IN THE SUPREME COURT OF FLORIDA

JAMES ARMANDO CARD, SR.,

Appellant

v.

STATE OF FLORIDA,

Appellee

Case No. SC06-1383

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

PAGE(S)

CASES

STATUTES AND RULES

PRELIMINARY STATEMENT

Appellant, James Armando Card, Sr., was the defendant in the trial court; this brief will refer to appellant as such, defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The 2003-2006 postconviction record on appeal consists of nine volumes, numbered I though IX, which will be referenced as "PC/" followed by the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. For example, "PC/III 417-26" references the trial court's Order Denying Motion for Postconviction Relief" found on pages 417 through 426 of volume III of the postconviction record on appeal.

The 2003-2006 postconviction record on appeal also includes four volumes of exhibits, numbered I through IV, which will be referenced as "PC/Ex/", followed by the respective Roman numeral designated in the Index to the Record on Appeal, followed by any appropriate page number. For example, "PC/Ex/I 732" references the first page of Dr. Wray's January 27, 1982, report found on page 732 of volume I of the Exhibit volumes of the record on appeal.

By Order dated January 11, 2007, this Court authorized the use of the record of the penalty phase proceedings in Card v. State, Florida Supreme Court case #SC00-182. That record will be referenced as "P1999/", followed by the respective Roman numeral designated in that Index to the Record on Appeal, followed by any appropriate page number, such as "P1999/XXIX 10-14" references a portion of the 1999 penalty-phase testimony of Vicky Elrod concerning Card's confession to her.

"IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a trial-court Order (PC/III 417-35)[1] denying Card relief after conducting an April 21, 2006, postconviction evidentiary hearing (PC/IX 511-637). The trial court provided an evidentiary hearing on claims V and IX of Card's Amended Motion to Vacate Judgment and Sentence (PC/I 92-170. Claim V alleged ineffective assistance of counsel concerning Card not testifying in the 1999 penalty proceedings

[1] Attached to this brief is the Order without its attachments.

(PC/I 133-36), and Claim IX alleged ineffective assistance of counsel related to mental mitigation that was and was not presented at the 1999 penalty proceedings (PC/I 145-48, 163-70). Here in the instant appeal, Card's two issues relate to claim IX.

This Court, in its opinion on direct appeal, summarized the core facts of the guilt-phase evidence:

> On the afternoon of June 3, 1981, the Panama City Western Union office was robbed of approximately $1,100. Blood was found in the office and the clerk, Janis Franklin, was missing. The following day, Mrs. Franklin's body was discovered beside a dirt road in a secluded area approximately eight miles from the Western Union office. Her blouse was torn, her fingers severely cut to the point of being almost severed and her throat had been cut.
>
> As early as 6:30 on the morning of June 3, 1981, the appellant telephoned an acquaintance, Vicky Elrod, in Pensacola, Florida, and told her that he might be coming to see her to repay the $50 or $60 he owed her. At approximately 9:30 that night Vicky Elrod met with the appellant. He took out a stack of twenty and one-hundred dollar bills and she asked if he had robbed a 7-Eleven store. He told her that he had robbed a Western Union station and killed the lady who worked there. He described scuffling with the victim, tearing her blouse and cutting her with his knife. He said he then took her in his car to a wooded area and cut her throat saying, 'Die, die, die.' Several days after their meeting, Vicky Elrod went to the police with this information.

Card v. State, 453 So. 2d 17, 18-19 (Fla. 1984).

After Card (Fla. 1984), this case has had a long history leading up to this appeal. Card v. State, 652 So.2d 344, 344 (Fla. 1995), summarized the history of this case up to 1995:

> In 1982, Card was convicted of first-degree murder and sentenced to death before the Honorable W. Fred Turner. On direct appeal, this Court affirmed Card's conviction and sentence. *Card v. State*, 453 So.2d 17, 24 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L. Ed. 2d 330 (1984). Card subsequently filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 which was denied. We affirmed. *Card v. State*, 497 So. 2d 1169, 1177 (Fla. 1986), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2203, 95 L. Ed.2d 858 (1987).

Card (Fla. 1995) reversed the trial court's "denial of a second motion for postconviction relief," 652 So.2d at 344, remanding the case to the trial court for proceedings concerning the preparation of the sentencing order:

> We believe that the allegations of the petition are sufficient to require an evidentiary hearing on the question of whether Card was deprived of an independent weighing of the aggravators and the mitigators. Among the matters that can be developed at the hearing are the nature of the contact between Judge Turner and the prosecutors, when the judge was given the form of the sentencing order, and at what stage of the sentencing proceeding he gave copies to defense counsel. Further, an evidentiary hearing will permit a full exploration of the facts bearing upon the State's contention that all of the matters relating to Judge Turner's sentencing practices in death penalty cases were known or should have been known more than two years before this petition was filed. *See Adams v. State*, 543 So. 2d 1244, 1247 (Fla. 1989).

652 So.2d at 345-346.

As a result of Card (Fla. 1995), the trial court provided Card a new penalty phase, which transpired in 1999. (P1999/I to P1999/XXXI) (**The performance of defense counsel at the 1999 penalty proceedings is contested in the instant proceedings.**) At

the 1999 penalty proceedings, after the jury was selected (P1999/XXIV 2806 - P1999/XXV 2966), evidence, argument, and instructions were presented (P1999/XXVIII 1-100; P1999/XXIX 1-65, 1-35; P1999/XXX 1-85; P1999/XXXI 1-154), resulting in the jury's 11-1 vote recommending death (P1999/XXXI 156-58).

At the 1999 penalty phase, the State called the following witnesses: George Dobos (P1999/XXVIII 31-45), David Slusser (P1999/XXVIII 46-63), Dr. Kielman (prior testimony read at P1999/XXVIII 66-78), Edward Franklin (P1999/XXVIII 79-90),Cindy Brimmer (P1999/XXVIII 91-100), and Vicky Elrod (P1999/XXIX 3-55). Because the State will argue that defense counsel's performance was not ineffective given his options in the face of the aggravating evidence and that, arguendo, Card suffered no Strickland prejudice, the State summarizes its evidence presented at the 1999 penalty phase.

The responding uniformed officer, Commander Dobos, then patrolman Dobos with the Panama City Police Department, testified that he responded to a call to the Western Union office at 32 Oak Avenue on June 3, 1981, at 3:14 p.m. (P1999/XXVIII 31-34). There was a "quantity of blood" on the floor and furniture and the office was in "general disarray." (P1999/XXVIII 34-35). A cash drawer was removed from its slot, broken, and found on the floor. The clerk, Mrs. Franklin, was missing from the office. (P1999/XXVIII 35). Her car was still

parked outside in the parking lot across from the office. (P1999/XXVIII 35). The officer described and used various photographs in his testimony. (P1999/XXVIII 36-44)

An investigator with the Panama City Police Department, David Slusser, testified that the victim was discovered the following day at 4:00 p.m.; it was 8.4 miles from the Western Union office to the dirt road and the victim's body was approximately another 1/4 mile from the road. (P1999/XXVIII 49-50). The investigator discussed several photographs of the victim and of the area where the victim was found (P1999/XXVIII 52-62). The victim was not wearing a blouse or top when she was found. (P1999/XXVIII 60). A photograph showed that one of the finger's of her right hand had been "almost severed" (P1999/XXVIII 61). There were also cuts on the victim's left hand. (P1999/XXVIII 61-62). Slusser was present during the autopsy of the victim. (P1999/XXVIII 51)

The doctor who performed the autopsy, Dr. Kielman, had died, so his prior testimony was read to the jury. (P1999/XXVIII 55, 65-78). He testified that he performed the autopsy on the victim, Janice Franklin. (P1999/XXVIII 71). She had a "very deep cut over the front of her throat." (P1999/XXVIII 72). A sharp instrument was used, and the cut was six to seven inches long. (P1999/XXVIII 74) The wound was 2 ½ inches deep and left a mark on the bone. (P1999/XXVIII 74-75). The doctor described the

injuries on the victim's hands, which were classic defense wounds caused by a person protecting herself from an attack. (P1999/XXVIII 76-77).

