IN THE SUPREME COURT OF FLORIDA

ROBERT DWAYNE MORRIS,

Appellant,

v. Case No. SC04-1594
Lower Tribunal No. CF94-3961A1-XX

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. Trial Facts

This Court summarized the relevant facts in its opinion in Morris v. State, 811 So. 2d 661, 662-664 (Fla. 2002):

> On the morning of September 2, 1994, the body of the 88-year-old victim, Violet Livingston, was found in her Lakeland apartment by her son. When the police responded to the murder scene, they found the victim lying on her bedroom floor between two beds. Her head was wrapped tightly in bed sheets. There was blood on the walls, the furniture, and her walking cane, which was on one of the beds. Both bedrooms were in disarray.
>
> The point of entry to the apartment appeared to be the kitchen window on the south side of the apartment. The screen was off the window and was leaning against the building. The window was shut but the glass was broken. Window latches and broken glass were found on the ground. Near the window was a yellow chair sitting underneath the porch light. The porch light cover was off the fixture and was lying on the ground.
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> According to the associate medical examiner, Dr. Alexander Melamud, the victim died as a result of multiple injuries. She had sustained bruises, lacerations, abrasions, rib fractures, brain hemorrhage, and mechanical asphyxia due to suffocation. Some of the injuries were consistent with her having been beaten with her walking cane. There were neck injuries consistent with strangulation, and wounds to her right forearm, hand, and knee, which could be classified as defensive wounds. Dr. Melamud could not determine the sequence of the injuries, or when the victim became unconscious, but he determined she was alive for a short period of time after the attack began.

At trial, the four main categories of evidence the State presented against Morris were: (1) DNA test results; (2) Morris's fingerprint on a lightbulb outside the victim's residence; (3) Morris's possession of various items taken from the victim's residence; and (4) the testimony of Damion Sastre, a jailhouse informant. Additionally, the State presented further inculpatory evidence that Morris had healing scars on his forearms and hands, and that the police obtained a bloody glove from Morris's apartment.

First, the State's DNA experts testified that Morris could not be excluded as the source of the DNA obtained from two locations on the victim's body and from the kitchen curtain. According to the State's population geneticist, the frequency of this DNA pattern in the African-American database would be 1 in 7.1 million (meaning the chance that the DNA was not from Morris was between 1 in 710,000 to 1 in 71 million). Morris presented his own population geneticist, who testified that the frequency of the DNA pattern within the African-American population is 1 in 2.2 million.

Second, the police obtained a total of eleven fingerprints of value for comparison from the interior and exterior of the victim's apartment. No prints found inside the victim's apartment matched Morris's fingerprints. However, a single print, obtained from the partially unscrewed lightbulb outside the kitchen window, was later matched to Morris. Of the remaining prints, one print belonged to the victim's son, four belonged to a police department intern, and five were never matched to anyone.

Third, the police found several items known to have belonged to the victim in and around Morris's residence. These included coin wrappers, coin booklets, a coin sorter, and a television. Additionally, witnesses who worked at a sandwich shop and a gas

station near the victim's apartment identified Morris as the man who purchased items with rare coins that were missing from the victim's coin collection.

Finally, Damion Sastre, a convicted felon, testified that Morris told him in jail that Morris committed the murder. Sastre testified that because Morris told Sastre that Morris had previously stolen a bicycle from the victim's apartment complex, Sastre suggested that Morris testify that he touched the lightbulb during that previous theft. However, Sastre also testified that Morris told him there was a screened porch into which Morris had to cut a slit to gain access to the victim's apartment, but then acknowledged, upon being shown a photograph on cross-examination, that there was no screened porch to the victim's apartment.

Morris took the stand in his own defense and stated that he did not kill the victim or break into her apartment. He testified that he went to the victim's apartment complex to play basketball, but nobody was there. He then stated that he remembered that a friend had asked him if he could get a bicycle for her, so he walked to the back of the apartments and saw a bike on the top stairs. Morris admitted he unscrewed the lightbulb on the victim's porch and went upstairs. However, he testified that he was unable to obtain the bicycle because it was secured by a lock. He testified that on his way home, he found a brown paper sack containing a coin sorter, coin books, a chain necklace, and some little bags containing coins. He spent the coins in a neighborhood sandwich shop and a gas station. Morris further testified that he never told Sastre that he killed the victim, took coins out of her apartment, or gained entry through a screened porch. Finally, Morris testified that Sastre must have obtained the information about which Sastre testified by looking at Morris's

> discovery materials to which Sastre had access in prison.
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> The jury convicted Morris of first-degree murder, armed burglary of a dwelling or battery committed during burglary of a dwelling, and robbery with a deadly weapon.

B. The Defense Attorneys

Howard Dimmig testified that he has been with the Public Defender's Office since 1988. He was the "Administrative Division Director" for the Public Defender's Office of the Tenth Circuit. (V-3, 374). He estimated that he has worked on "in excess of 15" murder cases where the State indicated they were seeking the death penalty. (V-3, 374). He had co-counsel in the Morris case, Howardene Garrett, and they split up the guilt and penalty phases. His primary focus was the guilt phase of the trial. (V-3, 347-48). Ms. Garrett was also an experienced capital litigator and together they came up with a strategy to represent Morris. (V-3, 376).

Dimmig moved to sever the sexual battery charge, stating: "I thought the prejudicial effect on the jury of hearing testimony of the sexual battery of an elderly woman would be to Mr. Morris's detriment, so I wanted to sever that charge away." (V-3, 348). Dimmig was successful and tried the sexual battery charge prior to the murder. (V-3, 349). A mistrial was declared on the sexual battery charge. Dimmig then renewed his motion for a judgment of acquittal [JOA], which was granted by

the trial court. (V-3, 349). The JOA was granted because the "State could not prove beyond a reasonable doubt that Mrs. Livingston was alive at the time of the sexual contact." (V-3, 367-68). In the murder trial he limited the State to non-sexual references to DNA evidence. The State was restricted in describing the substance yielding the DNA and was unable to show the locations where the DNA was collected from the victim, i.e., location A or B. (V-3, 375-76).

Dimmig acknowledged that he was faced with some pretty tough facts in this case. Morris's fingerprint was on the light bulb, his possession of coins taken from the house, and, his DNA was in and/or on the victim. (V-3, 375).

During trial he was aware that the jurors were allowed to ask questions. He recalled a discussion or issue coming up about a pending or proposed statute which would allow jurors to ask questions. (V-3, 350). At the time of trial there was "courthouse" talk about a "change that would allow jurors to ask questions." (V-3, 368).

Dimmig acknowledged that the prosecutor apparently thought that confusion or vagueness might be equated with reasonable doubt. (V-3, 351). He admitted the prosecutor apparently thought that the State would benefit from juror questions. (V-3, 351). However, Dimmig admitted he did not object to this

procedure. (V-3, 351). Dimmig testified: "You know, I don't really have an independent recollection of why I did not object at the time. In hindsight, certainly, I would not do something that I thought would benefit the State in the prosecution of the case. Why I didn't raise it at that time, I do not know." (V-3, 352). However, Dimmig had "no independent recollection of any questions being asked by jurors." (V-3, 369).

Dimmig recalled mentioning an alternate suspect in his opening statement. (V-3, 354). He mentioned four unidentified fingerprints and that a witness observed an unidentified individual, who was not black, closely observing the apartment in which Ms. Livingston was killed. (V-3, 354-55). The witness to this unidentified individual was Sherry Laventure. (V-3, 355). Ms. Laventure lived in a house behind the Martin's Landing complex where the murder occurred. (V-3, 355). Ms. Laventure was interviewed by the police in their "neighborhood canvass" and also interviewed by Public Defender investigators who were assisting Dimmig in preparing his case. (V-3, 355-56).

Dimmig called Laventure at trial to support his theory of an alternate suspect. (V-3, 356). She allegedly observed a man who was "definitely not a black man" closely observing Violet Livingston's apartment. (V-3, 356). Laventure testified that she did not get a good look at this individual's face. However,

she did testify that "he wasn't white." (V-3, 357). Dimmig attempted to refresh her recollection, but was unable to impeach her testimony with a prior phone conversation. (V-3, 358). Dimmig admitted that he did not have any prior written statements or depositions in which to impeach her testimony. (V-3, 358).

Dimmig was an Assistant State Attorney for five years, has been practicing as a criminal defense attorney, "in excess of 20 years." (V-3, 371). Dimmig testified that he never deposed his own witnesses. (V-3, 371). Nor, he testified, is it standard practice for defense lawyers to depose their own witnesses. (V-3, 372). The State does not typically depose their own witnesses. (V-3, 372). He had either talked to Laventure or had someone else talk with her prior to trial and felt he knew what she would say on the witness stand. (V-3, 372). "I did not want to take a deposition of her, because then the State would be aware of her, so, yeah, I didn't have one I could use." (V-3, 372).

Ms. Laventure would provide relevant testimony in two respects. One, that the person she observed outside of Ms. Livingston's apartment earlier on the day of her murder was not black, and, second, that Morris was accounted for at the time she observed this other individual, and, that therefore this

individual was not Mr. Morris. (V-3, 369-70). Dimmig presented evidence in the form of time records from Taco Bell to show that this individual Laventure observed was not Morris. (V-3, 370). Her testimony did not harm the overall theory of the defense, but, Dimmig did believe her testimony was damaging since he made a specific reference in opening regarding what he expected her to testify to. (V-3, 371). Dimmig testified that in his experience it is "not uncommon to be surprised" by what a witness testifies to at trial. (V-3, 373).

Dimmig made an investigative request [Defendant's Exhibit 1], acknowledging that Laventure was not a willing witness. (V-3, 361). Laventure testified that defense investigator Toni Maloney encouraged her to say that the person around the apartment was not black. (V-3, 361). Dimmig entered into a stipulation that advised the jury that no one from the Public Defender's Office had encouraged anyone to present false testimony. (V-3, 361). Laventure testified that she met with a person with a beard from the Public Defender's Office a couple of times. (V-3, 363). She testified that she told the investigator that the man she observed was not white. (V-3, 363). Dimmig testified that this would have made Barfield more appropriate than Tony Maloney to rebut Laventure's testimony. (V-3, 364-65). However, on re-direct, he testified that he

chose Maloney since she was the last person from his office to have contact with Laventure. (V-3, 465).

