IN THE SUPREME COURT OF FLORIDA

MICHAEL RIVERA,

Appellant,

vs. Case No. 01-2523

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, MICHAEL RIVERA, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the direct appeal record will be by the symbol "ROA," reference to the first evidentiary hearing will be the symbol PCR-1" and reference to the second evidentiary hearing will be “PCR-2" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's presentation of the case and facts to the extent that they are accurate. However the state will and does include in the argument section those additional facts which have been omitted from appellant's brief and are relevant for a complete review and determination of the arguments on appeal.

SUMMARY OF ARGUMENT

Issue I - The trial court correctly concluded that trial counsel's penalty phase performance was constitutionally adequate.

Issue II - The trial court did not abuse its discretion in any of its evidentiary rulings.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY DETERMINED THAT TRIAL COUNSEL PROVIDED CONSTITUTIONALLY EFFECTIVE REPRESENTATION AT THE PENALTY PHASE

Appellant was granted an evidentiary hearing during litigation of the initial motion for postconviction relief. This Court upheld the trial court's denial of all relief with the exception of one issue. Rivera v. State, 717 So. 2d 477, 484 (Fla. 1998). Although the trial court properly granted an evidentiary hearing on several claims, the court had erroneously denied Rivera a hearing on his claim of ineffective assistance of penalty phase counsel. Rivera 717 So. 2d at 484. Consequently, the Court remanded this case for an evidentiary hearing based on the following:

> Rivera claims that if counsel had adequately investigated and prepared for the penalty phase, he could have presented a wealth of mitigating factors. He argues that he was prejudiced by counsel's allegedly deficient performance because the trial court found only one statutory mitigator despite the fact that numerous mitigating factors allegedly existed and could have been considered. The trial judge ruled that this claim was procedurally barred. While the State concedes that this claim was not procedurally barred, it argues that the allegations of ineffectiveness were insufficient to require an evidentiary hearing. We disagree.
>
> [9] Rivera claimed in his postconviction motion and in his brief to this Court that

> the following potential mitigation was available if counsel had adequately investigated Rivera's personal history: (1) dissociative disorder; (2) psychosexual disorder; (3) history of hospitalization for mental disorders; (4) sexual
>
> abuse as a child; (5) expressions of remorse; (6) a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; (7) childhood trauma; (8) developmental age; (9) long-term personality disorder; (10) acceptable behavior at trial; (11) reduction in sentence by trial judge in prior case of sexual battery; (12) under influence of drugs at time of offense; (13) non-applicability of the aggravators; (14) drug abuse problem; (15) character testimony from family members; (16) psychotic depression and feelings of rage against himself because of strong pedophilic urges; (17) no drug or alcohol treatment program; (18) substantial domination by alternate personality; (19) artistic ability; (20) capable of kindness; and (21) family loves him. Considering the volume and extent of these alleged mitigators in comparison to the limited mitigation actually presented at trial, we agree with Rivera that he warrants an evidentiary hearing on his claim of penalty phase ineffective assistance of counsel. Cherry v. State, 659 So.2d 1069, 1074 (Fla. 1995); Harvey v. Dugger, 656 So.2d 1253, 1257 (Fla. 1995)

Id. at 484-485. The evidentiary hearing was held over a two day period commencing on April 26, 1999 and concluding on April 27, 1999. Following the receipt of memorandum form both parties the trial court ultimately denied relief. (PCR-2 584-601). With respect to Rivera’s claim that trial counsel should have

presented additional family members[1] to testify about his drug addiction and mental health problems, the trial court determined that much of the new evidence presented at the evidentiary hearing was cumulative to what was presented at trial. (PCR-2 601). Additionally with regards to the drug addiction and drug use at the time of the crime the trial court noted that appellant did not present any evidence at the hearing to establish that he was intoxicated at the time of the murder. (PCR-2 589, 599).[2] The court also noted that family members were generally not helpful and those who were did not have any helpful information, consequently trial counsel focused the presentation on Rivera's sexual abuse and his family's love for him. (PCR-2 594, 596).

With regards to Rivera's claim that Mr. Malavenda should have provided his mental health expert with information regarding his drug abuse history and addiction, the trial court determined that the penalty phase expert, Dr. Ceros-Livingston did have information regarding his drug abuse history. (PCR-2

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[1] Rivera also claims that trial counsel was ineffective in failing to call Andy Ramos to testify about his drug experiences with Rivera. The court noted that Ramos would not have been available to testify as he had his own legal problems at the time of Rivera's trial and therefore he would have bene unwilling to admit to the illegal drug use. (PCR-2 597).

[2] The trial court also noted that Rivera still claims that he is innocent of the murder. (PCR-2 596). This Court noted that Rivera refused to present a guilt phase defense of voluntary intoxication because of his consistent claim of innocence. Rivera v. State, 717 So. 2d 284, 485 (Fla. 1998).

590, 592). Rivera's presentation of a more detailed account of his drug abuse now does not translate into deficient performance at trial. (PCR-2 594). Furthermore, the trial court noted that Dr. Ceros-Livingston's original findings and conclusions would not change based on the additional evidence of Rivera's drug use. (PCR-2 595).

On appeal, appellant claims that the record does not support the trial court's conclusions. Rather, the record demonstrates that trial counsel, Edward Malavenda, failed to conduct a proper investigation into his background. Although counsel had presented penalty phase mitigation, he failed to do the following, "[c]ounsel brought out none of Mr. Rivera's humanizing life history, none of the information regarding how Mr. Rivera's drug abuse developed, or how the drug abuse affected Mr. Rivera personally or in his familial relationships." **Initial brief at 60.** Additionally, the history of Rivera's chronic drug abuse history was not adequately explored by the mental health expert who did testify at the penalty phase. **Initial brief at 60-61.**

Appellee asserts that the record on appeal as well as the record below does support the trial court's factual findings. Additionally the trial court's legal conclusions are supported by the relevant case law. The gravamen of Rivera's complaint before this Court is that there should have been greater

emphasis placed on appellant's chronic drug abuse history as well as his drug use on the day of the murder. Trial counsel was deficient in performance in this regard and the trial court was incorrect in failing to so find. The state asserts that neither the facts developed below or the relevant case law support appellant's claims.

