IN THE SUPREME COURT OF FLORIDA

ROGER LEE CHERRY,

Appellant,

v. **CASE NO. 90,511**

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State does not accept the argumentative and incomplete statement of the case and facts set out in Cherry's brief. The State relies on the following facts.

The Direct Appeal

On direct appeal from Cherry's convictions and sentences of death[1], this Court summarized the facts in the following way:

> Cherry burglarized a small two-bedroom house in DeLand belonging to an elderly couple, Leonard Wayne and Esther Wayne, during the late evening of June 27 or the early morning of June 28, 1986. When their son arrived for a visit about noon on the 28th, he noticed that their car was gone and a door to the house ajar. Upon entering the bedroom, he discovered his parents lying two feet apart on the bedroom floor, dead. Autopsies revealed that Mrs. Wayne died of multiple blows to the head and that Mr. Wayne died of cardiac arrest.
>
> At the trial, the state's chief witness, Lorraine Neloms, testified that Cherry left the apartment which they shared between 11 and 11:30 p.m. on June 27, 1986, explaining that "he needed some money." He returned about an hour later with two or three rifles and a wallet which contained a bank card and a license identifying a man named Wayne. She asked where he had been and he responded that he went inside a house by the armory. The prosecutor then asked:
>
> > Q. Did he tell you what happened inside the house?

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[1]This Court set aside one of Cherry's two death sentences on proportionality grounds. *Cherry v. State*, 544 So.2d 184, 188 (Fla. 1989).

> A: Yeah. When he went in there, the people was awoke and saw him and the lady tried to fight him or something and he hit her and pushed the man and he grabbed his chest and he found their car keys and took their car.

Ms. Neloms further testified that Cherry bled from a cut on his right thumb, which he stated was the result of having cut a line.

Cherry left the apartment twice more that evening. The first time he went to a bank and on his return stated that a card was stuck in the machine. The second time, about fifteen minutes later, he left "to ditch the car he stole."

The following night, Cherry had Ms. Neloms drive by the car he had "ditched." She identified it as a light blue Ford Fairmount. They saw several police officers around the car and did not stop. After returning home, Ms. Neloms then learned of the murders. As she and Cherry watched the eleven o'clock news, television footage showed the car and house by the armory. She described Cherry as acting "[r]eal strange." Ms. Neloms later went to the police and Cherry was arrested.

A Sun Bank supervisor then testified that the automatic teller machine three blocks from the Wayne residence captured a Master Card and a Sun Bank card belonging to the Waynes on June 28, 1986. Bank audit slips revealed that five or six transactions were unsuccessfully attempted between 1:55 and 2 a.m.

Police testimony indicated that the telephone wire outside the house had been cut at the junction box and that blood had been discovered on a piece of discarded paper near the box, on the walkway leading to the back porch, and on at least one of three jalousie panes found in a wooded thicket to the rear of the house. Those panes had been removed from the porch window. Cherry's blood was consistent with the blood found on the paper and the jalousie. Cherry's left palm print was found on the door frame at the entrance to the Waynes' bedroom and his left thumbprint appeared on one of the jalousie panes.

However, a hair fragment was collected from the bedroom wardrobe and determined to be dissimilar to Cherry's known hair sample. Cherry was arrested on July 2 at his home, approximately three blocks from the Waynes' house. Police noted at that time that Cherry had a cut on his thumb, which he remarked was the result of having cut the head off a fish.

Finally, evidence was presented that the Waynes' Fairmount had been discovered abandoned in a wooded area within a mile of their house. Inside its locked trunk, police found a metal tray bearing Cherry's left thumbprint. Cherry's blood was consistent with blood identified on a towel recovered from the front seat of the car.

A jury convicted Cherry of the four crimes charged in the indictment. During the penalty phase, the state offered no additional evidence. The defense evidence was limited to a September 10, 1987, psychiatric evaluation by George W. Barnard, M.D. (FN1) The jury recommended the imposition of the death penalty by a 7-5 vote for the murder of Leonard Wayne and by a 9-3 vote for the murder of Esther Wayne.

The trial judge sentenced Cherry to death on both capital counts in accordance with the jury's recommendation, finding that the aggravating circumstances (FN2) far outweighed any mitigating circumstances. On the burglary count, he sentenced Cherry to a life term of imprisonment, and on the grand theft count, to a five-year term, with each to run concurrent with the other.

> FN1. Dr. Barnard reported that Cherry's father beat him severely and that his mother had alcohol problems. In the year before his arrest, Cherry smoked marijuana daily and smoked approximately $700 worth of "crack," the last time being on June 28, 1986.
>
> FN2. The court found that Cherry had been previously convicted of another felony involving the use and threat of violence, that

> is robbery; that the murders were committed while he was engaged in the commission of a burglary; that the murders were committed for pecuniary gain; and that the murders were "especially wicked, evil, atrocious or cruel."

Cherry v. State, 544 So.2d 184, 185-186 (Fla. 1989). This Court summarized the final disposition of the direct appeal as follows:

> Accordingly, we affirm the four convictions and the death sentence imposed for the murder of Mrs. Wayne. We vacate the sentence imposed for the death of Mr. Wayne and remand for the imposition of a life sentence without eligibility for parole for twenty-five years. We also vacate the sentences for the two noncapital felony counts and remand for resentencing on those counts with instructions that the trial court resentence using a guidelines score sheet.

Cherry v. State, 544 So.2d at 188.

The Post-Conviction Proceedings

On April 16, 1992, Cherry filed his first *Florida Rule of Criminal Procedure* 3.850 motion in the Circuit Court of Volusia County, Florida. The Circuit Court denied relief without an evidentiary hearing, and Cherry appealed, raising the following claims:

> (1)(a) The trial judge's failure to recuse himself from presiding over the rule 3.850 proceedings (Appellant referred to this issue as a "preliminary" matter and not as a numbered claim. For ease of reference, we have numbered this issue as "(1)(a)" and the appellant's first issue as "(1)(b)."); (1)(b) the circuit court erred in summarily denying his race discrimination claims; (2) he was denied effective assistance of counsel at the penalty phase of his trial; (3)(a) he was denied a competent mental health examination; (3)(b) trial counsel was

ineffective for failing to arrange for a competent examination; (4) the circuit court erred in summarily denying his motion for appointment of forensic experts; (5) he was denied effective assistance of counsel at the guilt phase of his trial; (6) the State's failure to turn over exculpatory information in its possession before trial violated *Brady*; (7)(a) he was denied meaningful voir dire and a trial before an impartial jury; (7)(b) trial counsel was ineffective for failing to conduct an adequate inquiry into jurors' alleged misconduct and make an appropriate motion to exclude the jurors or for a mistrial; (8) the trial court excluded a defense witness on the improper basis that the witness's testimony would be offensive to elderly citizens; (9)(a) his first-degree murder convictions and death sentence violate the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution; (9)(b) trial counsel was ineffective for failing to object that his first-degree murder conviction was unconstitutional; (10) a new trial is required due to an insufficient record of the bench conferences and rulings on certain defense motions; (11)(a) the prejudicial atmosphere surrounding the trial proceedings created a risk that the death penalty was imposed in an arbitrary and capricious manner; (11)(b) trial counsel was ineffective for failing to object to the prejudicial atmosphere surrounding his trial; (12)(a) the prosecutor's improper closing argument at the penalty phase violated appellant's constitutional rights; (12)(b) trial counsel was ineffective for failing to object to the prosecutor's numerous improper comments during closing argument; (13)(a) the jury considered nonstatutory aggravating circumstances in violation of *Maggard v. State*, 399 So.2d 973 (Fla.), *cert. denied*, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981), and the constitution; (13)(b) trial counsel was ineffective for failing to object to the instructions that permitted the jury to consider the non-statutory aggravating factor of significant history of prior criminal activity; (14) the State and the court misled the jury into believing its sentencing verdict was merely advisory in violation of his constitutional rights; (15) his sentence of death was based upon one or more unconstitutionally obtained prior convictions; (16) the jury instructions improperly shifted the burden to him to prove that death was

