IN THE SUPREME COURT OF FLORIDA

LYNFORD BLACKWOOD,

Appellant,

vs. **Case No. SC03-1553**

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

CHARLES J. CRIST, Jr.
ATTORNEY GENERAL

DEBRA RESCIGNO
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0836907
1515 N. FLAGLER DRIVE
SUITE 900
WEST PALM BEACH, FL. 33401
561-837-5025 (Phone)
561-837-5108 (Facsimile)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, LYNFORD BLACKWOOD, was the defendant in the trial court below and will be referred to herein as "Appellant" or "Blackwood." 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 record in this case will be as follows:

"PCR"- Record in 3.851 appeal

"PCT"- Transcripts in 3.851 appeal

"DA"- Record from direct appeal

Reference to an supplemental pleadings and transcripts will be by the symbols "SPCR", etc. followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Blackwood was convicted of the murder of Carolyn Thomas-Tynes on January 23, 1997. The facts surrounding the murder, as found by this Court, are:

> Appellant was arrested in St. Petersburg, Florida, for the 1995 murder of Caroline Thomas Tynes. At trial it was established that appellant and the victim had dated on and off for approximately ten years but the relationship had ended sometime in October 1994; the victim had started dating someone else and, in fact, was six weeks pregnant at the time of her death. Upon his arrest, appellant confessed to choking the victim, but maintained that he did not intend to kill her. According to appellant, he had driven in his brother's truck to the victim's house on the morning of January 6, 1995, to return a set of sheets. After the two talked for a while, appellant and the victim engaged in consensual sexual intercourse. Afterwards, while lying in bed, they started to argue. Appellant claimed the victim told him that she did not want to see him anymore. He also claimed that the victim had told him that she had aborted six of his children. Appellant admitted to the police that he then strangled the victim using one or both of his hands.
>
> Afterward, he left the victim's house and drove away in her car, leaving his brother's truck behind. He later abandoned the victim's car and hitchhiked to St. Petersburg, where he eventually was arrested. Prior to his arrest, appellant admitted to his cousin-in-law, Donovan Robinson, that he had choked the victim after arguing with her. Robinson testified that appellant appeared surprised when he learned the victim was dead. Appellant

claims that he did not intend to kill the victim and that she was still breathing when he left. In addition, he maintained that he loved the victim and that he would have done anything he could to stay with her. According to one of the officers who took appellant's statement, appellant was upset and crying during his statements to the police.

The victim had been discovered on the evening of January 6, lying naked in the bedroom of her home in Fort Lauderdale. The cause of death was asphyxia. During the crime-scene investigation, one of the officers noticed that the house was meticulously kept but observed that objects on the table beside the bed had been tipped over or knocked to the floor. In the officer's opinion, the displaced items indicated signs of a struggle. The police also noted a box of condoms next to the bed and a condom wrapper on the floor in the hallway outside of the bedroom. There were no signs of forced sex. A lock of the victim's hair was found on the mattress and a folded washcloth and bar of soap had been lodged in the back of the victim's mouth blocking her pharynx. White foamy substance in her mouth and nose was later determined to be a combination of lung fluid and soap lather. According to the medical examiner, the fact that the foamy substance was also discovered in the victim's nose indicates the victim was alive when the soap and washcloth were placed in her mouth because she would have been forced to breath through her nose due to occlusion of her pharynx. The medical examiner also testified that indentations and foamy substance on one of the pillows next to the victim suggests that the pillow was placed over the victim's face to stop her from breathing. The defense attempted to rebut this conclusion on cross-examination, wherein the medical examiner admitted that she was unaware that

EMS personnel had inadvertently touched the foamy substance with his hand as he was checking the victim for vital signs and that he wiped his hand on one of the pillows on the bed. Based on this line of questioning, the defense created the possibility that the indentation and foam on the pillow was caused by the EMS personnel, and was not, as the medical examiner had initially surmised, caused by appellant placing the pillow over the victim's mouth. The defense's theory with regard to the pillow is also supported by appellant's confession to the police wherein he admitted to strangling and possibly placing the soap in the victim's mouth but denied moving or placing a pillow on her face.

The victim also had markings on her neck and bruises on the neck muscle indicating both ligature and manual strangulation. The medical examiner testified that the markings on the victim's neck were consistent with a double-stranded speaker wire found on the floor of the victim's bedroom. Small scratches on the victim's neck indicated the victim had tried to remove whatever was binding her neck. The medical examiner also noted petechia hemorrhaging in the whites of the victim's eyes, which she explained is caused by pressure around the victim's neck being released and reapplied. The number of hemorrhages detected suggests that the victim was alive and struggling while being strangled and that it took a while for death to occur. In other words, according to the medical examiner, petechia hemorrhaging does not occur in persons who die suddenly from asphyxia. Rather, it would have taken minutes, as opposed to seconds, for death to occur. Although the medical examiner could not determine the order in which the acts occurred, she opined that death could have resulted from any one of the above methods (i.e., manual or ligature strangulation, soap and washcloth in victim's mouth, and

suffocation by the pillow).

Blackwood, 777 So.2d at 403-04. At the penalty phase, the State offered two witnesses-- the medical examiner and Bernice Scott, the victim's mother. Id. at 404. Ms. Scott gave victim impact testimony and "[t]he medical examiner repeated much of the same testimony presented during the guilt phase of the trial, but added that based on the manner of death, the victim would have probably been aware of her impending death." Id.

Blackwood's penalty phase presentation included numerous friends, family members, and a detention center officer. This Court described their testimony as follows:

> Collectively, they testified that [Blackwood] was a slow learner,[1] that he was not a violent person and had never been violent or abusive toward the victim, that [Blackwood] was depressed and upset about breaking up with Caroline, that he worked for fifteen years as a cabinet maker, that he had a good relationship with his son, and that he did not smoke, drink, or consume drugs. A detention officer from the Broward County Jail testified that [Blackwood] behaves well in prison and as a result has been placed on trustee status, which means he is given limited responsibilities. The officer also indicated that Blackwood had been placed on suicide watch while in prison after attempting to commit suicide.

Blackwood, 777 So.2d at 404. The jury recommended a death

[1] In contrast, one witness claimed that appellant appeared to have above average intelligence. Blackwood, 777 So.2d at 404, f.n.1.

sentence by a vote of 9-3 (DA Vol. 14 p. 1538). Thereafter, a Spencer hearing[2] was held at which Blackwood presented additional testimony about his background and mental health mitigation from Dr. Trudy Block-Garfield. Dr. Block-Garfield testified at the Spencer hearing that she was appointed, in April, 1995, to evaluate Blackwood for competency and sanity (DA Vol. 11, p. 1165). She completed a psycho-social evaluation of Blackwood (DA Vol. 11 pp. 1165-1168). Dr. Garfield found that Blackwood was extremely depressed and he indicated that he was taking an antidepressant, Sinequan (DA Vol. 11 p. 1172). Blackwood told her that he had thought about suicide for a long time (DA Vol. 11 p. 1174). At the post-conviction evidentiary hearing, Dr. Garfield testified that she could not make a determination regarding competency at that time because of Blackwood's severe depression (PCT 49).[3]

Dr. Garfield further testified, at the Spencer hearing, that she next evaluated Blackwood for competency in December, 1995. Blackwood told her during this interview that he had never had any drug or alcohol problems, that he had lived in Florida for

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[2] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

[3] At the Spencer hearing, Dr. Block-Garfield mistakenly stated that she had found Blackwood competent to proceed to trial at that point (DA Vol. 11 p. 1180), but that is contradicted by her testimony at the post-conviction evidentiary hearing, which is supported by her report.

twenty years, and that he had maintained employment (DA Vol. 11 p. 1182-1185). Blackwood was no longer suicidal but he was still depressed (DA Vol. 11 p. 1185). Dr. Garfield administered the verbal portion of the Wechsler Adult Intelligence Scale (DA Vol. 11 p. 1188). Blackwood scored a verbal IQ of 70 which Dr. Garfield attributed to his depression, noting that people don't perform well on tests when they are depressed (DA Vol. 11 p. 1189). Dr. Garfield testified that Blackwood functions in the low average range (DA Vol. 11 p. 1190). Dr. Garfield also administered the Bender Visual Retention test to screen for neurological deficits and although Blackwood scored in the impaired range, Dr. Block-Garfield could not say that he was indeed neurologically impaired because of the depression and the lack of any other indicators of neurological impairment (DA Vol. 11 p. 1192). Based on her evaluation, Dr. Garfield found that Blackwood was competent to proceed to trial, and that he intellectually performed in the low average range (DA Vol. 11 p. 1204-1205).

Dr. Garfield's third evaluation of Blackwood occurred in March, 1997 and it was for the purpose of evaluating possible mitigation in order to testify at the Spencer hearing (DA Vol. 11 p. 1205-1207). Dr. Garfield read Blackwood's confession, the incident reports, and police reports (DA Vol. 11 p. 1207).

Regarding mitigation, Dr. Garfield found that Blackwood had the statutory mitigator of "no prior significant criminal history," and several non-statutory mitigators. While she found that Blackwood was under the influence of a mental or emotional disturbance at the time of the crime, she denied that he was under the influence of an <u>extreme</u> mental or emotional disturbance, as required for the statutory mitigator (DA Vol. 11 p. 1220, 1280).

The trial court sentenced Blackwood to death, finding one aggravator, HAC. Regarding mitigation, the trial court gave great deference to Dr. Garfield's conclusions- finding the only statutory mitigator she had given–"no significant history of prior criminal conduct" and accorded that factor "significant weight." (DA Vol XIV 1584). The trial court agreed with Dr. Garfield's finding that Blackwood was **not** under the influence of an "extreme mental or emotional disturbance," but considered it as a non-statutory mitigator because she testified that he was under the influence of an emotional disturbance. (DA Vol. XIV 1584).

As far as other non-statutory mitigating factors, the trial court found seven factors:

1. <u>Blackwood's capacity for rehabilitation</u>. The trial court specifically indicated that its only reason for finding

this mitigator was because Dr. Block-Garfield testified that the defendant had the capacity for rehabilitation. On cross-examination, however, Dr. Garfield admitted that she was not confident any murderer could be rehabilitated and that there is no protocol for rehabilitating a murderer. (DA Vol. XI 1233, 1235). Thus, although the court found that Blackwood's capacity for rehabilitation existed, it gave this mitigator "very little weight." (DA Vol. XIV 1584).

2. Blackwood's cooperation with police. The trial court gave this mitigator "only moderate weight," in light of the contents of Blackwood's confession and the circumstances which preceded it.

3. Murder was the result of lover's quarrel. The trial court considered this non-statutory mitigating factor to the extent that the killing was borne out of a prior relationship and thus, fueled by passion, but assigned no specific weight to it, (DA Vol. XIV, 1585-1586), noting that the relationship had ended in October, 1994, that Blackwood was aware that Carolyn had a new boyfriend and was six weeks pregnant with her new boyfriend's baby.

4. Defendant's remorse. The trial court strained to find some basis for this mitigator, as is evident from its order:

> It is difficult for the court to determine whether this non-statutory mitigator exists.

> The defendant did tell police that he was sorry for what happened. He also told the defense mental health expert that he regretted what happened.

(RXIV 1586). The court gave the factor some weight.

5. Defendant is a good parent. The trial court afforded "some weight" to this mitigator, noting that the son testified at the penalty phase that he and Blackwood were "best friends," that Blackwood visited him several times a week and that Blackwood provided financial support. (DA Vol. XIV 1586).

6. Defendant's employment record. Blackwood was a cabinet builder who was dedicated to his work. The trial court gave this mitigator "some weight." (DA Vol. XIV 1587).

7. Defendant's intelligence level. The trial court again relied upon Dr. Garfield's testimony, noting that she testified that Blackwood scored 70 on the Weschler Adult Intelligence Scale, but she did not believe that he functioned in the retarded range. In fact, Dr. Garfield did not believe that Blackwood's score "reflected his true intellectual capability," she believed it was lower because of his depression and that he "function[ed] in the low average range." (DA Vol. XI 1205). The trial court accorded this factor "some weight." (DA Vol. XIV 1587).

