IN THE SUPREME COURT OF FLORIDA

TROY MERCK, JR.,

Appellant,

v.

CASE NO. SC10-1830
L.T. No. CRC 91-16659 CFANO

STATE OF FLORIDA,

Appellee.
________________________________/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

In 1993, Troy Merck was convicted of the first degree murder of James Newton and sentenced to death. The following factual background was taken from this Court's opinion affirming Merck's conviction, but reversing his death sentence and remanding the case for a new sentencing phase proceeding:

> Merck was convicted of first-degree murder of the victim, James Anthony Newton. Newton died after Merck repeatedly stabbed him while the two men were in the parking lot of a bar in Pinellas County shortly after 2 a.m. on October 12, 1991. The bar had closed at 2 a.m., and several patrons of the bar remained in the parking lot. The evidence was that several of these individuals, including the victim, Merck, and those who witnessed the murder, had consumed a substantial amount of alcohol during the evening while at the bar.
>
> After closing, Merck and his companion, both of whom had recently come to Florida from North Carolina, were in the bar's parking lot. The two were either close to or leaning on a vehicle in which several people were sitting. One of the car's occupants asked them not to lean on the car. Merck and his companion sarcastically apologized. The victim approached the car and began talking to the car's owner. When Merck overheard the owner congratulate the victim on his birthday, Merck made a snide remark. The victim responded by telling Merck to mind his own business. Merck attempted to provoke the victim to fight; however, the victim refused.
>
> Merck then asked his companion for the keys to the car in which he had come to the bar. At the car, Merck unlocked the passenger-side door and took off his shirt and threw it in the back seat. Thereafter, Merck approached the victim, telling the victim that Merck was going to "teach him how to bleed." Merck rushed the victim and began hitting him in the back with punches. The person who had been talking to the victim testified that she saw a glint of light from

> some sort of blade and saw blood spots on the victim's back. The victim fell to the ground and died from multiple stab wounds; the main fatal wound was to the neck.
>
> Merck was indicted on November 14, 1991, for the first-degree murder of James Anthony Newton. The case went to trial and ended in a mistrial on November 6, 1992, because the jury was unable to reach a verdict. After a second trial, Merck was found guilty as charged. The jury recommended death by a vote of nine to three. The trial judge found two aggravating factors: (1) the murder was especially heinous, atrocious, or cruel; and (2) previous conviction of felonies involving the use or threat of violence. The court found no statutory mitigating factors and two nonstatutory mitigating factors: (1) abused childhood; and (2) alcohol use on the night of the offense. The trial court sentenced Merck to death.

Merck v. State, 664 So. 2d 939, 940-41 (Fla. 1995) (footnotes omitted). After remanding the case for a new sentencing hearing, Merck was again sentenced to death in September, 1997. This Court reversed Merck's death sentence, Merck v. State, 763 So. 2d 295 (Fla. 2000), and remanded for another sentencing hearing. At Merck's third sentencing hearing in 2004, the jury recommended the death penalty by a vote of nine to three. The trial court followed the jury's recommendation and sentenced Merck to death.

On direct appeal, Merck raised the following six claims: (1) the trial court improperly excluded evidence relating to Merck's presumptive parole release date; (2) the trial court improperly excluded evidence that was relevant to the nature and

circumstances of the offense, had bearing on the finding of an aggravating factor, and could have been the basis of additional mitigating factors; (3) the prosecutor's closing argument included improper remarks, which denied Merck a fair penalty-phase proceeding; (4) the trial court failed to find or gave too little weight to mitigating factors; (5) the death sentence is disproportionate; and (6) Florida's capital sentencing scheme violates the decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). This Court rejected Merck's claims and affirmed the death sentence. Merck v. State, 975 So. 2d 1054 (Fla. 2007), cert. denied, 555 U.S. 840 (2008).

Subsequently, this Court appointed the Capital Collateral Regional Counsel – Middle Region (CCRC) to represent Merck in his postconviction proceedings. Attorneys for CCRC timely filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. Merck raised seven claims in his postconviction motion: (1) ineffective assistance of guilt phase counsel; (2) ineffective assistance of penalty phase counsel; (3) Florida Statutes, section 921.141 is unconstitutional and the trial court's jury instructions violated Caldwell v. Mississippi, 472 U.S. 320 (1985); (4) Florida's death penalty

statute is unconstitutional; (5) the heinous, atrocious, or cruel jury instruction was unconstitutionally vague and broad; (6) a cumulative error claim; and (7) Merck may be incompetent at the time of his execution. (PCR V1:1-169). The trial court issued an order granting an evidentiary hearing on Merck's ineffective assistance of counsel claims. (PCR V2:170-71). On July 20-21, 2010, the trial court conducted an evidentiary hearing and Merck presented testimony from five witnesses, and the State presented one rebuttal witness. (PCR V6-7:753-1047). On August 27, 2010, the trial court issued a detailed order denying postconviction relief. (PCR V3-4:300-631).

At the evidentiary hearing, collateral counsel presented the testimony of Merck's 1993 guilt phase trial counsel, Fredric Zinober.[1] Zinober represented Merck at his original trial and penalty phase in 1993 as well as his second penalty phase in 1997. (PCR V6:763). The main defense theory at the guilt phase was that the State could not prove beyond a reasonable doubt that Merck was the individual who committed the murder, although trial counsel also testified that voluntary intoxication was a valid defense that he could not ignore given the overwhelming evidence regarding Merck's consumption of large amounts of

[1] At the time of Merck's trial, Mr. Zinober was a board certified criminal trial lawyer and had defended 12-18 murder cases. (PCR V6:773-74).

alcohol, including Merck's own version of events where he allegedly blacked out due to his intoxication. (PCR V6:764-65, 770-71, 781). Trial counsel did not want to solely pursue a defense theory that Merck's companion, Neil Thomas, was responsible for the murder and explained in detail his strategic reasons for not pursuing a single defense theory that another person committed the crime. (PCR V6:764-65, 782-86). Zinober argued to the jury in his closing argument that Merck was accompanied by Neil Thomas on the night of the murder and that an eyewitness, Katherine Sullivan, had described the perpetrator as wearing khaki pants and Merck was wearing different pants. (PCR V6:765-66). Zinober also pointed out to the jury other factors regarding Ms. Sullivan's identification of the perpetrator. (PCR V6:766-67).

Trial counsel Zinober testified that he did retain or seek to introduce testimony from a false identification expert like Dr. John Brigham because he had previously represented another defendant in the same circuit in a murder case that was a purely identification case, and after conducting a Frye hearing, the trial court had refused to allow testimony from Dr. Brigham. (PCR V6:771-73, 787). Furthermore, trial counsel did not know whether testimony from such an expert would be helpful in Merck's case because Merck's friend, rather than an unfamiliar

third-party, was going to testify that Merck committed the murder. (PCR V6:774, 787-88). As trial counsel stated, "I just don't really think this is really a case that lends itself to Dr. Brigham's testimony, to be honest with you." (PCR V6:788). Additionally, trial counsel acknowledged that he was reluctant to challenge Katherine Sullivan's eyewitness testimony because, although she identified Merck as the perpetrator, her description of the perpetrator's clothing was helpful to the defense theory that Neil Thomas may have committed the murder. (PCR V6:787-89). Finally, trial counsel admitted that an expert's testimony would not have been useful to contradict the auditory identification of Katherine Sullivan.[2] (PCR V6:790-91).

Dr. Brigham testified at the evidentiary hearing that he had spent thirty years researching eyewitness identification and had authored approximately 55 articles on the subject. (PCR V6:798). He explained that eyewitnesses are often inaccurate in their identifications and discussed several factors affecting the reliability of the identification. (PCR V6:800-02). Dr.

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[2] At trial, Katherine Sullivan testified that the man who picked a fight with the victim and said that he was going to teach the victim how to bleed, requested that his friend, the taller gentlemen, toss him the car keys. When the taller man tossed the keys, he said "Here are the keys, Troy," and the smaller gentleman said, "Don't call me by my name." (DAR V22:429). The "DAR" citation refers to the Direct Appeal Record from the trial conducted in 1993 before Judge Luten.

Brigham acknowledged that his testimony would be more concerned with visual identifications as opposed to auditory identification. (PCR V6:816-17). He also conceded that he would not be able to testify that Katherine Sullivan incorrectly identified Merck and Neil Thomas. (PCR V6:819-20).

Collateral counsel also presented the testimony of Pinellas County Sheriff's Office latent fingerprint examiner Henry Brommelsick. Brommelsick testified that he rolled the fingerprints of Merck and Neil Thomas prior to the 1993 trial. (PCR V6:826). On direct examination, Brommelsick reviewed exhibits 20-E, 20-F, and 20-H from Merck's 1993 trial and indicated that those exhibits indicated that Neil Thomas' prints were found at various locations on a Mercury Bobcat vehicle. (PCR V6:826-29). Brommelsick testified that the three 1993 trial exhibits were enlargements of the actual fingerprint cards obtained by the crime scene technician who processed the vehicle, and did not include any markings or diagrams that the technician may have made on the back of the cards. (PCR V6:829-30). On cross examination, Brommelsick reviewed numerous other fingerprint exhibits from the 1993 trial, exhibits 20-A thru L, which showed that Neil Thomas' fingerprints were on the driver's side of the vehicle, Merck's fingerprints were on the passenger side, and both individuals contributed palm prints to the roof

of the vehicle. (PCR V6:832-43).

Dr. Michael Maher, a forensic psychiatrist, testified at the evidentiary hearing that he was first involved with Merck's case at the time of his original trial in 1993 and gave a deposition in 1992, but he did not testify at the penalty phase. He was subsequently retained by Merck's public defenders in 2001 to prepare mitigation evidence for the 2004 penalty phase. (PCR V6:847-49). Trial counsel provided Dr. Maher with Merck's school records, juvenile and law enforcement records, medical records, and family background information. (PCR V6:849-50). Dr. Maher testified that he obtained information from Merck and his sister, Stacy France, that Merck's mother abused alcohol and drank turpentine while pregnant with Merck in an attempt to abort her pregnancy. Dr. Maher opined that Merck's mother may have had mental illnesses and that her abuse of substances during her pregnancy may have caused Merck's ptosis (drooping of an eyelid) and frontal lobe brain damage. Dr. Maher further testified that Merck's mother was physically abusive to him and that this may have contributed to his brain damage. (PCR V6:850-61).

