IN THE SUPREME COURT OF FLORIDA

KONSTANTINOS X. FOTOPOULOS,

Appellant,

v. **CASE NO. SC00-1511**

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts contained in Fotopoulous' brief is argumentative and is denied. The State relies on the following statement of the case and facts, which is taken verbatim from this Court's direct appeal decision:

> The following is a brief summary of the facts that were developed at Fotopoulos' trial. During the summer of 1989, Fotopoulos began an affair with Deidre Hunt, a bartender at Fotopoulos' bar. Hunt testified that one day in mid-to-late October 1989 Fotopoulos, Hunt, and Kevin Ramsey drove out to an isolated rifle range. According to her testimony, after they arrived Fotopoulos told Hunt she was going to have to shoot Ramsey or she would die. Ramsey, who had been led to believe he was being initiated into a club, was tied to a tree. While Fotopoulos videotaped, Hunt shot Ramsey three times in the chest and once in the head with a .22. Fotopoulos then stopped taping and shot Ramsey once in the head with an AK-47. According to testimony, Ramsey was chosen as the victim because he was blackmailing Fotopoulos concerning Fotopoulos' alleged counterfeiting activities. The videotape of Hunt shooting Ramsey was recovered from Fotopoulos' residence pursuant to a search warrant. The voice on the tape was identified as that of Fotopoulos.
>
> According to Hunt, Fotopoulos later used the videotape as leverage to insure that she would murder his wife, Lisa. Hunt was warned that if she did not cooperate the videotape of the Ramsey murder would be turned over to police. Hunt testified that Fotopoulos wanted Lisa dead so he could recover $700,000 in insurance proceeds. Fotopoulos later instructed Hunt that rather than kill

Lisa herself she should hire someone to do the job. Prior to enlisting Bryan Chase to kill Lisa, Hunt offered three different individuals $10,000 to do the job. For various reasons, either the plans never materialized or the attempts to murder Lisa were unsuccessful. Chase then agreed to do the job for $5,000. He too botched several attempts to murder Lisa. However, on November 4, 1989, Chase entered the Fotopoulos home and shot Lisa once in the head. The shot was not fatal. After Chase shot Lisa, Fotopoulos shot Chase repeatedly in an attempt to make it appear that Chase was killed during a burglary.

Fotopoulos and Hunt eventually were charged with two counts of first-degree murder, two counts of attempted first-degree murder, two counts of solicitation to commit first-degree murder, one count of conspiracy to commit first-degree murder, and one count of burglary of a dwelling while armed. Hunt pled guilty to all charges. She was given two death sentences prior to testifying at Fotopoulos' trial. *See Hunt v. State*, 1992 WL 289670, No. 76,692 (Fla. Oct. 15, 1992).

Fotopoulos testified in his own defense. He acknowledged his relationship with Hunt, but maintained that he had nothing to do with Ramsey's murder. He stated that he had loaned Hunt his business partner's video camera and she later gave him a tape as a surprise but he never looked at it. He admitted shooting Chase, but denied that he knew Chase was coming to shoot Lisa.

A jury found Fotopoulos guilty of all charges and recommended that he be sentenced to death for each murder. The trial court followed the jury's recommendation. In connection with the Ramsey murder, the court found that 1) Fotopoulos was previously convicted of another violent felony; 2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; and 3) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. As to the Chase murder, the court found the three aggravating factors found in connection with the Ramsey murder plus 4) the murder was committed while Fotopoulos was engaged or was an accomplice in the commission or an

> attempt to commit a burglary; and 5) the murder was committed for pecuniary gain. Although no statutory mitigating factors were found, the following nonstatutory mitigating factors were found as to both murders: 1) Fotopoulos was a good son; 2) he came from a good family; 3) he was hard-working; 4) he had good manners and he had a good sense of humor; and 5) he completed his education through the master's level. Fotopoulos was sentenced to concurrent life sentences in connection with the remaining convictions.

Fotopoulos v. State, 608 So.2d 784, 786-87 (Fla. 1992).

The United States Supreme Court denied Fotopoulos' petition for writ of certiorari on May 17, 1993. *Fotopoulos v. Florida,* 508 U.S. 924 (1993).

Fotopoulos next filed a petition for relief pursuant to *Florida Rule of Criminal Procedure* 3.850. The collateral proceeding trial court denied relief and Fotopoulos appealed.

After oral argument in this cause, this Court denied relief on certain claims, and remanded other claims for an evidentiary hearing. This Court's order, which was issued on August 25, 1999, reads, in its entirety, as follows:

> Upon consideration of the oral argument presented to this Court, we conclude that appellant's brief set forth positions and arguments that had not been properly presented to the trial court in either the original or amended rule 3.850 motion and, further, that appellant's oral argument attempted to assert positions and arguments that were not properly part of the appellate briefs filed with this Court. We criticize and condemn this practice, but in an attempt to properly administer justice, we hereby dismiss the above case without prejudice for the purpose of allowing appellant to amend his underlying motion

> brought pursuant to Florida Rule of Criminal Procedure 3.850. However, as a matter of law, we find that claims I, IV, V, IX, XII, and XV are procedurally barred, and claim III is facially insufficient to state a claim for ineffective assistance of counsel. Therefore, appellant is precluded from re-arguing those claims in his amended 3.850 motion.
>
> Appellant shall have sixty (60) days from the date of the issuance of this order to file an amended 3.850 motion in the trial court, subject to the conditions detailed above. The Circuit Court shall then hold a *Huff* hearing on the amended motion and proceed to an evidentiary hearing on issues which require consideration of evidence. Within ninety (90) days of the issuance of this order, both appellant and the State shall provide this Court with a status report on the post-conviction proceeding. We order that his proceeding be conducted on an expedited basis. Appellant shall also be allowed to proceed with his public records request to supplement the record that was the subject of an order from this Court dated November 17, 1998. Appellant may include any claims arising from those public records in his amended 3.850 motion, but subject to the same time requirements detailed above.

(R585-586).

