IN THE SUPREME COURT OF FLORIDA

MELVIN TROTTER,

Appellant,

v. **CASE NO. SC03-735**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR MANATEE COUNTY, STATE OF FLORIDA

_____

ANSWER BRIEF OF APPELLEE

_____

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PRELIMINARY STATEMENT

Appellee will refer to the instant record on appeal seeking relief from the denial of postconviction relief by "R" followed by the volume number and page number.

Additionally, appellee will refer to the original direct appeal record (Florida Supreme Court Case No. 70,714) by "1DAR" followed by the volume number and page number. As to the resentencing appeal (Florida Supreme Court Case No. 82,142), appellee will refer to that record as "2DAR" followed by the volume number and page number.

Appellee would note that the transcripts of the evidentiary hearing conducted in late April and early May 2002 inexplicably appear twice in the appellate record. The testimony beginning on April 29, 2002 first appears in Volume VIII at 1380, continues through Volumes IX, X, and XI and concludes in Volume XII at 2202. The testimony of that hearing also appears again starting at Volume XIV (TR 54) and continues through Volume XVIII (TR 876). Appellee will use the transcripts at Volume XIV through Volume XVIII.

STATEMENT OF THE CASE AND FACTS

Appellant was indicted and convicted for the June 16, 1986 first degree murder of Virgie E. Langford, a seventy-year-old owner of a grocery store in Palmetto, Florida. On direct appeal this Court briefly described the facts. Trotter v. State, 576 So. 2d 691, 692 (Fla. 1990):

> On June 16, 1986, a truck driver went into Langford's grocery in Palmetto, Florida, and found the seventy-year-old owner, Virgie Langford, bleeding on the floor in the back of the store. She had suffered a large abdominal wound which resulted in disembowelment; there were a total of seven stab wounds. She told the driver that she had been stabbed and robbed. Several hours after the surgery for her wounds, the victim went into cardiac arrest and died.
>
> The jury found Trotter guilty of robbery with a deadly weapon and first-degree murder, and recommended the death penalty by a nine-to-three vote. The trial court found four aggravating circumstances[n2] and four mitigating circumstances.[n3] Finding the aggravating circumstances outweighing the mitigating circumstances, the court sentenced Trotter to death.
>
> [n2] The crime was committed while under sentence of imprisonment; the defendant had previously been convicted of a felony involving use or threat of violence; the crime was committed while engaged in the commission of a robbery; and the crime was especially wicked, evil, atrocious, and cruel.
>
> [n3] Defendant was under the influence of extreme mental and emotional disturbance; the capacity of the defendant was substantially impaired; the defendant has a

> below average I.Q. and a history of family and developmental problems; and remorse.

The Court affirmed the judgment but remanded for resentencing. The two dissenting justices found no error in the sentencing. Id. at 695-696.

On the resentencing appeal this Court affirmed the sentence of death imposed. Trotter v. State, 690 So. 2d 1234 (Fla. 1996). The Court recited:

> At resentencing, the trial court followed the jury's eleven-to-one vote and again imposed the death penalty after finding four aggravating circumstances,[n5] two statutory mitigating circumstances,[n6] and several nonstatutory mitigating circumstances.[n7] Trotter raises ten issues in his present appeal.[n8]
>
> [n5] Trotter was on community control at the time of the murders; Trotter had been convicted of a prior violent felony; the crime took place while Trotter was engaged in a robbery and was for pecuniary gain (although the court listed these two circumstances separately in its written order, it stated at sentencing that it considered the two as a single factor); and the murder was especially wicked, evil, atrocious and cruel.
>
> [n6] Trotter was under the influence of extreme mental and emotional disturbance; and the capacity of the defendant was substantially impaired.
>
> [n7] Trotter has a below average I.Q., has both family and developmental problems, and has a disadvantaged background; Trotter may have suffered from a frontal lobe brain disorder; the defendant is remorseful; and other nonstatutory factors.

> [n8] The court counted community control as an aggravating circumstance; victim impact evidence is impermissible in general; admission of victim impact evidence here was improper; Trotter should have been allowed to raise the validity of his prior conviction; the court failed to investigate Trotter's claim of racial bias in seeking the death penalty; the court denied Trotter's challenges for cause; the court denied a particular challenge for cause; the court allowed evidence of a nonstatutory aggravating circumstance to be introduced; the prosecutor made improper comments; and the sentencing order is deficient.

Thereafter, appellant sought postconviction relief. He filed a Second Amended Motion to Vacate (R II, 292-370), the state filed a Response (R III, 373 - IV, 775) and following a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) (R XIII, 44-53), the lower court scheduled an evidentiary hearing on claims I - IV (R V, 785).

On March 20, 2003, following an evidentiary hearing, Circuit Judge Andrew D. Owens, Jr. entered a lengthy order denying the Second Amended Motion to Vacate Judgment of Conviction and Sentence (R VIII, 1319-1379). The court summarized the testimony of defense witnesses Peter Dubensky, Danny Wortham, Gladys Casimir, Marsha Polite, Ph.D. Calvin M. Pinkard, Jr., attorney James Slater, Dr. Harry Krop, Dr. Bill Mosman and state witnesses Krop and Dr. Sidney J. Merin (R VIII, 1324-1365). Judge Owens denied the claims that counsel rendered ineffective assistance in failing to timely file a motion to set aside a

1985 robbery conviction, denied a claim of ineffective assistance of counsel in the use of a mental health expert under Ake v. Oklahoma, 470 U.S. 68 (1985), and denied a claim that counsel failed to provide experts with information and that counsel failed to investigate and present family background information (R VIII, 1365-1374). Other claims were summarily denied (R VIII, 1375-1379).

Evidentiary Hearing:

James Slater, who had been co-counsel to Peter Dubensky in Trotter's initial trial for the Langford murder and lead counsel in the resentencing proceeding, admitted that he and Dubensky were two of the most experienced trial lawyers in the Public Defender's office. Slater had been practicing since 1973 (R XV, 273). Slater conceded that in denying the motion to withdraw plea and motion to vacate and set aside and correct sentence (on the 1985 non-capital case) Judge Dakan ruled both that it was barred by the two-year rule and that the evidence did not justify it as well -- he denied it on the merits (R XV, 274). Slater had represented Danny Wortham which had similar issues of law: intelligence, abusive background and he was in the same foster home as Trotter; he used the same trio of experts -- Krop, Maher and Wood -- in both cases and Slater had received a successful life recommendation following a guilty plea by Wortham (R XV, 275-277). Slater conceded that it was common

practice in Manatee County to use written acknowledgments which judges did not always repeat in the plea colloquy (R XV, 279). Slater testified that in the original sentencing proceeding the foster parents (the Ellingtons) and appellant testified that appellant was loved by them (R XV, 282-283).

Slater used a different strategy in the 1993 resentencing proceeding; putting on evidence of abuse or problems in the Ellington household (R XV, 283). Slater acknowledged that he may have traveled to Gainesville to visit with Dr. Krop and accommodate his schedule before the 1993 trial and that after the 1993 hearing he took the time to write him and thank him for his help on the case (R XV, 284). Slater also wrote to Dr. Maher on May 5, 1993, noting that the unsuccessful result in Trotter's case was attributed to the gruesome nature of the offense (R XV, 286). Slater acknowledged that in the initial trial the transcript shows the defense considered using former attorney Mr. Lee to testify about Trotter's voluntary plea to the charge, for consideration as mitigation (R XV, 287-288). He tried to do everything to help Trotter avoid the death penalty (R XV, 288); if he had evidence he would pursue and present it unless he had a strategic reason not to do so. Slater was pretty intense when it came to preparation and kept his investigator, Mr. Speed, working hard (R XV, 288-289). Slater recalled that he did put on evidence of Trotter's IQ and there

was testimony concerning his development. He identified State Exhibit 5, a memo directed to his investigator to find Dr. Pinkard and determine if the state was going to call him, because he might be a damaging witness against Trotter (R XV, 292).

Slater testified there was an HRS worker named Catherine Williams, whom he had used as a witness in the Danny Wortham case. She assisted in looking for records in Trotter's case; they were not able to find the HRS file that related to appellant. Slater acknowledged State Exhibit 7, a memo from Slater to the file dated January 29 indicating that appellant's sister Cathy Trotter's married name at the time was Cathy Williams. Slater authored that memo (R XV, 293-294). He recalled using Dr. Wood and Dr. Maher as his primary expert witnesses on the brain dysfunction issues (R XV, 295).

Psychologist Dr. Harry Krop testified that he met with attorney Slater and Dr. Maher after the first trial with regard to perhaps changing the strategy for resentencing partly because of new materials regarding the Ellingtons and also based on a discussion that focused on a person's drug use might not "fly anymore;" although it used to be helpful in mitigation it was perhaps now viewed as aggravation (R XV, 330). Krop administered an IQ test, the Wechsler Adult Intelligence Scale Revised (WAIS-R) and at the first meeting Trotter came out with

an IQ of 72 in 1987. Krop felt that was an accurate score (R XV, 331-332). Krop was still comfortable with that score in his 1992 interview with appellant. Trotter had previous testing in school on WISC-R where he obtained an IQ of 70 and scored an IQ of 69 on the verbal Slosson test, consistent with Krop's scoring (R XV, 334-336). Dr. Pinkard had given the Wechsler Intelligence Scale for Children, but since the WISC and WISC-R are children's IQ tests and Trotter was no longer a child when Krop saw him, Krop gave the WAIS-R. The IQ test score of 88 on Pinkard's testing with the current categorizations would be called low average -- when Pinkard did the testing it would be dull normal (Krop explained that there is no such classification as "adult normal" and if the transcript said that, it is a typographical error)(R XV, 336-337).

On cross-examination, Krop indicated that he had spent about an hour going over the plea form (from Trotter's 1985 plea) with appellant. He did not determine that Trotter was incapable of understanding the plea form or rights deal but felt that based on what Trotter told him that he did not understand parts of it. Krop relied to a large extent on what Trotter told him what happened with attorneys Lee and Moreland (R XV, 351-354). If Lee had spent a couple of hours with him he could have explained

the various rights[1] (R XV, 351-352). Krop admitted that in 1992 he was not aware of defendant's prior record or how many times he had entered a plea in court and did not recall that the PSI indicated that Trotter had been through the court system eight to eleven times prior to entering the 1985 plea. Krop admitted that Lee in his testimony indicated he had several conferences with defendant totaling more than three hours and went over the items with the defendant, which would be inconsistent with what Trotter told him. Krop did not know from Slater that he in fact had plead Trotter guilty using a written plea form to a violation of probation on that very form, subsequent to the 1987 trial and well before the 1992 hearing (R XV, 354-355). Krop fully testified about all these matters to the jury (R XV, 356). Adaptive behavior is an issue in determining mental retardation. He noted that based on the 72 IQ and his evaluation, Trotter was not mentally retarded and would concur today that appellant's functioning is in the borderline range of intellectual ability which is different than being mentally retarded (R XV, 356-357). Krop had Trotter's school records including evaluations by teachers on conduct, and work habits. There is an adaptive behavior scale filled out in the seventh grade, 75 to 100 areas assessing his condition, plus Dr. Pinkard reported an 88 IQ

[1] Krop noted that paragraph 4 of the form dealt with questions pertaining to perjury, paragraph 8 dealt with whether he was satisfied with his lawyer and paragraph 7 dealt with whether promises or threats were made to him (R XV, 352).

score in 1976. Pinkard also talked about his rehabilitation potential and although he indicated that he did not believe Trotter was well developed emotionally and had some inadequate personality characteristics, Pinkard overall described him as more mature and with an almost normal intelligence (R XV, 357-359). Krop contacted Trotter on six occasions for a total of ten and one-half hours. He spent considerable time preparing for his testimony and worked on cases with Slater both between the two Trotter trials and after the resentencing (R XV, 360).

