IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1885

JAMES EUGENE HUNTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On October 6, 1992 Mr. Hunter was charged by indictment 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 (R. 46-49). The case proceeded to jury trial on August 2, 1993 and concluded on August 6, 1993, with the jury returning verdicts of guilty on August 6, 1993 as charged to all eight counts (R. 291-301). After a penalty phase proceeding held on August 13, 1993, the jury recommended by a vote of nine to three that Mr. Hunter receive the death penalty for the first degree murder (R. 776). In its sentencing order, the trial court found two aggravators: prior violent felony conviction and capital felony committed during a robbery (R. 826-842). No statutory mitigating circumstances were found however, the court did find ten non-statutory mitigating factors: 1) fetal alcohol syndrome; 2) separation from siblings; 3) lack of mothering nurturing and bonding; 4) physical abuse; 5) emotional abuse and neglect; 6) unstable environment; 7) violent environment; 8) lack of positive role model; 9) death of adoptive mother; and 10) narcissistic personality disorder Id.

Mr. Hunter filed a direct appeal of his judgments and sentences raising fourteen claims. This court affirmed Mr. Hunter's judgment and death sentence on

June 1, 1995. Hunter v. State, 660 So.2d 244 (Fla. 1995). A petition for certiorari with the United States Supreme Court was denied. Hunter v. Florida, 516 U.S. 1128, 116 S.Ct. 946, 133 L.Ed. 2d 871 (1996).

Mr. Hunter filed his second amended 3.850 motion on November 10, 1999 (PC-R 1262). A hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) was held on May 3, 1999 (PC-R 1-47). On January 25, 2000 the trial court entered an order setting claims I, VI, XII, and XIII for an evidentiary hearing, and denying the remaining claims (PC-R 1817). On April 5, 2000, the evidentiary hearing was held (PC-R 95). On May 3, 2000, Mr. Hunter filed his written closing argument and memorandum of law (PC-R 1857). On My 15, 2000, the state filed its written closing argument (PC-R 1875). Thereafter, on July 25, 2000, the lower court denied all claims raised in Mr. Hunters 3.850 motion (PC-R 1883). Mr. Hunter filed a timely notice of appeal of the denial of his 3.850 motion on August 24, 2000 (PC-R 1952).

II. STATEMENT OF THE FACTS

An evidentiary hearing was held on April 5, 2000 on claims I, VI, XII and XIII of Mr. Hunters' 3.850 motion (PC-R 95-227). Claim I alleged that Mr. Hunter was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the guilt phase of his capital trial, the state's failure to

disclose critical exculpatory evidence which was never presented to the jury, and highly prejudicial prosecutorial misconduct, all in violation of Mr. Hunter's rights to due process and equal protection under the Fourteenth Amendment to the United States constitution, as well as his rights under the Fifth, Sixth and Eighth Amendments. The claim was asserted in sub parts alleging a) counsel was ineffective for failing to challenge the states case: b) counsel was ineffective for failing to move for an immediate Richardson hearing by the trial court due to the untimely and disguised disclosure by the state of photographs (PC-R 1176-1193).

Claim VI alleged that newly discovered evidence establishes that Mr. Hunter's capital sentencing conviction and sentence are constitutionally unreliable and in violation of the Sixth, Eighth, and Fourteenth Amendment (PC-R 1226, 1227).

Claim XII alleged that Mr. Hunter was denied a fair trial due to an actual conflict of interest by the Office of the Public Defender (PC-R 1245-1257).

Claim XIII alleged that counsel was ineffective for failing to file pre-trial motions challenging the identification of Mr. Hunter by witnesses Michael Howard and Taurus Cooley in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Corresponding provisions of the Florida Constitution (PC-R 1258-1260).

EVIDENTIARY HEARING FACTS

A. TESTIMONY OF GEORGE BURDEN

George Burden testified that he was the lead attorney on Mr. Hunters case and was employed by the Office of the Public Defender during the entirety of his representation (PC-R 120). He stated that one of the theories of defense was that Mr. Hunter was not the shooter (PC-R 121). He was aware of the various statements of different witnesses regarding the different clothing that each participant in the shooting was wearing (PC-R 121). He was aware that witnesses Taurus Cooley and Michael Howard had described the shooter as having on red clothing (PC-R 122). He also stated that all the witnesses stated that there was only one shooter (PC-R 122). He made a demand for discovery in the case (PC-R 122). He testified that he became aware of color photographs taken of the four suspects James Hunter, Eric Boyd, Charles Anderson and Bruce Pope taken by Officer Mclean on the evening of the shooting only during the testimony of the last state witness during the jury trial (PC-R 125). He stated that these photographs had not previously been disclosed until the trial of Mr. Hunter (PC-R 125). He stated that during a deposition of witness Donald Clark on July 8, 1993 in another case that he may have been given a copy of some "show up" folders with photographs but it was not clear to him that the photographs within the "show up"

folders were taken by Officer Mclean on the evening of the shooting and depicted the clothing each suspect was wearing on the evening of the shooting. (PC-R 127). Between the time of the deposition of Donald Clark and the trial of Mr. Hunter which began on August 2, 1993, Mr. Burden did not take any steps to ascertain when the photographs were taken and by whom (PC-R 128). He stated that nothing on the "show up" folders indicated the date that the pictures were taken (PC-R 129). He stated that one of the show up folders had a picture of Eric Boyd wearing a red shirt (PC-R 130). Mr. Burden was then asked as to the significance of a photograph depicting Eric Boyd wearing a red shirt on the evening of the shootings and he stated :

> Q. What would be the significance, in your mind, sir, of seeing a color photograph of Mr. Boyd depicting a red shirt, taken by Officer Mclean on the night of the shooting ?
>
> A. To me the relevance of that would be for the purposes of the jury, that they would see that the person wearing the clothing color described by all the witnesses as being the sole shooter was not Mr. Hunter, but was Mr. Boyd, because he is wearing the red shirt that they all, I believe, mostly agree was the color of the shirt the shooter was wearing.
>
> Q. All right sir.
>
> A. I would like to further state that they are cousins and it's not that they look dissimilar, either. They are related.

(PC-R 131).

Mr. Burden further stated that the "Show up" folder photograph of Mr. Hunter, taken by Officer Mclean on the evening of the shooting, showed him to be wearing a white shirt. (PC-R 132). He stated that none of the witnesses testified that the shooter wore a white shirt (PC-R 132). He said that he did not become aware that there was a color photograph of Eric Boyd showing that he wore a red shirt on the evening of the shooting until the last state witness was called and a motion for mistrial was held (PC-R 134). Even after Mr. Burden became aware of the existence of the photograph depicting Mr. Boyd wearing red clothing, he did not introduce it into evidence or use it in Mr. Hunters case in any fashion (PC-R 135).

Mr. Burden also testified that he recalled the testimony of state witness Taurus Cooley who was a listed victim as to the charges of robbery and attempted murder (PC-R 136). Mr. Cooley was an eyewitness in the case and was himself shot during the incident (PC-R 136). He claimed that he was not aware of any recent or pending charges against Mr. Cooley at the time he testified at Mr. Hunter's trial (PC-R 138). He claimed he was unaware that on March 24th, 1992 Mr. Cooley was arrested by the Daytona Beach Police Department on charges of fraudulent use of a credit card and possession of cocaine (PC-R 138). He claimed he was unaware that on April 22, 1992 the Office of the Public Defender of

Volusia County was appointed to represent Mr. Cooley on felony charges of credit card fraud and possession of cocaine (PC-R 139, 140). When asked whether he was aware of the Public Defenders Office representation of Mr. Cooley he stated:

> A. I don't recall. I honestly don't recall. I just want to make a statement that the facts that you disclosed that the office had withdrawn from him on the cases he had because of this case, that perhaps it was something that did come to my attention. That - - I don't know. It's now - - I'm just thinking how the dynamics worked at the time. I don't have a direct recollection, but, if that happened, someone would have told me. I just cant believe that wouldn't have been told to me.

(PC-R 140).

Mr. Burden claimed he was unaware that on May 11th of 1993 Mr. Cooley pled no contest to fraudulent use of credit card and possession of cocaine and received three years probation(PC-R 141). He claimed he was further unaware that in misdemeanor case 92-41177 Mr. Cooley was arrested and charged with the crime of battery and that the office of the Public Defender in Volusia County was appointed to represent him on that charge on September 9th, 1992 (PC-R 141). He claimed he was unaware that Mr. Cooley served 15 days in jail on that charge on July 19th, 1993 (PC-R 141). He claimed he was unaware that Mr. Cooley was arrested by the Daytona Beach Police Department for a possession of cannabis which occurred on January 28, 1991 (PC-R 141). He claimed was unaware that the

Office of the Public Defender for Volusia County represented Mr. Cooley on those charges and that Mr. Cooley received 15 days in jail for contempt of court on the case on May 15, 1993 (PC-R 142).

Counsel Burden further stated that he never cross examined Mr. Cooley concerning those recent and pending charges at Mr. Hunter's trial and that his decision not to do so was not strategic (PC-R 142). He also never questioned Mr. Cooley concerning his prior criminal history during his deposition which was taken on April 5, 1993 (PC-R 142). He further never told Mr. Hunter or the court that the Office of the Public Defender represented state witness/victim Taurus Cooley (PC-R 144). He had made a specific discovery demand upon the Office of the State Attorney requesting criminal background history of all state witnesses and was never provided any information concerning the criminal background of Taurus Cooley (PC-R 146). He claimed that had he been aware of Mr. Cooley's prior criminal history that he would have used it in cross examination (PC-R 165, 166,).

