IN THE SUPREME COURT OF FLORIDA

ELMER L. CARROLL,

Appellant,

vs. **CASE NO. SC94611**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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This brief is presented in 14 point Times New Roman, a proportionately spaced font.

PRELIMINARY STATEMENT

References in this brief are as follows:

Direct appeal record: "V", followed by the volume and page number.
Post conviction record: "PC-V", followed by the volume and page number.
Sentencing Hearing transcript: "STR.", followed by the page number.
Competency Hearing transcript: "CH.", followed by the page number.

STATEMENT OF THE CASE AND FACTS

I. TRIAL PROCEEDINGS AND DIRECT APPEAL

A. Pretrial Competency Hearing

On November 15, 1992, a competency hearing was held on defense counsel's motion to determine competency to proceed. (CH. 1340). Three of the four court appointed doctors who examined the appellant testified that they found him competent to stand trial: Dr. Kirkland (CH. 1362); Dr. Gutman (CH. 1368); Dr. Danziger (CH. 1380).[1] After hearing the testimony presented at the hearing, the Honorable Jeffords Miller, Circuit Judge, found appellant competent to stand trial. (CH. 1390, R. 1077).

B. Guilt Phase

(i) Evidence Linking Appellant To The Murder Of Christine McGowan

On direct appeal, this Court summarized the evidence linking appellant to the sexual battery and murder of ten-year-old Christine McGowan as follows:

> On October 30, 1990, at about 6:00 a.m., Robert Rank went to awaken his ten-year-old stepdaughter Christine McGowan, at their home in Apopka. When she did not respond to his calls, Rank went into her bedroom and found her dead. Shortly thereafter, Rank noticed that his front door was slightly ajar and that his pickup truck he had parked in the yard with the keys in it the night before was missing. When the police arrived, they determined that Christine had been raped and strangled. A

[1]Only Dr. Benson found appellant not competent to proceed. (CH. 1348).

BOLO was issued for the missing truck, which was a white construction truck bearing the logo ATC on the side.

Debbie Hyatt saw a white pickup truck parked near her residence east of Orlando on Highway 50 as she left for work about 6:50 a.m. About a mile down the road, she saw a man whom she later identified as Carroll walking in an easterly direction along the highway away from the truck. She described him as having long scraggly hair and wearing a brown jacket. She did not think to too much about it until she later heard over the radio that the police were looking for a white pickup truck bearing the ATC logo described in the radio bulletin, she called the police. When the sheriff's deputies arrived, she told them about first seeing the truck and the man walking down the road.

Carl Young, a state wildlife officer, was traveling on State Road 520 in Orange County on the morning of October 30, 1990. At a point near the intersection of Highway 50, Young noticed a man with shoulder length hair walking down the highway. Young thought this was strange because he was not carrying anything. The man looked back over his shoulder at Young as he passed. After turning onto Highway 50 and proceeding west, he saw a deputy sheriff behind a white pickup truck with his revolver drawn. Young went back to the scene to render assistance. By this time, another deputy had arrived, and he heard Debbie Hyatt tell them about the man she had seen walking down the highway away from the truck. Young recalled that her description resembled the person that he had just passed. Young drove back to where Carroll was continuing to walk down the road. Young called to him, but he kept on walking. Young pulled his gun and ordered Carroll to lie down on the ground. Young made a search for weapons and found a box cutter razor blade and some keys. Through radio communication with a deputy who remained at Rank's truck, it was determined that a number on the keys matched a number on the truck. Young and a deputy who had arrived to assist him then placed Carroll under arrest. At the trial, two other witnesses testified that they had seen the man they identified as Carroll about 6 a.m. at a 7-11 store near Apopka. The witnesses said that Carroll was driving a white truck with the ATC logo. It was also discovered that Carroll was a resident of a halfway house located next door to the Rank home. A resident of the halfway house testified that Carroll had told him that the girl who lived next door was "cute, sweet and liked to watch him make boats." She was seen talking

> to a man next door who may have been Carroll the day before the murder. Semen, saliva, and pubic hair recovered from the victim were consistent with that of Carroll. One DNA profile of a specimen obtained from the victim matched Carroll's DNA profile. Blood was found on Carroll's sweatshirt and on his penis.

Carroll v. State, 636 So.2d 1316, 1317 (Fla. 1994).

(ii) Testimony Addressing Appellant's Mental State

(a) State's Case

Dr. Michael Gutman testified that he examined appellant for over an hour and obtained a personal history from the appellant. In addition, Dr. Gutman received and reviewed prior medical records and reports concerning the charged offenses. (V-4, 510). After conducting the examination, Dr. Gutman concluded that appellant was malingering:

> ...And I also diagnosed him as having a long term character and behavior disorder which was a long term pattern of behavior and thinking where certain personality traits and patterns and behavior characteristics would show themselves up over a long period of time and that those characteristics involved antisocial personality traits and I think there were -- there was another one, paranoid: paranoid being a suspicious trend, borderline meaning emotional instability, suicidal, self-destructive type behavior... (V-4, 511).

In support of a malingering diagnosis, Dr. Gutman testified: "Well, past observations of other interviewers such as psychiatrists, social workers and psychologists showed

a strong trend toward malingering." [2] (V-4, 511).

Appellant was unable to recall or would not discuss any of the events leading up to his arrest. (V-4, 513, 529). However, appellant was able to discuss other significant events that occurred in his life around the same time. Id. Dr. Gutman was unable to render an opinion regarding appellant's sanity at the time of the crime because he was not able to obtain any verbal statements from appellant regarding the crime itself. "Since he was not able to relate any facts, then I could not make a determination as to whether or not he was legally sane or not." (V-4, 514).

The initial officers who arrested the appellant did not notice any bizarre or unusual behavior which called into question appellant's mental state. Although appellant at first either ignored or did not hear Wildlife Officer Young's first attempt to gain his attention, after Young drew his weapon and repeated his shout for him to stop, appellant turned around, and complied with Young's demands that he place his hands on his head. (V-3, 370-371). Then, at Young's direction, appellant dropped to his knees and laid spread-eagle face down on the ground. (V-3, 371). Once appellant

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[2]Dr. Gutman testified that in his opinion, appellant was in the range of IQ, "somewhere around 105 to 110." (V- 4, 512). Dr. Gutman recognized that this was inconsistent with other material he had received which showed that appellant had an IQ in the 60 to 69 range. Other IQ tests showed it to be in the "high seventies to low eighties, so there was inconsistencies in the intellectual functioning and IQ testing of how smart he was." (V- 4, 512).

was searched and handcuffed, Young asked appellant for his name. Appellant correctly told the officer that his name was Elmer Carroll. (V-3, 372). During his approximately hour long contact with appellant, Young observed no unusual, strange, or bizarre behavior by the appellant. (V-3, 374).

Similarly, Deputy Mark McDaniel did not notice any bizarre behavior on the part of the appellant except to note that he had almost no reaction to being arrested. (V-3, 343, 349). Appellant followed the arresting officers directions. (V-3, 351). At the Sheriff's Office, appellant sat in a chair and once asked for a glass of water.[3] (V-3, 355).

Two individuals, James Wasilewski and James Piper, who observed appellant on the morning of October 30, 1990 at a 7-11 in the Apopka area, stated that appellant did not act inappropriately or in a bizarre manner. (V-3, 315-316, 317, 330). Appellant entered the store, apparently purchased some items, got into the truck and left the store.

Dr. Robert Kirkland, a psychiatrist, testified for the State in rebuttal that he initially examined the appellant at the request of appellant's first defense attorney, Mr. Fussell.

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[3]Detective Riggs Gay of the Orange County Sheriff's Office observed appellant at Speed World and the Sheriff's Office 33rd Street Facility. (V-4, 538). Gay observed appellant "off and on for probably four or five, six hours." (V-4, 538). During that period Gay did not observe any bizarre or unusual behavior exhibited by the appellant. (V-3, 539).

(V-6, 787). Appellant was acting strange, depressed, and did not want to talk to Dr. Kirkland. (V-6, 788). Dr. Kirkland believed that appellant needed to be examined in a hospital setting and had him committed to the Florida Hospital. (V-6, 788). Dr. Kirkland stated that appellant was only in the hospital under his care for two days. (V-6, 788). During that time, appellant was examined, psychologically tested, and lab work was conducted. (V-6, 788). Dr. Kirkland testified:

> ...The testing didn't leave a clear cut diagnosis, if you will, but made several suggestions. Mr. Carroll's performance on the psychological testing was not typical of any one disorder. There were elements of depression. There were some psychotic elements with him expressing ideas that his food might be poisoned. There were also elements that suggested that he was malingering or faking... (V-6, 789).

He was not given any medication at that time and appellant did not want any medication. (V. 6, 790). After his initial evaluation, Dr. Kirkland told appellant's defense attorney that appellant was not competent to stand trial. (V-6, 790).

In October of 1991, under Court order, Dr. Kirkland was ordered to conduct a competency and sanity examination of the appellant. (V-6, 790). Dr. Kirkland came up with several diagnoses for the appellant. Dr. Kirkland testified: "I thought that Mr. Carroll suffered from what we call antisocial personality in that he regularly had difficulty conforming his behavior to what society expects." (V-6, 792). Appellant claimed that he suffered trauma to his head on a number of occasions and that he had

difficulty with high levels of alcohol to the point of having alcoholic blackouts. He found that "there continued to be enough signs of the disorders we call schizophrenia residual type perhaps or chronic paranoid type. There were the main features diagnostically at that time." (V-6, 793). Dr. Kirkland also considered the possibility that appellant was malingering. (V-6, 793). As to appellant's allegations of blackouts, Dr. Kirkland believed that appellant's claims of amnesia for important events was not accurate: "I think that he is presenting that falsely." (V-6, 793). However, Dr. Kirkland did not doubt that there were times that appellant had symptoms of schizophrenia, including delusions. (V-6, 794). Nonetheless, after reviewing the circumstances of the homicide and medical records, Dr. Kirkland, concluded, "though he may have been intoxicated at the time, he knew what he was doing, knew the nature and consequences of it and knew that it was wrong." (V- 6, 794).

Dr. Kirkland was the expert who spent the most time observing the appellant; testifying that he had occasion during the year appellant was incarcerated in the Orange County jail to observe him as the jail psychiatrist. (V- 6, 797). If appellant had required treatment in the state hospital Dr. Kirkland testified that he would have attempted to obtain that treatment for him. (V- 6, 797).

(b) The Defense Case

The defense called three mental health experts to testify during the guilt phase. Dr. McMahon testified that she had examined appellant on November 1, 1990, and found him extremely disorganized. (V-5, 650). She could not engage appellant long enough to complete an evaluation and believed that he was psychotic. (V-5, 654). For example, she asked appellant his name, "he told me at one point that he was not sure what his name was. For that reason he thought he had been adopted."[4] (V-5, 650). In Dr. McMahon's opinion, appellant was not malingering. (V-5, 655).

Dr. Jeffrey Danziger, a psychiatrist, testified that he interviewed appellant on October 14, 1991 to conduct a mental status evaluation of the appellant by court order. (V-5, 667). Prior to seeing the appellant, Dr. Danziger read and reviewed "old medical records and the like, as well as statements from witnesses and police reports relating to the alleged offense" that were provided by defense counsel. (V-5, 668). Dr. Danziger testified at length regarding the history that he was able to obtain regarding the appellant. Appellant "was aware that he was charged with burglary, assault, sexual battery and murder." (V-5, 669). Appellant said he was born in Georgia, had a seventh grade education, was married from the age of twenty to

[4]This is in marked contrast to the quick and accurate response appellant gave Officer Young when asked the same question upon his initial arrest. (V-3, 372).

twenty-five but that his marriage broke up. Id. He worked construction in labor pools but at the time of his arrest, he was living in a half-way house and unemployed. (V-5, 669). Appellant told Dr. Danziger of his extensive history of alcohol abuse which Dr. Danziger was allowed to relay to the jury over the prosecutor's objection:

> The defendant told me that he began to drink as a young child. By his report he was drinking heavily by the age of twelve. He stated that as a teenager he used to get drunk at least three times a week. As an adult, was drinking on a daily bays. (sic). He said he had a past history of blackouts, had been in the hospital for detoxification, had had shakes in the morning after a night of not drinking, then he denied seizures but did state that sometimes when coming off of alcohol or trying to stop, he would have visual hallucinations... (V-5, 670).

Appellant also told Dr. Danziger that he had been abused as a child by his father through harsh beatings. (V. 5, 671).

Based upon his interview, Dr. Danziger concluded the following: "First, diagnosis was that of schizophrenia chronic differentiated type. The second diagnosis was alcoholism and the third diagnosis was multiple drug abuse." (V-5, 675). Dr. Danziger was of the opinion that "the defendant was unable to tell right from wrong within a reasonable degree of certainty, more likely than not, was such not responsible for his actions." (V-5, 675). Dr. Danziger testified that while he felt that appellant had not been sane at the time of the offenses, he admitted that this was a very "difficult call to make," in that appellant claimed to have no recall of the rape and murder of Christine McGowan. (V-5, 675-676).

Dr. Edward Benson, a psychiatrist, testified that he examined appellant in December of 1990 at the Orange County jail. (V-6, 746). Appellant claimed that he was hearing voices in his head telling him various things. (V-6, 747). Appellant claimed in the past that he used "marijuana, LSD, crack cocaine and heroin and PCP." (V- 6, 751). When asked his name, appellant told him: "You know my name. I have lots of names.' I asked him the year. He said, 'No, they tell me different things. I don't ask..." (V-6, 753).

After seeing him a second time at the jail approximately one year later, appellant appeared more coherent, but Dr. Benson made the following diagnosis: "Paranoid schizophrenia, also previous history of significant poly-substance. That means a variety of substances of abuse, alcohol and various drugs, history of previous significant poly-substance abuse and the third diagnosis I had was borderline intelligence quotient, by previous psychological tests which showed at 79 some years past when he was regressed." (V-6, 758). Dr. Benson concluded that appellant was actively psychotic at the time of the alleged offense and did not know what he was doing or its consequences. (V-6, 759). Dr. Benson could not conclude based upon the available information that appellant could not distinguish between right and wrong. (V-6, 763). However, in his opinion, appellant did not know the nature and consequences of his act. (V-6, 763).

Defense witness Margaret Powell, director of the mission where appellant had been staying, testified that appellant had acted in a bizarre manner two weeks prior to the murder. Ms. Powell testified: "He got laid off from work a couple of weeks before then he was really disgusted because he couldn't find any work and then about two weeks beforehand, he began to act kind of different." (V-5, 625). When she told him to seek help, appellant "just said he didn't need help." (V-5, 626). While appellant lived at the mission Powell never had a problem with him. (V-5, 628). The night before Christine's murder, Powell talked to appellant for about an hour and appellant was responsive, communicative, and functioning like "any other man." (V-5, 632-633). Appellant was able to talk about things he wanted to do and told Powell: "I'll go see if I can find my family." (V-5, 631).

