IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Appellant,

v. CASE NO. 84,977

DONALD GUNSBY,

Appellee.

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REPLY/ANSWER BRIEF OF APPELLANT/CROSS-APPELLEE

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STATEMENT OF THE FACTS

The State (Appellant/Cross-Appellee) does not accept the hyperbolic and argumentative "Statement of Facts Regarding the Penalty Phase" set out on pp. 1-33 of Gunsby's brief. Most of the "facts" contained within this part of Gunsby's brief deal with claims as to which Gunsby is the appellant, not the appellee.

JURY SELECTION

The facts underlying the juror excusal claim were summarized by this Court on direct appeal:

> With regard to the first claim, the trial judge preliminarily questioned the venire concerning, among other things, whether their strong feelings for or against the death penalty would render them unable to fairly decide the case. He excused members of the venire who affirmatively stated that they would be unable to discharge their duty as jurors. Gunsby did not object to the procedure used by the trial judge, nor did he ask to make inquiries of the proposed jurors. We find that under these circumstances he has waived the right to challenge the excusal of these potential jurors. [citation omitted].

Gunsby v. State, 574 So. 2d 1085, 1088 (Fla. 1991).

THE EVIDENCE OF AGGRAVATION

This Court also addressed the prior violent felony and under sentence of imprisonment aggravating circumstances in its direct appeal opinion. In upholding the application of those aggravators, this Court stated:

> The other two aggravating circumstances are also fully supported by the record. Gunsby had previously been convicted of aggravated assault and sentenced to

> three and one-half years in the state prison in 1967. He also had been convicted of armed robbery and sentenced to ten years in the state prison in 1971. There is no question that the second aggravating circumstance, that he had been previously convicted of crimes of violence, was properly applied in this case.
>
> Further, the record clearly establishes that Gunsby had been sentenced to incarceration but had not reported to jail as ordered and that a warrant had been issued for his arrest. These circumstances justify a finding that Gunsby was under a sentence of imprisonment at the time of this offense....

Id., at 1090.

THE "JURY STUDY"

To the extent that Gunsby purports to rely upon the testimony of Dr. Steven Penrod concerning the results of his "jury study", the Circuit Court expressly stated that it based no part of its decision on that study. *(PCR 3558).* Penrod's testimony was admitted only as a proffer; it was never admitted into evidence. *(PCR 628).*[1]

To the extent that further development of the facts concerning Penrod's testimony is necessary, Penrod acknowledged that the jury regards the judge as a more authoritative figure than it does the prosecutor *(PCR 617)*, and further testified that the demographics of his mock juries in no way approximated those of the actual trial jury *(PCR 619).* The mock juries heard only a synopsis of the guilt phase facts *(PCR 619)*, and never received

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[1] Gunsby does not argue that the lower court erred in not admitting Penrod's testimony as evidence.

the guilt phase jury instructions, which contained, *inter alia*, the definition of reasonable doubt *(PCR 620)*. Moreover, the mock juries knew that they were not actual juries making actual sentencing recommendations. *(PCR 621)*. Finally, and most significantly, the study does not establish that a change in the evidence would result in a different verdict. *(PCR 622)*.

INEFFECTIVENESS OF COUNSEL

Gunsby's trial counsel, Ed Scott, was a police officer for fourteen years prior to attending law school and, during that time, dealt with individuals who were severely mentally ill. *(PCR 327)*. At the time of Gunsby's trial, Scott was also handling the clemency proceedings in the *Daniel Eugene Remeta* case and, based upon his involvement in that case, was familiar with the sort of evidence that could be used as mitigation in a death penalty trial. *(PCR 327-8)*. Scott consulted with Remeta's penalty phase lawyer and obtained various materials about death penalty cases from her. *(PCR 265; 328)*. Scott was familiar with Lewis Barnes from his police service, and was and is of the opinion that Barnes has no credibility at all. *(PCR 329-31)*.

Scott spent quite a bit of time with Gunsby and never had problems communicating with him even though "it was obvious [to Scott] that he was not a real bright individual." *(PCR 331)*. Scott had no reason to believe that Gunsby was mentally ill. *(PCR 332)*. Scott received copies of the mental status reports prepared by Drs. Mhatre and Poetter and, after learning of the circumstances of Dr. Mhatre's evaluation, questioned whether Mhatre had an adequate supply of information to provide a basis to support his opinions. *(PCR 332-3)*.

Scott was aware of Theodore Chavers' "connection" to this case because Gunsby mentioned Chavers in the statement given at the time of his arrest. *(PCR 336-7)*. Scott further testified that an attempt to use Gunsby's incarceration at Dozier School as mitigation likely would open the door to admitting why Gunsby was sent there in the first place. *(PCR 338)*. Dr. Poetter's evaluation of Gunsby revealed that he is mildly mentally retarded, with an IQ below the first percentile. *(PCR 341-2)*. Poetter also testified that Gunsby would probably not appreciate "all of the ramifications of his actions and be able to thoroughly assess the situation and, and arrive at the many alternatives that many of the rest of us would." *(PCR 342)*. Scott further presented testimony that Gunsby came from a dysfunctional family *(PCR 343-4)*; that Gunsby had a problem with substance abuse *(PCR 345)*; and that Gunsby's mother had a history of mental illness requiring hospitalization *(Id.)*.

Johnnie Gunsby grew up in the same environment as the defendant, yet has not committed any violent crimes. *(PCR 558-9)*.

THE MENTAL STATE EVIDENCE

The mental state evidence presented at trial is summarized in the state's initial brief. That evidence, which was presented during the penalty phase, was directed toward the statutory mental mitigators as well as toward non-statutory mitigation.

At the 3.850 hearing, Dr. Poetter testified that his opinion would be the same regardless of whether he was asked to address an issue by the state or by the defense. *(PCR 905)*. Prior to his trial testimony, Dr. Poetter was asked by the state,

in writing, to be prepared to address the statutory mental mitigators; his testimony would have been the same had that request come from the defendant. *(PCR 905)*. Dr. Poetter did not testify that Gunsby *is not* antisocial personality disordered, only that, years later, Poetter is not sure about that diagnosis. *(PCR 906)*. Dr. Poetter is, however, firm in his opinion that Gunsby was competent to stand trial at the time of these proceedings. *(PCR 901)*.

Dr. Mhatre's 3.850 testimony was that had he known Gunsby's IQ was below 70, he would have been of the opinion that Gunsby was not competent to stand trial. *(PCR 1038)*. A fair reading of the testimony does not indicate that Gunsby's educational background had any affect on Mhatre's opinion. *(Id.)* After conducting a face-to-face evaluation of Gunsby, Dr. Mhatre had no doubt as to his competence to stand trial. *(PCR 1040)*. Dr. Mhatre is of the opinion that an IQ less than 70 automatically equals incompetence to stand trial and an inability to conform one's conduct to the requirements of law. *(PCR 1041)*.

Dr. Caddy (a psychologist) testified that Gunsby is mildly mentally retarded and is properly diagnosed as a personality disorder not otherwise specified. *(PCR 805; 810)*. Caddy testified that Gunsby understands the difference between right and wrong *(PCR 810)* and insisted upon his innocence during Caddy's evaluation *(PCR 813-14)*. Caddy stated that Gunsby may not have been competent to stand trial in 1988. *(PCR 816)*. Dr. Caddy opined that Gunsby was under extreme mental or emotional disturbance at the time of the crime because:

> ...He suffers from a permanent and non-reversible mental illness of retardation that is so profound as to call into question his capacity to make a competent effective judgement and to appreciate all of the elements of the act not simply the capacity to commit the act but the appreciation of the consequences in particular. *(PCR 823).*

Caddy further was of the opinion that Gunsby's capacity to appreciate the criminality of his conduct was impaired "because of the impact of a likely combination of his state of retardation and the use of alcohol and also and likely the influence by which he would have been directed by others." *(PCR 824).*

Caddy testified that if indicators of criminal activity are *excluded*, there are no substantial indicators of antisocial behavior. *(PCR 830).*[2] Dr. Caddy believes that other defenses should have been considered, even though he cannot suggest any other strategy and even though Gunsby denied all involvement in this crime in the statement given to law enforcement shortly after his arrest. *(PCR 853-4; 856; 857).*

Dr. Phillips testified that, in his opinion, Gunsby "lacked the capacity to work with his attorney in a way that would have been *clinically meaningful*." *(PCR 958).*[3] Phillips testified that it is not possible to "fake smart" on an intelligence test. *(PCR*

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[2] Dr. Caddy was highly critical of the evaluation done by Dr. Mhatre, who is a psychiatrist rather than a psychologist. (PCR 840).

[3] Phillips specifically identified no less than ten (10) death penalty cases that he has testified in, always for the defendant. (PCR 966-70). This is contrary to Dr. Phillip's testimony that he has testified in "perhaps half a dozen" death penalty cases.

966).[4] The "quality of the relationship" with present counsel is what makes Gunsby competent at this time. *(PCR 971).* Gunsby knows right from wrong, and knows that it is wrong to murder someone. *(PCR 979).* Dr. Phillips is not an attorney, and has offered only psychiatric opinions, not legal opinions. *(PCR 980).*

SUMMARY OF ARGUMENT

Gunsby's ineffective assistance of counsel argument regarding his criminal history is improperly based upon *Johnson v. Mississippi,* 486 U.S. 578 (1998). *Johnson* does not control the issue because the issue in *Johnson* is not present in this case. To the extent that Gunsby is attempting to raise a claim of ineffective assistance of counsel predicated upon the fact that the jury was informed of the nature of the offenses which resulted in Gunsby being under sentence of imprisonment at the time of this murder, that claim is not properly briefed, and, moreover, is procedurally barred. Claims of ineffectiveness of counsel cannot be used to avoid the preclusive effect a procedural bar. To the extent that Gunsby seeks to rely upon a "jury study" which consisted of simulated jury deliberations, that testimony was never admitted as substantive evidence, and was not relied on by the lower court. The trial court erred in granting sentence stage relief on the ineffectiveness of counsel claim as it relates to the state's argument concerning Gunsby's prior criminal

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[4] The term "fake smart" means scoring higher on an intelligence test than one's IQ actually is.

convictions. The lower court abused its discretion in granting relief, and that decision should be reversed.

Gunsby's argument regarding the ineffectiveness of counsel claim relating to the presentation of mental state testimony does not establish that the lower court properly decided this issue. The fundamental component of this claim is the undisputed fact that the *sentencing* court found that Gunsby is mentally retarded, and found that to be mitigating. The confidential expert who testified at trial testified concerning various matters that fall within the purview of both statutory and non-statutory mitigation--whether or not the court order appointing that expert directed a mitigation evaluation is not the point. Trial counsel presented mental state mitigation, and the trial court did, in fact, find mental state factors in mitigation. To the extent that Gunsby argues that death is disproportionate in this case, none of the cases relied upon by him are controlling because they are distinguishable on their facts.

CROSS-APPEAL

Gunsby's claim that he is entitled to relief based upon ineffectiveness of trial counsel in the presentation of mitigation evidence regarding his background and early life is not a basis for relief. The lower court did not address this claim, but the facts necessary to decide it are found in the record. When the evidence presented at trial is considered alongside the evidence presented at the 3.850 hearing, the latter is little more than a cumulative version of the evidence that was already before the jury. There can be no deficiency when the

evidence the defendant claims was omitted is cumulative as to the other evidence and an expert testified concerning the same subject. Gunsby has not established deficient performance on the part of trial counsel, nor has he demonstrated prejudice. In order to carry his burden of proof under *Strickland v. Washington*, he must establish both components--he has demonstrated neither, and has not met his burden of proof.