Krop reviewed Dr. Mosman's criticism and affidavit and noted that the accusation that he mistook HRS worker Catherine Williams for appellant's sister was incorrect (R XV, 375-376). Krop testified that he had an extensive interview with appellant at his first meeting and did IQ testing; he did not do personality testing on Trotter since he did not feel it was necessary (R XV, 379). He opined that the MMPI would not have been valid because Trotter did not have a sufficient reading level. Additionally, he explained that he chooses not to do personality testing for a couple of reasons: (1) experience has taught that personality testing may end up being more harmful since skillful cross-examination can reveal that the majority of personality tests psychologists use are not particularly reliable or valid, particularly projective tests and in a

forensic setting; (2) this case was somewhat unique in that there was a lot of premorbid data (information prior to the homicide) -- there had been three or four other evaluations on intellectual or cognitive matters, which information can be more valuable because not subject to the criticism that the individual is trying to look dumb or crazy (R XV, 381). Krop had a sufficient history from Trotter and his own observations and noted Mosman's characterization of his work as inaccurate (R XV, 384). He again described the material that had been available to him (IQ testing in school, screening reports, Dr. Pinkard's report, staffing reports and notes, assessments of teachers on Trotter's adaptive behavior)(R XV, 384-386). Krop testified as to conversations with Slater regarding Dr. Pinkard's report; they were concerned that Pinkard's scores were different and significantly higher than other IQ testing at school or Krop's assessment. Slater suggested that it would not be particularly helpful to the case if Pinkard were called to testify when Krop asked Slater about getting in touch with Pinkard (R XV, 388). Krop asked Slater to try to get Pinkard's raw data; Slater indicated that he tried and was unable to obtain it. Krop presumed that it was not available (R XV, 388). They agreed Krop would not contact Pinkard. Additionally, Pinkard had information other than IQ presenting Trotter as a much more normal child than some of the other testing Krop had,

in terms of maturity and other factors. Some of the things in Pinkard's material contradicted the findings of other evaluators including Krop (R XV, 389). Krop explained that Trotter's score of 88 on the WISC represents a considerably higher intellectual functioning than the 69-72 Krop had on the WAIS; it was essentially two points from what is considered average or normal IQ, whether it be a child or adult. Moreover, on several of the subtests appellant scored very high, about average (R XV, 389-391). Krop explained that while there are articles showing individuals are obtaining higher IQs at about a rate of .3 per year, that is in regards to all individuals (from television, culture, experiences) and does not explain a difference between two IQ tests (R XV, 394). On four of the five scores on the WISC performance test by Pinkard, Trotter had a performance IQ of 97 -- basically in the normal range. The school psychologist got the same good scores as Pinkard (R XV, 396-397). Dr. Mosman retested Trotter and got an IQ score of 77 or 78 and that would not qualify Trotter as mentally retarded (R XV, 398).

Krop testified that Trotter was competent to stand trial, both in 1987 and 1993 and that is not a close call (R XVI, 410). Krop testified that he interviewed appellant's mother, Ms. Ola Wright, prior to his testimony at the resentencing proceeding -- she had previously been unavailable or could not be found. Krop also talked to Leroy Chandler and appellant's sister, Cathy

Williams (R XVI, 413-414). Krop did not get a sense the homicide was during a cocaine blackout; Trotter gave a fairly elaborate detailed account of the incident and appellant indicated that it was semi-accidental, semi-defensive (R XVI, 423-424). Krop indicated that several of the mitigating factors suggested by Mosman Krop actually discussed in his testimony (R XVI, 429-435) and disagreed with other Mosman opinions (R XVI, 436-440). Dr. Krop stood by his IQ score of 72, that Trotter was in the borderline intellectual ability (R XVI, 442). Krop explained that Trotter got a job at Tropicana and was working -- showing his adaptive functioning. He was socially okay and school records showed his capacity to adapt behaviorally; he did well in the proper environment. Trotter has also adapted in the prison environment (artwork, learning to play chess, no disciplinary reports) (R XVI, 480). Borderline mental retardation is not mental retardation (R XVI, 491). In addition to his personal interviews, Krop also had information from memos by the defense attorneys and investigator (R XVI, 505).

Dr. Mosman was called by the defense and offered his criticism of Dr. Krop. On cross-examination Mosman acknowledged that he was wrong in his sworn affidavit by claiming that Krop erred in believing Cathy Williams was appellant's sister (R XVII, 668-675). Mosman tested appellant and got a full scale IQ of 78; he agreed that the diagnostic criteria in DSM-IIIR says

retardation is a score of 70 and below and another section allows standard of error of measurement. The clinical judgment range is 65 to 75. Mosman agreed that when he tested appellant in 2002 Trotter cannot be classified as retarded. Mosman did not examine for adaptive behavior skills on appellant since his IQ score of 78 does not implicate mental retardation (R XVII, 692-695). An 88 IQ score on the Wechsler scales is in the dull normal range (R XVII, 701). Mosman listed the tests he gave and stated that he gave the Trail Making B test without giving Trail Making A, asserting that the A test is never scored and is not used in an impairment analysis. Mosman did not know whether giving Test A has an effect on the results of Test B (R XVII, 716-718). Dr. Mosman stated that it would have been "absolutely outstanding" for a jury to hear that Trotter financed his cocaine habit by repeatedly committing burglaries (and conceded that he had not tried a criminal case as a lawyer) (R XVII, 756-757). Mosman did not know what Dr. Wood or Dr. Maher (penalty phase expert witnesses) said or did not say to defense counsel or what information counsel had in making their strategic decisions (R XVII, 778-779). He conceded a decision had been made by authorities that appellant did not belong in EMR classes (R XVII, 786).

Dr. Pinkard testified and on cross-examination testified that he tested Trotter with the WISC and obtained a score of 88

(R XIV, 189). If that were an accurate score he would not be retarded (R XIV, 190). Pinkard agreed that for retardation, the criteria includes an IQ score approximately two standard deviations below the norm (at most 75 with the standard error of measurement under current criteria), deficient adaptive functioning and onset before age eighteen. If you do not have any one of these three criteria, you cannot make a diagnosis of mental retardation. An IQ of 78 or 80 would not satisfy retardation (R XIV, 190-191). Those scores would exclude Trotter (R XIV, 192). His report indicated Trotter was emotionally mature for his age (R XIV, 195-196). He was able to follow complex directions if given verbally and capable of being trained as a skilled worker in a variety of trades. He had an almost average intelligence (R XIV, 196). It is an essential part of the mental retardation diagnosis to consider adaptive functioning and Pinkard did not have Trotter's school records (R XIV, 199, 197). In 1973 the American Association for Mental Deficiency completely abandoned the borderline criteria and went back to 70 and below, years before Pinkard evaluated Trotter (R XIV, 203). Using the AAMD criteria, Trotter is <u>not</u> retarded and that is the criteria DSM-II was based on (R XIV, 204). The definition of mental retardation and intellectual functioning which defines it in terms of two standard deviations would not allow Trotter's 1973 IQ of 80 to be deemed retarded (R XIV,

205). Pinkard agreed that school and progress reports are important to assess adaptive functions and he never looked at Trotter's school records (R XIV, 207). Trotter's twelve-page adaptive behavior scale filled out in his school records was not provided to Pinkard, either then or now (R XIV, 208). He did not know what Trotter's school grades were (R XIV, 209). State Exhibit 4 showed grades of C's and B's in 1974-75 and A's and B's in 1975-76. Pinkard had not been told that as recently as 2001 Trotter received a full scale IQ of 78 on the WAIS-III (R XIV, 210). The current DSM does not allow a score of 78 to fit into the retardation category and Pinkard has no current information about Trotter's adaptive functioning (R XIV, 212). He did not consider adaptive functioning as part of his diagnosis (R XIV, 214). Pinkard could not explain why he got an IQ score of 80 and the school got a 70 (R XIV, 222). Pinkard was contacted by CCRC to become involved in this case; Pinkard's son is a lawyer for CCRC (R XIV, 223).

Dr. Merin, Board certified in clinical psychology, professional neuropsychology, medical psychotherapy and behavioral medicine, previously testified in the 1993 Trotter resentencing case (R XVIII, 801-804). He reviewed the transcripts, school records and Krop's testing. Krop had obtained on Trotter a WAIS-R IQ score of 72 and Dr. Mosman obtained an IQ score of 78 on the WAIS-III (R XVIII, 805). He

performed an evaluation on Trotter on April 9, 2002, with a representative of CCRC present. Merin concluded that Trotter was competent and was not suffering from mental retardation or any other disorder (R XVIII, 806-808). Merin opined that at the time of the crime in 1986 or 1987 appellant would not have qualified for mental retardation, considering both IQ scores, adaptive functioning and his current scores would not qualify as mental retardation (R XVIII, 809-810). He was aware also that on the WISC test by Dr. Pinkard, Trotter had an IQ of 88 (R XVIII, 811-812). In 1993, Dr. Merin opined that appellant's IQ was "probably the high 70's" (R XVIII, 813). He described some of the tests given by Dr. Krop: the Wisconsin Card Sorting Test in which Trotter performed very well (R XVIII, 814-816), the Categories Test, and the Bender-Gestalt Test in which appellant performed very well (R XVIII, 816-818). There was a two-part test: Trails A and Trails B (you never give just Trails B alone). It would be nonsense to say that the Trails A test has no diagnostic significance (R XVIII, 819-820). Merin also gave the Draw-a-Person and Finger Tapping tests and appellant was fine. Trotter has no brain damage or frontal lobe impairment. What he probably has is a learning disability; he could have had difficulty in school if education had not been encouraged (R XVIII, 822-824). On some of the comprehension Trotter performed very well (R XVIII, 824-825). On Dr. Mosman's most recent test

appellant came out with a verbal IQ of 82, and performance IQ of 77; a performance score of 77 is not too bad a score. The overall full scale IQ was 78 (R XVIII, 825-826). Merin stated that he never heard that it was normal in clinical practice in the 1970's to use an IQ range of 83 to 70 to make a mental retardation diagnosis (R XVIII, 829). He opined there was no chronic major depression or post traumatic stress disorder (R XVIII, 862-863).

SUMMARY OF THE ARGUMENT

I. Appellant is not entitled to relief pursuant to Atkins v. Virginia, 536 U.S. 304 (2002). The lower court found that "Trotter's postconviction attorneys failed to present evidence beyond speculation to support their allegations that Trotter is mentally retarded. . ." (R VIII, 1373-1374). All the experts agree that Trotter is not mentally retarded now; his most recent IQ test scoring places him above the range for mental retardation categorization and, indeed, defense expert Mosman did not even do adaptive functioning testing because of that fact. Dr. Pinkard obtained a score of 88 IQ on the WISC, given to Trotter as a child (which is dull normal) and did not have any school records to review, which would be most helpful in evaluating adaptive functioning. Both Dr. Merin and Dr. Krop described Trotter's adaptive functioning abilities and concluded that he was not retarded.

II. Appellant's challenge that Florida Statute 921.137 is unconstitutional under the Eighth Amendment is meritless. To the extent that appellant is asserting that the courts are unable to make a determination of mental retardation in a postconviction setting, that claim is refuted by this Court's decisions in Bottoson v. Moore, 813 So. 2d 31 (Fla. 2002) and Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002).

Appellant cannot obtain postconviction relief merely on the

basis of mere speculation. See Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000); Jones v. State, 845 So. 2d 55, 64 (Fla. 2003); Jennings v. State, 782 So. 2d 853, 859 (Fla. 2001); Cooper v. State, 856 So. 2d 969, 974 (Fla. 2003); Bruno v. State, 807 So. 2d 55, 67 (Fla. 2001); Cole v. State, 841 So. 2d 409, 418 (Fla. 2003); Gorby v. State, 819 So. 2d 664, 686 (Fla. 2002); Fennie v. State, 855 So. 2d 597, 606 (Fla. 2003).

III. The lower court correctly denied relief on a claim that appellant was denied effective assistance of counsel or due process of law in light of Ake v. Oklahoma, 470 U.S. 68 (1985). Initially, appellee notes that Ake is a due process of law case and appellant was not denied the right to assistance of a mental health expert; three such experts testified on his behalf at the resentencing proceeding. Had he been denied such a substantive Ake right, Trotter could have argued such denial on direct appeal and he is procedurally barred now for having failed to do so.

There is no Sixth Amendment right yet created or announced by the United States Supreme Court declaring a particular standard to evaluate a mental health expert's competence and if the Court were to announce one in the future, appellant could not obtain relief because of the non-retroactivity principles of Teague v. Lane, 489 U.S. 288 (1989) and its progeny.

