IN THE SUPREME COURT OF FLORIDA

LUTHER DOUGLAS

Appellant,

v. SC10-318

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellant, LUTHER DOUGLAS, raises three claims in this appeal from the denial of his amended motion for post-conviction relief. Douglas will be referred to as "Douglas" or "Appellant". The State will be referred to as "the State" or "Appellee".

The seven (7) volume record on appeal in the instant case will be referenced as "PCR" followed by the appropriate volume number and page number. The one volume supplemental record will be referred to as "PCR Supp" followed by the appropriate page number.

References to the record from Douglas's direct appeal will be referred to as "TR" followed by the appropriate volume and page number. References to Douglas's initial brief will be to "IB" followed by the appropriate page number.

CASE SNAPSHOT

This is an appeal from the denial of a motion for post-conviction relief. Douglas raises three claims, two of which have been repeatedly rejected by this Court. Douglas does not raise any guilt phase issues. The heart of Douglas's appeal is that trial counsel was ineffective during the penalty phase of Douglas's capital trial because counsel failed to put on mental mitigation evidence.

On December 26, 1999, Douglas raped and murdered eighteen year old Mary Ann Hobgood. Born on July 4, 1974, Douglas was 25 years old at the time he murdered Ms. Hobgood.

Miss Hobgood was a friend of Douglas's girlfriend. Before the night of the murder, Douglas had never met Ms. Hobgood. Douglas was arrested a month after the murder and charged with first degree murder and sexual battery. Douglas pled not guilty and proceeded to jury trial. Contrary to his pleas, a Duval County jury found Douglas guilty of felony murder and sexual battery.

At the penalty phase of Douglas's trial, trial counsel called twelve (12) mitigation witnesses. The gist of their testimony was that Douglas came from a religious, close-knit family, that Douglas's father, who was strict and controlling, sexually molested Douglas's older sister and was forced to leave when Douglas was nine or ten years old, that Douglas loves and

cares for his own four children, that Douglas is a good brother and son, that Douglas is a positive, upbeat and friendly person, that Douglas is a smart person, although he dropped out of high school due to reading problems, and that Douglas worked at various jobs.

Douglas's jury recommended that Douglas be sentenced to death by a vote of 11-1. The trial court found two aggravating factors: (1) the murder was especially heinous, atrocious, or cruel (HAC) and (2) murder in the course of an enumerated felony (sexual battery). The trial court found one statutory mitigator; no significant criminal history, and sixteen (16) non-statuory mitigators. The trial court followed the jury's recommendation and sentenced Douglas to death.

On direct appeal, this Court affirmed Douglas's death sentence. In May 2005, Douglas filed a motion for post-conviction relief, which he subsequently amended.

The collateral court held an evidentiary hearing on Douglas's motion. After both parties were afforded an opportunity to present post-evidentiary hearing memoranda and proposed orders for the collateral court's consideration, the collateral court denied Douglas's motion for post-conviction relief. This appeal follows.

STATMENT OF THE CASE AND FACTS

The relevant facts concerning the December 26, 1999 murder of eighteen year old Mary Ann Hobgood are recited by the Florida Supreme Court on direct appeal:

> …On the evening of December 25, 1999, Hobgood left her parents' house in Jacksonville, Florida, with her friend, Misty Jones. Douglas, who was Jones's boyfriend at the time and who had not previously met Hobgood, drove Jones to Hobgood's house and drove away with both women in his vehicle. The vehicle Douglas was driving that night was a red Ford Escort, which belonged to Jimela Dozier, the mother of one of Douglas's children. Jones later described the condition of the vehicle that night as dirty with trash inside and pollen and dirt on the exterior. After leaving Hobgood's, the three first stopped at a liquor store and bought a bottle of rum and soda, which Douglas and Hobgood drank. They then went to several bars in the Jacksonville area. Around midnight, Jones indicated that she was not feeling well and Douglas drove her home. Douglas then left Jones's house in the Escort with Hobgood.
>
> Approximately two hours later, Douglas arrived at the apartment where he was living and asked a teenage occupant to go with him to "take care of some business." When Douglas's request was refused he left the apartment.
>
> Jones testified that Douglas called her in the early morning hours of December 26, first telling her that he had dropped Hobgood off at a bar and then stating that he had taken Hobgood home. When Jones saw Douglas that morning she noticed scratch marks on his neck that had not been there the previous evening. In Douglas's presence, Jones called Hobgood's home, and after speaking with Hobgood's mother, learned that Hobgood had not returned home. When Hobgood's sister called Jones sometime later that day, Jones told her that they had been out the night before with Timothy Hightower, Jones's ex-boyfriend. Jones testified that she lied to Hobgood's sister because Douglas was with her and she figured that something was wrong.

Jones then confronted Douglas regarding Hobgood's whereabouts. The two went for a drive in the red Escort, which Jones noticed was newly clean inside and out. During the drive, Douglas admitted to Jones that he had beaten Hobgood and thrown her out of the car, leaving her for dead. Jones recalled that when she asked Douglas if he beat Hobgood because "she didn't have sex with black boys," Douglas just smiled. Douglas also told Jones that if she was questioned she should point the blame toward Hightower or she would end up like Hobgood. When police officers questioned Jones later that night she told them the same story she relayed to Hobgood's sister--that she and Hobgood had gone out with Hightower. Jones also gave a sworn statement to that effect. Jones subsequently recanted those statements when the officers questioned her again in January 2000 and told her that they knew she had lied.

On the afternoon of December 26, 1999, Hobgood's body was found along a set of railroad tracks. She was positioned on her back in a shrub line with her legs stretched out in front of her. Hobgood's body was nude from the waist down, except for her black socks. Her knit top and black bra were torn and pushed up to her shoulders, exposing her breasts. A few feet from Hobgood's body, the police found a tire lug wrench, a rubber car part and a blood soaked maroon jacket. The maroon jacket was later identified by Jones as the one worn by Douglas on December 25. A Jacksonville Sheriff's Office detective testified that the rubber car part looked identical to a part recovered from the red Ford Escort.

Associate medical examiner Dr. Matthew Areford, who went to the scene on December 26 and performed the autopsy on Hobgood on December 27, noted that Hobgood had suffered extensive injury, particularly to her head. Dr. Areford concluded that she died of blunt head trauma. Dr. Areford testified that while Hobgood was alive she received at least ten separate blows to her face, seven blows to the back of her head and seven to ten blows to her hands and arms. Her jaw and nose were broken, several of her teeth had been knocked out and her right shoulder was dislocated. Dr. Areford indicated that these injuries could have been

inflicted by another person's fist or by a hard object such as the lug wrench found at the scene. Several of the wounds on Hobgood's arms and hands were consistent with defensive wounds.

Although Dr. Areford could not determine the sequence of the injuries inflicted on Hobgood while she was alive, he opined that it was unlikely that Hobgood was struck from behind, fell to the ground and was hit a number of times while unconscious. Dr. Areford explained that such a scenario was inconsistent with the defensive type injuries found on Hobgood's hands and forearm as well as with the fact that there were injuries to all sides of her head, which indicated that she was rolling from side to side.

The autopsy also disclosed extensive injuries to Hobgood's body, in addition to those described above, which were inflicted after her death. Dr. Areford testified that these injuries were consistent with her body having been run over by the undercarriage of a car.

During the autopsy, Dr. Areford collected a rape kit, which included a set of vaginal swabs. Further analysis of the rape kit was conducted by David George, a serology analyst employed by the Florida Department of Law Enforcement (FDLE). George testified that the vaginal swabs tested positive for the presence of semen.

Subsequent DNA testing matched the semen collected from Hobgood to Douglas. Thomas Petree, an FDLE crime analyst with expertise in serology and DNA, testified that the odds of finding a random match between the sperm taken from the first vaginal swab and Douglas's known DNA profile are approximately one in 660 trillion African-Americans. The odds of finding a random match between the sperm taken from the second vaginal swab and Douglas's known DNA profile are approximately one in 170 quadrillion African-Americans.

On December 27, 1999, Douglas called Jimela Dozier, who had returned to Jacksonville the night before. During the conversation, Douglas asked Dozier to retrieve some items from the trunk of the Escort. When

Dozier opened the trunk she found a watch and two rings in the pocket of a black leather jacket. Douglas explained that the leather jacket and the jewelry were Christmas presents for her. The black leather jacket and jewelry were identified at trial as belonging to Hobgood.

