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IN THE SUPREME COURT OF FLORIDA

JERONE HUNTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-246

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

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

MITCHELL D. BISHOP
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 43319

Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
E-Filing: CappApp@MyFloridaLegal.com
E-Mail: Mitchell.Bishop@myfloridalegal.com
(386)238-4990
(386)226-0457 (FAX)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

This case presents a postconviction appeal after Appellant was denied relief under *Florida Rule of Criminal Procedure* 3.851 (hereinafter "Rule 3.851" or "3.851") in the Circuit Court for Volusia County, Florida. Appellant was convicted, among other things, of six counts of first-degree murder from which he received four death sentences in 2006. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Hunter." Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as such, the prosecution, or the State. Appellant's defense attorneys at trial will be referred to by proper name and title or "trial counsel." Unless indicated otherwise, bold-typeface emphasis is supplied. Cases cited in the text of this brief and not within quotations are italicized. Other emphases are contained within the original quotations.

RELATED CASES

Jerone Hunter and codefendants Troy Victorino, Michael Salas, and Robert Anthony Cannon were charged with the first-degree murders of Erin Belanger, Roberto Gonzalez, Michelle Nathan, Anthony Vega, Jonathon Gleason, and Francisco Ayo-Roman. During a home invasion in Deltona, Florida, the defendants beat the victims to death with baseball bats then cut their throats. Most of the cuts to the victims' throats were inflicted post-mortem.

Hunter was jointly tried with Victorino and Salas in 2006 in Volusia County.

Codefendant Cannon previously pled guilty as charged and received a life sentence. The jury convicted Hunter, Victorino, and Salas for all six first-degree murders. At the conclusion of the penalty phase, consistent with the jury's recommendations, Salas was sentenced to life in prison. Victorino was sentenced to death[1] for the murders of Belanger, Ayo-Roman, Gleason, and Gonzalez and life in prison for the murders of Nathan and Vega. Hunter was sentenced to death[2] for the murders of Gleason, Gonzalez, Nathan, and Vega and life in prison for the murders of Belanger and Ayo-Roman.

The convictions and sentences for Cannon and Salas have been affirmed. *See Salas v. State*, 972 So. 2d 941 (Fla. 5th DCA 2007), *rev. denied* SC08-333 (Fla. Mar. 29, 2010); *Cannon v. State*, 953 So. 2d 541 (Fla. 5th DCA 2007). This Court affirmed Victorino's convictions and sentences on direct appeal and affirmed the denial of postconviction relief. *See Victorino v. State*, 23 So. 3d 87 (Fla. 2009); *Victorino v. State/Crews*, 127 So. 3d 478 (Fla. 2013). This Court affirmed Hunter's convictions and sentences on direct appeal. *Hunter v. State*, 8

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[1] The jury's recommendation for Victorino's death sentences was as follows: Belanger (10-2); Ayo-Roman (10-2); Gleason (7-5); Gonzalez (9-3). The jury recommended life for Victorino for the murders of Nathan and Vega.

[2] The jury's recommendations for Hunter's death sentences are as follows: Gleason (10-2); Gonzalez (9-3); Nathan (10-2); Vega (9-3). The jury recommended life for Hunter for the murders of Belanger and Ayo-Roman.

So. 2d 1052 (Fla. 2008). This is Hunter's appeal from the denial of postconviction relief.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts as set out on pages 2-3 of Hunter's *Initial Brief* cites to portions from this Court's direct appeal opinion, but it is incomplete. As authorized by Fla.R.App.P. 9.210(c), the Appellant submits its statement of the case and facts. It its decision affirming Hunter's convictions and sentences of death, this Court summarized the facts of the offenses in the following way:

> I. FACTUAL AND PROCEDURAL BACKGROUND
>
> A. The Guilt Phase
>
> The evidence at trial established the following. On the morning of August 6, 2004, a coworker of two of the occupants of a residence on Telford Lane in Deltona, Florida, discovered the victims' bodies. Belanger lived at the Telford residence with Ayo–Roman, Nathan, and Vega. Gonzalez and Gleason happened to be at the house the night of the murders. The six victims had been beaten to death with baseball bats and had sustained cuts to their throats, most of which were determined to have been inflicted postmortem. Belanger also sustained lacerations through her vagina up to the abdominal cavity of her body; the injuries were consistent with having been inflicted by a baseball bat. The medical examiner determined that some of the victims had defensive wounds. A dead Dachshund was also found in the house.
>
> Following a call to 911, law enforcement officers responded to the scene. The front door had been kicked in, breaking a deadbolt lock and leaving a thirteen-inch shoe-print impression on the door. The victims were found throughout the house and blood was everywhere.

A knife handle and knife blade were recovered at the scene, along with two playing cards with bloody shoe imprints, a bed sheet with footwear impressions, as well as a pay stub with a footwear impression.

Hunter, who at the time was eighteen years old and in twelfth grade, met codefendant Cannon two months before the murders. He knew codefendant Salas from high school. Hunter met codefendant Victorino during the end of June or beginning of July of 2004, and moved in with Victorino a few days later. Together Hunter and Victorino lived in three different residences, including a house that belonged to victim Belanger's grandmother. No one had permission to stay at Belanger's grandmother's house, but Victorino testified that the owner's grandson had given him permission to stay there.

Approximately a week before the murders, Belanger contacted police concerning suspicious activity at her grandmother's residence. Victorino also reported to police that he had items stolen from the same house. He became angry when the police told him he would have to provide a list of the stolen property. Victorino told the police he would take care of the matter himself. Victorino also met with Belanger at her residence, seeking return of his property.

Brandon Graham, who was living with codefendants Cannon and Salas, met Hunter and Victorino when they went to Belanger's house on Telford Lane a few days before the murders so that Victorino could pick up his belongings. Victorino wanted them to fight the people at the residence. Hunter yelled for the occupants to come out and fight.

On the morning before the murders, Graham, Salas, and Cannon drove to the house where Hunter and Victorino were living. Victorino discussed a plan to beat everyone to death at the Telford residence, asking them if they "were down for it" and saying to Hunter, "I know you're down for it" because he had belongings stolen as well. All agreed. Victorino verbally described the layout of the Telford house and who would go where. Hunter asked if they should wear masks; Victorino said no because they would kill all of the occupants.

A witness testified that around midnight on August 5, 2004, she saw Hunter, Salas, Cannon, and Victorino near the murder scene. [FN1]

And Graham testified that the morning after the murders, he saw Victorino's belongings in the back of Cannon's SUV. On the day after the murders, Victorino was arrested on a probation violation.

> [FN1] Graham had not shown up at the prearranged meeting place and did not take part in the murders.

In his statement to police, Hunter said that he had gone in Cannon's SUV to the house on Telford on late Saturday or early Sunday to get his belongings that had been taken from Belanger's grandmother's house. He had an aluminum baseball bat with him. Hunter said he entered the house through the front door and found Gleason in the recliner in the living room. Hunter screamed, "Where's my stuff," and when Gleason said, "I don't know," he hit him with the bat. Hunter hit Gleason because he thought he was lying. Gleason attempted to get up from the recliner and Hunter hit him again. Hunter said he hit Gleason more than three times but less than twelve. Hunter said he then went to look for his belongings. Hunter also indicated that he encountered victim Gonzalez in one of the bedrooms. He claimed he hit Gonzalez because Gonzalez had swung at him with a stick. After Gonzalez dropped his stick, Hunter continued to hit him, three to five more times. Hunter then continued looking for his belongings. Eventually, Hunter and his codefendants left in Cannon's SUV. Hunter, who wore a black shirt, black shorts, and blue and white Nike tennis shoes during the incident, stated that he washed his clothes afterwards.

Cannon's SUV was seized on August 7, 2004. Salas admitted to being at the Telford residence the night of the murder and stated that Cannon had driven them there. Salas described what he had done while in the house and said the bats had been discarded at a retention pond. Based upon that information, law enforcement authorities recovered two bats from the pond and two bats from surrounding trees.

Salas testified about Hunter's involvement in the murders. Salas explained that before the men entered the house on Telford, Hunter called Salas and Cannon "bitches" because they did not want to take part in the plan. Hunter ran into the house after Victorino. Salas ran in next and saw Hunter swing his bat. Hunter said to Gleason, "I don't like you" and started hitting him. Hunter asked Salas if he had killed

Gonzalez; Hunter called Salas a "pussy boy" when Salas said he was not killing anyone. Hunter then ran into the bedroom and began hitting Gonzalez in the face and head. Hunter hit Gonzalez between twenty and thirty times, saying he had to kill him. Salas left the house. When Hunter came out he described how he found Nathan hiding in one of the bedrooms and killed her when she pled for her life. Salas described Hunter as having a look of "ferule [sic] joy."

Pursuant to a search warrant, numerous items were taken from the house where Hunter and Victorino lived. Among the items taken was a pair of size thirteen boots, a pair of size ten and one-half Nike blue and white tennis shoes without shoe laces, and a pair of shoe laces. These shoes, the laces, and other physical evidence were admitted at trial linking Hunter, Salas, and Victorino to the murders. [FN2]

> [FN2] The physical evidence at trial established that Victorino wore a size thirteen, had a pair of size thirteen boots, and had been wearing those boots the night of the murders, and that the shoe print on the front door of the Telford residence was from the left boot that had been recovered at the house where Hunter and Victorino had been living. In addition, Victorino's fingerprint was recovered from a boot box seized from Cannon's Ford Expedition. The impressions on the sheet from Telford could have been made by the boots, and the shoe imprint on the pay stub found at the crime scene was from the left boot. There were several suspicious red-brown stains on the boots. DNA testing on the boots revealed a match with the profile of victims Belanger, Vega, and Ayo–Roman. Vega's and Gonzalez's profiles could not be excluded from another stain on the boots. Testing of the playing cards recovered at the scene revealed one impression that could have been made by the right boot, while the impression on the other card could have been made by the right heel of the tennis shoe later identified as belonging to Hunter. DNA testing of the knife blade found at the scene revealed a mixture of the profiles of at least two people, which included Gleason, while Vega and Gonzalez could not be excluded. The knife handle included a mixture of DNA from two or more persons;

> Vega was the major contributor, and Gleason and Gonzalez could not be excluded. Sunglasses recovered from Cannon's vehicle had victim Ayo–Roman's fingerprint on them. Glass fragments found in Cannon's vehicle could have originated from a broken glass lamp at the crime scene. The two bats recovered submerged in water did not reveal DNA material. A sample from one of the bats that had not been under water revealed a mixture of at least two people, with Gonzalez as the dominant contributor. The other bat, also recovered above water, revealed a mixture of two or more persons, and victims Belanger, Ayo–Roman, and Gonzalez could not be excluded. A hair recovered from one of the bats was later determined to match the profile of Nathan. The Nike shoes, which had been washed, had diluted stains on the tongues of each shoe. The left shoe tongue revealed a mixture of two or more people, with Vega as the dominant contributor. Nathan could not be excluded. The tongue from the right shoe also contained a mixture; Gonzalez could not be excluded. One of the shoe laces that had been in the laundry basket at the house where Hunter and Victorino lived revealed a mixture, and Gonzalez and Hunter could not be excluded.

The jury returned its verdicts on July 25, 2006. It convicted Hunter of six counts of first-degree murder, three counts of abuse of a dead human body, and one count each of conspiracy to commit aggravated battery, murder, tampering with physical evidence, and armed burglary of a dwelling. The jury acquitted Hunter of the two counts of abuse of a dead human body with a weapon (postmortem cutting of throats or stabbing) and one count of cruelty to an animal.

B. The Penalty Phase

During the penalty phase, the State presented victim impact statements from family members of each of the victims. Hunter presented both lay and expert testimony. Family members testified that Hunter had a twin who had died as an infant and that Hunter had a history of talking out loud as though he were talking to his deceased sibling.

Dr. Alan Berns, a psychiatrist, testified to Hunter's family's history of mental illness, including schizophrenia and depression. Dr. Berns thought it likely that Hunter was schizophrenic and that it was unlikely that Hunter was malingering. Dr. Berns testified that schizophrenia can cause impairment of impulse control and judgment as well as an increased risk for violence.

Dr. Eric Mings, a neuropsychologist, also presented mental health testimony. While he did not find Hunter legally insane, Dr. Mings explained that Hunter had difficulty expressing his answers. Hunter's full scale IQ score was 91. His profile was consistent with a person with a psychotic mental illness. Dr. Mings testified that Hunter was not functioning as a normal adult, and while he knew the difference between right and wrong, he was probably impaired in respect to conforming his conduct to the law. Dr. Mings also testified that Hunter reported hearing voices other than that of his deceased brother. During cross-examination, Dr. Mings acknowledged that it was two weeks before trial when Hunter reportedly started hearing other voices.

