IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,161

MCARTHUR BREEDLOVE,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This appeal is from the circuit court's denial of Defendant's second motion for post-conviction relief, filed pursuant to Fla.R.Crim.P. 3.850. Portions of the record and transcript on Defendant's original direct appeal, filed in *Breedlove v. State*, Florida Supreme Court Case No. 56,811, are relevant to this proceeding, and will be cited as "(D.A.R. ___)" and "(D.A.T. ___)," respectively. The record generated in the proceedings on Defendant's second motion for post-conviction relief, which is the subject of the instant appeal, will be cited as "(R. ___)."

Defendant was indicted in the Circuit Court of the Eleventh Judicial Circuit, case no. 78-17415, for the murder of Frank Budnick, and tried on February 28 through March 5, 1978. At trial, the State established that the victim, Frank Budnick, had recently moved into the home of Carol Meoni. (D.A.T. 715-16). Meoni testified that the two went to bed at midnight on the night of the murder, and that she later woke up with a severe pain on the side of her head. (D.A.T. 726). She felt Budnick get over on top of her, and when she asked him what was wrong, he replied, "I am bleeding." (D.A.T. 726). She then looked up and saw a shadow go out of the bedroom door; Budnick followed. When she turned on the light, the bed was covered with blood. (D.A.T. 726). She ran out of the room, and found a bloody knife by the front door and Budnick's nude body lying face down by the street. (D.A.T. 727). He was bleeding, but was still alive and making sounds when she found him. (D.A.T. 726-27). Meoni went back into the house, and realized for the first time that she had blood on her face and a cut above her eye. (D.A.T. 731). The wound required nine stitches. (D.A.T. 737). Meoni identified the knife as one from her

kitchen. (D.A.T. 739). Her purse was missing from the living room, where she had left it. (D.A.T. 733). Additionally, she later discovered that she was missing a gold pocket watch and a pair of earrings, which had been either in her purse or on her dresser, as well as some cash, which had been in her purse. (D.A.T. 734-35).

Police officers were dispatched at 3:00 a.m., and upon arrival, found Budnick's body in the front yard by the street. (D.A.T. 612-13). Officer Roper observed quite a bit of blood on the front step, as well as in the living room and bedroom. (D.A.T. 614). Roper found the door between the kitchen and utility room open, and Meoni's purse in the backyard, with the contents scattered on the ground. (D.A.T. 615-16). Officer Weiss retrieved the murder weapon, an 8¾ inch kitchen knife. (D.A.T. 633). Weiss also retrieved a "heavily bloodstained" pillow from the bed which had slash marks across it. (D.A.T. 641-42, 647). A pair of blue jeans was found in the living room, and an empty wallet nearby. (D.A.T. 661-63).

The medical examiner, Dr. Kessler, who inspected the scene, observed a great deal of blood throughout the front rooms of the home. (D.A.T. 758). There was a trail of bloody footprints leading through the living room, "going over to a pair of jeans with the wallet next to it." (D.A.T. 759). Dr. Kessler's autopsy revealed that Budnick had died as the result of a stab wound to his left upper chest. (D.A.T. 766). The wound was 1½ inches wide, 3 inches long and 5½ inches deep, extending through the clavicle, the subclavian vein, the chest cavity, the lung and all the way to the shoulder blade in the back. (D.A.T. 769, 771). The wound could have been inflicted from "above", when the victim was lying down in bed. (D.A.T. 771). Budnick had

been stabbed with a great deal of force, breaking his collar bone. (D.A.T. 771, 779, 781). Defensive wounds on the Budnick's hands were consistent with an attempt to ward off the knife blow. (D.A.T. 772-3). A photograph of Meoni showed similar defensive wounds on her hands. (D.A.T. 764).

On the night of the murder, a neighbor observed a man pedal off on a blue bicycle. (D.A.T. 591-4). It was later determined that a blue bicycle had been stolen from a home two houses away from the Budnick/Meoni home. (D.A.T. 784-7). The bicycle was later discovered at Defendant's residence, which was nine blocks from the victim's home. (D.A.T. 882-883). A screwdriver was also found under the cushions of the sofa where Defendant slept. (D.A.T. 897). Defendant gave two statements to the police. In the first, he denied knowing anything about the bicycle, but later changed his story to claim that he stole it when he had become tired while walking back from the liquor store. (D.A.T. 922-25). Likewise, Defendant originally claimed that he had been wearing long pants at this time, but later changed his story and stated that he had cut off the legs of the pants after they had become bloody in a fight which he had gotten into. (D.A.T. 927-30). When the officers indicated that they did not believe him, Defendant responded that the police were simply trying to frame him, and that he supposed that they were going to say that the blood on his pants "came from the man inside the house." (D.A.T. 939). Defendant then told the police that they could not prove that he had been inside the house, because none of his fingerprints would be found there. (D.A.T. 940). When asked why, Defendant replied that he had been "wearing socks." (D.A.T. 941-42).

Defendant gave a subsequent statement on November 21, 1978, in which he admitted murdering Budnick. (D.A.T. 1037-55). Defendant broke into the Budnick/Meoni home and went into the living room and took Meoni's purse, which he carried out to the back porch, where he dumped out its contents. (D.A.T. 1043-45). He took some money and a watch from the purse. (D.A.T. 1045). He later sold the watch to a junkie in Hallandale. (D.A.T. 1051). Defendant then entered the bedroom and began going through the dresser drawers. He stated that he had gotten a knife from the kitchen which he used to pry open the jewelry box. (D.A.T. 1046-47). According to Defendant, Budnick had woken up just as the jewelry box "popped open", and had "jumped up" and asked Defendant what he was doing. (D.A.T. 1048). Defendant claimed to have "panicked" when Budnick grabbed his shirt, and had "swung back" with the knife. (D.A.T. 1046, 1048). Defendant averred that he had only "swung" once with the knife, and did not recall striking Ms. Meoni. (D.A.T. 1048). He then dropped the knife and ran out, first, however, grabbing the victim's jeans and going through them. (D.A.T. 1048). Finally, Defendant admitted stealing the blue bicycle and riding off. (D.A.T. 1049)

The defense rested without calling any witnesses, and the jury convicted Defendant of first-degree murder, burglary of a dwelling with an assault, grand theft and petit theft, but acquitted him of the attempted murder of Carol Meoni. (D.A.T. 154-58). The penalty phase was conducted on March 5, 1979. (D.A.T. 1273-1483). Prior thereto, defense counsel, Jay Levine, filed and argued numerous motions relating to the penalty phase, which will be detailed in the argument portion of the brief.

At the penalty phase, the State called two witnesses. (D.A.T. 1291-56). George Blishak of the Los Angeles Police Department testified that in 1968 he had arrested Defendant for burglary and assault with intent to commit rape. (D.A.T. 1298). In that case, Defendant had broken into a woman's apartment and had begun to choke her, while attempting to rape her. (R. 1294-98). Defendant had also committed another assault with intent to commit rape, in which he had attacked a woman in her own home, stuffing a handkerchief into her mouth and getting on top of her, before running off. (D.A.T. 1298-99). Defendant was convicted of these charges. (D.A.T. 1300-01).

Dr. Ronald Wright, the Deputy Chief Medical Examiner testified that Budnick had literally drowned in his own blood. (D.A.T. 1314, 1319-20). He also stated that the fracture of the clavicle and the puncture of the pleural lining would have been "associated with considerable pain." (D.A.T. 1320). Budnick would have still been conscious at the time that he had stepped outside and fallen down. (D.A.T. 1321-22).

The defense called three mental health experts at the penalty phase. (D.A.T. 1324-1386). Dr. Center, a psychologist, testified that he had examined Defendant and had performed various psychological tests. Center's test results suggested that Defendant fell within the dull-normal range of intellectual functioning, and that he suffered from brain dysfunction. (D.A.T. 1327-28). As to the statutory mitigating circumstances relating to mental state Center testified that Defendant had "emotional problems" and "definite impairment." (D.A.T. 1328-29). On cross-examination, Center stated that he had found no evidence that Defendant suffered from brain

damage. (D.A.T. 1330-31). Dr. Levy, another psychologist, similarly had performed various tests, and based upon the results found that Defendant was suffering from neurological impairment. (D.A.T. 1339-43). Defendant had related to Levy that he had a history of drug usage, which was consistent with Levy's belief that Defendant suffered from schizophrenia. (D.A.T. 1344). Defendant had also told Levy that he had received psychiatric treatment in California. (D.A.T. 1345). As to the statutory mitigating circumstances, Dr. Levy stated that Defendant's schizophrenia was in remission. (D.A.T. 1346-49). Defendant had told Levy that he had no recollection of the murder. (D.A.T. 1364). Dr. Miller, a psychiatrist, offered the opinion that Defendant suffered from chronic paranoid schizophrenia. (D.A.T. 1369). As to whether a person with this condition would suffer from an extreme mental or emotional disturbance, Miller stated that a schizophrenic would "suffer from an extreme mental condition." Miller did feel, however, that Defendant had seemed capable of adhering to the requirements of the law at the time he had seen him. (D.A.T. 1371-72). On cross-examination, Miller acknowledged that Defendant's inability to recall the circumstances of the offense made it difficult, if not impossible, to assess his mental condition at that time. (D.A.T. 1383-85).

The State called two psychiatrists in rebuttal, Drs. Jaslow and Mutter. (D.A.T. 1393-1417). Jaslow had examined Defendant and had also reviewed his records from California. He found nothing to indicate that Defendant was "seriously disturbed" or that he suffered from organic brain damage. (D.A.T. 1393-98). Jaslow further suggested that Defendant's behavior was consistent with that of a sociopath, and found no evidence of a major mental disorder or psychosis. (D.A.T. 1398-99). Nor did Jaslow feel that either statutory mental mitigating factor

-- extreme mental or emotional disturbance or substantial impairment to capacity -- applied. (D.A.T. 1400). Dr. Mutter similarly found neither of the statutory mitigating circumstances relating to mental state to apply. (D.A.T. 1411). Mutter also found no evidence of psychosis, brain damage or paranoid schizophrenia. (D.A.T. 1410). Rather, Defendant fit the definition of a sociopath. Mutter's opinion took into account Defendant's problems with drugs and/or alcohol. (D.A.T. 1407-08). However, Mutter felt that Defendant was malingering and had tried to manipulate him during the interview. (D.A.T. 1416).

The State argued to the jury that four aggravating circumstances applied: Defendant's prior violent felony convictions; that the murder was committed during a burglary; that the murder was committed to avoid arrest; and that the murder was especially heinous, atrocious, or cruel. (D.A.T. 1423-31). In his closing argument, counsel Levine, after a rather lurid description of the electrocution process, argued that the State had not met its heavy burden with regard to proving the aggravation factors. (D. A. T. 1444-50). He then pointed out that all three defense doctors had testified as to the existence of the extreme emotional distress mitigating factor. (D. A. T. 1451). He argued that the State's experts' rejection of the factors was a "semantic" distinction, and that they had conceded that Defendant was impaired, and urged the jury that at the very least, it had to find that nonstatutory mitigation existed. *Id.* He presented similar argument as to the capacity to conform mitigator, arguing that the murder was an act of panic. (D. A. T. 1453-56). He suggested that Defendant was ill, and that to condemn him would be "like hating someone with cancer." *Id.* He then told the jurors that Defendant's "godmother." Virginia Breedlove, needed Defendant alive, and begged them to spare her the task of collecting

the "burned and mutilated body of her child." (D. A. T. 1457). Levine concluded his closing with an extensive appeal for mercy, with repeated references to Defendant' brutal and lonely childhood. (D. A. T. 1457-58).

The jury subsequently returned an advisory recommendation of death, and, on March 30, 1979, Judge Fuller, sentenced Defendant to death. (D.A.R. 182-90). The court found the existence of three aggravating circumstances: that Defendant had prior convictions for crimes of violence, 921.141(5)(b), Fla. Stat. (1977); that the homicide had been committed during the course of a burglary, 921.141(5)(d), Fla. Stat. (1977); and that the homicide had been especially heinous, atrocious or cruel, 921.141(5)(h), Fla. Stat. (1977). After a lengthy analysis, the court concluded that no mitigating circumstances, statutory or otherwise, applied, and sentenced Defendant to death. (D.A.R. 186-89).

Defendant appealed, and this court affirmed his convictions and sentence of death in all respects. *Breedlove v. State*, 413 So. 2d 1 (Fla. 1982)(*Breedlove I*), cert. denied, 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982). This court found that there was sufficient evidence to sustain the conviction under either the felony murder or premeditation theory, and, as to the latter, observed the evidence included "Breedlove's arming himself with a butcher knife before entering the bedrooms and the defensive wounds suffered by both victims." *Breedlove I*, at 8, n. 12. The Court also rejected Defendant's claims regarding the penalty phase, finding that the evidence supported the trial court's conclusions. *Id.*, at 9-10.