Gunsby's claim of ineffectiveness of counsel based upon counsel's failure to object to the excusal of certain members of the venire is procedurally barred because it was raised and addressed on direct appeal by this court. Florida law is settled that a claim of ineffective assistance of counsel does not circumvent the rule that post-conviction proceedings do not serve as a second appeal. To the extent that Gunsby raises a "reverse-*Witherspoon*" component to this claim, that component is procedurally barred for the same reasons. Moreover, this claim is without merit based upon this court's direct appeal decision in this case, wherein this court found that the lower court had excused jurors who had affirmatively stated that they would not be able to discharge their duties as jurors. There can be no error in not objecting to the excusal of those jurors, and Gunsby cannot carry his burden of proof under *Strickland*. The reverse-*Witherspoon*/ineffectiveness of counsel claim, has no factual basis because the trial court "life qualified" the venire. There is no error, and, hence, no ineffectiveness of counsel.

Gunsby's claim that trial counsel was ineffective in not objecting to the jury instruction given on the cold, calculated,

and premeditated aggravating circumstance is foreclosed by binding precedent. The prior decisions of this court expressly hold that failure to object to the pre-*Jackson* cold, calculated, and premeditated jury instruction is not ineffective assistance of counsel.

Gunsby's claim that he was incompetent at the time of his 1988 trial is barred by a double layer of procedural bar. The competency claim could have been but was not raised on direct appeal, and is, therefore, procedurally barred from review in this collateral proceeding. Moreover, this claim is also procedurally barred because it is apparent from the original trial record. Alternatively and secondarily, this claim is meritless. Trial counsel had no difficulty communicating with Gunsby, and did not believe his client to be incompetent. Competency determinations are matters for the trial court, and a determination of competence is only reversible for an abuse of discretion. There is no abuse of discretion in this case, and there is no basis for relief on this procedurally barred claim.

Gunsby's claim that he received ineffective assistance of mental state experts is procedurally barred because it could have been but was not raised on direct appeal. This claim is also procedurally barred because it is raised for the first time in Gunsby's appeal from the trial court's ruling on the 3.850 motion. Alternatively and secondarily, Gunsby has not demonstrated any due process violation, and, hence, can establish no basis for relief.

because it could have been but was not raised at trial or on direct appeal. Alternatively and secondarily, Gunsby's claim has no legal basis. This Court and the United States Supreme Court have both decided this issue adversely to Gunsby, and there is no reason to revisit this court's prior decisions.

Insofar as the guilt phase component of the 3.850 motion is concerned, Gunsby argues that the lower court applied an improper standard in resolving the *Brady* claim against him. A fair reading of the lower court's order leaves no doubt that that court applied the proper standard, which is "no reasonable probability of a different result". The *Brady* claim is predicated upon the non-disclosure of the criminal history of an eyewitness, who was also the brother of the murder victim. Even if Gunsby had had that witness's criminal history, it would have made no difference because it would have had no effect on the credibility of that witness. Insofar as Diane Williams is concerned, she testified at trial that she had previously been convicted of a felony. She was charged with a technical violation of probation, but the evidence establishes that the disposition of that charge was in no way connected to her testimony in the Gunsby case, and, moreover, the ultimate disposition of the technical violation was not at all unusual. There is no reasonable probability of a different result if the non-disclosed evidence had been presented to the jury because of the corroboration present from the testimony of other witnesses.

Gunsby's guilt phase ineffective assistance of counsel claim fails because he cannot carry his burden of proof under

Strickland v. Washington. The matters at issue in connection with this claim are strategic decisions only, which are presumptively competent. Gunsby can establish neither deficient performance nor prejudice, and, consequently, is not entitled to relief.

Gunsby's newly-discovered evidence claim fails because none of the evidence is newly discovered, and, moreover, would not "probably produce an acquittal on retrial". The undisputed physical evidence is consistent with the testimony of the eyewitnesses who testified at Gunsby's capital trial, and is wholly inconsistent with the evidence that Gunsby claims is "newly" discovered. Even if the evidence is in fact newly discovered, it would not change the result because the version of events contained within the "new" evidence is incredible.

Gunsby's claim of cumulative error is not a basis for reversal of his conviction because none of the errors which he attempts to aggregate are, in fact, error. Because there is no error, there is nothing to aggregate and the cumulative error claim collapses for want of a legal basis.

ARGUMENT

I. IN REPLY TO THE ARGUMENT AS TO INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING GUNSBY'S CRIMINAL HISTORY

On pp. 35-40 of his brief, Gunsby perpetuates the trial court's error by relying on cases which were based upon *Johnson v. Mississippi*, 486 U.S. 578 (1988). *Johnson* does not control this issue for the reasons set out in the state's initial brief. Moreover, Gunsby's reliance on *Duest v. Singletary*, 997 F.2d 1336 (11th Cir. 1993), is misplaced for the same reasons. *Duest* involved only

Johnson error, though Gunsby does not include that fact in his brief. *See, e.g., Duest v. Singletary*, 997 F.2d at 1339. Gunsby's claim that the state's brief does not respond to the "sort of prejudice" found in *Duest* is *a non sequitur*: the "prejudice" found in *Duest* does not exist in this case.[5]

To the extent that Gunsby purports to raise a claim of ineffectiveness of counsel in footnote 18 on p. 36 of his brief, a footnote is a singularly inappropriate method of briefing a claim or ground for relief. *Duest v. State*, 555 So. 2d 849 (Fla. 1990). This "claim" is not properly briefed, and this Court should decline to address it for that reason. However, even if this claim is considered to have been properly presented, it is no more than an attempt by Gunsby to avoid the preclusive effect of a procedural bar by presenting a procedurally barred claim as one charging ineffective assistance counsel. This court has repeatedly held that claims of ineffectiveness of counsel cannot be used to escape an applicable procedural bar. *Cherry v. State*, No. 83,773, ms.op at 4-5 (Fla., Aug. 31, 1995). *Medina v. State*, 573 So. 2d 293 (Fla. 1991) *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990).

While the trial court did not reach this claim, there is no reason that the matter cannot be disposed of by this court on legal grounds alone. Gunsby relies on *Mann* to support his claim of ineffectiveness because, he claims, it was error to inform the jury of the offense which resulted in Gunsby being under sentence

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[5] As a decision of an intermediate Federal Court, *Duest* (and every other Circuit Court of Appeals decision relied on by Gunsby) is not binding on this court.

of imprisonment at the time of this murder.[6] Reliance on *Mann* is misplaced because that decision was not in any way concerned with the under sentence of imprisonment aggravator, but was, instead, concerned with the question of whether or not the defendant's prior conviction was in fact for a violent felony. *Mann*, 420 So. 2d at 580. Gunsby points to no authority for his position because no such authority exists. It strains credulity to suggest that the jury must determine the applicability of the under sentence of imprisonment aggravator in a vacuum, and there is no basis for relief, particularly on grounds of ineffectiveness of counsel.

Gunsby also argues, in truncated fashion, that he *would* have been able to keep the facts underlying his prior felonies from the jury. However, that argument is predicated upon Gunsby's refusal to recognize that the documentary evidence was in fact sufficient evidence of the underlying charges, which, in fact, could have been established through hearsay testimony. *See, e.g., Waterhouse v. State*, 596 So. 2d 1008 (Fla. 1992); *See also, Koon v. State*, 513 So. 2d 1253 (Fla. 1987).

The fact, which overrides all others in connection with this issue, is that the prior violent felony aggravator was established beyond a reasonable doubt. What should also not be the subject of debate is the fact that the *evidence* before the jury was accurate in all respects. The jury was correctly instructed about this aggravating circumstance and, of course, the jury is presumed to follow its instructions. *See, e.g., Sochor*

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6 *Mann v. State*, 420 So. 2d 578 (Fla. 1982).

v. Florida, 112 S.Ct. 2114 (1993); *Gorby v. State*, 630 So. 2d 544 (Fla. 1993). Gunsby ignores these facts, and succeeded in convincing the lower court to do likewise. That ruling is an abuse of discretion which not only flies in the face of settled legal principles, but also grants relief to a defendant who has wholly failed to establish the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984).[7] There is absolutely no reasonable probability of a different result and this claim fails because of that failure of proof. The trial court's grant of relief should be reversed.

To the extent that Gunsby relies on the "jury study" to support his position, three comments are dispositive. First, the testimony concerning that study was admitted *only* as a proffer, never as substantive evidence. *(PCR 628)*. Second, the trial court (quite correctly) did not rely on that study in any way. *(PCR 3558)*. Gunsby's brief does not explain how that "study" can establish prejudice (under *Strickland*) when it was not admitted into evidence and was not relied upon by the trial court.

Moreover, there are three independently adequate reasons why the "jury study" has no probative value. First, to sanction the use of a study such as this one is to wholly eviscerate the basic principle of trial by jury and replace that doctrine with speculative, after-the-fact critiques of *mock* juries whose "performance" is evaluated by a handpicked expert. That theory is the very antithesis of a system of justice founded on trial by

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[7] The state does not concede that counsel's performance was deficient, either.

jury. Second, the inherent deficiencies present in such a study undermine its value to the extent that it is of no assistance to the finder of fact. The mock juries in this case were not subjected to any voir dire examination; in no way approximated the demographics of the actual jury; heard *none* of the guilt phase evidence or jury instructions; and were well aware that, regardless of their verdict, *no one* would be punished because of anything they did. In summary, the mock juries in no way approximated any penalty phase jury, and certainly did not feel the weight of responsibility felt by an actual juror in a capital trial. Third, there is absolutely no indication (much less any evidence) that Gunsby's penalty phase jury acted in the same fashion as did the mock juries. Regardless of what the study does prove, and the state suggests that it proves nothing, that study fails to make the transition from the academic to the practical. Neither this study nor any other can determine what actually happened in this or any other case. Because of that failure, the study has no evidentiary value.

Florida law is settled that a juror may not impeach the verdict of a jury upon which he served. *See, e.g., Johnson v. State,* 593 So. 2d 206, 210 (Fla. 1992). The sanctity of jury deliberations is so highly regarded that counsel is flatly prohibited from post-trial interviews of jurors absent an extremely compelling need. *Fla. Rule Pro. Conduct,* 4-3.5(d). Gunsby may argue that because of these rules, he can only attack the jury's comprehension by use of a mock jury. The defect in that argument, which Gunsby cannot overcome, is that it is

internally inconsistent to afford the jury (and its verdict) the dignity it is due and at the same time allow that verdict to be attacked through an after-the-fact critique of the performance of a *simulated* jury. That is not, and should not be the law. While the study done in this case is perhaps of academic interest, that is the extent of its value. Even setting aside the defects that infect that study, its use in this fashion is inconsistent with 500 years of jury trials and the respect afforded the verdict of a jury.

To the extent that Gunsby relies on *Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995), to support his ineffective assistance of counsel claim, that is an attempt to put a square peg in a round hole. In *Jackson*, trial counsel apparently chose not to call mitigation witnesses because of the fear that doing so might open the door to the state's presentation of evidence of another charge pending against the defendant. *Id.*, at 1366, 1368. What appears to be, on its face, a sound strategic decision was actually deficient performance because there *was* no other charge pending against the defendant. *Id.* The peculiar facts of *Jackson* have no bearing on this case.

To the extent that Gunsby argues that the "logical import of the state's argument is that a prosecutor can say whatever she wants to the jury because it has no effect", that argument misses the point. Gunsby refuses to recognize that this is an ineffective assistance of counsel claim, not a substantive prosecutorial argument claim. Gunsby dressed his procedurally barred substantive claim up as one of ineffective assistance of counsel and convinced the trial court to rule in his favor.

