IN THE SUPREME COURT OF FLORIDA

EDWARD RAGSDALE,

Appellant,

vs. **CASE NO. SC00-414**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PASCO COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
Phone (813) 873-4739
Fax (813) 356-1292

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Defendant Edward Ragsdale was convicted of first degree murder and sentenced to death in 1988. His conviction and sentence were affirmed on appeal. Ragsdale v. State, 609 So. 2d 10 (Fla. 1992). This Court summarized the facts of the case as follows:

> The relevant facts reflect that on the evening of January 1, 1986, Samuel Morris heard noises emanating from his neighbor Ernest Mace's mobile home. After hearing what he described as "slamming furniture," Morris went over to Mace's home and observed someone in the kitchen. Morris knocked on Mace's door several times and, eventually, two men came out of the back of the mobile home. Morris gave chase to one of the men, but could not catch him. He returned to Mace's mobile home and found Ernest Mace badly beaten with his throat cut "from ear-to-ear." Morris asked Mace who his attackers had been, and, although unable to talk, Mace indicated by moving his head that he knew who his attackers had been. Morris testified that he asked Mace if it had been an individual named Mark, to which Mace responded with a negative motion. Emergency rescue workers arrived shortly thereafter, but Mace died enroute to the hospital.
>
> Investigating law enforcement officers concluded from their preliminary investigation that Ragsdale, together with Leon Illig, was involved in the murder. They obtained a statement from Carl Florer, the husband of Ragsdale's cousin, that on the day following the murder Ragsdale told him that he had "cut the old man's throat." Bulletins were then sent out notifying law enforcement agencies that Ragsdale and Illig were sought in connection with a murder investigation.
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> On January 12, 1986, Ragsdale was arrested in Alabama on a fugitive warrant

issued in 1985 when his parole officer reported that Ragsdale had left the state without permission. While processing Ragsdale's arrest, Alabama authorities discovered that he was wanted as a suspect in the Mace murder.

On January 16, 1986, a grand jury indicted Illig and Ragsdale for first-degree murder and armed robbery. Prior to Ragsdale's trial, Illig pleaded nolo contendere and received a sentence of life imprisonment. Shortly before Ragsdale's trial, the trial judge granted the state's motion in limine for an order directing the defense to make no attempt to inform the jury of Illig's conviction and sentence during voir dire and the guilt phase of the trial.

During the course of the trial, the victim's neighbor, Samuel Morris, testified as previously indicated. Carl Florer and Ragsdale's brother, Terry Ragsdale, testified that the appellant stated that he had hit the victim several times and then cut his throat. Terry Ragsdale testified that the appellant had said that the person killed was named Ernest Kendricks. Terry Ragsdale also identified a knife which the appellant had stated was the murder weapon.

Cindy LaFlamboy, Illig's girlfriend and roommate, stated that Ragsdale and Illig borrowed her car on the night of the murder in order to allegedly "collect some money" and stop by a liquor store. She testified that, approximately forty-five minutes later, Ragsdale returned to her home by himself. She stated that Ragsdale was in a very upset and nervous state. LaFlamboy testified that, when Ragsdale arrived, he stated that "I hope that Leon didn't get caught." LaFlamboy testified that, when Illig returned, clad only in shorts, he and Ragsdale quarreled over "the need to kill that man." She also testified that she saw Ragsdale cleaning blood from a pocket knife in her kitchen sink. The following day, when news of the murder appeared in the newspaper, LaFlamboy took Illig to the bus

station and then drove with Ragsdale to Alabama. LaFlamboy testified that, during their drive to Alabama, Ragsdale repeated that he had cut the victim's throat. On cross examination, however, LaFlamboy testified that there were no bloodstains on Ragsdale's clothing.

The state presented two confessions obtained by investigators. The first confession was obtained by a sheriff's deputy sent to question Ragsdale while in custody in Alabama. Evidence was presented that Ragsdale, after being advised of his rights, admitted going to the victim's house with the intent to rob him. Ragsdale stated to the sheriff's deputy that he left Illig with the victim and, upon returning, found blood covering the floor. In this confession, Ragsdale stated that, after reentering the room, Illig declared that he had murdered the victim because the victim could have identified them. Finally, Ragsdale described fleeing the scene in LaFlamboy's car without Illig and eventually returning to her house, where Illig later arrived, scantily clad. Ragsdale also repeatedly declared that he had not been an active participant in the killing and described attempts by Illig's family to get their son out of the country.

In his second confession, Ragsdale admitted striking the victim and cutting him with a knife when he believed the victim was reaching for a gun. However, Ragsdale stated that, after he cut the victim, Illig took the knife from him, said, "Let me show you how it's done," and inflicted the fatal cut. In this confession, Ragsdale also admitted owning the murder weapon, robbing Mace, and giving Illig's girlfriend the stolen money.

After the state rested, defense counsel attempted to call Illig as a witness. Illig asserted his Fifth Amendment rights and refused to testify. The trial judge then denied a request by Ragsdale's counsel to allow Illig to plead the Fifth Amendment in the presence of the jury. The defense

rested and the jury returned guilty verdicts against Ragsdale to all of the offenses charged.

During the penalty phase of the trial, the State again presented LaFlamboy, who testified that Illig was not acquainted with the victim and that Ragsdale had admitted killing the victim because he could identify Ragsdale. On cross-examination, LaFlamboy stated that she was Illig's fiancee and that she had helped Illig and Ragsdale leave the state. She also stated that Ragsdale had no blood on his clothing when he returned to her apartment on the night of the murder.

In mitigation, Ragsdale presented the testimony of his brother, who stated that he had known Ragsdale for almost thirty years, and that Ragsdale was a follower, not a violent person. Ragsdale's brother also stated on cross-examination that Ragsdale was a bully, became mean when on dope, and "could do anything if he was mad enough." He also noted that the victim was a family friend and thought that his brother's statement that he had cut the man's throat was false. He also testified that Ragsdale boasted a lot and that much of what he said was unreliable.

After commencing its deliberations, the jury asked the trial judge two questions. First, the jurors asked the judge whether it is "unjust--just to sentence the defendant to a greater sentence (death) than the accomplice, if based on the testimony heard by the jurors, the jurors believe that the defendant may have had a lesser part in the murder?" The trial judge, without objection, reread to the jury the following portion of the jury instructions:

> Deciding a verdict is exclusively your job. That's true in this phase of the trial, as well as the earlier phase. I cannot participate in that decision in any way. In fact, you should please

> disregard, again, anything I may have said or done, at any time during either phase of this trial, that made you believe I preferred one verdict over another.

In its second question, the jury requested the legal definition of "nolo contendere." In response to the second question, the judge read the definition of nolo contendere from Black's Law Dictionary. One of the jurors asked if the State had the right to rebut defense counsel's remarks in the penalty phase and was told "no." The same juror then asked whether the question regarding the fact that Illig received a life sentence could be reworded. The trial judge interrupted the juror and stated that the court could not assist any further in the matter. The jury returned to its deliberations and returned with a verdict recommending the death penalty by a vote of eight to four.