On direct appeal, this Court conducted its statutorily mandated proportionality review, noting that its role was "to

ensure that the sentence imposed in a particular case [was] not too great compared to other capital cases." Id. at 412. In upholding the death sentence in this case, this Court concluded:

> The record here shows that the appellant manually strangled the victim, strangled her with wire, lodged a bar of soap and washcloth in the back of her throat, and smothered her with a pillow. Extensive petechia hemorrhaging in the victim's eyes indicates that the appellant applied pressure to her neck, released it, and then reapplied it. There is also evidence that the victim struggled for her life during this attack: hair was ripped from her scalp; there were bruises on her head, neck and body; and objects on a bedside table were knocked to the floor. In light of this evidence, we cannot conclude that the trial court abused its discretion in determining that the HAC aggravator outweighed the mitigators. Thus, we uphold the imposition of the death sentence in this case.

Id. at 413.

After his request for certiorari review was denied by the U.S. Supreme Court, Blackwood filed the instant post-conviction motion. By order, dated April 11, 2003, the trial court granted Blackwood an evidentiary hearing on Claims II and III of his post-conviction motion. The remaining claims were summarily denied. Four witnesses testified at the evidentiary hearing: Dr. Trudy Block-Garfield, Dr. Martha Jacobson, Dr. Hyman Eisenstein, and defense counsel, Robert Ullman.

Dr. Garfield, a licensed psychologist, testified that she

had met with Blackwood three times over the course of the trial. The first two visits were court-ordered to evaluate Blackwood's competency to proceed to trial. Dr. Garfield first evaluated Blackwood in April, 1995 and at that time she completed a psycho-social evaluation (PCT Vol. 4, 10-13). Mr. Trachman was defense counsel at that time (PCT Vol. 4, 9). Dr. Garfield spent about an hour with Blackwood, and an additional hour and a half preparing a report (PCT Vol. 4, 11). Dr. Garfield found that Blackwood was extremely depressed and was taking an antidepressant, Sinequan (PCT Vol. 4, 11). Dr. Garfield could not make a determination regarding competency because of Blackwood's depression (PCT Vol. 4, 49). Blackwood told Dr. Garfield that he did not use drugs, drank some beer, wine and rum, had been hospitalized for a cut above his eye, and had no mental hospitalizations. Dr. Garfield had not learned anything since that was contrary to that information. Blackwood further told Dr. Garfield that he was born in Jamaica, that his parents came to the United States, that they are now divorced and he does not recall when they were divorced. Blackwood also reported that he is the oldest of four brothers and three sisters. He told Dr. Garfield that he graduated from Fort Lauderdale High School sometime in the seventies and he has one son. Blackwood also reported that he had never been arrested.

Dr. Garfield has not learned anything to the contrary since the evaluation (PCT Vol. 4, 45-47). At that time, Dr. Garfield also pressed Blackwood for information about the facts of the crime. Blackwood told her that he was not sure, but he had killed someone, and his cousin told him that he was accused of murder (PCT Vol. 4, 48). He told Dr. Garfield that he recalled having a fight with his girlfriend Carolyn, but he did not think she was dead (Pct Vol. 4, 48). Blackwood also said that on April 28, 1995, he still did not think Carolyn was dead because sometimes she was there in the night talking to him (PCT Vol. 4 48-49).

Dr. Garfield evaluated Blackwood for competency again on December 15, 1995 (PCT Vol. 4, 14, 49). Blackwood again told her that he had never had any drug or alcohol problems, that he had lived in Florida for twenty years, and had maintained employment. At the time of this evaluation, Blackwood was still depressed (PCT Vol. 4, 15, 50). Dr. Garfield testified that since competency was the issue, she administered the verbal portion of the Wechsler Adult Intelligence Scale, and the Benton Visual Retention Test (PCT Vol. 4, 17, 51). Blackwood scored a verbal IQ of 70 (PCT Vol.4, 17). Dr. Garfield testified that although such a score was in the borderline range, she was not inclined to believe that Blackwood was retarded in any fashion

and attributed his lower score to his depression, noting that people don't perform well on tests when they are depressed (PCT Vol. 4, 17)[3]. Dr. Garfield also administered the Benton Visual Retention test to screen for neurological deficits, but she did not feel that there was anything neurologically wrong with Blackwood (PCT Vol. 4, 59)

Blackwood further told Dr. Garfield that he had lived in Florida for twenty years, that his parents divorced two years after they came to the United States, and that he graduated from high school in 1976 or 1977 (PCT Vol. 4, 51-52). He had a son, who was 11 or 12 years old, was a cabinet maker, repaired small engines, sold tools at the flea market, and re-iterated that he did not use drugs but drank a lot of beer (PCT Vol. 4, 52). Dr. Garfield testified that the information Blackwood provided was consistent with what he stated during the first interview, but was now in greater detail (PCT Vol. 4, 53). Blackwood also confirmed that his only hospitalization was for stitches above his eye (PCT Vol. 4, 53). He also gave more details about the murder (PCT Vol. 4, 54). Blackwood stated that Carolyn was

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[3]Notably, Dr. Garfield's score of 70 is depressed when viewed in comparison to Blackwood's score from the test administered in September of 2002 by Dr. Eisenstein. On that test, Blackwood scored a 77 on the verbal portion of the WAIS (T. 185). Hence, Dr. Garfield competently analyzed Blackwood's IQ in December of 1995.

trying to see someone else, and he did not like that (PCT Vol. 4, 54). He had gone to Carolyn's to return some sheets and when he left she was unconscious and coughing (PCT Vol. 4, 54). He got scared and ran out (PCT Vol. 4, 55). Blackwood admitted that they had been arguing about the relationship and he was just scared and frightened (PCT Vol. 4, 55). Blackwood thought there was something wrong with Carolyn because she laid there coughing and spitting something (PCT Vol. 4, 55). Blackwood also detailed his relationship with Carolyn telling Dr. Garfield that he was always buying Carolyn things and that Carolyn complained about him giving her father money to buy a water heater (PCT Vol. 4, 56). Blackwood told Dr. Garfield that Carolyn complained that he did not give her enough money (PCT Vol. 4, 56). Dr. Garfield found that Blackwood was competent after this evaluation (PCT Vol. 4, 59).

On February 25, 1997 Dr. Garfield received a letter from defense counsel Ullman asking her to evaluate Blackwood for mitigation for the Spencer hearing which was approximately six weeks away (PCT Vol. 4, 60). Dr. Garfield's third evaluation occurred on March 12, 1997, and was for the purpose of evaluating possible mitigation (PCT Vol. 4, 67). During this evaluation, Blackwood gave her more information about his family background (PCT Vol. 4, 67). In her report dated March 18,

1997, Dr. Garfield stated that with respect to a mental and emotional disturbance, there are indications that Mr. Blackwood has a lengthy history of difficulties (PCT Vol. 4, 67). Blackwood told her that his mother had abandoned him and his siblings at an early age, leaving his father, who had health problems, to struggle to raise them (PCT Vol. 4, 68). Dr. Garfield opined that issues pertaining to abandonment resurfaced when Carolyn wanted to break up with him (PCT Vol. 4, 68). Blackwood's grandmother had taken care of him for a while, in Jamaica and at times there wasn't enough food (PCT Vol. 4, 68). After his family came to the United States, his mother abandoned him again, and his father took care of him (PCT Vol. 4, 68). Blackwood grew up in poverty while he was in Jamaica (PCT Vol. 4, 69). Blackwood told Dr. Garfield that he cooperated with the police (PCT Vol. 4, 69). Dr. Garfield opined that Blackwood was a good parent and amenable to rehabilitation (PCT Vol. 4, 69).

Dr. Garfield did not find that Blackwood has an anti-social personality, and the additional tests that had been done by the new experts confirmed that (PCT Vol. 4, 69). Dr. Garfield did not perform any additional tests because Blackwood was depressed, potentially affecting his performance (PCT Vol. 4, 73). Dr. Garfield testified at the evidentiary hearing that she

read the trial transcripts, reviewed the work of the other doctors, including their depositions, and that their findings were no different from hers, except that they gave Blackwood the statutory mitigator of "under the influence of extreme mental or emotional disturbance." Dr. Garfield gave a non-statutory mitigator of "under a mental or emotional disturbance," but did not find it to be extreme. She noted that her definition of extreme mental distress differed from that of the other doctors (PCT Vol. 4, 78). Importantly, Dr. Garfield testified that even after reviewing the additional information her opinion **had not changed, she does not believe the mental or emotional disturbance was "extreme"** (PCT Vol. 4, 81).

Dr. Martha Jacobson, a clinical psychologist, testified at the evidentiary hearing that she administered a comprehensive series of personality tests to Mr. Blackwood, conducted an extensive clinical interview and reviewed extensive materials (PCR 317-18). Dr. Jacobson agreed that Blackwood had not been in trouble with the law in the 28 years he had been in the United States and that he had been a cabinet maker for 15 years. (PCT Vol. 5, 151). She also agreed that Blackwood does not have an anti-social personality disorder or any other major personality disorder (PCT Vol. 4, 105-06). Additionally, she agreed with Dr. Garfield that Blackwood was suffering from major

depression (PCT Vol. 4, 133). Dr. Jacobson found that Blackwood has characteristics or traits of "avoidant personality disorder" wherein a person avoids individuals and social interactions to avoid being hurt; they anticipate being hurt or rejected (PCT Vol. 4, 104-05). She noted that these individuals have a psychological/developmental history of problems in consistent nuturing or have suffered emotional or economic deprivation (PCT Vol. 4, 105). She further found masochistic traits, which are self-defeating behavior, setting oneself up for failure (PCT Vol. 4, 106).

The only real difference between Dr. Garfield's and Dr. Jacobson's testimony was that Dr. Jacobson opined that Blackwood was acting under an **extreme** emotional disturbance at the time of the crime; this, giving him the statutory mitigator (PCT Vol. 5, 139). Dr. Jacobson testified that Blackwood's state of mind became extreme once Carolyn began to denigrate him, after they had made love (PCT Vol. 5, 171). According to Dr. Jacobson, Carolyn made Blackwood angry and he was out-of-control with rage when he stuffed the washcloth into Carolyn's mouth and began to choke her (PCT Vol. 5, 172-174). However, Dr. Jacobson admitted that Blackwood's mood and actions at the time of the murder were consistent with those of a normal person suffering the loss of a relationship (PCT Vol. 5, 164). Moreover, she agreed that

another psychologist could come to a different conclusion and that, Dr. Garfield had, in fact, already arrived at a different conclusion (PCT Vol. 5, 177-178).

A review of Dr. Jacobson's testimony further reveals that while she opined that Blackwood suffered a number of head injuries (falling out of trees and off a truck), she failed to determine whether Blackwood had ever been rendered unconscious by the head injuries, or if they had required hospitalization (PCT Vol. 5, 148-149). Dr. Jacobson was told that Blackwood nearly drowned as a child, but she never determined if CPR was necessary (PCT Vol. 5, 149-150). Further, Dr. Jacobson was not sure whether Blackwood lived with his father or mother when he came to the United States (PCT Vol. 4, 152-153). Finally, the statement that she had Blackwood write about the incident is inconsistent with the one he had given the police on January 10, 1995 (PCT Vol. 5, 166). Blackwood told Dr. Jacobson that he and Carolyn started arguing, during which she told him that he was not good enough for her anymore and that she had aborted his babies, but he did not tell this to the police (PCT Vol. 5, 166-67). During their argument, he told Carolyn that he should wash her mouth out with soap, but he did not tell this to the police (PCT Vol. 5, 167, 176). Blackwood stated that he tried to choke Carolyn, but he told the police that she was unconscious so he

must have choked her (PCT Vol. 5, 168). Finally, he told Dr. Jacobson that he was scared and started to call 911; but he did not tell this to the police (T. 171).

The second expert presented by Blackwood at the evidentiary hearing was Dr. Hyman Eisenstein, a neuro-psychologist, who also gave Blackwood the statutory mitigator of "under **extreme** mental or emotional disturbance" at the time of the crime as well as opining that Blackwood suffered from neurological deficits (PCT Vol. 5, 212-213). However, Dr. Eisenstein knew none of the facts or circumstances of this murder. He did not know how the victim was murdered, what instrumentalities were used, the degree of torture inflicted upon the victim, nor how long it took for her to die. Blackwood did not tell Dr. Eisenstein the details of the murder, the doctor had not read any of the trial testimony, nor had he read the medical examiner's report.