Dimmig spent a lot of time preparing for direct and cross-examination of witnesses in this case. (V-3, 363-64). He cross-examined a forensic expert and elicited the fact that hair samples microscopically different from Morris's were found at the crime scene. (V-3, 364-65). He cross-examined Dr. Word from Cellmark Labs and got her to admit the DNA might suggest a third party contributor or that it was "tainted" with a third person's DNA. (V-3, 365). And, Dimmig made an effort to impeach informant Sastre's credibility. (V-3, 365-66).

Dimmig recalled conversations relating to Morris testifying during the guilt phase and that they wanted him to testify in the guilt phase. (V-3, 466). Dimmig told him he had the right to testify and they in fact did call him in the guilt phase. (V-3, 469). They also wanted the bad information about Morris's criminal history to come out in the guilt phase so that the jury would know, or not be confronted with new aggravating factors during the penalty phase. (V-3, 466). Dimmig was not aware of any requirement for two inquiries in a capital case, covering guilt and penalty phases on a defendant's right to testify. (V-3, 467). Dimmig did not recall Morris ever asking him if he could testify during the penalty phase and never nudged him to

say something said on the stand was not correct and he wanted to answer it. (V-3, 468-69).

Howardene Garrett testified that she has been an Assistant Public Defender in the Tenth Circuit since 1989. Prior to that she spent five years as an Assistant Public Defender in the Sixth Judicial Circuit and three years in the 19th Circuit. (V-3, 391). At the time of trial she had been practicing law for 17 years and had handled "at least six" capital cases. (V-3, 403-04). She was a member of the capital trial division which consisted of two attorneys, a full time investigator, and, a mitigation specialist. (V-3, 404). She and Dimmig were assigned to the capital trial division together in 1996 and "both of us had tried capital cases before." (V-3, 405). Their mitigation specialist, Toni Maloney, had a master's degree and was "very, very familiar with the forensic system." (V-3, 405).

Ms. Garrett was second chair counsel in Morris's case and her primary responsibility was to prepare for and conduct the penalty phase. (V-3, 391-92). Their strategy was to have the penalty phase and guilt phase completely separate in the presence of the jury. However, they both participated in each phase "in the behind the scenes aspect." (V-3, 392).

Ms. Garrett was aware that Morris had a right to testify in the guilt phase and assumed he also had that right in the

penalty phase. (V-3, 392-93). She agreed that the right to testify is a personal one and an attorney cannot waive it for a defendant. (V-3, 393). Ms. Garrett did recall some discussions with Morris on whether or not he would testify in the guilt phase but testified: "...I honestly cannot remember whether we ever discussed the possibility of him testifying in the penalty phase." (V-3, 394). It was at least possible they did not discuss it, "I just don't have a recollection of it one way or the other." (V-3, 394). Ms. Garrett testified that she was aware of the circumstances of Morris's childhood, stating: "I was aware of that and attempted to present that at the penalty phase, as well as I guess you could say psychological abuse he experienced from poverty and from his mother's alcohol and drug problem and, you know, his role in the family as a result of those issues." (V-3, 394-95). Ms. Garrett had no way of knowing if Morris would have assisted the defense case by testifying in the penalty phase. (V-3, 395-96). "I can't rule out the possibility that it would have been a more effective presentation to have that come from Robert than from members of his family and from the psychologist who testified." (V-3, 396).

Morris maintained his innocence at trial and Dimmig and Garrett both felt that it was important for him to testify

during the guilt phase. (V-3, 408). They hoped that even if they were not successful in the guilt phase that they would get to know Mr. Morris and in effect humanize him. (V-3, 409). The defense considered the fact the jury found in effect that Morris was lying during the guilt phase, and, that it might not be effective to put him on again in the penalty phase. (V-3, 409-10). "The jury already met him and heard him speak and been able to look him in the eye and all of that. Benefit had already been obtained." (V-3, 410). Ms. Garrett testified:

> I know that Rex [Dimmig] and I talked extensively about how to present the penalty phase effectively, and I would think that this would be something that would be part of the discussion. I can't independently remember now whether or not that was something we talked about.
>
> I know that we had many conversations about what was the most effective way to get his story across in terms of his upbringing and the mitigation that it would present.

(V-3, 411).

Ms. Garrett testified that she presented several points of non-statutory mitigation. "I was trying to get the Court to instruct on all of the mitigators, even if they weren't mentioned in the statute." (V-3, 396). The trial court denied the requested instruction. (V-3, 397). The defense presented mitigation as planned and the defense did not fall back on the standard instruction on statutory mitigation. (V-3, 397).

Instead, Ms. Garrett explained: "I tried to list all the mitigation without reference to whether it was statutory or nonstatutory, just as mitigation." (V-3, 397). Ms. Garrett acknowledged that she presented evidence to support a statutory mitigation instruction, and, in fact, Judge Young did find one of the statutory mitigators. (V-3, 398). However, the jury did not receive a statutory mitigating instruction. (V-3, 398). She "could not rule out" the possibility that the statutory mitigation instruction might have made a difference in this case. (V-3, 398).

The defense team talked about how the mitigation could most effectively be presented to the jury. (V-3, 412). They also discussed what evidence to keep from the jury and present in front of the judge alone in a Spencer hearing. (V-3, 412). They were trying very much to "present a cohesive and hopefully persuasive presentation for the penalty phase." (V-3, 413-14).

Dr. Dee presented a lot of mitigation on how Morris functioned and his earlier experiences in life. (V-3, 414). They had information on mental age but did not recall specifically considering mental age in order to meet the age mitigator. (V-3, 414). But, she was very much aware that age is a mitigator, and a good one. (V-3, 414-15).

Ms. Garrett testified that presenting the statutory mental mitigators is "kind of a mine field" because it opens up areas of attack for the prosecution. (V-3, 415). This was something they discussed in Morris's case. (V-3, 415). It was a strategic choice to request the mitigation instruction that she did in this case and it was an informed decision. (V-3, 416). Dimmig had successfully kept evidence of sexual battery from the jury during the guilt phase. The jury never learned that Morris committed an actual sexual battery or had sex with a corpse. (V-3, 416). "I know that we were very concerned about being able to make the most of the fact that we had a much cleaner fact situation than we would have had if we had to try -- I mean, cleaner in the sense of less troubling to the jury, hopefully, because of the nature of the offense. That sounds like something we would have thought about, but I don't remember right now." (V-3, 417). It was very much part of their plan to shield the jury from the fact that Morris either raped the victim or had sex with her after she was dead. (V-3, 417).

Ms. Garrett admitted that a defendant has a right to be present at all proceedings in the case. She had no recollection of what transpired during a bench conference outside the presence of Morris. (V-3, 399). However, Ms. Garrett testified: "That kind of interruption and making –- for me to

have made such a point of saying, you know, 'This doesn't need to be on the record, and my client doesn't need to be present,' it leads me to think it must have been something of a minor nature." (V-3, 399-400). There are any number of matters which might have been discussed, but she hoped if it were a matter of a legal nature they would have reconstructed it at that time so the record would reflect the discussion. (V-3, 400). But, she acknowledged, "I don't know what it was." (V-3, 400). The fact that there was no reconstruction after the bench conference leads her to believe that the matter was not consequential. (V-3, 407-08).

C. Mental Health Experts

The defense called Dr. Bill Mosman, a psychologist and attorney. (V-2, 282). He was not a board certified neuropsychologist. (V-2, 283). Dr. Mosman has never testified for the State in a capital postconviction case. (V-2, 338). Dr. Mosman testified that he was retained to assist CCRC in reviewing data from a clinical or forensic perspective to "provide an opinion to you whether or not I felt that the area covered in reference to those clinical issues were minimally adequate during the trial process." (V-2, 284). He reviewed records in the Morris case including depositions, sworn statements, and "certainly all the work that Dr. Dee had done,

you know, testimony aspects of it." (V-2, 285). Dr. Mosman reviewed the tests and procedures utilized by Dr. Dee in support of his evaluation of Morris. (V-2, 286).

Morris was labeled educable mentally retarded which meant the school system at some point determined that he had an IQ below normal. (V-2, 286). However, educable mentally retarded is not a clinical diagnosis and even as a school label, is no longer in use. (V-2, 287). "[T]here is no diagnostic import or application of that in the clinical field." (V-2, 287). A series of Wechsler tests had been administered to Morris. On all of them he scored consistently in the lower percentiles. (V-2, 287-88). Some scores placed him in the retarded range. (V-2, 288, 318). If testimony at trial suggested that Morris was borderline mentally retarded, it would be inaccurate. It would be about 16 or 18 years out of date. The term is borderline intellectual functioning. (V-2, 312).

Dr. Mosman was not able to formulate an opinion on whether Morris was retarded: "No, I wasn't able to render an ultimate opinion on that issue." (V-2, 285). On the test he gave, Dr. Mosman obtained a verbal of 73 and a performance IQ of 74, rendering a full scale IQ of 71. (V-2, 340). These scores "are in that retarded range." (V-2, 340). Dr. Mosman admitted he did not administer a Vineland test and that he did not have an

opinion on the other criteria, “which is separate and distinct.” (V-3, 342-43). The adaptive behavior prong must be examined and requires a “lot of work and a lot of interviews, unless you just want to flip a coin.” (V-3, 344). Dr. Mosman admitted that he did not talk to any Morris family members. (V-2, 338).

Morris had a great deal of difficulty as a child “with concentrating, attending to tasks, doing memory and retention.” (V-2, 288). He also had a chronic history of physical and emotional abuse and also “witnessed a lot.” (V-2, 288). Mr. Morris had an absent father and was hospitalized at a young age with ulcers. This is not ordinarily seen in children and is “usually reflective of, I mean, extraordinary stress and emotional stress that a child has.” (V-2, 289). He also abused alcohol at an early age and his grades were very low. He was not a good student in school. (V-2, 289-90). Dr. Mosman admitted that a defense exhibit, admitted at trial, showed Morris’s grades in school, some C’s, but also D’s. (V-2, 328). At trial, the defense presented to the jury the fact he was in special classes. (V-2, 329).

