IN THE SUPREME COURT OF FLORIDA

JOHN C. MARQUARD,

Appellant,

v. **CASE NO. SC00-253**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Marquard was convicted of the first-degree murder of Stacey Willets and sentenced to death for that offense on February 5, 1993. Marquard appealed his conviction and sentence to the Florida Supreme Court, and, on June 9,1994, this Court affirmed the conviction and sentence. *Marquard v. State,* 641 So.2d 542 (Fla. 1994). The United States Supreme Court denied *certiorari* on January 23, 1995. *Marquard v. Florida,* 115 S.Ct. 946 (1995).

On March 26, 1997, Marquard filed a "Motion to Vacate Judgment of Convictions and Sentencing with Special Request for Leave to Amend". (R1). Various requests for production of documents pursuant to Section 119 of the *Florida Statutes* were filed, and, on February 22, 1999, Marquard filed his "Amended Motion to Vacate Judgment of Convictions and Sentence with Special Request for Leave to Amend." (R443). The State filed an answer to the amended motion on May 10, 1999. (R577). On May 21, 1999, the St. John's County Circuit Court entered an order on the amended motion which found certain claims procedurally barred, and granted an evidentiary hearing on claims one and two of the amended motion. (R585).[1] The evidentiary hearing was rescheduled, on Marquard's motion, for November 16, 1999. (R585).

On October 6, 1999, Marquard filed a motion to disqualify the

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[1] That hearing was originally scheduled for August 17, 1999. It did not go forward on that date.

Office of the State Attorney for the Seventh Judicial Circuit from participation in this case. (R598). That motion was denied on November 3, 1999. (R639). The evidentiary hearing proceeded as scheduled on November 16, 1999. (R1078). On that same day, Marquard filed another "Amended Motion to Vacate Judgment and Sentence with Request to Amend." (R647).

On December 16, 1999, Marquard filed yet another "Amended Motion to Vacate Judgment Convictions and Sentence with Special Request for Leave to Amend." (R664). On December 22, 1999, the Circuit Court entered an order denying relief on Marquard's post-conviction motion, but specifically reserving jurisdiction on the claim that Marquard's death sentence was disproportionate. (R727). Notice of appeal was filed on January 19, 2000. (R1054). The record was certified as complete and transmitted on March 24, 2000. Marquard's *Initial Brief* was filed on July 27, 2000. The matter was remanded to the Circuit Court for consideration of the proportionality issue, and, on October 27, 2000, the Court issued its order denying relief on that claim. (Supp. R. 183-184). A supplemental record was prepared, and, on April 4, 2001, Marquard's supplemental brief was received by the State.

STATEMENT OF THE FACTS

THE FACTS FROM TRIAL

On direct appeal from Marquard's conviction and sentence of death, this Court summarized the facts in the following way:

John Marquard, Mike Abshire, and the victim, Stacey Willets, decided to move from North Carolina to Florida in June 1991 using Stacey's car and sharing expenses. Prior to leaving, Marquard and Abshire discussed killing Stacey for her car and money, and during a stop in South Carolina Marquard told Abshire that he was going to kill her because he was tired of arguing with her. In St. Augustine, Marquard and Abshire formulated a plot to kill Stacey that night after luring her into the woods.

Marquard and Abshire invited Stacey to attend a party, drove her to a deserted area, and walked her into the woods. Marquard grabbed her from behind, stabbed her, threw her to the ground, and sat on her back. She was still breathing, so Marquard held her head under the rainwater that had accumulated in a puddle until she stopped breathing. When her body convulsed, he held her head underwater again. Abshire then stabbed her and the two tried to decapitate her. Marquard was arrested and confessed, saying he remembered walking into the woods with Stacey and standing over her body with a knife in hand. Abshire testified at trial, giving a detailed account of the murder.

Marquard was convicted of first-degree murder and armed robbery. The State put on a single witness to establish aggravation during the penalty phase -- a parole officer who testified that Marquard was on parole in North Carolina at the time of the killing. Marquard called Dr. Harry Krop to establish mitigation, and Dr. Krop testified extensively concerning Marquard's deprived childhood and present psychological state. The State put on its own mental health expert, Dr. Merwin, in rebuttal. The jury recommended death by a twelve-to-zero vote, and the court imposed death, finding four aggravating circumstances (FN1) and a number of nonstatutory mitigating factors. (FN2) The court imposed a consecutive life term for the armed robbery conviction. Marquard appeals his convictions and death sentence, raising twelve issues. (FN3)

FN1. The judge found that the murder was committed while Marquard was under sentence of imprisonment; was committed during the course of a robbery; was especially heinous, atrocious, or cruel; and was cold, calculated, and premeditated.

FN2. The judge made the following findings:

> The Court finds the Defendant had an unstable family life as a child and lacked the emotional support and care he should have received.
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> ....
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> The Court finds that Defendant suffers from either a personality disorder not otherwise specified or an antisocial personality There is not much difference between the two. The Court further finds Defendant did not have a stable home, but had divorced parents and an alcoholic mother with whom he lived. He had a difficult childhood. He may have been sexually abused on one occasion. Defendant used various drugs and alcohol, however, there is no evidence that use of those had anything whatsoever to do with the commission of the murder.

FN3. Marquard claims the trial court erred in ruling on the following matters: 1) excusing for cause a death-qualified venireperson; 2) refusing to suppress knives and camouflage pants; 3) permitting the State to introduce evidence of Marquard's talk of how to kill people with knives and how to make a "silent kill;" 4) denying defense request for judgment of acquittal on the armed robbery count; 5) refusing to allow defense counsel to argue to the jury concerning the consequences of life imprisonment; 6) permitting cross-exam into Marquard's criminal history during the penalty phase; 7) in instructing on and finding the aggravating circumstance of commission while under sentence of imprisonment; 8) in instructing on and finding that the murder was especially heinous, atrocious, or cruel; 9) in finding that the murder was for pecuniary gain; 10) in finding that the murder was cold, calculated, and premeditated; 11) the cumulative effect of numerous minor errors; 12) the constitutionality of the death penalty scheme.

Marquard v. State, 641 So.2d 54, 55-56 (Fla. 1994).

THE EVIDENTIARY HEARING FACTS

At the evidentiary hearing conducted in the Circuit Court of St. John’s County, the following evidence was presented.

Mariah Harrelson lives in Wilmington, North Carolina, and runs a foster home where Marquard stayed when he was 12 -13 years of age. (R11-13). She testified that Marquard received no therapy in her home -- she also testified that he got along well with the other children in her care, that she had no problems with him, and that he was "bashful and shy." (R13-14). She described an incident in which Marquard stole a bicycle and traveled a distance of some 55 miles to visit his father. (R16). She also testified that the other residents of her foster care facility did not manipulate Marquard into doing things that he did not want to do, and that he knew right from wrong. (R19).