THE EVIDENTIARY HEARING FACTS

At the evidentiary hearing, the following testimony was presented. The evidentiary hearing ordered by this Court took place on March 6-8, 2000. (R1-584). That hearing was limited to Claims I-XIII as raised in Fotopoulos' Amended Motion to Vacate Judgment and Conviction and Sentence with Special Leave to Amend and Evidentiary Hearing, which was filed on November 29, 1999. (R708). Fotopoulos presented 12 witnesses; the State presented none.

Fotopoulos' first witness was Deidre Hunt. She had previously been sentenced to death prior to testifying at Fotopoulos' trial. (R62). Her sentence was subsequently vacated by the Florida Supreme Court and she received a life sentence after a new trial. (R64,70). Fotopoulos' jury would not have known that she had subsequently received a life sentence. (R64). Hunt said that she was not recanting any of the substantive testimony that she gave at Fotopoulos' trial, (R65), and reiterated that she testified at Fotopoulos' trial "to get him off the streets." (R68).

Fotopoulos' next witness was Evangelos Katsouleas, his former business partner. (R89). He and Fotopoulos had bought identical bags while in college in the early 1980's. (R91). Katsouleas identified the bag marked as Exhibit 66A at trial as possibly being Fotopoulos' bag. (R91). Katsouleas stated that Fotopoulos' family asked him to go retrieve some of Fotopoulos' personal belongings from his former residence. (R96). Lisa Fotopoulos' brother, Dino Paspalakis, told Katsouleas that they were not to give any of Fotopoulos' belongings to anyone due to police orders. (R96). Katsouleas said that he was not called to testify at the trial in 1990, but would have been able to produce his bag that was identical to the one owned by Fotopoulos. (R97). The Fotopoulos family had asked him to retrieve the belongings

approximately a week or two after Fotopoulos' arrest. (R103). He lost contact with Fotopoulos since the spring of 1990 and their only communication was through mail. (R110).

Teja James testified that he had been arrested on charges related to Fotopoulos' offenses. (R125). He had received a deal in exchange for his testimony at Fotopoulos' trial. (R131). His plea agreement was announced at Fotopoulos' trial. (R134). He was not recanting any substantive testimony from the trial and that testimony was truthful. (R132). He testified that Fotopoulos was involved in the killing of Mark Kevin Ramsey, had elicited his help in attempting to kill Lisa Fotopoulos, and was involved with the attempt and ultimate killing of Brian Chase. (R132-133). He said that Fotopoulos had made "various efforts" to get him to kill Lisa Fotopoulos. (R152).

Mersini Karavokirou, Fotopoulos' sister, testified next. She said Fotopoulos asked her to retrieve his Rolex watch from Dino Paspalakis in order to give it to their father. However, according to the witness, Dino Paspalakis refused based on police orders. (R155).

Detective William Adamy testified he went to the Fotopoulos residence to look for the weapon used to kill Mark Kevin Ramsey and to find the videotape of the killing as a result of a statement made by Deidre Hunt. (R181). Dino Paspalakis and Lisa

Fotopoulos were present during the search and had consented, in writing, to the search. (R181, 332). Lisa Fotopoulos told the detectives she saw Fotopoulos bury something in the barbecue pit. (R191). Detective Adamy stated that a black duffle bag was retrieved from the barbecue pit in the backyard. (R183). The bag contained, among other things, a converter kit, a .22 pistol with a silencer, ammunition and bandoleers. (R194). In addition, a brown bag was found on the shelf in the garage containing a videotape. (R185). The videotape was subsequently reviewed -- it contained the murder of Mark Kevin Ramsey as described by Deidre Hunt. The bag was seized and a search warrant obtained. (R189). The Paspalakis family had identified the bag as belonging to their father. They had authorized the detectives to search the premises of the entire home, including the garage area. (R189-190). A "host of paramilitary stuff" was seized from underneath the Fotopoulos' bed. (R192).

John Boisvert, former boyfriend of Deidre Hunt, testified that Deidre Hunt was a manipulative person. (R203). He was not contacted to testify at Fotopoulos' trial. (R204). He was not anxious to get involved in a murder case. (R207).

Bridget Riccio, former friend of Deidre Hunt, testified next. (R207). When she and Hunt were teenagers, she stated Hunt shot a woman but told Police that Riccio was the actual shooter.

(R210, 212). Hunt was a leader and a manipulative person. (R214). Riccio was not called to testify at Fotopoulos' trial. (R215).

Fotopoulos' next witness was Carmen Corrente, his trial counsel. (R222). He did not have that many pressing cases that lasted an entire year. He had people to cover for him if there was a court appearance that he could not make himself. (R223). He took the Fotopoulos case because he was "able to devote the time to it." (R224). This was the only capital case he worked on at that time. Prior to the Fotopoulos trial, he worked on four capital cases -- three went into the penalty phase. (R226-227). He did not ask to have another attorney appointed for this case because he had the time to devote to it himself. (R228). He spent many hours preparing a motion to suppress evidence in this case and consulted Fotopoulos regarding details. (R231-232). He did not call any witnesses at the motion to suppress hearing because it was a legal argument and no facts were in dispute. (R232). He verified any time discrepancies between Fotopoulos' arrest and Hunt's deposition. (R243). He made decisions as to which claims were viable. (R249). He and Fotopoulos discussed making a motion for mistrial at various points in the trial, but Fotopoulos opted not to do so. (R252). He talked to all available relatives at the time of the trial to gather as much

information as possible regarding his client. (R254-255). Fotopoulos was not interested in mitigating circumstances and Mr. Corrente did not have his cooperation. (R255). Several people assisted him during voir dire and he had a juror specialist sitting at counsel table with him. (R258). He wanted the State to have the burden of establishing why two African-American jurors had been struck. (R258). He did not ask for a continuance upon learning that Deidre Hunt was going to be a witness as he was prepared for her testimony and had read all of her previous statements. (R261). He believed the thrust of the State's case was based on a conspiracy theory. (R265). Impeaching Deidre Hunt's testimony was not as critical an issue as some of the other evidence presented at trial. (R290). Mr. Corrente did not call Bridget Riccio as she was not a credible witness. (R294). He continually advised his client not to testify in his own defense. (R310). He told his client to testify to the exact number of crimes he had previously committed and advised him that the State would impeach him if there was any discrepancy. (R310). He made a tactical decision on cross-examination of Deidre Hunt at trial. (R316). There were a number of witnesses at trial that implicated Fotopoulos in the killing of Ramsey and Chase and the attempted murder of Lisa Fotopoulos. (R316-317). Fotopoulos was actively involved in his defense. (R320).