Defendant subsequently filed a motion for post-conviction relief in 1982, raising issues unrelated those presently before the court. The denial of that post-conviction motion was affirmed in *Breedlove v. State*, 580 So. 2d 605 (Fla. 1991)(*Breedlove II*). Defendant subsequently filed the instant, second, motion for post-conviction relief in the circuit court, which was summarily denied. Defendant then filed an appeal from the denial of his second R. 3.850 motion, along with a petition for writ of habeas corpus, in this court. The habeas claims were found to be meritless and/or procedurally barred. *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992)(*Breedlove III*). This court also rejected two of the three claims raised in the second post-conviction motion. The Court held that Defendant's *Brady* claim was procedurally barred. The two remaining claims alleged ineffective assistance of counsel during the guilt and penalty phases. Both claims were untimely, but the Court addressed them on the merits because Defendant had been represented by the same public defender's office during both his trial and his first motion for post-conviction relief. The Court found that the guilt-phase claims were properly rejected, but remanded for an evidentiary hearing as to the penalty-phase allegations. *Breedlove III*, at 12.

Pursuant to this court's mandate, an evidentiary hearing commenced on May 5, 1992, before 11th Judicial Circuit Judge David L. Tobin. (R. 832). The hearing proceeded without the benefit of the Public Defender's file on Defendant's case, which had been lost or stolen. During the first two days of the hearing, the defense presented several witnesses.

David Finger was the first witness called by the defense. He was admitted to the Florida Bar in March 1978, and at that time became an Assistant Public Defender in Dade County. He,

along with his 1992 law partner, Jay Levine were assigned to the courtroom of Judge Richard Fuller. Finger, who had virtually no involvement in the case, testified regarding an initial meeting involving he, Defendant and Levine, and about alleged communications between Levine and defense counsel Eugene Zenobi. (R. 841-849).

Jay Levine testified extensively regarding his alleged lack of participation in the trial preparation activities, Zenobi's alleged lack of preparation for the guilt phase, and Levine's own alleged 11th-hour assumption of responsibility for the penalty phase, for which he claimed to have been unprepared. (R. 854-957). Levine's testimony will be discussed in detail in the argument portion of the brief.

George Clifford Bell testified that he had known Defendant for approximately 30 years, since they were children; that Defendant was "happy-go-lucky" as a child; and was never violent before his parents divorced. Thereafter, Bell felt that Defendant had "changed." Bell also recounted Defendant's drug use as a teenager and after he returned from California. (R. 967-976).

On cross, Bell said he heard that Defendant had killed the people two days after it happened. (R. 977). Bell would not have been surprised if Defendant committed a murder and burglary while he was on drugs. The instant murder was the only time that Bell was aware of Defendant being in trouble with the law. Defendant never mentioned the rapes in California. (R. 979).

Defendant's siblings, Arthur Lee Breedlove, Olabella Breedlove, Elijah Gibson, and Juanita Anderson, testified about the alleged beatings they and Defendant received at the hands of their father, Ruby Lee Breedlove. They also confirmed that Ruby Lee, although strict, was a hard worker and a good provider, always saw that they had food, clothing, and shelter, and felt that it was very important for them to obtain an education. They also testified regarding the family's home life as Defendant was growing up, Defendant's pleasant personality as a child, and his later drug use. (R. 981-1009, 1019-36, 1120-28, 1179-87). Henry Washington, the brother of Defendant's deceased stepmother, Virginia Breedlove also testified about his observations of the Breedlove household. (R. 1170- 1178).

The defense also called Drs Eli Levy and Benjamin Center. who had testified at the original penalty phase. The experts zssentially testified that the had been ill-prepared and lacked the appropriate background materials at the trial. They conceded, however, that nothing in the materials given them by CCR changed their original opinions or the bases therefor. (R. i 040-1116). The doctors' testimony will be discussed in detail in the argument portion of the brief.

Defendant's next witness was Jethro Toomer, a clinical psychologist, who examined Defendant in December, 1991. He also reviewed records and documents relative to the case. (R. 1132-34). Toomer reviewed the same materials provided by CCR as the other doctors, and essentially offered the same conclusions and opinions as they did. (R. 1135-59). His testimony will also be addressed in detail, *infra*.

On the third day of the hearing, the defense rested. (R. 1197). The State's first witness was Eugene Zenobi, who was admitted to the Florida Bar in 1970. (R. 1198). He began working for the Dade County Public Defender's Office in 1976. In 1978 he became division chief, covering the cases which were assigned to judges Fuller, Durant, Hickey and Ferguson. He had three lawyers in each of the four courts under him. He handled Defendant's case, but did not recall how it came to be assigned to him. It would have been his practice to take notes of everything that he did in the case. (R. 1199). He had not seen Defendant's file since the trial, and had heard that it was lost. The case was assigned to Judge Fuller A concern among rhe defense bar at that time was that Judge Fuller had sentenced a lot of defendants to death. (R. 1200). Therefore, a first degree murder case in his court would have been a very serious matter. 'Without the file, Zenobi was unable to tell the court when he saw Defendant prior to trial. It was his practice at that time to see all clients before trial. (R. 1201). Zenobi was shown a motion for psychiatric examination he signed, along with an attached motion for hearing, and a request fur court appointment of a doctor regarding competency. The motion indicated that pursuant to conversation with the Defendant, counsel was requesting the examination. Zenobi stated that that would indicate that he had spoken to Defendant. The hearing was set for February 16, 19'79, in front of Judge Fuller. (R. 1202). It was Zenobi's practice at that time to request the court to order the State to disclose its penalty-phase witnesses, which was done in Defendant's case. Jay Levine assisted Zenobi on the case. (R. 1203). Without the file 14 years after the fact, Zenobi could not recall why Levine was assisting him. Zenobi recalled taking the deposition of Defendant's mother. Zenobi recalled that there was some question that the prosecutors may have allowed Defendant's mother to believe they were representing her son. Zenobi verified the

"running joke" between he and Levine on the matter. (R. 1204). Zenobi stated that the joke was based on his "complete disgust" with the prosecutor's conduct, which he thought was unethical and incompetent. The joke had nothing to do with Defendant never having seen Zenobi before, (R. 1205). Zenobi did not recall at whose request Levine did the penalty phase, but he would think it was at his, although Levine could have requested it. In 1979 Zenobi felt Levine was an excellent lawyer capable of handling the penalty phase. Zenobi was present during the entire penalty phase of the trial. He would have assisted Levine he if he had stumbled or asked for help. (R. 1206). Without the file, it would be hard for Zenobi tc say what preparation he did for the penalty phase. The listing of three doctors on the penalty phase witness list would have been consistent with Zenobi having spoken with them and determined that they would be helpful to the case, although he had no independent recollection. If Zenobi had spoken with the doctors, he would have made a note of it in rhe file. (R. 1.207). A continued witness list was filed on February 28, two days after trial began on the 26th, listing Dr. Center. (R. 1208). Zenobi was given certain facts: Levine testified that this was his first penalty phase; he argued with case law that the medical examiner should not have been allowed to testify because the crime was not HAC; he further argued that the State should not have been permitted to present live testimony regarding the California crimes; that the State should not have been permitted to discuss the Broward murder. Zenohi had no recollection as to whether he discussed any of these issues with Levine. (R. 1209-10). Zenobi stated that his recollection of the case overall was very poor. He had done more than 20 first degree murder cases since 1979. Zenobi did not recall who Virginia was. He had no recollection of how Levine came up with her at the penalty phase as a woman who had nurtured Defendant. In 1979 it was common practice to use doctors for the mitigating

factors. (R. 1211). Zenobi stated that the focus on child abuse as a mitigating circumstance was much more pronounced at the time of the 1992 hearing than it was in 1979. (R. 12 12). Zenobi would have, assuming he had as a guilt-phase defense tactic blamed Elijah for the murder and claimed that he and the mother were covering up for it, been concerned about calling these same people as witnesses during the penalty phase because of the potential inconsistency. (R. 1212). The defense asked no questions on cross.

The State next called Defendant's stepfather, Ruby Lee Breedlove, who was 63 at. the time of the hearing, and still working. (R. 1213). He had a trash-hauling and demolition business, which he had been involved in since the 1950's. He worked practically every day. He raised nine children, including Defendant. He provided them with shelter, clothing, food. He Felt very strongly about keeping them in School; he wanted rhem to get a good education. (R. 1214). He felt that was very important. He would get upset if they skipped and "stay on them" to make sure they went. Ruby Lee felt that he was very fair in the punishment. he gave Defendant. He never beat him so bad that he bled, nor to the point where he could not go to school. He only punished him when he did something wrong. (R. 1215). Ruby Lee hit him with a bullwhip only one time. He did not recall what the occasion was. (R. 1216). Defendant never got into trouble with law "like he is now" when he was living at home. (R. 1217).

On cross, Ruby Lee stated that when Defendant was a child, he was working two jobs. (R. 1217). During this time he was relying on his wife to ensure that the children were going to school. (R. 1218). It was a difficult time, hard to make ends meet., but. he did so by working

hard. He would come home sometimes and the kids would not have eaten. He would fix them food. (R. 1219). To punish the children, he would hit them, which did not do too much good, so he would try different measures. He would also have them stand in the corner with one foot up. (R. 1220). He got the bullwhip from one of his construction jobs. It was old and rotted, but there was a long piece with a knot on it that he used to shoo the dog. Defendant's stepmother, Virginia never hid it from him. (R. 1222).

The State's fmal witness was Dr. Charles Mutter, a psychiatrist who testified telephonically. Mutter interviewed Defendant on February 20, 1979, at the Dade County Jail. Mutter was called at the penalty phase by the State and testified at that time that Defendant was a sociopath. (R. 1224). Evidence that Defendant. had been severely beaten by his father between the ages of four through 17 or 18 would not have altered Mutter's diagnosis. It would still have been Mutter's opinion that Defendant was not under the influence of extreme mental duress or influence at the time of the crime. It would still have been his opinion that Defendant's ability to conform his conduct to the requirements of the law was not substantially impaired at the time of the offense. Mutter explained that battery during childhood had absolutely nothing to do with a person's competence or sanity. It had to do with personality development. Some persons are battered and become sociopaths and others are battered and become extremely benevolent. The battery was strictly a historical event which had nothing to do with the state of mind at the time of the event. (R 1225).

On cross, Mutter stated that he would get a history when he evaluated a patient in order

to have data about their personality development. He did that when he spoke to Defendant. "Sociopath" meant the same thing as "antisocial personality." It was the term used before the DSM-3R. (R. 1226). Mutter had stated that diminished capacity due to drug or alcohol use was possible, but he could not offer such an opinion based solely on Defendant's statements without eyewitnesses or blood levels at the time of, or shortly after, the offense. (R. 1227). At the time of the evaluation, Mutter only had his personal interview with Defendant. We subsequently obtained the California records, he believed, although he was testifying from Washington, without his file, and thus could not be certain. Organic brain damage was a diagnosis separate from antisocial personality, although they could coexist. Mutter saw no signs of organicity in Defendant. He had no memory problems,. except for the claim of amnesia as to the time of the offense. He understood things around him. (R, 1228). Mutter conducted no formal psychological testing for brain damage because there was no clinical Indication of it. If there had been, he would have ordered an MRI, a CAT scan and general neuropsychological testing. That was not done routineiy unless medically necessary, which it was not in Defendant's case. (R.. 1229). Finally, Mutter pointedly observed that neuropsychological testing was only as reliable as the people conducting the testing. The State then rested. (R. 1230).

After presentation of argument by counsel for the parties, (R. 1231-58), the court took the matter under advisement. (R. 1263). On May 26, 1992, the court issued a written order denying relief. (R. 822-24). The court found that defense counsel had made a strategic decision not to present character evidence through the family members at the penalty phase of the trial. (R. 823). The court further found that the alleged failure to provide background information was

factually without merit. (R. 823). The court also found that even if counsel's performance were to be deemed inadequate, that there was no reasonable probability that the outcome of the proceedings would have been different. (R. 823). Specifically. the court found that no additional mitigating circumstances were proved by a preponderance of the evidence, and that even if the proffered mitigation were considered established, it would not outweigh the factors in aggravation. (R. 824).

Defendant filed a notice of appeal on June 17, 1992, and the instant proceedings ensued. (R. 825). During the pendency of this appeal, however, Defendant filed a third motion for post-conviction relief in the circuit court. See ***State*** *v. Breedlove*, 655 So. 2d 74, 76 (Fla. 1995)(*Breedlove IV*), ***cert.*** den. ___ U . S. ., ___ s. Ct. ___, ___ 1.. Ed. 2d ___ (December 4 , 1995). After the court had indicated that it lacked jurisdiction to proceed, counsel for Defendant Successfully moved this court for relinquishment of jurisdiction. *Id.* In the motion. counsel raised a single claim for relief -- that, under, ***inter alia,*** *Espinosa v. Florida*, ___ U.S. ___, 112 S. Ct. 2926, 120 L. Ed.2d 854 (1992), Defendant's jury had received an unconstitutional HAC jury instruction which had tainted the recommendation and the resulting death sentence. ***Pd.*** Dade Circuit Judge Levenson held a hearing on the motion on June 18. 1993. and ordered a new sentencing hearing. ***Id.*** 'The State appealed, and this court reversed: finding that although the *Espinosa* issue was preserved, any error was harmless:

> However, we believe that the failure to give the requested instruction on heinous, atrocious, or cruel was harmless error. The evidence presented at the trial clearly established that Breedlove committed the murder in a heinous, atrocious, or cruel manner. The fatal stabbing was administered with such force that it broke the victim's collar bone and drove the knife all the way through to the shoulder blade.