Dr. Ruben Gur, a psychologist with training in neuropsychology, also testified for the defense. Dr. Gur, having conducted "behavior imaging" through the use of a PET scan, concluded that Hunter had deficits in the left frontal temporal areas, which relate to memory and the ability to interpret the emotional relevance of information. Dr. Gur opined that Hunter was not malingering and that the pattern was similar to what is seen in individuals with schizophrenia. Dr. Gur concluded that Hunter had schizophreniform disorder, but his schizophrenia was not full-blown. According to Dr. Gur, Hunter's brain has abnormal metabolism in twenty-three of thirty-five regions, including the entire limbic [FN3] system, which deals with memory and emotions. Further, Hunter is brain-damaged in the part of the brain that controls impulses and actions, and his left and right hemispheres do not communicate well. Therefore, Hunter would tend to be a follower. During cross-examination, Dr. Gur confirmed that Hunter was not far from graduating from high school, was in the forty-ninth percentile of his class, and had participated in team sports, and that the extent of his disciplinary record included leaving class early, horseplay, insubordination, disruption on campus, and battery

on a student.

> [FN3] The trial transcript reads that Dr. Gur said the "lymphic" system. This appears to be an error in transcription.

The State called one rebuttal witness, Dr. Lawrence Holder, a physician specializing in diagnostic radiology and nuclear medicine. He opined that Hunter's PET scan was normal as was his MRI. Dr. Holder stated that the use of PET scans to diagnose psychiatric diseases is not an established use.

The jury recommended a death sentence for the murder of Gleason by a vote of ten to two, a death sentence for the murder of Gonzalez by a vote of nine to three, a death sentence for the murder of Nathan by a vote of ten to two, a death sentence for the murder of Vega by a vote of nine to three, and life sentences for the murders of Belanger and Ayo–Roman.

C. The *Spencer* Hearing and Sentencing

On August 28, 2006, a *Spencer* [FN4] hearing was held and the trial court imposed sentence on the noncapital convictions. Sentencing on the capital convictions was imposed on September 21, 2006. The trial court followed the jury's recommendations and sentenced Hunter to death for the murders of Gleason, Gonzalez, Nathan, and Vega. In doing so, the trial court found the following five aggravating circumstances with their respective assigned weights: (1) the defendant has been previously convicted of another capital felony or felony involving the use or threat of violence to a person—very substantial weight; (2) the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary—moderate weight; (3) the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest—moderate weight; (4) the capital felony was especially heinous, atrocious, or cruel—very substantial weight; and (5) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification—great weight.

[FN4] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

> As for mitigation, the trial court found three statutory mitigating circumstances and assigned weights: (1) age of the defendant at the time of the crime—some weight; (2) the defendant acted under extreme duress or under the substantial domination of another person—some weight; (3) the defendant has no significant history of prior criminal activity—little weight. The trial court also found three nonstatutory mitigating circumstances: (1) the level of maturity of the defendant at the time of the crime—little weight; (2) the defendant exhibited good conduct during incarceration—very little weight; and (3) the defendant exhibited good conduct during trial—very little weight.

Hunter, 8 So. 3d at 1057-1061.

In his direct appeal, Hunter raised the following claims (in order presented in his direct appeal initial brief): 1) a primacy claim of state constitutional due process; 2) that the trial court erred in denying his motion to suppress his statements to law enforcement; 3) that the trial court erred in denying his motion to suppress physical evidence seized by law enforcement; 4) that the trial court erred in denying his motion for mistrial; 5) an ineffectiveness claim that counsel failed to move to strike Cannon's testimony; 6) that the trial court erred in denying his motion for judgment of acquittal; 7) that the trial court erred in denying his motion to sever his trial from the codefendants; 8) that the "And/Or" language pertaining to the defendants' names in the jury instructions that defined the criminal offenses was improper; 9) that the trial court erred in weighing the aggravation and mitigation; 10) that the proportionality review on appeal is insufficient because it

only considers cases in which death was imposed; 11) that Hunter's death sentence is not proportionate; 12) that the lethal injection method of execution is unconstitutional; 13) Florida's lethal injection procedure violates separation of powers; 14) that Hunter's death sentence is unconstitutional under *Ring v. Arizona*;[3] and 15) a cumulative error claim.

This Court denied all of Hunter's claims on direct appeal. Hunter then filed a petition for writ of certiorari in the United States Supreme Court which was denied. *Hunter v. Florida*, 129 S.Ct. 2005 (2009). Hunter timely filed his 3.851 motion for postconviction relief on April 13, 2010, raising all but one of the claims raised in this appeal.[4] After the State's response, the trial court, Circuit Judge William A. Parsons presiding, held a case management conference on September 8, 2010. The court granted an evidentiary hearing on the claims of ineffective assistance of counsel (Issues 1 and 2 of this appeal) and ruled that the remaining claims required no evidentiary development and could be decided purely as a

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[3] 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

[4] In the trial court below, Hunter raised a "competence to be executed" claim that he does not bring in this appeal. (V4, R582). Cites to the record on appeal will be "V" for volume number followed by "R_" for page number. Cites to the direct appeal record will be "DAR, V_, R_."

matter of law (Issues 3-7 of this appeal).[5] Judge Parsons held a two-day evidentiary hearing on October 4 and 27, 2011. At the conclusion of evidence, the court conducted a "question-answer" style summation (V3, R503-531) and then allowed the parties to submit written closing arguments. (V5, R819-879). On January 25, 2012, the trial court issued its order denying all of Hunter's claims for postconviction relief. (V6, R890-921). Notice of appeal was filed on February 6, 2012. Hunter's initial brief was timely filed on or about January 21, 2014. This answer follows.

EVIDENTIARY HEARING

The trial court held an evidentiary hearing on October 4, 2011, and October 27, 2011.

Lead Trial Counsel

Hunter's first witness was trial counsel Edwin Mills. (V2, R205).[6] Mills became a member of the Florida Bar in 1984 after graduating law school in December 1983. He worked as an Assistant State Attorney for the Ninth Judicial

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[5] In his 3.851 motion in the trial court, the Appellant had originally asked for an evidentiary hearing on the juror interview claim (Issue 3 in this appeal) but conceded at the case management conference that an evidentiary hearing was not necessary for that claim. (V1, R144-145).

[6] Prior to the evidentiary hearing, Mills reviewed his files, the sentencing order, and the postconviction motion. (V2, R213-14, 223).

Circuit for a few years before working eight years as in-house legal counsel for the Orange County Sheriff's Office. Mills opened his own practice in 1992. (V2, R206-07). During the past 15 years, about 75% of his practice has been devoted to criminal defense with the remainder devoted to family law and federal civil work. (V2, R207). Mills has averaged between two and three jury trials per month since opening his own practice. He has defended hundreds of cases. (V2, R208). Mills sat as either first or second chair for approximately seven capital cases. (V2, R208-09). He has attended a death penalty seminar presented by the Office of the Public Defender each year for the past 10 years. (V2, R211-12). Mills keeps himself apprised of all Florida case law opinions that are issued each week. (V2, R213). Mills and co-counsel Frank Bankowitz were court-appointed as Hunter's trial attorneys. Mills sat first chair. (V2, R215).

Mills and Bankowitz met with Hunter at the Volusia County jail shortly after their appointment and frequently met with him until the time of trial. (V2, R216, 218). They both reviewed voluminous discovery material and divided the work between the guilt and penalty phases. Mills primarily handled the guilt phase. (V2, R216). Both Mills and Bankowitz attended every deposition and every hearing. (V2, R217, 218). Early in the case, they hired mitigation specialist Odalys Rojas. (V2, R218). Mills did not recall whether or not he specifically asked Rojas to prepare a social history report. (V2, R226). Mills and Bankowitz also hired three

mental health experts: Dr. Alan Berns, a forensic psychiatrist, Dr. Eric Mings, a neuropsychologist, and Dr. Ruben Gur, a neuropsychologist. (V2, R218-19).

Based on his professional experience as a law enforcement officer and in representing mentally ill clients, Mills said he recognizes a person who has mental health issues. (V2, R249). Mills had Dr. Mings conduct a neuropsychological evaluation of Hunter because he (Mills) had concerns about Hunter's competency. (V2, R219). Hunter did not interact with counsel during initial jury selection in Volusia County, and would "go into this withdrawal stage" when Mills and Bankowitz met with him together. Hunter appeared to be more comfortable speaking with Bankowitz and Rojas. (V2, R219, 249-50). The case was subsequently moved to St. Johns County. (V2, R219).

Mills said Bankowitz primarily worked with Dr. Gur and Dr. Mings. (V2, R219, 248). Dr. Berns conducted an evaluation fairly close to the start of trial. (V2, R220). Mills and Bankowitz had mental health concerns regarding Hunter. Bankowitz met with Hunter's family numerous times in an attempt to gather information for statutory and non-statutory mitigation. (V2, R220). Rojas met with Hunter's family several times in an attempt to explore mental health issues from an "historical perspective." (V2, R220). Mills could not recall how many family members Rojas interviewed. (V2, R221-22). Additionally, Bankowitz met with one of Hunter's coaches from high school to find out how Hunter interacted with others

but "that didn't pan out." (V2, R221, 251-51). The information the coach would have provided was detrimental to Hunter. (V2, R251). Mills received several documents from mitigation specialist Rojas which summarized her interviews with Hunter's family members and other individuals. (V2, R246). Some of those documents indicated Hunter was aggressive, which was detrimental to Hunter's case. (V2, R247). Mills said Bankowitz and Rojas met with Hunter together since Hunter was more inclined to open up to them. (V2, R222, 249). When Mills and Bankowitz met with Hunter, "he would go into this withdrawal stage. He provided very little information to us." (V2, R250). Mills said predicting how Hunter would have acted on death row would have been wholly speculative. (V2, R244).

Mills said if Rojas or Mings had given him any information that Hunter might have witnessed violence from his father toward his mother, Mills would have presented the information as non-statutory mitigation. (V2, R233). Mills would have also presented any information he had that Hunter's step-father might have been psychologically or physically abusive toward Hunter or his mother. (V2, R234). He argued Hunter's mental health as both non-statutory and statutory mitigation in the sentencing memorandum. (V2, R245). Mills could not recall the strategy on which non-statutory mitigation to include in the defense's sentencing memorandum. (V2, R234-35).

Mills gave the closing argument because Bankowitz was ill. (V2, R223).

Mills acknowledged that he misstated the law in his closing argument when he told the jury that their vote "has to be just a majority." (V2, R239-40). However, this misstatement was not an attempt to mislead the jury. (V2, R241). The jury was properly instructed by the trial court. (V2, R243). Additionally, Mills recalled joining in a motion for mistrial when co-defendant Cannon refused to testify. Mills could not explain why the trial record did not reflect his objection. (V2, R242).

> I am one hundred percent confident that we joined in that objection for mistrial. I've spoken to Mr. Dowdy, who was Mr. Victorino's counsel. He recalls it, Mr. Bankowitz recalls it, I recall it. I recall standing in the well with the other lawyers next to the bench and joining in that objection. I have no explanation as to why it's not in the record.

(V2, R242)

Mills said Hunter was "adamant" that he was not going to enter a plea. Mills was concerned about Hunter testifying because of his withdrawn nature. (V2, R251). Hunter made the decision to testify against counsel's advice. (V2, R252, 274). Bankowitz said that after codefendant Victorino testified that he was not involved and had not participated at all in the crimes, Hunter "had the most observable burst of emotion . . . and demanded to testify." (V2, R274, 275). Mills did not recall any discussions with Hunter about gang involvement. (V2, R252). However, Mills noted during the trial that Hunter spent the majority of his time drawing on a pad of paper. Mills recognized and identified the drawings as "tagging," an activity that gangs engage in that involves graffiti and spray paint

symbols that only have meaning in the street gang world. (V2, R253, 254).

Second Chair Trial Counsel

Frank Bankowitz, co-counsel with Mills, graduated from law school in 1974 and has been practicing law for over 36 years. He initially worked for four years as an Assistant State Attorney for the Ninth Judicial Circuit. He then worked in a private practice firm doing primarily personal injury work for about two years. He became a sole practitioner in 1980. (V2, R256, 257). About 70% of his practice is criminal defense work. The remainder consists of family law and personal injury litigation. (V2, R258). He attends a yearly "life over death" seminar and maintains CLE work in capital litigation. He attends online seminars and keeps himself apprised of all Florida case law opinions that are issued each week. (V2, R259, 260). Bankowitz initially obtained death penalty experience while working at the State Attorney's Office. He has defended six first-degree, non-death cases and second-chaired four death cases. (V2, R261). Subsequent to Hunter's trial, he first-chaired a potential death penalty case in Seminole County which resulted in a plea deal. (V2, R261).

Bankowitz reviewed his files, the sentencing memorandum, his deposition, and the postconviction motion in preparation for the evidentiary hearing. (V2, R262). He recalled hiring Odalys Rojas and Dr. Mings for the penalty phase. He had previously worked with Mings on other cases. Rojas was willing to work

within the parameters established by the State regarding payment restrictions. (V2, R263, 264). Rojas was hired as a social investigator to interview family members and review Hunter's father's medical records with regard to schizophrenia. (V2, R266). She was not hired as a social worker. (V2, R267).

