IN THE SUPREME COURT OF FLORIDA

JASON BRICE LOONEY,

Appellant,

v. CASE NO. SC05-159

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR WAKULLA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. Procedural History

On August 26, 1997, Guerry Wayne Hertz, Jason Brice Looney, and Jimmy Dewayne Dempsey were indicted for the first-degree murders of Melanie King and Robin Keith Spears, committed on the 27th day of July, 1997, in Wakulla County, Florida. They were also indicted for burglary of a dwelling while armed, armed robbery with a firearm, arson of a dwelling and use of a firearm during the commission of a felony. (RI 1-3).[1] Pursuant to Rule 3.202, Florida Rules of Criminal Procedure, the defense was notified on August 27, 1997, that the State intended to seek the death penalty against the aforenamed defendants. (RI 14).

Pretrial, a series of motions were filed.[2] On April 7, 1999, a hearing was held on Hertz= motion to determine his competency to stand trial (RIII 216-475). Jury selection and the trial commenced November 29, 1999, and concluded on December 9, 1999, with a jury convicting Guerry Hertz and Jason Looney of

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[1] "R" refers to the original record on appeal and "PCR" refers to the postconviction record on appeal.

[2] Motions to sever the cases; to preclude the State from introducing evidence relating to events that occurred in Daytona Beach regarding this case; and a plethora of challenges to the imposition of the death sentence, as well as aggravating factors and a request to declare Section 922.10, Florida Statutes, as unconstitutional.

first-degree murder of Melanie King and Robin Keith Spears; guilty of burglary of a dwelling while armed with a firearm; guilty of armed robbery with a firearm; guilty of arson of a dwelling; and guilty of use of a firearm in the commission of a felony. (RXVIII 2177-2180). The penalty phase of the proceedings was held on December 9, 1999 (RXVIII-XIX 2200-2416). By a majority vote of 10-2, for each murder, the jury recommended and advised that the death penalty be imposed against Guerry Wayne Hertz and Jason Brice Looney. (RXIX 2415-2416; RI 189, 190).

Sentencing was held February 18, 2000, at which time the trial court, in concurring with the jury=s recommendation that the death penalty be imposed, prepared a sentencing order, setting forth the aggravating and mitigating circumstances found. (RII 281-290). As to Jason Brice Looney, the trial court found as aggravating factors that (1) Looney was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (aggravated battery in Volusia County, Florida); (2) the capital felony was committed while Looney was engaged in the commission of a burglary, arson and robbery; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (the defendants

discussed and determined that they would leave no witnesses); (4) the crime was committed for financial or pecuniary gain (**the court merged this aggravating factor with the capital felony was committed during the course of a burglary, arson or robbery**); (5) the murder was especially heinous, atrocious or cruel, and (6) the murder was cold, calculated and premeditated without any pretense of moral or legal justification (RII 281-286); Looney v. State, 803 So.2d 656, 682 (Fla. 2001).

In mitigation, the trial court found: (1) Looney=s age of twenty (20) which was given only moderate weight; (2) as to all other non-statutory mitigation, (a) Looney=s difficult childhood was given significant weight; (b) Looney had no significant criminal history or no history of violence and the fact that he posed no problems since being incarcerated was given marginal weight; (c) Looney was remorseful was given moderate weight; (d) the fact that society would be adequately protected if he were to be given a life sentence without the possibility of parole was entitled to little weight, and (e) the fact that a co-defendant, Dempsey, received a life sentence following a plea, was given significant weight and substantially considered by the trial court. (RII 287-290).

On appeal, the Florida Supreme Court, in Looney v. State, 803 So.2d 656 (Fla. 2001), affirmed the judgments and sentences

entered.[3] Looney filed a petition for writ of certiorari in the Unites States Supreme Court which was subsequently denied in Looney v. Florida, 536 U.S. 963 (2002) (Ring/Apprendi issue).

B. Facts of the Case

John Gunn, a law enforcement investigator with the State Fire Marshall=s Office in Tallahassee, Florida, testified that the kind of damage that was done by the fire does not happen unless an accelerant is used. (RXIII 1628). Moreover, since fire travels upward normally, the pattern that was shown in the trailer of running throughout the house was also consistent with an accelerant being used. (RXIII 1629-1630). Reviewing the

[3] Looney claimed: (1) The trial court improperly excused for cause a venire member whose opposition to the death penalty did not prevent or substantially impair her ability to perform her obligations as a juror; (2) the details of the collateral crimes in Volusia county became a feature of the trial causing prejudice that substantially outweighed the probative value of the evidence; (3) the trial court erred by admitting gruesome photographs of the bodies at the crime scene and the autopsy; (4) the trial court erred by refusing to grant a mistrial after the State's witness testified about the hearsay statement by a non-testifying codefendant which incriminated Looney; (5) the evidence was insufficient as a matter of law to sustain the convictions; (6) the trial court erred in denying the defense motion to require a unanimous verdict; (7) the statute authorizing the admission of victim impact evidence is an unconstitutional usurpation of the Court's rule-making authority under article V, section 2, of the Florida Constitution, making the admission of such testimony unconstitutional and reversible error; (8) four of the seven aggravating factors upon which the jury was instructed and which the trial court found are legally inapplicable and their consideration was not harmless error; and (9) the death sentence in this case is disproportionate.

pictures, in particular State's Exhibit #1-C, Mr. Gunn was able to demonstrate where the accelerant was used (RXIII 1633-1634), which was around the base of the bed and on the victim's clothing. (RXIII 1634-1636, 1639-1641). Likewise, Ron McCardle, an inspector with the State Fire Marshall's Office, observed that there was extensive fire in the mobile home based on the use of an incendiary, having multiple origins. (RXIII 1642-1644). The fire was set in three different areas and the nature of the fire was consistent with a flammable liquid pattern. It took fifteen to forty minutes for the trailer to burn. (RXIII 1645-1646). Testimony from James Carver, a chemist from the State Fire Marshall's Office, reflected that clothing found in the Mustang and clothing worn by the victims contained a medium petroleum distillate, turpentine and gasoline. (RXIV 1661-1673).

During the testimony of Officer Shaun Rooney, a Daytona Beach Shores police officer, Hertz' counsel objected to any evidence being presented regarding the car chase and subsequent capture of Hertz and his co-defendants Looney and Dempsey. (RXV 1727-1728). The trial court denied the objection finding that evidence with regard to what transpired in Daytona was relevant to show the circumstances of flight. (RXV 1729).

Catherine Watson testified that Hertz, her nephew, showed up at her home sometime during July 27, 1997. (RXV 1796-1797). She called 911 about an injured person and secured Hertz= gun before the police got there. (RXV 1798-1799).

St. Johns County Deputy Sheriff Shaun Lee testified that he responded to the 911 call about a person being shot (RXV 1802), and found a white male lying on the couch with blood all about who had been shot. He checked the house for weapons and found a .9 millimeter weapon in the bedroom. (RXV 1803). Deputy Sheriff Lee accompanied Hertz to the emergency room and while they were in the rescue unit, Hertz told the deputy that he was driving an Aoff-white beige truck and friend Jason was driving a black Mustang@ and that Ahe would not have been taken alive if he had been awake.@ (RXV 1804-1805).

The State also called Robert Hathcock who, at the time, was in the custody of the Wakulla County Jail on a twenty-two month sentence. (RXVI 1845-1846). He identified Hertz as being the cellmate in the Leon County Jail in May through September 1998. They would play cards and draw pictures together and talked about prison and about their crimes. (RXVI 1847-1849). Mr. Hathcock testified that he knew nothing about the murders and learned all he did from Hertz who told him that they had gotten

into a confrontation with police in Daytona and that=s how Hertz received his facial scar. Specifically, he testified:

> He started off by telling me that he had gotten into a confrontation with some police officers down in Daytona because I asked him about a scar on his head and that led to **B** the conversation got back to **B he told me that he and two of his co-defendants had been involved in two murders in Crawfordville and that they had killed B** ...@

(RXVI 1849-1850) (Emphasis added).

Shortly thereafter, defense counsel for Looney moved for a mistrial or for a severance. Mr. Cummings observed:

> And I think it was very specific. None of this stuff was supposed to come out and now we have a problem here. He made that statement. It incriminates my client. I can=t cross-examine Mr. Hertz and I move for a mistrial on behalf of Mr. Looney.
>
> THE COURT: What says the State?
>
> MR. MEGGS: Your Honor, he is absolutely correct. That should not have come out. It was inadvertent. I think a curative instruction would solve the problem and the witness can be instructed to only answer questions as they relate to Mr. Hertz and what Mr. Hertz said he in fact did. I don=t think it=s a basis for a mistrial.
>
> THE COURT: Okay. I=ll allow a fifteen minute recess. In the meantime you instruct the witness.

(RXV 1851).

Following further discussions with regard to the impact Mr. Hathcock=s statement - that he and co-defendants had been involved in two murders in Crawfordville - had, the trial court

recessed for the evening and took the matter up the next morning. At that time, the Court instructed the jury as follows:

> THE COURT: Let the record reflect that the jury has returned. Again, good morning, members of the jury. I must inquire, have any of you obtained any type of information from any source or in any fashion concerning the subject matters of these trials or these cases? Alright. That being the case, then at this time, then, the State would be prepared to call it:s next witness.
>
> And at this time, members of the jury, of course, as I indicated to you in your preliminary instructions, there are certain matters of law to which only the court is concerned, and the matters of facts are your province as the jury. And from time to time we have to conduct our respective provinces and to the exclusion of each other.
> At this time, the court will instruct you as a matter of law to disregard the testimony of Robert Hathcock in its entirety and the court has stricken Mr. Hathcock as a witness in these cases.
>
> So, at this time, the State will call it:s next witness.

(RXVI 1892).

The last witness called by the State was co-defendant Jimmy Dewayne Dempsey. (RXVI 1894). Dempsey testified that he was twenty-four years old and currently residing at Wakulla County Jail, having pled guilty to two counts of first-degree murder, one count of arson, one count of carrying a concealed weapon by a convicted felon, one count of robbery and having received two consecutive life sentences for the murders. (RXVI 1895). He

testified that during the daylight hours of July 26, 1997, he was at Tommy Bull=s house doing odd jobs to secure money. He knew Guerry Hertz for over seven years and had just met Looney three days beforehand. After completing his odd jobs, he left with Hertz and Looney when, it became clear, that Bull was not going to be able to give him a ride until the next day. (RXVI 1898-1899). They all left on foot and went to Hertz= house down the road. They started playing cards and started chatting about the fact that they were tired of walking all over the place and not having transport. At some point they decided to Aget@ a car. Since they did not have any money, Dempsey testified that it was likely they were going to steal one. He noted that he was armed with a .38 special; that Hertz was armed with a .357 Magnum and that Looney had a carbine rifle. While they had no specific plan, Dempsey took his knapsack and had tape in the eventuality they located a car. (RXVI 1900-1901). After an aborted first attempt to get a Jeep Cherokee, they found the mobile home shared by Keith Spears and Melanie King. (RXVI 1903). As they approached the house which was located in some woods, they saw a Mustang and a white truck. Looney laid claim to the car but they were thwarted when they heard a dog barking. Dempsey and Hertz then went to the front door as a decoy and asked if they could use the phone. (RXVI 1903-1904). Melanie

King came to the door and when asked if they could use the phone, provided them with a cordless phone. Hertz was standing with him on the porch while Looney had disappeared around the side of the trailer and came up behind him and Hertz. Dempsey pretended to use the phone and told the story about how his car had gone into a ditch and he needed to call his brother. (RXVI 1905). When Dempsey attempted to give the phone back, Hertz said hold up a minute and stuck a .357 through the door. As they got into the house, Hertz grabbed Melanie King around her neck and Looney came in and put a rifle to Keith Spears. Spears was made to lay down on the floor and Melanie King was taped up and placed on the bed. (RXVI 1906-1907). While Keith Spears was on the floor, they noticed a gun holster on the bed and Looney asked Spears where the gun was. Spears told him that it was underneath him and stated Aplease, don=t hurt me.@ The gun, a silver .9 millimeter automatic, was recovered. (RXVI 1910). Dempsey testified that Hertz wanted to scare the couple so he started waving the gun around and broke the fan light. Hertz demanded that they tell them where the valuables were located and told them AAll I want is the stuff@ and ADon=t be lying@. (RXVI 1911-1912). Spears was eventually put on the bed so he could be with his Aold lady@ and so that Dempsey could watch them. (RXVI 1912). Keith Spears and Melanie King were placed

face down on the bed, their hands and feet were tied, and their mouths taped. At some point, to make Melanie more comfortable, Dempsey put a pillow under her head. (RXVI 1913).