Judy Arnold worked at a bar close to the mission and testified that appellant had come in the night before the murder. Appellant was mumbling and talking to his jacket. He asked her and the other customers whether they thought he was crazy. (V-5, 641-642). Appellant paid for and drank several beers at the bar. Appellant told Ms. Arnold that he was in love "with something that he could not have." (V-5, 643). Appellant apparently went to another nearby bar and similarly began talking to his jacket. The bartender testified that appellant bought and consumed several beers. Appellant also asked the bartender if she would give him a gun or a knife. (V-5,

637).

C. Penalty Phase

In the penalty phase, the State attempted to introduce Department of Corrections files pertaining to appellant's previous incarceration to rebut any mental mitigating factors. When the defense objected, the prosecutor argued:

> Your Honor, I understand from Mr. Taylor, from what he said in chambers, that he doesn't intend to call any psychiatrists in this phase, but to rely on their prior testimony. This is going to rebut any mental mitigating factors accepted through their testimony or argued by the defense to show an absence of any history of mental disorders prior to his incarceration on this case. It's all relevant for that reason. These are also part of the materials that the Doctors were given indicated they considered by they're relevant. (STR. 906).

Defense counsel argued that the records should not be considered because they reflect that appellant was "serving a life for lewd and lascivious act. Goes into an incident involving apparently his niece." (STR. 906-907). The State argued such records were relevant because defense counsel made a "tactical decision" to rely upon his guilt phase experts to argue mitigators and that his failure to call them prevented the prosecutor from asking them about these records. (STR. 908). The State wanted to introduce records of past psychiatric examinations while appellant was incarcerated reflecting that he was a chronic sex offender. The trial court did not allow the State to introduce these documents, stating it would only inflame the jury and could be grounds for reversal. (STR. 910).

Defense counsel rested after telling the court that it was too dangerous to allow appellant to testify on his own behalf. Counsel did not know what appellant could say on the stand and that it would not be in his own best interest to testify. (STR. 912). The trial court then inquired regarding the possibility of other witnesses testifying on appellant's behalf. In response, defense counsel stated:

> The other witnesses were people that worked out there at the halfway house that knew him while he lived at the halfway house. Ms. Powell has already testified. She was the one that runs the halfway house. There's nobody that wants to say anything about Elmer or the psychiatrists have already testified. The other people that were able to render any type of relevant testimony as to his psychiatric condition at around the time of the offense have already testified and I don't want to open up the door to anything I've discussed with him. He's comfortable in not presenting any further evidence as far as mitigating factors. The mitigators, the way I see it, deal with his mental condition. (STR. 913).

However, prior to resting, the prosecutor and defense counsel discussed admitting a copy of a police report that indicated appellant had been sexually abused when he was thirteen. (STR. 913-917). This police report was introduced into evidence for the penalty phase. (STR. 917). Defense counsel used this report to argue that the jury should consider that appellant was sexually abused as a young man. (STR. 951).

Defense counsel argued in closing that the jury had already heard evidence regarding the mitigating factors in this case through the testimony of the guilt phase experts. (STR. 948). Defense counsel then recounted the evidence adduced during

trial which supported finding the statutory mental mitigators. (STR. 948-950).

The jury recommended that the trial court impose the death penalty by a vote of 12-0. The trial court followed this recommendation, finding three statutory aggravating circumstances: 1) prior violent felony conviction, 2) the murder was committed during the course of a sexual battery, and, 3) that the murder was especially heinous, atrocious, and cruel. (STR. 974-981). In support of the heinous, atrocious, and cruel aggravator, the trial court addressed the medical examiner's testimony in great detail. (STR. 978-979).

The trial court rejected the statutory mental mitigators urged by the defense, summarizing the extensive psychiatric testimony introduced at trial. (STR. 982-986). The trial court noted that this offense and appellant's conduct before, during, and after the murder did not suggest he was suffering from an extreme mental or emotional disturbance. The court concluded its findings with the following: " There is no testimony from any witness that the defendant was exhibiting any bizarre behavior characteristics at the time of the murder or sexual battery. On the contrary, the evidence showed that these were the acts of a cold-blooded, heartless child molester -killer who stealthily entered the victim's house, raped and murdered her, took her stepfather's truck and later had a cup of coffee at the 7-Eleven." (STR. 987-988). The trial court also rejected the defense contention that appellant's capacity to appreciate

the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (STR. 989). The trial court's rejection of the statutory mental mitigators was affirmed on direct appeal. Carroll, 636 So.2d at 1321.

II. POST-CONVICTION PROCEEDINGS

On April 29, 1997, the Honorable Belvin Perry, Circuit Judge, issued an order granting an evidentiary hearing on the following claims made in appellant's amended motion for post-conviction relief:

> III-(ineffective assistance during penalty phase)
> VI-subpart A (counsel ineffective because he failed to provide background materials to mental health experts)
> VI-subpart C (counsel ineffective for failing to investigate other suspects)
> IX-(only as to the allegations that counsel ineffective in connection with the mental health experts)
> XIX-(again only those claims involving counsel's alleged ineffectiveness in relation to the mental health experts)
> XXI-(only as to counsel's alleged ineffectiveness in connection with the mental health experts)

An evidentiary hearing was held on August 4th and 5th, 1997.

Trial Defense Counsel

The first witness called by the defense was James Taylor, appellant's trial counsel. Mr. Taylor was not the first attorney assigned to this case and began representing appellant in March of 1991. (PC-V-1, 108). Taylor testified that he turned his file

over to CCR a few months prior to the hearing and did not receive it back. (PC-V- 1, 131). The last time he had a chance to review appellant's file was in 1991. (PC- V-1, 131).

Mr. Taylor testified that he had not previously represented a client through to the penalty phase of a first degree murder case. (PC-V-1, 107). However, Mr. Taylor had represented a number of defendants charged with first degree murder:

> How many capital cases had I done? I'd never gotten to the penalty stage before. I had done defense of a couple of other first degree murder cases. I prosecuted a number of first degree murder cases. I don't keep count, I don't know. But I've, I have been involved in homicide cases, a lot of them.

Id. Mr. Taylor testified that he had no money concerns during his representation of the appellant. (PC-V-1, 108-109). Taylor conducted the investigation that he wanted in this case and did not feel limited in any way by financial concerns. (PC-V-1, 133).

Taylor testified that he pursued a two part theory of defense: 1) testing the state case for reasonable doubt based upon the circumstantial nature of the evidence, and 2) that if appellant committed the murder, he was insane. (PC-V-1, 109-110). In pursuing the defense theory, Taylor testified that some mental health experts had been involved before he was even appointed to represent the appellant. (PC-V-1, 110). Taylor testified:

> ...We ended up then with some other well-known respected psychiatrists in this city, two of which at one pont thought Mr. Carroll was not able

> to proceed to trial or to assist his attorney, and one, Dr. -- I think Danziger was of the opinion he was insane at the time of the alleged offense, and according to Florida Law. Dr. Gutman had a contrary opinion.
>
> Dr. Kirkland had the opinion he was insane and needed to be under psychiatric help initially in the case, shortly after the time of his arrest. For some reason Dr. Kirkland changed his mind before we went to trial. I really don't think I even got a report until close to the time of his testimony.
>
> But anyway, had Dr. Kirkland said, I think if Dr. Kirkland said he was insane it might have affected things. It probably wouldn't have but it might have. (PC-V-1, 110-111).

When asked by defense counsel if Taylor understood the importance of having a psychologist assist him both at the guilt and penalty phases, Taylor testified:

> This psychologist and the psychiatrist, all of them had testified as to Mr. Carroll's psychotic state, or lack of psychotic state at the time of the alleged offense. There's decisions you have to make when you're defending somebody. That was my decision, not to recall all of these people one more time, because if you've done your complete investigation, you've talked to some of the psychiatrists -- and, you know, the major psychiatrist was real, real close to changing his opinion just prior to his testimony. I think he said something like "maybe" in trial. Judge Perry probably has the notes. It's like 51 percent to 49 percent he thinks he's psychotic.
>
> So I really didn't want to start running around putting the people on the witness stand again right after the guilt phase so we could relive the horrible crime and to have the man say now the jury found him guilty, I'm probably wrong. And then no one would have been on our side except the psychologist from Gainesville. (PC-V-1, 114-115).

Taylor did not ask the experts to examine appellant to determine the presence of the statutory mental mitigators: "No. I was, they conducted what I would consider to be a rather complete examination for someone accused of a crime." (PC-V-1, 118).

As for not recalling his guilt phase experts, Taylor testified that his main witness, Dr. Danziger was wavering. Taylor explained:

> ...I certainly didn't want to put him on the stand and say have him waiver, then the ball game was truly over because what he said he had said, and he said it in a nice professional way.
>
> It was my call. I guess I didn't want to call the same people again just to have them ask the same series of questions maybe in a different way. I know as a prosecutor I would have enjoyed that, if I was a prosecutor in the case, after you lose the case to call the same witnesses back. You'd have a field day with something like that. They had been persuasive, as persuasive as I thought they were going to be as to that. It was a judgment call and I made it. (PC-V-1, 119).

Taylor testified that had he put his experts on again during the penalty phase that their testimony would have been weaker than during the guilt phase. (PC-V-1, 142). And, Taylor testified that he did not believe any expert called during the guilt phase could have established the statutory mental mitigators during the penalty phase. (PC-V-1, 142).

Taylor testified that he made a tactical decision not to call any witnesses during the penalty phase. (PC-V-1, 149). Taylor explained, "I had no one that I could call that I thought would be persuasive." (PC-V-1, 149).

Taylor admitted that he did not have as much background information as he wanted in this case. (PC-V-1, 134). Mr. Taylor thought appellant was nuts and although he was a nice courteous person, he did not give Taylor any help regarding his background and family members who might want to help him. (PC-V-1, 136). While

appellant was able to respond to questions, his answers were simply uninformative. (PC-V-1, 137). As for appellant's life history, Taylor testified:

> Well, he knew where he had been, he'd been in jail before and what he'd, he'd done.
>
> I think we talked about his life a bit. I don't think he had a close family relationship anymore because of different things that went on.
>
> I asked can this person help, can this person help? No.
>
> Seems to me he'd been married in the past, or something.
>
> He -- I got certain information now from a companion case that was proceeding along about the same time --had to be aggravated battery, or assault, or something. And his, a female companion of his, I took her deposition along with a couple of other people to find out some information about Elmer. And that was helpful... (PC-V-1, 137-138).

In fact, Taylor testified that while he may have been contacted by a family member at some time, he could not find any useful information; that is information that would have helped appellant during the penalty phase. (PC-V-1, 139). Based upon what appellant told him, Taylor did not believe that a family member could offer any helpful testimony. (PC-V-1, 140) And, Taylor testified that no one he talked to mentioned that appellant had sustained a brain injury or suffered from mental problems until the period immediately preceding the offense. (PC-V-1, 139).

Taylor testified that he tried to find appellant's family members:

> No. And I tried. I don't recall, I may have talked to some family members. It's been how many years, six years, or so, or six or seven years? I may have, have talked to them. But there was nothing.
>
> We made efforts and worked on it. And there was nothing to it. I just kept ending up going down dead-end streets. (PC-V-1, 117).

With regard to Robert Rank, Taylor did not recall anything suggesting that he was a drug dealer. He was informed that Rank had an arrest for marijuana or cocaine a couple of years prior to the murder. (PC-V-1, 122). Taylor took Mr. Rank's deposition but he had nothing to indicate that Rank had sold drugs to the appellant. (PC-V-1, 123). When shown defense exhibits suggesting that someone had seen appellant and Rank using drugs together and other information that could have linked the two, then Taylor would have investigated such allegations. (PC-V-1, 126). Taylor could not say whether he would have used such information at trial because he did not know until he evaluated the potential evidence. (PC-V-1, 127). Taylor admitted that he received some information prior to sentencing telling him the prosecutor received information from a "Ken Germaine" that Rank had been selling drugs out of his house. (PC-V-1, at 128). Taylor could not say that he would have attempted to even use such information:

> What that letter meant to me was Jeff Ashton [trial prosecutor] had received some information, for what it's worth, about some rumor that some guy had said this. And then the decision was made whether I was going to take off on a tangent and try to assassinate the reputation of Robert Rank. That really wouldn't get me anywhere. (PC-V-1, 129).

While he may have pursued any information that showed appellant and Rank used drugs together prior to the murder, Taylor testified that if it was merely a rumor he would not have used it: "If it was simply a rumor, I would not have used the rumor.

I would have had to be, to have been able to establish that." (PC-V-1, 147). Taylor also testified that showing Rank had used drugs with appellant would probably not have changed the verdict given the other evidence against the appellant. (PC-V-1, 149).

While Taylor testified that more can be done in any penalty phase, that did not mean he considered his representation of the appellant deficient:

> ...I mean, only so much that, that can be done in any case that would be persuasive to the jury.
>
> You know, the point is you've got 12 people sitting over here. Now, the object is to persuade those 12 people to vote a certain way, not just to have a machine gun type of defense.
>
> But I believe that you should take your best approach, your best defense and run with it and stay on the high road. That's the way I try cases and have for 25 years. (PC-V-1, 141).

As for failing to challenge the DNA evidence, while he filed a motion to exclude the DNA evidence and requested additional funds, he did not really want a DNA expert. Taylor explained:

> I did that for record purposes. I did not get in a fight with the court, or demanding I needed more money because I really didn't, I didn't want it. I was afraid that what would happen would be I would have not one DNA expert but two that I had to contend with at that point.
>
> I went to a DNA course, seminar prior to that time. I thought that the DNA evidence, if it was admissible was pretty solid. And back then people in Florida, in any event, were not having three week DNA hearings... (PC-V-1, 159).

<u>Detective James Latrelle (Brady Claim)</u>

Detective James Latrelle with the Orange County Sheriff's Department testified that he was one of the detectives assigned to investigate Christine McGowan's murder. (PC-V-1, 163-164). Latrelle took notes during the course of his investigation in a spiral notebook he shared with the lead Detective, Diane Payne. (PC-V-1, 164, 165). Although he could not personally recall this information, he read a note which indicated that the stepfather, a bus driver, had a violent nature and had hit Christine with his fists. (PC-V-1, 166). Also, in the notebook was a statement that suspect Robert smokes pot. (PC-V-1, 166). Again, although he had no recollection, such information apparently came from a Laura Quinton. (PC-V-1, 167). In the notebook was also a claim that appellant and Rank had been seen smoking crack at the 49er club. (PC-V-1, 168).

On cross-examination, Latrelle admitted he was not aware of any witness in this case who had first hand knowledge of any relationship between Rank and the appellant. (PC-V-1, 178). Nor did Latrelle know of anyone who had first hand knowledge of Rank committing any violent acts against the victim. (PC-V-1, 179). In fact, the notes referred to by defense counsel were rumors and speculation by various people. (PC-V-1, 179). To this date, Latrelle does not know anyone with first hand knowledge of any violence committed by Rank against Christine. (PC-V-1, 179).

Appellant's Family Members

As noted in appellant's brief, several family members were called at the evidentiary hearing to testify regarding appellant's childhood. These witnesses testified regarding appellant's early alcohol exposure, his alcoholic tendencies, general difficulty with school, bizarre behavior of his mother, and the beatings inflicted upon appellant by his mother. In addition, the sexual abuse of appellant by a Mr. Mays, reflected by the police report introduced during the penalty phase was explored in more detail. Nellie Smith, appellant's sister, testified that when appellant was eleven or twelve Joe Mays sexually abused the appellant. (PC-V-2, 282).