The victim's husband, Edward Franklin, testified about the last time he saw his wife and about money missing from their business. (P1999/XXVIII 79, 85-88) Cindy Brimmer, daughter of the victim, testified about her attempt to reach her mother the day of the murder and about missing property; she also provided a victim impact statement. (P1999/XXVIII 93-100)

Vicky Elrod, who lived in Pensacola in June 1981, testified that, on June 3, 1981, Card called in the morning and told her that "he would have the money and he could repay me then." She had loaned him or his wife some money for gas. (P1999/XXIX 7) That same day, at about 5:30p.m., Card called her again and said he was definitely coming to Pensacola to talk with her about something "very urgent." (P1999/XXIX 8) That night she went to see him at his motel in Pensacola, and he pulled out a "big wad of money," and she joking asked him if he had "knocked over a 7-11." (P1999/XXIX 9-10). Card replied that he had robbed a Western Union and killed the woman there using a knife. (P1999/XXIX 10-11). He told her that when he first entered the Western Union office there was someone else in the office, so he left telling the victim that he would return and wanted to talk with her. (P1999/XXIX 11). When Card returned, he was wearing

rubber gloves and he had a Bowie knife. (P1999/XXIX 11, 13). He went over to the safe and scuffled with the victim. (P1999/XXIX 11) He pulled out the knife, cut her "a little bit" in the back area, and tore her blouse. (P1999/XXIX 11-12). He took around $1,000. (P1999/XXIX 12). He forced the victim out of the business at knife point. (P1999/XXIX 13). He took her five or six miles into a wooded area. He then told her that he was not going to hurt her and that all he wanted was the money and asked her to get out of the car. (P1999/XXIX 13). As the victim was walking away, he got out of the car and quietly went behind her. (P1999/XXIX 13). He said he "grabs her by the back of, by her hair and pulls her neck back and cuts her throat." (P1999/XXIX 13) After he slit her throat, he told the victim to "die, die, die." (P1999/XXIX 13). Afterwards, Card threw away the knife where no one would find it. (P1999/XXIX 14)

Defense counsel's opening statement at the 1999 penalty phase, included the following topics:

> It's been said that aggravating circumstances are about the crime and that mitigating circumstances are about the person. *** (P1999/XXVIII 26)
>
> In mitigation we're going to talk to you at great length about how someone goes from being an innocent little baby that couldn't hurt anyone to sitting here contemplating death in the electric chair. *** (P1999/XXVIII 27)
>
> You will hear a story of a family in complete chaos. *** (P1999/XXVIII 27)

You will hear then that mother married and didn't marry well. She married a man that was horribly abusive. *** repeated beatings *** emotional abuse *** (P1999/XXVIII 27)

You've got a young man then that's reaching adolescent years, his formative years, where you're trying to decide just what you are and who you're going to be in life, with none of the tools to make that kind of decision in the way we would expect. (P1999/XXVIII 28)

You're hear about the flashes of good in him as he matured. *** good friend *** good friend *** he wanted to be a good man. *** He didn't know how. *** (P1999/XXVIII 28)

*** gradually Mr. Card's life comes together as a prisoner, and he's a good prisoner. His disciplinary record is outstanding. His contributions to society *** (P1999/XXVIII 29)

*** religious improvement *** (P1999/XXVIII 29)

*** correspondence that Mr. Card has, has had with the school children in California. *** (P1999/XXVIII 29)

*** interesting artwork that Mr. Card's been able to perform. *** (P1999/XXVIII 29)

*** Things have jelled slowly for him to where he is a good prisoner. *** you will see some family members that will testify and set the history where you will see how the siblings, his brother and sister will testify about abuse and the impact that they saw on, on Jim [Card] as he grew up. And then you'll, you'll see what's happened over the course of the last 15 or 16 years. And it's remarkable. And at the end of it you will hear, I anticipate, from a psychology professor from California that can relate all this for you, explain how these factors contribute, pull together to create the man that's sitting here with you today. (P1999/XXVIII 30)

When it's done, we'll be asking you to look into your hearts and not to avoid punishment but to look for compassion. The Judge will tell you that mitigation is virtually anything about the

> Defendant's character, background, or circumstances that in your conscience as a citizen would call for compassion for mitigation in this case of what is indisputably a horrible crime. And, you know, I would not want anyone to think for a minute that we are suggesting that anything we say in any sense lessens the, the crime itself. But what we want to do is explain to you how it got there, and then we want to give you some, some look at the future, maybe, to see this, if this, if there really is any, any need to kill this man. (P1999/XXVIII 30)

At the 1999 jury penalty phase, defense counsel presented the testimony of the following witnesses:

- ? Card's mother (P1999/XXIX 21-55);
- ? A Catholic priest (P1999/XXIX 56, transcript of video as attachment at end of volume 1-22);
- ? Card's brother-in-law (P1999/XXX 4-11);
- ? The Director of Catholic Charities (P1999/XXX 11-18);
- ? A Catholic nun (P1999/XXX 19-30);
- ? Card's ex-wife (P1999/XXX 31-43)
- ? Card's daughter (P1999/XXX 43-46);
- ? Card's friend (P1999/XXX 47-51)
- ? Card's niece (P1999/XXX 52-60);
- ? Card's brother (P1999/XXXI 5-25);
- ? Dr. Craig Haney, a Stanford University Ph.D. in psychology who also earned a law degree from Stanford (P1999/XXXI 30-86).

Defense counsel began his closing argument to the jury with the following theme:

> *** I told you the first day of trial that the State's case would be about a crime and our case would be about a man. If it was simply a matter of looking at a crime and running down a checklist we

> wouldn't need a jury. As [the prosecutor] has suggested list of factors and numbers could be used. If that approach could be used, if it made any sense at all we would have replaced each and every one of you with a personal computer years ago. And that is not what this is about. It is really not what this case has been about from the beginning.
>
> Mercy, pity, those are human qualities. Qualities that every one of us ought to have and those are unquantifiable things. Those are what jurors in a case like this, and I don't envy your job, that is what you have to look and decide if it applies.
>
> We have tried to tell you some story of how man goes from baby, an innocent baby to sitting over there contemplating these choices. And you get there by a hard life. By a truly pathetic set of circumstances.
>
> I liked Ms. Card when she was up there. But what a family she raised. A family that couldn't catch a break. ***

(P1999/XXXI 130-31) Defense counsel continued by discussing the testimony of the defense witnesses and how they support a jury recommendation of a life sentence. (See P1999/XXXI 132-46) The following excerpt illustrates the theme:

> [C]hildren raised under these conditions, poverty, abandonment, instability, neglect, abuse, abuse again, abuse again, have problems.

(P1999/XXXI 132-33)

Defense counsel argued to the jury that in 6,300 days, in 18 years in which Card has been in prison, he has had only five bad days. (P1999/XXXI 131-32) Defense counsel stressed how prison has provided an environment for Card to turn things around some, for example, for him to get his G.E.D. and write to

school children "about the choices you make in life." (P1999/XXXI 139-40) He discussed Card's art work, which the nuns display in their office. (P1999/XXXI 140-41) He highlighted the testimony of the "administrator of all of Catholic charities," who found Card "to be a sincere and genuine man." (P1999/XXXI 141-42) Defense counsel talked about Card's minister who thought that Card's artwork was beautiful and that Card's faith was genuine. (P1999/XXXI 142-43)

Defense counsel then argued to the jury that their role is to consider the totality of Card's background, including "family background, abusive upbringing, neglected upbringing" and how well he has done in prison. (P1999/XXXI 143-44) He stressed that Card is "more than the worst thing he did." He is not the "worst of the worst"; he is not the person for whom the death penalty was intended; and, when everything about Card, the person, is weighed, the jury should recommend life in prison. (P1999/XXXI 144-46)

On April 1, 1999, the jury recommended a death sentence by a vote of 11 to 1. (P1999/XI 2005; P1999/XXXI 156-58) On April 19, 1999, the trial court conducted a Spencer hearing. (P1999/XXVI 2994-3016) On June 21, 1999, the trial court sentenced Card to death. (P1999/XII 2248-53; P1999/XXVII 3018-30)

Card v. State, 803 So.2d 613 (Fla. 2001), affirmed the 1999 death sentence.

Card (Fla. 2001) summarized the trial judge's findings of aggravating and mitigating circumstances:

> [T]he trial court found five aggravators: (1) CCP; (2) HAC; (3) avoiding or preventing a lawful arrest; (4) pecuniary gain; and (5) murder committed during the commission of a kidnapping. In mitigation, the trial court did not find any statutory mitigation but found and weighed Card's difficult family background, good prison record, his religious beliefs, childhood abuse, good military record, artistic abilities, and correspondence with school children.

803 So.2d at 627. The weight given to each of the seven mitigating circumstances was as follows:

> (a) The defendant's upbringing was "harsh and brutal" and his family background included a brutal step-father; some weight;
>
> (b) The defendant has a good prison record; slight weight;
>
> (c) The defendant is a practicing Catholic and made efforts for other inmates to obtain religious services; some weight;
>
> (d) The defendant was abused as a child, which was also involved in the family background factor; some weight;
>
> (e) The defendant served in the Army National Guard and received an honorable discharge; some weight;
>
> (f) The defendant has artistic ability; little weight;
>
> (g) The defendant has corresponded with school children to deter them from being involved in crime; some weight.

(P1999/XII 2251-2252).

