IN THE SUPREME COURT OF FLORIDA

ROGER LEE CHERRY,
Appellant,

v. CASE NO. SC02-2023
STATE OF FLORIDA,
Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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RESPONSE TO PRELIMINARY STATEMENT

The "Preliminary Statement" set out in Cherry's brief is essentially correct -- however, Cherry's comment that the "circuit court denied several of Mr. Cherry's claims without an evidentiary hearing" is no more than a gratuitous complaint about the Circuit Court. Cherry has only complained about the denial of an evidentiary hearing on **one** claim, and, for the reasons set out below, the Circuit Court correctly denied relief on procedural bar grounds. As to any other claims, Cherry should have briefed them if he believed that the denial of an evidentiary hearing was error.

RESPONSE TO STANDARD OF REVIEW

The State has addressed the applicable standard of review in the discussion of the two issues raised in Cherry's brief.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

There is no need for oral argument in this case. The issues are neither numerous nor complex, and involve nothing more than the application of long-settled Florida law to an uncomplicated fact pattern. Nothing will be gained through oral argument, and this Court's decision-making process will not be aided by it.

STATEMENT OF THE CASE AND FACTS

In its last decision in this case, this Court summarized

the procedural history of this case in the following way:

> While this is Cherry's fourth appearance before us, this is his first petition for writ of habeas corpus.
>
> Cherry was convicted for the 1986 murders of Ester and Leonard Wayne. *See Cherry v. State*, 544 So. 2d 184 (Fla. 1989), *cert. denied*, 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 963 (1990). We affirmed both murder convictions. *See id.* at 186-87. We affirmed the death sentence imposed for Ester's murder; however, we reversed the death sentence imposed for Leonard's murder. *See id.* at 188. Because we reversed the death sentence imposed for Leonard's murder on proportionality grounds, there was no new penalty phase. The facts are more fully set forth in our opinion in Cherry's direct appeal. *See id.* at 185-86.
>
> Subsequently, Cherry filed a motion for postconviction relief pursuant to *Florida Rule of Criminal Procedure* 3.850. No petition for writ of habeas corpus was filed at that time attacking the ineffectiveness of appellate counsel on the direct appeal. [footnote omitted] The trial court denied relief without an evidentiary hearing. On appeal we affirmed the trial court with respect to most of Cherry's claims, but we remanded the claims related to allegations of trial counsel's ineffectiveness to the trial court for an evidentiary hearing. *See Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). After a three-day evidentiary hearing, the trial court again denied relief, and we affirmed that denial on appeal. *See Cherry v. State*, 781 So. 2d 1040 (Fla. 2000), *cert. denied*, 534 U.S. 878, 122 S.Ct. 179, 151 L.Ed.2d 124 (2001).

Cherry v. Moore, 829 So. 2d 873, 874-5 (Fla. 2002).

THE RULE 3.850 PROCEEDINGS

In its order dated October 16, 2001, the trial court summarized the procedural history of Cherry's 3.850 motions as

follows:

> After filing the notice of appeal on his first 3.850 denial, Defendant filed a second Rule 3.850 motion on August 7, 1997. Defendant asked the Florida Supreme Court to relinquish jurisdiction to the trial court to hear these claims so that all claims could be decided on appeal at one time; however, the Florida Supreme Court never relinquished jurisdiction. The State filed a Motion to Dismiss on October 14, 1997, because of the pending appeal. That motion has never been ruled on. Thus, the second Rule 3.850 Motion is still pending.[1] On September 14, 2001, a Huff[2] hearing was held.
>
> FN1 The Court accepts the instant motion as timely because of the newly discovered evidence claim, discussed under claim two. See Fla. R. Crim. P. 3.850(b)(1).
>
> FN2 *Huff v. State*, 622 So. 2d 982 (Fla. 1993); Fla. R. Crim. P 3.51(c).

(R430).