The court, in accordance with the jury recommendation, sentenced Ragsdale to death. The court found the following three aggravating factors: (1) the crime was committed while Ragsdale was on parole, under a sentence of imprisonment; (2) the murder occurred during a robbery and was committed for pecuniary gain; and (3) the crime was extremely wicked, evil, atrocious, and cruel. The court specifically supported the last finding by referring to the defendants' ages, the severity of the cut, and the evidence of defensive wounds on the victim. The trial court found no mitigating evidence and addressed the question of the differences in culpability between Illig and Ragsdale in its findings. In its findings, the trial court stated:

> There was [sic] differences in the culpability of the two defendants for this murder. The credible

> evidence indicated that while Mr. Illig struck Mr. Mace, it was Mr. Ragsdale that pitilessly cut his throat. In fact, the testimony of Ms. LaFlamboy indicated that Illig was upset that Ragsdale had killed Mr. Mace and considered the killing to be unnecessary.
>
> Furthermore, there was a difference in the criminal histories of these two defendants. Mr. Illig was only 17 years old at the time of the killing, while Mr. Ragsdale was 25 years old. Mr. Illig had no prior significant criminal record, while Mr. Ragsdale had been confined to the Alabama prison for commission of a felony and had absconded from parole from that state.
>
> Finding that no mitigating circumstances existed to offset the aggravating circumstances, the trial court imposed the death penalty.

609 So. 2d at 10-13.

Ragsdale filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 on March 24, 1994, and amended motions were filed on November 16, 1994 and July 12, 1996 (PC-R. V1/10-75, 85-187, V2/283-394).[1] The motions were

[1]References to the record will be as follows: the record in this appeal, Case No. SC00-414, will be designated as "PC-R2." followed by the appropriate volume and page number; the record

summarily denied (PC-R. V3/399-407). On appeal, this Court upheld the summary denial of the guilt phase issues, but remanded for an evidentiary hearing on the claims of ineffective assistance of counsel and inadequate mental health assistance in the penalty phase. Ragsdale v. State, 720 So. 2d 203 (Fla. 1998).

The evidentiary hearing was conducted on August 27, 1999, and October 29, 1999; a final hearing was held on December 20, 1999. The defense presented the testimony of Ragsdale's brother, Ernie; his cousins, Darlene Parker and Byron Hicks; and forensic psychologist Dr. Robert Berland. In addition, depositions from psychologist Dr. Donald DelBeato; Ragsdale's aunt, Rebecca Lockhart; and his cousin, Sheila Adams, were admitted into evidence, as was the pretrial deposition of Ragsdale's brother, Terry. The State presented trial counsel Robert Culpepper and neuropsychologist Dr. Sidney Merin.

Family witnesses Ernie Ragsdale, Darlene Parker, Byron Hicks, Rebecca Lockhart, and Sheila Adams discussed Ragsdale's childhood, and the physical and emotional abuse Ragsdale suffered at the hands of his father, Clyde Ragsdale. Ragsdale's father, Clyde, is dead, and his mother, Sibil, passed away about

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from the prior postconviction appeal, Case No. 89,657, will be designated as "PC-R." followed by the appropriate volume and page number; and the record from the appellant's direct appeal, Case No. 72,664, will be designated as "DA-R." followed by the appropriate volume and page number.

1998 (PC-R2. V2/T192, 204; SV1/T43). Although the testimony was consistent that Ragsdale was subject to abuse, the particular nature and extent of the abuse was not always consistent. For example, Ernie testified that the abuse occurred several times a week (PC-R2. V2/T166), and Darlene stated that Ragsdale got more beatings than the other children (PC-R2. V2/T229), but Rebecca stated that there was nothing special about Ragsdale's treatment (PC-R2. SV1/T47) and Shelia testified that she lived with Ragsdale's family for about a year and had only seen Clyde hit Ragsdale one time with his closed fist; she also saw Clyde take out a gun and shoot it over Ragsdale's and his brother's heads (PC-R2. SV1/T109-110). Sheila also stated that, because of Clyde's disability, he could not get around well and would lay in bed, calling the boys to come closer so he could hit them (PC-R2. SV1/T116-117). Once Ragsdale got to be a teenager, Clyde was afraid of him, and Ragsdale ran away from home for good as a young teen (PC-R2. V2/T193-194, 198, 233, 268; SV1/T47). Also, although the witnesses felt that Ragsdale and his brothers never deserved this treatment, and got abused for no reason or for "any little thing," testimony also established that Ragsdale would fight and get in trouble at school, and had been stealing pain pills from his father and consuming other drugs and alcohol since he was as young as eight years old (PC-R2. V2/T170, 184, 209, 247, 364-365; SV1/T46, 119).

In addition to the abuse, family members discussed Ragsdale's history of head injuries, including being shot in the eye with an arrow, going through the windshield in a car accident, and having been in a bar fight (PC-R2. V2/T171-173, 185-192, 248-251, 262-267).

Dr. Berland testified that his tests indicated that Ragsdale had average intelligence but that the split in scores on intelligence subtests suggested that his brain was impaired; other testing indicated that Ragsdale had borderline intelligence (PC-R2. V3/T296-301). In addition, Berland's personality test results suggested that Ragsdale had an ambulatory psychotic disturbance; a biologically-driven, highly energized mental illness (PC-R2. V3/T305, 317). However, Berland acknowledged that because Ragsdale also has a "character disturbance," in that he has a "potentially criminal kind of character," it was difficult to assess which of the scores on the personality test were dictated by mental illness, and which were the result of character problems (PC-R2. V3/T306). According to Berland, Ragsdale admitted to a number of psychotic symptoms, including hallucinations and delusional paranoid beliefs (PC-R2. V3/T319).

Berland concluded that both statutory mental mitigating circumstances would apply in this case, due to the presence of the psychotic disturbance he observed (PC-R2. V3/T317). He

believed that Ragsdale's brain impairment was caused by any number of head traumas, meaning not just blows to the head but substantial exposure to drug and alcohol abuse (PC-R2. V3/T297, 322). He identified two injuries as significant: a car accident where Ragsdale went through the windshield after hitting a tree when he was about 14 to 16 years old, and a bar fight a few years later where Ragsdale got hit in the head with a pipe (PC-R2. V3/T322-325). Although Berland knew that Ragsdale had left the hospital voluntarily after the car accident, he was not aware that Ragsdale had told Dr. Merin that he was not knocked unconscious by the accident (PC-R2. V3/T339, 366).

Dr. Berland identified a number of mitigating circumstances that he felt should have been presented at Ragsdale's penalty phase, including borderline intelligence, brain impairment, possible learning disability, depression, history of drug and alcohol abuse, child abuse, family background, and possibly Ragsdale's intoxication at the time of the offense, which Berland felt needed to be further investigated (PC-R2. V3/T314-316).

The State's expert, Dr. Merin, also examined Ragsdale prior to the postconviction hearing (PC-R2. V3/T359). Merin criticized Berland for placing so much emphasis on the results of just two tests; he explained why it was necessary to administer a number of different exams (Merin used fifteen) in

order to get an accurate psychological picture (PC-R2. V3/T359-361).