B. TESTIMONY OF ELIZABETH BLACKBURN-GARDNER

Ms. Blackburn testified that she was the lead prosecutor on Mr. Hunter's case (PC-R 170). She was responsible for responding to discovery requests (PC-R 170). She stated that she disclosed the show up photographs to Mr. Burden at the deposition of Donald Clark (PC-R 171). She had no explanation as to why the show

up photographs had not been shown to defense counsel before the July 8, 1993 deposition of Donald Clark (PC-R 174). She said the photographs taken by Mclean were shown to defense counsel in the form of "show up" folders (PC-R 174). She didn't recall ever informing Mr. Burden that the color photographs of James Hunter, Eric Boyd, Charles Anderson and Bruce Pope contained in the "show up" folders were taken by Mclean on the evening of the shooting (PC-R 175). The "show up" folders themselves did not have a date on them as to when the photographs were taken (PC-R 177).

Ms. Blackburn did not recall that witness/victim Taurus Cooley had any criminal history (PC-R 179). She did not recall that the Office of The Public Defender had been appointed to represent Mr. Cooley on his criminal charges (PC-R 180). She characterized Mr. Cooley as an important witness in the case (PC-R 181).

C. TESTIMONY OF CARLOS MCLEAN

Mr. Mclean was employed with the Deland Police Department (PC-R 202). On the evening of the shooting he responded to a BOLO detention which had been done by a Richard Graves of the Volusia County Sheriffs Office (PC-R 204). He transported the four defendants to the Deland Police Department (PC-R 204). He then took color photographs of all the suspects (PC-R 111). A day or two later

officer Flynt from the Daytona Beach Police Department came to the station and took the photographs (PC-R 205). The color photographs depicted the clothing that each was wearing (PC- R 208).

D. TESTIMONY OF JIMMIE FLYNT

Mr. Flynt is a sergeant with the Daytona Beach Police Department (PC-R 233). He participated in investigating the homicide in Mr. Hunter's case (PC-R 234). He went to the Deland Police Department to pick up color photographs from Mclean (PC-R 235). He then used the photographs to compile photo line ups (PC-R 236). He made four sets of the "show up" folders, each with one of the suspects along with five other pictures (PC-R 238). He never showed any of the "show up" folders to any witness in the case (PC-R 238). His reason for not showing them was that the surviving victims/witnesses **were unsure if they could identify anybody** (PC-R 239) (*emphasis added*). He brought the "show up" folders to the deposition of Donald Clark at the request of prosecutor Blackburn (PC-R 248). A copy of the photographs was then made and given to counsel for Mr. Hunter George Burden (PC-R- 248). He stated that prior to the deposition of Donald Clark he had never made the Office of the State Attorney aware of the existence of the photographs (PC-R 252).

E. TESTIMONY OF TAURUS COOLEY

Mr. Cooley stated that he recalled testifying in Mr. Hunter's case and that he was a victim in the case (PC-R. 263). He stated that the person that shot him had on red clothing(PC-R 264). It was dark the night of the shooting(PC-R 265).

He admitted that he had been charged in 1992 with credit card fraud and possession of cocaine, and he pled no contest to the charges on May 11th of 1993 and was placed on three years probation, and that he was represented by the Office of the Public Defender for Volusia County on the charges (PC-R 280,281). He also admitted to being arrested for the offense of battery in May of 1992, and being represented by the Volusia County Public Defenders Office (PC-R 281). He was sentenced to seventeen days in jail on that charge on July 19th, 1993 (PC-R 281). He also admitted to being charged with possession of marijuana on July 28, 1992 and being held in contempt of court and sentenced to 15 days in jail on May 15th, 1993 (PC-R 282). The Office of the Public Defender for Volusia County also represented him on that charge (PC-R 283).

F. TESTIMONY OF MELANIE ANDERSON

Melanie Anderson is employed with the Clerk of the Circuit Court as a project specialist (PC-R 107). She was the trial clerk on the Hunter case (PC-R 107). She produced four case files on Taurus Cooley (PC-R 108). They were

felony case 92-31321, and misdemeanor cases 92-41137, 92-41137, and 90-58257 (PC-R 108). Certified copies of the entire files were introduced into evidence at the evidentiary hearing (PC-R 109).

She also testified that the four "show up" folders previously introduced at the trial as state's exhibits BB, CC, DD, and EE were introduced as evidence at the motion for mistrial made by counsel Burden at the conclusion of the state's case at Mr. Hunter's trial (PC-R 114).[1]

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[1](***For purposes of clarification these are the four manilla folders which contain six photographs each in mug shot form which are included in the PC-R and ROA as*** **exhibits** ***each folder contains one photograph of the four suspects James Hunter, Charles Anderson, Eric Boyd, and Bruce Pope (along with photo's of five other individuals unrelated to the case*****): these are the color photographs taken by Mclean of the Deland Police Department on the evening of the shooting and were turned over to Sergeant Flynt of the Daytona Beach Police Department who ultimately compiled the "show up" folders. These are also the "show up" folders which were allegedly given to counsel Burden at the deposition of Donald Clarke. The basis form of each folder is a manilla folder with six cut out squares where each photograph is then taped or stapled. The idea is for the closed folder to be shown to a witness for purposes of identification*****).**

G. TESTIMONY OF JAMES HUNTER

Mr. Hunter testified that he informed counsel Burden about the existence of the color photographs that depicted the clothing of each suspect at the beginning of the case and asked him to use them in his defense (PC-R 319). He also stated that counsel Burden never showed him the "show up" folders at any time prior to the trial of his case (PC-R 321). He also stated that he was never informed that the Office of the Public Defender represented Taurus Cooley (PC-R 322).

H. THE LOWER COURT'S ORDER

The lower court denied all relief after the evidentiary hearing (PC-R 1883-1950). In addressing the ineffective assistance of counsel claim concerning the failure of counsel to use the color photographs taken by McLean on the night of the shooting which depicted the clothing worn by each suspect the court stated:

> Defendant claims that the state played a "shell game" with the lineup photo's taken by investigator McLean. He also claims that if postconviction counsel had not discovered these photographs, the issue of the photo's would be a mere illusion. The Court finds that this claim if more properly considered as a *Brady* violation claim rather than an ineffective assistance of counsel claim. It was shown at the evidentiary hearing that the photos' referred to in Defendant's motion are the mug show up folder's taken by Investigator McLean. The Florida Supreme Court held that these lineup photo's were disclosed to defense counsel at a deposition where such photographs were presented and counsel not only had the opportunity to examine the photos, but also received a

photocopy of the lineup photos. Hunter, 660 So. 2d at 250-51/ Therefore, the Defendant's claim of a *Brady* violation is barred by the law of the case doctrine as an issue that was raised and rejected on direct appeal. See, Fla. R. Crim. P. 3,850(c); Johnson v. State, 593 So.2d 206, 207 (Fla.), cert. denied 506 U.S. 839, 113 S. Ct. 119, 121 L.Ed. 2d 75 (!992) Kight v. Dugger, 574 So.2d 1066 (Fla. 1990); Medina v. State, 573 So.2d 293 (Fla. 1990).

Defendant claims that had counsel requested a *Richardson* hearing and a continuance to re-depose key State witnesses with these lineup photos, after disclosure of the photos at the July 8, 1993 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 areasonable 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 Taurus Cooley, one of the witnesses who identified him at trial as the shooter, had recanted that identification and would testify that 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 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 arrest minutes after the shooting, Defendant was wearing a white shirt. See, Transcripts, pp. 794-95; 800-02 (Pope's testimony), attached hereto as Appendix A. 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. See Transcripts, pp 1037-40; 1045-50; 1053; 1055-56' 1096-1100; 1102-03; 1105-06, attached hereto as Appendix B. Thus the use of these color photos would have been

> cumulative evidence not reasonably likely to produce a different outcome. See 90.403, Fla. Stat. (!991); See also Charles W. Ehrhardt, Florida Evidence 403.1 at 147 & fn.1 (2000).
>
> 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 arrest, the information that co-defendant Boyd was wearing a red shirt at the time of 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, see generally Appendix A, and also stated that one of the co-defendants, which included Boyd, was wearing a red shirt, See id. at 795. In addition, the Court finds that this argument is 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. See generally Appendix B. thus, this claim is legally insufficient as Defendant has not shown any actual prejudice.

(PC-R 1887-89).

As to the conflict of interest claim the court stated:

> Defendant claims that trial counsel, an attorney with 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, Taurus Cooley, was also represented by the Office of the Public Defender while he was a witness in the instant case. He further claims that counsel never questioned Cooley regarding his prior criminal history, and that challenging Cooley's credibility was of tantamount importance because Cooley

was the only person in position to see the face of the shooter due to the fact all other witnesses were uncertain or not in a position to see the shooting.

The Court finds that Defendant must satisfy the two-pronged 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. See Lee v. State, 690 So.2d 664, 669 (Fla. 1st DCA 1997) ("We point out, however, that this rule of automatic reversal is limited to a conflict issue preserved for review on direct appeal. ... When ineffective assistance of counsel is first asserted in a postconviction motion, the defendant must show that the conflict impaired the performance of the defense lawyer."). To prove a claim that an actual conflict of interest existed between a defendant and his counsel, the defendant must show his counsel actively represented conflicting interests and that the actual conflict of interest adversely affected his counsel's performance. See Cuyler v. Sulivan, 446 U.S. 335, 348, 350, 100 S.Ct. 1708, 1718, 1719, 64 L.Ed.2d 333 (!980); Buenoano v. Dugger, 559 So. 2d 1116, 1120 (Fla. 1990); Burnside v. State , 656 So.2d 241, 244 (Fla. 5th DCA 1995). In distinguishing between conflicts of interest from actual conflicts of interests, the Supreme Court held that an allegation of a possible conflict of interest does not result in the conclusion that a defendant received inadequate representation. Buenoano, 559 So.2d at 244. Although it is a fairly rigid rule of presumed prejudice, "it is not quite the per se rule of prejudice." Id.