The standard of review regarding the trial court's legal conclusion that counsel was not ineffective is two-pronged: the appellate court must defer tp the trial court's findings on factual issues and must review the trial court's ultimate conclusions *de novo*. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); Bruno v. State, 807 So. 2d 55, 61-62 (Fla. 2001).

In order to be entitled to relief on this claim, Rivera must demonstrate the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687 (1984). This Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must 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. 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.

Id. at 689 (citation omitted). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 784 So. 2d 380, 391 (Fla. 2000) (precluding appellate court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v. State, 675 So. 2d 567, 571 (Fla. 1996) (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 482, 486 (Fla. 1998); Occhicone v. State, 768 So. 2d 1037, 1048(Fla. 2000) ("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions."). With these principles in mind, the trial court's determination was proper.

In support of his claim Rivera presented the testimony of two mental health experts and several lay persons. The mental health experts were Dr. Faye Sultan, a forensic psychologist and Dr. Milton Burglass, a psychiatrist. Dr. Sultan interviewed Rivera on four separate occasions from November 5, 1998 through March 16, 1999. (PCR-2 234). Dr. Sultan identified three main diagnosis: Rivera suffers from; (1) Borderline Personality Disorder; (2) Paraphilia; and (3) substance abuse. (PCR-2 240-242). Rivera's borderline personality disorder causes difficulty in his ability to handle his emotions, impulses, and perceptions of life. (PCR-2 240). Rivera's developmental age is much lower that his chronological age. (PCR-2 251). The paraphilic condition is exhibited in Rivera's recurrent intense sexual urges which include; exhibitionism; transvestism; fetishism; voyeurism; and pedophilia. (PCR-2 241). Rivera's cocaine dependency results in a distorted perception of the world and exacerbates his existing urges to physically control someone. (PCR-2 242, 246). As a teenager, Rivera was involved in a sexual relationship with an older man which caused marked changes in his behavior. (PCR-2 249). Sultan opined that Rivera was under the influence of cocaine at the time of the crime. (PCR-2 253). Rivera could not conform his behavior to the requirements of the law, and he was suffering from extreme mental and emotional disturbance at the time of the crime.

Sultan would not offer an opinion regarding whether Rivera appreciated the criminality of his actions (PCR-2 279-280).

The information relied upon by Sultan in formulating her diagnosis consisted of clinical interviews with Michael Rivera; discussions with Rivera's brother, Peter and sister, Miriam; school records primarily from first to seventh grades; police reports from prior offenses committed by Rivera including his conviction for the attempted murder of Jennifer Geotz;, a 1980 evaluation by Dr. Kerger, a 1986 evaluation done by Dr. Cohn; and an evaluation done by Dr. Ceros-Livingston on November 13, 1986; trial testimony; and newspaper articles. (PCR-2 233-237, 274-278).

Sultan did not conduct any psychological testing of her own but rather relied upon the testing done by Dr. Ceros-Livingston in the formulation of her opinions. (PCR-2 267-268). Dr. Sultan conceded that much of her own diagnosis was already contained in the report of Dr. Ceros-Livingston. (PCR-2 271-273). The only disagreement with the diagnosis reached by Ceros-Livingston centered on the view/treatment of Rivera's drug abuse. (PCR-2 269-270). She stated that Ceros-Livingston, although she knew about Rivera's drug abuse history, did not include it in the diagnosis. (PCR-2 269-270). Sultan opines that Rivera's assaultive-aggressive behavior goes hand-in-hand with his cocaine use. (PCR-2 272). A basic premise of Sultan's

diagnosis is that Rivera was high on cocaine on the night of the murder. (PCR-2 253, 273). This opinion is primarily based on talking with Rivera's siblings who were with him weeks before the murder and "around" the time of the murder. (PCR-2 274-278).

Dr. Milton Burglass, a psychiatrist with extensive background in drug addiction also testified. (PCR-2 288-290). Dr. Burglass was asked to explore Rivera's substance abuse in general as well as any intoxication at the time of the offense. (PCR-2 293). Burglass recounted Rivera's chronic use of drugs and alcohol from the time he was nine years old. (PCR-2 296-304). Rivera's history of substance abuse began with occasional drinking and progressed into marijuana, glue sniffing and hallucinogens. (PCR-2 296-299). He first began to use cocaine in powder form in 1979 and eventually became addicted to crack cocaine in 1985. (PCR-2 300-303). Burglass further explained that generally speaking while on a cocaine high, the addict becomes delusional, cognitive thinking is impaired, and a person's sex drive is increased. (PCR-2 308-310). The effects of cocaine last from thirty seconds to two minutes. (PCR-2 316). Extensive use would lead to a shorter high. Afterwards the addict will become lethargic, sleepy and somewhat depressed. (PCR-2 305, 316-317). Burglass opined that around the time of the crime Rivera was under extreme emotional disturbance by

virtue of the physiological effect of cocaine use. (PCR-2 315). Burglass concluded that Rivera was high on cocaine on the night of the murder based on; affidavits from Andy Ramos, Miriam Rivera, Peter Rivera; school records; hospital records; reports from Drs. Cohn and Ceros-Livingston; and trial testimony. (PCR-2 293, 319).

In further support of this claim, Rivera presented the testimony of various lay witnesses which included his three siblings, former trial counsel, and three individuals who through personal knowledge, knew about Rivera's prior drug history. (PCR-2 131-227). Miriam Rivera testified that she and her siblings grew up in a very sheltered environment in New York. That all changed when they moved to Florida. (PCR-2 132-133). She and her brother Michael started drugs at an early age. They started snorting "rush" and progressed from alcohol, to marijuana and then to crack. (PCR-2 134-135). Rivera would steal money from his family to buy crack. (PCR-2 137-138). Rivera's thievery forced Miriam to move out of the house. (PCR-2 139). Miriam recounted trips that Rivera would take to Disney World with an older man named Donovan. (PCR-2 140-141). Miriam also stated that her brother spent time with Danny Franklin and Andy Ramos. (PCR-2 143). When Rivera was not on the drugs he was sensitive, creative, intelligent, and artistic. (PCR-2 144-145).