Merin described Ragsdale's background based on his interview: Ragsdale had a history of family conflict, difficulties in early life, drug and alcohol abuse from age 12 or 13 (PC-R2. V3/T363). Ragsdale had used a lot of marijuana, cocaine and alcohol from an early age, which may cause brain impairment (PC-R2. V3/T363-64). Typically, such impairment would be reflected in motor control and coordination skills (PC-R2. V3/T364). Ragsdale completed the eighth grade, but had lots of trouble at school with fighting and frequent suspensions for rules infractions, including having hit a teacher in the seventh grade (PC-R2. V3/T364). He was married for about a year when he was 22 years old, and lived with another woman for a time before he went to prison in Alabama (PC-R2. V3/T365). He consumed drugs and alcohol and got high on a daily basis; he also had a number of temporary jobs, but was never terminated from any employment (PC-R2. V3/T365).

According to what Ragsdale told Merin about the car accident he was involved in, Ragsdale was drinking, smoking pot, and doing acid when the car he was riding in hit a tree; Ragsdale's head went through the windshield and he received several severe cuts but was not rendered unconscious (PC-R2. V3/T366). Ragsdale spent some time in the hospital but left against

medical advice after telling his parents that he had been doing drugs, because he was fearful the police were going to come (PC-R2. V3/T366-367). Merin explained how Ragsdale's decision to leave, while medically inappropriate, demonstrated the injury had not affected his reasoning ability (PC-R2. V3/T367). Ragsdale denied having ever had hallucinations, delusions, or taken prescription medicine for psychological purposes; he did not recall anyone having ever told him that he was psychotic (PC-R2. V3/T368).

Because Dr. Merin was not permitted to question Ragsdale about the murder, he did not have an opinion on the extreme disturbance statutory mitigator, but Merin was not able to identify any brain injury or mental disorder that could provide for such a disturbance (PC-R2. V3/T368-370). Merin did not think that the second statutory mitigator of substantial impairment would apply (PC-R2. V3/T371). According to Merin, Ragsdale was not psychotic, but did suffer from a personality disorder/not otherwise specified and may have had a learning disability (PC-R2. V3/T371-373).

The State also presented the testimony of Ragsdale's trial defense attorney Robert Culpepper. Culpepper was appointed to represent Ragsdale after a number of other attorneys had been appointed and then withdrawn (PC-R2. V3/T388; see also, DA-R. V5/840-862). He obtained the discovery from the prior

attorneys, including a psychological report from Dr. DelBeato, which he reviewed (PC-R2. V3/T388-389). Culpepper stated that he did not put on any evidence of mental mitigation in the penalty phase because he didn't think it would help Ragsdale (PC-R2. V3/T390). He had considered the mitigation suggested by DelBeato's report, but did not consider it to be sufficient to present to the jury (PC-R2. V3/T391). Culpepper focused his case on establishing that the co-defendant Illig was more culpable in the actual killing and had already received the lesser sentence of life imprisonment (PC-R2. V3/T390).

Culpepper's wife assisted him a lot in the penalty phase investigation (PC-R2. V3/T391, 395). She had worked with him on cases in the past and had prior experience as a probation officer; she was later an investigator with the public defender's office (PC-R2. V3/T396-7). His wife was primarily the one to contact the family members in Alabama, and Culpepper knew that she made a lot of phone calls and talked to some people up there, but never got any response or generated any interest from any family members to help (PC-R2. V3/T391). None of the family members ever came down to visit Ragsdale in jail, there was no communication from the family, and the contacts they made did not lead to anything fruitful (PC-R2. V3/T391, 407-408). His feeling was that the family didn't care, they were not particularly helpful or interested (PC-R2. V3/T408).

Also, Culpepper spoke with Ragsdale, and Ragsdale gave no indication of any child abuse or family background mitigation (PC-R2. V3/T406).

Culpepper knew about Ragsdale's history of drug and alcohol abuse, his prior drug conviction, and the low intelligence and learning disability suggested by DelBeato; he also recalled reading depositions of Ragsdale's brothers, Terry and Ernie, that were taken prior to trial (PC-R2. V3/T401, 404). He knew that Terry's deposition was negative toward Ragsdale, but when he talked to Terry, the things Terry told him were very helpful for their defense (PC-R2. V3/T401-402). Terry had told him that Ragsdale was not a leader but a follower, which fit in well with the penalty phase strategy of proving that Illig was more culpable (PC-R2. V3/T392-393). However, once Terry took the stand, he reversed what he had told Culpepper and sounded more like he had sounded in the deposition (PC-R2. V3/T392-393, 402-403). Culpepper's notes from his interview with Terry were attached to his deposition (PC-R2. V3/T393).

Culpepper was asked if he made a decision not to conduct any further investigation into family background or mental mitigation, and he responded that, in hindsight, he thought they made an initial attempt to get information, they were not able to get a whole lot from Ragsdale, they got nothing from his family, had nothing fruitful happening in those areas so he

turned his attention to the relative culpability issue (PC-R2. V3/T407-408). He still believes this is the most effective thing they could have done; it wasn't necessarily a choice against putting on other mitigation, it was just that their investigation did not turn up anything else serious enough to present to the jury (PC-R2. V3/T413).

The deposition of Dr. DelBeato was admitted by the court upon agreement by the parties below (PC-R2. V3/T355). DelBeato is a licensed psychologist that evaluated Ragsdale in 1986 at the request of then-defense counsel William Webb (PC-R2. SV1/T69-70). DelBeato had no recollection of the case and no records from 1986; his testimony was based on a review of his 1986 written report (PC-R2. SV1/T70). DelBeato noted that his report was generated after a confidential evaluation, and would have been furnished to defense counsel but not to the court or prosecution (PC-R2. SV1/T73). Typically such evaluations encompassed his conclusions on competency, the ability to determine right from wrong, and any mitigating factors that were apparent (PC-R2. SV1/T71). In doing a general evaluation, he would identify any mitigating factors that he happened to notice (PC-R2. SV1/T74). He noted that his evaluation recommended investigating whether Ragsdale was on drugs at the time of the offense; if other possible mitigators were not discussed in his report, it's because he did not see any indication of them at

the time (PC-R2. SV1/T74-75).

DelBeato noted that his report indicated Ragsdale had a low IQ and a history of drug and alcohol abuse (PC-R2. SV1/T75). Ragsdale's impairment was not significant enough to suggest incompetency, but Ragsdale was functionally illiterate (PC-R2. SV1/T75-76). DelBeato would have noted this information in order to assist defense counsel in communicating with Ragsdale (PC-R2. SV1/T76, 78). Although such a learning disability can be associated with a particular disorder, DelBeato did not see any indication of organic brain damage (PC-R2. SV1/T76). DelBeato would have taken a personal history from Ragsdale, but he did not recall what information he may have obtained (PC-R2. SV1/T78-79). He always took such a history but did not include it in his report unless there was something significant (PC-R2. SV1/T78-79). DelBeato was asked whether he would have looked for child abuse, and DelBeato responded that since 90% of the people he evaluated in 26 years came from abusive families, he did not consider this to always be a mitigating factor; he noted that although not everyone that has been abused will commit a capital crime, most people involved in these types of crimes have been abused (PC-R2. SV1/T79). According to DelBeato, people are paying more attention to child abuse now than they did back then; he comments on any such abuse with every evaluation he does now, but 12 or 15 years ago he didn't do that

much, either because he did not consider it or because he just assumed that everyone he saw had been abused as a child (PC-R2. SV1/T80).