Subsequently, Card, through counsel filed the amended postconviction motion (PC/I 92-170) on which the instant appeal is based. The State responded in writing. (PC/I 175-96) The Circuit Court conducted a Huff hearing. (PC/VII 488-96)

On January 31, 2006, Card filed a pro se, handwritten waiver of his right to be present, in person, at the evidentiary hearing scheduled for April 21, 2006, and indicated that he would be willing to participate electronically. (PC/II 339-40) The State responded. (PC/II 341-43) On March 13, 2006, the trial court informed Card of his right to be present to testify at the postconviction evidentiary hearing, and Card indicated that he did not want to attend. (PC/VIII 505-508)

On April 21, 2006, the Circuit Court conducted the evidentiary hearing, at which Card's postconviction counsel called Bill Mosman to testify (PC/IX 514-86) and the State called Jeffrey Whitton (PC/IX 588-630), the attorney for Card during the 1999 penalty proceedings. The parties agreed that the circuit court could consider the record from the prior proceedings in the case. (PC/IX 529)

Bill Mosman indicated that he is a psychologist and Florida attorney and provided his biography. (PC/IX 515-24) He testified that in postconviction death penalty cases he has testified 15 times, "always at the request of the defense" (PC/IX 521-22),

and in non-capital cases he has also testified for the State (PC/IX 524) The trial court accepted Mosman as an expert allowing him to give "his opinion in the field." (PC/IX 524)

Mosman testified that, in response to a request by Card's postconviction counsel, he reviewed "quite a few documents" and attempted to interview Card in person, but Card refused to see him. (PC/IX 525-26) Mosman said that meeting with Card would have provided "a more robust or richer data pool," but he still has enough data to follow through "with what he was asked to do." (PC/IX 526) Mosman described his preparation for the postconviction evidentiary hearing, including documents. (PC/IX 526-44) Mosman read the transcript of the 1999 penalty proceedings but not the transcript from the trial. (PC/IX 532)

Mosman testified that, in his opinion, at the time of the crime "there was an extreme emotional disturbance." (PC/IX 535-36, 555-56) Mosman listed various documents related to Card's history on which he relied for his opinion. (PC/IX 539-44)

Mosman discussed Card's IQ scores of 78, 83, 92, 102, and 96. He stated that the definition of mental retardation has changed and that about the time of Card's highest score, "we changed that instrument … because it was inflating scores about five to ten points." Mosman then subtracted five to ten points from Card's scores, resulting in a full-scale IQ of "about 91, perhaps 86." (PC/IX 549-50) He concluded: "Now, that's where

his, mentally, we have that already set in." He continued that Card has some serious problems with his analysis and judgment. (PC/IX 550) He also testified about "brain damage." (PC/IX 550) He clarified that he is "not saying" that Card is retarded but rather, Card has a "mental deficit." (PC/IX 552)

When Card's postconviction counsel asked about the age mitigator, Dr. Mosman began to opine about Card's intellectual, mental age, and the State objected. During the discussion, the Judge observed that Mosman has "[n]ever interviewed him, never did any testing, done nothing" other than "reviewing records." Ultimately, the State agreed to allow Mosman to continue but subject to the State's objection. (PC/IX 556-60) Mosman continued with his age testimony. (PC/IX 560-62)

Mosman spoke with Dr. Haney, the mental health expert who testified for Card at the 1999 penalty phase. (PC/IX 552) Dr. Haney cannot diagnose, treat, or test. (PC/IX 553)
Dr. Mosman opined concerning a number of non-statutory mitigators that he said "were not brought up" in the 1999 penalty phase. (PC/IX 565-67)

On cross-examination, Mosman testified concerning his law practice, that he "won't touch criminal law with a 20 foot pole." (PC/IX 568)

Mosman acknowledged that his only experience "dealing with death penalty cases [is] as a witness similar to what [he was] doing" at the evidentiary hearing. (PC/IX 569)

When asked if he ever had a case in which he gathered data and interviewed and he still did not think he had enough to give an opinion, Mosman said "no" because of the "boxes and boxes that are worked up." (PC/IX 569)

Mosman reiterated that he has not interviewed or tested Card and stated that he "could not pick him out of a group of two guys." (PC/IX 570)

He said that he did have access to Dr. Carbonell's data. (PC/IX 570-71 Mosman had not spoken with either Carbonell or Dr. McClaren. He said that Carbonell did not return his calls and that McClaren does not have a recorder on his machine. (PC/IX 570-71)

Mosman thought that Dr. McClaren is a "real straight shooter" and he said that McClaren "does test and diagnose." (PC/IX 572)

Mosman stated that Dr. Haney considered many of the same documents and records he did, but Haney discussed them only in "risk factor analysis" rather than "mitigation." (PC/IX 573)

Mosman said he had read Card's Army medical record, which indicated that he was free from mental disease or defect, able

to distinguish right from wrong and "to understand and cooperate in Court proceedings." (PC/IX 575)

Concerning Morelli's report discussing the knot over Card's left temporal, Mosman testified:

> Q. … I'm just saying so we really don't know, other than what's written on here that James Card told R. J. Morelli, we're accepting that as truth?
>
> A. Well, I accepted it as truth because it was written by a professional in the course of the diagnostic and treatment.
>
> Q. And he did report that as the history?
>
> A. And he did report that that was reported to him and I have absolutely no reason to disbelieve him.

(PC/IX 577-78)

Mosman was asked about the anti-social personality disorder that a forensic psychiatrist, Dr. Wray, found in 1982, and a psychologist, Dr. Cartwright, found in 1981. (PC/IX 575-81. See PC/Ex/I 732, 741) He responded that "sociopathy" is an "ugly word" and should not be used in law or in diagnosis. (PC/IX 578-80)

Jeffrey Whitton, Card's 1999 penalty phase lead counsel, testified. John O'Brian helped him with the 1999 penalty phase on a pro bono basis. (PC/IX 589)[2]

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[2] Whitton also indicated that there were lengthy discussions with Card as to whether he should testify, and Card followed his counsels' recommendation that he not testify. (PC/IX 590) On cross-examination, Whitton also testified that Card "has

Whitton has been practicing law for 25 years. He had tried between a dozen and two dozen jury trials to verdict, ranging "from a misdemeanor battery to another murder case" to "contract actions to wrongful death tort case." He said it seems that he "always draw[s] the really weird" cases. "It's an interesting mixed practice." (PC/IX 598)

Whitton said that, to his knowledge, Card has always denied doing the crime. (PC/IX 592)

Whitton said that it is important to be consistent in the theme that is presented to the jury. (PC/IX 597)

Dr. Haney was referred by Whitton's mitigation investigator, who "highly recommended him." (PC/IX 591) Whitton explained how Haney fit into his strategy:

> The whole course of doing a trial like this, if I can maybe be a little bit fanatic and I apologize for that, is that you have to humanize your defendant. The jury has got this preconception that they're dealing with Hannibal Lector and it's a monster and you have to humanize the defendant. But you than have to explain how these very human problems play together to create the person that sitting in front of them. Dr. Haney was to come and to run, help us with his family background and to explain to the jury how those background factors, Mr. Card's history of abuse, his school history, various problems over the years, pretty exhaustive

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impulsivity problems" and he believed that on cross-examination he would "explode on the stand," which would undermine the effort to humanize Card. (PC/IX 611-12) Not testifying was Card's final decision after vacillating. (PC/IX 612) There was "[a]bsolutely no doubt" that Crad understood that it was ultimately his decision whether to testify. (PC/IX 629)

> background check, the research that was done, all played together to create someone, not that a murder could be justified or excused, but that it could perhaps be understood for what it was and be seen as a more human act than the act of a monster that deserved to be put to death.

(PC/IX 591-92)

Whitton testified that in preparation for the 1999 penalty phase, he "spent a lot of time" reviewing voluminous mental health records. He also reviewed Card's military records. (PC/IX 592-93) He relayed what he learned from Card's military records. (PC/IX 591. See also PC/IX 609-610)

Whitton and Dr. Haney personally interviewed Dr. Joyce Carbonell in Tallahassee for hours. He and Dr. Haney felt that she "displayed all sorts of nervous habits" and would change the subject during their discussions. They thought she would not "survive cross-examination in any meaningful fashion" and would not "present well as a witness." Therefore, Carbonell was not called as a defense witness. (PC/IX 594-95)

Whitton did not call Dr. McClaren as a witness in 1999 because "his report was just too inconclusive" and he "did not fit into the … theme I was trying to put to this jury of humanizing Jim." He continued: "It was going to make him look like he was a crazed killer …." He also said that he had no other evidence to support "organic impairment." (PC/IX 596-97)

On cross-examination, Whitton testified that McClaren put Card's IQ at about 100. (PC/IX 611) Whitton could no recollect precisely which records were provided to McClaren. (PC/IX 613)

Dr. Elzahary, a neurologist, was appointed, but regarding their MRI and EEG tests on Card, "all the results came back normal." (PC/IX 599) On cross-examination, Whitton said he did not have additional physical workup done on Card because of the results of the preliminary tests that were conducted. (PC/IX 617-18)

Whitton explained why he did not call Dr. Hord in 1999 even though he had testified in the first sentencing proceedings:

> Dr. Hord actually was, seemed a little offended that I didn't use him. I went back and I looked at his testimony and I looked at a subsequent report he did and it seemed to me that Dr. Hord was simply making up facts. He seemed to have a very poor understanding of the case, the history of the case, he assumed there had been a rape charge that the been brought and proven, which when I told him that just wasn't there, he said that doesn't make any difference to my diagnosis, I found that note, it doesn't make any difference to my opinion even though he had just spent ten minutes talking about how it all fit in. I just, you know, I didn't think Dr. Hord had a handle on what was going on, that was the first problem. The second one was he was coming up with, you know, again, the crazed killer approach, sociopathic personality and that wasn't the theme that I was trying to present to this jury of humanizing this man, bringing family members, explaining his background, explaining how that can lead to where you are. And so I just didn't think he would, if I were going to use anyone to bring in his psychiatric background it would have been Dr. McClaren as opposed to Dr. Hord.

