**IN THE SUPREME COURT OF FLORIDA**

**ALVIN LEROY MORTON,**

**Appellant,**

**v.** **CASE No. SC06-2091**

**STATE OF FLORIDA,**

**Appellee.**
**_____/**

**ON APPEAL FROM THE CIRCUIT COURT**
**OF THE SIXTH JUDICIAL CIRCUIT,**
**IN AND FOR PASCO COUNTY, FLORIDA**

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

### (A) Trial

This Court provided the following factual summary in Morton's direct appeal opinion:

> In the late evening of January 26 or early morning of January 27, 1992, appellant Alvin LeRoy Morton, accompanied by Bobby Garner and Tim Kane, forcibly entered the home of John Bowers and his mother Madeline Weisser. Two other individuals, Chris Walker and Mike Rodkey, went with them to the house but did not enter. Morton carried a shotgun and one of the others possessed a "Rambo" style knife. They began looking around the living room for something to take when Bowers and Weisser entered the room from another area of the house. Morton ordered the two of them to get down on the floor, and they complied. Bowers agreed to give them whatever they wanted and pleaded for his life but Morton replied that Bowers would call the cops. When Bowers insisted that he would not, Morton retorted, "That's what they all say," and shot Bowers in the back of the neck, killing him. Morton also attempted to shoot Weisser, but the gun jammed. He then tried to stab her, but when the knife would not penetrate, Garner stepped on the knife and pushed it in. Weisser ultimately was stabbed eight times in the back of the neck and her spinal cord was severed. Before leaving the scene, either Garner or Morton cut off one of Bowers' pinky fingers. They later showed it to their friend Jeff Madden.
>
> Acting on a tip, police and firefighters went to the victims' residence, where the mattresses had been set on fire, and discovered the bodies. Morton was later found hiding in the attic of his home. The murder weapons were discovered underneath Garner's mother's trailer. Morton later confessed to shooting Bowers and helping make the first cut on Weisser.

Morton v. State, 689 So. 2d 259, 260-261 (Fla. 1997).

On resentencing, the prior sworn deposition testimony of one of the conspirators, Timothy Kane, who was fourteen at the time of the murders, was offered into evidence. (RS V1, 189; RS

V7, 794). Kane recounted the following about Morton's role: "He was a leader. I mean, as far as he was the oldest and he was the one that this was all his idea. This was...He was doing this here." (RS V2, 201). Kane testified that he had previously observed the sawed off shotgun and knife used in the murders in Morton's bedroom. (RS V2, 221). After noting that the front door was kicked in, Kane testified about what transpired in the victims' house. (RS V2, 203).

Once inside the victims' house, the male victim came out asking what's going on. Morton told the man to get down on the ground. (RS V2, 204). Then he heard a different voice, a female voice, Kane testified: "It turned out to be the lady. She came out and she was hysterical. She didn't know what was going on." Id. Morton laid her on the ground the same way. Kane explained: "The guy was helping her down, you know, because she didn't know what was going on." (RS V2, 204). Morton and the man on the ground began talking, Kane testified: "[T]elling him, you know, don't hurt us, take anything you want, just leave us alone. And there was a conversation there, I mean. And he was standing up over him with a gun. And he walked around and started talking to Bobby in the doorway." (RS V2, 205). "They were saying just don't hurt us, please just leave. We won't call the police. Just leave." (RS V2, 220). Kane explained the victims tried to get up off the floor. Kane testified: "And

the woman started trying to get up. And Alvin had kicked her in the leg. And Bobby [Garner] had some type of pipe or something and hit him in the head and laid back down on the ground." (RS V2, 206). Shortly after that, Kane looked out toward the window and heard a gun blast. (RS V2, 206). Kane testified he observed the following after turning back around: "When I turned around I seen him poised over the man and he tried swinging it at the lady. And I guess it jammed or something because he [Morton] threw it on the ground and grabbed the knife and started stabbing her." (RS V2, 207-208).

While Garner brought the knife to the house, Kane testified he knew that it was Morton who "used the knife." (RS V2, 207). Kane explained: "...when I turned around I seen him standing over and the gun...I guess the gun jammed because he threw it down and she started screaming and he started kicking her and jumping on her and stuff, and that's when Alvin grabbed the knife and started stabbing her." (RS V2, 207). Kane testified Garner was jumping on her while Morton had the knife. (RS V2, 207). According to Kane, the woman began screaming as soon as the gun went off. She was stabbed in a matter of seconds after the gunshot. However, it seemed like she was moving for a while after the stabbing began. (RS V2, 208). When asked to estimate how long she was moving after being stabbed, Kane testified he could not give an accurate estimate. (RS V2, 208-209). Kane

testified that Morton's back was to him as he was stabbing her but he did see her move: "I seen movement. I seen thrashing. I seen Garner kicking on her and he [Morton] was stabbing on her. That's all I could really make out, really. It wasn't clear." (RS V2, 218). Eventually, however, the woman stopped moving. (RS V2, 209).

After the murder they left the victims' house but Morton told Kane he "couldn't go home." (RS V2, 212). Kane testified: "He said he knew where I lived. There wasn't no sense in leaving, you know." (RS V2, 212). Kane explained that he was afraid of Morton even before they went to the victims' house. Kane testified: "He was like a bully type, you know. He was bigger than me, you know. He picked on everybody. But, I mean, it was just like...I don't know, you know, what really caused it. He just intimidated, you know, at the time." (RS V2, 212). Kane testified that he was now serving a life sentence with a minimum mandatory sentence for his role in the victims' murders. (RS V2, 215). Kane testified that he was not promised anything by the State in exchange for his statement. (RS V2, 217).

**(B) Post-Conviction Evidentiary Hearing**

**(i) The Trial Attorneys**

Gary Urso testified that he was appointed co-counsel with John Swisher to represent Morton. (V14, 12). His primary focus was the penalty phase. Urso has been an attorney since 1984 and

was with the State Attorney's Office for three years before joining the "Health and Rehabilitative Services as the attorney doing all the child abuse [cases] in the county for two years." (V14, 134). Since then he opened his own law practice, starting off doing quite a bit of criminal defense, but moving to mostly marital and family law. (V14, 134). Prior to representing Morton, Urso testified that he had worked on two capital cases as a prosecutor but had not tried a capital case as a defense attorney. (V14, 18-19).

Before being appointed, Urso had conversations with Swisher about Morton's case and Swisher thought his experience would be helpful. (V14, 136). Urso testified that he considered himself "subordinate to Mr. Swisher in this entire case." (V14, 36). "We worked on issues of aggravators and mitigators and what we needed to develop for that purpose. I would review nearly everything with him." (V14, 36). The penalty phase in this case was tried twice, once in 1994 and again in 1999. On both occasions, the penalty phase recommendation was 11-1. (V14, 20-21). Urso met with Morton's mother and sister and talked with Morton's mother on the telephone. (V14, 23). He also hired an investigator, Paul Krisanda, who was used to find witnesses and serve subpoenas. (V14, 24-25).

Prior to the hearing, Krisanda met with Urso and told him that he was asked to investigate allegations of sexual abuse in

the Morton case. (V14, 24-25). Until he said that, Urso did not remember Krisanda being used for that purpose. (V14, 25). Urso did have Krisanda investigate allegations of sexual abuse. He interviewed Barbara Stacey and Angela Morton. (V14, 25-26).

Urso familiarized himself with the facts of the case by reading depositions, police reports, and speaking with witnesses. (V14, 138-40). He agreed that the facts presented in this case were horrific, the murder of a mother and son. (V14, 140). That the State would present eyewitness testimony and a taped statement from the defendant. (V14, 140-41). That on the tape the defendant admitted kicking in the door of the victims' home, that he was accompanied by two younger individuals, and that the evidence revealed that Morton was the ringleader of the group. (V14, 141-42). That Morton discussed days previously not only a plan to rob the individuals, but, that he also discussed bringing back a body part for Jeff Madden. (V14, 142).

In preparation for the penalty phase, he talked to Morton and Morton's mother, learned of his problems at birth (V14, 148-49) either by letter, conversation with his mother, or both. (V14, 149). Urso also talked with Angela, Morton's younger sister. She talked to him about family life and was very helpful. (V14, 151). Angela and her mother were both helpful and articulate. (V14, 151).

Urso had previously worked with social worker Mimi Pisters. (V14, 152-53). He was familiar with her background and that she had a Master's degree in social work. She worked with children in several countries and had worked on at least 2,000 cases. (V14, 153). She was probably 65 or older and Urso felt she would be an extremely effective witness. (V14, 153-54). One of the positive factors was that she was not a "professional" defense witness. (V14, 154). Urso explained:

> Well, she understood this personality constellation that we were trying to present to the jury better than any person that I've ever met. That's who she worked with, she worked with children who were unbonded, unattached, and she had some success with even changing their behaviors, even though it was one of the most difficult behaviors to change. She was also sweet as could be, I mean.

(V14, 154). They saw each other frequently and discussed the facts of the case. (V14, 155). Ms. Pisters also met with family members and Urso talked with her about Morton's background. (V14, 155-56). Ms. Pisters met with Morton on several occasions. (V14, 157).

In addition to being unbonded and unattached, Ms. Pisters also testified about physical abuse suffered by Morton. And, that the first eight years of life are a baseline for a person's personality development. (V15, 203). Ms. Pisters explained how this development led to Morton's antisocial personality disorder and that such a person has a difficult time making the right choices. (V15, 203).

Urso testified that Morton denied he was sexually abused. (V14, 167). Urso also discussed sexual abuse with Angela and his mother, and neither one could say that Morton had been sexually abused. (V14, 167).

Urso filed a motion to obtain a confidential mental health expert. (V14, 157). It was fair to say that he could not just go to San Francisco and get some psychiatrist or psychologist who charges $250 an hour. (V14, 156-57). He remembered the "judges being very sticky about these kind of things." (V14, 157). He utilized an expert who was on a list that would agree to be paid whatever fee the County was willing to pay. (V14, 157). Urso had known Dr. DelBeato for a number of years and had worked on cases with him before. (V14, 158). He felt Dr. DelBeato was "extremely competent." (V14, 158). Urso testified: "Well, my impression he is the most respected psychologist in this who testifies in our courts in New Port Richey, maybe Dade City." (V14, 159). Dr. DelBeato had been used by both the State and the defense in criminal cases. (V14, 158-59). He thought it was helpful that he testified about 50% for the State and 50% for the defense. (V14, 159).

Urso testified that Dr. DelBeato indicated there was no "organicity or organic problem." There was also nothing that indicated brain damage. However, Urso thought there might be "something different" in Morton's brain that they could present

to the jury based upon neuroimaging. (V15, 217-18). Morton, however, did not want the testing conducted and they abided by his wishes. (V15, 218).

Urso testified that everyone in the family "said positive things to me about Mr. Stacy. I never heard anything negative about Mr. Stacey." (V15, 212). Family members told him that Stacey tried to develop some sort of relationship with Morton and that he was a good father. (V15, 211).

Urso testified that he talked to some of Morton's teachers and that he was looking for teachers who could tell him about particular skills Morton had, that he was a good student, or someone who could say he was a good boy. However, he could not find a teacher willing to provide that kind of information. (V15, 221).

Urso was familiar with the PSI which documented Morton's auto theft at the age of 14, that he was charged with burglary and criminal mischief, also occurring at the age of 14. (V14, 170). He was also familiar with Morton's history of hurting animals, drilling a hole in a turtle, putting a kitten or kittens in a freezer. (V14, 170-71). "I never forgot that." (V14, 171). He also recalled Ms. Stacey having to pay $700 in damages for a fire set by Morton. (V14, 171). Urso's recollection was refreshed with a deposition taken from Timothy

Kane, who described Morton as a bully, "he picked on everyone." (V14, 179).

In Urso's opinion, Mimi Pisters essentially played the role of a mitigation specialist or forensic social worker. (V15, 220). Urso testified: "I don't know what else a forensic social worker would have done other than what she did." Id. She reviewed report cards, talked with Dr. DelBeato, spoke with the defendant three or four times, and talked to witnesses. Id.

As for not obtaining DOC records from Virgil Morton indicating that Virgil was a sexual deviant, Urso thought that the evidence they actually presented, that Virgil molested his own daughter, Angela, was "much more powerful evidence than a record suggesting a sexual deviant." (V15, 217). When asked if he looked at his file just prior to being called to testify again, Urso testified that he did not, and, his file was "all pulled apart in the courtroom." (V21, 1190).

After the case was remanded for a new penalty phase, Swisher suggested to Urso that medical tests not available at the first penalty phase might prove useful. (V21, 1134-35). He put in a letter the name of a doctor in Tampa to consult, Dr. Mayer. Id. His letter referenced brain development and speculated that "some of it I said is visible through an MRI." (V21, 1134). Also, he placed an article he had read in the file regarding brain development. (V21, 1134). He and Urso

discussed neuroimaging tests, like PET scans and CAT scans. Such testing, however, requires the cooperation of the defendant. (V21, 1134). Mr. Urso asked Morton "if he was willing to do that, and he said, no, he didn't want any more testing." Id. After speaking with Morton, neuro-imaging was no longer an option. (V21, 1141).

Swisher testified that the mother, Barbara Stacey, talked about Morton's difficult birth and the fact he was in the hospital for a good period of time. (V21, 1142). The defense presented several witnesses during the penalty phase, including the mother, sister, and, several aunts. (V21, 1142). He thought the mother and all witnesses came across well during the penalty phase. (V21, 1142).

