IN THE SUPREME COURT OF FLORIDA

LOUIS B. GASKIN,

Appellant,

vs. **CASE NO. SC00-2025**

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
(813) 356-1292 (Fax)

COUNSEL FOR STATE OF FLORIDA

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

CITATIONS: Reference to the record on direct appeal will be referred to as "R" followed by the appropriate volume and page numbers. Citation to the post-conviction record on appeal will be referred to as "PC-R" followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

The State generally accepts the Statement of the case and facts set forth in appellant's brief but adds the following.

Direct Appeal

On direct appeal, this Court affirmed appellant's two first degree murder convictions along with convictions for attempted first degree murder, armed robbery, and burglary. Gaskin v. State, 591 So. 2d 917 (Fla. 1991). This Court set forth the following summary of the facts:

> The convictions arise from events occurring on the night of December 20, 1989, when Gaskin drove from Bunnell to Palm Coast and spotted a light in the house of the victims, Robert and Georgette Sturmfels. Gaskin parked his car in the woods and, with a loaded gun, approached the house. Through a window he saw the Sturmfels sitting in their den. After circling the house a number of times, Gaskin shot Mr. Sturmfels twice through the window. As Mrs. Sturmfels rose to leave the room, Gaskin shot her and then shot Mr. Sturmfels a third time. Mrs. Sturmfels crawled into the hallway, and Gaskin pursued her around the house until he saw her through the door and shot her again. Gaskin then pulled out a screen, broke the window, and entered the home. He fired one more bullet into each of the Sturmfels' heads and covered the bodies with blankets. Gaskin then went through the house taking lamps, video cassette recorders, some cash, and jewelry.
>
> Gaskin then proceeded to the home of Joseph and Mary Rector, whom he again spied through a window sitting in their den. While Gaskin cut their phone lines, the Rectors went to bed and turned out the lights. In an effort to roust Mr. Rector, Gaskin threw a log and some rocks at the house. When Mr. Rector rose to investigate, Gaskin shot him from outside the house. The Rectors managed to get to

> their car and drive to the hospital in spite of additional shots fired at their car as they sped away. Gaskin then burglarized the house.
>
> Gaskin's involvement in the shootings was brought to the attention of the authorities by Alfonso Golden, cousin of Gaskin's girlfriend. The night of the murders, Gaskin had appeared at Golden's home and asked to leave some "Christmas presents." Gaskin told Golden that he had "jacked" the presents and left the victims "stiff." Golden learned of the robberies and murders after watching the news and called the authorities to report what he knew. The property that had been left with Golden was subsequently identified as belonging to the Sturmfels.
>
> Gaskin was arrested on December 30, and a search of Gaskin's home produced more of the stolen items. After signing a rights-waiver form, Gaskin confessed to the crimes and directed the authorities to further evidence of the crime in a nearby canal.

591 So. 2d at 918.

Evidentiary Hearing Testimony

1) Trial Counsel, Raymond Cass

Gaskin's trial defense counsel, Raymond Cass, testified that he was working exclusively in the capital division in the Public Defender's Office from 1983 to 1993. (PCR-5, 609). He carried a heavy case load, fourteen to sixteen cases. (PCR-5, 610). At the time of Gaskin's trial, Cass had handled roughly 150 to 175 cases in which the death penalty was a possibility. (PCR-5, 665). He had co-counsel on this case, Don Jacobson, who was a former FBI agent. (PCR-5, 610). Cass was lead counsel but

Jacobson helped "a great deal." (PCR-5, 610). Specifically, Jacobson was not only an attorney but had a P.H.D. in psychology from Georgetown and was useful in addressing the psychological problems in the case. (PCR-5, 699). Cass testified that he also utilized a capital appellate litigation specialist, Chris Quarles, who assisted him by preparing various motions. (PCR-5, 685). Cass also had the benefit of a part-time investigator working on the case. (PCR-5, 674). Cass had little recollection the work he did on the case as CCR took the trial file years prior to the evidentiary hearing. (PCR-5, 675). Cass had one interview with post-conviction counsel prior to the evidentiary hearing. (PCR-5, 675). Despite his inability to recall much of what occurred during his representation of Gaskin, Cass thought he provided reasonably effective assistance under the circumstances of this case. (PCR-5, 686). Cass made decisions in this case based upon his significant experience in the area of capital litigation. (PCR-5, 686-87).

Cass successfully had two experts appointed to assist the defense, Doctors Davis and Krop. (PCR-5, 671). And, Cass testified it was not typical for judges to give you as many experts as you want. (PCR-5, 672). When asked why he hired Dr. Davis, Cass testified that he thought he was going to give him

"a different answer than he gave me."[1] (PCR-5, 618). For that matter, he thought Dr. Krop would come back with a different conclusion. (PCR-5, 618). While he did not have a clear recollection, Cass thought that Dr. Krop told him that "the only thing he could do would be hurtful to the case[.]" (PCR-5, 619). Cass testified that he had used Dr. Krop on a number of occasions in the past. (PCR-5, 621). Cass testified that he has known Dr. Krop in the past to testify to the existence of the statutory mitigating factors when he thought they were supported by the evidence. (PCR-5, 659). And, Dr. Krop was one of the experts named in the "Public Defender's Association" literature as an expert to use in capital cases. (PCR-5, 659). Dr. Krop was frequently utilized within this circuit because of his expertise and his geographical proximity to the Seventh Judicial Circuit. (PCR-5, 659-60).

Dr. Krop did his usual competency work up but was also directed toward developing possible mitigation. However, Dr. Krop was not of sufficient help and Cass decided not to call either mental health expert. (PCR-5, 613). Cass did not believe that he received Gaskin's school records. (PCR-5, 615).

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[1]Cass agreed that some defense attorneys, including him, have asked the court to have Dr. Davis appointed as a confidential expert to prevent the state from using him. (PCR-5, 671). And, the fact that Dr. Davis was appointed as a defense expert prevented the state from using him in this case. (PCR-5, 672).

Cass testified that he could not recall if he had a conversation with Dr. Krop regarding how disturbed Gaskin was. However, Cass would agree that Gaskin was a disturbed individual. (PCR-5, 617).

Cass asked a court-reporter to take down or memorialize his conversation with Gaskin regarding whether or not to utilize Dr. Rotstein in mitigation. (PCR-5, 658). When asked why he felt it necessary to have a court-reporter present when he advised Gaskin about presenting mental health evidence in mitigation, Cass did not recall his motivation at the time, but agreed it was probably to protect his professional reputation. (PCR-5, 625). Cass felt certain that he discussed calling a mental health expert in mitigation with Gaskin beyond what was depicted in the transcript made during trial, but had no independent recollection of such a conversation.[2] (PCR-5, 627). Nonetheless, the transcript revealed a concern on Cass's part that calling Dr. Rotstein, who found one statutory mental mitigator, would allow the State to get into Gaskins' prior crimes. (PCR-5, 651).

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[2]Cass testified on cross-examination that this was not the first time his competence has been attacked in a capital case. (PCR-5, 657). In fact, it was clear to Cass that should he not prevail in a capital case that some years later his representation will be challenged, "inevitability." (PCR-5, 657).

In addition to the transcript, Cass's file revealed a letter from Dr. Krop indicating that he did not find the statutory mental mitigators. Further, the letter reflects that Dr. Krop thought is that his testimony would not be particularly useful to the defense. (PCR-5, 658-59). Cass testified: "He [Dr. Krop] told me he would like to help me, but he would hurt me if I put him on." (PCR-5, 671). And, Dr. Krop was not willing to testify to the existence of any statutory mitigating factors. (PCR-5, 671).

Cass agreed that the letter from Dr. Krop and the record memorialization of his discussion with Gaskin about offering Rotstein reveal a strategic determination not to use the mental health testimony. (PCR-5, 670). Dr. Rotstein's reports are usually very detailed and, while, having limited recollection of its content in this case, Cass did recall "it said a lot of things I didn't like very well." (PCR-5, 679). While Dr. Rotstein did find one statutory mental mitigator, it was his determination that the negatives contained in the report outweighed the positives in terms of presenting that information to the jury. (PCR-5, 679).

Cass testified that he is aware of the danger of calling a mental health expert and having his or her testimony used against his client. For example, the State might use the expert

to show that the defendant has an antisocial personality. (PCR-5, 660). Cass was also cognizant of the fact that cross-examination of an expert will reveal the historical background of a defendant, including prior criminal acts. (PCR-5, 661). Cass recalled that Gaskin admitted to committing an attempted murder and robbery at an ATM machine in Volusia County. (PCR-5,662). Also, Cass recalled that Gaskin admitted that prior to killing the victims in this case he had killed a man named Miller in Flagler County. (PCR-5, 662). The fact that Gaskin had tried to force himself on a six-year-old boy and that he was involved in incestuous sex with his first cousin could also be revealed through use of an expert. (PCR-5, 663-64). All of the prior criminal acts of Gaskin, including the prior murder and attempted murder were made available to the mental health experts. (PCR-5, 662). Had the experts been called such criminal activity would be revealed to the jury. (PCR-5, 663). Cass did not want the Flagler County jury in his case to hear any of that criminal history. (PCR-5, 663).

Cass was aware that even if an expert did not conclude that a defendant qualifies for an antisocial personality disorder diagnosis, the prosecutor will utilized the DSM to show, based upon prior conduct, that a defendant qualifies for the diagnosis. (PCR-5, 700-701). Such an examination usually

entails the prosecutor parading the details of prior negative or criminal conduct committed by a defendant. (PCR-5, 701-703). Presenting Dr. Rotstein's report to only the judge [Spencer Hearing] with the apparent agreement of the prosecutor, allowed the defense to present evidence of a statutory mitigating factor without exposing the expert to potentially damaging cross-examination. (PCR-5, 704-05).