Appellant was not denied due process of law and trial

counsel did not render ineffective assistance. Dr. Krop performed well within professional norms and he explained that his actions as well as those of trial counsel were predicated in significant measure to tactical considerations.

IV. Trial counsel did not render ineffective assistance by allegedly failing to investigate appellant's background and develop available mitigating evidence. To the contrary, the testimony and record demonstrate extremely competent representation by one of the most experienced capital litigators in the area who was assisted by co-counsel, an investigator, and three mental health experts. The alleged deficiency asserted here -- the failure to call two nieces, Casimir and Polite -- is insubstantial as counsel tactically chose to use experts to elicit family background information and thus make it more difficult for the prosecutor to effectively cross-examine them and utilized an appealing argument that Trotter had been abandoned throughout his life, which could have been severely compromised by the inconsequential testimony of Casimir and Polite.

V. Trial counsel was not ineffective in failing to file a timely motion to set aside a 1985 guilty plea and robbery conviction. The lower court properly determined that appellant was not prejudiced by counsel's actions as the trial court in its 1992 denial to the challenge based its ruling <u>both</u> on the

basis of untimeliness and that it was insufficient (R VIII, 1365-1366). Appellant's claim now must be rejected as procedurally barred (as a variant of an issue previously considered and rejected on direct appeal) and the doctrines of res judicata and law of the case. Trotter may not avoid such bars by simply cloaking the argument in ineffective assistance of counsel garb. To obtain relief in a postconviction proceeding, appellant must show not merely that a plea colloquy was inadequate but also that his plea was not voluntarily and intelligently entered -- which appellant has failed to do in light of the testimony presented below and at the 1992 hearing before Judge Dakan.

ARGUMENT

ISSUE I

WHETHER APPELLANT IS ENTITLED TO RELIEF PURSUANT TO ATKINS V. VIRGINIA, 536 U.S. 304 (2002) (Restated).

(1) Mental Retardation and the Supreme Court of the United States:

Execution of the mentally retarded is now prohibited pursuant to the United States Supreme Court's ruling in Atkins v. Virginia, 536 U.S. 304 (2002). In Atkins, the Supreme Court defined mental retardation as requiring a showing of

> not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong . . . . Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Id. at 318. The Supreme Court, quoting from various medical sources, described "mild" mental retardation as "typically used to describe people with an IQ level of 50-55 to approximately 70." Id. at 309 n.3 (citations omitted). The Court, however, while discussing the Wechsler Adult Intelligence Scales test, also stated that "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is

typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Id. n.5 (citations omitted).

Although the Court in Atkins left it to the states to specifically define what is meant by "mentally retarded," it seems clear that based on the definitions used in Atkins, that subaverage intellectual functioning requires an IQ score of 75 (at most) or below. Stated in the alternative, a person with an IQ score exceeding 75 would not meet the definition of mentally retarded required in order to avoid a sentence of death pursuant to Atkins and therefore, the issue of mental retardation need not even be addressed.[2]

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[2] In footnote 3 of the Atkins opinion the Court recited:

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is

> significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Footnote 5 of Atkins states in pertinent part:

> Dr. Nelson administered the Wechsler Adult Intelligence Scales test (WAIS-III), the standard instrument in the United States for assessing intellectual functioning. AAMR, Mental Retardation, *supra*. The WAIS-III is scored by adding together the number of points earned on different subtests, and using a mathematical formula to convert this raw score into a scaled score. The test measures an intelligence range from 45 to 155. The mean score of the test is 100, which means that a person receiving a score of 100 is considered to have an average level of cognitive functioning. A. Kaufman & E. Lichtenberger, Essentials of WAIS-III Assessment 60 (1999). It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. 2 B. Sadock & V. Sadock, Comprehensive Textbook of

Since appellant is not mentally retarded, the Atkins decision serves as no impediment to the denial of relief in the instant case.

(2) Determining Mental Retardation in Florida:

Clearly, the legislature has already considered the appropriate definition for "mental retardation" which precludes capital punishment, and it is codified in section 921.137(1). That section defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." "[S]ignificantly subaverage general intellectual functioning" is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." Section 921.137(1) also requires deficits in adaptive behavior, defined as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community."

The definition found in section 921.137(1) mirrors the established definition of mental retardation provided by the American Psychiatric Association and other leading organizations, as well as other provisions of Florida Statutes relating to mental retardation. The DSM-IV-TR provides that

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Psychiatry 2952 (7th ed. 2000).

mental retardation is (a) significantly sub-average intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test, (b) concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by cultural groups), in at least two of the following areas: communications, self care, home living, social/interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety, and (c) the onset is before age eighteen years. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Diseases, (4th ed. 1994), at 46; see also §§ 393.063(42), 916.106(12), Fla. Stat. (2000); Atkins, 122 S. Ct. at 2245 n.3 (discussing this definition from DSM-IV and similar definition from the American Association of Mental Retardation); Bottoson v. Moore, 813 So. 2d 31, 33-34 (Fla.) (rejecting claim that there was no definition of mental retardation in place in Florida, where trial court used functional equivalent of definition above), cert. denied, 122 S. Ct. 2670 (2002).

The definition that has been adopted by the Florida Legislature is therefore consistent with relevant psychological and legal authorities. Accepting a definition that requires more than a low IQ score is necessary in order to restrict the mental retardation exemption to those defendants that are

actually mentally retarded. It is well established that "[b]eing retarded means more than scoring low on an IQ test." Fairchild v. Lockhart, 900 F.2d 1292, 1295 (8th Cir. 1990). Reliance on low IQ scores alone is insufficient; such scores are hardly dispositive as to showing mental retardation. See San Martin v. State, 705 So. 2d 1337, 1348 (Fla. 1997) (there was "competent substantial evidence to support the trial court's rejection of these mitigating circumstances," including "borderline range of intelligence," where the trial court noted that a performance on an IQ test "an individual's performance on such a test . . . may easily reflect less than his best efforts"); Miles v. Dorsey, 61 F.3d 1459, 1473 (10th Cir. 1995) ("on test designed to assess memory and information, petitioner scored so low as to indicate intentional malingering"); Goldberg v. National Life Insurance Company of Vermont, 774 F.2d 559, 563 (2d Cir. 1985) (inter alia, "his IQ scores were just too low considering that he was a high school graduate and had been involved in business with some success"); Blackwood v. State, 777 So. 2d 399, 404-05 (Fla. 2000) ("Dr. Garfield could not say with certainty that appellant is retarded because she did not run all of the appropriate tests and because she attributed his scores to the depression"); Walls v. State, 461 So. 2d 381 (Fla. 1994) ("low IQ; expert psychologist stated that Walls' IQ actually had declined substantially during the years prior to

the trial").

(3) The Testimony at the Evidentiary Hearing Established That Trotter Is Not Mentally Retarded:[3]

The testimony adduced at the evidentiary hearing demonstrates that appellant is not mentally retarded for purposes of application of Atkins v. Virginia.

(A) Intellectual Functioning (IQ Testing):

Dr. Krop administered an IQ test (the Wechsler Adult Intelligence Scale Revised (WAIS-R)) at his first meeting with Trotter in 1987 and obtained a score of 72 and in his 1992 interview with him still felt comfortable with that score (R XV, 331-332). Dr. Pinkard had previously given the Wechsler Intelligence Scale for Children prior to the next revision (WISC-R or WISC-Revised). Both the WISC and WISC-R are children's IQ tests. When Krop saw that Trotter was not a child anymore, he gave the WAIS-R. Pinkard's score was an 88 on the IQ test, which in current categorizations would be dull normal (R XV, 336-337). Krop explained that adaptive behavior is not an issue in determining IQ but it is an issue in determining mental retardation. Krop concurred that appellant is functioning in the borderline range of intellectual ability, which is different than being mentally retarded (R XV, 356-357). Krop stated that he had described appellant as dull normal

[3] Appellee notes that appellant's argument makes no reference at all to the testimony of Dr. Merin.

(which the court reporter may have mistranscribed as adult normal) (R XV, 338, 359). The material that Krop had included IQ testing in the school records of WISC-R from Ms. Dukes, a screening test from the Slosson, a verbal IQ, plus three different wide-ranging achievement tests (R XV, 385). Dr. Pinkard's WISC score of 88 represented a considerably higher intellectual functioning than the 69 - 72 Krop had on the WAIS; it is essentially two points from what is considered average or normal IQ (whether it be a child or an adult). And on several of the subtests Trotter scored very high -- about 9 or 10, which is average (R XV, 389-390). As to Pinkard's high score of 88, Krop opined that if there is a 7 or 8 point differential using the WISC test -- if the WISC score were really an 80 and using a standard error of measurement of plus or minus five points -- it might mean the score was either a 75 or 85. Krop added that although Pinkard's raw data was unavailable, four out of the five scores on the performance test on the WISC were <u>average or above</u>. Trotter had a performance IQ of 97, which is basically in the normal range. The school psychologist got the same good scores as Pinkard (R XV, 390-397). Krop noted that Mosman had retested Trotter and got an IQ score of 77 or 78 in which Trotter would not qualify as being mentally retarded (R XV, 398).

Dr. Mosman tested appellant and got a full scale IQ of 78.

He agreed that the diagnostic criteria in DSM-IIIR says retardation is 70 or below and another section allows standard error of measurement of plus or minus five points to allow the clinician some discretion. Mosman acknowledged that "there is no way that someone with a 78 IQ could be diagnosed as retarded." Trotter could not now be classified as retarded (R XVII, 692-694). Mosman had not done adaptive behavior skills testing on Trotter since the IQ score of 78 does not indicate or implicate mental retardation (R XVII, 695). A footnote in the DSM indicated they get their IQ scores from either the Stanford-Binet or the WISC and a score of 88 would be in the dull normal range (R XVII, 699-701). Some of the tests Mosman gave were within normal limits (R XVII, 715-716).

Dr. Merin also opined that Trotter was not retarded, noting Dr. Krop's WAIS IQ score of 72 and Mosman's score of 78 on the WAIS-III (R XVIII, 804-810). Merin described a number of tests in which appellant scored very well (Wisconsin Card Sorting Test, Categories Test, Bender-Gestalt, Trails A & B) (R XVIII, 814-822).

Dr. Pinkard testified and on cross-examination stated that he tested Trotter with the WISC and obtained a score of 88 (R XIV, 189). If that were an accurate score he would not be retarded (R XIV, 190). Pinkard agreed that for retardation, the criteria includes an IQ score approximately two standard

deviations below the norm (at most 75 with the standard error of measurement under current criteria), deficient adaptive functioning and onset before age eighteen. If you do not have any one of these three criteria, you cannot make a diagnosis of mental retardation. An IQ of 78 or 80 would not satisfy retardation (R XIV, 190-191). Those scores would exclude Trotter (R XIV, 192). His report indicated Trotter was emotionally mature for his age (R XIV, 195-196). He was able to follow complex directions if given verbally and capable of being trained as a skilled worker in a variety of trades. He had an almost average intelligence (R XIV, 196). It is an essential part of the mental retardation diagnosis to consider adaptive functioning and Pinkard did not have Trotter's school records (R XIV, 199, 197). In 1973 the American Association for Mental Deficiency completely abandoned the borderline criteria and went back to 70 and below, years before Pinkard evaluated Trotter (R XIV, 203). Using the AAMD criteria, Trotter is not retarded and that is the criteria DSM-II was based on (R XIV, 204). The definition of mental retardation and intellectual functioning which defines it in terms of two standard deviations would not allow Trotter's 1973 IQ of 80 to be deemed retarded (R XIV, 205). Pinkard agreed that school and progress reports are important to assess adaptive functions and he never looked at Trotter's school records (R XIV, 207). Trotter's twelve-page

adaptive behavior scale filled out in his school records was not provided to Pinkard, either then or now (R XIV, 208). He did not know what Trotter's school grades were (R XIV, 209). State Exhibit 4 showed grades of C's and B's in 1974-75 and A's and B's in 1975-76. Pinkard had not been told that as recently as 2001 Trotter received a full scale IQ of 78 on the WAIS-III (R XIV, 210). The current DSM does not allow a score of 78 to fit into the retardation category and Pinkard has no current information about Trotter's adaptive functioning (R XIV, 212). He did not consider adaptive functioning as part of his diagnosis (R XIV, 214). Pinkard could not explain why he got an IQ score of 80 and the school got a 70 (R XIV, 222). Pinkard was contacted by CCRC to become involved in this case; Pinkard's son is a lawyer for CCRC (R XIV, 223).