While appellant cites Edward Couch's [appellant's oldest step brother] testimony about a puppy being hacked to pieces as an example of the brutal environment in which appellant was raised, the State pointed out that appellant was not even born when this particular incident occurred. (PC-V-1, 188). In fact, Couch indicated that he left the family home in 1952. (PC-V-1, 182). Appellant was not born until 1956. (PC -V-1, 183). However, Couch testified that he was still around appellant "some" after leaving the home. (PC-V- 1, 182). Another relative, Jessie Smith, appellant's oldest half-sister, left the family home before appellant was born. (PC-V-2, 210, 214). She too had very little contact with the appellant when he was growing up or as an adult. (PC-V-2, 215). The last time Jessie Smith [appellant's oldest half-sister] saw

the appellant was in the "early sixties I think I'd say." (PC-V-2, 216).

While appellant's family members now stated that if contacted at the time of appellant's original trial they would have testified on his behalf, they all admitted that at the time of trial none of them had talked to appellant in a decade or more.[5] Edward Couch acknowledged that in the eighties appellant went to prison for child "molestation." (PC-V-1, 196). The victim was a child of Couch's friends. (PC-V-1, 196). Couch admitted that appellant's molestation of the child bothered him. (PC-V-1, 197). And, Couch admitted that he "would distance himself" from the appellant. (PC-V-1, 197). Couch had no contact or communication with the appellant when he was in prison. (PC-V-2, 202). Couch did not know anything about the murder until "years afterward." (PC-V-1, 197). The last time Couch saw the appellant was in the "early eighties." (PC-V-1, 197). When Couch learned that appellant had been arrested for raping and murdering a little girl it bothered him. (PC-V-1, 198). Couch stated that they did not have a close knit family. (PC-V-2, 203).

Nellie Smith testified that appellant is her youngest brother. (PC-V-2, 271). Nellie Smith admitted on cross-examination that the last time she saw appellant prior to

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[5]Appellant's cousin, Edward Couch admitted that the last time he saw the appellant was in the "early seventies, I think." (PC-V-2, 300). Appellant's niece, Shirley Griffen admitted that she had not talked to appellant in "at least ten years." (PC-V-2, 307). The reason for that was Griffen traveled and "didn't hardly see any of my family." (PC-V-2, 307).

coming to court at the evidentiary hearing was around 1981: "I saw him when he got out of jail after having been in jail for sexual abuse on a Mary Downings (PH) daughter." (PC-V-2, 286). She admitted that she had been estranged from her brother since 1981, admitting that they had "problems." (PC-V-2, 286). Among these problems was the fact that appellant sexually molested her own daughter. And, Ms. Smith was aware that appellant sexually molested "Mary Downing, that was another little girl." (PC-V-2, 287-288).

Defense Mental Health Experts

Barry Crown, a licensed psychologist, Ph.D., testified that he was a specialist in substance abuse. (PC-V-2, 220). Crown interviewed appellant twice and conducted a number of tests on him.[6] (PC-V-2, 227). Appellant's full scale IQ was 81, putting him in the borderline between retarded and low average intelligence. (PC-V-2, 229). As a result of meeting family members and talking to appellant, Crown testified it is likely that appellant suffered from fetal alcohol syndrome. (PC-V-2, 245-246).

Crown testified that appellant suffers from brain damage:

> ...That brain damage affects both intellectual capacities and his cognitive capacities, as well as his affective capacities. By affective I'm moving away from cognition into expressions of emotions... (PC-V-2 at 233).

[6]Crown did not seek to look at the brain anatomically to determine whether or not appellant in fact suffered brain damage. (PC-V-2, 260).

Crown testified that had he done this testing in 1992 that he could have testified to the existence of the statutory mental mitigating circumstances. (PC-V-2, 249, 250).

On cross-examination, Crown admitted that the vast majority of his work as an expert has been for the defense. (PC-V-2, 252-253). Crown admitted that he met appellant at Union Correctional Facility and had no problem communicating with him. (PC-V-2, 254). Appellant appeared to understand his questions and respond appropriately. (PC-V-2, 254). Crown admitted that appellant appeared to be motivated to help himself in this case. (PC-V-2, 256).

The definition of mental retardation falls in the range of an IQ of 69 or 74. (PC-V-2, 258). Crown admitted that someone with an IQ of 81 "was smart enough to know it's wrong to rape and kill a little girl[]". (PC-V-2, 258). Crown also admitted that no test for motive: There is no test that would tell us that appellant committed this crime because he is mean or because he is brain damaged. (PC-V-2, 260). Crown admitted that he only knew some details about the offense and had only reviewed parts of the transcript provided to him by the defense. When asked what the stress or emotional distress existed at the time of the murder, Crown claimed it was some type substance abuse along with a major thought disorder. (PC-V-2, 261). Crown testified that he did not review materials relating to the crime to give some insight into appellant's functioning, at the time of the crime, explaining: "Certainly, Ms.

Coffman, had I been asked to comment or participate in the, in the guilt/innocence phase and to consider issues related to sexual abuse, by all means it (sic) would have. But for my purposes and in looking at issues related to penalty, no." (PC-V-2, 269-270). When asked if examining the circumstances of the rape and murder would shed light on the existence of the statutory mitigators, Crown testified: "Not form a neuropsychological prospective; from a psychiatric and clinical psychological, yes." (PC-V-2, 270).

Dr. Elizabeth McMahon, a clinical psychologist, testified for the defense. Dr. McMahon testified that she examined the appellant at the request of appellant's first defense counsel, Mr. Fussell. (PC-V-2, 313). She was asked to see appellant immediately, November 1st, which was within 48 hours of appellant's arrest. (PC-V-2, 313). Dr. McMahon believed appellant was psychotic. She did not believe appellant was malingering as he did not appear to be a bright individual and maintained psychotic symptoms for a three hour period of time. (PC-V-2, 317). After concluding her examination, Dr. McMahon called appellant's trial counsel, and told him that she could not complete her examination because she could not engage him long enough to test. (PC-V-2, 319).

Dr. McMahon testified that additional testing was required to determine whether or not appellant was competent at the time of the offense or to tell if "there was (sic)

any issues to the mitigation of any kind of sentencing[]." (PC-V-2, 319-320). She was not contacted to do additional testing. Mr. Taylor called her and asked her to testify shortly before the trial. (PC-V-2, 320).

At the time of the evidentiary hearing, Dr. McMahon was provided additional materials, prison records, school records, in addition to the reports of the other doctors who examined the appellant. (PC-V-2, 323-324). She examined the DOC records that showed appellant had been prescribed with anti-psychotic medication, tranquilizers, and anti-depressants during his incarceration after committing the current offense. (PC-V-2, 325-326). In her opinion, repeating Dr. Crown's diagnosis which she heard earlier during the evidentiary hearing, appellant suffers from non-specific, bilateral and diffuse brain damage that cannot be traced to a single event. (PC-V-2, 329). Dr. McMahon testified that she would have been available at the time of trial to testify that both of the statutory mental mitigators applied in appellant's case. (PC-V-2, 331-332).

Postconviction counsel did not ask that Dr. McMahon examine the appellant again prior to testifying at the evidentiary hearing. (PC-V-2, 337). And, she testified that at the time of trial she did not tell Mr. Taylor additional evaluations would be necessary: "As I recall what, what Mr. Taylor had called me to do was simply to testify to the interview that I did, period." (PC-V-2, 337). Dr. McMahon did not

administer a battery of tests to determine if appellant was malingering. (PC-V-2, 338). Dr. McMahon admitted that it is easier to determine whether or not someone was malingering from a battery of tests. (PC-V-2, 338).

Dr. McMahon admitted that her knowledge of the offense was very limited: "...I had to have known that there was a child involved. And I believe I knew there was, the allegation was of sexual battery and homicide." (PC-V-2, 339). Dr. McMahon was aware that appellant stole a truck and that he made either a forced or unforced entry into the home. She was not aware at the time of trial that witnesses observed appellant calmly having a cup of coffee after he stole the truck. (PC-V-2, 340-341).

Dr. Toomer evaluated appellant in January of 1996 at the request of the defense. (PC-V-2, 352). Dr. Toomer administered a battery of tests for the appellant, including some designed to assess mental status functioning. (PC-V-2, at 352). The results of these tests showed an indication of organic brain damage. (PC-V-2, 352). The result of all the material he reviewed, including DOC records, school records and affidavits from family members did not lead to a single diagnosis, Toomer explained:

> I was unable to arrive at a specific diagnosis because by examining, as a result of my examination, as a result of my examination of his history and the documents I eluded to, he presents symptomatology that runs the entire gamut of several personality disorders, all the way through to a major mental disorder. At times he manifests symptomatology indicative of psychosis, which is at one end of the continuum in terms of diagnosis and manifestation of behavior; and at other times he manifests symptomatology reflecting a severe personality disorder. (PC-V-2, 357).

In Dr. Toomer's opinion, he could have testified to the existence of the statutory mitigating circumstances, "that he was not able to appreciate the criminality of his conduct,' and he suffered from severe or extreme mental or emotional disturbance." (PC-V-2, 359-360). Dr. Toomer admitted that there is no single test that can rule out malingering and that it is largely a subjective determination. (PC-V-2, 363). Dr. Toomer admitted that inconsistent symptomology might suggest that an individual is malingering, that is exhibiting symptoms of one disorder one day and another the next. (PC-V-2, 365). However, Dr. Toomer testified that of more importance is the "exaggeration of the symptomatology." Id.

Dr. Toomer did not administer a test for determining "paraphilic disorder, a sexual disorder." (PC-V-2, 367). Although the defendant had a long term history of sex crimes against children, and was convicted of raping and murdering a child, Dr. Toomer did not administer this test to the appellant. (PC-V-2, 368). Dr. Toomer, did not state that such a test or diagnosis was not important, simply that it was not done in this case. (PC-V-2, 369). The prosecutor then inquired whether or not Dr. Toomer was familiar with appellant's past criminal history. Dr. Toomer stated he was and the prosecutor stated: " [prosecutor] I'm not going to spend the time to go through that, Your Honor. I just wanted to make the point in front of a jury I could have..." (PC-V-2 at 370).

Appellant's claim that Dr. Jeffrey Danziger would now reconsider his earlier opinion on appellant's competency at the time of trial is incorrect. (Appellant's Brief at 11). Dr. Danziger did not even address the issue of appellant's competency at the evidentiary hearing. Dr. Danziger testified that he was one of the court appointed psychiatrists to examine appellant prior to trial in 1991. (PC-V-2, 377). Dr. Danziger was familiar with the existence of statutory mitigators under Florida law. (PC-V-2, 379). However, appellant's trial attorney did not ask Dr. Danziger to testify regarding mental mitigators. (PC-V-2, 379). Dr. Danziger's opinion in 1991 was that appellant was not malingering. (PC-V-2, at 380). Had he been called to testify in the penalty phase, Dr. Danziger testified that he would have testified to the existence of the statutory mental mitigators. (PC-V-2, 382). However, Dr. Danziger testified that psychosis is not necessarily tied to insanity: "Of course not." (PC-V-2, 383).

Similarly, appellant's claim that Dr. Gutman would have changed his opinion regarding appellant's competency (appellant's Brief at 11), is not supported by the record. Dr. Gutman did not even address appellant's competency during his testimony at the evidentiary hearing. Dr. Gutman, testified that he initially evaluated appellant to determine his competency to stand trial and other issues surrounding his criminal defense. (PC-V-2, 387). Dr. Gutman's opinion at that time was as follows: "I felt that he was malingering and was, had a provisional diagnosis of psychosexual disorder,

pedophilia; and had a mixed personality disorder with antisocial passive-aggressive paranoid, borderline personality traits." (PC-V-2, 387). Armed with new records and a family history, Dr. Gutman would alter his diagnosis somewhat. (PC V. 2, 387-388). Dr. Gutman's current diagnosis would be as follows:

> My current diagnosis would be mental disorder with mood, memory, personality change and cognitive decline associated with alcohol deterioration and influence on the brain. (PC-V-2, 391-392).

In particular, the affidavits submitted by various family members showed that appellant was subjected to alcohol at a very young age and that appellant's mother may have been drinking "when he was in utero." (PC-V-2, 392). The school records or psychological records showed I.Q's ranging from "80 to in the 75 to 85 range." (PC-V-2, 392).

When asked if he now believed that appellant was malingering, Dr. Gutman testified:

> No, I, I believe that he has a malingering-like persona. And that, that gives the impression of malingering, him being very flighty -- have to say, the words being drizzly and flaky. And that looks like malingering, and may very well have been at the time. I'm not going to change that diagnosis, but going to say that he gives a malingering-like persona and demeanor and manner.
>
> And that I would still say at the time I saw him I thought he was malingering. Not his long-term overall illness but at least at the moment I saw him. (PC-V-2, 394).

When asked if he now believes his diagnosis was in error, Dr. Gutman testified:

"No, I'm not going to change that. He gives that impression. And I can't go back and relive those moments that I spent with him. But I would say that it appears that he had this demeanor, manner and persona that could now explain the use of the term malingering." (PC-V-2, 394). Dr. Gutman admitted his provisional diagnosis of "Psychosexual Disorder, Pedophilia." would be confirmed with three 'events,' involving young children. (PC-V-3, 404, 405).

Dr. Gutman's testimony only addressed the applicability of statutory mitigating circumstances, he did not change his opinion as to sanity at the time of the offense, which at the time of trial was that he could render no opinion because appellant would not talk to him about the offense. (PC-V-3, 406). Dr. Gutman acknowledged that appellant stole a truck after the murder, went to a 7-Eleven and had a cup of coffee, fleeing the area. (PC-V-3, 407). He acknowledged that this indicated an awareness of the criminality of his conduct: "Yes. Criminality? Yes." (PC-V-3, 407). Dr. Gutman testified that to determine whether or not a defendant meets the criteria for the statutory mitigators, an examiner needs to have the defendant's self-report of circumstances surrounding the offense or review reports and collateral data surrounding the offense. In other words, such an opinion should not simply be rendered by administering psychological tests. (PC-V-3, 408-409).

Given the new information, including the family history, Dr. Gutman concluded

that he probably would testify that the two statutory mental mitigators applied. (PC-V-2, 398). However, Dr. Gutman admitted that it was a very close question as to whether appellant would have met the criteria for the statutory mental mitigators. (PC-V-2, 399).

SUMMARY OF THE ARGUMENT

ISSUE I–This issue is procedurally barred as it should have been raised on direct appeal. In any case, appellant's deliberate, goal directed behavior, before, during, and after the offenses, refutes any suggestion he was insane at the time of the offense. ISSUE II–Appellant was not incompetent at any stage of the proceedings below. The overwhelming majority of experts who examined the appellant found him competent to stand trial. Trial counsel was not ineffective for failing to obtain background materials for the experts as even with the additional materials not a single additional expert testified that they now believed appellant was incompetent to stand trial. ISSUE III–Appellant has neither established deficient performance during the penalty phase nor prejudice under Strickland. The record revealed that appellant was estranged from his family at the time of trial and had not talked to any family members in more than a decade. Since appellant sexually molested his own niece and the daughter of his brother's friend, appellant and counsel had no reason to believe the long lost family members would be in a position to present favorable testimony. Further, counsel made a reasonable tactical decision to rely upon his guilt phase experts to argue the statutory mitigators.