The trial court should not have looked past the procedural bar at all and should have denied relief on that basis. *Cherry, supra; Medina, supra; see also, Kight, supra*. Even assuming the ineffective assistance of counsel claim was *properly* presented, the lower court applied an incorrect legal standard and abused its discretion in granting relief.

The trial court erred in granting sentence stage relief on this claim. That grant of relief is an abuse of discretion which should be reversed and the death sentence reinstated.

II. IN REPLY TO GUNSBY'S ARGUMENT REGARDING THE PRESENTATION OF MENTAL STATE TESTIMONY

On pp. 40-52 of his brief, Gunsby argues that the trial court properly found ineffective assistance of counsel as to the presentation of mental state mitigation. The state's initial brief addresses the errors committed by the lower court, and those arguments are not repeated. However, there are claims and assertions contained in Gunsby's brief that do require a response.

The most problematic component of this issue, insofar as Gunsby is concerned, is the undisputed (yet omitted) fact that the *sentencing* court found, as mitigation, that Gunsby is mentally retarded. *Gunsby v. State*, 574 So. 2d at 1088. Moreover, the accuracy of Gunsby's categorization of his organic brain damage as being "severe" is open to question. Likewise, the record does not support Gunsby's claim of any synergistic effect between his mental retardation and his "financial and emotional impoverishment." *(PCR 850-51; 928)*. Moreover, yet another omitted

fact is that, according to Gunsby's expert, it is not possible for an individual to "fake smart" on an intelligence test. *(PCR 966)*[8]

To the extent that Gunsby argues that the state has ignored Dr. Conley's testimony concerning the effect the order appointing him in this case had on his evaluation, it is Gunsby who is turning a blind eye to the facts. At trial, which is the pertinent time, Dr. Conley specifically and clearly testified about various matters that were argued as statutory and non-statutory mitigation. *(TR 618-650;682-692).*

The testimony of Dr. Caddy set out at p. 43 of Gunsby's brief is so riddled with assumptions that fact and conjecture cannot be separated. There is no evidence to suggest that Gunsby is unusually suggestible; only the conclusory statements of Gunsby's handpicked experts. Likewise, Dr. Phillips' testimony, which suggests that this crime was impulsive, is, under these facts, wholly incredible. Moreover, Dr. Poetter's after-the-fact testimony is nothing more than a later, different interpretation of essentially the same facts. There is essentially no dispute that Gunsby did in fact know right from wrong, and the efforts by the defense experts to put a favorable slant on that fact are unpersuasive.

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[8] The term "fake smart" refers to an individual's attempt to score higher on an intelligence test than his IQ truly is. No mental health expert mentioned any deficits in Gunsby's adaptive functioning, even though that is a component of a diagnosis of mental retardation. *DSM III-R at 31-32; DSM IV at 46.* While Gunsby was not affluent by any means, he was, from all indications, functioning in society.

Gunsby's attempt to argue against the state's position as to whether it was ineffectiveness of counsel to present Dr. Conley's testimony misses the point. *(See Answer Brief at 45).* That argument is rooted in hindsight, and premised upon what "might have been", neither of which is the proper standard for evaluating an ineffective assistance of counsel claim.[9] *See, e.g., Maxwell v. Wainwright,* 490 So. 2d 927, 932 (Fla. 1986). Instead, counsel's performance is presumptively competent, and is evaluated based upon counsel's perspective *at the time of trial. Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. 2052, 801 L.Ed. 2d 674. When the *Strickland* standard is applied, it is apparent that counsel's performance was neither deficient nor prejudicial. There is no reasonable probability of a different result, and the lower court should be reversed.

To the extent that Gunsby claims that the lower court did not base (at least in part) its finding of ineffective assistance of counsel on the fact that there was not a specific request for an evaluation for organic brain damage, that claim is patently incorrect. *(PCR 3561).* That aspect of the lower court's order was fully addressed in the state's initial brief beginning at p. 36.

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[9] Footnote 22 on p. 46 of the answer brief also focuses on what might have been. To the extent that footnote 22 purports to present a claim for review, it is insufficiently briefed. *See, e.g., Duest v. State, 555 So. 2d 849 (Fla. 1990).*

Gunsby also argues at length that Dr. Poetter should have been ordered to evaluate the defendant for purposes of mitigation. *(Answer brief at 48-50).* However, that argument misses the point because it fails to recognize Dr. Poetter's role, which was that of a court-appointed *competency expert*. *(TR 776-8).* Dr. Poetter was (obviously) *not* a confidential defense expert, and it is, at the very least, open to debate as to whether Dr. Poetter would even have properly gone beyond competency into the area of mitigation in his role as a non-confidential expert. It was not unreasonable performance on the part of trial counsel not to request (or acquiesce in) orders allowing non-confidential experts to delve into matters of mitigation as well as competency. Moreover, trial counsel received written reports from Dr. Poetter and Dr. Mhatre, and the value of further discovery from those experts is debatable. *(PCR 332).* While it is possible that trial counsel could have done more, that statement can be made about any case. *Maxwell, supra.* In this case, counsel's actions were not deficient, nor were they prejudicial. The lower court should be reversed.

To the extent that Gunsby attempts to rely upon the "jury study", that reliance is misplaced for the reasons set out at pp. 16-18 above. Moreover, the argument set out in footnote 23 on p. 51 of Gunsby's brief is not sufficient to present an issue for review. Even if that argument was sufficiently briefed, it is not a basis for affirmance of the lower court. Had the evidence from the 3.850 hearing been before this Court on direct appeal, it would in fact have established that Gunsby is *not* "the

seriously emotionally disturbed man-child" presented in that proceeding. *See, e.g., Gunsby v. State,* 574 So. 2d at 1091. Gunsby argues that public opinion polls indicate that a majority of Floridians do not favor the death penalty when the defendant is mentally retarded. Accepting that fact as true for purposes of argument, the fact that cannot be changed is that the trial jury in this case was told that Gunsby is mentally retarded and the trial court *did* find mental retardation as mitigation. *Gunsby v. State,* 574 So. 2d at 1090. Had there been no mental retardation evidence, Gunsby's argument might be relevant; under these facts, the argument is purely academic.

To the extent that Gunsby relies on *Knowles v. State,* 632 So. 2d 62 (Fla. 1993), for the proposition that death is disproportionate when "there are serious mental deficiencies", that argument is erroneous. *Knowles* was reversed on proportionality grounds after this court struck all but one aggravating circumstance. *Id.,* at 67. *Knowles* does not control because it is distinguishable on its facts.

Finally, while Gunsby accuses the state of presenting academic arguments at various points in his brief, the fact is that the grounds advanced for reversal of the lower court's grant of relief are predicated upon the correct standard of review. What Gunsby believes should have been done by trial counsel is not the standard; the standard is what trial counsel did based upon his perspective at the time of trial. The second component of the *Strickland* test, which was not properly evaluated by the trial court, is the prejudice prong of *Strickland v. Washington*.

Regardless of whether Gunsby's present counsel, in their wisdom, believe that trial counsel should have handled the case in a different way, the dispositive fact is that Gunsby has not demonstrated prejudice. Even assuming, *arguendo*, that trial counsel should have submitted an order that directed non-confidential experts to delve into mitigation, those experts did in fact testify as to mental state mitigation. In other words, trial counsel was *able* to present mental state mitigation testimony at the penalty phase of Gunsby's capital trial without doing what Gunsby and the lower court assert he should have done. Because trial counsel was successful in presenting mental state mitigation testimony without orders specifically directing the mental state experts to inquire into that area, it makes absolutely no sense to find ineffectiveness of counsel based upon the drafting of the orders appointing the experts. To find ineffectiveness of counsel under these circumstances is to place form over substance, and is the quintessential example of grading trial counsel's performance without acknowledging the evidence that was presented at trial. There was no ineffectiveness of counsel, and the order granting sentence stage relief should be reversed.

CROSS-APPEAL[10]

III. THE INEFFECTIVE ASSISTANCE OF COUNSEL/BACKGROUND EVIDENCE CLAIM

On pp. 52-54 of his brief, Gunsby argues that he is entitled to relief based upon his claim of ineffectiveness of trial counsel in presenting mitigation evidence regarding Gunsby's background and early life. The lower court did not address this claim, and made no findings of fact regarding it. However, given the nature of this claim, the facts necessary to decide it are found within the record.

Gunsby's argument is, once again, predicated upon what might have been if this case had been tried in the fashion deemed "correct" by present counsel. That is not the proper standard of review, which instead focuses on the reasonableness of counsel's actions at the time of trial. Moreover, Gunsby cannot obtain relief on ineffectiveness of counsel grounds unless he can demonstrate a reasonable probability of a different result. That he cannot do.

At trial, counsel presented the testimony of Annabelle Raines, who was one of Gunsby's neighbors. Ms. Raines testified that Gunsby would run away outsiders, drug dealers and drug users from their apartment complex. *(TR 580)*. Ms. Raines further testified that Gunsby helped elderly people and played with and looked out for the neighborhood children. *(TR 581-82)*. Eartha

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10 While Gunsby has formatted his brief to begin his cross-appeal with the guilt phase claims, the cross-appeal actually begins with this issue.

Harris, another of Gunsby's neighbors, testified that Gunsby played with the neighborhood children. *(TR 586).*

Counsel also presented the testimony of Johnnie Mae Gunsby, who is Gunsby's aunt who was primarily responsible for raising him. Ms. Gunsby testified about the defendant's mother's various problems, which included mental problems, epilepsy, disability, and virtually constant institutionalization. Ms. Gunsby also testified about the problems suffered by the defendant's brother, who had also been institutionalized for mental problems. Further, she testified that Gunsby did not know who his father was; that he exhibited strange behavior as a child; and that he was always attempting to help other people, a practice which on one occasion resulting in an injury to him. *(TR 650-60).* However, Ms. Gunsby also testified that on one occasion she was called to come to the school attended by Gunsby, and that Gunsby was playing with toys in the classroom while the other children attended to their lessons. *(TR 655-56).* Ms. Gunsby was informed by the teacher that that was the only thing that Gunsby wanted to do, and that he did not want to do his homework. *(TR 656).* Further, Ms. Gunsby testified that Gunsby only completed the third or fourth grade in school. *(TR 656).* Ms. Gunsby also testified that Gunsby frequently acted selfish, did not want to work in the fields, and would slip off at night.

In addition to the lay witnesses, counsel presented the testimony of Drs. Poetter and Conley. Dr. Poetter's testimony is summarized elsewhere, and Dr. Conley's testimony covered matters concerning Gunsby's background and early life, including the fact

that Gunsby insisted that he had a high school diploma but was only reading on a third grade level; that Gunsby came from a very dysfunctional family including a brother with a long history of mental illness and a mother who was mentally ill prior to Gunsby's birth. Moreover, Dr. Conley testified that Gunsby's mother spent most of her life in mental institutions and died in Florida State Hospital. *(TR 632)*.

Gunsby presented a massive amount of testimony at the 3.850 hearing which, according to present counsel, should have been presented at trial. However, with almost no exception, the 3.850 evidence is little more than a cumulative, embellished version of what was placed before the jury. Under settled Florida law, there can be no deficient performance when the evidence claimed to have been omitted is cumulative of the other evidence and an expert testified concerning the same subject. *See, e.g., Puiatti v. Dugger*, 589 So. 2d 231 (Fla. 1991); *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990); *Routley v. State*, 590 So. 2d 397 (Fla. 1991); *Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991); *Buenoano v. Dugger*, 559 So. 2d 1116 (Fla. 1990); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989); *Maxwell v. Wainwright*, 490 So. 2d 927 (Fla. 1986).