The Court further finds that this alleged conflict did not adversely affect counsel's performance because trial counsel testified at the evidentiary hearing that he was unaware of any representation by the Office of the Public Defender of State witness Cooley. See McCrae v. State, 510 So.2d 874, 877 (Fla. 1987). 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". Id. (citing Porter v. State , 478 So.2d 33, 35 (Fla. 1985); Foster v. State , 387 So.2d 344, 345 (Fla. 1980). Moreover, an "actual" conflict of interest exists if counsel's course of action os affected by the conflicting representation, i.e., where there is a divided loyalty with the result that a course of action beneficial to one client would be damaging to the interests of the other client. Id. at877 fn. 1 (citing Porter v. Wainwright , 805 F.2d 930 (11th Cir. 1986). An actual conflict forces counsel to choose between alternative courses of action. Id. (citing 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 95th Cir. 1981), cert denied, 456 U.S. 1011. 102 S/Ct. 2307, 73 L.Ed.2d 1308 (1982). 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 benefitted the defense. Id. (citing 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 670 (1983). Only when such an actual conflict is shown to have affected the defense is there shown prejudicial denial of the right to counsel. Id. (citing Cuyler, 466 U.S. at 348, 104 S.Ct. At 1718-19). 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 have been effected by something he was not aware of. Id.

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. See Transcripts, pp. 717-23; 739-40 9 Howard's testimony), attached hereto as Appendix C; Transcripts, pp. 752-54 & 760-62 (Troutman's testimony); Transcripts, pp. 778 & 784-87 (Pope's testimony), attached hereto as Appendix E.

(PC-R 1889-91).

SUMMARY OF THE ARGUMENTS

(1) . The lower court erred in holding that the Office of the Public Defender did not have an actual conflict of interest in representing Mr. Hunter.

(2). The lower court erred in denying Mr. Hunter's claim that trial counsel was ineffective for failing to challenge the state's case through the use of photographic evidence.

(3). The lower court erred in denying Mr. Hunter's claim that the prosecutors comments and argument rendered Mr. Hunter's conviction and sentence fundamentally unfair and unreliable in violation of the sixth, eighth, and fourteenth amendments of the United States Constitution and corresponding provisions of the Florida Constitution.

(4). The lower court erred in denying Mr. Hunter's claim that Mr. Hunter's sentence of death under the fourth, fifth, sixth, eighth, and fourteenth amendments to the United States Constitution is invalid because the jury instruction in both the guilt/innocence and penalty phase of the trial were constitutionally invalid.

(4)(a). The lower court erred in denying Mr. Hunter's claim that the jury instructions shifted the burden to Mr. Hunter to prove death was inappropriate and in the process employed a presumption of death in violation of constitutional

rights.

(4) (b). The lower court erred in denying the claim that the trial court's instructions to the jury unconstitutionally diluted its sense of responsibility in determining the proper sentence.

(4) (c). The lower court erred in denying Mr. Hunter's claim that the trial court's instruction on the "cold calculating, premeditated" aggravating factor created harmful error when viewed as to its cumulative effect.

(5). Florida's capital sentencing statute is unconstitutional on its face and as applied to prevent the arbitrary and capricious imposition of the death penalty, and for violating the constitutional guarantee prohibiting cruel and unusual punishment, in violation of the fifth, sixth, eighth, and fourteenth amendments.

(6). The lower court erred in denying Mr. Hunter's claim that the trial court failed to appoint adequate mental health experts and conduct competency hearings.

(7). The lower court erred in denying the claim that the court erred by finding that death was the appropriate penalty.

(8). The lower court erred in denying the claim that the trial court failed to declare a mistrial when a state expert improperly gave his opinion on Mr. Hunter's credibility.

(9). The lower court erred in denying Mr. Hunter's claim that Mr. Hunter's sentence rests upon an unconstitutionally automatic aggravating circumstance, in violation of Stringer v. Black , Maynard v. Cartwright, Hitchcock v. Dugger, and the Sixth, Eighth, and Fourteenth Amendments.

ARGUMENT I

THE TRIAL COURT ERRED IN HOLDING THAT THE OFFICE OF THE PUBLIC DEFENDER DID NOT HAVE AN ACTUAL CONFLICT OF INTEREST IN REPRESENTING MR. HUNTER.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State , 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE ACTUAL CONFLICT OF INTEREST

At the evidentiary hearing in this case Mr. Hunter produced substantial competent evidence that lead trial counsel George Burden represented Mr. Hunter while under an actual conflict of interest. Specifically, the evidence established that counsel Burden was employed by the Office of the Public Defender in and for Volusia County during the entirety of his representation of Mr. Hunter (PC-R 120). The evidence further established that state witness and victim Taurus Cooley was also represented by the Office of the Public Defender in and for Volusia County in numerous cases including 92-31321CFAES, 92-1137MMAES, 92-41137MMAES, and 90-58257MMAES (PC-R 108). Volusia County felony clerk Melanie Anderson testified at the evidentiary hearing and produced the clerk's files concerning these cases against Mr. Cooley (PC-R 109). All were introduced into

evidence at the hearing. A review of those case files involving criminal charges against state witness/victim Taurus Cooley reveals the following important information concerning the nature of the charges as well as the periods of representation by the Office of the Public Defender in and for Volusia County:

(a) **92 - 31321 CFAES - Credit Card Fraud & Possession of Cocaine.**

On March 24, 1992 defendant Taurus Cooley was arrested by the Daytona Beach Police Department on charges of Fraudulent use of a credit card & possession of cocaine.

On April 22, 1992 the Office of the Public Defender was appointed to represent Mr. Cooley on the felony charges.

On April 23, 1992, assistant Public Defender Terry Rawlinson served a notice of intent to participate in discovery on the case.

On May 7, 1992, the Office of the State Attorney filed an answer to the discover demand.

The case was scheduled for a pre-trial conference on June 4, 1992 and trial on July 6, 1992.

On June 9, 1992 Assistant Public Defender Terry M. Rawlinson filed a Motion to Continue the trial citing "additional time was needed to consult with the client and investigate the case."

The case was then re-scheduled for pre-trial of August 10, 1992.

On August 26, 1992 Assistant Public defender Terry M. Rawlinson filed a Notice of Taking Depositions in the case.

The case was then rescheduled for trial on September 14, 1992.

On September 9, 1992 Assistant Public Defender Terry Rawlinson filed another

Motion for Continuance.

The case was rescheduled for pre-trial conference on October 29, 1992 with trial set for December 14, 1992.

On November 4, 1992 special Public Defender David Beck was appointed to represent Mr. Cooley due to a **conflict of interest by the Public Defenders Office.**

On May 11, 1993 Taurus Cooley Pled No Contest to Fraudulent use of a credit card and Possession of Cocaine. He received 3 years probation.

(b) **92 - 41177 MMAES Battery**

Mr. Cooley was arrested and charged with the offense of battery on May 20, 1992.

On September 9, 1992 the Public Defenders Office was appointed to represent Mr. Cooley.

On September 15, 1992 the Public Defenders Office filed a notice to intent to participate in discovery.

The case was initially scheduled for trial on October 19, 1992.

It was then re-scheduled for trial on November 16, 1992.

Mr. Cooley failed to appear at pre-trial on November 11, 1992.

The court set aside the capias on May 29, 1993 and the defendant posted bond.

The trial was rescheduled for July 19, 1993 with a pre-trial conference on July 6, 1993.

Mr. Cooley then entered a plea on July 19, 1993 and was sentenced to 17 days in jail and 6 months probation. A provision of the sentence was screening and counseling for domestic abuse.

On January 13, 1994 a Violation Of Probation was filed. Mr. Cooley admitted

violating his probation on December 1, 1994 and was sentenced to 24 days in jail.

(c) **91 - 31373 MMAES Possession of Cannabis**

Mr. Taurus Cooley was arrested on January 28, 1991 for the offense of possession of cannabis.

On February 28, 1991 the Office of the Public Defender was appointed to represent Mr. Cooley on the criminal charge.

On March 11, 1991 the Office of the Public Defender filed a notice of intent to participate in discovery in the case.

On May 28, 1991 Mr. Cooley was accepted into the pre-trial intervention program and the case was closed.

On March 3, 1992 the State revoked the Pre-trial Intervention because Mr. Cooley did not comply with the conditions.

The case was rescheduled for trial on May 11, 1992.

On April 28, 1992 the court issued a capias for failure to appear at arrangement.

The capias was canceled on May 5, 1992 and the case was scheduled for pre-trial conference on June 30, 1992 with a trial on July 7, 1992.

On July 28, 1992 Mr. Cooley entered a plea of no-contest and was ordered to pay a fine.

On May 15, 1993 Mr. Cooley was held in contempt of court and sentenced to 15 days in jail.

(**NOTE**: all of the above information is contained in the court files of Taurus Cooley introduced as exhibits at the evidentiary hearing).

Under Florida Law the above facts represent a conflict of interest by counsel

Burden as he represented Mr. Hunter and the Office of the Public Defender in and

for Volusia County represented state witness/victim Taurus Cooley. Under Florida law this represents an actual conflict of interest. In Guzman v. State, 644 So.2d 996 (Fla. 1994), the Florida Supreme Court addressed the issue of a conflict of interest arising due to the Office of the Public Defender's previous representation of a key state witness. A cellmate of the defendant was going to be called as a witness for the state as to statements made by the defendant. Id. at 997. The public defender moved to withdraw because the public defenders office had previously represented the witness. Id.

In finding an irreconcilable conflict the Court stated :

> "**We can think of few instances where a conflict of interest is more prejudicial than when one client is called to testify against another**. As seen by the facts set forth earlier in this opinion, Boyne was a key witness against Guzman. The state contends that Boyne's waiver of the attorney/client privilege was sufficient to cure any prejudice that might have been caused by the public defender's representation of both Boyne and Guzman. While such a waiver might have cured any conflict the public defender had insofar as the representation of Boyne was concerned, that waiver does not waive Guzman's right to conflict free counsel."Id at 998, (*emphasis added*).