(B) Adaptive Behavior and Functioning:

As noted above, Dr. Mosman did not do any adaptive functioning testing; it was unnecessary since his IQ scores were above the mental retardation level. Dr. Krop testified at length about Trotter's adaptive functioning. He had his school records up through 1978 when appellant withdrew from school, including the evaluations by teachers on his conduct and work habits. There was a twelve-page adaptive behavior scale filled out in the seventh grade covering 75 - 100 areas assessing his condition (R XV, 358). Dr. Pinkard had described him as more

mature and an almost normal intelligence (R XV, 359). The school records contained an assessment by teachers or a counselor regarding how the student was adapting to various situations both in the community and in school (R XV, 386). Krop interviewed appellant's sister and Ms. Ellington. Trotter got a job at Tropicana and was working -- showing his adaptability; the school records showed his capacity to adapt behaviorally. Even in the home, records reflected he tried to protect and care for his younger siblings while his mother was out drinking. Additionally, records show adaptation in prison -- artwork, no disciplinary reports (R XVI, 476-480). Dr. Pinkard admitted that he did not have appellant's school records (R XIV, 197, 199) and conceded they were important to assess adaptive functioning (R XIV, 207). Pinkard stated that school and progress reports are important to assess adaptive functioning; he was not provided the twelve-page adaptive behavior scale filled out in his school records, did not know what Trotter's school records were, and acknowledged that State Exhibit 4 showed grades of C's and B's in 1974-75 and A's and B's in 1975-76 (R XIV, 207-209). Pinkard did not consider adaptive functioning as part of his diagnosis (R XIV, 214).

(4) Whether Atkins is Retroactive:

The United States Supreme Court has not yet announced whether Atkins is to be given full retroactive affect. As this

Court has noted in King v. Moore, 831 So. 2d 143, 144-145 (Fla. 2002), and Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002), the United States Supreme Court had advised lower courts to leave to it "the prerogative of overruling its own decisions." Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

Appellee notes that in Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002), this Court determined that:

> We find Atkins inapplicable in light of the fact that Bottoson already was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence did not support his claim.

This Court should not announce that Atkins is retroactive until the United States Supreme Court decides to do so.

(5) Atkins and Full Constitutional Protection:

Appellant next argues that he is entitled to (and presumably been denied) federal constitutional protections, to wit: right to a jury trial, appointment of competent counsel, competent experts pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985), and notice. Appellant alludes to Ring v. Arizona, 536 U.S. 584 (2002). This Court has already rejected a claim that a determination of mental retardation must be made by a jury. In Bottoson v. Moore, 813 So. 2d 31 (Fla. 2002), the defendant claimed during a pending death warrant that he was retarded. Following an evidentiary hearing the trial court found that he

was not mentally retarded because the evidence demonstrated that he failed to meet two out of the three requirements of the test for evaluating mental retardation (IQ test scores and significant deficiencies in adaptive behavior). This Court affirmed since the evidence supported the trial court's findings. Id. at 33-34. Thereafter, Bottoson sought relief pursuant to Ring, *supra*, and the Court rejected his claim noting that Atkins was inapplicable in light of the prior determination that he was not retarded. Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002). The lower court determined that trial counsel were competent and that Ake v. Oklahoma did not require the grant of relief. Similarly, there is no merit to any lack of notice complaint. This subissue is meritless.

(6) Appellant's Claim That He Has Not Been Provided with Mandated Constitutional Protections:

Appellant argues that there is no particular state postconviction procedure in connection with this issue, yet clearly the lower court was able in the proceeding below to permit the testimony of the various mental health expert witnesses who had a view to express (Drs. Krop, Merin, Mosman, and Pinkard). Trial courts have been able to consider and resolve such claims in the postconviction setting. See Bottoson v. State, 813 So. 2d 31, 33-34 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002).

Dr. Mosman, who did not even do adaptive behavior testing, agreed that Trotter cannot now be classified as mentally retarded, in light of his testing and obtaining a full scale IQ of 78 (R XVII, 692-695). Dr. Krop opined that appellant was operating in the borderline range of intellectual ability, which is different than being mentally retarded (R XV, 357; XVI, 398, 442). Dr. Krop also described appellant's adequate adaptive behavior as an adult (R XVI, 480). Dr. Merin found no mental retardation (R XVIII, 808-810).

The instant claim is meritless.

(7) The Differing Opinions of the Experts:

Appellant's most recent expert, Dr. Bill Mosman, testified that when he tested Trotter he achieved a full scale IQ score of 78, conceded that the diagnostic criteria in the DSM-IIIR states that retardation is 70 or below, that appellant cannot now be classified as retarded and that he had not tested for adaptive behavior skills since the IQ test score of 78 did not implicate mental retardation (R XVII, 692-695).

Dr. Harry Krop administered an IQ test -- the Wechsler Adult Intelligence Scale Revised (WAIS-R), and Trotter achieved an IQ score of 72 in 1987. The definitions of DSM or AAMD or AAMR in effect at that time included subaverage intellectual activity, usually IQ test score of 69 or below in combination with the person's adaptive skills. Additionally, Dr. Pinkard had years

earlier given the Wechsler Intelligence Scale for Children and gotten a much higher score of 88, what would now be called low average (R XV, 331-337).[4] Krop related also that there were numerous school progress reports, and school records contained an adaptive behavior scale, i.e., an assessment by the teachers or a counselor regarding how the student is adapting to various situations both in the community and in school (R XV, 385-386). Krop concurred that Mosman's more recent retesting of Trotter and obtaining a score of 77 or 78 would not qualify the defendant as mentally retarded (R XV, 398). Additionally, Krop testified that appellant's adaptability was demonstrated in the fact he got a job at Tropicana and was working; he was socially all right; school records showed a capacity to adapt behaviorally and did well when he was in the proper environment. Even records from home which reflected neglect and abuse reflect Trotter adapted by trying to protect and care for younger siblings while his mother was out drinking. Trotter was also adapting in the prison environment (R XVI, 480-481).

Dr. Merin found no mental retardation. Noting that one has to look at both IQ level and adaptive capabilities, Merin concluded that Trotter had street-wise intelligence. Trotter's

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[4] It seems clear from the testimony that counsel did not want to use Pinkard as a witness and indeed was concerned that the prosecution would find and call him as a state witness (R XV, 387-389; R XV, 292; State Exhibit 5 [memo to investigator by attorney Slater that "need to know if he has been contacted by the state and will be testifying in this case"]).

IQ score of 78 would not qualify as mental retardation and Merin's estimate in 1993 was confirmed by Mosman's more recent testing (R XVIII, 808-813). Merin listed and explained the tests in which Trotter did well (R XVIII, 814-828).

Even Dr. Pinkard admitted that his obtaining a score of 88 on the WISC, if accurate, would mean Trotter was not retarded (R XIV, 189-192). His report indicated Trotter was emotionally mature for his age, able to follow complex directions if given verbally and capable of being trained as a skilled worker in a variety of trades. He had an almost average intelligence (R XIV, 195-196). Pinkard did not have Trotter's school records (R XIV, 199, 197, 207). He did not know what the school twelve-page adaptive behavior scale provided. Pinkard had not been told by CCRC that Trotter in 2001 had received a full scale IQ of 78 on the WAIS-III (R XIV, 210).

To the extent that appellant complains that Mosman or Pinkard failed to do adaptive functioning testing, the short answer is Mosman's concession, that it is unnecessary to do so, since Trotter's IQ score takes him out of the retardation range, renders any further testing now as unnecessary. As Krop and Merin explained, the school records show his adaptive functioning.

Appellant's claim is meritless and relief can be denied on this point.

ISSUE II

WHETHER FLORIDA'S STATUTORY SCHEME CONTAINED IN F.S. 921.137 IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT.

Appellant next contends that the legislation enacted in F.S. 921.137 (2001) pertaining to execution of mentally retarded defendants is unconstitutional. He complains that there is no provision for retrospective application in Florida and that the Department of Children and Families has not adopted rules delineating which standardized tests are to be used in determining IQ scores.[5]

Appellant's claim for relief based on mental retardation must fail. As stated in Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002):

> We also reject Bottoson's claim that his rights under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), were violated. We find Atkins inapplicable in light of the fact that Bottoson already was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence did not support his claim. See Bottoson v. State, 813 So. 2d 31, 33-34 (Fla.), cert. denied, ___ U.S. ___, 122 S. Ct. 2670, 153 L.Ed.2d 844 (2002).

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[5] Appellant filed his post-evidentiary hearing closing argument on or about July 26, 2002 and cited Atkins v. Virginia, 536 U.S. 304 (2002) and F.S. 921.137 (R VII, 1263-1270). The state in its closing argument responded that Atkins did not mandate reversal of the death sentence since Appellant is not retarded and the defense has failed to establish Trotter was retarded despite use of its expert witnesses (R VII, 1310-1313). The lower court did not address Atkins in its order, believing that the parties had not addressed it. (R VIII, 1322 n.6).

See also Bottoson v. State, 813 So. 2d 31, 33 (Fla. 2002):

> We do not reach the merits of whether Bottoson's execution would violate the Eighth Amendment or whether section 921.137, Florida Statutes (2001), dealing with the execution of the mentally retarded is unconstitutional as applied, because we conclude that the trial court's finding of no mental retardation is supported by the record and evidence presented at the evidentiary hearing. See Watts v. State, 593 So.2d 198, 204 (Fla.1992) (stating that even if the defendant's premise was correct that it was cruel and unusual to execute mentally retarded persons, he would not be entitled to its benefits because two out of three mental health experts found that he was not mentally retarded and the defense psychologist found him to be only mildly retarded); Carter v. State, 576 So.2d 1291, 1294 (Fla.1989) (stating that the evidence that the defendant was mentally retarded was "so minimal as to render the Penry issue irrelevant").

Similarly, in the instant case the record below demonstrates after a consideration of the testimony of expert witnesses Pinkard, Krop, Mosman and Merin that Trotter has not established that he is or was mentally retarded at any relevant time period. As the lower court noted: ". . . the Court finds that Trotter's postconviction attorneys failed to present evidence beyond speculation to support their allegations that Trotter is mentally retarded or suffering from numerous other disorders" (R VIII, 1373-1374)(emphasis supplied).

This Court has consistently ruled that postconviction relief will not be granted on the basis of mere speculation or

possibility. Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000) ("Any contrary conclusion is sheer speculation based on the action of Judge Gross in another case. Postconviction relief cannot be based on speculation or possibility."), R. S. Jones v. State, 845 So. 2d 55, 64 (Fla. 2003); Jennings v. State, 782 So. 2d 853, 859 (Fla. 2001) citing Wright v. State, 581 So. 2d 882, 883, 887 (Fla. 1991)(affirmed that "speculative" claims under Brady do not warrant relief); Cooper v. State/Crosby, 856 So. 2d 969, 974 (Fla. 2003)(affirming trial court's conclusion that the "only indication that Skalnik ever received anything of value is offered in the form of pure speculation"); Bruno v. State, 807 So. 2d 55, 67 (Fla. 2001) (mere speculation regarding possible error is not enough to satisfy Strickland); Cole v. State, 841 So. 2d 409, 418 (Fla. 2003) (approving denial of relief where lower court ruled that 3.850 motion contained insufficient allegations as to prejudice and that the allegations made were entirely speculative); Gorby v. State, 819 So. 2d 664, 686 (Fla. 2002); Fennie v. State, 855 So. 2d 597, 606 (Fla. 2003) ("We agree with the trial court's conclusion that it is 'highly speculative and conjectural' that the introduction of Dr. Toomer's testimony would have impacted the outcome of the case.").

Appellant's claim is meritless.