When asked by the prosecutor if it was his strategic determination to keep as much of Gaskin's negative history from the jury as possible, Cass replied: "Absolutely." (PCR-5, 664). The plan for presentation of mitigating evidence was to show that Gaskin was not so bad in that he worked, had been a loving and good kid and that something had gone terribly wrong. (PCR-5, 679-80). While he did not have any specific recollection of their testimony, Cass agreed that calling two family members during the penalty phase in this case limited the amount of negative information of Gaskin's background presented to the jury. (PCR-5, 668). The balance between presenting such background or "lifeline" information with the need to limit the negative information exposed to the jury was, according to Cass, "a tightrope you have to walk." (PCR-5, 668).

Cass did not recall talking to any of Gaskin's school teachers. However, he was "pretty sure that Mr. Downey

[investigator] or Mr. Jacobson did." (PCR-5, 698). He recalled discussing the teachers with Mr. Jacobson but could not recall specifically what the decision was at that point. (PCR-5, 698-99). And, as far as presenting background information on Gaskin's performance in school, he did not want the conservative Flagler County jury to learn that Gaskin wasn't a great student and that he was stealing in school. In Cass's opinion, the jury would have considered such information "as aggravators." (PCR-5, 669). In effect, Cass testified he did not want to show the jury that Gaskin had a criminal history from the time he was very young to the time he murdered the victims. (PCR-5, 669).

2) Testimony Of Psychological Experts

Dr. Harry Krop, a clinical psychologist, testified that he examined appellant twice in 1990 at the invitation of appellant's trial counsel, Mr. Cass. (PCR-3, 291). Dr. Krop was asked to conduct a confidential evaluation of Mr. Gaskin. As is his general practice such an examination "[is] to evaluate client's competency, his sanity, and then explore any possible psychological issues that may be used as mitigation by the attorney." (PCR-3, 292). As of 1990, Dr. Krop testified he had worked on at least "3 or 400" first degree murder cases. (PCR-3, 292). Dr. Krop conducted the first examination and found

that Mr. Gaskin was competent to proceed but told Mr. Cass that Gaskin was a "very disturbed" individual and that he needed more information from family members to assist in his evaluation. (PCR-3, 295). In response, Dr. Krop stated that he received additional materials, including police reports, and names of individuals, "a Janet Morrison, a Virginia Brown, who were both quite familiar with Mr. Gaskin." (PCR-3, 296). He did not, however, receive any school records on Gaskin. (PCR-3, 301).

After the additional material was received, Dr. Krop testfied that he conducted a second examination: "[A]t which time I did much more extensive testing, including another MMPI and a lot of other personality tests, as well as a comprehensive battery of sexual testing. This is the battery of tests that I use when I do an evaluation which we refer to as psychosexual disorders." (PCR-3, 304). The reason for specific testing on sexual disorders was that during the initial interview, Gaskin informed Dr. Krop of various sexually deviant behaviors. Also, the second MMPI was administered to rule out a diagnosis of schizophrenia. (PCR-3, 304). He determined that various thoughts Gaskin had communicated were not delusions or hallucinations. They did represent unusual thought processes and Dr. Krop concluded that Gaskin had a severe personality

disorder as opposed to schizophrenia. (PCR-3, 304). Dr. Krop's diagnosis of Gaskin was to a reasonable degree of psychological certainty after the second interview and additional testing that was conducted prior to trial. (PCR-3, 310).

With the benefit of additional materials and Dr. Rotsteins' report provided to Dr. Krop after the conviction, his confidence level in his diagnosis is increased. "I would say, that my diagnosis was accurate." (PCR-3, 310). The diagnosis was "called a mixed personality disorder with schizoid and antisocial features." In current terminology, it is "personality disorder NOS, meaning not otherwise specified, but it would be the same thing with schizoid, schizotypal, and antisocial traits or features." (PCR-3, 311). Dr. Krop testified that he "never said" Gaskin was "schizophrenic." (PCR-3, 342). Dr. Rotstein's report did not change his diagnosis.[3] (PCR-3, 364). The school records subsequently provided by CCRC also did not alter his diagnosis of Gaskin. The school records simply added a "learning disability" that "supports" his diagnosis. (PCR-3, 302).

When asked if Gaskin's perception of reality was distorted

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[3]Post-conviction counsel subsequently obtained the report of Dr. Rotstein that concludes that Gaskin was a "seriously disturbed individual with sexually deviant propensities and also schizoid type personality features." (PCR-3, 306). Dr. Rotstein's report was consistent with Dr. Krop's. (PCR-3, 306-07).

at the time of the offense, Dr. Krop testified:

> Distorted in the sense he had difficulty with his own impulses, not distorted to the sense he didn't know right from wrong or he didn't know that his behavior was illegal or that he was doing something both morally and legally wrong. So it was distorted somewhat, but certainly the reality testing was adequate.

(PCR-3, 307). Dr. Krop also stated that when deposed prior to trial he stated that "the nature of the acts themselves sort of speaks for themselves as far as how disturbed Mr. Gaskins was." (PCR-3, 309). In fact, Gaskin was one of the most seriously disturbed individuals Dr. Krop had ever worked with. (PCR-3, 320-21). The two populations Dr. Krop worked with most were first-degree murder defendants and sexual offenders. "What you have in Mr. Gaskins is a combination of the two. His sexual deviancy, particularly at the age that he started engaging in sexually deviant behavior compared to thousands of sex offenders that I've worked with, it's very, very severe." (PCR-3, 321). Dr. Krop elaborated: "But I also thought what was unusual, I guess this would also fit into the disturbance, is how easily he talked about it, how easy it was for him to disclose some extremely perverted behaviors, how he could talk easily about having sex with animals, having sex with younger kids, having sex with the deceased." (PCR-3, 321).

In his initial interview, Dr. Krop acknowledged that Gaskin

left out the fact that he was masturbating at the time of the homicides or immediately after. Later, when specifically asked by Dr. Krop, Gaskin admitted this aspect of his offenses. (PCR-3, 374).

Dr. Krop testified that he discussed his findings with Mr. Cass in 1990:

> I guess the bottom line is that we discussed -- I told him there was a diagnosis of a severe personality disorder. It told him there was a diagnosis of paraphilia, which is basically a person with a severe sexual disorder. In Mr. Gaskins' case, it was Mr. Gaskins described for me pedophilia, he described with me sex with animals, he described exposing himself, obscene phone calls, cross dressing, forced sex. It was probably the gambit (sic) of sexually deviant activities.
>
> He also described for me the sexual acts that occurred even in the homicide, so I, of course, informed Mr. Cass that that would also have to describe the sexually deviant activities both in Mr. Gaskins' past history and also at the time of the offense.

(PCR-3, 312). "I also informed him that I would have to say that Mr. Gaskins does not appear to be remorseful, and that he is still talking to me about having thoughts of killing people. So I had to lay out for Mr. Cass what might be perceived as negative, and then I really have to leave that up to the attorneys as far as to make that decision." (PCR-3, 324).

In a letter, Dr. Krop advised Cass of the potential benefits and drawbacks of his testimony:

> I am writing to advise you I reevaluated Mr. Gaskins

> on June 8, 1990. Based on that evaluation I ruled out the defendant suffers from a psychotic disorder. He does suffer from a personality disorder, but in my opinion there are no statutory mitigating factors.
>
> In view of Mr. Gaskins' lack of remorse and self-continued homicidal ideation, it is likely my testimony would not be particularly helpful. Thank you for requesting my assistance in this case.

(PCR-3, 349-50). Dr. Krop recalled specifically discussing the negative impact of his testimony with Mr. Cass. Dr. Krop testified: "Mr. Cass was more concerned about how a trier of fact would perceive all of the sexual deviant and homicidal ideation and the lack of remorse." (PCR-3, 384). Dr. Krop told Mr. Cass that Gaskin suffered from a serious emotional disorder, but could not use the terminology "that's listed under the statutory mitigation." (PCR-3, 386).

Dr. Krop did not state that he needed to talk to additional individuals or family members in 1990. Dr. Krop was given a substantial family background from the two family members he talked with. (PCR-3, 350). Post-conviction counsel provided additional witness statements prior to the evidentiary hearing, but those statements added nothing of significance. Dr. Krop testified: "There is nothing particularly in the additional witness statements that added a whole lot about his history." (PCR-3, 371). The only addition to his testimony based upon the school records provided by post-conviction counsel would be that Gaskin had an attention deficit disorder. (PCR-3, 324).

Otherwise, Dr. Krop's diagnosis did not change with the benefit of additional materials. (PCR-3, 347).

Dr. Krop did find any indication of organic brain deficiency. After and having "subsequently evaluated him" Dr. Krop testified "that is my opinion now." (PCR-3, 352). Dr. Krop found "no significant impairment in neuropsychological functioning." (PCR-3, 354). Even though he originally thought that some neurological testing might be beneficial based upon a history of head injury, the testing he did in post-conviction revealed "there was no significant impairment in neuropsychological functioning." (PCR-3, 354). Thus, there was no change in his opinion from back in 1990. Id.

When asked about Gaskin's deviant sexual behavior, Dr. Krop described an incestuous relationship Gaskins had with a cousin and also that Gaskin "admitted to me he sexually abused a relative when he was younger." (PCR-3, 313). In Dr. Krop's experience, a person with such deviant tendencies usually had a dynamic of being abused themselves; however, Dr. Krop had no evidence to suggest Gaskin had been sexually abused. (PCR-3, 313). Gaskin did not describe his family as dysfunctional, although he was raised by different people, he perceived "people to love him and care about him." (PCR-3, 318). While it was certainly not the most normal family situation, Dr. Krop

testified "I didn't see it as particularly dysfunctional. It certainly was not abusive." (PCR-3, 318). And, he cannot attribute Gaskins deviant behaviors to a "dysfunctional family environment." (PCR-3, 320). While Gaskin's grandparents raised him in a restrictive environment, he did not view it as "dysfunctional." (PCR-3, 392). In fact, at the time of the evidentiary hearing, Dr. Krop still did not know why Gaskin turned "out the way he was." (PCR-3, 382).