In Valle v. State, 25 Fla.L.W. D260 (Fla. 4th DCA 2000), the defendant was charged with vehicular homicide. Two passengers in the defendant's car were injured and were to be called as witnesses for the state. Id at 261. They were both previously represented by the public defender's office. Id. One of them was

represented from beginning to end on two felonies including subsequent charges of violation of community control. Id. The latest representation was on a 1998 case which was closed "recently". Id. The trial court held a hearing and determined that the assistant public defender assigned to the defendant's case had not personally previously represented the witnesses or obtained any confidential information. Id. The trial court attempted to cure the conflict by ordering the public defender assigned to the defendant's case not to look at the case files of the two witnesses. Id. The Fourth District Court of Appeals reversed the case, finding an irreconcilable conflict of interest and stated "the fact that the representation of the adverse client had been concluded does not necessarily eliminate the conflict'. Id *citing* Hope v. State, *Supra*. The court further held that the trial court could not cure the conflict by ordering the assistant public defender assigned to the case not to look at the files of the two state witnesses. Id.

In Hope v. State, 654 So.2d 639 (Fla. 4th DCA 1995), the Office of the Public Defender had previously represented the alleged victim in an unrelated case. Id at 640. The Court found a conflict because the defendant had an interest in discrediting the testimony of the alleged victim and the alleged victim had an interest in seeking retribution against the defendant. Id.

THE LOWER COURT'S ERRORS

In the case at bar the trial court based it's denial of the conflict of interest claim on the basis that a) under Lee v. State, 690 So.2d 664 (Fla. 1st DCA 1997) the rule of automatic reversal does not apply where the conflict issue is raised for the first time in postconviction proceedings and, therefore, Mr. Hunter is required to show that counsel actively represented conflicting interests and that the actual conflict of interest adversely affected his counsel's performance (PC-R 1889) b) the alleged conflict did not adversely affect counsel's performance because trial counsel was unaware of any representation by the Office of the Public Defender and, therefore, it could not have adversely affected his performance (PC-R 1889) c) the alleged conflict did not impair counsel's performance because other witnesses also identified Mr. Hunter as the shooter(PC-R 1889).

The lower court erred in its denial of the conflict of interest claims by making findings of fact which were not supported by substantial competent evidence, by applying the wrong legal standard, and in making an improper conclusion of law that no conflict of interest existed.

In the first place, the finding by the lower court that counsel Burden was completely unaware of the representation of Mr. Cooley by the Office of the Public Defender is not supported by substantial competent evidence. Mr. Burden specifically stated at the evidentiary hearing in response to a question as to whether

he had knowledge of his offices prior representation of Mr. Cooley that "I don't recall. I honestly don't recall. I just want to make a statement that the facts that you disclosed that the office had withdrawn from him on the cases he had because of this case, that **perhaps it was something that came to my attention**. That - - I don't know. It's now - - I'm just thinking how the dynamics worked at the time. I don't have a direct recollection, but, **if that happened, someone would have told me. I just can't believe that wouldn't have been told to me."** (PC-R 140) (*emphasis added*).

Mr. Burden is clearly referring to the fact that the Office of the Public Defender withdrew from representing Mr. Cooley in the felony case due to this very conflict of interest i.e. the representation of Cooley while the office represented Mr. Hunter. As Mr. Burden stated, it is difficult to imagine that the Office of the Public Defender would withdraw from representing Mr. Cooley because of the Hunter case and that the lead attorney representing Mr. Hunter on a capital case would not be informed of that fact. This testimony is not referred to in the lower courts order and makes that court's finding that Mr. Burden was unaware of the prior representation of Mr. Cooley by the Office of the Public Defender unsupported by substantial competent evidence.

The lower courts reliance on Macrae v. State, 510 So.2d 874 (Fla. 1987) for

the proposition that ignorance of the prior representation of Mr. Cooley by counsel Burden means there is no conflict of interest is misplaced. Although Macrae does involve a case where the court found no conflict existed because the particular Public Defender involved did not know of the representation of a state witness by his office, it is clearly distinguishable from the case at bar. In Macrae the state witness is referred to as "one of the state witnesses." Id. at 877 whereas in the present case the prior representation is of an essential state witness and a victim in the case Also, there is no allegation in Macrae , as there is in this case, that counsel had the opportunity to question the witness at deposition and failed to ask any questions concerning criminal history. Further, in Macrae there was no allegation, as has been established in this case, that the Office of the State Attorney failed to respond to discovery demands concerning the criminal history of witness/victim Taurus Cooley (PC-R 146). In Macrae, there was also no evidence that the Office of the Public Defender actually withdrew, as happened in the case at bar, from representation of the state witness due to a conflict of interest with the pending charges against Macrae. This withdrawal is an important distinction because in Bouie v. State, 559 So.2d 1113 (Fla. 1990), this Court stated "the Public Defender's Office is the functional Equivalent of a Law Firm. Differing attorneys in the same Public Defender's Office cannot represent defendants with conflicting

interests." Id . at 1115. Since members of the Public Defender's Office are the functional equivalent of a law office, lead capital counsel Burden cannot claim ignorance of the actions of another member of the law firm, Mr. Rawlinson, in withdrawing from Taurus Cooley's case. The lower court failed to realize that knowledge of this action of withdrawal from Mr. Cooley's case by the Office of the Public Defender is presumed and imputed to Mr. Burden.

The lower court further erred in finding that the rule of automatic reversal does not apply in this case under the Lee case because Mr. Hunter first brought up his conflict claim in postconviction. In Lee v. State, 690 So.2d 664 (Fla. 1st DCA 1997), the defendant was charged with first degree murder. Two months prior to trial the public defender assigned to the case disclosed to the trial court that the Office of the Public Defender had previously represented a key state witness and that he had personally represented the witness 10 years earlier Id at 665. The Court held that defense counsel had an actual conflict of interest Id at 667. That court went on to comment upon the appropriate legal standard to apply in conflict of interest claims first brought in post - conviction proceedings by stating:

> When ineffective assistance of counsel is first asserted in a post - conviction motion, the defendant must show the conflict "impaired" the performance of counsel. Even then it is not necessary to show that counsels performance related to the conflict affected the outcome of the trial. Prejudice is presumed.

Id. at 667.

In applying the standards addressed by the court in Lee, clearly Mr. Hunter does not have to meet the second prong of the Strickland standard (that there is a reasonable probability that the outcome of the trial would have been different). Rather a much lower threshold of mere impairment of performance is to be applied. Irrespective of this application, there are several circumstances in the present case which dictate that Mr. Hunter should not be burdened with showing even an impairment of counsel's performance.

Most importantly, the Lee case (and others following the reasoning of Cuyler v. Sullivan, 446 U.S. 335 (1980), all have fact patterns whereby the defendant is notified about the conflict at the trial level by a motion to withdraw by the Public Defender or there is an actual waiver of the conflict by the defendant. In the case at hand no one from the Office of the Public Defender ever notified Mr. Hunter of the conflict. (PC-R 144). Therefore, he had no opportunity to raise this issue at the trial level or on direct appeal. Mr. Hunter should not be prejudiced by failing to raise an issue in his direct appeal where he had no notice. The lower court failed to recognize that fact.

Furthermore, the very conflicted public defender (Mr. George Burden) was the attorney who handled Mr. Hunter's direct appeal. Mr. Hunter cannot be

blamed or prejudiced for the failure of his appellate counsel to raise the issue of his own conflict to the Florida Supreme Court. For these reasons, Mr. Hunter asserts that the rule of automatic reversal should apply in his case without any showing of deficiency of counsel, as this is the first opportunity Mr. Hunter has had to address this issue to any court. The lower court failed to consider these facts and law.

DEFICIENCY IN PERFORMANCE OF COUNSEL

Should this court disagree with Mr. Hunter's assertion that the rule of automatic reversal should apply to this case, then there is ample evidence within the record of the evidentiary hearing and record on appeal, contrary to the finding by the lower court that there was no deficiency in performance, to establish a deficiency of counsel under the Cuyler standard. Again Mr. Hunter reiterates to the court that it is not a requirement that the deficiency in performance rise to the level of a reasonable probability that the outcome of the trial would have been different (i.e. an acquittal).

The primary deficiency of counsel relating to this conflict was the failure of counsel to question Mr. Taurus Cooley about his recent and pending criminal charges when he testified before the jury. Mr. Burden testified at the evidentiary hearing that there was no tactical reason for failing to do so (PC-R 142). The jury was never given an opportunity to assess the credibility of Mr. Cooley in light of

that information. Counsel had legal authority to question Mr. Cooley about those recent and pending charges under Blair v. State, 371 So.2d 234 (Fla. 2nd 1979); Crespo v. State, 344 So.2d 601 (Fla. 3rd DCA 1993); Douglas v. State, 627 So.2d 1190 (Fla. 1st DCA 1993); Gary v. State, 432 So.2d 796 (Fla. 4th DCA 1983); Breedlove v. State, 580 So.2d 605, 608 (Fla. 1991). This area of questioning was especially important for assessing Mr. Cooley's credibility since these charges were filed and prosecuted by the same law enforcement agency that investigated Mr. Hunter's case. Those facts lend credence to the defense theory that Mr. Cooley had reason to give testimony to appease the state in this case.

The lower court's finding that the failure to cross examine Mr. Cooley is not a deficiency of counsel is not factually or legally correct. The lower court stated there was no impairment of counsel's performance because other witnesses also identified Mr. Hunter as the shooter and the possessor of the .25 automatic chrome gun during the incident (PC-R 1891).

In making the above finding of no impairment of performance of counsel, the lower court was applying the wrong legal standard. In conflict of interest cases, the deficiency of counsel does not have to rise to a Strickland level of a reasonable probability that the outcome of the case would have been different. Rather, as stated in Lee "it is not necessary to show that counsels deficient

performance resulting from the conflict affected the outcome of the trial. As the Court held in Sullivan, **prejudice is presumed**." Lee, 690 So.2d at 669 (*emphasis added*). Therefore, the lower court erred in denying the conflict existed due to other eye-witness testimony in the case. Furthermore, even the conclusion by the lower court that other witnesses could identify Hunter is not supported by substantial competent evidence. A close examination of the testimony of the witnesses relied upon by the lower court reveals the following:

As to Mr. Howard:

> Q. Mr. Howard isn't it correct you didn't see the face of the person who had the gun on you? Is that correct?
>
> A. That's true.
>
> Q. But because of the way the hats were worn by everybody, you didn't see a good look at anybody's face, complete face?
>
> A. Not complete but from here down.