Fotopoulos limited his counsel from presenting mitigation. No further background material or records have been presented in this case. (R329-330). Numerous witnesses identified Fotopoulos' voice on the videotape giving Deidre Hunt instructions on how to kill Kevin Ramsey. (R330). Corrente filed and litigated various motions to suppress. (R331-332).

The next witness was Officer Richard P. Gillman, from the Manchester, New Hampshire Police Department. Officer Gillman met Deidre Hunt in 1986 when a missing person report was filed. (R361). He testified that Carmen Corrente did not talk to him about Fotopoulos. He was not aware of the facts in the Fotopoulos case. (R375).

Holly Brooke Pringle testified that she met Fotopoulos in 1980 when she worked at his bar. (R378). She saw Fotopoulos and Hunt riding a bicycle together and Hunt was carrying a gun, waving it around. (R379). She never saw Fotopoulos with a gun. (R380).

David Damore testified that he was the Assistant State Attorney at Fotopoulos' trial. (R385). He did not recall the specifics of jury selection during voir dire. (R389). All discovery and names of witnesses known to the State were provided to Fotopoulos. (R420). He called the witnesses for the sentencing proceedings at the trial. (R422). He never influenced

the testimony of any witnesses through plea agreements or other negotiations. (R455).

Konstantinos Fotopoulos testified that he and his former wife, Lisa, were living with Lisa's mother and brother until he was arrested. (R482-483). The brown bag containing the videotape of the Ramsey murder was his bag. (R484). The black bag found in the barbecue belonged to him. (R485). He put the black bag in the barbecue so that nobody would know of its presence. (R486). He was the only one that kept guns in the house. (R486). The black bag was watertight and had a fastened clamp on it. (R487). He would not have objected to a search of the house the night of the attempted murder of Lisa Fotopoulos. (R491). He would have objected to a search of the barbecue pit as he did not want them to find his AK-47. (R492). Subsequent to his arrest, he did not tell anyone to specifically retrieve the bag from the barbecue pit. (R505). He was concerned that he would be charged with having an automatic weapon. (R508).

On June 15, 2000, the Circuit Court issued its order denying all relief. (R1042-1056). Notice of appeal was given on July 14, 2000. Fotopoulos' *Initial Brief* was filed on March 14, 2001.

SUMMARY OF THE ARGUMENT

The first claim contained in Fotopoulos' brief is that the lower court erred in finding certain claims in the amended motion

to be procedurally barred. The legal basis for this claim is not identified in Fotopoulos' brief, and, in fact, the only identifiable challenge to any ruling by the lower court is Fotopoulos' statement that he "disagrees" with the lower court's denial of the cumulative error claim on procedural bar grounds. The trial court properly found that claim procedurally barred, and, in the alternative, without merit. That ruling is in accord with settled Florida law.

Fotopoulos' second claim is that the lower court erred in denying relief on the ineffective assistance of counsel claim. Fotopoulos cannot establish either deficient performance on the part of trial counsel, or prejudice as a result therefrom. The findings of fact by the Circuit Court are supported by the evidence, and, therefore, are presumptively correct and should not be disturbed. The ineffective assistance of counsel claim is not a basis for relief.

Fotopoulos argues that the life sentence imposed on Deidre Hunt following Fotopoulos' capital trial is "newly discovered evidence" that renders his sentence of death disproportionate. This claim is not a basis for relief because, as the collateral proceeding trial court found, Fotopoulos was the most culpable defendant, and, therefore, was most deserving of the death penalty. Because the degree of culpability between Hunt and

Fotopoulos is different, there is no proportionality issue when the less-culpable co-defendant received the more lenient sentence. Fotopoulos was, as the sentencing court found, the driving force behind two murders. In the face of that finding, there is no basis for relief because there is no probability of a different sentence even if Hunt's eventual life sentence had been imposed at the time of her testimony in Fotopulos' capital trial.

ARGUMENT

I. THE PROCEDURAL BAR CLAIM

On pages 26-27 of his brief, Fotopoulos claims that "the court erred in finding the claims made in the amended motion as barred." The precise nature of this claim is unclear, and the allegedly erroneous rulings of the circuit court are only vaguely identified. Moreover, the legal basis for the claim does not appear in Fotopoulos' brief. In fact, the only identifiable challenge to any ruling by the trial court is the sentence which reads: "However, the order does say that the cumulative error argument is also procedurally barred with which we disagree." *Initial Brief,* at 26-27. If that is the issue contained in Claim I, it is not a basis for relief for the following reasons.[1]

[1] If Claim I contains any other issues, they cannot be discerned from Fotopoulos's brief. Obviously, the State cannot respond to

In deciding the "cumulative error" claim, the collateral proceeding trial court held:

> The final claim in the motion begins on page 70 thereof and is mis-numbered as Claim 12. The Court has renumbered that claim for clarity as Claim 13. Claim 13 (renumbered) is what appears to be a "cumulative error" claim. This claim is procedurally barred because it could have been but was not raised on direct appeal to the Florida Supreme Court. Moreover, this claim is not a basis for relief because the Florida Supreme Court has held that allegations of individual error that are without merit do not support a "cumulative error" claim. *See, Bryan v. State,* 24 Fla. L. Weekly S516 (Fla. Oct. 26, 1999).

(R1051). Aside from his dissatisfaction with the result, Fotopoulos has not demonstrated any basis for relief.