Dr. Krop admitted that appellant exhibited a number of factors suggesting an antisocial personality disorder. For example, Gaskin was cruel to animals in a sexually deviant way in addition to flushing cats down the toilet. "There was also some other types of animals that he described that he would hurt purposefully. I think cats and something else." (PCR-3, 330). Another factor that was consistent with an antisocial personality disorder was Gaskin's truancy from school. (PCR-3, 331). And, forced sexual contact with another person when Gaskin was under the age of 15. (PCR-3, 333). Consequently, three factors suggesting an antisocial personality existed by the time Gaskin was fifteen. (PCR-3, 333). Also, stealing from family members at a young age is another factor that suggests an antisocial personality. Id. Dr. Krop admitted that Gaskin expressed a lack of remorse, another criteria for diagnosing an

antisocial personality. (PCR-3, 345). Also, Gaskins failure to conform to the societal norms was manifest.

Dr. Krop acknowledged that he had a report prepared by Dr. Davis who was also retained by Mr. Cass in 1990. (PCR-3, 359). Dr. Davis reported that he found a statutory mitigating circumstance and that Gaskin "had an antisocial personality disorder." (Pcr-3, 359). Dr. Krop testified that he rejected Gaskin as having a "full blown" antisocial personality disorder. Dr. Krop concluded that Gaskin had several personality disorders, "[a]ntisocial personality disorder is one of them." (PCR-3, 359-360).

If he had testified during the penalty phase, Dr. Krop acknowledged that "this multi-killer had been involved in a number of prior episodes of killing and attempting to kill people and had no remorse for those." (PCR-3, 346). Dr. Krop acknowledged that if he had testified during the penalty phase the prosecutor probably would have questioned him about all of the other criminal behavior of Mr. Gaskin not otherwise presented to the jury. (PCR-3, 338). As far as Dr. Krop knew, such questioning was "fair game" in determining whether someone fits within the criteria for antisocial personality disorder. (PCR-3, 338). So, Dr. Krop agreed that if he testified he "would have had to tell the jury that years before the incident

in this case, Mr. Gaskins was stalking people, murdering them for their money, or attempting to murder them for their money[.]" (PCR-3, 338).

Gaskin told Dr. Krop about a planned robbery of a co-workder with an accomplice. Gaskin told him that he in fact killed a man named Samuel Miller. (PCR-3, 335). He described another violent robbery at a bank where he watched people making deposits. (PCR-3, 336). When another car came by, Gaskin stated: "...When the next car came he struggled in his mind: Do it don't do it. He said he shot the lady making a deposit. She started screaming, and he thought here again to make her stop hollering so loud. He shot at the car. She threw the money bag towards him, and he said, I was a nervous wreck. He said, it was the first time I felt that way. He said, I felt paranoid. I drove wildly. I left. They told me the victim did not die in that case." (PCR-3, 336-37). It was clear that Gaskin displayed purposeful conduct in his actions during the various murders and attempted murders. (PCR-3, 355). Dr. Krop acknowledged that Gaskin employed a number of measures not to get caught. (PCR-3, 356).

Gaskin was not delusional. "He had some probably distorted fantasies about being a Ninja, but I believe he was not. He was just playing a role." (PCR-3, 357). Gaskin dressed up in dark

clothes and committed his crimes at night. (PCR-3, 357).

Dr. Jethro Toomer, a clinical psychologist from Miami, testified that he conducted an examination of the appellant at the request of post-conviction counsel from Tallahassee. (PCR-3, PCR-4, 414). He examined appellant once and spent four hours with him, which included the time it took to administer several tests. (PCR-4, 497). Dr. Toomer concluded that appellant displayed symptoms along a continuum, characteristic of paranoid schizophrenia to borderline personality disorder and schizotypal personality disorder with some indication of neurocognitive disorder. (PCR-4, 417-18). In Dr. Toomer's opinion, appellant's symptoms vacillate back and forth between schizophrenia and schizotypal personality disorder.[4] (PCR-4, 421). Dr. Toomer concluded that he could testify to the

[4]The variation in thought mentioned by Dr. Toomer to support a schizophrenia diagnosis was specifically appellant's Ninja preoccupation. Dr. Toomer admitted that appellant and a number of friends dressed up in Ninja outfits and watched Ninja movies. (PCR-4, 458). When asked if appellant's friends were schizophrenic, Dr. Toomer replied that he was only "concerned about Mr. Gaskin." (PCR-4, 458). The other aspect that suggested schizophrenia was that Gaskin apparently had one personality that was angry and one that would try and do what was right. Dr. Toomer talked in terms of this being a "personality dysfunction" as opposed to being multiple personalities. (PCR-4, 459). As far as auditory hallucinations, Dr. Toomer stated that appellant might have what he would call conversations with himself as to what "he should do, how he should behave, how he should function." (PCR-4, 461). He agreed with the prosecutor that some people might call that his conscience. (PCR-4, 461).

existence of both statutory mental mitigators in this case. (PCR-4, 423-24). In Dr. Toomer's opinion, what you have in the appellant is "an individual who is impaired and unable to function adequately." (PCR-4, 424). The school records reviewed by Dr. Toomer reflected that appellant had an average IQ but that he had "some specific skill deficits in terms of overall intellectual functioning." (PCR-4, 427). Dr. Toomer said that the school records were important as they, along with information from family members form the crux or corroboration among all the particular dimensions of a psychological examination. (PCR-4, 431-32).

On cross-examination, Dr. Toomer admitted that he conducts a large proportion of his examinations in capital cases at the request of the defense. (PCR-4, 435). Specifically, he has been retained by CCRC on perhaps a hundred or so occasions. (PCR-4, 433). When asked why a Tallahassee post-conviction lawyer would contact him, a Miami Doctor, to conduct an examination of a defendant when the case was scheduled to be heard in Daytona Beach, Dr. Toomer admitted it was probably because CCRC attorneys are very familiar with him. (PCR-4, 433-34). Dr. Toomer did not bring any of his notes with him when he testified, he only had a summary that he prepared. (PCR-4, 436).

Dr. Toomer asserted that he was familiar with appellant's criminal history. In addition to a juvenile history which included breaking and entering, Dr. Toomer told of a murder and attempted murder which occurred prior to the instant charged offenses. Dr. Toomer testified:

> I knew he had -- that there had been some other charges that he had picked up as part of his adult history. There was a charge -- he had been charged with shooting an individual. I believe the victim's name was Miller. He had also been charged with wounding a female, I believe, in the bank parking lot where she had been shot. Those were charges he had picked up also as an adult.

(PCR-4, 439). Dr. Toomer admitted that appellant killed a man by the name of Miller. Id. Dr. Toomer was not sure when appellant killed Mr. Miller, but thought appellant shot the lady during a robbery in a parking lot prior to 1989. (PCR-4, 439).

Dr. Toomer claimed not to be aware of any more criminal conduct. (PCR-4, 440). However, when questioned, Dr. Toomer acknowledged that appellant forced himself upon other individuals sexually. (PCR-4, 440). He did not categorize that as criminal conduct, but part of his "psycho social history." (PCR-4, 440). He did agree that such behavior violated societal norms. (PCR-4, 441). There were other indications of sexual deviancy, such as cross-dressing and bestiality in appellant's background. (PCR-4, 441). He believed that appellant's

bestiality involved a dog and a cat. Also, Dr. Toomer was aware that "some animals were flushed down the toilet at an early age." (PCR-4, 442). Dr. Toomer also stated that Gaskin had made inappropriate advances toward a five year-old child when he would visit according to the child's mother. (PCR-4, 442-43). Gaskin told Dr. Toomer:

> He specifically indicated the bestiality, the animal cruelty, and the deviant sexual behavior with regard to the son that I had mentioned of Jeanette Thomas.
>
> And also he mentioned that there was an instance where he had engaged in some type of oral sex with a girl who was approximately five years of age.

(PCR-4, 443).

Dr. Toomer claimed he did not find appellant had an antisocial personality disorder because he was not diagnosed as suffering from this disorder prior to the age of eighteen and that "he has shown manifestations of stability." (PCR-4, 445). "For example, there is a work history of approximately three years. There is a relationship, though at time stormy, that he was able to maintain. Those are not characteristic of antisocial personality, someone suffering the effect of an antisocial personality disorder." (PCR-4, 445). When confronted with the DSM, and that fact it does not require a diagnosis before the age of eighteen, simply that certain conduct be observed before the age of fifteen, Dr. Toomer claimed that the DSM was simply a "cookbook" or "guide" but that

"it is not definitive." (PCR-4, 446). He did not disagree with the criteria, simply that they are not "the definitive and end-all criteria." (PCR-4, 447). It was not that Dr. Toomer rejected the manual, but that he use it on a case by case basis and that he was the final determinant in terms of a particular diagnosis. (PCR-4, 451).

Dr. Toomer agreed that forcing someone into sexual activity is a factor suggesting an antisocial personality disorder. (PCR-4, 444). Similarly, appellant was truant from school which is another criteria for a antisocial personality disorder diagnosis. (PCR-4, 486). Appellant was also physically cruel to animals, another antisocial personality disorder indicator. Id. Appellant also lied, and stole items of value without confrontation from the victims. Consequently, Gaskin exhibited more than three criteria for an antisocial personality diagnosis prior to the age of fifteen. (PCR-4, 487). The antisocial personality disorder label or diagnosis was suggested; however, based on the "totality of the data" Dr. Toomer stated that he rejected it. (PCR-4, 490).