As for selecting experts, Swisher had to pick one from a list of approved experts for Pasco County. (V21, 1143). Swisher, after consulting with Urso, selected the expert on the list he thought would be the most favorable to the defense. Id. As for possible brain damage, Swisher testified that "Dr. DelBeato specifically puts in his report that the screening suggests no significant organic or thought impairment. So I mean I had a doctor that didn't lead me down the path, so I didn't go there." (V21, 1146-47). Swisher did not agree that Dr. DelBeato's testimony was unfavorable, testifying: "…And I felt and Gary [Urso] felt that, you know, the emphasis was going

to be on his past, not so much on the end result, and that the attempt was to humanize our client as opposed to put him up there as a poster child for some awful disorder." (V21, 1139).

Urso thought that the fact Morton got a second penalty phase was in the defense favor in that the jury would not hear all the evidence the State presented in the guilt phase: "They got the short version."[1] (V14, 164-65). Urso talked to Morton about sexual abuse, but Morton denied that he had been sexually abused. (V14, 167). Neither Angela Morton nor Barbara Stacey "could say they knew he was sexually abused." (V14, 167). They were both aware, however, that Angela had been sexually abused by Virgil Morton. (V14, 167-68). Urso presented to the jury the sexual abuse Angela suffered at the hands of Virgil Morton. (V14, 168). Although he did not obtain the medical records for the penalty phase, Urso read the discharge summary from Morton's birth, stating: "At time of discharge the infant was in satisfactory condition, with no abnormal neurological findings noted, the weight gain was satisfactory, and the weight of discharge was five pounds, three ounces." (V14, 168). After reviewing the birth records, Urso noted that they indicated no neurological problem. If he was advocating an organic problem

[1] The defense was able to exclude evidence that the victims' poodles were killed by the fires set to destroy evidence.

at the time of birth, such a conclusion by the treating physician would be a problem. (V14, 163).

John Swisher, was an experienced defense attorney and generally attends the life over death seminars, at least one a year. (V15, 258). He began practicing law in 1976 and "guessed" he has attended the seminar since the early 1980's. (V15, 259). Swisher has been handling capital cases since "probably the early '80's." (V15, 287). Swisher recalled talking to family members, talking to their experts, and thought they had meetings together. (V15, 272). However, he did not recall what records, if any, he provided to Dr. DelBeato or Mimi Pisters. (V15, 272-73). Swisher, like Urso, was terrible at marking down what time he put on the case for billing. Swisher testified: "I usually end up putting down a percentage of what I do, because I just don't go back everyday [sic] and put it down, and when I try to recall, I just forget." (V15, 274).

Swisher had talked to Urso about becoming second chair on the case. He had litigated against Urso and knew that he was an experienced lawyer. (V15, 289). He had expertise in childhood problems through his work with HRS and the state attorney's office. (V15, 289).

Swisher talked about how he developed a penalty phase defense with Urso:

> Well, as I remember, and I think I mentioned it to you, when I first started dealing - - talking with Gary about it, he had recommended a book to me. It was called High Risk, and it dealt with - - I think it was subtitled Children Without a Conscience.
>
> In reading through it, it appeared what led to Alvin's condition is something that was a combination of his environment and genetic background, and that was supported by his family.
>
> And I'm sure you've gone through all this, you know, the horrible childhood that he had growing up, some of the signs that were manifested as he had gotten into his early teen years, the fact that his father I believe was in the same jail that he was in when he was initially in custody, had been there for manslaughter and I believe he was in custody for arson, but I'm not a hundred percent on that, and that there was a genetic pattern.
>
> And the treatment that Alvin had received, that information did not come particularly from Alvin, it came from other family members, primarily the sister, as I recall.

(V15, 281).

Swisher and Urso had to pick an expert from the court appointed list. Urso had used Dr. DelBeato before and was comfortable with him. (V15, 302). If Swisher had heard of a psychiatrist in San Francisco who charged $250 dollars an hour he would have had to pay for it personally. (V15, 302-03). So, he and Urso used an expert who was going to abide by the County's fee schedule from the court-appointed list. (V15, 303). When asked if he thought about retaining another expert for the second penalty phase, Swisher testified: "I said he was not a great witness. There's better witnesses, but unfortunately to get better witnesses you have to have a client that's willing to be tested further; Mr. Morton wasn't, he

didn't want to go through that again." (V21, 1150). Swisher sent a letter to Urso suggesting that a brain scan might reveal abnormalities associated with brain development and comparisons between a nurtured child and one who was not. (V13, 2172).

Dr. DelBeato testified during the penalty phase. Swisher thought that the end result was a nasty word or term, but "the events leading up to that is what we wanted to emphasize is that he ended up that way, but it wasn't his fault, for lack of a better word." (V15, 311). The psychopath term was only revealed on cross-examination, whereas Dr. DelBeato and Ms. Pisters utilized the term antisocial tendency or disorder. (V15, 312).

Urso recalled reviewing Morton's school records and although he was aware of Morton's "problems at birth, I don't recall having records on those." (V14, 27-28). Urso's billing records reflect reviewing Morton's school records. (V14, 31). He also reviewed Department of Corrections Records. (V14, 31). Urso recalled reviewing records on Morton's father from another state, either Virginia or West Virginia, which referred to a manslaughter conviction. (V14, 32-33).

Paul Krisanda, an investigator, and Wilhelmina Pisters did legwork for him and spoke to other people. (V14, 33-34). In preparing for the case he researched the theory of the case, the unattached, unbonded child, and talked to Barbara Stacey,

Angela, and other family members. He thought the other family members were "aunts of Alvin's" and talked to "teachers at his schools." (V14, 34).

Mimi Pisters' role was to "humanize Alvin Morton." (V14, 38). She met with family members. (V14, 39). Urso did not recall seeing bankruptcy records for Morton or any juvenile court documents on Angela Morton. (V14, 41). Morton's premature birth fit within the theory of the defense case, that his mother was only able to go to the hospital a couple times a week so "there was never the maternal bonding that typically would have occurred at that stage." (V14, 43). Urso also testified that he contacted a neurologist at the University of South Florida Medical School. (V14, 48). They did consider the possibility Morton suffered from organic brain damage. (V14, 50). He discussed the possibility of a brain scan with Swisher, Ms. Pisters, and Morton. (V14, 52).

Urso did not consider Asperger's Syndrome as a viable defense. He was not aware of it at the time, it was only recognized [by the DSM-IV] as a trait or disorder in 1994. (V14, 62). Fearing he might have missed something, Urso conducted some research on Asperger's and satisfied himself that it would not be a viable penalty phase defense. (V14, 63). From his limited research, it appeared that people with this disorder frequently become successful, functioning adults, in

"terms of marriage and families." (V14, 63). Moreover, people with this type of disorder tend to be some of the most "successful people in society, because of their single-mindedness, because of their ability to concentrate on limited facts." (V14, 63). He thought that an assistant state attorney would make "mincemeat" of this defense. (V14, 63). Moreover, from his limited research [conducted before the evidentiary hearing], Urso did not find a link between Asperger's and violent tendencies or behavior. (V14, 64).

Urso testified that "[t]here was nothing to indicate that he had brain damage." (V14, 72). He did not think Morton's birth had any lasting impact upon Morton. Urso testified: "well, that would have been based on - - I think even Barbara Stacey says that here that he was fine afterwards - - Dr. DelBeato's evaluation, Mimi Pisters worked with him, I think it would have been based on that. There was nothing to suggest that there was any residual problem from that." (V14, 73). He did not have medical records and did not know Morton had an Apgar score of 3 at birth. He was aware the umbilical cord was wrapped around Morton's head. (V14, 74). He did have Barbara Stacey's letter, which stated not only was the cord wrapped around Morton and that he was black and blue, but the doctors said he was fine. (V14, 74). If he had obtained the birth

records, he would have provided them to Dr. DelBeato. (V14, 75).

Urso testified that he investigated the possibility that Morton was sexually abused. Urso testified: "Angela was subjected to sexual abuse by her father. There was a suspicion that Alvin had observed that, but I think this was also coming from a comment from an aunt that she had observed some sort of inappropriate touching of Alvin; I think that's what it was." (V14, 79). He instructed Krisanda to "meet with the family members to see if there was any truth to sexual abuse." (V14, 79).

In interviews, Morton told Urso he did not remember early childhood at all. Morton ultimately did recall [or accepted] being physically abused, kicked and beaten. (V14, 84). Urso asked Morton whether he had been sexually abused: "He denied it." (V14, 85). He was aware that sometimes abused children will suppress memories of abuse. Urso explained to Morton that he was looking for bad things that happened to him as a child in an effort to save his life. (V14, 86). Urso explained that he did not present a sexual abuse allegation for the following reasons: "He denied it. I didn't - - I could [sic] advance a position that I didn't believe to be true and that the client denied being true." (V14, 87). With regard to one aunt's suspicion of sexual abuse, Urso testified: "I don't think, from

what I learned of that woman, that she was able to testify that she observed sexual abuse." (V14, 91). Although Morton at one time denied being physically abused, Urso nonetheless presented physical abuse evidence because "there was corroborating testimony as to the physical abuse." (V14, 96).

After the first penalty phase, Swisher sent Urso a letter stating that Dr. DelBeato was not a "great witness." (V14, 98). He did not seek a second opinion from another mental health expert other than Dr. DelBeato. However, Dr. DelBeato's opinion was consistent with the State expert's and also Ms. Pisters'. (V14, 99-100). Urso did recall Dr. DelBeato telling Urso that he might negatively impact the case if he testified. (V14, 102). However, Urso talked to Dr. DelBeato and said "you are going to present the personality characteristics that are necessary to the theory of our case, and while I understand you're afraid you're going to hurt Alvin's case, that's our theory of the case." (V14, 105).

Urso did not talk to Les Stacey or investigate his background beyond discussions with Barbara Stacey, Angela Morton, and Morton. (V14, 109). It did appear to Urso that Les Stacey was a stable father figure. (V14, 112). Although Urso was aware the family had financial problems, he was not aware that the Staceys had filed for bankruptcy a few years prior to the murders. (V14, 113). Morton told Urso that he wanted to be

executed. (V14, 116). Urso and Swisher worked with Morton in order to gain his acquiescence to their penalty phase defense. (V14, 117).

Urso did not offer any medical records into evidence during the penalty phase. (V14, 119). Nor did he have records of Les Stacey's dishonorable discharge from the military. (V14, 120). Urso did not go to the family home in this case, but does not know if he would have done anything differently had he done so. But, it would have "helped me get a better feel for him and his family." (V14, 123). Urso said his billing records are "pretty accurate" but that he "always" misses "stuff on cases." (V14, 125). For example, Urso testified that he and co-counsel Swisher saw each other quite often and would not enter that as a time slip. "Seeing him, sitting down and talking about the case, I would not enter that as a time slip." (V14, 129). It was "chronic" for Urso not to bill all the time he spent on a case, even when his hourly rate on a conflict case is "substantially" less than his normal rate. (V14, 131-32).

**(ii) Mental Health Experts And Social Worker**

A total of four mental health experts were called to testify during the evidentiary hearing below in addition to a social worker/mitigation specialist. Morton called a psychiatrist from San Francisco, California, Dr. Arturo Silva, who testified that Morton was substantially impaired in his ability to conform his

conduct to the requirements of the law, based upon his diagnosis of Asperger's disorder, and brain damage. (V17, 661-62; 755, 763). Morton also called Dr. Robert Berland, a forensic psychologist, who did not find the statutory mental mitigators applied, but did find that Morton had a psychotic thought disorder based upon his interpretation of Morton's MMPI. (V17, 586, 599, 613-14, 618). Claudia Baker, a forensic social worker from California, testified about her biopsychosocial investigation of Morton and his family. (V15, 329-30).

The State called Dr. Donald DelBeato, a forensic psychologist who testified for the defense during the 1994 and 1999 penalty phases. He held the same opinion of Morton at the evidentiary hearing as he did at trial, that Morton had an Antisocial Personality Disorder and that he did not find evidence to support brain damage, a psychotic thought disorder, or any impairment which would allow him to find the statutory mental mitigators. (V19, 942-43; V20, 1091). Similarly, Dr. Arturo Gonzalez, testified during the post-conviction hearing that he held the same opinion of Morton that he did previously - that Morton qualifies for an Antisocial Personality Disorder. He also found no evidence to support a conclusion that Morton suffers from brain damage, a psychotic thought disorder, or, that the statutory mental mitigators applied in this case. (V10, 1685, 1688-89, 1696, 1751).

Any additional facts necessary for a discussion of the assigned errors will be discussed in the argument, *infra*.

## SUMMARY OF THE ARGUMENT

**ISSUE I**—-Trial defense counsel conducted a reasonable investigation into Morton's background in preparation for the penalty phase. Counsel contacted potential witnesses, employed an investigator, and a social worker, and developed a coherent penalty phase strategy. Defense counsel presented a number of witnesses who testified regarding Morton's abusive childhood. Counsel cannot be considered ineffective for failing to develop and present largely cumulative evidence.