In discussing the proper analytical approach to a claim of "cumulative error", this Court recently held:

> In *Downs*, 740 So. 2d at 509 n. 5, we held that claims of cumulative error are properly denied where the Court has considered each individual claim and found the claims to be without merit. Upon review of Rose's initial rule 3.850 motion, we determined that the trial record conclusively refuted Rose's claim that his attorney provided ineffective assistance of counsel in the guilt and penalty phases of trial. *See Rose II*, 617 So. 2d at 293-98. Having found that each claim lacks merit, we find no cumulative error.

Rose v. State, 25 Fla. L. Weekly S824 & n. 10 (Fla. Dec. 21, 2000); *see also, Mann v. State,* 770 So. 2d 1158, 1164 (Fla. 2000)

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issues which are not presented in a brief. And, after all, the purpose of an appellate brief is to present legal argument and authority in support of the party's position, not to force the opposing party to guess what the issues are.

("All of Mann's claims were either meritless or procedurally barred; therefore, there was no cumulative effect to consider. See *Melendez v. State,* 718 So. 2d 746, 749 (Fla. 1998)."). Likewise, "any claim that cumulative errors committed at trial prejudiced the outcome of his case must be raised on direct appeal; therefore, [the petitioner] is procedurally barred from raising this claim here. *See Torres-Arboleda v. Dugger,* 636 So. 2d 1321, 1323-24 (Fla. 1994)."). *Occhicone v. State,* 768 So. 2d 1037,1050 (Fla. 2000). The collateral proceeding trial court correctly denied relief on this claim on alternative grounds of procedural bar and lack of merit. Either basis, standing alone, is sufficient to support the denial of relief.

To the extent that further discussion of this claim is necessary, the trial court found that claims IV, V, VI, VII, VIII, IX, X, XI, and XII were not only procedurally barred, but also without merit. Fotopoulos does not challenge those rulings. Because there is no assertion that the trial court erred in its disposition of the claims forming the basis for any assertion of "cumulative error," Fotopoulos has waived any "challenge" to the disposition of the cumulative error claim. Under settled Florida law, there is no basis for reversal, not only because the cumulative error claim is itself procedurally barred, but also because there is no error to "cumulate." The trial court's denial

of relief should be affirmed in all respects.

II. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

On pages 28-60 of his brief, Fotopoulos asserts that he is entitled to relief based upon ineffective assistance of counsel grounds. The collateral proceeding trial court properly denied relief on this claim, and that ruling should not be disturbed.

THE LEGAL STANDARD[2]

A claim of ineffective assistance of counsel is governed by the two-part *Strickland v. Washington* standard, which the Florida Supreme Court has summarized as follows:

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, the claimant must identify particular acts or omissions of the lawyer that are

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[2] Whether counsel was ineffective under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is reviewed de novo. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland,* 466 U.S. at 698, 104 S.Ct. 2052 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

> shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Downs v. State*, 453 So.2d 1102 (Fla. 1984). **A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.**

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). (emphasis added). As *Maxwell* makes clear, the *Strickland* test is in the conjunctive, and, unless the petitioner establishes both deficient performance and prejudice, the claim fails. Stated differently:

> In order to establish ineffective assistance of counsel, a defendant must prove two elements:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
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> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Rutherford v. State*, 727 So. 2d 216 (Fla. 1998); *Rose v. State*, 675

> So. 2d 567 (Fla. 1996); *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985); *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985). In determining deficiency, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052; *see also Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995). Moreover, counsel's deficiency prejudices defendant only when the defendant is deprived of a "fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Shere v. State, 742 So. 2d 215, 218-19 (Fla. 1999).

The analysis of a claim of ineffective assistance of counsel begins with the presumption that counsel's performance was constitutionally adequate. As the Eleventh Circuit Court of Appeals has stated, the infrequency of successful ineffectiveness claims is the result of

> deliberate policy decisions the Supreme Court has made mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential," and prohibiting "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance." *Strickland*, 466 U.S. at 689-90, 104 S.Ct. at 2065-66. The Supreme Court has instructed us to begin any ineffective assistance inquiry with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *accord, e.g., Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992) ("We also should always presume strongly that counsel's performance was reasonable and adequate ...."). Because constitutionally acceptable performance is not narrowly defined, but instead encompasses a "wide range," a petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden. As we have

explained:

> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992).

Waters v. Thomas, 46 F.3d 1506, 1511-12 (11th Cir. 1995). With respect to presentation of mitigating evidence at the penalty phase of a capital trial, the *Waters* Court stated:

> we have never held that counsel must present all available mitigating circumstance evidence in general, or all mental illness mitigating circumstance evidence in particular, in order to render effective assistance of counsel. To the contrary, the Supreme Court and this Court in a number of cases have held counsel's performance to be constitutionally sufficient when no mitigating circumstance evidence at all was introduced, even though such evidence, including some relating to the defendant's mental illness or impairment, was available. *E.g., Darden v. Wainwright*, 477 U.S. 168, 184-87, 106 S.Ct. 2464, 2473-74, 91 L.Ed.2d 144 (1986); *Stevens v. Zant*, 968 F.2d 1076, 1082-83 (11th Cir. 1992), *cert. denied*, --- U.S. ----, 113 S.Ct. 1306, 122 L.Ed.2d 695 (1993); *Francis v. Dugger*, 908 F.2d 696, 702-04 (11th Cir. 1990), *cert. denied*, 500 U.S. 910, 111 S.Ct. 1696, 114 L.Ed.2d 90 (1991); *Stewart v. Dugger*, 877 F.2d 851, 855-56 (11th Cir. 1989), *cert. denied*, 495 U.S. 962, 110 S.Ct. 2575, 109 L.Ed.2d 757 (1990). In an even larger number of cases we have upheld the sufficiency of counsel's performance in circumstances, such as these, where counsel presented evidence in mitigation but not all available evidence,