Dr. Maher testified that his primary Axis I diagnoses were that Merck suffers from fetal alcohol effect and brain impairment, secondary to multiple causes such as post traumatic

stress disorder (PTSD) and alcoholism. (PCR V6:856-57; 890-92). Dr. Maher further opined that Merck has attention deficit disorder and impulse control disorder. (PCR V6:858). Dr. Maher was aware that testimony indicated that, on the night of the murder, Merck drank six beers and a couple of shots of tequila. (PCR V6:862). Based on the totality of his assessment, Dr. Maher testified that he believed both statutory mental mitigators were applicable in Merck's case. Dr. Maher testified that Merck was under the influence of extreme mental or emotional disturbance given his brain damage, impulsivity disorder, PTSD, and his state of intoxication. (PCR V6:864-66). Similarly, the witness opined that Merck's capacity to appreciate the criminality of his conduct was substantially impaired for the same reasons. (PCR V6:866-68).

Dr. Maher testified that prior to Merck's resentencing proceedings, he spoke primarily with trial counsel Michael Schwartzberg.[3] (PCR V6:873-74). Dr. Maher testified that his billing records and recollection of speaking with Michael

[3] At his resentencing, Merck was originally represented by Assistant Public Defenders Nora McClure and Chris Helinger, but due to a conflict, private attorneys Michael Schwartzberg and Richard Watts were appointed to represent Merck. (PCR V7:944-45). Dr. Maher had worked with Schwartzberg and Watts on approximately a dozen death penalty cases, maybe even twenty or thirty, prior to Merck's case. (PCR V6:882, 912). Mr. Schwartzberg passed away in January, 2005, approximately ten months after Merck's penalty phase. (PCR V6:882-83).

Schwartzberg was not consistent with the dates listed on Schwartzberg's billing statement, but he was not surprised as he did not think that Schwartzberg was "good on the details."[4] (PCR V6:875-77). Dr. Maher recalled being deposed by the State in October, 2003, with Michael Schwartzberg being present. (PCR V6:881). Prior to the March, 2004, penalty phase, Dr. Maher attempted to contact Michael Schwartzberg, but did not get to talk with him. (PCR V6:878-90). Dr. Maher could not recall specifically, but he thought he attended the penalty phase and listened to some of the lay witnesses' testimony. Dr. Maher testified that he recalled the defense resting and stating on the record that they would not be presenting testimony from Dr. Maher, and recalled the trial judge inquiring of Merck if he understood that decision. (PCR V6:878-80, 887-88). Subsequently, Dr. Maher testified at the Spencer hearing. (PCR V6:889).

On cross examination, Dr. Maher acknowledged that Merck had antisocial personality disorder. (PCR V6:897). Dr. Maher further agreed that Merck's prior history of threatening a person with a knife, threatening a person with glass, shooting a

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[4] Schwartzberg's billing statement listed a half hour conference with Dr. Maher on December 23, 2003, whereas Dr. Maher's billing records indicated that he spoke with counsel for .4 hours on December 11, 2003. (PCR V6:875-76).

woman in the face with a .22 rifle, multiple incidents of robbing a store and placing a knife to the victim's throat, as well as the instant murder, were all consistent with his antisocial personality and impulsivity disorder. (PCR V6:898-99). Dr. Maher also noted that Merck had above-normal intelligence. (PCR V6:906).

Trial counsel Richard Watts testified that he was appointed as a conflict attorney for Merck in 2003 to handle his resentencing proceedings.[5] (PCR V7:944). Although it was an atypical situation because it was only a penalty phase, due to the large amount of material, he requested the appointment of another attorney, Michael Schwartzberg. (PCR V7:944-45). The division of labor between the attorneys resulted in Watts handling all the lay witnesses and Schwartzberg handling the defense's mental health expert, Dr. Maher, and the cross examination of the State's witnesses. (PCR V7:947-48). Schwartzberg also handled voir dire, although Watts testified that it was a "team selection," including his and Merck's evaluations of the potential jurors. (PCR V7:948; 972-73). Trial counsel was aware that the State was seeking the heinous,

[5] Trial counsel Watts testified that he has handled approximately eighty capital murder trials during his career. His co-counsel, Michael Schwartzberg, was also heavily involved in capital litigation. (PCR V7:963-64).

atrocious, or cruel (HAC) aggravator and that was an area explored with the venire during voir dire. (PCR V7:948-56). During voir dire, the defense and prosecution utilized at least twenty-five cause challenges, and the defense used all of their peremptory challenges. (PCR V7:973-76).

Trial counsel Watts testified that Schwartzberg handled the aspect of the defense's case involving the proposed mitigator that Merck was a minor participant in the murder. Watts expressed concern with losing credibility by pursuing this theory given the overwhelming evidence of Merck's involvement and the fact that there was no evidence that Neil Thomas participated in any manner. (PCR V7:957-60; 979-80). Watts testified that he handled the "high road" mitigation of Merck's troubled and chaotic childhood and focused on trying to show that Merck had changed and had personal growth since the 1991 murder. (PCR V7:960-61; 979-80).

Trial counsel Watts testified that a decision was made to not present Dr. Maher's testimony to the jury, but to present him to the judge at the Spencer hearing. (PCR V7:965-66). Because Schwartzberg was responsible for handling Dr. Maher, and due to the passage of time, Watts could not recall much regarding their strategic reasons for choosing to present Dr. Maher at the Spencer hearing. Typically, Watts would be

concerned with the two-sided nature of presenting mental health testimony to the jury because cross-examination can be harmful and the State can present an opposing mental health expert. (PCR V7:966-71). In this case, Watts could not recall discussing these concerns with Schwartzberg, but he acknowledged that if Dr. Maher had been called, the prosecutor would have been able to detail Merck's substantial prior criminal acts to demonstrate his antisocial personality, would have called Dr. Slomin in rebuttal, and would have elicited testimony from Dr. Maher regarding Merck's statements which were inconsistent with any minor participant argument. (PCR V7:966-71).

After the defense rested their case at the evidentiary hearing, Merck addressed the trial court and expressed concern that his CCRC attorneys had not performed as he had previously requested. (PCR V7:996-1012). Specifically, Merck claimed that he had signed his postconviction motion based on representations that an amended motion would be filed adding claims that Merck wanted raised, and Merck also complained that his postconviction attorneys had performed ineffectively at the evidentiary hearing during the questioning of trial counsel. Merck requested that the trial court appoint new counsel for him and allow him to

file an amended motion for postconviction relief. The trial court denied Merck's request.[6]

In rebuttal, the State presented the testimony of psychologist Dr. Vincent Slomin. Dr. Slomin was originally retained by the State in 1993 as a consultant on Merck's case. (PCR V7:1015-16). Dr. Slomin reviewed a substantial amount of information in evaluating Merck, including Merck's MMPI psychological test results administered by Dr. Sidney Merin in 1992. Dr. Slomin also administered the MMPI test and conducted a clinical interview with Merck on March 1, 2004. Dr. Slomin attended the Spencer hearing and listened to Dr. Maher's testimony prior to offering his own testimony to the court. (PCR V7:1015-18).

After reviewing the background material and evaluating Merck, Dr. Slomin's diagnosis was that Merck suffered from antisocial personality disorder. (PCR V7:1019-22). He also agreed with Dr. Maher that Merck had impulsive disorder. (PCR V7:1023-24). Dr. Slomin, however, disagreed with Dr. Maher's opinion that there was organic brain damage because Merck's IQ score rose significantly during his incarceration. Dr. Sidney

[6] Merck filed a Motion to Petition for Exercise of All-Writs Authority with this Court regarding his complaints with CCRC and his request for new counsel. On March 31, 2011, this Court denied Merck's petition on the merits. See Merck v. State, 60 So. 3d 387 (Fla. 2011) (Table).

Merin had obtained an IQ score of 110 in 1992 (55th percentile), and when Merck was retested prior to the Spencer hearing in 2004, Dr. Slomin scored Merck's IQ at 128 (95th percentile). (PCR V7:1022-24). Likewise, Dr. Slomin disagreed with Dr. Maher that Merck suffered from PTSD. (PCR V7:1025). Finally, Dr. Slomin found that neither of the two statutory mental mitigators applied in this case as Merck was not under the influence of an extreme mental or emotional disturbance, nor was his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law substantially impaired. (PCR V7:1026-28).

Subsequently, on August 27, 2010, the trial court issued a detailed order denying Merck's motion for postconviction relief. Merck filed a notice of appeal on September 17, 2010. This appeal follows.

SUMMARY OF THE ARGUMENT

Issue I: The postconviction court properly denied Merck's claim that his trial counsel was ineffective for utilizing and failing to object to the standard jury instruction on voluntary intoxication. Trial counsel testified that he purposefully sought a voluntary intoxication instruction on the charge of first degree murder because of the overwhelming evidence regarding Merck's consumption of alcohol on the night of the murder, but his primary defense theory was that the State failed to carry its burden of proving that Merck committed the murder beyond a reasonable doubt. The two theories were not inconsistent and the language in the jury instruction correctly stated the law. Because Merck failed to establish both deficient performance and prejudice, this Court should affirm the lower court's denial of his claim of ineffective assistance of counsel.