ISSUE III

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE AS REQUIRED BY AKE V. OKLAHOMA, 470 U.S. 68 (1985).

Appellant next contends that he was denied competent, effective assistance of a mental health expert as required by Ake v. Oklahoma, 470 U.S. 68 (1985). He argues that the expert hired by the defense and who testified at both the original penalty phase proceeding and the resentencing penalty phase was not competent, largely because he has obtained a new expert, Dr. Mosman, who disagrees with him.

(A) Before addressing his argument, appellee preliminarily would make the following observations. In Ake v. Oklahoma, *supra*, the Supreme Court held that when a defendant in a criminal prosecution makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial the Constitution requires that the state provide access to a psychiatrist if the defendant cannot otherwise afford one. And when the state at a capital sentencing proceeding presents psychiatric evidence of the defendant's future dangerousness, due process requires access to a psychiatric examination on relevant issues, to a psychiatrist's testimony, and to assistance in preparation at the sentencing phase. Mr. Trotter, of course, was not denied access to a mental health expert. In the resentencing proceeding the defense used three experts, Dr.

Harry Krop, Dr. Michael Maher, and Dr. Frank Balch Wood. Thus, there was no due process violation by the trial court's having refused him access to a mental health expert for his defense; and if the trial court had erroneously denied such access, appellant could have argued a strict Ake violation on direct appeal. Consequently, any legitimate claim of a substantive Ake violation would be procedurally barred now.

Appellant now is really making a different claim -- that he has a right to bring forward a second expert collaterally who disagrees with the first at resentencing. But that is not a right guaranteed by Ake. Indeed, Justice Marshall, the author of Ake, subsequently acknowledged that the Court had not directly confronted the issue whether an expert appointed by the state to evaluate a defendant's competency to stand trial must meet minimum standards. Brown v. Dodd, 484 U.S. 874, 98 L.Ed.2d 164, 165 (1987) (dissenting to denial of a petition for writ of certiorari). Even if the United States Supreme Court should in the future announce a new rule creating a right and standard to evaluate a mental health expert's competence, appellant could not prevail since it would be subject to the non-retroactivity principles of Teague v. Lane, 489 U.S. 288 (1989) and its progeny.

A number of federal courts have declined to open the habeas courts to a battle of experts on competency review, to engage in

psychiatric medical malpractice as part of its collateral review of state court judgments. See, e.g., Waye v. Murray, 884 F.2d 765, 767 (4th Cir. 1989); Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990); Harris v. Vasquez, 949 F.2d 1497, 1518 (9th Cir. 1990); Wilson v. Greene, 155 F.3d 396, 400-403 (4th Cir. 1998), cert. den. sub nom., Wilson v. Taylor, 525 U.S. 1012 (1998).

Ake is a due process of law case. Trotter was not denied due process of law under Ake. See Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)(en banc); Provenzano v. Singletary, 148 F.3d 1327, 1333-1334 (11th Cir. 1998). To the extent that appellant may be urging that he was denied effective assistance of trial counsel under the Sixth Amendment by counsel's use of Dr. Krop at penalty phase, appellee notes that Trotter makes no challenge to trial counsel's performance, apparently choosing to rest on trial counsel Slater's assertion that he was disappointed with Krop. In any event, the lower court properly rejected such a claim as addressed below.

(B) Appellant complains that he was denied due process of law as required by Ake v. Oklahoma, *supra*, since the mental health expert employed and used at penalty phase, Dr. Harry Krop, has now been criticized by appellant's more recently employed expert Dr. Bill Mosman. State Exhibit 8 reveals Dr. Krop's extensive professional background. Appellant contends

that Krop incorrectly recorded IQ test scores, only completed a general personality evaluation for mitigating factors, did not conduct a neuropsychological evaluation on Trotter until June of 1991, and was ineffective in failing to give Trotter a second IQ test. Appellant suggests Dr. Krop was incorrect in his testimony about impaired memory for a cocaine blackout and repeats some of Dr. Mosman's criticisms of Dr. Krop.[6] Trotter notes that attorney Slater opined that he thought Krop was handling too many cases.

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[6] It should be noted that the evidentiary hearing demonstrated that Mosman's criticisms consisted of inaccurate and exaggerated complaints embellished with reckless hyperbole. For example, Mosman castigated Krop in a sworn affidavit asserting that Krop ignorantly confused HRS worker Catherine Williams with the defendant's sister and that Krop falsely attributed the HRS worker's comments to Trotter's family. In fact, it was Mosman who was wrong. Trotter's sister was Cathy Williams, a fact repeatedly referred to in the investigative reports Mosman claimed to have reviewed. Mosman had no credible explanation for making sworn allegations without a perfunctory effort to determine the truth. At the evidentiary hearing he acknowledged that he had been told he was in error (R XVII, 669) -- he made a mistake and was wrong and acknowledged knowing from the allegations of sex abuse against the Ellingtons that appellant had a sister named Cathy (R XVII, 675). Mosman had also asserted that Krop failed to tell the jury that HRS had the obligation to provide services to Trotter until he was twenty-two years old and that it had failed in its obligations by not putting him in foster care when he returned from Mississippi. It is clear that HRS jurisdiction ended at Trotter's eighteenth birthday. F.S. 39.41 (1978). Mosman simply stated he had been in error (R XVII, 691). After initially indicating that he had been retained by a prosecutor in a state case as recently as three weeks ago, he backtracked and admitted that he had not been retained by a prosecutor in the last five years (R XVII, 678-679). Mosman agrees that with his IQ test score of 78, Trotter <u>cannot</u> be diagnosed as mentally retarded (R XVII, 692-694).

At the evidentiary hearing Dr. Krop testified that Mosman's accusation was incorrect; he interviewed appellant's sister who gave her name as Catherine Williams (R XV, 375-376). He spent four and one-half hours with Trotter the first time and did IQ testing -- he would say it was an extensive interview (R XV, 378-379). He did not do personality testing on Trotter since he did not feel it was necessary. Here, Krop felt MMPI would not have been valid because Trotter did not have a sufficient reading level. He further explained that he chooses not to do personality testing for a couple of reasons. First, he has had the experience frequently that personality testing may end up being more harmful; under cross-examination it can be shown that the majority of personality tests psychologists used are not particularly reliable or valid, particularly in a forensic setting. Second, this case was unique in that there was a lot of premorbid data (information prior to the homicide). There had been three or four other evaluations on intellectual or cognitive matters and that information can be more valuable because not subject to the criticism the individual is trying to look dumb or crazy (R XV, 381). Krop felt he had a sufficient history from Trotter and his own observations. The material that he had available to him included IQ testing in school records from Mrs. Dukes, a screening report, verbal IQ test plus three different wide range achievement tests (raw data from one

and reports of two others in school records). Krop also had Dr. Pinkard's report and staffing and reporting notes when Trotter was accepted and subsequently dismissed from the EMR program. There were numerous progress reports. The school records contained an adaptive behavior scale, i.e., an assessment by teachers or a counselor regarding how the student is adapting to various situations both in the community and in school (R XV, 382-386).

Krop recalled conversations with attorney Slater about Dr. Pinkard and the latter's report. They had concerns that Pinkard's scores were different and significantly higher than other IQ testing at school or Krop's assessment. Slater suggested that it would not be particularly helpful to the case if Pinkard were called to testify (when Krop asked Slater about getting in touch with Pinkard). Krop did ask Slater to try to obtain raw data from Pinkard since it would help Krop understand why Pinkard's IQ testing was so much higher than everyone else's. Slater indicated that he tried and was not able to obtain the raw data; Krop presumed that meant it was not available. He and Slater agreed he would not contact Pinkard. Additionally, Pinkard had information other than IQ presenting Trotter as much more a normal child than some of the other testing Krop had, in terms of maturity and other factors. There were things in Pinkard's material contradicting the findings of

other evaluators including Krop (R XV, 388-389).

Trotter's WISC score of 88 represents a considerably higher intellectual functioning than the 69 - 72 Krop had scored on the WAIS and on several of the subtests. Trotter had scored very high -- getting average scores (R XV, 390). Krop opined that Mosman was not accurate in saying IQ scores inflate at .3 point per year; studies show the scores should differ at a maximum of seven or eight points (R XV, 391-392). Krop explained that psychologist Flynn has published articles that the norms show individuals are obtaining higher IQ's at about a rate of .3 a year, i.e., people are getting smarter at a rate of .3 a year due to life and cultural experiences -- but it does not explain a difference between two IQ scores (R XV, 394). The difference between Pinkard's score of 88 and the other scores of 71 is seventeen points, which he could not explain. Krop stated that Dr. Mosman had retested Trotter and gotten an IQ score of 77 or 78, which would not qualify Trotter as mentally retarded (R XV, 395-398).

Krop examined Trotter before both the 1987 and 1993 proceedings; appellant was competent to stand trial and that is not a close call (R XVI, 410). Krop's 1993 resentencing testimony indicated that he had occasion to personally interview appellant's mother, Ms. Ola Wright (although he had reports previously she had been unavailable or could not be found).

Defense counsel arranged the interview (R XVI, 413). Krop also talked to Leroy Chandler and Trotter's sister, Cathy Williams (R XVI, 414). Krop has testified several thousand times, about 150-200 times in murder cases, mostly in front of juries. He has gotten feedback from juries and others and finds it helpful to use DSM jargon; he thinks a jury can comprehend and conceptualize on behalf of the particular defendant (R XVI, 417-420).[7] Krop also makes presentations at conferences (R XVI, 420). Krop testified that for the resentencing, attorney Slater did not use cocaine expert Dr. Smith; they did not want to exclude cocaine but agreed it should not be the emphasis at resentencing; it was strategic -- juries were getting tired of hearing drugs as an excuse (R XVI, 421-422). Trotter gave a fairly elaborate detailed account of the murder incident, indicating that it was semi-accidental, semi-defensive and Krop did not get a sense this was a cocaine blackout (R XVI, 421-424). Krop stated that there was both good and bad stuff in the entire Ellington file from a defense strategy point but most of the concerns about the home seem to have occurred in 1980, after appellant left in 1978. Prior to 1980 most of the discussions were about the Ellingtons being a loving and caring family providing a lot of emotional support for children in the home and Slater's strategy was to present the Ellington home in a

[7] Additionally, state exhibit 8 reveals Krop's extensive professional background.

favorable light (R XVI, 427-428). For the resentencing Leroy Chandler and others gave information on abuse or punishment in the Ellington home that was not in the HRS file (R XVI, 429). Krop then explained that he had described many of the mitigating factors Mosman had mentioned and noted some of his disagreements with Mosman (R XVI, 430-440). While Trotter had marital problems they were not a significant contributor to the homicide (R XVI, 441). Krop stands by the IQ score of 72 he tested on Trotter, borderline intellectual ability (R XVI, 442). Krop reiterated that on the MMPI a high score on the psychopathic deviate scale correlated with anti-social tendencies can be very detrimental to a client particularly if the prosecutor is familiar with the test and challenges the expert. Krop would administer MMPI if he felt there was reason to do so, to get additional data. Here he did not do so since he felt he could not be challenged on his not diagnosing Trotter as having an anti-social personality disorder and it would not give additional information. It is the clinician's determination -- not the attorney's -- to decide what test he should or should not use. He did discuss with Slater why he did not do the test -- he felt he had enough on Trotter without it (R XVI, 460-463). Slater did not challenge him on what tests he should or should not use (R XVI, 464). Krop testified regarding Trotter's adaptive functioning -- he got a job at Tropicana and was

working. He was socially all right, the school records showed his capacity to adapt behaviorally, and Trotter did well as long as he was in the proper environment. He also adapted in the prison environment (artwork, learned to play chess, no disciplinary reports) (R XVI, 480). Krop testified that he did have time on this case and with Slater to be prepared and effective. Krop felt Slater did a very good job and provided him with what he needed (R XVI, 483-485). In addition to his personal interviews Krop had information from memos by investigator Speed or attorneys Dubensky and Slater (R XVI, 505).

