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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-1880

STATE OF FLORIDA,

APPELLANT

VS.

RAYMOND MORRISON

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA, (CRIMINAL DIVISION)

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, State of Florida, will be referred to as "State" and Appellee, Raymond Morrison, Defendant below, will be referred to as "Morrison." Reference to the records will be:

> **Direct Appeal** – case number SC60-94666 - *Morrison v. State*, 818 So.2d 432 (Fla.), *cert. denied*, 537 U.S. 957 (October 15, 2002) "ROA;"
> **Postconviction Relief Appeal** - "PCR;"

Supplemental records will be identified with an "S." The record citation will be followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On January 23, 1997, Morrison was indicted for the January 8, 1997 murder, burglary, and armed robbery with an assault. (ROA.1 7-9) Morrison was arrested on January 10, 1997, and later that night/early the next morning, confessed to the crimes and led the police to the murder weapon. (ROA.13 509 et seq., 525-26, 590-93; ROA.14 739-44). Initially, the Public Defender's Office, with Ronald Higbee representing Morrison, filed a motion to suppress. Once Mr. Higbee was permitted to withdraw, Refik Eler ("Eler") was appointed on January 14, 1998 and given an opportunity to amend the suppression motion. (ROA.2 329-40; ROA.4 686-87; ROA.5 753-79, 785-88; ROA.8 1258-1417, 1427-44; ROA.9 1449-52) Following the suppression hearing and the opportunity to amend provided Eler, the trial court took into

account the new information and granted in part and denied in part the motion to suppress. (ROA.2 336; ROA.5 796-816).

On September 21, 1998, jury selection began. Following a trial where both parties presented witnesses, on September 25, 1998, the jury convicted Morrison as charged. A presentence investigation ("PSI") was ordered and the penalty phase was scheduled. (ROA.15 1057, 1086-88; ROA.16 1085-86). At the October 8, 1998 penalty phase, the October 7, 1998 deposition of defense mental health expert, Dr. Krop, was read into the record and again the parties presented witnesses. The jury unanimously recommended death. (ROA.15 1058, 1089; ROA.16 1307-08, 1310) On November 12, 1998, after considering the evidence presented, the PSI, and the memoranda of the parties as to sentencing, the trial court sentenced Morrison to death.

Morrison appealed and this Court affirmed. *Morrison v. State*, 818 So.2d 432 (Fla.), *cert. denied*, Morrison v. Florida, 537 U.S. 957 (October 15, 2002). On direct appeal, this Court found the following facts:

> The evidence presented at trial revealed the following facts. On January 9, 1997, the dead body of eighty-two-year-old Dwelle was found on the floor of his bedroom by service personnel from Meals on Wheels. An autopsy revealed numerous injuries on the body of Dwelle, including contusions and abrasions to the head, chest, arms, and hand. According to the medical examiner, Dwelle died from loss of blood due to two lethal knife wounds to the throat. One was a stab wound to the left side of the neck which penetrated to the depth of almost five inches, perforating the

esophagus and nicking the cervical vertebrae. A second wound to the neck was described as an incised wound across the front of the throat. As a consequence, Dwelle aspirated the blood caused by the knife wounds to his neck.

Dwelle was disabled for many years, having suffered a stroke during a bout of typhoid fever at age six or seven. He could not use his left hand or arm, he could hardly stand up and walk, and he needed assistance to bathe, dress, and cook. Meals on Wheels delivered his meals once a day.

Investigation by police revealed that Morrison had visited his girlfriend, Sandra Brown, on January 8, 1997. Brown lived at the Ramona Apartments in an upstairs apartment directly across from Dwelle's apartment. Morrison spent the afternoon of January 8, 1997, socializing with Brown and her uncle at Brown's apartment. At some point in the late afternoon or early evening, Brown and Morrison walked to the local convenience store to buy some beer. Brown paid for the beer with money she had just received for babysitting. To her knowledge, Morrison did not have any money. They returned to Brown's apartment where they drank the beer with Brown's uncle. Brown's uncle later left to return to his own home. At about 9 p.m., Morrison prepared two steaks and placed them in the oven to cook. He then told Brown that he was going to take the trash out. He did not return to Brown's apartment and was not seen again by Brown until the next day at a different location. On that occasion, Morrison apparently avoided contact with Brown, who was attempting to talk to him to find out why he had left so abruptly the previous night.