Issue II: The postconviction court properly denied Merck's claim that his penalty phase counsel was ineffective during voir dire for failing to challenge for cause two jurors who were allegedly predisposed to recommending the death penalty. As the lower court noted, the record refutes Merck's allegations that the two jurors were biased. Both jurors indicated that they would base their decision on the evidence presented and would

consider both aggravating and mitigating circumstances prior to making their recommendation. Because the jurors were not subject to a for-cause challenge, penalty phase counsel did not perform deficiently by failing to challenge them, and even had counsel raised a cause challenge, it would have been denied.

Issue III: Penalty phase counsel did not perform deficiently by failing to proffer evidence that Merck was allegedly a minor participant or accomplice to the murder of James Newton. Trial counsel filed a motion and argued extensively that he should be allowed to present this evidence to the jury, but the trial court denied his motion. Appellant was simply attempting to argue lingering doubt to the jury under the guise of presenting evidence in support of the "minor participant" mitigator. Additionally, Merck was not prejudiced as a result of trial counsel's failure to proffer the evidence and preserve the issue for appellate review. Even had counsel proffered the evidence, it would not have resulted in Merck obtaining a new penalty phase proceeding on appeal.

Issue IV: Merck's claim that law enforcement acted in bad faith in failing to preserve potentially exculpatory evidence is procedurally barred as Merck raised this exact claim on direct appeal and it was rejected by this Court in Merck v. State, 664 So. 2d 939 (Fla. 1995).

Issue V: The postconviction court properly found that penalty phase counsel made an informed and strategic decision to present Dr. Maher's expert mental health testimony to the judge at the Spencer hearing rather than before the resentencing jury. Penalty phase counsel Schwartzberg was well aware of Dr. Maher's findings based on his evaluations of Merck, and counsel noted on the record at the time, that he did not call Dr. Maher before the jury because it would have allowed the State to present rebuttal testimony from Dr. Slomin which would have been detrimental to Merck. In addition to failing to show that penalty phase counsel performed deficiently, Merck also failed to establish prejudice as Dr. Maher's testimony was presented at the Spencer hearing and the sentencing judge was aware of Dr. Maher's opinions. Because the record clearly supports the lower court's finding that Merck failed to establish deficient performance and prejudice, this Court should affirm the court's order denying this claim.

Issue VI: Merck failed to establish that his penalty phase counsel was ineffective for failing to request jury instructions on the two statutory mental mitigating factors. Penalty phase counsel did not present any evidence before the jury that would require the giving of these instructions, but rather made the informed and strategic decision to present Dr. Maher's testimony

at the Spencer hearing and argue the existence of these mitigators to the trial judge. Because Merck cannot demonstrate deficient performance based on counsel's strategic decision, he is not entitled to postconviction relief. Furthermore, Merck cannot establish prejudice as counsel presented the mental health testimony at the Spencer hearing, but the trial judge rejected the existence of these two mitigators based on the rebuttal testimony of the State's mental health expert and the other evidence presented in the case.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY REJECTED MERCK'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE FOR FAILING TO OBJECT TO A JURY INSTRUCTION ON VOLUNTARY INTOXICATION.

In his first issue, Merck argues that trial counsel was ineffective for seeking an instruction on voluntary intoxication and failing to object to the standard jury instruction that stated it was "the" defense in this case, rather than simply "a" defense in the case. Collateral counsel asserts that trial counsel was deficient because his primary defense was that the State failed to prove the case beyond a reasonable doubt and the voluntary intoxication defense was therefore an inconsistent defense theory. After conducting an evidentiary hearing on this claim, the trial court issued an order denying relief. The State submits that the lower court properly concluded that Appellant was not entitled to relief on his ineffective assistance of counsel claims based on his failure to establish deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

In order for a defendant to prevail on a claim of ineffective assistance of counsel claim pursuant to the United

States Supreme Court's decision in Strickland, 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). Furthermore, as the Strickland Court noted, there is a strong presumption that 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. Additionally, Merck's burden of establishing deficient performance is especially difficult in the instant case because he was represented by an experienced, board-certified attorney at the guilt phase. See generally Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000) ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.").

On appeal, 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 reviews 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 lower court properly identified the applicable law in analyzing Merck's claims, correctly applied this law to the facts as presented in the trial and postconviction proceedings, and concluded that Merck was not entitled to postconviction relief. (PCR V3:301-02). The court stated:

> Merck argues that counsel was ineffective for failing to object to a jury instruction on voluntary intoxication at his 1993 trial. Merck pursued a voluntary intoxication defense during the 1992 trial, which ended in a mistrial. Merck states that at his 1993 trial, however, his defense was actual innocence. During the 1993 trial, an instruction on voluntary intoxication was read to the jury; counsel did not object to the instruction. Merck contends that, due to counsel's failure to object, the jury was misled as to the actual theory of defense and the State was able to underscore during closing arguments its position that Merck presented inconsistent defenses
>
> The court finds that Merck has not demonstrated that counsel was deficient. At trial, counsel first brought up the defense of voluntary intoxication during voir dire. (Exhibit A: Trial Transcript, pp. 362-364). At the jury instruction conference, the attorneys and the court discussed that voluntary intoxication would be included as a defense to first degree murder. (Exhibit A: pp. 1067-1069). Counsel addressed voluntary intoxication during closing arguments before moving on to what he described as "really" being the main defense, that there was a reasonable doubt Merck committed the act. (Exhibit A:

pp. 1135-1138). During its rebuttal argument, the State argued that Merck had advanced alternate defenses. (Exhibit A: pp. 1200- 1202). The court then read the jury the instruction on the voluntary intoxication defense; the court stated that "the defense asserted in this case is of voluntary intoxication by use of alcohol." (Exhibit A: pp. 1213-1214).

At the evidentiary hearing, Frederic Zinober, who represented Merck during the guilt phase of trial, testified that while the primary defense was that the State had not presented a prima facie case showing Merck's guilt, voluntary intoxication also had been a defense from the outset of trial. Additionally, Zinober testified, that Merck did not have much recollection about the night of the murder due to his alcohol consumption and there was undeniably evidence against him. Zinober testified that, based on Merck's own statements about that night, voluntary intoxication was an excellent defense if the jury disagreed with the main defense argument that there was a reasonable doubt as to Merck's guilt. Regarding the closing argument, Zinober explained that when he first addressed voluntary intoxication and then talked about what the defense "really" was, he was dealing with the voluntary intoxication issue first before moving onto the main defense that reasonable doubt existed as to whether Merck committed the offense.

The testimony and evidence before the court is that voluntary intoxication was pursued as a defense from the beginning of trial. Essentially, it was a secondary defense concerning Merck's ability to form intent if the jury disagreed with the main theory of defense and determined that Merck was the person who committed the murder. Although Zinober conceded at the hearing that it would have been preferable for the jury to have been instructed that voluntary intoxication was "a" defense, rather than "the" defense, the court finds that Merck cannot show that he was prejudiced by this phrasing. A review of Zinober's closing argument reflects that the primary focus of Merck's case was that the evidence was insufficient to show that he actually committed the murder. (Exhibit A: pp. 1124 - 1189). In this regard,

> Merck's case is similar to Ford v. State, 955 So. 2d 550, 553-554 (Fla. 2007), in which counsel was not ineffective for presenting evidence of voluntary intoxication, even though the main defense was that the State's case was inadequate to show Ford's guilt, because voluntary intoxication was raised in an attempt to defeat the premeditation element. The court accordingly finds that counsel cannot be deemed ineffective for failing to object to this jury instruction.

(PCR V3:302-03).

The lower court properly found that Merck failed to establish both deficient performance and prejudice based on trial counsel's failure to object to the voluntary intoxication instruction. As the court noted, trial counsel Zinober purposefully raised the defense of voluntary intoxication during voir dire and noted that he could not ignore this viable defense to first degree murder because of the overwhelming evidence that Merck consumed large amounts of alcohol at the bar prior to the murder, including Merck's own version of events wherein he claimed that he blacked out due to his intoxication.[7] (DAR V25:823-40). Zinober testified, however, that his primary defense theory was that the State had failed to carry its burden of proving Merck's guilt beyond a reasonable doubt. Trial counsel did not want to solely pursue a defense theory that

[7] Merck testified at his 1993 trial that he "had quite a bit" to drink that night and consumed around 15 beers and 8-10 shots of alcohol. (DAR V25:823-24).

Merck's companion, Neil Thomas, was responsible for the murder and explained in great detail his strategic reasons for not pursuing a single defense theory that another person committed the crime.

The testimony from the evidentiary hearing establishes that trial counsel adopted a defense theory which he believed to be most beneficial to his client. The law is clearly established, that such strategic decisions are "virtually unchallengeable" under the Sixth Amendment. Strickland, 466 U.S. at 691; Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Furthermore, in Ford v. State, 955 So. 2d 550 (Fla. 2007), a case directly on point, this Court rejected a similar claim. In Ford, the defendant argued that his trial counsel was ineffective for pursuing a voluntary intoxication defense because the defendant felt that the defense would operate as an admission of guilt. This Court found that the primary defense theory at Ford's trial was that the State had failed to carry its burden of proof, and further noted that the defense of voluntary intoxication was not used as an admission of guilt, but was utilized to suggest that Ford lacked premeditation. Id. at 553-54.

Likewise, in the instant case, the record and postconviction testimony clearly establishes that trial counsel did not utilize voluntary intoxication as an admission of

Merck's guilt, but utilized the substantial testimony of intoxication in an attempt to establish that the State had failed to carry its burden of establishing that Merck had committed premeditated murder. Certainly, had trial counsel *not* presented voluntary intoxication as a defense, Merck would complain that trial counsel was ineffective for *failing* to pursue such a defense theory. The current hindsight argument is simply a disagreement over the chosen strategy employed by experienced trial counsel, and since trial counsel's strategy was reasonable, this disagreement is insufficient to entitle Merck to postconviction relief. See Patton v. State, 878 So. 2d 368, 373 (Fla. 2004) (rejecting a claim that voluntary intoxication was not pursued as vigorously as it should have been and reiterating that "claims expressing mere disagreement with trial counsel's strategy are insufficient" to warrant relief). This Court has repeatedly stated that "it will not second-guess counsel's strategic decisions concerning whether an intoxication defense will be pursued." Dufour v. State, 905 So. 2d 42, 52 (Fla. 2005); Jones v. State, 855 So. 2d 611, 616 (Fla. 2003). Merck's trial attorney thoroughly considered the options, weighed the advantages and disadvantages of different defense theories, and chose to use the evidence of Merck's intoxication to a limited extent. The reasonableness of his

decision precludes a finding of ineffective assistance of counsel, and this Court should reject the instant claim.

