IN THE SUPREME COURT OF FLORIDA

MICAH NELSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC08-589
L.T. No. CF97-06806A-XX
DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following factual history is taken from this Court's opinion affirming Nelson's convictions and death sentence on direct appeal.

> The evidence presented at trial indicated that during the early morning hours of November 17, 1997, Micah Louis Nelson (Nelson) entered Virginia Brace's (Brace) home by removing the screen and climbing through the bathroom window. Seventy-eight-year-old Brace had been in bed and her glasses and hearing aid were on her bedroom dresser. Nelson sexually assaulted Brace, took her car keys from her purse, and then placed her in the trunk of her own car. He drove around with Brace in the trunk for a period of hours and eventually drove to an orange grove, where he apparently intended to leave her. However, the car became stuck in soft sand and had to be pulled out with the assistance of machinery at about 9:30 a.m. on November 17, 1997.
>
> Steven Weir, the heavy equipment operator who pulled the car out of the sand, felt a thud when he put his hand on the car's trunk. Nelson advised him that there was a dog in the trunk and then proceeded to turn up the car radio. The heavy equipment operator observed Nelson to be nervous and pacing, and Nelson would not look him in the eye when they spoke. Nelson sped off as soon as the car was lifted out of the sand and drove to another orange grove where he let Brace out of the trunk and walked her or dragged her 175 feet into the grove. [fn1] With Brace on the ground, Nelson attempted to strangle her with his bare hands, emptied the contents of a fire extinguisher into her mouth, and forced a tire iron into her mouth and through the back of her head.
>
> > [fn1] The medical examiner testified that the soles of Brace's feet were dirty, indicating that "she probably left standing on her feet," but that there was also evidence that she had been dragged on her back.

At 3:30 p.m. on November 17, 1997, Joann Lambert noticed an unfamiliar car parked on the road behind her house. The car was still parked in the same location when it began to get dark that evening so she called the Highlands County Sheriff's Department. When Deputy Vance Pope arrived to investigate the car, he found Nelson asleep in the back seat. Deputy Pope also noticed an insurance card on the floorboard with the name Virginia Brace. Nelson told Pope that he borrowed the car from a family friend. Pope could not verify the vehicle's registration because the DMV computer was not working at that time. Pope would not allow Nelson to drive because he did not have a driver's license, so he gave Nelson a ride to Nelson's sister's house. Later that evening, Pope heard the name Virginia Brace over the police radio, which prompted him to contact Sergeant Hofstra regarding his earlier contact with Nelson. Police recovered the car where Deputy Pope had last seen it, and it was identified as belonging to Brace.

At 11 p.m. on November 17, 1997, Deputy Pope returned to the house where he previously dropped off Nelson. Nelson agreed to be questioned by the Avon Park Police. After a series of interrogations on November 18, 1997, and November 19, 1997, Nelson showed the police where Brace's body was located and he confessed to killing her.

Nelson told police that some time after midnight, he broke into Brace's home through her bathroom window. He stated that he entered her bedroom and she woke up and started screaming. He said that they had a struggle on her bed, after which he took her car keys and placed her in the trunk of her car. Nelson stated that he drove around in the car for hours and that at one point he stopped to get gas. He then drove to an orange grove where he was going to kill Brace, but the car became stuck in the sand and he required help to extricate the car from the sand. He then took Brace to another orange grove where he and Brace walked into the grove. He stated that he started to choke Brace on the ground, but she did not pass out, so he sprayed a fire extinguisher into her mouth, which made her cough. He stated that he then took the tire iron and stuck it into her mouth until it came through the back

of her neck and into the ground. He stated that Brace gasped for air when he pushed the tire iron into her mouth. Nelson denied having any sexual contact with Brace.

At trial, Dr. Melamud, the medical examiner, testified that the condition of Brace's body corresponded with her being dead for two days before she was found. He testified that Brace's injuries were consistent with asphyxiation, an object being forced into her mouth through the back of her neck, such as a tire iron, and a fire extinguisher being discharged into her mouth. He stated that she also suffered a crushed vertebra as a result of the compression of her neck and spinal cord, and three broken ribs. He testified that her death could have resulted from any one of those injuries, or a combination of them. Although he could not assign an order in which the injuries occurred, he stated that the medical evidence indicated that she was alive both when the object was forced into her mouth and through the back of her neck, and when the fire extinguisher's contents were expelled into her mouth. [fn2] He could not say with certainty if she was conscious when those injuries were inflicted, but he opined that if Brace had been conscious during the infliction of any of these injuries, she would have experienced severe pain.

> [fn2] An emptied fire extinguisher was recovered on the rear floor of the driver's seat of Brace's car. A yellow powdery substance from the extinguisher's contents was located around the hose. The yellow powder was also found on the rear floorboard behind the driver's seat, in the trunk, and on Brace's face and in her bronchial tubes.

Karen Cooper, a laboratory analyst with the Florida Department of Law Enforcement (FDLE), testified that prints made from boots recovered from Nelson's bedroom at his sister's house were consistent with boot prints found at the orange grove on the ground near Brace's body. Stephen Stark, a latent fingerprint examiner with FDLE, testified that Nelson's latent prints were found inside Brace's bathroom on the towel rack, on tiles under the bathroom window, on the bathroom tub,

and on the bathroom door jamb. Stark, who also processed the crime scene at the orange grove, testified that there was a hole in the ground beneath the back of the victim's head and that a yellow powdery substance was found on the ground where the body was located. He also testified that three prints found in the interior of the trunk were consistent with Brace's fingerprints. Stark stated that when he processed the car, the trunk liner was moist and smelled of urine. Jennifer Garrison, an FDLE crime lab analyst in the serology DNA section, testified that testing revealed the semen found on Brace's bedspread was consistent with Nelson's DNA profile. Darrin Esposito, an FDLE crime lab analyst in the serology DNA section, testified that he tested the vaginal swab taken in this case, and it was consistent with a mixture of DNA from both Brace and Nelson. Jeannie Eberhardt, a serologist with FDLE, testified that the swabbing of the tire iron found in the trunk of Brace's car came back positive for indications of blood.

The jury recommended a death sentence by a vote of nine to three and the trial court sentenced Nelson to death. The trial court found six statutory aggravators: (1) the defendant was previously convicted of a felony, was under a sentence of imprisonment, and was on felony probation, or controlled release, at the time of the murder; (2) the crime for which the defendant was to be sentenced was committed while the defendant was engaged in the commission of, or flight after, committing a sexual battery, burglary, or kidnapping; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (4) the murder was especially heinous, atrocious or cruel (HAC); (5) the murder was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification (CCP); and (6) the victim was particularly vulnerable due to advanced age or disability. The trial court found that all six aggravators were proven beyond a reasonable doubt and assigned five of them great weight. The trial court assigned little weight to the sixth aggravator of the victim being "particularly vulnerable due to age or disability."