> inappropriate; (17)(a) the prosecutor's closing argument improperly asserted that sympathy and mercy were not considerations for the jury; (17)(b) trial counsel was ineffective for failing to object to the prosecutor's closing argument and the penalty-phase jury instructions which precluded the jury from considering sympathy in recommending a sentence; (18)(a) the heinous, atrocious, or cruel instruction was unconstitutionally vague; (18)(b) trial counsel was ineffective for failing to object to the invalid jury instructions; (19) the trial court's failure to conduct an independent evaluation of Cherry's mitigating circumstances deprived him of his right to an individualized sentencing determination.

Cherry v. State, 659 So.2d 1069, 1071 n. 1 (Fla. 1995). This Court affirmed the trial court's summary denial of relief as to all of the claims and sub-claims contained in the motion with the exception of the penalty phase ineffective assistance of counsel claim. This Court remanded the case for a limited evidentiary hearing on that narrow issue, stating:

> We reach a contrary result on the issue of whether the trial court should have granted an evidentiary hearing on Cherry's claim of ineffective assistance of counsel at the penalty phase. We find that Cherry has stated a prima facie basis for relief and is entitled to an evidentiary hearing. See *Brown v. State*, 596 So.2d 1026 (Fla. 1992).
>
> Cherry claims that trial counsel presented practically no mitigating evidence at the penalty phase other than a single four-page psychiatric report which was introduced without further argument or comment. Counsel made virtually no attempt to present evidence or argue mitigating circumstances. Cherry claimed in his 3.850 motion and detailed supporting material attached that the following information was available had counsel conducted an adequate investigation of mitigating circumstances: (1) Cherry grew up in conditions of abject poverty; (2) Cherry was severely physically and emotionally abused and

neglected from the time that he was an infant; (3) Cherry's mother was an alcoholic who drank during her pregnancy and throughout his life and repeatedly neglected, rejected, and abandoned him; (4) Cherry witnessed extreme violence as a child; (5) Cherry was institutionalized at a young age in a brutal and segregated juvenile institution. Cherry also specifically identifies three mental health experts in his petition who indicate that: (1) Cherry is now, and was at the time of trial, mentally retarded; (2) Cherry suffers from organic brain damage; (3) Cherry was incompetent to stand trial and to testify; (4) Cherry's history supports both statutory and nonstatutory mitigating evidence; and (5) Cherry was intoxicated at the time of the offense.

Based on the volume and detail of evidence of mitigation alleged to exist compared to the sparseness of the evidence actually presented, we agree that Cherry is entitled to an evidentiary hearing on his claims that counsel was ineffective at the penalty phase. This case is similar to the situation presented in *Harvey v. Dugger*, 656 So.2d 1253, 1257 (Fla. 1995), where we ordered an evidentiary hearing on a similar claim and observed:

> A number of Harvey's other penalty phase claims relating to ineffectiveness of counsel do not appear to be such as would warrant relief under the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, the cumulative effect of such claims, if proven, might bear on the ultimate determination of the effectiveness of Harvey's counsel. Therefore, in view of the fact that we have already determined to remand for an evidentiary hearing Harvey's penalty claims 2(a) and 3, we also remand his penalty claims 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), and 16 for consideration at the same time.

We affirm the summary denial of all claims raised in the 3.850 motion, except for those claims alleging that counsel was ineffective during the penalty phase of the

> trial. We reverse the summary denial of those claims and remand for an evidentiary hearing.

Cherry v. State, 659 So.2d at 1074.

On December 16, 1996, the evidentiary hearing ordered by this Court was conducted. (R1725). Following that hearing, the Circuit Court found that trial counsel had not been ineffective at the penalty phase of Cherry's capital trial. (R1735-36). In the order denying relief, the Court found, *inter alia,* that trial counsel's strategy of presenting the testimony of his mental health expert, Dr. Barnard, by introducing his report into evidence instead of calling him to testify live, deprived the state of any opportunity to cross-examine the contents of that report. (R1735). The court also found that counsel was not ineffective for not presenting evidence beyond that contained in the report (R1730); that Cherry's claim that he did not receive a "competent" mental health evaluation was both procedurally barred and meritless (R1731-32); and that the issues contained in Claim XIII of Cherry's motion were both procedurally barred and meritless (R1733-35). The trial court concluded:

> Although in hindsight trial counsel might have presented his case differently to the sentencing jury, this Court does not find that his performance was below the "broad range of reasonably competent performance under prevailing professional standards." *Maxwell v. State,* 490 So.2d 927 at 932. At the evidentiary hearing, several witnesses testified regarding the violent environment and

> personal abuse that the Defendant suffered at the hands of his father. This information was denied to trial counsel by the Defendant. The only knowledge of this abuse was contained in Dr. Barnard's report. Without the cooperation of the Defendant, trial counsel was unable to develop and present these or other witnesses at trial. Furthermore, in light of Defendant's innocence defense and Dr. Barnard's report which was considered in mitigation, this Court finds that there is no reasonable probability of a different sentencing result had the proffered family background testimony of abuse and deprivation and the live testimony of the mental health expert Dr. [Barry] Crown, both been presented during the 1986 penalty phase; and, considering the strength of the mitigators (violent childhood environment, child abuse) presented at the evidentiary hearing and the fact that there was no evidence presented supporting more than a speculative conclusion that the Defendant suffered from mental retardation and/or brain damage, the Court does not find a deficiency in counsel's performance which would have changed the result of the penalty phase proceedings. [footnote omitted]. This conclusion is made also in consideration of the aggravating factors supported by the record (prior conviction of violent felony, murder committed for pecuniary gain, and that the murder was especially heinous, atrocious, or cruel) and the Defendant's alibi that he was innocent, which was maintained throughout the trial. Accordingly, because the testimony and argument presented at the evidentiary hearing and the ineffective assistance claims raised in the Defendant's Motion for Postconviction Relief fail to demonstrate that the outcome of the proceedings would have resulted in a life sentence but for counsel's errors at penalty phase, this Motion must be denied.