Collateral counsel relies on Dufour v. State, 905 So. 2d 42 (Fla. 2005), in support of his argument that trial counsel was ineffective for pursuing "inconsistent" defense theories. This Court's decision in Dufour does not support Merck's position, but rather, supports the State's argument that this Court "will not second-guess counsel's strategic decisions concerning whether an intoxication defense will be pursued." Dufour, 905 So. 2d at 52. In Dufour, the defense attorney made the strategic decision *not* to present voluntary intoxication as a defense because the evidence he discovered in investigating the defense showed that Dufour was sober at the time, a psychiatric opinion did not indicate that Dufour was intoxicated, and Dufour himself never indicated that he was intoxicated. Id. Dufour's trial counsel opted to pursue a defense theory that Dufour did not commit the murder but another person, Robert Taylor, committed the murder. Id. at 52-53. Based on this evidence, this Court rejected the argument that trial counsel was deficient for failing to pursue a voluntary intoxication defense. Id.

Unlike the facts in Dufour, the evidence in this case unquestionably showed that Merck had consumed a large amount of

alcohol on the night of the murder. Merck's companion, Neil Thomas, testified that Merck had approximately six beers and two or three shots of alcohol during the four-hour time period they were at the bar, and, as noted in footnote 7, supra, Merck testified that he drank around 15 beers and 8-10 shots of alcohol. (DAR V25:740; 823-24). Furthermore, the defense of voluntary intoxication was not "inconsistent" with the defense theory that the State failed to prove that Merck committed the murder beyond a reasonable doubt. Unlike in Dufour, Merck's trial counsel testified that he purposefully did not raise a defense that Neil Thomas was responsible for the murder because he did not want to pigeon-hole himself into that defense; "I wouldn't do that for strategy reasons." (PCR V6:764-65, 782-86). Because Dufour does not support Merck's argument, and the instant facts are directly on point with Ford, this Court should reject Merck's claim and follow the rationale in Ford and deny the instant claim.

Additionally, Merck has failed to establish that trial counsel was deficient for failing to object to the standard jury instruction on voluntary intoxication. At the charge conference, trial counsel did not object to the court utilizing the voluntary intoxication for first degree murder because, as set forth above, trial counsel purposefully sought an

instruction on this valid defense. (DAR V26:1066-69). The trial judge ultimately instructed the jury on first degree murder and the lesser degrees of murder, and then proceeded to instruct the jury that "***the*** defense asserted in this case is of voluntary intoxication" and that this defense only applied to premeditated murder. (DAR V27:1213-14). Merck argues that it was deficient to fail to object to this instruction and asserts that trial counsel should have requested that the court instruct the jury that "***a*** defense asserted in this case is voluntary intoxication." Appellant's argument is misplaced and is a simple disagreement over semantics. The trial court's instructions were entirely correct as voluntary intoxication was the only affirmative defense asserted by Merck. See Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985) (emphasizing that voluntary intoxication is "an affirmative defense and that the defendant must come forward with evidence" to support this defense). The other "defense" was not an affirmative defense, but was simply an argument that the State had failed to carry its burden beyond a reasonable doubt. As trial counsel cannot be deemed deficient for failing to object to standard jury instructions which correctly state the applicable law, this claim is without merit. See Thompson v. State, 759 So. 2d 650, 665 (Fla. 2000) (stating that trial counsel's failure to object

to standard jury instructions that had not been invalidated by the court does not render counsel's performance deficient).

Finally, in addition to failing to establish deficient performance, Merck has also failed to establish any prejudice based on trial counsel's failure to object to the standard jury instruction. As the postconviction court noted, "Merck cannot show that he was prejudiced by [the] phrasing" contained in the standard jury instruction. The phrasing of the jury instruction did not preclude trial counsel from arguing his primary defense theory that the State failed to prove its case beyond a reasonable doubt. Likewise, the instruction did not operate as an admission of Merck's guilt. Even had the trial counsel requested that the instruction be changed from "the" defense to "a" defense, such a change would not have altered the outcome of the proceedings in any manner. Accordingly, because Merck cannot demonstrate either deficient performance or prejudice as required by Strickland, this Court should affirm the lower court's order denying the instant claim.

ISSUE II

THE POSTCONVICTION COURT PROPERLY DENIED MERCK'S CLAIM THAT HIS PENALTY PHASE COUNSEL WAS INEFFECTIVE AT VOIR DIRE.

In his second issue, Merck alleges that his penalty phase counsel was ineffective during voir dire for failing to strike jurors Rowley and Coop because they were allegedly predisposed to vote for the death penalty. At the evidentiary hearing, attorney Richard Watts testified that he and Michael Schwartzberg were appointed to represent Merck at his resentencing proceedings. Michael Schwartzberg, who passed away almost a year after Merck's resentencing, was responsible for questioning the venire, but Watts and Merck were involved with Schwartzberg in the "team" selection process of the actual jurors. (PCR V7:944-48). Watts acknowledged that both the State and defense used numerous cause challenges and the defense utilized all ten of their peremptory challenges. (PCR V7:973). Watts noted that the defense strategy in voir dire was to strike the most State-oriented jurors from the panel and to select "the best ones that they could." (PCR V7:949, 973-75). As to jurors Rowley and Coop, Watts testified that he had no independent recollection of the exchanges between these two individuals and the attorneys. (PCR V7:950-52).

After hearing the testimony at the evidentiary hearing and reviewing the record, the postconviction court denied the instant claim and stated:

> Merck argues that counsel was ineffective for failing to strike two jurors whose statements during voir dire revealed that they were predisposed to vote for imposing the death penalty. Specifically, he claims that jurors Rowley and Coop provided answers during voir dire indicating that they were biased and inclined to vote for death, and that they were not rehabilitated after giving these responses. Merck contends that there is a reasonable probability the outcome would have been different had Rowley and Coop not sat on the jury.
>
> **The court finds that counsel was not ineffective because the statements provided by Coop and Rowley during voir dire did not require that counsel move to strike them.** During voir dire, the State questioned the potential jurors on their thoughts about the death penalty and about sitting on a penalty phase jury without having been a member of the guilt phase jury. The State asked Coop what he thought about the death penalty, to which Coop replied, "I think that it depends entirely on the specific circumstance. It is warranted in more extreme circumstances." (See Exhibit D: 2004 Penalty Phase Transcript, p. 181). The State then went on to ask whether the words "heinous, atrocious and cruel" would "kind of fit" the circumstances Mr. Coop had in mind, and Mr. Coop answered affirmatively. (Exhibit D: pp. 181 – 182).
>
> Rowley stated that while he had supported the death penalty, he was beginning to reconsider that position. (Exhibit D: p. 129). He also said that in order to vote for the death penalty, he would have to be convinced "beyond a shadow of a doubt" that he should do so. (Exhibit D: p. 129). Rowley further answered that "I can evaluate the facts and look at it" (Exhibit D: p. 130). When the State indicated that it would attempt to prove that the crime was committed in a heinous, atrocious, or cruel manner, Rowley responded that if those circumstances were proved, he

would vote for death; he also stated, however, that he "would honestly evaluate the facts and then I can make a decision." (Exhibit D: pp. 130-131). Additionally, Rowley stated that, after listening to some of the other potential jurors, "it is going to be more difficult, I think, to convince me to vote for the death penalty than some of the other people that have already spoken." (Exhibit D: p. 130). In response to defense questioning, Rowley said he was in the "group" agreeing with another potential juror who said that, while he would have to see evidence that the death penalty should be imposed, he would lean toward imposing death unless the defense could convince him otherwise; however, Rowley also reiterated that he would make a decision after hearing everything. (Exhibit D: pp. 230 —231).

Richard Watts served as co-counsel, along with the late Michael Schwartzberg, during the 2004 penalty phase proceedings. At the evidentiary hearing, Watts testified that he, Schwartzberg, and Merck worked together as a team in evaluating the jurors, that Merck was alert to what was happening, and that they picked the most desirable jury they could from the prospective jury pool. **Watts testified that the defense's argument was that the statutory mitigating factor that the crime was especially, heinous, atrocious, or cruel ("HAC") did not apply as an aggravating factor because the death occurred quickly; accordingly, he testified, the answers provided by Coop and Rowley did not necessarily mean that he should move to strike them. In reference to Coop, Watts testified that Coop's statements did not make him think that Coop would automatically vote for the death penalty. Watts also testified that he thought Rowley's statements indicated that Rowley was receptive to both sides.**

The purpose of voir dire is to obtain an impartial jury. See Lewis v. State, 377 So.2d 640, 642 (Fla. 1979). It is recognized that "a juror is not impartial when one side must overcome a preconceived opinion in order to prevail." Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989). When a defendant faces the death penalty, the penalty phase jury may not contain individual jurors who would automatically vote for the

death penalty because the inclusion of such jurors would violate the defendant's right to an impartial jury. See Morgan v. Illinois, 504 U.S. 719, 729 (1992); O'Connell v. State, 480 So. 2d 1284, 1287 (Fla. 1985). Further, a juror in a death penalty case who will not consider mitigating factors should be disqualified. Morgan, 504 U.S. at 738 – 739. A juror must base his or her decision on the evidence presented and the law as instructed by the court. Hill v. State, 447 So. 2d 553, 555 (Fla. 1985).