The trial court addressed and rejected three statutory mitigating factors. [fn3] Twenty-one nonstatutory mitigating circumstances were addressed by the trial court: (1) at the time of the offense the defendant was impulsive and his ability to exercise good judgment was impaired (not proven); (2) defendant was remorseful for his conduct (not proven); (3) defendant did not plan to commit the offense in advance (not proven); (4) defendant demonstrated appropriate courtroom conduct and behavior (very little weight); (5) defendant is capable of forming loving relationships with family members and friends (very little weight); (6) any mental illness of the defendant may have been controlled by medication (little weight); (7) it is unlikely the defendant will be a danger to others while serving a life sentence in prison (very little weight); (8) defendant did not resist arrest, cooperated with the police, and showed the authorities where the body was located (moderate weight); (9) defendant never knew his father and lost his mother at a young age (moderate weight); (10) defendant had a troubled and neglected childhood (not proven); (11) defendant was the victim of inappropriate sexual conduct and abuse as a child (little weight); (12) defendant has organic brain damage (not proven); (13) defendant suffered from depression as a result of his conduct and attempted suicide in the jail (little weight); (14) defendant had diminished educational experience (little weight); (15) defendant was sexually assaulted while in prison (some weight); (16) defendant has limited intelligence (some weight); (17) defendant has no prior violent felony convictions (little weight); (18) the circumstances which resulted in the homicide are unlikely to recur since the defendant will be spending the rest of his life in prison (some weight); (19) defendant has accepted responsibility for his action (not proven); (20) defendant has never received treatment for his mental or emotional problems (little weight); and (21) defendant was willing to plead guilty to all charges for consecutive life sentences without parole (very little weight).

[fn3] The three statutory mitigating factors addressed by the trial court were: (1) age of the

> defendant at the time of the offense (twenty-one years old) (not proven); (2) the defendant was under extreme mental or emotional disturbance at the time of the offense (not proven); and (3) his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (not proven).

Nelson v. State, 850 So. 2d 514, 518-521 (Fla. 2003).

This Court issued its mandate on August 7, 2003. On October 8, 2003, Nelson filed a petition for writ of certiorari in the United States Supreme Court, which was denied on December 15, 2003. Nelson v. Florida, 540 U.S. 1091, 124 S. Ct. 961 (2003).

On September 17, 2004, Appellant filed his motion for postconviction relief with the trial court and simultaneously filed a motion for competency determination. (PCR V6:864-962; 963-966). On November 16, 2004, the State filed its response. (PCR V6:969-1000).

On January 15, 2005, the trial court appointed two experts, Drs. Carpenter and Dolente, to examine Nelson to determine his competency to proceed. (PCR V6:1001-04). On January 5, 2006, the court appointed a third expert, Dr. Sesta, to examine Nelson for competency. (PCR V6:1007-09). The court conducted a competency hearing on September 27, 2006, wherein the three expert witnesses testified regarding their competency evaluations. (PCR V10-11:1476-1762).

At the competency hearing, collateral counsel presented the testimony of Dr. Richard Carpenter. Dr. Carpenter examined Nelson for a half an hour and determined that he was incompetent to proceed primarily due to Nelson's inability to answer rudimentary questions and his eye movements. (PCR V10:1502-05, 1514-16). Dr. Carpenter opined that Nelson was having auditory hallucinations because his eyes moved from side-to-side as if he were responding to internal stimuli. (PCR V10:1505). Dr. Carpenter ultimately diagnosed Nelson as having a major mental illness; psychotic disorder, not otherwise specified. (PCR V10:1516). Dr. Carpenter, however, did not perform any testing to determine whether Nelson was malingering. (PCR V10:1522-40).

The State presented the testimony of Dr. Ralph Dolente who examined Nelson and found him competent to proceed. Dr. Dolente diagnosed Nelson as having an adjustment disorder, antisocial personality, and malingering. (PCR V10:1571). Dr. Dolente did not observe Nelson moving his eyes during his evaluation and he disagreed with Dr. Carpenter's opinion that Nelson was suffering from auditory hallucinations. (PCR V10:1571-77). Dr. Dolente explained that Nelson did not begin complaining of hallucinations until after he was charged with first degree murder and Nelson had told other mental health experts that he began having these hallucinations as a teenager. In Dr.

Dolente's opinion, it would be "unheard of" and "virtually impossible" for Nelson to have an onset of adolescent schizophrenia without being flagrantly mentally ill to the point of multiple hospitalizations and mental health admissions; something that was not present in Nelson's background. (PCR V10:1575-77). In Dr. Dolente's opinion, Nelson presented a "Hollywood-type pattern of classic malingering" by feebly attempting to feign amnesia. (PCR V10:1582-90).

Additionally, the court heard testimony from Dr. Joseph Sesta at the competency hearing. Similar to Dr. Dolente, Dr. Sesta opined that Nelson was malingering, had antisocial personality disorder, and suffered from a depressive disorder. (PCR V11:1664). Dr. Sesta testified that he disagreed with Dr. Carpenter's findings, but did not disagree with Dr. Dolente in any respect. (PCR V11:1666-67). Dr. Sesta testified that Nelson's answers to basic questions were not credible – those responses would only be present if someone were in the advanced stages of Alzheimer's disease or a catastrophic brain injury. (PCR V11:1669-70). Dr. Sesta concluded that Nelson had the capability to fully cooperate, but consciously chose not to assist in the mental status exam. (PCR V11:1672). After hearing the testimony from the three appointed experts, the

trial court entered an order finding Appellant competent to proceed. (PCR V7:1032-38).

On June 21, 2007, the trial court conducted a case management conference and determined that it would be appropriate to conduct an evidentiary hearing on Claims I, II, III, IV, V, and VII of Appellant's postconviction motion. (PCR V7:1050-51). At the evidentiary hearing conducted on October 16-17, 2007, Appellant presented the testimony of trial attorneys Robert Trogolo and Julia Williamson, and mental health experts Mark Ashby, Henry Dee and Michael Maher. In addition, the parties stipulated that the evidence and testimony from the competency hearing conducted on September 27, 2006, would be incorporated and filed as exhibits for the trial court's consideration in lieu of hearing the testimony from the witnesses again at the October, 2007 hearing.

At the evidentiary hearing, Assistant Public Defender Robert Trogolo testified that he began working at the Public Defender's Office in 1984, and was lead counsel for Appellant at his trial which began on November 30, 1999.[1] (PCR V7:1065-66). Although Mr. Trogolo shared responsibilities with co-counsel Julia Williamson, he was primarily responsible for the penalty phase. (PCR V7:1066).

[1] Appellant committed the instant murder on November 16, 1997 and was arrested the following morning.

When trial counsel Trogolo inherited the case from another assistant public defender, Dr. Henry Dee had already been appointed and he made the decision to keep Dr. Dee as his mental health expert. Trogolo was aware of Dr. Dee's diagnosis[2] and was further aware that Appellant had attempted suicide while incarcerated. (PCR V7:1067-68). Although Trogolo was aware that Dr. Dee would testify at the penalty phase that the two statutory mental mitigating factors were present, Trogolo testified that the defense team made a tactical decision not to request a specific jury instruction on these mitigators at the charge conference prior to the penalty phase. (PCR V7:1076-82). Trial counsel recalled telling the trial court at the time that it was a tactical decision not to request specific jury instructions on the statutory mental mitigating factors.