**ISSUE II**—-The two defense attorneys in this case hired an experienced, well qualified expert to examine Morton prior to the penalty phase. Only one of the post-conviction experts called to testify during the evidentiary hearing below found a statutory mental mitigator. Dr. DelBeato provided a competent examination, and, nothing offered by collateral counsel casts doubt upon the conclusions he reached and testified to during the penalty phase below. That collateral counsel found two mental health experts who offered inconsistent and unpersuasive testimony, does not establish trial counsel was ineffective.

**ISSUE III**--Trial counsel was not ineffective in failing to offer a co-defendant's life sentence into evidence. Morton was the oldest member of the group, the instigator, and primary actor in the murders.

**ISSUE IV**--The trial court's rulings on the admission of evidence during the post-conviction hearing were well within the court's sound discretion.

**ISSUE V**--This Court has repeatedly rejected claims based upon Roper v. Simmons for a defendant over the age of 18 at the time of his crimes. Morton has offered this Court nothing compelling to revisit and overturn established precedent.

## ARGUMENT

### ISSUE I

**WHETHER THE TRIAL COURT ERRED IN DENYING MORTON'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT BACKGROUND EVIDENCE IN MITIGATION DURING THE PENALTY PHASE. (STATED BY APPELLEE).**

Morton first claims that his defense attorneys failed to investigate and present Morton's background during the penalty phase below. The State disagrees. The trial court properly rejected these claims after an evidentiary hearing below.

### (A) Standard Of Review

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

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

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

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

court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

**(B) Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims**

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir.)(*en banc*), cert. denied, 516 U.S. 856 (1995) (citing Strickland, 466 U.S. at 689).

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

**(C) Appellant's Two Experienced Defense Attorneys Were Not Ineffective In Developing And Presenting Morton's Background As Mitigation**

Following several days of evidentiary hearings, the Circuit Court entered a fact-specific, comprehensive written order denying post-conviction relief, finding no deficiency of counsel under Strickland. The trial court stated:

> Defendant claims that he was subjected to daily physical abuse by his father, and ignored and neglected by his mother and stepfather. He claims that trial counsel presented testimony about Defendant's background through Defendant's mother, Barbara Stacey; his sister, Angela Morton; and his maternal aunts, that failed to adequately describe the nature of the environment in which Defendant grew up and the daily nature of the abuse, instead leaving the jury with the impression that the abuse was sporadic and generally benign. Defendant claims that had counsel adequately and accurately presented the nature of Defendant's abusive and malignant home environment it is likely the jury would have acquitted Defendant of first degree murder and sentenced him to life in prison.

> Defendant claims that counsel did not present sufficient testimony as to the physical abuse Defendant was subjected to by Virgil Morton. Defendant alleges that the testimony showed only that the abuse was sporadic or occasional. However, Defendant's mother, Barbara Stacey, testified at the penalty phase that the abuse she and her children suffered was a daily occurrence. See PPT, pp. 455-457, 462-468. The jury having heard the testimony about Virgil Morton's constant physical abuse of Defendant, counsel's failure to present additional cumulative testimony does not satisfy the requirements to be considered ineffective assistance.

(V9, 1438-39).

Collateral counsel incorrectly argues that the "1999 trial testimony painted a picture of mild abuse by a 'disciplinarian father' that had no lasting effect on Alvin." (Appellant's Brief at 35). To the contrary, the problem for Morton is that evidence of Virgil's abuse was extensively presented during the penalty phase. That, Morton, with unlimited time and the ability to focus upon a made record has found an additional witness or two to testify regarding the abuse does not establish that trial counsel was ineffective.

Trial defense counsel presented Morton's mother and sister to talk about the abusive early childhood. He also presented three other relatives who talked about Morton and his abusive childhood. (RS V5, 455-69; RS V6, 648-55). Extensive evidence presented by the defense established that Virgil was physically abusive to Morton, his mother, and, even sexually abused Morton's sister, Angela.

Collateral counsel's attempt to portray the defense attorneys in this case as inexperienced and unprepared for the penalty phase has no support in the record. While Urso did not have previous capital case experience, he had unique experience dealing with abused and neglected children. Moreover, he had the benefit of working with an experienced capital litigator, John Swisher.

Collateral counsel's repeated citations to defense counsels' billing records in an attempt to show some deficiency in time or investigation is not persuasive. It was "chronic" for Urso not to bill all the time he spent on a case, even when his hourly rate on a conflict case is "substantially" less than his normal rate. (V14, 131-32). Swisher, like Urso, was terrible at marking down what time he put on the case for billing. Swisher testified: "I usually end up putting down a percentage of what I do, because I just don't go back everyday [sic] and put it down, and when I try to recall, I just forget." (V15, 274). The billing records are therefore not an accurate delineation of everything that was done by the attorneys in preparation for the penalty phase.

It is not sufficient to establish that counsel could have done more. Rather, to carry his burden to prove deficient performance, Morton must establish that counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment. See Monlyn v. State, 894 So. 2d 832 (Fla. 2004); Windom v. State, 886 So. 2d 915 (Fla. 2004) (quoting Strickland). Morton's attack upon the professional competence of John Swisher and Gary Urso does not establish either prong of Strickland.

Urso recalled reviewing Morton's school records and although he was aware of Morton's "problems at birth, I don't recall having records on those." (V14, 27-28). Urso's billing records reflect reviewing Morton's school records. (V14, 31). He did also review Department of Corrections Records. (V14, 31). Urso recalled reviewing records on Morton's father from another state, either Virginia or West Virginia, and referred to a manslaughter conviction. (V14, 32-33). Paul Krisanda and Wilhelmina Pisters did legwork for him and spoke to other people. (V14, 33-34). In preparing for the case, he researched the theory of the case, the unattached, unbonded child, and talked to Barbara Stacey, Angela, and other family members. He thought the other family members were "aunts of Alvin's" and talked to "teachers at his schools." (V14, 34).

The defense utilized a retired mental health counselor and social worker, Wilhelminia Pisters, who testified extensively about Morton's background, including his lack of contact with his mother when he was hospitalized at birth, the absence of religious practices in the home, family violence and fear,

frequent moves by the family, poor health, lack of friendships, and, his mother's failure to enforce rules and guilt driven need to give her children everything. (RS V6, 531-41, 543-45, 585-86). She was probably 65 or older and Urso felt she would be an extremely effective witness. One of the positive factors was that she was not a "professional" defense witness, and therefore would have greater credibility with the jury. (V14, 153-54).

In Urso's opinion, Mimi Pisters essentially played the role of a mitigation specialist or forensic social worker. Urso testified: "I don't know what else a forensic social worker would have done other than what she did." She reviewed report cards, talked with Dr. DelBeato, spoke with the defendant three or four times, and talked to witnesses. (V15, 220). Ms. Pisters was a local expert and her qualifications appear even more impressive than those of the California social worker post-conviction counsel hired at a much more expensive rate. [$90.00 vs. $45].

The social worker hired by collateral counsel, Ms. Baker, testified that she was employed full time with the VA in San Francisco and worked as a mitigation specialist as an "aside." (V16, 427). Ms. Baker admitted it can be a profitable endeavor, as she charges $90.00 an hour with $45 per hour for time spent traveling. (V16, 427). She spent more than 100 hours on this

case at $90.00 an hour.[3] (V16, 430). Ms. Baker also spent extensive time traveling from California to Florida. She admitted it was more than ten hours travel time from California to Florida. (V16, 457). Ms. Baker "came back to Florida" many times during her work on this case. (V16, 459).

Collateral counsel's mitigation specialist, Ms. Baker, agreed through her review of the 1999 penalty phase that the defense presented a number of witnesses to testify that Virgil Morton was an abuser and that Morton was an abused child. (V16, 491). And, although Ms. Baker was not an expert on abused and unbonded children she deferred to Mimi Pisters on that issue. Ms. Baker testified: "That, I wouldn't say is my field of expertise. Mimi Pisters came to that conclusion and I would believe her." (V16, 491).

Trial counsel clearly did not ignore Morton's background; they called the two individuals most aware of Morton's environment, the two individuals who shared a home with Morton, his sister and mother, in addition to three aunts and a social worker/mental health counselor. That post-conviction counsel now has found an additional couple of aunts and a cousin to testify, with unlimited time and resources, does not establish

[3] She admitted that the job at the VA pays "probably" a lot less than her work as a mitigation specialist. (V16, 435). She would have to think about accepting the $75 an hour fee that Pasco County was willing to pay—it would depend upon other variables. (V16, 437).

that trial counsel was ineffective. Trial counsel cannot be considered ineffective for failing to present mitigating evidence that he, in fact, presented. Atwater v. State, 788 So. 2d 223, 233 (Fla. 2001)(rejecting an ineffectiveness claim for failing to present mitigation because Atwater's personal and family history were, in fact, presented during the penalty phase); Downs v. State, 740 So. 2d 506, 515-16 (Fla. 1999)(rejecting ineffective assistance claim for failing to present mitigating evidence where most, if not all, of the evidence was, in fact, presented.). Collateral counsel presented largely cumulative testimony about the abusive family environment Morton was exposed to as a young child. See Gorby v. State, 819 So. 2d 664, 676 (Fla. 2002)(finding counsel was not ineffective where each allegation "is either wholly unsupported by evidence, was actually presented as mitigation evidence, or is related to nonstatutory mitigation found to exist by the trial judge.").

As for failing to present documents to reflect Virgil Morton's character, the State submits the defense has not established any deficiency. Through testimony during the penalty phase, the jury was aware that Virgil had been convicted

of manslaughter and bragged about it.[4] Further, they were aware he sexually abused Angela and physically abused Morton. The jury did not need a DOC record reflecting that Virgil was possibly a sexual deviant, they heard firsthand about the sexual abuse of his own daughter.[5] Indeed, Urso testified that evidence Virgil actually molested his own daughter, Angela, was "much more powerful evidence than a record suggesting [he was] a sexual deviant." (V15, 217).

The record provides competent, substantial evidence to support the trial court's conclusion that the trial attorneys conducted a reasonable investigation into Morton's background.

**(i) The Defense Attorneys Had No Credible Evidence To Suggest, Much Less Establish That Morton Was Sexually Abused**

The State cannot find a specific fact based allegation in Morton's motion for post-conviction relief alleging that he was sexually abused. Nonetheless, the trial court addressed the claim made for the first time in collateral counsel's written closing argument. As recognized by the trial court below, counsel cannot be held ineffective for failing to present

[4] Barbara Morton testified in the 1999 penalty phase that Virgil bragged he had "murdered somebody, and he would murder them, too." (RS V5, 449).

[5] Counsel cannot be considered ineffective for failing to introduce Virgil's prison records. These records do not reflect upon Morton's character, which, of course, is the focus of the penalty phase. In fact, the State could properly object to those documents relating to Virgil on relevancy and hearsay grounds.

evidence of sexual abuse where counsel possessed no credible evidence to establish Morton was, in fact, sexually abused.

The trial court denied this claim below, stating:

> Defendant also claims counsel should have presented evidence that Defendant suffered sexual abuse from his father, Virgil Morton. Defendant denied being sexually abused, or denied any memory of sexual abuse, and Defendant's family members could not testify as to any sexual abuse suffered by Defendant. See EHT, pp. 76, 79, 161-1 62, 869; CEHT, pp. 11. Defendant presented only the testimony of one aunt, Robin Johnson, who observed Virgil "inappropriately touch" Defendant while Defendant was fully clothed and in the presence of others. See EHT, pp. 84 6-849. The witness had previously stated in deposition that she did not witness any sexual abuse, and testified at the hearing that she did not think the inappropriate touching was a sexual act. See EHT, pp. 846-849. Based on such limited and unclear evidence of sexual abuse, counsel's failure to present such argument cannot be said to fall below the level of reasonably competent representation.

(V9, 1439).

Morton repeatedly denied that he had been sexually abused. (V14, 85, 87; V15, 283; V16, 567-68). See Strickland, 466 U.S. at 691, 104 S.Ct. at 2052 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."). Urso asked Morton whether he had been sexually abused: "He denied it." (V14, 85). He was aware that sometimes abused children will suppress memories of abuse. Urso explained to Morton that he was looking for bad things that happened to him as a child in an effort to save his life. (V14, 86). Urso

explained that he did not present a sexual abuse allegation during the penalty phase for the following reasons: "He denied it. I didn't - - I could [sic] advance a position that I didn't believe to be true and that the client denied being true." (V14, 87). With regard to one aunt's suspicion of sexual abuse, Urso testified: "I don't think, from what I learned of that woman, that she was able to testify that she observed sexual abuse." (V14, 91).

Defense counsel investigated the possibility that Morton had been sexually abused. In light of Morton's denial of abuse, and the complete absence of evidence establishing abuse, defense counsel cannot be considered ineffective. In Gorby v. State, 819 So. 2d 664, 676 n.11 (Fla. 2002), this Court rejected a similar claim, stating:

> Trial counsel was not ineffective for not presenting evidence of Gorby's possible victimization in the form of childhood sexual abuse. The record reflects no sound evidentiary support for this allegation; indeed trial counsel testified during the postconviction proceedings that Gorby denied being the victim of any sexual abuse. **Based upon the record before us, we decline to determine that counsel was ineffective for not presenting evidence regarding the possibility of his client's victimization by child abuse when the client himself did not acknowledge such abuse and no other evidence substantially supports such an assertion.** *See generally Porter v. Singletary*, 14 F.3d 554, 559-60 (11th Cir. 1994). Furthermore, we agree with the postconviction judge's finding that Gorby's proffered evidence of exposure, while a child, to inappropriate sexual behavior by his mother is inconclusive. (emphasis added).