Dr. Mosman criticized Dr. Dee’s administration of the Wechsler in that it was not administered by Dr. Dee, but an assistant. (V-2, 294). Also, the assistant only gave part of the sub tests. Dr. Mosman testified that you cannot get an a

performance IQ based upon the number of sub tests administered. (V-2, 294). If you can't get a performance IQ, you can't obtain a full scale IQ. (V-2, 294). He stated that the test as given might provide an IQ from the low "seventies to high eighties." (V-2, 294-95). Another "general area of concern" he had was that only a few months after it was given a new "version came out, the W-A-I-S Roman numeral three." (V-2, 295). He thought that in comparing the two tests, one gets an inflation factor, an old instrument with old norms, you will get an IQ "that's too high." (V-2, 295). If the testing is inaccurate or very vague, then there is nothing that can be accurately stated to the courts, juries or attorneys. (V-2, 297).

Dr. Mosman thought that the IQ testing conducted under the auspices of Dr. Dee was "mathematically averaged and fabricated, and however, whatever word you want to use." (V-2, 318-19).

Dr. Mosman thought that the issue of mental retardation was not adequately addressed in preparation of the trial or during the trial. (V-2, 297). In Dr. Mosman's opinion, the evaluation of Morris was not done in a competent, professional manner. (V-2, 299). Nor, was a meaningful evaluation done with respect to the presence of statutory and nonstatutory mitigation. (V-2, 299).

Dr. Mosman thought that age at the time of the crime was an absolute giveaway. "It's mental age, intellectual age, social age, all those things." (V-2, 300-01). "While Mr. Morris might have been physiologically an adult at the time of the incident, the crime, whichever score you want, puts it into the range of about a twelve, maybe eleven to about fifteen-year-old." (V-2, 301). He found a substantial impairment in capacity to conform and that he committed the offense while under the influence of extreme mental or emotional disturbance. (V-2, 301-02). The brain damage and low intellectual functioning lead to the statutory mitigators. "And I'm not saying he was insane, I'm saying that there was significant impairments in many areas of functioning that were directly related to what happened and how it happened, just on the statutory issues." (V-2, 303-04). Dr. Mosman admitted that Dr. Dee testified at trial that Morris suffered from brain damage. (V-2, 329).

Dr. Mosman thought that he could have impulse control problems, "the modulator is broke." (V-2, 332). Dr. Mosman was asked about the facts of the offenses, that Morris had the ability to unscrew a light bulb in an attempt to make a stealthy entry, stole coins, raped the victim or had sex with her corpse, escaped, and discarded stolen items in a fashion or manner to prevent their discovery. (V-2, 334). Nonetheless, Dr. Mosman

stated that the facts are those that a "normal functioning eleven-year-old" could do. (V-2, 335). Dr. Mosman was questioned about whether he would find an age [mitigating] factor, that he would always couple that with influence of extreme mental or emotional disturbance. (V-2, 336). Dr. Mosman testified: "I can say perhaps not. Perhaps not. If the fact pattern relies heavily upon those type of issues, they should be presented. If it doesn't, it shouldn't be." (V-2, 336-37). Similarly, on the capacity to conform mitigator, Dr. Mosman stated that with a low mental age you would "[n]ot necessarily" qualify for that mitigator. And, Dr. Mosman pointed out the judge was able to find significant impairment in capacity to conform without relating it to mental age "because that was never presented." (V-2, 337).

Dr. Mosman admitted the standard definition for the intellectual functioning prong of mental retardation was 70 or below. (V-2, 320). And, he acknowledged that in terms of overall IQ, none of Morris's scores on past IQ tests were as low as 70. (V-2, 320-21). But, Dr. Mosman explained, because of measurement errors retardation has a broader range encompassing 75 or lower. (V-2, 321-22). The lowest IQ score in the records found by Dr. Mosman was 73. (V-2, 323). Dr. Mosman only met with Morris one time, and, that was after he had been deposed by

the Assistant State Attorney. (V-2, 323). And, he tested Morris, but, again, only after being deposed. (V-2, 323). Nonetheless, he still, at the time of the evidentiary hearing, did not have an opinion on whether Morris was retarded. (V-2, 323). Dr. Mosman admitted that at the time the IQ test was administered to Morris by Dr. Dee's assistant, it was the most up to date available. (V-2, 324). However, the whole test was not administered, consequently, Dr. Mosman testified, he "didn't do it." (V-2, 324). Dr. Mosman admitted that at the time the test was given in 1996, it was common practice for many clinicians to use graduate students or other assistants to conduct the testing. (V-2, 325).

The State called Dr. Henry Dee, a clinical neuropsychologist who has been practicing for over 20 years, doing forensic work with regard to competency, sanity, and, as an expert advisor. (V-3, 433-35). A clinical neuropsychologist has about five more years training than a clinical psychologist. (V-3, 448). Typically a neuropsychologist's additional training is in a department of neurology or neurosurgery. (V-3, 448-49). Dr. Dee is familiar with statutory and non-statutory mitigation in capital cases. (V-3, 435). He has been involved in testing of first degree murder defendants "in excess of 100" times. (V-3, 463). Dr. Dee met with Morris on four or five occasions for

a “total of some 21 hours of interviewing after the testing was done.” (V-3, 435-36). But, if the record reflects at the time of trial he met with Morris eight times, he would not dispute it. (V-3, 436). That was unusual in Dr. Dee’s experience, he testified that there “was an unusual amount of, unusual number of things that had been abusive and harmful in his childhood.” (V-3, 436). “As I remember - - well, there were multiple areas we had to go into. Childhood abuse, physical abuse, neglect on the part of his mother and his father, neglect that amounted to abuse, brain damage.” (V-3, 436).

Dr. Dee administered a standard battery of tests, the “Denman,” “Wisconsin Card Sorting Test,” “the Categories Test from the Halstead-Reitan Battery” as well as a group of tests on “facial recognition, finger localization, stereognosis and some language tests.” (V-3, 437). Dr. Dee testified that like most neuropsychologists, he uses testing assistants who administer tests. The one who conducted the testing in the Morris case, is one that he trained and who had been with him for some ten years. (V-3, 437-38). Dr. Dee testified that great care is taken training and supervising these individuals. (V-3, 438). Instructions are given in the test manuals and there’s not a lot of variability in scoring. (V-3, 438). They administer the test and “you supervise them in doing it.” (V-3, 438). He

reviewed the tests recently administered to Morris and stated that "I don't find much difference now" and that they are "certainly in the same range." (V-3, 439).

At the time he administered the tests to Morris, the WAIS-R was "the state of the art test." (V-3, 439). The WAIS-III came out right after that or around that time and he "wasn't using it yet." (V-3, 438-39). Dr. Dee explained that "[u]sually there's some lag of a year or two, or sometimes four or five in changing especially intelligence tests." (V-3, 439). The tendency on a new intelligence test is that performance tends to fall on the new test because of new norms and a new population, "typically about three points." (V-3, 440).

Dr. Dee testified that he found no indication of retardation in Morris from his testing, interviews, or other information he gathered. (V-3, 440). Dr. Dee explained he used a short form of the WAIS pioneered by one of his professors, the results of the research correlated that battery "with the full scale battery of the WAIS." (V-3, 441). Dr. Dee explained:

> …As a matter of fact, as was the standard practice then, it isn't now, but at that time, we were using a prorated version of the WAIS, a shorter version of the WAIS.
>
> * * *
>
> The correlation coefficient was about point nine, and the significance of that is that the correlation between the short form and the full test was slightly greater than the test/retest validity of the test itself,

> which meant they measured the same thing. So we didn't feel the need to use the longer battery.
>
> In the fullness of time now, having gone through many hearings in which I was cross-examined about this and having utterly failed at being able to communicate that statistical fact to prosecutors, juries and defense attorneys, I gave up, and now give the full test.

(V-3, 440, 441).

The prorated IQ Dr. Dee obtained for Morris in this case was 82. (V-3, 441). Dr. Dee reviewed multiple tests from Morris's past and he tested between 76 and 80. (V-3, 442). Dr. Dee ruled out mental retardation in this case:

> He had never been found to be mentally retarded, as a matter of fact, by testing and the work history that I got from him, his very articulate presentation, the way he reasoned, certainly were inconsistent with any impression of mental retardation.
>
> He could talk about these legal matters with considerable facility. He understood the issues. He was articulate about them in the way that no really retarded person can be.
>
> So there was just no point in going back and administering more tests or a different form or a different test to try to demonstrate he was retarded, because it was manifestly obvious he wasn't.

(V-3, 442).

Further, the DSM-IVTR requires a diagnosis of retardation by a certain age. Dr. Dee also explained retardation requires an IQ below 70 or 75, a diagnosis of mental retardation before

the age of fifteen, “and having adaptive functioning deficits in more than two significant life areas, such as being able to maintain a job, being able to maintain an apartment, to cook for yourself, keep your clothes clean, socialize appropriately, and so forth.” (V-3, 445). Dr. Dee did not think Morris met any of the criteria to be considered retarded. (V-3, 446).

Dr. Dee disagreed with Dr. Mosman’s opinion on age at the time of the crime being a mitigator in this case. (V-3, 461). Dr. Dee was familiar with the concept of mental age. However, he testified it was not a useful concept with adults. Dr. Dee explained: “The reason for that is pretty straightforward. Mental age as propounded by Binet was a useful concept as he was using it, because he was testing school age children and he wanted to -- actually, his purpose originally was to identify feeble-minded children, so that talking about a child with, say, a chronological age of ten and mental age of five was somehow meaningful.” (V-3, 443). “The notion of mental age in adults is an idea that is frankly fairly silly.” (V-3, 443-44). It is difficult to conceptualize the difference in mental age between a 40 year old and a 30 year old, “and talk about an adult male who has children and who has a job and is paying child support as having the mental age of eleven is something that I just can’t conceive.” (V-3, 443-44). “You can make various kinds of

sideways attempts to redefine the notion of the mental age, but really its purpose was for educational purposes originally." (V-3, 444). And, he did not think that Binet ever intended to talk about adults having the mental age of a child, it does not make sense. (V-3, 444). "So that way of talking about intelligence has long since passed, and it isn't in current use." (V-3, 444). "I don't think it makes any sense to call a thirty-three-year-old man with the adaptive functioning skills that Mr. Morris has, to characterize it, I don't think it's accurate or even meaningful to characterize him as having a mental age of eleven or twelve. It makes no sense to me. I think it defies common sense, as a matter of fact." (V-3, 459).