Michael Abshire, Marquard's co-perpetrator, testified that he and Marquard had been friends since late 1988 or early 1989. (R21). Their relationship started out as "Dungeons and Dragons buddies" and led to them becoming "inseparable". (R22). Abshire testified that he and Marquard took ephedrine and LSD, smoked marijuana, and drank beer and liquor. (R23-24).[2] Abshire testified that he used a knife on the victim "like chopping wood" because he thought she might still be alive and he didn't want her to "hurt anymore". (R35-6). Abshire does not recall his trial testimony that Marquard asked for a room for two at "Miss Rose's"[3], nor does he recall his

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[2] According to Abshire, ephedrine is an over-the-counter substance that is also known by the name "white crosses". (R25).

[3] "Miss Rose's" is a boarding house where Marquard and Abshire obtained a room for two people **before** the victim was killed. (TR

trial testimony concerning the amount of alcohol he and Marquard consumed on the night of the murder. (R42-3). Marquard was driving on the night of the murder, and, despite his consumption of alcohol, safely drove to and from the murder scene in a severe rainstorm. (R44; 48). Abshire testified that he did not force Marquard into the woods where the victim was killed, nor did he direct or force Marquard to stab the victim. (R47). The victim's throat had been cut **before** Abshire hacked at her neck, and, after the victim was dead, Marquard concealed the body, and then washed his clothes and otherwise cleaned up in order to conceal the murder. (R45; 47; 49).

Eric Wallen met Marquard in 1985/1986 when Marquard stayed with Wallen's family in St. Augustine. (R55-56).[4] At this time, Wallen was 15, and Marquard was 17. (R56-57). Wallen and Marquard "hung out" together, and alcohol and drug use were a "daily ritual". (R57). Wallen testified that Marquard was "easily led". (R60). Wallen also knows Abshire from being incarcerated with him -- he described Abshire as being "fairly explosive". (R61). Wallen also testified that Marquard knew right from wrong, and that he would refuse to go along with things that Wallen suggested that

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[4] Wallen met Marquard through the intervention of Father Baker, who apparently attempted to place juveniles with families. (R56). The precise nature of these activities was not developed in the record.

they do. (R67).

Rebecca Marquard Hicks is the defendant's older sister. (R73) She described Marquard's family circumstances up until the time that she, her sister, and her father left the household[5]. (R74-79). Ms. Hicks did not ever seeing her mother beat the defendant, and testified that Marquard went to prison for sexually battering his other sister's child. (R94).

Garry Wood was, at the time of Marquard's capital trial, an Assistant Public Defender for the Seventh Judicial Circuit. (R101-102). Mr. Wood received his law degree in 1986, and began working in the felony division the Public Defender's Office in January of 1989. (R102-104).[6] At the time of Marquard's trial, Mr. Wood had tried 75 jury trials. (R104). Marquard's case was the first death penalty case that Mr. Wood actually tried, and he was responsible for the guilt phase of the trial. (R105).[7] Mr. Wood described the penalty phase strategy, and testified that he was aware of Marquard's unstable childhood and history of substance abuse. (R108-109). Mr. Wood testified that he and Mr. Pearl had many records concerning Marquard, and that those records were given to

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[5] Marquard was five or six years old when Ms. Hicks left the household. (R74).

[6] Mr. Wood's initial assignment in the Public Defender's Office was in the felony division. (R104).

[7] Assistant Public Defender Howard Pearl was responsible for the penalty phase of Marquard's case. Mr. Pearl is deceased. (R106).

Dr. Harry Krop, who also had the entire "trial file" as well as the transcript of co-defendant Abshire's trial. (R110-111).[8] The records about Marquard contained a "rich history" of Marquard's various problems. (R112). Mr. Wood knew that Marquard had previously lived in St. John's County in connection with Father Baker, and tried unsuccessfully to contact Father Baker. (R113; 115). Mr. Wood knows Harrison and Blanks, and would never call either one of them as a witness because they have no credibility. (R119-120).[9] The statements given by Harrison and Blanks did not show Marquard's innocence, would not shift blame to Abshire, and, moreover, Mr. Wood felt that Harrison would be uncontrollable on the witness stand. (R121-123). Mr. Wood testified that Harrison's testimony in **Abshire's** trial would not have been admissible in Marquard's trial, would not play well with the jury, and, in any event, still implicated Marquard and would not have helped at the penalty phase of his trial, either. (R128). There would have been no basis to object to the use of a model of a human skeleton as a demonstrative aid, nor would there have been a basis to object to certain bones, which were introduced into evidence, going back to the jury room. (R129-130).

The penalty phase strategy, which Mr. Pearl had used before,

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[8] Dr. Krop is a psychologist who was, and is, well-known to the Public Defender's Office. (R156).

[9] Harrison and Blanks are "uncalled witnesses" that Marquard now alleges counsel was ineffective for not using at trial.

was to provide all information possible to Dr. Krop so that he could place that information in the mental health context for the jury. (R134-135). The defense did not want to emphasize the graphic details of the murder during *voir dire*, and, during the course of trial, did not observe the jurors to have emotional difficulty with the evidence. (R146-147). Mr. Wood and Mr. Pearl did not want to use Harrison as a witness because of their experience with his credibility, and, moreover, had no legal basis for ethically alleging that he was unavailable -- therefore, they had no basis for attempting to use his deposition testimony, which would not have been something they would have done, anyway. (R148). Defense counsel did not want to take a chance with Harrison, and, in any event, his statement did not help Marquard because it showed his involvement. (R150-151).[10] Mr. Wood testified that he did not contact that many people about Marquard because they had so much objective information about him in the form of objective reports. (R152). Dr. Krop never complained about the amount of information he had available to him, and, based upon past experience with Dr. Krop, Mr. Wood believed he would have done so if he felt he needed more information. (R152; 156-159). Nothing contained in those records was inconsistent with what Marquard revealed about his background and early life. (R159).

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[10] Marquard and Abshire wanted the victim's head for a souvenir. (R149).

Hobart Harrison has been convicted of three felonies, and is incarcerated following conviction for second-degree murder. (R166). He testified that, had he been called to testify at Marquard's capital trial, he would have done so because Abshire, not Marquard, committed the murder. (R161). Marquard's defense counsel, Wood, was present when Harrison's deposition was taken -- Harrison stated, in his deposition, that he did not know if Abshire's statement to him about the murder was true, and, moreover, Harrison admitted that he does not like Abshire and thought that he was trying to demonstrate how tough he was. (R165-66).

Michael Amiel is a psychiatrist in private practice in Gainesville, Florida. (R169-70). He interviewed Marquard on three occasions, reviewed various records and transcripts, and relied upon the psychological testing conducted by Dr. Krop -- Dr. Amiel agrees with Dr. Krop's diagnosis of chronic depression and a personality disorder, and suggested the **possibility** of a psychogenic amnestic period as an explanation for Marquard's lack of memory of the murder. (R180-85). Dr. Amiel testified that he cannot think of anything that Dr. Krop should have done that he didn't do. (R192).

Dr. Barry Crown is a psychologist who also evaluated Marquard. (R195; 200). He testified that Marquard has a "significant thought disorder"[11] and a "specific auditory processing deficit". (R202-3).

[11] Dr. Crown never identified what this thought disorder was.

Dr. Crown is not diagnosing Marquard as a schizophrenic, and specifically testified that Marquard is not insane. (R215-217)[12].