In the footnote, the trial court stated:

> Defendant's father, the source of the alleged child abuse, had been dead since 1968 - more than eighteen years before the Defendant committed the offenses in this case. Additionally, evidence presented indicated that the Defendant left home at the age of 16, twenty years prior to the offenses. As such, the Defendant had not been in contact with the alleged abuser for 18 to 20 years before

the murder of Mrs. Wayne.

(R1736).

The evidence produced at the evidentiary hearing is summarized below.

Cherry's trial attorney, David Miller, familiarized himself with the law regarding death penalty litigation prior to the time of Cherry's trial, and, moreover, discussed the case with his partners, John Tanner, and Mike Lambert, both of whom had experience in first-degree murder cases. (TR27-28). Cherry maintained his innocence, and at all times asserted that he had nothing to do with this crime. (TR29). That assertion was consistent with his trial testimony. (TR29). Cherry was able to communicate with trial counsel, but, insofar as the penalty phase was concerned, counsel was unable to obtain information from Cherry beyond that presented at trial. (TR30-31). Trial counsel was aware of the importance of presenting family members and other relevant mitigation testimony at the penalty phase of a capital trial. (TR31-32). Trial counsel attempted early on to obtain such information from Cherry, but Cherry would not communicate with him in that regard. (TR32-33). In trial counsel's words, Cherry "did not seem inclined to involve people who could have helped him and I knew little or nothing about his background not for want of

asking." (TR33). Counsel was aware, from some source, that there was a history of abuse claimed by Cherry, but Cherry would not provide him with the names of any individuals who could confirm that information. (TR35).

Counsel testified that he understood the difference between statutory and nonstatutory mitigation, and would have presented any available mitigation to the jury. As counsel put it, "I was concerned with getting in front of the jury what I could conceivably get in front of the jury to give them a reason not to put this man in the electric chair." (TR36). At the time of trial, and now, reliance upon the Bible (and quotations therefrom) in closing argument is typical in the area where this case was tried. (TR37-38).

As counsel described his strategy at the time of closing argument in the penalty phase,

> I had obliquely, or I had tried to obliquely pass on to the jury early on Mr. Cherry's insistence that someone else had done this. The evidence against him was very strong. I thought at the time that we had just about extended our credibility, good will, faith, if you would, to the jury about as far as we could. It seemed to me at the time that that was the only credible way in which to keep this man out of the electric chair. Mr. Cherry had not provided me, not that he had

> not been asked.[2] Mr. Cherry was not forthcoming on inquiry with the information that would have put that before the jury, put a witness before the jury.

(TR39).

Counsel went on to testify that presenting a substantive argument based upon Cherry having been beaten by his father, or having had an alcoholic mother growing up, in conjunction with Cherry's insistence that he was innocent of the crime charged, made no sense. (TR40). Again, in counsel's words, "It seemed foolish to me, it seemed a way to drive this jury to convict him to argue that this man was abused as a child and therefore in some way justified him in doing this, this thing that they had just found him guilty of." (TR41).[3]

None of the "new" information would in any way have impacted the mental state expert's evaluation, nor would any of that information have provided any statutory mental health mitigation. (TR43). Cherry maintained his innocence throughout, and presenting evidence to the jury related to his childhood (which would have revealed criminal conduct as a child) would have presented a

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[2]In the transcript, the word not in that parenthetical phrase is written "note." In context, that is an obvious typographical error.

[3]There was substantial evidence that this crime had been planned in advance. (TR41). See pp. 1-4, above.

problem for Cherry. (TR50). Cherry's refusal to assist in providing mitigation evidence and witnesses restricted counsel's ability to present mitigation. (TR50).

Counsel had discussed the seriousness of the charges with Cherry, had advised him of the possibility of a death sentence, and asked him for information about family, neighbors, teachers, and his former wife. (TR52-53). Cherry refused to divulge that information. (TR53).

Dr. Barry Crown, Ph.D., testified as an expert in psychology. (TR55-57). Crown was hired to review Cherry's case at the end of July, 1997. (TR73). Crown spent approximately four and one-half hours with Cherry. (TR74).[4] The majority of that time was spent in testing, and perhaps thirty minutes spent talking with him. (TR74). Crown conducted a number of tests on Cherry (TR75), and recommended a "functional brain imaging study." (TR76). Such a "study" was not done. (TR77). Crown did not talk with Dr. Barnard, who evaluated Cherry at the time of the offense, nor did Crown want any information from Dr. Barnard. (TR77-79). Crown described the "basic scenario" of this crime as "Mr. Cherry and others were

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[4]On page 15 of his brief, Cherry claims that the numerical category describing Crown's diagnosis is 310.1. That category is "personality change due to [general medical condition]". *Diagnostic and Statistical Manual* - Fourth Edition at 800.

involved in mowing lawns and apparently at one of the client's homes two people were found murdered." (TR80). Crown also "knew" that Cherry had been using cocaine and drinking at the time of the crime. (TR81). However, Crown testified that no aspects of this crime indicated that it had been planned. (TR81). He believes that despite the facts, which were that Cherry went "to a house in the middle of the night after announcing to his girlfriend, I'm going to go get some money, cut the phone line outside the house, remove[d] the jalousie windows, enter[ed] the home and then beats to death the elderly victim in a home," this crime is a "random act." (TR81). Crown has not reviewed the transcript of Cherry's capital trial, and does not know what Cherry's testimony at trial was. (TR82).

According to Dr. Crown, Cherry's IQ "mitigates" against the diagnosis of anti-social personality disorder.[5] (TR83). Crown made no effort to determine the facts and circumstances of the crime for which Cherry was convicted and sentenced to death. (TR84-85).

According to Dr. Crown, he used the *International Classification of Disease System No. 9.* (TR86). The reason for that is because the *Diagnostic and Statistical Manual* - Fourth Edition is "only for descriptive information." (TR86). According

[5]Crown identified no literature supporting that statement.

to Dr. Crown, anti-social personality disorder "is something that would apply as a gross diagnosis label to many trial lawyers, as an example, it's a catch-all description for people who tend to assume things that aren't necessarily true." (TR87). Despite conceding that Cherry fits all of the criteria for a diagnosis of anti-social personality disorder, Crown persisted in refusing to agree that such a diagnosis could, under any circumstances, be correct. (TR87).[6] Crown testified, without any support from any literature, that a diagnosis of anti-social personality disorder "is inappropriate when someone has been found to have organic brain damage." (TR90).

Crown accepted Cherry's assertion that he had never suffered any injuries that could cause organic brain damage. (TR94-95). Crown was informed by counsel for Cherry that "other people" were involved in the murders. (TR95). According to Dr. Crown, even though he does not know the source of the "information" regarding other participants, he is convinced that Cherry was under the substantial domination of another person, and that he was under "extreme duress." (TR96-97). The fact that Cherry disposed of his blood-spattered shoes after the crime, and, even if Cherry had told

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[6]Cherry fits virtually all of the diagnostic criteria set out in the *Diagnostic* and *Statistical Manual* - Fourth Edition for a diagnosis of anti-social personality disorder. (TR87-90).