An Order denying Cherry's Second Motion to Vacate was issued on October 16, 2001. Cherry filed a Motion for Rehearing on October 25, 2001, seeking rehearing on claim II only (the newly discovered evidence claim). (R436-445). The Motion for Rehearing was granted on October 31, 2001. (R446-447). An evidentiary hearing was held on June 10, 2002. An Order denying claim II of Cherry's Second Motion to Vacate was issued on August 12, 2002. (R486-489). Cherry filed Notice of Appeal on September 6, 2002. (R490-1).

The Evidentiary Hearing Facts

At the June 10, 2002, evidentiary hearing, Cherry's first

witness was Monica Jordan, a Capital Collateral Representative (CCR) investigator from 1995 to 2000, who is now a private investigator. (R614-5). In 1996, Cherry's CCR attorneys asked Ms. Jordan to interview Levester Hill, a childhood friend of Cherry's. She was instructed to gather any mitigation information that Hill could offer regarding Cherry. (R616). On August 9, 1996, Ms. Jordan obtained an affidavit from Levester Hill containing " ... information regarding mitigation I felt was important ... then ... he gave me additional information it was newly discovered evidence and I felt ... no one hade ever learned of his information before ..." (R618). She wrote the affidavit for Hill because " ... was very limited in reading and writing ... he's able to read and write but not very well ... he actually felt more comfortable with me writing it ... So I wrote it and read it to him." (R619).

On cross examination, Ms. Jordan stated that, after obtaining the affidavit, she called Cherry's defense attorneys " ... when I left outside of the Department of Corrections facility." She returned home with the affidavit and Cherry's attorneys had the information within 24 to 48 hours. (R620).

Peter Mills, who is currently an assistant public defender, was employed by CCR from June 1993 to October 1997 and was the lead attorney on Cherry's case. (R622-3). In

August 1996, Monica Jordan informed him that she had obtained an affidavit from Levester Hill that contained " ... some penalty phase information ... and information that related to the guilt phase also." (R626). At the evidentiary hearing held in 1996 pursuant to a remand by the Florida Supreme Court, Mills was not permitted to introduce the "guilt phase" information received from Hill as "Judge Graziano didn't feel that ... information was related to the penalty phase issue that the Florida Supreme Court had sent the case back down for." (R627). Subsequently, Cherry's motion to vacate was denied and Mills filed a notice of appeal. However, he did not file an *Initial Brief*, but rather filed another Rule 3.850 motion raising the “newly discovered evidence” claim. He stated, "that would have been right around the time when I was getting ready to leave CCR and I had been ordered not to work on any other case up there." (R628).

On cross examination, Mills stated that the evidentiary hearing was originally scheduled for August of 1996 (when the affidavit was obtained from Levester Hill), but was continued until December 1996. He did not file an amended Rule 3.850 motion prior to the December hearing that included the newly discovered evidence claim. (R630). The amended motion was filed in August of 1997, approximately one year after the

information was obtained from Levester Hill. (R631).

Ann Jacobs (an attorney now in private practice) was employed by the Volunteer Lawyer's Resource Center from 1991 through 1995, and represented Cherry during the post-conviction proceedings that were on-going at that time. In addition to Ms. Jacobs, volunteer counsel from the firm of Holland and Hart was also involved in Cherry's representation. (R633-4, 635). Ms. Jacobs stated, "... our theory and my theory was that Roger did not commit the murders ... my belief ... and the lawyers on the case all believed that James Terry was the primary suspect ... We investigated it. We tried to prove it." (R636). During her investigation of the case, Ms. Jacobs contacted the Hill family "because they knew Roger from when he was a child ... he may have stayed with them at some period of time to get away from his father, who was abusing him." She recalled the names Sylvester and Johnny Lee Hill, but did not recall Levester. (R637). After Cherry's first motion to vacate was summarily denied, it was remanded for an evidentiary hearing "on the penalty phase aspect of the case." (R637-8). Subsequently, Holland and Hart withdrew from the case and the Resource Center closed. (R639-40).

On cross examination, Ms. Jacobs recalled that an investigator from the Resource Center talked to the Hill

family sometime in 1992. (R644). There were "two or three" investigators that worked on Cherry's case and she personally interviewed James Terry, Lorraine Neloms, Sandra and Logertha Henry. (R644, 645).