The Ford Escort was taken to the FDLE laboratory in Jacksonville. Douglas's fingerprints were found on the inside and outside of the car and Jones's prints were found on the passenger side of the car. Human blood was identified at several locations inside and on the undercarriage of the Escort. DNA analysis of the blood samples taken from the Escort revealed a match with Hobgood's blood. The blood found on the black leather jacket Douglas gave to Dozier and the blood found on the maroon jacket recovered at the crime scene also matched Hobgood's blood. Petree testified that the odds of finding a random match between the DNA in the blood samples and Hobgood's known DNA are approximately one in 3.3 quadrillion Caucasians. Lastly, the lug wrench recovered near Hobgood's body tested positive for human blood but the DNA analysis yielded no results.

On January 24, 2000, lead detective Robert Hinson interviewed Douglas at the police station. Detective Hinson testified that Douglas admitted driving Dozier's red Ford Escort during the Christmas holiday and giving Dozier the black leather jacket and jewelry. Douglas claimed that on Christmas night he had been out with only Jones. After being shown a recent color photograph of Hobgood, Douglas claimed that he did not know Hobgood and had never seen her before. When asked about the presence of blood in the Escort, Douglas stated that the blood belonged to a friend named Eric Ransom, who had gotten into an altercation at a night club and was driven to the hospital by Douglas. However, jail records showed that Ransom was incarcerated in the Duval County Jail from March 25, 1999, to January 16, 2000. The police placed Douglas under arrest and questioned him a second time. Douglas then admitted that Jones had a female friend with her that night but stated he could not remember whether he had taken Jones's friend home.

> While in jail awaiting trial, Douglas talked to fellow inmate Thomas Brown about Hobgood's murder. During their first conversation about the murder, Douglas told Brown that he was charged with the murder of a girl and that he had run over her with a car because she would not move. However, in a later conversation Douglas stated that he ran over the girl because he had beaten her to death but wanted to make it look like a vehicular homicide. Douglas also told Brown that the State had a lot of evidence against him because he "took the pussy." Brown testified that he understood Douglas's statement "took the pussy" to mean that Douglas raped the girl.

Douglas v. State, 878 So.2d 1246, 1250-1253 (Fla. 2004).

Contrary to his pleas of not guilty, a Duval County jury found Douglas guilty, by special verdict, of first-degree felony murder with sexual battery as the underlying felony. At the penalty phase of his capital trial, Douglas put on 12 witnesses in mitigation.[1] The gist of their testimony was that Douglas comes from a religious, close-knit family, that Douglas's father, who was strict and controlling, sexually molested Douglas's older sister and was forced to leave when Douglas was nine or ten years old, that Douglas loves and cares for his own four children, that Douglas is a good brother and son, that Douglas is a positive, upbeat and friendly person, that Douglas

[1] These witnesses were: (1) Charlie McCloud, Douglas's brother-in-law; (2) Janice Williams, Douglas's maternal aunt; (3) John Williams, Douglas's uncle by marriage; (4) Tammy Wright, a close friend; (5) Joyce Douglas, Douglas's sister-in-law; (6) Sandra Wright, a friend of the family; (7) Lavern Montgomery, Douglas's brother-in-law; (8) Matthew McKever, Douglas's stepfather; (9) James Douglas, Douglas's brother; (10) Lavonia Montgomery, Douglas's sister; (11) Roy Smith, Douglas's maternal uncle; and (12) Sheryl McKever, Douglas's mother.

is a smart person, although he dropped out of high school due to reading problems, and that Douglas worked at various jobs.

The jury recommended the death penalty by a vote of eleven to one (11-1). Subsequently, the trial court held a Spencer hearing to allow both the State and Douglas to present additional evidence and arguments concerning sentencing.

The trial court found two aggravating circumstances: (1) the murder was especially heinous, atrocious or cruel (HAC); and (2) the murder was committed in the course of a sexual battery. The trial court found one statutory mitigator--that Douglas had no significant history of prior criminal activity in that he did not have a prior felony conviction--but assigned this mitigating circumstance little weight due to evidence that Douglas engaged in illegal drug activity that did not lead to arrests or convictions. The Court also considered thirty (30) non-statutory mitigators proposed by trial counsel and found sixteen (16) of them to exist. [2] The Court rejected the remaining

[2] (1) Douglas has a close-knit, religious family (little weight); (2) Douglas's family supports him even after his conviction (little weight); (3) Douglas was abused by his father both psychologically and physically (little weight); (4) Douglas witnessed his father commit acts of domestic violence against his mother (little weight); (5) Douglas and his siblings were afraid of their father when they were children (little weight); (6) Douglas's father was arrested for child abuse after beating Douglas with a belt (little weight); (7) Douglas's father sexually abused Douglas's oldest sister for seven years and was eventually arrested for the crime (little weight); (8) the revelation of the sexual abuse of Douglas's oldest sister had a

fourteen (14) mitigators proposed by Douglas's trial counsel.[3] The trial judge followed the jury's recommendation and sentenced Douglas to death. Douglas v. State, 878 So.2d 1246 (Fla. 2004).

Douglas raised five issues on appeal. Douglas argued: (1) the trial court erred in allowing the introduction of enlarged crime scene and autopsy photographs; (2) the trial court erred in rejecting several proposed mitigating circumstances and in

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devastating impact on Douglas and the rest of his family (little weight); (9) Douglas has an interest in the scriptures (little weight); (10) Douglas was helpful to his father around the house (little weight); (11) Douglas was diagnosed with learning disabilities in the second grade (very little weight); (12) Douglas never finished high school (very little weight); (13) Douglas has made plans for self-improvement since his incarceration, including obtaining his GED (little weight); (14) Douglas can be rehabilitated (moderate weight); (15) Douglas can be a productive inmate in prison (moderate weight); and (16) Douglas exhibited appropriate behavior during the trial (little weight

[3] The mitigating circumstances rejected by the trial court were: (1) Douglas's father left the home when Douglas was nine years old (not mitigating); (2) Douglas's father did not spend a significant amount of time with Douglas after he left the home (not mitigating); (3) Douglas loves his children (not proven); (4) Douglas is a good father to his children (not proven); (5) Douglas supports his children by buying food, diapers and other items (not proven); (6) Douglas is a positive, upbeat person (not proven); (7) Douglas has worked at several different jobs (not mitigating); (8) Douglas has an outgoing, friendly personality (not proven); (9) Douglas is and always has been respectful to his elders (not proven); (10) Douglas has been a good son to his mother and is protective of her (not proven); (11) Douglas has been a good brother to his siblings (not proven); (12) Douglas was impaired by alcohol at the time of the crime (not mitigating); (13) Douglas has been courteous and pleasant to the courtroom personnel (not proven); and (14) codefendant Misty Jones entered a guilty plea to the charge of accessory after the fact and will receive a maximum sentence of seven years' imprisonment (not proven).

assigning little weight to the mitigating circumstances related to Douglas's abusive childhood; (3) the trial court erred in instructing the jury on, and in finding, HAC; (4) Douglas's death sentence is not proportionate; and (5) Florida's capital sentencing procedure is unconstitutional under Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002). Though Douglas did not raise a challenge to the sufficiency of the evidence, the Florida Supreme Court considered, as it does in every capital case, whether there was sufficient evidence to support Douglas's conviction for first-degree felony murder.

On May 6, 2004, the Florida Supreme Court rejected Douglas's arguments on appeal. The Court found the evidence sufficient to support the conviction for first degree murder and affirmed Douglas's convictions and sentence to death. Douglas v. State, 878 So.2d 1246 (Fla. 2004). Mandate issued on July 15, 2004.

On October 13, 2004, Douglas filed a petition for a writ of certiorari in the United States Supreme Court. On January 10, 2005, the Court denied review. Douglas v. Florida, 543 U.S. 1061 (2005).

On May 17, 2005, Douglas filed an initial motion for post-conviction relief, which he labeled an amended motion. (PCR Vol. I 89-169). On December 27, 2005, Douglas filed an amended motion for post-conviction relief, which he labeled a second

amended motion for post-conviction relief. (PCR Supp.24-159). Douglas raised thirty-two (32) claims. On January 17, 2006, the State filed a response. (PCR Vol. II 190-268).

On April 7, 2006, the collateral court held a case management conference (Huff hearing) pursuant to Rule 3.851(f)(5), Florida Rules of Criminal Procedure.[4] Both sides were given an opportunity to present arguments on Douglas's purely legal claims. Likewise, both sides were given an opportunity to present arguments on those issues that did not involve disputed facts and could be decided as a matter of law on the record in the case. (PCR Vol. II 299).