Cheryl Furtick is a social worker employed by the South Carolina Department of Mental Health. (R219). She was retained to conduct a psycho-social assessment in the case. (R221; 228). She testified that Dr. Krop did a good job, but that he omitted the details of how Marquard "got where he is". (R237). The psycho-social history that she prepared is more detailed and involved than the one done by Dr. Krop. (R251).

Roger Marquard is the defendant's father. (R253). When Marquard was born, his father was a member of the United States Air Force, and, as such, was overseas for various periods of time. (R254). As far as Mr. Marquard knows, his son never sustained a head injury. (R255). He testified that he did not abandon Marquard in the divorce, and that Marquard's mother disappeared with him before he could seek custody. (R255). Ultimately, he obtained custody of Marquard -- while he had problems, he did not have a mental defect. (R258). Mr. Marquard testified that his wife (defendant's mother) was not drinking or using drugs while pregnant with the defendant. (R262).[13] Mr. Marquard testified that, while the

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[12] Marquard's assertion in his brief that Dr. Crown diagnosed him as a schizophrenic is incorrect.

[13] This testimony renders Dr. Crown's criticism of Dr. Krop's treatment of the fetal alcohol syndrome issue meaningless. Obviously, if Marquard's mother was not drinking while pregnant with him, fetal alcohol syndrome is a non-issue.

family life was essentially normal before the divorce, Marquard had a deprived childhood after his parents separated[14]. (R261; 264). Mr. Marquard testified that he tried to teach his son right from wrong. (R265).

I. THE PROPORTIONALITY CLAIM[15]

On pages 1-30 of his supplemental initial brief, Marquard argues that his death sentence is disproportionate because his co-perpetrator, Abshire, was sentenced to life in prison following his re-trial. The collateral proceeding trial court denied relief on this claim following remand, and that disposition is correct and should be denied in all respects.

In denying relief on the proportionality claim, the collateral proceeding trial court stated:

> The defendant, John C. Marquard, was, in fact, the dominant person in this entire course of events. It was John C. Marquard who made the decision that they should kill Stacey Willets. John Marquard drove Willets and Abshire to the wooded area, where they eventually took her life. Marquard took both individuals through the woods to the eventual location, where he caused the death of Stacey Willets. The defendant, John Marquard, was the individual who had the knife, who cut Stacey Willets

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[14] Mr. Marquard testified that his ex-wife was abusive to their two daughters, but not toward the defendant. (R268).

[15] In the supplemental initial brief, Marquard states that that brief supplements arguments I and II of his initial brief. If that is the case, Marquard is increasing the length of his brief to 130 pages. Likewise, Marquard has defied this Court's rulings with respect to the "supplementation of the record" by attaching as exhibits documents from the co-defendant's trial. This Court denied Marquard's motion to include such documents on February 5, 2001, as well as on August 22, 2000.

> throat, and attempted to decapitate her, and who then handed the knife to his co-defendant, Michael Abshire, and ordered him to stab the victim. The Court finds that Michael Abshire had no intention to kill the victim, and was merely an accomplice. The Court further finds that Abshire was acting [under] the substantial domination and extreme duress from the defendant Marquard. The Court further finds that the defendant Abshire showed considerable remorse after the crime was committed. The Court finds that the totality of the aggravating circumstances, in the case of John C. Marquard, far out weighs the mitigating circumstances, which were found by the trial and sentencing court. The Court further finds that based on the totality of the circumstances in the case, that the defendant's sentence of death was, in fact, proportional.

(Supp. R. 183-184). That disposition of the issue is supported by the record, is not clearly erroneous, and should not be disturbed.

Florida death penalty law is clear that insofar as the proportionality analysis in concerned:

> Nor do we find the death penalty in this case to constitute a disproportionate sentence even though two of the State's key witnesses were apparently not prosecuted despite their involvement in this crime and even though Jason was acquitted. When a codefendant (or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate. *Downs v. State*, 572 So.2d 895 (Fla. 1990), *cert. denied*, 502 U.S. 829, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991); *Slater v. State*, 316 So.2d 539 (Fla.1975). Thus, an equally or more culpable codefendant's sentence is relevant to a proportionality analysis. *Cardona v. State*, 641 So.2d 361 (Fla. 1994), *cert. denied*, 513 U.S. 1160, 115 S.Ct. 1122, 130 L.Ed.2d 1085 (1995). Disparate treatment of a codefendant, however, is justified when the defendant is the more culpable participant in the crime. *Hayes v. State*, 581 So.2d 121 (Fla.), *cert. denied*, 502 U.S. 972, 112 S.Ct. 450, 116 L.Ed.2d 468 (1991).

Larzelere v. State, 676 So.2d 394, 406-7 (Fla. 1996). In a

recently-decided case, this Court stated:

> Sexton's death sentence is proportionate to other cases where "masterminds" have been sentenced to death, even though they did not actually commit the murder. *See Larzelere*, 676 So.2d at 407; *Fotopoulos v. State*, 608 So.2d 784, 792-94 (Fla. 1992).

Sexton v. State, 2000 WL 1508567 (Fla. 2000). Likewise, as this Court pointed out in *Sexton,* "A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence." *Puccio v. State*, 701 So.2d 858, 860 (Fla. 1997). *Sexton v. State, supra.* Finally, as this Court has emphasized:

> Where the circumstances indicate that the defendant is more culpable than a codefendant, disparate treatment is not impermissible despite the fact the codefendant received a lighter sentence for his participation in the same crime. *See Howell v. State*, 707 So.2d 674, 682 (Fla.), *cert. denied,* 524 U.S. 958, 118 S.Ct. 2381, 141 L.Ed.2d 747 (1998); *Raleigh v. State*, 705 So.2d 1324, 1331 (Fla. 1997), *cert. denied*, 525 U.S. 841, 119 S.Ct. 105, 142 L.Ed.2d 84 (1998); *Sliney v. State*, 699 So.2d 662, 672 (Fla. 1997), *cert. denied*, 522 U.S. 1129, 118 S.Ct. 1079, 140 L.Ed.2d 137 (1998); *Heath v. State*, 648 So.2d 660, 665-66 (Fla. 1994).

Brown v. State, 721 So.2d 274, 282 (Fla. 1998); *see also, Howell v. State,* 707 So.2d 674, 683 (Fla. 1998) ("Based on the evidence presented regarding Howell's greater culpability in the murder as compared to his codefendants, we find that his death sentence is proportional. The evidence fully supports the trial court's conclusion that the evidence in mitigation pales 'into insignificance when considering the enormity of the proved

aggravating factors weighed against the want of mitigating circumstances and compels the sentence in accordance with the recommendation of the jury.'").

The collateral proceeding trial court's findings with respect to the relative culpability of Marquard and Abshire is supported by the record, and should not be disturbed. The denial of relief should be affirmed in all respects.

To the extent that further discussion of this claim is necessary, the "recantation" component of Marquard's claim is addressed in Claim II, below, and is meritless for the reasons set out therein. In the final analysis, Marquard's claim is nothing more than his continuing agreement with the sentence imposed on him for this offense. However, his sentence of death is supported by the record, and is not disproportionate because, as the court's findings make clear, Marquard was the most culpable of the two perpetrators. Because that is so, death is the proper sentence.

