IN THE SUPREME COURT OF FLORIDA

JAMES E. HUNTER,

Appellant,

v. **CASE NO. SC00-1885**

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

This is an appeal from the denial, following an evidentiary hearing, of Hunter's *Florida Rule of Criminal Procedure* 3.850 motion seeking relief from his convictions and sentence of death.

On direct appeal, this Court summarized the facts of this case in the following way:

> The following facts were established at trial. On September 16, 1992, James Hunter (a.k.a. Michael Miller), Tammie Cowan, Cathy Woodward, Charles Anderson, Andre Smith, and Eric Boyd traveled by car from St. Augustine to DeLand. Tammie Cowan testified that there were two black BB guns and one silver handgun in the car. Boyd and Anderson had the BB guns and Hunter had the handgun. In DeLand they stopped briefly to see Andre Smith's mother. Thereafter, at approximately 11:44 p.m., Cowan stopped the car and Anderson, Boyd, Smith, and Hunter exited. Hunter then confronted and robbed a man on the street, using the silver handgun. Hunter and his companions then departed for Daytona Beach. Shortly afterwards, a "be on the lookout" (BOLO) alert for the DeLand robbers was transmitted by the police throughout the Volusia County area. The BOLO described a gray four-door sedan occupied by at least five black individuals, two of whom were females, who were suspects.
>
> After the robbery, Hunter directed Cowan to drive to Daytona Beach and the vicinity of Bethune-Cookman College where four young men were standing outside the "Munch Shop." Hunter instructed Cowan to stop the vehicle, and Hunter, Lewis, Anderson, and Smith exited and approached the four men. Hunter was armed with the silver handgun.
>
> Hunter approached the men and ordered them to "give it up." Hunter and his companions then robbed the men at gunpoint. Thereafter, while the men were lying face down on the sidewalk, Hunter shot each of them in turn. Wayne Simpson was the last victim to be shot in this process, and he subsequently died. Hunter and his colleagues then fled with the victims' clothing, jewelry, and other miscellaneous items of personal property. When Hunter returned to the car, he ordered Cowan to leave, and told her that he had fired the gun because a victim had tried

to run. Shortly thereafter, at 12:40 a.m., Deputy Richard Graves observed a vehicle in Ormond Beach matching the DeLand BOLO. Graves stopped the automobile, and Cowan told Graves that she and the others had come from DeLand. While the car was stopped, the DeLand robbery victim was brought to the scene where he identified Hunter as his robber and also identified the car. Cowan consented to a search of the car which yielded two BB guns and personal property belonging to the victims of both the DeLand and Daytona Beach robberies. The gun used by Hunter was never found.

The Charges, Verdict, and Sentencing

Hunter was charged with one count of first-degree murder, three counts of attempted first-degree murder, one count of attempted armed robbery, and three counts of armed robbery. The jury found Hunter guilty of all eight charges. After a penalty phase proceeding, the jury recommended by a vote of nine to three that Hunter receive the death penalty for the murder of Simpson.

In its sentencing order, the trial court found two aggravators: prior violent felony conviction (FN1) and capital felony committed during a robbery (FN2) and no statutory mitigating circumstances. The court found ten non-statutory mitigating factors: (1) fetal alcohol syndrome; (2) separation from siblings; (3) lack of motherly nurturing and bonding; (4) physical abuse; (5) emotional abuse and neglect; (6) unstable environment; (7) violent environment; (8) lack of positive role models; (9) death of adoptive mother; and (10) narcissistic personality disorder.

> FN1. In addition to the eight contemporaneous convictions in this case, Hunter also has prior convictions for aggravated battery (2), shooting or throwing a deadly missile into an occupied vehicle, and attempted armed robbery.
>
> FN2. See Sec. 921.141(5)(b), (d), *Fla. Stat.* (1993).

Hunter v. State, 660 So.2d 244, 246-47 (Fla. 1995). The United States Supreme Court denied Hunter's petition for writ of certiorari on February 20, 1996. *Hunter v. Florida,* 516 U.S. 1128

(1996).

Hunter filed his first *Florida Rule of Criminal Procedure* 3.850 motion on March 28, 1997 and amended that motion on February 19, 1999. The State duly filed an answer to the motion, and on May 3, 1999 and continuing on August 16, 1999, the Circuit Court of Volusia County conducted a hearing as required by *Huff v. State*, 622 So. 2d 982 (Fla. 1993). On January 25, 2000, the Court entered an order granting an evidentiary hearing on Claims I, VI, XII, and part of XIII. Order, at 14. The Court denied relief on Claims II, III, IV, V, VII, VIII, IX, X, XI, and XIII (in part). (R1830). The evidentiary hearing was conducted on April 5, 2000.

THE EVIDENTIARY HEARING FACTS

At the evidentiary hearing conducted before the Circuit Court, the following evidence was presented.

EVIDENTIARY HEARING HELD ON APRIL 5, 2000

Hunter's first witness was Melanie Anderson, the trial clerk at Hunter's trial. (R107). During the trial, she marked the mug show-up folders into evidence for identification purposes. She did not recall at what point the photos were introduced into evidence. (R114).

The next witness was George Burden, Hunter's trial counsel. (R119-120). He handled Hunter's direct appeal and approximately ten death penalty cases prior to Hunter's trial. (R120). Saul Baran assisted with jury selection and was second chair counsel. (R121).

Mr. Burden reviewed discovery from the State. There was disparity among the witnesses regarding clothing worn by the participants in the shooting (R121). Misters Cooley, Troutman and Howard described the shooter as wearing red clothing. (R122). Mr. Burden testified all the witnesses said there was only one shooter. (R122). None of the witnesses said the shooter was wearing a white shirt (R132). However, there were in-court identifications by the witnesses/victims in this case that Hunter was the shooter. (R162). Mr. Burden made a demand for all discovery, including photographic evidence, and any Brady material from the State. (R122). He first became aware of the photos of the participants in the shooting during the testimony of the State's last witness during the trial (R125). He testified the photos had not previously been disclosed. (R125). However, the Florida Supreme Court concluded that the lineup photos had been disclosed to him. (R158). There was no date on the photos indicating when they had been taken. He would have used the photos at trial as exculpatory evidence had they been provided. (R129). Upon reviewing the photo of Mr. Boyd (co-defendant), it depicted red clothing. (R130). The photo of Hunter depicted white clothing (R132). A motion for mistrial was brought after Cooley, Howard and Troutman testified. (R134). He did not have the opportunity to cross examine these witnesses regarding the photos. (R135). He did not introduce the photos to the jury or enter them into evidence at trial (R135). He recalled that

witness/victim Cooley told police the shooter was wearing red. (R137).