> and where some of the omitted evidence concerned the defendant's mental illness or impairment. *E.g., Jones v. Dugger*, 928 F.2d 1020, 1028 (11th Cir.), *cert. denied*, 502 U.S. 875, 112 S.Ct. 216, 116 L.Ed.2d 174 (1991); *Card v. Dugger*, 911 F.2d 1494, 1508, 1511-14 (11th Cir. 1990), *cert. denied*, --- U.S. ----, 114 S.Ct. 121, 126 L.Ed.2d 86 (1993); *Bertolotti v. Dugger*, 883 F.2d 1503, 1515-19 (11th Cir. 1989), *cert. denied*, 497 U.S. 1031, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990); *Daugherty v. Dugger*, 839 F.2d 1426, 1431-32 (11th Cir.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 187, 102 L.Ed.2d 156 (1988); *Clark v. Dugger*, 834 F.2d 1561, 1566-68 (11th Cir. 1987), *cert. denied*, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988); *Foster v. Dugger*, 823 F.2d 402 (11th Cir. 1987), *cert. denied*, 487 U.S. 1241, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988). Our decisions are inconsistent with any notion that counsel must present all available mitigating circumstance evidence, or all available mental illness or impairment evidence, in order to render effective assistance of counsel at the sentence stage. *See, e.g., Stevens v. Zant,* 968 F.2d at 1082 ("[T]rial counsel's failure to present mitigating evidence is not *per se* ineffective assistance of counsel.").

Waters v. Thomas, 46 F.3d at 1511.

To the extent that Fotopoulos may allege a claim of ineffectiveness on the part of appellate counsel, that claim is not cognizable in this proceeding. Florida law is clear that "Ineffective assistance of counsel claims must be raised in the court in which the alleged ineffectiveness occurred. *See Shere v. State*, 742 So. 2d 215 (Fla. 1999) (*citing Knight v. State*, 394 So. 2d 997 (Fla. 1981); *Richardson v. State*, 624 So. 2d 804 (Fla. 1st DCA 1993); *Turner v. State*, 570 So. 2d 1114 (Fla. 5th DCA 1990))." *State v. Riechmann,* 777 So. 2d 342 (Fla. 2000).

Fotopoulos asserts, on page 34 of his brief, that "[e]ach of the numerous failures articulated in this brief and **in previous pleadings**" establish his claim of deficient performance on the part of trial counsel. The "failures articulated" in "previous pleadings" are not identified -- in any event, there is no procedure for the sort of incorporation by reference that Fotopoulos seems to envision. He is not free to leave this Court, and the State, in the position of attempting to determine which issues he is pursuing in this appeal. Any attempt to rely on prior briefs and pleadings as a basis for reversal is wholly inappropriate.

To the extent that Fotopoulos asks this Court to overrule a portion of *Strickland* on page 35 of his brief, as this Court recently emphasized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' *Agostini v. Felton* 521 U.S. 203, 237 (1997) (*quoting Rodriguez de Quitas v. Sherson/American Express, Inc.,* 490 U.S. 477, 484 (1989)." *Mills v. Moore,* 26 Fla. L. Weekly S242, 244 (Fla., April 12, 2001). *Strickland* states the law as it applies to claims of ineffective assistance of counsel.

THE INDIVIDUAL CLAIMS

In denying relief on the ineffective assistance of counsel

claims, the collateral proceeding trial court stated:

> It is safe to say that the credible and corroborating testimony of various co-conspirators presents a virtually unassailable account of the defendant's efforts to kill his wife, who had announced her intention to divorce him, in order to gain access to her financial assets. As part of that plan Fotopoulos caused the death of two individuals and nearly succeeded in killing his wife. The testimony and physical evidence adduced, including evidence of the arsenal weapons utilized and at Fotopoulos' disposal as well as the graphic video tape of the murder of Kevin Ramsey perpetrated by Deidre Hunt and Mr. Fotopoulos, at his direction, in which Mr. Fotopoulos' voice, identified by numerous witnesses at trial, is heard orchestrating the shooting leads this court to the conclusion that the overwhelming evidence in this case would not have been undermined in any significant of action by the sometimes incredible and otherwise uncompelling testimony adduced by the defendant at the evidentiary hearing in this cause. There has been no showing that any of the evidence presented in support of any ineffective assistance or newly discovered evidence claim provided any credible basis for this Court to determine that the outcome of the case would even possibly, let alone probably have been altered by a different course of action by defense counsel or the presentation of other "newly discovered" evidence.
>
> In fact, this court finds after considering all of the testimony adduced that trial counsel's []efforts on behalf of Mr. Fotopoulos were not only **not** deficient but were clearly reasonable and professional under the circumstances he was presented -- applying the standards of ***Strickland v. Washington,*** 466 U.S. 668 (1984). This Court finds that not only was counsel not deficient but that the decisions challenged by the defendant were reasonable strategical determinations utilizing all of the factual evidence available to him and that in addition the defendant has failed to carry his burden of demonstrating actual prejudice, ***i.e.,*** a reasonable probability of a different result in either the guilt or penalty phases of this case. Accordingly, all of the defendant's ineffective assistance of

counsel claims are **rejected.**

(R1051-52) (emphasis added). To the extent that those findings include determinations of the credibility of witnesses, such determinations are uniquely the province of the collateral proceeding trial court[3]. Those findings are supported by the evidence, and should not be disturbed. *State v. Spaziano,* 692 So. 2d 174 (Fla. 1997).

With respect to the "failure to investigate" component of the ineffective assistance of counsel claim, the trial court stated:

> Finally, the defendant's assertion that trial counsel was ineffective for not adequately investigating and utilizing evidence of Deidre Hunt's background and "domination" is also rejected. Carmen Corrente testified, without contradiction, that he did in fact attend Deidre Hunt's 1999 sentencing proceeding as part of his preparation for Mr. Fotopoulos' defense. In addition, he conducted a lengthy hours long deposition of Ms. Hunt prior to arriving at his trial strategy in dealing with Ms. Hunt through cross-examination. This Court finds that none of the evidence adduced at the evidentiary hearing in this cause could have led to a reasonable conclusion by the jury in this case that anyone other than Konstantinos Fotopoulos was the prime motivator, leader, and dominate member of this group of co-conspirators and bore prime responsibility for the deaths of Kevin Ramsey, Bryan Chase, and the attempted murder of Lisa Fotopoulos rested with the defendant.