Based on the testimony provided at the evidentiary hearing as well as the testimony at the resentencing proceeding, Judge Owens correctly denied relief (R VIII, 1368-1372). After noting that most of the testimony presented at the evidentiary hearing was cumulative and had been considered and rejected by the jury and judge at the resentencing proceeding, Judge Owens noted that Krop (1) had administered numerous tests including an IQ test; (2) had met with Trotter approximately six times during the course of his work, (3) reviewed numerous documents including DOC and jail records, HRS and old school records and investigative materials from the Public Defender's office, and (4) interviewed various witnesses. Krop "performed all the essential duties required by Ake, and Trotter clearly received

effective mental health assistance" (R VIII, 1370).

Appellant's claim that Dr. Krop failed to satisfy the command of Ake v. Oklahoma, *supra*, is meritless. See Mann v. State, 770 So. 2d 1158, 1164 (Fla. 2000)(upholding summary denial of Ake claim where record reflected that retained expert performed tests, interviewed the defendant, reviewed numerous documents including affidavits from family members, childhood health records, correctional institution records, hospital records and expert testimony from prior proceedings); Asay v. State, 769 So. 2d 974, 985-986 (Fla. 2000)(counsel conducted a reasonable investigation into mental health mitigation evidence which is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert); Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002)(Dr. Toomer's opinion is not only a recent and more favorable defense expert opinion but a cumulative opinion to one already presented to the trial court and fact that experts and more lay witnesses were not called during the penalty phase does not undermine our confidence in the outcome of the proceeding); Schwab v. State, 814 So. 2d 402 (Fla. 2002).

Appellant's claim is meritless and the lower court's order denying relief should be affirmed.

ISSUE IV

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ALLEGEDLY FAILING TO INVESTIGATE APPELLANT'S BACKGROUND AND DEVELOP AVAILABLE MITIGATING EVIDENCE ON HIS BEHALF.

Standard of Review:

The standard of review regarding the trial court's conclusion that counsel did not render ineffective assistance is two-pronged: the appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

Appellant next contends in this appeal that counsel was ineffective apparently solely in the failure to investigate and present the mitigation testimony of appellant's two nieces, Gladys Casimir and Marshanette Polite. The lower court disposed of this claim in claim III of the order denying relief (R VIII, 1373-74) explaining with regard to the testimony of Casimir and Polite:

> Concerning the testimony presented at the evidentiary hearing by Danny Wortham, Gladys Casimir, and Marsha Polite, the Court finds that the testimony was either irrelevant or cumulative. Casimir and Polite testified that they did not live at the Ellington foster home while Trotter resided there, and Wortham was removed from the Ellington foster home at approximately five years of age. Further, any additional

> testimony by the witnesses was cumulative to what was presented at the 1993 resentencing proceeding. A defense attorney does not provide ineffective assistance of counsel for failing to present cumulative mitigation. See Patton v. State, 784 So. 2d 380 (Fla. 2000), citing Valle v. State, 705 So. 2d 1331 (Fla. 1997).
>
> The Court further determines that Trotter failed to demonstrate that his resentencing attorneys failed to provide the mental health experts with available information. Testimony at the evidentiary hearing reveals that Krop reviewed numerous documents in preparation for his testimony and that he had access to witnesses and other investigative materials. Further, the Court finds that Trotter's postconviction attorneys failed to present evidence beyond speculation to support their allegations that Trotter is mentally retarded or suffering from numerous other disorders. See Cherry v. State, 781 So. 2d 1040 (Fla. 2000).
>
> Furthermore, the Court is concerned that it is being asked to "second-guess" his resentencing counsels' assistance following an adverse sentence. The Court finds that this is improper pursuant to the standards set forth in Strickland. Clearly, resentencing counsel set forth a tremendous amount of mitigation at resentencing, and the Defendant has failed to demonstrate prejudice. See Cherry v. State, 781 So. 2d 1040 (Fla. 2000).
>
> Regarding claims of IAC for trial counsel's actions at the original penalty phase, the Court finds that these claims are moot in light of the resentencing proceeding in 1993. See Messer v. State, 834 F.2d 890 (1988); State v. Riechmann, 777 So. 2d 342 (Fla. 2000).

In his order denying postconviction relief Judge Owens found

that evidence of appellant's disadvantaged or deprived background was presented at resentencing by Dr. Maher, that evidence of Trotter's history of growing up was presented at resentencing by Mr. Maher, that experts presented evidence of appellant's use of drugs and alcohol throughout the resentencing proceedings, that evidence of Trotter not having a role model was presented at resentencing by Dr. Maher (R VIII, 1349-1351 n.32, 35, 36, 37).

The lower court's findings and conclusions are fully supported by the record and appellant makes little or no effort to attempt to refute them. For example, the contention that trial counsel failed to develop adequate background information is belied by the fact that at the 1993 resentencing all three defense mental health experts - Krop, Maher, and Wood - testified as to statutory mitigation.

Counsel is not ineffective for failing to put on evidence in mitigation cumulative to that already presented. Freeman v. State, 852 So. 2d 216, ___ (Fla. 2003); Gudinas v. State, 816 So. 2d 1095, 1106 (Fla. 2002); Cherry v. State, 781 So. 2d 1040, 1051 (Fla. 2000); Fennie v. State, 855 So. 2d 597, 604 (Fla. 2003); Woods v. State, 531 So. 2d 79, 82 (Fla. 1988)("More is not necessarily better"); Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986) ("The fact that a more thorough and detailed presentation could have been made does not establish counsel's

performance as deficient"); Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987) (the mere fact that other witnesses might have been available or other testimony might have been elicited is not a sufficient ground to prove ineffectiveness); Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989)(proffer of additional character witnesses would not have had significant impact on the trial as it was merely cumulative); Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991) (failure to present cumulative witnesses did not amount to ineffectiveness); Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995)(en banc)("we have never held that counsel must present all available mitigating circumstance evidence in general. . ."); Glock v. Moore, 195 F.3d 625 (11th Cir. 1999) (failure to present repetitive and cumulative witnesses at penalty phase not ineffective); P.A. Brown v. State, 755 So. 2d 616, 637 (Fla. 2000)(failure to present additional lay witnesses to describe childhood abuse and low intelligence was not prejudicial and would have been cumulative to evidence presented); Valle v. State, 705 So. 2d 1331, 1334 (Fla. 1997).

Trial counsel is not rendered ineffective under the Sixth Amendment merely because more favorable expert testimony is available at postconviction. See Cooper v. State/Crosby, 856 So. 2d 969, 976, n.5 (Fla. 2003)(even more favorable expert testimony in postconviction does not automatically establish the

original evaluations were insufficient, citing Carroll v. State, 815 So. 2d 601, 618 (Fla. 2002), and Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002)); Hodges v. State, ___ So. 2d ___, 28 Fla. L. Weekly S475, 477 (Fla., June 19, 2003)(presentation of changed opinions and additional mitigation evidence in the post conviction proceeding does not, however, establish ineffective assistance of counsel); Asay v. State, 769 So. 2d 974, 987 (Fla. 2000); Rutherford v. State, 727 So. 2d 216, 224 (Fla. 1998); Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990).

A review of the Casimir and Polite testimony yields nothing significant. Gladys Casimir testified she was six years younger than appellant (R XIV, 133); she was not in the Ellington home at the same time as appellant (R XIV, 138). Casimir thought appellant was probably working in the fields (R XIV, 139) and she was unaware of his using any type of drugs ("nothing but drinking") (R XIV, 142). She provided no evidence anyone had been abusive to appellant. The other niece, Ms. Polite, had two prior felony convictions and did not know appellant was five years older than she was. They were all "together" but didn't know if they were living in the same house when taken to foster care (R XIV, 152-154). Everybody loved everyone; the mother was never abusive and she never saw her grandmother beat appellant (R XIV, 155). She testified that appellant took care of his wife and her children. Appellant was the breadwinner (R XIV,

157). He gave his wife the money to take care of everything (R XIV, 158).

As stated above on this point, appellant's challenge to the performance of trial counsel Slater and Blount at the resentencing proceeding apparently consists solely in the alleged failure to locate and provide to psychologist Dr. Harry Krop these two witnesses, or otherwise have these two witnesses testify at the penalty phase.[8] Mr. Slater testified that it was his practice to find family members and other members in the community that could testify about the client. The investigator would interview some of the people and at some point Slater as the attorney would make a decision whether or not to call those people (R XV, 265). Slater and prior co-counsel, Mr. Dubensky, were two of the most experienced trial lawyers in the Public Defender's office (R XV, 273). Slater admitted that his approach and the decisions what to present to the jury were significantly different in the resentencing proceedings (R XV, 265).[9] A different strategy involving different information evolved; for example, in the original penalty phase evidence of

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[8] Slater testified that at the resentencing proceeding he was assisted by co-counsel Mr. Blount (R XV, 255). Slater also had the services of an investigator assisting him (R XV, 265).

[9] The resentencing appeal record (Florida Supreme Court Case No. 82,142) reflects that at resentencing trial defense counsel called three mental health experts -- Dr. Krop, Dr. Wood, and Dr. Maher -- as well as an HRS inspector for foster care Priscilla Ridall and Detective La Gasse as witnesses.

a loving relationship at the Ellington home was presented whereas subsequently evidence suggested the Ellington household was abusive or there were some problems there (R XV, 283). Slater testified that in a previous case (Danny Wortham) he had used a similar strategy successfully as that used in the Trotter resentencing, i.e., abusive background in the same foster home Trotter had been in, along with the use of Dr. Wood and a PET scan. That approach had yielded a jury life recommendation after Wortham's plea of guilty; and since his goal in Trotter's case was to avoid the death penalty, the successful Wortham strategy "had an influence" in this case (R XV, 277). Slater further testified that he was trying to do everything he could to help Trotter avoid the death penalty and that if he had evidence that would help him he would pursue it and put it in front of the jury unless there was a strategic reason not to do so. Slater conceded that he was pretty intense when it comes to preparation (R XV, 288). He kept his investigator, Mr. Speed, working pretty hard,[10] he recalled electing to have appellant's mother and sister talk to Dr. Krop and put on their testimony through Dr. Krop rather than calling them to the stand (R XV,

[10] State Exhibit 5 was a directive to his investigator, Woody Speed, to locate Dr. Pinkard and find out if the state was going to call him. Slater was concerned that based upon the content of Dr. Pinkard's report he might have been a damaging witness against Trotter. He learned the state had not subpoenaed Pinkard (R XV, 291-292).

289).[11] State exhibit 7 from Slater's file was a memo he authored indicating that appellant's sister Cathy Trotter's married name was Cathy Williams (R XV, 294). When recalled to the stand Slater testified that he had contact with appellant's family members in Manatee County from 1986-1987 (R XVI, 511).

The defense did not fail to investigate appellant's background (indeed the defense file memoranda in State Exhibit 10 reveal many interviews and background information retrieved either by counsel or investigator Woody Speed). Rather, trial defense counsel made a conscious decision to present background information through experts instead of calling family members to the stand, a technique which limited the prosecutor's ability to cross-examine witnesses. This Court has repeatedly acknowledged that it will not second-guess counsel's reasonable strategic decisions in such matters. See, e.g., Gordon v. State, 863 So.2d 1215 (Fla. 2003)(decision not to put on alibi defense, failing to challenge DNA evidence and request Frye hearing or to move to sever trial from that of co-defendant constituted sound strategy decisions); Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000) ("Counsel's strategic decisions will not be second-guessed on collateral attack." citing Remeta v. Dugger,

[11] In a pre-evidentiary hearing deposition Slater admitted that he did not put on appellant's mother and sister and some others as in the first proceeding; it was a conscious strategy to put in hearsay testimony through Dr. Krop which would have been inadmissible had it not been a penalty phase (R VI, 1011).

622 So. 2d 452 (Fla. 1993)); Zakrzewski v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 826 (Fla., Nov. 13, 2003).