Alisa Rivera, also Michael's sister, testified consistently with her sister that the Rivera children lived sheltered lives in New York. (PCR-2 146-147). Things changed however when they moved to Fort Lauderdale. The defendant became involved in drugs with a friend Danny Franklin. (PCR-2 150-153). Rivera began stealing money from his family in order to buy drugs. (PCR-2 153-155). Rivera's mother favored Michael and never wanted to face the fact that he was involved in drugs. (PCR-2 149-151, 156). Michael was also involved with an older man named Donovan. (PCR-2 157-158).

Peter Rivera, Michael's brother, was the final family member to be called. He again corroborated the testimony of his sisters regarding Rivera's introduction to drugs once they moved to Florida. (PCR-2 164- 167). Peter and Michael did extensive drugs together especially crack cocaine.(PCR-2 169-173). Michael didn't hold down a steady job and started stealing from his family. (PCR-2 174). Peter testified that Michael was hanging around Donovan. (PCR-2 176, 179-180). Consistent with his trial testimony, Peter stated that he spent the day before the murder with his brother and they drank and smoked crack all day. (PCR-2 179, 183). Peter went to work the next day. (PCR-2 184). All three siblings had testified at the penalty phase without providing any information regarding Rivera's drug usage.

Danny Franklin, a childhood friend of Rivera was the next to testify. He and Rivera were friends since they were 13-14 years old. (PCR-2 179). They did an extensive amount of drugs together. In order to get money for drugs, they would do odd jobs or steal things. Franklin heard rumors that Rivera would also give blow jobs to Donovan for money. (PCR-2 188, 191-194).

Andy Ramos was the final lay witness to testify regarding Rivera's drug abuse. Ramos knew Rivera since August of 1985. He was running a crack house at the time. Shortly after they met, Rivera moved in with Ramos. (PCR-2 213). While living there Rivera would transact drug deals for Ramos. (PCR-2 213-214). Rivera moved out at the beginning of 1986, approximately a week before the murder. Ramos had not seen him since that time. (PCR-2 221-222).

Ramos stated that he would have been unavailable to testify at Rivera's trial because of his own extensive drug use and involvement. (PCR-2 146, 148).

The next witness to testify was Mark Peters. He and Rivera met each other three weeks before the murder. (PCR-2 203-204). They bought drugs from Ramos and would routinely smoke 3-4 times a week after work. (PCR-2 205-206).

To counter that evidence the state relied upon the original penalty phase presentation as well as the evidentiary hearing testimony of both Dr. Ceros-Livingston and trial attorney Edward

Malavenda. The pertinent factual development from both proceedings is as follows. Dr. Ceros-Livingston testified at the penalty phase of Rivera's trial. She had been appointed as a confidential expert for the purpose of penalty phase mitigation. Her original testimony before the jury was extremely detailed. Therein she chronicled Rivera's psychological development with a great emphasis on his extensive sexual disorders. (ROA 1990-2049). Rivera v. State, 561 So. 2d 536, 538 (Fla. 1998). Dr. Livingston saw Rivera for a total of seven and one-half hours over a three-day period. Ceros-Livingston administered three psychological tests. (ROA 1993, 2033, 2039). She detailed petitioner's sexual problems, which included chronic indecent exposures (ROA 2012-2017), and the unsuccessful therapy for his sexual problems. While on probation for indecent exposure, Rivera committed another such episode and was sent to prison for five years. (ROA 2009-2012). He began exposing himself two weeks out of prison. (ROA 2017). Within six months of his prison release he committed an attempted rape (ROA 2018-2020), and then the attempted murder of Jennifer Goetz (ROA 2021). During this time he made hundreds of obscene phone calls. Rivera had oral sex with a man, Mr. Donovan, at the age of thirteen. Rivera stated that he enjoyed it. (ROA 2013). Petitioner enjoyed sex in prison and continued

a relationship with Donovan up until the time of this murder. (ROA 2013-2014).

Based on her findings, Dr. Ceros-Livingston diagnosed Rivera as suffering from a borderline personality disorder between neurosis and psychosis. He may also be suffering from schizophrenia. (ROA 2033-2047). Rivera's extensive abusive past has caused him to suffer from identity problems in terms of sexual behavior, exhibitionism, voyeurism and transvestism. (ROA 2033-2035). She also opined that Rivera was under the substantial domination of his alternate personality "Tony"; and that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (ROA 2046-2048, 2083).

Dr. Ceros-Livingston's report, which was placed into evidence during the original penalty phase, included several references to Rivera's substance abuse. On the first page of her report she discussed Rivera's first introduction into substance abuse which included using "blotter acid", ingesting Quaaludes and drinking beer. Later on in the report she discusses Rivera's test results from the psychological testing conducted and how those scores could be indicative of Rivera's possible excessive use of drugs and alcohol.[3] Therein she further opines that these scores are consistent with someone who

[3] Significantly, Sultan relies on the tests conducted by Ceros-Livingston in formulating her own opinions about Rivera.

is a sociopath and possess limited resources for dealing with problems and stress.

At the evidentiary hearing Ceros-Livingston recounted that she had interviewed Rivera on three separate occasions in 1986 for a total of seven and one-half hours. During that interview, Rivera detailed for her his sexual problems as well as his drug use. (PCR-2 354-355, 357-358). Ceros-Livingston confirmed that much of the diagnosis contained in her original report and testified to at the penalty phase, are the same as those found by Dr. Sultan. (PCR-2 361-365). She also stated that her original diagnoses remain unchanged irrespective of the fact that current counsel has gathered more detailed information regarding Rivera's drug use. (PCR-2 364-366). The additional information may also have lead her to the conclusion that Rivera had an addiction, yet does not change her original diagnoses. (PCR-2 367-368). Moreover, Rivera's past sexual problems, including the attempted murder of Jennifer Geotz, his pattern of exposing himself and the obscene phone calls were all committed while Rivera was <u>not</u> under the influence of drugs or alcohol. (PCR-2 361.