ISSUE IV–Appellant has not carried his burden of establishing either deficient performance or prejudice arising from counsel's representation during the guilt phase.

Since not one expert at the evidentiary hearing testified that the additional background materials provided by collateral counsel would change their opinion as to competency or sanity at the time of trial, counsel cannot be deemed ineffective.

Appellant has offered nothing at the postconviction hearing to suggest that trial counsel's handling of the DNA evidence was inadequate.

ISSUE V–Appellant received a full and fair hearing of his postconviction claims.

ISSUE VI–The trial court's summary denial of several post-conviction claims should be upheld where such claims were either procedurally barred or refuted by the record. Moreover, since appellant has failed to fully brief most of the issues he claims were improperly denied without a hearing, these issues may be deemed waived on appeal.

ARGUMENT

I.

WHETHER THE TRIAL COURT ERRED IN REJECTING APPELLANT'S RENEWED POST-CONVICTION INSANITY CLAIM AND FAILURE TO FIND TRIAL COUNSEL DEFICIENT IN PRESENTING THIS DEFENSE TO THE JURY? (STATED BY APPELLEE).

Appellant claims that brain damage and mental problems rendered him legally insane at the time of his offense. (Appellant's Brief at 31-32). Appellant is essentially asking this Court to reweigh the trial testimony with the addition of evidence presented by the defense at the evidentiary hearing below. This issue is not properly addressed in this collateral attack upon appellant's conviction.

To the extent appellant is simply challenging the adverse finding of the jury regarding his sanity at the time of the offense, this issue is procedurally barred as it was not raised on direct appeal. See generally Johnston v. Dugger, 583 So.2d 657, 660 (Fla. 1991), cert. denied, 131 L.Ed.2d 141 (1992)("Johnston's claim that he was not competent to stand trial in 1984 is procedurally barred because he did not challenge the competency finding on direct appeal.")(citing Bundy v. State, 538 So.2d 445, 447 (Fla. 1989); Alvord v. State, 396 So.2d 184 (Fla. 1981)). "Proceedings under rule 3.850 are not to be used as a second appeal." State v. Bolender, 503 So.2d 1247 (Fla.), cert. denied, 484 U.S. 873 (1987). Consequently, this aspect of

appellant's claim is not properly raised before this Court.

To circumvent this clear procedural bar, appellant summarily mentions under this issue that his defense counsel was somehow ineffective in presenting this defense to the jury. He does not, however, mention in any detail counsel's alleged deficiencies nor how such deficiency prejudiced his client. This issue is later raised and more fully briefed in appellant's brief under Issue IV. (Appellant's Brief at 65-68). Rather than brief the same issue twice, the State will fully address the allegation of ineffective assistance of counsel as it relates to presentation of the insanity defense under Issue IV, *infra.*

Assuming, *arguendo*, that appellant's attempt to revisit the ruling of the fact finder below is not procedurally barred, the State notes that ample evidence supported the rejection of appellant's insanity defense. [7] And, if review of the jury and trial court's ruling is even appropriate at this level, the State is certainly entitled to a favorable standard of review.[8] See Jones v. State, 332 So. 2d 615, 618 (Fla. 1976)("The

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[7]This issue was raised as the twenty first claim in appellant's motion for postconviction relief. (PC-V-5, 826).

[8]"Under the M'Naghten Rule an accused is not criminally responsible if, at the time of the alleged crime, the defendant was by reason of mental infirmity, disease, or defect unable to understand the nature and quality of his act or its consequences or was incapable of distinguishing right from wrong." Hall v. State, 568 So.2d 882, 885 (Fla. 1990)(citing Mines v. State, 390 So.2d 332 (Fla. 1980)).

ultimate question of insanity, like all other factual questions, is left for determination by the jury which weighed all the evidence."). See also Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), affirmed, 457 U.S. 31 (1982).

Any attempt to buttress his trial claim now with information gleaned from the evidentiary hearing fails for three reasons. First, absent a claim of newly discovered evidence [a specific claim made in appellant's motion for post-conviction relief but asserted without any supporting facts][9], appellant may not simply add evidence developed in post-conviction proceedings to the evidence presented at trial and claim that the jury made an incorrect decision. Number two, even if such an analysis was proper, the experts who testified at the evidentiary hearing did not address the question of whether or not appellant was insane at the time of the offense. The experts called by the defense to testify at the evidentiary hearing primarily testified concerning the statutory mental health mitigators that might have been established during the penalty phase. However, this does not mean that they could have or would have testified that appellant met the criteria to be considered insane at the time of the

[9]In his motion, appellant summarily claimed that newly discovered evidence rendered his conviction unreliable. However, he did not bother to identify the evidence he is claiming as newly discovered. (PC-V-5, 828). The trial court noted the utter failure of counsel to plead this claim below: "This claim is not pled at all. Defendant simply states tht the State has a continuing obligation of public records compliance..." (PC-V-6, 1184).

offense. See e.g. Foster v. State, 679 So.2d 747, 756 (Fla. 1996)(extreme emotional disturbance mitigator "has been defined as 'less than insanity, but more emotion than the average man, however inflamed.'")(quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)). In fact, on review of the post-conviction record, the State did not find one additional expert from those who were procured by trial defense counsel who concluded that appellant was insane at the time of the offense.[10]

While appellant claims "[c]ommon sense dictates that Mr. Carroll was insane at the time of the offense" (Appellant's Brief at 33), the State maintains, as it did at trial, that common sense dictates just the opposite. It strains credulity to contend that appellant did not know what he was doing at the time of the offense or did not know what he was doing was wrong. The State notes that the primary problem with appellant's insanity defense is the same now as it was at trial below, appellant displayed ample evidence of goal directed, deliberate behavior before, during, and immediately after the offense.

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[10]Appellant apparently believes that any time the word psychotic is mentioned by an expert that this term alone is synonymous with insanity. However, as Dr. Danziger testified at the evidentiary hearing below, the term psychotic is not synonymous with the term insanity: "Of course not." (PC-V-2, 382). Dr. Danziger was also aware that Dr. Benson had testified that psychosis is not synonymous with insanity "in this case." (PC-V-2, 383).

Appellant, armed with a knife, quietly gained entry into the home, and began to sexually batter ten-year-old Christine McGowan in her own bed.[11] He was able to rape her anally and vaginally to completion, suffocating her in an obvious attempt to keep her from screaming out for help, or screaming out from pain. Quietly completing the rape and murder of Christine, stealing the truck, drawing no attention to himself as he purchased items from a 7-11, fleeing in the direction of Cocoa Beach, and later that morning abandoning the stolen truck, were not the activities of a severely impaired man. Instead, these were the activities of a man who had a criminally deviant goal, who knew what he was doing was wrong, who accomplished his criminal acts, and fled to avoid being caught. Appellant's trial experts had a hard time explaining how his conduct was consistent with that of an individual who did not know either the nature of, or the consequences of his conduct.[12] (V-6, 718-723; 766-

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[11]In his argument, the prosecutor noted the following regarding the knife found under the victim's pillow: "Remember, Robert Rank told you that this knife he had never seen before. This is not a knife that was in the house. It was found in Christine McGowan's pillow. So ask yourselves, how did it get there? Did this ten year old girl keep a knife under her pillow? No, the man who attacked her brought it with him..." (STR. 936-937).

[12]At trial, Dr. Danziger was not aware of how the victim was murdered, specifically, he was unaware that the evidence showed the killer put his hand over Christine's mouth. (V-6, 719). Dr. Danziger was forced to acknowledge that the attacker putting his hand over the victim's mouth to prevent her from screaming "possibly" indicated knowledge by the killer that the act was wrong. (V-6, 719-720). And, if the facts showed that after committing the rape and murder appellant fleeing in the stolen truck

771). Indeed, they could not reconcile his deliberate conduct with their asserted diagnosis. See e.g. V-6, 718-21.

Appellant's claim that lay witnesses observations roughly contemporaneous with the offense indicate he was insane is subject to dispute. (Appellant's Brief at 33). Although the director of the half-way house testified that she observed appellant acting in a bizarre manner two weeks prior to the murder, she talked to appellant the evening before Christine was murdered and he had not seemed irrational and had seemed to be "functioning like anyone else." (V-5, 632-633). Moreover, aside from initially refusing to stop, the arresting officers did not observe any unusual behavior by the appellant.[13] (V-3, 343, 349, 370-371, 374).

In sum, the State presented ample evidence at trial to overcome appellant's insanity defense. And, nothing appellant has offered at the evidentiary hearing casts any doubt upon propriety of his conviction.

II.

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to the other side of Orange County headed in the direction of Cocoa Beach would indicate an awareness of the wrongful nature of his conduct. As Dr. Danziger testified: "That would be a hard one to explain away, yes." (V-6, 720).

[13]Detective Riggs Gay observed appellant "off and on for probably four or five, six hours." (V-4, 538). During that period he did not observe any bizarre or unusual behavior. (V-3, 539).

WHETHER APPELLANT WAS INCOMPETENT DURING HIS CAPITAL PRETRIAL, TRIAL, AND SENTENCING PROCEEDINGS AND WHETHER COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT THIS ISSUE TO THE TRIAL COURT BELOW.

A. Procedural Bar

Appellant complains that he was incompetent at all stages of the proceedings below. This claim is procedurally barred as appellant did not challenge the lower courts competency finding on direct appeal.[14] See generally Johnston, 583 So.2d at 660 ("Johnston's claim that he was not competent to stand trial in 1984 is procedurally barred because he did not challenge the competency finding on direct appeal.")(citing Bundy v. State, 538 So.2d 445, 447 (Fla. 1989); Alvord v. State, 396 So.2d 184 (Fla. 1981)). In any case, the State notes that three of the four experts who testified at the competency hearing prior to trial found appellant competent to stand trial. (CH. 1360-1390). Perhaps recognizing this procedural bar, appellant claims that his counsel was ineffective in presenting the competency issue to the trial court below.

B. Standard Of Review

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[14]"'Criminal law presumes that individuals are competent...and a finding of competence, once made, continues to be presumptively correct until some good reason to doubt it is presented.'" James v. State of Iowa, 100 F.3d 586, 589 (8th Cir. 1996)(quoting Garrett v. Groose, 99 F.3d 283, 286 (8th Cir. 1996)). Appellant's conduct during trial does not suggest that a subsequent evaluation of his competency was required.

This Court recently summarized the appropriate standard of review in State v. Reichman, 25 Fla.L.Weekly S163, S165 (Fla. February 24, 2000):

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

Deference to the circuit judge recognizes the superior position of the trier of fact who has the responsibility of weighing the evidence and determining matters of credibility. Brown v. State, 352 So. 2d 60, 61 (Fla. 4th DCA 1977). And, an appellate court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 So.2d 504, 506 (Fla. 1955)).

C. Ineffective Assistance Legal Standard

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been

different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 113 S.Ct. 838, 122 L.Ed 2d 180 (1993). The Defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693. A claim of ineffective assistance fails if either prong is not proven. Kennedy v. State, 547 So. 2d 912 (Fla. 1989).

In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. Further, a court deciding an ineffective assistance claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct. Id. at 695. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, [e]ven the best criminal defense attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir.)(*en banc*), cert. denied.116 S.Ct. 490 (1995)(citing Strickland, 466 U.S. at 689). D. Appellant Failed To Show That Counsel Was Deficient In Presenting The Competency Issue Or That The

Alleged Deficiency Rendered The Result Of The Competency Proceeding Unreliable

Appellant's ineffective assistance of counsel claim as it relates to his competency to stand trial was raised below as the nineteenth claim in appellant's amended motion for post-conviction relief. The trial court rejected this claim below, noting that counsel was not deficient in presenting background materials to the defense experts. (PC-V-6, 1182).[attached appendix].

An individual is considered competent to stand trial if he had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Mental illness and competency to stand trial are distinct issues; "not every manifestation of mental illness demonstrates incompetence to stand trial." Card v. Singletary, 981 F.2d 481, 487 (11th Cir. 1992), cert. denied, 114 S.Ct. 121 (1993). A defendant presenting a substantive incompetency claim must present evidence indicating a "present inability to assist counsel or understand the charges." Id. By "present ability" is meant ability at the time of trial, not at the time the challenge to the conviction is made on competency grounds, nor at the time of a subsequent mental health evaluation. Id.

Before discussing appellant's ineffective assistance claim, the State must address

allegations presented in the argument portion of appellant's brief which require correction or clarification. While appellant mentions Dr. Kirkland's initial evaluation of appellant in support of his competency claim (Appellant's Brief at 38), appellant fails to mention that after additional testing and contact with appellant, Dr. Kirkland changed his opinion, finding appellant competent to stand trial and competent at the time of the offense. (CH. 1362, 1366; R. 1074). Similarly, while appellant mentions a portion of Dr. Ehrlich's report recording a delusion appellant orally relayed to the Doctor, appellant neglects to mention that Dr. Ehrlich, like the overwhelming majority of Doctors who examined him, concluded that appellant was competent to stand trial. Dr. Ehrlich concluded his report by stating: "I feel that Mr. Carroll is competent to stand trial. I feel that much of his mental symptomatology is self-serving distortions. Even if he is schizophrenic, he still has enough logical functioning intact to understand the functioning of the court system." (V-10, R. 1077-1078).

Appellant alleges that additional materials found by collateral counsel would have somehow changed experts' opinions regarding appellant's competency to stand trial.[15] (Appellant's Brief at 40-41). To support his claim, appellant alleges that "[a]fter reviewing the records provided to them by collateral counsel (consisting of school

[15]Dr. Danziger apparently looked over Defense Exhibit "E" in recent weeks and stated that nothing in those records was "inconsistent" with his findings at the time of appellant's trial. (PC-V-2, 381).

records, medical records, DOC records, and family histories) both doctors [Doctors Danziger & Gutman] testified that they would reconsider their original opinions regarding Mr. Carroll's competency at the time of trial. (PC-T. 403, 393, 375-82)." (Appellant's Brief at 40). A review of the record refutes this assertion. Neither Dr. Danziger nor Dr. Gutman testified that they now believed appellant was incompetent to stand trial. (PC-V-2, 377-382). The most that can be said is that Dr. Gutman's diagnosis of appellant as a malingerer is less certain now than it was at trial. Dr. Gutman testified that he now had some organic basis [long term alcohol abuse] and possible brain damage for some of his observations. (PC-V-3, 403). Dr. Gutman's diagnosis now with the benefit of additional records was as follows: "My current diagnosis would be mental disorder with mood, memory, personality change and cognitive decline associated with alcohol deterioration and influence on the brain." (PC-V-2, 391-392). However, Dr. Gutman's testimony at the evidentiary hearing does not support a finding that appellant was incompetent to stand trial or that he was insane at the time of the offense.[16]

Dr. Danziger testified at the evidentiary hearing but did not even address appellant's competency to stand trial. (PC-V-2, 375-383). Thus, appellant's claim that

[16]Indeed, even with the additional records found by capital collateral counsel, Dr. Gutman admitted that it was a very close question as to whether appellant would even meet the criteria for the statutory mental mitigators. (PC-V-2, 399).