A VCR, television, jewelry and CD=s were taken from the trailer. Looney found money in an envelope, which was divided up into three piles with about $500.00 per stack. (RXVI 1915-1916). Dempsey admitted that he recognized Melanie King as somebody he and Hertz went to school with and that Spears and King saw their faces although the victims spent most of the time in the bedroom. (RXVI 1916-1917). Dempsey testified that Hertz and Looney talked in the front bedroom, and that Looney said to Hertz that Aare we going to tell him.@ Looney indicated that they can=t have any witnesses, we don=t want to go to prison, AWe have to do this here@. Although they debated about it, Dempsey testified that he was outvoted and Hertz told him that, if he does not want to, he could just leave. (RXVI 1918). Dempsey went outside and Hertz then told him that he could leave but with a bullet. Although he thought it was a threat, Hertz seemed to be playful but at one point Hertz was standing behind him with the laser beam aimed at his head. (RXVI 1919-1920). Dempsey testified that Hertz and Looney poured gasoline throughout the trailer and that the odor of the gasoline permeated the trailer. (RXVI 1921-1922). When they entered the

back bedroom, Dempsey could see that Melanie King could smell the gasoline and that she knew that they were going to be burned in the trailer. She said that she would Arather die being burnt up than shot@. She stated, APlease, God, don=t shoot me in the head.@ Hertz replied, ASorry, can=t do that@, and then he proceeded to open fire, Looney followed and then Dempsey shot at Spears twice. (RXVI 1923-1924).

Totally seven shots were fired between Hertz, Looney and himself. They then set fire to the trailer and ran out of the house. Dempsey watched the flames. Looney then called to him and they left. It was Dempsey=s view that they were in the trailer a couple of hours. (RXVI 1924). When they left, Hertz drove the truck, Looney the car and they went to Hertz= house and unloaded the loot and divided up the money. (RXVI 1925).

Since they needed cigarettes, they traveled to Tallahassee, got gas and then drove to the Wal-Mart on Thomasville Road where they made purchases and discussed what they should do next. (RXVI 1925-1927). They ultimately ended up in Daytona Beach Shores where they met up with the police and were subsequently arrested. (RXVI 1928).

On cross-examination by Hertz= counsel, Dempsey admitted that he did not want to go to jail and that he had been hiding out at Hertz= house. He had shot his weapon once prior to that

day and thought about and commented about possibly shooting the police if they came to the door to arrest him at Hertz= house. (RXVI 1929-1933). Dempsey admitted that he lied to the police initially and did make a deal to protect himself to save his life. (RXVII 1938-1939). Dempsey was surprised when the door was forced open and Hertz grabbed Melanie King and Looney pointed his rifle at Spears. At no time did he tell Looney what to do, but he did tell Looney to shoot Spears if Spears moved. (RXVI 1942-1943). Dempsey admitted that it was his responsibility to guard the victims while the others pillaged the house. (RXVI 1944-1946). Dempsey admitted shooting at Spears twice, but stated that he did not know who really shot the victims. It was his decision to shoot and Ahe believed@ that he was equally responsible for what happened that night. (RXVI 1950-1951). While he could have left he elected not to but, he said he did not retrieve gasoline or spread flammable liquid throughout the trailer. (RXVI 1952-1955).

On cross-examination by Looney=s counsel, Mr. Cummings, Dempsey admitted that he knew Looney for three days and met him at Hertz= house. (RXVI 1957). The reason that they went to the trailer door was because a dog was barking and they wanted a decoy in order to hot wire the cars. (RXVI 1958-1959). Spears was on the floor when Dempsey entered the house and he did put

his gun to Spears= head when they were trying to figure out where Spears= gun was located. Dempsey was the one that told them they needed to shoot Spears if he moved. (RXVI 1960-1961). Dempsey admitted that he knew the victims were scared and that all three of them talked about taking stuff around the victims. (RXVI 1962). The money was split three ways at Hertz= house and unlike Dempsey and Hertz, Looney wore gloves and a mask. (RXVI 1966). Dempsey stated that he fired the gun to make sure the victims were dead but that he believed that the victims were already dead before he fired. (RXVI 1968). He was wearing a ASlayer@ t-shirt. His .38 was ultimately found underneath the passenger side of the Mustang in Volusia County. (RXVI 1969-1970).

On redirect examination, Dempsey testified that he thought Spears was already dead when he started firing because of how the body did not move. (RXVI 1983-1984).

C. Penalty Phase

On December 9, 1999, the penalty phase of Hertz and Looney=s trial commenced.[4] (RXVIII-XIX).

[4] Following discussions concerning the victim impact statements that were to be presented to the jury, both defense counsel for Hertz and Looney had no objections to the victim impact statements that were to be read. (RXVIII 2182-2183). Further discussions commenced with regard to the limitation on the testimony of Andrew Harris, a cellmate of Dempsey pretrial. (RXVIII 2195-2196). The State agreed that questioning of Harris would be limited to whether, pretrial, Harris was in a

The State first called Reginald Byrd, a Department of Corrections parole officer, who testified that Hertz was on probation at the time of the crime and was in violation status as of July 7, 1997. (RXVIII 2212). The State then introduced a certified copy of the aggravated battery conviction of both Hertz and Looney which had been previously stipulated to by defense counsels. (RXVIII 2213-2214).

The State next called Karen King, Melanie King=s mother, who read a prepared statement to the jury.[5] (RXVIII 2214-2217).

Janet Spears, Keith Spears= mother, also read a prepared statement concerning her son.[6] (RXVIII 2218-2220).

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cell with Hertz. (RXVIII 2197-2198).

[5] In summary, her statement provided that Melanie King was a studious person who took her work and education seriously. Ms. King always found time for her family but also was independent. Keith Spears and Melanie were planning on getting married. Her family now, will no longer be able to see her walk down the aisle. She was considered a great asset to her family and worked hard at TCC at her nursing studies as well as working full time at the Florida Lottery. Her death was a great loss to her family since they will no longer be able to share birthdays and holidays and her wedding together.

[6] In summary, Mrs. Spears= statement reflected that their lives have changed forever since their only son had been killed and he was the last one to carry on the family=s name. Keith Spears was a hard worker and an important asset to their family business. They were a close family and were always smiling and joking. The family was planning Melanie and Keith=s wedding. On the last day, Keith spent that day with his grandfather watching baseball on television.

The State rested. (RXVIII 2221).

D. Looney=s Case

Looney=s counsel, Gregory Cummings, called Robert Kendrick, a state probation officer (RXVIII 2227), who testified that Looney was on probation since April 22, 1996, for a three year period. During that time up until these murders, he had had no trouble and observed that Looney was a pretty average probationer. (RXVIII 2228-2229). On cross-examination, Mr. Kendrick testified that Looney was not authorized to carry a weapon. (RXVIII 2229).

Andrew Harris, incarcerated for second-degree murder, testified that he never met Jason Looney but heard his name when he was locked up with Dempsey. They talked about their cases since they were both there for murder and during those discussions, Dempsey told him that Looney was only a "lookout." (RXVIII 2232-2233). Harris never remembered Dempsey saying that Looney shot anyone and he recalled that Dempsey said he should have shot Looney because Looney was the most scared of the bunch. Harris recalled that Dempsey said Looney wanted to get out of the car as they traveled to Daytona but that Dempsey would not let him out and threatened to shoot him if he did. Harris testified that he never met or talked to Looney and that he was getting no benefit from testifying. (RXVIII 2233-2334).

On cross-examination, Dempsey told Harris that Looney was there all the time; they were there to get money or something. Harris also admitted that he was incarcerated with Hertz and that he talked with Hertz about the case. (RXVIII 2235-2236).

Susan Podgers, Jason Looney=s mother, testified that she loved Jason and that he was everyone=s favorite. (RXVIII 2236-2237). When Jason was about eighteen months old she went to work one day and that, was the last time, she saw her son alone. (RXVIII 2238). There were allegations of child abuse, however, no charges were ever brought. Until recently, she was not able to have contact with her son and in fact waited for twenty years until recently when they were reunited. (RXVIII 2238-2243).

Glenda Podgers, Jason Looney=s maternal grandmother, testified that at eighteen months, Jason was raped. He was taken to the hospital and after that was turned over to the welfare department. (RXVIII 2246-2247). Jason was adopted by his foster parents and Mrs. Podgers testified that she was only allowed to see him weekends and holidays until he was sixteen years old. (RXVIII 2247-2249). Mrs. Podgers observed that Mrs. Looney, Jason=s adoptive mother, was very controlling and thought that he would be the next Billy Graham. Church was very important in their household and they would go two or three times a week. She observed that Jason had no choice and further

noted that the Looney=s were very nice, however they would have nothing to do with Jason anymore. (RXVIII 2250-2251). When Jason was sixteen years old, his real grandfather killed himself. At that time Mrs. Looney told Jason that his real grandfather killed himself; that Jason had been raped as a baby by his grandfather. (RXVIII 2251). Mrs. Podgers testified that after Jason was told about this incident, he did not want to see her any longer and did not respond to cards and calls she sent. (RXVIII 2253). She subsequently learned that Jason never received the cards or the phone calls (RXVIII 2258). She was around him the last two years following his incarceration. (RXVIII 2256).

Looney rested his case. (RXVIII 2258).

E. Looney=s Case -- Reopened

Donnie Crum, a Major in the Wakulla County Sheriff=s Department, testified that when he took the statement from Jimmy Dempsey July 27, 1997, he admitted that he shot twice at the end of the shooting spree and stated that AWe had already doused the house with gasoline.@ (RXVIII 2327). Dempsey also stated he was not sure where Looney shot. (RXVIII 2328). On cross-examination by the State, Major Crum observed that the testimony he heard during the course of the trial and the penalty phase

was substantially the same statement that he took from Dempsey July 27, 1997. (RXVIII 2338-2339).

F. Sentencing Hearing January 14, 2000 - Looney and Hertz

At sentencing before the trial court, Karen King was called by the State and testified that Hertz knew her daughter because they lived across the street from Hertz. (RIV 480-481). Mrs. Spears addressed the Court and asked the Court to follow the jury=s recommendation. (RIV 484-485).

Looney presented the testimony of Alice Jayne West. Looney was a big brother to her son. Looney took care of her in 1988, when she was infected with the HIV virus. Looney was kindhearted, loving, trustworthy and not a violent person. (RIV 487). Likewise, Gladys Christine Hinton, Ms. West=s mother, confirmed Looney=s good character, stating that he was not a hard-core criminal and did not deserve the death penalty. (RIV 488).

Susan Podgers, Looney=s real mother asked that he be given life, since she had just reunited with him and she wanted a chance with her son. (RIV 489-492).

Hertz=s mother stated it was not fair that not everyone would receive life - Hertz didn=t deserve death, he was innocent. She believed Dempsey killed the people. (RIV 495-497).

Looney then personally testified before the Court, asking for forgiveness, stating he was sorry for what happened, and that he would give up his life if he could bring them back. (RIV 497-499).

Hertz likewise testified personally, asking the families to forgive him, stating that he will never get out of jail if he gets life. He will not be able to give his mother grandchildren. He wants to live out his life in prison, because he wants to explain to brothers to stay away from trouble-makers and live their lives without any trouble. (RIV 499-501).

G. July 28, 2004, Evidentiary Hearing

On July 28, 2004, the trial court held an evidentiary hearing on the limited issue of whether there existed additional mitigation at the time of trial which could have been presented but was not. In order to support this allegation, Dr. Mosman was employed to review the files and interview Looney. (PCRII 306-309). Specifically, Dr. Mosman was to do Atesting to see if in any way that [sic] clarified the testing and/or the data that was available in 1999 and 2000, when the case actually came to court.@ (PCRII 308). He was to Anarrowly focus on identification of presence or absence of any statutory or non-statutory mitigation that would have been present at the time of the trial.@ (PCRII 310).