Morrison was arrested on January 10, 1997, by Officer Anthony Richardson, on a warrant for failure to pay child support. Immediately upon arrest, Morrison asked Richardson if 'this [his arrest] was about that old man.' Richardson told him that he was being arrested for failure to pay child support but that some homicide detectives also wanted to talk to him, so Richardson was taking him to the homicide office of the Jacksonville Sheriff's Office. Richardson then advised Morrison of his constitutional rights. Morrison learned that Richardson, in addition to being

a police officer, was also a pastor in a local church. On the way to the police station, Morrison and Richardson discussed religion and Morrison's need to get his life in order. Richardson then turned Morrison over to homicide detectives Terry Short and T.C. Davis.

During a lengthy interview about the Dwelle murder, Morrison told Short that he wanted to talk to Richardson again. Short paged Richardson and Richardson returned to the police station to talk with Morrison. On the morning of January 11, 1997, and following a discussion with Richardson, Morrison gave a written statement detailing his involvement in the death of Albert Dwelle. The text of Morrison's written statement seen by jurors is as follows:

On Wednesday 01-08-97 at approximately 9:00 PM I had been smoking crack with Big Man. I ran out of crack and had no money. I went to Apt. 68 and sat on the steps. I was drinking a beer. I wanted a cigar. I knocked on the door of Apt. # 64. The man came to the door and I ask him for a cigar. He started telling me he couldn't let me come in. I ask for a light for the cigar he gave me. He went back into his bed room to get me a light. I follow him to the bed room. He reached into his shirt pocket hanging on a chair by the bed and handed me a light. I put the lighter back on the chair. I saw money in the shirt pocket. I reached over and grabbed a few bills out of his shirt pocket. He saw me take the money. He got a knife from somewhere and began swinging it at me. I tried to grab him to defend myself and also not to hurt him. I grabbed him by the arm and turned him around so he was facing away from me. He was thrusting the knife back over his shoulders at me. I was holding his right arm and he was still thrashing the knife trying to cut me. While he was trying to cut me the knife accidentally cut across his throat. I didn't know at the time that it had cut him. I was still holding him and he got even wilder thrusting the knife and I guess he got cut again. That's when I saw he was cut.

I laid him down on the floor and picked up the knife. I left the apartment and went to another part of the complex where I hid the knife under a brick.

> I then went to Big Mans house and got him to take me to the Chevron. We got gas and he took me to Marietta. When we got to Marietta I bought some drugs with the money I took from the old man. I then went back to Ramona Park where Big Man dropped me off and he went home. I saw my uncle Cap and I got in the car with him. I stayed with Cap until Friday morning and continued smoking dope and drinking till then. Police picked me up Friday after noon.
>
> Morrison also said he took the victim's money and spent it on drugs and prostitutes. In addition, Morrison was seen shortly after the murder attempting to sell silver coins, similar in size and appearance to coins owned by Dwelle and missing from Dwelle's apartment after the murder. Finally, Morrison led the detectives to the knife that he said he used to kill the victim.

Morrison, 818 So.2d at 437-39.

With respect to the penalty phase presentation, the Florida Supreme Court found:

> In the present case, the trial court found four aggravating circumstances: (1) Morrison was previously convicted of a felony involving the use or threat of violence to the person; (2) the crime for which Morrison was to be sentenced was committed while he was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit the crime of armed robbery or burglary with an assault or both; (3) the crime for which Morrison was to be sentenced was especially heinous, atrocious, or cruel; and (4) the victim of the capital felony was particularly vulnerable due to an advanced age or disability.
>
> Morrison did not present evidence of any of the statutory mitigating circumstances listed in section 921.141(6)(a)-(g), Florida Statutes (1997). The trial court, however, found the following nonstatutory mitigating circumstance and afforded it 'great weight': Morrison's low intellectual ability combined with drug and alcohol abuse would result in exercise of bad judgment. The trial judge also found several

> other nonstatutory mitigating circumstances and afforded them 'some weight,' including: Morrison's good jail conduct; the fact that there was no parole or other release available to Morrison; Morrison's cooperation with police; Morrison's abuse of alcohol and use of cocaine; Morrison's employment; Morrison's assumption of familial responsibility at an early age; and Morrison's positive adjustment while incarcerated.