II. THE CLAIM OF DISPROPORTIONALITY BASED UPON THE TESTIMONY OF THE CO-PERPETRATOR

On pages 28-36 of his brief, Marquard alleges that the testimony of his co-perpetrator at the evidentiary hearing is "newly discovered evidence" which results in his death sentence being "disproportionate". The collateral proceeding trial court rejected this claim, and that disposition should be affirmed in all respects.

In rejecting Marquard's "newly discovered evidence" claim, the

collateral proceeding trial court stated:

> The Defendant has also filed a Motion to Amend Pleadings to conform with the evidence which alleges that the new version of events, testified to by co-defendant Abshire at the evidentiary hearing, is newly discovered evidence and therefore trial counsel was ineffective in failing to discover and introduce this evidence. **The Court finds that this is not newly discovered evidence, this is simply the latest version of the events surrounding the homicide which is in direct conflict with Abshire's prior testimony and other evidence presented at the Defendant's trial**. Therefore, there is no probability there would have been a different result at trial.

(R734). [emphasis added]. In effect, Abshire's testimony at the evidentiary hearing was, arguably, a partial recantation of his trial testimony. Of course, recanted testimony is viewed, rightly, by the Courts with extreme suspicion and is, by definition, exceedingly unreliable. *See State v. Spaziano,* 692 So.2d 174 (Fla. 1997); *Armstrong v. State*, 642 So.2d 730 (Fla. 1994). Further, by definition, recanted testimony presents a credibility choice for the finder of fact. In this case, the Court resolved that credibility choice adversely to Marquard. That determination is not an abuse of discretion, and should not be disturbed.

In discussing the proper evaluation of recanted testimony, this Court stated:

> In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the issue. *Armstrong v. State*, 642 So.2d 730 (Fla. 1994); *Bell v. State*, 90 So.2d 704 (Fla. 1956). **Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not**

> **satisfied that such testimony is true**. Especially is this true where the recantation involves a confession of perjury. *Id.* at 705; *Henderson v. State, supra.*

State v. Spaziano, 692 So.2d at 177. [emphasis added]. This Court stated the standard of review of such testimony in the following way:

> Many years ago, in *Henderson*, we wrote:
>
> > A motion for a new trial is addressed to the sound judicial discretion of the trial court, and the presumption is that [it] exercised that discretion properly. And the general rule is that unless it clearly appears that the trial court abused its discretion, the action of the trial court will not be disturbed by the appellate court.
>
> *Henderson*, 135 Fla. at 562, 185 So. at 630 (Brown, J., concurring specially, with Terrell, C.J., and Whitfield and Chapman, JJ., concurring). This Court has continually reaffirmed that view. *Jent v. State*, 408 So.2d 1024, 1031 (Fla. 1981); *Baker v. State*, 336 So.2d 364, 370 (Fla. 1976). This rule is neither new nor unusual. It has been repeatedly applied and fully explained in our civil cases. *See generally Poole v. Veterans Auto Sales & Leasing Co.*, 668 So.2d 189, 191 (Fla. 1996); *Ford Motor Co. v. Kikis*, 401 So.2d 1341, 1342 (Fla. 1981); *Castlewood Int'l Corp. v. LaFleur*, 322 So.2d 520, 522 (Fla. 1975).[footnote omitted].

State v. Spaziano, 692 So.2d at 177-178. The trial court was in the best position to evaluate the credibility of the witnesses, and there is clearly evidence in the record to support the trial judge's ruling. There has been no showing of an abuse of discretion, and, in the absence of such, there is no basis for reversal.

III. THE INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL CLAIM

On pages 36-67 of his brief, Marquard raises a two-part ineffective assistance of counsel claim which challenges the penalty phase performance of trial counsel. This claim for relief, which was contained in Marquard's motion as Claim II and was properly denied by the trial court, is not a basis for reversal.

Under well-settled law, a petitioner alleging a basis for relief predicated upon ineffective assistance of counsel must establish that the performance of his counsel was deficient (below an objective standard of reasonableness) **and** that the petitioner was prejudiced as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984). The Eleventh Circuit Court of Appeals has stated, in the ineffective assistance of counsel context:

> "[b]ecause constitutionally acceptable performance is not narrowly defined, but instead encompasses a 'wide range,' a petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden." *Waters v. Thomas,* 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc). That is why "'the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between,'" *id.* at 1511 (*quoting Rogers v. Zant,* 13 F.3d 384, 386 (11th Cir. 1994)), and "[c]ases in which deliberate strategic decisions have been found to constitute ineffective assistance are even fewer and farther between." *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994).

Williams v. Head, 185 F.3d 1223, 1227 (11th Cir. 1999). With respect to the performance expected of counsel:

> The test for ineffectiveness is not whether counsel could have done more; perfection is not required. E.g., *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir. 1992) ("Trial counsel did enough. A lawyer can almost always do

> something more in every case. But the Constitution requires a good deal less than maximum performance."). **Nor is the test whether the best criminal defense attorneys might have done more. Instead, the test is whether some reasonable attorney could have acted, in the circumstances, as these two did -- whether what they did was within the "wide range of reasonable professional assistance,"** *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992). We answer that question in the affirmative.

Waters v. Thomas, 46 F.3d 1506, 1518, (11th Cir. 1995) [emphasis added].

In denying relief on Marquard's ineffective assistance of penalty phase counsel claim, the collateral proceeding trial court stated:

> In Claim II, of the Defendant's Amended Motion for Post Conviction Relief, the Defendant alleges that counsel was ineffective during the sentence and penalty phases of the trial. Contrary to the allegations in the Motion, Roger Marquard, the Defendant's father, testified that the Defendant's mother was not an alcoholic when the defendant was born and that family life was relatively normal until the Defendant was approximately five years of age. At that time the Defendant's mother became an alcoholic and the parties divorced. The Defendant's sister testified that the mother was abusive to her, but never to the Defendant. The Defendant's second sister, Amy, is deceased at this time and trial counsel cannot be faulted for failing to call her during the sentencing phase. The evidence is clear that if Amy had been called as a witness, she would have had to testify concerning the Defendant's conviction for molesting her child. No evidence was presented of any information which would have presented mitigating circumstances in the penalty phase.
>
> Contrary to the allegations in the Motion for Post Conviction Relief, no evidence was presented to show that John Marquard was ever sexually molested as a child either at home or by neighbors. There was no evidence

> presented at the evidentiary hearing that the Defendant's mother ever abused him, either physically or mentally. The Defendant never provided trial counsel with the names of any witnesses in mitigation. Trial counsel cannot be faulted for failing to call witnesses whose names are not disclosed by the Defendant.

(R733). Those findings by the trial court are supported by the evidence, are correct under prevailing law, and should be affirmed in all respects. This claim is reviewed *de novo* by this Court. *Sims v. State,* 754 So.2d 657, 670 (Fla. 2000).