Following a brief recital of the facts, Dr. Mosman concluded that there was other statutory mitigation, Awhen you take actually what was available and tease it out through a mental health lens and a developmental lens, if you will, then what comes out is several things.@ (PCRII 314). Specifically, he declared that the felony was done under extreme emotional (not mental, but emotional) disturbance, based on the fact that the Aparticular crime@ was committed on Athat particular day and in a particular manner.@ (PCRII 315). And that although physical age of 20 was found, that it really should also emphasize Amental, emotion, social age@. (PCRII 315). Dr. Mosman was reticent to give a specific mental or emotional age, but felt it was early teens. (PCRII 315).

As to non-statutory mitigation, Dr. Mosman listed 12 to 13 items that could have been found. (PCRII 315). He detailed the specifics of what, he believed, should have been submitted.[7] (PCRII 316-322).

Dr. Mosman opined that it was a combination of Looney's mental state and circumstances that lead him to committing the crimes. Specifically Looney was depressed, adrift, lonely and

[7] During cross examination it was shown that Dr. Mosman had no real understanding of the facts and almost every factor he proposed was presented by defense counsel during the penalty phase or was rejected for strategic reasons. (PCRII 338-347).

angered over how he was raised and the conditions he lived under, as such these Astressors@ were the culprits for the crimes. (PCRII 323-324). Dr. Mosman found no psychosis, no bipolar, no psychotic symptomalogy, rather a personality disorder of sorts due to trauma and aberrations in early developmental years. He also declared that there was clinical depression with predominant features of anxiety, panic, social avoidance, nervousness, self-destruction tendencies-short term, which were Athe stressors@ that caused the crime to occur. (PCRII 324-325).

Dr. Mosman stated that a "neuro-psychologist" should have been hired that could have Atied all the pieces together@ and he could think of no reason strategically why Athe mental health lens was not used@. (PCRII 326-329).

On cross-examination, it was brought out that Dr. Mosman had not spoken to defense counsel to understand why certain things were not done, and more importantly, had no clue that Dr. Partyka had assisted defense counsel during the penalty phase. Dr. Mosman admitted that he Aonly learned@ about Dr. Partyka the day before this hearing. (PCRII 330-331). Mosman had not read the guilt phase portion of Looney's trial and observed that he never found reading the trial transcript helpful, because he routinely focuses on the penalty phase. He knew nothing about

the transcript of the van ride and had no idea of the interaction between the three defendants. (PCRII 331-333) Although he acknowledged his testing showed Looney has an IQ of 120, he said that he had no number for Looney=s mental age. (PCRII 334-335).

He acknowledged that Looney had some type of personality disorder NOS, with avoidance features most likely, and Looney=s depression would ebb and flow. (PCRII 336-337).

The State reviewed what had been presented at the penalty phase of the trial and Dr. Mosman agreed that most, if not all, of his non-statutory list was developed by trial counsel. (PCRII 338-347) It was Mosman=s conclusion that only a good mental health expert could have tied all the pieces together and showed the emotional component to the mitigation. He stated that he did not think ADr. Partyka, a psychologist, could do that@. (PCRII 349-353). The State introduced the original trial transcripts and then called defense counsel and Dr. Partyka to testify. (PCRII 355).

Gregory Cummings took over Looney=s case after the original defense counsel left. Mr. Cummings, an experienced trial attorney had handled 12 capital cases before this case, 7 that went to penalty and one other, Chadwick Banks, where the death sentence was imposed. (PCRII 356-360). He did additional

investigation for the guilt and penalty phase, but also had the assistance of Danny Johnson, an investigator assigned the case from inception and Dr. Partyka, who was also intimately involved as a mental health expert. (PCRII 360, 362, 372). Cummings had discussions with Mrs. Looney, Looney's adopted mother, who proved to be very uncooperative and hostile, and it became apparent that the family with whom Looney lived for 16 years was not going to prove any assistance. Cummings observed that the only good thing was that Looney=s biological mother came forth and was willing to help. (PCRII 361).

Cummings received the Texas files on Looney regarding his being removed from his biological home and his grandparents and being adopted by the Looneys. He had a number of discussions with Dr. Partyka and Mr. Johnson about Looney, and he told Dr. Partyka to do no written reports as a result of those discussions. It was Dr. Partyka's suggestion to Cummings that he not be called as a witness because his testimony would do more harm than good. (PCRII 362-366). Cummings discussed his strategy with other colleagues and everyone agreed it was a Ano-brainer@ that Dr. Partyka should not be called. Additionally, Cummings believed that a second doctor would not have helped. He spoke to Looney about this strategy and Looney never asked that a second doctor be secured. (PCRII 366-369).

Cummings testified that there were no witnesses that Looney wanted that he failed to call and, that he counseled Looney against testifying at the penalty phase but did agree that he should testify at the Spencer hearing. (PCRII 372-375).

On cross-examination, Cummings stated that Dr. Partyka would not have been helpful and he made a strategic decision not to call him, and also decided that a second doctor would not have helped. He felt there was no way to introduce mental health information in a positive manner, and observed that just because something sounds plausible today, does not mean it was a good strategy at the time or without significant down sides. He observed, for example, that Dr. Partyka told him Looney had no remorse for the crime. It was only after the death recommendation that Looney got remorseful. (PCRII 376-380). On redirect, Cummings noted that almost all of the suggested Anew@ non-statutory mitigation proposed by Mosman was presented. (PCRII 381-384). Specifically, there was no evidence that the foster parents abused Looney and he never said so; Dr. Partyka said Looney was a psychopath, but there was no other evidence of mental illness; neither drugs nor alcohol were contributing factors to the crime, and Looney had been on probation for the last few years prior thereto and had good reports; no evidence of any self medicating drug or alcohol use within three years of

the crime; proportionality as to the life sentence of Dempsey was introduced and discussed; and finally, Cummings observed that it was not good to emphasize Looney=s Asmarts@ because they were trying to show Dempsey was the smarter and the leader in these crimes. (PCRII 382-384).

Dr. Partyka testified on a limited basis regarding what his involvement was in Looney=s case. He was hired early on in the case and interviewed Looney for over 9 hours on three occasions, March 25, 1999, July 30, 1999, and November 12, 1999. (PCRIII 474-476). He performed an entire battery of tests and concluded that Looney had a full scale IQ of 114, and had some antisocial tendencies. (PCRIII 477-479). There was no schizophrenia or psychotic illness. It was his view that Looney could have problems incarcerated. (PCRIII 479).

Ultimately, Dr. Partyka found that Looney was a psychopath displaying socially unacceptable behavior, such as criminal behavior, superficial charm, grandiose sense of self-worth, no remorse, poor behavior control, promiscuous sexual conduct, impulsiveness, and lack of empathy, to name a few. (PCRIII 481). Giving his condition a name, he would observe that Looney has a personality disorder with psychopathic traits, not a mental disease. (PCRIII 481-482). He noted that the crimes were impulsive but not panic or anxiety driven, and he felt that

while he could present facts about Looney=s troubled life, there was too much bad that would also come out. He believed others could present the evidence without as much down side. (PCRIII 483-484). The doctor had all of Looney=s records from Texas and testified that there was no evidence anywhere of child abuse, after he was in foster care, no neuro-psychological problems, and that Looney=s conduct thus far exhibited, such as running away, was more reflective of impulsive acts, boredom, and need to be stimulated rather than what had been suggested (by Mosman). (PCRIII 484-488).

On redirect, Dr. Partyka testified he did not recommend to Cummings to secure another mental health specialist. (PCRIII 491).

H. Trial Court=s Order Denying Post-conviction Relief

Judge Sauls= Order Denying Rule 3.851 Motion of the Defendant, dated December 30, 2004, held that none of the four (4) claims presented merited relief.[8] The Court concluded:

[8] The following issues were raised: I. Florida=s death penalty as applied violates Ring/Apprendi; II. Penalty phase counsel should have argued nonstatutory mitigation at the Spencer hearing was actually statutory mitigation; III. Trial counsel was ineffective because he failed to properly object to inadmissible evidence, allowed damaging evidence to be introduced by hearsay; allowed damaging evidence and opinions to be introduced without proper foundation; failed to present relevant and critical testimony in the guilt phase; failed to prepare and properly preserve argument for directed verdict;

9. The defendant and postconviction counsel have failed in their burden of showing that any ineffectiveness of trial counsel deprived the defendant of a reliable trial and penalty phase proceeding under Strickland v Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and its progeny. Counsel did conduct a reasonable investigation of mental health mitigation prior to trial and made a strategic and reasonable decision not to present this information through a mental health expert. He did not fail to investigate potential mitigating evidence and he did not fail to obtain an adequate mental health evaluation. See, Jones v State, 732 So.2d 313 (Fla. 1999); see also, Asay v State, 769 So.2d 974 (Fla. 2000); Core11 v Dugger, 558 So.2d 422 (Fla. 1990).

There is no evidence in the record to support that any emotional or cognitive disturbance mental health mitigator asserted by Dr. Mosman, as either statutory or nonstatutory, contributed to the defendant's actions in committing his crimes. His asserted additional statutory mitigators are without basis in the record and clearly conflict with the evidence of the defendant's conduct and behavior presented during trial. He was not familiar with the significant facts and circumstances or the evidence presented during the guilt phase and his parsing and teasing of the mitigation was strained and conjectural. Dr. Mossman's testimony likely would have been entitled to insignificant weight had it been presented in the penalty phase. Dr. Mosman presented no other supportable mitigation that would have been found that was not presented by trial counsel through the lay witnesses presented. The defendant has simply presented an additional mental health expert with somewhat strained and different conclusions than those of the expert relied upon by trial counsel. There has been no demonstration that the evaluation of trial counsel's expert was insufficient. The penalty phase jury was aware of most, if not all, of the mitigation

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failed to properly consult with and advise the defendant as to his trial rights; IV. Trial Counsel was ineffective in failing to seek a change of venue.

regarding the defendant's background and childhood.

10. Even if the mitigation evidence presented had been parsed and teased and enumerated as argued on post conviction relief, it has been repeatedly held by appellant majorities that a laundry list of enumeration of mitigation aspects or factors relating to a defendant's character, record and background is not required to supplant the standard Section 921.141(6)(h) approved jury instruction form.

As has been indicated such specific enumeration may create real risk of misleading a jury into not considering some mitigation aspect with respect to a defendant's background, character or record that it has heard because it has not been included in any enumeration. The mitigation presented would not have been provided any more impact or weight for its consideration if it had been teased or parsed into tiny bits and given multiple enumeration for multiplicative matching purposes against the State's aggravators. The jury was not left with the impression that the mitigation they could consider was limited nor that mitigation not specifically designated as statutory could not impact or be weighed against the State's statutory aggravators. Contrary to defendant's assertions that his case went to the jury with no statutory mitigators and only a grouping of nonstatutory mitigation, his case went to the jury with two statutory mitigators and a host of further nonstatutory mitigation. Furthermore, counsel made it clear and ably argued that any mitigator could outweigh all of the aggravators argued by the State.

11. The defendant has clearly failed to establish any deficient performance by or ineffective assistance of counsel nor that the defendant was deprived of a reliable trial or penalty phase proceeding. Accordingly, the defendant's Motion to Vacate Judgment of Sentence of Death Which Sentence Has Been Affirmed on Direct Appeal, shall be, and hereby is, denied.

Order dated December 30, 2005 (PCRIII 563-565).

SUMMARY OF ARGUMENT

Looney contends that he has met his burden and proved that trial counsel rendered ineffective assistance when he failed to present all Aextant evidence of statutory and nonstatutory mitigation during the penalty phase@ and Afailed to use the services of a mental health expert@ which resulted in prejudice to him. These assertions were found to be unfounded by the trial court which concluded that, ACounsel did conduct a reasonable investigation of mental health mitigation prior to trial and made a strategic and reasonable decision not to present this mitigation through a mental health expert. He did not fail to investigate potential mitigating evidence and he did not fail to obtain an adequate mental health evaluation.@ (Order dated December 30, 2005.) See: Strickland v. Washington, 466 U.S. 668 (1984), Wiggins v. Smith, 539 U.S. 510, 521 (2003).

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING DEFENSE COUNSEL WAS EFFECTIVE B-RE: FAILING TO PRESENT IN A CONVINCING MANNER ALL EXTANT STATUTORY AND NON-STATUTORY MITIGATION DURING THE PENALTY PHASE AND FAILING TO UTILIZE THE SERVICES OF A MENTAL HEALTH EXPERT TO PRESENT THE MITIGATION.