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[3] By finding that there was no "credible basis for this Court to determine" that there was a reasonable probability of a different result if the evidence presented at the Rule 3.850 hearing had been presented at trial, the court has resolved the credibility of witnesses against Fotopoulos. (R1051-52).

> Any evaluation of the ages of the parties involved, there [sic] respective educations, as well as their positions within the community, as well as a review of the evidence adduced as to Fotopoulos' ongoing criminal activities in counterfeiting, fascination with offensive weapons and his predilection for commando-like activities in hiding weapons and other paraphernalia around his home and in the woods, as well as his obvious motive in eliminating witnesses and affecting the death of the wife who was trying to divorce him and cut him off of his financial well-being, all point to the defendant, not Deidre Hunt, as the dominating influence in this reprehensible plan of multiple murders. Certainly, the physical evidence adduced in this case, the videotape with Fotopoulos' voice located at Fotopoulos' home, the discovery of the spent cartridge apparently from the AK-47 in Fotopoulos' vehicle and the testimony from all of the coconspirators at the original trial dovetailed to present a picture of Konstantinos Fotopoulos as the instigator and cause of the deaths in this case. None of the co-conspirators called to testify by Mr. Fotopoulos at the evidentiary hearing in any way recanted their prior substantive testimony that it was in fact the Fotopoulos who, suggested, planned, and implemented the killings at issue; to the contrary they reaffirmed that prior sworn testimony.

(R1053-54).

Those findings of fact are supported by the evidence, and should not be disturbed. Moreover, those findings of fact establish that Fotopoulos cannot establish either of the prongs of *Strickland's* two-part test. There is no basis for relief.[4]

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[4] To the extent that Fotopoulos complains about the transcript of his indigency hearing and counsel's alleged lack of preparation with respect to that proceeding, he has demonstrated neither deficient performance nor prejudice. Short of telling Fotopoulos to lie under oath, it is unclear just what trial counsel is supposed to have done. For whatever interest it holds, this

Fotopoulos' next sub-claim of ineffective assistance of counsel relates to the "fail[ure] to seek to suppress" a .38 Special revolver from which the serial number had been removed. This claim is no more than a conclusory allegation which is unsupported by any legal argument. Fotopoulos has not demonstrated (or even argued) any basis for suppression of the weapon at issue, and, consequently, has not even argued any deficiency on the part of trial counsel. Moreover, in light of the overwhelming evidence against Fotopoulos, he has not suggested how he was prejudiced, even assuming, *arguendo*, that there was some legal basis for suppression. This claim has no legal basis, is insufficiently pled, and does not supply a basis for overturning the trial court's denial of relief.

Fotopoulos' next specification of ineffective assistance of counsel is that "counsel's performance was ineffective during the suppression hearing." This claim was Claim VII in Fotopoulos' pre-remand Rule 3.850 motion -- the court denied relief on May 16, 1997, stating:

> Claim VII of the amended motion states that the failure of trial counsel to properly conduct a pretrial investigation and present evidence relating to Movant's rights to object to unlawful searches and seizures deprived Movant of his constitutional right to effective assistance of counsel in the guilt phase of

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claim was originally raised in collateral attack as a *Richardson* violation.

> his capital trial. Also within this claim, Movant stated that defense counsel failed to prepare for a hearing.
>
> As to the first part of this Claim, the contention appears to be that defense counsel failed in his attempt to suppress evidence along with numerous other failures in regard to the failure of defense counsel to properly conduct a pretrial investigation relating to Movant's rights to object to unlawful searches and seizures. Movant concludes that he was not properly "evicted" from the residence, which was owned and occupied by his mother-in-law, Mrs. Mary Paspalakis. The home was also occupied by other family members. There is nothing to suggest that he factually enjoyed any interest in the Paspalakis residence that would create a requirement that Movant be formally "evicted."
>
> Consequently, if there was such a contention, it cannot be fairly said that counsel [sic] alleged failures were prejudiced toward Movant. The evidence that was presented at trial was found in the home, where Movant resided, but was owed [sic] and occupied by the person giving voluntary consent. The Court finds that Movant has not demonstrated how a voluntary consent to search given by a property owner and co-occupant is unlawful. Additionally, Movant fails to demonstrate how his counsel did not prepare for the hearing, and how that failure prejudiced Movant. Therefore, the Court finds that Movant has failed to meet the threshold set out by the United States Supreme Court in ***Strickland***.

(R971-972).

In the most recent order, the collateral proceeding trial court stated:

> Particularly, this court chooses to address the defendant's claim that his trial counsel was ineffective in failing to suppress certain evidence, including but not limited to, a videotape and weapons discovered in bags found inside the residence as well as the BBQ pit outside the defendant's home. These matters were addressed in the Court's prior order in

> this cause and by the court at trial and the defendant has presented no credible evidence upon which to determine whether there was any legal basis upon which that evidence would have likely been suppressed had counsel acted differently.

(R1052-53). Fotopoulos has demonstrated no basis for suppression of the evidence at issue, and, in any event, is procedurally barred from raising this claim because it could have been but was not raised on direct appeal from his convictions and sentences. That is a procedural bar under settled Florida law. The trial court should be affirmed in all respects.

Fotopoulos next complains that trial counsel was ineffective with respect to the State's use of peremptory challenges to exclude two black venire members. This claim (Claim IV in the pre-remand motion) is not available to Fotopoulos because it was raised and rejected on the merits on direct appeal – this Court so held in its August 25, 1999, order. See pages 3-4, above. This Court stated:

> First, we find no merit to Fotopoulos' contention that the State was allowed to use peremptory challenges to exclude black prospective jurors contrary to this Court's decision in *State v. Neil*, 457 So. 2d 481 (Fla. 1984), *clarified, State v. Castillo*, 486 So. 2d 565 (Fla. 1985), and *clarified, State v. Slappy*, 522 So. 2d 18 (Fla.), *cert. denied* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), and limited by *Jefferson v. State*, 595 So. 2d 38 (Fla. 1992). In this case, the State used two peremptory challenges to exclude black prospective jurors from the jury. The first black juror excluded was Mrs. Bostic; the second was Mrs. Gordon.