(PC/IX 599-600)

Whitton concluded his direct-examination testimony:

> Q. Did you, did you think that you presented of best case that you could for James Card in 19, at the time of this sentencing phase?
>
> A. Well, you can do a would a, could a, should a any time and we spent hours afterwards doing postmortem. I could have done things differently but I don't know if I could have done anything better. I tried it as hard as I knew how.
>
> Q. Maybe I asked it wrong. Did you try the case that you intended to try?
>
> A. Yes. Like I say, I tried that case just as hard as I knew how. At fifty dollars an hour I was $40,000 fee on the thing which tells you how much I did, I took personally. I mean, we worked it hard.

(PC/IX 600-601)

On cross-examination, Whitton said that Card's 1999 penalty phase was the only death-penalty case he has handled. He indicated that he had participated in a four-day CLE course when it became apparent that he would be continuing the representation to trial. Part of Whitton's representation was winning the 3.850. As a result, Judge Costello asked him to continue with the appointment. (PC/IX 602-603. See also Whitton's summary of the surrounding case history at PC/IX 626)

John O'Brien sat with him during the trial. He is a good friend. (PC/IX 603)

To prepare for the 1999 penalty proceedings, Whitton read boxes of material, including the transcript of the first trial, discovery material, and CCR material. (PC/IX 604-605)

Contrary to the Initial Brief (IB 32), Whitton said he was not sure if he remembers any information about Card saving his baby sister's life. More specifically, he testified:

> Q. Do you recall having any information about at a time when Mr. Card, himself, intervened to save his baby sister from a life threatening situation with another family member?
>
> A. I remember lots of stories about what went on inside that family but I'm not sure if I remember that intervention or not. I remember a lot of the impact on the family when that sister, I believe it was that sister, passed away. A sister did, was killed in a car accident and that was something that we talked about.
>
> Q. That was one sister, how about another younger sister that Mr. Card saved?
>
> A. I can't tell you I remember that story. I can look, again, I have extensive files if you want me to look at some point.
>
> Q. If, in fact, you had that information would you agree with me that that would be important to present to a jury in this humanizing process of Mr. Card?
>
> A. If I had that kind of information I certainly would have gotten his mother to have told us the story.

(PC/IX 606-607)

He said that he had difficulty getting Card's family members to cooperate with him due to their strong, brittle personalities. (PC/IX 607-608) He elaborated:

> There were strong-willed and they didn't necessarily do everything I asked but we spent a lot of time and Ms. Rogers spent even more time and Ms. Husbands, my paralegal spent a lot of time trying to keep these witnesses, answer every question these witnesses had, get them prepared, get all the story we could out of them. I spent a lot of time with them, we put a lot of effort into it. Now I don't remember particular antidotes from his childhood, I remember something about a pet cow getting killed or something like that, that's about the only one that sticks in my mind today.
>
> Q. Okay. And so were you, at the time you were getting ready to present your witnesses in this case on Mr. Card's behalf, were you happy with the line-up you had from the family?
>
> A. It could have been better but I was losing them as fast as I was gaining them at the time we went to trial. The Court had given me a couple of continuances to get more but by the time I would get to the next day I would have lost some of the ones I had. We found a daughter in, or a sister in Orlando, she didn't come to trial, she wouldn't come. We had others. We dealt with the wife that was, or ex-wife that was here, children that were here, I mean, it was on effort to, and it was as good a line up as we were going to get. Now, could you have had a perfect line-up, yeah, but there weren't a lot of saints in this family.

(PC/IX 608-609)

Whitton considered the statutory mitigators for the penalty phase. Concerning extreme emotional disturbance, he testified that background for it would be limited by Card's insistence that he did not commit the crime. (PC/IX 614) Whitton elaborated concerning his efforts to pursue extreme emotional disturbance:

> I think that was the whole point in having him examined and having those medical records reviewed. My problem is that the evidence that came back from my experts was inconclusive. So, Dr. McClaren, that

> was part of what I wanted him to evaluate for me and it just didn't come back strong enough to present.

(PC/IX 615)

Whitton said that Dr. Haney was a "consulting expert." Haney was not a clinical psychologist. Haney did not tell Whitton that his (Haney's) experience was extremely limited. He explained that Haney's role was to explain "how Jim ended up being what he was and who he was here." (PC/IX 615-16) Later on cross-examination, he again reiterated Haney's role in the theme of the defense. (PC/IX 624)

Concerning age as a statutory mitigator, he explained that the concept is nebulous, Card was about 35 at the time of the crime, and that Card was "slow maturing." For example:

> The truth is I didn't know what in the world it meant. Everybody has an age and everybody has an emotional age. I didn't, at that time I don't remember whether there was law saying it was the emotional age that mattered although I know that's come out since. It kind of blurs together in my mind.

(PC/IX 619. See also PC/IX 622) He said that there were "some hints that he showed signs of immaturity," but, he continued, discussing Dr. Hord, "I don't recall anything in there that showed that Jim was emotionally immature or age at the time of the offense and, or is now for that matter." (PC/IX 619-20) He said he looked at it and concluded that it does not help. (PC/IX 620)

He said that he did not understand that his role was to present as many mitigators as possible. (PC/IX 625) In his preparation he enumerated specific mitigators to which his witnesses would testify and that he could argue in closing. (PC/IX 625)

On redirect examination, Whitton testified further about his consideration of age at the Spencer hearing:

> [A]t that point I'm certain what I was trying to convince the Judge of was there's very little point in putting this man to death, society's need, or for whatever societal purposes are served by the death penalty, that particular one wasn't served by putting him to death.

(PC/IX 627)

Whitton elaborated on maintaining a consistent theme in his penalty phase presentation:

> [T]here was some conversation with Mr. Paulk [the prosecutor] about previous record and things like that and I wasn't sure I wanted a history of gunshot wounds, multiple gunshot wounds in Nevada coming in over several years. I'm not sure that put him in the light that I wanted him in. I also know that, I don't believe Mr. Paulk ever realized that his second military discharge was less than honorable and I wasn't particularly interested in tipping him off to that fact since I had already told the jury he was honorably discharged from the Guard. I expected him to come back with that pretty quickly but when I realized he didn't have that information or it hadn't dawned on him cause he had all the information I had, that it seemed to me too that that might an issue best left on the table and so I left some of that alone. But it didn't fit the theme anyway so there wasn't a lot of point in me bringing some of that stuff up. It was all just, it was a swirling mess of factors at every time and so,

> no, I didn't, you know, I did not bring VA medical records from the '60's and '70's in.

(PC/IX 628-29) He continued by explaining his tactics concerning whether Card served in Vietnam and that, in a military town, he had no interest in exploring in front of the jury that Card was unsuitable for taking orders. (PC/IX 629)

Whitton said that Card was smart enough to understand his (Card's) own weaknesses and therefore ultimately agreed with his attorneys not to testify at the 1999 penalty proceedings. (PC/IX 629-330)

Counsel for Card (PC/III 405-15) and the State (PC/356-91) submitted written postconviction closing arguments. The defense's memorandum argued claim IX.

On June 8, 2006, the Honorable Dedee Costello denied Card's Motion for Postconviction Relief. The Order Denying Motion for Postconviction Relief (PC/III 417-26) is attached, without its attachments, to this brief.

SUMMARY OF ARGUMENT

The State respectfully submits this is a classic case of postconviction second-guessing trial counsel. Trial counsel's handling of Card's 1999 penalty phase was imminently reasonable. Indeed, it is undisputed that he devoted hundreds of hours to Card's cause. He reviewed reports and boxes of materials and

explored various mental mitigation possibilities. And after carefully weighing the options, he decided to humanize the Defendant by calling family, friends, and clerics to testify, and to use an expert to integrate their humanization theme.

Postconviction counsel has found one expert who would testify that trial counsel should have done more. However, there is a danger that the path the new expert advocated would open the door to evidence of the Defendant's anti-social personality disorder and manipulativeness. The flimsy foundation for the new expert's hindsighted opinions belie the attack on trial counsel and support the trial court's well-reasoned and extensive order.