Dr. Dee recalled considering the emotional disturbance mitigator at the time of trial. He felt Morris qualified for that one because "he had frontal lobe damage, he had difficulty controlling his conduct, he had a lack of inhibitory control, his emotional control was inadequate, so I would have to say yes to that." (V-3, 446-47). He recalled telling the jury of the mitigating facts without calling them statutory or nonstatutory. Dr. Dee recalled: "As I recall, the best I can recall, it was a result of the strategic decision on the part of defense attorneys not to go into those specific facts. They just wanted to talk about mitigation, both statutory and nonstatutory

without asking me which was which." (V-3, 447). In his experience, when he testified regarding the statutory mitigators the prosecutor will bring out all the negative things in a person's background that might show a manifestation of the extreme mental or emotional disturbance. (V-3, 449-50). "So that often what would look like a statutory mitigator may turn out in the eyes of the jury to be an aggravator, actually in my experience. That's why the prosecutors handle it that way." (V-3, 450).

Dr. Dee recalled that in this case, the defense separated the penalty phase from the Spencer hearing in terms of presenting statutory mitigating circumstances. Dr. Dee explained: "As I recall, that's why they had developed the strategy they had, not to go into whether or not it was statutory or nonstatutory and that way I wouldn't have to talk about the facts of the case, as a matter of fact." (V-3, 450). In this case, Dr. Dee acknowledged that would have revealed the fact there was a sexual assault on Ms. Livingston either alive or dead. (V-3, 450).

Dr. Dee did not know what he could have done differently and that he "was doing everything I could to be of use to the defense and to Mr. Morris, and I couldn't think of anything else." (V-3, 451). Dr. Dee acknowledged that Morris was placed

into the EMR program, primarily at the request of his mother. (V-3, 452-53). In fact, while placement in the program was useful to Morris, Dr. Dee testified: "...I suspect he really didn't from a diagnostic point of view, fit into that group. He was learning disabled, and I think he was hyperactive, and these combined would certainly have resulted in poor school performance, and I think did." (V-3, 453).

D. Robert Morris

Morris testified that he was 41 and resided in the Union Correctional Institution. (V-3, 422). Morris claimed to remember "everything about the trial." (V-3, 423). He was asked by Ms. Garrett if he wanted to testify in the guilt phase. (V-3, 424). And, in fact, Morris acknowledged testifying in the guilt phase. (V-3, 424). However, he testified that Judge Young did not ask him if he wanted to testify during the penalty phase. (V-3, 424-25). Nor, Morris claimed, did his attorneys ever tell him he had the right to testify in the penalty phase. (V-3, 425).

Morris claimed he would have testified in the penalty phase. (V-3, 425). He would have answered any questions his attorneys asked of him. (V-3, 425-26). Morris would have been in a position to tell the jury of his upbringing, how it felt to have his mother make him steal, and how he came to be diagnosed

with ulcers. (V-3, 426). He would have been in a position to tell his side of the story, but did not: “I was never asked.” (V-3, 426-27).

On cross-examination, Morris testified that he felt comfortable talking with his attorneys and that at no point during the penalty phase did he say, “I don’t agree with that, and I want to get on the witness stand...” (V-3, 427-28). But, Morris asserted “I didn’t even know that I could testify in the penalty phase.” (V-3, 428). He knew that he could testify in the guilt phase and insisted that he take the stand. (V-3, 428). He knew he could get up there and tell his side of the story. (V-3, 428). He did not turn to his attorneys in the penalty phase and say I want to testify: “No, I didn’t, but I didn’t know I could.” (V-3, 428). Morris was aware that the prosecutor at the evidentiary hearing [Aguero] did not prosecute him at trial. (V-3, 428-29). Morris specifically recalled the name of his prosecutor at trial was “Harb.” (V-3, 429-30). And, if he testified during the penalty phase Morris asserted [over post-conviction counsel’s relevancy objection] that he did not murder Ms. Livingston: “I didn’t do it.” (V-3, 430-31).

Any additional facts necessary for disposition of the issues presently before this Court will be discussed in the argument, *infra*.

SUMMARY OF THE ARGUMENT

ISSUE I: Trial defense counsel was not deficient in failing to object to juror questions, request a mistrial, or seek recusal of the trial court. It was within the sound discretion of the trial court to allow jurors to ask questions. The trial court did not make any deleterious comments regarding the appellant or the defense team in allowing the questions. Appellant has not shown any grounds for recusal of the trial court.

Defense counsel did not render deficient performance in failing to investigate and prepare for witness Laventure's testimony. Counsel made a reasonable tactical decision not to depose his witness prior to trial. Witness Laventure's testimony was, on balance, beneficial to the defense and neither deficient performance nor prejudice has been established.

ISSUE II: Appellant failed to show that the bench conference from which he was excluded constituted a critical stage in the proceedings. Indeed, trial counsel testified that if the discussion concerned any matter of consequence she would have ensured appellant's presence and reconstructed the record.

ISSUE III: Appellant failed to show that counsel was deficient in failing to call him to testify during the penalty phase. Appellant testified during the guilt phase and his

proposed penalty phase testimony was cumulative to evidence presented by his family members and mental health expert.

ISSUE IV: Trial counsel made a strategic decision not to present evidence on the statutory mental mitigators during the penalty phase and declined to request corresponding instructions. Such evidence would have "opened the door" to the State to reveal the fact appellant raped the elderly victim or had sex with her corpse. Moreover, the jury was instructed to consider all of the mitigation evidence presented in this case. He has failed to establish any prejudice based upon counsel's failure to request instructions on the statutory mitigating circumstances.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HIS DEFENSE ATTORNEYS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE OF HIS TRIAL? (STATED BY APPELLEE).

Appellant first claims that he was denied the right to effective assistance of counsel because his attorneys failed to object to jurors being allowed to submit questions during the trial. Morris asserts his attorneys should have objected, requested a mistrial, or, sought recusal of the trial court. Appellant also asserts his attorneys were ineffective in failing to adequately prepare for witness Laventure's testimony. The State disagrees. The trial court properly rejected these claims after an evidentiary hearing below.

A. Standard Of Review

This Court summarized the appropriate standard of review in State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000):[1]

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

[1]This standard applies to all issues of ineffectiveness addressed in this brief.

This Court has stated that "[w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). Consequently, this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984) (citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

B. Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because

representation is an art and not a science, "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir.)(*en banc*), cert. denied, 516 U.S. 856 (1995)(citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

C. Appellant's Two Experienced Defense Attorneys Were Not Ineffective In Failing To Object To Juror Questions Below

The trial court noted that defense counsel Dimmig did not know why he failed to object to the jurors being allowed to ask questions below. Nonetheless, the court found the deficiency prong had been met, but noted that the defendant failed to establish any resulting prejudice. The court noted: "The Defendant failed to present any evidence that questions were asked by the jury let alone if the questions that were asked

were detrimental to Morris's cause. Here, the Defendant has failed to show that there is a reasonable probability that the result of the proceeding would have been different."[2] (V-5, 791-92).

The State first questions the trial court's conclusion that counsel was deficient for failing to object below. Dimmig testified during the evidentiary hearing below: "You know, I don't really have an independent recollection of why I did not object at the time. In hindsight, certainly, I would not do something that I thought would benefit the State in the prosecution of the case. Why I didn't raise it at that time, I do not know." (V-3, 352). Dimmig had "no independent recollection of any questions being asked by jurors." (V-3, 369). Dimmig recalled a discussion or issue coming up about a pending or proposed statute which would allow jurors to ask questions. (V-3, 350). At the time of trial there was "courthouse" talk about a "change that would allow jurors to ask questions." (V-3, 368).

Trial defense counsel was not deficient in this case. Such a finding presumes that allowing jurors to ask questions is improper and that the trial court would have precluded questions

[2]The court's order did not specifically address Morris's argument that defense counsel should have sought recusal of the trial court.

upon defense counsel's objection. This presumption is not justified in this case. The trial court clearly expressed his opinion that juror questioning was proper in this case. Indeed, case law indicates it is a matter within the sound discretion of the trial court.

At the time of appellant's trial controlling precedent from this Court allowed juror questions in a capital case. In Watson v. State, 651 So. 2d 1159, 1163 (Fla. 1994), this Court stated: "There is also no merit to Watson's claim that the trial court violated his right to an impartial jury when it allowed the jurors to submit questions to the witnesses. [footnote omitted]. As both Watson and the State concede, this practice has been condoned as permissible trial procedure. See Shoultz v. State, 106 So. 2d 424 (Fla. 1958); Ferrara v. State, 101 So. 2d 797 (Fla. 1958). We decline to revisit the issue." Morris has not cited any contrary authority which suggests that allowing juror questions in this case constitutes reversible error.[3]

[3]This distinguishes the case relied upon by the appellant, Eure v. State, 764 So. 2d 798 (Fla. 2d DCA 2000), where the court found a reasonable probability of a different result had defense counsel lodged an objection to the prosecutor's inappropriate comments. The Court noted that had such comments been objected to "undoubtedly we would have reversed Eure's conviction in this appeal." Here, had an objection been lodged, appellant's conviction would not be reversed as juror questions have been approved as appropriate by precedent from this Court.