Levester Hill testified that he grew up with Cherry but has not spoken to him since "first part of '82, something like that." Hill also knew James Terry(who goes by "Woody") and testified that Terry and Cherry "used to hang out together." (R648-49). When they were together, "... James Terry had control most of time." Occasionally, Terry and Cherry used drugs together. (R649). Hill was informed by his mother that Cherry had been convicted of murder. He testified, "I heard about it on the streets and in the papers. My mother read it to me in the papers." He discussed the crime with James Terry "about three times." (R650, 662). Hill first discussed the crime with Terry in 1987. Terry told Hill, "Roger Cherry didn't do it." (R651). The next time the two spoke about the murder was in Terry's apartment during the Summer of 1988, which was about a year later. (R652, 661). Terry told Hill he had to get rid of "some shoes he said that he had to get rid of because they had matched some shoe prints that was at the scene of the crime." (R652). In October 1994, Terry and Hill spoke again about the murder in Terry's apartment. (R653,

661). Terry told Hill, "... once he was inside the house that the old lady started hollering and when the man came out he said he was explaining to me that the man fell and tumbled down to the floor holding his chest." (R655). Hill relayed this information to "Monica," an investigator from Tallahassee, who wrote an affidavit on his behalf, because "I don't write and read that well." (R656, 657, 658).

Dr. H. Dale Nute, a professor of criminology, was Cherry's next witness. He was employed as a consultant with the Forensics and Security Consultants Corporation for approximately twenty years. (R665-6). Prior to that, he worked for the Florida Department of Law Enforcement for fifteen years in the microanalysis section of the crime laboratory. (R666).

During his proffered testimony, Dr. Nute testified that, pursuant to a request by Cherry's attorneys, he reviewed the physical evidence, reports, testimony of expert witnesses for the State, defense witnesses, and closing arguments from Cherry's trial. (R675). He agreed with the State's theory that the point of entry into the victims' home was through the "jalousie" windows where "three panes had been removed. One of the panes was reported that Mr. Cherry's left thumbprint was found on it." (R677-8). In addition, the telephone wire near

the point of entry had been cut along with Cherry's right thumb. (R678). Dr. Nute testified that "the height of the opening was 14 inches instead of 18 inches ... under the window there was a wall ... was clean ... no scuffing ... the bottom of the window was four feet, one inch from the ground ... it was my conclusion that it would have been virtually impossible for one person to have pulled himself up and through the window without being aided by someone else, without scuffing the window." (R678). Dr. Nute stated that a paper bag found outside the scene "was three-quarters soaked with Mr. Cherry's blood ... there was no evidence of his blood coming into the house at the point of entry ..." Evidence at the scene also included a "fabric mark which was ribbed in design" on the window sill. Dr. Nute stated that there were "no bloody fabric marks in that area." Shoe track patterns located on a sofa bed sheet on the inside of the house underneath the window yielded a "pattern different from any shoes belonging to Mr. Cherry ..." (R679). In addition, Dr. Nute testified that the shoe track pattern on the sheet matched shoe tracks at the area where the car (the victims')had been abandoned as well as shoe tracks found on Mrs. Wayne’s "pajama bottoms," indicating that a second person was there who was more closely involved in the assault. (R679-

80, 681, 686). In Dr. Nute's opinion, Cherry was in the area outside the point of entry but did not actually go through the jalousie window to enter the victims' home. (R681). Although Cherry's palm print of was found on a door frame inside the home, "there was no blood in the area ... this would indicate he was more interested in taking care of his wound than assaulting an individual." (R682). Dr. Nute felt it would be "highly unlikely an individual would be able to assault two people without leaving some of his own blood if he hand is still bleeding." A towel found inside the abandoned car contained some of Cherry's blood, indicating he was "still bleeding after the assault" although none of his blood was at the scene nor was any of the victims' blood found on his clothing. (R683). Dr. Nute explained the theory of blood spatter "in a beating type case" and that an "individual doing the beating should have blood on them as well." (R684). Dr. Nute reiterated that Cherry "could not have been involved in the assault and not left some blood at the scene." (R685).