The trial court's findings of no deficient performance and no prejudice merit affirmance.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN FINDING THAT DEFENSE COUNSEL AT THE 1999 PENALTY PHASE PROCEEDINGS WAS NOT CONSTITUTIONALLY INEFFECTIVE? (RESTATED)

A. The order and its entitlement to deference concerning factual matters.

The trial court's well-reasoned and well-grounded order at issue is attached. (PC/III 417-26) The only claim on appeal is claim IX of Card's Amended Motion to Vacate Judgment and Sentence (PC/I 92-170. Claim IX alleged ineffective assistance

of counsel related to mental mitigation that supposedly should have been presented at the 1999 penalty proceedings (PC/I 145-48, 163-70).

Since the trial court conducted an evidentiary hearing on this matter, the trial court's factual determinations are entitled to special deference on appeal:

> Generally, this Court's standard of review following the denial of a postconviction claim where the trial court has conducted an evidentiary hearing affords deference to the trial court's factual findings. *McLin v. Stat*e, 827 So. 2d 948, 954 n.4 (Fla. 2002). 'As long as the trial court's findings are supported by competent substantial evidence, "this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."' *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997) (quoting *Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984)).

Walls v. State, 926 So. 2d 1156, 1165 (Fla. 2006).

Because of its entitlement to deference on factual matters and its extensive analyses and findings, the State quotes, at length, the portion of the trial court's Order pertaining to Claim IX of the postconviction motion:[3]

> … Defendant claims that penalty phase counsel provided ineffective assistance in that counsel utilized the services of an unlicensed psychologist as opposed to a clinical psychologist, and failed to obtain the services of a neuropsychologist.

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[3] It is interesting to note that the Initial Brief is devoid of any detailed discussion of the Order itself even though it is the Order that is being appealed.

Defendant claims that Dr. Craig Haney, a Ph.D. and professor of psychology at University of California, Santa Cruz, the defense expert who testified at the penalty phase trial, was not qualified to review the extensive medical evidence in the case. Dr. Bill Mosman, a forensic psychologist and member of the Florida Bar, testified on Defendant's behalf at the April 21, 2006 evidentiary hearing held on this issue.

Defendant has not established that penalty phase counsel was ineffective in his investigation of Defendant's mental health mitigation. Counsel had access to the entire circuit court file, and reviewed voluminous evidence including medical, military, and school records, affidavits of family members, and previous psychological evaluation reports. Counsel hired Dr. Haney to present expert testimony, who was recommended to him by his mitigation expert and who he independently researched through the internet. Defendant did not present any evidence or testimony to establish that penalty phase counsel failed to perform a thorough investigation in preparing Defendant's mental health mitigation. Furthermore, the fact that Defendant's new counsel would have hired a different expert witness or presented the evidence differently does not show that previous counsel's performance was ineffective. *See State v. Coney*, 845 So.2d 120, 136 (Fla. 2003); *Mills v. Moore*, 786 So.2d 532, 535 (Fla. 2001). Nor is counsel's reasonable mental health investigation and presentation of evidence rendered ineffective simply because Defendant has now obtained the testimony of a more favorable expert. *See Rivera v. State*, 859 So.2d 495, 504 (Fla. 2003); *Cooper v. State*, 856 So.2d 969, 976 n.5 (Fla. 2003). Finally, the Court notes that Defendant refused to be evaluated by his own expert for these proceedings. Therefore, to the extent that he raises a claim that counsel was ineffective for failing to secure additional psychological testing or evaluation beyond that contained in the record, he has not shown prejudice because [he] has not established that he would have cooperated in any such new testing.

To the extent that Defendant challenges the competency of Dr. Haney to have appeared as an

expert mental health witness, the Court first notes that any claim of an incompetent mental health evaluation is procedurally barred because Defendant did not raise such claims on direct appeal. *See Rodriguez v. State*, 919 So.2d 1252, 1267 (Fla. 2005). Furthermore, Defendant does not have a federal constitutional right to an effective mental health expert, and there is no constitutional rule regarding ineffective assistance of an expert witness. *See Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998); *Silagy v. Peters*, 905 F.2d 986, 1013 n.22 (7th Cir. 1990).

The U.S. Supreme Court case of *Ake v. Oklahoma*, 470 U.S. 68 (1985), "requires that a defendant have access to a 'competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.'" *See Walls v. State*, – So.2d–,2006 WL 300665 (February 9, 2006)[926 So.2d 1156]. However, defendant failed to provide the Court with any authority for his contention that the mental health expert must hold a particular degree or conduct a certain type of evaluation. Although Dr. Haney was not a licensed psychologist, he held a Ph.D., studied 'psychological issues and their relation to the legal system,' and specialized in the area of applying psychological principals to various law-related questions. He was provided with and reviewed voluminous documentation including medical, military, and school records of Defendant (including evaluations conducted close in time to the murders) and affidavits, and he interviewed others who knew Defendant. Considering the totality of the circumstances, including Defendant's apparent reluctance to assist expert mental health witnesses, Dr. Haney's evaluation 'was competent because it certainly was not so grossly insufficient as to ignore clear indications of either mental retardation or organic brain damage.' *Gorby v. State*, 819 So.2d 664, 680 (Fla. 2002) (internal quotation omitted).

***[4]

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[4] The trial court also addressed Card's IQ scores:

Defendant argues that Dr. Mosman showed that the medical records available to penalty phase counsel contained information sufficient to establish two statutory mitigators. First, Defendant claims there was information to show that Defendant committed the homicide while under extreme emotional disturbance, Fl. Stat. § 921.141(6)(b). It appears Defendant is arguing that counsel/Dr. Haney should have presented evidence to show that Defendant had a neurological

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The Defendant complains that Dr. Haney did not present to the jury Dr. Mosman's finding that Defendant received an IQ score of 83 in October 1959 and of 78 in 1961 which, Dr. Mosman felt, might support a diagnosis of mental retardation by today's standards. However, IQ score is not the only factor in mental retardation, and Dr. Mosman did not address any of the factors concerning adaptive functioning set forth in Fla. R. Crim. P. 3.203(b) and Fla. Stat. §921.137. Further, this argument ignores the fact that Defendant's medical records contained evidence to show that Defendant was not mentally retarded, including higher IQ test scores. See Defense Exhibit 10, at p. 15 ("Mr. Card achieved a verbal IQ of 92 and a Performance IQ of 102. His full scale IQ is 96...These scores are within the average range..."); Defense Exhibit 12 at p. 1 ("Mr. Card is functioning in the average range of intellectual ability, therefore any past or present thinking processes or behavior patterns cannot be attributed to retardation"); Defense Exhibit 26 at p. 4 ("Card completed his high school education while incarcerated at the Susanville, California, forestry camp. He also has two years of college at Modesto Junior College, which he obtained while incarcerated"); Defense Exhibit 11 at p. 1 ("He did not finish high school, but has a GED Degree. Surprisingly, he has also had three and a half years of college, majoring in architecture and pre-law."). Finally, the Court notes that Dr. Mosman himself testified that he was not opining that Defendant was mentally retarded. Defendant has never before claimed mental retardation or filed a motion pursuant to Fla. R. Crim.P.3.203.

disorder or head injury, that he suffered from personality disorders, specifically schizophrenia, and that he suffered from alcohol abuse. The record does not support Defendant's contention that the extreme emotional disturbance mitigator was present. *See* Defense Exhibit 11 at p. 2 ('There is no evidence that [Defendant] was under the influence of extreme mental or emotional disturbance.'). With regard to the neurological disorder/head injury, there was information in the record that refutes this assertion. Dr. Mosman cited affidavits submitted by Dr. Haney and Dr. McClaren; however, these affidavits simply stated that brain damage was possible and asked for more time to conduct additional testing. Medical records in the file supported the conclusion that Defendant did not have a brain injury. *See* Defense Exhibit 21 at p. 1, 9('Neurological examination is essentially normal,' 'No intracranial abnormalities are seen,' *see also* 'brain scan' in this exhibit (negative)). As for personality disorders, the record contained evidence that Defendant did not suffer from schizophrenia, but rather, had anti-social personality disorder. *See* Defense Exhibit 11 at p. 1 ('[N]o indication of paranoid schizophrenia, only **anti-social personality disorder**'); Defense Exhibit 12 at p. 1 ('It is my opinion Mr. Card demonstrates a **sociopathic personality** and behavior pattern.'). This information would not have helped Defendant, as the Courts have held that there is a significant difference between a mental disease and a mental disorder. *Patton v. State*, 878 So.2d 368, 375-76 (Fla. 2004) (collecting cases); *see also Elledge v. State*, 706 So.2d 1340, 1346 (Fla. 1997) (affirming death sentence where trial court denied statutory mental health mitigator based on the expert testimony that defendant had **antisocial personality disorder** and found that such disorder is not a mental illness, but a life long history of a person who makes bad choices in life, and that these choices are conscious and volitional). Finally, with regard to alcohol abuse, the record contained an evaluation report wherein a doctor wrote, 'Partial VA records indicate that the Defendant has had alcohol blackouts in the past. I initially thought this was very important since he may later allege amnesia during the murder. **Mr. Card however**

continues to deny any mental aberration and sticks to his alibi defense; he specifically continues to deny he had more than two beers and several joints the morning of the alleged murder.' *See* Defense Exhibit 11 at p. 1. Additionally, Defendant claimed that he was not involved in the murder, and any argument regarding the effects of alcohol on Defendant's commission of murder would have been contrary to the theory presented by the defense at trail.