Based on the trial record and evidence presented at the evidentiary hearing, Looney has failed to meet his burden under Strickland, or overcome the record evidence and has failed to present, even one iota of competent evidence to support allegations that more mitigation evidence could have been presented. Even Dr. Mosman=s Aexpertise@, the sole defense witness at the evidentiary hearing, could not Atease through mental health lens@ and identify any credible, non-cumulative mitigation.

Looney=s issue is broken down into several distinct sections, all entailing complaints that defense trial counsel could have done more to present mitigating evidence. Each viewed individually or collectively do not support a conclusion that a Strickland, violation occurred.

Strickland v. Washington, 466 U.S. 668 (1984), provides that a defendant must 1) demonstrate deficient performance by counsel (the errors were so serious that counsel was not functioning as

counsel), and 2) demonstrate that such deficient performance resulted in prejudice (there was a reasonable probability that, but for counsel=s deficiencies, the results would be different). Van Poyck v. State, 694 So.2d 686 (Fla. 1997); Kokal v. State, 718 So.2d 138 (Fla. 1998); Rutherford v. State, 727 So.2d 216, (Fla. 1998); Cherry v. State 659 So.2d 1069, 1072-73 (Fla. 1998); Jones v. State, 732 So.2d 313 (Fla. 1999); Asay v. State, 769 So.2d 974, 978 (Fla. 2000); Hodges v. State, 885 So.2d 338, 347 (Fla. 2003), wherein the Court held:

> The presentation of changed opinions and additional mitigating evidence in the postconviction proceeding does not, however, establish ineffective assistance of counsel. See Asay v. State, 769 So.2d 974, 987 (Fla. 2000); Rutherford v. State, 727 So.2d 216, 224 (Fla. 1998). The pertinent inquiry remains whether counsel's efforts fell outside the "broad range of reasonably competent performance under prevailing professional standards." See Maxwell, 490 So.2d at 932. Upon review of the trial court's order and record, we conclude that Hodges' penalty phase counsel performed in accordance with such standards. Our analysis of this case turns on the distinction between the after-the-fact analysis of the results of a reasonable investigation, and an investigation that is itself deficient. Only the latter gives rise to a claim of ineffective assistance of counsel.

On July 28, 2004, an evidentiary hearing was held for the limited purpose of determining whether counsel was ineffective for not presenting other mitigation that could have been presented, and would have impacted the jury=s verdict at sentencing, but was not investigated or explored by counsel.

Defense counsel, Mr. Gregory Cummings, an experienced capital litigator, was well aware of the background of his client. At the evidentiary hearing, he testified he was prepared and strategically presented mitigation from family and friends. He employed an investigator, Mr. Johnson and a mental health expert, Dr. Partyka to advise him and secure information in mitigation. Cummings made a strategic decision not to call his expert to testify, preferring to present mitigation through lay witnesses.[9] See Occhicone v. State, 768 So.2d 1037, 1048

[9] Unlike Justice O=Connor observations in her special concurrence in Rompilla v. Beard, 125 S.Ct. 2456, 2005 U.S. LEXIS 4846, 73 U.S.L.W. 4522 (Decided June 20, 2005), Cummings acted well beyond the standards of reasonable professional judgment in accessing Looney=s mitigation and presenting same.

> AI write separately to put to rest one concern. The dissent worries that the Court's opinion "imposes on defense counsel a rigid requirement to review all documents in what it calls the 'case file' of any prior conviction that the prosecution might rely on at trial." Post, at 1 (opinion of KENNEDY, J.). But the Court's opinion imposes no such rule. See ante, at 14. Rather, today's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Trial counsel's performance in Rompilla's case falls short under that standard, because the attorneys' behavior was not "reasonable considering all the circumstances." Id., at 688, 80 L.Ed.2d 674, 104 S.Ct. 2052. In particular, there were three circumstances which made the attorneys' failure to examine Rompilla's prior conviction file unreasonable.@

(Fla. 2000); Asay, 769 So.2d at 986 (no ineffective assistance of counsel in deciding against pursuing additional mental health mitigation after receiving an unfavorable diagnosis); State v. Sireci, 502 So.2d 1221, 1223 (Fla. 1987) (not ineffective assistance of counsel to rely on psychiatric evaluations that may have been less than complete); Sochor v. State, 883 So.2d 766 (Fla. 2004); see, Kimbrough v. State, 886 So.2d 965, 975-77 (Fla. 2004) (Dr. Mosman's testimony rejected where he found similar results as in the instant case.); See also Henry v. State, 862 So.2d 679 (Fla. 2003) (Dr. Mosman:s testimony rejected because there was not substantial evidence to support his findings at the postconviction evidentiary hearing), and Ferrell v. State, 2005 Fla. LEXIS 1297, 30 Fla.L.Weekly S457 (Fla. June 16, 2005), wherein the Court held:

> In the instant case, the record supports the trial court's conclusion that there was no particularized need for the SPECT scan. The postconviction experts independently determined that Ferrell suffered from the same injury, i.e., mild to moderate diffuse brain damage to the frontal lobe caused by chronic alcohol

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In summary Justice O:Connor found that trial counsels failed to properly access Rompilla:s prior conviction which was likely to be at the heart of the state:s case for the death penalty; failed to appreciate that the state:s use of the prior conviction would Aeviscerate@ the defense:s primary mitigation argument; and inexplicably the decision by defense counsel not to get the prior conviction files, readily available to the defense, was not a result of any tactical decision, all justified the holding that counsel's performance did not meet standards of Areasonable professional judgment@.

> abuse. While the scan would have confirmed the experts' diagnoses, it was not necessary in formulating their medical opinions about his brain damage. Further, Ferrell cannot show any prejudice from the trial court's denial of the SPECT scan. His experts were still able to testify that he had mild to moderate brain damage, which was consistent with the testimony presented at trial. The scan would not have provided any additional information about Ferrell's functional impairment than that presented. Thus, the trial court did not abuse its discretion in denying this request.
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> As to Ferrell's claim that counsel rendered ineffective assistance in not requesting a SPECT scan in 1992, we agree with the trial court that he is not entitled to relief. Under the Strickland standard, Ferrell must prove both deficient performance by counsel and prejudice from this deficiency. See Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). There was no evidence that such scans were being ordered in capital cases in Florida in 1992. Thus, counsel's failure to obtain a scan was not deficient performance. In addition there is no reasonable probability that the presentation of a scan would have resulted in a different outcome here. The jury heard Dr. Upson's testimony and was aware of Ferrell's problems. The scan results could have confirmed Dr. Upson's diagnosis of brain damage but were not necessary in forming that diagnosis. Thus, Ferrell was not prejudiced by any alleged failure of counsel in this regard. Accordingly, we affirm the trial court's denial of postconviction relief on this claim.

Cummings was able to present evidence of Looney=s sad life, including the circumstances of his being removed from his biological family, living with his adopted family, learning about his grandfather=s suicide and other matters. Occhicone, 768 So.2d at 1048; Asay, 769 So.2d at 986 (no ineffective

assistance of counsel in deciding against pursuing additional mental health mitigation after receiving an unfavorable diagnosis); State v. Sireci, 502 So.2d at 1223.[10]; Sochor v. State, 2004 Fla. LEXIS 985, 29 Fla.L.Weekly S363 (July 8, 2004).

Contrary to Looney=s assertion, Cummings was successful in convincing the trial court that one statutory mitigating factor (age of 20) was applicable as well as five (5) non-statutory factors, to which the Court gave Asignificant weight@. Looney v. State, 803 So.2d at 658.

Cummings emphasized to the jury that Looney was no worse than Dempsey who received a life sentence and that they should

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[10] Even assuming *arguendo*, that there was some deficient performance herein, no prejudice has been shown. There is simply no basis to support a prejudice finding based on the postulations of Dr. Mosman as to other mitigation which could have been presented. In fact most of what Dr. Mosman offered as additional mitigation was presented. See Maxwell, 490 So.2d at 932.

The jury recommended a death sentence by a ten-to-two majority, and the trial court found that the State had established six serious aggravators. Even with the postconviction allegations regarding Looney=s mental verses physical age, the admission of that evidence Awould not@ have led to a life recommendation. See Asay, 769 So.2d at 988 (determining that there was no reasonable probability that evidence of the defendant's abusive childhood and history of substance abuse would have led to a recommendation of life where the State had established three aggravating factors, including CCP); see also Breedlove v. State, 692 So.2d 874, 878 (Fla. 1997). Moreover Dr. Mosman presented no other mitigation that would have been found.

all be treated the same. It was very sad to hear about the murders of Keith Spears and Melanie King and to hear their mothers express pain and loss, but it was also important to remember Looney=s sad life.

Defense counsel provided the jury with a complete portrait of Looney, allowing the jury to consider an unlimited array of factors in determining the sentence to recommend. Looney=s biological mother and grandmother detailed the living conditions that Looney faced as a baby and there was evidence of the over-restrictive living conditions he suffered in the Looney home. The jury knew that Mrs. Looney told Looney, who was 16, he was adopted, that his real grandfather had raped him as a baby and committed suicide years later. Finally at the Spencer hearing, Looney=s mother testified[11] and other friends detailed what a wonderful person Looney was to them.[12] Looney personally

[11] Susan Podgers, Looney=s real mother asked that he be given life, since she had just reunited with him and she wanted a chance with her son. (RIV 489-492).

[12] Looney presented the testimony of Alice Jayne West. Looney was a big brother to her son. Looney took care of her in 1988, when she was infected with the HIV virus. Looney was kindhearted, loving, trustworthy and not a violent person. (RIV 487). Likewise, Gladys Christine Hinton, Ms. West=s mother confirmed Looney=s good character, stating that he was not a hard-core criminal and did not deserve the death penalty. (RIV 488).

testified before the Court, asking for forgiveness, stating he was sorry for what happened, and that he would give up his life if he could bring them back. (RIV 497-499).

The record is replete with evidence that Cummings provided effective assistance of counsel, he investigated, had the assistance of both an investigator and a mental health expert, discussed his strategy regarding the use of Dr. Partyka, with the doctor, professional colleagues and the defendant. Cummings tried to secure as much information about Looney as possible and was thwarted by Mrs. Looney=s unwillingness to assist him with any information during the 16 years Looney lived with the Looneys.

Unlike the scenario portrayed in Wiggins v. Smith, 539 U.S. 510, 521-523 (2003), Cummings did the necessary investigation to support his strategy and present mitigation.

> We established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687, 80 L.Ed.2d 674, 104 S.Ct 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688, 80 L.Ed.2d 674, 104 S.Ct 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "the proper measure of

attorney performance remains simply reasonableness under prevailing professional norms." *Ibid*.

In this case, as in Strickland, petitioner's claim stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence. Id., at 673, 80 L.Ed.2d 674, 104 S.Ct 2052. Here, as in Strickland, counsel attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternate strategy instead. In rejecting Strickland's claim, we defined the deference owed such strategic judgments in terms of the adequacy of the investigations supporting those judgments:

> "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id., at 690-691, 80 L.Ed.2d 674, 104 S.Ct 2052.

Our opinion in Williams v. Taylor is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied Strickland and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfilled their obligation to conduct a thorough investigation of the defendant's background." 529 U.S., at 396 (citing 1

ABA Standards for Criminal Justice 4-4.1, commentary, p 4-55 (2d ed. 1980)). While Williams had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case, cf. post, at 156 L.Ed.2d, at 497-498 (Scalia, J., dissenting), Williams' case was before us on habeas review. Contrary to the dissent's contention, post, at 156 L Ed 2d, at 499, we therefore made no new law in resolving Williams' ineffectiveness claim. See Williams, 529 U.S., at 390, 146 L.Ed.2d 389, 120 S.Ct 1495 (noting that the merits of Williams' claim "are squarely governed by our holding in Strickland"); see also *id.*, at 395, 146 L Ed 2d 389, 120 S Ct 1495 (noting that the trial court correctly applied both components of the Strickland standard to petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of Strickland's performance prong). In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of Strickland we apply today. Cf. Strickland, 466 U.S., at 690-691, 80 L.Ed.2d 674, 104 S.Ct 2052 (establishing that "thorough investigations" are "virtually unchallengeable" and underscoring that "counsel has a duty to make reasonable investigations"); see also id., at 688-689, 80 L.Ed.2d 674, 104 S.Ct 2052 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable").