On pp. 52-53 of his brief, Gunsby argues that testimony contrary to that given by Johnnie Mae Gunsby should have been presented through other relatives. This argument is directed toward the prototypical trial decision of what witnesses should be called, and makes no pretense of being based upon anything other than hindsight. The failure to present conflicting testimony does not support an ineffective assistance of counsel

claim, *Correll v. Dugger*, 558 So. 2d 422 (Fla. 1990), and it makes no sense to argue that trial counsel should have introduced testimony that conflicted with that of the woman who took the place of Gunsby's mother in his upbringing. The strategy espoused by present counsel, years after trial, would have been a disaster. Trial counsel used the best, most knowledgable and least impeachable witnesses available. He should not be criticized for not presenting multiple additional witnesses with less relevant knowledge to say essentially the same thing as the witnesses who testified. Trial counsel's performance was not deficient, nor was it prejudicial. *See, e.g., Buenoano, supra; Routley, supra; Kennedy, supra.*

Trial counsel presented Gunsby as a sympathetic figure who was born into a very dysfunctional family and was burdened with extremely limited mental abilities, but who nonetheless was always willing to help others in the community and was attempting to rid that community of drugs. The addition of testimony concerning the town of Jasper, Florida, where Gunsby was born, regardless of what that town was like at that time, would be of tenuous relevance at best because Gunsby's family moved to Ocala when the defendant was quite young. *(PCR 461-63).* In light of the circumstances of this murder and Gunsby's age at the time of the murder, that evidence has, at best, only slight relevance to Gunsby's character, record, or the circumstances of the offense. The mitigating value of such evidence is miniscule, at best, and the fact that that evidence was not presented does not even approach deficient performance under *Strickland* because it would

not have changed the result. Likewise, it simply cannot establish prejudice for purposes of *Strickland.*

To the extent that Gunsby relies on *Heiney v. State*, 620 So. 2d 171 (Fla. 1993), that case is not controlling. *Heiney* was a jury override case, whereas Gunsby's jury a recommended sentence of death. In *Heiney*, this court stated (in accordance with *Tedder*) that the un-presented mitigation "might have provided the trial judge with a reasonable basis to uphold the jury's life recommendation." *Heiney*, 627 So. 2d at 174. Because Gunsby's jury recommended death, *Heiney* has no application to this case.

Finally, to the extent that Gunsby relies on *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995), that case likewise is of no help to him. The evidence presented at Gunsby's trial essentially differs only in quantity from that presented at the 3.850 hearing. Trial counsel was not deficient in his performance, nor was Gunsby prejudiced.

While the state is aware that the lower court did not reach this claim, and, consequently, that there are no fact-findings existent in the record, this claim is properly decided on legal grounds alone. This claim does not state grounds for reversal of Gunsby's sentence of death.

IV. THE WITHERSPOON/INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

On pp. 54-58 of his brief, Gunsby argues that he is entitled to relief because trial counsel did not object to the "excusal of two prospective *Witherspoon*-scrupled jurors", and because counsel did not "demand a meaningful reverse-*Witherspoon*

inquiry". The lower court did not address this claim. Because this claim is procedurally barred, the absence of fact-findings by the lower court makes no difference at all.

The *Witherspoon* component of this claim was raised on direct appeal and decided on procedural bar grounds by this Court. *Gunsby v. State*, 574 So. 2d at 1088. Florida law is settled that claims of ineffective assistance of counsel cannot be used to circumvent the rule that post-conviction proceedings cannot be used as a second appeal. *See, e.g., Medina v. State*, 573 So. 2d 293 (Fla. 1990). Moreover, a defendant cannot escape the preclusive effect of a procedural bar by pleading otherwise-barred claims in terms of ineffectiveness of counsel. *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990). The *Witherspoon* component of this claim is procedurally barred, and relief should be denied on that basis. *See also, Kelley v. State*, 569 So. 2d 754 (Fla. 1990); *Sireci v. State*. 469 So. 2d 119 (Fla. 1985). The reverse-*Witherspoon* component of this claim, which is also pleaded in ineffective assistance of counsel terms, is procedurally barred for the same reasons. *See, e.g., Medina, supra; Kight, supra.*

Alternatively and secondarily, Gunsby's ineffective assistance of counsel claim lacks merit. In addressing this issue on direct appeal, this court stated:

> ...The trial court preliminarily questioned the venire concerning, among other things, whether their strong feelings for or against the death penalty would render them unable to fairly decide the case. He excused members of the venire who affirmatively stated that they would be unable to discharge their duty as jurors.

Gunsby, 574 So. 2d at 1088. Those findings by this court are not disputed, and are the law of the case.

The question to the venire which Gunsby asserts was objectionable is as follows:

> Q. Given the nature of this case, do any of you feel that it would be better if you did not serve on this particular case" *(TR 11)*[11]

Whether or not that question creates a *Witherspoon* issue in the first place is open to debate. What is not debatable is that it is incredible to suggest that counsel rendered ineffective of assistance of counsel by not objecting to the excusal of jurors who clearly indicated that they did not want to serve on the jury because they did not feel, in their own minds, that they could be fair and impartial.

Moreover, the questioning at issue in this case is substantially the same as what occurred in *Darden v. Wainwright*, 477 U.S. 168 (1986), and was approved by the United States Supreme Court. The courts have repeatedly emphasized that no formulaic incantation is required in the *Witherspoon* context. *Id.* As this

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[11] The court followed that question with the following statement:

> ...Is there anyone else? What I am really asking you to do in this process is to search your own conscience to determine whether or not you can sit as a fair and impartial juror and try this case solely on the facts and the law and the arguments of counsel.
>
> As so rather than anybody getting excused by one side or the other in this process I am asking the jurors to look inside themselves and determine whether they should excuse themselves. (TR 11).

Court found on direct appeal, the lower court excused the jurors who had affirmatively stated that they would not be able to discharge their duties as jurors. *Gunsby*, 574 So. 2d at 1088. There might well have been error had those jurors *not* been excused. However, that is not the case and there can be no error. Because there is no substantive error, counsel's performance in not objecting to the excusal of those jurors cannot have been deficient. Consequently, Gunsby cannot meet his burden of proof under *Strickland v. Washington*, 466 U.S. 668 (1984), and has not established a basis for relief.

In the footnote found on p. 57 of his brief, Gunsby argues, without citation to the record, that trial counsel was ineffective because he did not engage in "reverse-*Witherspoon* questioning of the venire." Inasmuch as this issue is only contained in a footnote, it is not properly presented to this court. *See, Duest, supra.* While it is true that trial counsel did not expressly "life-qualify" the venire, Gunsby has omitted the fact that the *Witherspoon*/reverse-*Witherspoon* questioning was done by the trial court. *(TR 71-2;73;126-7;142-3;148;158).* The questions that Gunsby claims should have been propounded by trial counsel were asked by the trial court, and Gunsby's argument fails for want of any basis in fact. Gunsby has not even claimed that any seated juror was not fair and impartial, and there is no error. In the absence of any error, counsel cannot have been ineffective. This claim is not a basis for relief.[12]

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[12] Gunsby's claim of *per se* error is an attempt to put a square peg in a round hole--because no error occurred, there can be no *per se* rule of reversal that is applicable.

V. THE COLD, CALCULATED, AND PREMEDITATED JURY INSTRUCTION CLAIM

On pp. 58-59 of his brief, Gunsby argues that trial counsel rendered ineffective assistance of counsel in failing to object to the instruction given to the jury on the cold, calculated and premeditated aggravating circumstance. This claim is foreclosed by binding precedent.

In *Harvey v. Dugger*, 20 Fla.L.Weekly S89,90 (Fla., Feb. 23 1995), this court expressly held that the failure to object to the pre-*Jackson* CCP jury instruction (prior to the release of *Jackson*, *Jackson v. Dugger* 19 Fla.L.Weekly S215 (Fla., April 21, 1994)) is not ineffectiveness of counsel. Gunsby does not attempt to distinguish *Harvey* because he cannot; *Harvey* is dispositive of this meritless claim.[13]

VI. THE COMPETENCY TO STAND TRIAL CLAIM

On pp. 59-60 of his brief, Gunsby argues that he was incompetent at the time of his 1988 trial. The lower court did not address this issue in the order deciding Gunsby's motion for post-conviction relief. While Gunsby argues that the lower court's denial of guilt phase relief is an implicit finding of competence, that leap of logic falls short of the mark.

In answering the 3.850 motion, the state expressly invoked the procedural bars that preclude consideration of this claim. *(PCR 2578).* In order to accept Gunsby's argument that there was

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Jackson v. Dugger

13 The lower court did not address this claim in its order on the 3.850 motion. Because this claim is properly decided on purely legal grounds, the absence of a ruling by the lower court makes no difference.

procedural bar defenses and reached the merits of this claim. Such a presumption is contrary to the law, as well as being contrary to a rational application of Florida's procedural bar rules. *See, e.g., Ylst v. Nunnemaker*, 111 S.Ct. 2590, 2596 (1990). This Court should not presume that the lower court ruled on the merits, but rather should presume that the ruling of that court was based upon settled procedural bar law.

Gunsby's competency claim is precluded by a double layer of procedural bar. First, Florida law is settled that competency issues that could have been but were not raised on direct appeal are procedurally barred from review in collateral attack proceedings. *See, e.g., Medina v. State*, 573 So. 2d 293 (Fla. 1990). The second procedural bar that is applicable is the settled rule that claims apparent from the original record must be raised, if at all, on direct appeal. *See, e.g., Lambrix v. State*, 559 So. 2d 1137 (Fla. 1990). In this case, direct appeal counsel specifically supplemented the record with the reports of the mental state experts, and, at the risk of stating the obvious, the facts underlying this claim were readily available at the time of the direct appeal proceedings. This court should follow settled Florida law, enforce the procedural bars, and deny relief on this claim.

Alternatively and secondarily, this claim lacks merit. The original trial judge, who ruled on the original competency motion, had the opportunity to observe the defendant's demeanor and interaction with his attorney, as well as the opportunity to observe Gunsby throughout his trial. Moreover, *at the time of trial*,

Gunsby's trial counsel had informed Dr. Conley in a letter requesting an evaluation that, based upon his conversations with Gunsby, counsel did not believe the defendant to be incompetent. *(PCR 1459).* Further, in his statement for purposes of the presentence investigation report, trial counsel stated that Gunsby was very open and cooperative about the case. (TR 888). The fact that defense counsel believes his client to be competent and able to assist in his defense is significant evidence that weighs heavily in favor of a finding of competency. *See, e.g., United States v. Rodriguez,* 799 F.2d 648 (11th Cir. 1986); *Reese v. Wainwright,* 600 F.2d 1085 (5th Cir. 1979).

The fact that defense counsel believed Gunsby to be competent is of particular significance because the basis of Gunsby's claim is that he would have difficulty consulting with his attorney. Defense counsel's contemporaneous statements concerning this issue are entitled to great weight because trial counsel was in the best position of anyone to evaluate Gunsby's ability to assist in the defense. Moreover, the evidence at *trial* was that Gunsby was able to rationally and coherently discuss his case with another inmate (who happened to be a disbarred attorney). *(TR 388-95).*

In his brief, Gunsby argues that only one of the five mental health experts who have evaluated him found him to be competent. *(Answer brief at 60).* That argument misses the point because whether a defendant is competent to stand trial is a legal question that is ultimately decided by the trial court. *See, Hunter v. State,* 20 Fla.L.Weekly S251 (Fla., June 1, 1995).