Dr. Danziger would change his opinion as to appellant's competency has no support in the record.

The additional material found by capital collateral counsel years after the trial consists primarily of affidavits from family members, appellant's school records, and the recorded sexual abuse apparently suffered when appellant was twelve. As later argued under Issue III, *infra,* much of this material was not reasonably available to counsel at the time of trial. In any case, the experts were largely aware of appellant's history of drug and alcohol abuse.[17] Perhaps more significant, is that appellant has not shown any prejudice as a result of counsel failing to obtain this material.

"If it is easier to dispose of an ineffectiveness of counsel claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed." Strickland, 466 U.S. at 697. Far from ignoring appellant's mental condition, Mr. Taylor brought appellant's mental condition to the attention of the trial court and requested a competency evaluation and competency hearing. Even with the addition of information uncovered by collateral counsel, not a single additional expert would have testified appellant was incompetent to stand trial. See e.g. Engle v.

[17]For example, at trial Dr. Benson mentioned that in addition to being schizophrenic, appellant had a "previous history of significant poly-substance abuse. That means a variety of substances of abuse, alcohol and various drugs, history of previous significant poly-substance abuse and the third diagnosis I had was borderline intelligence quotient..." (V-6, 758).

Dugger, 576 So.2d 696, 701 (Fla. 1991)("Counsel had Engle examined by three mental health experts, and their reports were submitted into evidence. There is no indication that counsel failed to furnish them with any vital information concerning Engle **which would have affected their opinions.**")(emphasis added). Consequently, appellant's ineffective assistance of counsel argument must fail under the prejudice prong of Strickland.

At the competency hearing, four of the five experts who examined the appellant found him competent to stand trial. [Dr. Kirkland: "I think he's competent to stand trial" (CH. 1362); Dr. Gutman: "It's my opinion that he was competent to, at the time competent to proceed at the time I evaluated him." (CH. 1368); Dr. Danziger: "My opinion was that he, this gentlemen is competent to proceed." (CH. 1380). As noted at the hearing, although Dr. Ehrlich was not called to testify, he too examined the appellant in 1990 and found that appellant was competent to proceed. (CH. 1390; R. 1077).

Fatal to appellant's post-conviction claim is the fact that not a single expert who testified at the evidentiary hearing claimed that their opinion on appellant's competency would change. A point emphasized by the State in its written closing argument on the Rule 3.850 motion:

> ...Significantly, none of the expert witnesses who testified at the evidentiary hearing even broached the competency issue. Not even

> Doctor Danziger, who was of the opinion that Carroll was insane at the time of the rape and murder of Christine McGowan, believed that Carroll was incompetent to stand trial!
>
> Even after the passage of more than five years since the trial of this case, **no other mental health expert besides Doctor Benson has stepped forward to opine that Carroll was** incompetent to stand trial. Because this evidence was presented at the time of trial, considered and rejected, no deficient performance has been or can be demonstrated with respect to this issue. (PC-V-6, 1143-1144).

In sum, based upon this post-conviction record, appellant cannot carry his burden of showing that his mental condition rendered him incompetent to stand trial.[18] See e.g. Bush v. Wainwright, 505 So.2d 409, 412 (Fla. 1987)(allegation that mental health professional would testify as to "a *possibility* of incompetence" at the time of trial was insufficient to require an evidentiary hearing on the defendant's competency to stand trial.)(Barkett, J., concurring); Zapata v. Estelle, 585 F.2d 750 (5th Cir. 1979)(once habeas petitioner has raised a substantial threshold doubt about his competency at the time of trial he must, at the ensuing evidentiary hearing prove the fact of that incompetency by a preponderance of the evidence).

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[18]Nor can it be said that counsel was ineffective for failing to request another examination to determine competency. Appellant points to no irrational or unusual behavior during the trial stage that suggested a need for additional inquiry into appellant's competency. See generally Thompson v. Wainwright, 787 F.2d 1447, 1458 (11th Cir. 1986)("Three factors should be considered in determining whether the trial court violated *Pate* by not conducting a hearing on competency: 1) evidence of the defendant's irrational behavior; 2) his demeanor at trial; and 3) any prior medical opinion on his competency to stand trial." (citing Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975).

E. Any Claim Regarding The Knowing Voluntary And Intelligent Waiver Of Appellant's Right To Testify Or Present Mitigating Evidence Is Barred From Review

Appellant maintains that his failure to testify on sentencing was not knowing, voluntary or intelligent and that his failure to present additional evidence during the penalty phase was involuntary. (Appellant's Brief at 41). This specific claim was not made in appellant's amended motion for post-conviction relief. (PC-V-5, 696-791, PC-V-6, 792-831). Since this specific claim was not made below and was not ruled upon by the trial court, it is not properly raised on appeal. See Parker v. Dugger, 660 So.2d 1386, 1389 (Fla. 1995)(noting that the trial court is the "appropriate place for the initial evaluation" of post-conviction claims and that this Court "will not rule upon the merits of those claims when the trial court never reached the merits below."); Doyle v. State, 526 So.2d 909, 911 (Fla. 1988)(noting that appellant's cruel and unusual punishment claim is "procedurally barred because it was not presented to the trial court in Doyle's 3.850 motion and cannot be raised for the first time in this appeal."). Further, even if this issue had been presented in appellant's motion for post-conviction relief, it would be procedurally barred because it should have been raised, if at all, on direct appeal.

III.

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL?

A. Appellant Has Not Demonstrated That Counsel's Performance Was Deficient During The Penalty Phase

Appellant's attempt to portray trial defense counsel as a disinterested, inexperienced, court-appointed lawyer is not well taken. While Mr. Taylor did not previously represent a defendant in a penalty phase in a capital case, he had represented a number of defendants charged with first degree murder. Moreover, Mr. Taylor had also prosecuted first degree murder cases. Taylor testified: "I have been involved in homicide cases, a lot of them." (PC-V-1, 108-109). Taylor testified about his philosophy in trying cases during the evidentiary hearing:

> ...You know, the point is you've got 12 people sitting over here. Now, the object is to persuade those 12 people to vote a certain way, not just to have a machine gun type of defense.
>
> But I believe that you should take your best approach, your best defense and run with it and stay on the high road. **That's the way I try cases and have for 25 years.** (PC-V-1, 141).

Taylor testified that he did not have money concerns during his representation of the appellant and conducted the investigation he desired. (PC-V-1, 108-109, 133).

Appellant's ineffective assistance of counsel claim primarily rests upon the following two asserted deficiencies: 1) that counsel failed to investigate the availability of testimony from family members documenting his drinking, drug use, and abusive childhood; and 2) that counsel failed to procure and present expert testimony during the penalty phase to establish the statutory mental mitigating

circumstances.

With regard to failing to find appellant's family members to support his statutory mental health mitigators and non-statutory mitigation, the trial court rendered a detailed order, denying this claim. (PC-V-6, 1162-1165). The trial court noted that counsel made a tactical decision not to recall his experts during the penalty phase and to use their testimony to argue the mental health mitigators. Further, the trial court noted that the family members were not available at the time of trial and that counsel made reasonable efforts to obtain favorable testimony but his efforts were not successful. Id. The trial court stated:

> This testimony is confirmed and bolstered by Defendant's family members who testified at the evidentiary hearing. Defendant's sister, Nellie Smith, who testified that she was very close to Defendant, stated that she had not seen Defendant since 1981, well before the date of the trial in this matter. Defendant's half-brother likewise had not seen Defendant since the early 1980's and Defendant's half-sister had not seen Defendant since the early 1960's. Obviously, this was not a close family and these family member's testimony supports that of defense counsel. It would have been difficult if not impossible at the time of trial to locate family members who were scattered to the winds and who had had no contact with Defendant in the years prior to this crime.

Also, the trial court noted that these witnesses might not have been the best witnesses: "...any gains arising from the family's testimony would have been outweighed by the other information known by the family." Notably, that appellant sexually molested two other young girls, including his own niece. (PC-V-6, 1164).

At the time of trial appellant was estranged from his family and probably had every reason to believe they would not provide any assistance. This conclusion is bolstered by Taylor's testimony at the evidentiary hearing: "I don't think he had a close family relationship anymore because of different things that went on. I asked can this person help, can this person help? No." (PC-V-1, 137-138). See Strickland, 466 U.S. at 691, 104 S.Ct. At 2052 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."). It was not as if Taylor simply sat back and did nothing: "...We made efforts and worked on it. And there was nothing to it. I just kept ending up going down dead-end streets." (PC-V-1, 117). It should also be noted that Taylor turned his file over to collateral counsel months prior to the evidentiary hearing and did not have the opportunity to review it in the several years since he had closed this case. (PC-V-1, 122, 124, 131-32). See Williams v. Head, 185 F.3d 1223, 1235 (11th Cir. 1999)(noting the inherent difficulty in reconstructing the facts surrounding an attorneys penalty phase investigation due to the passage of time and inability to review a lost file, stating, "[t]his is a prototypical circumstance in which we must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and 'recognize that counsel is strongly presumed to have rendered

adequate assistance.'")(quoting Strickland, 466 U.S. at 689-90).

Of course, it was established at the evidentiary hearing that appellant sexually molested his sister's daughter and sexually molested the daughter of his brother's neighbors. Consequently, the appellant and Mr. Taylor had every reason to believe that appellant's family members would not provide favorable testimony. A point made by the State in its written closing argument:

> Five relatives (a half-brother, a half-sister, a sister, a niece and a nephew) testified at the evidentiary hearing in rather unremarkable fashion for capital collateral litigation. However, what makes this case rather unusual is that Carroll's rape and murder of Christine McGowen is **not** the reason for the estrangement so prevalent among families who are related to someone on death row. According to the testimony adduced at the hearing, none of these family members wanted to have anything to do with Carroll **years** before this murder! As a consequence, none of these witnesses were in any position to offer relevant, credible testimony concerning Carroll's background. (PC-V-6, 1127-1128).

Appellant's sister testified at the evidentiary hearing that the last time she saw the appellant prior to the evidentiary hearing was around 1981. (PC-V-2, 286). The reason for this rather long period of separation was explored by the prosecutor:

> Q: [prosecutor] All, right, the molestation you were, you were referring to the victim in the case was Cathy Smith?
>
> A: Yes.
>
> Q: Who did you say her mother was?
>
> A: Me.

Q: You're her mother?

A: I'm Cathy Smith's mother.

Q: You mentioned Mary Downing?

A: Mary Downing, that was another little girl.

Q: Another molestation?

A: Yes.

Q: Ma'am, was your daughter Cathy Smith molested --
..[Objection, overruled]..

Q: Was your daughter Cathy Smith molested before or after Mr. Carroll molested the daughter of Mary Downing?

A: Before.

Q: I believe you testified that Elmer Carroll was a mean little kid when you were growing up? He grew up into a mean man, didn't he.

A: Yes.

(PC-V-2, 287-288).

Thus, while these various family members testified at the evidentiary hearing that had they been contacted they would have testified, at the time of trial appellant and Mr. Taylor had every reason to believe investigation to find appellant's long lost family members would not be fruitful and, indeed, could lead to disclosure of

damaging and embarrassing information.[19] The trial court was correct in finding that counsel's performance in failing to procure appellant's family members to testify in mitigation was not deficient. See Jones v. State, 732 So.2d 313, 319-320 (Fla. 1999)(although post-conviction counsel later found cooperative family members to testify on defendant's behalf, trial counsel was not ineffective in failing to present these witnesses where trial counsel talked to witnesses suggested by the appellant but that these witnesses were not willing to help and appellant's history revealed a **"lack of family interest"** at the time of trial)(emphasis added).

In Williams v. Head, 185 F.3d 1223, 1236 (11th Cir. 1999), the Eleventh Circuit addressed a similar allegation of ineffective assistance for failure of trial counsel to discover and present family members in mitigation:

> Present counsel have proffered affidavits from Williams' father and sister which, if believed, indicate that they could have provided additional mitigating circumstance evidence if they had been called as witnesses. It is not surprising that they could have done so. Sitting *en banc* , we have observed that "[i]t is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits,

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[19]Edward Couch was aware that appellant went to prison for child molestation (PC-V-1, 196) but did not have contact with him or correspond with appellant while he was incarcerated. (PC-V-2, 202). And, Couch admitted that it bothered him that appellant molested the daughter of family friends. (PC-V-1, 197). Collateral counsel did not present his investigator to testify at the hearing to show how easy or difficult it was to locate these family members.

> artfully drafted though they may be, usually proves little of significance." *Waters*, 46 F.3d at 1513-14. Such affidavits "usually prove[] at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. Id. at 1514.

As for failing to offer experts to testify on appellant's behalf during the penalty phase, the trial court held that this was a tactical decision based upon counsel's assessment of his experts testimony during the guilt phase:

> Although attorneys may differ as to this strategy, the decision does not fall within the realm of incompetency. Trial counsel's tactics were legitimate and hence, in this regard, this Court finds no ineffectiveness of counsel. (PC-V-6, 1164, 11165).

Since counsel's decision not to recall his guilt phase experts, Dr. Danziger, Dr. McMahon and Dr. Benson to testify during the penalty phase was clearly a tactical decision, it is virtually unassailable on a collateral challenge. See United States v. Ortiz Oliveras, 717 F.2d 1, 3 (1st Cir. 1983)("[T]actical decisions, whether wise or unwise, successful or unsuccessful, cannot ordinarily form the basis of a claim of ineffective assistance."). Courts have repeatedly acknowledged that highly deferential review of counsel's conduct is warranted in an ineffective assistance challenge especially where strategy is involved; intensive scrutiny and second-guessing of attorney performance are not permitted. Spaziano v. Singletary, 36 F.3d 1028 (11th Cir. 1994); Routly v. Singletary, 33 F.3d 1279 (11th Cir. 1994). The test for

determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992).

Mr. Taylor used the testimony of his guilt phase experts to argue the existence of the statutory mental mitigators. (STR. 949-952). A similar strategy was not deemed ineffective in Bryan v. Dugger, 641 So.2d 61 (Fla. 1994). In Bryan, the defendant claimed that counsel was ineffective for failing to present expert testimony on the existence of the statutory mental mitigators during the penalty phase. The defense attorney in Bryan relied upon expert reports that were prepared prior to trial in anticipation of the insanity defense to argue the existence of the mental mitigators during the penalty phase. In rejecting the ineffective assistance claim, this Court stated:

> Each of the medical reports clearly indicated the existence of mental abnormalities, so Stokes was able to persuasively argue both statutory mental mitigators from these reports. The fact that the language of the reports was not couched in the exact terms of statutory mental mitigators does not mean that they were not used effectively.

Bryan, 641 So.2d at 64. See also Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990)(counsel was not ineffective for failing to present expert testimony during the

penalty phase in mitigation where counsel presented extensive mental health testimony in the guilt phase).