Upon conclusion of Dr. Nute's proffered testimony, the trial court stated, "Virtually all of the information relayed by this witness has been previously considered at one point or another ... I don't believe that testimony was relevant to this issue and not considered accordingly." (R688).

Carol Crippen was a neighbor of the victims, Leonard and Ester Wayne. (R689). She was their neighbor for approximately one year and often saw people doing yard work in the Waynes' yard. (R689-90). She recalled that the yard workers were African-American, and stated that she was never contacted by an attorney or investigator on Cherry's behalf during his trial.(R690). During her proffered testimony, Ms. Crippen stated that she would have told attorneys or investigators this same information. (R691).

On cross examination during her proffered testimony, Ms. Crippen stated that she lived with her sister and her niece at this time and worked outside the home. Although they all worked, there was someone in her home "most of the time."(R692-3).

Diane Selman was Cherry's next witness. (R695). During her proffered testimony, she stated that she lived at the same address as Ms. Crippen (her sister), and also saw African-American yard workers at the Waynes' home. (R695-6; 699). She was never contacted by attorneys on Cherry's behalf but would have shared this information with them. (R6980). Although she worked outside the home during the time period of 1986 through 1987, she testified that there was nothing that made her unavailable at that point in time. (R699).

James Roy Terry, nicknamed "Woody," has lived in DeLand, Florida, for 50 years and knows Roger Cherry and Levester Hill from that area. (R700-1). He and Levester Hill discussed Cherry's convictions for the murders in this case "in "94 or 5." (R702). He testified that he did not tell Levester Hill that Cherry did not kill the Waynes. In addition, he did not tell Hill that he threw some shoes away because they matched shoe prints taken from the crime scene where the Waynes were murdered. (R702). Terry testified that he was in Apopka, Florida, with three other people, the night of the Waynes' murder. Therefore he could not have told Hill what had transpired inside the home. (R703). He did not tell his niece, Lorraine Neloms, to give the police any information regarding the Waynes' murder. He did not tell Neloms what to say in court and he did not have anything to do with the Waynes' murders. (R704). He testified that the police came to his apartment and "got my shoes and took them down somewhere and got a print of them ..." As they were the only shoes he had at the time, he "had to wait until they brought them back before I could go anywhere really." (R704). A few days after he returned from his Apopka trip, Terry found a car in the woods as "I go through the woods and pick up cans and I seen the car out there." He further testified, " ... I wasn't the only one

that seen the car. Anyone that passed by on that street could see the car." (R705).

On cross examination, Terry said that when the police came and confiscated his shoes, he was not informed if he was a suspect in these crimes. (R707). Terry stated that he threw out his only pair of shoes because they were worn out. (R708, 709).

The Circuit Court entered its order denying Cherry's Second Amended Motion to Vacate on August 12, 2002. Cherry timely filed a Notice of Appeal on September 6, 2002.

SUMMARY OF THE ARGUMENT

The "newly discovered evidence" claim contained in Cherry's brief is not only time-barred, but also is meritless, and the Circuit Court found. Competent substantial evidence supports the trial court's denial of relief on two independently adequate grounds, and that decision should not be disturbed.

The "inaccurate scientific evidence" claim is procedurally barred because it could have been but was not raised at trial or on direct appeal. To the extent that Cherry claims that the scientific evidence should have been the subject of a *Frye* hearing, that claim is procedurally barred because it could have been but was not raised at trial, on

direct appeal, or in Cherry's prior post-conviction proceeding. The Circuit Court properly denied relief on this procedurally barred claim without an evidentiary hearing.