(PC-R 1933, 1934).

As to Mr. Troutman:

> A. I looked over my shoulder watching Cooley take off his shirt. And he took off his shirt, there was a gun fire.
>
> Q. Did you see who fired the gun?

A. No.

Q. And so, because you were down on your stomach, I guess with your face looking down, you didn't see who actually did the shooting or get shot?

A. No

(PC-R 1939).

The above testimony demonstrates, contrary to the loser court's finding, that there was considerable doubt as to the identity of the shooter. This is consistent with the testimony of Sergeant Flynt who stated at the evidentiary hearing that he did not show the "show up" folders to any of the surviving victims because the **were unsure if they could identify anybody** (PC-R 239). This illustrates the critical importance of the testimony of Taurus Cooley and magnifies the importance of the failure of counsel Burden to cross examine Taurus Cooley about his recent and pending criminal charges. Since Mr. Burden could not ethically do so without violating Mr. Cooley's attorney/client privilege there is an actual conflict of interest mandating a new trial. The trial court erred in denying the conflict of interest claim.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. HUNTERS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE STATES CASE THROUGH THE USE OF PHOTOGRAPHIC EVIDENCE.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State , 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

INEFFECTIVE ASSISTANCE OF COUNSEL

At the evidentiary hearing, Mr. Hunter put forth evidence which established that trial counsel George Burden was ineffective for failing to challenge the state's case through the use of photographic evidence. Specifically, Mr. Burden was proven ineffective for failing to utilize on Mr. Hunter's behalf color photographs taken by Officer Mclean on the evening of the shooting. These photographs depicted the clothing worn on the evening of the homicide/robberies by then suspects and later co-defendants James Hunter, Eric Boyd, Charles Anderson and Bruce Pope (PC-R 127). These color photographs show Mr. Hunter wearing white clothing and co-defendant Boyd wearing red clothing(PC-R 130). This is crucial to Mr. Hunter's defense because all the eye-witnesses to the shooting stated to law

enforcement, at deposition, and at trial that the shooter was wearing red clothing.

the following demonstrates this fact:

DEPOSITION TESTIMONY OF TAURUS COOLEY (Dated 4-5-93).

> Q. Mr. Cooley could you describe or have you ever given a description of the person you say fired the shots?
>
> A. Yes
>
> Q. And what description did you give?
>
> A. I remember red, like a **red baseball cap or either red T-shirt**, either/or, or maybe both.
>
> Q. Did you get a good look at his face?
>
> A. He had a cap pulled down, kind of pulled down low to his face.

(PC-R1298).

DEPOSITION TESTIMONY OF MICHAEL HOWARD (Dated march 3, 1993)

> Q. Do you recall the color of the shirt that the man who shot Cooley had on? (Cross examination by Assistant State Attorney Elizabeth Blackburn).
>
> A. Yeah. He had like an Orange shirt, **orange/red shirt** with some blue jeans shorts.

(PC-R 1360).

TRIAL TESTIMONY OF MICHAEL HOWARD

Q. Did you happen to give a description to the police of the person who had the gun to Mr. Cooley?

A. Yes

Q. The man who had the silver gun?

A. Chrome yes.

Q. Was that description of blue jeans, pants, **red shirt and red cap?**

A. Yes

Q. Are you sure of that?

A. Uh-huh, yes I am.

Q. Your sure that the person who held that silver gun to Mr. Cooley had a **red hat, red shirt**, and blue jean pants?

A. Yes

Q. Okay, now the gentleman that approached you, did they have on baseball caps?

A. Yes

Q. Were they wearing them down?

A. Down about right here

Q. So it was tough to see their faces wasn't it?

A. Yes

Q. But because of the way the hats were worn by everybody, you didn't see a good look at anybodies

complete face?

A. Not complete but from here down.

(PC-R 1933, 1934).

TRIAL TESTIMONY OF TAURUS COOLEY

Q. That particular night, Mr. Cooley, did you give a description of Mr. Hunter?

A. No. not that night.

Q. Isn't it true that Mr. Hunter was wearing a red shirt?

A. **No**, I said I remember red, **either a red shirt or red baseball cap.**

Q. Both or one of them?

A. Either or both.

(PC-R 1370)

At the evidentiary hearing Mr. Cooley reiterated his testimony that the shooter had on red clothing (PC-R264).

The testimony at the evidentiary hearing further established that the color photographs taken by Mclean on the evening of the homicide were given within days to Jimmy Flynt of the Daytona Beach Police Department (PC-R 205). Flynt then placed each of the photographs in a "show up" folder along with five other photographs of persons unrelated to the case (PC-R 236). The idea of making the "show up" folders was so they could be shown to the surviving victims/witnesses

for purposes of identification. Flynt never showed the "show up" folders to any of the surviving victims because they had informed him that they were **uncertain that they could make a positive identification.** (PC-R 239)(*emphasis added*).

Rather than turning these photographs over to the Office of the State Attorney so they could be produced in a timely manner to the defense through discovery, Flynt kept the photographs in his possession for approximately eight months until, on July 8, 1993, he was directed by ASA Elizabeth Blackburn to bring them to the deposition of Donald Clark (PC-R 248). Donald Clark was a witness in a different case involving Mr. Hunter and his deposition was being taken in that case, not the homicide/robbery cases at bar (PC-R 127). This deposition was taken about one month before Mr. Hunter's trial began. There is a conflict in the evidence as to what was actually "disclosed" to Mr. Burden at the deposition of Donald Clark. According to Flynt and ASA Blackburn counsel Burden was shown all the "show up" folders and was given an opportunity to examine them(PC-R 171, 248). Blackburn also stated that it was not communicated to counsel Burden that the photographs of the four co-defendants Hunter, Boyd, Anderson and Pope which were contained within the "show up" folders were taken by Mclean on the night of the homicide/robberies (PC-R 175). Although Mr. Hunter, and the undersigned CCRC counsel, strongly believe that the

actions of the State do not amount to proper "disclosure" under the discovery rules since the deposition of Donald Clark was not even on the homicide/robbery case at bar, and date the photographs were taken was not disclosed, and they were effectively hidden within the "show up" folders, Mr. Hunter acknowledges that this Court ruled in its opinion from the direct appeal that disclosure of the photographs occurred at the deposition of Donald Clark. Hunter , 660 So.2d at 250-51. Therefore, this claim presumes that the photographs were disclosed to counsel Burden at the deposition of Donald Clark and the allegation of ineffectiveness concerns the failure of counsel Burden to utilize the photographs to challenge the state's case.

To sustain a claim of ineffective assistance of counsel, the defendant must prove both prongs of the test pronounced by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). One prong of the Strickland test is for the defendant to demonstrate that his counsel's performance was deficient. This first prong involves showing that defense counsel's errors were so serious that counsel did not function as "counsel" as guaranteed by the Sixth Amendment to the United States Constitution. In assessing the performance standard the court must measure the reasonableness of counsel's performance from viewing all the circumstances in light of the prevailing professional norms. The other prong of the

Strickland test requires the defendant to demonstrate that his counsel's deficient performance prejudiced the defense. In assessing prejudice the court must determine "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694. The court must evaluate this second prong in light of the totality of the evidence at trial since, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. At 696.

THE DEFICIENCY OF COUNSEL AND PREJUDICE PRONGS:

Counsel Burden was ineffective for failing to use the photographs taken by Mclean in two important ways: 1) failure to file pre-trial motions challenging the identity of Mr. Hunter and 2) failing to introduce the photographs in Mr. Hunter's defense at trial.

1) **Failing to file pre-trial motions attacking the pre-trial identification of Mr. Hunter.**

Florida law affords a defendant a right to file pre-trial motions challenging the identification of eye-witnesses. Florida courts have established guidelines for evaluation of the adequacy of identification. In Baxter v. State, 355 So.2d 1234 (Fla. 1978), the Second District Court of Appeals stated the guidelines as (1) the

ability of the witness to perceive and preserve a mental image of the offender; (2) the method of identification employed; (3) accompanying conversations or actions; (4) the positiveness and manner of the witnesses identification; (5) whether the witness expressed any doubts about the selection or failed to identify the accused. Id. at 1237.

Applying the above stated law to the facts at bar it is readily apparent that counsel should have filed a pre-trial motion attacking the identification of Mr. Hunter. Since this Court ruled that disclosure of the photographs taken by Mclean occurred at the July 8, 1993 deposition of Donald Clark, it was incumbent upon defense counsel to ascertain when the photographs were taken and what was done with them. Had counsel undertaken to discover these facts he would have discovered that Flynt of the Daytona Beach Police Department had gathered the photographs from Officer Mclean and placed them inside "show up" folders. Most importantly, had counsel questioned Flynt about the "show up" folders he would have uncovered that Flynt had declined to even show them to the surviving witnesses and victims because **they had expressed doubts as to whether they could make a positive identification** (PC-R 239) (the surviving victims and witnesses would be Taurus Cooley, Michael Howard, and Theodore Troutman). Counsel was deficient in failing to file pre-trial motions challenging the

identification of Mr. Hunter as the shooter where this crucial information from Flynt about the inability of the witnesses to make a positive identification could be communicated to the court. Prejudice is established since the loser court would have been forced to grant a pre-trial motion challenging the identification since the lead law enforcement officer had obtained information from the witnesses that no identification could be made.

The lower court denied this claim for the reason that there "is not a reasonable probability that the use of these photographs would have shown inconsistencies between photo-identification and the in-court identification or would have changed the outcome of the trial. Thus the claim is also legally insufficient" (PC R 1888).