DelBeato was aware of the standards for conducting the general evaluation, and would have followed those rather than expecting much direction from the attorneys (PC-R2. SV1/T80-81). His report noted that Ragsdale was chronically depressed, and DelBeato felt that this depression probably led to the chronic substance abuse, as this is a common form of self-medication (PC-R2. SV1/T82-83). He reviewed the tests that he would have administered, including a neuropsychological screening test, which did not suggest organic impairment (PC-R2. SV1/T83).

Following the conclusion of the evidentiary hearing, the judge held a hearing to entertain final arguments (PC-R2. V3/T428-491). The judge thereafter concluded that Ragsdale had failed to demonstrate either deficient performance or prejudice to support his claim of ineffective assistance of counsel (PC-R2. V3/T489-490). The judge noted that there was no doubt that Ragsdale had had a difficult childhood, and that there were some mitigating circumstances which perhaps should have been presented, but that based on what was available to counsel at the time of trial, counsel's actions were reasonable (PC-R2. V3/T489-490). Finally, the court noted that the aggravating circumstances properly considered by the sentencing judge far

outweighed any possible mitigating circumstances described at the evidentiary hearing, and therefore there is no reasonable possibility that the outcome of the initial sentencing would have been different even if the testimony presented at the evidentiary hearing had been offered during the penalty phase (PC-R2. V3/T490-491). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court's finding that Ragsdale's trial counsel provided effective assistance of counsel is supported by the record and consistent with applicable law. The evidence below did not establish that counsel's actions were unreasonable or that the outcome of Ragsdale's trial could have been any different had counsel's actions been different. Ragsdale was afforded a full and fair hearing below and is not entitled to any relief in this appeal.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN DENYING RAGSDALE'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND INEFFECTIVE MENTAL HEALTH ASSISTANCE.

Ragsdale alleges that the court below erred in denying his claims of ineffective assistance of counsel and ineffective mental health assistance.[2] His claims will be reviewed in detail; however, a review of the evidentiary hearing below clearly establishes that these claims were properly denied. The testimony at the hearing failed to substantiate any suggestion that Ragsdale was deprived of adequate counsel in the sentencing phase of his capital trial, and he is not entitled to relief.

Claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts

[2]Ragsdale's brief does not appear to pursue a claim of ineffective mental health assistance.

or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569. A proper analysis requires that counsel's performance be reviewed with a spirit of deference; there is a strong presumption that counsel's conduct was reasonable. 466 U.S. at 689. This Court discussed these standards in Blanco v. State, 507 So. 2d 1377, 1381 (Fla. 1987):

> A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omissions and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on the

> claimant to show otherwise. Second, the claimant must show the inadequate performance actually had an adverse affect so severe that there is a reasonable probability the results of the proceedings would have been different but for the inadequate performance.

Ragsdale has failed to satisfy this heavy burden. Not only has he failed to show that trial counsel's conduct fell outside the wide range of reasonable professional assistance, but he has also failed to show that the results of his sentence would have been different.

The allegations in this case involved trial counsel's investigation and presentation of mitigating evidence, particularly testimony of a difficult childhood and mental mitigation. Initially, Ragsdale suggests that Robert Culpepper's lack of experience with capital cases contributed to a deficient performance. Alleged inexperience is frequently cited as a basis of incompetence; however, inexperience alone demonstrates neither deficient performance or prejudice. See, United States v. Cronic, 466 U.S. 648 (1984); Burden v. Zant, 903 F.2d 1352, 1361 (11th Cir. 1990), rev'd on other grounds, 498 U.S. 433 (1991). In this case, Culpepper had over five years of experience in criminal defense work in Georgia before coming down here, and had worked for a state attorney's office for several months before doing criminal defense in his private practice (PC-R2. V3/T395-396). Although he did not contact any

particular organizations for specific information about litigating capital cases, he did speak with other lawyers in preparing the case (PC-R2. V3/T396). He was familiar with the law regarding capital cases and did some additional research to help prepare when he first got the case (PC-R2. V3/T395).

Culpepper was appointed to represent Ragsdale after five prior attorneys had been appointed and withdrawn (PC-R2. V3/T388; see DA-R. V5/840-862). He felt that most of the discovery and investigation had been completed, it was mostly a matter of learning the facts and taking them to trial (PC-R2. V3/T401). Culpepper considered the State's guilt case against Ragsdale to be overwhelming; the State not only had confessions from both Ragsdale and his co-defendant, Leon Illig; it had the testimony of Cindy LaFlamboy about Ragsdale returning to her house after the killing, cleaning up and washing off the knife (PC-R2. V3/T393). He thought the chances of getting an acquittal were "extremely, extremely thin," and probably began planting the seeds for a life recommendation by arguing relative culpability throughout the trial, although he had no specific memory of sitting down and developing this as a guilt phase strategy (PC-R2. V3/T397-398).

Ragsdale notes Culpepper's testimony about the case being "ready to be tried" as suggesting that Culpepper was not aware of the need to prepare for the penalty phase, citing Blake v.

Kemp, 758 F.2d 523, 533 (11th Cir.), cert. denied, 474 U.S. 998 (1985). Of course, in Blake, *no* penalty phase investigation was conducted, whereas in the instant case Culpepper reviewed a report from a mental health expert, made repeated attempts to contact family members for information, and discussed possible mitigation with Ragsdale himself (PC-R2. V3/T391, 404, 406-407). Culpepper also developed and focused on a strategy of relative culpability (PC-R2. V3/T390, 392, 394, 408). Thus, there is no suggestion from the facts of this case that Culpepper's inexperience led to a deficient performance due to his failure to understand the need to conduct a penalty phase investigation.

Ragsdale next argues that the decision to present Terry Ragsdale as a penalty phase witness was "an ill advised improvisation" (Appellant's Initial Brief, p. 52). His argument on this claim offers an unreasonable portrayal of Terry's deposition and trial testimony. For example, although Culpepper acknowledged that Terry's deposition was negative toward Ragsdale, the deposition also reflected that Terry expressed his willingness at that time to come to Florida to talk to a judge about reasons why Ragsdale should not get a death sentence, even if Terry was not paid and had to miss work to come (PC-R2. SV1/T24-25). Terry also stated that although he was "a little bit" mad about having been stuck with Ragsdale's loan, he did

not harbor any ill feelings towards Ragsdale (PC-R2. SV1/T8-9). Also, it is clear from Terry's trial testimony that he did not believe that Ragsdale was the one to cut the victim's throat, as Terry repeatedly stated that Ragsdale was not capable of committing this murder (DA-R. V4/T691, 694).