On May 15, 2006, the collateral court issued a case management order granting an evidentiary hearing on two claims listed by collateral counsel as requiring an evidentiary hearing. (PCR Vol. II 299-312). The collateral ah

court granted an evidentiary hearing on Claim X, which alleged ineffective assistance of counsel for failing to investigate and present the testimony of Dr. Harry Krop. The Court also granted an evidentiary hearing on Douglas's Claim XVIII-2, which alleged trial counsel was ineffective for failing to present available mental health mitigation evidence. (PCR Vol. II 299-312).

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[4] Huff v. State, 622 So.2d 982 (Fla. 1993).

On October 12 and November 21, 2006, the collateral court held an evidentiary hearing on Douglas's claims. After the hearing had concluded, the collateral court granted the parties' request to submit written closing arguments, in lieu of oral argument. On January 29, 2007, both parties submitted written closing arguments. (PCR Vol. III 479-517, 518-523).

On November 20, 2009, the collateral court judge issued an order denying Douglas's motion for post-conviction relief. (PCR Vol. V 788-850). On December 7, 2009, Douglas filed a motion for rehearing. (PCR Vol. V 851-856). On December 14, 2009, the State filed a response. (PCR Vol. V 851-866). On January 14, 2010, the collateral court denied Douglas's motion for rehearing.

On February 11, 2010, Douglas filed a notice of appeal. (PCR Vol. V 880-881). On September 3, 2010, Douglas filed his initial brief. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

ISSUE I: In this claim, Douglas alleges that trial counsel was ineffective during the penalty phase of Douglas's capital trial. Douglas claims trial counsel should have presented evidence in mental mitigation. However, trial counsel investigated mental health mitigation and decided as a matter of trial strategy not to present it for two reasons. One, because it would do more harm than good and, two because it would be inconsistent with the defense's strategy at the penalty phase. Douglas cannot show trial counsel was deficient.

Douglas can also show no prejudice. Both Drs. Krop and Miller would have provided some testimony in support of mental mitigation, including brain damage (albeit it unconfirmed with any objective testing). However, calling Drs. Krop and Dr. Miller would have also revealed, to the jury, that Douglas has anti-social traits, pulled a gun on the mother of his child, had an elevated score on the psychopathic deviant scale of the MMPI and is, in Dr. Miller's word, a "dangerous man." Given the many negative aspects about Douglas, there is no reasonable possibility that calling Drs. Krop and Miller would have resulted in a life sentence.

ISSUE II: In this claim, Douglas alleges that Rule 3.851 is unconstitutional because it requires a defendant to file his initial motion for post-conviction relief within one year of the

date his convictions and sentence to death become final. This Court has rejected this claim on numerous occasions. Even if that were not the case, what actually happened in this case belies any notion the time limitations imposed by Rule 3.851 trampled on Douglas's rights. Douglas filed his initial motion about four months after his convictions and sentence to death became final.

ISSUE III: In this claim, Douglas attacks the constitutionality of Florida's capital sentencing scheme on various grounds. Douglas also claims Florida's method of lethal injection is unconstitutional. This claim is procedurally barred because such a claim can be, and should be, raised on direct appeal. Moreover, this Court has consistently rejected the same claims Douglas makes here.

ARGUMENT

ISSUE I

WHETHER THE COLLATERAL COURT ERRED IN DENYING DOUGLAS'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF DOUGLAS'S CAPITAL TRIAL.

A. Standard of Review

On appeal from the denial of a claim of ineffective assistance of counsel, this Court employs a mixed standard of review. This means this Court defers to the collateral court's factual findings that are supported by competent, substantial evidence and reviews the collateral court's legal conclusions *de novo*. Conde v. State, 35 So.3d 660, 663 (Fla. 2010).

B. Applicable Law

To establish a claim of ineffective assistance of counsel, two elements must be proven. First, the defendant must show that trial counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Conde v. State, 35 So.3d 660, 663 (Fla. 2010).

A court deciding a claim of ineffective assistance of counsel must evaluate the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the

result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Pietri v. State, 885 So.2d 245 (Fla. 2004).

In doing so, however, the court must apply a strong presumption that trial counsel's performance was not deficient. The defendant carries the burden to overcome the presumption of effective assistance. The presumption requires the defendant to show both that trial counsel's alleged acts or omissions were unreasonable and not a matter of sound trial strategy. Asay v. State, 769 So.2d 974, 984 (Fla. 2000) (ruling that the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy). If the defendant fails to overcome the presumption of effectiveness, his claim must fail.

If a collateral defendant successfully demonstrates trial counsel's performance was deficient and was not a matter of sound trial strategy, the inquiry does not end. The defendant must also show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Conde v. State, 35 So.3d 660, 663 (Fla. 2010); Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998). For claims alleging ineffective assistance of counsel during the penalty phase, Douglas must show that, but for trial counsel's alleged errors, he probably would have received a life sentence. Gaskin v. State, 822 So.2d 1243 (Fla. 2002).

Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also* Gorby v. State, 819 So.2d 664 (Fla. 2002); Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998). If a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong. Waterhouse v. State, 792 So.2d 1176 (Fla. 2001). *See also* Downs v. State, 740 So.2d 506, 518 n. 19 (Fla. 1999) (finding no need to address prejudice prong where defendant failed to establish deficient performance prong); Kennedy v. State, 547 So.2d 912, 914 (Fla. 1989) (noting that

where defendant fails to establish the prejudice prong, the court need not determine whether counsel's performance was deficient).

C. Testimony at the Evidentiary Hearing

At the evidentiary hearing, Douglas presented four witnesses in support of his claim that trial counsel were ineffective for failing to adequately investigate, then present, mental health mitigation evidence. The first witness was Dr. Harry Krop. Dr. Krop's deposition was submitted into evidence, by stipulation of the parties, because he was unavailable on the dates for which the evidentiary hearing was set. Dr. Krop's deposition may be found in Volume III of the post-conviction record on appeal on pages 378-412.

Dr. Krop testified that trial counsel Refik Eler referred Mr. Douglas for evaluation in June 2000. (PCR Vol. III 384). Dr. Krop testified that Douglas was competent to proceed. (PCR Vol. III 385). Dr. Krop testified his records indicate that when he initially evaluated Douglas he only had some police reports. He did not have a specific recall of what records he actually had, however. (PCR Vol. III 385).

Dr. Krop testified that Douglas refused to talk to him about the murder. (PCR Vol. III 386). Douglas told Dr. Krop he had not talked to his attorney and would prefer to talk to him before discussing the murder with Dr. Krop. (PCR Vol. III 386).

Dr. Krop testified that Douglas did complete some psychological testing. (PCR Vol. III 386).

Dr. Krop wrote a letter to Mr. Eler requesting additional documents, including school records, depositions, police reports, any prior PSI's, medical records, and other relevant materials that might pertain to mitigation. He also asked Mr. Eler to work with him in coordinating family member interviews. He apparently did not receive any additional records from trial counsel because they were not in his file.

Dr. Krop did not have any record of seeing Douglas again after the initial evaluation. (PCR Vol. III 386-387). Dr. Krop was also not certain whether he had spoken with Mr. Eler after his initial evaluation. His records did not indicate he did but he could not remember. (PCR Vol. III 396-398).

Dr. Krop testified he also evaluated Douglas in preparation for the evidentiary hearing. This evaluation was done at the request of collateral counsel. (PCR Vol. III 387).

Dr. Krop met with Douglas and conducted neuropsychological testing. He also reviewed school records, which indicated Douglas had a full scale IQ of 75 when he was 10 years old. (PCR Vol. III 388). He also noted that in 2000, Douglas was tested and had a full scale IQ of 75. (PCR Vol. III 389).

Dr. Krop concluded that neuropsychological test results were consistent with frontal lobe deficits. (PCR Vol. III 388).

According to Dr. Krop, the frontal lobe is responsible for an individual's executive functioning. This executive functioning consists of more complex thought processes, which involve problem solving, planning, execution of ideas and impulse control. (PCR Vol. III 389-390).

Dr. Krop testified that persons with frontal lobe damage have difficulty taking initiative and starting things. However, once a person with frontal lobe damage does start something, he may have difficulty stopping. (PCR Vol. III 390).

Dr. Krop administered another IQ test in preparation for the evidentiary hearing. Douglas has a full scale IQ of 77. (PCR Vol. III 391).