Morrison, 818 So.2d at 456-57. *See also, Morrison*, 818 So.2d at 437-39.

On direct appeal, this Court found that "Morrison … testified at the motion to suppress hearing that he did not provide any inculpatory statements to police," Morrison, 818 So.2d at 446.

On October 15, 2002, the United States Supreme Court denied certiorari. *Morrison v. Florida,* 537 U.S. 957 (2002). Following public records litigation, on September 18, 2003, Morrison filed his initial postconviction relief motion. After change of postconviction counsel, on March 28, 2014, Morrison filed his amended motion raising elevex claims with multiple sub-claims. An evidentiary hearing was granted and held during ten days between January and March, 2015.

During the ten-day bifurcated evidentiary hearing, the Defense called: former prosecutor, Jay Taylor, trial defense counsel Refik Eler ("Eler") and Christopher Anderson, lay witnesses, Joseph Turner, Jr., Irving Huffington, Tangy Allen, Terry Heatly, Raymond Morrison, Sr., Gilda Louden, Betty Harris,

Paula Wilson, Georgia Morrison, Daniel Ashton Dennis Fuentez, former defense counsel, Alan Chipperfield and current collateral counsel, Linda McDermott, and expert witnesses Dr. Julie Heinig, Dr. Gordon Taub, Dr. Joseph Wu, Dr. Hyman Eisenstein, Dr. Lawrence Weiss, Dr. Harry Krop, and Micah Johnson. The State called Dennis Fuentez, Refik Eler, and Dr. Gregory Prichard.

At the evidentiary hearing, Eler testified that at the time of Morrison's trial, he had been practicing for some 12 years and that he had taken the death penalty seminars every year or every other year. He had been in private practice doing criminal defense for 10 years before Morrison's trial. Additionally, Eler had been a prosecutor before going into private practice. Between his prosecution and defense work, Eler tried between 80 and 100 cases. (PCR.12 2292-98, 2428-29). Eler explained that he had taken over Morrison's case from the Public Defender's Office and received four boxes of files indicating to him that a lot of work had been done and he would be doing "fine tuning." (PCR.12 2401) That office through Mr. Higbee or other counsel had represented Morrison for about a year before conflicting off the case. (PCR.12 2293-95, 2428) Mr. Higbee had prepared the Motion to Suppress and examined the witnesses at the hearing. (ROA.8 1261 et seq.) After he withdrew, Eler was provided an opportunity to amend and present an alibi witness unavailable previously. (ROA.5 795-96)

With respect to the use of alibi witnesses, Eler reported that the alibi defense rested on Mr. Early, also known as "Big Man." (PCR.20 3824). Ken Moncrief, ("Moncrief"), confirmed that before trial, a letter Morrison had written was found in the Clerk's file and that it had been there unbeknownst to either party. Eler had asked Moncrief to investigate, but he "came up empty." Moncrief could not find the people listed and the shoe store to which Morrison referred had been "closed for some time;" he found nothing relevant. (PCR.17 3217-18). He admitted he did not go to the Marietta area of Jacksonville where Morrison had said he had been on the night of the murder.

Addressing penalty phase and mental health issues, the record shows that Mr. Higbee, had Dr. Krop appointed in January 1997 and provided him with initial documentation and made Morrison available for evaluation. That evaluation which started in January 1997 included testing by Dr. Krop along with Drs. Scales and Risch. Eler had Dr. Krop reappointed to continue his evaluation and had contact with him in July 1998 and again before the penalty phase. Dr. Krop was selected in part because Eler had worked with him previously and found the doctor was able to make the complex simple for the jury to understand; Dr. Krop was "preeminent in the area." (ROA.1 19-21, 25-26, 37-38, 40-41; ROA.6 996-1015; 1080-83; PCR.12 2401-11, 2447-48). Eler relies on his mental health expert to

address those mental issue which are mitigating. (PCR.12 2411).

Eler also affirmed that throughout his interaction with Morrison he was never concerned mental retardation or mental disease as Morrison communicated well with this Court through letters, understood the court process, and throughout the trial. Had Morrison's actions caused Eler to become unsure of his client, he would have called Dr. Krop. (PCR.12 2439; PCR.20 3815-17, 3820). Similarly, Ken Moncrief testified he had no problem speaking with Morrison. Morrison did not cause Moncrief any concern regarding mental health issues. (PCR.18 3494).