Although Ragsdale now criticizes Culpepper for having presented Terry and "[w]hatever minimal mitigation" he provided, Terry's testimony was important. Terry testified that he and Ragsdale were two of four brothers in the family; Terry was 30 years old and Ragsdale was 27 at the time of trial (DA-R. V4/T686). Terry had been around Ragsdale growing up and as an adult, and did not believe that Ragsdale was a dangerous person (DA-R. V4/T687-688). Terry stated that Ragsdale was not violent; he would run his mouth a lot, but did not follow through on his threats (DA-R. V4/T688). According to Terry, Ragsdale was a follower (DA-R. V4/T688). Ragsdale quit school in the seventh grade, and can read some, about as well as Terry (DA-R. V4/T689-690).

Terry described how Ragsdale received the scar on his cheek, by going through a window in a car accident, when the car he was riding in hit a tree (DA-R. V4/T690). Also, Ragsdale's right eye seems to wander from an accident when they were very young, playing cowboys and Indians, and Terry shot him in the eye with an arrow (DA-R. V4/T690-691). Ragsdale was blind in that eye as

a result (DA-R. V4/T691). Terry stated that Ernest Mace was a family friend, although Terry didn't know him too well, and that Terry did not believe that Ragsdale was capable of killing Mace (DA-R. V4/T691).

On cross-examination, Terry admitted that Ragsdale was a bully growing up; all the brothers had been mean (DA-R. V4/T692). He didn't pick fights, but ended up in them anyway, and would hit and push people (DA-R. V4/T692). However, he wasn't violent, he was just the kind of person that didn't like to be pushed around (DA-R. V4/T693). Ragsdale was mean when he was smoking dope; he smoked it and sold it (DA-R. V4/T693). Terry also repeated that he didn't really know Mace that well, and that he did not think that Ragsdale was the one to kill Mace (DA-R. V4/T694, 696). Even though Ragsdale told Terry he cut the man's throat, Terry said that you couldn't believe half of what Ragsdale says (DA-R. V4/T694).

Culpepper testified at the evidentiary hearing that he made the decision to put Terry on the stand after speaking with Terry and having reviewed his deposition (PC-R2. V3/T401-402). This decision was not unreasonable; Culpepper had not gotten much cooperation from Ragsdale's family, and Terry's statements that Ragsdale was a follower and not capable of this murder fit with the defense theme of establishing that Illig was the actual killer (PC-R2. V3/T402, 407-408). Ragsdale's current criticism

of presenting Terry as a witness demonstrates only that his current counsel disagrees with trial counsel's strategic decision on this issue. This is not the standard to be considered. Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"); Rose, 675 So. 2d at 570 (affirming denial of postconviction relief on ineffectiveness claim where claims "constitute claims of disagreement with trial counsel's choices as to strategy"); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994); State v. Bolender, 503 So. 2d 1247, 1250 (Fla.), cert. denied, 484 U.S. 873 (1987). In reviewing Ragsdale's claim, this Court must be highly deferential to counsel:

> 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 proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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.

Strickland, 466 U.S. at 689; see also, Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial"); Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Stano v. State, 520 So. 2d 278, 281, n. 5 (Fla. 1988) (noting fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness). Thus, no ineffectiveness has been shown in the decision to use Terry as a penalty phase witness.

Ragsdale acknowledges that Culpepper's closing argument "had potential" since the jurors thereafter inquired about relative culpability; however, he then claims that Culpepper "dropped the ball" on this strategy by failing to request an Enmund v. Florida, 458 U.S. 782 (1982), charge when the jury question on culpability was raised. It must be noted initially that this argument is not properly before the Court. Ragsdale has never raised a claim that his attorney was ineffective in the response to the jury questions posed during penalty phase deliberations, and has never, until the filing of his brief, argued this as a

basis of deficient performance. His prior claim regarding the adequacy of defense counsel's closing argument was rejected by this Court in his prior appeal. Ragsdale, 720 So. 2d at 205, n. 2. It is not within the claims which were remanded for an evidentiary hearing, and it clearly should not be considered at this time.

In addition, Ragsdale does not explain how an Enmund charge could have made a difference in this case; the sentencing judge expressly found, as required, that "[t]he credible evidence indicated that while Mr. Illig struck Mr. Mace, it was Mr. Ragsdale that pitilessly cut his throat" (DA-R. V6/916). The jury question did not involve a strict Enmund issue, but simply questioned the "justice" of recommending a greater sentence for a less-culpable defendant. Responding to the inquiry with an Enmund charge could easily have confused the jurors or detracted from the fairness argument that the defense had emphasized. Thus, no ineffectiveness has been shown with regard to defense counsel's closing argument or response to the jury questions.

Ragsdale also claims that Culpepper failed to investigate family background and mental mitigation. As to the family background, Culpepper testified that his wife assisted him in the investigation by attempting to contact Ragsdale's family (PC-R2. V3/T391, 404). Although he did not recall at the hearing exactly who his wife had spoken to or what information

she had obtained, he knew that she had made a number of telephone calls and got little response or cooperation from the family (PC-R2. V3/T391, 404). Culpepper's testimony that no one from the family ever came to visit Ragsdale in jail or initiated any contact with him was not refuted by any witness (PC-R2. V3/T391, 408). In addition, Culpepper's discussions with Ragsdale did not offer any suggestion that Ragsdale had been abused as a child or had an impoverished background (PC-R2. V3/T406). It was not that Culpepper made a decision not to investigate Ragsdale's background, it was just that the investigation he and his wife attempted did not turn up anything fruitful, so they focused on other possible mitigation (PC-R2. V3/T407-408).

Clearly, this is not a case where counsel totally failed to investigate. Ragsdale's concerns about Culpepper's inability to testify, eleven years later, exactly which family members were contacted and what information was obtained do not suggest that counsel's performance was deficient. In all likelihood, Culpepper's wife would have contacted Ragsdale's mother and father, who were alive at the time of trial but not at the time of the evidentiary hearing (PC-R2. V2/T192, 204); she may have also spoken to one or more of his brothers and to Raymond Hicks, who Ragsdale lived with while in Florida but who did not testify at trial or at the evidentiary hearing. Culpepper himself spoke

with Terry and perhaps others (PC-R2. V3/T404). The fact that one brother, three cousins and a distant aunt are now willing to provide testimony about Ragsdale's difficult childhood does not establish that Culpepper performed deficiently in investigating Ragsdale's background for mitigation.

The cases cited by Ragsdale do not compel the granting of relief. Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir.), cert. dismissed, 515 U.S. 1189 (1995) was a case in which a misunderstanding between the two co-counsel resulted in a lack of investigation into mitigating evidence. The only evidence submitted for sentencing was the stipulation that the defendant was 33 years old. Although a routine background history was taken from the defendant, neither counsel followed up by talking with family members or friends. Jackson and her sister testified at the federal evidentiary hearing to a wealth of mitigation from her life history, including having to drop out of school in the eighth grade due to her pregnancy; being subject to abuse from an alcoholic mother, yet being devoted to her mother and caring for her through a terminal illness; her devotion to other family members including her child and her sister; a steady employment history; and having been under the influence of alcohol at the time of the crime. As noted above, the instant case is not one where no investigation was conducted, so Jackson is not persuasive.