Trial attorney Edward Malavenda was called as a witness by both sides. He testified that he began preparing for the penalty phase immediately after his appointment to represent Rivera. Malavenda went into the penalty phase prepared. His

strategy was to present evidence regarding Rivera's sexual abuse, mental health problems and drug abuse history. (PCR-2 125, 340-341). Towards that end, he hired Dr. Ceros-Livingston. He also attempted to speak to various family members but was somewhat unsuccessful. Rivera's father was particularly uncooperative, and never bothered to attend the trial.[4] Malavenda did speak to Michael's brother Peter at least once a week during those months before the trial in efforts to gather information about Michael. (PCR-2 342-345). It was only from Peter and Michael's discussions with Dr. Ceros-Livingston that Malavenda became aware of Michael's drug abuse. (PCR-2 95, 129-130). Malavenda attempted to find others who would have corroborated Rivera's drug use, however he was unable to find any of those individuals. (PCR-2 96,100, 103, 342-344).

In sum Malavenda testified that he presented all the mitigation that he was able to uncover. That consisted of extensive testimony regarding Rivera's mental health and sexual problems and whatever drug abuse history obtained through Dr. Ceros-Livingston. (PCR-2 94, 100-101, 115-125, 352). Given that the family did not have a lot of positive things to say about Michael, Malavenda decided to limit their testimony to

[4] Malavenda stated that he would not be surprised to learn that Rivera's parents were at the courthouse during these proceedings, yet they never bothered to come into the courtroom to see their son. (PCR-2 125-127, 342-347). That behavior was consistent with their attitude during the original trial. (PCR-2 345).

Rivera's sexual abuse at the hands of Donovan, and how the family loved him. (PCR-2 127-128).

The state asserts that the evidence recounted above conclusively establishes that trial counsel rendered constitutionally adequate representation at the penalty phase. First, although Rivera claims that counsel did not adequately investigate for the penalty phase, a review of the penalty phase transcript in contrast to the evidence presented twelve years later in these proceedings proves otherwise. Most of the evidence offered at this evidentiary hearing was actually presented at trial through the testimony of petitioner's three siblings, his mother, his girlfriend, his brother's fiancé and Dr. Ceros-Livingston, a clinical psychologist. (ROA 1937-2102). Moreover, the trial court found the existence of the mitigating factor that Rivera was under the influence of an extreme mental or emotional disturbance. Rivera, 561 So. 2d at 540. Thus, any additional evidence relating to this mitigating factor would have been cumulative and unnecessary. See Van Poyck v. State, 694 So. 2d 686, 692 (Fla. 1997)(rejecting claim of ineffective assistance of counsel at penalty phase since jury was aware of most of the information being presented in collateral proceedings); Puiatta v. State, 589 So. 2d 231, 234 (Fla. 1991) (same). Moreover, Dr. Ceros-Livingston was obviously aware of Rivera's drug usage, since she concluded in her report that

Rivera was a drug abuser. Rivera's presentation of this information in much greater detail now does not establish that the original investigation and presentation at the penalty phase was inadequate. Id.; See Chandler v. Dugger, 634 So. 2d 1066, 1069-1070 (Fla. 1994)(holding that more information regarding childhood background does render original penalty phase hearing unreliable); Glock v. State, 537 So. 2d 99 (Fla. 1987); Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991)(rejecting notion that counsel is required to call every witness who may have information about an event); Routly v. State, 590 So. 2d 397, 401 (Fla. 1991)(finding defendant did not demonstrate reasonable probability that sentence would have been different had trial counsel presented additional information where much of the evidence was already before judge and jury in different form); Rutherford v. State, 727 So. 2d 216, 224-225 (Fla. 1998) (same); Downs v. State, 740 So. 2d 506 (Fla. 1999)(same); Occhicone v. State, 768 So. 2d 1037, 1049-1050 (Fla. 2000) (same); Bruno, 807 So. 2d at 68 (explaining that counsel cannot be considered deficient simply because new information presented at evidentiary hearing may have been more detailed given that the information was essentially the same).

Second, Dr. Ceros-Livingston confidently stated that her diagnosis/testimony from the penalty phase would not have changed had she been given any additional information regarding

Rivera's drug abuse history. Consequently even if Malavenda had been deficient in failing to present evidence of Rivera's drug abuse, there is no prejudice. See Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997)(rejecting claim of ineffective assistance of counsel at penalty phase given that original expert stated at collateral proceedings that opinion would not change irrespective of new information); Remeta v. Dugger, 622 So. 2d 452, 455 (Fla. 1993)(finding that sentencing process not fundamentally unfair since original mental health expert's testimony would not have been significantly different irrespective of the new information); Patton, 784 So. 2d 380, 393 (rejecting claim of ineffective assistance of counsel for allegedly failing to provide mental health experts with defendant's mental health background as additional information did not change opinion of original doctors); Cf. Finney v. State, 27 Fla. L. Weekly S785, 786 (Fla. September 26, 2002)(affirming summary denial of claim of ineffective assistance of counsel for failing to provide mental health expert with sufficient background absent affidavit form expert that he would have changed his opinion if provided any new information). Significantly, Ceros-Livingston pointed out that much of Rivera's sexual deviancy and acting out was done while he was not under the influence of drugs. Consequently there is a strong basis for Ceros-Livingston's rejection of this "new"

information. See Correll v. Dugger, 558 So. 2d 422, 426 (Fla. 1990)(rejecting challenge to validity of penalty phase testimony since original expert was aware of information and discounted it). Simply because Rivera has uncovered a doctor ten to twelve years after the fact to include drug addiction as part of an overall diagnosis does not render Malavenda's prior investigation into mitigation suspect. See Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains different diagnosis now); Provenzano v. Dugger, 561 So. 2d 546 (Fla. 1991)(finding no basis for relief simply because current counsel found expert who could offer more favorable testimony); Jones v. State, 24 Fla. Law Weekly S145, 147 (Fla. March 11, 1999)(finding original evaluation adequate irrespective of new testimony to conflict with original diagnosis); Jackson v. Dugger, 547 So. 2d 1197, 1200(Fla. 1989) *rev on other grounds* (finding that defense counsel not required to pursue every possible defense based on a particular mental condition or factor); Engle v. State, 576 So. 2d 696 (Fla. 1991)(same); Routly v. State, 590 So. 2d 397, 401 (Fla. 1991)(same).

