla. 1986).

In contrast, no statutory mitigating circumstances are present, and the non-statutory mitigation found by the trial court is so weak as to be virtually non-existent. (R 852-854). The personality disorder with which Hunter has been diagnosed is narcissistic personality. (R 854). The defendant is not mentally ill, as even his own expert testified. (TR 1425; see also, TR 1594). While Hunter characterizes the sentencing order as holding that Hunter cannot "confine [] his conduct to the requirements of law," that statement is based upon an out-of-context interpretation of the order. What the trial court actually said was "this particular conduct disorder and the manner in which it is manifested in Mr. Hunter indicates that he is not the type of person who can function lawfully within the constraints of our society." (R 854). In other words, Hunter is a criminal and the murder for which he has been convicted was a product of his criminality, not the product of any mental illness.

Hunter also has traits of anti-social personality disorder. Of course, anti-social personality disorder is not mitigating, and to assign more than slight weight to Hunter's personality disorder would be an exercise in circular reasoning. See, e.g., Harris v. Pulley, 885 F. 2d 1354, 1383 (9th Cir. 1988). That is not the law because it makes no sense. This Court should reject Hunter's argument because, under any view of the aggravators and mitigators, Hunter was properly sentenced to death. There is no causal connection between the mitigators and the murder, and the aggravators clearly outweigh the weak mitigators. The sentence should not be disturbed.

## POINT VII

HUNTER IS NOT ENTITLED TO RELIEF ON HIS CLAIM THAT THE STATE'S EXPERT TESTIFIED ABOUT HUNTER'S CREDIBILITY.

On pp. 45-47 of his brief, Hunter argues that he is entitled to a new penalty phase proceeding because the State's mental health expert testified that Hunter is an "absolute liar". (TR 1585). That claim is without merit.

Hunter objected to that testimony, and the trial court immediately sustained the objection and instructed the jury to disregard that statement. (TR 1586). Of course, juries are presumed to follow their instructions, and, in this case, the prompt and unequivocal curative instruction was sufficient to obviate any error. Gorby v. State, 630 So. 2d at 547. Hunter received all he was entitled to receive, and, had he thought the curative instruction inadequate, should have requested an expanded instruction.

None of the cases cited in Hunter's brief are controlling because none of those cases stand for the proposition that a prompt instruction that the jury is to disregard a statement is not sufficient to remove any error. See, e.g., Gorby v. State, 630 So. 2d at 544. Hunter is not entitled to relief. See, e.g., Sochor v. Florida, 112 S. Ct. 2114, 2122 (1992).

## POINT VIII

THE WILLIAMS RULE CLAIM.

On pp. 48-53 of his brief, Hunter argues that the State improperly presented evidence of the armed robbery he had committed earlier in the evening in DeLand. This claim is without merit.

The evidence about which Hunter complains came in during the testimony of Reggie Barkley, who was the victim of a robbery perpetrated by Hunter (and his co-defendants) the evening prior to this murder.[4] Under any reasonable interpretation of the evidence, the DeLand robbery was clearly relevant and admissible because that offense gave rise to the BOLO leading to the identification of the defendant as the perpetrator of this murder. (TR 625-627). Law enforcement came in contact with Hunter solely as a result of that BOLO, not because of anything to do with the murder of Wayne Simpson. (E.g., TR 618). But for the robbery in DeLand, and the BOLO issued as a result, there would have been no reason for Hunter to have been stopped by law enforcement. It makes little sense to suggest that this evidence is not inextricably intertwined with the offense in this case. That evidence is necessary to demonstrate the context in which the murder took place, and was properly admitted. See, e.g., Fotopolous v. State, 608 So. 2d 784, 790 (Fla. 1992); Medina v. State, 466 So. 2d 1046, 1048-1049 (Fla. 1985); Heiney v. State, 447 So. 2d 210, 213-214 (Fla. 1984). The DeLand robbery was

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[4] The DeLand robbery occurred on the night of September 16, 1992. Wayne Simpson was murdered by Hunter late on September 16 or early on September 17, 1992.

clearly relevant, and Hunter should not be heard to complain that the jury was informed of the context of the murder. This claim is without merit. See also, Smith v. State, 19 Fla. Law Weekly S312 (Fla. June 6, 1994).