Collateral counsel falsely states that "[t]he testimony of Virgil's abuse of Angela also came from only one witness, Barbara Stacey and provided less detail than Robin Johnson's statement." (Appellant's Brief at 45 n.11). The testimony of Barbara Stacey, Angela's mother, was not at all equivocal, she caught Virgil in bed having sex with Angela. (RS V5, 461, 474-75, 496). Such testimony is obviously more definitive than the equivocal sexual or non-sexual touching of the fully clothed Morton reported by Johnson. Moreover, collateral counsel completely ignores the rather compelling fact that the victim of the abuse, Angela, actually testified during the penalty phase that Virgil sexually abused her a number of times, beginning when she was four. (RS V5, 505, 514). This stands in stark contrast to Morton, who denied being sexually abused.

The most collateral counsel could come up with was his aunt, Robin Johnson, and her interpretation of what she observed one day between Virgil and Morton.[6] (V19, 916-17). She did her best to suggest some type of sexual abuse was perpetrated upon Morton, but the most she could say was that she observed Virgil's hand on an inappropriate area of Morton and she

[6] Interestingly enough, Morton's California Social Worker, Ms. Baker, recounted a more expansive interpretation of Johnson's story based upon her out-of-court interview. Such hearsay, not under oath, and, later, not repeated in court by the alleged source, Ms. Johnson, casts doubt upon the credibility of Ms. Johnson or Claudia Baker, or both of them.

acknowledged that Morton was fully clothed. Johnson testified: "All of the clothing was on, his hand was there on top of the clothing and that isn't a sexual act." (V19, 920). She acknowledged that in a deposition taken shortly before she testified during the post-conviction hearing that she denied observing Morton being sexually abused. (V19, 919-20).

Even more strained, is collateral counsel's citation to Dr. Gonzalez's testimony regarding a statement he read from Christopher Walker, who claimed to have said that Angela "said the father had molested them, yes, which them included Alvin Morton" (DAR V10, 1707)(cited in Appellant's Brief at 44). The problem for collateral counsel is that this hearsay statement, allegedly from Angela [through Christopher Walker], was not repeated, either to trial counsel, or, by Angela herself, when she testified in court during the penalty phase or the post-conviction hearing. This double hearsay statement through Dr. Gonzalez, does not constitute admissible evidence which establishes that Morton was, in fact, sexually abused.[7]

In sum, Morton has not established that counsel was ineffective in failing to present evidence that he was sexually abused. Morton denied being sexually abused, and, collateral counsel failed to uncover any credible and admissible evidence

[7] Even defense expert Dr. Berland admitted he had no evidence to indicate Morton had been sexually abused. (V17, 628).

to establish that he suffered sexual abuse. Thus, the trial court's order denying relief is supported by competent and substantial evidence.

**(ii) Counsel Was Not Ineffective In Failing To Offer Evidence Of Poverty Or Continued Family Dysfunction After The Age of Eight**

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

> Defendant alleges that the testimony inaccurately established a home environment following Mrs. Stacey's marriage to Les Stacey as abundant, generous, and loving. According to Defendant, Mr. Stacey was an alcoholic who is nearly deaf and likely suffers from post traumatic stress disorder (PTSD) as a result of his service as a Marine in Vietnam. Defendant also alleges Mr. Stacey's violent past, as evidenced by an aggravated battery offense while he was in the military, should have been presented.
>
> Defendant presented no evidence to show that any of Mr. Stacey's alleged alcoholism, deafness, or PTSD had any influence on Defendant or adversely affected Defendant's home environment. Nor was any evidence presented to show that Mr. Stacey's single alleged violent act that occurred long before Defendant was born had any current relevance to Defendant's home environment. Defendant did not show that Mr. Stacey was ever violent or abusive toward Defendant. The most that was alleged was that Mr. Stacey ignored Defendant and did not spend any time with him. At the evidentiary hearing, Mr. Stacey testified that he never physically disciplined Defendant. See EHT, pp. 489-491. He also testified that he did not spend a lot of time with Defendant, but he was around the house. See EHT, pp. 479-480. Mr. Stacey testified that both he and Mrs. Stacey both worked long hours to make ends meet, and that he liked to read when he was home. See EHT, pp. 481-483, 494.
>
> Defendant asserts that his home environment was falsely portrayed as abundant, generous, and loving after his mother married Mr. Stacey. As an example, Defendant claims that the testimony that Defendant was provided with a car, a television, and clothing did not portray the actual situation in which the car was barely working, the television was used and purchased for $5.00 at a garage

sale, and the family's clothing came from Goodwill. However, it is hard to imagine how the fact that his family tried to provide him with these items, items which are not necessities and which many children are not provided with, to the best of their limited financial ability could be of any benefit to Defendant. Particularly when the record reflects that from the time he quit school at age 16 until the date of the murders when he was 19, Defendant did not, or could not, hold a job of his own in order to provide for himself. See PPT, pp. 482-492. It is, therefore, inconceivable that counsel could be considered deficient or ineffective for failing to make such argument to the jury.

Defendant also claims that counsel should have introduced evidence of the family's bankruptcy in 1989. As the family's work and financial situation was presented to the jury, the fact that they had a bankruptcy three years earlier would not have added significantly to the information the jury already had. Accordingly, counsel's alleged failure to present such information does not establish ineffective assistance of counsel.

As far as the portrayal of Defendant's home environment as loving, Defendant's aunts, Mrs. Dufoe and Mrs. Trepp, testified that they had observed Mr. Stacey to be a good stepfather to Defendant. See PPT, pp. 646, 654. Mrs. Dufoe testified that Mr. Stacey went out of his way to develop a relationship with Defendant and liked to spend a lot of time with him. See PPT, pp. 646-64 7. Mrs. Trepp testified that both Mr. and Mrs. Stacey gave Defendant affection and tried to do the best they could for Defendant. See PPT, p. 654. Defendant alleges that the testimony of the witnesses was inaccurate, but fails to allege anything that would show that the testimony of Defendant's family members was false or specifically that counsel could have known the testimony was false. Although Defendant's trial counsel may have been able to come up with additional witnesses or evidence to further underscore that Defendant's home environment was not ideal, there has not been a sufficient showing that counsel's failure to do so constituted deficient performance below that of a reasonable attorney. The testimony presented at the evidentiary hearing does not provide any additional support for the concept that Defendant's home environment was bad enough to be given any additional consideration in mitigation.

(V9, 1440-41).

The State can add little to the trial court's detailed order rejecting this claim. Morton failed to establish any abuse or serious deprivation suffered after Virgil was out of the family home, when Morton was eight years-old.[8] The majority of Morton's childhood and life was spent without suffering any abuse. It is unclear why collateral counsel contends that trial counsel was ineffective for failing to obtain and presumably present Les Stacey's Dishonorable Discharge from the service. As noted by the trial court, Mr. Stacey's discharge was for an unrelated, violent offense **which occurred prior to Morton's birth.** There was no evidence that Mr. Stacey was ever violent in the Morton home. The most that collateral counsel could come up with is that Mr. Stacey was "standoffish." If mitigating at all, failure to develop this evidence is hardly the type of serious deficiency required for granting relief under Strickland. In any case, as noted by the trial court, witnesses at the time of trial considered Mr. Stacey a good influence on Morton's life.

Morton's mother testified during the penalty phase that Mr. Stacey tried to be a good father for Morton. (RS V5, 476-78, 485). Kathy Dufoe, Morton's aunt, testified that Melvin Stacey

[8] The most post-conviction counsel could come up with is that on one visit after the divorce Virgil killed a puppy that jumped up on and scratched Angela. (V15, 351). However, there was no testimony that Morton was abused in any manner by Virgil after Morton was approximately eight years old.

was a good stepfather and liked to spend time with Alvin. (RS V6, 646-47). Similarly, another aunt, Paula Trepp, testified that Mr. Stacey was a good stepfather. (RS V6, 650, 653-54). Urso testified that everyone in the family "said positive things to me about Mr. Stacy. I never heard anything negative about Mr. Stacy." (V15, 212).

The trial court's finding that counsel was not deficient in developing background information on Mr. Stacey is fully supported by the record. Counsel cannot be faulted for failing to uncover any negative information about Stacey when the family members did not reveal it.

In sum, Morton failed to establish any abuse or deprivation suffered after Virgil was out of the family home, when Morton was eight years old. While the family was poor, Morton always had a roof over his head and was cared for. Moreover, both Les Stacey and Barbara Morton worked hard, Morton had his own room, a TV, video games, and was not required or even asked to contribute financially. Morton, at the age of 19, lived at home, and had no job history to speak of. Indeed, the fact that the family was poor and yet tried to provide for Morton, and Morton contributed nothing financially, reflects poorly on Morton's character. It certainly cannot be considered mitigating.

**(iii) In Conclusion, Morton has Not Proven Either Deficient Performance Or Prejudice Based Upon The Asserted Deficiencies In The Defense Attorneys' Background Investigation**

Swisher and Urso investigated Morton's family life and presented a number of witnesses who testified about the abuse, deprivation, and dysfunction. Counsel obtained school records, talked to teachers, hired a social worker/mental health counselor, and, employed an investigator. With the benefit of unlimited time and the ability to focus upon a made record, collateral counsel has found very little relevant, favorable, mitigating evidence which was not presented during the penalty phase below. Collateral counsel simply has not produced the quantity nor quality of mitigating evidence to establish that the outcome of his sentencing proceeding was unfair or unreliable. Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result").

This case presents a better factual situation for the State than Hodges v. State, 885 So. 2d 338, 351 (Fla. 2003), where the defendant failed to establish prejudice under Strickland. This Court distinguished Hodges from Wiggins, stating:

> In assessing the prejudice prong of the Strickland standard, the Wiggins Court reweighed the evidence in

> aggravation against the totality of the mitigating evidence, and determined the evidence of severe privation, physical and sexual abuse and rape, periods of homelessness and diminished mental capacities, comprised the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Wiggins, 539 U.S. at 535. Noting that in Maryland, the death recommendation must be unanimous, the High Court determined, "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that one juror would have struck a different balance." Id. at 537.
>
> A similar analysis in the instant matter fails to yield a similar result. Certainly, the absence of generalized evidence pertaining to the asserted social dysfunction of Hodges' entire hometown, and his exposure to environmental toxins in the general area, even when coupled with more specific evidence regarding his abusive and impoverished upbringing, would not have rendered the sentencing proceeding unreliable. The jury recommended a death sentence by a ten-to-two majority, and the trial court found that the State had established two serious aggravators: commission of murder to disrupt or hinder law enforcement and that the act was committed in a cold, calculated, and premeditated manner. See Hodges I, 595 So. 2d at 934. Even with the postconviction allegations regarding Hodges' upbringing, it is highly unlikely that the admission of that evidence would have led four additional jurors to cast a vote recommending life in prison. 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).

Hodges, 885 So. 2d at 350-351.

This case is more aggravated than Hodges, with an extremely brutal, double homicide - each supported by multiple aggravators - and a near unanimous (11-1) jury recommendation after the jury was fully exposed to much of the same evidence post-conviction

counsel presented with regard to Morton's background. Morton has fallen far short of establishing a reasonable probability of a different result had counsel presented additional evidence of Morton's dysfunctional background. See Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (three aggravating factors of during a burglary, HAC, and prior violent felony overwhelmed the mitigation testimony of family and friends offered at the post-conviction hearing); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989)(post-conviction evidence of abused childhood and drug addiction would not have changed outcome in light of three aggravating factors of HAC, during a felony, and prior violent convictions).

## ISSUE II

**WHETHER THE TRIAL COURT ERRED IN DENYING MORTON'S CLAIMS THAT HE WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION BELOW AND DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PROVIDE ADEQUATE BACKGROUND MATERIAL TO THE MENTAL HEALTH EXPERT. (STATED BY APPELLEE).**

As noted above, under Issue I, trial counsel conducted a reasonable investigation into Morton's background, talking to family members, hiring a mental health counselor and social worker [Ms. Pisters], reviewed school records, talked to teachers, and hired a respected local mental health expert to examine Morton. Competent, substantial evidence supports the trial court's rejection of Morton's due process and related ineffective assistance of counsel claims based upon the investigation and presentation of mental health testimony.

In rejecting this claim, the trial court stated, in part:

> …Defendant's claims that Dr. DelBeato failed to meet with or speak to Mimi Pisters is refuted by the testimony of both Dr. DelBeato and Mr. Urso that Dr. DelBeato did meet with Ms. Pisters. *See Evidentiary Hearing Transcript (hereinafter EHT), pp. 210, 885, 917-918, 922, 928-929, 1025.* This claim, therefore, relates solely to Defendant's allegation that Dr. DelBeato conducted an inadequate mental health evaluation of Defendant, and that counsel failed to ensure otherwise. Defendant did not offer any evidence to show that Dr. DelBeato is not qualified to conduct mental health evaluations. Nor has Defendant established that Dr. DelBeato's evaluation and diagnosis of Defendant is not accurate. Dr. Arturo Gonzalez, a psychiatrist who testified for the State at Defendant's trial and testified at the evidentiary hearing in this case, concurred with Dr. DelBeato's diagnosis. *See 1999 Penalty Phase Transcript (hereinafter PPT), pp. 671-673; Continuation of Evidentiary Hearing/Testimony of Dr. Arturo Gonzalez Transcript*

*(hereinafter CEHT), pp. 23, 28.* Defendant has only established that he has found experts who disagree with Dr. DelBeato's diagnosis, and, it should be noted, with each other.