In Blanco v. Singletary, 943 F.2d 1477, 1500-01 (11th Cir. 1991), cert. denied, 504 U.S. 943 (1992), defense counsel undertook some minimal investigation, included leaving messages with family members, but not until after trial had commenced. Although counsel had attempted to contact a number of Blanco's family members and friends, these attempts were not part of the general trial preparation, but were made as the trial was ongoing or after the guilty verdict had been returned. And although the court had recessed for four days before the sentencing, it was apparent that Blanco's attorney simply ran out of time due to the failure to begin the penalty phase investigation prior to trial. As a result, information about Blanco's impoverished childhood in Cuba, his organic brain damage, and his epileptic seizures was never known to counsel.

Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988), is also easily distinguishable. In that case, counsel "conducted almost no background investigation," and failed to learn that Middleton had been placed in a psychiatric hospital for about two weeks when he was twelve years old, diagnosed as having "Schizophrenia Reaction, Chronic Paranoid Type with Passive Features" and needing residential treatment. In addition to his documented mental illness, Middleton had suffered abuse as a child; he had run away from home frequently and, when his mother

died when he was ten years old, his father told him that his absence (from having run away) had caused her death; he had also been sexually abused while in reform school and made the first of several suicide attempts when he was thirteen years old. Clearly, the mitigation which was available for discovery in the Middleton case, particularly the extensive mental health evidence, is not present in the case at bar.

Obviously, Culpepper had a clear duty to conduct a reasonable investigation into possible mitigation, but once again this is not a case where no investigation was conducted. This Court has previously differentiated between cases where defense counsel conducted *no* penalty phase investigation and cases where, as here, an investigation was conducted and the question was whether the *scope* of the investigation was reasonable. See, Jones v. State, 732 So. 2d 313, 319 (Fla. 1999); Rutherford, 727 So. 2d at 223. Of course, there can be no set formula for a "reasonable investigation," because each individual case will present different avenues for investigation.

Case law offers a number of scenarios involving attorneys performing inadequate investigations: in Blanco, the only attempt to secure mitigation witnesses was to leave telephone messages and wait for responses, after trial had started; in Armstrong v. Dugger, 833 F.2d 1430, 1433-34 (11th Cir. 1987),

counsel had but a single conversation with the defendant and his parents, and another conversation with the defendant's parole officer. On the other hand, in Ferguson v. State, 593 So. 2d 508, 510-511 (Fla. 1992), counsel's interviewing the defendant and family members, and reviewing psychiatric reports, then putting the mother on as the only witness, was sufficient. See also, Jones, 732 So. 2d at 316-318 (counsel spoke with three family members that were not interested in helping the defendant, and presented a mental health expert but did not establish the statutory mental mitigation); Francis v. Dugger, 908 F.2d 696 (11th Cir. 1990), cert. denied, 500 U.S. 910 (1991) (decision to make impassioned argument for life and not to investigate family background not deficient). What is clear is that there is no particular investigative scope which is required; necessarily, what investigation will be deemed "reasonable" must vary from case to case depending on the circumstances presented. It is a matter of common sense that some defendants will present a great deal of potential mitigation, while others simply may not offer as much to be investigated or presented. Strategic decisions about when to forego further investigation must be made in every case, as lawyers can "almost always do something more," and do not enjoy the benefit of endless time, energy or financial resources. Rogers v. Zant, 13 F.3d 384, 387 (11th Cir.), cert. denied, 513

U.S. 899 (1994), quoting Atkins v. Singletary, 965 F.2d 952, 959-960 (11th Cir. 1992).

Strickland teaches that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-691. Thus, it is necessary to look at the investigation that was actually conducted, rather than simply seeing the fruits of a later investigation, to determine the reasonableness of the investigating attorney's performance. See, Rose, 675 So. 2d at 572 (in evaluating competence of counsel, must examine counsel's actual performance in preparation for penalty phase, as well as reasons advanced for performance). The investigation described by Culpepper below was more extensive than those in Ferguson, Jones, and Francis, all of which were deemed to be reasonable. Culpepper knew to investigate Ragsdale's background and talk to family members in order to develop penalty phase evidence, and his wife advised him of the conversations she had and the information she was getting, and he concluded that the family was not interested in helping (PC-R2. V3/T404, 406-408).

Ragsdale now asserts that Culpeppper's conclusion was "flatly incredible" because his brother Ernie was available and willing to help, even deposed prior to trial. The fact that one brother out of Ragsdale's six person family came forward at his

evidentiary hearing does not negate Culpepper's testimony that Ragsdale's family was not interested or helpful at the time of trial. And although Ragsdale now extols Ernie as a credible witness, at the time of trial, Ernie's child was being taken care of and adopted by Ragsdale's diabetic mother (PC-R2. SV1/T12). This is the same Ernie that Ragsdale gave the knife to after confessing to Mace's murder (DA-R. V2/T311). Ernie also believed that Ragsdale was mean and violent, especially when he was on drugs (PC-R2. V2/T184-185, 200). Ernie's testimony at the evidentiary hearing did not offer any positive character traits, so it also would have been subject to the same criticisms counsel is now leveling at Terry's penalty phase testimony.

Culpepper's testimony at the hearing below established that he conducted a reasonable investigation for background mitigating evidence at the time of Ragsdale's trial. This testimony provides substantial support for the trial court's finding that this mitigation "was not available to his trial counsel" (PC-R2. V1/130) and compels the rejection of Ragsdale's claim of ineffectiveness with regard to counsel's investigation of family background mitigation. Huff v. State, 25 Fla. L. Weekly S411 (Fla. 2000) (standard of review for ineffective assistance of counsel claim requires deference to factual findings of trial court). Since the trial court's finding that

Culpepper was not deficient in his investigation of Ragsdale's background is supported by the testimony below, it should not be disturbed on appeal.

As for mental mitigation, Culpepper testified that he considered presenting mental mitigation, that he had Dr. DelBeato's report and reviewed the report, but that he did not think there was sufficient mental mitigation to present to the jury (PC-R2. V3/T389-391). Although Ragsdale makes much of the fact that Dr. DelBeato characterized his own work as preliminary, this is not the issue. The question is whether any reasonable attorney could review Dr. DelBeato's report and conclude that the mental mitigation suggested in the report would not be helpful. There is no question that Culpepper was aware of Ragsdale's drug and alcohol use, his prior drug conviction, his learning disability and low IQ (PC-R2. V3/T406). According to Dr. DelBeato, any other possible mitigating factors which he noted in his evaluation would have been mentioned in the report (PC-R2. SV1/T75). The court below specifically found that "the psychological factors discussed during this hearing were considered by trial counsel" (PC-R2. V1/130). Since Culpepper was aware of this evidence and chose not to present it, the failure to present mental mitigation was a strategic decision, not subject to being second-guessed or challenged as ineffectiveness simply because current counsel would proceed

differently. Strickland, 466 U.S. at 689.