Third, Malavenda's failure to present any additional evidence about Rivera's drug abuse was not the result of an inadequate investigation. Malavenda was unable to locate any

individuals who could offer any such testimony. Malavenda testified that he presented whatever evidence he was able to uncover. The people he attempted to locate for purposes of providing mitigation are the same people he would have called at the guilt phase to establish an alibi. (PCR-2 96, 342-343). At the evidentiary hearing, Rivera presented Mark Peters and Andy Ramos. Both individuals testified about their drug experiences with Rivera. However, Peters was unavailable at the time of trial. He had moved to Orlando and did not notify defense counsel. Rivera, 717 So. 2d at 482. Similarly, Andy Ramos was equally unavailable at trial. At these proceedings he admitted that he would not have testified at trial regarding his drug involvement with Rivera. (PCR-2 225, 227). Malavenda's "failure" for not calling either of these individuals cannot be attributed to his actions. Consequently, Rivera's reliance on their testimony in support of his claim is of no consequence. See Strickland, 466 U.S. at 487(warning that a high level of deference must be paid to counsel's performance and the distortion of hindsight must be limited as the standard is to evaluate performance based on the facts known at the of trial); Cf. Cherry, 659 So. 2d at 1073 (concluding standard is not how current counsel would have proceeded in hindsight).

With regards to the testimony of Rivera's family, Malavenda testified that generally speaking they were not very cooperative

with him during trial preparations. (PCR-2 127). Peter Rivera was the only person whom Malavenda talked with on a regular basis. Peter did provide Malavenda with some information regarding the defendant's drug abuse history. (PCR-2 127). Given the family's resistance and inability to say anything really positive about the defendant, Malavenda made a strategic decision to present much of the mitigating evidence, including Rivera's drug use, through Dr. Ceros-Livingston. See Ferguson v. State, 593 So. 2d 508, 510 (Fla. 1992) (finding that defense attorney's decision to present mitigation through family rather than expert was reasonable tactical decision given that expert testimony would have opened door to negative information).

Fourth, the validity of the findings and conclusions of both mental health experts, Burglass and Sultan, must be called into question. The primary basis for their opinions regarding Rivera's behavior at the time of the murder is based on the factual conclusion that he was high on cocaine during the murder. However there is not one shred of evidence to support the underpinnings of their conclusions. Rivera was unable to establish that fact during the first evidentiary hearing, ..."since there was no evidence Rivera was intoxicated at the time of the murder." Rivera, 717 So. 2d at 485. Rivera did not offered any evidence at the hearing to rebut that finding. The only witness who even saw Rivera at any point on the day of the

murder was Mark Peters. The remainder of the witnesses could not and did not testify regarding Rivera's drug consumption at any point on that day. Notably, Mark Peters never testified that Rivera was high on drugs that evening. Consequently, there simply is no evidentiary support for Sultan's or Burglass' findings. Johnston, 583 So. 2d at 660 (upholding rejection of new mental health evaluations based on unwavering opinion of original doctor as well as no evidentiary support for new opinions); Francis v. Dugger, 529 So. 2d 670, 673 (Fla. 1988)(finding that opinions of new expert would not have changed outcome of the penalty phase proceedings since new findings are severely contradicted by other evidence); Duren v. Hopper, 161 F.3rd 655, 662 (11th 1998)(ruling that outcome of penalty phase proceedings would not have been different given that alleged intoxication of defendant is not based on credible evidence); Johnston, 583 So. 2d at 660 (upholding rejection of new mental health evaluations based on unwavering opinion of original doctor as well as evidence to contradict new evaluations); White v. State, 559 So. 2d 1097 (Fla. 1990)(rejecting claim of ineffective assistance of counsel for failure to pursue intoxication defense based on fact that defense was not supported by the facts). The trial court's rejection of appellant's claim that trial counsel's performance was constitutionally deficient was proper.

Additionally, Rivera was also unable to meet his burden under the second prong of Strickland, as well. The trial court determined that the evidence of mitigation presented at the evidentiary would not have resulted in a life recommendation as the aggravating factors would have still far outweighed the mitigation. (PCR 600). The trial court also noted that appellant had not presented any evidence to establish his claim that he was in fact intoxicated at the time of the murder of Stacie. (PCR 589, 599). Appellant relies completely on the testimony of family and friends who can recount Rivera's history of drug use. Not one witness ever discussed Rivera's mental state at the time of the crime.