Although Dr. Gonzalez did not actually interview Defendant prior to his testimony at the first penalty phase, he did meet with and speak to Defendant prior to the second penalty phase, and he reviewed the reports of both Dr. DelBeato and Mimi Pisters, a clinical social worker, which both indicated Defendant suffered from antisocial personality disorder. *See CEHT, pp. 23, 44.* Dr. Gonzalez subsequently reviewed the report and test results from Dr. Robert Berland, an expert in forensic psychology who testified on Defendant's behalf at the evidentiary hearing. Although he noted that the MMPI results in Dr. Berland's testing had improved since Dr. DelBeato's testing and the psychopathic deviate scale, scale four, was not elevated "to the degree that becomes pathological," he nevertheless concluded that Defendant had antisocial personality traits because scale four was the most elevated of the clinical scales. *See CEHT, pp. 43-44.* Such findings did not, however, change his opinion as to Defendant's original diagnosis of antisocial personality disorder. *See CEHT, p. 83.*

Defendant's arguments in this claim are all based upon the assumption that Defendant does have brain damage or another mental disorder, but could not have antisocial personality disorder. Such assumption has not been proven. In addition to Dr. Berland, Defendant presented testimony from Dr. Jose Arturo Silva, an expert in forensic psychiatry and lifespan cultural psychiatry. Both experts testified that they believe Defendant suffered from organic brain damage. *See EHT, pp. 562, 590.* But both experts also arrived at different main diagnoses. Dr. Berland diagnosed Defendant as suffering from chronic psychotic disturbance and Dr. Silva diagnosed Defendant as suffering from Asperger's disorder and personality disorder not otherwise specified, "with a significant number of schizoid personality disorder and also some evidence of antisocial traits." *See EHT, pp. 523, 529, 590-591.* Dr. Silva also opined that he does not believe Defendant is schizophrenic or that Defendant 'has been psychotic as far as [he could] see ever." *See EHT, pp. 664.* Such opinion is at odds with the diagnosis of Defendant's other expert, Dr. Berland.

Not only did Dr. Silva disagree with Dr. Berland's diagnosis, but neither of the State's experts found any evidence of psychosis or psychotic thought disorder. *See*

*EHT, pp. 874, 883- 884; CEHT, pp. 84.* Moreover, Dr. Berland's opinion may be skewed. When asked if he considered whether Defendant had antisocial personality disorder, Dr. Berland stated that:

> "As I perceive it, it is not my job to try to elaborate on things that would be harmful to him, not to say that they might not exist, but it's my job to see whether there are legitimate indications of things that would be helpful. So that while in some cases there may be some evidence of antisocial personality disorder, it's not something that I develop in detail, because that's not what I've been asked to do."

*See EHT, p. 526.*

Dr. Berland also testified that he based his diagnosis of psychotic thought disorder solely on the results of the MMPI test he administered. *See EHT, pp. 538-539, 572.* Dr. Gonzalez, however, testified that the MMPI Dr. Berland administered was "normal" or "beautiful." *See CEHT, pp. 20-22.* Dr. DelBeato concluded that he could not diagnose someone with psychotic thought disorder on the basis of that MMPI profile. *See EHT, pp. 883-884.* Although Dr. DelBeato testified that the L, F, and K validating scales on the MMPI were within normal limits, and the only clinical scale that was elevated was the scale four, Dr. Berland opined that the elevation of the L and K scales elevates the diagnostic scale eight to a psychosis level. *See EHT, pp. 574-580, 882-883.* However, Dr. Berland acknowledged that he was not aware of any research or accepted studies in the literature to confirm his anecdotal observations regarding the correlation between the elevation of the L and K scales allowing for an adjustment in scale eight. *See EHT, pp. 577-5 78.*

Neither of Defendant's expert witnesses could establish conclusively that Defendant did suffer from organic brain damage. Both Dr. DelBeato and Dr. Gonzalez testified that they saw no evidence of organic brain damage and, therefore, no reason to investigate further. *See EHT, pp. 870, 1018-1019; CEHT, pp. 17-18, 56.* Although Defendant criticizes [sic] his trial counsel for failing to perform any type of neuro-imaging of Defendant's brain, his current counsel has not had Defendant tested to provide objective evidence that such organic brain damage actually exists. *See EHT, p. 754.* Furthermore, the unrefuted testimony was that trial counsel recommended further testing prior to Defendant's second penalty phase in 1999, but Defendant refused to submit to any further testing. *See EHT, pp. 207-209.* In a letter dated May 5, 1997, Mr. Swisher

mentions to Mr. Urso having seen an article and television special about brain development, and questions whether they should have Defendant tested. *See Letter of May 5, 1997.* Mr. Urso testified that, although there had been no indication of brain damage, they considered testing for it in this case because there was literature to suggest that people who were unattached and unbonded may have brain abnormalities. *See EHT, pp. 64, 20 7-209, 239.*

Aside from Dr. Berland's and Dr. Silva's unsubstantiated opinions contradicting those of Dr. DelBeato and Dr. Gonzalez, Defendant has not provided any objective evidence that he has organic brain damage. Nor has Defendant established that Dr. DelBeato's diagnosis of antisocial personality disorder was not valid based on the information and testing available at the time. When asked whether, applying the DSM-IV to the facts in the record, he found that Defendant met the constructs of conduct disorder or antisocial personality disorder, Dr. Silva stated, "He comes close. It's one of those situations where it is close. It's one of those cases where it's very close." *See EHT, p. 691.* Dr. Silva, however, indicated that a person could not be diagnosed with antisocial personality disorder if he suffers from organic brain damage, because psychopathic or antisocial features are linked to the brain injury. *See EHT, p. 681.* From that perspective, however, one would have to assume as a given fact that the person in question does have organic brain damage. Such has not been satisfactorily established with regard to Defendant in this case.

Defendant failed to offer any evidence to show that Dr. DelBeato is not competent and qualified to conduct a proper mental health examination. Based on the foregoing, this Court finds that Defendant has not established that he did not receive competent mental heath [sic] assistance. Defendant has succeeded only in establishing that he has obtained the assistance of mental health professionals who disagree with the mental health professionals who testified at Defendant's penalty phase hearing, and who disagree with each other as to Defendant's diagnosis. As Defendant has not been able to establish that he did not receive competent mental health assistance, he has not met his burden of proving that counsel was ineffective and this claim is denied accordingly.

(V9, 1433-38).

The trial court's order denying relief on this claim thoroughly evaluated the evidence presented during the evidentiary hearing and is supported by competent, substantial evidence.

**(A) Defense Counsel's Retention Of Dr. DelBeato And Presentation Of Evidence During The Penalty Phase Did Not Constitute Deficient Performance**

Morton faults counsel for deciding to call Dr. DelBeato and Ms. Pisters which revealed Morton possessed Antisocial Personality Disorder. Although some arguably negative information was revealed through Dr. DelBeato, counsel made a reasonable tactical decision to present this testimony. On balance, Dr. DelBeato's testimony was favorable, showing how Morton's early life affected his later decisions and that his conduct must be viewed and evaluated on the basis of his early childhood experiences and his personality dysfunction. The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992). See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2001) ("Counsel's strategic decisions will not be second guessed on collateral attack."). "Even if in retrospect the strategy appears to have been wrong, the decision

will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983), cert. denied, 464 U.S. 1663 (1984). As a tactical decision, counsel's decision is virtually immune from post-conviction attack. Morton has not carried his burden of establishing counsel's performance was deficient or that he suffered prejudice.

Swisher, an experienced capital litigator, talked about how he developed a penalty phase defense with Urso:

> Well, as I remember, and I think I mentioned it to you, when I first started dealing - - talking with Gary about it, he had recommended a book to me. It was called High Risk, and it dealt with - - I think it was subtitled Children Without a Conscience.
>
> In reading through it, it appeared what led to Alvin's condition is something that was a combination of his environment and genetic background, and that was supported by family.
>
> And I'm sure you've gone through all this, you know, the horrible childhood that he had growing up, some of the signs that were manifested as he had gotten into his early teen years, the fact that his father I believe was in the same jail that he was in when he was initially in custody, had been there for manslaughter and I believe he was in custody for arson, but I'm not a hundred percent on that, and that there was a genetic pattern.
>
> And the treatment that Alvin had received, that information did not come particularly from Alvin, it came from other family members, primarily the sister, as I recall.

(V15, 281).

Swisher and Urso had to pick an expert from the court-appointed list. Urso had used Dr. DelBeato before and was comfortable with him. (V15, 302). If Swisher had heard of a

psychiatrist in San Francisco who charged $250 dollars an hour he would have had to pay for it personally. (V15, 302-03). So, he and Urso used an expert who was going to abide by the County's fee schedule from the court-appointed list. (V15, 303).

Dr. DelBeato testified during the penalty phase. Swisher thought that the end result was a nasty word or term, but "the events leading up to that is what we wanted to emphasize is that he ended up that way, but it wasn't his fault, for lack of a better word." (V15, 311). The psychopath term was only revealed on cross-examination, whereas Dr. DelBeato and Ms. Pisters utilized the term antisocial tendency or disorder. (V15, 312). The defense theory obviously gained greater credibility because the testimony of Dr. DelBeato did not materially conflict with that of Dr. Gonzalez, the state expert.

Morton's argument that his defense attorneys did not conduct any further investigation into Morton's mental health after remand from the 1994 penalty phase, is incorrect. After the case was remanded for a new penalty phase, Swisher suggested that medical tests not available at the first penalty phase might prove useful. (V21, 1134). Swisher and Urso discussed neuroimaging tests, like PET scans and CAT scans. Id. Such testing, however, requires the cooperation of the defendant. Urso asked Morton "if he was willing to do that, and he said,

no, he didn't want any more testing." (V21, 1134). Swisher testified that after speaking with Morton, neuroimaging was no longer an option. (V21, 1141).

Morton asserts that Urso's hiring of psychologist Dr. Donald Delbeato was deficient performance. However, Dr. DelBeato's professional qualifications have not been challenged and Morton failed to establish that Dr. DelBeato's opinions are unsound. To the extent Morton is raising a Due Process Claim pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985), the trial court properly found this claim procedurally barred as an issue which should have been raised, if at all, on direct appeal. (V9, 1447). See Moore v. State, 820 So. 2d 199, 203, n.4 (Fla. 2002) (affirming summary denial of an Ake claim in a post-conviction motion because Ake claims should be raised on direct appeal and therefore, are procedurally barred in post-conviction litigation); Dufour v. State, 905 So. 2d 42, 53-54 (Fla. 2005) (finding Ake claim procedurally barred because it was not raised on direct appeal).

In any case, Ake simply requires a state to provide expert mental health assistance when a defendant's mental state is at issue. Morton received State-funded expert assistance prior to and during trial. See Provenzano v. Singletary, 148 F.3d 1327, 1333-34 (11th Cir. 1998).

As recognized by the trial court below, trial counsel did not ignore potential mental health issues in this case. Urso filed a motion to get a confidential mental health expert. Urso testified that he could not just go to San Francisco and get some psychiatrist or psychologist who charges $250 an hour [Dr. Silva]. (V14, 156-57). Urso utilized an expert who was on a list that would agree to be paid whatever fee the County was willing to pay. (V14, 157). Urso had known Dr. DelBeato for a number of years and had worked on cases with him before. Urso testified: "Well, my impression he is the most respected psychologist in this who testifies in our courts in New Port Richey, maybe Dade City." (V14, 158). Urso thought it was helpful that Dr. DelBeato testified about 50% for the State and 50% for the defense. (V15, 159). He did not want someone who testified almost entirely for the defense. Id.

Morton presented no evidence to establish that Dr. DelBeato lacked the training, knowledge, qualifications, or experience to conduct a forensic evaluation of Mr. Morton. Dr. DelBeato has been a clinical psychologist for "thirty years in Pasco County" and examined "several hundreds" of criminal defendants. (V19, 936). He had been qualified as an expert in court several hundred times and had never been denied qualification in this state or any other. (V19, 937). In his thirty years of

practice, Dr. DelBeato has examined maybe 15 or 20 criminal defendants who were charged with capital crimes. (V19, 938).

While Dr. DelBeato did suggest to Urso that he not be called, they discussed it and Urso told him he wanted to present him to talk about the lack of attachment and the dysfunctional family, in effect, to explain how Morton became a man who could commit the instant offenses. (V20, 1092-93). Dr. DelBeato provided useful testimony about Morton as the unattached and unbonded child, to explain how he turned out the way he did. (V15, 311). The defense brought out the first month of Morton's life was spent in the hospital; that he had been abused as a child, and that he had no male role model growing up.

Morton's reliance upon Anderson v. Sirmons, 476 F.3d 1131 (6th Cir. 2007), is misplaced. In Anderson, defense counsel did not hire a mental health expert and conducted absolutely no investigation into the defendant's mental health background. The defendant in Anderson was brain damaged, had a low IQ, and was addicted to drugs. Yet, the court found "[t]he only evidence in the record is that Anderson's family background, mental health, and neurological health were never investigated by trial counsel." Anderson, 476 F.3d at 1145.