Appellant complains that as a result of counsel's limited investigation "Mr. Trotter was required to testify and his low mental capacity prevented him from creating a favorable impression before the jury" (Brief, p. 43). Some clarification is in order. In Trotter's original sentencing proceeding (Florida Supreme Court Case No. 70,714) appellant testified on his own behalf and related inter alia that he was loved and treated well when he stayed at the Ellingtons (1DAR XI, 1912-1934). The defense also called as witnesses Mr. and Mrs. Ellington (1DAR XI, 1949-1970), Rosa Hadley, Sam McDowell, a jail chaplain (1DAR XI, 1971-1990) and two mental health experts, Dr. David Smith and Dr. Harry Krop (1DAR XI, 2005 - 1DAR XII, 2135). That sentencing proceeding was essentially rendered a nullity by this Court's direct appeal ruling mandating a new sentencing proceeding. Trotter v. State, 576 So. 2d 691 (Fla. 1990). At the resentencing proceeding, as explained by counsel and Dr. Krop at the evidentiary hearing below, the emphasis shifted with the growing disaffection by juries of drug-use-as-mitigation to the hopefully more successful mitigation defense of abuse at the Ellington foster home which attorney Slater and Dr. Krop had utilized in the Danny Wortham case to obtain a life recommendation by the jury.

Rather than have Trotter testify at the resentencing, attorney Slater cleverly and strategically chose to have Dr. Krop testify about appellant's background with hearsay disclosures, otherwise not available except for this penalty phase.

The defense strategy at resentencing of using experts rather than family members to testify coincided with the defense attempt to obtain jury sympathy by portraying appellant as worthy of charitable treatment by them, i.e., that he was a person abandoned by his family throughout his difficult life. Consider trial counsel's closing argument at the resentencing:[12]

> What does Melvin know about life? He knows he has no father. He knows he has an alcoholic mother. He knows that every person he's ever been close to has been violent.
> (2DAR XVII, 2094).
>
> * * *
>
> This man has had nobody in the courtroom throughout this trial. Have you ever seen any other black person in this courtroom throughout the trial? I submit to you he has been alone in this trial, <u>he has been alone in his life, he has been alone from birth and he will continue to be alone for life</u>. (2DAR XVII, 2100)(emphasis supplied)

Defense counsel even quoted from the pre-sentence investigation which the defense brought out:

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[12] Florida Supreme Court Case No. 82,142, 2DAR XVII, 2080-2102.

> It should be noted that . . . he has lacked . . . even familial support and success. Lack of family support has been dramatically noticed since his arrest. It should be noted that the subject has received almost no visitation in the previous year that he has been incarcerated pending the disposition of these charges.
>
> (2DAR XVII, 2101)

Defense counsel Slater reiterated in his conclusion:

> You know, if a mother cares and a family cares, it doesn't matter what you've done, you're still going to be there to support your child, you're still going to be there to support your loved one, no matter what they are. No matter if they're a cocaine addict, no matter if they're a robber. You are going to be behind them because you love them, you care for them. That's humanity. That's what these people have shown for Virgie. He hasn't had that. Not from the beginning.
>
> "All family members interviewed by this officer have indicated they have made no attempt to visit him, correspond with him, or make any contact or give any support during this time."
>
> Is that love?
>
> "He is essentially a man alone." A man alone from birth he has been. "Mrs. Chandler's description of him having raised himself is a valid description of the way the subject has lived his entire life, through childhood into adulthood. He has found it very difficult to identify any areas of adequacy or support or success."
>
> He has stood alone through life, he's stood alone through this trial, and he'll stand alone wherever he goes. Because he has nothing. He's never had anything. And he never will.

(2DAR XVII, 2101-02)

To the extent that appellant is now urging that defense counsel should have presented the inconsequential testimony of nieces Casimir and Polite, the short answer is that counsel selected an alternate course of presenting Trotter's life through skillful use of experts and hearsay and the use of Casimir and Polite would run the risk of negating the poignant "He is essentially a man alone" theme and there is no basis to conclude that the current second-guessing is constitutionally mandated over the chosen strategy. As noted in Glock v. Moore, 195 F.3d 625 (11th Cir. 1999) the argument that Glock had a loving and supportive family who could help rehabilitate him is fundamentally inconsistent with the idea that his stepmother was so abusive that he developed a mental disorder at her hands. Id. at 638. Since counsel pursued a bifurcated strategy of presenting both offense-specific and defendant-specific mitigating evidence and since introduction of further abuse evidence would have meant the exclusion of the supportive family evidence, counsel's approach would continue to be a reasonable strategy and "Petitioner likely would have fared worse at trial if he had been able to pursue the strategy for which he now argues." Id. at 640. Similarly, in the instant case, the tactic adopted by the experienced capital litigator Mr. Slater was a reasonable one and need not be condemned simply because it

failed to achieve the desired result, or that collateral counsel seeks merely to engage in Monday-morning-quarterbacking.

This Court should affirm the trial court’s order denying relief on this point.

ISSUE V

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A TIMELY MOTION TO SET ASIDE AND VACATE TROTTER'S 1985 ROBBERY CONVICTION, SUBSEQUENTLY USED TO ESTABLISH AGGRAVATING FACTORS IN IMPOSING THE DEATH SENTENCE.

Appellant in his brief contends that trial counsel rendered ineffective assistance in failing to file timely motions to set aside and vacate Trotter's 1985 robbery conviction, subsequently used to establish two of the four aggravating circumstances. Trotter notes that original trial counsel failed to file any motion challenging the plea prior to Trotter's first trial, but prior to the resentencing proceeding counsel did file a motion to vacate the judgment and sentence for the robbery and burglary conviction in case number 85-463F and a hearing on that motion was held before Judge Dakan on November 13, 1992. The court at that hearing heard the testimony of Dr. Harry Krop and former attorney Henry Lee. The trial court, following that hearing, denied relief because of untimeliness and also insufficiency.[13] Trotter now argues that the plea was legally insufficient, that Trotter was not competent to enter that plea (to the non-capital case) and that counsel's failure to act timely violated the Sixth Amendment. For the reasons that follow, the claim is both procedurally barred and meritless. Relief must be denied.

[13] Trotter's resentencing appeal included a challenge to the court's ruling on Judge Dakan's disposition of the non-capital postconviction attack which this Court rejected.

The lower court rejected appellant's claim that trial counsel rendered ineffective assistance by failing to timely file a motion to set aside and vacate his 1985 robbery which was used to establish two of the four aggravating circumstances -- in claim I(A) below (R VIII, 1365-1367). The court noted that while counsel did not file a motion to set aside that conviction until November, 1992, appellant could not satisfy the prejudice component of Strickland v. Washington, 466 U.S. 668 (1984) since the trial court had denied the motion to set aside robbery conviction both on the grounds of untimeliness and as being legally insufficient (R VIII, 1366). See also State Exhibit 6 wherein it is recited that "the evidence presented at the hearing is not legally sufficient to support either motion." The court noted that appellant's reliance on Koenig v. State, 597 So. 2d 256 (Fla. 1992) was inapposite since the Florida Supreme Court has ruled that Koenig did not apply when a defendant sought to withdraw a plea at a resentencing proceeding. See Elledge v. State, 706 So. 2d 1340 (Fla. 1997). Moreover, prejudice was not established since other valid aggravating circumstances exist in this case. See Stano v. State, 708 So. 2d 271 (Fla. 1998) (R VIII, 1367). Trotter entered his plea of guilty to robbery in 1985, some eight years before Koenig was decided, and the current proceedings involve a collateral challenge to his convictions, not a direct appeal

(as Koenig involved). Counsel obviously is not constitutionally required to anticipate changes in the law. See Stevens v. State, 552 So. 2d 1082 (Fla. 1989).

(1) The instant claim is procedurally barred as it is an issue that was previously considered and rejected on direct appeal, or a variant thereof, and the postconviction vehicle is not to be used to litigate anew previously-considered claims. His claims are barred by the law of the case doctrine and are res judicata. On Trotter's last (resentencing) appeal he raised as Issue IV his contention that the lower court erroneously denied his challenge to the prior 1985 robbery which was used as an aggravating circumstance, Trotter v. State, 690 So. 2d 1234, 1236 n.8 (Fla. 1996), and this Court rejected it without discussion as "without merit." Id. at 1237. The current claim is an impermissible attempt to relitigate the appellate issue by reformulating it as an issue of ineffective assistance of counsel. See Schwab v. State, 814 So. 2d 402, 406, n.4 (Fla. 2002); Sireci v. State, 773 So. 2d 34, 40 n.10 and 11 (Fla. 2000); Asay v. State, 769 So. 2d 974, 989 (Fla. 2000)("These claims were raised and rejected on direct appeal, [citation omitted] and are thus procedurally barred in this proceeding. [citation omitted]. As we stated in Medina, 'it is inappropriate to use a different argument to relitigate the same issue.' Accordingly, 'even if couched in ineffective assistance

language,' [citation omitted], these claims that were raised on direct appeal are procedurally barred.").

Additionally, in Parker v. State, ___ So. 2d ___, 29 Fla. L. Weekly S27 (Fla., Jan. 22, 2004), this Court explained citing Florida Dept. of Transportation v. Juliano, 801 So. 2d 101, 107 (Fla. 2001) that "the law of the case doctrine . . . bars consideration only of those legal issues that were actually considered and decided in a former appeal, [citation omitted] while res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised." In Parker, the Court concluded that the law of the case doctrine was inapplicable since the admissibility of the challenged statement was never actually considered and decided by the Court in Parker's first appeal. Res judicata also was deemed inapplicable because the new penalty phase could not be deemed a new and different case; the guilt and penalty phases of a capital trial "are parts of the same case and the death sentence imposed after Parker's new penalty phase is not final until affirmed by this Court on direct appeal." 29 Fla. L. Weekly at S28.

Judge Stephen Dakan determined following an evidentiary hearing in November of 1992 that Trotter's Motions to Withdraw Plea and to Vacate, Set Aside or Correct Sentence were both procedurally barred by the two-year limitation of Rule 3.850,

Fla. R. Crim. P., and that "the evidence presented at the hearing is not legally sufficient to support either motion" (State Exhibit 6). Trotter raised as Issue IV in his last resentencing direct appeal that "the trial court erred by ruling that Rule 3.850's two-year limitation barred him from considering the constitutional validity of appellant's prior conviction for robbery" (Initial Brief, pp. 52-56, FSC Case No. 82, 142). He argued therein that the 1985 plea colloquy was inadequate under Koenig v. State, 597 So. 2d 256 (Fla. 1992) and Boykin v. Alabama, 395 U.S. 238 (1969) (Brief, p. 54). This Court summarily disposed of this claim with the curt declaration: "We find the remainder of Trotter's present claims to be without merit." 690 So. 2d at 1237.

Under this Court's Juliano and Parker jurisprudence, this Court's rejection of appellant's challenge to Judge Dakan's denial of relief on Trotter's claim that his 1985 convictions were infirm and should be set aside and could not be used as aggravating factors on direct appeal became and is now res judicata. Trotter's argument that the plea was invalid and must be set aside either was presented or could have been presented on direct appeal and substantively should not be subject to reconsideration. As stated in Juliano, *supra*, at 105:

> Importantly, the doctrine of res judicata not only bars issues that were raised, but it also precludes consideration of issues that could have been raised but were not

raised in the first case.

Trotter is also collaterally estopped from relitigating the same issue between the same parties. Topps v. State, ___ So. 2d ___, 29 Fla. L. Weekly S21, (Fla., Jan. 22, 2004).

Appellant's reliance on Johnson v. Mississippi, 486 U.S. 578 (1988) is inapposite. Since appellant's prior conviction has not been set aside, there can be no contention that the sentencing court improperly utilized an unconstitutionally obtained prior conviction as an aggravating factor. See Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001)("...this Court had held that a defendant's allegations concerning the unconstitutionality of a prior conviction were not cognizable if that conviction had not been set aside"); Bundy v. State, 538 So. 2d 445, 447 (Fla. 1989); Eutzy v. State, 541 So. 2d 1143, 1146 (Fla. 1989) ("Eutzy's Nebraska conviction has been final for over thirty years. The fact that Eutzy is seeking collateral review of this conviction does not entitle him to relief under Johnson"); Stano v. State, 708 So. 2d 271, 275 (Fla. 1998)(denying postconviction relief on a claim of violation of Johnson v. Mississippi, 486 U.S. 578 (1988) noting that Johnson was inapplicable because the prior convictions have not been set aside).