Mr. Burden was not aware of the Public Defender's Office representing victim Cooley on felony charges involving credit card fraud and cocaine possession. (R140). He was not aware of the Public Defender's Office representing Cooley on a misdemeanor charge. (R141). In addition, he was not aware of the Public Defender's Office representing Cooley for a possession charge. (R142-143). He had no idea that the Public Defender's Office represented Mr. Cooley on any case. (R147). He was not aware of the pending charges and did not cross examine Cooley. (R142). He did not recall questioning Mr. Cooley about criminal history at the time of his deposition. (R143). He did not inform Hunter that the Public Defender's Office had previously represented Cooley on criminal charges. (R144, 149). He would have withdrawn from representing Hunter after receiving direction from senior management. (R144-145, 148). He was very well aware of the statutory provision and case law regarding withdrawal of the Public Defender's Office. (R149). He had filed a motion requesting criminal background checks on the witnesses and victims in this case but did not receive any information from the State Attorney's Office regarding criminal background for Taurus Cooley. (R146-147).

Elizabeth Blackburn-Gardner was the lead prosecutor on Hunter's case. She testified that photographs had been provided to

Mr. Burden at a deposition of Donald Clark in an unrelated case. (R171). She did not recall if these photographs were those of the four co-defendants taken by Officer McLean on the night of the shooting. (R173). She recalls two arrest photographs of Hunter and co-defendant Anderson (taken in Palatka) were presented at the mistrial hearing. (R188).

Hunter's next witness was Carlos McLean, an on-call investigator with the DeLand, Florida Police Department. (R202). McLean investigated three robberies the night of the shooting. (R203). He got a description of the suspects' vehicle from the victims and put it out on a BOLO through teletype, notifying the Volusia County Sheriff's Department, among other agencies. (R203). McLean received information that a vehicle matching the description from the first robbery under investigation had been stopped by a Volusia County deputy in Ormond Beach. (R204). He transported the victim from DeLand to the scene in Ormond Beach where the defendant and co-defendants were being detained by Deputy Graves. The robbery victim positively identified the defendant and co-defendants. (R204). None of the male suspects were wearing shirts. (R215). After they were placed into custody, McLean transported them back to the DeLand Police Department. While in custody in the holding cell, the defendant and co-defendants complained of being too cold. Subsequently each picked out a shirt to wear that they claimed was theirs. (R216). McLean then

photographed each suspect individually. (R205). Approximately a day later, Detective Flynt from the Daytona Beach Police contacted McLean. He looked at the line-up photographs taken by McLean. McLean made a copy of the photo lineup and gave the originals to Detective Flynt. (R206).

Sergeant Jimmie Flynt testified that he investigated the murder of the victim in this case. (R234). He compiled the photographs that Investigator McLean had given him into show-up folders. (R237). He did not offer a deal to co-defendant Eric Boyd in exchange for testifying against Hunter. (R335).

Taurus Cooley was one of Hunter's victims. (R263). He testified that he was represented by the Public Defender's Office for various offenses in 1992. (R287).

Former Circuit Court Judge Gayle Graziano was the presiding Judge in this case. (R292). She testified that at the time the photographs of the defendant and co-defendants in the line-up folders were submitted into evidence, they were secure. (R294).

Eric Boyd was one of Hunter's co-defendants. He testified that Detective Flynt offered a deal if he testified against Hunter. (R313).

James Hunter testified he was wearing Gator clothing the night of the murder. (R318). Co-defendant Eric Boyd was wearing red clothing. (R319). He was not aware of the Public Defender's Office representing Taurus Cooley. (R323).

The last witness was Deputy Richard Graves with the Volusia County Sheriff's Department. (R336). Based on a BOLO received earlier in the night, he stopped a vehicle containing Hunter and four other occupants. (R337). He took polaroid photographs of all five. (R338). None of the males were wearing shirts at the time the photos were taken. (R340).

On July 25, 2000, the Court entered an order denying relief on Claims I, VI, XII, and XIII. (R1892).[1] Hunter gave notice of appeal on August 24, 2000, and the record was certified as complete and transmitted on December 13, 2000. Hunter filed his *Initial Brief* on April 17, 2001.

SUMMARY OF THE ARGUMENT

Hunter's claim of a "conflict of interest" on the part of trial counsel is not a basis for relief because there was no actual conflict of interest. The collateral proceeding trial court resolved the disputed facts, and those factfindings, which are supported by competent substantial evidence, are entitled to deference on appeal. The conflict of interest claim is not a basis for relief.

Hunter also claims that trial counsel rendered ineffective assistance by failing to challenge the State's case through the use

[1]To the extent that the Court had ordered an evidentiary hearing on claims that are not specifically addressed in the order, such claims were not presented at the hearing, and are therefore abandoned.

of photographic evidence. The collateral proceeding trial court denied relief on this claim, finding that use of the photographs at issue would have merely presented cumulative evidence which was not reasonably likely to produce a different result. The collateral proceeding trial court found that Hunter had not demonstrated a deficiency in the performance of his attorney, nor has he demonstrated prejudice as a result thereof. The most that this claim indicates is that Hunter's present counsel would have tried the case differently. That is not the standard of review of an ineffective assistance of counsel claim, and there is no basis for relief.

The collateral proceeding trial court properly found that there was no ineffective assistance of counsel with respect to the alleged "inflammatory and improper comments" by the prosecutor. Likewise, the underlying substantive claim of prosecutorial comment is not a basis for relief because the claim is not only procedurally barred but also without merit because the comment at issue was isolated, did not become a feature of the trial, and was not so prejudicial as to undermine the confidence in the result.

Hunter's next claim concerns the jury instructions given during his capital trial. The collateral proceeding trial court denied this claim on alternative grounds of procedural bar and lack of merit. That result is correct, and should not be disturbed.

Hunter's claim that the Florida Death Penalty Act is

unconstitutional on its face and as applied is not a basis for relief because, as the collateral proceeding trial court found, this claim is procedurally barred because it was raised and decided adversely to Hunter on direct appeal. Alternatively, as the trial court found, this claim is meritless. There is no basis for relief.

Hunter's claim concerning the mental state expert and the inter-related competency hearing claim is not a basis for relief because this claim was addressed on direct appeal and decided adversely to Hunter, rendering it procedurally barred, as the collateral proceeding court found. The most that Hunter has done is demonstrate his continuing dissatisfaction with this Court's direct appeal ruling.

Hunter claims that his death sentence is disproportional because his crime was merely a "robbery gone bad." The collateral proceeding trial court denied relief on this claim on procedural bar grounds because this claim had been raised and decided adversely to Hunter on direct appeal. The proportionality claim is not a basis for relief.

Hunter's claim concerning the "expert's opinion on credibility" is procedurally barred because it was raised and decided adversely to Hunter on direct appeal.

Hunter's challenge to the felony-murder aggravating circumstance was disposed of on lack of merit grounds by the

collateral proceeding trial court. In addition to having no merit, this claim is procedurally barred because this Court rejected Hunter's claim, on direct appeal, that the felony-murder aggravating circumstance is unconstitutional. This claim is procedurally barred, and, moreover, is without merit. It is not a basis for relief.