When this case is considered in light of the standard which governs ineffective assistance of counsel claims, it is clear that it was not unreasonable for defense counsel to defend this case in the manner they did. As the surviving defense attorney testified, they had extensive information about Marquard in the form of records from prior mental health treatment. Because of these records, which were unusual in their volume, counsel had an extraordinary amount of **objective** information about Marquard. Moreover, as counsel testified, defense co-counsel Howard Pearl had previously employed the strategy of using psychologist Harry Krop to present mental state testimony about a capital defendant. see pages 8-10, above. Such a strategy is not unreasonable, and is not the sort of strategy that **no** reasonable attorney would employ. Because that is the case, there is no basis for relief. The trial court should be affirmed in all respects.

To the extent that further discussion of the ineffective assistance of penalty phase counsel claim is necessary, the most

that can be said about the evidence presented at the evidentiary hearing is that evidence is cumulative of the evidence presented at the penalty phase through the testimony of Dr. Krop. It is axiomatic that counsel is not ineffective for not presenting cumulative evidence, and that rule applies here. Counsel's strategic decision to proceed with Dr. Krop as the mitigation witness was not unreasonable -- likewise, that decision did not amount to deficient performance, nor did it result in prejudice to Marquard. When the aggravators present in this case are weighed against the "new" mitigation, the result is still the same -- death is the appropriate sentence and, for that reason, there can be no prejudice. Likewise, to the extent that Marquard attempts to generate a conflict of interest with respect to Harrison, the testimony from the hearing demonstrates that such claim has no basis in law or fact. Moreover, trial counsel was unequivocal that he did not want to call Harrison as a witness because he was not credible. Decisions as to which witnesses to call are uniquely within the province of trial counsel, and Marquard's complaint to the contrary has no legal basis. The decision not to call Harrison because he was not credible was reasonable, *Waters, supra,* and does not provide grounds for relief.[16] The denial of relief should not

[16] Marquard alleges that trial counsel had a conflict of interest as to Harrison. He does not explain how that conflict arose, nor does he explain how it is a "conflict" when counsel has knowledge as to the lack of credibility of a former client. Had Harrison been

be disturbed.

The second component of Marquard's ineffective assistance of penalty phase counsel claim is a bare claim that his hand-picked mental state expert, Dr. Harry Krop, did not "provide effective mental health assistance." In denying relief on this claim, the collateral proceeding trial court stated:

> The Defendant also alleges that Dr. Krop was an ineffective mental health expert. The testimony of the expert witnesses at the evidentiary hearing shows that neither had any substantial criticisms of Dr. Krop's work, and, in fact, when asked directly, neither could point to any specific failure which would have been material to this case. At the evidentiary hearing, appellate counsel introduced the testimony of a social worker in an attempt to show that trial counsel was ineffective for failing to call such a witness during the penalty phase. The testimony of the social worker was totally based on hearsay and would have been inadmissible. Trial counsel cannot be faulted for failing to hire and call a witness whose testimony would not be relevant or admissible. [citations omitted]. The Court finds that all relevant matters in mitigation were in fact presented at the penalty phase.

(R734). Those findings are not an abuse of discretion, and should not be disturbed.

In his brief, Marquard frames this claim as a due process violation predicated upon *Ake v. Oklahoma,* 470 U.S. 68 (1985). However, as the Eleventh Circuit noted in the same context, "[p]etitioner's claim of a due process violation collapses as soon

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called, Marquard would still have been sentenced to death -- however, the ineffective assistance of counsel claim would then have been that counsel should have known better than to call Harrison because of his total lack of credibility. This claim is wholly meritless.

as one seeks to identify the trial court's ruling that purportedly rendered petitioner's trial fundamentally unfair." *Clisby v. Jones*, 960 F.2d 925, 934 (11th Cir. 1992). The Court went on to state:

> Unable to pinpoint the ruling in which the trial court denied him due process by violating his right to competent psychiatric assistance, petitioner is left with a naked complaint about the purported incompetence of Dr. Callahan's assistance. Stripped of its due process pretensions, petitioner's claim therefore amounts to an allegation of expert incompetence akin to an ineffectiveness of counsel claim under the Sixth Amendment. *Ake*, however, exclusively relied on due process grounds and explicitly refused to consider the applicability of the Sixth Amendment. *Ake*, 470 U.S. at 87 n. 13, 105 S.Ct. at 1098 n. 13.

Id., at 934. Marquard's claim, while at times pleaded obliquely in Sixth Amendment terms, is, as argued in his brief, purely a due process claim.[17] As such, that claim has no legal basis because Marquard is unable to point to any ruling by the trial court that denied him anything. There is no basis for relief, and the lower court should be affirmed in all respects.

To the extent that the performance of Dr. Krop is properly raised in Marquard's brief, the collateral proceeding trial court properly found that no shortcomings in Dr. Krop's evaluation had been identified[18]. That finding is supported by the evidence and is

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[17] To the extent that Marquard may argue to the contrary, the penultimate claim is that "... John Marquard's due process right to a fundamentally fair adversarial testing was denied." *Initial Brief*, at 67.

[18] To the extent that Marquard implies that the Rule 3.850 mental state expert testified that he was schizophrenic, that suggestion is not accurate.

not an abuse of discretion. In any event, the fact that a later-retained mental state expert disagrees with a prior expert is hardly novel, and is not a basis for relief. *Bertolotti v. Dugger,* 883 F.2d 1503, 1513 (11th Cir. 1989); *see also, Ake v. Oklahoma, supra.* There is no basis for relief.

IV. THE DENIAL OF A FULL AND FAIR HEARING CLAIM

On pages 67-73 of his brief, Marquard argues that he did not receive a "full and fair evidentiary hearing" as a result of various rulings by the collateral proceeding trial court. These issues, which are addressed separately below, are not grounds for relief because the trial court did not abuse its discretion.

Marquard's first sub-issue, which is set out on pages 67-71 of his brief, asserts that the State's objection to certain testimony by his social worker was improperly sustained. Marquard has only identified two sustained objections that he contends are error. *Initial Brief,* at 70, *citing* V7, R248-49. When the record is fairly read, it is apparent that each sustained objection was proper, and there is no basis for reversal.

Florida Rule of Evidence 90.704 provides that:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. **If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.**

Fla. Stat., § 90.704. [emphasis added]. This Rule has **not** been

interpreted as providing a conduit for the introduction of otherwise inadmissible evidence, nor does the Rule operate to undercut the other rules of evidence. *see, e.g., Erwin v. Todd,* 699 So.2d 275, 277, 278 (Fla. 5th DCA 1994); *Kelly v. State Farm Auto. Ins.,* 720 So.2d 1145-1146 (Fla. 5th DCA 1998). It is incumbent on the proponent of the evidence to establish the predicate "reasonable reliance by experts in the field" -- in the absence of such a predicate there is no error in the exclusion of the expert testimony. *See, Gray v. Russell Corp.*, 681 So.2d 310, 315 (Fla. 1st DCA 1996). Moreover, it is improper for an expert to testify that they have consulted with other experts because of the clear inference of agreement (which amounts to improper bolstering) on the part of the non-testifying individuals. *See, e.g., Schwarz v. State*, 695 So.2d 452, 455 (Fla. 4th DCA 1997). The testimony of the "expert social worker" runs afoul of each of these basic rules. At no point in the testimony of that witness did Marquard **ever** attempt to establish what sort of information is relied upon, within the meaning of § 90.704, by experts in the field of social work. Further, the witness improperly sought to bolster her testimony by identifying three individuals with whom she had consulted. (R232). Finally, despite Marquard's protestations, the excluded "evidence" was not evidence relied upon in the formation of an expert opinion -- it was irrelevant speculation that was outside the expertise of this witness. (R244-250). Marquard attempted to do nothing more

than place inadmissible evidence into the record in the guise of an "expert opinion" when his own expert did not even testify that those matters were reasonably relied upon by experts in the field of social work. Such is improper, and Marquard should not be heard to complain that the rules were applied to him.