This case is unusual because evidence of the tactical nature of counsel's decision is derived not only from Mr. Taylor's testimony at the evidentiary hearing but it is also apparent from review of the trial record. At a bench conference, the State discussed its desire to enter a number of psychiatric evaluations and other department of corrections records in order to rebut appellant's claim that the statutory mental health mitigators applied. The State was obviously frustrated with counsel's failure to present additional mental health testimony and the fact that this foreclosed the possibility of developing additional aspects of appellant's past history, as exhibited by the following:

BENCH CONFERENCE

....

> Mr. Ashton: Your, Honor, I understand from Mr. Taylor, from what he said in chambers, that he doesn't intend to call any psychiatrists in this phase, but to rely on their prior testimony. This [State's Exhibit B] is going to rebut any mental mitigating factors accepted through their testimony or argued by the defense to show an absence of any history of mental disorders prior to his incarceration on this case. It's all relevant for that reason. These are also part of the materials that the doctors were given indicated they considered but they're relevant.
>
> ...
>
> Mr. Ashton: Only to state, Your Honor, that Mr. Taylor had made a tactical decision to rely on the testimony of the psychiatrists at the guilt phase to argue the mitigators, even though he didn't directly address

them. This is the only way I have of rebutting the mitigation. Since he's not calling the doctors, I can't ask them about these things. I believe it's legitimate insofar as I've asked to offer it. (STR. 904-908).

The trial court then read into the record a summary of those documents proffered by the State, but were excluded by the court:

> As to State's Exhibit B, it deals with a mental status report of a defendant's psychological condition as reflected on or about the 27th day of February, 1984.
>
> As to State's Exhibit C, this is again a consultation sheet that deals with some type of treatment that is dated on January 16th, 1980. Basically he was evaluated and it talks about him being in a halfway house at one time for drugs and alcohol. Talks about the fact that he is serving a five year sentence for lewd and lascivious act which he was originally charged with sexual battery but the charge was dropped.
>
> It also talks about that one night he was babysitting for his sister who was divorced with a five year-old child and it talks about after the day of drinking and babysitting, he allegedly committed certain acts upon that child.
>
> It basically talks about the fact that he would be a good candidate for the mentally disorder[ed] sex offender program. State's Exhibit D marked for identification again another prison document by another psychologist. It deals with some testing that was done on or about April 5th, 1982.
>
> Among other things, it talks about he's a classic or closet type sexual offender. State's Exhibit E marked for identification again is another psychological screening document that deals with the same subject, the fact that he's a sex offender. This document appears to be dated 1/10/80. (STR. 909-910).

By relying on the guilt phase testimony defense counsel limited any additional revelations about appellant's unsavory past as a sex offender. This evidence would be relevant to any proper cross-examination of defense penalty experts because it

tends to show this was not a crime out of the ordinary for the appellant, committed in some delusional frenzy, but a deliberate act in accord with his history of unnatural sexual interest in young children. A point made by the prosecutor during the evidentiary hearing on cross-examination of Dr. Toomer, as reflected in the following colloquy:

> Q: In order to do a complete psychological evaluation, type of evaluation you said you did on Mr. Carroll it's important to know as much as possible about his history, that's correct? That includes his family history, social history and also includes criminal history, is that correct?
>
> A: That's correct.
>
> Q: In order to complete your evaluation you had to look at every] single crime Mr. Carroll had ever committed?
>
> A: Yes.
>
> Q: And you would be able to discuss with me, if I wanted to spend an hour, everything Mr. Carroll has ever done, correct?
>
> A: I don't know if I could do that from memory for an hour. Yes, I'm familiar with his history of involvement with the criminal justice system. Yes.
>
> Q: All of those facts are important as part of the basis of your opinion, is that correct?
>
> A: That's correct. That is correct, yes.
>
> MR. ASHTON: [prosecutor] **I'm not going to spend the time to go through that, Your Honor. I just wanted to make the point in front of a jury I could have...** (PC-V-2, 370).

Another expert, Dr. Gutman, admitted that while it was a very close question as to whether or not appellant met the criteria for the statutory mitigators, with three confirmed incidents involving children, his provisional diagnosis of "Psychosexual Disorder, Pedophilia" would be confirmed. (PC-V-2, 404, 405). Consequently, it is apparent that had appellant's experts' testified in the penalty phase the State possessed abundant material for effective cross-examination. See e.g. V-6, 719-20.

Thus, in addition to observing that appellant's experts had already testified during the guilt phase as to his mental deficiencies and were wavering under effective cross-examination, counsel's decision to rely upon guilt phase testimony precluded the State from exploring the extremely unsavory aspects of appellant's past. See Medina v. State, 573 So.2d 293,. 298 (Fla. 1990)(finding no ineffectiveness in not presenting witnesses when they would have opened the door for the State to explore defendant's violent tendencies). Such expert testimony in mitigation would have invariably led the jury to conclude that appellant is a dangerous repeat sex offender, a confirmed pedophile. (PC-V-3, 405). Moreover, the State's cross-examination of the experts would certainly focus upon the abundant evidence of deliberate goal directed behavior exhibited by appellant at the time of the offense; allowing the State to emphasize the heinous nature of appellant's crimes against the child victim. See Darden v. Wainwright, 477 U.S. 168, 187-161, 91 L.Ed.2d 144, 160-161 (1986)(where counsel's

choice not to present any mitigating evidence in the penalty phase and had the defendant make a simple plea for mercy was within the realm of sound strategy where available mitigation evidence might be countered by damaging information concerning the defendant's background). A factor that Taylor considered in deciding not to recall his guilt phase experts during the penalty phase: "So really didn't want to start running around putting the people on the witness stand again right after the guilt phase **so we could relive the horrible crime...**" (PC-V-1, 115). Under the circumstances of this case, defense counsel's decision not to recall his experts to testify in mitigation under the circumstances of this case and expose them to damaging cross-examination was a sound tactical decision. See Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995)(decision not to offer expert testimony as to mental condition at trial was reasonable tactical decision where counsel "feared that the presentation of psychiatric testimony would 'open the door' to **allow the prosecution to parade the horrible details** of each of the murders before the jury under the guise of asking the psychiatrist or other expert whether Bonin's acts conform to the asserted diagnosis.")(emphasis added).

The fact that collateral counsel has found additional defense experts [Drs. Crown and Toomer] who did not testify at either the guilt or penalty phases of appellant's trial and who would have testified as to the existence of statutory

mitigators does not suggest counsel's performance was deficient. Downs v. State, 24 Fla.L.Weekly S231 (Fla. 1999)("The fact that Downs has found experts willing to testify more favorably concerning mental mitigating circumstances is of no consequence and does not entitle him to relief.")(citations omitted); Jones v. State, 732 So.2d 313, 317-318 (Fla. 1999)(finding no deficient performance for failing to procure Doctors "**Crown**" and "**Toomer**" noting that trial counsel is not "ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case.")..

As already noted, counsel's decision to rely upon the guilt phase testimony did not expose the experts to effective cross-examination regarding appellant's past sex crimes and horrifying details surrounding appellant's rape and murder of Christine McGowan. Appellant has not shown that Mr. Taylor's performance during the penalty phase with respect to presentation of expert testimony was in any way deficient.

B. Appellant Has Not Shown That The Alleged Deficiencies In Counsel's Penalty Phase Presentation Rendered The Result Of The Penalty Phase Unfair Or Unreliable

The trial court also denied appellant's ineffective of assistance claim because appellant failed to show any prejudice as result of the claimed deficiencies. As for failing to call the experts and appellant's family members in the penalty phase, the trial court found that the result of the proceeding would not have been any different:

...This Court believes that the jury would have recommended the death

> penalty even if Defendant's troublesome childhood, alcoholism, and mental state had been explored in lengthy, gritty detail. There was sufficient evidence before the jury that outweighed the information now asserted to be incomplete such as Defendant's actions immediately after the crime and prior to his arrest, the other experts' testimony as to the possibility of malingering, the very heinous nature of the crime and Defendant's prior criminal history. This belief holds true even if the two statutory mitigators which defendant tried to establish at the evidentiary hearing had been found at trial.[]

The trial court noted: "Here, a great deal of the information that Defendant complains was not introduced at trial, indeed, was presented to the jury during the guilt/innocence phase of the trial, although perhaps not as in as great detail as current counsel would have liked." (PC-V-6, 1165-1166).

The trial court also noted that had this additional information been brought out, the jury would be exposed to damaging evidence:

> Moreover, as mentioned previously, if Defendant's family and the doctors that testified at the evidentiary hearing, had been available at trial and had given more extensive testimony than that presented by the earlier doctors, there is and was a good possibility that Defendant's past history of sexual crimes involving young children may have been exposed to the jury in great detail. This information, certainly, would have negated what additional background information and mental health information that would have been presented by these witnesses. (PC-V-6, 1166).

The trial court's assessment of the impact of this additional evidence should be given deference as the trial court heard not only the post-conviction witnesses but was also present during the penalty phase of appellant's trial. Consequently, the trial court

is in the best position to gauge its likely impact upon the jury. See generally Gerlaugh v. Stewart, 129 F.3d 1027, 1036 (9th Cir. 1997)("Fourth and finally, to send this case back to the state trial court to hear the evidence counsel failed to develop or to introduce--including the three witnesses as well as the doctor--would be a looking glass exercise in folly. The trial and sentencing judge has already considered *all* of this information in the post-conviction hearing and has held that none of it would have altered his judgment as to the proper penalty for Gerlaugh.").

It is important to note that the jury and trial court were aware of appellant's alcohol abuse, sexual abuse, drug abuse, as well as testimony concerning his mental infirmities and that he dropped out of school in the seventh grade. (V-11, 1304, 1310, 1313). For example, Dr. Danziger testified at trial:

> The defendant told me that he began to drink as a young child. By his report he was drinking heavily by the age of twelve. He stated that as a teenager he used to get drunk at least three times a week..." (V-5, 670).

See Maxwell v. State, 490 So.2d 927, 932 (Fla. 1986)("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient"). And, while appellant's family members discussed appellant's troubled childhood in "gritty" detail at the evidentiary hearing, he was **thirty-five** at the time he raped and murdered Christine, and thus far removed in time from that period in his life. (V-11, R. 313). See Thompkins v. Moore, 193 F.3d

1327, 1337 (11th Cir. 1999)(finding no prejudice for counsel's failure to present evidence of physical abuse as a child where the defendant was twenty-six at the time of the crime, noting that where a defendant is not young at the time of the offense "'evidence of a deprived and abusive child hood is entitled to little, if any, mitigating weight.'")(quoting Francis v. Dugger, 908 F.2d 696, 703 (11th Cir. 1990)); Mills v. Singletary, 63 F.3d 999, 1025 (11th Cir. 1995)("We note that evidence of Mills' childhood environment likely would have carried little weight in light of the fact that Mills was twenty six when he committed the crime.").

Appellant's reliance upon Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995), is misplaced. In Hildwin the lower court found that counsel's performance was deficient in that trial counsel failed to unearth a large amount of mitigating evidence and was not even aware "of Hildwin's psychiatric hospitalizations and suicide attempts." 654 So.2d at 109. This Court observed that post-conviction counsel offered two mental health experts who testified that both statutory mitigators applied and that the trial court found this testimony "most persuasive and convincing." Id. at 110. n. 8. This Court found that counsel's defective performance warranted a new sentencing proceeding.

In this case, unlike Hildwin, the defense attorney did not fail to locate prior hospitalization or mental health records. In fact, the mental health experts who

testified for the defense at trial reviewed a large number of records relating to the appellant. The only records not found by trial counsel were appellant's school records [appellant dropped out in the seventh grade] and testimonials from appellant's family members, who had not seen the appellant in a decade or more. Counsel did not ignore mental health issues: Trial counsel requested a competency hearing and presented the insanity defense. Through the guilt phase testimony Mr. Taylor argued the existence of the mental mitigators in the penalty phase. Thus, unlike Hildwin, defense counsel in this case did not fail to investigate appellant's mental condition or to argue the existence of the statutory mental mitigators.[20]

Appellant's case possesses three valid aggravating factors: Prior violent felony convictions, heinous atrocious and cruel (HAC), and committed during the course of a sexual battery. Most compelling is the heinous nature of this offense, committed against a ten year old girl. See Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992), receded from on other grounds, Hoffman v. State, 613 So.2d 405 (Fla. 1992)(asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity "simply does not constitute the quantum capable of persuading

[20]Nor can it be said that the defense experts presented at the evidentiary hearing in this case were given the credibility praise bestowed upon the experts by the trial court in Hildwin.

us that it would have made a difference in this case," given three strong aggravators, and did not even warrant a post-conviction evidentiary hearing); Routly v. State, 590 So.2d 397, 401-402 (Fla. 1991)(additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide a reasonable probability of life sentence if evidence had been presented). This Court has recognized that the HAC aggravator is among the most weighty aggravators in this State's capital sentencing calculus. See Maxwell v. State, 603 So.2d 490, 493 (Fla. 1992); Larkins v. State, 739 So.2d 90, 95 (Fla. 1999).

The trial court noted the following in finding the heinous, atrocious, and cruel aggravator:

> The evidence clearly establishes beyond a reasonable doubt that young Christine McGowan did not meet a swift, merciful and relatively painless death. The Defendant on the night in question entered her home without leaving a sign of forced entry. The evidence showed Christine McGowan received a blow to her head, as she was more than likely trying with all the fiber of her being to resist this uncivilized and barbaric attack. The evidence showed that the Defendant with his penis literally ripped her vagina apart while he raped her. The evidence also showed he attempted to have anal intercourse with her.
>
> The agony, the pain, the horror that this child must have suffered prior to her death is evident. The pain that she endured as a result of this savage and barbaric act coupled with the knowledge that she was not able to breathe is beyond comprehension... (V. 11, 1307-1308).

The State also notes that blood found on Christine's hands suggest that she was alive and attempting to fend off appellant's attack, as argued to the jury below:

> We know that the only place that Christine McGowan bled was from her vagina now, not her face, not from her nose. No cuts on her hands, so the only place that that blood could have come from on both her hands was from her vagina. This child was alive. This child was conscious. This child moved that hand down to her vagina that was being ripped open by that man while she was being suffocated to death... (STR. 938).