Crown that he had thrown away the evidence to avoid being caught, would not, according to Crown, indicate any planning on Cherry's part. (TR100-101). Crown works generally for the defense in capital cases. (TR105-106). Crown testified that the defendant is of "borderline" intelligence according to the definition of mental retardation promulgated by the American Association of Mental Deficiencies. (TR109).[7] According to Dr. Crown, anti-social personality disorder "is a disorder that's obviated when there is a diagnosis of brain damage." (TR114). While Crown testified that Cherry suffered from "toxic exposure," he was unable to identify any pesticides, herbicides, or other toxic substances to which Cherry was exposed. (TR119-120). No chemical testing was conducted to determine whether any toxic chemicals were present in Cherry's body. (TR120-121). Cherry is not mentally retarded. (TR129).

Lenox Williams testified about his experiences working at the Dozier School for Boys from June of 1960 until 1986. (TR142-151). Williams remembers Cherry being an inmate at Dozier School (TR144), but had very limited contact with him. (TR151). Cherry was at the Dozier School in 1962. (TR154). A number of people who have been

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[7]Crown continued to state that he does not recognize the *Diagnostic and Statistical Manual* as authoritative. (TR111). Neuropsychologists, which Crown professes to be, do not, according to Crown, recognize the DSM. (R111).

sent to Dozier School did not go on to murder anyone. (TR154). Cherry was a discipline problem while at Dozier School, and, had Williams been called to testify at Cherry's trial, that would have been a necessary part of his testimony. (TR154-55).

Sylvester Hill grew up with Cherry in the Deland, Florida, area. (TR161). Hill testified about the circumstances of Cherry's upbringing. (TR162-171). Hill has quite a few felony convictions and, at the time of the murders giving rise to this case, was in prison. (TR172-174). In 1992, Hill had provided a one-page affidavit setting out information known to him regarding Cherry's early life. (TR174-176). Much of the information Hill testified about in the evidentiary hearing is not in the affidavit because, at the time that affidavit was executed, Hill was on crack cocaine. (TR176). Hill's mother frequently fed Cherry, and frequently encouraged him to stay out of trouble and not violate the law. (TR191-192).

Levester Hill has known Cherry since 1960. (TR194). He also testified concerning Cherry's background and early life. (TR195-203). Levester is Sylvester Hill's brother. (TR203). According to Levester, Cherry was frequently having problems, and was "constantly being abused." (TR205-206). Levester observed Cherry living through nine straight years of abuse by his father beginning

in 1960. (TR207).[8] Levester has been in and out of correctional facilities since 1964, and has been convicted of felonies on four occasions. (TR209-210). Levester's parents took care of Cherry, and encouraged him to stay out of trouble. (TR213).

Ann Marie Luke is the sister of Sylvester and Levester Hill. (TR236; 241). Luke knows Cherry from having grown up with him in Deland, Florida. Luke remembers knowing that Cherry was in trouble, but not what it was about. (TR243). Cherry's mother was a nice woman who tried to take care of him as best she could. (TR244). Luke's mother and father also tried to help Cherry and make sure that he stayed out of trouble. (TR244).

Legertha Henry knew Cherry as a child, even though she was fifteen to sixteen years older than Cherry. (TR265). She testified about Cherry's background and early life in Deland, Florida. (TR266-274). She saw Cherry on occasions, and made home visits to his family in connection with her employment with HRS. (TR27; 275). She never saw Cherry being beaten, and never saw him acting improperly. (TR 276). She knows that he spent time in a "detention facility," but does not know what sort of crime he committed. (TR277). Cherry's father was a hard worker. (TR278).

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[8]Cherry was at Dozier School in 1962 (TR154), and his father died in February of 1967. (R361).

Dr. George Barnard was appointed by the Court to perform a psychiatric evaluation of Cherry. (TR317). Dr. Barnard is a psychiatrist, not a psychologist, and, in response to his request for background information, did receive various information concerning Cherry. (TR318-319). Subsequent to the time of trial, Dr. Barnard received additional information from current defense counsel. (TR320). Based upon his evaluation of Cherry at the time of trial, as supplemented by the additional materials provided to him, his opinion is that Cherry is a person of borderline intelligence with a history of substance abuse who would be classified as anti-social personality disordered individual. (TR321). Dr. Barnard is of the further opinion that Cherry does not qualify for any statutory mental health mitigating factors. (TR322). At the time of his initial evaluation of Cherry, he was aware of Cherry's history of child abuse. (TR322).[9]

Cherry engaged in a detailed discussion about the crime, and was insistent that he had an alibi for the crime, and that he did not kill anyone. (TR324). At the time Dr. Barnard evaluated Cherry, he was thirty-six years of age -- his father had died when Cherry was sixteen. (TR325-326). Cherry specifically denied use of

[9]Cherry informed Dr. Barnard that his father had a bad temper and that he had been beaten and dragged about by a chain by his father. (TR323-24).

crack cocaine at the time of the murders giving rise to this case. (TR327). Cherry does not meet the criteria for a diagnosis of retardation, and suffers from no deficiencies in his ability to engage in long range planning. (TR328-29). However, based upon all of the evidence **now** available to Dr. Barnard, he is of the opinion that Cherry is an anti-social personality disordered individual. (TR332).[10]

Pauline Powell testified that she knew Cherry from elementary school. (TR352). She testified concerning Cherry's background and early life in Deland, Florida. (TR352-54). She was not close personal friends with Cherry, and, in fact, "just knew who he was." (TR 354-55). She knew nothing about his criminal history, and did not know how many times he had been convicted of a crime. (TR355-56).

John Hill also grew up with Cherry. (TR357-58). Sylvester and Levester Hill are John Hill's brothers -- John Hill also has been convicted of two felonies. (TR365-66). The remainder of John Hill's testimony essentially mirrored that of his brothers. (TR367-78).

Hettie Mabry Cherry is married to the defendant. (TR379-80).

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[10]Whether or not an individual suffers from brain damage does not preclude a finding of anti-social personality disorder. (TR336).

She described Cherry as a "good man." (TR380).[11] Prior to her testimony, the witness last saw her husband some fourteen to fifteen years previously. (TR390-91). This witness has been convicted of three or four felonies. (TR401).

Reatha Mae Henry, who knows Cherry and his mother, testified that Cherry's mother suffered from epilepsy. (TR407-408). Henry further testified that Cherry's mother died of tuberculosis. (TR408). This witness observed Mrs. Cherry having one epileptic seizure. (TR410).

Sandra Henry testified that she knew Cherry for about two years when he was a boyfriend of her cousin. (TR412). This witness's cousin is Lorainne Neloms, who testified against Cherry at his capital trial.

Bernice Shipman met Cherry for the first time in 1967 when she resided in Deland. (TR 432-33). She testified about Cherry's treatment by his father while he was growing up. (TR434-436). This witness is the sister of Sylvester and Levester Hill. (TR441). Sometime during the 1980's, Cherry resided with this witness's mother. (TR442).

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[11]This witness testified that Cherry was "sexually assaulted" by his father. (TR389). That information was not mentioned until the evidentiary hearing, even though the witness had been previously interviewed by investigators working for the defendant. (TR386).