The lower court erred in evaluating this claim by focusing exclusively on the photographs themselves. The prejudice associated with counsel Burden's failure to use the photographs must be viewed in context of the available information from Flynt that he declined to use the prepared "show up" folders because none of the surviving witnesses/victims could make a positive identification. That crucial information together with the photographs establishes the prejudice prong and the lower court erred in denying this claim.

FAILING TO USE THE PHOTOGRAPHS AT MR. HUNTER'S TRIAL

Once the color photographs taken by Mclean on the evening of the homicide were "disclosed" to counsel Burden, he had a obligation to use the photographs to Mr. Hunters' benefit at the trail of this case. This would include the photographs themselves and also the facts and circumstances of how they came into existence and what was done with them by Officer Flynt. Counsel Burden failed to make any use whatsoever of either the color photographs or the facts and circumstances surrounding them. As will be demonstrated below the failure to do so was a deficiency of counsel that prejudiced Mr. Hunter and meets the elements of a ineffective assistance of counsel claim under the Strickland standard.

It is an established fact of the case that the shooter was wearing red clothing. The lower court made a specific finding of fact in it's order that "at trial, the uncontroverted evidence was that the shooter was wearing a red shirt and while, at the time of arrest minutes after the shooting, Defendant was wearing a white shirt" (PC-R 1887). This finding of fact is supported by substantial competent evidence and is entitled to deference by this Court.

Since it is a established fact of the case that the shooter was wearing red clothing, the photographs taken on the evening of the shooting which depict co-defendant Boyd wearing red clothing and Mr. Hunter wearing white clothing were of tantamount importance to Mr. Hunter's defense. Counsel Burden had the

opportunity to show the jury that Mr. Boyd and not Mr. Hunter was the actual shooter, or at a minimum **create reasonable doubt as to the identity of the shooter.** Furthermore, counsel Burden had the opportunity to present to the jury the facts and circumstances surrounding the taking of the photographs and what was done with them by Officer Flynt. This would have included the critical testimony that the photographs were taken on the evening of the homicide by Mclean, were given to Flynt who made up the "show up" folders, and then were never used by Flynt **because the surviving witnesses/victims informed Flynt that they could not make a positive identification** (PC-R 239). It is a deficiency of counsel for Mr. Burden to fail to utilize the photographs which depict Mr. Boyd as wearing the clothing of the shooter along with the information that none of the witnesses/victims, according to the lead law enforcement officer in the case, could identify anyone. Reasonable doubt necessarily arises from this evidence. It is clear from the record that counsel Burden had no understanding prior to trial as to the significance of the photographic evidence or the information from Flynt concerning the expressed doubt from the witnesses. He testified at the evidentiary hearing that he didn't know prior to trial that Flynt had even taken color photographs which depicted clothing (PC-R 238).

The lower court denied this claim stating:

> "Further, at trial the uncontroverted evidence was that the shooter was wearing a red shirt and while, at the time of arrest minutes after the shooting, Defendant was wearing a white shirt. See Transcripts, pp. 794-95; 800-02(Popes testimony) attached hereto as Appendix A. 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. See Transcripts, pp. 1037-40; 1045-50; 1053; 1355-56; 1096; 1099-1100; 1102-03; 1105-06, attached hereto as Appendix B. Thus, the use of these color photos would have been cumulative evidence not reasonably likely to produce a different outcome"

(PC-R 1887).

The lower court erred in finding that use of the photographs would have been cumulative evidence not reasonably likely to produce a different outcome. While it is true that counsel Burden did argue that the field interview cards reflected Mr. Hunter as wearing a white shirt, that is not a substitute fora color photograph taken from Mclean which show co-defendant Boyd wearing a red shirt on the very evening of the homicide. Although the jury heard testimony that the shooter was wearing red clothing, there was no testimony that a color photograph existed which showed Mr. Boyd wearing clothing that matched that of the shooter. Additionally, the lower court improperly confined it's findings to the photographs only. This is error because the prejudice to Mr. Hunter is not only the fact that the jury never heard of the existence of the color photograph that showed Mr. Boyd

wearing the clothing of the shooter, but also that Officer Flynt had created "show up" photos which **he declined to show to the surviving witnesses/victims because they had related to him that they could not identify anyone.** Mr. Hunter asserts that this critical information from the lead law enforcement officer in the case, coupled with the color photographic evidence depicting Mr. Boyd as wearing the clothing of the shooter, establishes the prejudice prong of Strickland. The lower court erred in denying this claim.

PENALTY PHASE PREJUDICE

The unreasonable performance of counsel in failing to utilize the photographs taken by Officer McClean also prejudiced Mr. Hunter in the penalty phase. The standard to be applied when dealing with ineffectiveness claims in the penalty phase is whether the defendant can establish that but for counsels's errors he would have probably received a life sentence. (See Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995); Rose v. State, 675 So.2d 567 (Fla. 1996).

This Court has recently reaffirmed the long standing law in Florida that equally culpable co-defendants should receive equal punishment. In Ray v. State, 25 Fla. L. Weekly S96 (Fla. 2000), the Court found a death sentence disproportionate based upon a life sentence given to an equally culpable co-defendant. In that case, the defendant and his cousin, Hall agreed to rob a liquor

store. They both went to the store, armed with loaded weapons, disguised in masks, with dark clothing. Id. at S97. After committing the robbery, while the two were in the process of escaping, a police officer was shot and killed. Id. The defendant tested positive for gunshot residue. Id. The co-defendant Hall tested negative. Id. The Court stated that because there was a "possibility" that Hall was the shooter, and he received a life sentence, the death sentence given to Ray was disproportionate. Id. At S99. (emphasis added) The Court stated "When a more culpable co-defendant receives a life sentence, a sentence of death should not be imposed on the less culpable defendant" Id. (Citing Jennings v. State, 718 So.2d 144 (Fla. 1998); Scott v. Dugger, 604 So.2d 465 (Fla. 1992); Hazen v. State, 700 So.2d 1207 (Fla. 1997): Slater v. State,316 So.2d 539 (Fla. 1975).

Under this doctrine of proportionality, as enumerated by this Court, Mr. Hunter could not be given the death sentence if there is a "possibility" that Mr. Boyd was the actual shooter. Therefore, counsels failure to communicate to the sentencing jury and judge the photographic evidence that showed Mr. Boyd wearing the red shirt which matched the eye-witness testimony of the shooter, prejudiced Mr. Hunter in the sentencing phase of the trial. There is a reasonable probability that Mr. Hunter would have received a sentence of life imprisonment had this information been properly admitted. This is true even had Mr. Hunter

been found guilty of felony-murder. The lower court erred in failing to even address the penalty phase prejudice associated with counsel Burden's failure to use the photographs on Mr. Hunter's behalf at trial.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. HUNTER'S CLAIM THAT THE PROSECUTORS INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENT RENDERED MR. HUNTER'S CONVICTION AND SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State , 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

During opening statement Assistant State Attorney Elizabeth Blackburn made the following remarks:

> "It wasn't just a tour of downtown Daytona, forty or fifty miles away from Palatka between midnight and 12:30. This isn't just a tour where their out to see the sights. They are looking for someone to rob. They are **like vultures, predators, looking for a victim."**

(TR 601).

Defense counsel did not object or request a mistrial when the prosecutor made those remarks. Florida law deems referring to a criminal defendant as a

vulture and a **predator** in opening statement as inappropriate and prejudicial comments. Failure of defense counsel to voice an objection to those inappropriate and prejudicial comments constitutes ineffective assistance of counsel warranting reversal. In Ross v. state, 726 So.2d 317 (Fla 2nd DCA 1998), the Second District Court of Appeals found that a prosecutor made numerous inappropriate and prejudicial comments because he referred to defense witnesses as "pathetic", "ridiculous", "inappropriate", "insulting to the intelligence", "totally incredible" and who "just flat out lied". The defendants testimony was characterized as "preposterous", "Nonsense", and "bologna". The court stated "suffice to say that in light of the egregious arguments made by the prosecutor, we conclude that defense counsels failure to object fell below any standard of reasonable professional assistance. We further conclude that there is a reasonable probability that the outcome would have been different because, had an objection and a motion for mistrial been made and denied by the trial court, we would have reversed the conviction in this appeal". The court found the remarks to be so egregious that it reversed and remanded even though ineffective assistance of counsel is not a claim that will ordinarily be considered on direct appeal. The court based that unusual decision on its ruling that the comments amounted to fundamental error.

Mr. Hunter asserts that the reference to him by the prosecuting attorney as a

vulture and a predator are at least as equally egregious as the remarks by the prosecutor in the **Ross** case. The use of the words **vulture and predator** are highly inflammatory and characterize the defendants as having bad character and a propensity for criminal activity. The comments by the prosecutor were inexcusable.

Defense counsel was ineffective for failing to object to these arguments. The cumulative effect of these arguments was to "improperly appeal to the jury's passions and prejudices. Cunningham. v. Zant, 927 F.2d 1006, 120 (11th Cir. 1991).

Arguments such as those made by the prosecutor in Mr. Hunter's case violate due process and render his trial and sentence unfair and unreliable. This Court has held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke. v. Tate, 572 So.2d 146 (Fla. 1990). The lower court erred in denying this claim.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. HUNTER'S CLAIM THAT MR. HUNTER'S SENTENCE OF DEATH UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION IS INVALID BECAUSE THE JURY INSTRUCTIONS IN BOTH THE GUILT/INNOCENCE AND PENALTY PHASE OF THE TRIAL WERE CONSTITUTIONALLY INVALID.

A. THE LOWER COURT ERRED IN DENYING MR. HUNTER'S CLAIM THAT THE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. HUNTER TO PROVE DEATH WAS INAPPROPRIATE AND IN THE PROCESS EMPLOYED A PRESUMPTION OF DEATH IN VIOLATION OF CONSTITUTIONAL RIGHTS.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added).