Dr. Eisenstein[1] became involved in this case and was asked to do neuropsychological testing. (PCR.15 2934) As part of that assessment, Dr. Eisenstein administered the WAIS-III obtaining a full scale score of 79. (PCR.15 2978-79). Family members and friends were interviewed by Dr. Eisenstein (PRC.15 2999-3000). Dr. Eisenstein noted Morrison had a substance abuse problem, suffered head injuries,[2] and had been born prematurely[3] which

[1] Much of Dr. Eisenstein's testimony was addressed to the Intellectual Disability claim. The trial court did not make a definite ruling on intellectual ability, thus, the State will not delve into those issues here, except were necessary to address the ineffectiveness of counsel related to mitigation.

[2] Such comes from lay witness accounts that were developed during collateral litigation. As Daniel Ashton, collateral counsel's investigator testified, he could locate no records supporting Morrison being in a car accident with a head injury. (PCR.18 3431)

might be a source of organic brain damage ("OBD"). (PCR.15 2944-3043). Dr. Eisenstein also suggested that the OBD limited Morrison's cognitive flexibility and ability to plan. (PCR.15 3011). Dr. Eisenstein testified that Morrison's mental health issues, OBD, drug usage, and IQ findings combined to support a finding of the both statutory mental mitigators of extreme mental or emotional disturbance at the time of the crime and "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

Dr. Krop, Morrison's trial mental health expert at trial reported during the postconviciton evidentiary hearing that he had evaluated Morrison for the penalty phase mitigation and administered, or he had his associates administer, IQ and neuropsychological tests to Morrison. Dr. Krop saw Morrison twice and the neuropsychological expert saw him once, and gave the WIAS-III (SPCR 31-35, 50)[4] Morrison was given the Stanford-Binet IQ test in 1976 yielding a full scale score of 78; Dr.

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[3] Although family witnesses reported Morrison was born prematurely, Dr. Eisenstein saw/read nothing to indicate Morrison suffered anoxia, or a lack of oxygen, as a result of his premature birth. Daniel Aston could locate no records of Morrison's birth as such were destroyed. (PCR.18 3430)

[4] The record was missing the February 18, 2015 evidentiary hearing transcript and an Unopposed Motion for Supplementation of the Record has been filed. This transcript will be identified as SPCR)

Risch's 1997 testing using the WAIS-R gave a 78 IQ. (PCR.14 2794-95). In 1997/98, Dr. Krop did not evaluate Morrison for ID, however, he found deficits in intellectual functioning. The IQ results obtained by Dr. Krop were 76 verbal (5th to 9th percentile); 87 performance score (16-25th percentile); and 78 full scale (5th to 9th percentile. (PCR.18 3538-39, 3554) In 1998, Morrison would not have been classified as ID and Dr. Krop would not have found ID then. The 1998 score would have been a fairly reliable measure of Morrison's functioning at the time. (PCR.18 3555-56).

Dr. Wu performed a PET scan and found abnormal brain metabolism showing diffused neocortical or cerebellar decrease which is significant with someone who likely has significant impairment on IQ. Also, an abnormal pattern was found in Morrison's frontal lobe often seen in those who have sustained a head injury (PCR.15 2906-07, 2910-13, 2919)

At the evidentiary hearing, Gilda Louden[5] ("Gillis") reported, she saw Morrison on the night of the murder, between 7:45 and 8:00 PM and that he was high on drugs. She did not notice any blood stains[6] on him and he was asking for money.

[5] She has had several marriages and has used the last names of Louden, Payton, and Seals.

[6] The record established that blood was found under Dwelle's body, on a towel, and two spots were found on a trash can near the body. (ROA-T.3 555)

(PCR.16 3160, 3165-66). She also Gillis offered her opinion that even as an adult, Morrison has the mind of a 15 or 16 year old. (PCR.16-17)

Charlene Wright ("Wright") testified during the evidentiary hearing that she is the sister of Sandra Brown. According to Wright, she reported to the police that she had seen Morrison in Marietta on the night of the murder while visiting her mother. Morrison is her friend, and they have known each other for her entire life. (PCR.17 3320) Wright testified that the officers showed her a photographs of the victim in this case showing his fatal injuries with some redness on his neck. Wright claimed the officers were asking her to identify the man, but she said she did not know the man as he did not come out of his apartment when she was visiting Brown. Although Wright claimed she did not know to which night the police were referring, nor could she report who those officers were except to say they were Caucasian, she subsequently testified that she saw Morrison on the night before Dwelle's body was discovered. (PCR.17 3320-29).