Dr. Toomer claimed not to know the diagnostic criteria for schizophrenia "off the top" of his head. (PCR-4, 453). Dr. Toomer acknowledged that the diagnostic criteria of schizoid personality disorder "is a pervasive pattern of peculiarities of

ideation, appearance and behavior and deficits in interpersonal relatedness beginning by early adulthood and present in a variety of context that are not severe enough to meet the criteria for schizophrenia[]". (PCR-4, 454). Without pronounced hallucinations and delusions "diagnostically he's not schizophrenic." (PCR-4, 454). Dr. Toomer stated that the MMPI suggested schizophrenia as well as the totality of other data. (PCR-4, 455). However, when pressed about the apparent lack of significant auditory or visual hallucinations which is required for a schizophrenia diagnosis under the DSM-IV, Dr. Toomer apparently agreed that appellant's prominent diagnosis would be schizotypal. (PCR-4, 461-63). In fact, if he had to go with one diagnosis, "based upon whether or not the individual fits all of the criteria according to the DSM-IV, which is not my standard but yours, if that's what you're talking about doing, then you would have to go with schizotypal." (PCR-4, 463). However, his overall clinical opinion was that appellant "vacillates between the two, between schizotypal personality disorder and schizophrenia."[5] (PCR-4,

[5]When asked whether the factors which Dr. Toomer mentioned for rejecting an antisocial diagnosis--ability to maintain a job and long term romantic relationship--suggested that appellant did not suffer from schizophrenia, Dr. Toomer mentioned that once appellant was observed with his clothes on backward at work. (PCR-4, 456-57). Otherwise, it appeared that appellant acted relatively normal at work. (PCR-4, 457). Dr. Toomer also

464).

Dr. Toomer stated that he had reviewed DOC records pertaining to appellant but that he was not aware of any psychotic behavior on the part of Gaskin while incarcerated. (PCR-4, 469). There was no evidence that appellant was being treated for schizophrenia. (PCR-4, 469). Dr. Toomer attempted to explain that in the structure of the prison environment the symptomology might no longer be obvious because of the regimentation. (PCR-4, 469-70). When asked if he would expect any hallucinations to stop while incarcerated, Dr. Toomer claimed not to know. (PCR-4, 470). But, Dr. Toomer did testify: "He did not indicate that he was having any type of hallucinations, nightmares or sleep difficulty at the time I evaluated him." (PCR-4, 471). Dr. Toomer did not recall reviewing any data in the DOC file which would support a conclusion that appellant was schizophrenic or schizotypal. (PCR-4, 476). While Dr. Toomer admitted that their were some disciplinary reports in the DOC file, he did not "recall the number." (PCR-4, 472).

Dr. Toomer did not conduct any additional neuropsychological testing. While Dr. Toomer believed that he

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acknowledged that various family members "said that they didn't notice anything basically in terms of dysfunctioning." (PCR-4, 491).

mentioned such testing might be helpful to post-conviction counsel, it was apparently never followed up on. (PCR-4, 466). He wanted to do additional testing and a followup interview with appellant and communicated this to post-conviction counsel in 1995. (PCR-4, 467). However, Dr. Toomer admitted that he did not conduct any additional testing. (PCR-4, 467).

Dr. Toomer testified that Gaskin's mom abandoned him at the age of one year, and he was raised by his grandparents. (PCR-4, 492). Dr. Toomer acknowledged that Gaskin's grandparents tried to take care of him and provided for him. (PCR-4, 493). Dr. Toomer also acknowledged that at one time Gaskin might have stolen as much as one thousand dollars from them. (PCR-4, 493). One "hypothesis" of the grandparents not wanting Gaskin out of their sight (being considered strict) was that he was a troublemaker and was frequently truant from school. (Pcr-4, 493-94).

Dr. Toomer also acknowledged that in appellant's prior crimes, including the prior murder and prior shooting of his robbery victim, appellant always did his best not to get caught. (PCR-4, 479). When asked where appellant was on the night of the crimes in terms of the "continuum" of his diagnosis, Dr. Toomer asserted: "he was anywhere along the continuum." (PCR-4, 452). The prosecutor questioned Dr. Toomer on how his

diagnosis that the statutory mental mitigators applied at the time of the offense fit within the details of the offenses. Dr. Toomer acknowledged that in addition to taking steps to ensure he was not caught, appellant engaged in deliberate behavior to arouse the individual inside the (Rectors') house so that he could get a better shot. (PCR-4, 483). Dr. Toomer believed that appellant threw something on the roof to get one victim's attention and get him out of bed. (PCR-4, 483). However, Dr. Toomer noted that individuals who are mentally ill engage in deliberate conduct. (PCR-4, 479-80). While in common sense terms Gaskin's conduct suggested that he knew what he was doing, Dr. Toomer again stated that "mentally disturbed engage in behavior that appears to be purposeful and planned." (PCR-4, 480).

3) Lay Witness Testimony

Assistant Principal Hunsinger testified that he was Principal of Flagler Palm Coast High School when Gaskin attended the school. He testified that Gaskin was ultimately dismissed from the school for lack of attendance. (PCR-5, 603-04). Hunsinger was also aware of two instances of Gaskin stealing at school. On one occasion, Gaskin with another boy stole the M & M's which were to be used for fund raising. He denied any

participation in the theft. (PCR-5, 604-05). When Gaskin denied participating in the theft he was lying. (PCR-5, 605).

On the second incident, Hunsinger testified that the school had a problem with theft from the boys' locker room. An assistant principal by the name of Haller positioned himself in an office which overlooks the locker room with one-way glass. (PCR-5, 606). Hunsinger testified that Gaskin was observed taking items from one of the student's lockers and was confronted. (PCR-5, 606). Despite being caught red-handed, Gaskin adamantly denied taking anything from the locker. (PCR-5, 606). Gaskin was suspended for committing the theft. (PCR-5, 606).

Bruce Hafner, P.H.D., the retired former head of the exceptional program in Flagler County, testified about the program in which Gaskin was placed as a child. (PCR-4, 507). In the learning disabilities program, students are enrolled where there is a gap between the IQ and performance on achievement tests. (PCR-4, 508). Reviewing Gaskins' records, they showed that he was placed in the part time program and that he had been held back in the third and fifth grades. (PCR-4, 510-11). The school records reflected that Gaskin consistently had very poor scores in reading and language arts. (PCR-4,

511). Dr. Hafner had no contact with Gaskin and no personal knowledge of him. (PCR-4, 512).

Elizabeth Willis, appellant's 8th grade math teacher, testified that Gaskin was in a lower achieving group. (PCR-3, 398). She did not consider him a behavior problem in class (PCR-3, 398), but acknowledged on cross-examination that he stole the cases of M & M's that were being used to raise money for the cheerleaders. (PCR-3, 399-400). Further, Ms. Willis testified that appellant "tended to have a history of stealing" in school. (PCR-3, 400). Ms. Elsie Chappel, Gaskin's fourth grade math teacher, testified that he was withdrawn as a student and that he had problems solving word problems. Gaskin could read, but not very proficiently. (PCR-4, 594-95). However, Gaskin was proficient at math computations such as adding, subtracting, and multiplication tables. (PCR-4, 594).

Kenneth Gordon, Gaskin's fifth grade social studies teacher, testified that neither his academic performance nor behavior were notable. (PCR-5, 596). Contrary to appellant's initial brief, the teacher did not testify about "some of the beatings that Louis was subjected to by his great grandmother." (Appellant's Brief at 19). He heard about one incident through another teacher that Gaskin snuck out his bedroom window and got a severe beating when he was caught. (PCR-5, 599-600).

Janet Smith, who testified during the penalty phase, was called to testify by post-conviction counsel during the evidentiary hearing. She lived with appellant and the grandparents when she was 11 and Gaskin was 10 or 11. (PCR-4, 527). She confirmed that the grandparents were very strict and that they were not allowed beyond the gated yard unless the grandmother went with them. (PCR-4, 528). She thought that her grandparents were concerned about them getting in trouble or something happening to them if they were out alone. (PCR-4, 536). However, friends were allowed over and Smith and Gaskin would play with them. (PCR-4, 538-39). The grandparents would take them to school every day. (PCR-4, 537). The grandmother really loved them and there was no abuse in the house. (PCR-4, 537).

Gaskin had a lot of rules and used to get in trouble. When asked if he stole the grandparents' money, Smith testified: "Oh, yes, sir. He did do that." (PCR-4, 535). She recalled that Gaskin got in trouble for stealing things. (PCR-4, 535). Also, she recalled hearing that Gaskin had tried to do something sexual to her sister. (PCR-4, 536). And, she was aware of Gaskin flushing animals down the toilet. (PCR-4, 539).

Smith confirmed that the grandparents could not read and did not help them with homework. However, she testified "[t]hey

would have to get someone else to help us." (PCR-4, 528). They were poor and did not get new clothes. Gaskin would be teased by the neighborhood kids for sucking his thumb.[6] (PCR-4, 529). Gaskin fell off his bike, hitting his head and had to get stitches. (PCR-4, 534). Smith testified that appellant seemed okay to her after he got the stitches. (PCR-4, 534).

Despite the claim that they were poor and did not get new clothes, one witness, Edward Stark, testified that as a child Gaskin got a new bike. (PCR-4, 547). "Mr. Gaskins was riding a bicycle down the road, up and down the road because he just got a brand-new bike, and he had the fanciest bike on the block, so racing everybody up and down the road..." (PCR-4, 547). Stark stated that he and Gaskin would get into trouble: "We got into all kinds of mischief. We used to stay after school and make mischief all the time, and it got to the point where we used to engage in fights and things like that." (PCR-4, 548). Stark did not believe that Gaskin was 'mental' or 'schizophrenic.' (PCR-4, 550). Gaskin told Stark that he took nude pictures of his cousin. (PCR-4, 550). Stark was one of the individuals in the neighborhood that dressed up in Ninja

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[6]Smith acknowledged giving a deposition to Gaskin's trial attorneys prior to the trial. Smith did not recall whether or not she told the attorneys about Gaskin sucking his thumb or whether she mentioned it in her deposition. (PCR-4, 533).

outfits as it made them--the small guys--feel tougher. (PCR-4, 551). In 1990, Stark testified that he was in prison in Starke. (PCR-4, 555).