The last witness to testify at the evidentiary hearing was defense counsel, Robert Ullman. Ullman detailed the efforts he undertook in preparing for the penalty phase and the reasoning behind the tactical decisions employed. Ullman was appointed on June 19, 1996 nunc pro tunc to June 18, 1996 (T. 262)). The case went to trial six (6) months later, in December, 1996 (PCT Vol. 6, 232). Prior defense counsel was Robert Trachman (PCT Vol. 6, 232). During Mr. Trachman's representation, Blackwood

had been evaluated for competency/insanity by Dr. Trudy Block Garfield, Dr. Macaluso, and Dr. Spencer (PCT Vol. 6, 262-265). Ullman reviewed all of the competency evaluations (PCT Vol. 6, 266). Dr. Macaluso was the only doctor who had found that Blackwood was not competent to proceed to trial; thus, Ullman hoped to rely upon Dr. Macaluso for statutory mitigators because he was the most favorable expert for Blackwood (PCT Vol. 6, 267, 275). Ullman's time records indicate that he prepared a mitigation packet and spoke with Dr. Macaluso on October 8, 1996, almost two months **prior to** the guilt phase (PCT Vol. 6, 269). Although Ullman did not have an independent recollection of the conversation at the evidentiary hearing and couldn't specifically recall asking Dr. Macaluso to be an mitigation expert on October 8, 1996, he believed that the doctor indicated he would be a mitigation expert at that time (PCT Vol. 6, 269, 299). Ullman's time records also show that he sent a follow-up letter to Dr. Macaluso on October 28, 1996, but Ullman could not remember what the letter was about (PCT Vol. 6, 270).

Ullman's time records also show that on November 4, 1996, about one month prior to the guilt phase, Dr. Trudy Block-Garfield telephoned Ullman (PCT Vol. 6, 271). Ullman stated, at the evidentiary hearing, that Dr. Block-Garfield was the second most favorable expert because, although she found Blackwood

competent, she also found that he was severely depressed and his functioning was low-average impaired cognitive functioning (PCT Vol. 6, 267). Blackwood's guilt phase began on December 2, 1996, and he was convicted on December 5, 1996 (T. 271). After the guilt phase, on December 12, 1996, Ullman re-contacted Dr. Macaluso by letter and requested that he testify at the penalty phase regarding statutory mitigators. Although Ullman agreed on direct examination that this was the first time he had asked Macaluso to be a mitigation witness for penalty phase, his time records refute that showing that he contacted Macaluso earlier, in October (PCT Vol. 6, 234). On December 17, 1996, Ullman wrote a letter to Dr. Macaluso indicating that the penalty phase was to begin on January 23, 1997, and included copies of all the psychological reports, a copy of Blackwood's confession, the detective's report, and a copy of the medical examiner's report (PCT Vol. 6, 235-237, 275). Mr. Ullman federal expressed the packet to Dr. Macaluso on December 21, 1996.

Dr. Macaluso replied by letter on January 7, 1997 that he "would not be able to testify with reasonable medical certainty that any of the **statutory** mitigating circumstances are present" (emphasis added)(PCT Vol. 6, 276). On January 9, 1997, after receiving the letter, Ullman contacted Dr. Macaluso by telephone and they spoke for thirty (30) minutes (PCT Vol. 6, 277). The

penalty phase trial was held on January 23, 1997 and Ullman did not present any mental health mitigation; however, as he noted at the evidentiary hearing, there was virtually no mental health mitigation here, no history of any psychological problems (PCT Vol. 6, 286). Ullman put on ten (10) witnesses at the penalty phase, including friends, family members and a jail deputy (PCT Vol. 6, 286). As already noted, the jury recommended death by a vote of 9-3. After the penalty phase, Ullman asked Garfield to be a mitigation witness for the Spencer hearing (PCT Vol. 6, 250). Although his time records do not indicate any meeting or conversations with Block-Garfield, he noted that he saw her frequently at the courthouse and spoke with her about the case then (PCT Vol. 6, 252, 255). His recollection was that she did not find the statutory mitigator of "extreme mental/emotional disturbance," because she found that Blackwood was under the influence of a "mental or emotional disturbance," but it was not extreme (PCT Vol. 6, 256). Thus, Dr. Block-Garfield gave Blackwood the non-statutory mitigator of a mental/emotional disturbance. Further, as already noted, Dr. Block-Garfield testified at the Spencer hearing, finding one (1) statutory mitigator "no significant prior criminal history," and several non-statutory mitigators.

In a written order, dated July 23, 2003, the trial court

vacated Blackwood’s death sentence finding that trial counsel’s penalty phase preparation and presentation was deficient and resulted in prejudice to Blackwood (PCR 311-21). Blackwood filed an appeal arguing that the trial court was correct in granting a new penalty phase but incorrect in summarily denying Claim I. The State filed a Notice of cross-appeal.

SUMMARY OF ARGUMENT

Point I - Blackwood argues that the trial court **correctly** ordered a new penalty phase in this case. Because this is essentially a counter-argument to what will be raised on cross-

appeal, it will be addressed therein.

Point II- The trial court's summary denial of Claim I of Blackwood's post-conviction motion was proper as all of the claims raised therein are either legally insufficient, procedurally barred or refuted from the record.

Cross-Appeal- The trial court erred by vacating Blackwood's death sentence and ordering a new penalty phase. The trial court improperly applied both the deficiency and prejudice prong of Strickland and its conclusions are erroneous as a matter of law.

ARGUMENT

POINT I

THE TRIAL COURT'S DETERMINATION THAT BLACKWOOD IS ENTITLED TO A NEW PENALTY PHASE IS INCORRECT (Restated).

Blackwood's first point on appeal alleges that the trial court "**properly** found that [he] was entitled to a new penalty phase pursuant to Strickland." Blackwood's Point I is unusual in that it does not raise any alleged **error** committed by the trial court; instead, it argues that the trial court was correct in granting a new penalty phase. Because points on appeal are generally limited to those asserting **errors** in the trial court's actions, it appears that Blackwood's Point I is an anticipatory response to the State's cross-appeal, which will argue that the trial court improperly granted a new penalty phase in this case. Consequently, in an effort to avoid duplication, the State will address all of Blackwood's arguments in Point I under its Cross-Appeal.

POINT II

THE TRIAL COURT CORRECTLY DENIED AN EVIDENTIARY HEARING ON BLACKWOOD'S CLAIM I OF HIS AMENDED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE (RESTATED).

Blackwood argues that the trial court erred by summarily denying Claim I of his Amended Motion to Vacate Judgment and Sentence, which alleged ineffectiveness of counsel during the guilt phase. According to Blackwood, an evidentiary hearing was required because Claim I alleges specific facts, not rebutted by the record, which demonstrate deficient performance that prejudiced him. This Court will find that the trial court's summary denial of Claim I was proper.

The standard of review for the summary denial of a rule 3.851 claim was recently stated by this Court as follows: "[t]o uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." Kimbrough v. State, 29 Fla. L. Weekly S323 (Fla. Jun 24, 2004). See also Gordon v. State, 863 So.2d 1215 (Fla. 2003). In LeCroy v. Dugger, 727 So.2d 236 (Fla.1998), this Court explained:

> A motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial

> counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.

LeCroy, 727 So.2d at 239 (quoting Kennedy v. State, 547 So.2d 912, 913 (Fla.1989)). Further, a post-conviction motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied. Baker v. State, 29 Fla. L. Weekly S105, S413 (Fla. March 11, 2004).

A. Ullman's Alleged Racist View

Relying upon State v. Davis, 872 So.2d 250 (Fla. 2004), Blackwood argues it was error to deny him an evidentiary hearing on his claim of ineffective assistance of counsel based upon his trial counsel's (hereinafter referred to as "Ullman") racial bias. The State's first argument is that this claim has not been preserved for appellate review because the precise argument was not presented to the trial court. See Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Blackwood's 3.850 motion does not specifically allege that Ullman had a "racial bias" and does not present the matter as a separate claim requiring an evidentiary hearing (PCR 169). Rather, the two paragraphs alleging that Ullman made statements about African-Americans during a DUI arrest are included at the end of Blackwood's

argument that he is entitled to an evidentiary hearing because of Ullman's addictions to drugs and/or alcohol and allege only that Ullman "never disclosed his attitudes toward African-Americans to Mr. Blackwood." (PCR 169). Thus, the precise argument raised on appeal was not presented to the trial court and consequently, cannot be raised for the first time on appeal.[5]

Moreover, the claim is without merit. The State's written response to Claim I addressed Blackwood's two-paragraph assertion that Ullman allegedly made derogatory statements about African-Americans during a DUI arrest. The State's response argued that allegation, as well as the allegations about Ullman's drug addiction were legally insufficient and meritless, as pled, because Blackwood failed to plead what effect, if any, the incidents had on his trial (PCR 220-284). That is, Blackwood failed to allege and illustrate the requisite **nexus** between Ullman's personal problems and his trial performance.

The determination of ineffectiveness pursuant to Strickland v. Washington, 466 U.S. 668 (1984), is a two-pronged analysis: (1) whether counsel's performance was deficient; and (2) whether the defendant was prejudiced thereby. In assessing an

[5] The alleged racial bias of trial counsel was not even emphasized at the Huff or case management hearing as warranting an evidentiary hearing (PCR Vol. 3, 4-29). In fact, post-conviction counsel did not mention it at all in his initial argument and made only a veiled reference to it in his rebuttal, never using the words "racial bias." (PCR 27-28).

ineffectiveness claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. At all times, the petitioner bears the burden of proving not only that his counsel's representation fell below an objective standard of reasonableness, but also that he suffered actual and substantial prejudice as a result of the deficient performance. In order to demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Thus, the petitioner must show not only that his counsel's performance was below constitutional standards, but also that he suffered prejudice as a result of this deficient performance. The burden of proof for showing ineffective assistance is, and remains, on the defendant. Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982). See also Johnston v. Singletary, 162 F.3d 630, 635 (11th Cir. 1998).

"A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are

not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant." LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998); Kennedy, 547 So.2d 912. The state asserts that this information has no significance or relevancy to the overall issue regarding counsel's performance under Strickland. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. See Kennedy v. State, 547 So. 2d 912 (Fla. 1989).

Blackwood's motion failed to allege with specificity how Ullman's alleged "attitude" toward African-Americans, made during a DUI arrest, resulted in deficient conduct by him during Blackwood's trial and how those deficiencies prejudiced Blackwood. Blackwood's blanket assertion that Ullman's "attitude" impacted his representation of Blackwood fails to plead a claim for relief; hence this claim is legally insufficient and must be denied. See Kennedy v. State, 547 So. 2d 912 (Fla. 1989).

Moreover, State v. Davis, 872 So.2d 250 (Fla. 2004), relied upon by Blackwood, is inapplicable and does not warrant an evidentiary hearing on this claim. In Davis, the defendant alleged, in his post-conviction motion, that trial counsel was

ineffective based upon the racial remarks he made to the all-white panel of potential jurors during voir dire. Specifically, trial counsel stated:

> Now, Henry Davis is my client and he's a black man, and he's charged with killing Joyce Ezell who was a white lady, lived in Lake Wales. *Now, all of us that are talking now, myself and all of y'all, are all white.*
>
> There is something about myself that I'd like to tell you, and then I'd like to ask you a question. *Sometimes I just don't like black people. Sometimes black people make me mad just because they're black.* And, you know, I don't like that about myself. It makes me feel ashamed.
>
> But, you know, sometimes if this was a thermometer of my feelings, and if you took it all the way up to the top, and this was one, this was five, all the way up here was ten, you know, my feelings would sometimes start to boil and *I get so mad towards black people because they're black* that it might go all the way up to the top of that scale. And, you know, I'm not proud of that and it embarrasses me to tell y'all that, to say it in public.
>
> In followup questioning of individual jurors--none of whom stated that they shared counsel's sentiments--trial counsel stated, "Well, I'm a white southerner, and I've got those feelings in me that I--maybe I grew up with them." During his penalty-phase closing argument, trial counsel reminded the jurors of his comments during jury selection:
>
> Henry is a black man, Mrs. Ezell was a white woman. We are all of us white. I'm a white southerner. You have told me and the court that you would disregard and not base your

> verdict on the question of race. I will believe you, I will trust you on that. It is hard for me to talk to you, my friends and neighbors, about something like this. I will not believe that race will be a factor in your decision, but I will ask you to be especially vigilant, because being a white southerner, I know where I come from. And I told you a little bit when we were questioning you as to potential jurors about some feelings that I have, and maybe very deep down y'all have them too.