During his post-conviction evaluation, Dr. Krop did not review any testimony from the twelve witnesses who testified on Douglas's behalf during the penalty phase of Douglas's capital trial. (PCR Vol. III 405). He also made no formal diagnosis. (PCR Vol. III 400). Dr. Krop did, however, review Douglas's criminal history as part of his evaluation. Douglas reported that he had a couple of drug related charges as an adolescent, he had been arrested four or five times as an adult, including a rape that was dropped, two charges of domestic violence for which he got time served, a drive by shooting that was dropped, and of course the current charge. (PCR Vol. III 400). Dr. Krop was also aware that Douglas had a pretty tumultuous family

background that included domestic violence and drugs, and that Douglas grew up in a pretty dysfunctional family. (PCR Vol. III 400).

Dr. Krop believes he probably would have diagnosed Douglas with some type of personality disorder with antisocial traits. Because he made no attempt to diagnose Douglas, Dr. Krop does not know whether Douglas would have met full criteria for antisocial personality disorder. (PCR Vol. III 400). Dr. Krop believed that sociopathic or psychopathic traits would probably exist in Douglas's personality. (PCR Vol. III 401). Douglas's MMPI results showed an elevated score on the psychopathic deviant scale. (PCR Vol. III 401).

Dr. Krop provided no opinion whether at the time of the murder, Douglas was under an extreme emotional disturbance. He did believe Douglas was emotionally distraught at the time and most likely under the influence of alcohol. Combined with the neuropsychological deficits, Dr. Krop believed Douglas would likely have presented with a serious emotional or psychological disturbance. (PCR Vol. III 401-402). Dr. Krop's conclusion that Douglas was emotionally distraught, at the time of the murder, stemmed solely from Douglas's self-report about his on-going conflicts with his girlfriend and Douglas's self-reported drinking on the night of the murder. (PCR Vol. III 410-411).

Dr. Krop provided no opinion that, at the time of the murder, Douglas was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Dr. Krop believed Douglas's judgment was probably compromised but he could not conclude the statutory mitigator applied. (PCR Vol. III 402).

In Dr. Krop's opinion, Douglas is not mentally ill. (PCR Vol. III 404). Douglas is not mentally retarded. (PCR Vol. 406).

Dr. Krop testified that while frontal lobe damage impacts the part of the brain that involves complex planning, frontal lobe damage does not prevent a person from taking steps to cover up a murder. (PCR Vol. III 407). Likewise, frontal lobe damage doesn't mean a person has no control over impulses. (PCR Vol. III 407). Instead, people with frontal lobe damage are likely to be more impulsive, to have difficulty in terms of motivation, make bad choices in terms of problem solving, and to use poor judgment. (PCR Vol. III 407).

People with frontal lobe deficits can plan a murder. (PCR Vol. III 407-408). A person with frontal lobe deficits can lie to deflect suspicion and could instruct a girlfriend to lie for him in order to cover up his guilt. (PCR Vol. III 408).

Douglas also called Dr. Ernest Miller to the witness stand during the evidentiary hearing. Dr. Miller examined Douglas in

preparation for the evidentiary hearing. Dr. Miller did not see Douglas prior to trial. Dr. Miller's testimony can be found at Volume III of the post-conviction record on appeal at pages 441-477.

Dr. Miller met with Douglas the day before the evidentiary hearing for two hours. (PCR Vol. III 445). Prior to meeting with Douglas, collateral counsel provided Dr. Miller with information indicating that Dr. Krop had found evidence of brain damage. (PCR Vol. III 445).

Dr. Miller testified that Douglas recounted a social history that showed he was a product of a dysfunctional home environment. (PCR Vol. III 446). Douglas told Dr. Miller his father was found guilty of raping one of his sisters. (PCR Vol. III 446). He also told Dr. Miller his father was a strict disciplinarian who did not let anyone speak up, admonishing the children for speaking without being invited to do so. (PCR Vol. III 446-447). Douglas felt scape-goated for infractions his siblings actually committed. (PCR Vol. III 447). This dynamic occurred before age 11 when his father left the home. Dr. Miller testified that Douglas did not describe any particular acts of abuse or violence on the part of his father (whippings, beatings, etc). (PCR Vol.III 447).

Douglas recounted, to Dr. Miller, that he had gotten into juvenile difficulties at a very tender age for sale or

possession of drugs. (PCR Vol. III 447). Douglas told Dr. Miller that he had a "drug sales" career. He also became a heavy drinker and drug user. (PCR Vol. III 447). Douglas never held a legitimate job for any period of time. (PCR Vol.III 447). According to Dr. Miller, Douglas's lifestyle was characterized by intermittent violent behavior which led to his detention by the law before 2002. (PCR Vol. III 448).

Dr. Miller testified that Douglas's triggers to violence might be viewed as relatively trifling from someone else's perspective. (PCR Vol. III 448). Douglas is someone who would over-react if someone said something wrong. He would react excessively with an "overkill, as it were." (PCR Vol. III 448).

Dr. Miller observed that Douglas has a history of alcoholism. Douglas was poorly adaptive in school. Behavioral problems interfered with his ability to do well. (PCR Vol. III 448).

Douglas went to a place call JMI, which Dr. Miller believed was an excellent juvenile program. Douglas did not do well in the program because Douglas continued in his patterns of behavioral problems, attitudes of indifference, and disrespect of the law. (PCR Vol. III 448-449).

Douglas did try to proceed with his education. He tried to obtain a GED but they told him he wasn't qualified to do so. (PCR Vol. III 449).

At the time he evaluated Douglas, Douglas was not manifestly depressed. He does not hear voices. Douglas does have a diminished capacity to reproduce geometric designs. He also demonstrated diminished capability to maintain attention in several of his tasks.

Douglas did not do well in a test of intermediate memory. (PCR Vol. III 450). The results of the interview indicated subtle indices of neural dysfunction; that is Douglas has problems with nerve cells exchanging information in the manner in which they properly should. (PCR Vol. III 451).

Dr. Miller opined that Douglas suffers from both drug and alcohol addiction. (PCR Vol. III 452). This diagnosis was based solely on Douglas's self-report with no objective evidence to support it. (PCR Vol. III 465).

Dr. Miller's impression is that Douglas suffers from a personality disorder, not otherwise specified. Within this personality disorder, Douglas has features shared by persons who are egocentric, self-centered, have a lack of empathy and demonstrate problems with restraint, inhibitions, and deferring immediate reward for future gain. Persons who have the same personality traits as Douglas have difficulties maintaining relationships, are given to violent behaviors, and have little concerns for the rights of others. (PCR Vol. III 452-453). While Douglas does not share all of these Cluster B traits,

these types of traits are found in persons who have narcissistic personalities, psychopathic personalities and borderline personality disorder. (PCR Vol. III 453).

In Dr. Miller's view, Douglas's exposure to violence in his formative years, both as a witness and a victim, if untreated, will move him into a path of needing alcohol or other kinds of self-treatment to deal with chronic depression. Given time, treatment might make it less likely that Douglas would act out with violence when a stressor is introduced into his life. Alcohol and drug use precipitate violence in Douglas. It reduces his inhibitions insofar as his conduct. (PCR Vol. III 454-455).

In Dr. Miller's view, Douglas has rage and frustration built into him that is repressed and has been suppressed. Dr. Miller noted that, as a result, if there is an insult or a perceived insult, or some offense of some type presents itself to him, Douglas overreacts. Dr. Miller noted that in such cases "look out for the poor victim." (PCR Vol.III 455).

In Dr. Miller's view, Douglas was suffering from an extreme mental or emotional disturbance at the time of the murder. (PCR Vol. III 456). Dr. Miller could not diagnose PTSD. (PCR Vol. III 456).

Dr. Miller testified he saw Douglas one time, one day before the evidentiary hearing. He did not review Dr. Krop's

report. (PCR Vol. III 459). Dr. Miller did not interview any of Douglas's family members. (PCR Vol. III 459). Dr. Miller did not review any of the testimony of the 12 witnesses who testified on Douglas's behalf during the penalty phase of his capital trial. (PCR Vol. III 459-460). Dr. Miller did not review any police reports regarding the events leading up to the murder of Mary Ann Hobgood. (PCR Vol. III 460).

Dr. Miller did not review any of the photos of Ms. Hobgood as she was found at the murder scene. (PCR Vol. III 460). Dr. Miller testified that Douglas reported that someone ran over Ms. Hobgood after she was dead. (PCR Vol. III 460). Douglas did not tell Dr. Miller that he was the person who actually ran over Ms. Hobgood. (PCR Vol. III 460).