Joseph Fludd lived next door to Cherry, and has known him for many years. (TR462-63). He testified regarding his observations of Cherry during his growing up years. (TR463-65). This witness moved to Deland, Florida in 1965, and, in 1967, Cherry's father died. (TR471). Cherry's mother did not beat him, and seemed to love both of her sons and tried to care for them. (TR472).

The deposition testimony of Daisy Mae Gandy, Bertie Fludd, and Inell Gandy was also received. That testimony briefly described Cherry's background and early life.

The record on appeal was certified as complete and transmitted on July 15, 1997. Cherry's initial brief was filed on May 13, 1998.

SUMMARY OF THE ARGUMENT

The Rule 3.850 trial court properly denied relief on the ineffective assistance of penalty phase counsel claim, finding that Cherry would not provide potential mitigation witnesses to him, despite being aware of the dire circumstances confronting him. Moreover, none of the "mitigation" that has been "found" since the imposition of Cherry's death sentence is particularly compelling, and, moreover, none of that testimony establishes the existence of any statutory mitigating circumstances. Cherry cannot prove deficient performance on the part of trial counsel, nor can he

demonstrate prejudice, as required by *Strickland v. Washington.*

The trial court properly found Cherry's claim of an incompetent mental state evaluation at trial to be procedurally barred because it could have been but was not raised on direct appeal. Moreover, that claim is meritless because, as the Rule 3.850 court found, the "evidence" upon which it is based is wholly speculative.

Cherry's claims of ineffectiveness of counsel for "failure to object during the penalty phase of his trial" are not a basis for relief because those claims were held to be procedurally barred by this Court in the 1995 opinion issued in this case.

The trial court correctly denied Cherry's "Motions to Perpetuate Testimony" because those motions were filed in an untimely fashion, as well as because there has been no showing that any witness was "unavailable" within the meaning of the applicable Rule of Criminal Procedure.

ARGUMENT

I. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

On pages 42-70 of his brief, Cherry argues that the trial court erroneously found that he received effective assistance of counsel at the penalty phase of his capital trial. For the reasons set out below, the Circuit Court correctly decided this issue, and

the denial of relief should be affirmed in all respects.

The basis of Cherry's claim, as framed in his post-conviction motion and decided by the Circuit Court, is that counsel "was deficient by failing to investigate for readily available mitigating evidence, and his failure to present such evidence at penalty phase, deprived" Cherry of his right to effective counsel. (R1725). In support of this claim, Cherry argued that the following "mitigation" could have been but was not presented:

> 1. Defendant is mentally retarded; 2. Defendant suffers from organic brain damage; 3. Defendant was subjected to physical and psychological abuse while he was a child; 4. many of Defendant's relatives were impoverished alcoholics which doomed the Defendant to a childhood of poverty and racial discrimination; 5. Defendant's upbringing made the Defendant dependent on alcohol, crack cocaine and other psychoactive substances; 6. the lack of "social services" for poor blacks of his mental condition and lack of education led to his spending almost all of his adolescence in juvenile facilities, where he received neither treatment nor education, but only brutalization.

(R1726). The trial court denied relief on this claim, and that ruling should be affirmed in all respects.

The Legal Standard

The standard by which claims of ineffective assistance of counsel are evaluated is the well-known *Strickland v. Washington*, 466 U.S. 668, 687 (1984), standard, in which the United States Supreme Court held that:

> First, the defendant must show that counsel's performance

> was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

See also, Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). That standard is in the conjunctive, and, unless the defendant can establish both deficient performance **and** prejudice, he is not entitled to relief. *Maxwell, supra.* In order to establish the deficiency prong of *Strickland,* the defendant must establish that counsel's performance fell outside the wide range of professionally competent assistance. *Strickland, supra,* at 688. The prejudice prong of the standard is established by a showing that there is a reasonable probability that "but-for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* at 694. Moreover, contrary to Cherry's suggestion, the *Strickland* standard is not an outcome-determinative one. Instead, that standard evaluates whether or not the proceeding itself was unfair or unreliable. *Lockhart v. Fretwell,* 506 U.S. 364 (1993). As the *Fretwell* Court emphasized, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.,* at 843.

Review of trial counsel's performance is highly deferential, especially where matters of trial strategy are concerned. *Strickland, supra,* at 689-90. Extensive scrutiny and second-guessing of attorney performance is not appropriate, and the analysis of any claim of ineffective assistance of counsel must begin with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland, supra,* at 689. A defendant is "not entitled to perfect or error-free counsel, only to reasonably effective counsel." *Waterhouse v. State,* 522 So.2d 341, 343 (Fla. 1988). Even if the defendant establishes that a more thorough investigation might have been conducted, and even if that investigation might have been fruitful. That showing does not establish that counsel's performance fell outside of the wide range of reasonably effective assistance. *Burger v. Kemp,* 483 U.S. 776, 794 (1987).

"A fair assessment of attorney performance requires that that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Francis v. State,* 529 So.2d 670, 672 n. 4 (Fla. 1988). The ultimate question is not what the best lawyer would have done, nor is it what most good lawyers would have done -- the question is

only whether a competent attorney reasonably **could** have acted as this one did given the same circumstances. *See, White v. Singletary,* 972 F.2d 1218, 1220-1221 (11th Cir. 1992). That standard is a high one, with the result that the "cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant,* 13 F.3d 384, 486 (11th Cir. 1994). Cherry cannot carry his burden of proof, and the Circuit Court's denial of relief on ineffective assistance of counsel grounds should be affirmed in all respects.

The Circuit Court's Findings Should be Affirmed[12]

As set out at page 22, above, Cherry's Rule 3.850 motion alleged that he could prove six specific matters in "mitigation." At the conclusion of the hearing, evidence had presented on only two of those six claims: that Cherry has "organic brain damage", and that Cherry was abused as a child. The other matters alleged in the motion were either affirmatively disproven, or were not the subject of evidence that was presented below.

In denying relief on this claim, the Rule 3.850 trial court made the following findings, which are well supported by the

[12]The facts of this case, including the defense expert and the conclusions reached by him, are very similar to *Kokal v. Dugger*, No. 73,102 (Fla. 07/16/98). *See* pp 33-35, below.

record. First, the trial court found that the testimony of Cherry's hand-picked mental state expert, Dr. Crown, was based on no more than speculation by that witness in reaching his "conclusions" regarding fetal alcohol syndrome, organic brain damage, and mental retardation. (R1726). As that court pointed out, Dr. Crown opined that Cherry is "borderline retarded" (instead of being truly "retarded") because he has an IQ of 74. *Id.,* at n. 1. Crown further testified that Cherry does **not** suffer from Anti-Social Personality Disorder because he was abused as a child. *Id.* Crown offered no support for that opinion, and it is evidence of his extreme bias in favor of the defendant that he was willing to testify in a way that has no support in any of the literature regarded as authoritative by members of his profession. In fact, Crown testified that the sort of paper-and-pencil tests employed by neuropsychologists are more accurate in the detection of organic brain damage than are medical tests such as MRIs, CAT scans, and PET scans. (R124-25).[13]

Dr. Barnard is a psychiatrist who evaluated Cherry at the time of his capital trial. (R1727). Dr. Barnard testified at the