Davis, 872 So.2d at 252. Trial counsel explained, at the evidentiary hearing, "that he decided on the comments excerpted above as a way of getting jurors to 'drop the mask' and acknowledge hidden feelings about race." Id. He "felt the approach was warranted because this was an 'extreme case, a very bad case on the facts.'" Id at 252-53. According to trial counsel, "he discussed the strategy with Davis, who told him that blacks sometimes feel the same way about whites." Id. at 253. The trial court denied post-conviction relief, determining that the "remarks on racial animus made by counsel during voir dire were a legitimate tactical approach by experienced counsel, and that Davis approved the tactic. The trial court concluded that '[n]othing in the record supports Davis' claim that his attorney is a racist and as a result failed to properly represent him.'" Id.

On appeal, the Supreme Court reversed, holding "that the

expressions of racial animus voiced by trial counsel during voir dire so seriously affected the fairness and reliability of the proceedings that [its] confidence in the jury's verdicts of guilt [was] undermined." Id. The Court rejected the notion that "an explicit expression of racial prejudice can be considered a legitimate tactical approach. Whether or not counsel is in fact a racist, his expressions of prejudice against African-Americans cannot be tolerated." Id. Noting that racial prejudice cannot play any part in the determination of guilt or imposition of sentence in a criminal case, the Court noted that it was "greatly disturbed by trial counsel's blatant acknowledgment to the jury, in defending an African-American defendant accused of an interracial crime, of his negative feelings toward 'black people just because they're black.'" Id. at 255. The Court condemned the statements "not because counsel chose to discuss the topic of race in voir dire, which is permissible, but because he did so in a manner that fatally compromised his ability to effectively represent Davis in his capital trial and created a reasonable probability of unreliable convictions." Id.

Thus, the error in Davis consisted of what counsel **told** the jury about his own racial prejudices. The Court concluded that counsel's admission about his own racial prejudice constituted

deficient performance. Here, in contrast, Ullman said nothing to the jury about any alleged racial prejudice. The only comment Blackwood points to, as establishing Ullman's "racial bias," is a comment Ullman allegedly made to a police during his arrest for DUI. Absolutely nothing was said to the jury or venire in this case and consequently, Davis does not require an evidentiary hearing on this claim.

Blackwood acknowledges that Ullman did not express any racist views to the jury, but argues, nonetheless, that an evidentiary hearing is warranted to determine whether Ullman's "racist views affected his performance during the guilt phase." Because Blackwood cannot establish deficiency, there is no reason to hold a hearing on the prejudice prong. Further, Davis's finding of prejudice is clearly distinguishable from the facts at hand. In Davis, the Court found prejudice in the fact that trial counsel failed to present, during the guilt phase, two African-American witnesses who would have supported the defense theory that Davis was present, but did not commit the murder. Counsel could not explain adequately, at the evidentiary hearing, why he did not call the witnesses. The Court also relied upon the fact that a new penalty phase had been granted by the trial court based upon counsel's inexplicable failure to investigate standard mitigation. Here,

Blackwood has failed to allege that there were any witnesses, who supported his defense, whom Ullman did not present. Further, a new penalty phase was granted in this case for a different reason. Davis does not support the holding of an evidentiary hearing on this claim.

B. Ullman's Addiction.

Blackwood next contends that the trial court erred by summarily denying his claim that Ullman was ineffective at trial because he suffered from a long-standing drug addiction. Blackwood asserts that an evidentiary hearing is required because the pleading outlines: Ullman's drug addiction, including a drug overdose right before representing Blackwood; the fact that Ullman never informed Blackwood that he had any personal problems and actually denied having any personal problems; and numerous deficiencies during the guilt phase which resulted from the drug addiction.

In summarily denying this claim, the trial court stated:

> Although the Defendant provided a well-documented history of Mr. Ullman's drug abuse, the Defendant failed to plead what effect, if any, the listed incidents had on his trial. The claim that Mr. Ullman's drug addiction and personal problems impacted his representation of the Defendant is conclusory, fails to demonstrate with specificity how Mr. Ullman was deficient, and fails to plead a claim for relief. The Defendant has also failed to illustrate a nexus between Mr. Ullman's personal problems

> and his trial performance. Accordingly, this claim is legally insufficient and is therefore, denied.

(Supplement to Record on Appeal, Trial Court's April 11, 2003 Order). The trial court correctly found that the claim was legally insufficient. As previously noted, the determination of ineffectiveness pursuant to Strickland v. Washington, 466 U.S. 668 (1984), is a two-pronged analysis: (1) whether counsel's performance was deficient; and (2) whether the defendant was prejudiced thereby. In assessing an ineffectiveness claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89.

At all times, the petitioner bears the burden of proving not only that his counsel's representation fell below an objective standard of reasonableness, but also that he suffered actual and substantial prejudice as a result of the deficient performance. In order to demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Thus, the petitioner must show not only that his counsel's performance was below constitutional standards, but also that he suffered prejudice as a result of this deficient performance. The burden of proof for showing

ineffective assistance is, and remains, on the defendant. Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982). See also Johnston v. Singletary, 162 F.3d 630, 635 (11th Cir. 1998).

"A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant." LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998); Kennedy, 547 So.2d 912. The state asserts that this information has no significance or relevancy to the overall issue regarding counsel's performance under Strickland. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. See Kennedy v. State, 547 So. 2d 912 (Fla. 1989).

Here, as the trial court correctly found, Blackwood failed to allege with specificity how Ullman's performance was deficient or how such deficiencies prejudiced him. Although Blackwood documented Ullman's drug addiction, arrests, and a

federal conviction, he failed to plead what effect, if any, those incidents had on his trial. That is, Blackwood failed to allege a nexus between Mr. Ullman's drug/personal problems and his trial performance. Blackwood also failed to allege that Ullman was under the influence of drugs at the time of trial. A blanket claim that Mr. Ullman's drug addiction and personal problems impacted his representation of Blackwood fails to plead a claim for relief.

Blackwood's reliance upon State v. Bruno, 807 So.2d 55 (Fla. 2001), as mandating an evidentiary hearing in this case, is misplaced. The primary difference between Bruno and this case is that Bruno alleged that defense counsel **was impaired by drugs/alcohol during the time he represented Bruno** and pointed to counsel's hospitalization for drug/alcohol, **during his representation of Bruno**, as evidence of counsel's impairment and ineffectiveness. An evidentiary hearing was held in Bruno which established that defense counsel was retained in August, 1986 to represent Bruno. He developed a drinking problem over the next few months, and, when drinking, would occasionally use cocaine. On October 15, 1986, defense counsel enrolled in Alcoholics Anonymous and remained alcohol and drug free until March 1987, when he began drinking again but not using cocaine. Defense counsel admitted himself into a hospital on March 15, 1987, for

his drinking problem, remained hospitalized for twenty-eight days, and subsequently remained alcohol and drug-free. After being released, counsel apprised both Bruno and the court of his problem and offered to withdraw, but Bruno asked him to continue as counsel. The trial, which originally had been set for March 30, 1987, was rescheduled for August 5, 1987, and began on that date. Defense counsel testified at the evidentiary hearing that he never was under the influence of alcohol or drugs while working on this case. The trial court concluded that Bruno "failed to meet his burden of demonstrating how [counsel's] drug and alcohol usage prior to trial rendered ineffective his legal representation to the Defendant and how such conduct prejudiced the Defendant," Id. at 62 and this Court agreed.

Here, in contrast to Bruno, Blackwood failed to allege that Ullman was under the influence of drugs or alcohol **during** his representation of Blackwood or **at the time of Blackwood's trial**. Further, none of the incidents cited by Blackwood support such a conclusion. A review of Blackwood's pleading shows that he documents incidents that occurred **either before or after Ullman's representation, but not during that representation**. Blackwood points to a DUI arrest in 1983, a Baker Act commitment in 1988, and a drug overdose in April, 1995, all of which occurred before Ullman was appointed to represent Blackwood in

June, 1996. Further, the second DUI arrest outlined by Blackwood occurred **after** Ullman's representation, in November, 1999, as did Mr. Ullman's pleading guilty to the federal crime of using a telephone in the commission of and to facilitate acts constituting a drug crime, which occurred in April of 2000, over three years **after** Blackwood was convicted (PCR 100-05). Additionally, Mr. Ullman was not suspended from the Florida Bar due to his alleged drug and alcohol problems, it was solely based on his federal conviction (PCR 106-18).

Thus, unlike Bruno, Blackwood failed to raise allegations that Ullman was under the influence of drugs or alcohol **during** his representation of Blackwood or **at the time of Blackwood's trial**. More importantly, as noted by the trial court, Blackwood failed to allege what effect, if any, those preceding and subsequent incidents had on his trial. Blackwood did not allege a nexus between Mr. Ullman's drug/personal problems and his trial performance. He did not allege with specificity how Ullman's performance was deficient or how such deficiencies prejudiced him. As such, Blackwood's claim was legally insufficient and summary denial is warranted. See O'Callaghan v. State, 542 So. 2d 1324, 1325-26 (Fla. 1989)(affirming summary denial of ineffectiveness claim which was based on counsel undergoing bar disciplinary proceedings because of an alcohol

problem); Bryan v.State, 753 So. 2d 1244, 1247 (Fla. 2000)(finding that trial counsel's representation was not deficient, therefore counsel's alcoholism was irrelevant to claim of ineffective assistance of counsel); Bonin v. Calderon, 59 F. 3d 815, 838 (9th Cir. 1995)(upholding trial court's refusal to hear evidence of counsel's drug use as claim of ineffective assistance of counsel employs as objective standard and therefore source of counsel's alleged shortcoming is irrelevant); Berry v. King, 765 So. 2d 451, 454 (5th 1985)(same); McDougall v. Dixon, 921 F. 2d 518, 535 (4th Cir. 1990)(same).

C. Jury Selection

Blackwood next argues that the trial court erred by summarily denying his claim that Ullman's was ineffective during jury selection because peremptory challenges were exercised on individuals that should have been struck for cause. Again, as previously noted, the determination of ineffectiveness pursuant to Strickland v. Washington, 466 U.S. 668 (1984), is a two-pronged analysis: (1) whether counsel's performance was deficient; and (2) whether the defendant was prejudiced thereby.

In assessing an ineffectiveness claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

Strickland, 466 U.S. at 688-89.

At all times, the petitioner bears the burden of proving not only that his counsel's representation fell below an objective standard of reasonableness, but also that he suffered actual and substantial prejudice as a result of the deficient performance. In order to demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Thus, the petitioner must show not only that his counsel's performance was below constitutional standards, but also that he suffered prejudice as a result of this deficient performance. The burden of proof for showing ineffective assistance is, and remains, on the defendant. Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982). See also Johnston v. Singletary, 162 F.3d 630, 635 (11th Cir. 1998).

"A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the

defendant." LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998); Kennedy, 547 So.2d 912.

1- Prospective Juror Pitz

Blackwood claims that Ullman was ineffective for using a peremptory challenge to strike prospective juror Pitz, who should have been struck for cause. In summarily denying this claim, the trial court noted that it was refuted from the record since any cause challenge would have been denied based upon Pitz's response that he was able to put his feelings aside and follow the law. The trial court was correct.

The standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424-26 (1985) (quoting Adams v. Texas, 448 U.S. 38 (1980). Under this test, a trial court must excuse a juror for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. Rimmer v. State, 825 So.2d 304, 318 (Fla. 2002) see also Singer v. State, 109 So.2d 7, 23-24 (Fla.1959) ("[I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the

evidence submitted and the law announced at the trial he should be excused for cause on motion of a party, or by the court on its own motion.").