Bankowitz and Mills frequently discussed Hunter's case. (V2, R265). Schizophrenia was the primary focus of the mitigation case. (V2, R266). However, the State presented an expert to rebut the schizophrenia claim. (V2, R276). Bankowitz knew it was the defense's duty to present non-statutory mitigation but Hunter's family was "uncooperative." No one in Hunter's family was willing to admit a family history of mental illness. (V2, R268, 272). Further, the potential for "future non-dangerousness" or future conduct was not a notion that Bankowitz and Mills ever discussed as mitigation. (V2, R273). Had the defense presented a "lack of future dangerousness" witness, the State would have obtained its own evaluation of Hunter to rebut that claim. (V2, R277). Hunter's prior aggressive behavior would have then been presented through other witnesses. (V2, R278). Bankowitz said he was not willing to hire an expert on future dangerousness and take a chance that the State's rebuttal expert "might" agree with his. He said, "In 36 years of practice in criminal law, I have never had a State's expert agree with my expert in that area." (V2, R280).

Forensic Social Worker

Hans Selvog, Ph.D., is a forensic social worker. (V2, R283). Prior to starting his own practice in 2009, Selvog worked for 22 years for a non-profit organization in Virginia that conducted forensic social work which determined "alternative sentencing" for felony offenders. (V2, R283, 285-86). The organization also conducted studies on prison overcrowding and helped identify certain populations of inmates that could be placed in less restrictive environments. (V2, R286).

Selvog reviewed the trial work conducted by mitigation specialist Odalys Rojas. He reviewed medical and school records, and also interviewed Hunter and family members. (V2, R295, 296, 298, 301). Selvog also reviewed psychiatric records of Hunter's father, the sentencing memos, sentencing order, and the direct appeal opinion. (V2, R297). Selvog said Hunter's father suffered from chronic schizophrenia while married to Hunter's mother. Hunter was exposed to chronic violence "in utero" while his mother was pregnant with him as well as being exposured to repeated violence against his mother after his birth.[7] (V2, R299).

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[7] The State objected to Dr. Selvog reading his report into the record because its contents were hearsay. The court sustained the objection. (V2, R299-300, 308, 322, 324). During the argument over the hearsay objection, it became clear that Dr. Selvog was going to simply repeat what other witnesses had told him during his review of records and investigation. The State did not question Dr. Selvog's qualifications as an expert in forensic social work. Hunter did not, however, elicit any expert opinions from Dr. Selvog in the area of forensic social work. While the

Future Conduct in Prison

Dr. Kimberly Brown is a forensic psychologist at the Vanderbilt University School of Medicine, Department of Psychiatry. She is the director of the Forensic Evaluation Team. (V2, R328). She has evaluated approximately 1,200 criminal defendants. (V2, R349). The majority of her work consists of conducting pre-trial evaluations. (V2, R350). To prepare for Hunter's case, she reviewed documents from Hunter's trial, penalty phase transcripts, and the postconviction motion. She evaluated Hunter on June 9, 2010, in order to conduct a risk assessment of future violence as well as his level of psychopathy. (V2, R330, 331-32).

Brown administered several tests to Hunter which included the Miller Forensic Assessment of Symptoms Test (M-FAST), which assesses a level of malingering or feigning mental illness. (V2, R332). She also administered the Psychopathy Checklist-Revised (PCL-R), which measures a level of psychopathy. (V2, R333). Brown explained that about 75% of the prison population has

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State acknowledged that Dr. Selvog was permitted to rely on hearsay in forming any expert opinions he may have had, the State based its objection on Fla. Stat. 90.704 which does not permit an expert to recite hearsay evidence during the direct examination testimony. *See* EHRHARDT'S FLORIDA EVIDENCE, 1 Fla. Prac. Evidence § 704.1 at 794 (2013); *Linn v. Fossum*, 946 So. 2d 1032, 1038-39 (Fla. 2006) ("Usually, experts can testify that they formed their opinions in reliance on sources that contain inadmissible information without also conveying the substance of the inadmissible information").

antisocial personality disorder, and approximately 25% of those inmates have a level of psychopathy, a type of personality disorder containing more serious traits outside of antisocial personality characteristics. (V2, R333-34). Brown administered the Violence Risk Appraisal Guide (V-RAG),[8] which assesses the risk that an individual who has already committed acts of violence will commit future acts of violence. (V2, R335, 339). In Brown's opinion, Hunter was not malingering and not feigning a mental illness. Hunter was "very defensive and guarded those symptoms and makes effort to hide them." (V2, R336). The PCL-R results indicated Hunter did not demonstrate traits consistent with psychopathy. The test scores start with zero and end with 40. A score over 30 indicates psychopathy. Hunter's total score was 9. In Brown's opinion, Hunter's score was "clearly not in the psychopathic range." (V2, R336). The results reached, however, are dependent upon the accuracy of the information Brown received. (V2, R353).

Brown said the V-RAG contains 9 categories of risk (which are referred to as "bins"). A category of 9 indicates a person is most likely to commit future acts of violence and a category of 1 indicates a person is least likely to commit future acts of violence. Items are scored from -24 to +32, with a mean score of 0. Hunter's total score was a -4 which placed him in category 4 of the 9 categories.

[8] The V-RAG is most valid when the test is administered to males. (V2, R343).

(V2, R341, 342). In Brown's opinion, Hunter "had a 17% likelihood of being charged or convicted of a new violent offense in seven years and a 31% chance in 10 years." (V2, R343-44, 364). That result depends on the accuracy of the information Brown received. (V2, R353).

Brown concluded that Hunter is low in psychopathy and his risk of future dangerousness is lower than the base rate. (V2, R344). However, Brown said "these measures aren't great at assessing violence once you're in prison because risk of committing violence in the community appears somewhat different that risk of committing violence in prison."[9] (V2, R344). Brown said research indicates the test subjects were inmates who were young (under the age of 21); had a prior prison sentence; past prison violence; were educated (measured by whether they graduated high school); and that length of sentence was a factor. (V2, R346). Additionally, the V-RAG is scored based on factors that occurred at the time of the offense. (V2, R347). Brown was aware that future dangerousness is not part of Florida's death penalty sentencing protocol. (V2, R359).

Brown reviewed Hunter's DOC records which included medical records. There was no indication Hunter was receiving any mental health treatment or

[9] The test subjects used for the V-RAG were incarcerated at the time and had the opportunity to be released and re-offend. Some of the subjects were mental patients. The test subjects were not people who were going to spend the rest of their lives in prison. (V2, R345).

medication. (V2, R354). Brown was aware Hunter had been diagnosed with paranoid schizophrenia at the time of the penalty phase. However, she was not aware whether or not he had been evaluated for schizophrenia subsequent to his incarceration in prison. (V2, R355-56). Brown said Hunter denied being part of a prison gang. (V2, R359).

State's Rebuttal Forensic Psychologist

Dr. Harry McClaren, a forensic psychologist, has conducted thousands of mental health evaluations during his 28-year career. (V3, R405-06, 415). In preparation for the evidentiary hearing, McClaren reviewed voluminous documents which included the trial record, depositions, Minnesota Multiphasic Inventory-2 (MMPI-2) test results,[10] and law enforcement records. (V3, R 416-17,422, 453). McClaren said the St. Johns County jail records indicated Hunter was "stunned" after the guilty verdicts. Hunter "seemed to have poor eye contact; he was not very spontaneous in his speech . . . depressed . . . ." McClaren said this is normal behavior for a person convicted of murder. (V3, R423).

McClaren interviewed Hunter over four days and administered the MMPI-2[11] in September of 2011. (V3, R 417, 418, 419). Hunter was very cooperative.

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[10] This test was administered by Dr. Mings. (V3, R453).

[11] The scoring of the test is computer-generated. (V3, R437).

(V3, R422). In McClaren's opinion, there were numerous "critical items" on the MMPI-2 that he wanted to discuss with Hunter. (V3, R419-20). Hunter's answers reflected a valid test which reported infrequent psychiatric symptoms. (V3, R440, 451). There were no elevated scales on the validity scale. (V3, R444). The depression scale, psychopathic deviate scale, paranoia scale, anxiety scale, schizophrenia scale, and hypomania scale were all elevated. (V3, R444-45, 446, 447, 448, 449, 450). These six out of ten scales were all elevated, indicating Hunter was reporting a lot of psychopathology. (V3, R450). Although the test results from the 2011 administration of the MMPI-2 were "similar" to the 2006 results, McClaren said "this one is much more reflective of higher elevations of infrequent symptoms now than when Dr. Mings saw him prior to trial." (V3, R453).

After reviewing all the material, reviewing the notations of jail and prison guards who observed Hunter, and evaluating Hunter on four separate days, McClaren concluded that Hunter does not suffer from schizophrenia, bipolar disorder, or a persistent mental illness. (V3, R424-25, 454). Hunter does not exhibit any type of bizarre behavior and has had good behavior on death row. (V3, R425).

Hunter self-reported that he frequently abused marijuana prior to incarceration. (V3, R426). In McClaren's opinion, Hunter meets the criteria for a

diagnosis of antisocial personality disorder as detailed in the DSM-IV-TR.[12] (V3, R426, 430, 431-33, 465). In addition, in McClaren's opinion, Hunter also suffers from post-traumatic stress disorder (PTSD) and personality disorder-not otherwise specified ("NOS"). (V3, R427, 428). McClaren opined that Hunter's PTSD stemmed principally from Hunter's experiences during the murders in this case. (V3, R427). Other contributing factors were Hunter having witnessed domestic violence as a child and the experience of losing a friend who had been killed during a robbery in New York.[13] (V3, R469). McClaren said Hunter also exhibits symptoms of schizotypal personality disorder which is *not* schizophrenia. (V3, R428-29).

McClaren said he never met or spoke to Hunter's father. However, he was informed that Hunter's father suffered from schizophrenia. As a result, Hunter may have experienced traumatic events during his childhood due to his father's mental illness. (V3, R470-71). In addition, Hunter's stepfather abused cocaine and, in McClaren's opinion, Hunter was exposed to more traumatic childhood experiences. (V3, R472-73). In McClaren's opinion, Hunter is not a psychopath.

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[12] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

[13] There is no suggestion that Hunter was present when his friend was killed.

(V3, R429). McClaren said some of Hunter's family reported that Hunter spent a significant amount of time "communicating" with his deceased twin. (V3, R476). In McClaren's opinion, these communications would not be classified as "auditory hallucinations." (V3, R477).

Hunter self-reported participating in numerous fights prior to age 15, and that numerous fights occurred in the third grade. (V3, R477, 479, 483). McClaren said Hunter believed that white people in the county where he was living (Hamilton County) were not tolerable of black people. (V3, R479-80). Dr. McClaren said that if Hunter suffered from schizophrenia, he would have expected to see manifestations of the mental illness during the past five years of Hunter's incarceration on death row. (V3, R482).

Dr. McClaren said that children of schizophrenic parents may be more likely to suffer from the disease. However, no one can examine a person and determine if that person will become schizophrenic. (V3, R487). In McClaren's opinion, the symptoms that would support a diagnosis of bi-polar disorder would show up later in someone's life. (V3, R488). Further, in McClaren's opinion, and after examining "hundreds and hundreds of people" during his career, the voice Hunter claims to hear is that of his deceased twin, and that does not support a diagnosis of schizophrenia. (V3, R490).

STANDARD OF REVIEW

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Claims of ineffective assistance of counsel are reviewed under the standards set forth by the United States Supreme Court in *Strickland v. Washington* and this Court's application of the *Strickland* standards to Florida law. To establish a claim for ineffective assistance of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to establish the first prong, Hunter must prove that, "counsel's representation fell below an objective standard of reasonableness." *Wheeler v. State*, 124 So. 3d 865, 873 (Fla. 2013) (*quoting Strickland*, 466 U.S. at 688). The objective standard of reasonableness is measured by the prevailing professional norms under the circumstances as seen "from counsel's prospective faced at the time" of trial. *Hannon v. State*, 941 So. 2d 1109, 1125 (Fla. 2006) (*citing Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003)). *See also Preston v. State*, 970 So. 2d 789, 803 (Fla. 2007).

The prejudice prong is met only if "there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wheeler*, 124 So. 3d at 873 (*quoting Strickland*, 466 U.S. at 694)*; see also Porter v. McCollum*, 558 U.S. 30 (2009) (explaining that the Court does not require proof "'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'") (*quoting Strickland*, 466 U.S. at 693-94).

For claims that allege counsel was ineffective during the penalty phase, prejudice is measured by "whether the error of trial counsel undermines the [c]ourt's confidence in the sentence of death when viewed in context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Wheeler*, 124 So. 3d at 873 (*quoting Hurst v. State*, 18 So. 3d 975, 1013 (Fla. 2009).