> MR. TROGOLO: The next page is the mitigating circumstance that we're requesting that the Court instruct upon, in other words, the two generals in eight.
>
> THE COURT: Okay. And obviously you don't object to that, Mr. Wallace.
>
> MR. WALLACE: Your Honor, just so we're clear, the defense, the defendant is not asking for any of the other statutory mitigating circumstances?

[2] Dr. Dee advised Trogolo that Nelson was marginally competent, but Dr. Dee thought Nelson needed to go to the State Hospital for treatment because he was not responding to the medication administered at the jail. (PCR V7:1068). However, in order for that to occur, Nelson would need to be found incompetent by the trial court. Because Dr. Dee had opined that Nelson was competent and Trogolo and the defense team never saw anything to call into question that finding, Trogolo did not file a motion for competency determination. (PCR V7:1105-08).

MR. TROGOLO: That's correct, your Honor. **That's a tactical decision that we made.**

(DAR V24:2917). As Mr. Trogolo explained in great detail at both the trial (DAR V24:2917-24) and the evidentiary hearing (PCR V7:1077-82), the defense made a tactical decision not to request special instructions on the statutory mental mitigators, but rather, argued to the jury that Dr. Dee's mental health diagnosis constituted mitigation evidence under the statutory "catch-all" instruction. At trial, Appellant even acknowledged under oath that he understood that he was entitled to the instructions, but that his attorneys had explained to him their tactical reasons for proceeding with the catch-all instruction and that he understood and was satisfied with this decision.[3] (DAR V24:2921-22).

Trogolo explained at the evidentiary hearing that, as he stated on the record at the time, he made the tactical decision to proceed with the catch-all instruction because he was afraid the prosecution would be able to diminish the impact of Dr. Dee's testimony by arguing that the mental mitigation did not rise to the modifying level of "extreme" or "substantial." Furthermore, he did not want the jury to hear that some

[3] Trogolo testified at the evidentiary hearing that he was not surprised that Appellant understood this decision because the attorneys had discussed this decision with him prior to the charge conference. (PCR V7:1083-85).

mitigation was “statutory” and some was “nonstatutory” because they might not place the appropriate weight on the nonstatutory mitigation. (PCR V7:1079-82). Counsel acknowledged that his decision did not impair in any way his ability to present mental health mitigation to the jury from Dr. Dee. Furthermore, Trogolo testified that the tactical decision to forego requesting specific jury instructions on the two statutory mental mitigators did not preclude him from arguing their existence to the jury in closing argument. (PCR V7:1081-82).

In addition to discussing his strategy regarding jury instructions, trial counsel Trogolo also testified regarding his observations of his client during his representation. As noted, counsel was aware of Appellant’s suicide attempt while incarcerated and was further aware that the jail psychiatrist, Dr. Mark Ashby, had prescribed psychotropic medication to Appellant prior to, and during, trial. In fact, trial counsel specifically requested that the trial judge instruct the jury that Appellant was under the influence of psychotropic medication during the trial. (PCR V7:1070). Trogolo explained that he requested this instruction because he thought it would be good for the jury to hear this information, and further, if the State opposed the instruction and the court denied his

request, it would create a potential appellate issue.[4] (PCR V7:1070, 1112-13).

During his representation of Nelson, trial counsel Trogolo met with him weekly or bi-weekly. (PCR V7:1103). Additionally, co-counsel Williamson and mitigation specialist Tony Maloney[5] also met with Nelson. (PCR V7:1103-04). Based on his lengthy experience in dealing with criminal defendants, counsel was aware of the requirements for seeking a competency determination. (PCR V7:1085-94). Based on his involvement with Appellant, coupled with Dr. Dee's diagnosis, trial counsel did not see a need to seek a judicial determination of competency. As trial counsel made clear on the record at the time of trial, and reiterated at the postconviction evidentiary hearing, there was no valid claim that Nelson was incompetent to proceed at the time of his trial. (DAR V15:1365, 1400-04, 1446; PCR V7:1098-1108).

[4] Prior to trial, Trogolo had obtained Appellant's jail medical records. (PCR V7:1098-1101). After requesting the special instruction, the State raised an objection, at which time, the court heard testimony from Dr. Ashby. (DAR V15:1362-70, 1393-1407, 1434-50). After hearing from Dr. Ashby, the court decided to give the defense's requested instruction.

[5] Mitigation specialist Tony Maloney had a background in mental health because she had previously worked at a mental health facility and Trogolo believed she had a M.S. degree in psychology. (PCR V7:1094).

Trial counsel Trogolo testified that it was not unusual for him to proceed to a penalty phase proceeding with only one mental health expert. In addition to having obtained the services of Dr. Dee, trial counsel had also obtained the jail medical records and was aware of Dr. Ashby's treatment of Nelson. Also, defense counsel had obtained a mental health report from Dr. William Kremper.[6] (PCR EV4:619-23). Trial counsel testified at the evidentiary hearing that he made a tactical decision, after consulting with Dr. Kremper, not to present his testimony at the penalty phase proceeding because he was concerned that any advantage gained by calling him would have been outweighed by the negative "baggage" that Dr. Kremper could present. (PCR V7:1100-03). Likewise, counsel did not call any of the mental health experts involved in this case at the guilt phase to dispute the mens rea requirement of first degree murder because the law would not allow that type of testimony unless there was a defense of insanity which was not present in this case. (PCR V7:1117-21).

Co-counsel Julia Williamson testified at the evidentiary hearing that she worked on both the guilt and penalty phase portions of this case, but because it was her first penalty

[6] Dr. Kremper had examined Appellant in 1992 after Appellant had been charged with multiple counts of sexual abuse against his five-year-old cousin.

phase, Trogolo handled more of the penalty phase presentation before the jury. (PCR V8:1187-90). Counsel testified that Appellant was not forthcoming with facts to her about the case and the guilt phase theory of defense was to argue for second degree murder.[7] (PCR V8:1195-98). She claimed that, in hindsight, she should have called Dr. Mark Ashby during the guilt phase to testify that Appellant had schizoaffective disorder and auditory hallucinations.[8] (PCR V8:1200-01). Trial co-counsel Williamson further testified that in retrospect, she should have requested a competency evaluation of Appellant because he was not forthcoming about the facts of the case. (PCR V8:1198).

In addition to Appellant's trial attorneys, three mental health experts testified at the postconviction evidentiary hearing. Jail psychiatrist Dr. Mark Ashby testified regarding

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[7] As this Court noted on direct appeal, Appellant confessed to law enforcement officers to breaking into the victim's home, kidnapping her, and subsequently violently killing her. Nelson, 850 So. 2d at 519. Nelson denied sexually abusing the victim. Id.