ARGUMENT

I. THE CONFLICT OF INTEREST CLAIM[2]

On pages 22-37 of his brief, Hunter argues that the collateral proceeding trial court erroneously determined that Hunter's assistant public defender "did not have an actual conflict of interest." The collateral proceeding trial court denied relief on this claim, finding that there was no "actual conflict since trial counsel could not be effected [sic] by something he was not aware of." (R1890). The findings of fact by the circuit court are supported by competent substantial evidence, and should not be disturbed. That court's legal conclusion that there was no conflict and hence no basis for relief is correct, and should not be disturbed.

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

> Defendant claim that trial counsel, an attorney in the Office of the Public Defender, had an actual conflict of interest which requires automatic reversal due to the fact that a key State witness, Taurius Cooley, was also represented by the Office of the Public Defender while he

[2]This was Claim XII in the motion.

was a witness in the instant case. He further claims that counsel never questioned Cooley regarding his prior criminal history or about the pending charges and investigations against him, and that challenging Cooley's credibility was of tantamount importance because Cooley was the only person in a position to see the face of the shooter due to the fact that all other witnesses were uncertain or not in a position to see the shooting.

The Court finds that Defendant must satisfy the two-prong test of *Cuyler* to establish reversible error, and is not entitled to automatic reversal, since he is raising the conflict issue for the first time in a postconviction proceeding. [citation omitted]. To prove a claim that an actual conflict of interest existed between a defendant and his counsel, the defendant must show that his counsel actively represented conflicting interests and that the actual conflict of interest adversely affected his counsel's performance. [citations omitted]. In distinguishing possible conflicts of interests from actual conflicts of interests, the Supreme Court held that an allegation of a possible conflict does not result in the conclusion that a defendant received inadequate representation. . . .

The Court further finds that this alleged conflict did not adversely affect counsel's performance because counsel testified at the evidentiary hearing that he was unaware of any representation by the Office of the Public Defender of State witness Cooley. [citation omitted]. This Court "need not reach the question of whether there was an 'actual' or 'meaningful' conflict of interest that affected or must be presumed to have affected the outcome." [citation omitted]. . . . An actual conflict forces counsel to choose between alternative courses of action. [citations omitted]. Therefore, to show actual conflict, one must show that a lawyer not laboring under the claimed conflict could have employed a different defense strategy and thereby benefited [sic] the defense. [citation omitted]. Only when such an actual conflict is shown to have affected the defense is there shown prejudicial denial of the right to counsel. [citations omitted]. Defendant's trial counsel was not even aware that State witness Cooley was represented by the same Office of the Public Defender. There could not have been an actual conflict since trial counsel could not be effected [sic] by something he was not aware of. [citation omitted].

> Finally, the Court also finds that the alleged conflict did not impair counsel's performance, i.e., failing to challenge Cooley's credibility as the only witness to see the shooter, because other witnesses also identified the Defendant as the shooter of Cooley and the possessor of the .25 automatic chrome gun during the incident. [exhibit citations omitted].

(R1890-1891). Those factual findings are supported by competent substantial evidence, and are entitled to deference on appeal. The legal conclusion of the Circuit Court is reviewed *de novo*[3]. When the inaccurate and misleading argument set out in Hunter's brief is fairly considered, there is no doubt that the lower court properly denied all relief.

The underlying finding of fact by the Circuit Court is that trial counsel was unaware that Cooley had been represented by the Public Defender's Office. (R1890). While Hunter disagrees with that finding of fact, it is supported by the record, and, because that is so, should not be disturbed because it is not an abuse of discretion. *State v. Spaziano,* 692 So. 2d 174 (Fla. 1997). As this Court has often noted, such credibility determinations (if that is even what this can be called) are left to the Circuit Court which saw the witness testify *ore tenus*, and is in the best position to assess the testimony. Hunter's only reason for setting aside the factual determination of the trial court is because he has reached

[3]"The question of whether a defendant's counsel labored under an actual conflict of interest that adversely affected counsel's performance is a mixed question of law and fact." *Quince v. State,* 732 So. 2d 1059, 1064 (Fla. 1999).

a different interpretation of the same testimony. *See, e.g., Maharaj v. State,* 25 Fla. L. Weekly S1097 (Fla. 2000); *Blackwood v. State,* 777 So. 2d 399 (Fla. 2000). That is an insufficient basis to overturn the factfindings of the trial court.

Because Hunter's attorney did not know that witness Cooley had also been represented by the Public Defender, counsel could not, as the Court found, have been affected by a fact that was unknown to him. Because that is so, there was no "actual conflict", and, hence, there is no basis for reversal based upon a "conflict of interest." In addressing this issue in essentially the same posture, the Florida Supreme Court held:

> Because appellant's counsel was not aware of the situation, he cannot be charged with any deficiency for not taking some kind of action concerning the matter. Nor do we think that the situation called for counsel to make inquiry into the matter in order to be considered reasonably effective and within the range of normal, professional competence. We need not reach the question of whether there was an "actual" or "meaningful" conflict of interest that affected or must be presumed to have affected the outcome. *See Porter v. State*, 478 So. 2d 33, 35 (Fla. 1985); *Foster v. State*, 387 So. 2d 344, 345 (Fla. 1980). (FN1) We simply hold that no deficiency of performance by defense counsel is shown on this point.
>
> > FN1. As was stated in *Porter v. Wainwright*, 805 F.2d 930 (11th Cir. 1986), an "actual" conflict of interest exists if counsel's course of action is affected by the conflicting representation, i.e., where there is divided loyalty with the result that a course of action beneficial to one client would be damaging to the interests of the other client. An actual conflict forces counsel to choose between alternative courses of action. *Stevenson v. Newsome*, 774 F.2d

> 1558, 1562 (11th Cir. 1985), *cert. denied*, 475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986); *Baty v. Balkcom*, 661 F.2d 391, 395 (5th Cir. 1981) (Unit B), *cert. denied,* 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982). To show actual conflict, one must show that a lawyer not laboring under the claimed conflict could have employed a different defense strategy and thereby benefitted the defense. *United States v. Mers*, 701 F.2d 1321, 1328-30 (11th Cir), *cert. denied*, 464 U.S. 991, 104 S.Ct. 482, 78 L.Ed.2d 679 (1983). Only when such an actual conflict is shown to have affected the defense is there shown prejudicial denial of the right to counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 104 S.Ct. 482, 78 L.Ed.2d 679 (1980). **Appellant's counsel at trial was not even aware that the state's witness was represented by the same public defender's office, so there could not have been an actual conflict.**

McCrae v. State, 510 So. 2d 874, 877 (Fla. 1987). [emphasis added]. Despite Hunter's efforts to distinguish *McCrae* from the facts of his case, that decision is clear -- under these facts, there could not have been an actual conflict, and, because that is so, there is no legal basis for relief.

To the extent that further discussion of the conflict of interest claim is necessary, the legal standard is the two-part standard set out in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which requires the defendant to demonstrate that counsel "actively represented competing interests", **and** that the "actual conflict of interest adversely affected his counsel's performance." Because there is no "actual conflict", the inquiry need not even proceed to the "adverse effect" prong of the inquiry. However, the trial court

also evaluated that component of the issue, and found that there was no adverse effect because other witnesses identified Hunter as the person who possessed and fired the weapon during the robbery. (R1890). Because that is so, there is simply no basis for relief because Hunter cannot establish either prong of the *Cuyler* standard.