> The puncture of the victim's lung was associated with great pain and the victim literally drowned in his own blood. The victim had defensive stab wounds on his hands and did not die immediately. Moreover, the attack occurred while the victim lay asleep in his bed as contrasted to a murder committed in a public place. In fact, in discussing this aggravator in Breedlove's direct appeal, we stated that this killing was "far different from the norm of capital felonies" and set apart from other murders. *Breedlove* [*I*], 413 So.2d at 9. Under the facts presented, this aggravator clearly existed and would have been found even if the requested instruction had been given. Further, there were two other valid aggravating circumstances, including the previous conviction of a violent felony. While Breedlove presented some testimony concerning possible psychological problems, two state experts expressly stated that they found no evidence of organic brain damage or psychosis and one of them said Breedlovc was malingering. Any error in the instruction was harmless beyond a reasonable doubt and did not affect Breedlove's sentence.
>
> We reverse the order vacating Breedlove's death sentence.

Breedlove IV, at 76-77 (citations and footnotes omitted). Thereafter the proceedings herein resumed.

POINT INVOLVED ON APPEAL,

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIM, RAISED IN HIS SECOND MOTION FOR POST-CONVICTION RELIEF, THAT HIS TRIAL COUNSEL HAD BEEN INEFFECTIVE DURING THE PENALTY PHASE OF HIS TRIAL, WHERE THE EVIDENCE ADDUCED AT THE HEARING BELOW SHOWED THAT THERE WAS NO BASIS FOR EXCUSING HIS PROCEDURAL DEFAULT OF THE ISSUE AND WHERE DEFENDANT FAILED TO SHOW THAT TRIAL COUNSEL'S PERFORMANCE WAS INADEQUATE OR THAT HE WAS PREJUDICED BY COUNSEL'S ALLEGEDLY DEFICIEN'T PERFORMANCE. (RESTATED).

SUMMARY OF THE ARGUMENT

This case was remanded for an evidentiary hearing on rhe claims of Defendant that his counsel was ineffective in his conduct of the penalty phase in his 1979 trial. In the opinion directing the holding of the evidentiary hearing, this court found that this claim, raised 14 years after trial in a second post-conviction motion was untimely and successive, but excused the default based on the alleged conflict which arose when the same Public Defender's Office which handled the trial had also filed the first R. 3.850 motion. However evidence adduced at the hearing showed that the claim was waived for tactical reasons, not because of the alleged conflict. As such the procedural bar should be enforced. Further to the extent that the State was hampered by the loss of Defendant's trial files, she claims should be barred by the doctrine of laches.

Turning to the merits, the trial court properly concluded that Defendant was not entitled to relief. The thrust of Defendant's argument was that Jay Levine. who had conducted the penalty phase of Defendant's trial, had failed to investigate, and was unprepared, at the time of the sentencing hearing before the jury in 1979. Defendant further alleged that as a result the three mental health experts who testified for Defendant at the penalty phase did not have the necessary background information regarding Defendant's alleged history of drug abuse, psychological problems, and abuse and neglect as a child. Finally, Defendant faulted Levine for failing to call Defendant's family members at trial to testify regarding his alleged history of drug usage and abuse as a child.

The trial court properly rejected the testimony of Levine that he had been unprepared for trial, as this claim was refuted by the trial record. Levine had prepared and argued all of the pretrial motions relating to the penalty phase. He further called three experts who testified regarding Defendant's history of mental health and drug problems, and who opined that the statutory mitigators of extreme mental disturbance and lack of capacity to conform his conduct to the requirements of the law applied. Finally, he effectively cross-examined the State witnesses. The original trial court rejected the defense experts' testimony because Defendant's conduct at the time of the crime was more consistent with the State experts' testimony that Defendant was simply antisocial. Nothing adduced at the post-conviction hearing altered the experts' conclusions or the bases therefor, or the basis for the findings of the court at the original penalty phase. As such the trial court properly found that Defendant had shown neither deficient performance nor prejudice with regard to the mental health experts.

The lay evidence presented at the post--conviction hearing largely addressed two subjects: the alleged beatings and neglect Defendant to which was subjected as a child, and his history- of drug abuse. Defendant has not shown that- this evidence was available to Levine in 1979. Even assuming 'that the evidence were available, he has not shown that under the circumstances, reasonable counsel would have presented it, because it would have opened the door to highly unfavorable rebuttal evidence, and because the testimony was inconsistent both with that of other witnesses and with the expert testimony. Finally, the testimony could reasonably have been found not to establish mitigating circumstances, thus Defendant has not shown that any of this "new" information would have probably affected the outcome of the sentencing proceedings. The trial

court properly found both a lack of deficiency and a lack of prejudice regarding this aspect of Defendant's claim.

Finally, the trial court found that even assuming arguendo that the evidence of abuse were deemed established, it would not outweigh the strong aggravation found at the trial, and twice affirmed by this court on appeal. In view of the foregoing, the trial court properly denied relief.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIM, RAISED IN HIS SECOND MOTION FOR POST-CONVICTION RELIEF, THAT HIS TRIAL COUNSEL HAD BEEN INEFFECTIVE DURING THE PENALTY PHASE OF HIS TRIAL, WHERE THE EVIDENCE ADDUCED AT THE HEARING BELOW SHOWED THAT THERE WAS NO BASIS FOR EXCUSING HIS PROCEDURAL DEFAULT OF THE ISSUE AND WHERE DEFENDANT FAILED TO SHOW THAT 'TRIAL COUNSEL'S PERFORMANCE WAS INADEQUATE OR THAT HE WAS PREJUDICED BY COUNSEL'S ALLEGEDLY DEFICIENT PERFORMANCE.

A. Introduction.

This appeal follows this court's remand for an evidentiary hearing on the issue of the alleged ineffectiveness of counsel during the penalty phase of Defendant's trial. This court's opinion ordering the remand for an evidentiary hearing found that the issue was time-barred. However, the Court further found that Defendant's procedural default was excused. See, *Breedlove* ZZZ, at 11. The State submits that the evidence adduced below warrants the revisiting of the procedural bar issue.[1] This issue will be addressed in section "'B. ," infra. In any event, Defendant failed to carry his burden of showing that counsel's performance was deficient or that the alleged deficiency prejudiced him. These issues will be addressed in section "C." Both procedurally, and on the merits, the trial court properly denied relief.

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[1] The State presented this argument below. (R. 1236-38).

B. Defendant? claim is procedurally barred and further should be denied under the doctrine of laches.

Defendant's claim that his penalty-phase trial counsel was ineffective is. as this court noted, untimely and successive. ***See Breedlove III***, at 11. Although this court also concluded that the procedural default was excusable, id., evidence adduced at the hearing on remand shows that the procedural bar should be applied to this claim.

In this court's opinion remanding for an evident&y hearing, the Court found that although the ineffectiveness claims were time-barred and successive under R. 3.850, Fla. R. Crim. P., the default was excused because the first post-conviction motion was filed by the same Public 'Defender's Office that had handled the trial., The court therefore reasoned that this conflict of interest prevented the raising of the ineffectiveness claims at that time, citing ***Adam v. State***, 380 So. 2d 421 (Fla 1980). However evidence adduced at the hearing on remand showed that the claims were omitted not due to any conflict, but because of a tactical choice. Jay Levine testified at the evidentiary hearing that he told Elliot, Scherker. the Assistant Public Defender who handled the first post-conviction motion, that there had been no investigation done for the penalty phase. (R. 954-55). He talked to Scherker before the motion was filed in 1982 and Scherker told him not to worry about it. (R. 955). Levine testified that Scherker made a strategic decision not to pursue the ineffectiveness claims, but instead to focus on the fact that the investigating officers had been prosecuted for corruption by the federal government. (R. 956). That this claim was ultimately unsuccessful, ***see Breedlove II***, does not vitiate the conscious decision to waive the

instant claim. Furthermore, no actual conflict existed. Levine testified that he had left the Public Defender's Office in 1980, two years before the first R. 3.850 motion was filed, (R. 957), and Levine willingly testified on Defendant's behalf, asserting that he had been unprepared for the penalty phase. which he also said he told Scherker in 1982. (R. 954). See *Adams*, at 422 (conflict arises because appellate counsel would have co attack competence of colleague in same office, and possibly call same to testify).

Although the trial court denied relief solely on the merits of the claim, it plainly tended to agree with the State's position on the bar and laches[2] issues, but felt constrained by this court's mandate to rule on the merits. (R. 1238). The aria! court's deference to the mandate was proper. This court, however, should revisit its own conclusions based upon the new evidence adduced on remand. Based on the new evidence, the procedural bar should be enforced. and relief denied on that basis.

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[2] As noted, the proceedings below took place 14 years after the trial. The evidence showed that both the Public Defender's Office and Dr. Levy, who testified at both the original penalty phase and at the evidentiary hearing, had lost their tiles regarding Defendant. As will be discussed extensively, *infra*, trial counsel Levine's memory was extremely selective, and much of his testimony did not seem to correlate with the trial record. Co-counsel Eugene Zenobi had virtually no memory of the trial at all, although he testified as to what his usual practices would be. Zenobi's "standard operating procedures" were directly contrary to much of Levine's testimony. Zenobi further testified that among those procedures was to make a note in the file of everything done in preparation for trial. Likewise, Dr. Levy's report was very brief, and he had little recollection of the case other than what was reflected in the report. The trial attorneys' memories were also very vague in this regard. To the extent that Defendant has claimed that the State failed to rebut any of his contentions, and such is due to the missing files, this claim should also be barred by the doctrine of laches.

C. Defendant has failed to show that counsel was ineffective with regard to the guilt phase of Defendant's trial.

1. Introduction

The thrust of Defendant's argument was that Jay Levine, who had conducted the penalty phase of Defendant's trial, had failed to investigate, and was unprepared, at the time of the sentencing hearing before the jury in 1979. Defendant further alleged that as a result the three mental health experts who testified for Defendant at the penalty phase did not have the necessary background information regarding Defendant's alleged history of drug abuse, psychological problems, and abuse and neglect as a child. Finally. Defendant faulted Levine for failing to call Defendant's family members at trial to testify regarding his history.

The trial court found that contrary to Levine's testimony at the evidentiary hearing. claims that he was ineffective at the original penalty phase, the record showed that he was well-prepared and forcefully argued the case. (R. 823). This conclusion is supported by the record. The trial court further rejected Defendant's claim that the mental health experts who testified at the penalty phase did not have the relevant background information. (R. 824). The record also supports this factual finding. Finally, the trial record and the evidence presented below show that reasonable counsel would not have presented the witnesses now proffered by the defense. As such the trial court properly found that Defendant had not established that his counsel was deficient.

The trial court further found that Defendant had not established prejudice. (R. 824). The court found that Defendant had not proved the existence of proposed mitigating circumstances.

Id. This conclusion is supported by the record. The court further found that even assuming, arguendo, that Defendant had proved the newly-presented mitigating circumstances existed, they would be outweighed by the aggravating circumstances. *Id.* This conclusion was proper, and the trial court correctly denied relief.

Levine was the chief witness presented by Defendant at the post-conviction hearing. As will be discussed in detail below, his claims of unpreparedness were wholly lacking in credibility, and refuted by the trial record. Two of the three penalty phase expert witnesses, as well as a fourth doctor, testified for Defendant at the post-conviction hearing. The trial record shows that the original witnesses were far more prepared than alleged by Defendant, and in any event none of the "new" information would have changed their opinions. Additionally, one of the State's trial experts also testified that his opinions were unchanged at the time of the post-conviction hearing. Finally, the trial court properly concluded that reasonable counsel would not have called the lay witnesses proffered below. Valid strategic reasons existed for not calling these witnesses. Additionally, Defendant has failed to show that these witnesses were available at the time of trial, or that they would have testified as they did below. Their testimony could reasonably have been found not to establish mitigation, was contradicted by the State's witness, and was not corroborated by any objective source. In view of the foregoing, Defendant failed to overcome the presumption that counsel acted competently, *Strickland v. Washington, 466* U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), or show that Levine was deficient and that absent any alleged deficiency, the outcome of the proceedings probably would have been different. As such, the trial court properly denied relief.

2. *Levine's testimony was wholly lacking in credibility, and the trial court properly concluded that it did not prove that his performance had been deficient.*

As noted above, the State's ability to respond to Defendant's claims of counsel's deficiency was substantially hampered by the fact that the Public Defender had lost Defendant's trial file. Co-counsel Eugene Zenobi's recollection of the trial, which had occurred more than thirteen years before the evidentiary hearing was held, was not good [3] Levine, on the other hand, claimed near-photographic recall as to the specific conversations with Zenobi and Defendant upon which Defendant's current claims are predicated. Despite this mnemonic feat, however, Levine's memory was astoundingly poor regarding other matters. Given Levine's extraordinarily selective memory, his credibility was highly questionable. Further, many of his contentions did not square with the record of the first trial. As such the trial court properly rejected his *mea culpas*. See *Francis* v. *State*, 529 So. 2d 670, 672, n. 2 (Fla. 1988); *Routly* v. *State*, 590 So. 2d 397, 401 (Fla. 1991).

The centerpiece of Defendant's claim was that Levine did not know that he would be conducting the penalty phase until after the guilt phase verdict was rendered on March 3, 1.973. Levine contended that before that date, he was only asked by Zenobi to sit in on the trial "to protect the record" and that he did not participate in any of the preparation for trial, other than perhaps filing some "form motions" at Zenobi's request. He further claimed that he had no contact with Defendant other than the initial meetings where he and Finger instructed Defendant

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[3] Zenobi had conducted more than 20 first-degree murder trials in the interim, and had not seen his file since the trial. (R. 1200, 1211). Without his file, he testified that he would have difficulty discussing the specifics of the case. (R. 1207). It was his practice at the time LO make note of everything done in preparation for trial. (R. 1199).

not to speak to the police and allegedly thereafter castigated him for not following their advice. This thesis simply is not borne out by the trial record. On the contrary, the record shows that Levine handled every pretrial proceeding pertaining to the penalty phase, and was clearly in contact with Defendant, while Zenobi addressed all the guilt phase issues.