Although trial counsel Williamson did not recall specific conversations with Appellant regarding the facts of the case, she acknowledged on cross examination that Appellant had told other members of the defense team a version of the facts similar to the one he gave law enforcement. (PCR V8:1232-39).

[8] On cross examination, Williamson reluctantly acknowledged that case law holds that this type of diminished capacity evidence would not have been admissible during the guilt phase of Appellant's trial. (PCR V8:1209-12).

the medication he prescribed to Appellant while he was awaiting trial in 1997-99. Dr. Ashby testified that he diagnosed Appellant at that time has having schizoaffective disorder and prescribed Mellaril, an antipsychotic medication designed to stop hallucinations, and Imipramine, an antidepressant.[9] (PCR V7:1138-41).

Dr. Henry Dee, a neuropsychologist, testified that he first met Appellant on June 15, 1998, at the request of the Public Defender's Office. At their initial brief meeting, Appellant appeared primarily mute and unresponsive. (PCR V7:1159-61). Later that same day after being sent back to the jail, Appellant attempted suicide. Dr. Dee initially believed that Appellant was suffering from severe depression. (PCR V7:1161).

Dr. Dee subsequently met with Appellant on July 7, 1999, and conducted a "more adequate" interview and administered both psychological and neuropsychological tests. Dr. Dee further interviewed Appellant on July 23-24, 1998; July 28, 1998; September 14, 1998; October 13, 1998, February 1, 1999; and on November 24, 1999, one week before his trial began. (PCR V7:1161-62). Dr. Dee diagnosed Appellant with schizoaffective disorder and depression. (PCR V7:1163-64). When Dr. Dee met

[9] Dr. Ashby gave the same information at the time of Appellant's trial when he testified in conjunction with defense counsel's request for a jury instruction on psychotropic medication. (DAR V15:1438-47).

with Appellant after his suicide attempt, Dr. Dee stated that Appellant's condition had improved, presumably from the medication he was receiving. (PCR V7:1164).

Dr. Dee testified that he suggested to Appellant's trial counsel on more than one occasion that Appellant be treated at the state mental hospital. Dr. Dee was concerned about Appellant's competency, but it was difficult because his condition "waxed and waned" at various times; sometimes Appellant was unresponsive and mute, and at other times, he was open and easy to talk to. (PCR V7:1166-67). On his last visit with Appellant only a week before his trial, Dr. Dee stated that Appellant was very clear and forthcoming with information. (PCR V8:1176). Ultimately, Dr. Dee informed trial counsel that Appellant was "marginally competent" to proceed. (PCR V7:1172). Dr. Dee further informed trial counsel that he had nothing to offer in the guilt phase because Appellant's mental status did not rise to the level of insanity. (PCR V8:1176-82).

Dr. Michael Maher testified that he was retained by CCRC-M to evaluate Appellant for mitigation issues. (PCR V8:1266-69). After reviewing background material and interviewing Appellant on June 2, 2004, Dr. Maher opined that Appellant had

schizoaffective disorder and was not competent to proceed.[10] (PCR V8:1279-87). Dr. Maher did not form an opinion as to Appellant's competency at the time of his trial, and he did not think it was possible at this time to reach a conclusion on that issue. (PCR V8:1294). Dr. Maher further testified that both statutory mitigating factors applied in this case. (PCR V8:1287-88).

After hearing the testimony from the competency hearing and the evidentiary hearing, the trial court entered a detailed 73-page order denying Appellant's postconviction motion. (PCR9: 1389-1462). The instant appeal follows.

[10] Dr. Maher, however, did not review any of the court-appointed experts' reports from the competency evaluations conducted in 2005 and 2006, nor did he perform any type of testing to determine competency. (PCR V8:1292-93).

SUMMARY OF THE ARGUMENT

Appellant failed to establish that trial counsel was ineffective for failing to move for a competency determination prior to trial. Trial counsel's mental health expert had examined Appellant for competency and found him competent to proceed, and based on his own extensive dealings with Appellant, trial counsel also felt that he was competent to proceed. Appellant's subclaim that the trial court should have *sua sponte* ordered a competency hearing is procedurally barred as it should have been raised on direct appeal. Even if not procedurally barred, the claim is without merit as the trial court had been informed that both trial counsel and his mental health expert did not have reasonable grounds to seek a competency determination.

Appellant's related claim that he was tried while incompetent is also without merit. Trial counsel noted on the direct appeal record on the eve of trial that he did not have any concerns regarding Appellant's competency. At that time, the court heard testimony from jail psychiatrist Dr. Ashby that he was treating Appellant with medication to assist Appellant in maintaining his competency. Furthermore, Appellant's retained mental health expert, Dr. Dee, examined Appellant numerous times prior to trial and found him competent to proceed. In fact, Dr.

Dee met with Appellant one week before the trial and testified that it was one of his best sessions with Appellant; he was very clear and forthcoming with information. Thus, the direct appeal record and the testimony from the postconviction evidentiary hearing clearly establish that Appellant was competent at the time of trial.

Appellant failed to carry his burden of establishing ineffective assistance of counsel based on trial counsel's decision not to call jail psychiatrist Dr. Mark Ashby as a witness in the guilt and penalty phases. Trial counsel explained that he did not call the jail psychiatrist because he had retained an experienced forensic neuropsychologist, Dr. Dee, for the specific purpose of evaluating Appellant for competency and mitigation. Trial counsel correctly testified that Dr. Ashby's testimony would not have been admissible in the guilt phase as diminished capacity evidence because caselaw from this Court prohibited such testimony. As to the penalty phase, trial counsel utilized Dr. Dee to testify regarding mental health issues and other nonstatutory mitigation, and Dr. Dee specifically informed the jury of Dr. Ashby's treatment of Appellant while incarcerated. Thus, even if counsel was deficient in failing to call Dr. Ashby at the penalty phase,

Appellant was not prejudiced because the same information was presented via Dr. Dee.

Likewise, Appellant failed to establish ineffective assistance of counsel based on counsel's strategic decision not to call Dr. Kremper or a similar expert to testify during the penalty phase. Trial counsel consulted with Dr. Kremper during his pre-trial preparation, but made the decision not to call the witness because he was afraid of opening the door to damaging evidence contained in Dr. Kremper's report. Appellant's current hindsight argument that another expert would have been more effective than Dr. Dee is without merit.

Lastly, trial counsel made a strategic decision to request the catch-all jury instruction at the penalty phase rather than specific jury instructions on the two statutory mental mitigating factors. Counsel explained that he was concerned that the prosecutor would negate the statutory mitigators because of the modifying adjectives of "extreme" and "substantial," and accordingly, trial counsel was worried that the jury would not appropriately weigh the mitigation evidence. Contrary to Appellant's assertion, the record clearly establishes that trial counsel's strategic decision was not based on ignorance of the law.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY REJECTED APPELLANT'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM BASED ON COUNSEL'S FAILURE TO MOVE FOR A DETERMINATION OF COMPETENCY PRIOR TO TRIAL AND PROPERLY FOUND THAT THE TRIAL COURT WAS NOT REQUIRED TO *SUA SPONTE* ORDER A COMPETENCY HEARING.