In addressing the refusal to admit records similar in character to those at issue here, this Court has held:

> Johnson further contends that the trial court improperly refused to admit medical records about various psychological problems he had over many years, including suicide attempts and treatment by medication. **The record, however, indicates that Johnson's counsel attempted to introduce these records without authenticating them, which is required under the evidence code. Sec. 90.901-902, *Fla. Stat.* (1987). The rules of evidence may be relaxed during the penalty phase of a capital trial, but they emphatically are not to be completely ignored.** Moreover, the trial court found that the records were not complete in themselves and required interpretation to be understood by the jury. The judge even offered to admit them if defense counsel laid the proper predicate, which counsel did not do. Accordingly, there was no error in declining the request in light of counsel's actions.

Johnson v. State, 660 So.2d 637, 645 (Fla. 1995); *Hitchcock v. State,* 578 So.2d 685, 690 (Fla. 1990) ("While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded."). In contrast, Marquard did not attempt to **admit** the records at issue -- he merely sought to have his expert testify about their content without establishing a predicate of any sort. The trial court properly refused to allow Marquard to ignore the rules of evidence, and should be affirmed in all respects.

The second sub-issue contained within this claim asserts that the trial court should not have sustained the State's hearsay objection to certain testimony by Marriah Harrelson and Becky Hicks. *Initial Brief*, at 71-72. According to Marquard, the evidence at issue was admissible under the relaxed penalty phase standard contained in § 921.141(1) which allows the admission of probative evidence. However, the rules of evidence have not been suspended for Marquard's benefit. *See, Johnson, supra; Hitchcock, supra.* Moreover, and of the most significance to the issue before this Court, Marquard never argued to the collateral proceeding trial court the theory of admissibility advanced in his brief. Specifically, Marquard never argued to the trial court that the testimony at issue would have been admissible in the penalty phase of Marquard's trial based upon the relaxed hearsay rule, and it approaches invited error for Marquard to ask a question that calls for a hearsay response and, when an objection is made, to stand mute when the objection is sustained without explaining to the Court what his theory of admissibility is.

Further, Marquard has failed to preserve this point for appellate review because he failed to comply with Rule 90.104(1)(b). That Rule provides:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
> ...
> (b) When the ruling is one excluding evidence, the

> substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

§ 90.104(1)(b), *Fla. Stat.* Marquard did not proffer what the witnesses would have said, and his failure to do so failed to preserve this issue for appeal. *See, Lucas v. State*, 568 So.2d 18, 22 (Fla. 1990) (applying requirement of proffer to capital sentencing phase). This claim is not a basis for relief.

The third sub-claim contained in this issue concerns the collateral proceeding trial court's refusal to "judicially notice" the prior testimony of Hobart (Hobie) Harrison. *Initial Brief*, at 72-73. There are several deficiencies with Marquard's argument, any one of which is sufficient to foreclose him from relief based on this claim.

The first problem with Marquard's claim is that a claim of improper denial of judicial notice is not the same as a claim that certain excluded evidence was admissible under § 90.803(22) and 90.804(2)(a). Marquard raised neither of the hearsay exceptions at the evidentiary hearing, and, in fact, did not offer this evidence under either theory. It makes no sense to suggest that the lower court can be placed in error based upon grounds that were never before it.[19]

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[19] Analytically, the 90.803(22) exception cannot co-exist with the 90.804(2)(a) exception. Nonetheless, Marquard's one-sentence analysis claims that both rules required the admission of the prior testimony.

Further, to the extent that additional discussion of this claim is necessary, § 90.803(22) does not require the admission of Harrison's former testimony because, at the time that testimony was given, Harrison had been called as a state witness against Abshire, Marquard's co-perpetrator. The State's interest in that proceeding was to present testimony relevant to Abshire's guilt, and there was no motive to present testimony about Marquard's participation in the crime. Because the State did not have a similar motive to develop the testimony at the earlier trial, the 90.803(22) exception does not apply.

To the extent that Marquard asserts that the § 90.804(2)(a) exception applies, that claim is incorrect. There was no showing that Harrison was "unavailable" within the meaning of § 90.804(1), and, when his evidentiary hearing testimony is read, it is clear that none of the five definitions of unavailability apply[20]. Because that is true, the § 90.804 exception does not come into play.

To the extent that Marquard's *Initial Brief* can be construed as presenting a claim that the lower court improperly denied the request for judicial notice (which was the posture of the matter in the trial court), that claim is not a basis for relief, either. Section 90.203 prescribes the following procedure for judicially noticing the matters set out in 90.202:

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[20] During the hearing, Marquard never claimed that Harrison was unavailable for 90.804 purposes.

> A court shall take judicial notice of any matter in § 90.202 when a party requests it and:
> (1) Gives each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request.
> (2) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

§ 90.203, *Fla. Stat.* Marquard complied with neither of the § 90.203 requirements, and should not be heard to complain.

V. THE GUILT PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

On pages 74-80 of his brief, Marquard raises various claims of trial court error with respect to the denial of relief on the guilt phase ineffective assistance of counsel claim. For the reasons set out below, the denial of relief should be affirmed in all respects.

The first sub-claim raised in Marquard's brief is that trial counsel was ineffective for "failing to question jurors about their feelings regarding any emotional impact of gruesome evidence." [sic]. *Initial Brief*, at 74. In denying relief on this claim, the lower court stated:

> In Claim I(A)(2), the Defendant alleges that trial counsel was ineffective in that he failed to question prospective jurors as to their feelings regarding any potential emotional impact photographs of the crime scene and skeletal remains of the victim would have on them. Trial counsel testified at the evidentiary hearing that he made a strategic decision not to emphasize these matters and the Court finds that counsel's decision was reasonable. *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable); *Rutherford v. State*, 727 So.2d 216, 221 (Fla. 1998), *quoting State v. Bolender,* 503 So.2d 1247, 1250 (Fla. 1987) (strategic decisions do not constitute ineffective assistance if

> alternative courses of action have been considered and rejected). Therefore, the Court finds that counsel was not ineffective in the selection of the jury in this case.

(R728-29). The collateral proceeding trial court's order is supported by the evidence, is legally correct, and should not be disturbed. This claim is reviewed *de novo. Sims v. State*, *supra.*

At the evidentiary hearing, trial counsel testified that he did not want to play up the graphic details of this brutal crime to the jury, and that he made a decision **not** to place the details of the murder before the jury during *voir dire* to see what the effect would be. (R146-47). This is the epitome of a strategic choice made after consideration of the available options -- because that is so, there can be no ineffective assistance of counsel with respect to this claim. *See, Strickland, supra; Waters, supra.* The trial court correctly denied all relief.