Wright claimed Morrison was spotted at the end of the road estimated as a block away; they did not have a conversation, but just hollered "Hey" to each other as Wright continued to do what she had been doing in her yard. It was dark out; the encounter took place between 8:00 and 9:00 PM at night. In response to police questioning, Wright stated she told the police Morrison

did not have any money that night and was wearing a white shirt and dark pants. Wright did not see any blood on Morrison's clothing. (PCR.17 3329-31). After giving that statement, Wright was driven home. (PCR.17 3331)

Joseph Turner, a convicted felon 12 times over offered his impression of Morrison whom he knew from growing up in the same neighborhood. Turner saw children making fun of Morrison; found Morrison easily influenced and slow; Morrison was a follower. (PCR.13 2547-49, 2553). Morrison never lived on his own and Turner does not believe Morrison is capable of taking care of himself. It was not until Morrison was 17 or 18 that Turner started associated with Morrison and using drugs together. (PCR.13 2553-58)

Irving Huffingham testified Morrison had been recommended for testing. His test results put him into the top end of the borderline range of mental retardation; however, he did not qualify for special education classification or any special treatment. Morrison was not even assigned on a part-time basis. (PCR.13 2576-80, 2584-86). There were multiple retentions noted in the school records indicating an academic problem. (PCR.13 2590).

Tangy Allen, the mother of two of Morrison's children never knew Morrison to drive a car. He was good with children and helped her around the house, however one night, Morrison put

beer in the baby's bottle. (PCR.14 2815-18, 2824). Allen characterized Morrison as having another child in the house; he could not be sent to the store. Allen paid the bills; Morrison did not have any concept of having a bank account. She also helped his with employment applications for day labor. Morrison was limited on the tasks he was able to do. Yet, according to Allen, Morrison constantly writes to her; she receives two letters from Morrison weekly. (PCR.14 2819-24, 2859-61). Allen admitted she would do anything she could to help Morrison (PCR.14 2850).

Terry Heatly, a thrice convicted felon and drug user, averred that he knew Morrison only on drugs. With that admission, Heatly claims Morrison's personality was very mentally slow and that Morrison was a follower. It was Heatly's lay opinion Morrison did not have the capability of caring for himself and he had never known Morrison to have a driver's license. (PCR.14 2867-68)

Georgia Morrison ("Georgia") testified at the penalty phase and again in the evidentiary hearing contradicting her prior sworn testimony. During the postconviction hearing, she denied that Morrison could cook or do laundry. After dropping out of school because of his grandmother's illness, Morrison's responsibilities were merely to watch her, give her the medication his mother set out, and to heat and serve his

grandmother the food Georgia had prepared. (PCR.17 3289, 3301)

Willie Morrison, ("Willie"), Morrison's younger brother and thrice convicted felon reported that as a child, Morrison was depended on others to help him. Willie used to help his older brother with homework. Morrison would need help with simple chores such as raking the yard, doing the dishes, and cleaning his room. (PCR.17 3350-56). According to Willie, on occasion, Morrison would forget why he was sent to the store. Morrison was a follower (PCR.17 3356-57)

Paula Wilson ("Wilson"), Morrison's younger sister related that Morrison had left the stove on once and almost burned down the house. Morrison could follow simple instructions. (PCR.17 3391-92).

Following the evidentiary hearing and the submission of post-hearing memoranda by the parties, the trial court, on September 18, 2015, granted relief finding ineffective assistance during the suppression hearing, guilt and penalty phases. (PCR.8 1518-1640). The State appealed.

SUMMARY OF THE ARGUMENT

Issue I - The trial court erred not finding this claim procedurally barred and its analysis under *Strickland v. Washington*, 466 U.S. 668 (1984) is unsupported by the evidence and law. The trial court failed to address the fact that Morrison had testified at trial that he did not confess and that he took an inconsistent position on collateral review without testifying to the new allegations. There was no finding that Morrison's confession would have been found to be involuntary by the trial court or jury and that the result of the proceedings would have been different. This Court should find the trial court erred, that Morrison did not carry his burden under *Strickland*, and reinstate the convictions.