## POINT IX

THE TRIAL COURT PROPERLY DENIED HUNTER'S MOTION TO SUPPRESS.

Hunter argues that the trial court erroneously denied his motion to suppress evidence. When the facts are objectively considered, there is no doubt that the trial court's ruling was correct.

Shortly after midnight on September 17, 1992, Volusia County Sheriff's Deputy Richard Graves received a BOLO from the DeLand Police Department which described the suspects in a robbery from that jurisdiction. (TR 191-192). That BOLO described the suspect vehicle as a gray four-door mid-sized vehicle occupied by two black females and three or four black males. (TR 192; 194). The driver and front seat passenger were described as black females. (TR 194). The DeLand robbery took place at approximately 11:49 p.m. (TR 195), and Deputy Graves first observed the vehicle on Nova Road in Ormond Beach about 50 minutes later. (TR 191; 195). Sufficient time had passed between the DeLand robbery and the time the vehicle was spotted in Ormond Beach to have traveled to Ormond from DeLand. (TR 195). Deputy Graves requested a backup unit and stopped the vehicle on Nova Road near State Road 40. (TR 198). The black female passenger matched the BOLO description, as did the clothing worn by the subjects. (TR 200-201).

The foregoing facts clearly support the validity of the traffic stop. Under the circumstances, and taking into account all of the facts known to Deputy Graves, it is clear that the

deputy stopped the car in which Hunter was riding based upon a well-founded and reasonable suspicion. United States v. Hensley, 469 U.S. 221 (1985); Carroll v. State, 19 Fla. Law Weekly S187 (Fla. Apr. 14, 1994). Of course, there is no question that the BOLO was issued by the DeLand Police Department and that that agency had a reasonable suspicion based on articulable facts that the described vehicle and its occupants had been involved in the commission of a crime. See, United States v. Hensley, 469 U.S. at 232-233. An officer from the DeLand Police Department would certainly have been allowed to stop the vehicle based on that BOLO for purposes of further investigation, and, consequently, the stop by the Volusia County Sheriff's Office was permissible. Id. The Volusia County Sheriff's Office clearly executed the stop in objective reliance on the DeLand BOLO, and the stop was no more intrusive than what the DeLand Police Department would have been permitted to conduct. Hunter's claim has no basis in the Fourth Amendment and he is not entitled to relief.

To the extent that Hunter complains about the search of the vehicle, that claim is without merit for three reasons. First, the search was conducted pursuant to valid written and oral consent to search. United States v. Mendenhall, 446 U.S. 544 (1980); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Tukes v. Dugger, 911 F. 2d 508, 517-518 (11th Cir. 1990), cert. denied, 112 S. Ct. 273 (1991). Second, the search falls squarely within the Carroll exception to the warrant requirement. Carroll v. U.S., 267 U.S. 132 (1925). There is no doubt that there was probable cause to believe that the vehicle contained evidence of

criminal activity, and, consequently, the search was proper. E.g., TR 635 (weapons); Arkansas v. Sanders, 442 U.S. 753, 760 (1979); Chambers v. Maroney, 399 U.S. 42, 44, 52 (1970). See also, Florida v. Meyers, 466 U.S. 380 (1984); Chambers v. Maroney, supra, at 52. Third, the defendant never raised the issue of consent at trial and has waived that claim. Rutherford v. State, 545 So. 2d 853 (Fla. 1989).

There is nothing to support Hunter's claim that the driver of the vehicle consented to the search based upon acquiescence to authority, and there is no defect with the search itself. Likewise, there is no defect with the initial stop of the vehicle. This claim is without merit.

## POINT X

HUNTER WAS NOT PROHIBITED FROM BACKSTRIKING A PROSPECTIVE JUROR.

On pp. 59-64 of his brief, Hunter argues that he was prevented from backstriking a prospective juror. This claim is not preserved for review and, alternatively, is without merit.

In Rivers v. State, 458 So. 2d 762 (Fla. 1984), this Court held that, in the absence of an attempt to backstrike, any claim of error is not preserved for review. While Hunter attempts to distinguish Rivers, that effort is not successful. A review of the portion of jury selection subsequent to that set out in Hunter's brief indicates that Hunter exercised his last two peremptory strikes, and then requested and was given one additional peremptory which he exercised. (TR 566-567). At no time did Hunter attempt to backstrike any juror subsequent to the Court's ruling, and, consequently, has failed to preserve the issue for review. See, e.g., Rivers, supra.