There is a strong presumption that counsel's performance was constitutionally effective. *Hannon*, 941 So. 2d at 1118 (*quoting Strickland*, 466 U.S. at 689) ("Judicial scrutiny of counsel's performance must be highly deferential.")). The defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Hannon*, 941 So. 2d at 1118 (*quoting Strickland*, 466 U.S. at 689). And "[a] fair

assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Because a court can make a finding on the prejudice prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *See Franqui v. State*, 59 So. 3d 82, 95-97 (Fla. 2011); *Preston v. State*, 970 So. 2d 789, 803 (Fla. 2007) (*citing Whitfield v. State*, 923 So.2d 375, 384 (Fla. 2005) ("[B]ecause the *Strickland* standard requires establishment of both [deficient performance and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong.")

B. MITIGATION

A defendant's claim that he was denied effective assistance of counsel because counsel failed to present mitigation evidence will be rejected where the [sentencer] was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. *Troy v. State*, 57 So. 3d 828, 835 (Fla. 2011) (*citing Van Poyck v. State*, 694 So.2d 686, 692-93 (Fla. 1997)). Further, if the record demonstrates that counsel's decision not to present evidence "might

be considered sound trial strategy" the claim may be summarily denied. *Franqui*, 59 So. 3d at 99 (*quoting Strickland*, 466 U.S. at 689). Also, this Court has recognized that, "an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." *Winkles v. State*, 21 So. 3d 19, 26 (Fla. 2009). S*ee also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004). Counsel need not investigate further when the evidence to be discovered and presented is just as likely to have resulted in aggravation against rather than mitigation for the defendant. *Id*.

C. PROCEDURAL BAR

This Court has consistently held that a claim that could have been or was raised on direct appeal is procedurally barred in postconviction proceedings. *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006); *Davis v. State*, 928 So. 2d 1089, 1116-1136 (Fla. 2005); *Duckett v. State*, 918 So. 2d 224, 231 (Fla. 2005); *Robinson v. State*, 913 So. 2d 514 (Fla. 2005). Further, it is inappropriate to use a different argument to relitigate the same issue. *Willacy v. State*, 967 So. 2d 131 (Fla. 2007). A procedurally barred claim cannot be considered under the guise of ineffective assistance of counsel. *Freeman,* 761 So. 2d at 1067 (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel). *See also Rodriguez v. State/Crosby*, 919 So. 2d 1252, 1262 (Fla. 2005).

D. ABA GUIDELINES

Throughout various portions of his argument, Hunter cites as authority to support his ineffectiveness claims the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines").[14] In no uncertain terms, this Court has held that the ABA Guidelines are *not* mandatory regulations for defense counsel to rigidly follow.

> The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's *Strickland* analysis. Rather, the ABA Guidelines provide guidance, and have evolved over time as has this Court's own jurisprudence. To hold otherwise would effectively revoke the presumption that trial counsel's actions, based upon strategic decisions, are reasonable, as well as eviscerate "prevailing" from "professional norms" to the extent those norms have advanced over time.

Mendoza v. State, 87 So. 3d 644, 653 (Fla. 2011). The United States Supreme Court said the following about the ABA Guidelines:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel

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[14] American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913 (2003). Hunter cites to the Court the original 1989 edition of the guidelines throughout his brief. The State will reference the 2003 edition—the most recent edition—in its answer brief.

> and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89, c*ited in Mendoza*, 87 So. 3d at 653. The ABA Guidelines are binding on neither counsel nor this Court.

SUMMARY OF ARGUMENT

Hunter's attorneys presented a comprehensive case in mitigation that included statutory and non-statutory factors. Hunter's trial attorneys used three psychologists and a mitigation investigator to highlight his youth, the early stages of schizophrenia, and possible brain damage.[15] But Hunter's family would not corroborate any information about the family's mental health background. And counsel wanted to avoid damaging evidence about Hunter's aggressive behavior while in school. Even so, much of the evidence Hunter brought up in postconviction was cumulative to the evidence from his penalty phase. Simply because Hunter now claims that there is a better way to argue his case does not render his trial attorneys deficient. In hindsight, Hunter is second-guessing trial counsels' reasoned strategy.

Hunter was a young man with no previous record of conduct while incarcerated. The only evidence of Hunter's behavior in a jail or prison was from

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[15] Although the latter was not established, counsel pursued it with reasoned strategy.

his time in pretrial confinement and one of the jail guards testified at the penalty phase that Hunter was well-adjusted and behaved. It would have been pure speculation for an expert to have theorized what Hunter's future behavior *might be* while serving a life sentence in prison. The attorneys were reasonable to not even consider such conjecture. As to trial counsel's penalty phase closing argument, the misstatement regarding the penalty phase jury vote does not entitle Hunter to relief. The trial court properly instructed the jury and the variation in penalty phase recommendations from the jury for each defendant proves that the jury understood its instructions from the court.

When Cannon refused to testify at trial, each defense team furiously objected and the courtroom erupted in chaos. When codefendant Salas's attorney moved for a mistrial, the other defense teams joined him. Victorino's attorneys recalled joining the motion for mistrial; Hunter's attorneys were absolutely confident that they joined the motion for mistrial. But in the midst of the fog, the direct appeal record appears to have not captured every word. The record notwithstanding, Hunter's attorneys diligently participated in the joint effort to protect each defendant from the effects of Cannon's refusal to testify. In any event, a mistrial was not necessary and a curative instruction—perhaps the appropriate remedy for counsel to request—would not have made a difference even if it had been given. Cannon's testimony barely mentioned Hunter. The focus shifted to

Victorino and several other witnesses, including Hunter himself, testified in detail about Hunter's participation in the murders. There is no likelihood that Cannon's testimony affected the outcome of the trial.

Hunter could have raised his juror interview claim on direct appeal and he did not. Even so, Hunter has never requested to interview a juror from his case under any basis provided for in the rules. Hunter's claim is an attempt to pry into the sanctity of jury deliberations; a conclave that is meant to remain inviolate from biased influence and a party to the proceding is principal among those biased influences.

It has long been settled that Florida's instructions to the jury dilute neither the jury's sense of responsibility nor its vital role in capital sentencing. Hunter has not argued a basis to disturb this resolved matter. Since its reformation thirty years ago, Florida's capital sentencing statute has provided a robust procedure that identifies the most aggravated and least mitigated first-degree murderers with due process that guards against arbitrary and capricious sentencing. Hunter could have challenged the statute on direct appeal and he did not. Even if he had, the claim is meritless.

Hunter already challenged the penalty phase jury non-unanimity in his direct appeal. He cannot relitigate the claim now. Even if he could, a unanimous jury is not required in sentencing. To settle the matter more, Hunter's jury convicted him

with a unanimous vote of six first-degree murders and an armed burglary, all of which aggravated his four death sentences. Finally, because Hunter is not entitled to relief on any of his individual claims, there can be no cumulative effect in his favor.

ARGUMENT

ISSUE 1: TRIAL COUNSEL WAS NOT INEFFECTIVE AT THE PENALTY PHASE

In the first issue, Hunter claims that his attorneys were ineffective during the penalty phase of his trial. Hunter divides this claim into three subparts. First, Hunter alleges that his trial counsel was ineffective generally for his "failure to present available and known non-statutory mitigation evidence to the jury and judge." (*Initial Brief* at 8). Second, Hunter alleges that his trial counsel was ineffective specifically for not presenting through expert testimony Hunter's "probable future conduct in prison." (*Initial Brief* at 21). Third, Hunter alleges that his trial counsel was ineffective when he "misstated the law and misled the jury about its vote on the sentencing recommendation." (*Initial Brief* at 34).

A. The Trial Court's Order Denying Postconviction Relief

After hearing evidence and argument, the trial court denied Hunter's guilt phase ineffectiveness claim. As to each subpart, the court below made findings.

Non-Statutory Mitigation

> Mr. Hunter claims ineffectiveness of assistance of counsel regarding the conduct of his lawyers in "failing to reasonably use, at a minimum,

> the product of their mitigation specialist." There was no reliable testimony presented at the evidentiary hearing as to what that was. At the hearing it was clear that his attorneys were aware of non-statutory mitigation but were impeded by Mr. Hunter's uncooperative family who wanted to avoid divulging and testifying in regard to the family history of mental illness. The attorneys for Mr. Hunter appear to have conducted an analyzation of both statutory and non-statutory factors, employing those they felt could be best presented consistent with their theory of the case.

(V6, R885). The trial court then outlined the comprehensive case of mitigation that Hunter's attorneys presented at his penalty phase. The court found:

> **Much of the mitigation evidence was integrated** by which the court means that it was **a blend of both statutory and non-statutory factors** assembled and presented through both nationally and regionally recognized experts who painted a comprehensive picture of the difficulties Mr. Hunter had been through in his life at all stages of his life. The evidence presented at the evidentiary hearing does not present any reliable evidence that would change or alter that picture in any relative way.

(V6, R886). The trial court's sentencing also reflects a presentation of both statutory and non-statutory mitigation. In the sentencing order, the trial court made the following findings regarding statutory mitigation:

1. Hunter's age at the time of the murder (18 years) (some weight);

2. Hunter was an accomplice with minor participation (not established);

3. Hunter was under the substantial domination[16] of Victorino (some

[16] The trial court specifically noted, however, that Hunter was "not a recalcitrant participant once he decided to be a part of the murder team." The trial court also

weight);

4. Hunter has no significant criminal history (little weight);

5. Hunter's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (not established);

The trial court made the following findings regarding non-statutory mitigation:

1. Hunter was immature at the time of the crime (little weight);

2. Hunter could not have foreseen that his conduct would create a grave risk of death to one or more persons (not established);

3. Hunter's good conduct during incarceration (very little weight);

4. Hunter's good conduct during trial (very little weight).

Future Conduct in Prison

Under this sub-claim, the postconviction court specifically found:

> From an evidentiary standpoint, this particular analysis is not normed to inmates and is certainly not normed to someone who committed six brutal murders. The court finds **this claim is based on mere speculation and has as its underpinnings very dubious science**.

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specifically rejected the theory that Hunter "surrendered his mental functions to the extent that his executive functions were taken over by Mr. Victorino." (V6, R1594). The substantial domination mitigator was based on Victorino's recruiting and leading the members of the murder team. As the trial court found and the evidence supports, however, once Hunter joined Victorino he was an enthusiastic participant.

. . .

> The defendant has failed to establish ineffectiveness in regard to Claim 3B. Even if the information should have been presented, there is no reliable evidence that the attorney's performance deprived the defendant of a reliable penalty phase proceeding. That evidence, if presented and believed, could never have overcome the power of the statutory aggravators presented by the State and could never have impacted the conclusion and outcome of the result concerning the four death sentences. The defendant has failed to prove either prong of the *Strickland* test.

(V6, R887-88). In a footnote, the court elaborated further:

> It is difficult to comprehend how an attorney representing Mr. Hunter, having just been convicted of killing four innocent young people in a mass slaughter where the four defendants used baseball bats and other weapons to brutally murder them would show that somehow a psychologist and the information she provided could reliably support the proposition that the guards in the prison and those interacting with Mr. Hunter in the future would not likely be the subject of his later violence. It is hard to imagine how that claim could even be presented without demeaning the credibility of every other theory of statutory and non-statutory mitigation that was presented in this case. This claim appears to be an academic exercise that establishes no rational relationship to the facts of this case of a likely outcome and quite frankly, ignores the power and weight of the statutory aggravating facts established by the State.

(V6, R888).

Misstatement About the Majority Vote

Specifically, Hunter claims trial counsel erred when he stated in the penalty phase closing argument:

> "And I ask you, accordingly, to very carefully once again deliberate and reach the conclusion that you, as a body -- and in this case it doesn't have to be anything more than a majority

> recommendation but as a majority of the body feel it is appropriate.
>
> You don 't have to do this as a group because, remember, it's not required to be a unanimous recommendation or a unanimous conclusion as to the appropriate penalty in the case. It has to be just a majority."

(DAR, V49, R4968-70). The trial counsel made the following findings regarding trial counsel having misstated the law about the jury's majority vote.

> . . . . The defendant does not dispute the fact that the court properly instructed the jury by stating, correctly, "if by six or more votes the Jury determined that Mr. Hunter should not be sentenced to death, the advisory sentence would be a recommendation to the court that it impose a sentence of life in prison without the possibility of parole."
>
> There is no question that counsel for the defendant made a mistake. The question remains as to whether or not that mistake was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment and secondly that the defendant has established that the deficient performance resulted in prejudice."
>
> While the defense counsel made a mistake, there has been no showing of prejudice. The court properly instructed the jury on the law to be followed. In fact, because the jury imposed death sentences for six of the victims (four involving Mr. Victorino and four involving Mr. Hunter, two of which are in common), they were able to demonstrate that they understood the law and that they did, in fact, follow it.

B. Argument

Non-Statutory Mitigation

Trial counsel is given wide latitude in making strategic decisions. *Dufour v. State*, 905 So. 2d 42, 56 (Fla. 2005). Strategic choices made after a thorough

investigation are virtually unchallengeable. *Willacy v. State*, 967 So. 2d 131, 143 (Fla. 2007) (*quoting Wiggins v. Smith*, 539 U.S. 510, 521 (2003). "Trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony." *Winkles v. State*, 21 So. 3d 19, 26 (Fla. 2009) (*citing Griffin v. State*, 866 So. 2d 1, 9 (Fla. 2003) (concluding there was no deficiency where counsel chose not to present witness who would have testified about the defendant's penchant for stealing automobiles and his prior difficulties with the murder victim)).