In this case, the record reflects that prospective juror Pitz initially stated that he felt that anybody convicted of first degree murder should automatically receive the death sentence (T. Vol. 2 p. 143). However, the record also reflects that Mr. Pitz unequivocally stated that he would follow the law in this case, even if the law conflicted with his personal opinions and beliefs (T. Vol. 2 p. 145). He stated that he could put aside his personal convictions (T Vol. 2 p. 145).

Hence, Mr. Ullman was not deficient because based on the record in this case, Mr. Ullman could not have struck Mr. Pitz for cause since Mr. Pitz stated he would put his feelings aside and follow the law. Blackwood alleges that a cause challenge was still warranted because "the juror reaffirmed his response to Mr. Loe that he would automatically go for death," there is no record cite provided and it did not occur after the juror unequivocally stated that he would follow the law. Moreover, Blackwood has failed to establish the requisite prejudice, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 688-89. In this case,

although Mr. Ullman exercised all of the peremptory challenges, he did not ask the judge for any additional challenges. Therefore, Blackwood can not show that an improper juror sat on the panel.

2-Juror Weil

Blackwood claims that Ullman was deficient for failing to challenge juror Weil for cause because she indicated that her experiences with the criminal justice system would prevent her from being a fair and impartial juror. As the trial court found in summarily denying this claim, it is refuted from the record.

The standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424-26 (1985) (quoting Adams v. Texas, 448 U.S. 38 (1980). Under this test, a trial court must excuse a juror for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. Rimmer v. State, 825 So.2d 304, 318 (Fla. 2002) see also Singer v. State, 109 So.2d 7, 23-24 (Fla.1959) ("[I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the

evidence submitted and the law announced at the trial he should be excused for cause on motion of a party, or by the court on its own motion.").

In the instant case, there is no basis for any reasonable doubt as to whether juror Weil possessed an impartial mind. Here, "[a]lthough juror Weil had experiences with the criminal justice system, the record does not reflect that she would not be able to put her feelings aside and to follow the law." Specifically, during voir dire questioning by the state, the following occurred:

> Mr. Loe: Right. The bottom line to us, though, I think is, do you feel you could be fair and impartial?
>
> Ms. Weil: I would like to think that I could be, but that's something that you don't know.
>
> Mr. Loe: That's true.
>
> Ms. Weil: I would like to think we're all intelligent adults, and I know when I'm starting to go sway one way or another that I catch myself. I'm just saying something's that's deep inside you may influence you if you've gone through that process.
>
> Mr. Loe: Ok fair enough.
>
> Ms. Weil: and it hasn't been favorable let's say.

(T. Vol. II pp. 240-241).

> Mr. Loe: Do you all feel that you could give a fair trial to both sides? Anybody of the

> 31 of you that are seated here that we talked to today, feel that you couldn't be fair and impartial to everyone? No hands.

(T. Vol. II p. 243).

Moreover, the prosecutor asked all of the jurors that if he proved his case beyond a reasonable doubt they would vote guilty, and juror Weil answered affirmatively (T. Vol II p. 244-254). Hence, after a complete review of the record, it is clear that there was no basis upon which Mr. Ullman could successfully challenge juror Weil for cause. _See_ _Reaves v. State_, 27 Fla. L. Weekly S601, (Fla. 2002) (finding that trial counsel was not ineffective for failing to strike a juror for cause because Reaves had not shown that trial counsel had a reasonable basis to assert for-cause challenges). The trial court correctly found that the claim was refuted from the record, warranting summary denial.

3.Juror Wolf

Blackwood claims that Ullman was deficient for failing to challenge juror Wolf for cause because her experiences with the criminal justice system would prevent her from being a fair and impartial juror. Blackwood argues that he was prejudiced because juror Wolf improperly sat on the jury.

However, as the trial court correctly found, this claim is also refuted from the record. Juror Wolf never stated that her

experiences with the criminal justice system would prevent her from being a fair and impartial juror. Rather, in the instant case, the record reflects that there was no reasonable doubt that juror Wolf possessed an impartial state of mind.

During voir dire, the following occurred:

> Mr. Ullman: Has anyone ever put a gun to your head? That's the kind of information I'm looking for.
>
> Mr. Rousseau: No.
>
> Mr. Ullman: You know, not- Ms. Wolf?
>
> Ms. Wolf: My mother-in-law was mugged, robbed, beaten.
>
> Mr. Ullman: Really?
>
> Ms. Wolf: Yeah.
>
> Mr. Ullman: Did they catch the suspect?
>
> Ms. Wolf: No.
>
> Mr. Ullman: Where did that happen?
>
> Ms. Wolf: North Miami.
>
> Mr. Ullman: All right. Down in Dade?
>
> Ms. Wolf: Uh-hum
>
> Mr. Ullman: Were you involved in the case? Did you go down there and reassure her and talk to any detectives?
>
> Ms. Wolf: No, we didn't speak to anybody at the police. But it was a very cavalier attitude from her opinion.
>
> Mr. Ullman: Really. They never caught the

> suspect?
>
> Ms. Wolf: No
>
> Mr. Ullman: The fact that that happened, is that going to affect your ability to sit here?
>
> Ms. Wolf: I wouldn't think so.
>
> Mr. Ullman: No?
>
> Ms. Wolf: No.

(T. Vol. III, pp. 307-308)

> Mr. Ullman: ...So when you're back there, should we get there, all right–and I have no idea whether we will–will you follow the law as it relates to the penalty phase? How about you Ms. Wolf?
> Ms. Wolf: Yes.

(T. Vol. III, p. 325).

> Mr. Ullman: ... My point simply is this, will you weigh the aggravators and mitigators? Because that's important? How about you?
>
> Ms. Wolf: Yes.

(T. Vol. III p. 326).

Hence, after a complete review of the transcript, it is apparent that Mr. Ullman could not be deficient for failing to strike juror Wolf for cause because he had no proper basis on which to make such a motion. <u>See</u> <u>Reaves v. State</u>, 826 So.2d 932 (Fla. 2002) (finding that trial counsel was not ineffective for failing to strike a juror for cause because Reaves had not shown

that trial counsel had a reasonable basis to assert for-cause challenges). Because the claim is refuted from the record, it was proper to summarily deny it.

D. Ineffective Cross-Examination

Blackwood next argues that the trial court erred by summarily denying his claim that Ullman was ineffective in his cross-examination of Detective Palazzo. In summarily denying this claim, the trial court stated:

> The Defendant failed to plead with specificity how Mr. Ullman was deficient and how the Defendant was prejudiced by the cross-examination of Detective Palazzo. The defendant's allegations are conclusory and legally insufficient.
>
> In determining the effectiveness of Mr. Ullman's cross-examination it is important to discern the overall defense to the charged crime and the theory behind the defense, which was that this was not a case of first-degree premeditated murder. It is clear from the record that Mr. Ullman's trial strategy was to argue that the crime could only have been a lesser degree of murder because the evidence demonstrated that Mr. Blackwood snapped and that there was absolutely no evidence of premeditation. The record reflects that Mr. Ullman carried out this particular trial strategy effectively and his performance fell well within the wide range of reasonable professional assistance. Based on the record, the Court finds that Mr. Ullman was not deficient in his cross-examination of Detective Palazzo, nor is there any evidence that there is a reasonable probability that but for any deficiency in the cross-examination, the result would have been

> different. Therefore, this claim must be summarily denied.

(Order). The trial court's ruling was correct. Blackwood's motion cites to different portions of the cross-examination and makes conclusory claims that the questioning was ill-conceived, devestated/damaged Blackwood's case, or made good points for the state, yet the motion fails to explain why such questioning was deficient and how Blackwood was prejudiced by the questioning. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. See Kennedy v. State, 547 So. 2d 912 (Fla. 1989).

Moreover, as the trial court found, this claim is without merit. Blackwood claims that Ullman's cross-examination of Detective Palazzo was ineffective because Ullman made a good point for the state on the issue of premeditation, allowed the detective to discredit Blackwood's statement that he did not know that Ms. Thomas was dead when he left the house, and allowed Detective Palazzo to discuss Blackwood's intelligence. However, as the trial court found, it is apparent from the record, when read as a whole, that Mr. Ullman effectively cross-examined Detective Palazzo.

During the opening statement, Mr. Ullman argued that there was no evidence that the murder was premeditated. Rather, he

argued this was a case of second-degree murder as the evidence would demonstrate that Blackwood snapped (T. Vol. 3 p 375). During closing arguments, Mr. Ullman argued that the evidence reflected that the crime was not planned. Specifically, Ullman attacked Detective Palazzo's testimony that Blackwood was intelligent and argued that based on Blackwood's actions during and after the crime, Blackwood was not smart enough to plan such a crime (T. Vol. 6 p. 808). Mr. Ullman argued that based on Blackwood's actions of leaving the scene without attempting to hide the crime, but leaving his car there, showed that Blackwood was not an intelligent person who thought-out the crime (T. Vol. 6 p. 808). During his rebuttal closing argument, Mr. Ullman argued that this was not a planned crime, rather they had sex, they had an argument, and the crime happened (T. Vol. 6 p. 836). Clearly, Mr. Ullman's trial strategy was to get a conviction on the lesser included offense of second degree murder.

The cross-examination of Detective Palazzo, when viewed in its entirety, shows that Ullman established that, other than the manner in which the crime was committed, there was no additional evidence of premeditation. Specifically, the following occurred during cross examination of Detective Palazzo:

> **Question: Okay, So if I understand you correctly, there is no independent witnesses that say, listen, I planned on killing Carolyn Thomas?**

Answer: Oh, no.

Question: There is no- there is no planning, any evidence of that, that he discussed killing her?

Answer: No, if he did, we don’t know it if-

Question: So there is no evidence of that?

Answer: Right

Question: So your answer, as far as premeditation, is the murder itself?

Answer: Yes.

Question: And to base your opinion that the murder was done in such a way that that caused premeditation, you’re relying on the choking and the strangulation?

Answer: Yes.

Question: Hypothetically speaking, let me ask you a question. I shoot a person six times in the back, spur of the moment, I just take my gun out, I don’t even know the person, I shoot him six times in the back, would you not make the same argument that because of the injuries it was premeditated?

Answer: You can’t expect me to formulate an opinion just on that, because when we do an investigation, we have to look at the totality of the circumstances. Why were you there? What were you doing? What was your relationship with that person? Uhm did you have a reason to want them dead? You know, did you have a motive? Was there a point in time where you should have realized what you were doing was going to kill that person? And you should realize at that point you better stop because you’re going to kill them?

Question: Good Point. Here’s my next question for you. Mr. Blackwood, the defendant, indicated that he loved Ms. Thomas, did he not?

Answer: He did.
Question: He indicated that he was sorry for what happened did he not?

Answer: He did.

Question: Didn’t he indicate on two occasions, if not three, during the course of the statement, he didn’t know she was dead?

Answer: He did say that.

Question: And he choked her until she was unconscious?

Answer: That’s what he said.

Question: Okay. That’s what he said. All right. Now as an investigator, did you think it was unusual that he didn’t know she was dead when he choked her?

Answer: There is no doubt in my mind that before he left that house he knew she was dead.

Question: He had indicated that he thought she was alive because there was a quot, a white spitty, foam substance coming from her mouth?

Answer: Yeah that would be the soap bubbles.

Question? Mixed with saliva?

Answer: Right.

Question: So in Blackwood’s mind, according to his statement, when he left the house, he looked at foam bubbles coming out of the

> mouth and in his mind he felt she was alive? You've taken numerous statements, haven't you, in the past?
>
> Answer: Of course.
>
> Question: On a one to ten, ten being a fairly bright individual, not necessarily a road scholar, and one being fairly stupid, for lack of a better term, individual, or not that bright, where would you rate this gentleman, his intelligence level?
>
> Answer I don't know him well enough to rate his intelligence. I only dealt with him that one afternoon during a statement.

(Emphasis added)(T. Vol. 6 pp. 675-678).