The second issue contained in Marquard's ineffective assistance of guilt phase counsel claim is that "defense counsel failed to properly litigate the issue of the state's exclusion of juror Robinson." *Initial Brief,* at 75. The claim contained in Marquard's brief is that counsel did not "rehabilitate" that juror properly. However, the *Witherspoon/Witt*-based issue contained in Marquard's brief is not properly before this Court because it was not raised in the *Florida Rule of Criminal Procedure* 3.850 motion. In the motion itself, Marquard's claim was based upon a claimed violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and *State v.*

Neil, 457 So.2d 481 (Fla. 1984). (R448). It is axiomatic that issues not raised in the trial court cannot be presented for the first time on appeal to this Court. That is just what Marquard has done, and the issue contained in his brief is not properly before this Court.

To the extent that further discussion of this claim is necessary, the juror at issue was challenged for cause by the State, and that cause challenge, which was based on *Witherspoon*, was granted. (R916). Obviously, a challenge for cause based upon a juror's fixed opposition to the death penalty is not the same thing as the racially motivated **peremptory** challenge at issue in the *Batson/Neil* line of cases. Marquard's attempt to blend inconsistent legal theories is disingenuous, and does not supply a basis for reversal of the lower court's denial of relief.

The next claim of ineffective assistance of guilt phase counsel is Marquard's claim that trial counsel should have impeached Abshire and that counsel should have called Harrison and Blanks to testify. The trial court made the following findings with respect to this claim:

> In Claim I(B)(7), the Defendant faults trial counsel for failing to impeach the co-defendant, Abshire, concerning statements that the co-defendant gave to the police relating to Defendant's intoxication through the use of alcohol and drugs, and concerning the co-defendant's charge role in the homicide. A careful review of the record in this case, reveals that the co-defendant's prior statements to police never indicated that the Defendant was intoxicated at the time of the commission of the crime and that all statements to the police by the

> co-defendant are, in fact, consistent with the co-defendant's trial testimony. A copy of the relevant portions of the trial transcripts is attached hereto as Exhibit#2. A copy of Michael Abshire's confession is attached hereto as Exhibit #3. The co-defendant, Abshire, at all times maintained that the Defendant, Marquard, was in, the instigator, moving force, and dominant participant in the commission of the crime. A copy of the testimony of Michael Abshire is attached hereto as Exhibit #4.
>
> The Defendant also claims ineffective assistance of counsel in that trial counsel failed to call Hobart Harrison as a witness in this case. Counsel for the Defendant did call Hobart Harrison as a witness at the motion for post conviction relief evidentiary hearing. Hobart Harrison is presently serving a prison sentence and was serving such sentence at the time of the original trial. Hobart Harrison has a long criminal record and his testimony was not worthy of belief. Trial counsel testified at the evidentiary hearing, that he made a tactical decision not to call Hobart Harrison, because he was not willing to vouch for his credibility and Hobart Harrison's testimony would have implicated the Defendant. *Lightbourne v. State*, 471 So.2d 27 (Fla. 1985); *Magill v. State*, 457 So.2d 1367 (Fla. 1984); *Beard v. State,* 548 So.2d 675, 676 (Fla. 5th DCA 1989) (the decision whether to call a witness or not is usually a tactical decision made by the lawyer and should not be second-guessed by a court.). The Court finds that the trial counsel was not ineffective for failing to call Hobart Harrison.

(R729-30). Those findings, which were made after a full evidentiary hearing, are supported by the evidence, are in accord with settled law, and should not be disturbed.

To the extent that further discussion of counsel's informed decision not to call Harrison as a witness is necessary, the cautionary language of the United States Supreme Court bears repeating:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to

> second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana, supra*, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case. **Even the best criminal defense attorneys would not defend a particular client in the same way.**

Strickland v. Washington, supra, at 689.[21] [emphasis added]. Trial counsel's decision as to which witnesses to call was a strategic decision that was made with full knowledge of the facts necessary to reach an informed decision. Counsel's performance was not deficient, and the trial court's denial of relief should not be disturbed.

Marquard's next sub-issue is his claim that the trial court erred in not ruling on his claim of ineffective assistance of

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[21] Blanks was not mentioned in the Rule 3.850 motion, and he did not testify at the Rule 3.850 hearing. Trial counsel was familiar with him, and testified that Blanks' statement did not show Marquard's innocence, and, moreover, that he would not call Blanks to testify because of his lack of credibility.

counsel which was related to the admission into evidence of certain of the victim's bones. Trial counsel testified that the bones at issue (which were limited in number) were introduced into evidence, were a part of the testimony of Dr. Maples, and, because they were in evidence there was no means to prevent them from going to the jury room during deliberations. (R130-31).[22] Because there was no legal basis to exclude the bones, counsel was not ineffective for not objecting to them.

Likewise, there was no basis on which to move to exclude the videotape of the crime scene. Despite the tone of Marquard's brief, the crime scene in this case was, compared to many, rather benign. There was no videotape of a blood-spattered room, nor was there film of a body that had been decomposing in the Florida sun. Instead, the video depicted skeletal remains, which, while doubtless unpleasant, are not prejudicial, are highly relevant, and were properly admitted. Of course, murder is a grisly affair, and a killer should not be heard to complain because the jury is made aware of the true nature of his handiwork. *Hall v. Black*, 891 F.2d 89, 91-92 n.1 (5th Circuit 1989). There is no ineffective assistance of counsel, and no basis for relief.

Pull Maples' testimony and check on "post-mortem injuries".

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[22] Marks on the bones, which occurred when the victim was stabbed, were discussed during the testimony of Dr. Maples. (R1276-1296). The jury was entitled to see the subject of Dr. Maples' testimony for itself.

VI. THE INEFFECTIVE ASSISTANCE/ PROSECUTORIAL ARGUMENT CLAIM

On pages 80-81 of his brief, Marquard sets out what appears to be a claim that a *Caldwell v. Mississippi* violation occurred, and that the collateral proceeding trial court should have conducted a hearing on this claim. This claim is unworthy of this Court's attention for the following reasons.

This claim is not properly before this Court because it was not contained in Marquard's Rule 3.850 motion[23]. It is axiomatic that claims cannot be raised for the first time on appeal from the denial of Rule 3.850 relief.

Even if this claim had been contained in the Rule 3.850 motion, there would be no basis for relief. The only relief Marquard has requested is an evidentiary hearing on a purely legal claim. Because there was no error under *Caldwell*, the incantation of "ineffective assistance of counsel" does not suffice to entitle him to an evidentiary hearing when there is no merit to the substantive claim.

Moreover, without waiving any defense as to the lack of preservation of this claim, it is clear that the jury was instructed in conformity with well-settled Florida law. (TR 777, 864, and 1770) *See*, *Rutherford v. Moore*, 774 So 2d 637 (Fla.

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[23] Marquard's *Initial Brief* contains no citation to the record on appeal, and does not identify any ruling by the trial court on this "claim".

2000); *Cherry v. State*, 2000 WL 1424539 (Fla. 2000). There would be no basis for relief even if Marquard had properly raised this claim.