Issue II – The trial court erred in granting a new trial on the claim of ineffective assistance of guilt phase counsel for not investigating and presenting evidence on an alibi defense, challenging the State's timeline, voluntary intoxication defense, and the Victim's alleged relationship with Sandra Brown. When the trial and postconviction records are considered in light of one another, it is clear the granting of relief was not supported by the evidence and the trial court failed to make a finding of *Strickland* prejudice. This Court should reverse and reinstate Morrison's convictions.

Issue III – The trial court erred in finding counsel

rendered ineffective assistance in the penalty phase. With respect to mental health issues, the trial defense expert did not opine that he would have changed his opinion and the trial court did not find that any statutory mental health mitigation would have been found. Likewise, the trial court's assessment of the change in lay witness testimony and the defendant's change in strategy from showing a more positive side to now a more negative mitigation case does not support either *Strickland* deficiency or prejudice. Also, the trial court erred in finding deficiency arising from counsel not giving an opening statement for the penalty phase especially in light of a finding that but for that omission, the result of the penalty phase would have been different. Finally, the trial court erred in assessing the claim of failure to challenge the prior violent felony aggravator in its "conclusion" as the trial court had specifically found that such was not deficient performance. The trial court's legal conclusion of Strickland prejudice is erroneous as a matter of law. This Court should vacate the decision and reinstate the death sentence in this case.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN GRANTING RELIEF ON THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SUPPRESSION HEARING

During the suppression hearing, Morrison testified that he did not provide any inculpatory statements to police and admitted that some 13 hours has passed since he had used cocaine last. On collateral review, he claimed via his pleadings, but without testifying at the evidentiary hearing, that counsel was ineffective in not presenting: (1) mental health experts to show his police statement was not voluntary, (2) cocaine use within hours of interrogation to explain why his story to the police kept changing, and (3) evidence that he would take responsibility for the crimes other committed. Following an evidentiary hearing, relief was granted. However, this was error. The claim was procedurally barred, factual findings by the trial court were unsupported by the evidence, and the incorrect *Strickland* standard for deficiency and prejudice were employed. This Court should reverse finding Morrison failed to carry his burden of proof.

A. STANDARD OF REVIEW – Recently, this Court discussed the standard to be applied in reviewing claims of ineffective assistance of counsel announcing:

Following the United States Supreme Court's decision

in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court explained that two requirements must be met for ineffective assistance of counsel claims to be successful:

> 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.

Bolin v. State, 41 So.3d 151, 155 (Fla. 2010) (*quoting Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986)).

Regarding the deficiency prong of *Strickland*, there is a strong presumption that trial counsel's performance was not ineffective. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (*quoting Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)).

Regarding the prejudice prong of Strickland, "the defendant must show that there is a reasonable probability that, 'absent the [deficient performance], the factfinder would have [had] a reasonable doubt respecting guilt.'" *Henry v. State*, 948 So.2d 609, 617 (Fla.2006) (quoting Strickland, 466 U.S. at 695, 104 S.Ct. 2052). "A reasonable probability is a 'probability sufficient to undermine confidence in the outcome.'" Id. (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

"Because both prongs of Strickland present mixed

> questions of law and fact, this Court employs a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence, but reviewing the trial court's legal conclusions de novo." *Dennis v. State*, 109 So.3d 680, 690 (Fla. 2012).

Salazar v. State, 41 Fla. L. Weekly S50 (Fla. Feb. 18, 2016), *reh'g denied* (Apr. 11, 2016).

At all times, the defendant bears the burden of proving not only that counsel's representation fell below an objective standard of reasonableness and was not the result of a strategic decision, but also that actual and substantial prejudice resulted from the deficiency. *See Orme v. State*, 896 So.2d 725, 731 (Fla. 2005) (Fla. 2005) (*quoting Strickland*, 466 U.S. at 694 that "a defendant has the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the complained about conduct was not the result of a strategic decision")

With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Chandler v. United States*, 218 F.3d 1305, 1313 n.12 (11th Cir. 2000). "The test for ineffectiveness is not whether counsel could have done more; perfection is not

required." *Id.*, at 1313 n. 12. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The ability to create a more favorable strategy years later, does not prove deficiency. *See Patton v. State*, 784 So. 2d 380 (Fla. 2000); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). From *Williams v. Taylor*, 529 U.S. 362 (2000), it is clear the focus is on what efforts were undertaken and why a specific strategy was chosen over another. Additionally, as noted in *Chandler*, 218 F.3d at 1318, "...counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. *See Strickland*, [466 U.S. 690-91] ("Strategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.")"