The statements made by Coop and Rowley during voir dire do not indicate that they had preconceived opinions about how to vote. Although Watts conceded that he believed a juror who leans towards death has a preconceived opinion, the court finds that the statements of these two jurors did not show that they were "leaning" towards imposing the death penalty, nor that the individuals had preconceived opinions that would prevent them from being impartial. Rowley's statements cannot be said to demonstrate that he was predisposed to voting for the death penalty in this case. He did not say that he would automatically vote for the death penalty based upon the fact that Merck had been convicted. While Rowley's statements suggested that HAC was the kind of factor that would influence his decision, he also said that he would evaluate the facts presented before deciding how to vote, that the State would have to convince him to vote for imposing death, and that he would not make a decision until he heard all of the evidence. Taken as a whole, Rowley's answers indicate that he would listen to all of the facts and evidence and take into consideration both aggravating and mitigating circumstances before casting his vote.

Similarly, a review of Coop's statements does not reflect that he had a preconceived opinion regarding the death penalty, nor that he would automatically vote for the death penalty if the State showed HAC. Although he expressed his belief that death was warranted in "more extreme circumstances," Coop also explicitly indicated that his vote would depend on the "specific" situation. Coop's statement that HAC was indicative of "more extreme circumstances" does not specifically suggest that he would automatically vote

> for the death penalty upon a showing of HAC. Accordingly, this statement alone was insufficient to prove he was biased. During the evidentiary hearing, Watts conceded that the issue of HAC should have been clarified to the jurors; however, he maintains that he would not have automatically ruled out either Coop or Rowley based on their responses regarding HAC.
>
> This situation is comparable to the one addressed in Dufour v. State, 905 So. 2d 42 (Fla. 2005). In that case, Dufour argued that two jurors demonstrated a predisposition to imposing the death penalty; however, because the jurors also stated that not every premeditated murder should result in the death penalty and that they could evaluate the evidence before making a decision, their inclusion on the jury was not error. Id at 53-56. The record here indicates that Rowley and Coop acknowledged that they would base their decisions upon the information presented and would consider evidence of both aggravating and mitigating factors. Accordingly, the court finds that Merck has not shown that counsel was ineffective in accordance with Strickland, and Claim IIa is denied.

(PCR V3:308-10) (emphasis added).

As the postconviction court properly found, the record establishes that neither of these two jurors were predisposed to automatically give the death penalty in every murder case and both indicated that the State had the burden to prove the existence of an aggravating factor. Juror Rowley indicated that the State would have to convince him "beyond a shadow of a doubt" that the death penalty was applicable and indicated that he could look at all the facts and evaluate the case, but it was going to be more difficult to convince him to vote for the death

penalty than others on the venire. (ROA 2d Addendum V1:129-31).[8] When the prosecutor indicated that it was attempting to prove that the murder was committed in a heinous, atrocious, or cruel manner (HAC), juror Rowley stated that if HAC was proved, he would vote for death, but he would "honestly evaluate the facts" and then make a decision. (ROA 2d Addendum V1:129-31). Rowley further indicated that he was in the group of other potential jurors who were, as defense counsel Schwartzberg called it, "leaning towards the imposition of death unless I can convince you of something else," but Rowley followed up by indicating that he would wait to make a decision until hearing all the evidence.[9] (ROA 2d Addendum V2:217-33).

When questioned by the prosecutor regarding his views of the death penalty, juror Coop stated, "I think it depends entirely on the specific circumstance. It is warranted in more extreme circumstances." (ROA 2d Addendum V1:181). The prosecutor then asked if the terms "heinous, atrocious, or cruel" are the type of adjectives that would "fit into" what

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[8] Citations to the 2004 resentencing proceeding will be cited to as "ROA," with the appropriate volume number.

[9] The prosecutor objected to defense counsel's questioning of this "group" and indicated that an objection would be made to any cause challenge to any member of this "group" based on defense counsel's questions. (ROA 2d Addendum V2:232-33).

juror Coop was talking about, and he responded affirmatively. (ROA 2d Addendum V1:181).

Both jurors Rowley and Coop were impartial and competent to serve as jurors. See Lusk v. State, 446 So. 2d 1038, 1041 (Fla. 1984) (stating that the test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court). As the United States Supreme Court held in Morgan v. Illinois, 504 U.S. 719, 729 (1992), it is a violation of due process for a juror to serve on a capital jury when the juror has already formed an opinion on the merits and will automatically vote for the death penalty in every case. In this case, both jurors Rowley and Coop indicated that they would follow the law and would not automatically vote for the death penalty. Thus, the postconviction court properly found that trial counsel was not deficient for failing to challenge these jurors for cause. See Dufour v. State, 905 So. 2d 42, 53-55 (Fla. 2005) (rejecting ineffective assistance of counsel claim based on counsel's failure to challenge jurors for cause because, although the jurors indicated that they were predisposed to favor the death penalty, they all indicated that they would follow the law and

consider the aggravating and mitigating factors in making their determination as to whether to vote for death).

In addition to failing to establish deficient performance, Merck cannot establish prejudice because, even had penalty phase counsel moved to strike these jurors for cause, his challenge would have been rejected based on the jurors' responses during voir dire. Merck's allegation that trial counsel should have asked follow-up questions to jurors Rowley and Coop is speculative and does not support an ineffective assistance of counsel claim. See Green v. State, 975 So. 2d 1090, 1104-05 (Fla. 2008) (rejecting claim of ineffective assistance of counsel at voir dire because juror was competent to serve and allegations of failure to ask further questions was speculative); Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002) (holding that an allegation that there would have been a basis for a for-cause challenge if counsel had "followed up" during voir dire with more specific questions was mere conjecture). Trial counsel testified that the defense's goal during voir dire was to challenge the most State-oriented jurors and to pick the best of the available panel. After exercising numerous cause challenges and all of their peremptory challenges, the defense "team" selected who they thought were the best available jurors for Merck's penalty phase proceedings. As Merck failed to carry

his burden under Strickland of establishing ineffective assistance of counsel, this Court should affirm the postconviction court's order denying the instant claim.

ISSUE III

THE POSTCONVICTION COURT PROPERLY DENIED MERCK'S CLAIM THAT RESENTENCING PENLATY PHASE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROFFER TESTIMONY THAT MERCK WAS A MINOR PARTICIPANT IN THE MURDER.

In his third claim, Merck asserts that his penalty phase counsel was ineffective for failing to proffer testimony that Merck was a minor participant in the murder and that the actual killer was his companion, Neil Thomas. Collateral counsel acknowledges that at a motion in limine hearing on March 1, 2004, resentencing counsel Schwartzberg argued to the court that he should be allowed to introduce evidence to the jury that there was "contradictory evidence" as to the identity of the individual who caused the death of Mr. Newton. (ROA Addendum 618-28). Defense counsel indicated that he wanted to introduce evidence that Neil Thomas provoked the confrontation; Thomas supplied alcohol to Merck on the night of the incident; Katherine Sullivan's description of the clothing worn by the killer was similar to clothing worn by Neil Thomas; and fingerprint evidence was consistent with Neil Thomas' prints. (ROA Addendum 618-24). The State noted that the same motion had been made prior to Merck's second sentencing hearing, was rejected by the trial court, and that ruling was not overturned on appeal.

After hearing argument from both sides regarding defense counsel's motion, the court denied the motion in limine. Defense counsel Schwartzberg inquired whether the court's ruling precluded him from putting forth evidence in support of the statutory mitigator that Merck was a minor participant. (ROA Addendum 628-29). The court responded that defense counsel could not introduce evidence regarding this mitigator because Merck was the only person charged and convicted, and thus, his participation could not be minor. (ROA Addendum 628-30). Schwartzberg responded that, even though Merck was the only person charged and convicted, it should not preclude him from presenting evidence to support the mitigator of minor participation. The court again denied counsel's motion and noted that allowing such evidence would indirectly allow Merck to relitigate the issue of guilt.[10] (ROA Addendum 632-33).

On March 19, 2004, after the evidence had been presented to the penalty phase jury, the court initiated the jury instruction

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[10] It is well established that residual or lingering doubt is inappropriate mitigation evidence at the penalty phase. See Reynolds v. State, 934 So. 2d 1128, 1152 (Fla. 2006); England v. State, 940 So. 2d 389, 406 (Fla. 2006); Duest v. State, 855 So. 2d 33, 40 (Fla. 2003). Thus, the trial judge properly excluded evidence regarding Merck's theory that Neil Thomas committed the murder. Likewise, Merck's attempt to introduce lingering doubt evidence under the guise of "minor participation" mitigation was also properly excluded as Neil Thomas was not an accomplice or codefendant in the instant crime.

conference. (ROA 2d Addendum V3:542-44). The court asked Schwartzberg to confirm that only two mitigators would be presented to the jury; one being Merck's age at the time of the offense, and the second being any other aspect of Merck's character, record or background, or any other circumstance of the offense. (ROA 2d Addendum V3:542-44). Counsel responded by stating the following:

> That is based on the Court's ruling, Judge. It is our position previously, as I have stated, that without the evidence that I will be proffering to the Court, after we are completed about this substantial participation of another and that Mr. Merck was not the person who actually committed the crime based on other factors which this Court has precluded from being there.

(ROA 2d Addendum V3:543).

On appeal to this Court, Merck argued that the trial court erred in excluding this evidence, and this Court rejected his argument and stated:

> In this claim, Merck argues that the trial court erred in excluding defense evidence regarding the circumstances of the murder. He claims that the trial court improperly excluded testimony that would tend to show that he did not fatally stab the victim and that his involvement in the crime was minor.
>
> The record reflects that except for the testimony identified below that was not proffered, the allegedly excluded testimony was presented to the jury. Contrary to Merck's argument on appeal, the jury heard that Neil Thomas illegally bought alcoholic drinks for an underage Merck on the night of the murder. Thomas testified that he, not Merck, called the victim a "pussy" and that the victim's subsequent refusal to

fight may have been perceived by Merck as disrespectful and annoying. Thomas testified that he drove Merck away from the crime scene and that they changed clothes so that they would be less recognizable, hid from the police in some bushes, and played pool together later that night. Finally, Thomas testified that he had not been charged with any crime regarding Newton's murder, denied being given preferential treatment, and explained the prosecuting attorney's role in and the circumstances surrounding his release after turning himself in to police in 1997 on a 1994 arrest warrant.