(2) To vacate his prior robbery and burglary convictions

in a postconviction proceeding, Trotter would have to prove that his plea was not voluntarily and intelligently entered, not merely that the plea colloquy was inadequate. In arguing that the inadequacy of the plea colloquy is grounds for relief and relying on such direct appeal cases as Koenig v. State, 597 So. 2d 256 (Fla. 1992), Black v. State, 599 So. 2d 1380 (Fla. 1st DCA 1992), and McCarthy v. United States, 394 U.S. 459 (1969), appellant displays a fundamental misunderstanding of the applicable law. In McCarthy, *supra*, the Supreme Court ruled on direct appeal that the failure of the trial court to conduct an adequate plea colloquy was reversible error. This standard would not apply to a collateral attack in state or federal court. See United States v. Timmreck, 441 U.S. 780 (1979)(Court unanimously held that conviction based on a guilty plea is not subject to collateral attack when all that is shown is a formal violation of Rule 11. Such a violation is neither constitutional nor jurisdictional. Nor can any claim reasonably be made that the error resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure". Id. at 784, citing Hill v. United States, 368 U.S. 424, 428 (1962). Respondent could have raised the claim on direct appeal but did not and there is no basis here for allowing collateral attack to do service for an appeal); accord, United States v. Fels, 599 F.2d 142, 149 n.5

(7th Cir. 1979); Adams v. Peterson, 968 F.2d 835, 840-841 n.3 (9th Cir. 1992); Keel v. United States, 585 F.2d 110 (5th Cir. 1978).

At the hearing before Judge Stephen Dakan on November 13, 1992 (2DAR [resentencing appeal] IV, TR 1-112), Dr. Krop testified that appellant had a verbal IQ of 72, a performance IQ of 73, and a full scale IQ of 72 (2DAR IV, TR 10). Krop opined that Trotter did not understand portions of the waiver rights form; that he would have problems with paragraphs 2, 4, and 7 of the acknowledgment form. Krop stated that appellant indicated to him that he never saw attorney Lee, and the attorneys never discussed the facts of the case with him (2DAR IV, TR 25-28). On cross-examination at that hearing, Krop acknowledged that he had evaluated appellant in 1986 and had determined that he was competent at the time of the offense and competent to stand trial on the charges or robbery and murder in the first degree. Krop would have made a determination that Trotter had the ability to understand the charges, to proceed to trial and assist counsel. He had the ability to understand the proceedings and proceed to trial. Moreover, Trotter has improved since the psychological evaluation in 1986 (2DAR IV, TR 34-35). Krop agreed that with his test scores Trotter would not be classified as mentally retarded (2DAR IV, TR 36). His opinion was based on what Trotter had told him; Krop thought

this had been the first time Trotter had entered a guilty plea. Krop did not know Trotter's experience level in the criminal justice system (2DAR IV, TR 41-42). Krop acknowledged that when he had talked to Trotter he was able to get across to Trotter what the rights were. Krop answered that he was able to communicate with him sufficiently and that Trotter had six years experience in the criminal justice system; it would be relevant if Trotter also had had six years experience before that (2DAR IV, TR 42-43). He had no crystal ball to know when Trotter was being truthful and he has been burned badly by other defendants he thought were truthful (2DAR IV, TR 44). Krop conceded there was a discrepancy between what Trotter had told him and what the attorneys' billing records reflect on time spent with the client (2DAR IV, TR 46). Krop had not spoken to defense lawyers Moreland or Lee. Krop indicated that he was able to explain to Trotter his rights in the one and one-half hour he spent with him (2DAR IV, TR 47-48).

At the same hearing attorney Henry Lee testified that he met with appellant at the county jail on July 29, 1985, to go over the case and explain what was going on; there was another meeting on September 10 (2DAR IV, TR 54). Trotter seemed to understand what Lee was talking about and would have requested an evaluation if it appeared he didn't understand the nature of what he was charged with (2DAR IV, TR 55). Lee went over the

probable cause report with him at the first meeting (2DAR IV, TR 56). Trotter had been charged in a four-count information. Lee deposed the witnesses and discussed a plea offer with the prosecutor (2DAR IV, TR 58). The prosecutor agreed to drop two counts and the defense pled to the two counts involving victim Little to a term of community control (2DAR IV, TR 59). Both Lee and Trotter thought it was a good deal; the guidelines were for a prison term at that time and if he took the plea he would get out of jail immediately. Lee told Trotter what he had found out through the depositions, i.e., that victim Little was an available witness, was a very good witness who knew the defendant, the state had a pretty good case against him, and the state was going to drop the other two counts. The deal was for two years community control, that he would get out of jail if he took the deal, and Trotter readily accepted it. He explained that at a jury trial he would probably be convicted and explained what community control was. Lee explained the facts of the case with him and reviewed the sentencing guidelines with him (2DAR IV, TR 60-61).

At the postconviction evidentiary hearing Krop testified that he did not determine Trotter was incapable of understanding the plea form or rights deal; he just didn’t feel that based on what Trotter had told him that he understood it. If Lee spent up to three hours with Trotter prior to the plea he could have

explained the various rights to him in that time (R XV, 351-352). Krop did not know from the defense attorneys that appellant had been through the court system eight to eleven times prior to entering the 1985 plea. Slater had not told him that Trotter had plead guilty using a written plea form to a violation of probation on the 1985 robbery which would have occurred subsequent to the 1987 trial and well before the 1992 hearing at which Krop testified (R XV, 353-355). Krop reiterated that whatever deficiencies, Trotter was competent to stand trial both in 1987 and in 1993, and that is not a close call (R XVI, 410).

Peter Dubensky admitted that when he represented appellant in 1987 on the instant murder charge he (Dubensky) offered to plead guilty to first degree murder and waive the jury; he wouldn't have done that without having discussed it fully with Trotter. Dubensky felt Trotter was competent and would understand the consequences of entering a plea (R XIV, 92-93). As a Public Defender he took many pleas involving written plea agreements which he thought were valid prior to the Koenig case (R XIV, 93-95).

James Slater, co-counsel in Trotter's initial murder trial and lead counsel in the subsequent resentencing proceeding, thought that in Trotter's 1985 plea to robbery Judge Gallen used the old acknowledgment and waiver of rights form (R XV, 262).

Slater acknowledged that in the order denying motion to withdraw plea and motion to vacate and set aside and correct sentence in case number 85-463, Judge Stephen Dakan ruled that even if there was not a procedural bar for the two-year limitation, the evidence at the hearing did not justify relief (R XV, 274; see also State Exhibit 6). Slater admitted that it was common practice in the 1980's to use written pleas as opposed to an extensive plea colloquy and sometimes the judge just didn't repeat all those in the oral colloquy (R XV, 279). In fact, the same thing was done in the Koenig case. Until the Koenig case everyone did not assume that written pleas were invalid (R XV, 281). Slater admitted that in the original 1987 murder trial the record reflects that defense counsel had considered calling attorney Harry Lee as a defense witness to testify that Trotter had entered a voluntary plea to the robbery case, as a mitigating circumstance (R XV, 287-288; see also 1DAR XI, 1990).

There was no reason in 1987 to conclude that the plea colloquy was inadequate. Written plea agreements such as the one signed by Trotter were used in circuits throughout the state to supplement the court's oral plea colloquy, a practice which continued up to and even beyond the 1992 Koenig decision. See State v. Blackwell, 661 So. 2d 282 (Fla. 1995)(upholding the use of written plea document to advise pleading defendants of the possibility and consequences of sentencing as a habitual

offender).

Florida courts have acknowledged, like their federal counterparts, that the inadequacy of a plea colloquy is not sufficient ground to sustain a collateral attack and limit collateral attacks on guilty pleas to situations in which actual involuntariness or lack of knowledge and prejudice are alleged and proven. See Caristi v. State, 578 So. 2d 769 (Fla. 1st DCA 1991); James v. State, 696 So. 2d 1194 (Fla. 2d DCA 1997); State v. Larrimore, 701 So. 2d 585 (Fla. 2d DCA 1997)(defendant barred from collaterally challenging validity of guilty plea again where he had already challenged plea in post-plea motion and prior appeal and failed to show prejudice).

Appellant cannot demonstrate manifest injustice that would warrant vacating the plea. No competent evidence was introduced at the 1992 hearing before Judge Stephen Dakan that the plea was not in fact voluntarily and intelligently entered. Trotter did not testify and the expert opinion offered by the defendant was contingent in facts that were either not established or disproved by the testimony at the evidentiary hearing. Judge Dakan correctly denied the motion both on the merits and that it was barred on untimeliness grounds. While it is true that an expert may base an opinion on hearsay information if it is of the type routinely relied on by experts in the field, F.S. 90.704, in light of Trotter’s disparate statements to his

attorneys and police and the defense's own presentation, such statements do not meet this criteria.[14] An expert may not become a conduit for inadmissible evidence and may not testify to hearsay statements provided by other fact witnesses. Hitchcock v. State, 636 So. 2d 572 (Fla. 4th DCA 1994); Maklakiewicz v. Berton, 652 So. 2d 1208 (Fla. 3d DCA 1995); Bianchi v. State, 528 So. 2d 1309 (Fla. 2d DCA 1988); Department of Corrections v. Williams, 549 So. 2d 1071 (Fla. 5th DCA 1989). See also Cirack v. State, 201 So. 2d 706 (Fla. 1967) and Holsworth v. State, 522 So. 2d 348, 352 (Fla. 1988) holding that expert could not testify to his opinion as to voluntary intoxication when the opinion was based on the non-testifying defendant's hearsay statement concerning drug and alcohol usage; Tullis v. State, 556 So. 2d 1165 (Fla. 3d DCA 1990)(holding trial court correctly excluded testimony of defense psychologist for failure to establish predicate on which opinion could be based).

Even if these inadmissible hearsay statements were given some efficacy, however, they would not mandate Judge Dakan granting the motion. Dr. Krop merely opined that Trotter would have had difficulty comprehending the plea form, unless explained to him; once Krop had fully explained the plea form, the only sections Trotter said he would not have agreed with

[14] Peter Dubensky, when noting Trotter's inconsistent statements to him concerning the crime, agreed with the defense assertions that it was commonplace for defendants to lie to their attorneys (R XIV, 102).

were paragraphs 4, 7 and 8.[15] Paragraph 4 informs the defendant that the court may ask the defendant questions under oath about the crime that would subject him to perjury. Since such questioning did not occur this paragraph is irrelevant. Paragraph 8 deals with satisfaction with his attorney. While this question is prudent in that it may preclude later false allegations, satisfaction with one's lawyer is not a constitutional prerequisite to the entry of a valid plea. Since Trotter's recollection of his contact with his lawyers was clearly flawed, the basis for his dissatisfaction is dubious at best. The final area of concern was paragraph 7 that dealt with whether there had been promises or threats that would render the plea involuntary. Since there is no allegation that any threats

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[15] (R XV, 342-352). Significantly, according to Dr. Krop, the defendant had no apparent disagreement with paragraph 1 which related the charges and maximum punishments, paragraph 5 which stipulated that there was a factual basis for the plea and that the defendant believed the plea was in his best interests, paragraph 6 which set forth the negotiated disposition and paragraph 2 which provided:

> I understand that I have the right to be represented by an attorney at every stage of the proceeding and, if necessary an attorney will be appointed to represent me. I have the right to a jury trial and have the right to an attorney's help at that trial. I have the right to compel attendance of witnesses on my behalf, the right to confront and cross-examine witnesses against me and the right not to testify or to incriminate myself. By pleading guilty or nolo contendere, I understand that there will be no trial of any kind and I am waiving my right to a trial.

occurred or that any promises were made (other than those made in the plea agreement which were complied with), this too is an irrelevancy. Moreover, Dr. Krop acknowledged that his testimony incorrectly assumed a lack of prior contact with the criminal justice system and was based upon the truthfulness of the defendant's statements to him. He was never provided with the defendant's criminal history or the testimony of attorney Lee, and it was never established whether this information would cause him to change his testimony. Since his opinion was not based upon all the relevant facts and since crucial facts upon which he relied were contradicted, Judge Dakan was not required to accept his opinion as controlling.

Appellant's claim is meritless. The lower court's order denying postconviction relief should be affirmed.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Carol C. Rodriguez, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619-1136, this ____ day of March, 2004.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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