Similarly, in Coates v. State, 855 So. 2d 223, 225-226 (Fla. 5th DCA 2003), the Fifth District noted that allowing jurors to ask questions in a criminal case is within the trial court's discretion. The court stated:

> Similarly, the court allowed the jury to ask questions of witnesses in a carefully controlled environment. The judge instructed the jurors to write any questions they might have with respect to a witness on a sheet of paper and to hand the document to the bailiff. Jurors were then asked to leave the courtroom while the judge reviewed the questions with the attorneys and ruled on any objections. Thereafter, the jury was readmitted to the courtroom and the judge asked the question of the witness. Each attorney was then given the opportunity to ask follow-up questions.
>
> Mr. Coates does not appear to object to any particular question that was asked. Rather, he argues that the court abused its discretion in allowing jury questioning at all. He asserts that the process of jury questioning compels jurors to become advocates, rather than neutral finders of fact. We again find no abuse of discretion.
>
> We conclude instead that the benefits of allowing jury questioning of witnesses is substantial, and that a trial court may exercise its sound discretion in determining whether to use it in a particular case. Our supreme court has approved jury questioning of witnesses, so long as the judge controls the procedure. See Watson v. State, 651 So.2d 1159 (Fla.1994), cert. denied, 516 U.S. 852, 116 S.Ct. 151, 133 L.Ed.2d 96 (1995). While there have been some misgivings expressed, the district courts of appeal have likewise sanctioned controlled jury questioning. See Henderson v. State, 792 So.2d 641 (Fla. 1st DCA 2001); Patterson v. State, 725 So.2d 386 (Fla. 1st DCA 1998);

> Tanner v. State, 724 So.2d 156 (Fla. 1st DCA 1998); Bradford v. State, 722 So.2d 858 (Fla. 1st DCA 1998); Pierre v. State, 601 So.2d 1309 (Fla. 4th DCA 1992); Scheel v. State, 350 So.2d 1120 (Fla. 3d DCA 1977); see also § 40.50(2), Fla. Stat. (2002). Similarly, virtually all federal jurisdictions that have considered jury questioning have sanctioned it under proper controls. See United States v. Hernandez, 176 F.3d 719 (3d Cir.1999); Shackelford v. Champion, 156 F.3d 1244 (10th Cir.1998), cert. denied, 525 U.S. 1150, 119 S.Ct. 1050, 143 L.Ed.2d 56 (1999); United States v. Feinberg, 89 F.3d 333 (7th Cir.1996), cert. denied, 519 U.S. 1133, 117 S.Ct. 997, 136 L.Ed.2d 876 (1997); United States v. Sutton, 970 F.2d 1001 (1st Cir.1992); United States v. Land, 877 F.2d 17 (8th Cir.), cert. denied, 493 U.S. 894, 110 S.Ct. 243, 107 L.Ed.2d 194 (1989); United States v. Polowichak, 783 F.2d 410 (4th Cir.1986); United States v. Callahan, 588 F.2d 1078 (5th Cir.), cert. denied, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979); United States v. Gonzales, 424 F.2d 1055 (9th Cir.1970). See, generally, Joshua H. Tucker, Comment, The Impartiality Question, Should Juror Witness Questioning Be Upheld, 25 Hamline L.Rev. 517 (2002).
>
> The procedure adopted by the trial court in the present case is essentially the one suggested by the Fourth District in Pierre v. State, 601 So.2d 1309 (Fla. 4th DCA 1992). While it may not be the only procedure that might be found acceptable, it is certainly one that assures careful control over the process. We accordingly find no abuse of discretion in its application during the trial of Mr. Coates.

Even assuming that allowing jurors to ask questions constitutes an adverse legal ruling, such a ruling provides no basis for recusal. Jackson v. State, 599 So. 2d 103, 107 (Fla.

1992)(holding that "[t]he fact that a judge has previously made adverse rulings is not an adequate ground for recusal."). Morris cites no case law to suggest that a trial court simply allowing jurors to ask questions constitutes valid grounds for recusal. The trial court did not engage in any deleterious commentary regarding the questions, allowed defense counsel input on the questions, and, did not depart from its neutral role. See Owen v. Crosby, 854 So. 2d 182 (Fla. 2003)(appellate counsel not ineffective for failing to raise procedurally barred issue of judicial bias where "trial judge made no statements which would cause Owen to believe that he would not receive a fair trial."). If anything, the record reflects that the trial court showed some degree of irritation toward the prosecutor in addressing juror questions. This occurred during a colloquy on questions regarding locations A, B, and C:

> MR. DIMMIG: Your Honor, at this point, the defense would make a motion in limine that the State not be permitted to ask any questions or attempt to elicit any evidence or make any statements concerning pretrial rulings in this particular case.[4] That's not relevant. It's not generally admissible evidence. There's no –-
>
> THE COURT: I agree with that. When I said he can prove it in the case, I meant prove

[4]The defense offered a stipulation which would explain that A, B, and C referred to locations on the body of Ms. Livingston, without telling them the actual body part, i.e., breast, and vagina.

> the fact that the locations came from the body of Ms. Livingston, not the reason for it.
>
> MR. DIMMIG: I certainly have no problem with that. My motion in limine is that the suggested language that Mr. Harb proposed for the stipulation not be used in terms of telling this jury that there has been any kind of a pretrial ruling.
>
> THE COURT: I understand.
>
> MR. HARB [PROSECUTOR]: Well, is the defense going to be calling the shots, Judge? I have a problem with that.
>
> THE COURT: I know you do, Mr. Harb, but I don't have any reason to –-
>
> MR. HARB: I'm asking the court –-
>
> THE COURT: –-debate it with you. There is either a stipulation or there isn't a stipulation. The fact that the jurors didn't even understand that the locations were on the body of Ms. Livingston is not my problem. That has never been a decision that the court interfered with. If they were confused about it, it's because they were confused about it in the State's case in chief. Call your first witness.

(T-22, 2140-42).

The record reveals no basis from which defense counsel could conclude that Morris would not receive a fair trial on the basis of judicial bias. Since were no valid grounds for recusal of the trial court, trial counsel cannot be considered ineffective for failing to file a recusal motion.

Regardless of the deficient performance prong, appellant's claim that counsel's 'error' in failing to object to the juror questions rendered the result of his trial unreliable, strains the outer bounds of credulity.[5] First, he fails to identify a single question which might have made a difference in this case. Appellant posits that the prosecutor's concern about potential juror confusion reflected in the questions is grounds enough to assume that answering the questions was harmful to the defense. Indeed, the questions do reflect some confusion on the part of the jurors. However, the jurors questions stem from the

[5]Appellant reliance upon United States v. Cronic, 466 U.S. 648 (1984) is misplaced. In Cronic the Court recognized that some extremely limited factual scenarios may obviate the need for a defendant to demonstrate prejudice for ineffective assistance of counsel. However, despite the fact that the trial court in Cronic had appointed an inexperienced real estate lawyer who was given only a limited time to prepare the case against fraud charges, the Court declined to find such a situation per se ineffective. Instead, the Court found in Cronic that the defendant must plead and prove deficient performance and resulting prejudice. Cronic provides no support for appellant's claims for post-conviction relief. See Fennie v. State, 855 So. 2d 597, 602 (Fla. 2003)(declining to apply Cronic on assertion that counsel was essentially absent during voir dire by failing to effectively question jurors on racial tension); Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990)(prejudice prong required even where counsel advised defendant to plead guilty to a charge that counsel had not investigated); United States v. Reiter, 897 F.2d 639, 644-645 (2d Cir 1990), cert. denied, 498 U.S. 990 (1990)(applying both prongs of Strickland despite defendant's claim that counsel's errors were so serious that it amounted "no counsel at all."). In this case, none of appellant's allegations suggest that the highly experienced defense attorneys were either incapable of representing him or effectively abandoned his cause.

confusing, and, in the State's view, inappropriate granting of a defense motion-in-limine, which reduced the State to referring to the victim's body parts on which Morris's genetic material were found as locations "A," "B," and "C." (T-22, 2138). Naturally, the jurors wanted to know what points A, B, and C referred to. (T-22, 2126). Unfortunately, they were deprived of this knowledge by the court ruling that any reference to the sexual battery be excluded.[6] Thus, the State was prevented from presenting the full force and effect of its DNA evidence in this case.

[6]On direct appeal, this Court declined to address the State's cross-appeal concerning the motion in limine which precluded any reference to sexual battery. Of course, the jury did hear evidence emanating from appellant's sexual attack upon Mrs. Livingston, the jury was simply not given the proper context of this evidence. As a result, the State was prevented from establishing the full force and effect of its identification evidence. The jury was shielded from unpleasant terms like "semen" and unpleasant locations on the victim's body where appellant's semen was found. Instead, the trial court protected appellant from his own misconduct, requiring the State witnesses to refer to appellant's semen as "biological material" and the vaginal and anal areas of the victim as points "A" and "B". (T-8, 1417, 1464; T-23, 2267-68; T-26, 2819). This evidence was directly relevant to identity, opportunity, motive, and was critical to the State's presentation of evidence on the murder count. Merely because this evidence is prejudicial did not require the State to prosecute appellant's crimes in a vacuum. Although the undersigned counsel is not aware of a procedural mechanism to re-address the cross-appeal at this point, the State nonetheless asks this Court to address this issue recognizing the potential for future litigation and to provide guidance for trial courts in the future.

The State possessed absolutely overwhelming evidence of appellant's guilt. In addition to appellant's fingerprint on the light bulb at the entrance of the victim's apartment, the DNA from blood matching appellant's was found on the curtain where the murderer apparently gained entry into the victim's apartment. (T-23, 2284-86, 2290-92). Moreover, genetic material from biological fluid [semen] found at two places on the victim's body also matched appellant's genetic profile. (T-23, 2289, 2296). Nothing presented at trial below or during the evidentiary hearing casts any doubt upon the validity of the DNA evidence used in this case.[7]

In addition to the compelling DNA evidence presented by the State, appellant was observed passing the victim's stolen coins to two different merchants,[8] and property stolen from the victim was found in his apartment.[9] (T-24, 2536-39, 2568-69, 2539-40).

[7]Testing on blood found on the curtain revealed a genetic frequency of approximately 1 in 7.1 million among African Americans. (T-23, 2296). For Caucasians, the frequency is even more rare, approximately 1 in 39 billion. (T-23, 2296).

[8]At the Texaco station, Tambra Clarke, who recognized appellant from previous visits to the store, testified that appellant used rare coins to purchase items two days after the victim's murder. Ms. Clarke testified that appellant used the following coins: "...one silver dollar and there was two Kennedy half dollars and then two silver quarters." (T-24, 2567-68).

[9]Ian Floyd, who used to play basketball with appellant, observed a small television set of the type missing from the victim's residence in appellant's apartment after the victim's murder. (T-24, 2574-77).

Appellant had scratches on his hands and arms after the victim's murder (T-24, 2546-48) and a glove with blood on it was recovered from a dirty clothes hamper in his apartment.[10] (T-24, 2538-39). Appellant's cell mate, Sastre, testified that he helped appellant come up with the 'story' to explain away his fingerprint on the victim's lightbulb, i.e., the attempted theft of a bike. (T-26, 2889-91). Further, appellant admitted to Sastre that he murdered the victim and that he would take a deal for life, but would not accept the death penalty. (T-26, 2894-95). Appellant also admitted to Sastre that he wore socks on his hands at the time of the murder. (T-26, 2891).