Although appellant concedes that "some mitigation" was presented at the penalty phase, he contends that the evidence was not sufficiently presented nor properly corroborated. Consequently, he claims that Malavenda's deficient performance resulted in prejudice. In support of his argument, Rivera relies on Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994); Philips v. State, 608 So. 2d 778, 783 (Fla. 1994); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991); and Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989). Therein ths Court has granted relief irrespective of the presence of numerous or strong evidence in aggravation. Appellant mischaracterizes the underlying premise

of those cases. For instance, in Bassett, this Court never discussed the existence or strength of the aggravating factors. Relief was granted based on the significant absence of mitigation. Bassett 541 at 596-597. In Mitchell, this Court granted relief after concluding that, "[d]efense counsel presented no evidence at the penalty phase. He testified that he thought he was going to obtain a not-guilty verdict, so he had not prepared for the penalty phase." Mitchell, 595 at 941-942. Likewise in Lara there was a complete failure of counsel to conduct any investigation into mitigation. Lara 581 So. 2d at 1289. Similarly in Phillips, there was very little evidence presented at the penalty phase. The state conceded that trial counsel's performance was in fact deficient. Phillips, 608 So. 2d at 782. And finally in Torres-Arboleda, the penalty phase presentation consisted solely of an expert opining that the defendant was an "excellent candidate for rehabilitation" and that he was very intelligent. Id. at 1325. Clearly one of the overriding concerns in all of these cases was the virtual absence of mitigation at the penalty phase in contrast to the evidence presented at the evidentiary hearing. As recounted above, the penalty phase presentation in this case was very similar to the evidentiary hearing presentation. The only difference in the presentations is that now Rivera presents a more detailed account of his drug abuse history. And as already

noted, the relevance of that information is significantly lessened given the lack of evidence to establish Rivera's alleged intoxication at the time of the murder.

The circumstances of this case are that Michael Rivera strangled to death eleven-year-old Stacie Jazvac while he was attempting to sexually assault her. Michael Rivera has a strong propensity towards this type of sexual and aggressive behavior against females as evidenced by his conviction for the attempted murder on another young female child, Jennifer Goetz. The circumstances of this case led this Court to conclude that this murder satisfied the finding of three aggravators; "heinous, atrocious and cruel"; "the murder was committed during the course of a sexual battery"; and Rivera has a "prior violent felony conviction." Rivera v. State, 561 So. 2d 536, 540 (Fla. 1990). Consequently, the cumulative nature of the evidence, coupled with the horrific facts of this child murder, there is no reasonable likelihood that had the jury been given extensive details about Rivera's long standing use of illicit drugs, including his constant thievery to support his habit, that the results of the proceedings would have been different. Mills State, 603 So. 2d 482, 486 (Fla. 1992) (upholding trial court's denial of relief where new psychologist's testimony is premised on poor impulse control would not have resulted in life sentence); Tompkins v. State, 549 So. 2d 1370, 1373 (Fla. 1989)

(upholding denial of postconviction relief where additional evidence of abused childhood and drug and alcohol addiction would not have outweighed the aggravating factors which include prior violent sexual batteries and HAC); Mendyk v. State, 592 So. 2d 1076, 1079-1080 (Fla. 1992)(same); Routly, 590 So. 2d at 402 (same). The trial court properly concluded that Rivera failed to establish that trial counsel Malavenda provided ineffective assistance of counsel at the penalty phase. Relief must be denied.

ISSUE II

THE TRIAL COURT DID NOT DEPRIVE APPELLANT OF A FULL AND FAIR HEARING

During the evidentiary hearing, appellant attempted to present thee testimony of Mark Peters. Peters was called to discuss his drug experiences with appellant.[5] At one point, Peters was asked questions regarding the circumstances of his moving to Orlando. (PCR 208-209). The state objected since there had already been a finding that Peters was unavailable at the time of trial to testify as to an alibi defense. (PCR 210). The following exchange took place:

> CCCR: Your honor, we are not using him as an alibi witness. We are using him in the penalty phase as a mitigation witness, and we are trying to show that he was not unavailable.
> STATE: But the determination of availability has already been addressed, and it is the law of the case.
> COURT: I don't know how you get around that.
> CCCR: Well, I believe it was addressed in terms of the guilt phase. We are here on the penalty phase.
> COURT: Isn't unavailability unavailability?
> CCCR: okay.

(PCR 210). On appeal, appellant claims that the trial court erred in not allowing Peters to re-address the circumstances of his move to Orlando. However appellant does not offer any justification for such an opportunity. The trial court's ruling was correct.

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[5] The state has never attempted to refute the claim that Rivera does have a chronic drug abuse history.

At the first evidentiary hearing, Mark Peters was presented as a potential alibi witness in support of the claim that trial counsel was ineffective for failing to call him. In the alternative, appellant argued that Peters testimony amounted to newly discovered evidence or in the alternative Brady material.[6] This Court disposed of those claims as follows:

> Peters left Orlando after giving his information to both the police and Rivera's counsel, Edward Malavenda. He testified at the evidentiary hearing that he did not tell the police he was leaving and did not remember telling Malavenda he was leaving. Consequently, when the trial commenced, Malavenda had no alibi witnesses to present. Arguably, Malavenda should have presented Peters' deposition since he should have been able to establish his unavailability. Nevertheless, neither Peters' deposition nor his live testimony would have provided Rivera with an alibi for the crucial time after 7 p.m., the approximate time after which the victim was murdered. Therefore, assuming, arguendo, that Rivera established that Malavenda rendered deficient performance, he still must satisfy Strickland's prejudice prong. We find that Rivera has not satisfied that prong of the test.
>
> Finally, Rivera's sub-claims that either this information constitutes newly discovered evidence, or a Brady (FN6) violation, are without merit. First, by definition, newly discovered evidence only includes facts that were "unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.850(b)(1). The relevant facts were known by Malavenda and Rivera at the time of trial

[6] Brady v. Maryland, 373 U.S. 83 (1963).

> and thus do not constitute newly discovered evidence.
>
> Second, to establish a Brady claim, Rivera must prove the following:
>
> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.
>
> Hegwood v. State, 575 So.2d 170, 172 (Fla.1991) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir.1989)). From the facts presented, it does not appear that Rivera can meet any of the four prongs required to establish a Brady violation. First, the fact alone that Rivera's counsel had this information renders Brady inapplicable. Second, whether this information was favorable is very debatable. Third, the State did not suppress this information since Peters unilaterally decided to leave the area. Finally, since this information was not exculpatory, Rivera cannot meet Brady's fourth and most important prong. We therefore affirm the trial court's denial of relief on this claim.