To the extent that Hunter argues that the trial court improperly evaluated the "deficiency in performance," that argument seems to blend elements of an ineffective assistance of counsel claim into the conflict of interest claim. Hunter argues that the trial court "applied the wrong legal standard", but never explains how that is so. The lower court found, based upon the trial testimony, that "failing to challenge Cooley's credibility" was not an "impairment" of counsel's performance because there were other witnesses who placed the weapon in Hunter's possession and identified him as having shot witness Cooley. (R1891). Because that is the posture of the record from Hunter's trial, there is simply no basis for relief.

To the extent that Hunter argues for a "rule of automatic reversal," that is not the law. Rather, this Court has held:

> To prove an ineffectiveness claim premised on an alleged conflict of interest the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Buenoano v. Dugger*, 559 So. 2d 1116, 1120 (Fla. 1990). **Our responsibility is first to determine whether an actual conflict existed, and then to determine whether the**

> **conflict adversely affected the lawyer's representation. A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests."** *Cuyler,* 446 U.S. at 350, 100 S.Ct. 1708. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party. *See Buenoano v. Singletary*, 74 F.3d 1078, 1086 n. 6 (11th Cir. 1996); *Porter v. Singletary,* 14 F.3d 554, 560 (11th Cir. 1994); *Oliver v. Wainwright*, 782 F.2d 1521, 1524-25 (11th Cir. 1986). **Without this factual showing of inconsistent interests, the conflict is merely possible or speculative, and, under** *Cuyler,* 446 U.S. at 350, 100 S.Ct. 1708, **such a conflict is "insufficient to impugn a criminal conviction."**

Herring v. State, 730 So. 2d 1264, 1267 (Fla. 1998). [emphasis added]. Hunter's claim has no factual or legal basis, and the trial court should be affirmed in all respects.

To the extent that Hunter argues that he should have the benefit of "the rule of automatic reversal," such argument is inapplicable to this case. Despite Hunter's protestations, the "conflict" issue was raised for the first time on collateral attack, and the fact that trial counsel was also appellate counsel does not change the outcome because counsel could have sought to withdraw at any time. The absence of such a motion supports the factual conclusion of the trial court that there can be no "actual conflict" based upon facts that are unknown to counsel. Because that is so, there is no basis for relief. The trial court should be affirmed in all respects.

II. THE "FAILURE TO USE PHOTOGRAPHIC EVIDENCE" CLAIM

On pages 38-52 of his brief, Hunter argues that trial counsel was "ineffective for failing to challenge the state's case through the use of photographic evidence."[4] This claim is not a basis for relief for the reasons set out below.

In order to properly evaluate this claim, which, despite this Court's clear direct appeal decision, is still being advanced, the original disposition of this claim is the proper starting point. Specifically, on direct appeal, this Court stated, with respect to the photographs at issue:

> Hunter next argues that the trial court erred in failing to declare a mistrial based upon his claim that the State committed a *Brady* (FN6) violation when it failed to disclose photographs which depicted Hunter in clothing different from that described by eyewitnesses. *See also Fla.R.Crim.P.* 3.220(a)(2) (The State shall disclose "any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged.").
>
> "The test for measuring the effect of the failure to disclose exculpatory evidence ... is whether there is a reasonable probability that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Duest v. Dugger*, 555 So. 2d 849, 851 (Fla. 1990) (*quoting United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985)). To prove that there has been a *Brady* violation, a defendant must prove: (1) that the undisclosed evidence actually exists; (2) that the evidence was suppressed; (3) that the evidence was exculpatory; and (4) that the defendant was prejudiced by the non-disclosure. *James v. State*, 453 So. 2d 786, 790 (Fla.), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984).

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[4]This argument, as set out in Hunter's brief, combines claims I-A, I-B, and I-C from Hunter's Rule 3.850 motion.

During the trial, Detective Flynt referred to certain photographs taken by Deputy Graves and attached to the field interview (FI) cards prepared by Graves at the time Hunter was arrested. Defense counsel objected and informed the court that he was never provided these pictures. Initially, Hunter moved for a mistrial on the ground that the "State had in their possession photographs of all four defendants after they were arrested [the night of the murder]."

The court conducted an inquiry which revealed that the prosecution did not have in its possession the photographs of the Defendant taken by Deputy Graves on the night of the arrest and referred to by Detective Flynt. Three sets of photographs were involved in this inquiry: the photographs attached to the FI cards (FI photos), the photographs contained in the mug showup folders (lineup photos), and a photocopy of the photographs contained in the mug showup folders. Detective Flynt obtained the FI photos from the DeLand Police Department and was not "aware of any other photos being made." It was also determined that the photographs of Hunter, Smith, and Boyd, which were taken at the Ormond Beach district office and at Investigator McLean's DeLand office, were contained in the mug showup folders and used in a photo-lineup.

In denying the motion for mistrial, the trial court found that although the FI photos were not previously disclosed to Hunter, those photographs were "[b]asically head shots" (since the defendants pictured were not wearing shirts) which were not exculpatory. The judge found that Hunter had not established the existence of any undisclosed photographs depicting Hunter's clothing.

Upon review, we find that the record supports the trial court's finding that the lineup photos were disclosed to defense counsel. (FN7) It is undisputed that Hunter's counsel was present at a deposition where such photographs were presented and counsel not only had an opportunity to examine the photographs, but also received a photocopy of the lineup photos. We also agree with the trial court's conclusion that the FI photos, which were not previously disclosed, were not exculpatory. (FN8) In short, we find there was no error or abuse of discretion on the part of the trial court in denying the motion for mistrial.

> FN6. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
>
> FN7. We also agree with the trial court that there are no undisclosed photographs depicting Hunter in full dress.
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> FN8. Despite the fact that all of these photographs were disclosed at trial, Hunter makes no claim of a discovery violation. *See Richardson v. State*, 246 So. 2d 771 (Fla. 1971). In fact, Hunter received the photos before the end of the State's case and makes no demonstration of prejudice.

Hunter v. State, 660 So. 2d 244, 250-51 (Fla. 1995).

In Hunter's Rule 3.850 motion, this claim consisted of several sub-parts, all of which are not a part of this appeal. In denying relief on this claim, the collateral proceeding trial court stated:

> Defendant claims that had counsel requested a *Richardson* hearing and a continuance to re-depose key State witnesses with these lineup photos, after the disclosure of the photos at the July 8, 1992 deposition, which was eight months after the State had such photos, there is a reasonable probability that it would have changed the outcome by providing the jury with a clear identity issue. This Court finds that there is not a reasonable probability that the use of these photos by counsel would have changed the outcome of the trial. In Defendant's 3.850 motion, he alleged that Taurius Cooley, one of the witnesses who identified him at trial as the shooter, had recanted that identification and would testimony the co-defendant Boyd was the shooter. Cooley testified at the evidentiary hearing on Defendant's 3.850 motion that he did not make an identification of Boyd as the shooter from the lineup photos when shown to him when shown to him by a CCRC representative. Further, at trial the uncontroverted evidence was that the shooter was wearing a red shirt and while, at the time of the arrest minutes after the shooting, Defendant was wearing a white shirt. [citations omitted]. Defense counsel argued these facts extensively during closing argument, including the fact that Deputy Graves' field interview cards also showed the Defendant wearing a white shirt at the time of arrest.