At the time the State challenged Mrs. Bostic, defense counsel noted that the prospective juror was black and objected. The trial court noted that the defendant is white and there were four black jurors. When asked by the court, the defense declined to elaborate as to how it was prejudiced by the State's challenge. The prosecutor pointed out that two black jurors had already been accepted by the State. He then explained that he challenged Mrs. Bostic because her son had been involved with the juvenile section of the State Attorney's office since 1987 and he felt Mrs. Bostic's extensive exposure to the office would make it difficult for her to maintain impartiality. Defense counsel's only response to this reason was that Mr. Grisham and several others had children who had been involved with the law. The trial court found that the defense had failed to meet its initial burden of demonstrating that there was a strong likelihood that the State was exercising peremptory challenges in a racially discriminatory manner. The court also found that the State had given a racially neutral explanation for the challenge.

Although broad leeway should be granted a defendant attempting to make a prima facie showing that a likelihood of discrimination exists, *State v. Slappy*, 522 So. 2d 18 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), a trial court is vested with broad discretion in determining whether peremptory challenges are racially motivated. *Reed v. State*, 560 So. 2d 203 (Fla.) *cert. denied*, --- U.S. ----, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990). We find no abuse of discretion in connection with the trial court's findings.

The fact that a juror has a relative who has been charged with a crime is a race-neutral reason for excusing that juror. *Bowden v. State*, 588 So. 2d 225, 229 (Fla. 1991), *cert. denied*, --- U.S. ----, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992). Fotopoulos' claim that this reason is not supported by the record was not raised below and therefore has been waived. 588 So. 2d at 229. As noted above, defense counsel's only response to the asserted reason was that Mr. Grisham and several other jurors had children who had been involved with

> the law. The record demonstrates that Mr. Grisham's situation was distinguishable from that of Mrs. Bostic. It was Mr. Grisham's stepson, who had never lived with him, who had been involved with the law. In fact, after further questioning it was revealed that Mr. Grisham had been one of his stepson's victims and his dealings with the State Attorney's office was as a victim. Likewise, there is no indication that other jurors with children or relatives who had been involved with the law had extensive dealings with the State Attorney's office.
>
> The State later used a preemptory challenge to excuse Mrs. Gordon. Again, the only basis for the defense's objection to the challenge of Mrs. Gordon was the fact that she was black. However, "out of an abundance of caution" the court asked the State to give reasons for the challenge. The prosecutor stated that Mrs. Gordon was opposed to the death penalty, her grandson was facing a trial on drug trafficking, and Mrs. Gordon's car had been seized as a result of her grandson's criminal activity. Defense counsel failed to challenge these reasons, responding "Nothing further." The court again overruled the *Neil* objection, finding that 1) there had been no initial showing of a strong likelihood of discrimination and 2) even if there had been an adequate showing, the State had presented race-neutral reasons. Again, we find no abuse of discretion in connection with these rulings. Moreover, Fotopoulos' challenges to the stated reasons have not been preserved because they were not raised below. *Bowden,* 588 So. 2d at 229; *Floyd v. State*, 569 So. 2d 1225, 1230 (Fla. 1990), *cert. denied*, --- U.S. ----, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991).

Fotopoulos v. State, 608 So. 2d 784, 787-89 (Fla. 1992). The trial court properly denied relief on this claim (R1053), and that order should not be disturbed.

Fotopoulos' final claim of ineffective assistance of counsel is a "cumulative error" claim, which asserts that "all these

deficiencies on the part of trial counsel" combined to deny him a fair trial. The "errors" that are aggregated to form this claim are either meritless, procedurally barred, or both. Because that is so, this sub-claim has no legal basis, and represents, at most, an attempt to evade the application of the various procedural bars by pleading a claim that is unavailable to Fotopoulos as a merits claim in the guise of one of ineffective assistance of counsel. (R1053). Such is improper under long-settled Florida law. There is no basis for relief.

To the extent that further discussion is necessary, Fotopoulos's present counsel relies on *Heath v. Jones* for the proposition that Fotopoulos is entitled to relief because of the "cumulative effect" of his counsel's errors. That reliance is misplaced. In fact, *Heath* states:

> Heath has not attempted to show prejudice due to the ineffectiveness of counsel at pretrial. As the state points out, Heath has not shown that any of the pretrial motions would have succeeded if they were better prepared. Heath has also failed to show any other pretrial motions which would have succeeded if they were submitted. Moreover, after reviewing all the articles and video tapes that Heath claims his trial counsel should have submitted, we are unable to conclude that the failure of the trial court to grant a change of venue constitutes a constitutional error. Therefore, the failure to submit any support with the motion does not raise a "reasonable possibility" that, but for the ineffectiveness, the result of the motion would have been different. *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068.

> Even assuming that Heath was able to show that his attorneys' performance was deficient during the guilt phase, he is unable to show prejudice resulting from their actions. This case is similar to *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987). In *Magill,* trial counsel's performance was much more deficient because the attorney in effect conceded his client's guilt during his opening and closing arguments. This Court, however, did not find prejudice due to this action. The *Magill* court held that because of substantial evidence of guilt, including the defendant's confession, it was "highly unlikely that [counsel's] deficient performance affected the jury's verdict during the guilt phase." *Id.* at 888.

Heath v. Jones, 941 F.2d 1126, 1140-41 (11th Cir. 1991).[5] There is no basis for relief, and the lower court should be affirmed in all respects.

III. THE "NEWLY DISCOVERED EVIDENCE" CLAIM

On pages 61-69 of his brief, Fotopoulos argues that Deidre Hunt's 1998 life sentence for her involvement in these murders "is newly discovered evidence justifying a new trial or a new sentencing hearing." *Initial Brief,* at 61. The collateral proceeding trial court denied relief on this claim -- that ruling is correct, and should be affirmed in all respects.