Whether form motions or not, the record shows that all the pretrial motions relating to the penalty phase were filed by Levine, well in advance of the March 3, 1979 verdict. He filed a *Witherspoon* motion regarding the "death qualification" of the jury on February 21, 1979, which he argued to the court. (D. A. R. 40-41A, D. A. T. 13-23). He also filed motions to disclose the aggravators on which the State intended to rely,' (D. A. R. 42-44A), to declare § 922.10: Fla Stat., unconstitutional, alleging that electrocution was cruel and unusual punishment, (D. A. R. 45-46A), and to dismiss or to declare death not a possible penalty, based on the contention that the aggravating factors were not set forth in the indictment, nil on February 21, 1979. (D. A. R. 47-48A). On that **date,** he also filed a motion to declare § 921.141, Fla. Stat., unconstitutional on the grounds that the provisions relating to aggravation and mitigation were vague and overbroad, that the during the commission of a felony aggravator was "automatic," that HAC was not consistently applied, that the mitigating circumstances were defined so as to cause arbitrary application, that the statute violated *Lockett*, that the State had shown no compelling interest to justify the imposition of the death penalty in violation of *Roe* v. Wade, that the penalty was inconsistently applied, that the death sentence would be disproportionate in this case, and

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[4] Levine orally renewed this motion on March 3, 1979. (D. A. T. 1271). This occurred immediately after the verdict was rendered, with no break in the proceedings.

requesting an evidentiary hearing regarding the allegations in the motion. (D. A. R. 49-55A). Levine argued all these motions to the court at a February 22, 1979 hearing. (D. A. T. 13-23). Levine also orally moved at that hearing for the State to be required to disclose its penalty phase witnesses. (D. A. T. 18-23). All of the foregoing activities strongly indicate that Levine was handling all duties associated with the penalty phase of the trial. His concern regarding the disclosure of penalty phase witnesses also indicates that he was the individual who was preparing for that portion of the trial.

This contrasts with Zenobi's almost exclusive attention to the guilt phase. Zenobi argued the motion for preliminary adversarial hearing, (D. A. R. 21A), filed a motion for continuance on January 5, 1979, (D. A. R. 22), filed an additional motion for continuance due to the, disclosure of a new witness on February 15, 1979, and attended the hearing alone (3 A. R. 26-27A). He also filed a motion for examination to determine competency on February 15, 1979, although Levine argued the motion. (D. A. R. 28-29A, 7). Zenobi filed several motions for the production of police reports on February 20, and attended the hearing alone. (D. A. R. 31-39A, D. A. T. 1-12). He also tiled motions to suppress Defendant's statements and various items of physical evidence. (D. A. R. 66-70A). Zenobi handled the bulk of the suppression hearing, examining all the police witnesses, (D. A. T. 50-63, 82-96, 103-110, 122-132, 197-220, 248-270), the jail counselor, (D. A. T. 273-278, 282. 300-302, 305), Defendant's mother, (D. A. T. 132-143, 151-153), and David Finger. (D. A. T. 284-288, 297-299). The notable exception, as discussed below, was Defendant's testimony, and the State's rebuttal witness thereto. Finally. Zenobi filed a motion for new trial on March 6, 1979. (D. A. R. 182). Again, these

circumstances indicate a clear division of duties, with Zenobi responsible for the guilt phase, and Levine taking charge of the penalty phase.[5]

Likewise, Levine's claim that he was only present to "protect the record" also rings hollow. Of innumerable objections found in the 500 pages of testimony and argument, (D. A. T. 578-1095), all but a small handful were made by Zenobi. Even then, on the few occasions where Levine spoke up, it was after Zeuobi had already done so. {e.g., D. A. T. 870, 887, 933, 1016). Such does nor reflect someone acting solely in the role of "protecting the record. " The State would submit that that is because Levine's role was *not* primarily "to protect the record," but rather, as the entire trial record reveals, to prepare for the penalty phase-.

Further: contrary to Levine's claim of no prior contact with Defendant, his lengthy direct examination of Defendant at the hearing on the motion to suppress strongly suggests that he was well-acquainted with Defendant. He led Defendant through a detailed account cf his various meetings with the detectives, including the alleged beatings and threats he received, that Defendant's stomach was weak because of the gunshot wounds he had received in California, and that the detective allegedly was "in good" with Defendant's mother. (D. A. T. 308-46).

Additionally, the testimony of Levine and Finger at the evidentiary hearing was both

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[5] Defendant's brief recognizes this division of labor in the argument that the trial court's finding that Levine took depositions was wrong: "Because these depositions *related only to the guilt phase,* Mr. Zenobi conducted the questioning." (B. 82)

inconsistent with this record, and revealed a suspiciously consistent but selective memory on the part of both men.[6] Both testified that they had spoken with Defendant when he was first arrested and instructed him not to speak to the police. (R. 842, 855). Finger also testified to this effect at the 1979 motion to suppress. (D. A. T. 287-288). At the evidentiary hearing, Finger and Levine also testified that Finger became enraged when Defendant nevertheless gave a statement: and they told him that they would be withdrawing from the case and someone else would represent him. (R. 843, 855). Both testified that they had not discussed t-he facts of the case at either meeting. (R. 849, 856). At the suppression hearing, however, **Finger** testified that they had. (D. A. T. 291). Finger also testified in 1979 that he did not threaten Defendant for not folfowing his advice. (D. A T. 294). Both men testified that they withdrew from the case because Defendant had given a statement. (R. 843, 855). However. it was conceded that Zenobi, who hsd been practicing since 1970,[7] (R. 1.198): handled most of the first-degree murder cases in the division. while Finger, at least, was handling primarily misdemeanors at that time. (R. 843, 846).

Levine also testified that he was not on the case until two or three weeks before the trial.[8] (R. 899). However, the trial record reflects that Levine tiled numerous motions and was present at every hearing on the case after Defendant's December 8, 1978, arraignment, except For one,

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[6] Levine and Finger were law partners at the time of the hearing, but allegedly had not discussed their testimony before the hearing. (R. 841).

At the time of the initial meeting with Defendant, Levine and Finger had been admitted to the bar for 3 years and 9 months, respectively.

[8] Accepting this testimony, Levine would have not been associated with the case until the week beginning February 12 or 19, 1979.

on February 15, 1979. (D. A. R. 5-70A, D. A. T. 13-391). And as noted above, during that period, Levine prepared and argued all the pretrial motions regarding the penalty phase. Levine, however, testified that he did not recall participating in the preparation of the defense at all. (R. 857). He further testified, contrary to the trial record as discussed above, that he "may" have argued some of the "'form" motions, and that he was "present" at the motion to suppress hearing. (R. 860). This minimization of his participation, vague memory, and complete failure to mention that he conducted the examination of Defendant at the motion to suppress hearing contrasts mightily with the verbatim account Levine offered of the alleged conversation with Defendant at that hearing wherein Defendant supposedly claimed he had never met Zenobi. (R. 861). This alleged conversation also conflicts with portions of the trial record where Zenobi discussed the difficulties he was having in obtaining Defendant's cooperation. At that hearing, held the week prior to, the suppression hearing, Zenobi stated to the court that "one of the reasons that [he] requested the competency evaluation last Friday, . . . was because of the difficulty [they had] in communicating with [Defendant] and in some of his reluctance in attending the Court hearings." (D. A. T. 17-18). Plainly Zenobi had been in contact with Defendant, or at least attempted to do so, but was thwarted by Defendant's own actions. Thus the contention that Zenobi never contacted Defendant was not accurate. Likewise the extensive, fact-specific cross-examination of the State's witnesses at the suppression hearing by Zenobi calls into question the accuracy of Levine's testimony. Levine claimed to have done nothing in preparation of the case, and claimed that Zenobi had not investigated it. Yet Zenobi was clearly familiar with the facts.[9] Furthermore,

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[9] Ineffectiveness at the guilt phase was not the issue either below or in the instant appeal. However, these glaring inconsistencies between the testimony at the evidentiary hearing

although without the file Zenobi could not recall the specifics of the case, he testified that it was his practice at the time to see all his clients prior to trial. (R. 1201). He further noted that in the motion for competency examination, he indicated that the motion was based upon his conversation with Defendant, a statement he would not have made had he not actually done so. (R. 1202).

Levine also recounted how he and Zenobi had a "running joke" about how Zenobi bad "fouled up" the case by not interviewing Defendant before the suppression hearing. Zenobi conceded that the case was an occasional subject of conversation between them at social occasions: but vehemently denied that it had anything to do with him not meeting with Defendant: rather, it was about Zenobi's disgust with the prosecutor because Zenobi felt the prosecutor had misled Defendant's mother. (R. 880-81, 1204-05).

The foregoing examples, along with Levine's thorough examination oil the witnesses at the penalty phase: as discussed, *infra*, demonstrate the incredible nature of Levine's testimony. The trial court properly concluded that Levine's claims that he was unprepared to represent Defendant, his only client on death row, (R. 890), were not founded in fact. *Francis*; *Routly*.

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and the trial record are certainly relevant in assessing whether the trial court properly rejected Levine's testimony as not credible.

3. Neither the evidence adduced at the evidentiary hearing nor the trial record reflect that Levine was deficient in his presentation of the mental health mitigation evidence, nor that any alleged deficiency prejudiced Defendant.

Levine presented the testimony of two psychologists, Benjamin Center and Eli Levy, and a psychiatrist, Lloyd Miller, at the 1979 trial. Center and Levy testified at the 1992 evidentiary hearing, along with Dr. Jethro Toomer. At trial. the State had called psychiatrists Albert Jaslow and Charles Mutter. Dr. Mutter also testified at the evidentiary hearing. The trial record reflects that Levine competently examined both the defense and State experts and that the defense experts were prepared and testified favorably For Defendant. At the post-conviction hearing, none of the experts changed their opinions or the bases therefor. As such Defendant has failed to show his counsel was ineffective

In its original sentencing order, the trial court rejected the mental health mitigators now proffered by Befendant :

> (b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> FINDING:
>
> There is no evidence that rhe defendant was under the influence of extreme mental or emotional disturbance during the commission of the murder. In fact, he was so rational that he concealed his fingerprints, stole a bicycle to flee the scene, disposed of his bloody clothing, and sold the jewelry taken in the theft. The defendant was able to answer the charges against him and able to adequately assist counsel in his defense at trial.
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> * * *
>
> (f) Whether the capacity of the defendant to appreciate

> the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired.
>
> FINDING:
>
> There was a conflict in the evidence as to the capacity of the defendant to appreciate the criminality of his conduct. The Defense presented evidence that the defendant suffered from schizophrenia, chronic paranoid type, exhibited behavior similar to a person medically diagnosed as brain damaged, and would be inclined to either withdraw or behave inappropriately if he were involved in, a stress situation. The defendant also claimed to have used drugs on the night of the murder and have no recollection of what happened.
>
> Two court appointed experts testified that defendant knew right from wrong and had the capacity to appreciate tbe criminality of his acts at the time of the offense. There was evidence that the defendant could think quite clearly, reason quite well, and did not suffer from any brain damage. The defendant's personality was characterized as sociopathic. that he knew right from wrong but did not care.
>
> The Court finds that the defendant's capacity to appreciate the criminality of the murder he committed was not impaired or diminished. The defendant knew right from wrong and set upon a conscious. willful course of action. The facts of the crime are consistent with a sociopathic personality and it appears to the Court that defendant knew what he was doing at all times (refer to mitigating finding (b)) .

(D. A. R. 187-188). Plainly the trial court originally rejected these factors as mitigating based upon its finding that the facts and circumstances of the crime were more consistent with the opinions of Drs. Jaslow and Mutter that Defendant was anti-social than with the opinions of Defendant's experts that he suffered from schizophrenia. This court affirmed those findings. *Breedlove 1*, at 9-10. As nothing produced at the evidentiary hearing altered these opinions or their bases, there is no reasonable basis to conclude that the "new" information could have altered

the outcome of the proceedings. A review of the expert testimony in 1979 and 1992 confirms this conclusion.

Dr. Center

Dr. Benjamin Center was the first witness called by Levine at the penalty phase. He testified that he had spent seven hours evaluating Defendant. (D. A. T. 1325). I. evine led him through a discussion of his findings regarding the Halstead, Bender-Gestalt, Rorschach and IQ tests which he had administered co Defendant. (D. A. T. 1326-1328). As to rhe extreme emotional distress mitigating circumstance; the doctor testified, "I feel that the information that I have infers that he has emotional problems." (D. A. T. 1328). Turning to the capacity to conform mitigator. Center opined that Defendant had "'definite impairment; " 'based upon the test battery. Center stated that if Defendant were placed in a stress situation ire would withdraw or act inappropriately. (D. A. T. 1329). On cross examination, the prosecutor noted that Center had stated in his report that Defendant knew right from wrong.[10] Center responded that Defendant could know right from wrong but still act inappropriately. (D. A. T. 1330). Center stated that he had talked to Defendant's mother. The prosecutor then asked Center whether he had reviewed any materials regarding the case or Defendant's history, to which Center replied that he preferred to do his evaluations blind, so as not to affect his objective clinical impressions. (D. A. T. 1335). Dr. Center did not believe Defendant was a sociopath. After he was given the materials from California to review: he testified that they did not alter his opinions. (D. A. T. 1336). On

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[10] Levine objected that that was not the issue. (D. A. T. 1330).

redirect, Levine also elicited the fact that Defendant had been declared a mentally disordered sex offender in California, and that this was not inconsistent with Center's findings. He also again emphasized that whether Defendant knew right from wrong would not affect his impaired judgment and inability to conform his conduct. (D. A. T. 1337).