In sum, there is no possibility that the fact the jurors were able to submit questions in writing in this case rendered the result of appellant's trial unreliable or unfair. The State submitted overwhelming evidence of appellant's guilt and he has failed to meet his burden of establishing prejudice under Strickland. The trial court's denial of relief on this claim should be affirmed on appeal.

D. Defense Counsel Was Not Ineffective In Failing To Properly Prepare For Witness Laventure's Testimony

Appellant next contends that defense counsel was ineffective for failing to prepare for the guilt phase of his

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[10]The glove had blood on it with genetic characteristics consistent with the appellant's. (T-23, 2286).

trial. Specifically, he contends that counsel was ineffective in failing to depose defense witness Laventure prior to trial. The State disagrees.

The trial court rejected this claim below, stating, in part:

> Mr. Dimmig testified he conducted a phone interview of witness Ms. Laventure. During the interview she informed him that she observed an individual that was definitely not a black man. However, Mr. Dimmig testified that he was aware before trial that Ms. Laventure was not a willing witness as she previously indicated. Mr. Dimmig testified at trial Ms. Laventure testified that she observed a man lurking around that was definitely not white. Mr. Dimmig admits that Ms. Laventure's testimony was a surprise and detrimental. He attempted to recover by refreshing Ms. Laventure's recollection of the statement she made to him. Mr. Dimmig acknowledges that he did not have a written deposition in which he could utilize to impeach Ms. Laventure. However, he testified that it is not his standard procedure to depose defense witnesses. Throughout his career, in excess of twenty years, Mr. Dimmig doesn't ever recall deposing a defense witness.
>
> This Court finds that Mr. Dimmig's conduct and representation met the standard of performance and there was no deviation from the required standard of performance. Thus, the Defendant is unable to meet either prong of the Strickland test, and ground I (B) is denied.

(V-5, 792-93).

Ms. Laventure lived in a house behind the Martin's Landing complex where the murder occurred. (V-3, 355). Ms. Laventure

was interviewed by the police in their "neighborhood canvass" and also interviewed by the Public Defender investigators who were assisting Dimmig in preparing his case. (V-3, 355-56).

Laventure testified at trial that she did not get a good look at the individual lurking around the victim's apartment. However, she did testify that "he wasn't white." (V-3, 357). Dimmig attempted to refresh her recollection with a conversation she had with him. (V-3, 357). He was unable to impeach her testimony with a prior phone conversation. (V-3, 358). Dimmig admitted that he did not have any prior written statements or depositions with which to impeach her testimony. (V-3, 358).

Appellant essentially contends that a defense attorney must depose any witness he plans to call at trial, or, at least any witness he believes might be "reluctant." However, as Dimmig testified, he has never deposed his own witnesses. Nor, did he know of any defense attorneys who deposed their own witnesses. Obviously, deposing your own witness opens the door to revealing defense strategy and allows the State to prepare for the witness. Dimmig made a reasonable tactical decision not to depose witness Laventure.

The presumption of effectiveness is even more difficult to overcome when addressing the conduct of an experienced defense attorney such as Mr. Dimmig. See Chandler v. United States, 218

F.3d 1305, 1316 (11th Cir. 2000), *en banc*, ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger."). Dimmig was an Assistant State Attorney for five years and the remaining years he has spent practicing as a criminal defense attorney, "in excess of 20 years." (V-3, 371). Dimmig testified that he never deposed his own witnesses. (V-3, 371). Dimmig had either talked to Laventure or had someone else talk with her prior to trial and felt he knew what she would say on the witness stand. (V-3, 372). "I did not want to take a deposition of her, because then the State would be aware of her, so, yeah, I didn't have one I could use." (V-3, 372).

Dimmig explained that Ms. Laventure would provide relevant testimony in two respects. One was that the person she observed outside of Ms. Livingston's apartment earlier on the day of her murder was not black, and, the second was that Morris was accounted for at the time she observed this other individual. Therefore the jury could conclude that this individual was not Mr. Morris. (V-3, 369-70). So, he presented evidence in the form of time records from Taco Bell to show that the individual Laventure observed was not Morris. (V-3, 370). Her testimony did not harm the overall theory of the defense, but, Dimmig did believe her testimony was damaging since he made a specific

reference in opening regarding what he expected her to testify to. (V-3, 371). Dimmig testified that in his experience it is "not uncommon to be surprised" by what a witness testifies to at trial. (V-3, 373).

The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992). See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000)("Counsel's strategic decisions will not be second guessed on collateral attack."). "Even if in retrospect the strategy appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983), cert. denied, 464 U.S. 1063 (1984). See Valle v. State, 778 So. 2d 960 (Fla. 2001)("This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected.")(citing Shere v. State, 742 So. 2d 215, 220 (Fla. 1999)). Since it was standard practice for defense attorneys

not to depose their own witnesses, it cannot be said Dimmig was ineffective for failing to depose witness Laventure.

Aside from appellant's failure to establish deficient performance in this case, he has completely failed to establish any resulting prejudice. Appellant's assertion that defense counsel should have called investigator Barfield in an attempt to impeach Laventure is without merit. Post-conviction counsel failed to call Barfield during the evidentiary hearing and this Court may not simply speculate about the impact or potential relevance of his testimony in this case. See Spencer v. State, 842 So. 2d 52 (Fla. 2003)(rejecting ineffectiveness claim where collateral counsel failed to call the allegedly impeaching witness during the evidentiary hearing and noting that reversible error cannot be predicated on "conjecture.")(citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)).

Militating against any finding of prejudice in this case is the deft manner in which trial defense counsel addressed Laventure's testimony in closing argument:

> ...I wanted you to hear from Sherry Laventure because the bottom line, the issue she was going to talk about is the fact that there was somebody seen lurking around Violet Livingston's apartment the afternoon of September 1st, the afternoon before the night when she was murdered, who didn't belong there. I thought she was going to say he wasn't black. I was willing to live with that. It didn't help me a lot because

> there were Negroid body hairs found inside Mrs. Livingston's apartment. So you would think, well, maybe it's more likely that a black was the one in there.
>
> The population geneticists have told you that this particular DNA profile is more common, significantly more common in the African American database than it is in the Caucasian database or the Hispanic database. I still wanted you to hear it even though I thought she was going to say it wasn't a black person. It didn't matter. We know it wasn't him because Julie Woodruff from Taco Bell got on the witness stand and said he was working from 2:00 to 5:30 on Thursday afternoon, September 1st. She had the records initialed by the manager on duty.
>
> You heard Ms. Laventure say she knows what time it was, after two o'clock, because she goes to get her daughter from school, so she went out to get the mail just before getting in her car. So we know it wasn't him. Apparently, maybe it was a black person. So be it. The issue is somebody was lurking around that apartment, somebody who the police got told about. Ms. Laventure told you she told the police about this person, and yet that's not checked out either.

(T29, 3435-37). The fact that the person Ms. Laventure observed may have been African American probably worked to appellant's advantage given the physical evidence suggesting that the attacker was in fact, African American. The most important fact elicited from Ms. Laventure in favor of appellant's defense was the time this individual was observed near the victim's apartment. The prosecutor apparently did not dispute the fact that the defendant was at work between 2:00 and 5:00 on

September 2nd. The prosecutor in fact, appeared to accept the testimony that appellant was at work:

> ...We know that Mrs. Livingston was alive at six o'clock that night. We know that he did not get home until about 5:45 p.m. He said he got off work about 5:30, took him about 15 minutes and things got vague from that point on. Things got so conveniently vague as to the time.

(T-28, 3361-62).

Thus, based upon this record, the race of the individual observed by Ms. Laventure was not critical to appellant's defense. And, since the jury was specifically advised that no defense attorney or any representative of the defense advised **any** witness to present false testimony, it cannot be said that appellant suffered any prejudice as a result of counsel's failure to depose witness Laventure prior to trial.

ISSUE II

WHETHER APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL WHEN DEFENSE COUNSEL HELD A DISCUSSION WITH THE TRIAL COURT OUT OF MORRIS'S PRESENCE WITHOUT A WAIVER? (STATED BY APPELLEE).

Appellant next asserts that his defense attorneys rendered ineffective assistance by participating in a bench conference without Morris present or obtaining a waiver of his presence.[11] The State disagrees.

The trial court rejected this claim below, stating, in part:

> When questioned about matters that were discussed in a bench conference outside the presence of Morris, Ms. Garrett testified that she has no independent recollection of the conversation. She stated that she did read the transcript in preparing for her testimony at the evidentiary hearing. She was unable to say with any certainty that the exchange that took place was regarding a legal matter that involved Morris. However, she stated that based on her background, her training and the fact that she did not reconstruct the conversation on the record,

[11]Any substantive claim of error emanating from his lack of presence is procedurally barred for the failure to object at trial below and raise the issue on direct appeal. See Cole v. State, 701 So. 2d 845 (Fla. 1997)(failure to contemporaneously object at trial bars appellate claim that lower court erred in holding bench conferences in hallway without defendant's presence); Vining v. State, 827 So. 2d 201, 217 (Fla. 2002)("substantive claims relating to Vining's absence are procedurally barred as they should have been raised either at trial or on direct appeal.")(citing Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)).

> she believes that the conversation was not pertinent to the legal issues of Morris.
>
> The Court finds that Ms. Garrett is a credible witness and the testimony provided by her is reliable. Therefore, the Court finds that Ms. Garrett's conduct and representation met the standard of performance and there was no deviation from the required standard of performance. Thus, the Defendant is unable to meet either prong of the Strickland test, and ground VI is denied.

(V-5, 795-96).

The trial court found that Ms. Garrett was a credible witness. Ms. Garrett testified below that she did not believe she would have excluded Morris from a discussion in which he needed to be present. (V-3, 407). The fact that there was no reconstruction after the bench conference led Garrett to believe that the matter was not consequential. (V-3, 407-08). The record supports her testimony and the trial court's denial of relief on this issue below.