Detective Palazzo further agreed that it seemed ridiculous that an intelligent person would leave his car at the crime scene, drive out west and discuss the crime with other people (T. Vol. 6 pp 679-680). Hence, it is clear from the record that Mr. Ullman argued that there was no evidence to support premeditation, that Blackwood was not smart enough to plan the crime, and that he did not know that Ms. Thomas was dead when he left the house. Ullman clearly argued for second-degree, not first-degree murder. Therefore, it is apparent that Mr. Ullman was not deficient nor has Blackwood shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 688-89.

E. Defense Counsel's Failure to Object

Blackwood's last argument is that the trial court erred by summarily denying his claim that Ullman was ineffective by failing to object to Detective Desaro's comment on Blackwood's silence. In summarily denying this claim, the trial court found:

> The Defendant's allegation that Mr. Ullman was ineffective because he failed to object to Detective Desaro's comment on defendant's silence, is without merit.
>
> The Court finds that even if Desaro's comment could be viewed as a comment on the Defendant's silence, the defendant failed to show prejudice as a result of Mr. Ullman's failure to object to Detective Desaro's comment. Since the Defendant ultimately gave a taped recorded confession, this Court finds that any comments on the Defendant's silence, if interpreted as such, were harmless beyond a reasonable doubt.
>
> Additionally, the defendant failed to show prejudice as a result of Mr. Ullman's failure to object to Detective Palazzo's testimony that he believed the defendant knew that the victim was pregnant. Both Serina Thomas, the victim's daughter, and hazel Thomas, the victim's sister, testified that they had spoken to the Defendant before the murder and he knew the victim was pregnant. Therefore, any opinion rendered by Detective Palazzo, including his belief that the Defendant had lied, was harmless error in light of the testimony of the victim's daughter and sister.

(Order). In Jackson v. State, 522 So.2d 802 (Fla.), cert. denied, 488 U.S. 871 (1988), the Florida Supreme Court adopted a rule for determining whether a comment constitutes a comment

on silence. The court said that if the comment is "fairly susceptible" of being interpreted by the jury as a comment on the defendant's exercise of his right to remain silent it will be treated as such. See also State v. Kinchen, 490 So.2d 21 (Fla.1985). Where a defendant does not "remain silent" at the time of arrest, the constitutional right is found **not to** have been exercised. See Anderson v. Charles, 447 U.S. 404 (1980); Ivey v. State, 586 So.2d 1230, 1234 (Fla. 1st DCA 1991).

Here, Blackwood ultimately waived his right to remain silent and confessed to choking Ms. Thomas (T. Vol. 5 pp. 590-599). That confession was played for the jury. Because Blackwood did not "remain silent," Mr. Ullman cannot be deficient for failing to object to Detective Desaro's testimony. Moreover, even if Mr. Ullman should have objected there is no prejudice because Blackwood has failed to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 688-89. Comments on a defendant's silence are subject to harmless-error analysis. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Here, as the trial court found, any error in allowing Detective Desaro to testify that Blackwood did not want to talk anymore is harmless because Blackwood subsequently waived his right to remain silent and confessed.

Blackwood’s contention that Ullman was ineffective for failing to object when Detective Palazzo testified that he believed that Blackwood knew that Ms. Thomas was pregnant is also without merit. Although Detective Palazzo’s opinion regarding Backwood’s truthfulness is irrelevant, Blackwood cannot show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Serina Thomas, the victim’s daughter, and Hazel Thomas, the victim’s sister testified that they had spoken to Blackwood and he knew that Carolyn was pregnant (T. Vol. 6 pp. 760-765, 770). Hence, Blackwood cannot show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 688-89. Although Detective Palazzo opined that Blackwood lied when he said he did not know Carolyn was pregnant, such testimony is merely cumulative because victim’s sister and daughter testified that Blackwood knew she was pregnant. Cf. Capehart v. State, 583 So.2d 1009, 1013 (Fla. 1991)(finding that question and response about Capehart’s truthfulness were improper however error was harmless beyond a reasonable doubt).

CROSS APPEAL

THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY VACATING BLACKWOOD'S DEATH SENTENCE AND GRANTING A NEW PENALTY PHASE.

It was reversible error for the trial court to vacate Blackwood's death sentence and grant him a new penalty phase. The trial court improperly applied the deficiency and prejudice prongs of Strickland and therefore, its legal conclusion that deficiency and prejudice were established is erroneous as a matter of law. The resultant decision to vacate the death sentence cannot stand. The case must be reversed and remanded for reinstatement of the death penalty.

The standard of review for post-conviction claims **following** an evidentiary hearing affords deference to the trial court's factual findings. "As long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise on the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' " McLin v. State, 827 So.2d 948, 954 n. 4 (Fla.2002) (quoting Blanco v. State, 702 So.2d 1250, 1252 (Fla.1997)). See also Nixon v. State, 857 So.2d 172 (Fla. 2003). However, this Court does conduct an independent review of the deficiency and prejudice prongs as mixed questions of law and fact. Stephens

v. State, 748 So.2d 1028, 1033-34 (Fla. 2000). In Stephens, this Court stated:

> although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement . . . both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Id. 748 So. 2d at 1033 (emphasis in the original). Thus, questions of fact are reviewed to determine whether they are supported by competent, substantial evidence, while the deficiency and prejudice prongs are reviewed de novo.

Here, Blackwood was granted an evidentiary hearing on Claims II and III. Claim II alleges that trial counsel inadequately investigated mental health mitigation, obtained an inadequate mental health evaluation for the penalty phase and failed to adequately prepare Dr. Trudy Block-Garfield for the Spencer hearing (by not providing the necessary background information). Claim III alleges that Dr. Trudy Block-Garfield rendered inadequate mental health assistance to Blackwood in that her mental health evaluation of him was insufficient.

In its written order vacating the death sentence and granting a new penalty phase, the trial court noted that the "dispositive issue presented by claims II and III is whether Mr. Blackwood was deprived of the effective assistance of counsel as a result of his counsel's failure to investigate and present any

mental health mitigation at the penalty phase proceeding." (PCR 311-12). The trial court concluded that Ullman's "performance was both deficient and prejudicial, under Strickland, because he failed to adequately investigate and present mental health mitigation at the penalty phase proceeding which undermined confidence in the outcome of the trial." (PCR 312).[6]

In order to prove an ineffective assistance of counsel claim, a defendant must establish two elements pursuant to Strickland v. Washington, 466 U.S. 668 (1984): (1) that counsel's performance was deficient; and (2) that the defendant was prejudiced thereby. In assessing an ineffectiveness claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. The burden of proof for showing ineffective assistance is, and remains, on the defendant. Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982). See also Johnston v. Singletary, 162 F.3d 630, 635 (11th Cir. 1998). In assessing an ineffectiveness claim, the Court must start from a "strong presumption that counsel's

[6] The trial court's written order states that it was not necessary for it "to address trial counsel's alleged deficiencies with respect to the Spencer hearing," because it had found that both prongs of Strickland were met with respect to counsel's penalty phase preparation and presentation (PCR 320). Thus, the trial court did not address the last part of Claim II and Claim III, which is essentially the same argument.

conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89.

At all times, the defendant bears the burden of proving not only that his counsel's representation fell below an objective standard of reasonableness, but also that he suffered actual and substantial prejudice as a result of the deficient performance. In order to prove prejudice in the penalty phase context, a defendant "must demonstrate that but for counsel's errors he would have probably received a life sentence." Rose v. State, 675 So.2d 567, 571 (Fla. 1996), citing Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995). Such a demonstration is made if "counsel's errors deprived [defendant] of a reliable penalty phase proceeding." Rose, at 571 (citation omitted). In Baxter v. Thomas, 45 F.3d 1501, 1512-13 (11th Cir. 1995), the 11th Circuit explained that to establish the requisite prejudice in the penalty phase, the deficient performance must prejudice the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different. See also Bolender v. Singletary, 16 F.3d 1547, 1556-57 (11th Cir.) (citing Strickland, 466 U.S. at 687).

In finding the **deficiency** prong met in this case, the trial court stated:

Mr. Blackwood's trial counsel, Robert Ullman, was appointed on June 19, 1996. Prior to Mr. Ullman's appointment, Mr. Blackwood was evaluated for competency by Dr. Macaluso, Dr. Block-Garfield and Dr. Spencer. Dr. Macaluso was the only mental health expert to find that Mr. Blackwood was not competent. Mr. Ullman hoped to rely upon Dr. Macaluso for statutory mitigators because Dr. Macaluso rendered the most favorable defense competency evaluation. On October 8, 1996, Mr. Ullman prepared a mitigation packet for Dr. Macaluso and assumed that he asked Dr. Macaluso to be a witness. Mr. Ullman followed up in a letter to Dr. Macaluso on October 28, 1996. Mr. Ullman had no independent recollection of the contents of that letter or of speaking to Dr. Macaluso on that date.

Mr. Ullman spoke to Dr. Block-Garfield on November 4, 1996, as reflected by his bill. Mr. Ullman did not recall if he asked Dr. Block-Garfield to be a mental health witness at that time; however, he did recall asking Dr. Block-Garfield in February, 1997, which was <u>after</u> the penalty phase proceeding.

The guilt phase proceeding began on December 2, 1996, and the jury returned its guilty verdict on December 5, 1996. The Court set the penalty phase proceeding for January 23, 1997, giving the parties almost seven weeks to prepare.

On December 12, 1996, Mr. Ullman wrote to Dr. Macaluso advising that he needed Macaluso's help as an expert witness for the penalty phase proceeding. Mr. Ullman followed with a letter to Dr. Macaluso on December 17, 1996, providing him with information pertinent to the case, i.e., Dr. John Spencer's report, materials form Dr. Block-Garfield, Mr. Blackwood's confession, the detective's report and Dr. Price's autopsy report. In addition, Mr. Ullman

informed Dr. Macaluso that the penalty phase proceeding would begin on January 23, 1997.

Mr. Ullman never met with Dr. Macaluso. On January 7, 1997, sixteen days prior to the penalty phase proceeding, Dr. Macaluso wrote a letter to Mr. Ullman advising that he could not assist in the penalty phase. After receiving the letter, on January 9, 1997, Mr. Ullman contacted Dr. Macaluso by telephone. Dr. Macaluso was unhappy with the fee arrangement and he advised Mr. Ullman that he was not willing to work for ($1500). Even though Dr. Macaluso never met with Mr. Blackwood subsequent to his competency evaluation, on November 3, 1995, Dr. Macaluso stated in his letter of January 7, 1997, that he "would not be able to testify with reasonable medical certainty that any of the statutory mitigating circumstances are present." This Court finds that the record reflects no evidence of any discussion with Dr. Macaluso relative to nonstatutory mental health mitigation evidence. Mr. Ullman testified that he was upset by Dr. Macaluso's letter and thought that in reality it was a "CYA" letter because Dr. Macaluso did not want to be a witness for what he thought would be inadequate compensation.

Mr. Ullman testified that he was left in a terrible position only two weeks prior to the scheduled commencement of the penalty phase proceeding; he had no mental health mitigation witnesses. Rather than ask for a continuance of the penalty phase or contact Dr. Block-Garfield or Dr. Spencer, this Court finds that <u>Mr. Ullman</u> <u>did nothing</u>. He defended Mr. Blackwood at the penalty phase proceeding without further investigation and without any mental health mitigation witness to provide statutory or nonstatutory mitigators. This Court finds that <u>Mr. Ullman's performance was deficient</u> under <u>Strickland</u>.

(PCR 312-315).

The trial court rejected the State's argument that Ullman made a strategic decision to not present Dr. Macaluso or any other mental health mitigation at the penalty phase because the testimony would not have been helpful. Concluding that such a strategy was "unreasonable," the trial court noted that Ullman's failure to contact Dr. Block-Garfield, Dr. Spencer or any other mental health expert, **after** Dr. Macaluso indicated he could not provide statutory mitigation for the penalty phase, "<u>fell far short</u> of prevailing professional standards in capital cases," and was "not reasonable under the facts and circumstances of this case." (PCR 316).