*Sub judice,* Swisher and Urso did not ignore potential mental health issues as the defense counsel apparently did in Anderson. They hired a respected, experienced mental health

expert to examine Morton. Dr. DelBeato found Morton had an average or above average IQ, and, as a result of his early childhood experiences, an Antisocial Personality Disorder. Dr. DelBeato's testimony fit within the context of other testimony presented by the defense from family members and mental health counselor and social worker Ms. Pisters.

**(B) Morton Has Not Shown That Either Dr. Gonzalez's Or Dr. Delbeato's Opinions Would Change With The Benefit Of Any Additional Background Material Uncovered By Collateral Counsel**

Morton failed to show that any additional background material, such as birth records, would have altered Dr. DelBeato's opinion in any way. The birth records, while noting oxygen deprivation at birth, also documented the fact the attending physician found no abnormal neurological findings for Morton upon his discharge from the hospital. (V19, 949-51). The lack of such material did not have an impact upon Dr. DelBeato's opinion. Consequently, defense counsel cannot be considered ineffective in failing to provide that material to his expert. See e.g. Carroll v. State, 815 So. 2d 601, 611 (Fla. 2002)(Even "assuming trial counsel was deficient for failing to provide the additional background information" defendant failed to demonstrate prejudice under Strickland where the experts would not have changed their opinions with the benefit of such material); Brown v. State, 755 So. 2d 616, 636

(Fla. 2000)(trial counsel's performance was not deficient for failing to provide mental health expert additional background information because the expert testified at the evidentiary hearing that the collateral data would not have changed his testimony); Engle v. Dugger, 576 So. 2d 696, 701 (Fla. 1991)("Counsel had Engle examined by three mental health experts, and their reports were submitted into evidence. There is no indication that counsel failed to furnish them with any vital information concerning Engle **which would have affected their opinions.**" (emphasis added)).

In his post-conviction motion, Morton alleged that counsel was ineffective for failing to ensure the necessary psychiatric analysis was performed. However, he completely failed to identify what this so-called necessary psychiatric analysis consists of. See Cherry v. State, 781 So. 2d 1040, 1052 (Fla. 2001)("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 under Florida Rule of Criminal Procedure 3.850, [citation omitted], especially where there is no evidence other than Dr. Crown's [post-conviction defense expert] statement that Dr. Barnard conducted a superficial examination that Dr. Barnard's evaluation was insufficient."). The record reflects that Dr. DelBeato interviewed Morton, administered a number of tests, and wrote a

detailed report. (V19, 869-70, 940-943). See Gorby v. State, 819 So. 2d 664, 681 (Fla. 2002)("Dr. Goff's examination itself was competent because it certainly was not so 'grossly insufficient [as to] ignore clear indications of either mental retardation or organic brain damage.'" (citing State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987)).

While Dr. DelBeato did not talk to family members of Morton, he did talk to Ms. Pisters and defense counsel about Morton's background.[9] He spent more time than the four hours he billed in the case and testified that he felt he had enough time to conduct a professional evaluation.[10] Dr. DelBeato testified that he spent maybe 90 minutes or longer with Morton, then "maybe 15, 20 hours talking and going over the results and going over materials the attorney had, and talking to each other, and another lady that was there." [Mimi Pisters]. (V19, 956-57).

[9] Morton had no previous history of mental health treatment apart from court ordered treatment with a Juvenile Alternative Sentencing Counselor, who counseled Morton in 1986 after he stole his mother's car. (V16, 483). Defense social worker Baker stated she did not attempt to talk to the counselor because "apparently Mr. Morton didn't - - wouldn't say anything to him, so how much information would he have?" (V16, 483).

[10] Dr. Berland's estimate of the time it would take to administer various psychological tests to Morton does not establish that Dr. DelBeato spent inadequate time. (V21, 1299-1301). Although Dr. Berland essentially criticized Dr. DelBeato for only administering the verbal portion of the WAIS, Dr. Berland administered the full WAIS and came up with an even higher IQ level. Moreover, the abbreviated MMPI was administered by Dr. DelBeato. While we do not have the test results because his records were lost, we do know that scale 4 was elevated, the same scale Dr. Berland found elevated.

During the evidentiary hearing, Morton failed to establish that Dr. DelBeato spent inadequate time evaluating Morton.

Dr. DelBeato did look for mitigating factors and did find some mitigation, including "Family dysfunction. Relatively unsupervised. Family situation. No significant male bonding or mode. Lack of supervision or guidance." (V19, 945). He reviewed Morton's case for the statutory mitigating factors but did not think that they applied. He felt Morton had a personality disorder and character dysfunction, but that he was not under the stress of mental illness or psychosis. In other words, Dr. DelBeato did not find any "cognitive impairments that would have impaired his ability to determine right from wrong." (V19, 946-47).

Dr. DelBeato has extensive experience administering neuropsychological screening tests for brain damage on behalf of individuals sent to him by the state of Florida. However, after screening Morton, Dr. DelBeato did not find any indication of brain damage. (V19, 942-43; V20, 1090). While Dr. DelBeato did not have the birth records at the time of his initial evaluation of Morton, he recalled talking to Mr. Urso about potential anoxia at birth. (V19, 950). He thought then, and he still thinks, that the difficult birth, given Morton's subsequent intelligence scores, does not suggest any material degree of brain damage. (V20, 1091).

Now, having reviewed the birth records obtained by collateral counsel before the post-conviction hearing Dr. DelBeato would not conclude that Morton suffered any significant brain damage as a result. (V20, 1091-93). Dr. DelBeato noted the discharging doctor found no abnormal neurological findings upon discharge and that Morton's IQ was either average or above average. (V19, 951-53). Dr. DelBeato simply found no reason to suspect Morton was brain damaged and referred him for additional testing. Dr. Gonzalez, a psychiatrist [MD], testified during the post-conviction hearing that he reviewed the birth records, and came to the same conclusion as Dr. DelBeato on brain damage. (V10, 1685, 1688).

**(C) The Fact That Morton Has Found Experts To Testify More Favorably On Mitigation Does Not Establish His Trial Counsel Were Ineffective**

Morton has simply shown that with apparently unlimited resources, he could find experts willing to provide favorable mitigation testimony. This fact, however, does not in any way establish deficient performance on the part of Mr. Urso and Mr. Swisher. It is well established that trial counsel's reasonable investigation into a defendant's mental health or presentation of mental health testimony is not rendered deficient simply because post-conviction counsel is able to secure more favorable mental health experts. See Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002)("We have held that counsel's reasonable mental

health investigation is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'")(quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000); Downs v. State, 740 So. 2d 506 (Fla. 1999)("The fact that Downs has found experts willing to testify more favorably concerning mental mitigating circumstances is of no consequence and does not entitle him to relief.")(citations omitted); Jones v. State, 732 So. 2d 313, 317-318 (Fla. 1999)(finding no deficient performance for failing to procure Doctors Crown and Toomer noting that trial counsel is not "ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case.").

In any case, one of his experts, Dr. Silva [the only expert to find a statutory mental mitigator], a California resident, was not reasonably available to trial counsel. Trial counsel had no reason to scour the country, only to, perhaps, by chance, stumble upon Dr. Silva in California.[11] Counsel did not have any reason to seek out an expert outside the state; an expert who was not on the court-appointed list for Pasco County, and who charged more than the county was willing to pay. [Dr. Silva spent more than 150 hours working on this case and charged $250

[11] Prior to the Morton case, Dr. Silva had never testified as an expert in Florida. (V17, 659).

an hour, an expense of nearly $40,000, not including travel costs and lodging, necessitated by traveling from California to Florida]. (V21, 1253-54).

**(D) The Testimony Of Dr. Silva And Dr. Berland Was Less Credible Than That Of Dr. Gonzalez And Dr. Delbeato And Did Not Establish The Statutory Mental Mitigators**

Neither Dr. Silva, with his diagnosis of Asperger's disorder and non-specific brain damage, nor Dr. Berland, with his psychotic thought disorder diagnosis, related these alleged mental infirmities to Morton's conduct on the night of the murders. Morton displayed a high degree of planning and deliberate conduct which strongly militates against finding any mental impairment on the night of the murders. See Rose v. State, 617 So. 2d 291, 293 (Fla. 1993)(stating that a post-conviction judge "has broad discretion in determining the applicability of mitigating circumstances and may accept or reject the testimony of an expert witness."); Davis v. State, 604 So. 2d 794, 798 (Fla. 1992)(statutory mitigating circumstances properly rejected, despite testimony of two defense experts, where defendant's methodical behavior was inconsistent with alleged mental incapacity). This was a coldly planned and executed murder of two individuals.

Morton targeted the house because the victims had a satellite dish and a pool, staked out the victims' house by breaking into an abandoned neighbor's house, wore gloves, hid

his shotgun under a blanket on the ride to the victims' house, and ordered the phone lines cut, before breaking open the victims' door. Once inside, he ordered the victims to the ground, and, as the male victim was pleading with Morton, telling him he would give him a check and not tell the cops, Morton coldly responded, "that's what they all say" and shot him. Thereafter, he attempted to shoot Ms. Weisser, but the shotgun jammed, he then stuck a knife in the back of her neck as she lay on the floor. After either he or Garner cut off a finger as a souvenir, Morton hid the shotgun, and returned home where he put his clothes and shoes in the wash [eliminating evidence]. Later, Morton returned to set the victims' house on fire to get rid of evidence. (RS V3, 248-50, 252-53, 258-59).

Morton, who all the experts agree, was either average or above average in intelligence, was clearly not impaired in any way at the time of the murders.[12] Dr. Silva's highly compensated opinion to the contrary, he did not establish a single statutory mental mitigator. See Bertolotti v. Dugger, 883 F.2d 1503, 1518 (11th Cir. 1989)("Before we are convinced of a reasonable probability that a jury's verdict would have been swayed by the testimony of a mental health professional, we must look beyond the professional's opinion, rendered in the impressive language

[12] Dr. Berland agreed that Morton was probably more intelligent than most criminal defendants: "122 is above average for the population, certainly among criminals." (V21, 1303).

of the discipline, to the facts upon which the opinion is based.")(citing Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987)). Of the four mental health experts who testified during the evidentiary hearing, only Dr. Silva found a statutory mental mitigator applied. Even Dr. Berland, the other defense expert,[13] testified that he could not say within a reasonable degree of medical certainty, that the statutory mental mitigators applied in this case. (V17, 618).

As found by the trial court below, Dr. Berland's testimony was not persuasive or compelling. He testified that he found some non-statutory mental health mitigation, brain damage and some type of underlying psychotic thought disorder. He viewed his role as attempting to identify mitigation, and, therefore did not even attempt to ask Morton about the facts of the offenses for which he had been convicted. Even though he concluded that Morton had some form of psychotic thought disorder, he chose not to ask Morton what he was thinking at the time of the murders. (V17, 613-14). Dr. Berland explained: "I didn't ask him, because it was my job to look for mitigating issues that might affect his case favorably." (V21, 1305).

Dr. Berland did not note any signs of psychotic behavior, nor did Morton report any to him. (V17, 597-98). Nor did

[13] Dr. Berland admitted that the "overwhelming majority" of his work in criminal cases is on behalf of the defense. (V17, 593).

Morton's mother [the only family member he talked to], observe or report any behaviors to suggest Morton was psychotic. (V17, 598, 633). Nor do the DOC records indicate that Morton has displayed psychotic symptoms while in prison. (V17, 599). Dr. Berland admitted the only evidence he has to suggest Morton suffers from a psychotic thought disturbance came from his interpretation of Morton's MMPI. (V17, 599). However, Dr. Berland admitted "it's not common" for a test to stand on its own to diagnose a thought disorder, you would rather have data from records, the defendant or family members to support it.[14] Id. And, significantly, Dr. Berland admitted he didn't have any such supporting data in this case. Id. As Dr. Gonzalez noted, you "could not" diagnose a thought disorder based solely upon the MMPI. (V10, 1756).

It appears Dr. Berland used his own unique interpretation of the validity scales of the MMPI-II to conclude that Morton suffers from delusional or psychotic thought. In response to the trial court's question, Dr. Berland admitted that he could point to no literature or accepted studies to support his interpretation.[15] (V17, 638). On cross-examination, it was

[14] Interestingly enough, the other defense expert, Dr. Silva testified that you do not render a diagnosis based solely upon the results of a test. (V21, 1214).

[15] Dr. Berland claimed that you could not diagnose Antisocial Personality Disorder from the MMPI without corroborating information and behaviors. Curiously, Dr. Berland diagnosed a

noted that a resource book on the MMPI-II, by Dr. Graham, did not tend to support Dr. Berland's conclusions regarding psychotic thought based upon the L and K validity scales of the MMPI-II. (V17, 599-605). The only clinical scale that was elevated was 4, or the psychopathic deviate scale. (V17, 602). Dr. Berland was forced to admit that any L or K scale correction would apply to all the scales not just the 8, presumably enhancing the already elevated finding for the psychopathic deviate scale. (V17, 639).

Dr. Berland acknowledged a number of facts which tend to support an antisocial personality disorder diagnosis for Morton, including torturing or killing animals prior to the age of 15, truancy from school, larceny of his parents' car, setting fire to a neighbor's trailer, and, a brutal double homicide.[16] (V17, 612-13). Dr. Berland reviewed Morton's school records which

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psychotic thought disorder based only upon his own unique interpretation of the test. (V17, 586-87).