The Supreme Court also said in *Strickland*, 466 U.S. at 691, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *See also Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000); *Peterka v. McNeil*, 532 F.3d 1199, 1206 (11th Cir. 2008). Trial counsel is not deficient if witnesses are "either unwilling or unavailable to testify" at the penalty phase. *See Hartley v. State,* 990 So. 2d 1008, 1013 (Fla. 2008). The test for determining the reasonableness of trial counsel's actions "is not how, in hindsight, present counsel would have proceeded." *State v. Fitzpatrick*, 118 So. 3d 737, 747 (Fla. 2013). *See also Ferguson v. State,* 593 So. 2d 508, 511 (Fla. 1992) ("Although in hindsight one can speculate that a different argument may have been more effective, counsel's argument does not fall to the level of

deficient performance simply because it ultimately failed to persuade the jury."). In *Willacy*, trial counsel pursued a strategy of trying to humanize the defendant as much as possible. 967 So. 2d at 143. Counsel avoided presenting evidence to support certain statutory and non-statutory mental health mitigation because it would have opened the door to testimony from teachers and principals about Willacy's incorrigible behavior in school. *Id*. Trial counsel in *Willacy* was also not deficient in forgoing evidence of physical abuse as a child when Willacy's family repeatedly denied that such abuse had occurred. *Id*. at 143-44.

Trial counsel is not required to argue all mental health mitigation in the alternative as both statutory and non-statutory mitigation. *Nelson v. State/McNeil*, 43 So. 3d 20, 32 (Fla. 2010). In *Nelson*, trial counsel did not believe that the mental health mitigation was sufficient enough to qualify as "extreme," so he did not request an instruction on the statutory mental health mitigators. *Id*. "Trial counsel . . . was concerned that the jury would not give proper weight to the nonstatutory mitigation if certain mitigation as singled out as being statutory." *Id*. Counsel was also concerned that the State would successfully argue to the jury that no mental health mitigation was established at all if it did not meet the modifying adjective "extreme." *Id*. This Court agreed that counsel's actions in *Nelson* were reasonable; counsel still presented and argued mental health mitigation through the psychologist as non-statutory mitigation. *Id*. *Cf. also Israel v. State/McNeil*, 985

So. 2d 510, 516-17 (Fla. 2008) (counsel was reasonable to curtail his argument about non-statutory and not draw attention to areas that could be more harmful to the defendant—such as drug abuse and other damaging testimony from family members—and focus on the mental health factors).

In this case, trial counsel presented a comprehensive case in mitigation that encompassed both statutory and non-statutory mitigation. Hunter's attorneys hired a mitigation specialist to assist in the investigation. The attorney and the mitigation specialist met numerous times to review records, interview family members and school personnel, and prepare for the penalty phase. The attorneys presented three different psychologists to support statutory and non-statutory mental health mitigation. Counsel argued Hunter's mental health as statutory and non-statutory mitigation in the sentencing memorandum. Trial counsel's case in mitigation was frustrated, to some extent, by Hunter's family being uncooperative—no one in Hunter's family was willing to admit a family history of mental illness. Counsel made the strategic decision to avoid certain areas of Hunter's background in order to avoid more harmful evidence in rebuttal. Counsel was concerned with presenting witnesses such as Hunter's wrestling coach because of Hunter's aggressive behavior in school. Counsel was afraid it would open the door to more adverse testimony about Hunter. Counsel actions were based on a thoroughly investigated strategy. Counsel was not deficient. If counsel in *Nelson* and *Israel*

were reasonable in avoiding the "statutory" label to mental health mitigation and avoiding certain damaging information in non-statutory mitigation, surely Hunter's attorneys were reasonable in arguing mental health primarily as statutory mitigation and avoiding damaging areas in non-statutory mitigation.

Future Conduct in Prison

Hunter's attorneys were reasonable in not considering evidence that was speculative, or worse, did not exist. *Johnson v. State*, 63 So. 3d 730, 744 (Fla. 2011) (trial counsel not deficient for failing to present "most defense-friendly statistic on the number of shoes that could have matched the impressions found at the crime scene" when such evidence did not exist). Avoiding speculative evidence in the penalty phase applies to mental health mitigation as well. *Kimbrough v State/Crosby*, 886 So. 2d 965, 981 (Fla. 2004) (forensic psychologist's finding of statutory mental health mitigators was based on speculation and conjecture and rebutted by the State's expert. Counsel was also reasonable in forgoing more concrete mental health evidence in order to avoid exposing damaging evidence about Kimbrough's psychopathic deviance and malingering). *See also Asay v. State*, 769 So. 2d 974, 986-87 (Fla. 2000) (trial counsel's presentation of mental health evidence was not deficient where postconviction experts' diagnoses were speculative and unsupported by the evidence).

Hunter's attorneys did not consult with an expert about future dangerousness

and Hunter's probable future conduct in prison. They had no reason to. Hunter was a young man with no prior record of incarceration. The only evidence the attorneys had about Hunter's conduct while incarcerated was his conduct in pre-trial confinement. Hunter's attorneys presented that evidence and the trial court found it as mitigation. (V6, R919; DAR, V9, R1596). There was nothing concrete for Hunter's attorney's to present that would support a theory that Hunter was not likely to commit future acts of violence while in prison. Hunter's postconviction expert testified that Hunter's risk of future dangerousness is below the base rate but also admitted that the testing she administered to evaluate the potential for future dangerousness is not very effective at assessing a prison population serving a life sentence. The test subjects upon which the raw data is based had the opportunity to be released and reoffend. Dr. Brown stated, "these measures aren't great at assessing violence once you're in prison because risk of committing violence in the community appears somewhat different than risk of committing violence in prison." (V2, R344). Notwithstanding the testing's inaccuracy at assessing prisoners serving a life sentence, the trial court also found that it was not particularly helpful that the testing showed Hunter has a 31% chance of committing another act of violence within ten years. (V6, R888).

Misstatement About the Majority Vote

That trial counsel may have misspoken or made contradictory arguments

does not constitute deficient performance. *Diaz v. State/Crews*, --- So. 3d ---, 38 Fla. L. Weekly S839, S846-47, 2013 WL 6170645, *18 (Fla. Nov 21, 2013) (Where the defendant was not entitled to relief on an ineffective assistance of counsel claim based on counsel having misstated the standard of proof regarding the mitigating factors during the penalty phase closing argument). *See also Mendoza*, 87 So. 3d at 654-55 (Contradiction in trial counsel's comments from opening statement to closing argument was not ineffective assistance of counsel); *Cf. Gaskin v. State*, 822 So. 2d 1243, 1251 (Fla. 2002) (defense counsel gave a very brief penalty phase closing, did not discuss the aggravators, and briefly mentioned mitigation but "was not so deficient as to undermine confidence in the outcome of the proceedings").

Trial counsel's misstatement during his penalty phase closing argument about the proper vote needed for the jury to recommend life was not an act of incompetence or negligence. He simply misspoke during the argument. Even if trial counsel acknowledges that it was a mistake, it does not make him deficient. Counsel was not originally supposed to give the penalty phase argument, but co-counsel Mr. Bankowitz was ill and could not deliver the closing. *Strickland* does not require that counsel be the best lawyer, nor does it require counsel to be flawless in the delivery of his or her case. The deficiency prong in *Strickland* is measured by what reasonable attorneys would do under the same or similar

circumstances. And ultimately, the trial court instructed the jury correctly about its penalty phase vote. The variation in sentencing recommendations from one victim to the next is clear evidence that the jury understood its instructions and was not misled by trial counsel's misstatement. Hunter cannot establish prejudice.

C. Appellant's Case Law Distinguishable

Non-Statutory Mitigation

For the first subpart of his claim, Hunter relies primarily on two United States Supreme Court opinions applying the *Strickland* standard to an attorney's investigation for the penalty phase: *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005). First, in *Wiggins*, the Supreme Court found that a cursory investigation will not support a strategic decision in sentencing strategy. The trial court in *Wiggins* denied defense counsel's motion to bifurcate the sentencing phase and counsel was faced with the tactical decision of whether to present evidence that negated the defendant's culpability for the crime or mitigated against the defendant receiving the death penalty. *Id*. at 515. Wiggins' counsel did not inquire into his background beyond the probation office's standard investigation. Counsel promised the jury that they would hear about Wiggins' difficult life, then failed to present any evidence about his client's troubled background.

In *Rompilla*, the defense attorneys knew that the Commonwealth would seek

the death penalty by establishing the defendant's violent criminal history through prior rape and assault convictions, with an emphasis on the transcript of the rape victim's trial testimony. 545 U.S. at 375. Despite being warned twice by the prosecution of their intention to use the criminal history and transcript and despite having access to the prior conviction file through public records and discovery, Rompilla's attorney failed to examine the file at all until the prosecutor's second warning, and afterwards still did not evaluate the entire file. *Id*. Rompilla's attorneys failed in the basic function of reviewing the prosecution's case in aggravation to anticipate what the prosecutor may emphasize and discover any mitigating evidence with which to counter. *Id*.

In contrast from the attorneys in *Wiggins* and *Rompilla*, Hunter's attorneys conducted a comprehensive investigation into his background. Attorneys Mills and Bankowitz hired a mitigation specialist and three mental health professionals to inquire into Hunter's biological, psychological, and social history. After a detailed investigation, they made the informed strategic decision to avoid certain areas that may have been susceptible to harmful rebuttal evidence of Hunter's aggressive behavior in school. It is clear from the direct appeal record and the postconviction testimony that Hunter's attorneys prepared and presented a complete picture of Jerone Hunter's life and argued for a combination of both statutory and non-statutory mitigation that, no matter how it was presented, simply could not

outweigh the overwhelming aggravation in these brutal murders.

Future Conduct in Prison

Hunter relies on the decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986) and this Court's opinion applying *Skipper* to Florida in *Valle v. State*, 502 So. 2d 1225 (Fla. 1987). *Skipper* was a case that materialized in the wake of *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Lockett v. Ohio*, 438 U.S. 586 (1978); the latter two requiring that the sentencer in a death penalty case be permitted to consider anything about the defendant's character, background, or the circumstances of the offense. In *Skipper*, the defendant wanted to present evidence that he had adjusted well to incarceration during his pre-trial confinement and that he had shown rehabilitative potential during a previous prison term by earning a high school diploma. 476 U.S. at 2-3. Skipper also wanted to promise his sentencer that he would behave himself in prison and continue to support his family financially with his earnings working in prison. *Id*. The Supreme Court held that defendants cannot be prohibited from presenting such evidence. In light of *Skipper*, Manuel Valle's case was remanded for further consideration by this Court. Consistent with *Skipper*, this Court remanded for resentencing, holding that Valle's evidence about his prior term of incarceration where he had been a "model prisoner" was relevant. *Valle*, 502 So. 2d at 1226.

There is a principal and decisive legal distinction that separates *Skipper* and

Valle from Hunter's case. The holdings in *Skipper* and *Valle* were based on violations of Due Process when a trial court prohibited the defendants from presenting the evidence in question. They were not decisions based on the Right to Counsel where an attorney, strategically or not, did not present evidence about a defendant's potential for good conduct in prison. Hunter was not deprived of due process. If there had been evidence to present on the matter, Hunter would not have been denied that opportunity. His attorneys simply did not have a prison record to present.

There is also a principal and decisive factual distinction between *Skipper* and *Valle* and this case. Ronald Skipper and Manuel Valle both had previous terms of incarceration with tangible evidence of good conduct, productive achievements, and positive adjustment to a term of imprisonment. Jerone Hunter did not. First, Hunter's attorney did present and argue his good behavior in pre-trial confinement and the trial court found it as non-statutory mitigation. But any evidence about Hunter's probable future conduct in prison would have been speculative. Hunter was a very young man at the time of the murders and his sentencing. He had no previous record of imprisonment for his attorneys to present.

Misstatement About the Majority Vote

In support of this sub-issue, Hunter cites cases that he claims hold it would be reversible error for the trial court, over a defense objection, to improperly

instruct the jury. *See generally Jackson v. State*, 438 So. 2d 4 (Fla. 1983); *Rembert v. State*, 445 So. 2d 337 (Fla. 1984). *See also Patten v. State*, 467 So. 2d 975 (Fla. 1985) (reversible error for trial court to give "*Allen*[17] charge" to a deadlocked penalty phase jury). Neither *Jackson* nor *Rembert* stand for the conclusion for which Hunter presents them. In *Jackson*, this Court dealt with a previous instruction that required a majority vote for any sentence, not just death. 438 So. 2d at 6. Lack of preservation notwithstanding, this Court held that there was no prejudice to the defendant in having charged the jury with the prior instruction. *Id*. In *Rembert*, this Court addressed the same issue and held that there was no prejudice even after the instruction had been rewritten. 445 So. 2d at 340.[18]

The issue here, however, is not that the trial court gave an erroneous instruction, but that the attorney misspoke during his closing argument. The trial court correctly instructed the jury. (DAR, V49, R5026-28). Contrary to what Hunter suggests, even if the trial court gave an erroneous instruction, *Jackson* and *Rembert* do not necessarily mean that a trial court's erroneous instruction automatically constitutes reversible error. In *Patten*, the "*Allen* Charge" was certainly reversible error. 467 So. 2d at 979-80. But in other cases, this Court has

[17] *Allen v. United States*, 164 U.S. 492 (1896).