In his first claim, Appellant alleges that he was denied the effective assistance of trial counsel because trial counsel failed to file a motion to determine his competency prior to trial. Appellant further alleges that the trial court violated his constitutional rights for allowing him to be tried and convicted while allegedly mentally incompetent. Specifically, collateral counsel asserts that trial counsel was ineffective for failing to move for a competency determination after: (1) Nelson attempted suicide in June, 1998, and was subsequently placed on suicide watch; (2) after trial counsel's retained mental expert found Nelson "marginally competent;" and (3) after defense counsel requested a jury instruction indicating that Nelson was on psychotropic medication. Contrary to Appellant's assertions, the State submits that trial counsel provided effective assistance of counsel.

In order for a defendant to prevail on a claim of ineffective assistance of trial counsel claim pursuant to the United States Supreme Court's decision in Strickland v.

Washington, 466 U.S. 668 (1984), a defendant must establish two general components.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986); see also Davis v. State, 928 So. 2d 1089, 1104-05 (Fla. 2005). Furthermore, as the Strickland Court noted, there is a strong presumption that trial counsel's performance was not ineffective. Id. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91 (1955)).

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but must review the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case,

the State submits that the trial court properly found that Appellant failed to carry his burden of establishing that trial counsel's representation was deficient. The testimony from the evidentiary hearing clearly establishes that trial counsel was not deficient for failing to move for a competency hearing.

Lead trial counsel, Robert Trogolo, testified that he had extensive experience in dealing with competency issues while working with the Public Defender's Office.[11] Trogolo testified that during his representation of Appellant, he and the other members of the defense team met with Appellant regularly, usually weekly or bi-weekly. While incarcerated, Appellant gave factual statements to the defense team regarding the crime that were consistent with the statements he gave to law enforcement officers during his taped confession. As the trial court noted, trial counsel Trogolo testified that Appellant knew "factually what was going on as far as the case against him and the proceedings that were going on. . . . [and] understood the charges against him, the roles of the judges and the lawyers." (PCR V9:1442).

[11] As the trial court found, lead counsel Trogolo testified that "[h]e was admitted to practice in 1975, and he first started working with competency issues when he started with the Public Defender's Office in the Sixth Judicial Circuit in 1980 or 1981. He said counting all cases not just murder cases he had probably filed for a determination of competency in dozens of cases prior to handling Mr. Nelson's case." (PCR V9:1441).

Trial counsel Trogolo provided his mental health expert, Dr. Dee, with a tremendous amount of documentation regarding Appellant, and Dr. Dee opined that the Appellant was "marginally competent." Trogolo testified that he considered Appellant's suicide attempt, his taking of psychotropic medication in jail, and Dr. Dee's opinion finding Appellant competent when making his decision not to file a motion for competency determination. Although Appellant was often quiet when they met, counsel felt that Appellant never reached the point where he needed to make a motion for competency determination because trial counsel, like Dr. Dee, found Appellant to be competent.

As the record and the testimony from the evidentiary hearing establishes, Appellant has failed to carry his burden of establishing deficient performance by trial counsel. The fact that Appellant was taking psychotropic medication and had attempted suicide while in jail did not *per se* render him incompetent. See Drope v. Missouri, 420 U.S. 162 (1975) (noting that a suicide attempt is an indication of possible mental instability, but such an attempt does not legally create a reasonable doubt about the defendant's competence to stand trial); Fallada v. Dugger, 819 F.2d 1564, 1569 (11th Cir. 1987); McCune v. Estelle, 534 F.2d 611, 612 (5th Cir. 1976). Experienced trial counsel acted within the broad range of

reasonably competent performance under prevailing professional standards when he made a determination that his client was competent to proceed to trial based on all of the surrounding circumstances. In making this determination, trial counsel had the benefit of the opinion of his experienced mental health expert, Dr. Henry Dee, that Appellant was competent, the opinion and testimony of jail psychiatrist, Dr. Mark Ashby, at the pre-trial hearing that Appellant was under medication but was competent (DAR V15:1369-1450), and his own dealings with his client. Thus, the State submits that a review of the record supports the trial court's ruling denying the instant claim:

> The Court finds that that the defense has not shown that trial counsels' representation fell below an objective standard of reasonableness. Lead trial counsel testified that Mr. Nelson did communicate with the defense team, understood the proceedings, and the roles of the players. The defense mental health expert, Dr. Dee advised the defense that Mr. Nelson was marginally competent to proceed. The Defendant has not supported his claim that counsel was ineffective in failing to move for a determination of competency to proceed.

(PCR V9:1443).

In addition to arguing that trial counsel was ineffective for failing to file a motion for competency determination, collateral counsel further argues that the trial court had an obligation to *sua sponte* order a competency hearing. See Bishop v. United States, 350 U.S. 961 (1956) (holding that the trial court must conduct a hearing on the issue of a defendant's

competency to stand trial when there are reasonable grounds to suggest incompetency); Pate v. Robinson, 383 U.S. 375 (1966) (placing burden on trial court, on its own motion, to make inquiry into defendant's competency when there is a "bona fide doubt" as to his competency). The State submits that the instant sub-claim is procedurally barred from review in a postconviction proceeding because the claim relies exclusively on matters contained in the direct appeal record. See James v. Singletary, 957 F.2d 1562, 1572 (11th Cir. 1992) (finding that a claim based on Pate v. Robinson, 383 U.S. 375 (1966), "can and must be raised on direct appeal").

Even if this Court were to address Appellant's procedurally barred sub-claim, the record clearly establishes that the trial court did not have any reasonable grounds to question Appellant's competency to stand trial. Collateral counsel argues that at a pretrial conference on March 11, 1999, a defense attorney filling in for Trogolo made the following comments to the trial court which put the court on notice of the necessity for a competency hearing:

> MR. MACK: Judge, I'm covering this for Mr. Trogolo. There was just a couple points Mr. Trogolo asked me to advise the court of. One was that we've had our client seen by an expert advisor, and apparently he found our client to be marginally competent at this time.
>
> THE COURT: Okay.

> MR. MACK: However, he did say that he's recommending that a second expert advisor be involved on this, and Mr. Trogolo intends to follow through on that.

(DAR V1:52-53). Additionally, immediately prior to the opening statements in Appellant's trial, defense counsel requested a special jury instruction informing the jury that Appellant was taking psychotropic medication. During the discussion regarding this instruction, the trial court heard testimony from jail psychiatrist Dr. Mark Ashby. (DAR V15:1362-1449). Trial counsel Trogolo made numerous comments during this discussion that clearly establish that Appellant was in fact competent to proceed at the time, and that counsel was not requesting a determination of competency. (DAR V15:1363-65, 1400-01, 1404, 1446).