Dr. Miller said that Douglas gave no details of the murder except to say he had engaged in sexual relations with the victim. (PCR Vol. III 461). Douglas did not tell Dr. Miller he beat Mary Ann Hobgood to death. (PCR Vol. III 461). Douglas did not tell Dr. Miller he stole Ms. Hobgood's jewelry and clothing, then gave it to another woman as a gift. (PCR Vol. III 461). Douglas did not tell Dr. Miller he cleaned the car he was driving to eliminate evidence of his crime or that he told Misty Jones to lie if she was asked about his whereabouts on the night of the murder. (PCR Vol. III 461). Douglas did not tell Dr. Miller that when Misty Jones asked him whether he beat Ms.

Hobgood because she didn't have sex with black boys, he just smiled. (PCR Vol. III 477).

Douglas also did not describe his mother to Dr. Miller. He did not tell Dr. Miller that from all reports, she was an ideal mother. (PCR Vol. III 462). He did not, however, impute any mistreatment to her. (PCR Vol. III 462).

Douglas did tell Dr. Miller that after his father left the home, his mother engaged in a five-year relationship with a good man, who was never violent. (PCR Vol. III 463). Douglas did not mention his mother's subsequent marriage to another man who was also considered a good man and who was never violent with his wife and her children. (PCR Vol. III 463). However, Dr. Miller thinks that exposure to two positive role models beginning at age 11 would be too late to have a positive influence or any meaningful effect. (PCR Vol. III 464).

All of Dr. Miller's conclusions about his additions to cocaine and alcohol came from Douglas's self-report. Dr. Miller had no objective evidence in which to corroborate any of his conclusions. (PCR Vol. III 465).

While Dr. Miller concluded that Douglas's childhood experiences would result in chronic depression, he saw no overt manifestations of depression in Douglas. (PCR Vol. III 465-466). Instead, Dr. Miller reached this conclusion only because the majority of children from that type of environment have chronic

depression. He told the collateral court that, as such, his opinion, of chronic depression, is based only on statistics as opposed to an individual assessment of Douglas. (PCR Vol. III 466).

Douglas has antisocial personality traits. (PCR Vol. III 471). Dr. Miller believes that Douglas probably demonstrates a lack of empathy and is self-centered. (PCR Vol. III 471-472). Douglas also shows a lack of concern or care for the safety of others. (PCR Vol. III 472)). Douglas is the type of person who might know he is about to do something wrong but does it anyway. (PCR Vol. III 473). He will choose his own needs over the needs of others. (PCR Vol. III 474).

According to Dr. Miller, Douglas is a person who might, instead of extending his middle finger to someone who cuts him off in traffic, get out of his car and shoot the other fellow's car up. (PCR Vol. III 475-476). Dr. Miller described one such near "over kill" when the mother of Douglas's child nagged him about something. Douglas, who had come home wasted and coming down from a high, pulled a gun on her and was going to shoot her. Fortunately, his brother-in-law intervened. (PCR Vol. III 476).

Dr. Miller opined that given the bumps and bruises of everyday life in American society, Douglas is a dangerous man. (PCR Vol. 477). The likelihood that Douglas, like anyone who

conspicuously uses and depends on drugs and alcohol, will visit harm on themselves or other persons is substantially higher than the ordinary individual or person. (PCR Vol. III 477).

Refik Eler, lead trial counsel also testified at the evidentiary hearing. Mr. Eler's testimony is set forth in Volume VI of the post-conviction record at pages 924-952.

Mr. Eler testified he was appointed to represent Luther Douglas. Mr. Eler testified that it was his impression that Douglas was very bright and intelligent. (PCR Vol. VI 926).

Mr. Eler testified that his primary responsibility at trial was the guilt phase of the trial. He also assisted Ms. Hepler, co-counsel, with the penalty phase. (PCR Vol. VI 926).

Mr. Eler has been practicing criminal law for 20 years. He has handled 50-100 homicide cases in those 20 years. He has also handled more than a dozen capital cases. (PCR Vol. VI 396). Prior to Mr. Douglas's trial, he had been either lead or co-counsel in about 10-12 capital murder trials. Mr. Eler told the collateral court that he retained Dr. Krop to examine Douglas. Mr. Eler had worked with Dr. Krop before the trial and had worked with him in about 10-12 cases before Douglas. (PCR Vol. VI 936-937). He and Dr. Krop had a good rapport and could openly communicate about the murder cases they worked on together. (PCR Vol. VI 937).

Mr. Eler's recollection of his contact with Dr. Krop in relation to the Douglas case was not particularly good. Mr. Eler explained his lack of recall as to the exact nature of his consultations with Dr. Krop.

Mr. Eler explained that he provided his files, in three large cardboard boxes, to collateral counsel. (PCR Vol. VI 928, 941-943). When collateral counsel made Mr. Eler's files available to him to review before the evidentiary hearing, the confidential psychiatric folder and correspondence folder were missing. (PCR Vol. VI 927-928, 941-943). Mr. Eler could testify that he had a conference with Dr. Krop because his billing records showed there was a conference with Dr. Krop. (PCR Vol. VI 927).

Mr. Eler has put on mental health mitigation through Dr. Krop in other cases. He is not certain whether he has ever put on Dr. Krop to testify about a client's frontal lobe dysfunction. (PCR Vol. VI 929). Mr. Eler is familiar with frontal lobe dysfunction. (PCR Vol. VI 930).

Insofar as investigating Douglas's background, Mr. Eler retained the services of an investigator, Investigator Mooneyman. Mooneyman's practice was to interview family members on his request. Mr. Eler told the court that Ms. Mooneyman probably did that in this case. (PCR Vol. VI 931). He has no independent recollection of that. However, that is what

normally happened. It probably did in this case. (PCR Vol. VI 931).

Pertinent to Strickland's deficient performance prong, both collateral counsel and counsel for the State explored what information Mr. Eler had regarding Dr. Krop's evaluation of Douglas and how that information impacted the defense team's decision not to call Dr. Krop. Mr. Eler believed there was evidence of antisocial behavior found in Douglas. (PCR Vol. VI 933). This would explain why the defense team did not present mental mitigation evidence. (PCR Vol. VI 933). Mr. Eler recalled he had a conversation with Dr. Krop and that Dr. Krop told him there was really nothing he could not to help on the mental mitigation part. (PCR Vol. VI 940).

One thing Mr. Eler considers in evaluating whether to put on mental health mitigation evidence is whether there is anything out there that will "bite us on the rear end." (PCR Vol. VI 935). Things he considers in deciding whether to put mental mitigation evidence before the jury is a history of violence or antisocial behavior, problems in the jail, like DRs, and things of that nature that might open the door to the prosecutor arguing that the defendant is not a good candidate for rehabilitation. (PCR Vol. VI 934). Mr. Eler recalled there were some bad collateral issues out there. (PCR Vol. VI 941). He believes that he talked about his phone call with Dr. Krop

with both Ms. Hepler and Douglas, himself, and Ms. Hepler decided not to call him. (PCR Vol. VI 941).

When collateral counsel queried Mr. Eler whether he would put on mental mitigation evidence if there was evidence of frontal lobe dysfunction, Mr. Eler said he could not answer that (in a vacuum). He would have to find out if there was any antisocial personality or sociopathic problem. If there were, Mr. Eler probably would recommend to penalty phase counsel that she not present mental health mitigation. (PCR Vol. VI 934).

On the other hand, if there were no antisocial personality disorder, no sociopathy, no DRs at the jail, or nothing that would come back and bite them, he would consider putting mental mitigation before the jury. He does not want to open the door to evidence of prior acts of violence, antisocial personality, sociopathy, and bad conduct at the jail. (PCR Vol. VI 935). Even if Mr. Eler had testimony supporting the statutory mitigator of extreme emotional distress, he would not have presented it to the jury if there was also evidence Douglas was antisocial. (PCR Vol. VI 951).

The defense strategy at the penalty phase was to put Douglas in the best light possible, someone who was a good person, who could be a good inmate and could be a productive prisoner. (PCR Vol.VI 939). This was important in Mr. Eler's view because the evidence put on in the guilt phase did not put

Douglas in a good light. Given the evidence at trial, the defense wanted to present him as a caring person. In order to do so, they called a dozen relatives and friends to testify about the good things in his life, his contributions to the community, things of that nature. (PCR Vol. VI 939).