At the evidentiary hearing, Dr. Center testified that he "did not think" at the time he prepared his report that he would be asked to testify regarding mitigation. (R. 1091). However, he testified that in 1979 he was aware of what the penalty phase was and was familiar with the statutory mental health mitigators. (R. 1092). Further: his report concluded with the observations that Defendant knew right from wrong and was aware of the nature and consequences of his acts, and that in a stress situation -he would act inappropriately. (R. ,248). Nothing in the report addressed the issue of Defendant's sanity at the time of the offense or his competency to stand trial. Id. Center reviewed the results of his testing of Defendant, much as he did at the penalty phase. (R. 1093-1100). Center also testified, as he did in the penalty phase, that it was his practice in 1979 to conduct his testing blind. (R. 1102). Center conceded that his conclusions in 1979 were virtually identical to his post-conviction testimony. (R. 1109-10).

Dr. Levy

At the trial, Dr. Eli Levy testified that he had interviewed and evaluated Defendant. He administered numerous tests, and concluded that Defendant suffered neurological impairment, and organic deficiency, *i.e.*, brain damage, and that as a result Defendant was not functioning well. (D. A. T. 1339-43). Levy testified regarding Defendant's history of drug use, and that he had

used cocaine and mescaline on the night of the crime. Levy stated that drug use was consistent with his findings. Levy felt that Defendant also suffered from schizophrenia with depressive tendencies, which coincided with his drug use. (D. A. T. 1344). Levy also detailed Defendant's history of psychiatric treatment in California, all of which was consistent with long-standing mental illness. (D. A. T. 1345). Levy concluded that Defendant was afraid of involvement with others, and had an inadequate self-perception, and was not malingering. (D. A. T. 1346). As to whether Defendant was under the influence of an extreme mental or emotional disturbance at the time of the crime, Levy testified that at the time he interviewed him, his schizophrenia was in remission, due to the medicatioris being administered to him in jail. (D. A. T. 1347). Levy further opined that were he not medicated Defendant's personality would decompensate and greater pathology would show. *Id.* Likewise, Levy felt. that at the time of his interview. Defendant was able to conform his conduct to the requirements of the law. *Id.* However, unless he were on medication, he would have been very fragile, and m a stress situation. would not have been able to cope and would have behaved bizarrely or irrationally. (D. A. T. 1347-48).

On cross examination Levy was asked whether he had reviewed the California police reports. (D. A. T. 1349). Levine objected, and argued that the question was inappropriate because the State had denied the defense access to the reports. [11] *Id.* The prosecutor asked several questions about whether Levy had reviewed the police reports or Defendant's confession, to which Levy replied that he did not want to review such information before the evaluation because he did

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[11] As noted above, several defense motions for the production of police reports were denied.

not want preconceived notions. (D. A. T. 1353-55). Levy also rejected the prosecutor's suggestion that Defendant was a sociopath. Rather, Levy felt Defendant suffered from organic deficits and was paranoid schizophrenic, and that psychologically speaking, Defendant was not an adult. (D. A. T. 1356-58). Levy also brought out that Defendant had cold him that the police coerced his mother into incriminating him by giving her alcohol. (D. A T. 1362). Levy reiterated his opinion that Defendant did not possess the ability to use good judgment and that under stress he would have no judgment of any kind. (D. A. T. 1363). Levy also rejected the prosecutor's suggestion that. this was refuted by Defendant's calm behavior at trial, pointing out that he was under medication at the time of trial. (D. A. T. 1364). Defendant told Levy that he had no recollection of the murders. *Id.* Finally, on redirect, Levy again testified that none of the background information alluded to by the state would have changed any of his opinions. (D. A. T. 1365).

Dr. Levy also testified at the evidentiary hearing. As noted, he too had lost his file on Defendant. (R 1063). Although he testified that "to the best of his recollection," Defendant's attorneys had not discussed the case with him prior to his testimony, (R. 1044), his recollection of other matters did not square with the trial record. For example, he believed that be had only testified at the trial but not the penalty phase, anti denied testifying regarding anything but Defendant's ***Miranda*** waiver. (R. i042, 1064). Levy also admitted that he could not recall everything Defendant had told him 14 years after the fact. (R.. 1063). Levy testified that CCR had given him numerous materials to review which would have been helpful in evaluating Defendant. (R. 1044). However, most of these materials were generated after Levy evaluated

Defendant on January 31 and February 1, 1979, (R. 397). e.g.. this court's post-trial appellate opinions, the trial court's sentencing order, Defendant's (February 26, 1979) testimony at the suppression hearing, and the penalty phase testimony of the other experts. (R. 1046). As to the other materials, Levy testified that he was aware of the facts of the offense at the time he evaluated Defendant. (R. 2043). Further: as outlined above, Levy's penalty phase testimony and 1979 report showed that he was aware of Defendant's history of drug use, his psychiatric treatment in California, his family and school history and his alleged drug and alcohol use the night of the murder. (D. A. T. 134445, R. 397-98). In any event, Levy, like Center. testified that his opinions regarding the applicability of the mental health mitigators to Defendant, and the reasons therefor, had not, changed from his testimony in 1979. (R. 1052, ! 066). As to the fact that most of the California experts who examined Defendant found him to be antisocial, rather than paranoid schizophrenic, Levy opined that he did not "disagree" with their findings because the examinations were in a "different time and a different space, " (R. 1072). He was unable to offer a response when it was noted that, as with Levy's examination, the California evaluations were conducted shortly after Defendant broke into a home and assaulted the resident. Id. At the evidentiary hearing Levy stated that he felt the extreme mental distress mitigating factor applied, but the he did not feel Defendant's judgment was so impaired that he could not conform his conduct to the law. (R. 1073-74). Levy nevertheless "would nor be too reluctant to say" that Defendant did not know right from wrong. (R. 1075). He noted, however, that Defendant remembered what had occurred when he gave his confession a few days after the murder. (R. 1076).

Dr. Miller

Lloyd Miller, board certified in psychiatry and neurology, also testified on Defendant's behalf at the penalty phase. (D. A. T. 1365). He examined Defendant twice and reviewed Defendant's case file and the jail medical records. (R. 451). Levine asked extensive questions regarding the medications Defendant was administered in the jail, although this information did not appear in Miller's written report. (D. A. T. 1366-68, R. 451-455). Miller testified that Defendant was being given Trilafon, which was an anti-psychotic used in the treatment of schizophrenia. (D. A. T. 1366). Miller further testified that Defendant's fiat affect, was not from the medication, but from the underlying mental illness. (D. A. T. 1367-68). He noted that Defendant was also prescribed Sinequon, which was an anti-depressant, as well as other tranquilizers to address the side effects of the medications. (D. A. T. 1368) Miller testified that in his first interview with Defendant they reviewed Defendant's past medical history, his legal involvement, and his childhood and development, Including his school and home life. (D. A. T. 1369). During the second meeting. Miller conducted a mental status examination. *Id.* Miller concluded that Defendant suffered from chronic paranoid schizophrenia. He felt Defendant's condition was long standing, but had improved with the medication being administered in the jail. *Id.* Miller testified that as a result of his condition, Defendant bad difficulty in his interpersonal relationships, and was mistrustful. (D. A. T. 1369). He also detailed Defendant's alleged hallucinations and feelings of persecution. (D. A. T. 13'70). When Levine asked about the applicability of the extreme mental or emotional disturbance mitigator, Miller opined that although Defendant knew right from wrong, paranoid schizophrenia was an extreme mental condition. (D. A. T. 1371). As to Defendant's capacity to conform his conduct, Miller stated that at the time

of the trial Defendant had such capacity, because he was under medication. (D. A. T. 1372). However, without the medications, Miller believed that Defendant would "more likely than not" be psychotic, and that it would not take much " to get him there." *Id.* Miller would have expected stress to cause a paranoid response in Defendant, ranging from mistrust to hostility. (D. A. T. 1373).

On cross, Miller stated that Defendant told him that, he had only stolen a bicycle, but had not committed the murder. (D. A. T. 1376). Miller also pointed out that Defendant had been previously diagnosed as narcoleptic, a fact he noted from the jail records or possibly from Defendant. (D. A. T. 1377). The prosecutor again asked about the California records. (D. A.. T. 1378) Levine objected that the State had not provided them with the records, and the trial court sustained the objection. (D. A. T. 1378-79). Miller again asserted that Defendant would become psychotic if his medication was discontinued. (D. A. T. 1380). Miller pointed cu? that Defendant was in need of treatment, even after he had been convicted. (D. A. T. 1381-82). Miller stated that he could not render an opinion to a medical certainty as to the two statutory mental health mitigators because Defendant had denied participation in the crime. (D. A. T. 1383-85). He could however, respond to the hypothetical as to what Defendant would be like without his medications, which he was not receiving at the time of the crime. (D. A. T. 1385). On redirect Miller again testified that assuming Defendant was not medicated, he would have been under extreme mental or emotional distress. (D. A. T. 1385-86). Dr Miller was not called at the evidentiary hearing.

Dr. Toomer

Dr. Jethro Toomer was a clinical psychologist. (R. 1132-33). Toomer examined Defendant in December, 1991. He also reviewed records and documents relative to the case. Ultimately, Toomer prepared a report. Toomer reviewed the same materials provided by CCR as the other doctors. (R. 1135). In addition to the clinical interview, Toomer administered the Bender Gestalt, an IQ test, the Carlson Psychological Survey, and the Thematic Perception Test. The overall results from the Carlson indicated to Toomer that Defendant's profile was similar to those whose behavior is characterized by a weak, immature and dependent personality, orientation behavior characterized by poor impulse control or poor judgment, poor self-concept and identification and generally overall poor social judgment. (R. 1137). Generally the profile would coincide with a poor home environment and some involvement in drug abuse a; part of the overall development. [12] The Render revealed visual motor coordination problems and was suggestive of organicity. 'roomer felt that Defendant displayed' five of the six indicators of organicity. (R. 1 ***138).*** In the Thematic test, Defendant created stories which represented a kind of helpless, dependent orientation toward life, and at the same time, distrust toward and withdrawal from interaction with others. He also showed a strong need of a dependency upon others for emotional gratification, needs and satisfaction, but also distrust reflected through a poor judgment as to others' motives. The test reflected social dysfunction and poor social judgment. (R. 1139). Toomer stated that the profile that emerged was that of an individual with a long-standing history of mental problems. These problems had been given a number of diagnoses by various

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[12] As discussed, ***infra,*** the lay witnesses testified that Defendant did not use drugs during his developmental years while living at home before he went to California in his late teens.

individuals. Additionally others had noted Defendant's bizarre behavior, all of which painted a picture of an individual who was suffering from the long term effect of mental dysfunction which had significant impact on his overall behavior. The documents also gave Toomer information about Defendant's childhood, which indicated that Defendant was the product of a dysfunctional family unit, having none of the basic support that would be expected. (R. 1141). Defendant was left to develop emotionally on his own, compounded by physical and emotional abandonment and abuse. The materials also reflected a long standing problem with alcohol and drug abuse.[13] (R. 1.142). 'Toomer's testing indicated the possibility of organic brain damage. Dr. Center's report also indicated neurological impairment. Center's results were consistent with Toomer's. (R. 1 143). Toomer felt that Defendant's impairment- existed at the rime of the offense. Toomer was of the opinion that Defendant was suffering from an extreme mental or emotiona! disturbance at the time of the offense. (R. i 144). This opinion was based upon Defendant'.< organic brain damage, prior mental illness, and history of drug and alcohol abuse. In Toomer's opinion. Defendant's ability to conform his conduct to the law at the time of the offense was substantially impaired. The nature of his mental dysfunction would prevent him from being able to do that. Someone could know right from wrong, but still not be able to conform. (R. 1145). Toomer disagreed with the conclusions of Jaslow and Mutter that Defendant was a sociopath or suffered from antisocial personality disorder. (R. 1 146). Toomer did not feel that Defendant met the criteria for antisocial personality disorder because the disorder is iife-long, whereas Defendant

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[13] As discussed below, the bases for Toomer's conclusions are not entirely consistent with the picture of Defendant's rearing disclosed by Defendant or presented by his family members.

demonstrated periods where he managed to conform his conduct to what was socially expected.[14] Additionally, Toomer found that there was evidence that Defendant had displayed remorse or caring which was also inconsistent.[15] (R. 1148). Toomer also testified that he agreed with the paranoid schizophrenia diagnosis. (R. 1148).