Alternatively and secondarily, this claim lacks merit. Hunter exercised all of his peremptory challenges and received one additional challenge, which he also used. (E.g., TR 568). Subsequently, four peremptories were exercised by the co-defendant and one peremptory was exercised by the State. (TR 568-569). Under any view of the facts, Hunter would not have been able to exercise his last strike against the entire panel because he had used all of his peremptories well before the "entire panel" was seated. If Hunter still had a peremptory left when the panel was seated, and had not been allowed to use that

peremptory, perhaps he would have a basis for complaint. However, Hunter should not be heard to complain because he was not frugal enough with his peremptory challenges. He had used them all well before the panel was seated, and has no basis for complaint. To the extent that Hunter claims that he was somehow forced to expend his peremptory strikes, that claim is meritless. The trial court had granted one additional peremptory, even though there would have been no basis for reversal had that request been denied. As the Eleventh Circuit has noted in another context, "no good deed goes unpunished," and that adage is particularly appropriate here. See, e.g., Bonfiglio v. Nugent, 986 F. 2d 1391, 1392 (11th Cir. 1993). The trial court gave Hunter more than was required, yet he still complains. Regardless of Hunter's argument to the contrary, his claim collapses into no more than a claim that he should have been given a second additional peremptory challenge. Hunter has shown no abuse of discretion, and is not entitled to relief.[5]

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[5] To the extent that Hunter claims that he asked the Court for an additional peremptory to strike juror Eskridge, that claim is rebutted by the record. Hunter's counsel stated that he probably would have struck Eskridge well after his request for an additional peremptory had been denied. (TR 569-570).

## POINT XI

THE STATE DID NOT INTRODUCE EVIDENCE OF A COLLATERAL CRIME.

On pp. 65-67 of his brief, Hunter argues that evidence of other crimes was introduced during direct examination of Tammy Cowan. This claim does not entitle Hunter to relief for two independently adequate reasons.

First, it is doubtful that the "other crime evidence," as it was before the jury, was in fact evidence of another crime. As the trial court pointed out, the evidence about which Hunter complains falls far short of establishing the elements of some other offense. (TR 692).

The second reason that this evidence was properly admitted is because that evidence was relevant to establish that Hunter had possession of the murder weapon after the shootings, and to establish the context of the criminal transaction. See, Randolph v. State, 463 So. 2d 186, 189 (Fla. 1984); see also, State v. Richardson, 621 So. 2d 752, 756-757 (Fla., 5th DCA 1993). Even if this evidence establishes another crime, it was admissible because it tended to establish the fact of possession (and disposal) of the murder weapon by Hunter. That purpose is proper, and Hunter is not entitled to relief. In any event, the evidence did not become a feature of the trial, and there is no basis for relief.

## POINT XII

### HUNTER'S CROSS-EXAMINATION OF A STATE WITNESS WAS NOT IMPROPERLY RESTRICTED.

On pp. 68-71 of his brief, Hunter argues that his cross-examination of a State's witness was improperly restricted. A fair reading of the record demonstrates that this claim is meritless.

On direct examination, Detective Flynt testified as a chain-of-custody witness about various items of the victims' property. (TR 876-884). During cross-examination, Hunter inquired into unrelated matters, and, when the State objected, that objection was sustained. (TR 886). Florida law is settled that cross-examination "is limited to the subject matter of the direct examination and matters affecting the credibility of the witness." F.S. §90.612(2). The witness testified only about chain of custody matters, and the testimony Hunter sought to elicit was far outside the scope of direct examination. Of course, Hunter could have called this witness in his case-in-chief, but did not. He should not be heard to complain.

None of the cases relied upon by Hunter compels a different result. The quotation from Coxwell v. State is not authority for Hunter's position because cross-examination was not improperly restricted. Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978). Likewise, Johnson v. State is distinguishable on its facts. Johnson v. State, 595 So. 2d 132, 133 (Fla. 1st DCA 1992). The testimony which was disallowed in Johnson dealt not only with the direct testimony of the witness, but also with credibility matters. Id. That is not the present situation.