Merck argues that the trial court excluded potentially exculpatory testimony by a fingerprint examiner and evidence that eyewitness Katherine Sullivan's description of the stabber's clothing matched Thomas's clothing, not Merck's. The record does not contain a proffer of such testimony. Thus, we deny Merck's claim.[FN4] See Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990) ("A proffer is necessary to preserve a claim such as this because an appellate court will not otherwise speculate about the admissibility of such evidence.").

[FN4. The trial judge initially denied Merck's motion in limine regarding the foregoing evidence because he found that the prior trial judge's denial of the same motion during the first resentencing became the "law of the case" after it was upheld on appeal by this Court. This law-of-the-case reasoning was erroneous. First, in Merck's appeal from his first resentencing, this Court declined to reach Merck's claim that the trial court erred in excluding evidence regarding another suspect because the Court found reversible error on another ground. Merck II, 763 So. 2d at 297. Second, this Court has consistently applied the "clean slate" rule to resentencing proceedings. Preston v. State, 607 So. 2d 404, 408 (Fla. 1992). A resentencing is to proceed in every respect as an entirely new proceeding. A trial judge is to properly apply the law during the new penalty phase and is not bound in proceedings after remand by a prior legal error. Id. at 409 (citing Spaziano v.

> State, 433 So. 2d 508, 511 (Fla. 1983), aff'd, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)). However, the evidence was either admitted or not proffered, and therefore the trial court's erroneous law-of-the-case ruling was harmless error.]

Merck v. State, 975 So. 2d 1054, 1060-61 (Fla. 2007).

The postconviction court granted Merck an evidentiary hearing on this claim, and after hearing the evidence, the court denied the claim and found that Merck had failed to show deficient performance and prejudice. (PCR V3:312-15). The court noted that counsel did not perform deficiently because Schwartzberg argued extensively to the trial judge that he should be allowed to admit this evidence before the jury, but the court denied his request and specifically precluded him from introducing this evidence. Merck next claims that counsel was ineffective when he failed to proffer the evidence that the court had previously ruled was inadmissible after he informed the court of his intention to proffer such evidence. The postconviction court found Merck's interpretation "flawed and illogical." As the court noted, although "undoubtedly unclear," counsel's statements at the charge conference cannot be construed to mean that counsel intended to proffer additional evidence because all the evidence had already been presented at

that time and counsel's comments indicated that he was aware the court would not allow a proffer.

In addition to failing to establish deficient performance, the postconviction court also found that Merck failed to establish prejudice. Merck argues that, had counsel proffered the evidence and preserved it for appellate review, this Court would have reversed for a new penalty phase. As the lower court properly found, Merck's argument is without merit. This Court noted that the majority of the allegedly excluded evidence was actually admitted to the jury. See Merck, 975 So. 2d at 1061-62. As to the excluded evidence which was not proffered or presented to the jury, Henry Brommelsick's fingerprint analysis and Katherine Sullivan's description of the clothing worn by the killer, trial counsel's failure to proffer this evidence did not prejudice Merck in any way as this Court has consistently held that lingering doubt is inadmissible at the penalty phase.

Even if this Court were to consider this inadmissible lingering doubt evidence, a review of the excluded evidence establishes that there is no question as to Merck's guilt or participation in this murder. Henry Brommelsick, a fingerprint analyst, testified at the postconviction evidentiary hearing that Neil Thomas' fingerprints were found on the driver's side exterior window, on the exterior of the passenger side's roof

and window, and on the rear hatch glass. Merck's fingerprints were also found at numerous places on the exterior of the passenger side of the car, including the roof, but none of Merck's prints were found on the driver's side of the car. Brommelsick's testimony did not refute in any manner the eyewitness testimony establishing that Merck committed the instant murder. Likewise, Katherine Sullivan's description of the killer's pants did not call into question her out-of-court and in-court identification of Merck as the killer[11] or the other substantial evidence establishing Merck's guilt. All of the evidence excluded from the resentencing proceedings was admitted at Merck's guilt phase in 1993, and the jury found that Merck committed the murder beyond a reasonable doubt. Because Merck failed to establish that his penalty phase counsel performed deficiently by failing to proffer this evidence and that he was prejudiced by this alleged deficiency, this Court should deny the instant claim.

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[11] Katherine Sullivan's identification of Merck focused on the relative height and size differences between Merck and Thomas, their different hair styles, the fact that Thomas was wearing a black shirt and Merck was wearing a light pink, long-sleeved dress shirt, Merck's droopy or "buggy" eyes, his Southern accent, and her over-hearing the killer referred to as "Troy." (DAR V22:420-49).

ISSUE IV

APPELLANT'S CLAIM THAT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED WHEN LAW ENFORCEMENT FAILED TO PRESERVE ALLEGEDLY EXCLUPATORY EVIDENCE DURING THE SEARCH OF THE VEHICLE IS PROCEDURALLY BARRED.

Merck asserts that law enforcement's failure to preserve a shirt and pair of khaki pants found during the search of the vehicle abandoned by Merck and Thomas was a bad-faith failure to preserve exculpatory evidence in violation of his due process rights. See Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."). The postconviction summarily denied the instant claim as one that could have been, and actually was, raised on direct appeal. (PCR V3:303-05). The court noted that the instant issue was raised and rejected on direct appeal following Merck's conviction and sentence of death in 1993. In Merck v. State, 664 So. 2d 939, 942 (Fla. 1995) (emphasis added), this Court stated:

> In Issue 4, Merck asserts that the failure on the part of Detective Nestor to keep as evidence a pair of khaki pants located during the search of the vehicle abandoned by Merck and his companion after the murder, was a bad-faith failure to preserve potentially exculpatory evidence, resulting in a denial of due process. In examining the items found in the vehicle, **Detective Nestor meticulously looked at every item**

> **found in the car**, and a videotape was made of the search. Detective Nestor testified that it was his job as the case agent to determine which of these items had evidentiary value. **He retained all items that he determined to have evidentiary value, and he left the other items in the vehicle. The vehicle was thereafter available to be picked up by its registered owner [Merck's brother]. One of the items examined by Detective Nestor was a pair of "baggy khaki colored style pants." Detective Nestor testified that after he examined those pants and found no blood stains on them, he concluded that they did not have evidentiary value and left the pants in the vehicle.**
>
> Merck raised this issue in post-trial motions which were acknowledged not to be timely. Merck asserts that the failure to maintain this evidence was fundamental error and, as such, can be raised for the first time post-trial. We do not agree. Here, the failure to preserve the khaki pants was clearly known by Merck prior to and during the trial. The issue was not preserved by timely objection and was not properly the basis for a post-trial attack on the conviction. State v. Matera, 266 So. 2d 661 (Fla.1972).
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> **However, even if there had been a timely presentation of this issue, based upon our review of the record, we conclude that the failure to preserve the khaki pants was not a denial of due process pursuant to Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), and Kelley v. State, 569 So. 2d 754 (Fla.1990). There is simply no showing that Detective Nestor acted in bad faith in deciding not to preserve pants which had no blood stains. Moreover, Merck has to stack multiple inferences in order to postulate that the pants were either material or exculpatory. Thus, we find no merit in Merck's fourth issue.**

In an effort to avoid the clear procedural bar, Merck alleges that Detective Nestor gave "revised" testimony at Merck's resentencing proceedings in 1997, which this Court and trial counsel did not have the benefit of at the time of Merck's

1993 trial and subsequent appeal. Merck's claim is without merit. As the postconviction court properly found in denying this claim:

> Det. Nestor's 1997 testimony did not provide any information that would entitle Merck to relief. It was undisputed since the time of trial that Det. Nestor saw a pair of khaki pants but did not keep them because he did not believe that they had any evidentiary value due to the lack of visible blood. It was also known at the time of trial that Det. Nestor was aware that Sullivan identified the killer as wearing khaki pants. The crux of this information was previously available to Merck and has already been considered.

(PCR V3:305). Because this Court has already rejected this claim, finding that there was no due process violation under Youngblood, and Detective Nestor did not add any new information at Merck's subsequent proceedings, this Court should affirm the lower court's finding that the claim is procedurally barred.

ISSUE V

THE POSTCONVICTION COURT PROPERLY REJECTED MERCK'S CLAIM THAT HIS PENALTY PHASE COUNSEL WAS INEFFECTIVE FOR MAKING THE INFORMED AND STRATEGIC DECISION TO PRESENT THE DEFENSE MENTAL HEALTH EXPERT AT THE SPENCER HEARING RATHER THAN BEFORE THE JURY.[12]

Collateral counsel asserts that penalty phase counsel was ineffective for failing to provide sufficient background material to his mental health expert and for failing to present the expert's testimony to the jury. Specifically, Merck argues at length that penalty phase counsel Schwartzberg was "uninformed" about Dr. Maher's potential testimony and was not prepared to present his testimony to the jury at the penalty phase. Merck speculates that "[w]hen the time came for Schwartzberg to do his job; he realized that he had not spoken to Dr. Maher and had no idea what Maher's opinions would be so he got "cold feet" and abdicated his responsibility." Initial Brief of Appellant at 82.

After conducting a hearing on Merck's claim, the postconviction court denied the claim and stated:

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[12] Although counsel claims in the heading of this issue that penalty phase counsel was ineffective for failing to provide Dr. Maher with "sufficient background information to establish both statutory and non-statutory mitigation," counsel never identifies *any* information allegedly not supplied to Dr. Maher, nor does counsel ever discuss this allegation in the argument section of his brief. Accordingly, this sub-claim has been abandoned.