On cross, Toomer conceded that his diagnoses were entirely consistent with what Levy and Center testified tc in 1979. (R. 1149-50). Toomer pointed out that one of the California doctors diagnosed Defendant as paranoid schizophrenic. However, it was pointed out that there were a total of ten evaluations in California; the remaining nine found Defendant to be antisocial. (R, 1151). In the personal interview Defendant did not give a great deal of information regarding the alleged beatings at home. Rather his descriptions of family life were "okay to idealistic." This set alarms off with Toomer. (R. 1152). Such a representation was symbolic of dysfunction. Asked to clarify, Toomer said Defendant said he was hit with a belt by his stepfather but that overall family life was okay. Toomer was unable to point to any place in any of the records prior to the filing of the 1991 post-conviction motion where Defendant ever told anyone that he had

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[14] The record reflects that since the age of 20 Defendant had numerous convictions. (there were several arrests without convictions from age 17). The record commenced with burglaries, (1967-68), and escalated to burglaries with attempted rapes, (1968), and ultimately culminated in a pair of burglaries with murders, (1974, 1979). (R. 896-98, 462-475). In between, the record reflects a series of parole violations: defendant was paroled from prison in California in 1972, and violated the terms of his parole the same year, parole was renewed in 1974, suspended in 1975, and Defendant was again released in 1977. (R. 420, 523-28). Dr. Toomer reportedly reviewed these records, so it is unknown upon what his opinion was based.

[15] Again this "evidence" does not appear of record. On the contrary, by all accounts, with the exception of his initial confession, Defendant has maintained his innocence, or at least a lack of memory of the crime. See, testimony of Drs. Levy, Center, Miller, etc.

been beaten. (R. 1153). A ten minute break was taken for Toomer to review the records. Toomer was only able to refer to the family affidavits. (R. 1154). Nowhere in any of the records generated prior to the filing of the R. 3.850 motion in 1991 was there any suggestion that Defendant was regularly beaten as a child. (R. 1155). Toomer had testified that one of the things with antisocial personality disorder was the existence pre-1.8 of conduct disorder, which was essentially antisocial conduct by a someone under 18. Among the criteria, three of which were necessary for diagnosis was truancy. The records reflected that Defendant had a history of truancy. Another criterion was deliberately engaging in fire-setting. (R. 1156). The California reports indicated a history, given by Defendant. of setting fires as a child. 'roomer disagreed that the factor was present because one had to look at the underlying reasons; for example if the child did not go to school because he did not have clothing, he was not truant. When asked if Defendant ever complained he did not have clothes, or shelter or food, Toomer responded that that was not the point. Plus, he did not ask him. Defendant never indicated to 'Toomer that his father was strict and expected him to go tc school every day. (R.1159). Toomer was not aware of Arthur's testimony that they were punished for skipping school. Toomer could only interpret the DSM-3R criteria based on the information he had. Based on what he had 14 years later, he did not find Defendant antisocial. (R. 1160).

Dr. Jaslow

Albert Jaslow was called in rebuttal by the State at the penalty phase. He testified that Defendant had a long term history of difficulty in his behavior, drug and alcohol abuse. (D. A. T. 1397). However, Jaslow did not believe there was anything to indicate that Defendant was

psychotic or seriously disturbed. (D. A. T. 1397). He did not feel that Defendant suffered from any organic brain damage. (D. A. T. 1398). Defendant had an IQ of 88, showed a sufficient capacity to read and write, and to understand the consequences of his behavior. (D. A T. 1399). Jaslow found no psychosis, organic brain damage, or major mental disorder. *Id.* He felt that Defendant had never been psychotic. but rather, was a sociopath. ***Id'.*** Jaslow felt that there was no suggestion that Defendant was under extreme mental or emotional disturbance at the time of the crime. (D. A. T. 1400). Even with drugs or alcohol, Jaslow felt that Defendant would have known what he was doing. ***Id.*** As to Defendant's capacity to conform, Jaslow opined that as a sociopath, Defendant had a certain amount of impairment in that regard. *Id.* Jaslow qualified this conclusion however, stating that other than the Defendant's sociopathic outlook of "he wants it. he takes it," no impairment existed. *Id.* In terms of a major mental disorder or Defendant's ability to appreciate the consequences of his actions, the factor did not apply. *Id.*

On cross, Jaslow conceded that Trifaion was used to alleviate psychotic behavior, but was also used to as a sedative. (D. A. T. 1401) Jaslow stated that no neurological testing had been conducted on Defendant. because none was ndicated. (D. A. T. 1402). Levine also got Jaslow to confirm the purposes of the tests administered by the defense experts, and that 'Defendant had long-standing psychological prohlems. ***(D. A.*** T. 1403). Dr. Jaslow was not called at the evidentiary hearing.

Dr. Mutter

The final expert to testify in rebuttal at the penalty phase was Charles Mutter. Mutter examined Defendant and opined that although Defendant "possibly" had diminished capacity because of the use of drugs or alcohol, he did not believe it was mitigating because it was voluntary. (D. A. T. 1407). He also noted that Defendant's confession did not indicate that his memory was impaired. *Id.* As to the mental mitigators, Mutter stated that the "'most favorable thing" he could say was that Defendant had had emotional problems for a long period, from childhood, which had manifested themselves in his misuse of drugs. He further felt that Defendant needed long term treatment. (D. A. T. 1409). That said, however: Mutter did not believe that Defendant suffered any major -disorder, that he was psychotic, that he was schizophrenic, or that there was any evidence of brain damage. (D. A T. -142.0). Rather, Mutter felt Defendant was a sociopath. *Id.* Defendant knew right from wrong. but simply did not care. Any difficulties Defendant had were not extreme, and Defendant's ability to conform his conduct was not substantially impaired (D. A. T. 141 1).

On cross, Levine again elicited the fact that Trifalon and other medications administered to Defendant in the jail could be used as anti-psychotics, but also as tranquilizers. (D. A. T. 1412). Mutter noted that the drugs could be consistent with treatment for schizophrenia, but also consistent with treatment for drug withdrawal. (D. A. T. 1413). Mutter stated that he took Defendant "at his word" regarding his history of drug use. *Id.* Levine then elicited that Defendant said that he had used heroin and done at least SO trips on LSD. (D. A. T. 1414). Mutter testified that the effect, depending on the quality of the drugs, could range from minor

aberrations to hallucinations and delusions, some of which could be very severe. Id. Levine further got Mutter to state that the effects could be permanent, although Mutter noted that the empirical research was not yet conclusive as to that. *Id.* Mutter conceded that he had oniy conducted clinical testing for brain damage, but had not conducted further testing because it was not indicated. ***Id.*** Defendant's test results showed fair judgment on informal testing, but his lifestyle showed gross impairment in practice, and Mutter felt his insight was "nil." (D. A. T. 1415). Levine again brought out Mutter's conclusion that Defendant "possibly" had diminished capacity as a result of drugs and alcohol. *Id.* However, Mutter felt that Defendant was "'bright," and was simply a sociopath. ***Id.*** Mutter felt that Defendant had first exhibited symptoms of sociopathy in early adolescence, which was consistent with the literature. (D. A. T. 1416). Mutter noted that sociopathy was believed to have environmental or hereditary causes, but at that time, the consensus of opinion was tending toward an environmental etiology. *Id.* On redirect examination, Mutter testified that he felt Defendant was' malingering and was trying to manipulate him during the interview, [16] *Id.* Mutter further stated that any diminution of capacity Defendant might have suffered did not rise to the level of an inability to appreciate the criminality of his acts or to conform his conduct to the law. (D. A. T. 1417). Rather, Defendant understood that what he did was criminal and could have conformed his behavior if he had chosen co. *Id.*

At the post-conviction hearing, Dr. Mutter again testified. He stated that the evidence regarding beatings which Defendant received would not have changed his opinion that Defendant

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[16] Some of the reports in the California materials gathered by CCR also reflect the belief of the examiners that Defendant was "feigning" or "faking" psychosis. (R. 661, 700, 708).

was a sociopath. (R. 1224-25). It also did not change his opinion that Defendant was not under the influence of severe mental and emotional distress at the time of the murder, or that Defendant was able to conform his conduct to the requirements of the law. (R. 1225). He felt that the alleged battery had nothing to do with the murder. Some persons are battered and become benevolent and others become sociopaths. *Id.* On cross examination, Mutter stated that although diminished capacity based upon drug or alcohol use was possible, he could not offer such an opinion as to Defendant without eyewitnesses to, or blood levels taken at the time of, the murder. (R. 1227). Mutter stated that he did not have the California records at the lime of his evaluation of Defendant, but had subsequently. reviewed them. He reiterated that he saw no signs of any organicity in Defendant. He had no memory deficits , except the claim of amnesia as to the crime itself, which was negated by his' detailed confession . We understood what was happening around him. (R. 1228). Mutter did not order an MRI or a. CAT scan because such tests are not routinely administered unless medically necessary; his examination of Defendant did not indicate such a need. [17]

The foregoing testimony clearly indicates that both Levine and the defense Experts were prepared for the penalty phase of Defendant's trial. and presented favorable testimony.'" Levine conceded that he would not have asked the experts the questions he did without knowing their

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[17] The California authorities conducted an EEG of Defendant, with normal results. (R. 675-77).

[18] Levine also conceded he was prepared to cross-examine the officer from California who testified about the rapes, and that he conducted a "good cross" of the ME who testified regarding the HAC factor. (R. 914, 919).

answers. (R. 921). He also conceded that he presented substantial expert testimony in support of mitigation; he only felt he was "unprepared" because he did not present evidence that Defendant was beaten as a child.[19] (R. 954). However, the defense expert testimony was entirely rebutted by the State's own experts. Nothing adduced at the post-conviction proceeding altered any of the expert opinions or the bases therefor. As noted above, the trial court did not reject the opinions of the defense experts on the basis of any lack of background information to substantiate their opinions. Rather the court, found Defendant's conduct at *the time of the crime* clearly showed that he was aware of what he was doing, and of the criminality of his behavior. This evidence supported the conclusions of Drs. Jaslow and Mutter that Defendant knew right from wrong, but simply did not care. It did not jibe with the defense experts' conclusions that he was psychotic.[20] None of the lay witnesses or background information presented below altered the fact that Defendant covered his hands with socks to prevent fingerprints, broke into the Budnick/Meoni home, first armed himself with a kitchen knife, proceeded into the bedroom where he attacked them both with knife, leaving defensive wounds on both, retreated from the home, but not before rifling Budnick's jeans, stole a bike to effect his getaway, and then disposed of his bloody clothes and the loot. On the contrary, the evidence adduced below also showed, in far

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[19] 'The "'beating" claims are also without merit, as discussed, *infra*.

[20] The assertion in the brief, (B. 79), that Miller stated he could not render an opinion about Defendant's mental state at the time of the crime because he had no background information is inaccurate. Miller testified that because *Defendant* denied or could not recall his actions at the time of the crime, he could not render an opinion within a reasonable medical certainty. Defendant did not testify, and no evidence was adduced on this subject at the post-conviction hearing. In any event, Miller went on to testify how he would have expected Defendant to act under the circumstances, based upon his observations. (D. A. T. 1385).

greater detail than at the original hearing, that Defendant had committed three extremely similar crimes previous to the instant murder. As such it cannot reasonably concluded that anything Levine purportedly should have done would have probably altered the outcome of the proceedings. 'The trial court properly denied relief. See *Patten* v. *State*, 596 So. 2d 60, 63 (Fla. 1992)(rejection of mental health mitigation supported by "'testimony that defendant is simply antisocial); *Turner* v. *Dugger*, 614 So. 2d 1075. 1079 (Fla. 1992)(counsel not deficient ""simply because he relied on what may have been less than complete pretrial psychological evaluations'"), quoting *State v. Sireci*, *502 So.* 2d 3221. 1223 (Fla. 1987); see also *Johnston* v. *Dugger*, 583 So. 2d 657, 660-61 (Fla. 1991); *Roberts* v. *State, 568* So. 2d 1255, 1260 (Fla. 1990); *Provenzano* v. *Dugger*. 561 So. 2.d 541, 546 (Ha. 1990); *Doyle v. Dugger*, 922 F.2d 646. 653 (11th Cir. 1991); *Card* v. *Dugger*, 913. F.2d 1494. I.51 1-14 (11th Cir. 1990); *Jennings* v. *State*, 583 So. 2d 316, 320-21 (Fla. 1991); *Hill v. Dugger*, 556 So 2d 1385, 1388-89 (Fla. 1990).

> *4. Defendant has not shown that Levine was deficient in not presenting the testimony of Defendant's family members at the penalty phase, or that his background investigation was inadequate, where reasonable counsel would not have presented the proffered evidence and there was no credible evidence that this testimony, the witnesses themselves, or the materials would have been available at the time of the trial, and furthermore, Defendant has not shown that any of this information would have probably affected the outcome of the penalty phase had it been available or presented at that time.*

The lay evidence presented at the post-conviction hearing largely addressed two subjects: the alleged beatings and neglect Defendant to which was subjected as a child, and his history of drug abuse. Defendant has not shown that this evidence was available to Levine in 1979. Even

assuming that the evidence were available, he has not shown that under the circumstances, reasonable counsel would have presented it, because it would have opened the door to highly unfavorable rebuttal evidence, and because the testimony was inconsistent both with that of other witnesses and with the expert. testimony. Finally, the testimony could reasonably have been found not to establish mitigating circumstances, thus Defendant has not shown that any of this "new" information would have probably affected the outcome of the sentencing proceedings."