Contrary to Appellant's argument in his brief, the instant case is not "directly on point" with Tate v. State, 864 So. 2d 44 (Fla. 4th DCA 2003). In Tate, the defendant was twelve-years-old when he brutally murdered a six-year-old child. After being convicted of this offense, Tate's counsel moved for a new trial and a hearing to determine Tate's competency. The evidence before the trial court included Tate's extremely young age, inexperience with the criminal justice system, representations from trial counsel that Tate was not assisting them and "had no idea what was going on," had a social maturity

of a six-year-old and a mental delay of about three to four years which equated to a mental age of nine or ten years old. Id. at 48. Based on Pate and this Court's decision in Hill v. State, 473 So. 2d 1253 (Fla. 1985),[12] the Fourth District Court of Appeal found that the trial court erred in not *sua sponte* ordering a pre-trial competency hearing, and in denying trial counsel's post-trial motion requesting a competency hearing.

The facts of this case are easily distinguishable from Tate and Hill. Here, nine months prior to trial, the trial court was made aware that trial counsel's retained mental health expert had found Appellant competent to proceed. Then, immediately before opening statements, defense counsel again informed the trial court that Appellant was competent to proceed and further informed the court that Appellant was taking medication so that he could maintain his competency. The trial court heard testimony from another mental health expert, jail psychiatrist Dr. Ashby, that established that Appellant was competent at that time. Appellant did not engage in any bizarre behavior at

[12] In Hill, this Court found sufficient reasons to question the defendant's competency existed in the record, namely, the defendant suffered from grand mal seizures and mental retardation, had severe speech problems, was illiterate, could not relate details to the defense team, exhibited behavior at trial indicating that he did not appreciate the nature of the proceedings, and that trial counsel did not understand the distinction between competency to stand trial and competency at the time of the offense.

trial, although the trial court was aware that Appellant suffered from depression and had attempted suicide over a year ago while in jail.

Obviously, contrary to the assertions in Appellant's brief, the discussions on the record prior to trial did not require the trial court to *sua sponte* conduct a competency hearing. Appellant incorrectly argues that Florida Rule of Criminal Procedure 3.210(b) required a competency determination. This rule stated:

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition. . . .

Fla. R. Crim. P. 3.210(b) (1999). As the record clearly establishes, and as the trial court properly found when denying this sub-claim, "[d]efense counsel did not ask for a competency determination, and the trial court did not have any significant information before it that would indicate that a competency determination was necessary." (PCR V9:1443). Because Appellant has failed to carry his burden of establishing that trial counsel was ineffective for failing to move for a competency determination, and has further failed to establish that there were any reasonable

grounds to believe that Appellant was not competent to proceed, this Court must affirm the lower court's ruling denying this claim.

ISSUE II

APPELLANT'S SUBSTANTIVE DUE PROCESS CLAIM THAT HE WAS TRIED AND CONVICTED WHILE MENTALLY INCOMPETENT IS WITHOUT MERIT.

In a related claim, Appellant asserts that his substantive due process rights were violated because he was tried and convicted while mentally incompetent. See Dusky v. United States, 362 U.S. 402, 402 (1960) ("We also agree with the Solicitor General that it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but that the '*test must be whether he has sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.*'") (emphasis added); see also Fla. R. Crim. P. 3.210 (codifying the Dusky standard). Appellant, relying on James v. Singletary, 957 F.2d 1562, 1572 (11th Cir. 1992), argues that he has presented "clear and convincing evidence to create a real, substantial, and legitimate doubt as to his competency to stand trial" and it is now the State's burden to prove that Appellant was competent at the time of trial.

Contrary to Appellant's assertions, the State submits that Appellant has failed to establish a substantive due process

violation. In Wright v. Secretary for the Dep't of Corr., 278 F.3d 1245, 1259 (11th Cir. 2002), the court stated:

> As we have held, "'a petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence.'" Medina, 59 F.3d at 1106 (quoting James v. Singletary, 957 F.2d 1562, 1571 (11th Cir. 1992)). Only "[a] petitioner who presents clear and convincing evidence creating a real, substantial, and legitimate doubt as to his competence to stand trial is entitled to a hearing on his substantive competency claim." Id. (internal quotation marks and citations omitted). The point is that on this claim, "the standard of proof is high and the facts must positively, unequivocally, and clearly generate the legitimate doubt" about whether the petitioner was mentally competent when he was tried. Id. (internal quotation marks, brackets, and citation omitted). "Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." 59 F.3d at 1107 (internal quotation marks, brackets, and citations omitted).
>
> Wright has not met that high standard. The fact that he suffers from chronic schizophrenia the effects of which have come and gone over the years is not enough to create a real, substantial, and legitimate doubt as to whether he was competent to stand trial in January of 1987. His incompetency to stand trial seven and eight months later, like his incompetency to stand trial seventeen years earlier, is relevant, but it is not enough to counter the best evidence of what his mental condition was at the only time that counts, which is the time of the trial. The best evidence of Wright's mental state at the time of trial is the evidence of his behavior around that time, especially the evidence of how he related to and communicated with others then. The unrebutted evidence at trial is that in the days and weeks leading up to the trial Wright behaved in a perfectly normal fashion, related well to others, and had no problem at all communicating with them. There is no evidence that he behaved abnormally at trial, nor is there any evidence that he had any problem understanding the charges against him or communicating with his counsel. This claim fails on the merits.

As previously noted in Issue I, supra, trial counsel Trogolo indicated that he did not find, based on his extensive experience, a need to file a motion for competency determination given the entirety of the circumstances. Trial counsel met with Appellant regularly and conferred with his retained mental health expert, Dr. Dee, who also opined that Appellant was competent to proceed. In fact, when Dr. Dee met with Appellant right before trial, Appellant was clear and very forthcoming with facts and Dr. Dee stated that it was one of their best sessions. Dr. Ashby, the jail psychiatrist, testified on the eve of trial that Appellant was under medication to ensure his continued competency. Furthermore, the evidence at the evidentiary hearing established that Appellant gave detailed facts to the defense team regarding the crime that mirrored his confession to law enforcement officers. Although the trial court and trial counsel were aware that Appellant had attempted suicide over a year before his trial and was currently taking psychotropic medication, this does not equate to a finding that Appellant was not competent to proceed. See generally Sanchez v. Gilmore, 189 F.3d 619, 623 (7th Cir. 1999) (concluding that a state appellate court was not unreasonable in determining there was no doubt of defendant's competency despite suicide attempt

during trial because court made independent observations of defendant's demeanor and concluded he was competent).

In denying this claim the trial court stated:

> As discussed in Claim I, lead defense counsel, Robert Trogolo, did not find based on his extensive experience that it was necessary to file a motion for a competency determination. **Mr. Trogolo testified that Mr. Nelson was able to communicate with the defense team. He testified that Mr. Nelson understood the proceedings, and the roles of the players.** Dr. Dee, the defense's mental health expert, advised the defense that Mr. Nelson was marginally competent to proceed. The fact that Mr. Nelson had once tried to commit suicide and was on psychotropic medication does not mean he was incompetent, or that the court was required to order a competency evaluation. The evidence supports a conclusion that the Defendant was competent at the time of the trial. Claim II of the Defendant's Motion is denied.