VII. THE SHACKLING CLAIM

On pages 82-83, Marquard argues that the trial court should have granted him a hearing on his claim that "the jury saw him handcuffed during the trial." *Initial Brief,* at 82. In his brief, Marquard asserts that trial counsel was ineffective for"failing to ask the court to poll the jurors to determine the prejudicial effect or to seek a cautionary instruction." *Initial Brief*, at 82-3. This claim is undeserving of this Court's attention.

Like the preceding claim, this claim was not raised in the Rule 3.850 trial court. While Marquard did include a shackling claim in his Rule 3.850 motion, the ineffective assistance of counsel component was wholly different from that advanced in his brief. In the original motion, the **sole** reference to ineffectiveness was in the caption, where Marquard asserted that counsel was ineffective for "not requesting the handcuffs be removed". *Motion,* at 62. That bare assertion has been embellished, if only slightly, in Marquard's brief, and now adds different specifications of alleged "ineffectiveness". However, the true facts are that the claim raised below, which the trial court ruled on, is not the claim pressed on appeal to this Court. Florida law is settled that issues cannot be raised for the first time on

appeal from the denial of Rule 3.850 relief.

Moreover, there is no evidence to suggest that this claim has any factual basis, and, in any event, the claim contained in the Rule 3.850 motion is procedurally barred -- the court properly denied relief on that basis. The trial court's denial of relief as to this claim should not be disturbed.

VIII. THE JUROR INTERVIEW CLAIM

On pages 83-84 of his brief, Marquard argues that the trial court should have granted an evidentiary hearing on his claim that Rule 4-3.5(d)(4) of the *Rules Regulating the Florida Bar* is "unconstitutional". The collateral proceeding trial court found this claim procedurally barred because it could have been but was not raised on direct appeal. (R585). That finding of procedural bar is in accord with settled Florida Law. *See, Arbelaez v. State,* 25 Fla. Law Weekly S586 (Fla. July 13, 2000); *Brown v. State,* 755 So.2d 616, 620 (Fla. 2000); *Gaskin v. State,* 737 So.2d 509 (Fla. 1999).

In addition to the procedural bar, this claim is insufficient as a matter of law, as the trial court found.[24] In his brief, Marquard makes it clear that he has no indication of juror misconduct -- he merely wants to conduct the fishing expedition that this Court squarely rejected in *Arbelaez, supra.* Even if this

[24] The lower court held: "In addition, the Defendant has set forth no reasonable basis upon which juror interviews could be granted in this case." (R585).

claim was not procedurally barred, it would fail as a matter of law. The lower court should be affirmed in all respects.

IX. THE JURY INSTRUCTION CLAIM

On pages 84-98 of his brief, Marquard raises various claims concerning the jury instructions that were given at the penalty phase of his capital trial. This claim was contained in Marquard's Rule 3.850 motion as Claim V. The collateral proceeding trial court found this claim procedurally barred because it could have been but was not raised on direct appeal to this Court. (R585). That disposition, which Marquard does not acknowledge in his brief, is the correct result.

Florida law is well-settled that claims that could have been but were not raised on direct appeal cannot be raised for the first time in a Rule 3.850 motion. The collateral proceeding trial court correctly applied that settled procedural rule, and denied relief on this claim. This Court should affirm that ruling, and, moreover, should decline to reach the merits of Marquard's procedurally barred jury instruction claims.

To the extent that the subsidiary claims deserve comment, Marquard's claim that "non-statutory aggravation" was introduced his claim is based upon out-of-context quotations of portions of the record. Likewise, the assertion that the sentencing court improperly considered non-statutory aggravation is based upon an out-of-context interpretation of the sentencing order. When the

order is read without slanting it to suit one's purpose, it is clear that the Court's statements are supported by the evidence, and are not "non-statutory aggravation". This claim would not be a basis for relief even if it were not procedurally barred.

The second sub-claim contained within this issue is Marquard's claim that the cold, calculated, and premeditated aggravating circumstance jury instruction was inadequate. Marquard did not object to the **jury instruction**, and, under settled Florida law, did not preserve that issue for further review. *Jackson v. State*, 648 So.2d 85, 95 n. 8 (Fla. 1994). To the extent that Marquard suggests that counsel was ineffective for not objecting to the jury instruction, counsel is not ineffective for failing to anticipate changes in the law such as the one effected by *Jackson v. State*, 648 So.2d 85 (Fla. 1994). See e.g., *Cherry v. State*, 2000 WL 1424539 (Fla. 2000). Finally, there is no error because the cold, calculated, and premeditated aggravator applies to this murder under any definition of that aggravating circumstance.

Marquard's third sub-claim contained in this issue is a claim that the trial court incorrectly instructed the jury on the heinous, atrocious, or cruel aggravating circumstance because the jury was not instructed that the defendant must "intend" to inflict unnecessary torture on the victim. Even if this claim were not procedurally barred, it would not be a basis for relief because Florida law is clear that there is no "intent element" associated

with the heinous, atrocious, or cruel aggravator. *See, Guzman,* 721 So.2d 1155 (Fla. 1998); *Brown v. State,* 755 So.2d 616, 620 (Fla. 2000).

The fourth sub-claim concerns the pecuniary gain aggravating circumstance jury instruction. This claim is procedurally barred because it was not raised on appeal -- this aggravator was not found, so any error in the jury instruction, even if there had been one, would be meaningless in the context of the case. To the extent that Marquard attempts to make this claim one concerning the "during the course of a robbery" aggravator, that claim is legally inapplicable as framed in Marquard's brief.

The fifth sub-claim contained in Marquard's brief is his claim that "during the course of a felony" aggravator is an unconstitutional "automatic" aggravating circumstance. In addition to being procedurally barred, this claim is meritless under settled law. *Hunter v. State*, 660 So. 2d 244, (Fla. 1995), *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

The sixth sub-claim contained in Marquard's brief is his claim that the burden of proof was shifted to him to prove that death was not the proper sentence. In addition to being procedurally barred, this claim is meritless under settled case law. *See, Boyde v. California,* 494 U.S. 370 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

X. THE CUMULATIVE ERROR CLAIM

On pages 98-99 of his brief, Marquard raises a perfunctory claim of "cumulative error" that does not identify with specificity the "errors" that he seeks to "cumulate". This claim was not raised in his Rule 3.850 motion, and, for that reason, is not properly before this Court on appeal. Moreover, in addition to the procedural bar to this claim, this claim is without merit because there are no "errors" to "cumulate". None of the claims contained in his Rule 3.850 motion, or the appeal from the denial thereof, are meritorious, and, further, a number of those claims are themselves procedurally barred. It takes no analysis to conclude that a procedurally barred claim cannot be resurrected by pleading it as a claim of "cumulative error", especially when the cumulative error claim is, itself, procedurally barred. To the extent that Marquard seeks to incorporate "errors ... revealed" in his direct appeal, this Court found no error in that proceeding. This claim is procedurally barred in addition to being meritless.

CONCLUSION

For the reasons set out above, Marquard's conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of the Appellee, has been furnished by U.S. Mail to Julius J. Aulisio, Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619, on this _____ day of April, 2001.

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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ASSISTANT ATTORNEY GENERAL