Rivera v. State, 717 So. 2d 477, 483 (Fla. 1998). Irrespective of these factual findings, appellant did not explain to the trial court below or to this Court now, why he should be entitled to re-open this inquiry, "[i]t is the general rule in Florida that all questions of law which have been decided by the

highest appellate court become the law of the case which, except in extraordinary circumstances, must be followed in subsequent proceedings, both in the lower and the appellate courts." Brunner Enterprize., Inc. v. Department of Revenue, 452 So. 2d 550, 552 (Fla. 1984); See also Hodges v. Marion Cty., 774 So. 2d 950, 952 (5th DCA 2001) (rejecting contention that law of the case is overcome simply by arguing that issue was wrongly decided in first appeal); Davis v. State, 648 So. 2d 107, 110 (Fla. 1995)(refusing to revisit issue of prosecutorial misconduct since it was addresses in original appeal); Rose v. State, 787 So. 2d 786, 801 (Fla. 2001)(refusing to revisit challenge to trial court's weighing process of aggravating factors as issue was adversely decide to appellant in original appeal).

Appellant also complains that the trial court precluded him from presenting evidence regarding the fact that two of Rivera's prior convictions in a separate case had been vacated and therefore that was relevant to a prejudice determination. **Initial brief at 76.** The prior convictions were relied upon in part in support of the aggravating factor of "prior violent felony." The state noted that the issue had already been resolved in the prior postconviction litigation and therefore was not germane to this inquiry. The trial court agreed. The court acknowledged that it could take judicial notice of

anything that relates to the case but the limited issue before him was the performance of trial counsel. (PCR 258-259). The state asserts that the trial court did not abuse its discretion in this regard.

On direct appeal, Rivera challenged the admissibility of his convictions for sexual assault and attempted first degree murder against Jennifer Geotz. Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990). This Court found the evidence relevant and properly admitted at the guilt phase as collateral crime evidence. Id. In the initial motion for postconviction relief, the admissibility of that same evidence was again challenged.[7] Based on the fact that two of the prior convictions were vacated, Rivera argued that there presentation at his trial violated Johnson v. Mississippi, 486 U.S. 578 (1988). The state countered that simply because appellant's convictions for aggravated battery and aggravated child abuse were vacated, Rivera was not entitled to relief under Johnson. Those charges were vacated based upon a legal principle that the single act of violence against Jennifer Goetz cannot form the basis for three separate crimes. Rivera v. State, 547 So. 2d 140, 142 (Fla 4th DCA 1989). In no way did this undermine the accuracy and reliability of Rivera's criminal actions against Jennifer Goetz.

[7] However, at this point, two of the four prior convictions had been vacated based on double jeopardy grounds. Rivera v. State, 547 So. 2d. 140 (4th DCA 1989).

The jury heard the testimony of Jennifer Goetz at the guilt phase, wherein she described what Rivera to her. (ROA 1451-1461). Additionally, Dr. Ceros-Livingston also detailed appellant's actions regarding Jennifer Geotz. (2021-2023, 2024, 2061, 2066-2067). Rivera has repeatedly admitted the attack at trial and in both postconviction proceedings. (ROA 1516; PCR-1 389; PCR-2 233). Whether his actions legally form the basis for four crimes or two, his convictions for kidnaping and attempted murder of Jennifer Geotz remain valid. Rivera, 547 So. 2d at 142. The jury was not exposed to any factual information that was otherwise inadmissible.[8] Without the convictions for battery and child abuse, Jennifer Goetz's testimony would have been the same. And Rivera's admission would still be the same. There is no error.

On appeal, in rejecting appellant's claim, this Court determined:

> Prior to his capital trial in this case, Rivera was convicted of kidnapping, attempted first-degree murder, aggravated child abuse, and aggravated battery. These convictions were introduced and relied upon in the capital case to support the prior violent felony aggravator. However, the aggravated battery and aggravated child abuse convictions were later vacated. Rivera v. State, 547 So.2d 140 (Fla. 4th DCA 1989). Rivera argues that his death sentence was imposed in violation of the Eighth

[8] The fact that petitioner admitted to the crime must dispel any contention that the crime was not committed. There is no violation of Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

> Amendment, on the basis of the Supreme Court's opinion in Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). This claim is meritless.
>
> [12] Despite the reversal of two of Rivera's prior violent felony convictions, he still has three other prior violent felony convictions which support this aggravator, thus precluding resort to the Supreme Court's decision in Johnson as a basis for relief. As we observed in Bundy v. State, 538 So.2d 445, 447 (Fla.1989), the defendant's death sentence in Johnson was set aside by the Supreme Court because his New York assault conviction, which provided the sole basis for his prior violent felony aggravator, had been reversed. (FN13) Obviously, Rivera can make no such claim. Therefore, we affirm the trial court's ruling on this claim of error.

Rivera, 717 So. 2d at 487. This Court's prior determination remains valid. In other words, the magnitude and impact of this aggravating factor remains in tact regardless of the reversal of the two lesser convictions. Consequently, the trial court's analysis regarding the prejudice prong of Strickland was not altered.[9]

Appellant next claims that the trial court erred in sustaining the state's objection to hearsay testimony. The challenged testimony involved why other boys who knew Robert Donovan[10] decided to stop seeing him. (PCR-2 179). The state

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[9] Moreover the state would also note that the trial court's legal determination that trial counsel did not preform deficiently, renders any prejudice analysis moot.

[10] As mitigating evidence, appellant did present evidence that he was sexually molested by Robert Donovan. (PCR-2 141-

objected on two grounds, hearsay and relevancy. (PCR-2 178-179). The trial court determined that the witness could only testify regarding Rivera's relationship with Mr. Donovan and not what Mr. Donovan was doing with other boys. (PCR-2 179). The trial court's ruling was correct. Cf. Hill v. State, 515 So. 2d 176, 178 (Fla. 1987) (upholding trial court's refusal to admit evidence which focused on life experiences and character of family members rather than that of defendant). The state would also note that Donovan's molestation of appellant was brought at trial. (ROA 2012-2014, 2034, 2060, PCR-2 101).