ARGUMENT

I. THE "NEWLY DISCOVERED EVIDENCE" CLAIM IS NOT ONLY TIME-BARRED, BUT ALSO MERITLESS, AS THE CIRCUIT COURT FOUND.

On pages 41-59 of his brief, Cherry argues that the Circuit Court was wrong when it denied relief on his "newly discovered evidence" claim on the alternative grounds of time bar and lack of merit.[1] Both of these discrete grounds for denial of relief are reviewed under the competent substantial evidence standard. *See, Diaz v. Dugger,* 179 So. 2d 865, 868 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1998) ("As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'"); *Guzman v. State,* 721 So. 2d 1155, 1159

[1]The Circuit Court's primary basis for denial of relief was the time-bar (or procedural bar) to consideration of this claim. The lack of merit was a secondary, alternative basis for denial of relief. Either is sufficient, standing alone, to foreclose relief on this claim.

(Fla. 1998) (Sitting as the trier of fact, the trial judge has the superior vantage point to see and hear the witnesses and judge their credibility); *Melendez v. State,* 718 So. 2d 746 (Fla. 1998).

In finding that Cherry's "newly discovered evidence" claim was untimely, the Circuit Court stated:

> Specifically, Defendant alleges that James Terry, known as "Woody", confessed to Levester Hill that he was involved in the killings of Leonard and Esther Wayne, the crimes for which Defendant was convicted. Mr. Hill signed an affidavit to this effect on August 9, 1996, and it was submitted to this Court along with the Motion for Rehearing. At the evidentiary hearing, Peter Mills, lead attorney in Defendant's case in August of 1996, testified that he sent Monica Jordan, a.k.a. Monica Conklin, to interview Mr. Hill to see if he had any relevant information. Mr. Mills was preparing for the evidentiary hearing on the penalty phase ineffective assistance of counsel claims, which were remanded to the trial court. [citation omitted]. Ms. Jordan testified that she interviewed Levester Hill on August 9, 1996 and during the interview, Mr. Hill told her he had additional information about the case. She testified that Mr. Hill informed her that James Terry had told him that Defendant did not commit the murders for which he was convicted of; that he (Terry) threw his shoes out because they matched the shoe prints taken at the scene of the crime; that he (Terry) was at the scene of the crime; and that he (Terry) made his niece (Lorraine Neloms) testify against Defendant in an effort to protect himself. She testified that she promptly notified Defendant's attorneys of this new information. Mr. Mills testified that he tried to introduce Mr. Hill's affidavit at the 1996 evidentiary hearing, but his request was denied. Therefore, he decided to file a second Rule 3.850 Motion.

Mr. Hill then testified at the evidentiary hearing that Defendant was a good friend of his, more so than Mr. Terry, and that he had three discussions with Mr. Terry about Defendant's case, occurring respectively in 1987, 1988, and 1994. The substance of Mr. Hill's testimony at the evidentiary hearing is consistent both with Ms. Jordan's testimony and his August 9, 1996 affidavit, except for two points. Mr. Hill testified that (1) Mr. Terry did not say that he actually went into the house on the night of the murder and (2) no explanation was given by Mr. Terry regarding the reason for Ms. Neloms' trial testimony. Mr. Terry also testified and denied the allegations made by Mr. Hill. Mr. Terry testified that (1) he did not tell Mr. Hill that Defendant did not commit the murders; (2) he never told Mr. Hill that he threw his shoes away because they matched the prints found at the scene; (3) he never told Mr. Hill he was at the crime scene; and (4) he never told Ms. Neloms what to say in Court.

To establish a claim of newly discovered evidence, Defendant must show: (i) the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and could not have been discovered through due diligence; and (ii) the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Jones v. State,* 591 So. 2d 911, 915-16 (Fla. 1991). The actual confession in this case was unknown at the time of trial because it was allegedly made, piecemeal, beginning in 1987, after Defendant was convicted. Although the last "piece" of the alleged confession was made in 1994, it did not come to counsel's attention until August 9, 1996, when defense counsel was preparing for the evidentiary hearing to be held in December of 1996, as ordered by the Florida Supreme Court. Defendant has only one(1) year from the date the evidence was discovered or could have been discovered to file a Rule 3.850 Motion. *Glock v. Moore,* 776 So. 2d 243, 251 (Fla. 2001); *Jones,* 591 So. 2d at 915-16. Therefore, the Court finds that at the very least, this "newly discovered evidence" could have been

> discovered, by due diligence, in 1994 and brought to the Court's attention within one year from that date. Thus, the Court finds that Defendant has not successfully demonstrated that the "evidence" is newly discovered. Accordingly, this claim is untimely. *See, Glock,* 776 So. 2d at 251 (any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence); *Jones v. State,* 591 So. 2d at 917; *Mills, Jr. v. State*, 684 So. 2d 801 (Fla. 1996) (Mills must show in his motion for relief both that his evidence could not have been discovered with the exercise of reasonable diligence and that the motion was filed within one year of the discovery of evidence upon which avoidance of the time limit was based).