Pamela Williams testified that she first met Gaskin when she was seven or eight and he was thirteen or fourteen. (PCR-4, 556). Pamela testified that her grandmother seemed like a mean witch to her she "didn't like nobody to go nowhere." (PCR-4, 557). Sometimes she would let friends come over to play with her but other times she would not. (PCR-4, 558). She described the house as full of "junk" but stated that it wasn't "dirty, dirty." (PCR-4, 559). "She would keep her certain areas clean." (PCR-4, 559). Williams did not know if Gaskin was picked on as a kid, but imagined that he would be because his clothes and their grandma's house were not "up-to-date." (PCR-4, 561-62). Williams testified that she would have testified to this information in 1990 had she been contacted. However, when asked why CCR was only able to track her down "a month and a half ago." (PCR-4, 572-73). Williams testified that they did not find her earlier because "I was on the run all the time." (PCR-4, 573). Williams explained that "I was always in different places." (PCR-4, 573).

On cross-examination, Williams clarified that she did not live with the grandparents but spent nights there; her home was

around the corner. (PCR-4, 574). Williams admitted on cross-examination that the dates were mixed up, that she was only seven or nine when appellant was fourteen. (PCR-4, 575). She did not know anything about Gaskins' upbringing until he was fourteen. (PCR-4, 576).

Her grandmother had many rules: "Too many rules. Her rules was over-strict." (PCR-4, 574). Williams thought of her grandmother as "loving" but also as a "witch." (PCR-4, 577). When Williams was asked why Janet Morris who actually lived there thought that the grandmother loved them and would not let anyone spank them, Williams testified that Janet was not lying. (PCR-4, 574-75). And, she admitted that the grandparents fed Gaskin, put a roof over his head, and the grandmother would walk him to school. (PCR-4, 580). Williams was aware of several instances when Gaskin got into trouble: That he broke into the neighbor's house and a pawn shop. (PCR-4, 578).

Any additional facts necessary for a disposition of the assigned errors will be discussed in the argument, infra.

SUMMARY OF THE ARGUMENT

ISSUE--The trial court's ruling denying post-conviction relief is supported by the record and should be affirmed on appeal.

A) Counsel retained two mental health experts to examine the appellant. Defense counsel made a strategic decision not to present their testimony as presentation of such testimony would reveal a panoply of additional misconduct, including the fact appellant murdered a co-worker, and attempted to murder another woman during a robbery. Defense counsel presented the testimony of two family members who were very familiar with appellant's upbringing as a child and family life. Collateral counsel has not been able to uncover any significant mitigation that might have altered the jury recommendation in this case given the numerous, compelling aggravators present in this double homicide case.

B) Trial counsel was not ineffective for failing to provide Dr. Krop with background materials. Dr. Krop, the expert who spent the most time with appellant, had the same diagnosis at the time of trial as he did at the evidentiary hearing. The one and only alteration in his opinion based upon the school records subsequently obtained by collateral counsel was the fact that appellant had a learning disability.

C) Appellant has established neither a deficiency in defense

counsel’s closing argument nor resulting prejudice.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HIS COUNSEL RENDERED INEFFECTIVE ASSISTANCE DURING THE SENTENCING PHASE OF HIS TRIAL? (STATED BY APPELLEE).

Appellant asserts that his trial counsel was ineffective in failing to present expert testimony on his mental state during the penalty phase of his trial. Further, appellant asserts that additional mitigation witnesses were available and should have been presented. The trial court properly denied the allegations of ineffective assistance after a full and fair hearing below.

PRELIMINARY STATEMENT ON APPLICABLE LEGAL STANDARDS

A) Standard Of Review

This Court summarized the appropriate standard of review in State v. Reichman, 775 So. 2d 342 (Fla. 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)).

B) Applicable Legal Standards For Evaluating Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 688 (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. 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. 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).

The prejudice prong is not established merely by a showing that the outcome of the proceeding might 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 (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).

With these principles in mind, the State submits the trial court properly denied appellant's claim of ineffective assistance of trial counsel.

ANALYSIS OF APPELLANT'S CLAIMS

A. Appellant's Counsel Was Not Ineffective For Failing To Present Mental Health Testimony And Additional Lay Mitigation Witness Testimony

1) The Decision Not To Present Expert Mental Health Testimony

After hearing the evidence presented by the defense below, the trial court denied this claim as it related to the failure to present mental health mitigation, stating, in part:

> ...In the instant case, counsel did procure two mental health experts to evaluate the Defendant for competency and mitigation, Dr. Robert Davis and Dr. Harry Krop, who were aware of most of these background facts propounded by the Defendant. See State's Exhibit 7 (Dr. Davis's report); State's Exhibits -12 (Dr. Krop's notes and letters); Appendix B at 14-15 (information known by Drs. Krop and Rotstein); see also Transcripts, April 14, 2000, p. 344; Transcripts, April 13, 20000, pp. 143; 163; 195-203; 223-24 (information known by Dr. Toomer); State's Exhibit 1 at index #5 (Dr. Rotstein's report). Dr. Davis found the Defendant competent to stand trial, the Defendant did not need any type of hospitalization or any type of special psychiatric or psychological care, and that the Defendant does not labor under any particular disease of the mind so that he doesn't know what he is doing. See State's Exhibit 7, pp. 2-3. Also, at the evidentiary hearing, Dr. Krop testified that his diagnosis of the Defendant would be the same as it was originally on June 8, 1990, with the addition of the opinion that the Defendant suffers from a learning disability, attention deficit disorder, based on the school records.[]. See Transcripts, April 13, 2000, pp. 34; 41-42; 55; 78; 80-81. Dr. Krop's diagnosis of the Defendant is mixed personality disorder with schizoid and anitsocial features (terminology in 1990) or personality disorder not otherwise specified, with schizoid, schizotypal, and antisocial features (modern terminology); he did not find any statutory mitigators. Id. at 41-42. Dr. Krop also testified, at the evidentiary hearing, that he spoke with counsel regarding his diagnosis and proposed testimony for the penalty phase, and that Dr. Krop concluded that he would not be much help due to the fact that Dr. Krop would also have to testify about the Defendant's past criminal conduct, sexual deviancy, and lack of remorse. Id. at 43-44; 54-55; 66-69; 77; 80-81; 115-18; 124-25; see also State's Exhibit 8 (June 22, 1990 letter). Further, counsel testified, at the

> evidentiary hearing, that because the Defendant's background contained the many negatives, and the fact that Dr. Krop told him that his proposed testimony would hurt rather than help and include discussion of Dr. Davis' report and diagnosis, it was counsel's strategy not to present this mitigation to the jury and not to present Dr. Krop's report and diagnosis to the judge. See Transcripts, April 14, 20000, pp. 359, 369; 392-402' 410; 417-24; 434-37. In cases where counsel did conduct a reasonable investigation of mental health mitigation prior to trial and then made a strategic decision not to present this information, the Florida Supreme Court has affirmed the trial court's findings that counsel's performance was not deficient. Asay, 2000 WL at 9; see also Rutherford, 727 So.2d at 223; Jones v. State, 732 So.2d 313, 317 9la. 1999); Rose v. State, 617 So.2d 291, 293-94 (Fla. 1993). This Court finds that Counsel was not deficient because counsel did conduct a reasonable investigation of mental health mitigation prior to trial and made reasonable, strategic decision not to present this information to the jury and not to present Dr. Krop's findings to the judge. Therefore, this claim is also legally insufficient.

(PCR-11, 1506-07).

Appellant attempts to take pieces from the mental health evaluations that might prove useful, but ignores the vast, indeed, overwhelming negatives associated with presentation of that testimony. Trial counsel, unlike post-conviction counsel, does not operate in a vacuum. Whereas post-conviction counsel prefer to throw everything possible into the mix in the hopes of finding some aspect of information critical enough to hit the target of ineffective assistance, a trial attorney must consider the totality of potential mitigation, including the impact of evidence upon a jury and the potential rebuttal that might be

offered.[7] And, in this case, it is fortunate that the strategic nature of the decision not to offer mental health testimony is depicted in the record.

At the time of trial Cass discussed with appellant the possibility of presenting Dr. Rotstein and his report as mitigation. (R. 967-970). Cass explained to the appellant that presenting Rotstein's report would provide the mitigating factor of substantial impairment, however:

> If I put Rotstein up there, Tanner (prosecutor) can and will cross-examine Dr. Rotstein on the whole examination and there are some matters in there, like sexual deviants, that sort of thing and also information of prior crimes that he can bring out.
>
> We have been able to keep those out so far, but I am kind of hung on the horns of a dilemma.
>
> On one hand I have a mitigating factor that I can bring on your behalf, but I am afraid, I know what he can elicit from the doctor on cross-examination, not about that fact, but about the whole interview as to what you told Dr. Rotstein can come out...

The record reflects that appellant agreed with Cass's suggestion that they not call Dr. Rotstein during the penalty phase. (PCR-8, 968-69).

Dr. Krop also advised Cass at the time of trial that his

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[7]Instead of gaining the two votes needed for a life recommendation; in this case, presentation of this evidence would in all likelihood, result in losing the four votes defense counsel managed to receive for his client. Indeed, given the horrible nature of the multiple murders and attempted murders, four victims in all, four votes for life represented a significant achievement.

testimony would do more harm than good. (PCR-3, 349-50; PCR-5, 658-59, 671, 673). In fact, this was communicated to Cass in a letter, wherein Dr. Krop, stated in part: "In view of Mr. Gaskins' lack of remorse and self-continued homicidal ideation, it is likely my testimony would not be particularly helpful." (PCR-3, 349-50). Cass testified at the evidentiary hearing that he did not want the Flagler County jury to hear any of appellant's damaging criminal history that would be revealed through the mental health experts. (PCR-5, 662-63).

As a strategic decision, counsel's performance is virtually unassailable in post-conviction litigation. See Maharaj v. State, 778 So.2d 944, 959 (Fla. 2000)(where this court "recognized that counsel cannot be ineffective for strategic decisions made during a trial.")(citing Medina v. State, 573 So. 2d 293, 297 (Fla. 1990)); 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."). Defense counsel clearly recognized the possibility of presenting both Dr. Krop and Dr. Rotstein in mitigation, but rejected this course of action as it would be more damaging than beneficial. Since the alternative course of action was considered and rejected, counsel cannot be considered ineffective. Valle v. State, 26

Fla.L.Weekly S46 (Fla. 2001)("This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected.")(citing Shere v. State, 742 So. 2d 215, 220 (Fla. 1999)).