[16] Morton clearly met the diagnostic criteria under the DSM-IV-TR, which provides an individual only need to meet three criteria for such a diagnosis. He had an inconsistent work history, A (6) failure to sustain consistent work behavior [at the age of 19, Morton was not in school and had absolutely no work history], A (1) failure to conform to societal norms by repeatedly performing acts that are grounds for arrest [in this case, animal cruelty, car theft, burglary and arson, along with the instant offenses, double homicide], A (4) irritability and aggressiveness [Morton's friends described him as a "bully"], A (7) lack of remorse [despite murdering two individuals in their own home, Morton was pleased with himself after the murders].

revealed Morton was capable of doing the school work when he wanted to.[17] (V17, 619-20).

As the trial court found below, the more credible testimony of Dr. DelBeato and Dr. Gonzalez rebut the post-conviction defense experts. Morton had a history of conduct which falls squarely within the antisocial realm, from torturing animals, bullying other people, being irresponsible with no work history to speak of, truant from school, stealing property, breaking into and vandalizing a neighbor's home, and, the present offense, murdering two individuals without remorse. As noted by the trial court, even Dr. Silva admitted that he thought Morton was very close to qualifying for an Antisocial Personality Disorder diagnosis, it's "very close." (V17, 763).

Dr. DelBeato did not find any evidence of brain damage. Morton was intelligent, and the full WAIS administered by Dr. Berland did not show any indication of brain damage. To the contrary, Dr. DelBeato explained:

> ...For example, the block design test, which is Koh's block, which is a test as a matter of fact that was incorporated into this Wechsler because it was good for discriminating brain damage, he got the highest score you could possibly get on it.
>
> The interesting thing is that Alvin's scores have increased since I gave it to him. That's not supposed to

[17] Forensic social worker Baker testified that Morton was frequently truant and dropped out in the 11th grade. (V16, 476). However, he did have some good grades and on his achievement tests Morton scored "average" to "above average" in nearly every category. (V16, 476).

> happen. So basically what that would suggest is that, number one, he is more achievement-oriented. In other words, at the time I saw him he was depressed and underachieving, and has maybe in prison studied.
>
> ...
>
> [objection omitted]
>
> ...it shows that he is extremely high, more intelligent than he showed, and that could be for a lot of reasons.

(V20, 1090-91).

Even if we were to assume that Morton had a developmental disorder (Asperger's), "it wouldn't have had any significant bearing on what happened." (V20, 1091-92).

In diagnosing Asperger's Syndrome, Dr. Silva appeared to rely heavily on the perception that Morton had difficulty socializing and that Morton had a flat or emotionless effect. However, as Dr. DelBeato testified, a flat or emotionless effect is not uncommon for an interview conducted in an institutional setting like prison where an individual is facing potentially severe consequences. (V20, 1086-87). Dr. DelBeato noted that outside the forensic interview, he had indications of Morton sharing or expressing emotion. Dr. DelBeato testified:

> I did review depositions. I believe Alvin's sister and some of the co-defendants, who indicated that they had observed Alvin showing emotion, showing bullying behavior and being less than flat.
>
> As a matter of fact, there was a case of a recall of the incident after the alleged murder that where one of the people was in essence saying that he was kind of glib and remorseless.

(V20, 1088-89).

Morton was described by one witness as "rather glib and laughing about what had happened about this murder." (V20, 1089). Similarly, Dr. Gonzalez noted that some available evidence in this case showed Morton laughing, giggling, or otherwise sharing emotion with members of his group.[18] (V10, 1751). Moreover, the background material reviewed by Dr. DelBeato indicates that Morton was aggressive and the leader of the group. (V19, 959). Similarly, Dr. Gonzalez testified: "From the sister and from all the reports from the peer group, confessions or statements that they made to authorities, he seemed to socialize well. He was referred to as being a bully, but the leader of the gang or leader of the people." (V10, 1695).

Dr. DelBeato noted a number of behaviors of Morton, from truancy, being a bully, cruelty to animals, theft and vandalism, as well as the instant double homicide, which are more likely to be associated with someone with Antisocial Personality Disorder, rather than Asperger's, a mild form of Autism. (V19, 961-62). Dr. Silva's conclusory attempt to link Asperger's and violent conduct by citing non-specific, anecdotal evidence, is extremely tenuous. This was not a reactive, violent event, but a well

[18] Morton was laughing with his friends while showing the finger cut off from the male victim's hand. Dr. Gonzalez, like Dr. DelBeato, noted it was not uncommon for an individual interviewed in a forensic setting to have a flat emotional effect. (V10, 1747).

planned and executed robbery, burglary, and double homicide. The Diagnostic and Statistical Manual of Mental Disorders, Text Revision, [DSM-IV-TR], 299.80, pgs. 80-84, promulgated by the American Psychiatric Association, does not reflect any link between Asperger's and violent conduct, much less the kind of preplanned, and calculated violence displayed by Morton in this case.

Dr. DelBeato noted that the MMPI-II administered by Dr. Berland was essentially normal, with only scale 4, the psychopathic deviate scale, elevated. In Dr. DelBeato's opinion, the test did not support a conclusion that Morton had a psychotic thought disorder. (V19, 955-56). Nor did Dr. DelBeato possess any evidence to suggest Morton suffered from a psychotic thought disorder: "Nothing." (V19, 956).

Dr. DelBeato's opinion was supported by Dr. Arturo Gonzalez, the expert called by the State. Dr. Gonzalez, a psychiatrist, reviewed a large amount of material before testifying in this case, including Morton's birth records, the WAIS score obtained by Dr. Berland, and, Dr. Berland's MMPI. Dr. Gonzalez concluded that Morton had an Antisocial Personality Disorder. (V10, 1755). Moreover, Dr. Gonzalez testified that Morton did not suffer from brain damage, that the MMPI was essentially normal, with an elevated psychopathic deviate scale,

and that the statutory mental mitigators did not apply in this case. (V10, 1688-89; 1696; 1755-56).

Dr. Gonzalez had a great deal of experience interpreting the MMPI over the course of his long career, and concluded that the MMPI results obtained by Dr. Berland did not indicate any psychotic thought disorder, as Dr. Berland had concluded. (V10, 1756). Nor was Dr. Gonzalez aware of any professional literature or opinions which would support Dr. Berland's interpretation of the MMPI in this case.[19] (V10, 1693). Moreover, there was no evidence in the record to suggest that Morton suffered from any psychosis or delusional thought. In fact, as Dr. Gonzalez noted, Morton displayed a high degree of deliberate conduct in this case, conduct which is inconsistent with a finding that Morton was in any way impaired at the time of the offenses. (V10, 1695-96).

In sum, defense counsel made a reasonable investigation into Morton's mental state, retained an expert, and presented favorable mitigation testimony through Dr. DelBeato. Dr. DelBeato was a competent local expert, who administered standard tests and consulted with counsel and social worker Ms. Pisters regarding his findings. That he did not conclude Morton suffered from any serious mental impairments at the time of the

[19] Dr. Gonzalez showed the test results to another professional in his office who administers MMPIs and she stated "it's a normal MMPI." (V10, 1693).

offenses was not the fault of trial counsel. His testimony was credible and fit within the defense theme of attempting to explain how Morton became the type of person [abused, unattached, unbonded child] who could commit such horrendous offenses and therefore mitigate his personal responsibility. Dr. DelBeato's conclusions were essentially the same as Dr. Gonzalez's. The two experts hired by collateral counsel offered less credible testimony and never related any alleged mental infirmity to the facts of this case.

**(E) Morton Failed To Establish Prejudice Based Upon Counsel's Claimed Deficiencies In Addressing Potential Mental Health Issues**

This was not a close case. The jury vote in favor of the death penalty was 11-1. Appellant's sentence is supported by several uncontested and weighty aggravators. Appellant was the leader and primary actor of a group which planned and carried out the premeditated slaughter of two innocent people in their own home.

The trial court found a total of eight aggravating factors, three with respect to victim John Bowers and five with respect to victim Madeline Weisser in this double homicide. Specifically, regarding victim Bowers, the court found (a) cold, calculated and premeditated without pretense of moral or legal justification as Morton thought about and discussed committing this murder for several days beforehand to the point of apparent

obsession; he considered and solicited suggestions of what proof would be needed to establish the murder, such as a human body part as trophy; the careful planning was demonstrated in selecting a victim who lived only with his elderly mother in an isolated area across the street from a vacant dwelling which served as headquarters for a preliminary stakeout and/or dry run; arranging for the phone lines to be cut in carrying out the preordained plan under cover of darkness; rushing into the dwelling while heavily armed with a sawed-off shotgun and Rambo-style knife; concealing the shotgun in a towel and the getaway bikes in nearby brush; having worn gloves to avoid leaving fingerprints and having expressed a hope that the killing would produce a rush. (RS V1, 153-154).

The court also found (b) that the homicide was committed while engaged in the commission or attempt to commit a robbery and/or burglary. The court found (c) homicide committed for the dominant purpose of avoiding or preventing a lawful arrest; it was not an impulsive killing. The killing occurred immediately after the victim begged for his life urging he wouldn't inform on Morton and appellant remarked, "That's what they all say..." Then he pulled the trigger of the shotgun against the victim's neck. Appellant later admitted he had no choice but to kill since the victim turned and looked at him. Morton also set fires in the home in an effort to destroy evidence. (RS V1,

154-155). As to victim Madeline Weisser, the court found (a) HAC since the evidence showed she was repeatedly kicked and stomped on before and during repeated stabbing with a Rambo-style knife before the final bone-crunching incision was inflicted. The victim sustained numerous significant and painful defensive wounds (a portion of her fingers were almost slashed off). She was stabbed eight times in the throat and neck and survived several minutes in a paralyzed state after her spinal cord was severed. The victim was aware of her imminent and torturous death.

Morton's confession revealed he was aware of the pain the knife would cause when used since he made a preliminary attempt to shoot the victim to minimize the pain but the gun jammed. He then stabbed her. (RS V1, 155). The court also found (b) a prior conviction of a capital felony, i.e., the conviction of the murder of John Bowers and (c) the homicide was committed in a cold, calculated and premeditated manner without moral or legal justification (as earlier explained in the order pertaining to victim Bowers). Similarly, the court found (d) homicide during the attempt to commit a burglary/robbery and (e) committed for the dominant purpose to avoid or prevent a lawful arrest (RS V1, 156-157).

In Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998), the jury recommended death by a vote of seven to five. The

trial court found three aggravating factors (during a robbery/pecuniary gain; HAC; and CCP), along with the statutory mitigator of no significant criminal history. The judge had not found any nonstatutory mitigation, despite trial testimony of Rutherford's positive character traits and military service in Vietnam. Testimony was presented at the post-conviction evidentiary hearing that Rutherford suffered from an extreme emotional disturbance and had a harsh childhood, with an abusive, alcoholic father. Yet this Court unanimously concluded that the additional mitigation evidence presented at the post-conviction hearing would not have led to the imposition of a life sentence due to the presence of the three substantial aggravating circumstances. 727 So. 2d at 226. See also Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (three aggravating factors of during a burglary, HAC, and prior violent felony overwhelmed the mitigation testimony of family and friends offered at the post-conviction hearing); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989) (post-conviction evidence of abused childhood and drug addiction would not have changed outcome in light of three aggravating factors of HAC, during a felony, and prior violent convictions).

In light of this planned, extremely brutal, double homicide - each supported by multiple aggravators – and the near unanimous (11-1) jury recommendation after the jury was fully

exposed to much of the same evidence post-conviction counsel has presented with regard to Morton's family background, there can be no reasonable probability that a different result would have been obtained had counsel presented the contested and conflicting mental health testimony he presented during the evidentiary hearing below.

## ISSUE III

**WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OFFER INTO EVIDENCE A CO-DEFENDANT'S LIFE SENTENCE. (STATED BY APPELLEE).**

The trial court rejected this claim below, stating:

> A co-defendant's life sentence may only be considered mitigation if the co-defendants were equally culpable and had similar backgrounds. *See Jennings v. State*, 718 So. 2d 144 (Fla. 1998). As co-defendant Timothy Kane was fourteen years old at the time of the offense and ineligible for the death penalty, his life sentence is irrelevant to any mitigation of Defendant's sentence. *See Farina v. State*, 801 So. 2d 44 (Fla. 2001). The record does not support the claim that Defendant was equally culpable with either co-defendants Timothy Kane or 17 year old Robert Garner. Rather, the record indicates that Defendant played the predominant role and was described as the "leader" or "ringleader" of the group of persons involved in the murders. *See PPT, p. 599; EHT, pp. 137, 273, 887; CEHT, p. 24.*

(V9, 1446).

Morton offered no evidence during the post-conviction hearing below to suggest, much less establish, his claim that defense counsel can be considered ineffective for failing to present evidence of Garner's life sentence. Morton attempts to buttress his argument by stating that the younger Bobby Garner "killed Madeleine Weisser" and "likely" cut off her finger as a souvenir. However, Morton admitted that after he murdered Mr. Weisser, he put a knife in Ms. Weisser's neck, and the greater weight of the evidence suggests that it was Morton who actually murdered her and cut off her finger. Presentation of Garner's life sentence would simply allow the State to focus upon

Morton’s role as the oldest member of the group, its clear leader, and the primary actor in the group responsible for the premeditated slaughter of two human beings. Even now, Morton fails to argue how Garner’s life sentence would be mitigating as to his own sentence. The trial court’s order should be affirmed.