This case is a good example of the rationale underlying that rule.

In this proceeding, Dr. Mhatre originally found Gunsby competent to stand trial based upon his face-to-face evaluation. *(TR 567-569).* Dr. Mhatre changed his mind in the 3.850 proceeding based *solely* on the fact that Gunsby's full scale IQ score was below 70. Dr. Mhatre testified that his office practice was to find anyone with a sub-70 IQ incompetent and leave the final decision to the court. *(PCR 1041).* Dr. Mhatre's practice is not in accord with settled principles because it arbitrarily assumes that *every* defendant with an IQ below 70 *always* lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and *never* has a rational and factual understanding of the proceedings against him. *See, e.g., Dusky v. United States,* 362 U.S. 402 (1960). Dr. Mhatre had no question about Gunsby's competence after an in-person evaluation, *(PCR 1040),* and it is absurd to suggest that even though Gunsby met the test for competence, he is incompetent solely because of his IQ score. Dr. Mhatre's 3.850 testimony is wrong because the evaluation trumps the numerical guideline he has adopted as his personal practice.

Of course, competence is not determined by a head count of the experts; the expert reports are merely advisory and the trial court retains the responsibility of deciding the ultimate issue. *See, e.g., Hunter v. State, supra; Muhammad v. State,* 494 So. 2d 969, 973 (Fla. 1986). On direct appeal, a determination of competence is only reversible for an abuse of discretion, *Hunter, supra,* and the

only evidence Gunsby has presented is the testimony of witnesses who saw Gunsby years after his trial. The evidence would not establish grounds for reversal on direct appeal, and the fact that Gunsby has, years later, located experts who will testify differently does not warrant collateral relief. *See, e.g., Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991); *Henderson v. Dugger*, 522 So. 2d 835 (Fla. 1988).

Gunsby argues that the evidence of incompetence was "uncontroverted" at the 3.850 hearing; that is, at the least, somewhat of an overstatement. Dr. Phillips testified that Gunsby did not have the "capacity to work with his attorney in a way that would have been *clinically meaningful*." *(PCR 958)*.[14] Dr. Caddy testified that Gunsby *may* not have been competent at the time of the trial. *(PCR 816)*. Dr. Poetter did not retreat from his original opinion that Gunsby *was* competent to stand trial. *(PCR 901)*.[15] The evidence is not "uncontroverted"; Dr. Caddy's testimony was qualified to the extent that it is little more than a guess; Dr. Phillips' testimony as to competency is meaningless jargon strung together to approximate a sentence; and Dr. Mhatre's testimony (at the 3.850 hearing) is based upon a personal practice that is without legal support.[16] None of that

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[14] The phrase "clinically meaningful" is a non-sequitur that seems to blend the therapy context into a legal context. Whatever it truly means, the phrase "clinically meaningful" is no part of the *Dusky* standard for competence to stand trial.

[15] Dr. Poetter was one of the original experts at trial; Dr. Mhatre's opinion is discussed at p. 36, above, and, for those reasons, is erroneous.

[16] Dr. Mhatre's office practice is also inconsistent with the practice of the profession. *See, DSM-IV at 46.*

testimony establishes incompetency and, if this court looks beyond the clear procedural bars, Gunsby fails to establish a basis for relief on the merits, as well.

VII. THE INEFFECTIVENESS OF EXPERTS CLAIM

On pp. 60-61 of his brief, Gunsby argues that he is entitled to relief based upon ineffective assistance of his mental state experts. This claim was only tangentially raised in the motion to vacate *(PCR 462-3)*, and was not addressed by the lower court. For the reasons set out below, this claim is barred by a double layer of procedural bar.

The first reason this claim is procedurally barred is because it could have been but was not raised on direct appeal. Gunsby's failure to raise this claim in his direct appeal proceedings is a procedural bar to further litigation. *See, e.g., Muhammad v. State*, 603 So. 2d 488 (Fla. 1992); *Johnson v. State*, 593 So. 2d 206 (Fla. 1992). This Court should enforce the procedural bar, decline to reach the merits of this claim, and deny relief.

The second reason this claim is procedurally barred is because it is raised for the first time in Gunsby's appeal from the trial court's ruling on the 3.850 motion. That is a procedural bar under settled Florida law. *See, e.g., Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988).

Gunsby may argue that he presented this claim in his 3.850 motion. While it is true that Gunsby included a passing reference to this Court's 1987 *Sireci*[17] opinion, it is also true that that citation appears in connection with Gunsby's claim of

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17 *State v. Sireci*, 502 So. 2d 1221 (Fla. 1987).

ineffective assistance of counsel. *(PCR 460 et seq.)*. Gunsby did not present a free-standing claim of "ineffective expert assistance" in the 3.850 motion, and his failure to do so is a procedural bar to consideration of that claim on appeal.

Alternatively and secondarily, this claim lacks merit. As understood by the state, Gunsby's claim for relief is predicated on the due process clause. In support of his claim, Gunsby relies on three Eleventh Circuit Court of Appeal cases and one case decided by this Court. Each of those cases is distinguishable on its facts, and, insofar as the federal decisions are concerned, is of questionable precedential value in light of subsequent decisions of the federal appellate court.

In *Ford v. Gaither*, 953 F.2d 1296 (11th Cir. 1992), a panel of the Eleventh Circuit Court of Appeals relied on the *ore tenus* rule to uphold a grant of habeas relief based upon the *denial* (by the state trial court) of a non-record request for a psychiatric evaluation. *Id.*, at 1298. The decision turned on the credibility choices made by the federal magistrate judge who conducted the evidentiary hearing. *Id.* The Eleventh Circuit Court of Appeals expressly stated that the due process violation occurred when the trial court refused to order the evaluation that was orally requested and is not a part of the record. *Id., at 1299*. The defendant in *Ford* was obviously able to identify a specific act by the trial court which violated his right to expert assistance.

The second case relied on by Gunsby is *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991). The *Ford* panel summarized *Cowley* as holding that the "testimony of [a] psychologist who could not

testify as to defendant's competency to stand trial or at the time of the offense was not sufficient substitute for the provision of an adequate defense psychiatrist as required by *Ake [v. Oklahoma, 470 U. S. 68, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985)]. Ford, supra, at 1299.* The *Cowley* panel based its holding on the refusal of the state to provide expert assistance. *Cowley,* at 645. Moreover, the expert in *Cowley* only testified about his prior treatment of the defendant (years before the crime at issue) because he was a personal friend of Cowley's trial counsel. *Id.* The Eleventh Circuit did *not* hold that the expert's evaluation had been inadequate, but instead stated that he "was pressed into giving advice, and he could not testify as to whether Cowley was either competent to stand trial or insane at the time of the crime [footnote omitted]". *Id.*

The third case relied on by Gunsby is *Blake v. Kemp,* 758 F.2d 523 (11th Cir. 1985). *Blake* is cited in the omitted footnote referred to above, where the *Cowley* panel summarized its holding as being that "examination by the *state's* psychiatric witness, who did not determine sanity at the time of the crime, is insufficient to guarantee a fair trial under *Ake*". *Cowley, supra at 645 n. 11.* Once again Gunsby is attempting to put a square peg into a round hole--*Blake* is inapposite because the facts are not the same.

Blake is relevant insofar as Gunsby's complaints about the non-confidential *experts* are concerned. The *Blake* decision, in the final analysis, stands for the proposition that *Ake* is not satisfied when the evaluation is conducted by the state's expert

only and does not reach the issue of sanity. *See, e.g., Cowley, supra; Blake,* 758 F.2d at 528. In his effort to come within the scope of *Blake*, Gunsby complains not only about his confidential expert but also about the state experts. However, because Gunsby had his own expert, any attempt to create an issue out of the *state* experts collapses. Whether or not Dr. Mhatre made any "errors or oversights" at the time of trial does not matter--the defendant had an expert of his own, and the adequacy of Dr. Mhatre's evaluation was challenged on cross-examination, which was the correct method of doing that, anyway. Dr. Mhatre was not appointed to assist Gunsby, and he does not constitute a proper part of the *Ake/Sireci* analysis. Dr. Mhatre was never a favorable witness, and, if he made any errors, those matters were properly the subject of cross-examination--they have nothing to do with due process.

Likewise, Dr. Poetter was not a confidential expert, even though he was called to testify by the defendant. Dr. Poetter's testimony was favorable to Gunsby, and counsel cannot be faulted for having presented evidence that, on the whole, was helpful to his client. In any event, Dr. Poetter was not appointed to assist Gunsby, either, and no due process implication is present.[18]

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[18] In the ineffective assistance of counsel context, an attorney's statements that he could have done a better job are of little weight. *See, e.g., Francis v. State,* 529 So. 2d 670, 672 n.4 (Fla. 1988). An after-the-fact comment by a mental health expert about his trial performance ought to be treated in the same way.

Insofar as Dr. Conley is concerned, his testimony was extremely favorable to Gunsby, even though Gunsby now argues that he was denied due process because Dr. Conley incorrectly reached a diagnosis of paranoid schizophrenia. What Gunsby describes as "an academic question" is not that at all. The merits issue in this claim is whether a defendant is denied due process by the appointment of a confidential expert who renders a highly favorable, yet incorrect, opinion. To rule that due process is implicated under these facts would be to leave the area of constitutional law and create the wholly new sub-area of penalty phase psycho-legal malpractice. As the courts have repeatedly recognized, mental state experts frequently disagree, and a favorable opinion can frequently be obtained in the context of a criminal case. *Bertolotti v. Dugger*, 883 F.2d 1503, 1518 (11th Cir. 1989). Dr. Conley's testimony in the role of a confidential expert was highly favorable and, in fact, was that Gunsby was far worse off psychologically than the present experts believe him to be. That does not establish "ineffectiveness" on the part of Dr. Conley, and it certainly does not establish a due process violation because Gunsby can point to *no* action by the state that deprived him of anything.

Insofar as the Eleventh Circuit panel decisions are concerned, those decisions deal with a situation that is not present in this case. This case is, instead, virtually indistinguishable from *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992) (*en banc*), where the Eleventh Circuit held that there is no *Ake* violation, and hence no due process claim, when the defendant

cannot "pinpoint the ruling in which the trial court denied him due process by violating his right to competent psychiatric assistance." *Clisby, supra, at 934.* Gunsby, like Clisby, received the assistance of a mental state expert hand-picked by the defense; Gunsby never complained about the evaluation conducted by his expert, and is unable to identify any ruling by the trial court that infringed upon his due process rights.[19]

To the extent that Gunsby relies upon a passing reference to this court's opinion in *State v. Sireci*, 536 So. 2d 231 (Fla. 1988), that decision is of no help to him, either. *Sireci* was predicated upon the fact that the evaluations were grossly inadequate because they *ignored* clear indications of organic brain damage *or* mental retardation. *Sireci*, 536 So. 2d at 233. Unlike the *Sireci* experts, Gunsby's hand-picked expert (as well as one state expert) unequivocally testified that Gunsby is mentally retarded. While the extent of his mental retardation may be debatable, the fact that mental retardation testimony was before the jury is not. While Gunsby's newest experts opine that Gunsby suffers from "organic brain damage", the fact is, as set out in the state's initial brief, that the mental retardation trumps whatever "brain damage" Gunsby may have. *See, Initial Brief at 31-33.*

The *Diagnostic and Statistical Manual-4th Edition*, which is the newest version of the *DSM III-R*, does *not* contain any diagnosis of "organic brain damage".[20] Under the *DSM-IV* classification

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19 The *en banc Clisby* decision stands as the final word from the Eleventh Circuit on this issue.