In light of these standards, our principal concern in deciding whether Schlaich and Nethercott exercised "reasonable professional judgment," id., at 691, 80 L.Ed.2d 674, 104 S.Ct 2052, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background ***was itself reasonable***. ***Ibid***. Cf. Williams v. Taylor, supra, at 415, 146 L.Ed.2d 389, 120 S.Ct 1495 (O'Connor, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of their performance, measured for

> "reasonableness under prevailing professional norms," Strickland, 466 U.S., at 688, 80 L.Ed.2d 674, 104 S.Ct 2052, which includes a ontext-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," id., at 689, 80 L.Ed.2d 674, 104 S.Ct 2052 ("Every effort [must] be made to eliminate the distorting effects of hindsight").

In Hodges v. State, 885 So.2d 338 (Fla. 2004), the Court held:

> The presentation of changed opinions and additional mitigating evidence in the postconviction proceeding does not, however, establish ineffective assistance of counsel. See Asay v. State, 769 So.2d 974, 987 (Fla. 2000); Rutherford v. State, 727 So.2d 216, 224 (Fla. 1998). The pertinent inquiry remains whether counsel's efforts fell outside the "broad range of reasonably competent performance under prevailing professional standards." See Maxwell, 490 So.2d at 932. Upon review of the trial court's order and record, we conclude that Hodges' penalty phase counsel performed in accordance with such standards. Our analysis of this case turns on the distinction between the after-the-fact analysis of the results of a reasonable investigation, and an investigation that is itself deficient. Only the latter gives rise to a claim of ineffective assistance of counsel.

In Pietri v. State, 885 So.2d 245 (Fla. 2004), the Court held:

> There is a strong presumption that trial counsel's performance was not ineffective. As Strickland provides: "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," 466 U.S. at 689, and further: "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.@ 466 U.S. at 690. The defendant alone carries the burden to overcome the presumption of effective assistance: "The defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'@ Id. at 689. The United States Supreme Court explained that

> a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.
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> Id. at 690; see also Asay v. State, 769 So.2d 974, 984 (Fla. 2000) ("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy."). Finally, "Judicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689.

See also Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986), Jones v. State, 732 So.2d 313 (Fla. 1999); Pietri, supra:

> Under this analysis, we hold that Pietri has failed to demonstrate that counsel was deficient in securing a mental health expert. **Although counsel was admittedly not focused on the penalty phase from the outset or in the months prior to the start of the guilt phase trial, the record clearly reflects that counsel began attempts to secure a mental health expert well before the penalty phase began. There was evidence of clear justification for not utilizing Dr. Krop as a witness**, see Asay v. State, 769 So.2d 974, 984 (Fla. 2000) ("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy."), and counsel subsequently contacted at least four experts before finally locating one who could offer assistance. In Hodges v. State, 2003 Fla. LEXIS 1062, 28 Fla.L.Weekly S475

(Fla. June 19, 2003), this Court held that trial counsel had conducted a reasonable background investigation where the "deficient results of that investigation were attributable to an uncooperative defendant and unwilling, absent, or recalcitrant witnesses." 2003 Fla. LEXIS 1062 at *9, Id. at S476. While there is no claim here that Pietri was uncooperative, the record does reflect that at least one of the mental health experts contacted by defense counsel, Dr. Haynes, was unwilling to testify. Here we do not even have deficient results because the evidence ultimately presented at trial encompassed the material for which Pietri now asserts fault with counsel.

Unquestionably, the best-case scenario would have been for Dr. Caddy to have been secured earlier to allow more time for his review of all matters related to Pietri. However, we do not agree that counsel's performance was constitutionally deficient here, where the record reflects that counsel attempted, for over two months prior to the penalty phase, to secure a mental health expert. Counsel contacted at least five experts, and ultimately produced Dr. Caddy and Jody Iodice at trial. Importantly, counsel also requested, both pre-trial and post-verdict, a continuance before the start of the penalty phase to allow additional time for preparation. The judge ultimately denied the request. This is not a situation in which defense counsel did nothing to secure a mental health expert to evaluate his client. Here defense counsel made a reasonable effort to secure a mental health expert and such efforts were successful. Additionally, the expert ultimately provided competent testimony on the defendant's behalf, which addressed the matters which Pietri now claims were overlooked. We cannot say that defense counsel provided constitutionally deficient performance.

Even if we were to hold that defense counsel was deficient in the attempts to secure a mental health expert, based on the evidence presented at the evidentiary hearing, it is clear Pietri has failed to demonstrate that he suffered prejudice as a result. **While defense counsel's performance can always be**

> **second-guessed and attacked on postconviction, Strickland mandates that we look at the evidence that was actually presented compared to that presented at the postconviction evidentiary hearing. Here, it is clear that Pietri has failed to actually provide any new evidence.**

(Emphasis added).

The Pietri Court further cited as support for denying Pietri=s claims of ineffective assistance:

> In Jones v. State, 732 So.2d 313 (Fla. 1999), we held that the record presented there did not establish a reasonable probability that absent the claimed errors, the sentencer would have concluded that the defendant should not have been sentenced to death. See id. at 321. We noted that the defendant had failed to demonstrate, at the postconviction hearing, an inadequacy in the penalty phase testimony of the defendant's mental health expert, and the defendant had simply presented additional mental health experts who came to different conclusions than the penalty phase expert. See id. at 320. There, we reasoned: "The evaluation by Dr. Anis is not rendered less than competent, however, simply because appellant has been able to provide testimony to conflict with that presented by Dr. Anis." Id. Further, we held that the defendant had failed to demonstrate that he suffered prejudice because "although the court found no statutory or nonstatutory mitigation, by virtue of the testimony of Dr. Anis, the sentencing jury was aware of most of the nonstatutory mitigation regarding appellant's impoverished and abusive childhood. The jury was also aware of appellant's abuse of alcohol and excessive use of marijuana." Id. at 321; see also Brown v. State, 755 So.2d 616, 636 (Fla. 2000) (Strickland standard not satisfied where mental health expert testified during postconviction hearing that even if he had been provided with additional background information, his penalty phase testimony would have been the same); Rose v. State, 617 So.2d 291, 295 (Fla. 1993) ("The fact that Rose has now obtained a mental health expert whose diagnosis

> differs from that of the defense's trial expert does not establish that the original evaluation was insufficient."); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990) (holding prejudice not demonstrated where mental health testimony would have been largely repetitive; also, fact that defendant had secured an expert who could offer more favorable testimony based upon additional background information not provided to the original mental health expert was an insufficient basis for relief).

In Dufour v. State, 905 So.2d 42, 55-58 (Fla. 2005),[13] the Court observed in a similar claim:

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[13] State v. Duncan, 894 So.2d 817, 825-826 (Fla. 2004), is clearly distinguishable,

> Despite the trial court's statement, in its order, that "the Court can conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify,@ Order Granting in Part and Denying in Part Fifth Amended Motion to Vacate Judgments of Conviction and Sentences at 18, it is clear to us that the record is completely devoid of any justification for counsel's failure to present the available evidence. The trial court did not provide what it believed to be the "sound strategic and tactical reasons for deciding not to call Dr. Berland," nor can we ascertain from this record what those reasons may have been. When questioned during oral argument, the State's attorney could also not provide this Court with any such reasons. **We again emphasize that our holding is not based solely upon Duncan's former attorney's failure to provide a justification for his actions. Instead, it is the complete absence in the record before us of any reason to support why the doctor was not called to testify on Duncan's behalf.** Duncan, having satisfied his burden under Strickland, is entitled to a new penalty phase.

(Emphasis added).

Dufour asserts that his trial counsel was deficient in failing to consult a second mental health expert after receiving an unfavorable and unprofessional report from the confidential mental health expert consulted, Dr. Gutman. Dvorak testified at the evidentiary hearing that Dr. Gutman was retained to examine Dufour with regard to competency for trial and at the time of the offense, as well as for mitigating information relating to Dufour's background. Dr. Gutman's report indicated that he not only evaluated whether Dufour was competent but also fully evaluated Dufour's mental health status. Dr. Gutman found that Dufour had antisocial behavior, showed little signs of a conscience, and had average intelligence. Dr. Gutman concluded Dufour was competent at the time of the offense and for trial. Dr. Gutman could not provide any psychiatric dynamic or reason behind the killing and he did not indicate that Dufour was in any way unaware of what he was doing.

Dvorak testified that he did not seek nor did he have any reason to seek a second mental health opinion and did not engage in further investigation to find evidence of mental illness or brain damage. Dvorak stated that Dr. Gutman's opinions were so strong that there did not appear to be any prospect for a more favorable opinion. Dufour's other trial counsel, Cohen, confirmed that Dr. Gutman's report reflected negatively on Dufour. Cohen testified that Dr. Gutman did everything Cohen would have expected an expert to have done in 1984. Concerned with virtually everything Dr. Gutman stated in the report being revealed at trial, they decided not to call Dr. Gutman as a witness. Moreover, the defense team determined that introducing a mental health expert would have opened the door for the State to elicit evidence with regard to Dufour's background, including facts surrounding a double homicide Dufour committed in Florida, which occurred prior to the Miller homicide. n4

> n4 The postconviction evidentiary hearing record indicates that Dufour committed a double homicide, the "Stinson and Wise murders," in Florida before the murder in this case. However, the instant case proceeded to trial first and Dufour

> ultimately pled guilty to the Stinson and Wise murders after the penalty phase in the instant case. Testimony at the evidentiary hearing revealed that Dvorak was aware of both the double homicide that Dufour committed in Florida, as well as the additional Mississippi murder of Earl Wayne Peeples.

As this Court has noted, to prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. See Strickland, 466 U.S. at 687; Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). The first inquiry requires the demonstration of "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Under this analysis, Dufour has failed to demonstrate that counsel was deficient in securing a mental health expert. Although counsel did not seek a second opinion, the record clearly reflects that counsel attempted to secure a mental health expert, had no reason to doubt that expert's negative conclusions, and made an informed decision not to present a mental health expert. There was evidence of clear justification for not utilizing Dr. Gutman as a witness, see Asay v. State, 769 So.2d 974, 984 (Fla. 2000) ("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy.").

Moreover, this is not a case where counsel never attempted to meaningfully investigate mitigation. See *id.* at 985 ("This Court has found counsel's performance was deficient where counsel 'never attempted to meaningfully investigate mitigation' although substantial mitigation could have been presented.") (citing Rose v. State, 675 So.2d 567, 572 (Fla. 1996)). Counsel is entitled to great latitude in making strategic decisions. See Rose, 675 So.2d at 572. In those cases where counsel has conducted a reasonable investigation of mental health mitigation

prior to trial and then made a strategic decision not to present this information, this Court has affirmed the trial court's findings that counsel's performance was not deficient. See Asay, 769 So.2d at 985.

Here, trial counsel was not ineffective simply because after receiving an initial unfavorable report from Dr. Gutman they did not proceed further to seek additional experts for mental mitigation evidence. In Asay, the defendant's original penalty phase counsel engaged a psychiatrist who diagnosed Asay with antisocial personality disorder, but found that Asay did not exhibit an "emotional or cognitive disturbance." Id. at 985. In that case, the Court concluded that the defendant's attorney was not deficient in deciding to discontinue his investigation for mental health mitigation after receiving an initial unfavorable report from an examining psychologist. See id. at 986.

Similar to Asay, we conclude Dufour's trial counsel was not deficient where, after receiving the initial unfavorable report from an examining mental health expert, Dvorak did not retain an additional expert. Furthermore, Dr. Gutman's evaluation is not rendered less competent simply because Dufour was able to provide conflicting testimony at the evidentiary hearing. See Jones v. State, 732 So.2d 313, 320 (Fla. 1999) (stating that the evaluation by a mental health expert is not rendered less competent simply because the appellant provided conflicting testimony). Based on the record, we conclude that trial counsel conducted a reasonable investigation into mental health mitigation, which is not rendered deficient simply because Dufour was able to secure more favorable mental health testimony in the postconviction proceeding.