(R486-8.)

The Circuit Court's order is supported by competent substantial evidence, and should be affirmed in all respects. As this Court has held in resolving similar time-barred "new evidence claims":

> Therefore, we find our statement in *Steinhorst v. State*, 695 So. 2d 1245 (Fla. 1997), to be applicable here in respect to the due diligence issue:
>
> > When the evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing theory. *Johnson v. State*, 660 So. 2d 637, 642 (Fla. 1995), *cert. denied*, 517 U.S. 1159, 116 S.Ct. 1550, 134 L.Ed.2d 653 (1996). Under that standard, we will not alter a trial court's factual findings if the record contains competent, substantial evidence to support those findings.
>
> *Steinhorst*, 695 So. 2d at 1248. Also applicable is

our statement in *Melendez v. State*, 718 So. 2d 746 (Fla. 1998):

> First, to qualify as newly discovered evidence, "the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Second, to prompt a new trial, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial."
>
> In reviewing a trial court's application of the above law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent, substantial evidence, "this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."
>
> *Id.* at 1251 (footnotes omitted) (quoting *Jones v. State*, 591 So. 2d 911, 915, 916 (Fla. 1991), and *Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984)).

Melendez, 718 So. 2d at 747-48 (*quoting Blanco v. State*, 702 So. 2d 1250, 1251 (Fla. 1997)) (emphasis added).

Accordingly, we affirm the circuit court's decision that Swafford's successive motion was untimely.

Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002).[2] *See,*

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[2]There is no support in the evidence for Cherry's theory that he presented the purported "new evidence" in a timely fashion.

Stano v. State, 708 So.2d 271, 276 (Fla. 1998) (same); *See also, King v. State,* 808 So. 2d 1237, 1245 (Fla. 2002); *Jones v. State,* 709 So. 2d 512, 520 n. 6 (Fla. 1998) (finding procedural bar to claim of newly discovered evidence where claim not timely presented); *Mills v. State*, 786 So. 2d 547, 549-50 (Fla. 2001). The Circuit Court properly found Cherry's "new evidence" claim untimely, and properly denied relief on that basis. Competent substantial evidence supports the Circuit Court's decision, and it should not be disturbed.

Alternatively and secondarily, this claim is meritless in addition to being time-barred. In denying relief on the merits in the alternative, the Circuit Court stated:

> Moreover, the Court finds that the claim should otherwise be denied on the merits. Mr. Hill's live testimony is inconsistent, albeit slightly, with his affidavit. More importantly, after hearing the testimony of all the witnesses and observing their demeanor, this Court finds that Mr. Hill's testimony is simply not credible, nor worthy of belief. The testimony of Mr. Terry, on the other hand, is more credible on key points. *Porter v. State,* 788 So. 2d 917 (Fla. 2001), *cert. denied*, 534 U.S. 1004 (2001).

(R488).

Those credibility choices, which were made after an evidentiary hearing during which the Circuit Court had the opportunity to observe the witnesses and their demeanor during their testimony, are supported by competent substantial

evidence, and should not be disturbed. As this Court has long recognized, the trial courts occupy a unique vantage point when assessing the relative credibility of witnesses testifying before them. *See, Blanco, supra.* Cherry's brief ignores the fact that the credibility determinations were resolved adversely to his position, and, in the final analysis, his brief does no more than demonstrate his displeasure over having been denied relief. The Circuit Court's denial of relief on the merits, which was alternative and secondary to the denial on time-bar grounds, is supported by competent substantial evidence, and should not be disturbed.