Within the wide range of reasonable professional assistance, there is room for different strategies, no one of which is "correct" to the exclusion of all others. Felker v. Thomas, 52 F.3d 907 (11th Cir. 1995). Even with the benefit of hindsight in this case, it is readily apparent that counsel's decision not to present mental health testimony to the jury was a wise one. Appellant expressed a lack of remorse for his murderous conduct, confessed to having murdered a co-worker for money, and attempted to murder another woman[8], also for money. When he gunned down his co-worker, appellant claimed Miller begged for his life, saying, "'don't shoot me, don't kill me.'" (PCR-8, 1049). When asked if his cries for mercy bothered him, appellant told Dr. Rotstein: "'It didn't bother me, his begging for mercy didn't bother me.'" (PCR-8, 1049).

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[8]Appellant described for Dr. Rotstein a robbery at the Sun Bank where he shot a woman and made off with $900. Appellant said "'I shot her in the shoulder. She was in pain and screaming.'" (PCR-8, 1043). When asked if the sight and sound of the woman in agony bothered him, appellant responded: "'It did not bother me.'" (PCR-8, 1043).

In addition to a prior murder and attempted murder, a panoply of sexual misconduct might have been revealed. As noted in Dr. Rotstein's report: "It is clear that Mr. Gaskins has engaged in multiple deviant sexual behavior such as pedophilia with both males and females, exhibitionism, incest, bestiality, and violence during the sexual act." (PCR-8, 1050). Also, appellant's prior instances of animal torture would certainly be revealed as a factor which suggests that he qualifies for an antisocial personality disorder diagnosis. Significantly, Dr. Krop indicated that appellant was continuing to have homicidal thoughts. 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).

The mental health experts would also reveal damaging information about the instant offenses, including the revelation that appellant masturbated before murdering the Sturmfels, and that he thought about sexually assaulting Mrs. Sturmfel. (PCR-8, 1045-46). Indeed, appellant revealed that he placed his fingers inside Mrs. Sturmfel's vagina after she was

dead. (PCR-8, 1046). This devastating information was successfully kept from the jury during the penalty phase by the tactical decision of Mr. Cass. 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). Even now, it is clear that the damaging information which was available through the mental health experts, far outweighs the benefit of any mitigation. 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). Dr. Krop admitted that if he testified during the penalty phase he would reveal that "this multi-killer had been involved in a number of prior episodes of killing and attempting to kill people and had no remorse for those."[9] (PCR-3, 346).

[9]Also, Dr. Krop agreed that he "would have had to tell the jury that years before the incident in this case, Mr. Gaskins was stalking people, murdering them for their money, or attempting to murder them for their money[.]" (PCR-3, 338).

Appellant's attack upon the quality of the mental health assistance available to the him is without merit. Appellant claims that the only thing trial counsel did was have a "minimal look at by a single doctor, Dr. Krop, into Mr. Gaskin's background." (Appellant's Brief at 36). However, far from a minimal look, Dr. Krop was the expert who spent the most time with appellant and administered the most tests.[10] (PCR-3, 296-304). Indeed, it is apparent that Dr. Krop spent more time examining appellant than did the expert retained by collateral counsel, Dr. Toomer.

Collateral counsel quotes an isolated part of the record, noting that Dr. Krop, during a pretrial deposition, indicated that he needed additional material to be more certain of his diagnosis. (Appellant's Brief at 34-36, 38). However, appellant neglects to mention that Dr. Krop received that material in the form of background from family members. (PCR-3, 296). Further, Dr. Krop had an additional interview with appellant and conducted additional testing. (PCR-3, 310). Dr. Krop was confident enough to give a diagnosis at the time of trial to a reasonable degree of medical certainty. (PCR-3,

[10]In fact, Dr. Krop even administered a second MMPI which helped him rule out a schizophrenia diagnosis. (PCR-3, 304).

310-11). Even now, with the benefit of school records procured by post-conviction counsel, Dr. Krop testified that his diagnosis at the time of trial was accurate. (PCR-3, 310). Indeed, his diagnosis did not change at all from the time of trial with the exception of his observation that appellant suffered from a learning disability. (PCR-3, 302).

Appellant next faults trial counsel for failing to retain the Miami based Dr. Toomer, rather than the local doctors he had examine the appellant, Krop and Davis. Dr. Krop was well known by the defense bar as a mitigation specialist and had been utilized by Cass a number of times in the past. (PCR-5, 621, 673). Trial counsel was under no obligation to scour the State, shopping for the one expert who might find that both statutory mental mitigators applied. Downs v. State, 740 So. 2d 506 (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.")(emphasis added).

Based upon this record, it is extremely doubtful that a reasonably competent defense attorney would even call Dr. Toomer during the penalty phase. Presenting Dr. Toomer's testimony would reveal another murder committed by appellant, a co-worker of his at the Mill, as well as an attempted murder of another woman during an ATM machine robbery. (PCR-4, 3439). In addition, other unfavorable conduct would be revealed, such as animal torture, bestiality, and pedophilia. (PCR-4, 442-43). Thus, presenting Dr. Toomer's testimony carried the same risks as offering Dr. Rotstein and Dr. Krop.

Appellant's reliance upon this Court's decision in Rose v. State, 675 So. 2d 567 (Fla. 1996), is misplaced. Trial counsel in that case did not even investigate the defendant's mental status and failed to uncover and present a large amount of potential mitigation. Significantly, this Court noted that in Rose the testimony of Dr. Toomer regarding the statutory mental mitigators during the evidentiary hearing was largely un-impeached. The other potential mitigation included the fact that Rose grew up in poverty, that he was emotionally and physically abused throughout his childhood, that he was locked in a closet by his mother for extended periods, that he suffered severe head injury in a 30 foot fall and suffered blackouts, that he had a

learning disability, and was a chronic alcoholic. Rose, 675 So. 2d at 571.

Any additional mitigation uncovered by post-conviction counsel in this case was not nearly compelling as that presented in Rose. And, trial counsel investigated appellant's mental condition, hiring to mental health experts to examine the appellant. Appellant neglects to mention, or is simply unaware, that upon remand for presentation of the additional non-statutory and statutory mitigation discussed in Rose, the jury again recommended and the trial court once again imposed the death sentence. This sentence was affirmed on direct appeal by this Court. Rose v. State, 26 Fla.L.Weekly S210 (Fla. 2001)[Rose II]. Interestingly enough, this Court noted that the trial court correctly rejected the opinion of "Dr. Toomer" that the statutory mental mitigators applied where his testimony was successfully impeached by the State on cross-examination. Rose II, at S215.

As in Rose II, Dr. Toomer's conclusion with regard to the statutory mental mitigators in this case is less than credible. 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)). The facts of these offenses are replete with examples of deliberate, goal directed behavior. See 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). For example, appellant cut the phone lines before attacking the Rectors to prevent the victims' from calling for help. (PCR-8, 1047). And, for each set of victims' appellant took items of value, being was careful to insure that he took any items that might reveal his fingerprints. (PCR-8, 1046). Indeed, in planning his attack on the Rectors, appellant threw objects on the roof to get the male victim up so that he could get a better shot. (PCR-4, 483). Dr. Toomer's opinion to the contrary, this is hardly the conduct of an individual who was "substantially impaired" at the time of the offenses. These were carefully executed attacks upon unsuspecting victims in their own homes.

In finding that the murders of Georgette and Robert Sturmfels

were cold, calculated and premeditated, the trial court stated:

...In advance of his trip from Bunnel. to Palm Coast

> the defendant loaded his car with the .22 caliber rifle and cutters for telephone wires if needed. He actually cut the phone line at the Rector house prior to his commission of the offenses. In addition, the defendant carried and outfitted himself with gloves, a scarf, goggles, and a camouflage shirt.
>
> ...

(PCR-8, 987). And, noting that the murders and attempted murders

were committed for pecuniary gain, the court stated:

> ...After having shot and executed ROBERT and GEORGETTE STURMFELS the defendant promptly closed the curtains to the house and began to search through the pockets of ROBERT STURMFELS, drawers in all rooms of the house, closets in the bedrooms and halls of the house. The defendant literally tore th house up looking for property of value that he could take. The defendant took cash, miscellaneous jewelry, GEORGETTE STURMFELS' purse, two living room lamps, two vcr's, a grandfather type pendulum wall clock, a camera an iron, and a battery from the Sturmfels vehicle. After having transferred all the stolen property to his own car, the defendant went looking for other victims and property. Within hours of the killing of and theft from the Sturmfels the defendant went to a dwelling in the same general area and after having shot into the house and scaring the victims, the Rector's away, he entered their house and after having looked through various areas in the house stole the wallet and pants belonging to Joseph Rector and took the purse belonging to Mary N. Rector.

(PCR-8, 986).

While Dr. Toomer did find both statutory mitigators, of the four experts who examined appellant, he alone thought that appellant was schizophrenic.[11] However, Dr. Toomer

[11]While Dr. Rotstein would have found a statutory mental mitigator he did not find appellant was schizophrenic. Dr.

acknowledged that if one was strictly going by the criteria of the DSM-IV, "then you would have to go with "schizotypal." (PCR-4, 463). Dr. Toomer added, however, that the DSM was simply a "cookbook" and he makes the ultimate diagnosis, notwithstanding the criteria set forth in manual. (PCR- 4, 446). Regardless of the criteria he utilized, Dr. Toomer's opinion was thoroughly impeached on cross-examination during the evidentiary hearing. (PCR-4, 435-85).

Based upon this record, it is clear that counsel made a reasonable investigation into appellant's background, talked to family members, and hired two mental health experts. Counsel made a reasonable strategic decision not to present the mental health testimony as it would be far more damaging to the appellant than beneficial.