[13]This testimony is inconsistent with the Court's *Hoskins v. State,* 702 So.2d 202 (Fla. 1997), decision. In fact, *Fundamentals of Human Neuropsychology, 4th Edition*, Kolb and Whishaw, points out that "in the 1990's, the technology of MRI, PET, and mechanic and electrical recording procedures makes many of the neuropsychological assessment tests unnecessary." *Id.*,at 627.

evidentiary hearing that Cherry fell into the borderline range of intellectual function, and fit the diagnostic criteria for Anti-social Personality Disorder. (R1727). Dr. Barnard did not testify at Cherry's trial -- his written report was introduced into evidence at the penalty phase. (R1727). That report is attached to the Circuit Court's order denying relief as "Appendix A". (R1743-46). As the trial court found, the strategy of introducing that report into evidence deprived the State of the opportunity to subject it to cross-examination. (R1727). Such a strategy is certainly reasonable, because, had Dr. Barnard been called to the stand during Cherry's trial, the diagnosis of anti-social personality disorder would have been placed before the jury. *Thompson v. Nagle,* 118 F.3d 1442 (11th Cir. 1997). Counsel cannot be legitimately criticized for not informing the jury that his client is a psychopath, because such a diagnosis is anything but mitigating. *See, e.g., Harris v. Pulley,* 885 F.2d 1354, 1381 (9th Cir. 1988); *see also, Elledge v. State*, 706 So.2d 1340, 1347 (Fla. 1997).

Further, contrary to Cherry's assertion that Crown's testimony was "uncontradicted", Dr. Barnard testified that Cherry is neither organically brain damaged nor mentally retarded, and, even if he was, such would not preclude a diagnosis of Anti-social Personality

Disorder, contrary to Crown's unsupported statement. (R1728). Dr. Barnard, who evaluated Cherry closest in time to the offenses at issue, still maintains the opinion, even taking into account further information about Cherry, that he is an individual of borderline intelligence (but not mentally retarded) who is Anti-social Personality Disordered. (R1728). In Dr. Barnard's opinion, no statutory mitigators are applicable to Cherry. (R1728). Dr. Barnard's report, which was placed into evidence (and presumptively considered by the jury, contrary to Cherry's suggestion on page 60 of his brief), summarized the "child abuse" to which Cherry was subjected, and any further information concerning that subject would be cumulative. Cherry's new-found claim of alcohol and drug use at the time of the offense is wholly inconsistent with the testimony of Cherry himself, as the trial court found. (R1729). Likewise, such a theory is inconsistent with the facts related to Dr. Barnard by the defendant. (R1743). As the trial court further found, attempting to convince the jury that non-statutory mitigation existed in the form of alcohol and drug use at the time of the offense would be inconsistent with the circumstances of the crime[14] -- it is unreasonable to argue, as Cherry now does, that

[14]As the Circuit Court found, Cherry denied substance abuse to Dr. Barnard and during his testimony at trial. (R1732). That denial is fatal to any reliance on an "intoxication defense", as well as

counsel was ineffective because he did not pursue a theory that was inconsistent with all of the other facts. (R1729).

Trial counsel also testified that Cherry consistently maintained his innocence of the crimes at issue, and, even though the possibility of a death sentence was discussed, Cherry refused to provide the names of potential mitigation witnesses despite repeated requests for such information. (R1729). Counsel made the best of what can best be described as a bad situation, and the fact that Cherry received a sentence of death means only that that is the sentence he deserved, not that counsel was constitutionally ineffective. *See, Rose v. State,* 617 So.2d 291 (Fla. 1993). To the extent that Cherry presented "evidence" beyond that contained in Dr. Barnard's report, that material is merely cumulative to the facts set out in Dr. Barnard's report, which was before the jury. As the trial court found, counsel was not ineffective for not presenting that cumulative information, especially in light of the negative information that would have accompanied it and Cherry's continuing claim of innocence. (R1729-30). Cherry has not carried his burden of proof as to either prong of the *Strickland* standard, and is not entitled to relief.

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effectively destroying any claim that substance abuse exists as a mitigator.

Despite the hyperbolic nature of Cherry's brief, the trial court properly found that trial counsel did not render ineffective assistance of counsel. Cherry's arguments to the contrary are based upon out-of-context quotations from the testimony of Cherry's trial counsel and are no more than *ad hominem* abuse directed toward counsel. The true facts, as the trial court found, are that Cherry would not provide information to counsel regarding potential mitigation beyond that contained in the report prepared by Dr. Barnard. Whether or not Cherry was cooperative with the psychiatrist, and he apparently was, is not the point. Cherry refused to provide mitigation information to counsel. The two are not the same, and one is not mutually exclusive of the other, contrary to Cherry's apparent belief. In any event, the "new mitigation" is cumulative to that contained in Dr. Barnard's report, which was considered by the jury.

Moreover, none of the "mitigation" that has now been "developed" is particularly compelling. To the extent that there is evidence that Cherry was abused as a child, regardless of whatever sympathy value is found in that evidence, the fact is that the "abuser" had been dead for 18 years at the time of the murders. The value of such evidence is, at most, minimal, and it was before the jury, anyway.

On pages 48-49 of his brief, Cherry asserts that he "qualifies" for three statutory mitigators based upon the testimony of Dr. Crown: that he suffered from an extreme mental or emotional disturbance at the time of the offense, that he acted under extreme duress or under the substantial domination of another person, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. According to Cherry, the opinion testimony to that effect, and the test results supporting it, are "totally unrebutted." Despite Cherry's claim of support for the statutory mental mitigators, such is simply not correct. As the trial court found, Dr. Barnard, who evaluated Cherry at the time of trial, testified that, **even with further background information on Cherry**, there are no statutory mental mitigators in this case.[15] (R1728). Of course, the determination of whether a mitigating circumstance exists is the responsibility of the sentencing judge. *Wyatt v. State,* 641 So.2d 355 (Fla. 1994); *see, e.g., Niebert v. State,* 574 So.2d 1059 (Fla. 1990); *Campbell v. State,* 571 So.2d 415 (Fla. 1990). Disagreement with the trial court, which is all Cherry

[15]Of course, opinion testimony as to the existence of mitigation carries little weight when there are no supporting facts. *Gudinas v. State,* 693 So.2d 953 (Fla. 1997); *Walls v. State,* 641 So.2d 381 (Fla. 1994).

argues, is not a basis for relief. *Floyd v. State,* 497 So.2d 1211 (Fla. 1986); *Quince v. State*, 414 So.2d 185 (Fla. 1987). The trial court's denial of post-conviction relief should be affirmed in all respects.

On pages 49-62 of his brief, Cherry discusses various non-statutory mitigation which, he claims, was proven. However, that portion on the brief misses the point: that "mitigation" was contained in Dr. Barnard's report, which was presented to the jury, as the trial court found. (R1730). Because that "mitigation" is merely cumulative to that which was presented at the penalty phase of Cherry's trial, counsel's performance was not deficient, and Cherry is not entitled to relief on ineffective assistance of counsel grounds. The most that Cherry has done is prove that present counsel would have tried the case differently. That is not the standard by which ineffectiveness claims are evaluated, and Cherry has not carried his burden of proof.