[18] The issue in both *Jackson* and *Rembert* was preservation of trial court error and procedural bar, not the substance of an ineffectiveness claim.

found that a trial court's erroneous instruction in the penalty phase was harmless beyond a reasonable doubt. *See State v. Breedlove*, 655 So. 2d 74, 76 (Fla. 1995) (jury instruction on heinous, atrocious, or cruel was the type declared unconstitutional in *Espinosa*,[19] but harmless beyond a reasonable doubt; aggravator would have existed no matter what instruction had been given). *See also Johnson v. Singletary*, 640 So. 2d 1102, 1104-05 (Fla. 1994). Neither does a trial court misspeaking during instructions automatically constitute reversible error. *Rhodes v. State*, 638 So. 2d 920, 926 (Fla. 1994) (Where the trial court misspoke when instructing about the aggravators but told the jury to refer to the written instructions if it had questions and the written instructions were correct). Whether the error or misstatement is reversible is case-by-case dependent. In this case, the trial court's instructions to the jury about its vote were correct and the attorney's misstatement does not automatically constitute deficient performance. The misstatement did not confuse the jury as evidenced by the variation in sentencing recommendations for each defendant and victim.

D. No Prejudice

Even if the representation by Hunter's attorneys was deficient, Hunter suffered no prejudice. *Rimmer v. State*, 59 So. 3d 763, 781 (Fla. 2010); *Jones v.*

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[19] *Espinosa v. Florida*, 505 U.S. 1079 (1992).

State, 998 So. 2d 573, 584 (Fla. 2008). The non-statutory mitigation Hunter claims should have been presented through a social worker or mitigation specialist was presented in large part through the mental health experts and other lay witnesses who testified. Hunter's forensic psychiatrist, Dr. Berns, testified that Hunter was likely in the early stages of schizophrenia.[20] Hunter's neuropsychologist, Dr. Mings, agreed. Hunter's attorneys attempted to established that Hunter had brain damage through the other neuropsychologist, Dr. Gur. That opinion was discredited by the State's rebuttal expert, Dr. Holder, a radiologist. Hunter's mother, aunt, and grandmother all testified that Hunter had witnessed his mother being abused when he was young and that Hunter had grown up under a very strict step-father.

There is no likelihood that a different case in mitigation would have changed the jury's recommendation. The murders in this case were exceptionally barbaric. Hunter was a zealous participant in the murder team, second only to Victorino. The testimony describing Hunter's participation is particularly savage:

> Hunter went back into the bedroom and starting hitting Gonzales in the head. (V39, R3524-25). Hunter "started hitting him and hitting him, and he wouldn't stop." Salas told Hunter to stop. Hunter told

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[20] All of the mental health experts that testified at Hunter's penalty phase agreed that Hunter knows right from wrong and he is not insane, nor was he at the time of the murders. (DAR, V46, R4624; V47, R4714)

> him, "[H]e's not dead, I got to kill him." Salas said Hunter struck Gonzales "around 20 to 30" times, "more than I can count."
> . . .
>
> Hunter told them [the other codefendants] he found a girl in the closet. Hunter said she (Michelle Nathan) cried, "please don't kill me, please don't kill me." Hunter told her, "too late, bitch." She screamed as he stabbed her in the chest. He hit her repeatedly in the head, "again and again." (V39, R3532).

(DAR, V39, R3525-26, 3531-32). The case against Hunter is heavily aggravated. The murder team devised a detailed plan for attacking the house and assigned each member a specific room. The defendants lined up outside of the house with a tactical posture, breached the doorway, and commenced the slaughter. Hunter carried out his assignment without hesitation. Hunter literally clubbed his victims to death with a baseball bat while they pleaded for their lives. There is no likelihood that a different case in mitigation would have outweighed the aggravation of six cold, calculated, and heinous first-degree murders committed during a burglary for the purpose of avoiding arrest.

ISSUE 2: TRIAL COUNSEL WAS NOT INEFFECTIVE AT THE GUILT PHASE

In the second issue, Hunter claims that his trial attorneys were ineffective during his guilt phase. Specifically Hunter alleges that trial counsel failed to "properly litigate the motion for mistrial at the time co-defendant Anthony Cannon testified." (*Initial Brief* at 39). Hunter cannot establish both prongs of *Strickland*. To the extent that Hunter is attempting to re-litigate his direct appeal claim under

the guise of ineffective assistance of counsel, the claim is procedurally barred. Hunter points to this Court analysis of the Confrontation Clause issue raised in his direct appeal. *Hunter*, 8 So. 3d at 1066. Hunter now claims, "Thus, [this] Court found that trial counsel was ineffective for (a) failing to preserve the alleged error for appeal and (b) for raising a belated basis on a state procedural rule rather than on Constitutional grounds." (*Initial Brief* at 41). Hunter's assertion that this Court found his counsel ineffective on direct appeal is, of course, presumptuous. Indeed, Hunter raised ineffective assistance of counsel claims in his direct appeal and this Court explicitly held they were not cognizable at that time. *Id*. at 1061 n.5.

A. The Trial Court's Order Denying Postconviction Relief

After hearing evidence and argument, the trial court denied Hunter's guilt phase ineffectiveness claim. The trial judge in Hunter's postconviction hearing was the same judge that presided over the joint trial of Hunter, Victorino, and Salas. That same judge presided over codefendant Victorino's postconviction proceeding. Victorino raised the same claim that Hunter raises—that counsel was ineffective for failing to move for a mistrial after Cannon refused to testify. The trial court held that the same analysis applies. (V6, R895).

The trial court first discussed this Court's analysis of the issue raised on direct appeal in both Hunter's and Victorino's cases. Hunter and Victorino raised a Confrontation Clause challenge to Cannon's refusal to testify. The postconviction

trial court first held that the claim was procedurally barred and Hunter was trying to re-litigate the direct appeal issue by "couching it as ineffectiveness of counsel." (V6, R893). The trial court then analyzed whether Cannon's refusal to testify deprived Hunter a fair proceeding warranting a motion for mistrial. The trial court found that Cannon, as a participant in the murder, was going to testify as an eye witness to the murders. (V6, R894). The trial court astutely observed that Cannon's refusal to testify was more detrimental to the State than the defendants.

> Because there were ten people in the house and six are dead, there are only four people that had potential knowledge regarding [exactly what happened within the interior of the house as the six victims were killed]. All had entered pleas of not guilty and all had the privilege against self-incrimination so they could not be required to testify. Any trial in that setting would not be able to provide the jurors with a commentator to explain what went on within the house . . . .
>
> When Mr. Cannon testified he did provide information that the parties were there but refused to answer the questions associated with his role as commentator inside the residence, for the most part. To the extent that the State did not have a live witness to explain that information, **the defendants each enjoyed a benefit that it appeared they would not otherwise have. Two of the defendants with similar interests asked no questions, apparently in an effort to take advantage of that benefit**.

(V6, R894). The trial court also found that the testimony Cannon did provide was nothing new that was not also available through other reliable sources. (V6, R894-95).

B. Argument

Hunter's codefendant and companion capital case, Troy Victorino, raised

essentially the same claim in his postconviction proceedings regarding counsel's handling of Cannon's refusal to testify. Victorino claimed that his trial counsel, "should have objected, requested a curative instruction, and moved for a mistrial when . . . Cannon refused to be cross-examined," having violated Victorino's Sixth Amendment right to cross-examine the witnesses against him. *Victorino*, 127 So. 3d at 487. This Court held that, because "Cannon gave direct testimony implicating Victorino then refused to be cross examined," Victorino's attorneys performed deficiently by not objecting and requesting a curative instruction. *Id*. at 489. But this Court also held, "Cannon's refusal to be cross examined did not vitiate Victorino's trial," a mistrial was not necessary, and a curative instruction would have been sufficient to attenuate the effect of Cannon's testimony. *Id*. "Cannon's testimony was brief and unelaborated . . . only a few lines of testimony were harmful . . . . [and] each of the incriminating points made by Cannon was established by other evidence." *Id*.

Hunter's Counsel was Not Deficient

First, trial counsel was not deficient. At the evidentiary hearing, Attorney Mills was adamant that he joined in the objection and motion for mistrial at the time Cannon refused to be cross-examined. As even Hunter acknowledges, Attorney Mills stated:

> No. I am one hundred percent confident that we joined in that objection for mistrial. I've spoken to Mr. Dowdy, who was Mr.

> Victorino's counsel. He recalls it, Mr. Bankowitz recalls it, I recall it. I recall standing in the well with the other lawyers next to the bench and joining in that objection. I have no explanation as to why it's not in the record.

(V2, R242) (*Initial Brief* at 42). And perhaps the reason the objection and motion for mistrial from Hunter's defense team was not recorded is explained by the chaos of the moment in the courtroom when Cannon became a hostile witness to everyone, the State included. Judge Parsons recalled how hectic the situation became. "[T]here were many [defense counsel], and they were all up and down . . . one of them asked me to declare [Cannon] an adverse witness." (V3, R516). The evidence in postconviction directly contradicts Hunter's claim. According to Mr. Mills, he objected and moved for a mistrial during Cannon's testimony. After Cannon began refusing to answer the State's questions, each defense team launched a barrage of objections throughout the remainder of the time Cannon was on the stand. During the State's direct examination and Victorino's cross examination of Cannon, the examining attorney could barely ask a question without the other attorneys simultaneously objecting on multiple grounds. Cannon could barely refuse to answer before an attorney fired off another volley of objections. (DAR, V28, R1941-70).[21] Based on the evidence presented in

[21] The objections from Hunter's attorney that were captured on the record are as follows: <u>During direct examination by the State (outside the presence of the jury)</u>:

postconviction, Hunter cannot prove the deficiency prong of *Strickland* and his ineffectiveness claim should fail.

Straight to Prejudice

Alternatively, even if this Court is not inclined to explicitly hold that Hunter's attorney was not deficient, the Court can abstain from answering the deficiency question at all. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed"). Because a court can make a finding on the prejudice prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *See Franqui*, 59 So. 3d at 95-97; *See also Walls v. State*, 926 So. 2d 1156, 1173 (Fla. 2006) (summary denial appropriate on ineffective assistance of counsel claim where evidence was cumulative); *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001) (Because the *Strickland* standard requires

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objection to Cannon being declared a hostile witness for the State to ask leading questions (DAR, V28, R1946); During the cross examination by Victorino's attorney: objection to beyond the scope of direct when Cannon was asked if it were actually he and Salas who actually recruited Victorino as the muscle (DAR, V28, R1957-57); objection to beyond the scope of direct when Cannon was asked about a person named Thomas Aichinger (DAR, V28, R1964); joining Salas's objection to a letter purportedly written by Cannon being admitted into evidence (DAR, V28, R1967-68).

establishment of both the deficient performance and prejudice prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong).

It appears from the testimony in postconviction by Hunter's attorney there is an error in the direct appeal record where it failed to capture Mr. Mills's objection to Cannon's entire testimony and motion for mistrial. And despite counsel's certainty, any record of his objection and motion for mistrial at the time he made it appears to have vanished into thin air. To cloud the matter more, this Court has already ruled on direct appeal that Hunter did not preserve the challenge to Cannon's testimony under the Confrontation Clause; and rightfully so, based on the direct appeal record *as it reads*. Thus, rather than trying to grapple with this Hydra, the Court can navagate the ship around it with a course charted straight to the prejudice analysis. Because of the conflict between the direct appeal record and the postconviction evidence and because ultimately Hunter cannot demonstrate prejudice, this Court should reject Hunter's ineffectiveness claim without opining one way or the other on deficiency.

There were only two places in Cannon's testimony where anyone was able to get a substantive response about the other codefendants. Only one of them was in the presence of the jury. First, after the judge sent the jury out of the courtroom, the following exchange took place between the prosecutor and Cannon:

> Q: All right. At the time you drove Mr. Victorino, Mr. Salas and Mr. Hunter up to the house on August 5th, Telford Lane, where the people were killed, you knew the intention was to kill the people inside, did you not?
> A: His intention.
> Q: All right. And you knew -- his, meaning Mr. Victorino, correct?
> A: Yes, Sir.
> Q: And you drove him there knowing that's what he was gonna do?
> A: I guess sir, yes.