The questions put by Hunter's lawyer did not even arguably concern the credibility of the witness, and were not calculated to develop information that modified, supplemented, contradicted, rebutted or clarified the witness' direct testimony. See, e.g., Johnson v. State, 595 So. 2d at 135. There was no error, and Hunter is not entitled to relief.

## POINT XIII

HUNTER'S CLAIM OF A RICHARDSON VIOLATION IS REBUTTED BY THE RECORD.

On pp. 72-74 of his brief, Hunter argues that a Richardson violation occurred as to the State rebuttal witness Dr. Umesh Mhatre[6]. When the facts upon which this claim is based are considered objectively, it is clear that no violation took place. Moreover, while there was no discovery violation, the trial court conducted an adequate inquiry into the claimed nondisclosure.

After hearing the arguments of counsel and taking the testimony of Dr. Mhatre, the trial court found that there had been no non-disclosure, and that Hunter's attorney had the information and had created any problem himself. (TR 1576). The facts supporting this finding are that Hunter's attorney had the document upon which this claim is based at least two months previously, and had only provided that document to the State pursuant to court order after jury selection began. (TR 1574). Dr. Mhatre had no indication that he had seen Hunter before until he found that document in the records obtained from Hunter. (TR 1573). Dr. Mhatre had no recollection of Hunter at all, and any prior contact with Hunter played no part whatever in his opinions about the defendant. (TR 1573). Dr. Mhatre did not know, nor did he ever state, what previous diagnosis Hunter had been given. (TR 1575). Hunter stated that he had no memory of Dr. Mhatre. (TR 1442; 1576). Hunter has not established any non-disclosure

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[6] The state is using the correct spelling of Dr. Mhatre's name even though the record uses the spelling "Mhatra".

on the part of the State. Instead, the record demonstrates a pattern of obfuscation by Hunter; that is no basis for complaint.

Assuming arguendo that a non-disclosure did occur, it was, at most, trivial, given that Dr. Mhatre had no memory of treating Hunter, and did not base any part of his opinion on any prior treatment. (TR 1576). Likewise, any non-disclosure by the State was clearly inadvertent because the State could not, under any stretch of the imagination, develop the information until the defendant provided the State with the records containing the information. Id. Finally, Hunter cannot demonstrate any prejudice affecting his trial preparation because Dr. Mhatre had no recollection of prior treatment of the defendant. (TR 1576-1577). The trial court clearly conducted a Richardson inquiry and resolved the issue against Hunter. See, e.g., Brazell v. State, 570 So. 2d 919, 921 (Fla. 1990). Hunter was not entitled to a Richardson hearing, but received one anyway. The record conclusively rebuts his claim and he is not entitled to relief.

## POINT XIV

SECTION 921.141 IS CONSTITUTIONAL.

On pp. 75-90 of his brief, Hunter raises a number of boiler-plate challenges to the constitutionality of the death penalty statute. To the extent that Hunter challenges the heinous, atrocious and cruel and the cold, calculated and premeditated aggravating circumstances, those aggravators are not present in this case. To the extent that Hunter raises a Caldwell claim, that claim is not preserved for review. Rutherford v. State, 545 So. 2d 853 (Fla. 1989).

To the extent that Hunter raises claims concerning counsel (p. 77-78), the trial judge (p. 78), the Florida Judicial System (p. 78-82), "procedural technicalities" (p. 84-86), and "other problems with the statute" (p. 86-90), those claims are barred because they were not raised by timely objection. See, e.g., Rutherford v. State, supra.

To the extent that Hunter raises a claim concerning the Tedder rule and the hindering governmental function aggravating circumstance, those claims are not present in this case. To the extent that Hunter challenges this Court's review, that claim is meritless. In summary, this claim is substantially identical to claim 12 in Marquard v. State, Slip Op. No. 81,341 (June 9, 1994), and this claim does not provide a basis for relief for the same reasons.

## CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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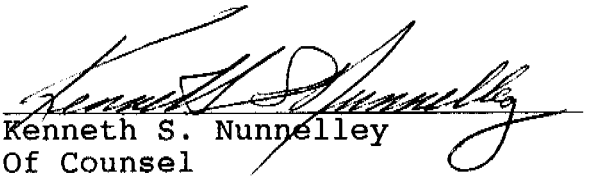
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to George D.E. Burden, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 25th day of July, 1994.



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