It would not be consistent with the strategy they employed at the penalty phase to put on evidence that Douglas showed a reckless disregard for the safety of others, was irritable and aggressive, and failed to conform to social norms. (PCR Vol. VI 944). Putting on mental health mitigation opens the door to specific acts of misconduct and evidence of the defendant's antisocial personality disorder. (PCR Vol. VI 945).

Ms. Ruth Ann Hepler testified at the evidentiary hearing. Ms. Hepler's testimony can be found at Volume VI of the post-conviction record on pages 954-974.

Ms. Hepler testified she had been a criminal defense lawyer for 15 years. (PCR Vol. VI 955). In 1992, she started working as an Assistant Public Defender and worked as an APD until 1999. On October 1, 1999, she opened up a private practice. In her private practice, Ms. Hepler does criminal defense, family law, and some civil matters. Prior to this case, she had not tried a murder case. (PCR Vol. VI 963).

In Douglas's case, she was primarily responsible for the penalty phase. (PCR Vol. VI 955). However, Mr. Eler was lead

counsel. (PCR Vol. VI 963). Ms. Hepler viewed herself as a second chair in the penalty phase. (PCR Vol. VI 963). Mr. Eler had already done a significant amount of work when she came onto the case. (PCR Vol. VI 964).

Ms. Hepler perceived Douglas to be intelligent. She never got any kind of notion that Douglas was suffering from any cognitive deficits or low IQ. (PCR Vol.VI 970). She told the collateral court that she has represented hundreds of people who have given her that impression. (PCR Vol. VI 970). In her conversations with Douglas, there was never anything unusual about him in the sense of a cognitive difficulty, a learning disability, or an inability to understand or communicate. (PCR Vol. VI 970).

Ms. Hepler's impression of Douglas was that he was cooperative and interested in the presentation of his case. (PCR Vol. VI 970). Douglas was actively involved in providing information necessary to prepare the case for trial. (PCR Vol. VI 971).

Ms. Hepler spoke with Douglas's mother, brothers and sisters, and family friends. She did not recall anyone bringing up any issue of him having any kind of cognitive defect or anything unusual. (PCR Vol. 971-972).

Ms. Hepler did not believe there was any history of posttraumatic stress in Douglas's family history. (PCR Vol. VI

957). Ms. Hepler did not recall finding a significant history of alcohol and substance abuse. (PCR Vol. VI 958).

Ms. Hepler described her decision making process in deciding what evidence to present at the penalty phase of Douglas's capital trial. Ms. Kepler told the collateral court that in deciding what evidence to present in mitigation, she would consider the whole picture. (PCR Vol. VI 964).

In considering whether to put on Dr. Krop, the defense team would consider whether there were bad things his testimony would open the door to, like Douglas's drug arrests when he was an adolescent and evidence that Douglas was arrested for rape. (PCR Vol. VI 965). Additional considerations would include evidence that Douglas had been arrested twice for domestic violence for which he was sentenced to time served in jail and that Douglas scored high on the psychopathic deviant scale on the MMPI. (PCR Vol. VI 964-965). In Ms. Hepler's view, none of that information would be considered mitigating by a Duval County jury or, indeed, any jury. (PCR Vol. VI 965).

Ms. Hepler told the collateral court that her strategy during the penalty phase was to portray Douglas as a loving son and brother. The defense team called family members to portray Doulgas as a loving person, who up to that point had led a pretty run of the mill life, who had been a loving father to his children, and a loving son and brother to his mother and

siblings. The defense team also wanted to portray Douglas as someone who was really a mild-mannered personality who got along well with others. (PCR Vol. VI 966).

The defense presented evidence intended to convince the jury to recommend a life sentence. She believed the testimony they presented through the witnesses they did call was consistent with their penalty phase strategy. (PCR Vol. VI 966-967). Suggestions that Douglas had been arrested several times for drug related offenses, domestic violence, rape, and a drive-by shooting would have been inconsistent with the defense strategy at the penalty phase. (PCR Vol. VI 969). Ms. Hepler thought that, if this evidence had come out, it would make her witnesses, who were portraying Douglas as a good guy, "look kind of silly." (PCR Vol. VI 969).

Ms. Hepler believes it is important, once the penalty phase strategy is determined, to present evidence consistent with that strategy. (PCR Vol. VI 970). Ms. Hepler also believes it is ill-advised to present evidence that is inconsistent with that strategy. (PCR Vol. VI 970).

D. The Collateral Court's Ruling

The collateral court denied Douglas's claim that trial counsel were ineffective for failing to investigate and present mental health mitigation evidence. (PCR Vol. V 819-839). The collateral court made no finding that counsels' performance

either was, or was not deficient. The collateral court found, however, that because Douglas had not established Strickland's prejudice prong, there was no need to determine whether counsels' performance was deficient. (PCR Vol. V 833-834).[5] In finding no prejudice, the collateral court concluded:[6]

> …This Court concludes that had the mental health mitigation evidence been presented, it would have been more harmful than helpful. Further, the Florida Supreme Court has noted that anti-social personality disorder is "a trait most jurors tend to look

[5] The collateral court observed that counsels' decision not to call Dr. Krop was likely a reasonable strategic decision given that calling Dr. Krop would open the door to harmful evidence, including evidence of Douglas's anti-social personality traits, his prior criminal history, and prior acts of violence and substance abuse. (PCR Vol. V 833). However, the collateral court declined to actually find that counsel conducted a reasonable investigation or made a strategic decision not to call Dr. Krop. The collateral court declined to address Strickland's deficient performance prong because counsel could not recall their decision making process, including why they pursued a humanizing strategy over mental health mitigation that would cut both ways. Counsel could also not remember the extent of his conversations with Dr. Krop. The collateral court observed that Mr. Eler and Ms. Hepler's inability to recall was exacerbated by the fact they both turned their original files over to collateral counsel and much of that file, most especially the psychiatric file and correspondence folder, was missing by the time the evidentiary hearing was held. (PCR Vol. V 829, n.8). In declining to address Strickland's deficiency prong because counsel could not specifically recall their conversations with Dr. Krop or their decision making process as to the strategy to pursue, it appears the collateral court incorrectly applied a subjective standard, rather than an objective standard in analyzing Douglas's allegation that trial counsel's performance was deficient. (PCR Vol. V 832-833). *See* Strickland, 466 U.S. at 688, 104 S.Ct. 2052; Schwab v. State, 814 So.2d 402, 408 (Fla. 2002).

[6] Most internal citations omitted.

disfavorabLy upon." 875 So. 2d at 437 (quoting Freeman v. State, 852 So.2d 216, 224 (Fla. 2003)

In addition, this Court finds that putting on evidence of mental health mitigation would have opened the door to evidence that the Defendant had a life-long history of drug and alcohol abuse, he had been involved in the sale of drugs, he had a history of behavioral problems as a youth, and he had a history of violence, including pulling a gun on the mother of one of children because she had "nagged him." The State also would have been able to present evidence of the Defendant's criminal history, including a rape charge which had been dropped, two domestic violence convictions, a drive-by shooting charge which had been dropped, and drug charges. Such evidence would not have been mitigating in nature and would have contradicted the evidence of the Defendant's good character presented by the defense. Evans, 946 So. 2d at 13 (finding that the defendant failed to establish prejudice where the mental health evidence would have opened the door to evidence of a long history of behavioral problems and escalating violence); *see also* Jones, 998 So. 2d at 585 (finding that the defendant failed to establish prejudice for failing to present evidence of the statutory mitigator of extreme mental or emotional disturbance and an inability to conform to the requirements of the law where it would have given the state the opportunity to show that the defendant's profile included characteristics frequently found in child molesters and rapists, including unpredictable, erratic, aggressive and cold behavior, and would also have opened the door to the defendant's lengthy criminal history); Bums v. State, 944 So. 2d 234, 243 (Fla. 2006) (finding that it was not ineffective assistance of counsel to fail to present mental health mitigation which would have conflicted with counsel's strategy of presenting the defendant as a productive member of society who was supportive of his family); 875 So. 2d at 436-37 (finding that it was not ineffective assistance of counsel to fail to present mental health mitigation evidence which would have opened the door to evidence of the defendant's criminal record and incidents of threats and abuse toward family members).