Merck claims that during his penalty phase in 2004, counsel rendered ineffective assistance by failing to provide his mental health expert, Dr. Michael Maher, with sufficient background information to establish both statutory and non-statutory mitigation. He also contends that counsel made an uninformed decision not to call Dr. Maher to testify before the jury. Specifically, he alleges that the contact between Schwartzberg and Dr. Maher was "extremely perfunctory," and that counsel was completely unaware of the testimony Dr. Maher was prepared to give.

Merck contends that he was prejudiced by counsel's failure, because the jury remained unaware that the prenatal abuse by his mother "was a precursor to a neurodegenerative process of chronic nature that ultimately was the cause of statutory mitigation." In particular, he claims that Dr. Maher would have testified about Merck's ptosis and impulsivity, which resulted from his mother's attempt to abort him, and that he would have explained "the subtle signs of insanity." Merck's position is that but for counsel's uninformed decision not to call Dr. Maher, the two statutory mitigators would have been clearly established, resulting in a different outcome.

To the extent that Merck alleges that the contact between Schwartzberg and Dr. Maher was minimal, the court finds that the claim is corroborated by Dr. Maher's testimony at the evidentiary hearing. Nevertheless, the record does not support Merck's assertion that counsel's decision was uninformed.

During his deposition in 2003, Dr. Maher discussed Merck's mental health as well as the possible basis for several statutory mitigators. (See Exhibit F: Transcript of October 20, 2003, Deposition of Dr. Michael Maher, pp. 30-35). Schwartzberg was present at that deposition, and would have heard Dr. Maher's opinion and testimony regarding these mitigators. He also would have had access to transcript of Dr. Maher's extensive 1992 deposition, which was contained in the record. Additionally, during the evidentiary hearing, Dr. Maher, who estimated that he had worked with Schwartzberg on at least a dozen cases, testified that Schwartzberg was

generally knowledgeable about the law and its relation to issues of mental health, and that both Schwartzberg and Watts had substantial prior experience in dealing with experts on the issue of psychological mitigation in death penalty cases. Thus, counsel had sufficient information to understand the value of Dr. Maher's testimony.

Not only does the record support an inference that counsel's decision was informed, but it also reflects that his decision was strategic. Counsel was aware that if he called Dr. Maher to testify before the jury, the State would call its expert witness, Dr. Vince Slomin, in rebuttal. (Exhibit D: p. 467). When it was announced that the defense would not be calling Dr. Maher, or any other expert for mitigation, the court explained to Merck that doing so would preclude the State from calling an expert in rebuttal. (Exhibit D: p. 523). It also explained that any mitigating evidence presented to the court during the Spencer hearing could not be argued for the jury. (Exhibit D: pp. 525-526). As for Dr. Maher in particular, the State noted that it saw "a very strategic reason" for choosing not to call him. (Exhibit-D: p. 526). Having discussed these issues with his lawyers during a recess, Merck confirmed his agreement with the decision, and his understanding of its consequence. (Exhibit D: p. 526).

Moreover, at the Spencer hearing, Schwartzberg thoroughly explained his reason for not calling Dr. Maher to testify in front of the jury. (Exhibit D: pp. 65 1-653). Schwartzberg expressed his concern that Dr. Slomin's testimony in rebuttal of Dr. Maher would have confused the jury about the actual term to be served if Merck received a life sentence. (Exhibit D: pp. 65 1-653). This is reflected by Schwartzberg's objection on grounds that Dr. Slomin's testimony would "create the exact same problem that lead [sic] this jury to the question they asked you within minutes of being out." Thus, the essence of Schwartzberg's argument was that Dr. Slomin's rebuttal would have been detrimental to Merck, in light of the court's previous ruling to exclude certain evidence, which he believed to be "necessary to return an appropriate recommendation in this particular case." (Exhibit D: p. 655).

For these reasons, the Court concludes that counsel was not deficient in failing to call Dr. Maher before the jury; rather, counsel made an informed and strategic decision based on his experience, and based on his determination that the State's rebuttal witness could have had a harmful impact on Merck's case. See Fennie v. State, 855 So. 2d 597 (Fla. 2003) (finding that counsel could not be deemed ineffective for failing to call a witness at the penalty phase after learning that the witness posed problems and might be harmful for the defense); see also Gaskin v. State, 822 So. 2d 1243, 1248 (Fla. 2002).

Even if Merck had demonstrated that counsel was deficient, his claim would fail under the second part of Strickland, as Dr. Maher's testimony could have resulted in the exposure of other significantly damaging evidence.

At the evidentiary hearing, Dr. Maher confirmed that in his opinion, Merck suffered from an impulsivity disorder. This allowed the State to inquire into the basis for the diagnosis, and subsequently elicit highly prejudicial testimony about Merck's violent history. For instance, Dr. Maher confirmed his awareness of several violent acts committed by Merck, and his opinion that each of those was consistent with his diagnosis.

And, even if Merck's previous acts of violence could have been excluded, Dr. Maher's testimony regarding Merck's initial recollection of the crime would have been substantially detrimental. Specifically, at the evidentiary hearing, Dr. Maher testified that during their initial interview, Merck admitted that he stabbed the victim. Further, the State called Dr. Maher's attention to his 1992 deposition, in which he stated that Merck "ultimately acknowledged that the way he responded was beyond what he even thought was necessary to protect himself." (Exhibit G: Transcript of October 28, 1992, Deposition of Dr. Michael Maher, pp. 11-13). **Based on these reasons, the court concludes that Merck was not prejudiced by counsel's decision not to call Dr. Maher during the penalty phase.** See Gaskin, 822 So. 2d at 1248. ("Counsel will not be held ineffective when a decision is made to not present mental mitigation

> because it could open the door to other damaging testimony.”). In fact, the detrimental effect of hearing about Merck’s violent history, as well as his initial confession, would likely have outweighed any benefit incurred from Dr. Maher’s testimony. Accordingly, this claim is denied.

(PCR V3:313-16) (footnote omitted and emphasis added).

The record clearly supports the postconviction court’s finding that counsel made “an informed and strategic decision” to present Dr. Maher at the Spencer hearing rather than before the jury. At the evidentiary hearing, penalty phase counsel Richard Watts testified that he was primarily responsible for the preparation of the lay witnesses and that Schwartzberg was responsible for dealing with the defense’s mental health expert, Dr. Maher. Watts testified that, after Dr. Maher’s deposition was taken,[13] a decision was made regarding presenting Dr. Maher at the Spencer hearing rather than before the jury, but Watts did not have any specific recollection of the decision-making process.

Although defense counsel Schwartzberg had passed away and was unavailable to testify regarding the strategic reasons for presenting Dr. Maher at the Spencer hearing rather than before the jury, the postconviction court properly found that the

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[13] Schwartzberg and Watts attended the State’s deposition of Dr. Maher in 2003 (PCR V3:336), and also had access to Dr. Maher’s prior deposition from 1992.

record from the penalty phase establishes that counsel had a valid strategic reason for making this decision. At the penalty phase, the State announced that if the defense called Dr. Maher, the State was prepared to call Dr. Slomin as a rebuttal witness. (ROA 2d Addendum V3:467). Subsequently, when the defense indicated that they would not be presenting Dr. Maher before the jury, the court conducted a colloquy with Merck and he confirmed that he was aware of this decision and agreed with it. The court noted that this would prevent the jury from hearing Dr. Slomin's rebuttal testimony and defense counsel indicated that the defense could call Dr. Maher at the Spencer hearing. (ROA 2d Addendum V3:520-29). In fact, at the Spencer hearing, defense counsel called Dr. Maher and Schwartzberg explained in detail his strategic reason for making this decision. (ROA 2d Addendum V4:631-52). Schwartzberg informed the court that he was concerned that Dr. Slomin's rebuttal testimony would have created problems and confused the jury. (ROA 2d Addendum V4:651-56).

Obviously, the record supports the postconviction court's conclusion that penalty phase counsel considered presenting Dr. Maher at the penalty phase, but opted instead to present his testimony at the Spencer hearing. The law is well established that "[t]actial decisions regarding whether or not a particular

witness is presented are 'subject to collateral attack in rare circumstances when the decision is so irresponsible as to constitute ineffective assistance of counsel.'" Fennie v. State, 855 So. 2d 597, 606 (Fla. 2003) (quoting Jackson v. State, 711 So. 2d 1371, 1372 (Fla. 4th DCA 1998)); see also White v. State, 964 So. 2d 1278 (Fla. 2007) (finding that trial counsel was not ineffective for making the strategic decision to present testimony at Spencer hearing rather than in front of the jury); Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("Strategic 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 trial counsel had a valid strategic reason for presenting Dr. Maher at the Spencer hearing rather than before the jury, Merck cannot establish deficient performance and this Court should affirm the lower court's denial of this claim.

Additionally, although not required to consider the second prong of Strickland given Merck's failure to establish deficient performance, the lower court nevertheless found that Merck failed to establish prejudice as a result of trial counsel's decision to present Dr. Maher at the Spencer hearing. A review of Dr. Maher's depositions in 1992 and 2003, the latter of which

trial counsel Schwartzberg and Watts attended, refutes any allegation that trial counsel failed to provide Dr. Maher with background information regarding mental health mitigation or that trial counsel was somehow unaware of Dr. Maher's findings regarding Merck's mental status and the applicability of the two statutory mental mitigators.[14] (DAR V6:922-62; PCR V2:260-99). As the lower court noted, if trial counsel had presented Dr. Maher to the jury, the State would have called Dr. Slomin in rebuttal and been able to "elicit highly prejudicial testimony about Merck's violent history." (PCR V3:315). In support of Dr. Slomin's diagnosis that Merck suffered from antisocial personality disorder, he would have exhaustively testified about the details of Merck's prior violent crimes before the jury. Dr. Slomin would have also rebutted Dr. Maher's opinions regarding Merck's alleged brain damage and the applicability of the two statutory mental mitigators. Thus, had Dr. Maher been presented before at the penalty phase, the jury, like the sentencing judge, would have rejected Dr. Maher's opinion that the statutory mental mitigators applied to Merck in light of Dr.