Defendant has failed to show that any. of the witnesses or materials now presented were available to counsel in 1979. It appeared from the trial record that Defendant's mother and brother, whom Levine testified he felt were trying to convict Defendant. were not at ail cooperative at that time. (R. 929). For example, it took at least three tries before Zenobi could get them to appear for depositions. (D. A. T. 33-39). Likewise, in the post sentence report. Defendant's father told the corrections authorities that Defendant was no longer welcome in his home. (R. 427). The trial record also showed that, Defendant himself was not cooperative with his defense team. He failed to follow their advice about speaking to the police, refused to attend hearings, and rebuffed their attempts to communicate with him. (D. A. T. 17-18). Furthermore, Levine repeatedly complained at trial that the police reports and the California information had not been disclosed to him, and conceded at the evidentiary hearing that under the law of the rime,

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[21] As discussed in detail above, Levine's claims that he had no discussions with Defendant prior to the penalty phase are wholly unbelievable and contrary to the trial record. This argument thus presumes that some discussion at least with Defendant did occur.

he was not entitled to receive them.[22] (R. 915). In view of the foregoing Defendant has clearly not overcome the presumption that Levine acted in a professionally acceptable manner in his preparation of the penalty phase.

Additionally, as discussed above, ample evidence of Defendant's use of drugs in the past was adduced at the original trial." Most of the lay witnesses testified that they were aware of Defendant's drug problem, but had not personally observed his use. They did not testify as to his alleged drug use around the time of the murder. The one exception was the testimony of Elijah. which as discussed below, was wholly incredible. Furthermore, as also discussed below, Elijah was characterized by the defense at the guilt phase as a iiar and a murderer, and thus could not reasonably have been called at the penalty phase. In view of the foregoing, counsel was not deficient in not calling these witnesses to testify on this issue. Additionally. as the State experts pointed out, and as was found by the trial court, Defendant's conduct at the time of the murder and good recall shown in his confession strongly militate against the notion that Defendant was intoxicated at the time he killed Budnick.

Furthermore, the record suggests that Levine made a tactical decision not to call witnesses to testify regarding Defendant's background and character. At the original penalty phase

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[22] As noted above, Dr. Miller reviewed the court and jail records pertaining to Defendant.

[23] There has been no evidence presented that Defendant had an alcohol problem. On the contrary, the California records contain repeated references to Defendant's self-admitted drug problems, hut denial of any difficulties with alcohol.

proceedings, the State sought to introduce rebuttal evidence that Defendant had confessed to another, very similar, murder in Broward county. (D. A. T. 1362). Defendant had admitted to burglarizing the home of 63-year-old Alice Rough and to killing her. (R. 1033).[24] However: because Defendant had not put on any evidence of his character, the court found that the evidence's prejudicial nature outweighed its probative value. (D. A. T. 1362, R. 1033-36). Levine had specifically made the argument in limine that Defendant's prior bad acts which did not prove any of the aggravating circumstances were only admissible in rebuttal, and that "[i]f we remain silent, they are not entitled to rebut anything. " (D. A. T. 1280). The court essentially agreed, noting, however, that Defendant could cause certain. evidence to become admissible in rebuttal: "[w]hat they bring up relative to their case, I do not know whether it will open areas ..." (D. A. T. 1281).

Because Levine did not present evidence of Defendant's character through his family members, the State was not permitted to introduce the evidence of the 1974 Rough murder. This evidence would have revealed that Defendant broke into her house during the early morning hours, and stabbed Rough several times in the chest and abdomen. In addition to his taped confession. Defendant was linked to this murder through his bloody finger and palm prints found at the scene of the crime. (R. 426). This evidence would have been particularly damaging in that

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[24] At the time of the original trial, Defendant had not yet been convicted of this crime. (R. 1033). As such, the evidence could not come in support of the prior violent felony conviction aggravating factor at the penalty phase. However, in 1982 Defendant was convicted for this crime, based upon a plea agreement. (R. 472-74, 1033). Thus, were a resentencing held, this conviction and its underlying circumstances would be admissible for the purpose of proving the prior violent felony aggravator, as collateral counsel conceded below. (R. 1034).

its factual circumstances where virtually identical to those in the instant case. Some of Defendant's family members testified at the post-conviction hearing that when Defendant first came back from California, in the mid 1970's, he was not using drugs and was "very healthy in general terms," and was "calm." (R. 1030, 1120, 1182). That Defendant was not, at the time he committed a virtually identical murder, under the influence of the allegedly extreme conditions which the experts testified affected his behavior at the time of this crime, plainly would have only served to bolster the opinions of the State's experts. This evidence would also have further damaged the testimony of Defendant's expert witnesses, who testified that Defendant did not have the capacity to conform his conduct to the requirements of the law and was under extreme mental or emotional distress at the time of the crime, largely based upon Defendant's alleged mental problems and drug abuse. Further, Levine himself testified that he was aware that if he put on testimony, that the State would be entitled to rebut it. (R. 910, 940). He was also aware of the facts of the Rough and California cases..': (R. 912). The trial court thus properly could have concluded that reasonabbe counsel would not have opened this door by calling character witnesses. *Darden v. Singletary*, 477 U.S. 168, 186, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)(admission of mitigation evidence bears the risk of opening the door to unfavorable rebuttal); *Medina v. State, 573 So.* 2d 293, 297 (Fla. 1990)(no ineffectiveness in not presenting witnesses where they, would have opened door for state to explore defendant's violent tendencies); *Valle v. &ate,* 581 So. 2d 40 (Fla. 1991)(same); *Floyd v. State,* 569 *So.* 2d 1225 (Fla. 1990)(same); *White v. Singletary*, *972* F.2d 1218, 1225 (11th Cir. 1992)(same); *Lusk v. Singletary, 890* F.2d 332. 338 (1 lth Cir. 1989)(entirely possible jury would have considered such evidence as aggravating rather than mitigating).

Furthermore, the presentation of these witnesses, as was plain from the evidentiary hearing, would have given the State repeated opportunity to elicit other damaging or inconsistent evidence regarding Defendant and the defense theory. For example, family friend Clifford Bell testified that when Defendant was on drugs, he was scary and violent, that Bell would not have been surprised if Defendant committed a murder when he was on drugs, and that he had "heard" on the street at the time that Defendant had murdered Budnick. (R. 373, 976-77. 979). This of course directly contradicted the testimony of' Defendant's brother, Arthur Lee Breedlove, who testified regarding Defendant's drug use, hut denied that Defendant was violent when on drugs, because he had never seen Defendant be violent in his life. (R. 999, 1009). Similarly, both of Defendant's sisters, Olabella Breedlove, and Juanita Anderson, testified that they had been treated the same as Defendant by their father, but neither had ever been convicted of a crime. (R 1028, 1184). Finally, most of these witnesses were repeatedly asked by the State whether they were aware of Defendant's criminal history in California and about his confession to the Rough murder, as well as the details of the instant crime,. including the incriminating statements of Elijah and Defendant's mother. and the evidence of Defendant's consciousness of guilt. (Bell, R. 979; Arthur Lee, R 1009; Olabella, R. 1029, 1032-33, 1036; Washington, R. 1178). This repeated rebuttal opportunity for the State was a valid tactical reason for not calling these witnesses, particularly given the contradictory and unsubstantiated. nature of their testimony, as discussed below. ***Darden;*** *Medina*; ***Valle; Floyd; White;*** *Lusk*.

Furthermore, several of the witnesses which Defendant now alleges should have been called simply would not have been called by reasonable counsel. Levine himself conceded that

he did not call Defendant's mother because she "was trying to put him in the electric chair." (R. 929).[25] Likewise, Zenobi had spent a considerable portion of his guilt-phase closing argument, (D. A. T. 1152-54, 1218-22), attacking both Defendant's mother and his brother Elijah Gibson: alleging that Elijah had committed the crime, and that the mother had pressured Defendant into taking the rap. Levine avoided answering the question of whether Zenobi's closing was why Elijah was not called: "[u]nder some circumstances that could have been the case unless I could also tell you that it wouldn't be the case." (R. 927). Levine was aware that Elijah told the police, and testified on deposition, that -Defendant came home riding a strange bike, had blood on him and threw his clothes away, and that he also had a gold watch with rhinestones like that taken from the victim. (R. 928'1. Additionally. Arthur Lee testified that he could have been located at the time of trial because he was "locked up" in Florida City for an armed robbery. (R. 1001) Arthur Lee aiso had convictions in the 1970's For armed robbery and dealing in stolen merchandise. (R. 995). Arthur Lee also testified that like Defendant. he had used drugs but had not become addicted "from my own responsibility. "[26] (R 1008). The trial court properly found that not calling these witnesses was a strategic decision. *Spaziano v.* Singletary, 36 F.3d 1028 (1 1th Cir. 1994)(counsel's decision based on how jury would perceive witness required deference Lo counsel's judgment),

As noted, Defendant's mother did not testify post-conviction. As such Defendant has

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[25] Notably, Defendant did not call his mother at the post-conviction hearing.

[26] This testimony dovetailed neatly with that of Dr. Mutter, who opined that Defendant's actions were the result of personal choice. (D. A. T. 1411).

plainly failed to show any prejudice in not calling her. Likewise, Elijah's testimony would have been of questionable value. In addition to having been blamed for the murder and being a multiple felon, his testimony, which addressed only Defendant's drug use, was simply fantastic. We testified that at the time of the murder, Defendant, who was not employed, was consuming $600 a day in heroin in 1978. (R. 1124). Defendant supposedly got the money by borrowing it from friends, or maybe stealing a little, but Defendant "'didn't have a heavy habit stealing."[27] (R. 1124-25). This testimony was simply not credible, and would have been rejected by any reasonable trier of fact.

Defendant also avers that the triai court failed to credit unrebutted evidence of "'neglect" and "poverty" during Defendant's childhood. (B 87-88). This claim is entirely without merit None of the witnesses testified regarding neglect or poverty. Rather. all testified that Defendant's father was hard-working and a good provider, and there when they needed him. (Arthur Breedlove, R. 985, 990, 1007, 1010; Olabella Breedlove, R. 1028. 1037; Ruby Lee Breedlove, R. 1214). They further testified that the father felt it was very important for them to stay in school and get an education, and did what hecould to ensure that they attended school. (Ruby Lee, R. 1214-15; Arthur Lee, R. 1010). Defendant himself told Dr. Toomer that his home life was "okay to idealistic." and never mentioned any deprivation of food, clothing or shelter, (R. 1152, 1159). There simply was no evidence at all of poverty or neglect. The trial court properly found no deficiency in failing to present such (non-existent) evidence.

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[27] Arthur Lee testitied directly to the contrary, that Defendant never asked friends or family for money for drugs. (R. 999).

It is also alleged in the brief that Levine should have presented the evidence of the repeated beatings alleged to have been inflicted upon Defendant as a child. The veracity of this evidence, as well as its mitigation value in 1979, is questionable. As brought out repeatedly during the evidentiary hearing, there had never been any mention of the allegedly chronic abuse of Defendant as a child until this (second) post-conviction motion was filed. (R. 940, 946, 974, 991). Dr. Levy specifically testified that there was no record of family abuse. (R. 1071). He further stated that had Defendant mentioned abuse it would have been important enough to put in his report.[28] (R. 1067). Likewise Dr. Toomer was not aware of any such evidence." (R. 1153). On the contrary, Defendant told him that he had had a good childhood.[30] (R. 1152). Defendant also reported in the psychological evaluation conducted in 1972 by she California correctional authorities that he had a good relationship with all his family members. (R 415). Clifford Belt, a close family friend, testified that Defendant was a "happy -go-lucky" child, was very happy with his father, and always wanted to be around him. (R 967, 974)

Furthermore, given the questionable nature of the abase testimony, It cannot be said that reasonable counsel should have called these witnesses. Professional felon Arthur Lee stated that

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[28] As noted, Levy had lost his fiie on Defendant. (R. 1063).

[29] The proceedings were recessed to allow Dr. Toomer to comb through the California records, which he had previously read. The only reference he found was a brief mention that Defendant had wet the bed, until *age* 9, for which he was "whipped. " This reference hardly comports with the accounts alleged by the various witnesses of almost daily, severe beatings until Defendant left home *at age 15 or 16.* Further, the term "whipping" is not uncommonly used colloquially to mean "spanking, " and does not necessarily suggest beatings.

[30] In Dr. Toomer's topsy-turvy world, this of course meant to him that Defendant had not had a good childhood.

Ruby Lee regularly used a bullwhip on them, but only for not doing their chores or skipping school. (R. 895-97, 1004). Further, Arthur Lee could not say that their father was a "bad guy." (K. 1005). On the contrary, he was "a good dad. " *Id*. He still saw Ruby Lee, and had a good relationship with him. (R. 1008). Ruby Lee was very strict because he thought it was important for the children to go to school and get a good education (R. 1007). Arthur Lee stated that Defendant ran away after he was punished for skipping school. (R. 992). Arthur Lee also conceded that none of them committed any felonies while they were living at home. Id. Arthur Lee also testified that both Ruby Lee and Virginia, Defendant's stepmother, treated Defendant like one of their own. and that Defendant was very close to Virginia, (R. 988-89), and that Virginia kept a clean home and always had dinner ready. (R. 990). Finally, Arthur Lee claimed to have no -knowledge of Defendant' s prior crimes. (R. 1007-08).