The second statutory mitigator that Defendant claims counsel/Dr. Haney should have been able to show through his medical records is that his emotional age at the time of the homicide was less than his chronological age, Fl. Stat. § 921.141(6)(g). However, Defendant was 34 years old at the time of the offense. The Florida Supreme Court has held that trial courts may reject age as a mitigating factor where the defendants 'were twenty to twenty-five years old at the time their offenses were committed and there is no showing of immaturity or a comparatively low emotional age.' *Brown v. State*, 721 So.2d 274, 281 (Fla. 1998)(internal quotation omitted) (citing *Scull v. State*, 533 So.2d 1137, 1143 (Fla. 1988) (noting that defendant's age of twenty-four will not establish mitigator absent other evidence indicating defendant's low emotional age). Defendant claims, and Dr. Mosman testified, that Defendant was socially, emotionally, and intellectually immature and that his mental age was therefore less that his chronological age. However, Dr. Mosman did not test Defendant, and, as outlined above, some tests showed Defendant had an average IQ, Defendant had completed a GED and three and one-half years of college, and there was no evidence that he suffered from a head injury or neurological problems. Further, Dr. Mosman did not testify as to what he believed Defendant's mental age to be, and the Florida Supreme Court has upheld a death sentence on a person with a mental age as young as 13. *Alston v. State*, 723 So.2d 148 (Fla. 1998) (citing *Remeta v. State*, 522 So.2d 825 (Fla. 1988)).

Finally, the Court finds that, even if these mitigating factors had been shown to be present, Defendant cannot show prejudice from counsel's failure to establish them, as the Court found five

> statutory aggravating factors, including the heinous, atrocious, or cruel ("HAC") aggravator and the cool, calculated, and premeditated aggravator ("CCP"). *See Alston*, 723 So.2d at 148 (upholding death sentence where trail court found five aggravators, including HAC and CCP, despite its finding of several non-statutory mitigators).
>
> In light of the foregoing, Defendant's claim of ineffective assistance of counsel regarding his mental health mitigation evidence is due to be denied.

(PC/III 417-25)

B. Deference to trial counsel's reasoned judgment.

In addition to the deference attached to the trial court's factual determinations, trial counsel's judgment is entitled to deference, rather than hindsighted second-guessing. As Card correctly concedes (IB 38), his burden is "heavy."

Recently, Dillbeck v. State, No. FSC# SC05-1561 (Fla. May 10, 2007), summarized the standard of appellate review concerning claims of ineffective assistance of counsel:

> We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). As we stated in *Wike v. State*, 813 So. 2d 12, 17 (Fla. 2002), this standard requires a defendant to establish…:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.
>
> *Id.* (quoting *Strickland*, 466 U.S. at 687); *see also Rutherford v. State*, 727 So. 2d 216 (Fla. 1998).
>
> ***

> To establish deficient performance under *Strickland*, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness' based on 'prevailing professional norms.' 466 U.S. at 688; *Wike*, 813 So. 2d at 17. 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' *Strickland*, 466 U.S. at 689.

Here, not only was the trial court's Order solidly grounded on the record and law, but also, trial counsel's performance was imminently reasonable. Even armed with "distorting effects of hindsight," Card's postconviction motion and this appeal fail to establish that any course of action would have been better than the one counsel chose. Indeed, one might ask if, instead of humanizing the Defendant, trial counsel had chosen to put Card's disturbed psyche at issue in the penalty phase, as Dr. Mosman advocated, the postconviction issue would be second-guessing that decision.

C. Applying the standards of review to trial counsel's decisions, was there competent evidence to support the trial court's finding of "counsel's reasonable mental health investigation and presentation of evidence" at the 1999 penalty phase (PC/III 423)?

In evaluating the reasonableness of trial counsel's performance vis-à-vis the postconviction second-guessing of Dr. Mosman, perhaps the most telling aspect of Mosman's testimony is his characterization of "sociopathy" as an "ugly word" (PC/IX

578-80).[5] More specifically, Mosman was asked about the anti-social personality disorder that a forensic psychiatrist, Dr. Wray, found in 1982, and a psychologist, Dr. Cartwright found in 1981. (PC/IX 575-81. See PC/Ex/I 732, 741) He responded that

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[5] Patton v. State, 878 So. 2d 368, 375-376 (Fla. 2004), collected cases concerning the negative impact of a diagnosis of antisocial personality disorder:

> The difference between a disorder and a disease is not insignificant. *See Elledge v. State*, 706 So. 2d 1340, 1346 (Fla. 1997) (affirming death sentence where trial court denied statutory mental health mitigator based on the expert testimony that defendant had antisocial personality disorder and that such disorder is not a mental illness, but a life long history of a person who makes bad choices in life and that these choices are conscious and volitional); *Rose v. State*, 617 So. 2d 291, 294 (Fla. 1993) (finding that trial court properly denied relief on claim of ineffective assistance of counsel where counsel conducted a sufficient investigation of mental health mitigation but made a strategic decision not to present such evidence because psychologist determined defendant had an antisocial personality disorder but not an organic brain disorder); *see also Long v. State*, 610 So. 2d 1268, 1272 (Fla. 1992) (affirming death sentence, noting that state's mental health expert testified during guilt phase in regard to defendant's insanity defense, that although defendant "did suffer from a severe antisocial personality disorder, it was his opinion that Long did not suffer from a mental illness or disease"); *Jennings v. State*, 453 So. 2d 1109, 1112 (Fla. 1984) (affirming death sentence, noting that state's psychiatric expert in penalty phase testified that although appellant "had a character or personality disorder which is not easily cured, appellant did not suffer from any mental disease or defect"), *vacated on other grounds*, 470 U.S. 1002 (1985).

"sociopathy" is an "ugly word" and should not be used in law or in diagnosis. (PC/IX 578-80) However, as the trial court's order pointed out (PC/III 424), anti-social personality disorder is an integral part of prior psychological evaluations of Card. In addition to **"sociopathy"** being an **"ugly word"**, it is also a concept that is totally incongruous to trial counsel's thematic strategy to humanize the Defendant. In humanizing Card, trial counsel wished to avoid such ugliness, as well as the ugliness of someone who is extremely disturbed (IB 45-49).

Mosman's testimony ignores the entirety of information that trial counsel had before him. For example, Mosman partially relies upon an affidavit of Dr. McClaren (PC/IX 548), yet, as the trial court points out (PC/III 424), that affidavit was submitted only for the purpose of obtaining additional testing prior to trial. (PC/IX 595-97; PC/Ex/I 778-79) Thus, McClaren only said it was possible that Card had organic brain damage. Further, when a neurologist tested Card, the results were "normal." (PC/IX 598-99)

Mosman’s reliance upon the report of Dr. Carbonell (PC/IX 547-50), fails to address the fact that penalty phase counsel met with and interviewed Dr. Carbonell for several hours, and she "displayed all sorts of nervous habits" and would change the subject during their discussions. Trial counsel thought she would not "survive cross-examination in any meaningful fashion"

and would not "present well as a witness." Therefore, Carbonell was not called as a defense witness. (PC/IX 594-95) Dr. Mosman testified that he was unable to make contact with Dr. Carbonell yet he relied on her report.

Mosman's reliance upon the Washoe Medical Center records (PC/IX 547-48) overlooks that in June 1972 Card's "[n]eurological examination was normal" (PC/Ex/II 859). In November 1975, Dr. Montgomery's discharge summary stated that Card "complained about everything" and that he "was very manipulative, demanding things … basically characteristically manipulative personality…." (PC/Ex/II 881) Accordingly, the trial court reasonably relied on this exhibit (#21) and other evidence in rejecting Mosman's testimony as showing extreme emotional disturbance that could have been presented in the penalty phase. (PC/III 424)

Similarly, Card at postconviction (IB 49-54) second-guesses trial counsel's failure to pursue immaturity as an age mitigator. Card overlooks trial counsel's assessment that, although there were "hints" of immaturity, counsel saw nothing indicating that Card was "emotionally immature." (See PC/IX 619-20) At one point trial counsel highlighted Card's mental acuity to understand his own weaknesses in deciding not to testify in 1999 (See PC/IX 629-30). Moreover, Card now tenders evidence in purported support of this mitigator that would have had the same

discordant impact as Card's hindsighted proposed emotionally disturbed evidence: juvenile delinquency (IB 50-51); schizophrenic personality (IB 51); "Card's extensive juvenile criminal record" (IB 51). Further, as the trial court emphasized, Card "was 34 years old at the time of the offense," and, as the trial court summarized:

> Dr. Mosman did not test Defendant, and, as outlined above, some tests showed Defendant had an average IQ, Defendant had completed a GED and three and one-half years of college, and there was no evidence that he suffered from a head injury or neurological problems. Further, Dr. Mosman did not testify as to what he believed Defendant's mental age to be ***.