Dufour asserts that Dvorak's testimony at the evidentiary hearing reveals that his decision not to seek further opinions was based on ignorance of Florida law, and was not an informed strategic decision. Specifically, Dufour alleges that Dvorak did not seek a second opinion after receiving Dr. Gutman's report because Dvorak testified that he did not want to give the State access to Dr. Gutman or his report. Because experts are confidential, Dufour asserts that

the State would not have had access to the identity of defense counsel's experts, and, therefore, Dvorak's decision not to retain another expert was deficient performance. However, testimony presented at the evidentiary hearing belies Dufour's argument that opposing counsel would not have become aware that Dr. Gutman and other experts were being retained by the defense. Specifically, Assistant State Attorney Dorothy Sedgwick testified that in 1984 the procedure for court-appointed attorneys in capital cases to obtain an expert involved filing a motion with the court for funds. The motion would include the expert's name, thereby placing the State on notice of the expert's identity. Thus, Dvorak testified that had he asked for a second expert the State would have known that Dr. Gutman's opinion of Dufour was negative. Additionally, there was nothing to suggest that Dr. Gutman was incompetent or that Dufour had any condition produced by mitigating factors. Based on these factors, Dufour's argument that Dvorak's decision not to seek a second opinion was based on ignorance of the law instead of a sound trial strategy is unpersuasive.

Moreover, this Court has previously recognized that "trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony." Griffin v. State, 866 So.2d 1, 9 (Fla. 2003); see also Reed v. State, 875 So.2d 415, 437 (Fla. 2004) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword."). Dvorak testified at the evidentiary hearing that he was concerned that if Dr. Gutman's report was revealed, it would likely have opened the door for damaging evidence to be introduced to the jury that would have depicted Dufour as a sociopath who knew what he was doing at the time of the murder. See Ferguson v. State, 593 So.2d 508, 510 (Fla. 1992) (finding counsel's decision to not utilize mental health experts to be "reasonable strategy in light of the negative aspects of the expert testimony" where experts had indicated that defendant was malingering, a sociopath, and a very dangerous person); see also

Reed, 875 So. 2d at 437 ("This Court has acknowledged in the past that an antisocial personality disorder is 'a trait most jurors tend to look disfavorably upon.'") (quoting Freeman v. State, 852 So.2d 216, 224 (Fla. 2003)). Under these circumstances, Dufour cannot now second-guess a strategic decision employed by defense counsel. See Brown v. State, 846 So.2d 1114, 1125 (Fla. 2003) (emphasizing that the Court will not second-guess counsel's strategic decisions on collateral attack).

Moreover, Dufour has failed to demonstrate that he suffered prejudice as a result of defense counsel's decision not to obtain additional mental health opinions. At the evidentiary hearing, two mental health experts testified on Dufour's behalf. Dr. Jonathan Lipman, the defense neuropharmacologist, opined that Dufour was in a state of chronic intoxication at the time of the murder. Dr. Lipman also opined that based on the combination of drugs and alcohol Dufour was likely suffering from an organic brain syndrome, and that a person in Dufour's condition would have an impaired ability to conform his conduct to the requirements of the law. Dr. Robert Berland testified that, although he was relying on incomplete archival data, there was substantial information that would permit the conclusion that Dufour was under the influence of extreme mental or emotional disturbance at the time of the crime. Dr. Berland further testified that, although there was no evidence that Dufour had a substantial impairment in his capacity to appreciate criminality, the nature of Dufour's mental illness impaired his capacity to conform his conduct to the requirements of the law at the time of the crime. In addition, Dr. Sherry Buorg-Carter, the defense psychologist, could not state to what extent Dufour's alcohol and substance abuse influenced him in connection with the murder or his capacity to appreciate the wrongfulness of his conduct. However, she did testify to the extreme mental and emotional disturbance mitigator simply because at the time of the incident he would have been diagnosed with chronic substance abuse disorder. Further, she testified that the only other possible mitigator available in this case would have been Dufour's impaired capacity to appreciate the

criminality of his conduct or conform his conduct to the requirements of the law. However, Dr. Carter's opinions relating to the statutory mitigators were limited because she admitted that she could not state to what extent Dufour's substance abuse affected or influenced the murder, nor could she state whether his capacity to appreciate the wrongfulness of his conduct was impaired when he committed the murder. The State also presented a mental health expert, Dr. Sidney Merin, whose opinion with regard to Dufour's mental state at the time of the crime contradicted that of the defense experts. Dr. Merin found that Dufour had and probably still has some mild neurocognitive impairment but not to the extent that would render Dufour incapable of planning, organizing, and thinking through his actions.

Simply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief. See Carroll v. State, 815 So.2d 601, 618 (Fla. 2002) ("The fact that Carroll has now secured the testimony of more favorable mental health experts simply does not establish that the original evaluations were insufficient."); see also Cherry v. State, 781 So.2d 1040, 1052 (Fla. 2000) ("The fact that Cherry found a new expert who reached conclusions different from those of the expert appointed during trial does not mean that relief is warranted . . . ."). In assessing prejudice, "it is important to focus on the nature of the mental health mitigation" now presented. Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998). Neither expert presented by the defense in this postconviction proceeding rendered a strongly favorable opinion. Dr. Lipman admitted that he could only testify in generalizations as to the effects of drug abuse where the specifics of the offenses were in dispute. While Dr. Berland concluded that Dufour suffered from mental illness at the time of the murder, he also testified that it did not appear that any mental illness controlled Dufour's behavior. It is not reasonably probable, given the nature of the testimony offered by Drs. Berland and Lipman, that had the testimony been presented at the

> penalty phase it would "have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." Maxwell, 490 So.2d at 932. Notably, there was substantial aggravation at issue in this case, including the CCP aggravator. Accordingly, we deny this claim.

See also: Chandler v. U.S., 218 F.3d 1305 (11th Cir. 2000); Grossman v. Crosby, 359 F.Supp. 1233 (M.D. Tampa 2005):

> A review of other cases supports the conclusion that no ineffective assistance of counsel has been shown on the facts of this case. In White v. Singletary, 972 F.2d 1218 (11th Cir. 1992), trial counsel had spoken to family members, and presented five witnesses, including White's mother, uncle, and fiance. The court held that this situation was clearly distinguished from cases showing a lack of any investigation. **"A lawyer can almost always do something more in every case - the Constitution requires a good deal less than maximum performance.**@ 972 F.2d at 1225.

FAILURE TO PRESENT ALL EXTANT MITIGATING EVIDENCE

A. The Adoptive Home

Looney asserts that defense counsel should have emphasized more the conditions of his adoptive home environs as mitigation, specifically, Cummings should have located Mark Looney, an adoptive brother. Dr. Mosman testified at the evidentiary hearing that Looney had Amajor development problems@ and Astressors@ due to the 16 years he spent with the Looney family. (PCRII 319-322, 324). Mosman stated that Looney=s environment A...had a significant and major effect on his development for those 16 years. It led to significant depression, a lot of self

destructive behavior in later adolescence. What the records indicate, to help put this in perspective, is that not only was the home externally viewed as very rigid, and the interviews from the children talked about a lot of abuse which went beyond rigidity,...@. (PCRIII 407). He ventured further that:

> And so I think that the context and the climate of the adoptive home, while it had the potential of being healing and curative for a child who had been abused and placed, in this particular case it did just the opposite. **And I=m not blaming the adoptive home for what happened here, but I=m saying there=s a direct clinical and psychologically (sic) dynamic linkage between all of these.**

(PCRIII 408)(Emphasis added).

The trial court rejected Looney=s allegation as to ineffectiveness on this issue, finding:

> There is no evidence in the record to support that any emotional or cognitive disturbance mental health mitigator asserted by Dr. Mosman, as either statutory or nonstatutory, contributed to the defendant's actions in committing his crimes. His asserted additional statutory mitigators are without basis in the record and clearly conflict with the evidence of the defendant's conduct and behavior presented during trial. He was not familiar with the significant facts and circumstances or the evidence presented during the guilt phase and his parsing and teasing of the mitigation was strained and conjectural. Dr. Mossman's testimony likely would have been entitled to insignificant weight had it been presented in the penalty phase. Dr. Mosman presented no other supportable mitigation that would have been found that was not presented by trial counsel through the lay witnesses presented. The defendant has simply presented an additional mental health expert with somewhat strained and different conclusions than those

> of the expert relied upon by trial counsel. There has been no demonstration that the evaluation of trial counsel's expert was insufficient. The penalty phase jury was aware of most, if not all, of the mitigation regarding the defendant's background and childhood.
>
> 10. Even if the mitigation evidence presented had been parsed and teased and enumerated as argued on post conviction relief, it has been repeatedly held by appellant majorities that a laundry list of enumeration of mitigation aspects or factors relating to a defendant's character, record and background is not required to supplant the standard Section 921.141(6)(h) approved jury instruction form. As has been indicated such specific enumeration may create real risk of misleading a jury into not considering some mitigation aspect with respect to a defendant's background, character or record that it has heard because it has not been included in any enumeration. The mitigation presented would not have been provided any more impact or weight for its consideration if it had been teased or parsed into tiny bits and given multiple enumeration for multiplicative matching purposes against the State's aggravators. The jury was not left with the impression that the mitigation they could consider was limited nor that mitigation not specifically designated as statutory could not impact or be weighed against the State's statutory aggravators. Contrary to defendant's assertions that his case went to the jury with no statutory mitigators and only a grouping of nonstatutory mitigation, his case went to the jury with two statutory mitigators and a host of further nonstatutory mitigation. Furthermore, counsel made it clear and ably argued that any mitigator could outweigh all of the aggravators argued by the State.

(PCRIII 563-564).

The record reflects, apart from the evidence presented at the evidentiary hearing, that the jury was well aware of Looney=s adoptive home conditions. Looney was adopted by his foster parents. His maternal grandmother, Mrs. Podgers, testified that

she was only allowed to see him weekends and holidays until he was sixteen years old. (RXVIII 2247-2249). Mrs. Podgers observed that Mrs. Looney, Jason=s adoptive mother, was very controlling and thought that he would be the next Billy Graham. Church was very important in their household. Looney had no choice and was required to go two or three times a week. She observed that the adoptive family was very nice however they would have nothing to do with Jason anymore. (RXVIII 2250-2251). When Jason was sixteen (16) years old, his real grandfather killed himself. At that time Mrs. Looney not only told Jason that his real grandfather killed himself; but that Jason had been raped as a baby by his grandfather. (RXVIII 2251). After Jason was told about this incident, he did not want to see his grandmother any longer and did not respond to her cards and calls. (RXVIII 2253). Mrs. Podgers subsequently learned that Jason never received her cards or the phone calls (RXVIII 2258).

At the evidentiary hearing, defense counsel testified after discussing Looney=s circumstances with Dr. Partyka and his investigator, and after attempting to get the Looneys to help Jason, defense counsel decided that the best strategy to tell

Looney=s sad story was to present the mitigation through Looney=s real mother and grandmother.[14]

Cases relied upon by Looney, Rose v. State, 675 So.2d 567 (Fla. 1996); State v. Reichmann, 777 So.2d 342 (Fla. 2000), and State v. Lewis, 838 So.2d 1102 (Fla. 2002), are all distinguishable from the instant circumstances. In Rose, the court found an inexperienced defense counsel wanting for failing to investigate any mitigation.[15]

> We find counsel's performance, when considered under the standards set out in Hildwin and Baxter, to be deficient. It is apparent that counsel's decision, unlike experienced trial counsel's informed choice of strategy during the guilt phase, was neither informed nor strategic. Without ever investigating his options, counsel latched onto a strategy which even he believed to be ill-conceived. n5 Here, there was no investigation of options or meaningful choice. See Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991)("Case law rejects the notion that a 'strategic'

[14] Cummings received the Texas files on Looney regarding his being removed from his biological home and his grandparents and being adopted by the Looneys. He had a number of discussions with Dr. Partyka and Mr. Johnson about Looney, and he told Dr. Partyka to do no written reports as a result of those discussions. It was Dr. Partyka's suggestion to Cummings that he not be called as a witness because his testimony would do more harm than good. (PCRIII 449-453). Cummings discussed his strategy with other colleagues and everyone agreed, it was a Ano-brainer@ that Dr. Partyka should not be called. Additionally Cummings believed that a second doctor would not have helped. He spoke to Looney about this strategy and Looney never asked that a second doctor be secured. (PCRIII 453-456)

[15] Both prongs of Strickland were found proven by Rose.

decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."), cert. denied, 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992). As noted above, it appears to have been a choice directly arising from counsel's incompetency and lack of experience. However, counsel, regardless of his inexperience, was not at liberty to abdicate his responsibility to Rose by substituting his own judgment with that of an appellate colleague. n6

> n5 The strategy appears to be closely akin to a claim of residual or lingering doubt, a claim which this Court has repeatedly held is not an appropriate matter to be raised in mitigation during the penalty phase proceedings of a capital case. See King v. State, 514 So.2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 947 (1988); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Burr v. State, 466 So.2d 1051 (Fla.), cert. denied, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985).
>
> n6 The State suggests that resentencing counsel did not investigate and present mitigating evidence because Rose insisted that counsel put on the "accidental death" theory at the penalty phase, rather than pursue mitigation. However, a careful reading of the record indicates otherwise. Resentencing counsel testified that the accidental death theory "changed everything that Mr. Rose ever stood for as far as his view of this case. He never admitted to me he did this crime. Never. Okay. So I mean this theory was a Mr. Carres [the appellate attorney] theory." We find no support in the record for the position that counsel's strategy was forced upon him by the defendant.