> [citations omitted]. Thus, the use of these color photos would have been cumulative evidence not reasonably likely to produce a different outcome.
>
> Defendant further claims that although the evidence showed that he was wearing a white shirt at the time of arrest, the information that co-defendant Boyd was wearing a red shirt at the time of the arrest was never given to the jury. This is rebutted by the record. Co-defendant Pope testified at trial that Defendant was wearing a white shirt [citation omitted],and also stated that one of the co-defendants, which included Boyd, was wearing a red shirt. [citation omitted]. In addition, the Court finds that this argument merely restates the argument that these photos would have presented a better identity issue to the jury. As demonstrated by defense counsel's closing argument, the jury was presented with this exact issue, i.e., that Defendant was wearing a white shirt while the shooter was wearing a red shirt. [citation omitted]. Thus, this claim is legally insufficient as Defendant has not shown any actual prejudice.
>
> Defendant claims that had trial counsel shown the color photo of Eric Boyd (wearing a red shirt) to the State witnesses, they would have identified Boyd as the shooter. He also claims that had counsel introduced the photos at trial, there is more than a reasonable probability that the outcome of the trial would have been different because they show Boyd wearing the red clothing, rather that the Defendant, on the night of the shooting. for the same reasons as stated under Claim I B [which is set out above], this Court finds that there is not a reasonable probability that the use of these photos at trial would have changed the outcome of trial. As such, this claim is also legally insufficient.

(R1886-1888). The collateral proceeding trial court correctly decided this claim, and should be affirmed in all respects.

The law is well-settled with respect to the standard which governs ineffective assistance of counsel claims: in order to be entitled to relief, the defendant must demonstrate not only that the performance of his attorney fell below an objective standard of

reasonableness, but also that there is a reasonable probability that, **but for the deficiency**, the result would have been different (the prejudice component). *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984). Unless the defendant can establish both parts of the two-part *Strickland* standard, he is not entitled to relief. Moreover, in ruling on a claim of ineffectiveness, the Court need not pass on both parts of the *Strickland* standard when it is clear that the defendant cannot establish one of them. *See, Kennedy v. State,* 547 So. 2d 912, 914 (Fla. 1989).[5] In discussing the evaluation of a claim of ineffective assistance of counsel, the Eleventh Circuit has held:

> ... our decisions teach that whether counsel's performance is constitutionally deficient depends upon the totality of the circumstances viewed through a lens shaped by the rules and presumptions set down in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and its progeny.
>
> Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994). That result is no accident but instead flows from 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

[5]For example, if the defendant cannot meet the prejudice prong of *Strickland,* the Court need not concern itself with also ruling on the performance prong.

> 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). When that standard is applied in this case, there is no basis for relief because, as the trial court found, the testimony at trial was that, at the time of the arrests, Hunter was wearing a **white** shirt, and co-defendant Boyd was wearing a **red** shirt. (R1887). As the trial court found,

> this argument merely restates the argument that these photos would have presented a better identity issue to the jury. As demonstrated by defense counsel's closing argument, the jury was presented with this exact issue, i.e., that Defendant was wearing a white shirt while the shooter was wearing a red shirt.

(R1887)[6]. Because the issue advanced by Hunter was squarely placed

[6]Hunter and the others were not contacted by law enforcement until some time after the shooting that gave rise to this case.

before the jury, the most that the present argument does is suggest that current counsel would (or might) have tried the case differently -- that is not the legal standard, and such after-the-fact second-guessing is exactly the practice that is precluded by *Strickland.* The lower court's denial of relief should be affirmed in all respects.

In his brief, Hunter alleges, for the first time, that "in failing to utilize the photographs [he was] also prejudiced [] in the penalty phase." *Initial Brief* at 50. This claim was not contained in Hunter's Rule 3.850 motion, was not in some fashion alleged orally, and, consequently, is not properly before this Court. The law is well-settled that claims cannot be raised for the first time on appeal from the denial of Rule 3.850 relief. *Doyle v. State,* 526 So. 2d 909, 911 (Fla. 1988). Hunter's criticisms of the trial court for "failing to address" claims that were never placed before it are baseless. This component of this claim is not before this Court, and, therefore, is not a basis for relief.[7]

To the extent that Hunter's briefing of this claim includes an undercurrent concerning the claimed "alterations" made to certain

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Hunter v. State, 660 So. 2d at 246-7.

[7] Hunter's brief contains comments to the effect that the showup folders were not shown to the surviving victims because they had indicated that they could not "make an identification." (Check R239). How this claim is helpful to Hunter is not developed -- moreover, this "claim" (if that is what it is) has been raised for the first time on appeal. For that reason, it is not properly before this Court.

photographs, the trial court found:

> Defendant claims that counsel should have questioned Detective Flynt regarding why his (defendant's) photograph was removed from State's Exhibit CC (mug showup folder) and placed into State's Exhibit BB (mug showup folder) between the July 8, 1993 deposition and trial. However, Defendant has not specifically shown prejudice as to the different arrangement of his photo. Further, Detective Flynt, who made the lineup photo folders, testified, at the evidentiary hearing, that he had no explanation why the Defendant's photos were re-arranged within the folders between the July 8th deposition and trial, he did not place two pictures of the Defendant in one folder on purpose; it was an oversight, and the lineup photo folders were not fastened or stapled closed and were placed in the evidence room at some point before trial. The [Defendant] has not alleged, nor shown, how this proposed questioning would have changed the outcome of his trial. Thus, this claim is legally insufficient.

(R1888). Those findings of fact are supported by competent substantial evidence, and should not be disturbed. The trial court's denial of relief should be affirmed in all respects.

III. THE PROSECUTORIAL ARGUMENT CLAIM

On pages 53-55 of his brief, Hunter argues that he is entitled to relief based upon what he describes as "inflammatory and improper comments" by the prosecutor. This claim was raised in Hunter's Rule 3.850 motion in Claims II(c) and VIII. The collateral proceeding trial court denied relief on both claims, and that ruling should be affirmed.

To the extent that the claim contained in Hunter's brief is a claim of ineffective assistance of counsel, the trial court denied relief on that claim. Specifically, Hunter asserted that trial

counsel should have objected and moved for a mistrial when the prosecutor referred to him as a vulture and a predator in opening statement.[8] The trial court denied relief on the ineffective assistance of counsel claim, stating:

> ... The burden is on Defendant to make at least a *prima facie* showing that individually or cumulatively this "evidence" would have, within a reasonable probability, changed the outcome of his trial. [citation omitted]. Initially, the Court finds that although the prosecutor's comments may have bordered on improper, they are distinguishable from those made in *Ross [v. State*, 726 So. 2d 317 (Fla. 2d DCA 1998)] and Hunter has failed to meet his burden in showing that either individually or cumulatively the un-objected comments were so "sinister" as to undermine the confidence in the outcome of his trial. [citation omitted].