20 Dr. Phillips, who works for the organization that published the *DSM-IV*, did not use the correct nomenclature. As a result,

system, "organic mental syndrome" has been replaced by the categories of delirium and dementia. *DSM-IV at p. 123.* Gunsby does not fit the criteria for delirium (based on his expert's testimony), and, likewise, does not fit the criteria for dementia, either. (*DSM-IV* at 129; 133-151). As set out in the state's initial brief, the mental retardation overrides whatever "organic brain damage" there may be.[21] The confidential expert at trial did not ignore the fact that Gunsby is mentally retarded, and, for that reason, Gunsby does not come within the narrow facts which would establish a basis for relief under *Sireci*, either. In addition to being procedurally barred, this claim is wholly meritless.

VIII. THE MENTAL RETARDATION EXECUTION BAR CLAIM

On pp. 61-62 of his brief, Gunsby argues that he should not be executed because he is mentally retarded. The lower court did not address this claim. However, there are two independently adequate reasons why this claim is not a basis for relief.

The first reason why this claim is not available to Gunsby is because it is procedurally barred. This claim could have been but was not raised at trial or on direct appeal. Under settled Florida law, Gunsby's failure to raise this claim in a timely manner is a procedural bar to litigation of this claim in a

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Dr. Phillips' testimony, at best, is difficult to decipher. The *DSM III-R* contains no diagnosis of "organic brain damage", either.

[21] In other words, the brain damage component of the diagnosis, if it is even correct, is subsumed within the diagnosis of mental retardation. In *Sireci*, this court seems to have regarded mental retardation/brain damage as an either-or concept. *See, e.g., Sireci v. State*, 536 So. 2d at 232.

collateral proceeding. *See, e.g., Woods v. State*, 531 So. 2d 79 (Fla. 1988).

Alternatively and secondarily, Gunsby's claim lacks merit because it has no legal basis. Of the cases relied upon by Gunsby in support of his position, *Allen v. State*, 636 So. 2d 494 (Fla. 1994) and *Thompson v. State*, 648 So. 2d 692 (Fla. 1994), do not address the issue raised by Gunsby. Neither of those decisions is analogous to Gunsby's case.

The other cases upon which Gunsby relies, *Hall v. State*, 614 So. 2d 473 (Fla. 1993) and *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *do not* stand for the proposition that the execution of a mentally retarded defendant is prohibited by either the State or Federal Constitutions. The death sentence in *Hall* was upheld by this court, *Id.*, and the sentence in *Penry* was set aside on *Lockett/Eddings* grounds, *Id.* at 328. Those decisions are of no help to Gunsby.

To the extent that Gunsby attempts to combine the *Hall* dissent with the *Allen* decision and emerge with a winning argument, that effort fails. The fatal defect in that argument is two-fold: the *Hall* dissent is not the law in this state, and the defendant's age cannot be legitimately compared to the defendant's IQ. *See, e.g., Penry*, 492 U.S. at 339 (setting out various obstacles to the use of the mental age concept). Yet another fundamental difference between *Penry* and *Allen*, which is sufficient to undermine reliance on *Allen* in this case, is that United States Supreme Court precedent supports the *Allen* result. *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702

(1988) (execution of under-sixteen defendant). *Penry*, on the other hand, fully supports this court's *Hall* decision, which is the law in this state. Gunsby's claim to the contrary is without merit and there is no basis for relief.

THE GUILT PHASE FACTS

On pp. 63-71 of his brief, Gunsby sets out a one-sided and argumentative statement of the facts in connection with his appeal from the denial of 3.850 relief as to his conviction. That statement of facts blends selected portions of the 3.850 testimony in with the facts from the guilt phase of Gunsby's capital trial. The state does not accept that statement of the facts as accurate.

The Facts From Trial

The evidence of guilt presented at trial is not complex. Gunsby was identified by two eye-witnesses as the person who entered the Big Apple store in Ocala, Florida, and shot Hesham Awadallah to death. *(TR 234, 239; 259; 337).*[22] Tony Awadallah, the victim's brother's, positively identified Gunsby as the shooter and picked Gunsby out of a photo-line up. (TR 239; 337). Tony Awadallah was certain of his identification of Gunsby, but did not know him by name. (TR 239; 244). Tony testified that Gunsby had on camouflage clothing at the time of the shooting. (TR 239). Further, Tony testified that he thought two other people

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22 Because many of the participants in this case have the same last name, first names are used at various points in this brief for purposes of clarity.

were with Gunsby because three people ran out of the store after the shooting. (TR 246).

Opal Latson was a cashier at the Big Apple on the day of the shooting. (TR 251-2). A friend of Gunsby's (Jessie Anderson) had been injured in an altercation at the store earlier in the day (TR 186; 197; 237), and Gunsby came to the store and left word with Opal that he intended to harm Tony. (TR 254).[23] Opal Latson identified Gunsby as the shooter, and testified that, at the time of the shooting, Gunsby was wearing blue jeans, a black leather jacket, a black hat and a camouflage t-shirt. (TR 258). Opal also identified Gunsby from a photo line up. (TR 259; 339).

James Colbert testified that, on the day of the murder, he was at a party at James Anderson's house, as was Gunsby. (TR 191). Gunsby and some others went to the hospital to see about the individual who had been injured at the Big Apple. (TR 193; 197); Colbert thought Gunsby was wearing "some green army pants" (TR 195), but he could have been mistaken. (TR 195; 204-6).[24]

Bennie Brown was also present at the party at James Anderson's house where she heard about one of her friends being injured at the Big Apple. (TR 222). She heard Gunsby say that he was "tired of those damn Iranians messing with the black".

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[23] Jessie Anderson's 3.850 testimony is consistent with this statement. (PCR 213).

[24] Whether or not "green army pants" and camouflage are the same thing is not apparent. If they are not the same, and they appear not to be, then Colbert's testimony is surplusage as to this point. Colbert's testimony was heavily qualified at the time of trial, and his 3.850 testimony is of no significance.

(TR 224). Gunsby left the party, and, when he returned, he was wearing camouflage. (TR 224). Gunsby left the party again and, when he returned, he was heard to say that he had "taken care of that". (TR 227). Brown did not know what Gunsby was supposed to have taken care of. (TR 228).

In addition, an inmate of the Marion County jail testified that he had overheard Gunsby say (to another inmate) that he had shot the wrong brother (TR 346), and that his trial strategy was to try and put the murder off on an individual named Isaac. *(TR 347).* Another witness, Diane Williams, testified that on the day following the shooting, Gunsby told her that he had in fact been the shooter and asked her to help him establish an alibi. (TR 368). Williams has a prior felony conviction for welfare fraud. (TR 372).

Opal Latson, the cashier, testified in rebuttal that, prior to the shooting, an individual had been brought to the Big Apple by the police regarding the incident in which Jesse Anderson was injured earlier in the day. (TR 473). She was certain that that individual was not the shooter. (TR 473). After the shooting, she heard the victim's father say to the police that that person knew who the shooter was. (TR 474).[25]

The 3.850 Evidence

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[25] The victim's father, who is also Iranian, speaks only broken English. At the 3.850 hearing, he testified through an interpreter. *(PCR 868).* This fact explains the confusion surrounding some of his statements.

A substantial portion of Gunsby's statement of the facts is devoted to setting out matters which deal with Tony Awadallah's criminal history. At the 3.850 hearing, the state conceded that a *Brady* violation had occurred as to Tony's criminal history, and that is what the lower court found. *(PCR 3548).* Tony never requested any favorable treatment based upon his status as a witness in the Gunsby case. *(PCR 205).* The shooter walked directly into the Big Apple and was clearly seen by Tony Awadallah. *(PCR 206).* Tony was standing directly across from the door when the gunman walked into the Big Apple. *(Id.)* Insofar as the Diane Williams component of the *Brady* issue is concerned, Gunsby presented no evidence that the disposition of the technical violation of probation charges against her was in any way connected to her trial testimony.

Lewis Barnes has been convicted of two counts of capital murder in Texas and two counts of first degree murder in Florida, as well as drug trafficking, escape, and various other Texas convictions. *(PCR 321-22).* Defendant's exhibit 91 does not establish that Tony and Barnes were in the same part of the Marion County jail. *(PCR 377).*

James Colbert testified that he was mistaken when he testified at trial that Gunsby was wearing "army pants" on the day of the murder. *(PCR 1001).* Colbert also testified that he was not present when the victim was shot. *(PCR 1006-7).*

The defendant's claim that Gunsby was the "only familiar face" in the photo line up shown to Tony Awadallah is not supported by any evidence. (*See, e.g., Answer Brief at 65-6).*

Likewise, there is no record support for the defendant's claim that Tony's criminal charges were disposed of as a result of his status as a witness in this case. *(See, Id., at 66).*

Agnes Myers never told anyone her 3.850 testimony version of the shooting. *(PCR 436).* Her 3.850 testimony was that Tony and his father were behind the counter at the time of the shooting, and that Opal was not behind the counter at all. *(PCR 437).* She further testified that the "three gunmen" never entered the store, but rather fired from the doorway. *(Id.).*

ARGUMENT

I. THE TRIAL COURT CORRECTLY DECIDED THE BRADY CLAIM

On pp. 72-83 of his brief, Gunsby argues that the trial court incorrectly resolved the *Brady* claim insofar as Tony Awadallah and Diane Williams were concerned. Gunsby overstates the effect of the evidence at issue.

A. Tony Awadallah

The state conceded, and the trial court found, that a *Brady* violation existed due to the failure of the state to disclose Tony's criminal history. *(PCR 3548).* The criminal history at issue included the drug charges pending against Tony, the disposition by plea of those charges, and new charges which were pending against Tony at the time of trial in this case. The lower court found that there was no reasonable probability of a different result had the evidence been disclosed. That finding is supported by the record and should not be disturbed for two independently adequate reasons.

The first reason that Gunsby's claim is not a basis for relief is because his claim that the trial court did not apply the correct legal standard is not supported by the plain language of the court's order. Gunsby's claim, as understood by the state, is that because the lower court did not use the phrase "reasonable probability" in the dispositive sentence of the order *(PCR 3549)*, then that court must not have applied *Bagley* properly. That claim fails when the order is read in context. In addressing this claim, the lower court stated:

> In order for evidence to be material under the *Brady* standard, there must be a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Breedlove*, 580 So. 2d at 607; *Medina v. State*, 573 So. 2d 293 (Fla. 1991). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Bagley*, 473 U.S. at 682. Thus the mere possibility that an item of undisclosed evidence might have helped the defense, or might have affected the outcome of the trial does not establish materiality under the *Brady* standard. *Breedlove*, 580 So. 2d 607.

(PCR 3549). To accept Gunsby's rationale, this court would be compelled to assume that the lower court stated the law correctly in one paragraph and forgot it by the time the next paragraph was drafted. While the court perhaps should have used the phrase "reasonable probability" in the dispositive sentence, a fair reading of the order demonstrates that the lower court found that there was no reasonable probability of a different result. The trial court is presumed to know and follow the law, *Walton v.*

Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), and that is what happened here. Despite Gunsby's attempt to change the lower court's ruling, that court applied the proper standard and properly denied relief.