In denying relief on this claim, the trial court stated:

> This Court also rejects the defendant's assertion that Deidre Hunt's 1998 re-sentencing to life imprisonment constitutes "newly discovered evidence" justifying a re-sentencing proceeding for the defendant. **As previously noted the evidence originally presented in**

[5] Heath was executed on March 20, 1992. *Death Row U.S.A.*

> **this cause, and uncontroverted by any new evidence adduced by the defendant, demonstrates that Konstantinos Fotopoulos was the prime movant and dominant actor in the killings at issue. He carried the motive that caused the death of Mark Kevin Ramsey and Bryan Chase and the near death of his wife Lisa.** Under the circumstances in this case the defendant presents no basis for this court to determine under a "proportionality" analysis that a resentencing is warranted. **The defendant was the most culpable and the most deserving of the death penalty.** *See, Jennings v. State,* 718 So. 2d 144 (Fla. 1998). The overwhelming evidence of guilt adduced against the defendant for the crimes at issue and the great weight of the numerous aggravating circumstances which exist against a minimum of mitigation does not warrant re-visiting Fotopoulos' death penalties.
>
> Here, unlike the case of Ms. Hunt, the defendant did not come forward with evidence which assisted the state in the prosecution; rather, he held fast in his denial of any involvement against the overwhelming weight of the evidence. There was no evidence of Ms. Hunt's domination of the defendant while there was arguable evidence to the contrary. Furthermore, the defendant presents few if any mitigating circumstances compared to those asserted by his co-defendant in her separate sentencing proceeding. Recognizing that each sentencing proceeding is an individualized determination this court finds no basis for determining that the death penalties imposed on Mr. Fotopoulos were disproportional or otherwise provided any basis for relief.

(R1055-56) [emphasis added].

Florida law is clear that a death sentence may be disproportionate when an equally-culpable co-defendant receives a sentence less than death. However, when the degree of culpability differs, there is no proportionality issue when the less-culpable co-defendant received the more lenient sentence. As

this Court has stated:

> Nor do we find the death penalty in this case to constitute a disproportionate sentence even though two of the State's key witnesses were apparently not prosecuted despite their involvement in this crime and even though Jason was acquitted. When a codefendant (or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate. *Downs v. State*, 572 So. 2d 895 (Fla. 1990), *cert. denied*, 502 U.S. 829, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991); *Slater v. State*, 316 So. 2d 539 (Fla. 1975). Thus, an equally or more culpable codefendant's sentence is relevant to a proportionality analysis. *Cardona v. State*, 641 So. 2d 361 (Fla. 1994), *cert. denied*, 513 U.S. 1160, 115 S.Ct. 1122, 130 L.Ed.2d 1085 (1995). Disparate treatment of a codefendant, however, is justified when the defendant is the more culpable participant in the crime. *Hayes v. State*, 581 So. 2d 121 (Fla.), *cert. denied,* 502 U.S. 972, 112 S.Ct. 450, 116 L.Ed.2d 468 (1991).
>
> In this case, the trial judge specifically examined the appellant's culpability, stating:
>
> > The evidence established beyond a reasonable doubt that, although [the appellant] was not the triggerman, she was present for the murder actively participating in carrying out the murder which she planned in a cold and calculated manner. Her participation was not relatively minor. Rather she instigated and was the mastermind of and was the dominant force behind the planning and execution of this murder and behind the involvement and actions of the co-participants before and after the murder. Her primary motive for the murder was financial gain, which motive was in her full control.
> >
> > ....
> >
> > ... Under no reasonable view of the evidence can it be said that the degree of culpability

> of Steven Heidle or Kristen Palmieri was equal to that of [the appellant]. [The appellant] was in charge and they were the subordinates with significantly lesser roles.

> As indicated by the trial judge, we find that the evidence establishes beyond question that the appellant was the dominating force behind this murder and that she was far more culpable than the State's two key witnesses. Additionally, the evidence supports the judge's conclusion that the aggravating factors outweigh the mitigating factors. Consequently, we find that the appellant's sentence is not disproportionate. *See, e.g.*, *Garcia v. State,* 492 So. 2d 360 (Fla.) (prosecutorial discretion in plea bargaining with less culpable accomplices is not impermissible and does not violate the principles of proportionality), *cert. denied*, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986). In making this determination, we note that Jason's acquittal is irrelevant to this proportionality review because, as a matter of law, he was exonerated of any culpability.

Larzelere v. State, 676 So. 2d 394, 406-7 (Fla. 1996). As was the case in *Larzelere,* Fotopoulos was the dominating force behind the murders. In sentencing Fotopoulos to death for the murder of Mark Kevin Ramsey, the Court stated:

> The defense argued this factor [accomplice/minor participant] was established. This Court finds it was not. Specifically this Court finds that in both murders Fotopoulos was the “captain” and co-defendant Hunt was the “lieutenant.” The Defendant’s participation was anything but minor. He planned the killing, videotaped it, and administered the *coup de grace.*

(TR 3937-38). Further, in sentencing Fotopoulos to death for the murder of Bryan Chase, the Court stated:

> The defense argued this factor [accomplice/minor

> participant] was established. This Court finds it was not. specifically this Court finds that in both murders Fotopoulos was the "captain" and co-defendant Hunt was the "lieutenant." The Defendant's participation was anything but minor. It was the Defendant who made "meat loaf" of Chase and added the *coup-de-grace* after the initial shots.

(TR3942). In view of those explicit findings as to the relative culpability of Fotopoulos and co-defendant Hunt, the assertion that his death sentences are "disproportionate" has no factual basis.

It is true, as Fotopoulos asserts, that the jury did not (and could not) know that Hunt had received a life sentence for her participation in the crimes a issue. However, it is also true that the sentencing court evaluated the relative culpability of not only Fotopoulos, but also Hunt, and, after so doing, determined that Fotopoulos was the driving force behind both murders. In the face of that finding, there is no basis for relief because there is no probability of a different result even if Hunt's eventual sentence had been imposed at the time she testified in Fotopoulos' capital trial.

CONCLUSION

Based upon the foregoing arguments and authorities, the 3.850 trial court's denial of relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to George E. Tragos, Esquire, 600 Cleveland Street, Suite 700, Clearwater, FL 33755, on this ___ _ day of July, 2001.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 Point.

KENNETH S. NUNNELLEY

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