Finally, this Court finds that even if the Defendant had presented mental health mitigation evidence, it would not have outweighed the aggravating factors. The trial court found two aggravating factors: (1) that the murder was committed while the Defendant was engaged in the commission of the crime of sexual battery, and (2) that the murder was especially heinous, atrocious, and cruel. The HAC aggravator has been held to be one of the most weighty aggravators. Offord v. State, 959 So. 2d 187, 191 (Fla. 2007) ("HAC is a weighty aggravator that has been described by this Court as one of the most serious in the statutory sentencing scheme.") (citing Larkin v. State,739 So, 2d 90, 95 (FIa. 1999)); Sireci v. Moore,825 So. 2d 882, 887 (Fla, 2002) (noting that prior violent felony conviction and HAC are two of the most weighty aggravators in Florida's sentencing scheme).

Although Dr. Miller testified that the statutory mitigator of extreme mental or emotional disturbance was present in the Defendant, this Court notes that this finding was based solely on the Defendant's self-report. Further, Mr. Miller testified that he only saw the Defendant for two hours and admitted that this is not enough time to make any in depth findings. He also admitted that his diagnosis of depression was based on statistical evidence.

Although Dr. Krop testified that the Defendant suffered from serious mental or emotional disturbance at the time of the crime, he could not state that it met the statutory mitigator and admitted that his opinion was based on the Defendant's own self-report. Further, he specifically testified that the Defendant is not mentally retarded, does not suffer from any major mental illness, and did have the capacity at the time of the murder to appreciate the criminality of his conduct and conform to the requirements of the law. In light of these facts and the aggravating nature of the evidence that would have been admitted with the mental health mitigation evidence, this Court finds that the mental health mitigation evidence would have been given little weight and would not have outweighed the aggravating circumstances. Perez v. State, 919 So. 2d 347, 372-73 (Fla, 2005) (finding no error to the trial court's assignment of little weight to the mitigator of extreme mental or emotional

> disturbance where the defendant's diagnosis included anti-social and borderline personality features which show an indifference to harming others and dangerousness, and where there was no evidence that the defendant was unable to conform his conduct to the requirements of the law).
>
> Based on all of the above, this Court finds that the Defendant has failed to establish that he was prejudiced by trial counsel's failure to present evidence of mental health mitigation. There is no reasonable probability that had this evidence been presented the balance of aggravators and mitigators would have been any different and resulted in a life sentence. This Court's confidence in the outcome of the penalty phase proceedings remains intact. Accordingly, sub-claim 2 is denied.

(PCR Vol. V 819, 822-839).

E. Argument

This Court may deny Douglas's claims for at least two reasons. First, Douglas cannot show prejudice from trial counsels' failure to call Dr. Krop or Dr. Miller, to the witness stand, during the penalty phase of Douglas's capital trial. Although each expert would have provided some evidence in mitigation, their testimony would have been devastating to trial counsels' attempt to portray Douglas in the best light possible.

Calling Drs. Krop and Miller to put on evidence in support the "emotional distress" mental mitigator would have exposed the jury to Douglas's extensive juvenile and adult arrest records as well as his unwillingness or inability to benefit from a good

rehabilitative program like the one described by Dr. Miller.[7] Calling Dr. Miller would also have put evidence before the jury that Douglas was a drug dealer, overreacts to stress, had previously pulled a gun on another woman with the intent to kill her and was "a dangerous man." Counsel is not ineffective for failing to put on such damaging testimony. Reed v. State, 875 So.2d 415, 437 (Fla. 2004) (ruling counsel was not ineffective for failing to put on family background testimony that cast Reed in a bad light, which included evidence Reed had broken his grandmother's nose, abused drugs over many years, was jailed on various occasions, continued his drug use after his brother took him in on the condition that he stop using drugs, and threatened to kill his brother's wife).

In addition to Douglas's highly unfavorable social history, calling Dr. Krop and Dr. Miller would have revealed, at a minimum, that Douglas has a personality disorder with antisocial traits and had scored high on the psychopathic deviant scale when Dr. Krop administered the MMPI. The Florida Supreme Court has on several occasions found testimony that a defendant has an

[7] Neither Dr. Krop nor Dr. Miller opined that Douglas's capacity to appreciate the criminality of his conduct or to conform his conduct to requirements of law were substantially impaired. Likewise, Dr. Krop's testimony did not establish the "emotional disturbance" mental mitigator applied because Dr. Krop could not testify Douglas's emotional disturbance was extreme. (PCR Vol. III 401-402, 410-411). Additionally, Douglas is not mentally retarded and has no major mental illness.

antisocial personality disorder is not evidence that a jury looks upon favorably. Freeman v. State, 852 So.2d 216, 224 (Fla. 2003) (noting that antisocial personality disorder is "a trait most jurors tend to look disfavorably upon."). *See also* Reed v. State, 875 So.2d 415, 437 (Fla. 2004); Cummings-El v. State, 863 So.2d 246, 268 (Fla. 2003) (noting that antisocial personality disorder is not a mitigating factor); Elledge v. State, 706 So.2d 1340, 1346 (Fla. 1997) (affirming death sentence where trial court denied statutory mental health mitigator based on the expert testimony the defendant had antisocial personality disorder and that such disorder is not a mental illness, but a life long history of a person who makes bad conscious and volitional choices in life).

Taken as a whole, both Dr. Krop and Dr. Miller's testimony was much more harmful, than helpful. Because their testimony would have allowed evidence to come in that was manifestly unfavorable, Douglas has failed to present proof sufficient to undermine the confidence in the outcome of his penalty phase proceedings and sentence to death. As such, Douglas has failed to overcome the prejudice prong in the Strickland analysis and this court should deny his claim.

Second, this claim may be denied because the decision to portray Douglas in the best light possible was a sound strategic decision made after investigation by two very experienced trial

counsel. Trial counsel cannot be ineffective if, based on the circumstances that existed at the time of trial, he or she makes a reasonable strategic decision not to call a particular witness or witnesses. A strategic decision is reasonable unless no other trial counsel, under the same circumstances, would have made the same decision. Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000)(noting that for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take); Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (noting that counsel's conduct is unreasonable only if petitioner shows "that no competent counsel would have made such a choice").

In this case, after investigation, trial counsel decided to put on family background testimony that would put Douglas in the best light possible. The record establishes that trial counsel vigorously pursued this defense strategy at the penalty phase.

Trial counsel put on twelve (12) mitigation witnesses to testify about Douglas's myriad positive character traits and his future plans for bettering himself. Overlaying this testimony was evidence that Douglas's early childhood life was dysfunctional because of his father's overly controlling and abusive behavior which culminated in Douglas's father leaving the family home before Douglas was a teenager. The record is

replete with trial counsel's efforts to persuade the jury that Douglas was a person who could, and did, overcome extreme adversity and childhood trauma to become a better person.

Most, if not all, reasonable counsel would have refrained from putting on evidence that totally contradicted the picture painted by Douglas's family members and friends. From Douglas's family members and friends, the jury heard testimony that Douglas had a rough start in life but was a good person with positive character traits and potential for rehabilitation.

From Drs. Miller and Krop, the jury would have heard evidence of Douglas's antisocial personality traits and associated conduct. This Court has determined that it is a reasonable strategic decision not to present evidence the defendant has antisocial personality disorder. Dufour v. State, 905 So.2d 42, 57-58 (Fla. 2005) (holding that defense counsel made a reasonable strategic decision not to present mental health mitigation testimony at the penalty phase because it would have opened the door to mental health expert's finding that defendant was a sociopath).

Indeed, through Drs. Krop and Miller, the jury would have learned that Douglas's conduct on the night of the murder was simply the culmination of a life of lawlessness, indifference to the needs and rights of others, illegal drugs, and violence toward women. This expert testimony not only would have been

more harmful than helpful, it would have completely undermined the strategy employed by trial counsel during the penalty phase of Douglas's capital trial. Evans v. State, 946 So.2d 1 (Fla. 2006) (While evidence presented at the evidentiary hearing established that Evans suffered from mental health problems, it also displayed a long history of behavioral problems and escalating violence throughout his school career. Presenting this evidence at the penalty phase would have resulted in the jury hearing about Evans' aggression towards students and teachers, his aggression towards police officers, his pride in being known as a "jack-boy" because he robs drug dealers, and his habit of carrying a gun. It is just as likely that this evidence would have been more "aggravating" than mitigating).