(PC/III 425) Indeed, all of the cases that Card now cites (IB 50, 52) were decided after the 1999 evidentiary hearing in this case. Any clarity that they provided did not exist in 1999. Trial counsel is not deficient for not relying upon case law rendered after his decisions. See State v. Lewis, 838 So. 2d 1102, 1122 (Fla. 2002) ("appellate counsel is not considered ineffective for failing to anticipate a change in law"), citing Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992) ("Defense counsel cannot be held ineffective for failing to anticipate the change in the law."). See also Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 841, 122 L.Ed.2d 180 (1993)(Strickland's prohibition against evaluating trial defense counsel's performance against hindsight is a protection for counsel).

Here, trial counsel spent hundreds of hours preparing for the 1999 penalty phase. It was undisputed that, in counsel's words, "we worked it hard." He elaborated: " At fifty dollars an hour I was $40,000 fee on the thing which tells you how much I did, I took personally." (PC/IX 600-601) Counsel read boxes of material. (PC/IX 604-605) He evaluated various potentially pertinent reports. (E.g., PC/IX 599-600)

Arbelaez v. State, 898 So. 2d 25, 39 (Fla. 2005), enunciated the general applicable principle:

> We have generally denied relief where the attorney's chosen strategy was to 'humanize' the defendant rather than to portray him as psychologically troubled. *See, e.g., Henry v. State*, 862 So. 2d 679, 685-86 (Fla. 2003); ***

Here, trial counsel emphatically testified at the evidentiary hearing that his strategy emphasized humanizing "Jim" Card. (PC/IX 591-92) For example, he testified concerning evidence that he decided not to present for the penalty phase:

> Dr. McClaren … didn't fit into the pattern I was trying to, the theme I was trying to put to this jury of humanizing Jim. It was going to make him look like he was a crazed killer in a way and I didn't, that was not the theme I was [t]rying to present to the jury.

(PC/IX 596-97)

The record of the 1999 penalty phase clearly shows that trial counsel, after exploring and considering various options, very capably implemented the humanization strategy. His opening statement stressed Card, "the person" and how he went from "an

innocent little baby" to sitting here facing the death penalty. (P1999/XXVIII 26-27) Counsel focused upon the abuse to which Card was subjected (P1999/XXVIII 27-28), rather than opening the door to that "ugly word." Counsel continued by arguing that, in spite of the deck stacked against him, Card's imprisonment provided the environment for him to turn his life around: "outstanding" disciplinary record, gradual involvement in religion, warning children about the choices they make, "interesting artwork." Counsel told the jury that a psychology professor would pull together the factors that created the man sitting here today. (See P1999/XXVIII 27-29)

Then, in spite of difficulties maintaining the assistance from Card's family (PC/IX 608-609), trial counsel delivered the evidence. One-by-one, family members testified on Card's behalf: Card's mother (XXIX 21-55); his brother-in-law (P1999/XXX 4-11); his ex-wife (P1999/XXX 31-43); his daughter (P1999/XXX 43-46); a niece (P1999/XXX 52-60); and, Card's brother (P1999/XXXI 5-25). In addition, through video, a Catholic priest testified (P1999/XXIX 56, attachment at end of volume pp. 1-22), and the Director of Catholic Charities (P1999/XXX 11-18), a Catholic nun (P1999/XXX 19-30), and, a friend (P1999/XXX 47-51) testified for him. As promised, Dr. Craig Haney, a Stanford University Ph.D. in psychology who also earned a law degree from Stanford, tied it together. (See P1999/XXXI 30-86).

Accordingly, trial counsel continued the humanizing theme as his closing argument pleaded to save Card's life: "I told you the first day of trial that … our case would be about a man." (P1999/XXXI 130-31) "[C]hildren raised under these conditions, poverty, abandonment, instability, neglect, abuse, abuse again, abuse again, have problems." (P1999/XXXI 132-33) But in spite of those problems, Card obtained his G.E.D. and writes to school children "about the choices you make in life." (P1999/XXXI 139-40) Defense counsel highlighted how well Card has done in prison. (P1999/XXXI 143-44) He stressed that Card is "more than the worst thing he did." He is not the "worst of the worst"; he is not the person for whom the death penalty was intended; and, when everything about Card, the person, is weighed, the jury should recommend life in prison. (P1999/XXXI 144-46)

In spite of defense counsel's valiant effort, the jury recommended death, but the result is not the test. The test is the reasonableness of counsel's defense.

In additional to the trial court's Order standing soundly on its own, the State highlights several cases as instructive in evaluating whether counsel satisfies constitutional effectiveness and support affirmance.

Sliney v. State, 944 So.2d 270, 282-83 (Fla. 2006), rejected Sliney's assertion that his counsel was ineffective for failing to present any expert testimony at the penalty phase.

Here, counsel did present expert testimony, which was insulated from that "ugly word" of "sociopathy." As here, in Sliney, at the postconviction hearing, Sliney's penalty-phase counsel testified that he did review experts' reports.

Sliney discussed Jones v. State, 928 So. 2d 1178 (Fla. 2006), which applies here:

> In *Jones v. State*, 928 So. 2d 1178 (Fla. 2006), the defendant asserted that penalty-phase counsel was ineffective for failing to present the testimony of a mental health expert who had evaluated the defendant. We held that the failure to present this expert's testimony was not ineffective because his testimony would have been inconsistent with the other mitigation evidence, it would have opened the door to other damaging evidence, and trial counsel's strategy of humanizing the defendant, a strategy with which this expert's testimony would have starkly contrasted, was valid. *Id.* at 1184. Thus, counsel's strategic decision not to call the expert and instead rely for mitigation on lay testimony about the defendant was neither deficient nor prejudicial because we found that the expert's testimony could have actually damaged the defendant's chances for a life sentence. Id. at 1186. For the same reasons, we affirm the circuit court's decision to deny the instant claim.

Here, as in Jones, Mosman and his 20-20 postconviction hindsight would have been inconsistent with "trial counsel's strategy of humanizing the defendant." Here as in Jones, 928 So.2d at 1184, "Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected," quoting Rutherford v. State, 727 So.2d 216, 223 (Fla.

1998), quoting State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987).

In Rutherford v. State, 727 So.2d 216, 222-223 (Fla. 1998), like here, counsel

> made the decision to focus on the solid, 'Boy Scout' character traits of Mr. Rutherford. The theory was that Mr. Rutherford was a 'good ol' fellow' who must have just lost it. That he was really a good guy. The attempt was to make him look as human as possible, to focus on his positive traits.

Here and in Henry v. State, 862 So. 2d 679, 685-686 (Fla. 2003), "retrial counsel knew about the mental health testimony available …, but concluded that their testimony was likely to do more harm than good." Instead, counsel decided to try to humanize the Defendant. "Retrial counsel's decision was a reasonable strategy after full consideration of the alternative."

While in Burns v. State, 944 So.2d 234 (Fla. 2006), the raw number of lay witnesses was larger than here, it is not a counting contest. In Burns, like here, a professor was called as a witness. In Burns the professor opined regarding the Defendants' "ability … to adjust to confinement and future dangerousness." Here, counsel adduced evidence concerning Card's actual exemplary record in prison and wanted to avoid expert testimony that would be inconsistent with humanizing Card. In

Burns, resentencing counsel argued a theme almost identical to trial counsel's here:

> Even more importantly in this case, Members of the Jury, is all of the evidence presented about Daniel Burns' life, his background, his character, and his family. A man must be judged on his whole life, not just on one incident.

Id. at 241. In Burns, as here, the decision not to pursue a certain type of psychological testimony was after weighing the options:

> The postconviction court denied this claim, noting that it relied on this record evidence from the resentencing for its conclusion that counsel's decision to not call Dr. Berland was strategic:
>
> > In Burns' case . . . the alleged mental mitigation evidence was actively sought out, evaluated by counsel with knowledge of the likely rebuttal evidence and, as the . . . transcript . . . demonstrate[s], a reasoned decision was made not to present the testimony in light of the other 'theme' evidence presented on Burns' behalf. The record in this case strongly supports and convinces this Court to find that Resentence Counsel's alleged failure to present a 'mental illness' factor was not an oversight but, rather, was a tactical choice.

Here, there was no "oversight but, rather, … a tactical choice."

Here, as in Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997), the "penalty phase strategy was to humanize [the Defendant] by dwelling upon his close family ties and on the positive influence he had on his family" and positive behavior in prison. Here, as in Haliburton, Appellant "has shown neither

deficiency nor prejudice, and the trial court properly denied this claim."

Moreover, extreme emotional disturbance assumes that the defendant committed the crime, but here Card maintained that he did not commit the crime at all. (PC/IX 592, 614)

Card relies upon Heiney v. State, 620 So. 2d 171 (Fla. 1993)(IB 40); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995)(IB 41-42); Rose v. State, 675 So.2d 567 (Fla. 1996) (IB 43); State v. Lewis, 838 So.2d 1102 (Fla. 2002)(IB 42-43); and State v. Reichman, 777 So.2d 342 (Fla. 2000).