The second reason that this claim is without merit is because Gunsby overstates the impeachment value of the undisclosed criminal histories.[26] Insofar as Tony Awadallah is concerned, the impeachment value of his criminal history is so weak as to be virtually non-existent. Tony was an eyewitness to his brother's murder, and positively identified the defendant the day after the murder. *See, e.g., PCR 3549.* Tony's incentive to testify was to see that his brother's killer was successfully prosecuted, not to help himself with his own legal entanglements. Given Tony's status as an eyewitness to his brother's murder, it strains credulity to suggest that he could have been impeached with his criminal history. Had the defendant attempted to impeach him in that way, the jury would have heard that Tony neither requested nor received anything in return for his testimony, and that the reason he testified was because Gunsby killed his brother. *(PCR 205).* Such "impeachment' would not have helped, and would probably have been harmful. Tony's statements were consistent, and any suggestion that he was testifying in

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[26] The state does not concede that a *Brady* violation occurred as to Williams.

order to help himself would have been unsupportable. There is no reasonable probability of a different result.[27]

B. Diane Williams

Insofar as Diane Williams is concerned, there is no dispute that that she had a prior felony conviction and that that fact was brought out at trial. *(TR 372)*. Further, there is no evidence at all to support Gunsby's conclusory statements that Diane Williams received anything in return for her testimony. In fact, all of the evidence is to the contrary and establishes beyond a doubt that there was no "deal". *(PCR 50-53; 57; 64-5)*. Instead, none of the lawyers involved in the Williams matter even knew she was in any way involved as a witness in the Gunsby case. *Id.* Further, the violations with which Williams was charged were "technical" probation violations, and the ultimate disposition of those violations was not unusual. *(PCR 51)*.[28] In summary, there is no evidence of any favorable treatment--all the evidence is contrary to that claim. Because there was no "deal", there is nothing that Gunsby could have used as impeachment of Williams. Because the value of this "impeachment" is minute, and because two other witnesses also heard Gunsby make inculpatory statements, there is no reasonable probability of a different

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[27] Tony's story never "changed" despite Gunsby's claim at p. 80 of his brief.

[28] Gunsby's claim that Williams was picked up for violation of probation after it "became known" that she might know something about this case is unsupported by the record.

result. *Bagley, supra.* The trial court correctly resolved this issue, and that decision should be affirmed.

To the extent that Gunsby attempts to bring this case within the reach of *O'Neal v. McAninch*, 115 S.Ct. 992 (1995), that argument is not persuasive because is does not fit the facts. *O'Neal* is a federal habeas corpus harmless error decision that is limited to its narrow facts. Specifically, *O'Neal* addressed the situation occurring when the federal habeas trial court finds a matter "so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal v. McAninch*, 115 S.Ct. at 994. There are three reasons why *O'Neal* does not apply to Gunsby's case. First, this proceeding is obviously not a federal habeas corpus proceeding. Under the plain language of *O'Neal*, that decision does not reach outside the area of federal habeas practice. *O'Neal, supra,* ("when a *federal judge* in a *habeas* proceeding..." [emphasis added]). Second, *O'Neal* did not concern itself with the "reasonable probability" component of the *Bagley* analysis. Instead, *O'Neal* dealt with *harmless error analysis* in a federal habeas proceeding. The issue present in Gunsby's case has nothing to do with harmless error. Any attempt to analogize across legal propositions fails because it is an attempt to compare apples and oranges.[29]

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[29] The harmless error standard at issue in *O'Neal* was the "substantial and injurious effect" standard set out in *Brecht v. Abrahamson*, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), rather than the *Chapman* "harmless beyond reasonable doubt" standard. By its language, *O'Neal* is limited to a small fraction of habeas cases.

The third reason that *O'Neal* has nothing to do with this case is because, unlike the apparent situation in that case, the trial court here found no reasonable probability of a different result. *See, PCR 3549.* While Gunsby tries to equate "grave doubt" with the trial court's comment that "this is a very close question", that argument is no more than sophisticated sophistry. The trial court in Gunsby's 3.850 proceeding decided the question before him, and that is the end of the inquiry. *O'Neal* is inapposite in this context.

Finally, Gunsby's cumulative effect argument fails because the non-disclosed evidence was of no impeachment value. The testimony of Tony Awadallah and Diane Williams was consistent with that of the other witnesses and the physical evidence, and, even if Gunsby had attempted to impeach those witnesses, that would have made no difference in the result because of the convergent corroboration of the other witnesses. In this case, there is no possibility at all of a different result, much less a reasonable probability. The lower court should be affirmed in all respects.

II. THE GUILT PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

On pp. 84-86 of his brief, Gunsby argues that trial counsel was ineffective for not deposing two individuals. For the reasons set out below, Gunsby cannot carry his burden of proof under *Strickland v. Washington,* 466 U.S. 668 (1984).

A. James Anderson

Gunsby argues that trial counsel was ineffective for not interviewing or deposing James Anderson. Anderson's 3.850

testimony was that Gunsby did not mthe statement that "he had taken care of that." *(PCR 217-18).* However, given that the state's theory of the case was that Gunsby shot the victim in retaliation for Tony (the victim's brother) injuring Jessie Anderson (James' brother), it is hardly surprising that James declined the opportunity to implicate himself in a murder.

James Anderson presumably would have testified in the same manner at trial, thus leaving the jury with a credibility choice between Anderson and Bennie Brown. Because of the other evidence of Gunsby's guilt, which included two eyewitnesses and three admissions on Gunsby's part, there can be no prejudice. The importance of Gunsby's statement that he had "taken care of things" is minimal standing alone--the statement *only* becomes important when it is considered along with the other, unequivocal and independent evidence of guilt. In light of all the evidence, there is no reasonable probability of a different result even if James had testified. *See, e.g., Strickland v. Washington, supra.* Because Gunsby cannot establish *Strickland* prejudice, he has failed to carry his burden of proof.

Moreover, Gunsby cannot establish the deficient performance prong of *Strickland*, either. All of the evidence pointed to Gunsby, and the fact that trial counsel did not depose a tertiary witness about a minor issue is not deficient performance. Of course, a defendant is "not entitled to perfect or error-free counsel, only to reasonably effective counsel." *Waterhouse v. State,* 522 So. 2d 341, 343 (1988). Moreover, as this court noted in *Maxwell v. Wainwright,* "few trials proceed without any []error and it

is almost always possible to imagine a more thorough job being done than was actually done." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). In this case, counsel did enough.

Brown's testimony about Gunsby's statement to James Anderson was equally consistent with the defense theory of alibi. Brown testified that she did not know what Gunsby had "taken care of", and counsel may well have decided to leave well enough alone insofar as James was concerned. Regardless, it was not deficient performance on counsel's part. Even if Brown's testimony had been discredited, which Gunsby has still failed to do, the other, unchallenged evidence of guilt remained. While the trial court did not reach this issue specifically, the fact that that court denied guilt stage relief is an implicit finding that Gunsby did not establish a right to relief under *Strickland v. Washington*. At the very least, the lower court implicitly found that Gunsby had not established prejudice under *Strickland*. That court's denial of guilt stage relief should be affirmed.

B. Lewis Barnes

Gunsby also argues that trial counsel was ineffective for not calling one Lewis Barnes as a witness. Trial counsel's decision was a reasonable tactical decision which is, of course, virtually unchallengeable. *Strickland v. Washington*, 466 U.S. at 690-691.

Counsel was familiar with Barnes through his connections to law enforcement, and was of the opinion that Barnes has no credibility whatsoever. *(PCR 330-31)*. Trial counsel was quite familiar with Barnes, and it was a reasonable tactical decision

to determine that time could be better spent in ways other than pursuing Barnes as a witness. Counsel's decision was totally reasonable--there is no deficiency in his performance. *Strickland v. Washington, supra.* Of course, a determination of which witnesses to call is uniquely a strategic decision for counsel--there is no basis for relief here. *See, e.g., Jones v. State,* 528 So. 2d 1171 (Fla. 1988).

To the extent that it is necessary to address the prejudice prong, the lower court's denial of relief is an implicit finding that Barnes was not a credible witness. That finding came after the trial court heard Barnes testify, and is not an abuse of discretion. Subsumed within that finding is a finding that Gunsby failed to establish the prejudice prong of *Strickland*. What Gunsby claims is corroboration of Barnes' testimony, is not that at all.[30] Instead, Barnes' testimony is wholly un-corroborated and incredible. Gunsby cannot have been prejudiced by the fact that unbelievable testimony was not placed before the jury.[31] Gunsby has failed to establish either deficient performance or prejudice in connection with his guilt phase ineffectiveness of counsel claims. Under settled law, he must establish both prongs in order to be entitled to any relief. Gunsby has failed to

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30 Defense Exhibit 91 does not prove that Tony and Barnes were held in the same area of the Marion County Jail. *(PCR 377).* Moreover, as set out at pp. 49-50, Tony's identification as Gunsby as the trigger man has not been shaken.

31 Gunsby's claim that the state did not challenge Barnes' credibility in this case because he is a witness in another first-degree murder case is absurd. (PCR 325-6).

carry his burden of proof, and the lower court's denial of guilt stage relief should be affirmed.

III. THE NEWLY-DISCOVERED EVIDENCE CLAIM

On pp. 86-93 of his brief, Gunsby argues that newly discovered evidence in the form of four witnesses entitles him to a new trial. For the reasons set out below, the evidence at issue is either not newly discovered, would not "probably produce an acquittal", or both.

A. The Legal Standard

In order to qualify as newly discovered evidence, the claimed facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial and it must appear that defendant or his counsel could not have known them by the use of diligence." *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979). The standard for granting relief on newly discovered grounds is that the evidence "must be of such a nature that it would *probably* produce an acquittal on retrial." *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (emphasis in original). While *Jones* changed the standard the evidence must meet to establish a right to relief, it did not change the substantive definition of newly discovered evidence. *Id.*, at 916. The threshold question is whether the evidence qualifies as newly discovered; if it does not, then the inquiry ends. *Id.* For the reasons set out below, Gunsby is not entitled to relief on this claim.[32]

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[32] The lower court did not address this claim in the order on the 3.850 motion. However, the denial of relief is an implicit denial of relief on the newly discovered evidence issue. That ruling is not an abuse of discretion.

B. Alvin Latson's Testimony is Not Newly-Discovered

On pp. 86-90 of his brief, Gunsby argues that the testimony of Alvin Latson is newly discovered evidence. In fact, Mr. Latson's existence has never been a secret, and he could have been found in 1988 prior to the trial of this case. All trial counsel need have done was to ask Opal Latson about her martial status. Such a question would have generated Alvin Latson's name, and counsel could have proceeded from that point as he saw fit.[33] *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1325 (Fla. 1994).

Gunsby expressly abandoned his ineffective assistance of counsel claim in his brief. To the extent that he may attempt to resurrect that claim in his reply brief, that is an improper presentation of the argument. Moreover, while Alvin Latson *could* have been discovered at the time of trial, it was not deficient performance on the part of counsel not to have done so. Counsel could have interviewed Alvin Latson in an attempt to discover unfavorable information about his ex-wife, but the fact that he did not does not render his performance deficient because there was no information to suggest that such an interview would have been productive. Even if an ineffective assistance of counsel claim could properly be resurrected, it would not be a basis for reversal. See pp. 55-59, above.

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[33] The irony of this claim is that Gunsby's present counsel found Alvin Latson on precisely the same facts that existed in 1988. It is mere sophistry to assert that this evidence is "newly discovered" when present counsel had no more to go on in locating Alvin than trial counsel did eight (8) years ago.

As set out above, Alvin Latson's testimony does not meet the legal definition of newly discovered evidence. However, even if that evidence did qualify as newly discovered, it would not "probably produce an acquittal." In order to damage Opal Latson's identification of Gunsby as the shooter, an incredible series of propositions must be accepted as true.