## ISSUE IV

**WHETHER THE TRIAL COURT ERRED IN MAKING RULINGS ON THE ADMISSION OF EXPERT TESTIMONY AND JUDICIAL NOTICE DURING THE EVIDENTIARY HEARING BELOW. (STATED BY RESPONDENT).**

Morton next claims the trial court erred in making several evidentiary rulings during the post-conviction hearing below. Specifically, Morton asserts the trial court erred in failing to take judicial notice of the American Bar Association Guidelines [ABA], refusing to allow the defense social worker to comment on the effectiveness of Ms. Pisters, and allowing Dr. DelBeato to render an opinion on Asperger's disorder. (Appellant's Brief at 94). The State disagrees. These evidentiary rulings rested within the sound discretion of the trial court. See Huff v. State, 495 So. 2d 145, 148, 151 (Fla. 1986)(stating that decisions on judicial notice and whether to allow expert testimony are within the trial court's discretion); see Schoenwetter v. State, 931 So. 2d 857, 869 (Fla.)("The standard applicable to a trial court's ruling on the admission of evidence is whether there has been an abuse of discretion."), cert. denied, 127 S.Ct. 587, 166 L.Ed.2d 437 (2006).

First, the State disputes collateral counsel's claim that the request for judicial notice of the ABA guidelines was timely. The State only received request for judicial notice on the morning on the first day of the evidentiary hearing. (V14, 6). As noted by the trial court in taking their request for

judicial notice under advisement: "I don't think I'm making myself clear to counsel. What I'm saying is, I'm prepared to take this under advisement in order to give both sides an opportunity to respond to this, since you just popped it on everybody this morning." (V14, 9-10). After first taking the issue under advisement, the trial court decided against taking judicial notice.

Morton cites no authority to suggest that Morton had a Constitutional "Due Process Right" which required the court to take judicial notice of the ABA Guidelines. The guidelines are certainly not definitive when assessing the reasonableness of attorney conduct under Strickland. As noted by the Eleventh Circuit in Dill v. Allen, 488 F.3d 1344, 1362 n.48 (11th Cir. 2007):

> Petitioner urges us, in assessing reasonableness, to adhere to the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) set forth by the American Bar Association (the "ABA Guidelines"). We decline to do so. Although the ABA Guidelines suggest that "[i]t is necessary to locate and interview the client's family members . . ., and virtually everyone else who knew the client and his family," the Supreme Court has not made those standards the law of the land. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides."). Despite the emphasis in *Strickland* on the optional character of the ABA Guidelines, *id.*, we recognize that the Court itself has deemed the Guidelines useful in specific situations. *See Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 2536-37, 156 L. Ed. 2d 471 (2003) (finding that the trial counsel's conduct "fell short" of the standards set forth in the ABA

> Guidelines). That said, the facts before us do not counsel the articulation of a per se rule that to render effective assistance, a defense counsel must always consult with the defendant's family members. *See Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999).

Regardless of the propriety of the trial court's ruling, the defense has shown absolutely no prejudice from the court's ruling on its request to take judicial notice. Collateral counsel did not proffer any questions or relevant cross-examination based upon the ABA guidelines which might have enhanced or otherwise altered their presentation of evidence during the post-conviction hearing. Indeed, the defense presented the testimony of Attorney Robert Norgard below in an attempt to establish prevailing standards or norms for defending capital cases in Florida. (V21, 1152-80). The trial court's ruling did not deprive Morton of a full and fair evidentiary hearing below.

Morton next asserts the trial court erred in refusing to allow Claudia Baker, an expert in forensic social work, to testify regarding the general or accepted standards for forensic social workers in capital cases. Claudia Baker was asked "what are the prevailing standards or what were the prevailing standards in the community as to what a forensic social worker consisted of in 1999?" (V16, 386). The State objected as an area outside her expertise and on grounds that it was not relevant. (V16, 386). The State also requested a Frye hearing,

but, the trial court deferred ruling until it heard additional predicate from the defense. (V16, 387).

Ms. Baker testified that she had experience working in New York and San Francisco in both state and federal court. (V16, 388). Ms. Baker testified that forensic social work is recognized within the NAA, the National Association of Social Work. (V16, 390). On voir dire by the State, Ms. Baker acknowledged that there is a Board of Behavioral Science Examiners in California which governs social workers. However, Ms. Baker was unaware of any guidelines or written standards which govern social workers as to a standard of effective assistance in capital cases. Prior to Morton, Ms. Baker testified in Florida twice, once as a fact witness and once as an expert in Post Traumatic Stress Disorder. (V16, 392). The Morton case was her first time testifying as an expert in forensic social work in Florida. (V16, 392). Back in 1999, Ms. Baker had never testified as an expert in the area of forensic social work. (V16, 392).

The trial court, after the defense proffer and the State's voir dire, stated:

> Okay. Well, I find that the evidence presented before me demonstrates that there's no evidence of published standards as to forensic social work biopsychosocial examination, that there's no evidence that there's any scientific studies as to the content of such an examination, there's no scientific or national organization that comments on the qualification, education or contents

> of such a study. I, therefore, find that does not meet the Fry [sic] test. I'm sustaining the State's objection.

(V16, 395-96).

On cross-examination, the State further questioned Ms. Baker's qualifications. Ms. Baker acknowledged that there was no "sort of examination that tests proficiency in the area of forensic social worker, slash, mitigation specialist[]" (V16, 500). Nor, did she have to take certain courses every year to keep up with certification in the area of forensic social work or mitigation specialist. (V16, 500). Ms. Baker agreed that there was nothing to prohibit anyone from holding themselves out as a mitigation specialist; in fact, Mr. Morton could walk out of jail tomorrow and hold himself out as a mitigation specialist. (V16, 501).

The defense failed to establish that there were any generally accepted standards for a forensic/social worker/mitigation specialist or that Ms. Baker was qualified to testify about what those standards were in a capital case in Florida in 1999. See Gilliam v. State, 514 So. 2d 1098, 1100 (Fla. 1987)(An expert witness may testify only "in his or her area of expertise" and "must not be based on speculation, but on reliable scientific principles."). There are no specific educational requirements, continuing education requirements, nor licenses required. The defense failed to show any definitive or

published and accepted guidelines for mitigation specialists. Consequently, the trial court did not abuse its broad discretion in refusing to allow Ms. Baker to testify regarding her own subjective opinion of the minimum requirements for a mitigation investigation. See Huff, 495 So. 2d at 151 (It is "within the province of the trial court to determine whether to admit the testimony of a purported expert witness" and that decision is "conclusive unless erroneous or founded upon error in law."); Simmons v. State, 934 So. 2d 1100, 1117 (Fla. 2006)("A trial court has wide discretion concerning the admissibility of evidence and the range of subjects about which an expert can testify.")(citations omitted). No abuse of the trial court's discretion has been shown by Morton.

In any case, collateral counsel's limited proffer does not establish any prejudice emanating from the trial court's ruling. Ms. Baker testified generally regarding interviewing family members and developing background material. She opined that it would not be "reasonably" sufficient for a forensic social worker to only talk to the mother, a sister, the defendant, and, obtain school records. (V16, 397). The proffer did not establish any compelling information that would serve to alter the outcome of this case.

Finally, the trial court did not abuse its broad discretion in allowing Dr. DelBeato to testify regarding Asperger's

disorder. Testifying in several hundred cases, Dr. DelBeato has never been denied qualification as an expert: "Not in this state or any other state that I have ever testified in. (V19, 936-37). During the evidentiary hearing, collateral counsel raised no objection to Dr. DelBeato's qualification as an expert in the area of "forensic psychology." (V19, 938).

In Penalver v. State, 926 So. 2d 1118 (Fla. 2006), this Court stated: "The qualification of a person as an expert is within the sound discretion of the trial judge. See Holland v. State, 773 So. 2d 1065 (Fla. 2000); Terry v. State, 668 So. 2d 954 (Fla. 1996). Once the witness has qualified as an expert, the trial judge also has broad discretion in determining the range of the subjects on which an expert can testify, and the trial judge's ruling will be upheld absent a clear error. See Pagan v. State, 830 So. 2d 792 (Fla. 2002)." Dr. DelBeato, as a forensic psychologist, with extensive experience examining criminal defendants and testifying in court, was clearly qualified to render an opinion on recognized mental disorders.

Dr. DelBeato possessed extensive experience screening for brain damage. "I do approximately one a week neurospych screenings for referral for the State of Florida Department of Health, been doing that since 1975." (V19, 943). While Dr. DelBeato admitted he was not an "expert" on Asperger's, it was only in the sense that he was not a specialist in that disorder.

(V20, 1085). Dr. DelBeato stated that as a clinical psychologist he was able to understand and discuss the disorder. In fact, he has screened children that he thought had Asperger's and read literature on the disorder. (V20, 1086). Dr. DelBeato felt comfortable giving an opinion on Asperger's. (V20, 1086).

The criteria for Asperger's disorder are listed in the DSM-IV-TR and are certainly subject to discussion and interpretation like any other disorder by a qualified forensic psychologist, like Dr. DelBeato. Morton has offered nothing to suggest, much less establish, that the trial court abused its broad discretion in allowing Dr. DelBeato to discuss Asperger's disorder.[20]

[20] In any case, any error in the trial court's ruling would clearly be harmless. Remand for another evidentiary hearing on the basis of such an insignificant error would amount to nothing more than legal churning.

## ISSUE V

**WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING MORTON'S NEWLY DISCOVERED EVIDENCE CLAIM BASED UPON ROPER V. SIMMONS.**

The trial court rejected this claim below, stating:

> Defendant raised this claim in an amendment to his motion for post conviction relief, which was filed subsequent to the conclusion of the evidentiary hearing, but which Defendant claims is timely because it is based on newly discovered evidence. In *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court held that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of the death penalty on persons who were under the age of 18 at the time of their crimes. The Defendant in this case was 19 and one half years old when he planned and committed the murders. Accordingly, *Roper* does not apply in this case.

(V9, 1449).

The Court also declined to reweigh the age mitigator in light of Roper and the allegedly newly discovered evidence. The trial court stated:

> Defendant claims that a newly published study by the National Institutes of Heath [sic] (NIH) found that portions of the human brain do not fully develop until an individual is approximately 25 years old. Defendant claims this information requires a new penalty phase so that the non-statutory mitigator of Defendant's age can be reconsidered in light of the new evidence, and that the statutory mitigator of cold, calculated and premeditated (CCP) must be reconsidered because the newly discovered information tends to establish that Defendant did not have the mental and emotional capabilities to form the heightened premeditation required for the CCP aggravator to apply.
>
> Defendant's age was found to be a mitigator, but assigned little weight. There is nothing in this study provided by Defendant that would be likely to change that finding enough to overcome the number and type of aggravating circumstances in this case. Defendant cites to

> a number of cases where the court held that the closer the defendant was to the age where the death penalty is constitutionally barred, the weightier the age mitigator becomes. However, each of the cases involved defendants under the age of 18. The age of 18 is considered to be the age of majority when a person becomes a responsible adult. Although there will be exceptions to that rule on both sides of 18 years, a standard must be established and there is no credible evidence to show that the majority of 18 year olds do not conform their behavior to the requirements of society despite the reported results of the NIH study. Defendant was 19 and one half years old at the time of the offense.
>
> Furthermore, despite a study of 13 individuals that determined in general terms that some areas of the brain develop at a slower pace, there has been no evidence presented in this case that would show that Defendant's brain was less than fully developed. Defendant attempted to establish that he had brain damage, but no mapping of Defendant's brain was ever conducted to show that there was any damage or that it was not fully developed.

(V9, 1448-49).

This claim was properly denied without a hearing below. First, it is procedurally barred. The trial court found age as a mitigator and this Court affirmed the minimal weight given Morton's age on appeal. Morton v. State, 789 So. 2d 324, 331-332 (Fla. 2001). As an attempt to reargue an issue decided adversely to him on direct appeal, the claim is procedurally barred. See Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996)("It is inappropriate to use a collateral attack to relitigate an issue previously raised on appeal."). In any case, this Court has repeatedly rejected claims like Morton's based upon Roper. Morton has offered this Court nothing compelling to revisit and overturn established precedent. See

Kearse v. State, 2007 Fla. LEXIS 1534 (Fla. August 30, 2007)(rejecting claim of eighteen year old defendant that his low level of intellectual functioning and emotional impairments render him ineligible for execution under Roper, noting that Roper only applies to defendants under the age of eighteen) and Hill v. State, 921 So. 2d 579 (Fla. 2006)(same). See also Grossman v. State, 932 So. 2d 192 (Fla. 2006)(unpublished opinion)(affirming summary denial of Roper and newly discovered evidence claim based upon the same 2004 brain mapping study cited by Morton).

As noted by the trial court, Morton was 19 and one-half years old when he committed the two murders and related offenses. He possessed at least average, and, probably above average intelligence. Roper provides no support for vacating his death sentences. Accordingly, the trial court's order denying relief should be affirmed.

## CONCLUSION

Based on the foregoing arguments and authorities, the Circuit Court's order denying post-conviction relief should be affirmed.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Marie-Louise Samuels Parmer, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this 1st day of October, 2007.

## CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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