Rose, 675 So.2d at 572-73.

Likewise, in Reichmann, the court concurred with the trial court that counsel=s failure to investigate **any** mitigation resulted in a proper determination of counsel=s ineffectiveness.

> Although there was some evidence suggesting that Riechmann did not want defense counsel to go to Germany, defense counsel conceded that Riechmann did not instruct him or preclude him from investigating further or presenting mitigating evidence. Moreover, defense counsel was unable to provide any explanation as to why he did not conduct an investigation or contact witnesses available to him.
>
> Thus, it is apparent that the trial court's factual findings are supported by competent and substantial evidence and its legal conclusions are supported by our prior opinions in Mitchell v. State, 595 So.2d 938, 942 (Fla. 1992) (holding that penalty phase representation was ineffective where defense counsel presented no evidence of mitigation but where evidence was presented at the evidentiary hearing that could have supported statutory and nonstatutory evidence); Bassett v. State, 541 So.2d 596, 597 (Fla. 1989) (holding that defense counsel's failure to discover material nonstatutory evidence of mitigation consisting of defendant's domination by other individuals and the difference in age between him and his codefendant raised a reasonable probability that the jury's recommendation would have been different); and Stevens v. State, 552 So.2d 1082, 1087 (Fla. 1989) (holding that defense counsel's failure to investigate defendant's background, failure to present mitigating evidence during the penalty phase, and failure to argue on defendant's behalf rendered defense counsel's conduct at the penalty phase ineffective). **It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital case.**

Reichmann, 777 So.2d at 350-51. (Emphasis added).

And in State v. Lewis, 838 So.2d at 1113-14, the court held:

In reviewing the current case, we find there is competent, substantial evidence to support the trial court's finding that counsel did not spend sufficient time to prepare for mitigation prior to Lewis's waiver. n9 **Kirsch never sought out Lewis's background information and never interviewed other members of Lewis's family; therefore, he was unable to advise Lewis as to potential mitigation which these witnesses and records could have offered. The only witness who was available and willing to testify in favor of the defendant was a mental health expert who had merely talked with Lewis and had not yet reached a diagnosis because he did not have sufficient information. There is also competent, substantial evidence to support the trial court's finding that Lewis's waiver of the presentation of mitigating evidence was not knowingly, voluntarily, and intelligently made. Based on this lack of a knowing waiver and the substantial mitigating evidence which was available but undiscovered, we hold that Lewis did suffer prejudice.** n10 Accordingly, we find that there is competent, substantial evidence to support the trial court's factual determinations and approve the legal conclusion that Lewis established a claim for ineffective assistance of counsel in the penalty phase of the trial.

> n9. In this case, defense counsel had thirty days in which to prepare but spent far less than eighteen hours in preparation. To be clear, the finding as to whether counsel was adequately prepared does not revolve solely around the amount of time counsel spends on the case or the number of days which he or she spends preparing for mitigation. Instead, this must be a case-by-case analysis. For example, in Rose, although counsel had seventy-nine days in which to prepare for a resentencing, this was not sufficient time, in part because counsel never had a capital case before. Rose, 675 So.2d at 573.
>
> n10. See, e.g., Mitchell v. State, 595 So.2d 938, 942 (Fla. 1992) (finding that counsel

> was deficient and defendant suffered prejudice when counsel failed to present mitigating evidence that defendant had brain damage, a history of child abuse, and a history of substance abuse); State v. Lara, 581 So.2d 1288, 1289 (Fla. 1991) (holding that counsel did not sufficiently prepare for the penalty phase and defendant suffered prejudice because counsel failed to adequately present evidence of child abuse, the defendant's bizarre behavior signaling serious mental disorientation, and prior hospitalization for mental illness); see also Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989) (finding that prejudice ensued when counsel failed to properly investigate for the penalty phase and hence did not present witnesses who would have testified merely that the defendant was "a devoted father, husband, and brother," despite the fact that this testimony could have permitted the prosecution to explore the defendant's numerous other felony convictions and that he had been dishonorably discharged from the military).

(Emphasis added).

The trial court was correct in concluding there was no deficient performance by Cummings as to evidence pertaining to Looney=s adoptive home life.

B. The Statutory Age Mitigator

Looney, through the testimony of Dr. Mosman, argues that counsel was deficient because he did not explore Looney=s Amental

age@ verses his Achronological age@ for this statutory mitigating factor.[16] See: Kimbrough v. State, 886 So.2d 965 (Fla. 2004).[17]

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[16] Although Mosman acknowledged his testing showed Looney has an IQ of 120, he said that he had no number for Looney=s mental age. (PCRIII 421-422).

[17] In Kimbrough v. State, 700 So.2d 634, 637-38 (Fla. 1997), the record reflects the **trial court rejected Kimbrough=s age of 19 as a mitigating factor**. In postconviction, Dr. Mosman identified mental age verses chronological age as a factor in mitigation in an effort by Kimbrough to show his trial counsel was ineffective:

> In support of the statutory age mitigator, Mosman explained that "age has to do with mental age, developmental age, social age, intellectual age, moral age." Kimbrough rated a ten percentile rating "from all the years of academic functioning." His school records also reflected annual testing where “76 out of 100 of his same age peers were educationally much more sophisticated and skilled than he." Mosman calculated that based on an IQ of seventy-six, Kimbrough had the intellectual efficiency of a thirteen-year-old child. Kimbrough's emotional age, his ability to relate and engage in mature interpersonal relationships, was also low.
>
> On cross-examination, Mosman acknowledged that this was not the first time he had testified in a capital case that a defendant's mental age does not match his chronological age. He had previously testified that a thirty-eight-year-old man had the mental or developmental age of a fourteen-year-old. Mosman was not aware that this Court upheld the trial court's rejection of this proposed mitigator because his opinion was contradicted by the other twenty-five witnesses called by the defense during the penalty phase. He agreed that none of the various IQ test scores in this case placed Kimbrough in even the mild mental retardation range. Kimbrough, 886 So.2d at 975-76.

The record reflects that the trial court considered this statutory mitigating factor and found it to exist, giving it moderate weigh (Looney was 20 at the time of the murders).

Looney, on appeal from the denial of his postconviction motion, seeks to capitalize on the recent decision of Roper v. Simmons, 543 U. S.__, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), as authority to suggest that trial counsel should have presented evidence of mental age in addition to chronological age. The United States Supreme Court=s decision in Roper, 125 S.Ct. at 1197-98, creates a bright line age limitation in the application of capital punishment.

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in Thompson drew the line at 16. In the intervening years the Thompson plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of Thompson extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

The trial court rejected Looney=s assertion that counsel was ineffective as to the Aage@ mitigation, finding that:

> With respect to the asserted non-presented statutory mitigation of the defendant's emotional and social age deficits that he felt were not presented in the

> appropriate manner, apart from his chronological age, Dr. Mosman testified vaguely without any specific delineation of any emotional or social deficits of the defendant. On cross examination, although he acknowledged that his IQ testing of the defendant reflected a full scale IQ of 120, in the upper ten percent, Dr. Mosman was reticent to give any specific mental, emotional or social age for the defendant preferring a band of "mid-adolescence".

Having failed to demonstrate that evidence of mental age would have somehow changed the statutory factor found, Looney has not shown that counsel did something in error. Moreover, no prejudice can be shown from the lackluster evidence of Amental age@ postulated by Dr. Mossman to this statutory mitigator presented to the jury and trial court and found by the trial court at trial.

C. Statutory Mitigator - Extreme Emotional Disturbance.

Next Looney asserts, without citing any authority, that counsel was ineffective for not finding, in essence Dr. Mosman, and presenting evidence of extreme emotional disturbance. He argues that this evidence was not countered by the State below.

At the evidentiary hearing the State called, for limited purposes,[18] Dr. Partyka, who testified contrary to Dr. Mosman=s

[18] There was a discussion as to what Dr. Partyka could testify to since Looney was not waiving the confidential nature of Dr. Partyka from their pretrial discussions. (PCRIII 485, 487).

extreme emotional disturbance findings based on Looney=s Adepression@, his Aloneliness@, and anger as to how he was raised:

> It appeared to me that his leaving his family and the running away, going, I believe, to south Texas, was more of an implusive act, more of he needed a change, more of an indication of an issue of boredom and a need for stimulation than anything else.

(PCRIII 487).

In further discussing the events leading up to Looney=s actions in Tallahassee, Florida, Dr. Partyka testified:

> Well, my understanding, again, is that everything seemed more prompted by impulsivity and a lack of boredom. Many times psychopaths move quite a bit about the country. In Mr. Looney=s case, he appeared to be an individual who had difficulty settling down. Part of that was he has difficulties with relationships. They tend to be shallow. His emotions tend to be shallow, and consequently he doesn=t have lasting relationships. So it=s not surprising that he would pick up and leave from, I believe it was Corpus Christi to go to New Orleans, stay in New Orleans a little bit, hook up with some people, and end up in Tallahassee.

(PCRIII 486)

Ultimately he was diagnosed as a psychopath and was compared by Dr. Partyka to Ted Bundy. (PCRIII 487).

It was clear from both defense counsel=s testimony and Dr. Partyka=s that Dr. Partyka would not have been a good witness for Looney. Based on this record it is evident that defense counsel

could not be faulted for not calling Dr. Partyka at the penalty phase proceedings.[19]

D. Non Statutory Mitigation

Besides identifying the same twelve potential areas of non statutory mitigation, Looney makes no additional argument as to why trial counsel was ineffective for presenting or not presenting these purported aspects of his life.

The trial court in reviewing this laundry list concluded that:

> 9. The defendant and postconviction counsel have failed in their burden of showing that any ineffectiveness of trial counsel. deprived the defendant of a reliable trial and penalty phase proceeding under Strickland v Washington, 466 U.S. 668,104 S.Ct. 2052,80 L.Ed.2d. 674 (1984) and its progeny. Counsel did conduct a reasonable investigation of mental health mitigation prior to trial and made a strategic and reasonable decision not to present this information through a mental health expert. He did not fail to investigate potential mitigating evidence and he did not fail to obtain an adequate mental health evaluation. See, Jones v State, 732 So.2d 313 (Fla. 1999); see also, Asay v State, 769

[19] Defense counsel felt there was no way to introduce mental health information in a positive manner, and observed that just because something sounds plausible today, does not mean it was a good strategy at the time or without significant down sides. He observed, for example, that Dr. Partyka told him Looney had no remorse for the crime. It was only after the death recommendation that Looney got remorseful. (PCRIII 463-64). On redirect, Cummings noted that almost all of the suggested Anew@ non-statutory mitigation proposed by Mosman was presented. (PCRIII 486-71).

So.2d 974 (Fla. 2000); Core11 v Dugger, 558 So.2d 422 (Fla. 1990).

There is no evidence in the record to support that any emotional or cognitive disturbance mental health mitigator asserted by Dr. Mosman, as either statutory or nonstatutory, contributed to the defendant's actions in committing his crimes. His asserted additional statutory mitigators are without basis in the record and clearly conflict with the evidence of the defendant's conduct and behavior presented during trial. He was not familiar with the significant facts and circumstances or the evidence presented during the guilt phase and his parsing and teasing of the mitigation was strained and conjectural. Dr. Mossman's testimony likely would have been entitled to insignificant weight had it been presented in the penalty phase. Dr. Mosman presented no other supportable mitigation that would have been found that was not presented by trial counsel through the lay witnesses presented.