(R1822). There is no basis for relief based upon this claim because, even if it was improper to refer to Hunter as a "vulture and predator", that isolated comment is not a basis for relief because the standard is "Whether the error was so prejudicial as to 'vitiate the entire trial.' *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984)." *Reaves v. State*, 639 So. 2d 1, 5 (Fla. 1994); *See also, Pacifico v. State*, 642 So. 2d 1178, 1183 (1st DCA 1994)("Despite the impropriety of such references, prosecutorial 'name-calling' will result in reversal only if the vituperative comments become such a feature of the trial that the accused's right to a fair trial is prejudiced."); *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987) reference to defendant as a liar not basis for

[8]According to Hunter's argument, the complained-of comments were made once.

reversal); *Maldonado v. State*, 697 So. 2d 1284 (5DCA 1997) (reference to defendant as coward not basis for reversal). Under the facts of this case, which clearly establish that Hunter was searching out victims to rob, and because of the very limited comment at issue, there is no basis upon which to premise any relief. The absence of an objection to such a statement does not amount to deficient performance on the part of trial counsel, and, moreover, Hunter suffered no prejudice. The trial court's denial of relief on the ineffective assistance of counsel component of this claim should not be disturbed.

Likewise, the substantive claim is not a basis for relief. As the trial court found, that claim is procedurally barred from review because it could have been but was not raised at trial and on direct appeal. (R1827). That is a procedural bar under settled Florida law. The denial of relief should not be disturbed.

IV. THE JURY INSTRUCTION CLAIMS[9]

On pages 56-66 of his brief, Hunter raises three separate claims concerning the jury instructions given during his capital trial. The collateral proceeding trial court found these claims to be procedurally barred[10] and, in the alternative, meritless. That

[9]This issue was pleaded as Claim III in Hunter's Rule 3.850 motion.

[10]At no point in his brief does Hunter acknowledge the procedural bars to litigation of these claims, nor does he attempt to argue that the procedural bars were erroneously found. Instead, Hunter has completely ignored the reasons for the denial of relief

result is correct for the following reasons.

Hunter's first claim is that the lower court erred in denying relief on his claim that the jury instructions "shifted the burden of proof" to Hunter to "prove death was inappropriate." The collateral proceeding trial court found this claim to be procedurally barred because it could have been but was not raised at trial and on direct appeal. (R1822). That is a procedural bar under settled Florida law. *Fla. R. Crim. P.* 3.850(c). The trial court found, in the alternative, that the jury was properly instructed, and that the burden of proof was not shifted. (R1823). This claim is not a basis for relief, and the lower court should be affirmed.

The second jury instruction claim contained in Hunter's brief is the argument that the jury instructions "unconstitutionally diluted" the jury's "sense of responsibility in determining the proper sentence." No record citations are provided, nor does Hunter provide any citation to authority supporting his claim of error. The lower court found this claim to be procedurally barred because it was not preserved at trial, a ruling which accurately reflects this Court's direct appeal decision. (R1823); *Hunter v. State*, 660 So. 2d at 253. Moreover, as the lower court found, this claim is meritless. (R1823).

To the extent that further discussion is necessary, "this

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on this claim.

Court repeatedly has held that *Caldwell* errors cannot be raised on collateral review." *Owen v. State*, 773 So. 2d 510, 515 n. 11 (Fla. 2000). Moreover, as this Court has held:

> ...Brown argues that the standard jury instruction in capital cases denigrates the jury's true role in sentencing in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This Court has held that the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, *see Burns v. State*, 699 So. 2d 646 (Fla. 1997),*cert. denied*, 522 U.S. 1121, 118 S.Ct. 1063, 140 L.Ed.2d 123 (1998), and does not denigrate the role of the jury. *See Johnson v. State*, 660 So. 2d 637, 647 (Fla. 1995); *Combs v. State*, 525 So. 2d 853, 855-56 (Fla. 1988) (rejecting argument and holding *Caldwell* inapplicable to death penalty cases in Florida); *Grossman v. State*, 525 So. 2d 833 (Fla. 1988) (holding same), *receded from on other grounds by Franqui v. State*, 699 So.2d 1312 (Fla. 1997), 523 U.S. 1040, 118 S.Ct. 1337, 140 L.Ed.2d 499 (1998), and *cert. denied*, 523 U.S. 1097, 118 S.Ct. 1582, 140 L.Ed.2d 796 (1998). Accordingly, we find this claim to be without merit.

Brown v. State, 721 So. 2d 274, 283 (Fla. 1998). This claim would not be a basis for relief even if it was not procedurally barred.

The third jury instruction claim contained in Hunter's brief is his claim that the instruction on the cold, calculated, and premeditated aggravator "created harmful error when viewed as to its cumulative effect." The lower court found that this claim was inappropriate for collateral attack, and, further, that the claim was procedurally barred because it had been raised and decided aversely to Hunter on direct appeal. (R1824). This claim is procedurally barred under settled Florida law.

To the extent that further discussion of this claim is

necessary, Hunter predicates this claim on the false premise that the sufficiency of the instruction on the cold, calculated, and premeditated aggravator was not addressed by this Court. That is not the true posture of this case. This Court held:

> Hunter's constitutional challenge aimed at the cold, calculated, and premeditated circumstance and the form it takes as a jury instruction, which he claims is "too vague to provide the constitutionally required guidance" is also without merit. We have previously rejected a claim that the cold, calculated, and premeditated aggravating factor is unconstitutionally vague and overbroad. *See Klokoc v. State*, 589 So. 2d 219, 222 (Fla. 1991).
>
> In *Jackson v. State*, 648 So. 2d 85, 88 (Fla. 1994), this Court declared unconstitutionally vague a standard instruction on the cold, calculated, and premeditated factor that told the jury it could consider, if established by the evidence, that "the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without a[ny] pretense of moral or legal justification." In this case, the trial judge gave the following expanded instruction on cold, calculated, and premeditated:
>
> > The aggravating circumstances that you may consider are limited to any of the following and you may not consider any other aggravating circumstances.
> >
> > ....
> >
> > Four, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification.
>
> ....
>
> > Simple premeditation of the type necessary to support a conviction for First Degree Murder is not sufficient to sustain a finding that this killing was committed in a cold, calculated or premeditated manner. What is

> required is a heightened form of premeditation which can be demonstrated by the manner of the killing. The premeditation of the Robbery cannot be transferred to the murder. Cold means totally without emotion or passion. Calculated means the defendant formed the decision to kill in sufficient time in advance of the killing to plan and contemplate.
>
> We hold that this instruction was not "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." *See Espinosa v. Florida,* --- U.S. ----, ----, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854, 858 (1992).