Rutherford's analysis, 727 So.2d at 223, shows why Heiney, Hildwin, and Rose are inapplicable here:

> The fact that trial counsel here was aware of, but rejected, possible mental mitigation in favor of a 'humanization' strategy distinguishes cases such as ***Rose*** where this Court remanded for a new resentencing proceeding because it was apparent from the record that 'counsel never attempted to meaningfully investigate mitigation.' 675 So.2d at 572. The evidence that would have been available in Rose if counsel had conducted a reasonable investigation included the defendant's abuse as a child, an IQ of 84, previous head trauma, chronic alcoholism and a previous diagnosis of a psychiatric disorder. ***See id.*** at 571. We found under the facts of that case that trial counsel's mitigation decisions were 'neither informed nor strategic,' and that 'there was no investigation of options or meaningful choice.' Id. at 572-73. Likewise, in ***Heiney v. State***, 620 So. 2d 171, 173 (Fla. 1993), this Court rejected the State's argument that trial counsel's decision not to present any mitigation was 'strategic,' holding that counsel 'did not make decisions regarding mitigation for tactical reasons. [Counsel] did not even know that mitigating evidence

> existed.' *See also* ***Hildwin***, 654 So. 2d at 109 (remanding for new sentencing proceeding where 'trial counsel's sentencing investigation was woefully inadequate,' as evidenced by the fact that he 'was not even aware of [the defendant's] psychiatric hospitalizations and suicide attempts'); *Phillips v. State*, 608 So. 2d 778, 782-83 (Fla. 1992) (remanding for new sentencing proceeding where trial counsel did 'virtually no preparation for the penalty phase').

Here, trial counsel labored long and hard "meaningfully investigat[ing] mitigation" and made a strategic choice to pursue humanizing "Jim" rather than portraying him as disturbed or otherwise mentally impaired.

In stark contrast with the hundreds of hours that trial counsel here spent preparing for the 1999 penalty phase, in Lewis, 838 So.2d at 1108-09, "counsel spent very little time readying for the penalty phase proceedings," totaling after the guilty verdict "less than 18 hours … spent preparing for the penalty phase." In stark contrast to the family reunion that trial counsel and his investigator marshaled here, in Lewis, counsel belatedly talked with the mother in those 18 hours and barely spoke with the father. In Lewis, counsel "never contacted any of Lewis's other family members in an attempt to discover potential mitigation." In Lewis, "[o]n the day that the penalty phase began, Dr. Klass was the only witness willing and able to testify for the defense. Lewis, however, refused to have Dr. Klass testify" because of a disagreement on strategy. Further,

unlike here, where Card bears the appellate burden, in Lewis, the State bore it: "the trial judge concluded that defense counsel did not spend sufficient time in preparing for the penalty phase. This finding is supported by competent, substantial evidence." Id. at 1109. Here, the trial court finding of "counsel's reasonable mental health investigation and presentation of evidence" (PC/III 423) is "supported by competent, substantial evidence."

Unlike the display of family and religion and counsel's evidence-based impassioned plea for mercy here, in State v. Riechmann, 777 So.2d at 347, "At the penalty phase, Riechmann's attorney presented **no** mitigating evidence." Moreover, as in Lewis, in Riechmann, the appellate burden fell on the State. In the postconviction evidentiary hearing in Riechmann, the collateral defense "presented seven witnesses who testified in detail about the positive personal qualities Riechmann showed during the extensive period that they knew him," Id. at 348. In contrast here, Card's collateral attack ignores the lay witnesses that trial counsel produced to humanize Card. Instead, in hindsight, Card argues that Mosman was a better expert than Haney. As the trial court ruled:

> {T]he fact that Defendant's new counsel would have hired a different expert witness or presented the evidence differently does not show that previous counsel's performance was ineffective. *See State v.*

Coney, 845 So.2d 120, 136 (Fla. 2003); *Mills v. Moore*, 786 So.2d 532, 535 (Fla. 2001).

In sum, Card has failed to meet his appellate burdens. Card has failed to establish that trial counsel was deficient. The trial court's finding that trial counsel was reasonable should be affirmed.

ISSUE II

HAS CARD SHOWN THAT THE TRIAL COURT ERRED IN RULING THAT HE FAILED TO ESTABLISH PREJUDICE? (RESTATED)

Card poses Strickland's prejudice prong as his Issue II. To prevail on appeal, Card must show error on Issue I and Issue II. See Dillbeck v. State, No. FSC# SC05-1561 (Fla. May 10, 2007), citing Ferrell v. State, 918 So. 2d 163, 170 (Fla. 2005) (quoting Strickland, 466 U.S. at 687).

The State submits that the trial court correctly ruled that there was no prejudice (PC/III 425):

> Finally, the Court finds that, even if these mitigating factors had been shown to be present, Defendant cannot show prejudice from counsel's failure to establish them, as the Court found five statutory aggravating factors, including the heinous, atrocious, or cruel ("HAC") aggravator and the cool, calculated, and premeditated aggravator ("CCP"). See *Alston*, 723 So.2d at 148 (upholding death sentence where trail court found five aggravators, including HAC and CCP, despite its finding of several non-statutory mitigators).[6]

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[6] Alston v. State, 723 So.2d 148 (Fla. 1998)

Applying Strickland to a claim attacking trial counsel's performance at the penalty phase, the test becomes:

> In assessing prejudice, we reweigh the evidence in aggravation against the totality of the mental health mitigation presented during the postconviction evidentiary hearing to determine if our confidence in the outcome of the penalty phase trial is undermined. *See Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 1998) (stating that in assessing prejudice 'it is important to focus on the nature of the mental mitigation' now presented); *see also* Wiggins, 539 U.S. at 534 ('In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.').

Hannon v. State, 941 So.2d 1109, 1134 (Fla. 2006). Here, as in Alston and as in Hannon:

> We conclude that it does not. There is no reasonable probability that had any of the mental health experts who testified at the postconviction evidentiary hearing testified at the penalty phase, Hannon would have received a life sentence. Our confidence has not been undermined in this outcome or proceeding.

Hannon, 941 So.2d at 1134. Here, there was only one expert, whose testimony would not sway anyone and whose testimony risked opening the door to very negative aspects of Card's mental history thereby actually causing prejudice.

Indeed, here the trial judge who evaluated prejudice (PC/III 426) and observed the postconviction evidentiary hearing evidence (PC/IX 511) was the same judge who heard the penalty phase evidence (P1999/XXVIII,XXIX,XXX,XXXI) and re-sentenced Card to death (P1999/XII 2248-53). She was particularly well-

suited to consider the totality of the evidence at all the proceedings combined, including the demeanor of all witnesses.

Even ignoring the trial judge's distinctive position to determine prejudice here in determining the effect of any purported missing mitigation, the weak stature of the purported mitigation, as well as the very serious aggravation clearly demonstrate the correctness of the trial court's ruling on lack of prejudice. The trial court, as well as this brief supra, have discussed the significant problems with, and weaknesses of, the hindsighted mitigation. Further, the aggravating factors included both the very weighty CCP **and** very weighty HAC.

As in Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997),

> In light of the substantial, compelling aggravation found by the trial court, there is no reasonable probability that had the mental health expert testified, the outcome would have been different. Haliburton has shown neither deficiency nor prejudice, and the trial court properly denied this claim.

Accordingly, Hannon v. State, 941 So. 2d 1109, 1137-1138 (Fla. 2006), held:

> Based on the brutal and disturbing nature of these murders [HAC], there is no reasonable possibility that Hannon would have received a life sentence. Therefore, Hannon has failed to demonstrate that if the mental health and lay witness testimony presented during the postconviction evidentiary testimony had been offered at trial 'the result of the proceeding would have been different,' *** Our confidence in the outcome of this case has not been

> undermined. … Accordingly, this claim is without merit.

Here even more than in Henry v. State, 862 So.2d 679, 686 (Fla. 2003), there was no prejudice:

> In this case, retrial counsel's decision not to present mental health experts did not prejudice Henry. Despite the presentation of this expert testimony during the penalty phase of the original trial, the trial court did not find one mitigating factor, but it did find two valid statutory aggravators, the same two found upon retrial.

In contrast to the foregoing cases, Card cites to Hildwin, which, as discussed, supra, is inapplicable. Here, unlike Hildwin, counsel was woefully aware of Card's mental background, which also included notes of sociopathy and manipulation. Counsel did well to avoid those "ugly words."

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's denial of Card's Amended Motion to Vacate Judgment and Sentence entered in this case.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on May 11, 2007 to:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

Respectfully submitted and served,
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[AG# L06-2-1280]

IN THE SUPREME COURT OF FLORIDA

JAMES ARMANDO CARD, SR.,

Appellant

v.

STATE OF FLORIDA,

Appellee

Case No. SC06-1383

ATTACHMENT TO
ANSWER BRIEF OF APPELLEE

Order Denying Motion for Postconviction Relief. (PC/III 417-26)