(DAR, V28, R1943-44). Not only was that line of questioning outside of the presence of the jury, but all of the answers implicated only Victorino and not Hunter. Once the jury came back in, the State followed Cannon's willingness to talk about Victorino and the questions shifted the focus to Victorino only, rather than all three codefendants. Then, the State finished its direct examination with the following exchange:

> Q: . . . Would you at least be willing to tell this jury who went into the house the night those people were killed? . . . .
> A: All of us did.
> Q: These three men sitting here?
> A: Uh-huh.
> Q: Victorino, Hunter, and Salas?
> A: Yeah.
> Q: And everyone was armed with a baseball bat?
> A: Yes, Sir.

(DAR, V28, R1954). Nowhere during the cross-examination by Victorino's attorneys did Cannon implicate Hunter. Notwithstanding Cannon's refusal to answer, not even the questions posed by Victorino's attorney implicated Hunter. Instead, the most they suggested was that Cannon and Salas were actually the two

with the motive to "beat-up" the victims because of a previous altercation and that Cannon and Salas had actually recruited Victorino as the "muscle." (DAR, V28, R1957-58). Hunter was not mentioned at all. In the thirty-four pages of Cannon's testimony Jerone Hunter is implicated in only eight, unelaborated words. This Court found that Victorino was not prejudiced because Cannon's testimony was brief and unelaborated; only implicating Victorino a few times. In that regard, Cannon implicated Hunter even less.

This Court also held that Cannon's testimony implicating Victorino was cumulative to other testimony.

> Both Brandon Graham, a coconspirator who withdrew before the attack, and Salas testified that before entering the Telford Lane home, Victorino expressed his intent to kill the occupants. Codefendants Salas and Hunter testified that they, along with Cannon and Victorino, all armed with baseball bats, entered the Telford Lane home on the night of the murders. Finally, while the other witnesses could not testify to Cannon's feeling of intimidation or his motive for participating in the crimes, Graham, Salas, and Hunter all testified that they were afraid of Victorino, and Salas and Hunter added that they participated in the attack because they feared Victorino would harm them if they did not participate.

Victorino, 127 So. 3d at 490. The victims' blood was also on Victorino's boots, Victorino's boot print was on the front door of Telford Lane home, and his boot print was on playing cards inside the house. All of these factors led this Court to the conclusion that Cannon's brief implications did not prejudice Victorino. *Id*.

Cannon's testimony had even less of an impact on Hunter. Not only was

Cannon's mention of Hunter a fleeting blip in the trial, the State's case against Hunter was proven through stronger evidence. Hunter admitted his involvement in the murders to Investigator Horzepa after he was questioned by law enforcement. (DAR, V32, R2555, 2559). Hunter confessed that he went to the Telford Lane house with the others armed with a baseball bat. Hunter admitted specifically to hitting victims Gleason and Gonzalez several times with the bat. (DAR, V32, R2524-27, 2530). Similar to Victorino, coconspirator Graham also implicated Hunter. Codefendant Salas gave a detailed description of Hunter's involvement in the murders.

> Salas explained that before the men entered the house on Telford, Hunter called Salas and Cannon "bitches" because they did not want to take part in the plan. Hunter ran into the house after Victorino. Salas ran in next and saw Hunter swing his bat. Hunter said to Gleason, "I don't like you" and started hitting him. Hunter asked Salas if he had killed Gonzalez; Hunter called Salas a "pussy boy" when Salas said he was not killing anyone. Hunter then ran into the bedroom and began hitting Gonzalez in the face and head. Hunter hit Gonzalez between twenty and thirty times, saying he had to kill him. Salas left the house. When Hunter came out he described how he found Nathan hiding in one of the bedrooms and killed her when she pled for her life. Salas described Hunter as having a look of "ferule [sic] joy."

Id. at 1059. Hunter, of course, took the stand and verified his confession and vividly described how he followed Victorino into the Telford Lane home and began hitting the victims with a baseball bat. (DAR, V38, 3343-3441). Corroborating Hunter's confession and Salas's and Graham's testimony, another

impression on the playing cards inside the home likely came from Hunter's tennis shoe. Sunglasses recovered from Cannon's vehicle when all of the defendants were arrested had a victim's fingerprint on them. Glass fragments found in Cannon's vehicle could have originated from a broken glass lamp at the crime scene. Blood found on shoe laces that were seized from Hunter's and Victorino's house belonged to three of the victims. *Hunter*, 8 So. 3d at 1059 n.2.

The evidence that incriminates Hunter in these murders, independent of Cannon, is overwhelming, not the least of which is Hunter's own confession. Cannon's implication of Hunter was a flash in the pan. No matter what trial counsel would have done, Cannon's refusal to testify did not affect the jury's determination of Hunter's guilt or recommnedation of death. The net result should not undermine this Court's confidence in the outcome of Hunter's trial. Hunter's guilt phase ineffectiveness claim should fail.

Even if Deficient, Still No Prejudice

For the same reasons articulated above, even if this Court were to affirmatively hold that Hunter's trial counsel was deficient, the fact remains that Hunter cannot establish prejudice. For that reason, Hunter cannot establish his ineffectiveness claim under *Strickland*, notwithstanding trial counsel's handling of Cannon's testimony. Hunter's ineffectiveness claim should fail.

C. Appellant's Authority Not Applicable

Hunter cites no case from any court to suggest that the trial court's ruling is erroneous. Hunter does not quarrel with this Court's opinion in *Victorino*. Hunter only refers to the non-binding ABA guidelines[22] for the performances of counsel in death penalty cases. Moreover, trial counsel's testimony at the evidentiary hearing—with which Hunter juxtaposes the guidelines—directly refutes the ineffectiveness claim. Attorney Mills is "one hundred percent confident" that Hunter's defense team joined in the objection and motion for mistrial on the constitutional basis. Other than his mere disagreement with the trial court's ruling against him, Hunter has given this Court no legal basis to reverse the court below.

ISSUE 3: THE TRIAL COURT DID NOT ERR IN DENYING HUNTER'S REQUEST TO INTERVIEW JURORS

In the third issue, Hunter challenges the constitutionality of Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar: a rule that generally prohibits an attorney involved in a particular case from communicating with any juror from that particular case about the trial. More specifically, Hunter raises this claim to "urge[] this Court to explain, with a due process analysis, why academics, journalists, and lawyers not connected to his case can conduct 'fishing expedition' interviews

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[22] 31 HOFSTRA L. REV. 913, 1028-29 (2003).

while trial and postconviction counsel are precluded from doing so." (*Initial Brief* at 44). While Hunter alleges that the rule itself deprives him of "adequate assistance of counsel," it does not appear that Hunter is alleging that his counsel was ineffective under *Strickland* in this claim. (*Initial Brief* at 43).

A. The Trial Court's Order Denying Postconviction Relief

At the case management conference Hunter conceded that this claim was purely a question of law that did not require an evidentiary hearing. Following this Court's precedent, the trial court denied Hunter's challenge to the rule prohibiting attorney contact with jurors. Specifically, the lower court held:

> The defendant claims that the rules prohibiting his counsel from interviewing jurors to determine whether misconduct existed violates Equal Protection and the First, Sixth, Eighth, and Fourteenth Amendments of the United States and Florida Constitutions. The defendant claims that the rule against juror interview precludes the finding that the jury improperly considered the victim impact evidence as an aggravating circumstance. The defendant claims that since he is incarcerated the prohibition violates Equal Protection as a free defendant could properly approach the jurors to determine if misconduct occurred. The defendant further claims that his rights to a fair trial and access to courts are violated by this prohibition as he cannot determine whether extraneous influences affected his jury or that many of the jurors had knowledge of the case from outside sources. The state responds that this claim is procedurally barred as a claim that could have or should have been raised on direct appeal. The state alternatively responds that this claim is without merit and presents nothing more than a fishing expedition into areas that are prohibited.
>
> This type of claim has been found procedurally barred by the Florida Supreme Court. *See Marquard v. State*, 27 Fla. L. Weekly S973, n. 1 & 2 (Fla. Nov. 21, 2002) (*citing Rose v. State*, 774 So. 2d 629, 637

> n.12 (Fla. 2000)); *Gorby v. State*, 819 So. 2d 664, 674, n.7 and 8 (Fla. 2002); *Brown v. State*, 755 So. 2d 616, 621 n.5 and 7 (Fla. 2000). Furthermore, this type of claim has also been found without merit. *Sweet v. Moore*, 822 So. 2d 1269, 1274 (Fla. 2002) (*citing Johnson v. State*, 804 So. 2d 1218, 1224 (Fla. 2001); *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2000)).

(V6, R896).

B. Argument

First, Hunter did not raise any claim concerning juror interviews in his direct appeal proceeding. This Court has repeatedly held that this claim is procedurally barred if not raised on direct appeal. *Reese v. State*, 14 So. 3d 913, 919 (Fla. 2009); *Spencer v. State*, 842 So. 2d 52, 72 (Fla. 2003); *Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2000); *Young v. State*, 739 So. 2d 553, 555 n.5 (Fla. 1999).

Second, notwithstanding the procedural bar, Hunter's claim lacks foundation. Hunter failed to file a notice of intention to interview jurors. This notice is required by Florida Bar Rule 4-3.5(d)(4) and must be based on counsel's reasonable belief that the verdict may be subject to legal challenge. *Vining v. State*, 827 So. 2d 201, 216 (Fla. 2002) (*citing* R. Regulating Fla. Bar 4-3.5(d)(4)). The notice must set forth the names of any jurors to be interviewed. *Vining*, 827 So. 2d at 216. Here, Hunter never filed a notice of intention to interview jurors.

Third, Hunter failed to allege that any juror misconduct took place, and there is nothing in the record that would support such a conclusion. Absent any substantiating factual allegations, Hunter's claim is purely a speculative request to

conduct what this Court has referred to as "fishing expedition interviews." *Arbelaez*, 775 So. 2d at 919. These interviews amount to an impermissible review of the jury's deliberations and should not be used to support a claim in postconviction. *Vining*, 827 So. 2d at 216; *Johnson v. State*, 593 So. 2d 206, 210 (Fla. 1992).

Finally, this Court has expressly rejected Hunter's claim that Florida Bar Rule 4-3.5(d)(4) violates his constitutional right to Equal Protection. *Reese*, 14 So. 3d at 919 (holding rules prohibiting attorneys from interviewing jurors after trial did not violate a capital murder defendant's right to equal protection in pursuing postconviction relief (*citing Barnhill v. State*, 971 So. 2d 106, 117 (Fla. 2007))); *see also Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001); *Arbelaez*, 775 So. 2d at 920. Hunter cites no case that has held otherwise and simply asks this Court to reconsider its precedent. This Court should hold fast to its well-settled precedent and affirm the trial court's denial of this claim.

ISSUE 4: FLORIDA STATUTE §921.141 IS NOT FACIALLY VAGUE AND OVERBROAD; TRIAL COUNSEL WAS NOT INEFFECTIVE

In the fourth issue, Hunter claims that Florida's capital sentencing statute is unconstitutionally vague and overbroad under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because "the jury did not receive adequate guidance" and "the trial court's instructions to the jury unconstitutionally diluted its sense of responsibility

in determining the proper sentence." (*Initial Brief* at 45). Hunter also alleges that trial counsel was ineffective: to the extent [he] failed to litigate these issues." At the outset of the issue, Hunter acknowledges that he raises this claim in order to preserve it for federal review. (*Initial Brief* at 45). This claim is procedurally barred, without merit, and counsel could not have been ineffective.

A. The Trial Court's Order Denying Postconviction Relief

As Hunter conceded in his 3.851 motion below, this claim is purely a question of law that did not require an evidentiary hearing. (V4, R585-86). Following this Court's precedent, the trial court denied Hunter's claim. Specifically, the lower court held:

> The defendant claims that his jury was misled by comments, questions, and instructions that unconstitutionally and inaccurately diluted the jury's sense of responsibility towards sentencing in violation of the Eighth and Fourteenth Amendments. The defendant also claims that to the extent that this issue was not properly litigated at trial or on appeal, he received ineffective assistance. The defendant contends that the Court committed error under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), in instructing the jury that its sentence was merely advisory and repeated references to the jury's decision as a recommendation. The defendant urges that the state repeated these terms over counsel's objections.
>
> This claim is procedurally barred as it was or could have or should have been raised on direct appeal. *Farina*, 801 So. 2d at 55; *Harvey*, 650 So. 2d at 987; *Reed*, 640 So. 2d at 1094; *White*, 565 So. 2d at 700. As such, the rephrasing of this claim in the guise of ineffective assistance of counsel is also barred. *Arbelaez*, 775 So. 2d at 915.
>
> Moreover, although denied on the basis of the procedural bar, this Court notes that these claims have been held without merit when the

> Court has read the standard jury instructions. *Burns v. State*, 699 So. 2d 646, 654 (Fla. 1997) ("We have recognized that *Tedder* notwithstanding, the standard jury instruction fully advises the jury of the importance of its role and correctly states the law."); *Johnson v. State*, 660 So. 2d 637, 647 (Fla. 1995) (finding no merit to defendant's argument that Florida's jury instructions denigrate the role of the jury in violation of *Caldwell*) (*citing Combs v. State*, 525 So. 2d 853 (Fla. 1988); *Grossman v. State*, 525 So. 2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989)); *Sochor v. State*, 619 So. 2d 285, 291 (Fla. 1993) ("Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate *Caldwell*."); *see also Johnston v. Singletary*, 162 F.3d 630, 643-44 (11th Cir. 1998) (*citing Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997), *cert. denied*, 523 U.S. 1141 (1998)). Therefore, counsel cannot be deemed ineffective for failing to raise futile arguments. *Harvey*, 656 So. 2d at 1258; *Swafford*, 569 So. 2d at 1266; *King*, 555 So. 2d at 357-58; *Magill*, 457 So. 2d at 1370. In addition, any claims of ineffective appellate counsel are not proper in a 3.851 motion. *See Davis v. State*, 789 So. 2d 978, 981 (Fla. 2001); *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). *See also Miller v. State*, 196 So. 2d 1243, 1257 (Fla. 2006).