[14] Although Schwartzberg was not as communicative with Dr. Maher as he had been in past cases, the evidence supports the postconviction court's finding that Schwartzberg was informed and aware of Dr. Maher's opinions and made a strategic decision not to present him before the jury.

Slomin's rebuttal testimony and the other factual evidence. (ROA V2:312-13).

Any allegation of prejudice is further rebutted by the fact that trial counsel presented Dr. Maher's testimony at the Spencer hearing and the sentencing court, and this Court on appeal, were well aware of Dr. Maher's diagnoses. As this Court stated in Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), when addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." In this case, Merck has failed to carry his burden of showing that, had trial counsel acted as alleged, there is a reasonable probability that he would have obtained a life sentence. Because Merck has failed to meet his burden of establishing deficient performance and prejudice as required by Strickland, this Court should affirm the lower court's denial on the instant claim.

ISSUE VI

MERCK FAILED TO ESTABLISH THAT HIS PENALTY PHASE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST JURY INSTRUCTIONS ON THE TWO STATUTORY MENTAL MITIGATORS WHEN THERE WAS NO EVIDENCE INTRODUCED TO JUSTIFY THE INSTRUCTIONS.

In his final claim, Merck alleges that his penalty phase counsel was ignorant of prevailing law and ineffective for failing to request that jury instructions on the two statutory mental mitigators be read to the jury. Merck claims that counsel should have requested that the jury consider: (1) that Merck's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired; and (2) that Merck was under the influence of extreme mental or emotional disturbance at the time of the murder. Merck asserts that the evidence from the lay witnesses concerning Merck's alcohol use and his troubled background would have legally supported the giving of the instructions on the two mental mitigators.

The postconviction court rejected Merck's claim and stated, in pertinent part:

> . . . [I]n its August 6, 2004 sentencing order, the court found that the extreme mental or emotional disturbance and impaired capacity mitigating factors had not been shown. The court evaluated those factors based upon both the testimony presented at the Spencer hearing and the testimony presented to the jury during

the penalty phase trial. The penalty phase trial jury was not instructed on these two mitigating factors.

However, during the penalty phase trial, the jury heard testimony concerning Merck's background and extensive alcohol use. Merck's sister, Stacy France, testified that their mother attempted to abort Merck and mentally and physically abused him after he was born, beating him frequently. (Exhibit D: pp. 454-455). The jury also heard from Ann Rackley, who ran a group home for children who were abandoned, abused, or neglected or had emotional problems. She testified that Merck lived at the home for a time during his childhood. (Exhibit D: pp. 473-474). Rackley further testified that she learned that Merck had essentially been his mother's "hitting post" and that Merck was placed in a class for emotionally handicapped children. (Exhibit D: pp. 476-480). During his time at the group home, Rackley testified, Merck progressed academically and in his interaction with others. (Exhibit D: pp. 481-483). Rackley's testimony reflected that Merck's mother chose to take him out of the group home, however, because she would be able to receive government assistance if Merck was living at home with her. (Exhibit D: p. 483). Merck's one-time foster mother, Linda Snyder, testified that Merck did well in her care but was always "disturbed" when he returned after a visit home. (Exhibit D: pp. 494 - 495). Finally, Merck told the jury directly that he remembered drinking alcohol even as a young child and that he drank extensively throughout his life. (Exhibit D: pp. 530, 536 - 537). As to the amount of alcohol Merck consumed on the night of the murder, Thomas testified that he recalled that Merck had approximately five to six beers and up to four shots of alcohol. (Exhibit D: pp. 321 - 322).

At the evidentiary hearing, Watts testified that it was Schwartzberg who took responsibility for asking for any statutory mitigating factors at the jury instruction conference, but Watts did agree that all the witnesses who were called to testify concerning mitigation did so and that the testimonial evidence concerning mitigation "was delivered" to the jury. Watts further testified that he remembered Rackley's testimony as especially forceful.

The court finds that Merck is not entitled to relief on this claim. First, there was no evidence, based upon the testimony presented to the jury, that these aspects of Merck's background affected him at the time of the murder. Merck says the instructions should have been given based upon the testimonial "civilian" evidence actually provided. But the testimony given by France, Rackley, Snyder, Thomas, and Merck himself did not support the position that, at the time of the murder, Merck was under extreme mental or emotional disturbance or that his capacity to conform his conduct to the law was impaired.

Accordingly, there simply was no information presented mandating that instructions be provided on the two mitigating factors in question. Regarding the instruction on extreme mental or emotional disturbance, as in Duest v. State, 855 So. 2d 33, 42 (Fla. 2003), although there was evidence that Merck consumed alcohol the night of the murder, there was not any evidence that Merck "was under an extreme mental or emotional disturbance at the time of the killing," nor was there any evidence of Merck's "probable mental state at the time of the murder." See also Geralds v. State, 674 So. 2d 96, 101 (Fla. 1996) (holding that the trial court was not required to instruct the jury on the extreme mental or emotional disturbance mitigator when there was no evidence about the defendant's mental condition at the time of the murder.) Additionally, it is not evident that the testimony presented to the jury about Merck's alcohol use required that the impaired capacity instruction be provided to the jury. Duest, 855 So. 2d at 42 ("Evidence of consumption of intoxicating substances, without more, does not require an instruction on [the impaired capacity] mitigator." **Although Merck argues that counsel did not request these instructions because counsel was ignorant of the law, there is no evidence before the court to support this contention. His argument appears to be based merely upon Schwartzberg's statement that he would only seek the age and "catch-all" mitigating factors. However, based on the foregoing, counsel was not required to seek the instructions on the other two mitigators, and it is likely that the court would have denied any such request.**

> Plus, the jury did hear extensive testimony about Merck's background, as summarized above, and was instructed on the "catch-all" mitigating factor. The jury therefore was able to consider all of the information recalled by various witnesses as part of Merck's background in regard to mitigation. Even having heard this testimony, and having been instructed that they could consider any other aspect of Merck's character, record, or background, the jury voted in favor of imposing the death penalty. Accordingly, the court finds that Merck has not met his burden under Strickland, and Claim IId is denied.

(PCR V3:316-18) (footnote omitted and emphasis added).

As the postconviction court correctly noted, there is simply no evidence to support collateral counsel's assertion that penalty phase counsel Schwartzberg was ignorant of the law when he failed to request jury instructions on the two statutory mental mitigating factors. Rather, the record of the charge conference supports the inference that penalty phase counsel simply recognized that there was no evidence introduced, *at that time*, which would support the instructions. (ROA 2d Addendum V3:542-44). Subsequently, at the Spencer hearing, penalty phase counsel presented mental health testimony from Dr. Maher and, based on Dr. Maher's testimony, argued in his written Memorandum in Support of a Life Sentence that the two statutory mitigators applied. (ROA V2:295-304).

Although counsel presented evidence of Merck's extensive alcohol use and his placement in emotionally handicapped classes

during his childhood, this presentation from civilian witnesses did not mandate the giving of jury instructions on the two statutory mental mitigators. In the case of Morris v. State, 931 So. 2d 821 (Fla. 2006), this Court addressed a similar ineffective assistance of penalty phase counsel claim based on counsel's failure to request jury instructions on the two statutory mental mitigators. In Morris, there was evidence presented to the jury from a mental health expert, Dr. Dee, that Morris had an IQ of 82, had been diagnosed with attention deficit hyperactivity disorder (ADHD) as a child, had been in educable mentally retarded classes in school, and had abused alcohol and various controlled substances. Id. at 835. However, as this Court noted when rejecting this claim:

> [T]here was no evidence presented to the jury during the penalty phase that Morris' IQ level, ADHD, or drug abuse affected his behavior before or during the time that he committed the murder. Nor was there any evidence presented to the jury at the penalty phase that Morris had any brain damage. As a result, the jury did not hear any evidence to support a finding that either statutory mitigator existed. . . . Because no testimony as to either statutory mitigator was presented to the jury during the penalty phase, if counsel had requested an instruction on these mitigating circumstances it likely would have been denied by the trial court.

Id. at 836.

Likewise, in the instant case there was no evidence presented to the jury that would have justified trial counsel

requesting the statutory mental mitigator instructions. Trial counsel's decision was not the result of ignorance of the law, but rather, was a reflection of a highly experienced counsel's informed and strategic decision to present Dr. Maher's testimony at the Spencer hearing. A strategic choice such as the one made by defense counsel in this case is almost immune from postconviction attack. See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000) ("Counsel's strategic decisions will not be second guessed on collateral attack.").

Even assuming *arguendo* that Merck established the requisite deficiency based on counsel's failure to request the statutory mental mitigating instructions, he has failed to show any resulting prejudice. With regard to the penalty phase, this Court observed that a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

Here, Merck failed to show that the evidence presented to the jury from the civilian witnesses regarding his alcohol use and troubled upbringing even supported an instruction on the statutory mental mitigating circumstances. See Geralds v. State, 674 So. 2d 96 (Fla. 1996) (stating that a defendant must produce evidence that he was under the influence of an extreme mental or emotional disturbance at the time of the murder in order to have the jury give a jury instruction on the statutory mental mitigator); Duest v. State, 855 So. 2d 33, 42 (Fla. 2003) (stating that "[e]vidence of consumption of intoxicating substances, without more, does not require an instruction" on the impaired capacity mitigator). Thus, because Merck never presented evidence to the jury that either of these statutory mental mitigators applied at the time of the murder, even if counsel had requested the instructions, the request would have been denied by the trial court. Furthermore, the jury was instructed to consider "any and all circumstances" presented in Merck's background as a mitigating circumstance -- the "catch-all" instruction. Accordingly, based on these facts, the State submits that the lower court properly denied Merck's claim as he has failed to establish both deficient performance and prejudice.

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. mail to Richard E. Kiley, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 2nd day of December, 2011.

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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