2) Counsel's Failure To Present Additional Lay Witnesses In Mitigation

Appellant next contends that additional lay witnesses should have been called to document his restrictive upbringing and unusual family situation. As for this aspect of appellant's claim, the trial court found that counsel's performance was not deficient:

Rotstein's report concluded: "I would have to state therefore that the information that we have does not support a diagnosis of schizophrenia" (PCR-8, 1060).

....[T]he Defendant presented testimony of friends, family members, and former teachers or administrators. This Court finds that the production of this evidence would have opened the door to damaging cross-examinations regarding the Defendant's past violent and criminal conduct. A defendant is not prejudiced by the failure to introduce this type of nonstatutory mitigation when it would have opened the door to testimony of the defendant's violent past. Asay v. State, 2000 WL 854255, p. 12 (Fla. June 29, 2000); see also Breedlove v. State, 692 So.2d 874, 877 (Fla. 1997), Brown v. State, 755 So.2d 616, 636 (Fla. 2000). In the instant case, the Defendant admitted to a previous murder in Flagler County, he admitted to an attempted murder and robbery at an ATM in Volusia County. See Transcripts, April 14, 2000, p. 393. Also, there was testimony regarding the Defendant sexually forcing himself on a six-year-old boy, the Defendant's consensual, incestuous relationships and sexual deviancy, including bestiality , the Defendant's violent attempt to sexually force himself on his former girlfriend, the Defendant's admission that he loved to kill and that he killed cats and snakes, and history of stealing at school and from his great grandparents. Id. At 453-71; see also Transcripts, April 13, 2000,. Pp. 129-32; 266-67; 335-37. In addition, counsel testified, at the evidentiary hearing, that he purposely chose not to let the Defendant's past violent and criminal conduct come out during the testimony of the penalty phase witnesses because, in his experience, a Flagler County jury would have considered the Defendant's past, including information contained in the school records, as aggravating circumstances. Id. at 392-400. This Court finds that counsel made a reasonable strategic decision not to present this nonstatutory, non-mental health mitigation. Thus, the Defendant has failed to establish the prejudice component of this ineffective assistance of counsel claim, hence, it is legally insufficient. Further, this Court also finds that this additional non-statutory mitigation would not, within a reasonable probability, "have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue in this case," i.e., conviction of prior violent felonies, commission during a robbery or burglary, CCP, and HAC

> in the murder of Georgette Sturmfels. Rutherford v. State, 727 So.2d 216, 226 (Fla. 1999); see also Gaskin, 737 So.2d at 512, fn. 1; Appendix A. Where the trial court finds substantial and compelling aggravation, such as prior violent felonies, commission during a burglary, CCP and HAC, there is no reasonable probability that the outcome would have been different had counsel presented additional mitigation evidence of the defendant's abused childhood [fn omitted] and brain damage. Asay, 2000 WL at 13; see also Breedlove, 692 So.2d at 878; Brown, 755 So.2d at 637; Robinson v. State, 707 So.2d 688, 696-97 (Fla. 1998).

(PCR-11, 1505-06).

As for the teachers, they did document that appellant had difficulty in school; that he suffered from a learning disability reflected in his poor reading scores on standardized tests. However, the teachers were also generally aware of appellant's misconduct in school, the fact that he had a history of stealing and truancy. (PCR-3, 400; PCR-5, 604-05, 606). Cass testified that appellant's problems with attendance, in particular his stealing in school would be viewed as an aggravator by a Flagler County jury. (PCR-5, 669). Cass did not want to show the jury that appellant had a criminal history from the time he was very young to the time he murdered the victims' in this case. (PCR-5, 669).

On the whole, the lay mitigation testimony presented was hardly compelling. There was additional testimony confirming that the grandparents were very strict, but it was not shown

that they were physically or even verbally abusive. (PCR-4, 537; 574-75). Appellant was not allowed beyond the house without supervision, but friends could come over and play. (PCR-4, 538-39). They were certainly poor, but appellant always had a roof over his head and was fed. (PCR-4, 580). While the grandparents were apparently not able to read and help appellant with his homework, they would apparently get people to help. (PCR-4, 528). And, the grandmother would walk appellant to school. Dr. Krop did not view appellant's home life as particularly "dysfunctional" and testified it "certainly was not abusive." (PCR-3, 318).

As noted by the trial court below, some of the information provided by the lay mitigation witnesses was not at all helpful. For example, Pamela Williams, was aware of several instances where appellant got into trouble, including the fact that he burglarized a neighbor's house and a local pawn shop. (PCR-4, 578). Janet Smith was aware that appellant stole from his grandparents. (PCR-4, 535). Smith also recalled hearing that Gaskin had tried to do something sexual to her sister. (PCR-4, 536). And, she was aware that appellant had flushed animals down a toilet. (PCR-4, 539). And, appellant's friend, Mr. Stark, testified that he and appellant would stay after school "and it got to the point where we used to engage in fights and

things like that."[12] (PCR-4, 548). Stark added that he did not believe that Gaskin was mentally ill. (PCR-4, 550).

In this case, Cass presented two family members during the penalty phase who were very familiar with appellant's home life and upbringing.[13] That additional family members could have been called is of no consequence. 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"). The trial court already found that appellant had a deprived childhood based upon the lay testimony presented during the penalty phase. The addition of a single non-statutory mitigating factor--appellant suffered from a learning disability--based upon additional lay witness testimony is hardly compelling. In Williams v. Head, 185 F.3d 1223, 1236

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[12]It is unlikely that Stark was even available to testify in 1990 as he stated he was in prison at that time in "Starke." (PCR-4, 555).

[13]During the penalty phase, Cass offered the testimony of Janet Morris and Virginia Brown. Janet Smith, then Janet Morris, was raised with the appellant in the grandparents home. She had known the appellant all of her life and was six months older than he was. (R. 972, 975). Appellant's Aunt, Virginia Brown, who saw him almost every day for three years when she lived next to the grandparents. She testified as to appellant's strict upbringing, including the fact that he had to be within calling distance of the house when he was a little kid. (R. 978). She was also familiar with appellant as an adult, that he lived with her for four months and that he worked at the Mill where he was well liked by his co-workers. (R. 980).

(11th Cir. 1999), the Eleventh Circuit addressed an 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, 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. (emphasis added).

The picture of appellant presented at trial was more favorable than the impression left after the evidentiary hearing. Counsel presented two family members who were very familiar with appellant and how he grew up to humanize appellant in the eyes of the jury. Counsel attempted to show that appellant was a good kid growing up, a good worker, and that the current criminal episode, although certainly horrendous, was an isolated episode in his life. That collateral counsel suggests to this Court that showing that appellant continues to have

homicidal thoughts, was physically and sexually abusive to animals, had a history of stealing at school, murdered a co-worker for money, attempted to murder another woman at a bank for money, in exchange for some largely non-statutory 'mitigation,' suggests that collateral counsel, unlike appellant's trial counsel, would make a poor strategic decision in this case. However, even if counsel's strategic decision is fairly debatable under the facts of this case, appellant has not carried his burden of showing his counsel's performance was deficient. 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).

3) Failure To Establish Prejudice

Assuming, arguendo, appellant established deficient performance, he certainly has not established any prejudice. This was a coldly planned and executed double murder of two people in their own home. After murdering the Sturmfels, stealing numerous items from their home, appellant went to nearby house, stalking the Rectors. Appellant shot through a window, striking Mr. Rector. The Rectors' were extremely lucky

to survive appellant's attempt to murder them, fleeing the home with appellant shooting at them. As the trial court noted below: "...[T]his Court also finds that this additional non-statutory mitigation would not, within a reasonable probability, 'have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue in this case,' i.e., conviction of prior violent felonies, commission during a robbery or burglary, CCP, and HAC in the murder of Georgette Sturmfels." (PCR-11, 1506). 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 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); Porter v. State, 26 Fla.L.Weekly S321 (Fla. 2001)(additional

mitigation of history of alcohol abuse, abusive childhood, and defendant's military history would not make a difference in the sentence where the murders committed were "cold, calculated, and highly premeditated.").

B. Counsel's Alleged Failure To Provide Mental Health Experts With Sufficient Background Information

Collateral counsel asserts that the failure to provide Dr. Krop with background materials prevented counsel from presenting any mental health mitigation to the jury. (Appellant's Brief at 55). Appellant's argument on appeal is devoid of any merit.

The trial court denied this claim below, stating, in part:

> ...At the evidentiary hearing, Dr. Krop explained that it was just during the June 4, 1990 deposition that he felt he could not testify to a reasonable degree of psychological certainty, however, after he saw the Defendant a second time, on June 8, 1990, he would have been able to testify to a reasonable degree of certainty to his original diagnosis.[noted omitted]. Id. at 34-36; 41. Dr. Krop also testified that his diagnosis of the Defendant would be the same as it was originally on June 8, 1990, only four (4) days after his deposition, with the addition of the opinion that the Defendant suffers from a learning disability, attention deficit disorder, based on the school records. [note omitted]. Id. at 34; 41-42; 55; 78; 80-81. This Court finds that the Defendant has failed to establish any actual prejudice from counsel failing to provide Dr. Krop with the school records. In light of Dr. Krop's postconviction testimony, there is not a reasonable probability that Dr. Krop's diagnosis would have been different; it was the same with only one minor addition-a learning disability, a nonstatutory mitigator. See also Asay, 2000 WL at 12 (a defendant is not prejudiced by the failure to introduce this type of non-statutory mitigation when it would have opened the door to the defendant's

> violent past); Breedlove, 692 So.2d at 877 (same); Brown, 755 So.2d at 636 (same); see also Claims III and V, supra (analysis of no prejudice where nonstatutory mitigators open door to the Defendant's violent past). Thus, this claim is legally insufficient.
>
> Further, although the Florida Supreme Court rejected the Defendant's Claim XIX, i.e., he received an inadequate or incompetent mental evaluation because insufficient background information was provided by counsel, the Court stated that the Defendant would have a full opportunity to address this claim at the evidentiary hearing. Gaskin, 737 So.2d at 516, fb, 13. As stated previously, the Defendant did not present any evidence that showed any inadequacy or incompetency of Dr. Krop's, Dr. Davis', or the State's expert, Dr. Rotstein's, evaluations. Moreover, the evaluation done by Dr. Krop (or the other doctors) is not rendered inadequate or incompetent simply because the Defendant has now been able to provide Dr. Toomer's testimony to conflict with that presented by Dr. Krop (or the other doctors). See Asay 2000 WL at 9; Jones, 732 So.2d at 320; Rose, 617 So.2d at 294; Correll v. Dugger, 558 So.2d 422, 426 (Fla. 1990)(mental health examination is not inadequate simply because defendant is later able to find experts to testify favorably based on similar evidence). Thus, this Court also finds that the Defendant was not denied a competent mental health evaluation.