Blackwood devotes a large portion of his Claim I to arguing that the trial court correctly found the deficiency prong, relying upon <u>Wiggins v. Smith</u>, --- U.S. ----, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) and <u>Williams v. Taylor</u>, 529 U.S. 362. The State notes that those cases are inapplicable here. Defense counsel's performance in <u>Willaims</u> was found deficient because he did not begin the investigation until a week before penalty phase began and there was a "wealth of mitigation" that was not presented at the penalty phase. In <u>Wiggins</u> counsel's performance was found deficient because he "never attempted to meaningfully investigate mitigation" although substantial

mitigation could have been presented. Here, in contrast, the evidence adduced at the evidentiary hearing demonstrates that Ullman conducted a very thorough penalty phase investigation. Ullman was appointed on June 19, 1996 nunc pro tunc to June 18, 1996 (T. 262)). The case went to trial six (6) months later, in December, 1996 (PCT Vol. 6, 232). Prior defense counsel was Robert Trachman (PCT Vol. 6, 232). During Mr. Trachman's representation, Blackwood had been evaluated for competency/insanity by Dr. Trudy Block Garfield, Dr. Macaluso, and Dr. Spencer (PCT Vol. 6, 262-265). Ullman reviewed all of the competency evaluations (PCT Vol. 6, 266). Dr. Macaluso was the only doctor who had found that Blackwood was not competent to proceed to trial; thus, Ullman hoped to rely upon Dr. Macaluso for statutory mitigators because he was the most favorable expert for Blackwood (PCT Vol. 6, 267, 275). Ullman's time records indicate that he prepared a mitigation packet and spoke with Dr. Macaluso on October 8, 1996, almost two months **prior to** the guilt phase (PCT Vol. 6, 269). Although Ullman did not have an independent recollection of the conversation at the evidentiary hearing and couldn't specifically recall asking Dr. Macaluso to be an mitigation expert on October 8, 1996, he believed that the doctor indicated he would be a mitigation expert at that time (PCT Vol. 6, 269, 299). Ullman's time

records also show that he sent a follow-up letter to Dr. Macaluso on October 28, 1996, but Ullman could not remember what the letter was about (PCT Vol. 6, 270).

Ullman's time records also show that on November 4, 1996, about one month prior to the guilt phase, Dr. Trudy Block-Garfield telephoned Ullman (PCT Vol. 6, 271). Ullman stated, at the evidentiary hearing, that Dr. Block-Garfield was the second most favorable expert because, although she found Blackwood competent, she also found that he was severely depressed and his functioning was low-average impaired cognitive functioning (PCT Vol. 6, 267). Blackwood's guilt phase began on December 2, 1996, and he was convicted on December 5, 1996 (T. 271). After the guilt phase, on December 12, 1996, Ullman re-contacted Dr. Macaluso by letter and requested that he testify at the penalty phase regarding statutory mitigators. Although Ullman agreed on direct examination that this was the first time he had asked Macaluso to be a mitigation witness for penalty phase, his time records refute that showing that he contacted Macaluso earlier, in October (PCT Vol. 6, 234). On December 17, 1996, Ullman wrote a letter to Dr. Macaluso indicating that the penalty phase was to begin on January 23, 1997, and included copies of all the psychological reports, a copy of Blackwood's confession, the detective's report, and a copy of the medical examiner's report

(PCT Vol. 6, 235-237, 275). Mr. Ullman federal expressed the packet to Dr. Macaluso on December 21, 1996.

Dr. Macaluso replied by letter on January 7, 1997 that he "would not be able to testify with reasonable medical certainty that any of the **statutory** mitigating circumstances are present" (emphasis added)(PCT Vol. 6, 276). On January 9, 1997, after receiving the letter, Ullman contacted Dr. Macaluso by telephone and they spoke for thirty (30) minutes (PCT Vol. 6, 277). The penalty phase trial was held on January 23, 1997 and Ullman did not present any mental health mitigation; however, as he noted at the evidentiary hearing, there was virtually no mental health mitigation here, no history of any psychological problems (PCT Vol. 6, 286). Ullman put on ten (10) witnesses at the penalty phase, including friends, family members and a jail deputy (PCT Vol. 6, 286). After the penalty phase, Ullman asked Garfield to be a mitigation witness for the Spencer hearing (PCT Vol. 6, 250). Although his time records do not indicate any meeting or conversations with Block-Garfield, he noted that he saw her frequently at the courthouse and spoke with her about the case then (PCT Vol. 6, 252, 255). Dr. Block-Garfield did not find the statutory mitigator of "extreme mental/emotional disturbance," because she found that while Blackwood was under the influence of a "mental or emotional disturbance," it was not

extreme (PCT Vol. 6, 256). Thus, Dr. Block-Garfield gave Blackwood the non-statutory mitigator of a mental/emotional disturbance. Dr. Block-Garfield testified at the Spencer hearing, finding one (1) statutory mitigator "no significant criminal history" and several additional non-statutory mitigators.

Simply because Ullman's investigation did not uncover the statutory mitigator of "extreme mental or emotional disturbance," does not entitle Blackwood to relief. Blackwood's good fortune in finding mental health professionals who have now opined that he suffered from **extreme** mental or emotional disturbance at the time of the crime does not prove that a competent investigation was not conducted at the time of trial. 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 new diagnosis of organic brain damage); Provenzano v. Dugger, 561 So. 2d 546 (Fla.1991)(finding no basis for relief by mere fact that defendant has found expert who can offer more favorable testimony); Jones v. State, 732 So. 2d 313, 319 (Fla. 1999)(finding counsel's decision not to pursue further mental health investigation after receiving initial unfavorable report reasonable); Engle v. State, 576 So. 2d 696 (Fla. 1991)(same),

Hodges v. State, SC01-1718 (June 19, 2003)(same). As noted above, Ullman presented substantial family/friend mitigation at the penalty phase, in the form of ten (10) witnesses and presented mental health mitigation from Dr. Block-Garfield at the Spencer hearing, which the trial court relied upon in sentencing Blackwood to death.

What has happened here is that, six years later, Blackwood has secured experts who will now testify that Blackwood suffered from an **extreme** mental or emotional disturbance at the time of the crime. That is the only difference between their testimony and that of Dr. Block-Garfield, as will be fully discussed below. The Florida Supreme Court has held that counsel's reasonable mental health investigation is not rendered incompetent "merely because the defendant has now secured the testimony of a more favorable mental health expert." Asay v. State, 769 So.2d 974, 986 (Fla.2000); Cherry v. State, 781 So.2d 1040, 1052 (Fla. 2000); Gaskin v. State, 822 So.2d 1243, 1250 (Fla. 2002). Ullman was not deficient in investigating and preparing mental health mitigation for the penalty phase.

Moreover, the trial court further found that Ullman's deficient performance **prejudiced** Blackwood. The State's position is that the trial court improperly applied the prejudice prong of Strickland to the facts of this case and

therefore, its legal conclusion that prejudice was established is erroneous as a matter of law. Further, since both deficient performance and prejudice must be established by the defense before relief is warranted, the trial court erred by vacating Blackwood's death sentence in this case. Strickland, 466 U.S at 691-69 (an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.... Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution). If there is no prejudice, it matters not how deficient counsel's performance was; no relief is mandated.

Applying the proper prejudice standard to this case, it is clear there was no prejudice. The dispositive issue in this case, as phrased by the trial court, was whether Ullman was ineffective for failing to present **mental health mitigation** at the penalty phase. After finding Ullman deficient in not presenting such testimony, the trial court found that Blackwood was prejudiced by the deficiency **because the result of the penalty phase would have been different had the jury heard the mental health testimony**. The trial court concluded that "[h]ad the jury been presented with expert mental health mitigation,

there is a reasonable probability that the balance of the aggravating and mitigating circumstances would have changed their recommendation." (PCR 320). The court noted that "[i]n weighing the single aggravator against the mitigators presented, [it] gave great weight to the jury's recommendation." (PCR 320).

The problem with the court's analysis is that it completely ignores the fact that Ullman presented **mental health mitigation**, in the form of **testimony from Dr. Block-Garfield**, at the Spencer hearing, which the trial court **relied upon heavily** in sentencing Blackwood to death. At the Spencer hearing, Dr. Garfield testified that Blackwood had no prior criminal history (supporting the statutory mitigator of "no significant prior criminal history"), that he was suffering from an emotional disturbance at the time of the crime (supporting a non-statutory mitigator), that he had the capacity for rehabilitation, that he cooperated with the police, that the murder was a result of a lover's quarrel, that he was remorseful, that he had a deprived childhood, that he was a good parent, and that he had a low intelligence level.

The trial court relied heavily upon Dr. Block-Garfield's testimony in its sentencing order, finding only one statutory mitigating factor, no significant history of prior criminal

conduct, to which it accorded "significant weight."(DA XIV 1583-84). Regarding non-statutory mitigation, the trial court found eight factors: (1) Blackwood was "under the influence of a mental or emotional disturbance" which was not extreme (2) Blackwood had the capacity for rehabilitation, **which it indicated was based solely upon Dr. Block-Garfield's testimony** and which it gave "very little weight" (DA XIV 1584); (3) Blackwood's "cooperation with police," which it gave "only moderate weight in light of the contents of Blackwood's confession and the circumstances which preceded it"; (4) Carolyn's "murder was the result of a lover's quarrel," which the court considered at defense counsel's request, but assigned no specific weight to because the facts do not support it (DA XIV 1585-1586); (5) Blackwood's "remorse" which the court gave some weight, noting it was difficult for it to determine whether this non-statutory mitigator existed; (6) Blackwood was a "good parent" which the trial court accorded some weight; (7) Blackwood's employment record, which the trial court gave some weight and (8) Blackwood's intelligence level, which the trial court **found based upon Dr. Block-Garfield's testimony** and afforded some weight.

Thus, the trial court found the statutory mitigator offered by Dr. Block-Garfield, as well as most of the non-statutory

mitigation she presented. The trial court’s written order vacating the death sentence fails to acknowledge that it heard Dr. Block-Garfield’s mental health testimony, relied upon it in its mitigation findings, but ultimately was **unpersuaded** that it outweighed the HAC aggravator and imposed the death sentence anyway. Significantly, Dr. Block-Garfield’s testimony **did not change between the Spencer hearing and the 3.850 evidentiary hearing**. Thus, it is inexplicable how the trial court could conclude that the **jury’s recommendation would have been different had it heard her testimony**. If the testimony made no difference to the trial court, how can there be a reasonable probability that it would have changed the jury’s recommendation.

Moreover, it is inconsequential whether Dr. Block-Garfield’s testimony would have made a difference in the jury’s recommendation. The trial court is the ultimate sentencer and it heard her testimony and rejected it. Whether a mitigator has been established and the appropriate weight it should be given are matters within the discretion of the trial judge based upon the evidence presented. See Bonifay v. State, 680 So.2d 413, 416 (Fla.1996); Campbell v. State, 571 So.2d 415, 420 (Fla.1990). The trial court's original finding is not subject to reversal merely because the defendant reaches a different

conclusion. See James v. State, 695 So.2d 1229, 1237 (Fla.1997). As this Court noted in State v. Coney, 845 So.2d 120 (Fla. 2003), a case which the trial court found "strikingly similar" to this case, application of the Strickland prejudice prong to the penalty phase of a case requires a trial judge to as whether, "but for counsel's deficient performance would the defendant have been sentenced to life in prison rather than to death? In Florida, the sentencing scheme requires that, first, the jury weigh the aggravating and mitigating factors and recommend to the court, by a majority vote, whether life or death is the appropriate sentence. Next, the court must independently consider the aggravating and mitigating circumstances and reach its decision on the appropriate penalty, giving great weight to the jury's advisory sentence." Id., citing Tedder v. State, 322 So.2d 908 (Fla.1975).