(V6, R897-98).

B. Argument

First, Hunter's claim is procedurally barred. It could have been raised on direct appeal. *Victorino*, 127 So. 3d at 503. Hunter failed to address this issue on direct appeal. The trial court's denial should be affirmed.

Second, Hunter's claim has no merit. Claims under *Caldwell v. Mississippi* are well settled in Florida. Florida's standard instruction *does not* dilute the jury's sense of responsibility in the sentencing process. "We reject Brown's contention that the penalty-phase jury instructions used in this case violate *Caldwell* . . . ."

Brown v. State, 126 So. 3d 211, 220-21 (Fla. 2013) (*citing Patrick v. State*, 104 So. 3d 1046, 1064 (Fla. 2012), *cert. denied*, 134 S.Ct. 85 (2013) ("The standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury and do not violate *Caldwell*.").

Third, if Hunter wanted to pursue this claim under an ineffective assistance of counsel theory, he failed in his burden because he elicited no testimony from trial counsel at the evidentiary hearing about this claim. Indeed, Hunter conceded in his postconviction motion to the trial court that this claim did not require an evidentiary hearing. Even if trial counsel had not raised this issue, it would not make him constitutionally ineffective. Counsel cannot be deficient for failing to raise a meritless claim. *Troy*, 57 So. 3d at 844 (trial counsel was not ineffective in failing to raise a meritless claim alleging the arbitrary and capricious imposition of the death penalty), *citing Teffeteller v. State*, 734 So. 2d 1009, 1023 (Fla. 1999). The trial court's denial of Hunter's claim should be affirmed.

ISSUE 5: FLORIDA'S CAPITAL SENTENCING STATUTE IS NOT UNCONSTITUTIONAL AND IS NOT APPLIED ARBITRARILY AND CAPRICIOUSLY; TRIAL COUNSEL AND APPELLATE COUNSEL WERE NOT INEFFECTIVE

Hunter's claim appears to reach back to the genesis of Florida's capital sentencing statute in the reconstruction of capital punishment starting with *Profitt v. Florida*, 428 U.S. 242 (1976) in the wake of *Furman v. Georgia*, 408 U.S. 238

(1972). Like the previous issue, Hunter acknowledges that he raises this claim simply to preserve it for federal review. (*Initial Brief* at 46). This claim is procedurally barred, without merit, and neither trial nor appellate counsel could have been ineffective.

A. The Trial Court's Order Denying Postconviction Relief

As Hunter conceded in his 3.851 motion below, this claim was purely a question of law that did not require an evidentiary hearing. (V4, R586-89). Following this Court's precedent, the trial court denied Hunter's constitutional challenge to Florida's capital sentencing statute. Specifically, the lower court held:

> This claim is procedurally barred because it could have been but was not raised on direct appeal. *Fotopolis* [sic] *v. State*, 608 So. 2d 784, 794 (Fla. 1992). The method of execution component was rejected on direct appeal and cannot be relitigated in this action. *Hunter v. State*, 8 So3d 1075. This claim is procedurally barred.

(V6, R898-99).

B. Argument

First, this claim is procedurally barred because it could have been raised on direct appeal. *Johnson v. State*, 104 So. 3d 1010, 1027 (Fla. 2012). And Hunter cannot use a claim of ineffective assistance of counsel to circumvent the procedural bar. *Foster v. State*, 38 Fla. L. Weekly, S756, S765, 2013 WL 5659482, *23 (Fla. Oct. 17, 2013) (*citing Gore v. State*, 846 So. 2d 461, 466 n.4 (Fla. 2003)). The constitutionality of Florida's capital sentencing statute is purely a question of

law appropriate for review in a direct appeal. Hunter could have raised this claim on direct appeal. He did not. The trial court's denial should be affirmed.

Second, if Hunter wanted to pursue this claim under an ineffective assistance of counsel theory, he failed in his burden because he elicited no testimony from trial counsel at the evidentiary hearing about this claim. Indeed, Hunter conceded in his postconviction motion to the trial court that this claim did not require an evidentiary hearing. In any event, counsel cannot be deficient for failing to raise a meritless claim. *Troy*, 57 So. 3d at 844; *Teffeteller*, 734 So. 2d at 1023. The trial court's denial of Hunter's claim should be affirmed.

Third, Hunter's claim has no merit. In *Profitt*, the United States Supreme Court held that:

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida to determine independently whether the imposition of the ultimate penalty is warranted.

428 U.S. at 252-53 (*quoting Songer v. State*, 322 So. 2d 481, 484 (1975)) (internal quotations omitted). The High Court also stated that, "The Supreme Court of Florida . . . has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed." *Proffitt*, 428 U.S. at 253. The Florida death penalty statute has been repeatedly upheld, both by this Court and the United

States Supreme Court for nearly thirty years since the reconstruction of capital punishment. *See e.g. Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983). *See also Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002). Thus, the trial court's denial of Hunter's claim should be affirmed.

Fourth, like trial counsel, appellate counsel cannot be ineffective for failing to raise a meritless claim. *Jackson v. State*, 127 So. 3d 447, 476 (Fla. 2013). In that regard, Hunter also appears to be litigating his ineffective assistance of appellate counsel claim in the wrong pleading. "Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus." *Id.* (*citing Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000)). Hunter filed a petition for writ of habeas corpus contemporaneous with this appeal and he raised no such claim in his petition. In any event, appellate counsel is not ineffective for strategically selecting the strongest points for review on appeal, even for matters that were preserved. *Freeman*, 761 So. 2d at 1069 (*quoting Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points."). Hunter's appellate counsel was reasonable to not muddy the waters in his appeal with a meritless claim such as

this. The denial of Hunter's claim should be affirmed.

ISSUE 6: FLORIDA'S DEATH SENTENCING STATUTE IS NOT UNCONSTITUTIONAL AS APPLIED

Like the previous issue, Hunter acknowledges that his sixth claim is raised to preserve it for federal review. Though not indicated in the title of the issue, Hunter's "as applied" argument in this iteration of his various challenges to the constitutionality of Florida's capital sentencing statute appears to be a claim based on *Ring v. Arizona*, 536 U.S. 584 (2002). This claim is both procedurally barred and without merit.

A. The Trial Court's Order Denying Postconviction Relief

As Hunter conceded at the case management conference, this claim was purely a question of law that did not require an evidentiary hearing. Following this Court's precedent, the trial court denied Hunter's *Ring* claim. Specifically, the lower court held:

> In *Victorino v. State*, 23 So.3rd 87 (Fla. 2009), the Supreme Court dealt with the claim that the death sentences are illegal under *Ring v. Arizona*. Likewise in *Hunter v. State*, 8 So.3rd 1052 (Fla. 2008), the Supreme Court ruled on the *Ring v. Arizona* claims. The Supreme Court indicated that "*Ring* does not apply to cases that include the prior violent felony aggravator, the prior capital felony aggravator, or the under-sentence-imprisonment aggravator, and Mr. Victorino's case includes all three." The court concluded in both Mr. Victorino's case and Mr. Hunter's case that they are not entitled to relief based on a *Ring* challenge and in this case the defendant is merely trying to re-litigate issues previously raised and resolved. Claim 7 fails.

(V6, R899).

B. Argument

Hunter's *Ring* claim fails for three reasons. First, Hunter's claim is procedurally barred. He has already challenged the constitutionality of his death sentences under *Ring* on direct appeal. *Hunter*, 8 So. 3d at 1075-76. This Court rejected Hunter's *Ring* claim. This issue is settled. Hunter cannot use postconviction proceedings as a second appeal to relitigate the same issue. *Schoenwetter v. State*, 46 So. 3d 535, 561 (Fla. 2010). Hunter's claim is procedurally barred and the trial court's denial should be affirmed.

Second, notwithstanding the procedural bar, Hunter's claim has no merit. As this Court pointed out in its direct appeal opinion, *Ring* is inapplicable where "convictions by a unanimous jury formed the basis for the trial court's finding of the prior violent felony aggravator." *Hunter*, 8 So. 3d at 1076. (*citing Bevel v. State*, 983 So. 2d 505 (Fla. 2008)). *See also Kalisz v. State*, 124 So. 3d 185, 212 (Fla. 2013) (*Ring* does not apply to cases where the prior violent felony or prior capital felony aggravating factor is applicable). Here, a unanimous jury found Hunter guilty of six counts of first-degree murder and one count of armed burglary of a dwelling. *Hunter*, ; (DAR, V9, R1579)71 So. 3d at 1075-76; (DAR, V9, R1579). Subsequent to these unanimous jury findings beyond a reasonable doubt, the trial court found that the capital felonies constituted aggravating circumstances for each of his death sentences. Essentially, for each of Hunter's death sentences

there are five contemporaneous first-degree murders and an armed burglary that establish aggravation. *Ring* is inapplicable to Hunter's case.

Lastly, this Court has "repeatedly and consistently rejected claims that Florida's capital sentencing scheme is unconstitutional under *Ring*." *Baker v. State*, 71 So. 3d 802, 824 (*quoting Darling v. State*, 966 So. 2d 366, 387 (Fla. 2007)); *see also Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002); *Hunter*, 8 So. 3d at 1076. Accordingly, the trial court's denial of Hunter's claim should be affirmed.

C. Appellant's Case Law Distinguishable

Hunter appears to primarily rely on dicta from this Court's opinion in *State v. Steele*, 921 So. 2d 538 (Fla. 2005). (*Initial Brief* at 48-49). In *Steele*, this Court answered two certified questions in an interlocutory appeal that generated from a first-degree murder prosecution in Pasco County. *Id*. This Court held: 1) trial courts *may* require the State to provide notice of (but not plead in the indictment) the aggravating factors it intends to rely on during the penalty phase; and 2) trial courts may not require a special verdict form detailing the jurors' determination of the aggravating factors found. *Id*. at 540. As to the former question, the matter is one of trial court discretion. As to the latter question, this Court held, "[s]uch a requirement imposes a substantive burden on the state **not contained in the statute** and **not required** by *Ring*." *Id*. (emphasis added).

In Hunter's argument, he skips to this Court's epistle to the legislature where

the Court urged legislative action to review and potentially revise Florida's statute that requires only a majority vote in capital sentencing. But Hunter avoids the previous section of *Steele* where this Court said, "we are unwilling to approve ad hoc innovations to a capital sentencing scheme that [is] constitutional. . . . [U]nless . . . a material change occurs in [the statute, decisional law, rules of procedure, or standard instructions], a trial court departs from the essential requirements of law in requiring a special verdict form . . . ." *Id*. at 547-48. And since *Steele*, there has been no material change in the law. The bottom line is there is still no requirement that the jury reach anything more than a majority vote on both the existence of an aggravator or the recommendation for death. This issue is settled. Unless and until there is legislative change or a controlling decision from the United States Supreme Court. Hunter's *Ring* claim should be denied.

ISSUE 7: HUNTER'S TRIAL WAS NOT FRAUGHT WITH PROCEDURAL AND SUBSTATIVE ERRORS

Lastly, Hunter asserts that he is entitled to relief because the combination of procedural and substantive errors in his guilt and penalty phases virtually dictated his death sentence. "[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail." *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003) (citing *Downs v. State,* 740 So. 2d 506, 509 n. 5 (Fla. 1999). Because Hunter is not entitled to postconviction relief on any of his issues, this Court should also reject his claim of cumulative error.

CONCLUSION

Based on the foregoing discussions and arguments, the State respectfully requests this Honorable Court affirm the trial court's denial of postconviction relief.

CERTIFICATE OF SERVICE

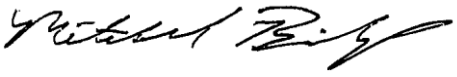
I certify that a copy hereof has been furnished by E-Mail to Robert Strain, Assistant CCRC-Middle, strain@ccmr.state.fl.us, and support@ccmr.state.fl.us, on this 27th day of March, 2014.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,

PAMELA JO BONDI
ATTORNEY GENERAL

/S/ 

By: MITCHELL D. BISHOP
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 43319
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
E-Filing:
CapApp@MyFloridaLegal.com
E-Mail:
Mitchell.Bishop@myfloridalegal.com
(386)238-4990
(386)226-0457 (FAX)