This straightforward standard was never applied at the penalty phase of Mr. Hunter's capital proceedings. To the contrary, the court repeatedly and unconstitutionally shifted to Mr. Hunter the burden of proving whether he should

live or die. (R. 1763). Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the Constitution, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell.

In his preliminary penalty phase instructions to the jury, the judge explained that the jury's job was to determine if the mitigating circumstances outweighed the aggravating circumstances. (R. 1766).

The jury understood that Mr. Hunter had the burden of proving whether he should live or die. But just in case the jury was unsure, the judge twice repeated the incorrect statement of the law immediately before the jury retired for deliberations:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, the law requires that the trial judge give great weight to your recommendations. It is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 1763) (emphasis added). And:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 1766) (emphasis added).

The instructions violated the law in two ways. First, the instructions shifted the burden of proof to Mr. Hunter on the central sentencing issue of whether death was the appropriate sentence. Secondly, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. (R. 1763, 1766). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Hunter is entitled to a new sentencing hearing because his sentencing was tainted by improper instructions. The lower court erred in denying this claim.

B. THE LOWER COURT ERRED IN DENYING THE CLAIM THAT THE TRIAL COURT'S INSTRUCTIONS TO THE JURY UNCONSTITUTIONALLY DILUTED ITS SENSE OF RESPONSIBILITY IN DETERMINING THE PROPER SENTENCE.

Mr. Hunter's jury was repeatedly and unconstitutionally instructed by the court that its role was merely "advisory." Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. Espinosa. Here, however, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. The lower court erred in denying this claim.

C. THE LOWER COURT ERRED IN DENYING MR. HUNTER'S CLAIM THAT THE TRIAL COURTS INSTRUCTION ON THE "COLD, CALCULATING, AND PREMEDITATED" AGGRAVATING FACTOR CREATED HARMFUL ERROR WHEN VIEWED AS TO ITS CUMULATIVE EFFECT.

The law is clear that, unless the parties agree that the judge may instruct on all the-factors, the jury must be instructed on **only** those aggravating and mitigating factors that are supported by the evidence. Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985) ("The standard jury instructions instruct the judge to give instruction on only those aggravating and mitigating circumstances for which evidence has been presented."); Accord, Riley V. Wainwright, 517 So.2d 656, 659 (Fla. 1987) ("If the

jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, **then the entire sentencing process necessarily is tainted by that procedure**.") (emphasis added).

Thus, the Court recognizes that it is constitutional error for the jury to be prevented from considering non-statutory mitigating factors in determining whether to recommend life imprisonment or the death penalty, because the failure to do so skews the analysis in favor of imposition of the death penalty. A jury instruction on an improper statutory aggravating factor results in the same taint. When more aggravating factors are present, more mitigation will be needed to counterbalance the presence of the aggravating factor. Thus, the presence of an improper factor also necessarily skews the analysis in favor of the death penalty, which renders the death penalty unreliable under the Eighth and Fourteenth Amendments.

In the instant case, the State requested instruction on CCP for the following stated reasons:

> Based upon the circumstances in that the victim that was openly killed was the fourth person shot at the scene, that there was adequate time for an extended reflection and planning by the time Mr. Hunter had squeezed off his fourth round into a fourth different victim after a time period that was not instantaneous.

(TR. 1640). The court agreed to give the CCP instruction over strenuous defense

objection. (TR. 1649,50). In the State's closing argument that the death penalty was the proper sanction in this case, the state attorney spent the balance of his time arguing that this was a cold, calculated and premeditated murder. (TR. 1723-26)

There can be no conclusion other than that the jury applied the CCP factor in recommending imposition of the death penalty. The multiple shootings by Defendant would necessarily have been viewed by a lay person as cold, calculated and premeditated. Evidence and argument was presented by the State to that end, and the prosecution devoted the entire penalty phase to convince the jury that this multiple shooting was done with planning, calculation and heightened premeditation. Even is these-offensive things had not been stressed, in all likelihood the jury still would have attributed weight to this factor when, told by the court that it was permissible under the law that they do so.

This court dealt with the improper instruction of the HAC aggravating factor in the case of Omelus v. State, 584 So.2d 563 (Fla. 1991). In Omelus, the state stressed that three aggravating circumstances were clearly established by the evidence, specifically: (1) that the murder was committed for pecuniary gain; (2) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; (3) that the murder was especially heinous, atrocious, or cruel. The state focused especially upon

the last factor, that the murder was especially heinous, atrocious, or cruel. The jury returned a recommendation of death by an eight-to-four vote.

The trial judge subsequently imposed the death penalty, finding two aggravating circumstances: (1) that the murder was committed for pecuniary gain and (2) that it was committed in a cold, calculated, and premeditated manner. The trial court did not find as an appropriate aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

This court found that the trial court erred in instructing the jury that it could properly consider as an aggravating factor that this murder was especially heinous, atrocious, or cruel. In ordering a new penalty phase this court stated:

> Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not harmless beyond a reasonable doubt under the-standard set forth in DiGuilio.

Clearly, the instant case is analogous to the error found in Omelus. To be sure, the jury would not appreciate, however, that as a matter of law it could not properly weigh the cold, calculated, and premeditated nature of Wayne Simpson's

murder into the equation of whether to recommend life imprisonment or the death penalty for Hunter. Indeed, the jury is **presumed** to have used this instruction and to have followed the law given it by the trial judge. Grizzell v. Wainwright, 692 F.2d 722, 726-27 (11th Cir. 1982), cert. denied, 461 U.S. 948 (1983).

The burden is on the State to show beyond a reasonable doubt that the instruction on this inapplicable statutory aggravating factor did not affect the jury recommendation. See Chapman v. California, 386 U.S. 18 (1967). The State cannot meet that burden. Accordingly, the death penalty must be vacated and the matter remanded for a new penalty phase.

This Court has determined that the cold, calculated and premeditated aggravating factor when erroneously entered in the sentencing calculus creates an extra thumb to be placed on the death side of the scale. Stringer v. Black, 112 S. Ct. 1130 (1992). As a result, Mr. Hunter's sentence of death must be vacated.

In Mr. Hunter's case, the jury's death recommendation was tainted by this Eighth Amendment error. The jury received constitutionally inadequate instructions regarding aggravating circumstances. The statutory language regarding these factors is vague and overbroad, and this constitutional infirmity was not cured. See Richmond v. Lewis, 113 S. Ct. 528 (1993). Under Espinosa, it must be presumed that the jury's erroneous consideration of this invalid aggravator

would have overall tainted the jury's recommendation with Eighth Amendment error, even though the judge never used it in the sentencing mix.

The State's argument did not comport with Florida law. The State did not address Mr. Hunter's intent, but erroneously focused on the injuries received by the victim.

Despite the State's improper argument and the unconstitutional jury instructions, the jury returned a death recommendation by a mere vote of nine (9) to three (3). The trial court then imposed a sentence of death.

This Court has held the statutory definition of "cold, calculated and premeditated" to be unconstitutionally vague and overbroad and that a narrowing construction was necessary. Jackson v. State, 648 So. 2d 85 (Fla. 1994). Under Jackson, the State must prove "that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold) ...; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated) ...; and that the defendant exhibited heightened premeditation (premeditated) ...; and that the defendant had no pretense of moral or legal justification. Jackson, at 89. However, Mr. Jackson's

jury was not advised of the narrowing construction.[2]

When an aggravating factor does not legally apply, the jury should not be instructed on the factor. The Florida Supreme Court has ordered resentencings in cases because the jury was instructed on inapplicable aggravating factors. Lawrence v. State, 614 So. 2d 1092, 1096 (Fla. 1993); White v. State, 616 So. 2d 21, 25 (Fla. 1993); Padilla v. State, 618 So. 2d 165, 170-71 (Fla. 1993).

Richmond v. Lewis, 113 S. Ct. 528 (1992), requires not only that states adopt a narrowing construction of an otherwise vague aggravating factor, but also that the narrowing construction actually be applied during a "sentencing calculus." In Florida, as the Florida Supreme Court has recognized, the penalty phase jury is part of the "sentencing calculus." See Johnson v. Singletary, 612 So. 2d 575, 577 (Fla. 1993). The only way for a penalty phase jury to apply a narrowing construction of an aggravating factor is for the jury to be told what that narrowing construction amounts to.

Mr. Hunter's jury was not told about the limitations on the "cold, calculated and premeditated" and presumably found this aggravator present. [R.778]. It must be presumed that the erroneous instructions tainted the jury's recommendation and

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[2]In fact, the Florida Supreme Court has found that the facts do not establish the presence of this aggravating factor under the narrowing construction of which the jury was ignorant.

the judge's death sentence, with Eighth Amendment error. Thus, a reversal is required unless the errors were harmless beyond a reasonable doubt. Stringer v. Black, 112 S. Ct. 1130 (1992).

On direct appeal, the Florida Supreme Court upheld the trial court in it's finding that the aggravator did not apply. However, the Florida Supreme Court did not consider the fact that the jury had weighed an invalid aggravating circumstance, in making it's recommendation. see Sochor ("...a jury is unlikely to disregard a theory flawed in law...").

The weight the jury accorded this aggravating factor would have been lessened had it received accurate instructions. Even with these erroneous jury instructions, three jurors voted for Mr. Hunter's life to be spared. (R. 783).

The evidence had provided a reasonable basis upon which the jury could have based a life recommendation without erroneous instructions. See Hall v. State, 541 So. 2d 1125 (Fla. 1989).

In light of the mitigation before the jury, the errors cannot be said to be harmless beyond a reasonable doubt, and a new jury sentencing must be ordered. The lower court erred in denying this claim.

ARGUMENT V

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND FOR VIOLATING THE CONSTITUTIONAL GUARANTEE PROHIBITING CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Florida's capital sentencing scheme denies right to due process, and constitutes cruel and unusual punishment on its face and as applied in this case. It did not prevent the arbitrary imposition of the death penalty nor narrow the application of the death penalty to the worst offenders.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. This leads to the arbitrary and capricious imposition of the death penalty, and violates the Eighth Amendment.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances envisioned in Proffitt v.