(PCR V9:1444) (emphasis added). As the record clearly establishes that Appellant was competent at the time of trial, this Court must affirm the lower court's denial of Appellant's claim.

ISSUE III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED ON COUNSEL'S FAILURE TO CALL JAIL PSYCHIATRIST DR. MARK ASHBY AT THE GUILT AND PENALTY PHASES.

In claim III, Appellant alleges that trial counsel was ineffective for failing to call Dr. Ashby, the jail psychiatrist, at the guilt phase to testify that Appellant did not have the mens rea to commit first degree murder. Collateral counsel further asserts that effective counsel would have called Dr. Ashby at the penalty phase to establish statutory mitigation. The State submits that the lower court properly found that Appellant failed to carry his burden under Strickland of establishing deficient performance and prejudice.

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but must review the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In the instant case, the trial court found that trial counsel was not deficient for failing to call Dr. Ashby at the guilt phase to testify regarding Appellant's lack of premeditation. Furthermore, even if counsel were deficient, Appellant could not demonstrate prejudice because evidence showing that Appellant lacked premeditation would not have affected the jury's verdict on the

charge of first degree felony murder given the jury's verdicts of guilt on the underlying felonies of burglary, sexual battery, and kidnapping. (PCR V9:1444-46).

Trial counsel Trogolo testified that he consulted with Dr. Dee, his retained mental health expert, about the possibility of pursuing a legal insanity defense, but that was not a viable defense.[13] (PCR V7:1117-21). Because the law would only allow defense counsel to argue diminished capacity if he had raised an insanity defense, counsel did not even attempt to call Drs. Dee, Kremper or Ashby at the guilt phase. See Chestnut v. State, 538 So. 2d 820 (Fla. 1989);[14] Gurganus v. State, 451 So. 2d 817 (Fla. 1984). Defense counsel thought the better strategy was to pursue a defense theory of arguing for second degree murder in order to maintain credibility with the jury. Because the law would not allow trial counsel to present expert testimony regarding Appellant's alleged diminished capacity at the guilt phase and trial counsel had a strategic decision in pursuing his defense theory, trial counsel's decision not to call Dr. Ashby cannot be deemed deficient. See Evans v. State, 946 So. 2d 1,

[13] Dr. Dee testified that he informed trial counsel that insanity was not a valid defense for them to pursue. (PCR V8:1176).

[14] In Chestnut, this Court held that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to prove that a defendant could not have formed the specific intent needed to be held responsible for committing a crime.

11 (Fla. 2006) (stating that trial counsel cannot be ineffective for failing to seek to introduce evidence of a meritless defense, diminished capacity, at the guilt phase); Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

Because Appellant failed to show deficient performance, this Court need not even address the second prong of Strickland to determine whether Appellant has made a showing of prejudice. See Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."). Nevertheless, even assuming Appellant had established deficient performance, he is unable to establish prejudice. As defense counsel acknowledged at the evidentiary hearing, the State had ample evidence that the instant murder was first degree felony murder. The State's evidence and the jury's verdicts established beyond a reasonable doubt that Appellant committed the murder during a burglary, sexual battery, and kidnapping. Thus, even if trial counsel could have produced evidence that Appellant lacked premeditation, it would

not have affected the jury's verdict finding Appellant guilty of first degree murder based on the underlying felonies. Because Appellant has failed to establish either deficient performance or prejudice, this Court should deny the instant claim.

Likewise, Appellant has failed to carry his burden of establishing ineffective assistance of counsel for failing to call Dr. Ashby at the penalty phase or Spencer hearing. Trial counsel Trogolo testified that he did not give much thought to calling Dr. Ashby, a jail psychiatrist, in the penalty phase. (PCR V7:1100-01). Trogolo had retained Dr. Dee, a mental health expert with a tremendous amount of experience in capital cases, to examine Appellant for the purpose of presenting mitigation evidence to the jury. Counsel did not give much thought to calling the jail psychiatrist that worked on a contract basis with the jail and who had not examined Appellant for the purpose of testifying to mitigation evidence.[15] Trial counsel retained Dr. Dee for the penalty phase and provided him with a voluminous amount of background material. Obviously, trial counsel was not deficient for choosing to utilize his forensic expert neuropsychologist, Dr. Henry Dee, at the penalty phase proceeding rather than the jail psychiatrist, Dr. Mark Ashby.

[15] Trial counsel testified that he did not have much interaction with Dr. Ashby and recalled that he was simply interjected into the proceedings on the eve of trial when counsel requested the instruction on the psychotropic medication.

Although it is unnecessary to address the prejudice prong of Strickland due to Appellant's failure to establish deficient performance, the State submits that Appellant has failed to meet his burden as to the prejudice prong.[16] Dr. Ashby treated Appellant during his incarceration at the jail and testified at the evidentiary hearing that he diagnosed Appellant as having schizoaffective disorder and prescribed Mellaril, an antipsychotic medication designed to stop hallucinations, and Imipramine, an antidepressant. Dr. Ashby's evidentiary hearing testimony was clearly cumulative to, and much less detailed, than the testimony presented by Dr. Dee at the penalty phase. Dr. Dee testified extensively at the penalty phase regarding statutory and nonstatutory mitigation. Dr. Dee related to the jury that both statutory mental mitigators applied and specifically informed the jury that Appellant had attempted suicide while in jail, suffered from severe depression and hallucinations, and was currently taking medications prescribed by Dr. Ashby to control his depression and hallucinations. (DAR V25:3121-3208). Because Appellant has failed to show deficient performance or prejudice as a result of trial counsel's decision not to present the testimony of Dr. Ashby at the penalty phase

[16] In denying this sub-claim, the trial court found that Appellant had not established deficient performance and did not address the prejudice prong of Strickland. (PCR V9:1446).

or Spencer hearing, this Court should affirm the lower court's denial of this claim.

ISSUE IV

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN THE INVESTIGATION AND PREPARATION OF THE PENALTY PHASE.

In his fourth issue, Appellant claims that trial counsel was ineffective for failing to properly investigate and prepare for the penalty phase and in failing call Dr. Kremper, or similar expert, to testify regarding the existence of mental mitigation. Collateral counsel asserts that effective counsel would have called a "qualified psychiatrist (like Dr. Maher) to evaluate the report of Dr. Kremper and the Department of Health and Rehabilitative Services' report which detailed the incidents of incest when Mr. Nelson was five years old." Counsel's hindsight argument is without merit and the State submits that the trial court properly denied this claim.