Addressing a similar asserted deficiency in presentation of mitigating evidence in a capital case involving the rape and murder of a nine-year old boy, a federal court observed:

> This was no crime of anger, no quick burst of rage immediately regretted. The lead-up was cold and calculated, at points terrifyingly clinical. We cannot fathom what could cause one to desire to rape a broken and bleeding child. Perhaps that is what we simply call "evil." **But we are certain counsel's failure to throw a few more tidbits from the past or one more diagnosis of mental illness onto the scale would not have tipped it in Eddmond's favor.**[21]

Eddmonds v. Peters, 93 F.3d 1307, 1322 (7th Cir. 1996)(emphasis added). The State also notes that the expert testimony as to the existence of the statutory mitigators was significantly impeached by the State below. Three of the experts who claimed that the statutory mitigators applied reached that conclusion despite admitting limited knowledge of the facts surrounding appellant's offense. (PC -V-2, 269-270; PC- V-2, 339, 340-341; PC-V-2, 261, 269-270). Furthermore, the expert testimony presented

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[21]The manner and circumstances of death were similar: "Concerned about waking his grandmother in the next room, Eddmonds pushed Richard's face into the pillow to stifle his cries, bearing all his 185 pounds down on the 55-pound child. When Eddmonds was finally sated, Richard was dead." Eddmonds, 93 F.3d at 1322.

by the defense does not eliminate or explain the ample evidence of goal directed behavior of the appellant at the time of the offense. See Bertolotti v. Dugger, 883 F.2d 1503, 1518 (11th Cir. 1989)("Before we are convinced of a reasonable probability that a jury's verdict would have been swayed by the testimony of a mental health professional, we must look beyond the professional's opinion, rendered in the impressive language of the discipline, to the facts upon which the opinion is based.") (citing Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987)); Davis v. State, 604 So.2d 794, 798 (Fla. 1992)(statutory mitigating circumstances properly rejected, despite testimony of two defense experts, where defendant's methodical behavior was inconsistent with alleged drug use). A point emphasized by the prosecutor at trial in his sentencing argument to the jury below:

...

> ...But again as we say with the psychiatrists in the trial, everything that this man did after the crime showed that he knew damn good and well what he was doing was wrong because somebody who doesn't realize what they're doing was wrong doesn't run. That's what this man did. He ran. He stole a truck and he ran. Every single thing he did about this crime shows that he knew it was wrong. Somebody who didn't know a crime was wrong wouldn't have known to shut his victim up. He couldn't care if she yelled because it's not wrong what he was doing. He knew it was wrong. (STR. 941-944).

The addition of expert testimony and testimony from appellant's long estranged family members opens the door to cross-examination regarding the unsavory aspects of appellant's psychological makeup. Such testimony invites

additional revelations regarding appellant's past sex crimes against children, including molesting his own niece, a past diagnosis of appellant as a mentally disordered sex offender (STR. 909-910), and, confirmation of a "pedophilia" diagnosis (PC-V-2, 404-405). A dangerous repeat sex offender is not the type of individual a jury is likely to take pity upon. Particularly in light of the horrendous nature of appellant's offenses against a young girl. Consequently, the trial court's finding that the additional evidence in mitigation would be at least partially offset by damaging revelations is supported by the record. Based upon this record, appellant failed to establish prejudice--i.e., that but for the alleged deficient performance "there is a reasonable probability" that the result of the proceeding would have been different.

IV.

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S INEFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL CLAIMS? (STATED BY APPELLEE).

Appellant begins his attack on Mr. Taylor's representation of appellant by quoting isolated record excerpts and using those excerpts to suggest that Mr. Taylor was completely unprepared for trial in this case. (Appellant's Brief at 64). The statement concerning not being prepared was made at a motion in limine hearing concerning the admissibility of DNA evidence. (V-1, 63). The record should not be misinterpreted to suggest that Mr. Taylor was making a general statement asserting he was

unprepared for trial in this case. And, while Mr. Taylor claimed he was not prepared for a hearing on the DNA issue, Mr. Taylor's comments in fact revealed that he conducted an extensive investigation regarding the DNA evidence, including talking to experts: "I've talked to experts." (V-1, 64). And, Mr. Taylor later testified at the evidentiary hearing that he had taken a course in DNA evidence prior to appellant's trial. (PC-V-1, 159).

In any case, Mr. Taylor testified that he felt comfortable with his level of investigation and preparation for trial in this case and was not limited by financial concerns. (PC-V-1, 108-109, 133). In fact, Taylor testified that he deposed a number of people in preparing for trial: "I took everybody's depositions that was remotely material to the issues in this case." (PC-V-1, 111). The record in this case refutes any suggestion that Mr. Taylor rendered ineffective assistance during the guilt phase of appellant's trial.

A. Mr. Taylor Was Not Ineffective In Presenting Appellant's Insanity Defense

The trial court rejected this claim below, noting that the experts were not inadequately supplied with background materials:

> Further, based on the medical experts' testimony at trial, they were somewhat aware of Defendant's past alcohol abuse, possible head injury and family life." (PC-V-6, 1170).

In fact, the experts who testified at the competency hearing and at trial indicated

they reviewed a large amount of background material on the appellant. For example, Doctor Danziger testified that he was provided information by both defense counsel and the prosecution, including medical records from the jail, witness accounts and police reports, and medical records dating back about "ten years." (V-5, 668-670, 681). At trial, Dr. Danziger testified that he obtained data, including medical records, from a variety of sources before he interviewed the appellant. (V-5, 667-668). He also obtained a family history from the appellant, including circumstances of his early life, educational background, substance abuse problems, and past psychiatric history. (V-5, 668-670). Dr. Danziger testified that while it was a very close question, in his opinion, appellant met the legal test for insanity at the time of these offenses. (V-5, 675-676).

Appellant claims that Mr. Taylor did virtually nothing to present appellant's insanity defense. (Appellant's Brief at 65). Even a cursory review of the record refutes this assertion. Taylor utilized Doctors Benson, Danziger, and McMahon to present appellant's defense. Even today, with the benefit of additional materials gathered years after the trial, appellant has not found one single additional expert to testify that appellant was insane at the time of the offense. Thus, it is apparent that Mr. Taylor presented the most favorable witnesses available to assert appellant's insanity defense.

As for not obtaining additional defense experts and instead relying upon one defense expert, Dr. McMahon,[22] and the other court appointed experts to present the insanity defense, it is apparent that counsel made a tactical decision to rely upon the court appointed experts. This is apparent from reviewing a transcript of the closing argument, wherein defense counsel argued:

> Now, I also offered the testimony of some court appointed psychiatrists, **not my psychiatrists**, like she said but **court appointed psychiatrists**. The court appointed four psychiatrists to go out there and examine Elmer Carroll. The court did. And I called two of them as witnesses in this case because it was important to consider whether or not this man was insane at the time this offense was committed. Even though he told the psychologists and the psychiatrists I have no remembrance of anything like that happening, it's important to present to this jury, and the court appointed those psychiatrists. (V-7, 838).

Taylor used the fact he called "court appointed" experts rather than selected "defense" experts, to enhance the credibility of his experts in the eyes of the jury.

As discussed earlier, the testimonials from appellant's long estranged family members were not reasonably available at the time of trial. Nonetheless, even with the addition of appellant's school records and family members affidavits, and the testimony of his post-conviction experts there is no reason to believe that appellant's insanity defense is any stronger today than it was at trial. The primary thrust of the

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[22]Appellant's previous defense counsel contacted Dr. McMahon shortly after appellant's arrest and asked her to evaluate him.

expert testimony presented at the evidentiary hearing was directed toward establishing the mental mitigators. Not one expert who testified at the evidentiary hearing testified that they believed appellant met the criteria to be considered insane under Florida law.

Conspicuously, Dr. Danziger did not testify at the evidentiary hearing that his opinion regarding appellant's sanity at the time of the offense was stronger with the additional materials discovered by collateral counsel. The most that can be said is that the additional material was not inconsistent with his diagnosis at the time of trial. (PC-V-2, 381). Dr. Danziger did not even broach the issue of appellant's sanity at the time of the offense during the evidentiary hearing. Dr. Danziger's testimony at the evidentiary hearing does not suggest that anything collateral counsel has found would have strengthened his testimony at trial. Similarly, Dr. McMahon did not testify that additional materials materially strengthened her opinion, it was consistent with her opinion: "Say there's nothing inconsistent with that' some of them don't necessarily speak to the psychosis itself, it speaks to other things. But it's not inconsistent." (PC-V-2, 330). The material Dr. McMahon was provided by collateral counsel included DOC records surrounding appellant's incarceration and medication history which were not even available at the time of trial. (PC-V-2, 326). Dr. McMahon **did not testify** that with the benefit of the additional materials or testing she could now render

an opinion that appellant met the criteria to be considered insane at the time of the offense. She did, however, render an opinion that appellant met the criteria for both of the statutory mental health mitigators. However, testimony regarding the mental mitigators would not even be admissible during the guilt phase of appellant's trial. See generally State v. Bias, 653 So.2d 380 (Fla. 1995).

While appellant criticizes trial counsel for not arranging for additional testing with Dr. McMahon prior to trial, Dr. McMahon testified that she did not conduct additional testing prior to the evidentiary hearing either. (PC-V-2, 337). Nor did Dr. McMahon testify that she told trial counsel additional testing was necessary. (PC-V-2, 337). At the evidentiary hearing, Dr. McMahon testified that she concurred with the testing done by Dr. Crown and his diagnosis of the appellant: That appellant suffers from non-specific, bilateral and diffuse brain damage that cannot be traced to a single event.[23] (PC-V-2, 329).

Appellant also claims that Mr. Taylor "allowed the State to present damaging testimony from experts who based their opinions on incomplete information–experts who now say they would have testified differently had Mr. Taylor provided them with

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[23]Significantly, Dr. Crown did not testify as to appellant's sanity at the time of the offense. He was not even familiar with the facts surrounding the offenses. (PC V-2, 269-270). Despite this lack of knowledge, Dr. Crown testified that in his opinion, both statutory mitigators applied.

the records gathered by post-conviction counsel." (Appellant's Brief at 65). The use of the term "experts" in appellant's brief suggests that more than one state expert would have changed his or her opinion. However, the **only** mental health professional who changed his opinion at all based upon the school records and affidavits from long lost family members was Dr. Gutman, who testified for the State at trial.

The school records from the late 1960's apparently document appellant's less than stellar IQ. Dr. Gutman admitted that the school records or psychological records showed IQ's ranging from "80 to in the 75 to 85 range."[24] (PC-V-2, 392). However, Dr. Gutman was the only expert who testified at trial that believed appellant's IQ was above the tested range. A fact that he admitted during his testimony at trial, where he acknowledged that his conclusion regarding appellant's IQ was inconsistent with the psychological testing he reviewed and was much lower than he observed. (V-4, 533). Nonetheless, as one defense expert acknowledged during the evidentiary hearing, someone with an IQ of 81 "was smart enough to know it's wrong to rape and kill a little girl[]". (PC-V-2, 260).

The most that can be said is that with the passage of time and procurement of additional materials by collateral counsel Dr. Gutman's diagnosis of appellant as a

[24]At trial, based upon his interview with the appellant Dr. Gutman estimated that appellant's IQ was somewhere around 105 to 110. (V-4, 512).

malingerer is less certain now than it was at trial. (PC V. 3 at 403). Dr. Gutman's diagnosis now with the benefit of additional records was as follows: "My current diagnosis would be mental disorder with mood, memory, personality change and cognitive decline associated with alcohol deterioration and influence on the brain." (PC-V-2, 391-392). However, his current diagnosis of appellant's mental state included a diagnosis of "Psychosexual Disorder, Pedophilia." (PC-V-2, 404-405). Moreover, Dr. Gutman's testimony at the evidentiary hearing does not support a finding that appellant was incompetent to stand trial or that he was insane at the time of the offense. In fact, even with the additional materials, Dr. Gutman admitted it was a very close question as to whether or not appellant would even meet the criteria for the statutory mental mitigators. (PC-V- 2, 399).

At trial, Dr. Gutman testified that he could not render an opinion as to appellant's sanity at the time of the crime because he claimed to have no recollection of the offense.[25] (V-4, 514). A view that he still retained at the time of the evidentiary

[25]Dr. Gutman noted that part of the reason for his belief appellant was malingering was because appellant was able to recall other events occurring in his life around the time of the charged offense. (V-4, 513, 529). Moreover, Dr. Gutman noted that in looking over appellant's records other mental health professionals had thought appellant was malingering. This diagnosis was supported by "past observations of other interviewers such as "past observations of other interviewers such as psychiatrists, social workers and psychologists showed a strong tend toward malingering." (V-4, 511).

hearing. (PC-V- 3, 406). Thus, Dr. Gutman's failure to express an opinion as to appellant's sanity at the time of trial cannot in any way be attributed to any lack of background materials provided by Mr. Taylor; it was appellant's failure to recall any facts surrounding the charged offenses.

Apart from failing to show deficient performance, appellant has not carried his burden of establishing prejudice. Since not one additional expert is now available to testify that appellant was insane at the time of the offense even with the benefit of additional materials and further testing, appellant cannot show a possibility of a different outcome at trial, much less a reasonable probability.

The facts of this offense and appellant's conduct immediately afterward reveal deliberate, goal directed behavior and an awareness that the conduct was wrong. When these facts are coupled with the rebuttal testimony of Dr. Kirkland, it is clear that appellant's insanity defense would fail even with the addition of material documenting appellant's long term alcohol abuse and school records documenting his below average IQ.[26] See V-6, 788-794. Neither of these additional facts taken either alone or in combination suggest that appellant was legally insane at the time of the

[26]Again, it must be remembered that Dr. Danziger's opinion already took into account extensive alcohol abuse, including his report of abusing alcohol as a child. Moreover, at trial, both Dr. Benson and Dr. Danziger reviewed and accepted appellant's IQ as below average in the 81 range.

offense. Based upon this record, appellant has neither shown deficient performance nor resulting prejudice from counsel's presentation of the insanity defense.

B. Trial Counsel Was Not Ineffective For Failing To Retain A DNA Expert

The trial court denied this claim below, noting that counsel did attempt to exclude the DNA evidence but that counsel made a tactical decision not to hire a DNA expert. (PC-V-6, 1172-1173). The trial court's decision is supported by the evidence and should not be disturbed on appeal.

Taylor believed that the DNA testing conducted in this case was accurate and did not want to risk another adverse opinion from an expert. (PC-V-1, 159). And, even now, appellant has not found any evidence to suggest that the DNA testing in this case was in any way inaccurate. Significantly, appellant did not use a DNA expert to attack the findings in this case. Since appellant has failed to show that hiring a DNA expert would have uncovered any favorable evidence, he has not demonstrated any prejudice.[27] U.S. v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987)(a defendant must show what the witnesses would have testified to and how it would have changed the outcome.). As observed by the District of Colombia United States Court of Appeals:

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[27]The trial court went one step further and concluded that even if counsel had successfully excluded the DNA evidence, ample evidence connected appellant to the offense and the result of the trial would remain unchanged. (PC-V-6, 1173).

> ...a defendant basing an inadequate assistance claim on his or her counsel's failure to investigate 'must make a comprehensive showing as to what the investigation would have produced. The focus on the inquiry must be on what information would have been obtained from such an investigation and whether such information, assuming its admissibility in court, would have produced a different result.'

U.S v. Askew, 88 F.3d 1065 (D.C. Cir. 1996), cert. denied, 136 L.Ed.2d 340 (1996)(quoting Sullivan v. Fairman, 819 F.2d 1382, 1392 (7th Cir. 1987)). See also Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974)(reversible error cannot be predicated on mere conjecture). Appellant failed to show what favorable evidence, if any, would have been uncovered from counsel hiring a DNA expert. Consequently, appellant's claim is facially insufficient and must be rejected.