Florida, 428 U.S. 242 (1976).

Florida law creates a presumption of death where but a single aggravating circumstance applies. This creates a presumption of death in every felony-murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence so strong as to outweigh the aggravating factors. This presumption does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders.

In view of the arbitrary and capricious application of the death penalty under the current statutory scheme, the constitutionality of Florida's death penalty statute is in doubt. Florida's death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. The lower court erred in denying this claim.

ARGUMENT VI

THE LOWER COURT ERRED IN DENYING MR. HUNTER'S CLAIM THAT THE TRIAL COURT FAILED TO APPOINT ADEQUATE MENTAL HEALTH EXPERTS AND CONDUCT COMPETENCY HEARINGS.

Case law from this Court and other courts have consistently held that the Federal and Florida constitutions mandate the appointment of experts and an adversarial hearing on the question of the defendant's competency when the issue is raised by factually-supported motions. To deny such appointment of experts and a hearing to determine competency violates Article I, Sections 9 and 16 of the Florida Constitution, and the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

Fla. R. Crim. P. 3.210 provides that upon the filing of a motion which presents a reasonable basis to place the defendant's competency to stand trial in question, the court must follow the rule and shall set a hearing and order the defendant's examination by two or three experts. Fla. R. Crim. P. 3.210(b).

This Court Supreme Court has held that once a motion is filed suggesting a factual basis to doubt the defendant's competency to stand trial, the appointment of experts and a hearing are obligatory. The test for is not whether the defendant is in fact incompetent or competent; rather the test is whether there is a reasonable

ground to believe the defendant may be incompetent. The trial court in the instant case failed to recognize this distinction by merely denying the defendant his experts and a hearing.

In the instant case, the defendant alleged and the report of Dr. Rotstein supported that the defendant was not competent to stand trial because Mr. Hunter was incapable to assist his attorney in his defense, manifest appropriate courtroom behavior, or testify relevantly. (R. 726). The Defendant met his threshold burden of providing a reasonable basis to question the Defendant's competency to stand trial.

In Tingle v. State, supra, the defendant was convicted of sexual battery of his daughter. Two motions regarding Tingle's competency were filed when first motion counsel alleged that Tingle tried to stab himself with a ballpoint pen and then when a mental health worker thought the defendant was hallucinating from paranoid schizophrenia. Thereafter, the trial court reviewed again the mental health file and found no mention of any such diagnosis. The Supreme Court found that the second motion was effectively denied by the trial court's failure to rule on it holding that Tingle was deprived of his due process right of not being tried while mentally incompetent.

Fla. R. Crim. P. 3.210 provides in the pertinent part that upon reasonable

grounds that the defendant is not mentally competent to stand trial, the court shall **immediately** enter its order setting a time for a hearing to determine the defendant's mental condition. [emphasis added]. Similarly, with regard to the request in the same motion for experts to determine the defendant's competency at the time of the offense, the district court's opinion allows the trial judge himself to make such determination and to short-circuit the procedural dictates of Fla. R. Crim. P. 3.210 which holds mandatory the)appointment of experts once defense counsel certifies his belief that the defendant may be incompetent. State v. Hamilton, 448 So.2d 1007 (Fla. 1984), requires the court to act and appoint an expert to aid the defense without the exercise of any discretion as to any matter of law or fact.

Under a review of the facts of this case and the law it is clear that the defendant presented reasonable grounds in his motion to believe that he was mentally incompetent. And once a reasonable factual basis is presented by the defendant's motion, the appointment of experts and the holding of a formal hearing on competency to stand trial is mandatory.

The actions of the trial court allows for the trial court to substitute its judgment for that of experts and effectively nullifies the criminal rules with regard to the appointment of experts and a hearing to determine competency at the time of

the offense and to stand trial. Pursuant Drope v. Missouri, 420 U.S. at 178-183, a retroactive determination of the defendants competency is insufficient relief; the defendants conviction must be vacated and the case remanded for the appointment of experts and a hearing on the defendant's competency at the time of the offense and to stand trial. If the defendant is found to be competent, then a new trial must be held. The lower court erred in denying this claim.

ARGUMENT VII

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT THE COURT ERRED BY FINDING THAT DEATH WAS THE APPROPRIATE PENALTY.

This case can perhaps best be described as a simple robbery gone bad. Two aggravating circumstances exist. They are not particularly compelling. The murder occurred during the commission of a robbery, and despite arguments to the contrary, there was an obvious lack of premeditation. Hunter had one prior aggravated battery, one prior throwing a deadly missile, an additional attempted armed robbery and an attempted first-degree murder conviction arising out of this same felony murder incident. Additionally, the trial court found mitigating circumstances, i.e., James Hunter suffered form a deprived childhood and suffered from a personality disorder that manifested in that "he is not the type of person that can function lawfully within the constrains of our society." (R. 852, 854). On the spectrum of murder cases that this Court has reviewed, this case does not qualify as one warranting imposition of the death penalty.

This Court Supreme Court has recognized the mitigating quality of crimes committed impulsively while the perpetrator suffered from a mental disorder rendering him temporarily out of control. E.g., Holsworth v. State, 522, So.2d 348 (Fla. 1988). In Holsworth, the defendant, like Hunter, had a personality disorder.

While committing a residential burglary, Holsworth attacked a mother and her daughter with a knife. Both victims received multiple stab wounds. The daughter died. Although the jury recommended life, the trial judge found no mitigating circumstances and imposed death. However, this Court reduced the sentence to life citing Holsworth's drug use, his mental impairment, his abuse as a child and his potential for productivity in prison.

James Hunter is likewise deserving of a life sentence. His crime was a product of his mental impairment. He had a personality disorder and suffered from fetal alcohol syndrome. He also had a deprived childhood arising from the fact that his mother abandoned him related to drinking problems, and his adoptive father routinely gave him severe beatings. The trial court found that his personality disorder prevented him from confining his conduct to the requirements of law (R. 853). Eye-witness testimony established that Hunter discharged his weapon impulsively for an unknown reason. Although not found in the judges's sentencing order, Appellant reportedly loved children and would buy them all ice cream from the ice cream truck. (R. 719). He would also give money away to poor people. (R. 71).

Hunter's offense was apparently a simple robbery gone bad. Impulsive killings during the course of other felonies, even where the defendant was not

suffering from an impaired mental capacity, have also been found unworthy of a death sentence. Proffitt v. State, 510 So.2d 896 (Fla. 1987). Certainly, with the added mitigation of mental impairment contributing to the crime, Hunter's life must be spared. James Hunter's death sentence is disproportionate to his crime. This court must reverse the death sentence with direction to the trial court to impose life. The lower court erred in denying this claim.

ARGUMENT VIII

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT THE TRIAL COURT FAILED TO DECLARE A MISTRIAL WHEN A STATE EXPERT IMPROPERLY GAVE HIS OPINION ON MR. HUNTER'S CREDIBILITY.

During the direct examination of State psychiatric expert Dr. Umesh Mahtra, the State asked the following question:

> All right. Based on your view of those volumous material you have outlined in the last two days and having an opportunity now to hear him testify yesterday, were you able to form an opinion of the defendant within the reasonable bounds of medical certainty?
>
> * * * * *
>
> DR. MAHTRA: Well, I have several opinions about it. Number one, I found him to be an absolute liar.

(TR. 1585).

Defense counsel made and immediate objection and moved for mistrial. (TR. 585, 86). The trial court sustained the objection, denied the motion for mistrial and instructed the court to disregard the last comment of Dr. Mahtra. (TR. 1586). Reversal of Appellant's death sentence is required on this issue.

Dr. Mahtra's testimony that James Hunter is a liar is inadmissible since this opinion testimony is not in the nature of a medical opinion, bat rather was merely

commenting on the credibility of a witness. Farley v. State, 324 So.2d 662, 663 (Fla. 4d DCA 1975) (holding that an expert witness may not draw legal conclusions that a criminal violation has occurred or that the defendant was guilty of that violation. For the jury to hear an "expert" comment on the defendant's credibility has deprived the defendant of his constitutional rights to due process of law and the right to a fair and impartial trial by jury. U.S. Const. Amend. V, VI, XIV. Fla. Const. Art. I, §§ 9, 16, 22.

The introduction of this opinion evidence is thus improper and requires reversal. In the instant case it cannot be said beyond a reasonable doubt that the improper opinion testimony on the truthfulness of the defendant did not affect the verdict. Such evidence has been held as a matter of law to not be harmless.

Mr. Hunter testified on his own behalf, and allowing testimony from Dr. Mahtra that Mr. Hunter was a liar was erroneous and prejudicial and very likely bolstered the State's version of events in the jury's eyes. Based on this testimony the jury may have believed that the defendant was a liar instead of relying on their own instincts.

This evidence was not harmless and as a result, a new penalty phase is required. The trial court erred in denying this claim.

ARGUMENT IX

THE LOWER COURT ERRED IN DENYING MR. HUNTER'S CLAIM THAT MR. HUNTER'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Hunter was convicted of one count of first-degree murder, with robbery being the underlying felony. The jury was instructed on the "felony murder" aggravating circumstance:

> Two. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery. I defined those terms for you in the first phase of the trial. The definitions remain the same during this phase.

(R.). The trial court subsequently found the existence of the "felony murder" aggravating factor.

The jury's deliberations were tainted by the unconstitutional and vague instruction. The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Hunter thus entered the penalty phase already eligible for the death penalty.

The death penalty was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the robbery, felony-murder finding that formed the basis for conviction.

Aggravating factors must channel and narrow the sentencer's discretion. A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Mr. Hunter thus should receive a new penalty phase. The lower court erred in denying this claim.

WHEREFORE based on the foregoing information, Mr. Hunter respectfully moves this court for a new trial and/or to vacate his sentence of death and order a resentencing hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 17th , 2001.

_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing, Initial Brief of Appellant was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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