In addition to failing to establish deficient performance, Cherry cannot demonstrate that he was prejudiced, as he must to prevail under *Strickland.* The evidence of the brutal murder at issue was, simply put, overwhelming. See pages 1-4, above. None of the "mitigation" at issue, even assuming that it should have been put before the jury, is sufficient to mitigate the brutal murder of

an elderly victim in her own home. None of that "evidence" is sufficient to in any way ameliorate Cherry's guilt, and, because that is so, there is no prejudice. *See, Tafero v. State*, 459 So.2d 1034 (Fla. 1984). Death is the appropriate sentence in this case.

On pages 64-70, Cherry argues that the trial court applied the wrong legal standard when it denied relief on the ineffective assistance of counsel claim. Precisely how the trial court failed to apply the proper legal standard is not explained -- apparently Cherry believes that the trial court's use of the phrases "probably," "highly likely," and "demonstrate that the outcome of the proceedings would have resulted in a different result" demonstrate a misapplication of the *Strickland v. Washington* standard. However, as set out at pages 22-25, above, the *Strickland* standard is not an outcome-determinative one. Instead, that standard focuses on whether there is a reasonable probability of a different result in the proceeding, which is defined as a "probability sufficient to undermine confidence in the outcome." *Strickland, supra.* Moreover, it is not enough for the defendant to establish that some error occurred -- unless the error rendered the result of the proceeding **unfair**, there is no basis for relief, because to do otherwise would grant the defendant a windfall when he was not prejudiced. *Lockhart v. Fretwell,* 506 U.S. 364 (1993).

Cherry has not met the standard that he must in order to be entitled to relief.

To the extent that Cherry attacks the trial court's conclusion that his hand-picked mental state expert did not use any formal "testing evaluation" to reach his diagnosis of "mental retardation", it appears that Crown ignored the "adaptive function" component of the definition of retardation. (R109-10). To the extent that Cherry complains about the trial court's statement that the mental state expert conducted no "physical tests" even though the evidence was that "neuropsychological testing is more sensitive than any other form of testing for brain damage", the trial court's statement regarding the propriety of conducting such physical testing is in accord with this Court's decision in *Hoskins v. State,* 702 So.2d 202 (Fla. 1997), where this Court remanded the proceeding so that the type of testing referred to by the trial court could be conducted.[16] Moreover, Dr. Crown disagrees with the *Diagnostic and Statistical Manual* -- Fourth Edition, even though that is one of the leading treatises in the field of psychology. (R1728).[17] Further, throughout his brief, Cherry is referred to as

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[16]Obviously Dr. Crown thinks that his method of neuropsychological testing is more accurate and discriminating than does this court. *See, Hoskins.* See also, note 11, above.

[17]Dr. Crown elected to rely on another definition of mental retardation which was more favorable to the defendant under the

"borderline retarded." Under the DSM-IV (and all prior versions of the DSM), there is no such thing as "borderline retardation."[18] DSM-IV at 45, 684. Dr. Crown's use of such a misleading (and non-existent) phrase is yet another example of his bias in favor of the defendant. Dr. Crown further erroneously testified that Cherry could not be diagnosed as an Anti-Social Personality because he had been abused as a child and because he suffers from "organic brain damage". There is no support in the psychological literature for such a statement, and, in fact, such statement is plainly incorrect. DSM-IV at 648-49.

To the extent that further discussion of this issue is necessary, the trial court correctly resolved the conflicts in the testimony, and correctly credited Dr. Barnard over Dr. Crown[19]. The trial court expressly (and correctly) found that, even taking into account the "new" information about Cherry, Dr. Barnard's opinions and conclusions did not change. (R1728). That finding of fact is supported by the evidence, and should be affirmed.

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particular facts of this case.

[18]The correct phrase is "borderline intellectual functioning." DSM-IV at 684.

[19]Dr. Crown's bias against the State was readily apparent, and was evidenced by comments such as "Lawyers suffer from ASPD". The criminal components of such a diagnosis make that very unlikely. See, DSM-IV at 649-50.

To the extent that Cherry claims, on pages 68-70 of his brief, that the trial court erred in finding that Cherry would not communicate with trial counsel regarding potential mitigation witnesses, the testimony of trial counsel speaks for itself. (R31-33). That finding by the trial court is correct in all respects.[20] Finally, this case is, in many respects, the functional equivalent of *Kokal v. Dugger*, No. 73,102 (Fla. 07/16/98), with the difference being that there is no deficiency in counsel's performance. The trial court's denial of relief should be affirmed.

II. THE INCOMPETENT MENTAL STATE EXPERT CLAIM

On pages 70-78 of his brief, Cherry argues that he is entitled to relief because he did not receive a "competent" mental state evaluation and because counsel was ineffective for not investigating and providing background information to the mental state expert. The rule 3.850 trial court denied relief on this claim on alternative grounds, and that disposition should be affirmed in all respects.

The first reason that the incompetent mental state expert

[20]On pages 69-70 of his brief, Cherry sets out a hyperbolic recitation of the "evidence" that could have been presented in mitigation. As set out above, such evidence is cumulative. To the extent that such listing states that Cherry's mother chased him with a knife "in the fit of an epileptic seizure", such is physically impossible.

claim is not a basis for relief is that it is procedurally barred because it could have been but was not raised on direct appeal. *Doyle v. State,* 526 So.2d 909, 911 (Fla. 1988). The trial court imposed that procedural bar, and that ruling should be affirmed in all respects. (R1731).[21]

The second reason that this claim is not a basis for relief is because the "evidence" of organic brain damage and mental retardation is, as the trial court found, speculative. (R1730). There has been no showing that an expert could have been located at the time of trial who would have testified as did the collateral attack expert, and that failure of proof is fatal to Cherry's claim. *See, Kokal v. Dugger*, No. 73,102 (Fla. 07/16/98)*; Elledge v. Dugger,* 823 F.3d 1439 (11th Cir. 1987); *Horsley v. Alabama,* 45 F.3d 1486 (11th Cir. 1995). Moreover, the defendant is not entitled to a psychiatrist of his own choosing or liking, and clearly is not constitutionally entitled to a **favorable** psychiatric opinion. *Ake v. Oklahoma,* 470 U.S. 68 (1985).

In his brief, Cherry argues that trial counsel was ineffective for not providing background material to the trial mental state expert and for not requesting mental state assistance for penalty

[21]Cherry does not address the procedural bar in his Initial Brief.

phase use. As the trial court properly found, trial counsel consulted with the mental state expert and introduced his written report into evidence at the penalty phase of Cherry's trial. (R1731). As set out at pages 25-34, above, the additional "evidence" offered at the rule 3.850 hearing is, at most, cumulative to that contained within that report, which went to the jury without cross-examination. (R1731). As Dr. Barnard (the trial expert) testified, none of the "additional" information about Cherry affected his professional opinion. (R321-323). Because that is the case, Cherry cannot establish prejudice.[22]

On pages 73-74 of his brief, Cherry enumerates a number of matters to which Dr. Barnard testified during the post-conviction hearing. However, those matters are all cumulative to the matters contained in Dr. Barnard's written report with the exception of the claim that Cherry was intoxicated at the time of the murders. As the trial court found, any claim of intoxication is rebutted by the testimony of Cherry himself[23] and by the circumstances of the crime. (R1731). Cherry's theory of the case was that he was innocent, and,

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[22]To the extent that Cherry complains, on page 72 of his brief, that Dr. Barnard conducted no testing, that statement is nothing more than gratuitous criticism. It is axiomatic that psychiatrists, like Dr. Barnard, do not conduct paper-and-pencil testing.