(Order at 11-12).

The State can add little to the detailed analysis of the trial court below. However, the State notes that while collateral counsel repeatedly refers to additional lay witness testimony that collateral counsel was able to present during the evidentiary hearing, he completely fails to tie that material to any deficiency in Dr. Krop's or Dr. Davis' diagnosis. Dr. Krop testified that his request of Mr. Cass for some background

information from people who knew the appellant was complied with. (PCR-3, 296). After the additional information was received, Dr. Krop conducted additional testing of the appellant, including a comprehensive battery of sexual testing. (PCR-3, 304). Only appellant's school records were not received by Dr. Krop at the time of trial. (PCR-3, 301). The one and only change in Dr. Krop's diagnosis based upon review of these records would be the addition of a learning disorder. (PCR-3, 302). Otherwise, Dr. Krop's opinion of appellant's mental condition in general and on the evening of the charged offenses did not change.

Collateral counsel briefly mentions that the experts were unable to explore appellant's "brain damage" because of an inadequate investigation into appellant's background. (Appellant's Brief at 55). However, as the trial court noted below, appellant presented no evidence to support his assertion of brain damage:

> Moreover, specifically addressing the Defendant's claim of organic brain damage, this Court also finds that the Defendant has failed to show any actual prejudice. Dr. Krop testified, at the evidentiary hearing, that he suggested during his June 4, 1990 deposition, a neuropsychological evaluation (which was never given in 1990) to be done on the Defendant only because of the fact revealed by the family members that the Defendant fell off his bike during his youth; the Defendant did not give Dr. Krop any indication from the interview and evaluation that he may have organic brain damage. See Transcripts, April 13,

> 2000, pp. 45-46; 82-85; 102-04. However, Dr. Krop tested the Defendant for neuropsychological functioning impairment, on April 6, 2000, using the tests available in 1990, and Dr. Krop concluded that the Defendant had no significant impairment. [f.n. omitted]. Id. at 85; 102-04. As such, this claim is conclusively refuted.

(PCR-11, 1510-11).

Dr. Krop testified at the evidentiary hearing that he originally thought that some neurological testing might be beneficial, but the testing he conducted revealed that "there was no significant impairment in neuropsychological functioning." (PCR-3, 354). And, interestingly enough, collateral counsel below apparently chose not to have Dr. Toomer explore the possibility that appellant suffered brain damage. (PCR-4, 466-67). Thus, appellant's cryptic argument that mental health experts were unable to explain Gaskin's "brain damage" due to counsel's ineffective assistance is conclusively refuted by the record.

In this case, Mr. Cass successfully had two mental health experts appointed.[14] They conducted comprehensive testing of the

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[14]Again, the failure to hire the Miami based Dr. Toomer does not establish that Mr. Cass was ineffective. This Court in Porter v. State, 26 Fla. L. Weekly S321 (Fla. May 3, 2001) stated: "Moreover, we have held that merely because a defendant presents a new expert who has evaluated a defendant after trial and who renders a different opinion than prior experts that does not by itself render inadequate a prior thorough examination.")(citing Engle v. Dugger, 576 So. 2d 696 (Fla. 1991)).

appellant and rendered reports and opinions to counsel based upon the testing and background information provided by family members. The only material requested by Dr. Krop but not received was appellant's school records which revealed a learning disability.[15] As noted above, a competent defense attorney would not present expert testimony for the addition of a non-statutory mitigating circumstance, a learning disability, when such testimony would reveal a panoply of additional violent conduct of the appellant, including a prior murder and attempted murder. The trial court's order denying this claim is well supported by the record and should be affirmed on appeal.

C. Trial Counsel's Asserted Failure To Argue The Aggravating And Mitigating Circumstances In Closing Argument

Appellant finally asserts that his trial counsel was ineffective for making a brief closing argument during the penalty phase. Specifically, appellant asserts that trial counsel failed to argue the aggravating or mitigating circumstances. Appellant's Brief at 58-62. Appellant's argument is devoid of any merit.

The trial court denied this claim below, stating, in part:

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[15]Dr. Toomer's more favorable diagnosis regarding the statutory mitigators does not suggest that the evaluations which were conducted were inadequate. As noted above, that counsel is able to procure an expert to give a more favorable opinion is of no consequence.

The Defendant alleges that counsel limited his brief appeal, approximately six (6) pages of trial transcripts, to the jury that his life should be spared because the times have changed for the worse since World War II, that legal killing results in the "dehumanization of humanity," and that the jury should strive for a more peaceful society by recommending life. Gaskin, 737 So.2d at 515. At the evidentiary hearing, counsel testified that he was not sure why he did not address the statutory aggravators or mitigators in closing argument. See Transcripts, April 14, 2000, p. 373. In the instant case, the State's closing argument was also brief, approximately eight (8) pages of trial transcripts. See Transcripts, June 18, 1990, pp. 36-43, *attached hereto* as Appendix C. During the State's closing, the State addressed each of the statutory aggravators, but also addressed the issue of the sanctity of human life in light of recommending death. Id. at 42-43. During counsel's closing argument, counsel briefly touched on some of the statutory aggravators, however, it appeared he did not want to argue or second guess the jury's verdicts. See Transcripts, June 18, 1990, pp. 43-44, *attached hereto as* Appendix D. Counsel also addressed two mitigators: the Defendant's age and anything found in the character of the Defendant. Id. at 44-45. Counsel further alluded to the Defendant's mental state, as a sociopath or a person that does not care for himself, however, counsel conceded there was no evidence in the record that the Defendant was a sociopath. Id. at 44. Counsel explained that there was evidence of the Defendant's restrictive childhood, and how the Defendant, as a child, would be left only to his fantasies. Id. at 45. Counsel also opined that the Defendant actually acted out and lived the Ninja fantasy resulting in a horrible tragedy. Id. Then, for approximately two and one-half (2 ½) pages, counsel appeals to the jury regarding the "dehumanization of humanity" and sparing the Defendant's life. Id. at 45-48.

This Court finds that, in light of counsel's reasonable strategy to keep out the Defendant's past violent and criminal conduct, sexual deviancy, and lack of remorse by not presenting extensive mitigation evidence, and in light of the State's closing

> argument, as well as the evidence presented regarding the manner in which the murders were committed, counsel's performance during closing argument was not deficient. See Appendices A, C, & D. Counsel argued the two mitigators which could be found from the mitigation evidence that was presented during the penalty phase. Counsel addressed some of the aggravators, but did not argue them extensively in order not to second guess the jury's verdicts. Finally, counsel replied and expanded on the State's opening the door to the sanctity of human life issue. Further, this Court finds that there is not a reasonable probability that the outcome of the penalty phase proceeding would have been different if counsel, during closing argument, would have fully addressed all of the statutory aggravators and stated more regarding the mitigating evidence that was presented, especially in light of the compelling and substantial aggravators proven beyond a reasonable doubt, i.e. prior violent felonies, commission during a robbery or burglary, CCP, and HAC. See also Asay, 2000 WL at 13; Breedlove, 692 So.2d at 878; Brown, 755 So.2d at 637; Robinson, 707 So.2d at 696-97. Therefore, this claim is legally insufficient.

(Order Denying at 13-14).

Once again, the State can add little to the trial court's detailed order denying relief on this claim. The State notes, however, that appellant fails to show what compelling argument was available to counsel regarding the mitigators and, in particular, the aggravating circumstances. Certainly, trial counsel would not want to argue the aggravating circumstances, reminding the jury again of the horrible crimes for which they had convicted the appellant. Appellant fails to suggest an alternative closing argument that would have resulted in a life recommendation under the facts of this case. See Griffin v.

Delo, 33 F.3d 895, 903 (8th Cir. 1994)("We agree with the district court that there is no reason to conclude that a longer or more passionate closing argument would have resulted in an alternative sentence or that the brief dispassionate argument undermined the reliability of the jury's sentence of death.").

The State submits that argument during the penalty phase is uniquely a matter of trial strategy and tactics. Making a simple plea for mercy and reminding the jury that it was wrong to take a human life under any circumstances was certainly a reasonable argument under the circumstances of this case. See generally Eddmonds v. Peters, 93 F.3d 1307, 1322 (7th Cir. 1996)("Counsel's plea for mercy centered on the one thing in Eddmond's favor: that he never had a specific intent to kill Richard--it was an accident. A strategic decision not to clutter such a plea with a series of excuses based on a tough childhood and ambiguous claims of mental illness was not incompetence."). Given the horrendous facts of this case, the fact the jury's vote was only 8 to 4 in favor of death is a testament to the effectiveness of trial counsel's argument. It must be remembered that appellant murdered a couple in their own home and immediately afterward attempted to murder another couple, also in their own home. One might expect such

unfavorable facts as these to result in a unanimous or near unanimous verdict in favor of the death penalty. It is apparent that the experienced capital defense counsel made the best argument available in this case.

Based upon this record, appellant has not carried his burden of establishing either deficient performance or resulting prejudice. Accordingly, the trial court's order denying relief must be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's ruling denying appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
813) 801-0600
813) 356-1292 (Fax)

COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Dwight M. Wells, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this _____ day of July, 2001.

_____
COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR STATE OF FLORIDA