The defendant has simply presented an additional mental health expert with somewhat strained and different conclusions than those of the expert relied upon by trial counsel. There has been no demonstration that the evaluation of trial counsel's expert was insufficient. The penalty phase jury was aware of most, if not all, of the mitigation regarding the defendant's background and childhood.

10. Even if the mitigation evidence presented had been parsed and teased and enumerated as argued on post conviction relief, it has been repeatedly held by appellant majorities that a laundry list of enumeration of mitigation aspects or factors relating to a defendant's character, record and background is not required to supplant the standard Section 921.141(6)(h) approved jury instruction form. As has been indicated such specific enumeration may create real risk of misleading a jury into not considering some mitigation aspect with respect to a defendant's background, character or record that it has heard because it has not been included in any enumeration. The mitigation presented would not have been provided any more impact or weight for its consideration if it

> had been teased or parsed into tiny bits and given multiple enumeration for multiplicative matching purposes against the State's aggravators. The jury was not left with the impression that the mitigation they could consider was limited nor that mitigation not specifically designated as statutory could not impact or be weighed against the State's statutory aggravators. Contrary to defendant's assertions that his case went to the jury with no statutory mitigators and only a grouping of nonstatutory mitigation, his case went to the jury with two statutory mitigators and a host of further nonstatutory mitigation. Furthermore, counsel made it clear and ably argued that any mitigator could outweigh all of the aggravators argued by the State.
>
> 11. The defendant has clearly failed to establish any deficient performance by or ineffective assistance of counsel nor that the defendant was deprived of a reliable trial or penalty phase proceeding.

(PCRIII 562-64).

There is no basis shown as to why any of the twelve listed additional mitigating factors did not fall within the mitigation presented.[20]

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[20] The jury was told that at a young age, (18) months, Looney was taken from his natural mother and placed in foster care, because he was sexually abused. (RXVIII 2238-2243, 2246-47). The jury was told that his grandfather was the abuser and had committed suicide. (RXVIII 2251)

There was no evidence presented other than the observations of Dr. Mosman that there was any abuse in the adoptive home, rather, the evidence was that the Looney=s household was religious and was too rigid. (RXVIII 2250-51). When defense counsel tried to talk with Mrs. Looney to secure information on behalf of Looney, he said she sounded very hateful. (PCRIII 458). AShe was very angry at what he had done and been charged with, and almost seemed like a reflection upon her. She didn=t give a darn about what happened to Jason from that point on.@

Likewise the trial court found what Dr. Mosman testified to, to be speculative or a stretch; and would not have resulted in a different recommendation. Looney has failed to present any evidence or argument otherwise.

E. Failure to Use a Mental Health Expert

Both Cummings and Dr. Partyka testified that any testimony from Dr. Partyka came with baggage. Dr. Partyka believed that the same evidence, Looney=s sad childhood, without the Apsychopath@ baggage could be presented through other witnesses. Mr. Cummings testified that was his strategy and that strategy was reached after he discussed Looney=s case with others: AIt seems like a no-brainer to me not to call Dr. Partyka, when your

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(PCRIII 458).

Dr. Partyka, who saw Looney pre-trial, at the behest of defense counsel, interviewed Looney for over nine hours and gave Looney a battery of tests. He found no mental illness or disease, but determined that this intelligent (IQ 114) defendant was antisocial and a psycopath. He opined that the crimes were impulsive but not driven by panic or anxiety. Although, by any measure, Looney had a difficult life, he has a history that would show no child abuse after Looney moved into foster care, and actions such as running away were more attributable to impulsive acts, boredom and the need for stimulation. (PCRIII 479-488).

Defense counsel Cummings testified that Dr. Partyka stated that there was no evidence of alcohol or drug abuse in any of the historical documents, that Looney had been good on probation the three years previous to the crime and had not been self medicating, and that Looney had no remorse for the crime. (PCR Vol. III 469-471).

doctor, your expert, tells you you don=t want to call me.@ (PCRIII 454).

Looney admits that calling Dr. Partyka might be dangerous, but opines A[B]ut this did not mean that another expert would have been put in a position of revealing Dr. Partyka=s findings. On the contrary, another expert could have testified to the significance of Looney=s traumatic history of child abuse and abandonment as noted by Dr. Mosman.@ (Appellant=s Brief p 61)

In Dufour v. State, 905 So.2d 42, 56-57 (Fla. 2005), the Court in similar circumstances held:

> As this Court has noted, to prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. See Strickland, 466 U.S. at 687; Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). The first inquiry requires the demonstration of "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Under this analysis, Dufour has failed to demonstrate that counsel was deficient in securing a mental health expert. **Although counsel did not seek a second opinion, the record clearly reflects that counsel attempted to secure a mental health expert, had no reason to doubt that expert's negative conclusions, and made an informed decision not to present a mental health expert. There was evidence of clear justification for not utilizing Dr. Gutman as a witness**, see Asay v. State, 769 So.2d 974, 984 (Fla. 2000) ("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy.").

Moreover, this is not a case where counsel never attempted to meaningfully investigate mitigation. See *id*. at 985 ("This Court has found counsel's performance was deficient where counsel 'never attempted to meaningfully investigate mitigation' although substantial mitigation could have been presented.") (citing Rose v. State, 675 So.2d 567, 572 (Fla. 1996)). Counsel is entitled to great latitude in making strategic decisions. See Rose, 675 So.2d at 572. In those cases where counsel has conducted a reasonable investigation of mental health mitigation prior to trial and then made a strategic decision not to present this information, this Court has affirmed the trial court's findings that counsel's performance was not deficient. See Asay, 769 So.2d at 985.

Here, trial counsel was not ineffective simply because after receiving an initial unfavorable report from Dr. Gutman they did not proceed further to seek additional experts for mental mitigation evidence. In Asay, the defendant's original penalty phase counsel engaged a psychiatrist who diagnosed Asay with antisocial personality disorder, but found that Asay did not exhibit an "emotional or cognitive disturbance." Id. at 985. In that case, the Court concluded that the defendant's attorney was not deficient in deciding to discontinue his investigation for mental health mitigation after receiving an initial unfavorable report from an examining psychologist. See id. at 986.

Similar to Asay, we conclude Dufour's trial counsel was not deficient where, after receiving the initial unfavorable report from an examining mental health expert, Dvorak did not retain an additional expert. Furthermore, Dr. Gutman's evaluation is not rendered less competent simply because Dufour was able to provide conflicting testimony at the evidentiary hearing. See Jones v. State, 732 So.2d 313, 320 (Fla. 1999) (stating that the evaluation by a mental health expert is not rendered less competent simply because the appellant provided conflicting testimony). Based on the record, we conclude that trial counsel conducted a reasonable investigation into mental health mitigation, which is not rendered deficient simply because Dufour was able to secure more

> favorable mental health testimony in the postconviction proceeding.

(Emphasis added).

Likewise here, Cummings had an investigator and a mental health expert to Atease out@ mental health information. Records were secured and Dr. Partyka interviewed and tested Looney. Dr. Partyka reported to Cummings his feeling that Looney=s childhood and other life issues would be better displayed through others, not the doctor, because of Dr. Partyka=s belief that Looney=s mental health evaluations were not helpful.[21] Cummings discussed

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[21] See Rivera v. State, 859 So.2d 495, 502 (Fla. 2003), wherein the very opposite was asserted-that lay witnesses should have been used over an expert to present mitigation:

> In support of Rivera's IAC claim that trial counsel should have put on more evidence of his drug use history, addiction, and dependence, several lay witnesses testified at the evidentiary hearing that Rivera began drug use at an early age, that he experimented with many types of drugs, and that he may have abused drugs. However, the trial court found in its order denying postconviction relief that "the evidence presented by appellate counsel during the evidentiary hearing was practically identical to the evidence presented by [trial counsel] during trial."
>
> The trial court essentially concluded that the fact that some lay witnesses could have given slightly more detail about Rivera's history of drug use than the defense expert actually presented in this case was insufficient to meet the Strickland standard that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

the use of Dr. Partyka as a witness with other qualified colleagues and strategically determined that it would not be wise to call this expert. Having made a valid strategic decision after a mental health investigation, Cummings cannot be held to be ineffective. Dufour controls.

F. Failure to Present Mitigating Evidence Effectively

Citing Wiggins v. Smith, 539 U.S. 510 (2003), Looney suggests that defense counsel should have been more effective in presenting mitigation.[22] In particular, Looney points to the opening and closing arguments and urges that had Cummings been more expansive

in setting forth the facts, the results would have been different.

In Wiggins, the court found trial counsel inadequate for failing to conduct a reasonable investigation, given notice that such an investigation would likely turn up important mitigating evidence. Wiggins does not control here since no mitigation was unearthed that was not investigated by defense counsel; at best, Looney is trying to put a new spin on the evidence; there was

[22] For example in footnote 13 (Appellant=s Brief p.65) Looney chides defense counsel for not knowing how many aggravating circumstances were shown **B** A[There were six statutory aggravators, not seven. (RXVIII, OR. 2203) Cummings should have known that.@ The record actually reflects that there were seven aggravating factors but two were merged as one **B** Looney, 803

mitigation found and considered by the jury and trial court,[23] and the Anew@ mitigation articulated, without evidentiary support, by Dr. Mosman would not have changed the dynamic that the aggravation outweighed the mitigation.

As to re-argument pertaining to the Aother possible statutory aggravating factors@ that should have been found, the State relies on previously presented arguments to demonstrate that those factors could not be found.

G. Prejudice

Citing Rivera v. State, 859 So.2d 495 (Fla. 2003), Looney concludes in this pleading that not only has he demonstrated deficient performance by Cummings but actual prejudice. Rivera, does control, however not in Looney=s favor.

> Because this case involves a brutal abduction, rape, and child-murder involving strong aggravators that would not have been significantly impacted by the weight of the proposed nonstatutory mitigation, the trial court concluded that prejudice had not been sufficiently demonstrated under this portion of his IAC claim. In other words, the trial court concluded that Rivera failed to show that the additional evidence regarding his childhood trauma, developmental age, and failure to receive drug or alcohol treatment was sufficient to undermine confidence in the outcome of his original penalty phase proceeding. See Strickland, 466 U.S. at 694. We find no error in this conclusion.

So.2d at 664.

[23] The recommendation for imposition of the death penalty was by a 10-2 vote. Looney, 803 So.2d at 664.

Rivera, 859 So.2d at 506.

Sub judice, the trial court concluded that, based on the record and following the evidentiary hearing, no prejudice was proven in this case.

> 10. Even if the mitigation evidence presented had been parsed and teased and enumerated as argued on post conviction relief, it has been repeatedly held by appellant majorities that a laundry list of enumeration of mitigation aspects or factors relating to a defendant's character, record and background is not required to supplant the standard Section 921.141(6)(h) approved jury instruction form. As has been indicated such specific enumeration may create real risk of misleading a jury into not considering some mitigation aspect with respect to a defendant's background, character or record that it has heard because it has not been included in any enumeration. The mitigation presented would not have been provided any more impact or weight for its consideration if it had been teased or parsed into tiny bits and given multiple enumeration for multiplicative matching purposes against the State's aggravators. The jury was not left with the impression that the mitigation they could consider was limited nor that mitigation not specifically designated as statutory could not impact or be weighed against the State's statutory aggravators. Contrary to defendant's assertions that his case went to the jury with no statutory mitigators and only a grouping of nonstatutory mitigation, his case went to the jury with two statutory mitigators and a host of further nonstatutory mitigation. Furthermore, counsel made it clear and ably argued that any mitigator could outweigh all of the aggravators argued by the State.

(PCRIII 564).

CONCLUSION

Based on the foregoing all relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Mr. Frank Sheffield, Esq., 906 Thomasville Road, Tallahassee, Florida 32302 this 23rd day of September, 2005.

_____

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CERTIFICATE OF TYPE SIZE AND FONT

I hereby certify this brief was typed using Courier New 12 point.

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CAROLYN M. SNURKOWSKI
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