Hunter v. State, 660 So. 2d at 253-54. This claim is not a basis for relief, and the trial court should be affirmed in all respects[11].

V. THE UNCONSTITUTIONAL SENTENCING STATUTE CLAIM

On pages 67-68 of his brief, Hunter argues that the Florida capital sentencing statute is unconstitutional on its face and as applied.[12] The collateral proceeding trial court denied relief on this claim, finding it to be procedurally barred because it was raised and decided adversely to Hunter on direct appeal. (R1826). Hunter's *Initial Brief* raises four identifiable challenges to the sentencing statute: 1. no standard is provided for determining that aggravators outweigh mitigators; 2. aggravators are not

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[11]The claim relating to the cold, calculated, and premeditated aggravator does not appear to be precisely the same claim as the one raised in the trial court. To that extent, it is not properly before this Court.

[12]Once again, Hunter has wholly ignored the procedural bars.

sufficiently defined; 3. the "independent reweighing process" envisioned in *Proffitt v. Florida* is not present; and 4. the statute creates a presumption of death when only one aggravator applies. Of those identifiable claims, sub-claim 1 was not raised on appeal, and is therefore procedurally barred. Sub-claim 2 was likewise not raised on direct appeal -- it too is procedurally barred. Sub-claim 3 was raised and decided on direct appeal and cannot be relitigated in this collateral proceeding. *Hunter v. State,* 660 So. 2d at 253. Sub-claim 4 appears to have been raised on direct appeal and rejected by this Court on the alternative grounds of procedural bar and lack of merit.[13]

In the alternative, the trial court found this claim meritless. Those findings are in compliance with well-settled Florida law, and should not be disturbed. *Hunter v. State, supra*.

VI. THE MENTAL STATE EXPERT/ COMPETENCY HEARING CLAIM

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[13]This sub-claim was apparently sub-claim 15 of Hunter's thirteenth issue on appeal. This court held:

> We find a number of the other challenges to be procedurally barred because they have not been properly preserved for appeal and, even if preserved, they have been rejected in *Fotopoulos v. State,* 608 So. 2d 784, 794 n. 7 (Fla. 1992), *cert. denied*, --- U.S. ----, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993). These include challenges numbered . . . (15), and ....

Hunter v. State, 660 So. 2d at 253.

On pages 69-72 of his brief, Hunter complains that the lower court erred in denying his claim for relief based upon the competency proceedings that were conducted pre-trial. The collateral proceeding trial court denied relief on this claim, finding that it was procedurally barred because it was raised and decided on direct appeal. (R1825). That denial of relief is in accord with settled Florida law, and should not be disturbed.

To the extent that further discussion of this claim is necessary, this Court's direct appeal opinion is dispositive:

> Hunter first claims that the trial court erred in finding him competent to stand trial. The test for whether a defendant is competent to stand trial is whether "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824, 825 (1960); see also Sec. 916.12(1), *Fla. Stat*. (1993); *Fla.R.Crim.P*. 3.211(a)(1). The reports of experts are "merely advisory to the [trial court], which itself retains the responsibility of the decision." *Muhammad v. State*, 494 So. 2d 969, 973 (Fla. 1986) (*quoting Brown v. State*, 245 So. 2d 68, 70 (Fla. 1971), *vacated in part on other grounds*, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972)), *cert. denied*, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987). And, even when the experts' reports conflict, it is the function of the trial court to resolve such factual disputes. *Fowler v. State*, 255 So. 2d 513, 514 (Fla. 1971). The trial court must consider all evidence relative to competence and its decision will stand absent a showing of abuse of discretion. *Carter v. State*, 576 So. 2d 1291, 1292 (Fla. 1989), *cert. denied*, 502 U.S. 879, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991).
>
> Here, the trial court considered a wide variety of lay and expert evidence in making its determination as to whether Hunter was competent to stand trial. The evidence included: the report and testimony of Dr. Jack Rothstein,

an expert in psychiatry and neurology; the report of Dr. Lawrence Ehrlich, the court-appointed forensic psychiatrist; the report and testimony of Dr. Lynn Westby, a court-appointed licensed psychologist; the testimony of Ismael Lopez, a mental health specialist at the Volusia County Jail; and the report and testimony of Olney McLarty, the forensic court liaison.

After considering the evidence and observing Hunter's behavior in court, the trial court found Hunter competent to stand trial. Although there were conflicting opinions from the experts on the issue of competency, it was within the sound discretion of the court to resolve the dispute. There is evidence to support that resolution. (FN3) Therefore, the trial court did not abuse its discretion in finding Hunter competent to stand trial.

Hunter also claims error in the denial of his renewed motion to determine competency. In this motion, defense counsel made several observations about his client's continuing unusual behavior, including Hunter's repeated threats to disrupt the proceedings. Defense counsel also referred to a second report from Dr. Rothstein which primarily discussed mitigating circumstances, but also opined that Hunter was incompetent to stand trial.

Once a defendant is declared competent, the trial court must still be receptive to revisiting the issue if circumstances change. However, only if bona fide doubt is raised as to a defendant's mental capacity is the court required to conduct another competency proceeding. *Pericola v. State*, 499 So. 2d 864, 867 (Fla. 1st DCA 1986), *review denied*, 509 So. 2d 1118 (Fla. 1987); *see also Drope v. Missouri*, 420 U.S. 162, 180-81, 95 S.Ct. 896, 908, 43 L.Ed.2d 103, 118-19 (1975). A presumption of competence attaches from a previous determination of competency to stand trial. *Durocher v. Singletary*, 623 So.2d 482, 484 (Fla.), *cert. dismissed*, --- U.S. ----, 114 S.Ct. 23, 125 L.Ed.2d 774 (1993).

Upon review of the record, we find no abuse of discretion by the trial court. Hunter presented nothing materially new in his second competency motion. While there was continuing evidence of incompetence, it was the same or similar to the evidence previously asserted and was not of such a nature as to mandate a new hearing.

FN3. For example, Ismael Lopez, who had ten

> hours of contact with Hunter, found that Hunter "was fine, stable, rational, no psychosis, no cognitive impairment."

Hunter v. State, 660 So. 2d at 247-48. The issue contained in Hunter's *Initial Brief* is nothing more than his continuing dissatisfaction with this Court's direct appeal decision. There is no basis for relief, and the collateral proceeding trial court should be affirmed in all respects.

VII. THE PROPORTIONALITY CLAIM

On pages 73-75 of his brief, Hunter argues that the lower court should have granted relief on his claim that death is a disproportionate penalty in this case, which he describes as a "robbery gone bad." The collateral proceeding trial court denied relief on this claim on procedural bar grounds -- this claim was addressed by this Court on direct appeal and decided adversely to Hunter[14]. (R1825). Because Florida law is settled that claims that were disposed of on direct appeal cannot be relitigated on collateral attack, there is no basis for relief. The lower court should be affirmed in all respects.