[23]Cherry denied substance abuse to Dr. Barnard and when he testified. (R1732 at n. 8).

because that is so, an intoxication defense would have been totally inconsistent with the rest of the defense case, either as a guilt phase theory or at the penalty phase as "mitigation." Cherry's argument places great weight on the theoretical "perfect" penalty phase as envisioned by his present attorneys. However, perfection is not required, nor is it the standard by which counsel's performance is evaluated. *Waterhouse v. State,* 522 So.2d 341, 343 (Fla. 1988).

The theory advanced by present counsel fails to take into account the reality of the situation -- Cherry was charged with the brutal murder of two elderly persons, a crime which, under the best of circumstances, presents a difficult case for mitigation. It would not be in Cherry's interest to change to an intoxication theory of defense at the penalty phase after unsuccessfully attempting to convince the jury that he was innocent. Such a strategy would not have been successful, and it certainly cannot be said that no reasonable lawyer would have decided not to use such a theory. *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995). The fact is that there are certain cases that simply cannot be won, and this is one of those cases. *Clisby v. Alabama,* 26 F.3d 1054 (11th Cir. 1994). The trial court properly denied relief on this claim,

and that decision should be affirmed in all respects.[24]

III. THE "FAILURE TO OBJECT" INEFFECTIVENESS CLAIMS

On pages 79-89 of his brief, Cherry raises several claims of ineffective assistance of counsel based upon trial counsel's "failure" to object to various matters during the penalty phase of Cherry's trial[25]. For the reasons set out below, none of those "claims" is a basis for reversal of the trial court's denial of relief.

Of the specifications of ineffective assistance of counsel set out in footnote 12, below, the allegation concerning the "doubling" of aggravators was raised and addressed on direct appeal, as the trial court found. (R1734); *Cherry v. State*, 544 So.2d at 187. This Court found that improper doubling of the during the course of a burglary and committed for pecuniary gain aggravators had occurred,

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[24]Cherry places great reliance on *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994). That decision is not binding on this Court, and is of no value to Cherry because it does not state the law accurately.

[25]The specifications of ineffectiveness are: failure to object to all aggravators; failure to object to "doubling" of aggravators; failure to object to the heinous, atrocious, or cruel jury instruction; failure to object to instructions that "placed the burden" on Cherry to prove that mitigators outweighed aggravators; failure to object to an anti-sympathy jury instruction; failure to object to a jury instruction that allowed "non-statutory aggravators" to be found; and failure to object "to a host of improper comments made by the prosecutor during closing argument."

but that death was still the appropriate sentence. *Id.* Cherry is not entitled to relitigate an issue that this Court resolved on direct appeal by pleading it in the guise of a claim of ineffective assistance of counsel. *Medina v. State,* 573 So.2d 293, 295 (Fla. 1990). The trial court properly denied relief on this claim. (R1733).

Insofar as the other claims contained in this issue are concerned, this Court held those claims procedurally barred in its 1995 opinion[26]. *Cherry v. State*, 659 So. 2d at 1071 n. 1, 1072. Because that is true, and because Cherry has not even suggested how that disposition is erroneous (other than that he does not like the result), there is no basis for further discussion of issues which have already been decided. The trial court's denial of relief on these claims, while perhaps reaching farther than necessary, is correct and should be affirmed in all respects.

IV. THE DENIAL OF THE MOTIONS TO PERPETUATE TESTIMONY

On pages 89-91 of his brief, Cherry argues that the trial court erred to reversal when it denied his motions to perpetuate the testimony of three expert witnesses: Dr. Glen Caddy, Dr. Kris

[26]The summary denial of the ineffective assistance of counsel components of those claims was also affirmed by this Court. *Cherry v. State,* 659 So.2d at 1072.

Sperry, and Dr. Diane Lavate. The motions at issue were filed in open court *during* the December, 1996 hearing. (R1710-19). The trial court denied those motions. (TR475). For the reasons set out below, that ruling was not an abuse of discretion, and should be affirmed in all respects[27].

The motion to perpetuate testimony at issue in Cherry's appeal from the denial of rule 3.850 relief was filed near the end of the evidentiary hearing conducted by the circuit court. In fact, only two witnesses testified after the filing of that motion, and one of those witnesses (Joe Fludd) was a person claimed to be unavailable in the motion at issue.[28] (R1711). At best, the timing of Cherry's motion is highly suspect, and, obviously was calculated to delay the proceedings by seeking leave to perpetuate the testimony of witnesses whose whereabouts were unknown. Further, under the clear language of *Florida Rule of Criminal Procedure* 3.190(j), the trial court had the discretion to deny the motion as untimely because

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[27]In his brief, Cherry refers to the motion to perpetuate as a "renewed" motion. That is an incorrect and misleading label.(R1710). While it is true that a motion to perpetuate had been filed previously, that motion was based upon the claimed unavailability of certain witnesses for an *August* hearing. That hearing was continued. (R166). The motion at issue was a wholly new motion that Cherry held back until the hearing was practically concluded.

[28]Fludd was the last witness to testify, and he took the stand shortly after the filing of the motion at issue. (TR462).

such application was made within 10 days of the trial date. Because the three expert witnesses at issue were retained by Cherry's attorney and were obviously neither hostile nor reluctant witnesses, it is hardly an abuse of discretion to deny a motion to perpetuate testimony when such is filed at the end of trial and seeks to perpetuate the testimony of partisan experts who have not even been subpoenaed. Cherry has made no showing that any of the witnesses were unavailable, has shown only that he made no effort to secure the attendance of the witnesses, and has, in fact, demonstrated a deliberate strategy of making no effort to secure the attendance of hand-picked experts and then complaining about his own failings[29]. There is no basis for relief to be found in this issue, and the trial court should be affirmed in all respects. *Pope v. State,* 441 So.2d 1073, 1076 (Fla. 1983); *Palmieri v. State,* 411 So.2d 985 (Fla., 3d DCA 1982).

CONCLUSION

Based upon the foregoing, the Circuit Court's denial of relief should be affirmed in all respects.

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[29]Cherry made no effort to utilize the provisions of § 942.03, *Fla. Stat.*, to secure the attendance of *any* of the witnesses at issue. He did, however, utilize that procedure to secure the attendance of trial counsel. (R189-94). Obviously, Cherry was aware of the proper procedure, and chose not to use it in an effort to secure some advantage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief of Appellee has been furnished by U.S. Mail to Andrew Thomas, Capital Collateral Regional Counsel, Northern District, Post Office Drawer 5498, Tallahassee, FL 32314-5498, this _____ day of August, 1998.

_____
Of Counsel