II. THE "INACCURATE SCIENTIFIC EVIDENCE" CLAIM IS PROCEDURALLY BARRED BECAUSE IT COULD HAVE BEEN BUT WAS NOT RAISED AT TRIAL, ON DIRECT APPEAL, OR IN CHERRY'S PRIOR COLLATERAL MOTION. DENIAL OF AN EVIDENTIARY HEARING WAS PROPER.

On pages 59-64 of his brief, Cherry argues that the Circuit Court should have allowed an evidentiary hearing on his claim that "inaccurate scientific evidence" (which is a claim based on *Frye*) was presented at his capital trial. What Cherry has not revealed to this Court is that the Circuit Court denied relief on this claim on procedural bar grounds. Cherry does not discuss the procedural bar finding in his brief, and has further attempted to mislead this Court by

asserting that the standard of review applicable to summarily denied claims applies to this procedurally barred claim. Despite the hyperbole of this claim, the Circuit Court correctly found the claim foreclosed by multiple procedural bars, which were correctly found as a matter of law.

In denying relief on this claim (which was Claim III in the motion), the Circuit Court held:

> Defendant's third, fourth, and fifth claims are discussed here together because the court finds all three to be claims that are procedurally barred, i.e., they all should have been raised at trial, on direct appeal, or in Defendant's first 3.850 motion. [citation omitted]. Specifically, the third claim alleges that inadmissible, inaccurate, scientific evidence was presented to Defendant's jury that violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Defendant admits he raised this issue in his first 3.850 motion, but now seeks an evidentiary hearing to clarify the exact methods used in calculating the population frequency statistics testified to at trial by David Baer, a crime laboratory analyst in the serology section of the Florida Department of Law Enforcement (FDLE) crime laboratory. Defendant wishes to challenge whether the evidence passes the *Frye* test. The court finds this claim to be procedurally barred because it should have been raised at trial or on direct appeal. [citations omitted].

(R433-4).

Florida law is well-settled that claims that could have been but were not raised at trial or on direct appeal are procedurally barred from review in a post-conviction motion. *Chandler v. State,* 28 Fla.L.Weekly S329 (Fla. April 17, 2003);

Vining v. State, 827 So. 2d 201, 213 (Fla. 2002); *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Garcia v. State*, 622 So. 2d 1325, 1326 n. 3, 1327 n. 5 (Fla. 1993); *Johnston v. Dugger*, 583 So. 2d 657, 662 n. 2 (Fla. 1991); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla.1990) ("[p]ostconviction proceedings cannot be used as a second appeal"). This claim could have been but was not raised at trial or on direct appeal, and is, as the Circuit Court found, procedurally barred at this point in the proceedings. The Circuit Court correctly denied an evidentiary hearing on this procedurally barred claim.

To the extent that further discussion of this procedurally barred claim is necessary, Cherry raised a portion of this claim (but not the *Frye* part) as an **ineffective assistance of counsel** claim in his prior Rule 3.850 motion. The Circuit Court denied relief on that guilt stage ineffective assistance of counsel claim, and this Court affirmed that ruling. *Cherry v. State,* 659 So. 2d 1069, 1072 (Fla. 1995). Just as it is axiomatic that the preclusive effect of a procedural bar cannot be avoided by pleading a substantive claim as one of ineffectiveness of counsel (which Cherry did with respect to a component of this claim in his prior post-conviction proceeding), Cherry cannot obtain a

hearing (or any other relief) by pleading, for the first time in a successive Rule 3.850 motion, that certain scientific evidence should have been the subject of a *Frye* hearing. That claim appeared for the **first** time in Cherry's successive Rule 3.850 motion, and is procedurally barred for the additional reason that the claim could have been raised in Cherry's first motion for post-conviction relief. This procedurally barred claim was properly resolved against Cherry without an evidentiary hearing.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Linda McDermott,

CCRC-North, 1533-B South Monroe Street, Tallahassee, Florida 32301, this ___ day of July, 2003.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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SENIOR ASSISTANT ATTORNEY GENERAL