To the extent that further discussion of this claim is necessary, this murder is hardly a "robbery gone bad." This Court summarized the relevant facts as follows:

> Hunter approached the men and ordered them to "give it up." Hunter and his companions then robbed the men at gunpoint. **Thereafter, while the men were lying face down**

[14]This claim was Claim IV(c) in Hunter's motion.

> **on the sidewalk, Hunter shot each of them in turn.** Wayne Simpson was the last victim to be shot in this process, and he subsequently died. Hunter and his colleagues then fled with the victims' clothing, jewelry, and other miscellaneous items of personal property.

Hunter v. State, 660 So. 2d at 246. This is not a "simple robbery gone bad" as Hunter would have this Court believe.

With respect to the proportionality of the sentence of death, this Court stated:

> As his final issue, Hunter argues that the death penalty is not proportionate here. In reviewing a death sentence, this Court must consider the particular circumstances of the case on review in comparison to other decisions we have made, and then decide if death is an appropriate penalty in comparison to those other decisions.
>
> In the case at bar, the trial court found two statutory aggravating circumstances: prior violent felony conviction (there are a total of twelve prior violent felonies including the convictions in this case) and a capital felony committed during a robbery. The trial court found no statutory mitigating circumstances but found ten non-statutory mitigating factors: (1) fetal alcohol syndrome; (2) separation from siblings; (3) lack of motherly nurturing and bonding; (4) physical abuse; (5) emotional abuse and neglect; (6) unstable environment; (7) violent environment; (8) lack of positive role models; (9) death of adoptive mother; and (10) narcissistic personality disorder.
>
> Hunter claims that this case is identical to *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988), where the Court found that the case did not warrant the death penalty because the mitigating circumstances outweighed the aggravating circumstances. In *Livingston*, the defendant entered a convenience store/gas station, fatally shot the female attendant, fired one shot at another woman inside the store, and carried off the cash register. *Id.* at 1289 The mitigating circumstances in *Livingston* included: (1) defendant's childhood was marked by severe beatings by his mother's boyfriend; (2) defendant's intellectual functioning was, at best, marginal; (3) defendant was only seventeen; and (4)

> defendant had used cocaine and marijuana extensively. Two statutory aggravators were found: (1) previous conviction of a violent felony; and (2) commission of murder during armed robbery.
>
> We find no abuse of discretion by the trial court in concluding that the aggravating circumstances, especially the twelve prior violent felonies, which distinguish *Livingston*, outweigh the mitigating circumstances here. The twelve violent felonies include four prior felonies: (1) two convictions for aggravated battery; (2) shooting or throwing a deadly missile into an occupied vehicle; (3) attempted armed robbery; and eight contemporaneous felonies: (4) first-degree murder; (5) three convictions for attempted first-degree murder; (6) attempted armed robbery; (7) three convictions for armed robbery. We also find that the mitigating circumstances in *Livingston*, as set out above, were substantially stronger than those involved herein. The comparison of the two sets of mitigating circumstances explicitly reflects this distinction between the two cases. The underlying circumstances of the murders were also different. We conclude, based upon review of all of the evidence in this case as well as our case law, that death is not a disproportionate penalty here.

Hunter v. State, 660 So. 2d at 254. The proportionality of Hunter's death sentence has already been determined, and the collateral proceeding trial court correctly declined to relitigate that claim. The denial of relief should be affirmed in all respects.

VIII. THE "EXPERT'S OPINION ON CREDIBILITY" CLAIM

On pages 76-77 of his brief, Hunter claims that the lower court erred in denying relief on his claim that it was error not to declare a mistrial when a State expert "gave his opinion on" Hunter's credibility.[15] The collateral proceeding trial court denied relief on this claim on procedural bar grounds -- the claim had

[15]This claim was Claim IV(d) in the Rule 3.850 motion.

been raised and decided adversely to Hunter on direct appeal. The is the correct result under settled Florida law, and it should not be disturbed.

To the extent that additional discussion of this claim is necessary, this Court's direct appeal decision is dispositive:

> Hunter claims next that the trial court erroneously allowed a State psychiatric expert, Dr. Mhatre, to give his opinion on Hunter's credibility when Mhatre testified:
>
> > Q [Prosecuting Attorney] All right. Based on your view of those voluminous materials you have outlined in your observations of Mr. Hunter over the last two days and having an opportunity now to hear him testify yesterday, were you able to form an opinion of the defendant's mental health within the reasonable bounds of medical certainty?
> >
> > ....
> >
> > A [Dr. Mhatre] Well, I have several opinions about it. Number one, I found him to be an absolute liar.
>
> When defense counsel objected, the trial court sustained the objection and instructed the jury "to disregard the last comment of Dr. Mahtra [sic]." However, the court denied a motion for mistrial.
>
> We reject Hunter's claim that Mhatre's testimony mandated a mistrial. Under the circumstances we conclude that the sustaining of the objection and the curative instruction were sufficient to cure any error. A mistrial should be granted only where it is apparent that the defendant cannot receive a fair trial. Dr. Mhatre's testimony was not favorable to Appellant, and in that context we find this particular comment not to be so egregious as to deny appellant a fair trial. As in *Morgan v. State*, 639 So.2d 6, 12 (Fla. 1994), the doctor's testimony here pertained to his mental health analysis and diagnosis of Hunter rather than to any particular assertions by Hunter as to his involvement in the crime. Considering that context,

we find no error in the denial of a mistrial.

Hunter v. State, 660 So. 2d at 252. This claim is procedurally barred from relitigation in this proceeding, and there is no basis for relief. The lower court should be affirmed in all respects.

IX. THE "AUTOMATIC AGGRAVATOR" CLAIM

On pages 78-79 of his motion, Hunter asserts that the felony-murder aggravating circumstance is invalid, and that the lower court should have granted him relief on this claim.[16] The lower court found that the claim was meritless under *Blanco v. State,* where this Court held:

> Blanco next argues that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony. We disagree. Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants. *See Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *See generally White v. State*, 403 So.2d 331 (Fla. 1981). We find no error.

Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997). That disposition is correct, and should not be disturbed.

Moreover, the claim contained in Hunter's Rule 3.850

[16]This was Claim VII in the Rule 3.850 motion.

proceeding is procedurally barred because it was raised and decided on direct appeal when this Court rejected Hunter's claim that the felony-murder aggravator was unconstitutional. *Hunter v. State,* 660 So. 2d 252-53. As this Court held on direct appeal, this claim is without merit under *Lowenfield v. Phelps* 484 U.S. 231, 241-44 (1988), and *Parker v. Dugger* 537 So. 2d 969, 973 (Fla. 1988). In addition to being meritless, this claim is procedurally barred -- relief should be denied on that basis, as well.

CONCLUSION

For the reasons set out above, Hunter's conviction and sentence of death 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 has been furnished by U.S. Mail to Eric C. Pinkard, Assistant CCRC, 3801 Corporex Park Dr., Tampa, FL 33619, on this _____ day of June, 2001.

_____
Of Counsel

CERTIFICATE OF FONT

This brief is typed in Courier New 12 Point.

_____
COUNSEL FOR THE STATE