Appellant failed to show that the bench conference constituted a critical stage in the proceeding in which his presence was required. See Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000)("The constitutional right to be present does not extend to bench conferences involving purely legal matters because the defendant's presence would be of no assistance to counsel.")(citation omitted). The fact that Ms. Garrett, Mr. Dimmig, Mr. Harb, and the trial court, agreed to discuss a

matter outside of Morris's presence, and, indeed, off the record, clearly suggests that the matter discussed was not a substantive legal matter. Prior to Ms. Garrett bringing up "one other thing" off the record, Dimmig was evidently prepared to make a motion for mistrial. However, he was reminded by the prosecutor that his client, Morris, needed to be present. Dimmig agreed: "Yeah. We would need him in here." (T-33, 4168). When they went back on the record and the defendant entered the courtroom Dimmig made a motion for mistrial based upon publication of a fingerprint card. Id. This sequence of events clearly indicates that the prosecutor and defense attorneys were cognizant of the need for appellant's presence –- when discussing a substantive legal or factual matter. The record therefore supports the trial court's conclusion below, that Garrett would not have discussed a substantive legal or factual matter off the record and outside of Morris's presence.

Aside from failing to establish any deficiency on the part of counsel, appellant has completely failed to address the prejudice prong. In Vining v. State, 827 So. 2d 201, 217-18 (Fla. 2002), this Court rejected a similar claim, stating, in part:

> In relation to this claim, Vining has failed to show how he was prejudiced by his absence during the pretrial and pre-penalty phase proceedings, nor has he asserted how

> he could have made a meaningful contribution to counsel's legal arguments during these preliminary proceedings. As to Vining's absence from the bench conferences, while our ruling in Coney requires a defendant's physical presence at the immediate site of a bench conference, that ruling was prospective in application and thus did not apply to Vining's 1990 trial. See Boyett v. State, 688 So.2d 308, 309 (Fla. 1996) (stating that Coney rule regarding physical presence did not apply retroactively to trial that took place before Court's opinion was released). Furthermore, as the lower court noted, Vining has not shown that any matter discussed during these bench conferences required his consultation nor has he demonstrated any prejudice from his absence. While Vining cites a number of pages in the trial record where he allegedly was not present for bench conferences, he does not elaborate on what was discussed during these conferences or how he was prejudiced by his absence during them. Finally, as to Vining's absence when the jury asked the judge a question during guilt deliberations, the lower court noted that both defense counsel and the prosecutor were present when the trial judge responded "no" to the jurors' question of whether they should decide on an advisory sentence if they should agree on a verdict of first-degree murder. Because this was clearly the appropriate response, the postconviction court concluded, and we agree, that any error resulting from Vining's absence was clearly harmless. Thus, we affirm the lower court's denial of the claim relating to Vining's absence because he has failed to meet the Strickland prejudice prong.

As in Vining appellant failed to show that his presence would have altered the outcome of his trial in any manner. See also Wike v. State, 813 So. 2d 12, 22 (Fla. 2002)(affirming

denial of post-conviction relief on defendant's claim of absence from bench conferences where trial court found only legal issues were discussed and that defendant therefore failed to demonstrate prejudice under Strickland.). Indeed, appellant did not show that any matter of consequence was even discussed. Spencer, *supra* (reversible error cannot be predicated on "conjecture."). Consequently, the trial court's ruling denying relief must be affirmed.

ISSUE III

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE IN FAILING TO CALL MORRIS TO TESTIFY DURING THE PENALTY PHASE OF HIS TRIAL? (STATED BY APPELLEE).

Appellant next asserts his defense attorneys were ineffective for failing to call him to testify during the penalty phase of his trial. The trial court rejected this claim below, stating, in part:

> ...Ms. Garrett testified that Morris never requested to testify in the penalty phase. Ms. Garrett testified that she had extensive discussions regarding the defense strategy with Morris. It was decided that the best strategy was to have Morris testify in the penalty [guilt] phase. Ms. Garrett testified that she and Mr. Dimmig decided that it would be important for Morris to testify and state directly to the jury that he was innocent. However, when the trial entered into the penalty phase, she believed it would not have been effective to place Morris on the stand. It was obvious that the jury determined that they did not believe Morris, because they found him guilty in the guilt phase.
>
> . . .
>
> Based on the evidence presented, and applying the Strickland standard the court finds that the alleged deficiencies in representation raised by the defendant do not constitute ineffective assistance of trial counsel, but, rather, conscious, strategic, and tactical decisions. "Tactical or strategic decisions of counsel do not justify post conviction relief on the grounds of ineffective assistance of counsel." Gonzalez v. State, 579 So. 2d

> 145, 146 (Fla. 3d DCA 1991). Consequently, claim VII is denied as it fails both prongs of the Strickland test.

(V-5, 796-97). The trial court's ruling is supported by the record and should be affirmed on appeal.

Dimmig was not aware of any requirement for two inquiries on the right to testify in a capital case covering the guilt and penalty phases. Dimmig did not recall Morris ever asking him if he could testify during the penalty phase and never nudged him to say something said on the stand was not correct and that he wanted to answer it. (V-3, 468-69).

Ms. Garrett did not recall any specific conversations about Morris testifying. Ms. Garrett testified:

> I know that Rex [Dimmig] and I talked extensively about how to present the penalty phase effectively, and I would think that this would be something that would be part of the discussion. I can't independently remember now whether or not that was something we talked about.
>
> I know that we had many conversations about what was the most effective way to get his story across in terms of his upbringing and the mitigation that it would present.

(V-3, 411).

Ms. Garrett recognized that calling Morris in the penalty phase might not be a wise move. Morris maintained his innocence at trial and Dimmig and Garrett both felt that it was important for him to testify during the guilt phase. (V-3, 408). They

hoped that even if they were not successful in the guilt phase that the jury would get to know Mr. Morris and in effect humanize him. (V-3, 409). The defense considered the fact the jury in effect found Morris was lying during the guilt phase, and, that it might not be effective to put him on again in the penalty phase. (V-3, 409-10). "The jury already met him and heard him speak and been able to look him in the eye and all of that. Benefit had already been obtained." (V-3, 410).

Appellant contends that this Court's ruling in Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993), requires an on the record waiver of the right to testify in the penalty phase. (Appellant's Brief at 44). However, Deaton does not stand for the proposition that a court must obtain an on the record waiver of the right to testify. Indeed, this Court has rejected the need for an on the record waiver. Davis v. State, 875 So. 2d 359, 368-69 (Fla. 2003).

In Deaton, this Court rejected the State's appeal of a trial court's order granting the defendant a new penalty phase. The defendant in Deaton waived the right to testify and present witnesses in mitigation. However, this Court found the waiver was not knowing, voluntary, or intelligent because his counsel failed to investigate mitigating evidence. 635 So. 2d at 8.

This Court noted that "no evidence whatsoever was presented to the jury in mitigation." Id.

In contrast to Deaton the defense attorneys in this case conducted an extensive penalty phase investigation. Moreover, the defendant did not waive the right to present mitigating evidence. In fact, the defense attorneys presented substantial mitigating evidence during the penalty phase, including lay witnesses and expert mental health testimony. Thus, Deaton provides no support for appellant's contention that a new penalty phase is warranted.

In Monlyn v. State, 894 So. 2d 832, 837-38 (Fla. 2004), this Court addressed a similar claim of ineffectiveness based upon counsel's alleged failure to inform the defendant of his right to testify in the penalty phase. In rejecting this claim, this Court stated:

> Monlyn claims that counsel was ineffective for failing to advise him that he could testify in his own behalf during the penalty phase. At the evidentiary hearing, Monlyn testified that although he testified in the guilt phase of trial, counsel did not inform him of this right to testify during the penalty phase. He said that he would have testified that he was "sorry for what happened" and that he was just "in the wrong place at the wrong time." Monlyn's trial counsel testified that he had no specific recollection of advising Monlyn. At the time of the trial, however, counsel had practiced law for twenty years and had served as counsel to murder defendants in at

least fifty cases, approximately ten of which were death penalty cases. He said that his standard practice was to discuss the right with the client "in each and every case" and that the decision to testify was the client's. Asked if he "probably" followed his practice in this case, counsel responded, "Not probably. I did it." The lower court found, as a matter of fact, that Monlyn was advised of his right to testify and that the proposed remorse testimony would not have resulted in a life recommendation.

To establish this claim, Monlyn must meet both prongs of Strickland. Oisorio v. State, 676 So.2d 1363, 1364-65 (Fla.1996) (holding that to succeed in an ineffectiveness claim that trial counsel interfered with defendant's right to testify, defendant must meet both prongs of Strickland). He has failed as to both. The trial court's finding, based on trial counsel's unswerving testimony, that counsel always advised clients of this right and that he did so in this case, is supported by competent, substantial evidence. See Roberts v. State, 840 So.2d 962, 973 (Fla.2002) ("Findings on the credibility of evidence by a lower court are not overturned if supported by competent, substantial evidence."); accord Zakrzewski v. State, 866 So.2d 688, 696 (Fla.2003) (citing Roberts and, where defendant's and counsel's testimony conflicted, upholding the trial court finding that counsel was credible).

Further, Monlyn has shown no prejudice. Monlyn testified during the guilt phase that he did not intend to kill the victim and that he felt "bad" about it. He testified at the evidentiary hearing that he was "just in the wrong place at the wrong time." Such testimony does not reflect remorse and appears to be an attempt to minimize responsibility. Further, Monlyn's testimony stands in direct contravention of the trial testimony presented to the jury that Monlyn

> planned to rob or kill the victim, or both, and Monlyn's own trial testimony that he chose to hide out in the victim's barn for two nights after he escaped from prison. The evidence showed that he beat the victim with such severity--inflicting over thirty blunt injury wounds--that the victim died after Monlyn tied, gagged, and hid him. Monlyn left the victim to die without seeking any help. The jury unanimously recommended death, and the trial court found five aggravating circumstances, including two of the most serious--that the crime was especially heinous, atrocious, or cruel, and that it was cold, calculated, and premeditated. See Larkins v. State, 739 So.2d 90, 95 (Fla.1999) (stating that "[HAC and CCP] are two of the most serious aggravators set out in the statutory sentencing scheme"). The trial court found no statutory mitigation and only three nonstatutory mitigating factors. Thus, no reasonable probability exists that the outcome of the penalty phase would have been different had Monlyn testified.

Here, appellant never told his attorneys he wanted to testify in the penalty phase. It can be surmised that he was aware of his right to testify, and, in fact, he did testify during the guilt phase. Moreover, as in Monlyn appellant failed to establish that his proposed penalty phase testimony would be of any benefit.

Appellant's testimony on his background raised nothing new from that presented by family members and Dr. Dee during the penalty phase below. Moreover, on cross-examination, appellant denied once again that he even committed the murder.