Any reasonable trial counsel, having investigated Douglas's family and social history, and learning from a competent mental health professional that Douglas likely has antisocial personality disorder, may have made the same decision that trial counsel did in this case. A finding trial counsel made a reasonable strategic decision to forgo the presentation of evidence that is not mitigating precludes a finding of deficient performance. Burns v. State, 944 So.2d 234 (Fla. 2006) (testimony that Burns suffered from a psychotic disturbance would have undermined the positive traits accentuated by the mitigation evidence presented); Hannon v. State, 941 So.2d 1109

(Fla. 2006)(Counsel not ineffective for failing to present testimony that Hannon may have had drug and alcohol problems that may have influenced him to commit the murders because such evidence would have been in total conflict with the picture of the nonviolent, "teddy bear" image of Hannon and inconsistent with his innocence/alibi defense); Henry v. State, 862 So.2d 679, 686 (Fla. 2003) (determining there was no deficient performance in counsel's decision to humanize defendant rather than use mental health testimony); Banks v. State, 842 So.2d 788 (Fla. 2003) (trial counsel not ineffective for failing to call Dr. McClaren when he rendered an unfavorable report); Shere v. State, 742 So.2d 215, 223-24 (Fla. 1999) (determining that counsel was not ineffective for failing to request a neuropsychological or neurological exam by a qualified expert even though trial counsel had obtained evidence of defendant's "severe head injury as a youth and his subsequent headaches" where counsel's penalty phase strategy was to portray the defendant as "a kind, gentle, God-fearing man"); Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998) (determining there was no error where retrial counsel was aware of mental mitigation "but made a strategic decision under the circumstances . . . to instead focus on the 'humanization' of Rutherford through lay testimony"); Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997) (counsel not ineffective for failing to call mental health

expert even though she could have testified that there was a strong indication of brain damage, because she would have also testified that Haliburton was an extremely dangerous person who was likely to kill again); Bryan v. Dugger, 641 So.2d 61, 64 (Fla. 1994) (determining that trial counsel was not ineffective for choosing a mitigation strategy of humanizing the defendant and not calling a mental health expert). Douglas's claims should be denied.

ISSUE II

WHETHER FLORIDA RULE 3.851 IS UNCONSTITUTIONAL.

In this claim, Douglas alleges that Rule 3.851, Florida Rules of Criminal Procedure is unconstitutional because it requires capital defendants to file any motion for post-conviction relief within one year of the date his convictions and sentence to death become final. Douglas alleges the rule violates a defendant's right to due process, equal protection, access to courts, effective assistance of counsel, and the defendant's rights to petition for a writ of habeas corpus. (IB 39).

Douglas raised this claim in his motion for post-conviction relief. The collateral court summarily denied the claim. (PCR Vol. V 794). The collateral court pointed to the many cases from this Court wherein this Court has rejected the same claim Douglas makes here. (PCR Vol. V 794).

Before this Court, Douglas does not explain how the rule operates so oppressively.[8] Indeed, what actually happened in his case seems to belie any oppression.

Douglas filed his initial motion for post-conviction relief just four months after his convictions and sentence to

[8] Douglas attempts in this claim to "re-allege and reincorporate arguments provided in his Amended 3.851 to the trial court in support of this claim." (IB 39).

death became final. (PCR Vol. I 89-169).[9] Moreover, Douglas amended his claim some seven months later, raising thirty-two claims. (PCR Supp 24-161).

The collateral court granted Douglas an evidentiary hearing on the claims he listed as requiring a factual determination and granted the parties an opportunity to submit written closing arguments after the hearing. Douglas also filed a petition for writ of habeas corpus in this Court contemporaneously with the filing of his initial brief. Douglas points to no actual proof that the time limitations set forth in Rule 3.851 denied him equal protection, access to the courts, effective assistance of counsel, due process or an opportunity to file a petition for a writ of habeas corpus.

Even so, this Court has rejected this same claim on numerous occasions. In Vining v. State, 827 So.2d 201, 215 (Fla. 2002), the Florida Supreme Court noted that it has "repeatedly rejected arguments that the one-year time limit imposed by Florida Rule of Criminal Procedure 3.851 is unconstitutional." *See also* Gonzalez v. State, 990 So.2d 1017, 1034 (Fla. 2008) ("[R]ule 3.851 as amended in 2001 does not violate a defendant's due process rights or equal

[9] Douglas's conviction became final on January 10, 2005 when the United States Supreme Court denied his petition for a writ of certiorari. Douglas v. Florida, 543 U.S. 1061 (2005).

protection rights."); Arbelaez v. State, 775 So.2d 909, 919 (Fla. 2000); Koon v. Dugger, 619 So.2d 246, 251 (Fla. 1993).

To the extent that Douglas claims the rule deprives him of effective assistance of collateral counsel, this Court has specifically rejected the same claim many times. Claims of ineffective assistance of collateral counsel do not present a cognizable claim for relief. Vining v. State, 827 So.2d 201, 215 (Fla. 2002). *See also* Lambrix v. State, 698 So.2d 247, 248 (Fla. 1996).

ISSUE III

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL.

In this claim, Douglas avers that Florida's capital sentencing scheme is unconstitutional on various grounds including that Douglas's sentence to death violates the dictates of Ring v. Arizona, 536 U.S. 584 (2002).[10] Douglas also avers that Florida's method of administering lethal injection violates Douglas's Eighth Amendment right to be free from against cruel and unusual punishments.

Douglas raised the Ring portion of this claim in his second amended motion for post-conviction relief. (PCR Supp 152-156). The collateral court denied his claim. (PCR Vol. V 847-848). The collateral court found the claim to be procedurally barred because it was raised and rejected on direct appeal. (PCR Vol. V 847).

[10] Douglas claims his sentencing jury failed to determine the existence of any aggravating factors beyond a reasonable doubt. Douglas claims this failure violates nearly all of his constitutional rights. (IB 45). Douglas is mistaken. Douglas's jury found Douglas guilty of felony murder with sexual battery as the underlying felony. The jury also found Douglas guilty separately of sexual battery. As such, Douglas's jury found Florida's "in the course of an enumerated felony" unanimously beyond a reasonable doubt. In any event, the jury's death recommendation demonstrates the jury not only found at least one aggravator beyond a reasonable doubt but found sufficient aggravators to warrant a death sentence.

The collateral court also found the claim to be without merit as Douglas was convicted by a 12 person jury, unanimously and beyond a reasonable doubt, of sexual battery. Moreover, one of the aggravators found to exist was that Douglas committed the murder in the course of a sexual battery. (PCR Vol. V 847-848). Citing to several cases from this Court, the collateral court ruled that Ring was satisfied when the defendant committed the murder in the course of an enumerated felony, such as sexual battery. (PCR Vol. V 847).

This Court may deny this claim on two grounds. First, Douglas's attack on Florida's capital sentencing scheme is procedurally barred. [11] Claims that Florida's capital sentencing statute is unconstitutional can be and should be raised on direct appeal. Failure to do so acts as a procedural bar to Douglas's attempts to re-litigate these issues in post-conviction proceedings. Miller v. State, 926 So.2d 1243, 1256 (Fla. 2006) (Claims challenging the constitutionality of Florida's capital sentencing procedures should be raised at trial and on direct appeal). *See also* Gorby v. State, 819 So.2d 664, 687 (Fla. 2002).

[11] To the extent that any part of claim III relies on Ring v. Arizona, 536 U.S. 584 (2002), the claim is procedurally barred because this Court rejected Douglas's Ring claim on direct appeal. Douglas v. State, 878 So.2d 1246, 1263-1264 (Fla. 2004).

Second, this Court should reject Douglas's third claim on appeal because this Court has repeatedly rejected claims that Florida's capital sentencing scheme is unconstitutional. Likewise, this Court has repeatedly rejected the same lethal injection claims that Douglas makes here. Marek v. State, 8 So.3d 1123 (Fla. 2009)(rejecting claim that Florida's lethal injection procedures constitute cruel and unusual punishment); Frances v. State, 970 So.2d 806, 822 (Fla. 2007) (Ring does not require aggravating circumstances to be found individually by unanimous jury); Johnson v. State, 969 So.2d 938, 961 (Fla. 2007) (holding that relief is not available under Ring where one of the aggravators rests on the separate conviction for an enumerated felony); Merck v. State, 975 So.2d 1054, 1067 (Fla. 2007)(defendant not entitled to notice of aggravators in the indictment and jury may recommend death by majority vote); Lugo v. State, 845 So.2d 74, 119 (Fla. 2003) (reiterating that this Court has rejected the contention that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty). Based on well established case law from this Court, this claim should be denied.

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court affirm the collateral court's order denying Douglas's amended motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Mail to Frank Tassone, Tassone, Sichta, and Dreicer, LLC, 1833 Atlantic Boulevard, Jacksonville, Florida 32207, this 6th day of December, 2010.

_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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