Trial counsel Trogolo testified at the evidentiary hearing that he made a strategic decision not to present the testimony of Dr. Kremper, after consulting with him, because the jury would then hear bad conduct regarding Appellant's character. Dr. Kremper examined Appellant when he was sixteen-years-old in connection with his charges of sexual battery and lewd assault on a family member. Obviously, trial counsel was justified in not wanting the jury to hear about Appellant's actions of reportedly raping his five-year-old cousin vaginally, anally,

and digitally, and Dr. Kremper's opinion that Appellant was in need of long term treatment for sexual deviancy. Trial counsel conducted a thorough investigation in this case by hiring an experienced mental health expert and providing him with voluminous background information and records, including the report from Dr. Kremper. (DAR V25:3126). Trial counsel made sound strategic decisions regarding the presentation of the mental mitigation evidence, and counsels' decision not to call Dr. Kremper does not equate to a finding of ineffective assistance of counsel. See Sexton v. State, 33 Fla. L. Weekly S 686 (Fla. Sept. 18, 2008) (trial counsel not ineffective for failing to call Dr. Maher when he would have testified that the defendant was a "sadistic sexual psychopath"); Bowles v. State, 979 So. 2d 182 (Fla. 2008) (trial counsel had strategic reason not to call mental health expert because it would have opened the door to damaging testimony); Willacy v. State, 967 So. 2d 131, 143-44 (Fla. 2007) (concluding that trial counsel's strategy to forgo presentation of some mental mitigation was reasonable where it would have opened the door to the defendant's prior bad acts).

In denying this claim, the lower court found that trial counsels' performance did not fall below an objective standard of reasonableness. Based on the testimony from the evidentiary

hearing, the trial court properly found that trial counsel had a strategic decision not to call Dr. Kremper. (PCR V9:1447). Appellant has failed to show any error regarding this ruling.[17] The fact that Appellant makes the speculative and hindsight argument that Dr. Maher would have been a more effective witness does not warrant a finding of ineffective assistance of counsel. See Stephens v. State, 975 So. 2d 405, 415 (Fla. 2007) ("Being able to secure an expert witness to provide an opinion as to mental health mitigation during postconviction proceedings, which arguably could have been helpful to [the defendant], does not, in and of itself, render trial counsel's performance ineffective."); Peede v. State, 955 So. 2d 480, 494 (Fla. 2007) ("The fact that Peede produced more favorable expert testimony at his evidentiary hearing is not reason enough to deem trial counsel ineffective.").

The State submits that even if Appellant has made a showing of deficient performance, the trial court properly found that Appellant failed to establish prejudice. Trial counsel provided Dr. Dee with the reports from Dr. Kremper and Dr. Dee was aware

[17] As previously noted, this Court employs a mixed standard of review to ineffective assistance of counsel claims, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the court's legal conclusions de novo. See Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

of Dr. Ashby's diagnosis and treatment. (PCR V7:1169-74). Trial counsel testified at length regarding the defense team's strategic decision at the penalty phase of not requesting jury instructions on the statutory mental mitigators even though Dr. Dee would testify that they existed. (PCR V7:1076-85).

In order to establish prejudice, Appellant must demonstrate that "there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). In this case, even assuming that trial counsel had presented the testimony of Drs. Kremper, Maher, and/or Ashby, there is no reasonable probability that the outcome of the penalty phase would have been any different. This Court thoroughly analyzed the trial court's rejection of the statutory mental mitigators and found that the trial court was entitled to reject Dr. Dee's testimony as to the applicability of these mitigators when the facts of the case did not support the expert's opinion. See Nelson, 850 So. 2d at 529-31 (holding that Appellant's behavior and actions at the time of the murder support the trial court's rejection of the two statutory mental mitigators). Given the substantial aggravating factors present in this case in relation to the mitigation, there is no

reasonable probability that the mitigation evidence would have resulted in a life sentence. Accordingly, this Court should affirm the trial court's denial of this claim.

ISSUE V

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S STRATEGIC DECISION NOT TO REQUEST SPECIFIC JURY INSTRUCTIONS ON THE STATUTORY MENTAL MITIGATING CIRCUMSTANCES.

In his fifth claim, Appellant alleges that trial counsel was ineffective for failing to request jury instructions on the two statutory mental mitigators. Counsel mistakenly argues that trial counsel's strategic decision was based on ignorance of the law. As a review of the record establishes, trial counsel was aware of the applicable law and made a strategic decision not to request specific instructions on the two statutory mental mitigating circumstances.

At the evidentiary hearing, without giving trial counsel any context for the question, collateral counsel asked Trogolo if he had read three Florida Supreme Court cases: Bryant v. State, 601 So. 2d 529 (Fla. 1992), Stewart v. State, 558 So. 2d 416 (Fla. 1990), and Smith v. State, 492 So. 2d 1063 (Fla. 1986). Trogolo testified that he did not recall, but if they were capital cases, he had probably either read them or read summaries of them. (PCR V7:1071). When Trogolo asked collateral counsel to "tell me what proposition they stand for" so that he could intelligently answer the question, collateral counsel moved on to another subject. (PCR V7:1071).

Contrary to Appellant's assertion that trial counsel's strategic decision was based on ignorance of the law, trial counsel testified that he was well aware that he was entitled to the jury instructions on the two statutory mental mitigating circumstances because he had produced evidence to support the instructions from Dr. Dee. (PCR V7:1074-85). Trogolo explained at length, both at trial and at the evidentiary hearing, his strategic decision for not requesting the specific instructions, but rather, opting for the general "catch-all" instruction that the jury could consider any aspect of the defendant's background or character. (DAR V24:2917-24; PCR V7:1076-82). Trogolo testified that he was afraid the prosecutor would argue to the jury that the defense had not established the statutory mitigators given the modifying adjectives of "extreme" and "substantial" contained in the instructions. He feared the jury would not properly consider and weigh the mitigation evidence if the prosecutor successfully argued that it did not rise to the level of "statutory" mitigation. Trogolo testified that his decision did not prohibit him from making any arguments to the jury and did not impair the presentation of mental mitigating evidence from Dr. Dee. Furthermore, Trogolo testified that Appellant agreed with this strategy after consultation with both trial attorneys. (DAR V24:2921-22).

As the trial court properly found when denying this claim, Appellant failed to establish that trial counsel was deficient for making the reasonable strategic decision to forego a specific jury instruction on the two statutory mental mitigating factors. (PCR V9:1449). Even if this Court were to find that counsel was deficient in failing to request jury instructions on the two mental mitigators, Appellant is unable to establish prejudice when both the trial court and this Court found that the two mitigators were not established by the evidence. See Nelson v. State, 850 So. 2d 514, 529-31 (Fla. 2003) (affirming the lower court's rejection of the two statutory mental mitigators given Appellant's behavior and actions). Because Appellant has failed to carry his burden of establishing deficient performance or prejudice, this Court should affirm the lower court's denial of the instant claim.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard E. Kiley, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136 and Paul Wallace, Assistant State Attorney, Post Office Box 9000-Drawer SA, Bartow, Florida 33831-9000, this 20th day of January, 2009.

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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