In Coney, this Court agreed that the prejudice prong was met because the jury, by the thinnest margin allowable, seven to five, had recommended the imposition of the death penalty. Thus, if only one of the seven jurors voting for death had been persuaded to change her or his vote, the recommendation would have been for a life sentence and, in view of the law requiring the presence of compelling evidence to override a jury's recommendation of life, the court would likely have followed the

jury recommendation and sentenced the defendant to life in prison. This Court agreed that the mental health evidence offered by the defendant at the post-conviction evidentiary hearing, from Dr. Thomas Hyde, a highly qualified behavioral neurologist, and Dr. Hyman Eisenstein, a clinical psychologist, would likely have persuaded the jury to vote for life. Both Drs. Hyde and Eisenstein concluded that Coney suffered from brain dysfunction and psychiatric illness. Dr. Hyde opined that Coney had organic brain dysfunction (in the frontal lobe), resulting in impulse control problems, major recurrent depression, and a history of emotional/sexual and physical abuse.

Dr. Eisenstein opined, as he did in this case, that Coney was suffering from extreme mental and/or emotional impairment at the time of the commission of the crime. He concluded that Coney had impairment to the frontal lobe of his brain which would affect his ability to make cognitive changes, and a deficit in his right brain functioning, resulting in impulsive behavior.

This Court acknowledged that the doctors’ opinions were vigorously challenged by the state on cross-examination and were contradicted by the state's expert neuropsychologist, Dr. Jane Ansley, who concluded that Coney did not suffer from any significant psychological disorder or organic brain damage;

however, it found that the credibility of the witnesses was for the jury and it could not conclude that the evidence presented by the defendant, if heard by the jury, would not have tilted the balance in favor of a recommendation of life.

Coney is immediately distinguishable from this case because there was no mental health testimony presented in that case to the trial judge before the decision was made to impose the death sentence. Here, in contrast, mental health testimony from Dr. Block-Garfield was presented at the Spencer hearing, considered by the trial judge and rejected in favor of a death sentence. Thus, the question for establishing prejudice, i.e., whether the defendant would have been sentenced to life but for counsel’s errors, can be conclusively answered here in the negative. The trial court had already considered her testimony before imposing the death sentence. As already noted, her testimony did not change between the Spencer hearing and the post-conviction evidentiary hearing. Consequently, it would not have changed the trial court’s mind and it is unlikely that it would have resulted in a life recommendation from a 9-3 jury. The trial court should not have considered Dr. Block-Garfield’s testimony in determining whether the prejudice prong was met here and it was error for it to factor her testimony into the equation.

Excluding Dr. Block-Garfield’s testimony from the analysis,

the proper question for the trial court, in determining the prejudice prong in this case, was whether there was a reasonable probability that Blackwood would have received a life recommendation, but for counsel’s errors, based on the testimony given at the evidentiary hearing from Drs. Jacobson and Eisenstein. The trial court’s task was to assess the credibility and strength of that evidence and decide whether it was of such a nature that its absence rendered the prior results unreliable. Rose v. State, 675 So. 2d 567, 570 (Fla. 1996); Rivera v. State, 717 So. 2d 477 (Fla. 1998). This Court rejected the argument that prejudice is established merely by the presentation of additional or new evidence in Robinson v. State, 707 So. 2d 688, 695-697 (Fla. 1998), finding that the presentation of additional witnesses would have also allowed cross-examination and rebuttal evidence that could have countered any value that might have gained from the new evidence. Valle v. State, 581 So. 2d 40, 49 (Fla.1991); Medina v. State, 573 So. 2d 293, 298 (Fla.1990) (finding no ineffectiveness in not presenting witnesses where they would have opened the door for the State to explore defendant's violent tendencies).

That is what would have happened here. The only real difference between the testimony Dr. Garfield and that of Drs. Jacobson and Eisenstein was that they opined that Blackwood was

acting under an **extreme** emotional disturbance at the time of the crime; this, giving him the statutory mitigator (PCT Vol. 5, 139). Dr. Jacobson testified that Blackwood's state of mind became extreme once Carolyn began to denigrate him, after they had made love (PCT Vol. 5, 171). According to Dr. Jacobson, Carolyn made Blackwood angry and he was out-of-control with rage when he stuffed the washcloth into Carolyn's mouth and began to choke her (PCT Vol. 5, 172-174). However, Dr. Jacobson admitted that Blackwood's mood and actions at the time of the murder were consistent with those of a normal person suffering the loss of a relationship (PCT Vol. 5, 164). Moreover, she agreed that another psychologist could come to a different conclusion and that, Dr. Garfield had, in fact, already arrived at a different conclusion (PCT Vol. 5, 177-178).

A review of Dr. Jacobson's testimony further reveals that while she opined that Blackwood suffered a number of head injuries (falling out of trees and off a truck), she failed to determine whether Blackwood had ever been rendered unconscious by the head injuries, or if they had required hospitalization (PCT Vol. 5, 148-149). Dr. Jacobson was told that Blackwood nearly drowned as a child, but she never determined if CPR was necessary (PCT Vol. 5, 149-150). Further, Dr. Jacobson was not sure whether Blackwood lived with his father or mother when he

came to the United States (PCT Vol. 4, 152-153). Finally, the statement that she had Blackwood write about the incident is inconsistent with the one he had given the police on January 10, 1995 (PCT Vol. 5, 166). Blackwood told Dr. Jacobson that he and Carolyn started arguing, during which she told him that he was not good enough for her anymore and that she had aborted his babies, but he did not tell this to the police (PCT Vol. 5, 166-67). During their argument, he told Carolyn that he should wash her mouth out with soap, but he did not tell this to the police (PCT Vol. 5, 167, 176). Blackwood stated that he tried to choke Carolyn, but he told the police that she was unconscious so he must have choked her (PCT Vol. 5, 168). Finally, he told Dr. Jacobson that he was scared and started to call 911; but he did not tell this to the police (T. 171).

Hence, it is apparent from Dr. Jacobson's testimony that had it been presented before the jury, the State would have been able to cross-examine her and establish that Blackwood has changed his version of how the crime occurred and that Dr. Garfield's conclusions are equally valid. Rogers v. Zant, 13 F.3rd 384, 387 (11th Cir. 1994)(explaining that it is reasonable strategy to decide not to investigate a certain line of defense irrespective of what it may uncover based on counsel's decision to avoid a certain course); Medina v. State, 573 So.2d 293, 298

(Fla.1990) (finding no ineffectiveness for counsel's choice not to present witnesses who would have opened the door for the State to cross-examine them about the defendant's violent past); Ferguson v. State, 593 So.2d 508, 510 (Fla.1992) (finding that counsel's decision not to put on mental health experts was a "reasonable strategy in light of the negative aspects of the expert testimony" because the experts had indicated that they thought that the defendant was malingering, a sociopath, and a very dangerous person); Gaskin v. State, 822 So.2d 1243, 1249 (finding that counsel acted reasonably by not putting on evidence that would open the door to other damaging testimony about Gaskin).

The second expert presented by Blackwood at the evidentiary hearing was Dr. Hyman Eisenstein, a neuro-psychologist, who also gave Blackwood the statutory mitigator of “under **extreme** mental or emotional disturbance” at the time of the crime as well as opining that Blackwood suffered from neurological deficits (PCT Vol. 5, 212-213). However, Dr. Eisenstein knew none of the facts or circumstances of this murder. He did not know how the victim was murdered, what instrumentalities were used, the degree of torture inflicted upon the victim, nor how long it took for her to die. Blackwood did not tell Dr. Eisenstein the details of the murder, the doctor had not read any of the trial

testimony, nor had he read the medical examiner's report. Dr. Eisenstein's testimony should have been afforded **no weight** by the trial court because he opined that Blackwood was under an **extreme** emotional disturbance at the time of the crime, without even knowing critical information. See Nelson v. State, 27 Fla. L. Weekly S797, (Fla. 2002)(finding that trial court was entitled to evaluate and disregard expert opinion testimony supporting claim of statutory death penalty mitigator of extreme mental or emotional disturbance, if court felt testimony was unsupported by facts); Walls v. State, 641 So. 2d 381, 390-391 (Fla. 1994)(recognizing that credibility of expert testimony increases when supported by facts of case and diminishes when facts contradict same); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996)(same); Wournos v. State, 644 So. 2d 1000, 1010 (Fla. 1994)(upholding rejection of uncontroverted expert testimony when it cannot be reconciled with facts of crime).

Thus, contrary to the trial court's findings, the record does not establish a reasonable probability that Blackwood would have received a life sentence had the jury heard from these two (2) doctors. The fact that Blackwood found two new doctors to "mouth" the magic phrases that an additional statutory mitigator was present does not carry the day.[7] See Gaskin v. State, 822

[7] Notably, Dr. Garfield maintains that even after a current review of the transcripts from the trial and penalty

So.2d 1243, 1250-51 (Fla. 2002)(finding that Gaskin had not met his burden of showing that but for counsel's alleged deficiency, the result of the penalty phase would have been different because Dr. Krop testified at the evidentiary hearing that his diagnosis of Gaskin would have changed little if counsel had given him Gaskin's school records); Asay v. State, 769 So.2d 974, 986 (Fla. 2000)(finding that testimony of mental health experts would not have been entitled to significant weight had it been presented in the penalty phase because neither expert was familiar with the significant facts of this crime); Brown v. State, 755 So.2d 616, 636 (Fla.2000) (holding that trial counsel's performance was not deficient for failing to give a mental health expert additional information because the expert testified at the evidentiary hearing that the collateral data would not have changed his testimony); Breedlove v. State, 692 So.2d 874, 877 (Fla.1997) (holding that because the psychologists testified that their opinions would remain unchanged even considering the additional information, there was not a reasonable probability that the result of the penalty phase would have been different).

Moreover, as noted by this Court in the direct appeal

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phase, Blackwood’s school records, and the deposition of Dr. Jacobson and Dr. Eisenstein, she still would not find that Blackwood suffered from an **extreme** emotional disturbance.

opinion[8], the trial court considered that Blackwood was depressed and suffering from a mental disturbance because it found such evidence sufficient to establish the non-statutory mitigator that Blackwood suffered from an emotional disturbance and gave it "moderate" weight. Thus, evidence of Blackwood's mental state at the time of the crime was found and considered by the trial court in weighing the aggravating and mitigating circumstances. It is highly unlikely that in this case, where the jury recommended death by a vote of 9-3 and the State established that the murder was heinous, atrocious, or cruel (HAC), evidence that Blackwood was under an extreme emotional disturbance would have resulted in a life recommendation. This Court has affirmed the denial of relief where additional mitigation was available, but was not presented. See, Asay v. State, 25 Fla. L. Weekly 523 (Fla. June 29, 2000)(affirming denial of relief where counsel conducted reasonable investigation when considered in light of hindrance by defendant's mother); Hill v. Dugger, 556 So. 2d 1385, 1388-89 (Fla. 1990)(affirming denial despite affidavits from family members regarding defendant's background and drug use, from doctor asserting he had insufficient information, and from counsel conceding ineffective representation); Smith v. Dugger,

[8] Blackwood v. State, 777 So. 2d 399, 409 (Fla. 2000).

565 So. 2d 1293, 1295 (Fla. 1990)(affirming denial of claim counsel failed to investigate and present information to mental health expert and to ensure competent evaluation); Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990)(same); Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990); Roberts v. State, 568 So. 2d 1255, 1260 (Fla. 1990)(same). Even if counsel did not present all mitigation available, if the mitigation now available would not have resulted in a different sentence, there is no prejudice. Cf. Van Poyck v. State, 694 So. 2d 686, 694-96 (Fla. 1997)(notwithstanding a wish for additional time for investigation, it would not have mattered how much time was granted given the weakness in the mitigation available). Consequently, the trial court improperly applied the prejudice prong to this case. It cannot be shown that he would have received a life sentence had the jury heard the testimony about the additional statutory mitigator.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court reverse the trial court's vacation of Appellant's death sentence and ordering of a new penalty phase. The State requests re-imposition of the death sentence and affirmance of the summary denial of Appellant's remaining claims.

Respectfully submitted,

CHARLES J. CRIST, Jr.
Attorney General

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DEBRA RESCIGNO
Assistant Attorney General
Bar No. 0836907
1515 North Flagler Dr.
West Palm Beach, FL 33401
561-837-5025 (Phone)
561-837-5108 (Facsimile)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to KENNETH MALNIK, Counsel for Appellant, 1776 N. Pine Island Road, Suite 216, Plantation, Fl. 33322, this 16th day of August, 2004.

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CERTIFICATE OF FONT

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