C. Trial Counsel's Examination Of The Medical Examiner Was Not Deficient Nor Was His Failure To Object To Admission Of Every Photograph

While appellate counsel criticizes Taylor for being passive and not vigorously cross-examining Dr. Hegert, he fails to even allege what favorable information could have been elicited in a more vigorous cross-examination of Dr. Hegert. (Appellant's Brief at 69-71). As such, his claim regarding the cross-examination of Dr. Hegert is facially insufficient and warrants no further discussion on appeal.

With regard to Mr. Taylor's failure to object to the photographs of the victim, the trial court noted that this was an issue that should have been raised on direct appeal. (PC-V-6, 1176). Any attempt by a defendant to avoid the application of a

procedural bar by simply recasting his claim under the guise of ineffective assistance of counsel is not generally successful. See Sireci v. State, 469 So.2d 119, 120 (Fla. 1985). In any case, the trial court held that appellant cannot demonstrate prejudice; finding that admission of the eight photographs had no impact upon the verdict in this case.

It was simply unrealistic for trial counsel to attempt to exclude every single photograph of the victim. Instead, counsel chose to make somewhat realistic objections to various photographs. This was a homicide case. Photographs of the victim are typically relevant and admissible to explain the victim's injuries and cause of death. See Henderson v. State, 463 So.2d 196, 200 (Fla. 1985)("Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.")

D. Appellant's Cumulative Allegation Of Ineffective Assistance Of Counsel Is Without Merit

An unfortunate fact of litigating capital cases at the trial level is that defense counsel's performance will invariably be subject to extensive post-conviction inquiries and hindsight miasma. This Court stated long ago that this state of affairs should not be the norm:

> Criminal trials resolved unfavorably to the defendant have increasingly come to be followed by a second trial of counsel's unsuccessful defense. Although courts have found most of these challenges to be without merit,

> defense counsel, in many of the cases, have been unjustly subjected to unfounded attacks upon their professional competence. **A claim of ineffective assistance of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule.**

Clark v. State, 460 So.2d 886. 890 (Fla. 1984)(quoting Downs v. State, 453 So.2d 102 (Fla. 1984))(emphasis added). Unfortunately, it has become the rule, not the exception in capital cases.

Appellant received the competent assistance of an experienced defense attorney in this case. Mr. Taylor questioned appellant's competency and represented him during the competency hearing. Defense counsel presented three mental health experts in support of his insanity defense at trial. Even with the passage of time and extensive inquiry, post-conviction counsel has not found one additional expert to opine that appellant was either insane at the time of his offense or incompetent to stand trial. Based upon this record, it is clear appellant received a fair trial and penalty phase. In other words, appellant has not carried his burden of establishing counsel's performance "so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." Maxwell v. State, 490 So.2d at 932.

V.

WHETHER APPELLANT WAS AFFORDED A FULL AND FAIR EVIDENTIARY HEARING?

Appellant complains he was denied due process below because of an evidentiary ruling by the trial court and the fact the trial court did not grant an extension of time to allow collateral counsel to file his written closing arguments. Appellant's claim is devoid of merit.

As for the notes, the trial court made a simple evidentiary ruling based upon the State's objection to those portions of the notes not written by the testifying witness, Detective Latrelle. The notes reflected hearsay statements and recorded rumors (double hearsay). And, since the notes were not made or taken by Latrelle, it was clearly a stretch for Latrelle to testify about the content of the notes, even if he could identify Detective Payne's handwriting. As appellant has identified nothing of substance from the proffer of the excluded notes of any significance to these post-conviction proceedings, this ruling can hardly be said to have prejudiced him, much less denied him due process. (PC-V-1, 174-176).

As for the trial court's refusal to allow collateral counsel to file an untimely written closing argument, the State notes that the state attorney's initial response to appellant's amended postconviction motion was not accepted as it was untimely filed. In fact, the defense moved to strike the response as untimely (PC-V-5, 958), and the

trial court granted the motion. (PC-V-5, 979). Thus, the record reflects that the trial court was serious about deadlines it set in this case for both sides. Nonetheless, appellant fails to mention that the trial court did grant an extension of time to the defense to file written closing arguments. (PC-V-6, 1115-1116). In doing so, the trial court observed: "The Court's resolution of Defendant's postconviction motion will be based on the testimony presented at the evidentiary hearing and the law. It is common knowledge that the attorney's arguments are not testimony and/or evidence and will not be considered as such." (PC-V-6, 1115). The trial court did not err in failing to grant collateral counsel an indefinite extension of time to file its written closing argument.[28]

[28]Appellant's attempt to show the trial judge was somehow biased by referencing the judge's conduct at the time of the competency hearing is highly questionable. *(Appellant's Brief at 72). The Honorable Judge Perry was not the presiding judge at the time of appellant's competency hearing, it was the Honorable Jeffords Miller. (CH. 1337).

VI.

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING SEVERAL CLAIMS CONTAINED IN APPELLANT'S MOTION FOR POST-CONVICTION RELIEF?

A. Appellant's Inadequate Funding Claim Was Properly Denied Without A Hearing

While appellant generally maintains that Office of Collateral Counsel was underfunded (Appellant's Brief at 75), he fails to show any concrete example of investigation that was not conducted or argument that was not made in this post-conviction proceeding simply because of the alleged under-funding. Indeed, appellant had the benefit of an investigator and was able to hire two defense mitigation mental health specialists, Doctors Crown and Toomer, in addition to two of the experts utilized by Mr. Taylor at trial, Dr. McMahon and Dr. Danziger.

Instead of a legitimate post-conviction claim, this appears to be nothing more than a pro forma statement by collateral counsel, complaining of under funding. Moreover, the State notes that collateral counsel never filed a motion to stay the evidentiary hearing because of the perceived lack of funding. C.f. Hoffman v. Haddock, 695 So.2d 682 (Fla. 1997)(where CCR sought and received a stay of a scheduled evidentiary hearing in circuit court due to lack of funding). The trial court properly denied appellant's inadequate funding issue without a hearing. (PC-V-6, 1159).

Appellant also summarily argues that "[e]ffective legal representation has been

denied Mr. Carroll because public records from the various agencies were not provided to Mr. Carroll's counsel, or if received, were incomplete in violation of Florida Statute, Chapter 119." (Appellant's Brief at 76). However, appellant does not even bother to inform this Court what records counsel requested but were not received. As such, appellant fails to state a claim for appellate relief.

B. The Trial Court Properly Denied Appellant's *Brady* Claim

While appellant claims he did not receive a hearing on his Brady claim, he did receive one regarding his ineffective assistance claim for failing to uncover or utilize evidence allegedly linking the victim's step-father to the charged offenses. These claims were closely related and appellant's collateral counsel was able to develop his Brady claim at the evidentiary hearing below. The problem with appellant's Brady claim, is that there remains **no evidence** linking Mr. Rank to the victim's murder. In denying this claim on ineffective assistance grounds, the trial court stated:

> ... Robert Rank's involvement in drugs, his violence toward the victim, and that he may possibly have known Defendant, had never been substantiated. He testified that while investigating any crime, he solicits and writes down, any rumor or gossip he hears which may later be helpful in the investigation. This Court finds that the alleged new evidence is simply not credible and that even if trial counsel had been aware of these notes, he cannot be held to be ineffective in failing to track down every rumor that arose from the investigation. Consequently, this claim is without merit. (PC -V-6, 1171, 11172).

As a preliminary matter, appellant failed to even establish the State possessed

material "favorable" information which was not disclosed to the defense. As this Court noted in Medina v. State, 690 So.2d 1241, 1249 (Fla. 1997):

> *Brady* does not require disclosure of all information concerning preliminary, discontinued investigations of all possible suspects in a crime. Spaziano v. State, 570 So.2d 289 (Fla. 1990). In other words, simply because someone other than the defendant "was a suspect early in the investigation, though this theory was later abandoned, is not information that must be disclosed under *Brady."* Id. at 291.

The officers notes did not constitute material evidence nor did they lead to any material evidence in this case. To this date, Detective Latrelle does not know anyone with first hand knowledge of any violence which occurred between Rank and Christine. And, fatal to appellant's claim, he presented no evidence at the hearing to suggest that violence occurred between Rank and his step daughter or that appellant and Rank ever used drugs together. Since collateral counsel developed no evidence to support his theories regarding Robert Rank, it is clear that any attack on Rank at trial would have been an absurd exercise in futility.

While appellant contends that Mr. Taylor testified he would have used this information at trial (Appellant's Brief at 81), a review of the record does not support this contention. Taylor could not say whether he would have used such information at trial because he could not make an informed judgment until he evaluated such evidence. (PC-V-1, 127). And, as noted by Mr. Taylor below, regarding an allegation that Rank had sold drugs out of his house, taking off on a "tangent" and trying to

"assassinate" the character of Robert Rank would not get him anywhere. (PC-V-1, 129). Taylor noted that if the only evidence he had was a rumor he would not use this information, i.e., he would have to establish it. (PC-V-1, 149).

Finally, appellant's contention that this "Rank" speculation would somehow have changed the verdict in this case (Appellant's Brief at 81), strains the outer bounds of credulity. The State presented overwhelming evidence of appellant's guilt in this case, including uncontroverted DNA evidence. Simply because some unsubstantiated rumors were recorded by the police early in the investigation, rumors that remain unsubstantiated to this day, does not cast any doubt upon appellant's guilt. Much less can it be said that there is a there is a "reasonable probability" that the outcome of the trial would have been different had this information been disclosed to the defense. Robinson v. State, 707 So.2d 688, 693 (Fla. 1998).

C. Summary Denial Of Multiple Claims

Appellant next claims the trial court erred in summarily denying "[c]laims IV, X, XII, XIII, XV, XVII, XVIII." (Appellant's Brief at 81-82). Appellant appears to believe the trial court must attach portions of the record to support the summary denial of every claim contained in his motion. Appellant's argument to the contrary, the trial court need not attach portions of the record to support its denial of relief if it

sufficiently states its rationale for denying relief.[29] In Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), cert. denied, 502 U.S. 834, 116 L.Ed.2d 83, 112 S.Ct. 114 (1994), this Court stated that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision *or* attach those specific parts of the record that refute each claim presented in the motion." However, an evidentiary hearing is not a matter of right, a defendant must present "'apparently substantial meritorious claims'" in order to warrant a hearing. State v. Barber, 301 So.2d 7, 10 (Fla. 1974)(quoting State v. Weeks, 166 So.2d 892 (Fla. 1960)).

Rather than briefing this issue, appellant simply cites general language concerning ineffective assistance of counsel and claims the trial court erred in denying claims "IV, X, XII, XIII, XV, XVII, XVIII." (Appellant's Brief at 81-82). Since appellant has not bothered to submit supporting argument, his claims may be deemed waived on appeal. In Shere v. State, 24 Fla. L. Weekly S301 n. 6 (Fla. 1999), this Court addressed similar allegations of error, stating:

> In a heading in his brief, Shere asserts that the trial court erred by summarily denying nineteen of the twenty-three claims raised in his 3.850 motion. However, for most of these claims, Shere did not present any argument or allege on what grounds the trial court erred in denying these claims. We find that these claims are insufficiently presented for review. *See* State v. Mitchell, 719 So.2d 1245, 1247 (Fla. 1st DCA

[29]The State notes that the trial court received the trial and penalty phase transcripts. (PC-V-6, 1159).

1998)(finding that issues raised in appellate brief which contain no argument are deemed abandoned), *review denied*, 729 So.2d 393 (Fla. 1999).

To the extent this Court may examine these summary claims, in the interest of not exceeding the allowable page limit, the State will rely upon the order of the trial court denying these claims. However, the State notes that instruction issues, closing argument, and other such issues are issues that typically should be raised on direct appeal and are considered procedurally barred if raised for the first time in collateral proceedings. See Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988)("Because a claim of error regarding the instructions given by the trial court should have been raised on direct appeal, the issue is not cognizable through collateral attack."); Kelley v. State, 569 So.2d 754, 756 (Fla. 1990)(prosecutorial comments are reflected in the record and therefore must be challenged on direct appeal).

D. Assistance Of Mental Health Experts

While appellant claims the trial court erred in denying his ineffective assistance of mental health experts' claim, a full evidentiary hearing was held on appellant's claim that counsel was ineffective for failing to obtain sufficient background materials for the experts. As the only specific deficiency articulated in appellant's motion was that the experts rendered their opinions without the benefit of material he alleges counsel was ineffective for failing to procure (PC-V-4, 95), this issue closely mirrors

appellant's ineffective assistance of counsel claim. After a full evidentiary hearing on appellant's ineffectiveness claim, the trial court found that the defense experts at trial were generally aware of this information at the time of their diagnosis, i.e, appellant's low IQ and long term alcohol abuse. Further, the trial court noted that much of this material was not reasonably available to trial counsel. Nor can it be said that the absence of this evidence rendered their assistance inadequate. Indeed, as noted previously, even with the additional background material, not one expert testified at the evidentiary hearing that with the benefit of the additional materials they now would testify that appellant was either incompetent at the time of trial or insane at the time of the offense. In Provenzano v. Dugger, 561 So.2d 541, 546 (Fla.1990) this Court rejected a claim that the defendant's experts were more vulnerable to cross-examination based upon counsel's failure to develop additional background information.

The additional records obtained by collateral counsel were not medical records or significant recent mental health observations. Appellant was thirty-five at the time of the offense. Since appellant dropped out of school in the seventh grade, the school records were created over twenty years prior to the charged offenses. Similarly, as far as the family members' testimonials, not one of them had any contact with appellant for over a decade. And, they generally addressed observations regarding appellant's

childhood. Engle, 576 So.2d at 701 ("This is not a case like Mason v. State, 489 So.2d 734 (Fla. 1986), in which a history of mental retardation and psychiatric hospitalizations had been overlooked.").[30]

E. Cumulative Error Allegation

The trial court denied this "catch all" claim below, stating:

> This is rather a catch all claim in which the Defendant avers that all the errors listed in claims I through XXIII combined to create a fundamentally unfair trial. Based upon the rulings made previously in this Order, this claim is without merit and hence, denied. (PC-V-6, 1184).

Aside from the general lack of merit to appellant's individual claims, appellant's argument below did not mention any specific errors. (PC-V-5, 829). On appeal, appellant adds to his argument by mentioning, but not fully briefing, two errors, i.e, admission of photographs and the prosecutor's argument. However, as appellant failed to include these arguments in his cumulative error claim before the trial court--Claim XXIV-- they should not be considered for the first time on appeal. Shere, 24 Fla.L.Weekly at S301, n. 6.

In any case, this cumulative error claim is contingent upon appellant demonstrating error in at least two of the other claims presented in his motion. For

[30]Prior to committing the instant offenses, it is apparent appellant had never been hospitalized for a psychiatric condition.

the reasons previously discussed, he has not done so. Thus, this claim must be rejected because none of the allegations demonstrate any error, individually or collectively. Melendez v. State, 718 So.2d 746, 749 (Fla. 1998)(where claims were either meritless or procedurally barred, there was no cumulative effect to consider); Johnson v. Singletary, 695 So.2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless).

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's denial of appellant's motion for 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 has been furnished by U.S. Regular Mail to Andrew Thomas, Chief Assistant CCC , Office of the Capital Collateral Regional Counsel - Northern Region, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, on this _____ day of April, 2000.

COUNSEL FOR STATE OF FLORIDA