According to Olabella, (who would have been approximately five years old when Defendant left home), Defendant left after Ruby Lee argued with him for going out against his express wishes. (R. 1023). She stated that Defendant was beaten at least once or twice a week, but that Defendant was never disrespectful to Ruby Lee.[31] (R. 1022). She also testified that Defendant was very easy-going. (R. 1020). Olabella also testified that Defendant's mother[32] was an alcoholic and quick-tempered, although she did not know what 'her personality was like because she was never around her. (R. 1026). On cross the State pointed out that although Olabella had

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[31] Presumably Olabella did not consider disobedience to be "disrespectful."

[32] Olabella was Defendant's half-sister.

the same upbringing as Defendant she had never committed a crime and had always, like her father, worked for a living. (R. 1028). She. like all the other witnesses, claimed to be unaware of Defendant's criminal history, despite their "close" relationship. (R. 1027, 1029-1036). She also conceded that Ruby Lee was a good father and good provider. (R. 1028, 1037).

Juanita Anderson also testified that Ruby Lee was strict, hut treated them well. (R. 1179). He only punished them when they did not conform to his expectations. *Id.* According to Anderson, however, it was Virginia, her mother who received the brunt of Ruby Lee's anger."" (R. 1180). Like Olabella, she testified that she and other siblings also had never committed any crimes. -despite being raised the same as Defendant. (R. 1184). Although she spoke with Defendant's appellate counsel in 1982, she never mentioned any beatings. (R. 1186).

Contrary to these witnesses, Defendant's father, Ruby Lee, whom even the defense witnesses conceded was a reliable, hard-working, upstanding citizen who was "always there when they needed him, " testified that he did not beat the children on a regular basis. Although he mentioned some methods which may seem severe by 1995 standards, the punishments were neither as chronic nor as irrational as defense counsel claims. Rather, the father testified that they were only punished for truancy or failure to do their chore: or other appropriate reasons. That the punishments were meted out for misbehavior was corroborated by Defendant's siblings, when they were pressed on cross. Finally, the father testified that he tried numerous other methods of

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[33] Defendant, however, told the California authorities that they got along well. (R. 703).

discipline, because he did not find the corporal punishment to be effective. The prior records comport with Ruby Lee's testimony. Defendant told the Florida correctional authorities after his conviction that he had a good relationship wirh his parents, who administered discipline: but were fair. He also stated that he had good relationships with his family members and that there were no bad influences at home. (R. 505).

Rather than the compelling evidence of child abuse which Defendant claims, the State would submit that given the varying testimony, a reasonable factfinder could have found that Defendant was raised in a home where he was well-housed, well-clothed, and wel!i-fed, by a respectable father and stepmother who treated him as their own, and who sought to instill in him the values of responsibility and education. Although Ruby Lee's methods may appear harsh by today's standards, an ineffectiveness claim must he viewed without the distorting effects of hindsight. See *Routly v. Singletary*, 43 F.3d 681 (11th Cir. 1994); *Strickland*. The state would submit that Ruby Lee's punishments were not particularly unusual or severe by the standards of the 1950's and early 1960's. Further, this evidence would have been evaluated by a judge and jury in 1979, the vast majority of whom would have been raised during the same rime or earlier than Defendant. Especially given that even the defense witnesses all testified that the punishment was only meted out for misbehavior, it is reasonable to conclude that such factfinders would not be persuaded that these circumstances were mitigating. In view of the foregoing, Levine was not deficient in failing to present the "beating" evidence. Likewise, given the unpersuasive nature of the testimony and the witnesses, the trial sourt properly found that the alleged mitigation had not been shown to exist, and that therefore Defendant had not shown prejudice. See *Sochor* v.

State, 619 So. 2d 285, 293 (Fla. 1993)("deciding whether such family history establishes mitigating circumstances is within the trial court's discretion); *Valle v. State*, 581 So. 2d 40, 48-49 (Fla. 1991)(trial court properly rejected evidence of dysfunctional family and abusive childhood as mitigating factors).

5. The trial court properly determined chat even assuming the proposed mitigation presented at the post-conviction hearing were found to exist, the aggravating circumstances would outweigh such mitigation.

Finally, although the State does not in any way concede that Defendant established the existence of any evidence which could reasonably be construed as mitigating, the trial court did find, assuming arguendo that the lay testimony were accepted as mitigation,[34] that the aggravating circumstances herein would still outweigh any such mitigation. The trial court's conclusion is fully supported by the record of substantial aggravation proven to exist, and affirmed on appeal herein. As such, Defendant has not shown that he was prejudiced by the alleged failure to present this evidence, and the trial. court properly denied relief.

The trial court found the following circumstances in aggravation. (a) that Defendant had prior violent felonies; (b) that the murder was committed in the course of a burglary, which the trial court merged with the pecuniary gain aggravator it also found to exist; and (c) that the murder was especially heinous atrocious and cruel. (U. A. R. 184-86). These findings were

[34] The trial court did not address the experts' testimony in this regard. As demonstrated above, the opinions of the defense experts were clearly refuted by the State experts, and were properly rejected as not established by the trial court.

affirmed on direct appeal, ***Breedlove I***, at 9, and were reaffirmed on appeal from Defendant's third post-conviction motion. ***Breedlove IV,*** at 76-77.

With regard to the prior felony circumstance the trial court found that Defendant had broken into the homes of Mrs. Angie Meza and Ms. Hedda Shuhbaum, and attempted to rape them. (D. A. R. 184). In the course of these crimes, he stuffed a sock in Meza's mouth, and attempted to suffocate Shuhbaum, but was interrupted when rhe police broke in, shooting him *Id.* Additionally; although it was not brought out at the time of the original penalty phase, in any new hearing the jury would be entitled to know the facts of the Rough murder, as conceded by counsel below. In that case he broke into the home of a 63-year-old woman and stabbed her to death while she lay sleeping in bed. All these crime:; are quite violent, and hear many similarities to the instant murder. This factor is thus entitled to great weight.

The evidence presented at trial also amply supported i he HAC finding, and the accordance of great weight to that factor. In this regard the trial court found:

> The murder was especially heinous, atrocious or cruel. The victim, Frank Budnick, was asleep in bed along with Carol Meoni when the defendant entered the bedroom with a large butcher knife. The evidence indicated that the defendant approached the bed and began stabbing and slashing with the knife at Frank Budnick. There was a large slash tear found in the pillow slip where the victim had been sleeping. Carol Meoni, who was sleeping next to the victim, was stabbed in the face (Ms. Meoni survived the attack). Both the victim and Ms. Meoni sustained "defensive" wounds on their hands. The victim's right hand had five (5) distinct wounds. The fatal blow resulted when the defendant plunged the knife into the victim's upper chest with tremendous force. The knife fractured the clavicle (collar bone) as it entered the body and proceeded to sever

> the subclavian vein. The knife punctured the left lung and came to rest in the muscles of the shoulder blade. The medical examiner described the injury as a penetrating knife wound approximately five and one half (5%) inches deep, which would result in considerable pain. The victim got out of bed, stated "I'm bleeding, " and walked outside into the front yard where he tried to call for help and collapsed. The medical examiner stated that whiie he was conscious the victim would have experienced the additional sensation of drowning as blood flowed into his lung. The mechanism of death was that the victim drowned in his own blood.

(D.A.R. 186). This finding was affirmed on direct appeal.

> Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different from the norm of capital felonies and sets the crime apart from murder committed in, for example, a street, a store, or other public area.

Breedlove I, at 9. Finally, alleged *Espinosa* error was deemed by this court to be harmless in *Breedlove IV*, based upon the strength of the evidence supporting the HAC and other aggravating factors:

> The evidence presented at trial clearly established that Breedlove committed the murder in a heinous, atrocious, or cruel manner. The fatal stabbing was administered with such force that it broke the victim's collar bone and drove the knife ail the way through the shoulder blade. The puncture of the victim's lung was associated with great pain and rhe victim literally drowned in 'his own blood. 'The victim had defensive stab wounds on his hands and did not die immediately. Moreover, the attack occurred while the victim lay asleep in his bed as contrasted to a murder in a public place. In fact in discussing this aggravator in Breedlove's direct appeal, we stated that this killing was "far different from the norm of capital felonies" and set apart from other murders. *Breedlove [I]* , 413 So. 2d at 9. Under the facts presented this aggravator clearly existed . . . Further, there were two other valid aggravating circumstances, including the previous conviction of a violent felony. While Breedlove presented some testimony concerning possible

> psychological problems, two state experts expressly found no brain damage or psychosis, and one of them said Breedlove was malingering.

Breedlove IV, at 76-77 (citations omitted).

It is thus apparent that the aggravation in this case, where Defendant was 31 at the time of the murder, far outweighed the alleged mitigation relating to Defendant's childhood and drug abuse. *See Francis v. Dugger*, 908 F.2d *696*, 703 (11th Cir. 1990)(noting the limited value of such mitigation evidence as to murderers of Defendant's age). The trial court properly found that Defendant had failed to show that the addition of this evidence would have changed the outcome of the penalty phase. *Tompkins v. Dugger*, 549 So. 2d 1370, 1373 (Fla. 1989)(factors of abused childhood and drug addiction did not outweigh aggravating circumstances of HAC, commission during a felony and prior violent felony conviction; relief on ineffectiveness claim thus not warranted); *Menáyk v. State*, *592 So.* 2d 1076, 1079-80 (Fla. 1992)(even accepting proffered mitigation of mental deficiency, intoxication at the time of the offense, history of substance abuse, deprived childhood, and lack of prior criminal history, three substantial aggravators, which were approved on direct appeal would not have been outweighed); *Kirg v. State*, *597 So* 2d 780 (Fla. 1992)(similar); *Buenoano v. Dugger*, 559 So. 2d 3 116 (Fla. 1990)(similar).

Finaliy, the State must address a recurring contention in the defense brief, that this court allegedly Found that the aggravation was weak in this case.[35] The State respectfully, but

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[35] The passage upon which he relies was found in *Breedlove III*, at 12:

vehemently, submits that the reading of the record in *Breedlove* ZZZ overlooks the evidence presented at trial, the State's position at trial and on direct appeal, and this court's holdings in *Breedlove I*. On direct appeal the claim that this killing was not premeditated was raised and explicitly rejected by this court:

> On appeal [Defendant] claims that *Pinder v. State*, 375 So. 2d 836 (Fla. 1979), mandates that the burglary conviction and sentence be vacated because the state proved only felony murder, not premeditated murder. The state, on the other hand, claims that it presented sufficient evidence of premeditation to warrant both convictions and sentences . . . We find, however, that Breedlove's contention is not really an issue in this case because the state introduced sufficient evidence of premeditation. [12]
>
> [12] This evidence includes, among other things, Breedlove's arming himself with a butcher knife before entering the bedrooms and the defensive wounds suffered by both victims.

Breedlove I. at 8 (citations omitted, footnote the court's). Furthermore, the trial record does not reflect any waiver of the premedication theory at trial, or on appeal. The indictment charged in the alternative. (D. A. R. 1-4A). The jury was instructed on both premeditated and felony murder. (D. A. R. 1229-3 1). At closing argument the prosecutor began by going over the indictment, including the reference to premeditated murder. (D. A. T. 3 158). Although the prosecutor pointed out that the State did not have to prove premeditation for Defendant to be

> However, it must be remembered that Breedlove's victim died from a single stab wound inflicted during the course of a burglary and that Breedlove acquired the weapon only after entering the house. The State conceded at the trial that this was a case of felony murder rather than premeditated murder. 'A strong presentation of mitigating evidence is more likely to tip the scales in a case where the killing was not premeditated.

guilty of first-degree murder, (D. A. T. 1159), he argued that contrary to Defendant's claim in his confession that he only had swung once and caught the victim with the knife by accident, the forensic evidence, the eyewitness account and the ME's testimony showed that Defendant had intentionally and repeatedly stabbed both Budnick and Meoni as they were laying in bed. (D. A. T. 1195-1198). The prosecutor specifically argued that Defendant was purposefully trying 60 eliminate the witnesses to his crime:

> The exact physical acts performed by Frank Budnick we will not know. We do not know whether he died a hero or not. We will not know, but something happened which caused him to wake up, and *McArthur Breedlove now knows that there is someone who can identify him, have him convicted of a crime, and he took that knife, ladies and gentlemen, und he engaged in a savage and brutal and vicious and animalistic attack upon the two people in that bed.*
>
> * * *
>
> *He had, without any doubt a conscious intent to kill Carol Meoni and Frank Budnick, and you have seen the physical evidence which. proves it.*

(D. A. T. 1198). Such words hardly reflect a waiver of the premeditation theory by the State.[36] Defendant's contention regarding the absence of premeditation must therefore be rejected. For the reasons set forth above. the trial court properly found that Defendant was not entitled to relief. That finding should be affirmed.

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[36] See Brief of Appellee, Florida Supreme Court Case No. 56,811, at penalty phase. 27-28. Although the State addressed the merits of Defendant's claim regarding the consequences of his having only been convicted of felony murder, this argument was expiicitly made only "arguendo," after presenting argument rejecting the premise that Defendant was not convicted of premeditated murder. See *Id.*, at 28.

CONCLUSION

For the foregoing reasons, the trial court's denial of post-conviction relief should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brie:' of Appellee was mailed to TODD G. SCHER. Assistant Capital Collateral Representative. P 0 Drawer 5498, Tallahassee, Florida 32314-5498, this 15th day of December, 1995.

RANDALL SUTTON
Assistant Attorney General