First, it must be accepted that Opal coincidentally identified Gunsby from a photo line up and, by sheer happenstance, identified the same person as did the other eye witness. Second, the person identified by both Tony and Opal just *happened* to be the *same* person who admitted that he was the murderer to three different people. The convergent validity of the testimony is un-shakeable, and the chances of dismantling Opal's identification through her estranged husband are less than nonexistent. All of the evidence points to Gunsby, and whatever Opal said (or did not say) to her almost-ex-husband on the night of the shooting has no effect whatsoever on the other components of the state's case. Even if Alvin Latson's testimony fit the definition of newly discovered evidence, which it does not, it is not reasonably likely to produce an acquittal on re-trial because it is incredible.

On pp. 87-90 of his brief, Gunsby sets out a number of matters which, he claims, establish that Opal Latson (Sellers) is unworthy of belief. To the extent that Opal's relationship with James Colbert is concerned, little need be said. Opal identified Gunsby as the shooter on the day *following* the shooting, and did

not become involved with Colbert until several months later. *(PCR 1005-6).*[34]

Gunsby's claim that Alvin Latson's information could only have come from Opal is remarkably disingenuious--Alvin's testimony is similar to that of Lois Myers and, rather than having no source of information other than Opal, as Gunsby admits, there is a connection between Alvin and Lois. *(See, Answer Brief at 88).*[35] To the extent that Gunsby claims that the state's cross-examination of Alvin indicates that *Opal* is not a credible witness, that claim is specious. The state's cross-examination speaks for itself--it has nothing to do with Opal's credibility. *(PCR 236-7;240).* Gunsby's claims to the contrary do not withstand a superficial reading of the record.[36]

To the extent that Gunsby argues that Opal is not credible because she denies being present when Tony borrowed a gun from Alvin, that is, at most, a collateral matter which has no bearing on the issue of her identification of Gunsby. To the extent that Gunsby attacks Opal's testimony in her deposition regarding why she left employment with the Ocala Housing Authority, the

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[34] Opal was not questioned about this relationship. Nothing other than Gunsby's speculation points to any relationship existing between Opal and Colbert at the time of the shooting. Gunsby's "motive" for Opal to falsify collapses because the motive does not exist.

[35] Lois Myers is variously referred to in this case as Agnes Dolores Myers and "Little Agnes".

[36] Opal testified that her divorce proceeding from Alvin was a contested one. Even if that divorce case was ultimately settled, it is axiomatic that even divorces which ultimately settle often start out as contested proceedings.

deposition answer is not inappropriate to the question asked,[37] and, even if it was, that does not affect Opal's testimony about the events of the shooting--that testimony has been consistent at all times.

To the extent that Gunsby claims that Tony's act of borrowing a weapon establishes uncertainty as to his (and Opal's) identification of the killer, that claim is spurious. Whatever Tony's motives were, this fact is of no consequence as to the identification of Gunsby. To the extent that n. 37 on p. 90 of Gunsby's brief purports to present an issue for appellate review, that claim is not properly briefed. *Duest v. Dugger, 555 So. 2d 849 (Fla. 1990).* Moreover, that evidence is not *Brady* evidence, and is, in fact, not even admissable. *See, e.g., Rivera v. State,* 561 So. 2d 536 (Fla. 1990); *State v. Savino,* 567 So. 2d 892 (Fla. 1990).

Even if Alvin Latson's testimony qualified as "newly discovered" there is no reasonable probability that that testimony would produce an acquittal on re-trial. *Jones, supra; Torres-Arboleda, supra.*

C. The Testimony of Agnes Dolores Myers Is Not Newly-Discovered Evidence

On p. 91 of his brief, Gunsby argues that the testimony of Lois Myers is newly-discovered evidence. Myers' testimony at the 3.850 hearing begins at *PCR 403*, and is directly contrary to prior statements under oath which were given in close proximity to the murder. (*See, e.g., State's Exhibit 15).* Myers' prior sworn

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37 While the question may have been "designed to elicit" a disclosure of termination through firing, it was far from crystal clear, particularly to a non-lawyer. It was not a "point blank" question.

statements are completely inconsistent with her newest version of the events, and, even if she had given a version of the 3.850 testimony at Gunsby's trial, she would have been thoroughly impeached with her two prior statements.[38]

What Gunsby attempts to cast as "new evidence" is not that at all. Instead, Myers' new version of what "she saw" is more closely akin to recanted testimony, which has long been viewed unreliable. *See, e.g., Henderson v. State,* 135 Fla. 548, 185 So. 625 (1939); *supra, Armstrong v. State,* 642 So. 2d 730 (Fla. 1994). While Myers' first two statements were not made in the course of trial proceedings, they were made under oath and are therefore presumptively truthful. The physical evidence, which Gunsby has never disputed, establishes that the victim was shot from a distance of less than six feet *(TR 330).*[39] Myers' version of the events, that the shooter fired from the door without entering the Big Apple *(PCR 437)* is, based upon the unchallenged physical evidence, impossible and unbelievable. *See, e.g., Scott v. Dugger,* 634 So. 2d 1062, 1065 (Fla. 1993). Under Myers' version of the shooting, the fatal shot was fired from a distance of at least 13 feet. *See,* State's Exhibit 1 (crime scene diagram.) Her recent testimony is not new evidence--the trial court's denial of relief is an implicit finding that such testimony is not credible. Under

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38 As set out p. 62 above, Alvin Latson and Dolores Myers are "connected". Their 3.850 testimony is remarkably similar. That testimony is also remarkably inconsistent with all of the other testimony and all of the physical evidence.

39 Gunpowder residue was found on the victim's shirt (TR 329), and wadding from the shotgun shell was recovered from the side of the victim's heart opposite the entrance wound. (TR 307).

these facts, that finding is not an abuse of discretion and should be affirmed. *See, e.g., Glendening v. State*, 604 839 So. 2d 830 (Fla. 2nd DCA 1992)

Of course, it is not unusual for witnesses to emerge after a defendant is convicted. *See, e.g., High v. Kemp*, 819 F.2d 988, 994 (11th Cir. 1987), *cert. denied*, 109 S.Ct. 3264 (1989). The fact that Myers' story has now changed does not establish that her original statements were not true, and, in fact, does not exculpate Gunsby in any way because she does not say that he was *not* involved. To the extent that she claims that the shooter had on a mask, her original statement was that the individual "had a hood over his head." *State's Exhibit 15-Statement of 5/16/88 at 5.* Her testimony in this regard is not new, and was clearly known at the time of trial. For that reason alone, it does not fall within the definition of newly discovered evidence. *Jones, supra.*

To the extent that Gunsby claims Myers' testimony implicates Colbert and Chavers as two of the three individuals at the shooting *(PCR 405, 413)*, that identification is highly speculative at best. *(PCR 404)*. Myers did not claim to see who fired the fatal shot *(PCR 415)*, and, coincidentally, described the third person as being large and muscular, a description which fits Gunsby remarkably well. *(PCR 413)*. Even accepting the most recent version, it does not create a reasonable probability of an acquittal given the other evidence against Gunsby, the physical impossibility of Myers' story, and the prior inconsistent statements made by her. Gunsby is entitled to no relief.

D. Agnes Bryant Myers' Testimony Is Not Newly Discovered Evidence

On p. 92 of his brief, Gunsby claims that the testimony of Agnes Bryant Myers is new evidence.[40] Specifically Gunsby claims that "nothing in the record developed by the police or counsel" tends to suggest Ms. Myers as a witness. In fact, in her May 16, 1988, statement, Dolores Myers specifically said that she talked about the shooting with her mother (Agnes Bryant Myers), her sisters, and her Aunt. *(State's Exhibit 15--5/16/88 statement at 11).* Ms. Myers was clearly identified at that time, and, while present counsel may have stumbled upon her, she was been identified as a witness years ago. Ms. Myers' testimony falls far short of meeting the definition of newly discovered evidence. *Jones, supra, at 916.*

Moreover, even if this evidence could conceivably be considered "newly discovered", it would not probably produce an acquittal. Myers' testimony does not adversely affect the convergent evidence against Gunsby, and there is no basis for relief.

E. James Colbert's Testimony Is Not Newly Discovered Evidence

On pp. 92-93 of his brief, Gunsby claims that James Colbert has recanted his trial testimony. In fact, Colbert testified at the 3.850 that he was not lying at trial, but rather that he was mistaken when he testified that he saw Gunsby wearing "green army pants". *(PCR 1001).* At trial, Colbert specifically testified that he could have been mistaken about having seen Gunsby wearing "green army pants". *(TR 204-6).* Even if Colbert's 3.850

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40 This witness is the mother of Agnes *Dolores* Myers.

testimony that he was "mistaken" is taken as credible, it is not enough to justify reversal of the conviction. Given the suspicion with which recanted testimony is viewed, along with two eye witness identifications, three admissions and yet another witness who saw Gunsby wearing Army fatigues, Colbert's new testimony would not "probably produce an acquittal on retrial." The lower court's implicit credibility determination should not be disturbed.[41]

F. The Claimed "New Evidence" Is Not A Basis For Relief

On p. 93 of his brief, Gunsby argues that the "totality" of the "newly discovered evidence" would probably produce an acquittal on retrial. All of what Gunsby labels as "new evidence" is either not newly discovered under the threshold definition of that term, is not credible for the various reasons set out above, or both. When the "new evidence" is fairly considered, there is no conclusion possible other than that Gunsby has failed to establish any basis for relief whatsoever. The trial court's denial of guilt stage relief should be affirmed in all respects.

IV. THE CUMULATIVE ERROR CLAIM IS NOT A BASIS FOR REVERSAL OF THE CONVICTION

On pp. 93-97 of his brief, Gunsby re-pleads three claims as independent grounds for relief and then argues that the "cumulative effect" of these claims entitles him to a new trial.

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41 Even if Colbert was a suspect at one time, that fact corroborates nothing. As set out pp. 61-62, above, whatever relationship may have existed between Opal Latson and James Colbert did not come into being well after the shooting.

This claim is not a basis for relief for two independently adequate reasons.

The first reason that this claim is of no help to Gunsby is because this claim was not presented to the trial court in the 3.850 motion. Florida law is settled that a claim cannot be raised for the first time on appeal from the denial of post-conviction relief. *See, e.g., Doyle v. State*, 526 So. 2d 909, 926 (Fla. 1988). Gunsby did not raise this claim in a timely fashion--that is a procedural bar to consideration of his now-presented cumulative error claim.

The second reason this claim does not state grounds for relief is because there is no error to be aggregated in the first place. The particular "errors" that Gunsby attempts to lump together are individually addressed at pp. 50-55, 55-59, 58-67, above. Because the individual "errors" are not error at all, there is nothing to aggregate and the cumulative error claim collapses.

To the extent that Gunsby's argument is (or may be) a standard-of-review argument, there are two deficiencies with that proposition. First, Gunsby cites no binding precedent which compels the trial court to aggregate *all* alleged errors, much less to evaluate a *Brady* claim in light of the other evidence. Second, even if the method of review advanced by Gunsby is proper (and the state does not concede that it is), the explicit and implicit findings of the trial court indicate that the court properly assessed the evidence and denied relief. That finding is due to be affirmed in all respects.

CONCLUSION

For the reasons set out above, this court should set aside the trial court's reversal of Gunsby's death sentence. Likewise, for the reasons set out above, the lower court's decision as to the guilt phase of Gunsby's capital trial should be affirmed 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 has been furnished by U.S. Mail to: Mr. Bruce A. Peterson, POPHAM HAIK, SCHNORRICH & KAUFMAN, LTD., 222 South Ninth St., Minneapolis, MN 55402, on this the 14th day of September, 1995.

Kenneth S. Nunnelley
Of Counsel