Rivera next challenges the trial court's refusal to allow Rivera to elicit from his sister, Miriam Rivera, the details of her own crack use. However a review of line of questioning demonstrates that the trial court properly limited the witness's testimony.

Appellant's counsel was allowed to delve into the experiences this witness and her brother, the defendant had growing up. (PCR-2 at 132-137). That testimony also included any drug use this witness experienced with appellant. However, when the subject matter switched to exclude any direct information about appellant the trial court sustained the state's objection in the following manner:

> Q: Okay, Can you tell me a little bit about your experience with that?

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142).

> A: I used cocaine. It's just – what do you mean, I don't understand the question?
> Q: What type pf cocaine did you start out using?
> A: Powdered cocaine.
> Q: And did it change?
> STATE: Your Honor, I object to relevancy to this witness' use of drugs. It has nothing to do–
> COURT: Let's go where we belong.
> APPELLANT COUNSEL: Okay, I think if I may, I could show that it's a going to be relevant in Mr. Rivera's drug use.
> COURT: What this witness did in terms of drugs is not relevant to what Mr. Rivera did. She could tell you with regard to what Rivera did.
> APPELLANT COUNSEL: Okay.

Following that ruling, and without objection, the witness testified about appellant's drug use including the types of drugs appellant was ingesting, an over review of how his drug use progressed, as well as how his behavior changed during that time. (PCR-2 137-138). Again counsel again strayed from the relevant subject matter and asked the witness the following:

> Q: And based on your own use of the cocaine and the crack, what would that tell you or what did that make you think about what Michael was doing?
> A: Well, I myself knew it's a very addictive substance. And just by the way he was acting, I could tell by my own use and what I had seen from another roommate what he was doing and what he was going through.
> Q: And what would you think that he was going through?

(PCR-2 139). At that point another objection was sustained. (PCR-2 139). The witness then recounted appellant's stealing

from his family, which prompted Miriam Rivera to move out of the house. (PRC-2 140). Eventually the witness was again asked about her own drug experiences, which prompted the objection now being challenged. (PCR-2 142). The court asked counsel to explain the relevancy of her personal drug use. Counsel then explained that because the witness had personal knowledge of cocaine use and how it affected her she could compare her experiences with that of her brother. Such an explanation would add "substance" to what she knows about her brother. The court sustained the objection unless the witness was going to be qualified as an expert on substance abuse and the effects of cocaine. (PCR-2 142-143). The state asserts that the trial court's ruling was correct and that appellant's reliance on Floyd v. State, 569 So. 2d 1225, 1231-1232 (Fla. 1990) is of no moment.

This Court explained in Floyd that lay people can offer an opinions or inference in limited circumstance. Floyd, 569 So. 2d at 1232. However, the opinion and inference being offered in Floyd, was related to a policeman's observations and opinions about objective facts that he personally observed at a crime scene. Id. In other words he was allowed to opine an explanation regarding how certain events unfolded at the crime scene. In contrast Appellant was attempting to elicit from this witness her opinion about what crack cocaine did to her and

compare that to what crack cocaine did to her brother. The court properly sustained the objection. This witness was never precluded from recounting whatever observations she or another family had about appellant's behavior when he was on or off drugs. (PCR-2 143-145). However, to offer an opinion regarding the comparison of one's reaction to that of another's reaction is beyond her frame of knowledge. The trial court's ruling was correct. Rivera's sister was allowed to recount whatever experiences she and her brother had together as well as those experiences of her brother's to which she had knowledge.

The final challenge to the trial court's evidentiary rulings was the court's refusal to allow trial counsel, Mr. Malavenda to offer his opinion about what effect the new evidence would have had on a jury. (PCR-2 101-102). The issue developed as follows:

> Q: Would you agree that once the guilt phase portion is over, the penalty phase portion you could present any sort of evidence that would convince the jury to give your client life aside from the fact whether he was claiming his innocence?
> A: I agree.
> Q: Okay. backing up a little bit to what you are saying. Are you now saying then that in your opinion just nothing would have mattered in this case as to what you presented during the penalty phase?
> STATE: Objection. How could this witness possibly know what would have mattered to a jury of 12?
> COURT: You want to rephrase the question?

> Q: In your legal opinion that no matter what you presented to the jury, it would not have helped Michael?

(PCR-2 102). The trial court refused to allow the witness to answer that question. The trial court's ruling was correct.

On appeal, appellant claims that the question was relevant and an appropriate examination into the thought processes of the attorney and therefore shed light on the attorney's strategy and tactics. The state asserts that appellant is correct in that such an inquiry is indeed appropriate. However, the question posed to the witness did not pertain to that inquiry. Rather the question posed called for a legal conclusion from the witness regarding the potential impact of the mitigating presented at the evidentiary hearing. The state asserts that the question was in an inappropriate inquiry regarding the prejudice prong of Strickland. Malavenda was being asked if he thought the more evidence of drug and sex abuse would have made a difference to the jury. The state asserts that such a legal question is inappropriate as it is the court who is to make that determination. Chandler v. United States, 218 F.3d 1305, 1315 n. 16 (11th Cir. 2000) (observing that because standard is an objective, trial counsel's admission that his performance was ineffective is irrelevant to the court's legal determination); Tarver v. Hooper, 169 F. 3d 710, 716 (11th Cir. 1999); Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992) (same).

In any event, Malavenda answered previously questions regarding his thought processes and strategy regarding thee presentation of that evidence. He explained that he did present whatever information he had available regarding drug and sex abuse. He felt he was unable to do any more with the drug abuse given the lack of available witnesses and the fact that appellant was maintaining his innocence. (PCR-2 100-101). The state asserts the trial court did not abuse its discretion in precluding the witness from providing his legal opinion.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Martin McClain & Suzanne Myers, 101 N.E. 3rd Ave. Suite 400, Ft. Lauderdale, Fl. 33301, this ____ day of November, 2002.

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CELIA A. TERENZIO
Assistant Attorney General

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

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