Appellant's defiant attitude, in the face of overwhelming evidence of his guilt, would defeat the defense case in mitigation, a possibility recognized by Ms. Garrett during the evidentiary hearing below. Thus, it was certainly a reasonable defense strategy not to offer appellant's testimony in the penalty phase. See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000)("Counsel's strategic decisions will not be second guessed on collateral attack.").

Aside from failing to demonstrate any deficiency, appellant has completely failed in his burden of demonstrating prejudice under Strickland. Morris's testimony was entirely cumulative to that presented by his defense attorneys through family members and Dr. Dee below. See Brown v. State, 894 So. 2d 137 (Fla. 2004)(even if there was some deficiency on the part of counsel, "there is no prejudice because the additional testimony presented at the evidentiary hearing contributes virtually no new information and is merely cumulative to the testimony presented at trial.")(citations omitted); Downs v. State, 740 So. 2d 506, 516 (Fla. 1999)(affirming trial court's denial of ineffectiveness claim for failing to present mitigating evidence where the additional evidence was cumulative to that presented during sentencing).

Although collateral counsel claims that Morris could have described his childhood with "halting eloquence" his testimony during the evidentiary hearing below was neither eloquent nor compelling. Indeed, rather than presenting compelling testimony, appellant simply stated in response to leading questions that he "could" have described various incidents from his childhood. Thus, the record does not support appellant's assertion that he addressed his background or abuse in a compelling manner.[12] His testimony was certainly no more compelling than the witnesses presented by the defense at his trial below.[13] And, those witnesses did not carry the same risk of alienating the jury which Morris's testimony certainly posed. Consequently, the trial court's ruling should be affirmed on appeal.

[12]Morris testified that **he would have been** in a position to tell the jury of his upbringing, how it felt to have his mother make him steal, and how he came to be diagnosed with ulcers. (V-3, 426). He did not state how it actually felt.

[13]The defense presented eleven witnesses during the penalty phase. They included Morris' mother, sisters, daughter, niece, family friends, and, a teacher. (T-31, 3927 through T-34, 4340). Appellant's troubled childhood was fully developed and presented to the jury below. The defense presentation was so thorough that collateral counsel did not offer a single additional lay witness [with the exception of Morris], to testify regarding mitigation that might have been overlooked by trial defense counsel.

ISSUE IV

WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST INSTRUCTIONS ON STATUTORY MITIGATORS? (STATED BY APPELLEE).

Appellant finally contends that trial defense counsel were ineffective in failing to request an instruction on the statutory mental mitigators below. The trial court rejected this claim below, stating, in part:

> As to claim IX, Ms. Garrett testified that there was some concern that if she asked for statutory mitigation the State would be allowed to inquire into the facts. Facts that potentially included issues Mr. Dimmig had successfully kept out during the guilt phase. She testified that she made a strategic choice to list all the mitigation factors without reference to statutory or non-statutory mitigation.
>
> Here, trial counsel's testimony substantiated each of the alleged errors or omissions as defense tactics. Thus, the Defendant is unable to overcome "the presumption that under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689. Claim IX is denied.

(V-5, 798). The trial court's ruling is supported by the record and should be affirmed on appeal.

The failure to elicit testimony on the statutory mental mitigators and resulting failure to request a statutory mental mitigator instruction was not the result of inadvertence or a failure to investigate. It was a tactical decision made by highly experienced defense attorneys, a decision that has not

been shown to be unreasonable even using prohibited "20/20" hindsight. Defense counsel's decision shielded the jury from some highly damaging information. See Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000), *en banc*, ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger."). A strategic choice such as the one made by defense counsel in this case is almost immune from post-conviction attack. See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000) ("Counsel's strategic decisions will not be second guessed on collateral attack."). "This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected." Spencer, 842 So. 2d at 62; accord Valle v. State, 778 So. 2d 960 (Fla. 2001).

This case is unusual because the tactical nature of defense counsel's decision on the statutory mental mitigators and its clear benefit is reflected in the trial record. The defense did not elicit any testimony from Dr. Dee regarding the statutory mental mitigators before the jury. The defense therefore failed to "open the door" to the prosecutor to reveal the details of appellant's offenses. Specifically, defense counsel's tactical decision precluded the jury from learning that appellant raped

the victim before murdering her or that he sexually assaulted her corpse. Defense counsel's decision clearly frustrated the prosecutor who intended to question Dr. Dee about the sexual aspects of appellant's offenses. See Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995)(decision not to offer expert testimony as to mental condition at trial was reasonable tactical decision where counsel "feared that the presentation of psychiatric testimony would 'open the door' to allow the prosecution to parade the horrible details of each of the murders before the jury under the guise of asking the psychiatrist or other expert whether Bonin's acts conform to the asserted diagnosis.").

When the prosecutor mentioned the mental mitigators on cross-examination of Dr. Dee, the defense objected, claiming it was beyond the scope of direct. The defense accused the prosecutor of attempting to build up a "straw man" only to knock him down. (T-34, 4381). The prosecutor clearly wanted to be able to present to the jury the fact that Dr. Dee was aware of and had considered the fact that appellant either committed sexual battery on the victim or had sex with her corpse. The prosecutor asked the court to reconsider the motion in limine on sexual battery in light of Dr. Dee's testimony. However, the trial court rejected the prosecutor's motion, stating: "Your motion is denied. I don't think the door is open enough at

least to abate Judge Moore's pretrial order. It may, but I don't think so. So you can proffer or not as you choose." (T-34, 4343). The prosecutor's proffered cross-examination of Dr. Dee included reference to the sexual battery upon the living or dead victim. (T-34, 4345-48, 4350, 4367-4370).

The door would clearly have been opened for the prosecutor if Dr. Dee talked about the statutory mental mitigators. And, in fact, the defense did present testimony that appellant was substantially impaired at the time of the offenses during the Spencer hearing. Dr. Dee testified that in his opinion, appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. (T-10, 1692-94). Thus, counsel's decision in this case was not borne out of ignorance or a failure to investigate. And, the trial court found the substantial impairment mitigator based upon Dr. Dee's testimony.

Ms. Garrett testified that presenting the statutory mental mitigators is "kind of a mine field" because it opens up areas of attack for the prosecution. (V-3, 415). This was something they discussed in Morris's case. (V-3, 415). It was a strategic choice to request the mitigation instruction that she did in this case, it was an informed decision. (V-3, 416).

And, Dimmig had successfully kept evidence of sexual battery from the jury. In other words, the jury never learned that Morris committed an actual sexual battery or had sex with a corpse. (V-3, 416). "I know that we were very concerned about being able to make the most of the fact that we had a much cleaner fact situation than we would have had if we had to try -- I mean, cleaner in the sense of less troubling to the jury, hopefully, because of the nature of the offense. That sounds like something we would have thought about, but I don't remember right now." (V-3, 417). But, it was very much part of their plan to shield the jury from the fact that Morris either raped the victim or had sex with her after she was dead. (V-3, 417).

Dr. Dee's evidentiary hearing testimony confirms that trial defense counsel made a reasonable tactical decision in this case. Dr. Dee testified: "As I recall, the best I can recall, it was a result of the strategic decision on the part of defense attorneys not to go into those specific facts. They just wanted to talk about mitigation, both statutory and nonstatutory without asking me which was which." (V-3, 447). In his experience, when he testifies on the statutory mitigators prosecutors bring out all the negative things in a person's background that might show a manifestation of the extreme mental or emotional disturbance. (V-3, 449-50). "So that often what

would look like a statutory mitigator may turn out in the eyes of the jury to be an aggravator, actually in my experience. That's why the prosecutors handle it that way." (V-3, 450). In fact, Dr. Dee recalled that in this case, the defense separated the penalty phase from the Spencer hearing in terms of presenting statutory mitigating circumstances. Dr. Dee explained: "As I recall, that's why they had developed the strategy they had, not to go into whether or not it was statutory or nonstatutory and that way I wouldn't have to talk about the facts of the case, as a matter of fact." (V-3, 450). In this case, Dr. Dee acknowledged, that would have revealed the fact there was a sexual assault on Ms. Livingston either alive or dead. (V-3, 450).

Even assuming, *arguendo*, appellant established some deficiency based upon defense counsel's failure to request statutory mitigating instructions, he has failed to show any resulting prejudice. With regard to the penalty phase, this Court observed that a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), cert. denied, 534 U.S. 878 (2001) (quoting Strickland, 466 U.S.

at 695). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

Here, the jury was told to consider any and all circumstances presented in appellant's background as a mitigating circumstance –- the catch all instruction. The jury was instructed to consider all of the mitigation evidence presented in this case. He failed to show that the evidence presented to the jury even supported an instruction on the statutory mitigating circumstances,[14] much less establish them by a preponderance of the evidence. Thus, had the defense requested such instructions, they would have properly been denied by the trial court. See e.g. Floyd v. State, 850 So. 2d 383 (Fla. 2002)("In the absence of both a request for an instruction on age and any evidence on which the trial judge could base a decision to find it as a mitigating factor, we determine that no error occurred.")(citing Cooper v. State, 492 So. 2d 1059, 1063 (Fla. 1986)).

[14]The defense did not present testimony on the statutory mental mitigators during the penalty phase. The defense later offered such evidence through Dr. Dee during the Spencer hearing.

Appellant's sentence is supported by four aggravating factors in this case, HAC, financial gain, prior violent felony convictions, and committed while under supervision or imprisonment. Appellant broke into Mrs. Livingston's apartment, entered her bedroom, and embarked upon a horribly violent attack upon the 88-year-old victim. Defensive wounds revealed that Mrs. Livingston attempted to resist the attack, but was beaten down by the appellant, and, ultimately killed. (T-SR1, 93). Coupled with appellant's financial motive and the crimes of violence in appellant's past, for which he was still under supervision by corrections, it becomes abundantly clear that the lack of instructions on statutory mitigating circumstances had no impact upon the outcome of this case.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to affirm the denial of postconviction relief in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard E. Kiley and James V. Viggiano, Jr., Assistant CCRC-Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136; and to John K. Aguero, Assistant State Attorney, Tenth Judicial Circuit, P.O. Box 9000 - Drawer SA, Bartow, Florida 33831-9000, this _____ day of May, 2005.

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).

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COUNSEL FOR APPELLEE