Ragsdale's brief again unfairly characterizes some of the testimony at the hearing below on this issue. For example, he notes repeatedly that DelBeato's report advised defense counsel of the need to investigate Ragsdale's claim to have been on drugs and alcohol at the time of the crime, stating that Culpepper failed to follow up on Delbeato's advice to do more. Yet he has not alleged that intoxication was not explored and, more importantly, has never identified any possible fruit from such an investigation. Additionally, Ragsdale's suggestion that DelBeato inferred that money may have limited the scope of his evaluation was expressly refuted by Dr. DelBeato (PC-R2. SV1/T89-90).

Of course, a defendant's mental condition is not an issue in every case. Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); see, Francis, 908 F.2d at 703 (noting trial counsel had no reason to retain mental health expert since facts of the offense showed Francis was fully aware of criminality of his actions). Furthermore, it is important to assess the nature of the mental evidence available in determining counsel's reasonableness in pursuing such mitigation. Rutherford, 727 So. 2d at 223. Although Dr. Berland testified below that both mental mitigating factors would apply in this case, the testimony which he offered was not compelling and was, in some ways, directly refuted by

both Dr. Merin and Dr. DelBeato. Dr. Berland's diagnosis of an unspecified form of mental illness based on the administration of outdated intelligence and personality tests was criticized by Dr. Merin (PC-R2. V3/T291-291, 305, 360-363). Both Merin and DelBeato conducted neuropsychological screenings and found no indication of organic brain damage (PC-R2. V3/T360, 369, 371; SV1/T76, 83). In addition, Berland testified that Ragsdale's "character disturbance" made it difficult to assess which of his test results were the product of mental illness and which merely reflected the character problem (PC-R2. V3/T306). A review of the mental health evidence available both as known to defense counsel at the time of trial and as offered at the evidentiary hearing does not establish that Culpepper was ineffective in his decision not to present mental health mitigation.

Strickland counsels that, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, it is not necessary to address whether counsel's performance fell below the standard of reasonably competent counsel. 466 U.S. at 697. The jury recommendation for death in this case was eight to four. Ragsdale committed a senseless murder of a family acquaintance in order to rob the man. Mr. Mace was beaten, suffered numerous stab wounds, and had his throat cut "from ear to ear." The circumstances of the instant offense and Ragsdale's prior record demanded the imposition of

the death penalty for this crime.

As part of this issue, Ragsdale asks for reconsideration of several claims this Court initially found to be procedurally barred, alleging that these claims include facts which must be considered as part of the total record in assessing any potential prejudice. Ragsdale has not cited any authority which requires previously-rejected claims to receive new life simply because new allegations are offered. However, to the extent that an ineffective assistance of counsel argument was previously presented on these claims, Ragsdale still has not demonstrated deficiency or prejudice. Primarily, Ragsdale alleges that the State's penalty phase closing argument was highly improper, and counsel was ineffective for failing to object to many of the State's comments. A review of the State's closing argument, in context, establishes that the prosecutor's remarks were supported by the record and relevant to the aggravating factors applicable in this case, including heinous, atrocious, or cruel. Since the comments were not improper, counsel cannot be deemed to have been ineffective for failing to object.

Ragsdale's extensive review of the mitigating evidence presented at the hearing below does not demonstrate that the jury recommendation or actual sentence would have been any different had this testimony been offered at his original

sentencing. Although Ragsdale was harshly disciplined as a child, the abuse described at the evidentiary hearing was not as horrific as many childhood descriptions routinely presented at capital postconviction hearings. In addition, the fact that Ragsdale had been away from the abusive home for and out living his own life for many years detracts from the mitigating value of his past abuse. In fact, Ragsdale's father was afraid of Ragsdale by the time he was a teenager, and Ragsdale was out of his parents' home by the time he was a young teen (PC-R2. V2/T193-194, 198, 233, 268; SV1/T47).

Furthermore, some of Ragsdale's assertions do not enjoy solid record support. For example, Ragsdale states that he was introduced to drugs around age eight "through parental neglect," when the only testimony at the hearing was that Ragsdale began sneaking his father's pain pills around that time (PC-R2. V2/170). Ragsdale also states that his father was mentally ill, apparently based on the testimony of Rebecca, who had limited contact with the family, and Sheila, who believed Clyde was mentally ill because he told her once that her shorts were too short, when she did not think they were (PC-R2. SV1/43, 50, 119-120).

Even Culpepper testified at the evidentiary hearing that he would not necessarily have presented evidence about child abuse or brain damage, even if he had discovered it - he would have to

give further consideration to whether such evidence would contradict the relative culpability strategy (PC-R2. V3/T405-406). While evidence about Ragsdale's childhood troubles and mental deficiencies may not directly contradict the relative culpability strategy, it certainly detracts from the argument that Ragsdale was not capable of committing this murder to characterize him as mentally ill and criminally deviant since childhood.

Many comparable cases support the judge's conclusion below that no possible prejudice could be discerned from counsel's performance in this case, even if deficiency could be proven or presumed. In Rutherford, the jury had recommended death by a vote of seven to five; as in the instant case, the judge had found three aggravating factors (during a robbery/pecuniary gain; HAC; and CCP) and the statutory mitigator of no significant criminal history. The judge had not found any nonstatutory mitigation, despite trial testimony of Rutherford's positive character traits and military service in Vietnam. Testimony was presented at the postconviction evidentiary hearing that Rutherford suffered from an extreme emotional disturbance and had a harsh childhood, with an abusive, alcoholic father. Yet this Court unanimously concluded that the additional mitigation evidence presented at the postconviction hearing would not have led to the imposition of a life sentence

due to the presence of the three substantial aggravating circumstances. 727 So. 2d at 226. See also, Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (three aggravating factors of during a burglary, HAC, and prior violent felony overwhelmed the mitigation testimony of family and friends offered at the postconviction hearing); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (no reasonable probability of different outcome had mental health expert testified, in light of strong aggravating factors); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989) (postconviction evidence of abused childhood and drug addiction would not have changed outcome in light of three aggravating factors of HAC, during a felony, and prior violent convictions).

In Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990), trial counsel had failed to present mitigating evidence that Buenoano had an impoverished childhood and was psychologically dysfunctional. Buenoano's mother had died when Buenoano was young, she had frequently been moved between foster homes and orphanages where there were reports of sexual abuse, and there was available evidence of psychological problems. Without determining whether Buenoano's counsel had been deficient, the court held that there could be no prejudice in the failure to present this evidence in light of the aggravated nature of the crime. The mitigation suggested in the instant case is much

less compelling than that described in Buenoano, and this case is also highly aggravated. See also, Mendyk v. State, 592 So. 2d 1076, 1080 (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 postconviction 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 reasonable probability of life sentence if evidence had been presented); LeCroy v. State, 727 So. 2d 236, 240 (Fla. 1998) (no deficiency or prejudice where counsel presented penalty phase witnesses describing defendant as a good boy from a good home, despite postconviction allegations of childhood abuse and neglect).

As Dr. DelBeato noted, a history of an abusive childhood is fairly typical in capital defendants (PC-R2. SV1/T79). Evidence of a difficult upbringing also loses weight where, as here, the defendant is a mature adult, having been living responsibly on his own for a number of years before the murder. Compare, Rose v. State, 617 So. 2d 291, 295 (Fla.), cert. denied, 510 U.S. 903

(1993) (family background evidence not compelling where Rose was thirty-two years old at time of murder, and brother would have testified that Rose was a violent person when on drugs, a continuous pattern since childhood); Bottoson v. State, 674 So. 2d 621 (Fla.), cert. denied, 519 U.S. 967 (1996) (no reasonable probability of different result even if mental health testimony and troubled childhood had been presented on forty-one year old defendant).

As noted in the cases above, in order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Strickland, 466 U.S. at 694. The aggravating factors found in this case were: committed while under a sentence of imprisonment, committed during the course of a robbery/pecuniary gain, and heinous, atrocious or cruel. Ragsdale has not and cannot meet the standard required to prove that his attorney was ineffective when the facts to support these aggravating factors are compared to the mitigation now argued by collateral counsel.

Thus, the investigation and presentation of mitigating evidence in this case was well within the realm of constitutionally adequate assistance of counsel. Trial counsel

conducted a reasonable investigation, presented appropriate penalty phase evidence, and forcefully argued for the jury to recommend sparing Ragsdale's life. There has been no deficient performance or prejudice established in the way Ragsdale was represented in the penalty phase of his trial. On these facts, the appellant has failed to demonstrate any error in the denial of his claim that his attorney was ineffective in the investigation and presentation of mitigating evidence or in any other aspect of the penalty phase litigation. No relief is warranted.

ISSUE II

WHETHER THE LOWER COURT ERRED IN THE CONDUCTING OF THE EVIDENTIARY HEARING.

Ragsdale's next issue challenges four actions by the court below in conducting the evidentiary hearing: (1) making a "recommendation" rather than a final order; (2) excluding the pre-hearing deposition of trial counsel Culpepper following his testimony and excusal as a witness at the hearing; (3) limiting cross-examination of trial counsel; and (4) applying the law to the facts of the case. Each of these claims will be addressed in turn; as will be seen, none of the claims offer any basis for relief.

Ragsdale's complaint that the judge below issued a "recommendation" to this Court rather than entering an order on the postconviction motion is an unwarranted concern with semantics. Even if the judge below were confused as to his actual role due to the nature of the remand for an evidentiary hearing in this case, his findings are expressly noted and Ragsdale has not even attempted to identify any prejudice in the judge's description of his action as a recommendation. During the course of the hearings below, the judge noted that his recommendation was due to this Court by a certain date; although the prosecutor advised that he had to rule by then, no other clarification of the judge's role was offered (PC-R2. V3/T421, 491). If counsel now believes that the judge's characterization

of his ruling as a recommendation amounts to reversible error, he had an obligation to advise the court below that it was not making a recommendation when that nomenclature was initially used. At any rate, no useful purpose would be served by remanding this case for a new order denying relief.

As to the court's exclusion of defense counsel Culpepper's pre-hearing deposition, this claim cannot be considered since the deposition itself is not included in the record on appeal. See, Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990), cert. denied, 510 U.S. 845 (1993) (to preserve issue of exclusion of evidence, the nature of the evidence must be proffered on the record). In addition, Ragsdale has offered no basis for the admission of this prior testimony, either in his brief or at the time of the hearing (PC-R2. V3/T415-418). The record reflects that the deposition was taken in order to accommodate Culpepper's appearance as a witness; however, admission of the deposition was not necessary since the State was able to secure Culpepper's presence at the hearing (PC-R2. V1/27-39). Ragsdale rested his case without calling Culpepper as a witness. The State presented Culpepper in its case, and Ragsdale sought to have the deposition admitted after the State had rested and Culpepper had been excused as a witness. There is no claim that the deposition contains inconsistent statements and it was not used to impeach Culpepper. No error has been demonstrated.

This was an evidentiary ruling within the wide discretion of the trial judge, and no abuse of discretion has been shown. See, Provenzano v. Moore, 744 So. 2d 413, 415 (Fla. 1999), cert. denied, 120 S.Ct. 1222 (2000) (evidentiary rulings from postconviction hearings are reviewed for an abuse of discretion). Ragsdale has not explained why consideration of the deposition is necessary, other than to assert that it is "more detailed" than Culpepper's in-court testimony; he has not explained why he did not ask questions to elicit these details while Culpepper was in court testifying.

Ragsdale also challenges the trial court's sustaining of the State's objection to Ragsdale asking Culpepper about his failure to object to alleged prosecutorial misconduct. Once again, this claim cannot be reviewed, because no proffer of the excluded answer was made on the record. Lucas, 568 So. 2d at 22. Even if considered, however, the court's ruling was again well within the judge's discretion. This Court's remand specified the issues to be litigated at the evidentiary hearing; the prior finding of a procedural bar regarding the comments in the State's closing argument precluded this as an avenue for evidentiary development. Ragsdale, 720 So. 2d at 205, n. 2. Furthermore, the question was asked on cross-examination, and clearly went beyond the scope of the direct examination by the State. Thus, the court below properly excluded Ragsdale's

attempt to expand the scope of the hearing held below.

Finally, Ragsdale's dispute with the lower court's application of the law to the facts of his case merely reflects his disagreement with the ultimate result reached in this case. Although Ragsdale presumes that the court below used a "subjective" assessment of attorney performance, rather than the objective test mandated by Strickland, his reasoning is not clear. He speculates that the court's ruling was subjective because the judge appeared to accept trial counsel's testimony that Ragsdale's family was uncaring. According to Ragsdale, since it was only trial counsel's *impression* that the family did not care, reliance on this subjective impression was erroneous. What Ragsdale fails to appreciate is that counsel's comments that he did not get any cooperation out of Ragsdale's family at the time of trial was competent testimony on which the trial court was permitted to rely. Reliance on such testimony did not change the judge's objective assessment of Culpepper's performance into an improper subjective ruling.

A review of the transcript clearly demonstrates that the evidentiary hearing held below provided Ragsdale with a full and fair opportunity to present his allegations of ineffective assistance of counsel. The trial judge weighed the evidence presented, considered the credibility of the witnesses that testified, and appropriately reviewed Culpepper's actions

deferentially and from Culpepper's perspective at the time of trial. The judge's specific findings that some of the mitigation presented at the evidentiary hearing was not available to counsel and that other mitigation was considered at the time are supported by Culpepper's testimony and should be accepted by this Court. Since the judge below applied the correct law to factual findings which are supported by the record, this Court must affirm the denial of postconviction relief.

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's denial of postconviction relief must be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
Phone (813) 873-4739
Fax (813) 356-1292
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

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

COUNSEL FOR APPELLEE

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

COUNSEL FOR APPELLEE