In discussing the *Strickland* prejudice prong, the United States Supreme Court has stated:

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *See Wong v. Belmontes*, 558 U.S. ----, ----, 130 S.Ct. 383, 390, 175 L.Ed.2d 328 (2009) (per curiam) (slip op., at 13);

> *Strickland*, 466 U.S., at 693, 104 S.Ct. 2052. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.*, at 696, 104 S.Ct. 2052. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697, 104 S.Ct. 2052. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693, 104 S.Ct. 2052.

Harrington v. Richter, 131 S.Ct. 770, 791-92 (2011).

Addressing a challenge to the voluntariness of a confession, this Court has stated:

> The mere fact that a suspect was under the influence of alcohol when questioned does not render his statements inadmissible as involuntary. "The rule of law seems to be well settled that the drunken condition of an accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession, but may affect its weight and credibility with the jury." *Lindsey v. State*, 66 Fla. 341, 343, 63 So. 832, 833 (1913).

Thomas v. State, 456 So.2d 454, 458 (Fla. 1984). *See Rigterink v. State*, --- So.3d ---, 2016 WL 1592714 (Fla. 2016).

B. FACTS – During the suppression hearing, Morrison testified that he had not confessed to the police. This Court found on direct appeal that "Morrison … testified at the motion to suppress hearing that he did not provide any inculpatory statements to police," *Morrison*, 818 So.2d at 446.

Morrison also testified that he was arrested at about 3:30 P.M. and that he that he had last had any drugs or alcohol at

2:30 A.M. on the morning of his arrest. (ROA.8 1392, 1405). With respect to the effects of smoking crack cocaine, Morrison stated he did not know how long the effects take to wear off, but it does not take 13 hours. (ROA.8 1409-10). He admitted being given his *Miranda*[7] rights, but testified that he told the police immediately he did not want to talk and wanted to call his father to get a lawyer. Throughout his direct examination, Morrison maintained that he reiterated to the police that he did not want to talk to them (ROA.8 1394-96, 1401-02, 1404-06). Morrison stated that he understood he could have a lawyer appointed to him at no cost. (ROA.8 1394-95). It was Morrison's testimony he was read his rights upon his arrest and that the detective reviewed them with the written *Miranda* form which he signed acknowledging that he understood his rights and that he did not have to talk to anyone. (ROA.8 1406, 1408).

On cross-examination, Morrison testified:

> [Prosecutor] Did you not ultimately tell them that you had been in Albert Dwelle's apartment?
> [Morrison]: No.
> [Prosecutor]: You never told them you went in there?
> [Morrison]: Never.
> [Prosecutor]: You never said that Mr. Dwelle cut his own throat?
> [Morrison]: No, sir.
> [Prosecutor]: You never said that you wanted to get money out of his shirt?
> [Morrison]: No, sir, I didn't.
> [Prosecutor]: But you signed a confession saying that?
> [Morrison]: Yes. But I didn't-at the time I didn't

[7] *Miranda v. Arizona*, 384 U.S. 436 (1966)

know-I didn't even read the confession.

(ROA.8 1407-08) *See Morrison*, 818 So. 2d at 446, n.7. Morrison maintained that he did not answer any questions. (ROA.8 1408-09)

Judge Henry Davis presided over Morrison's trial and postconviction litigation. Following the suppression hearing, the trial court found that Morrison testified that "he had [last] consumed alcohol and cocaine at 2:30am, which was about 13 hours prior to his arrest at 3:30pm (ROA.5 797); Morrison "was not threatened" (ROA.5 798); Morrison was advised of *Miranda* Rights by Officer Richardson (ROA.5 797); Officer Short also advised Morrison of *Miranda* rights (ROA.5 798-79); Morrison refused to speak with Officer Davis (ROA.5 799-800); Morrison requested to speak with Officer Richardson again (ROA.5 800); after requesting to be taken to jail, Morrison "called him [Richardson] back in to talk" (ROA.5 800); Richardson honored the confidentiality of Morrison's communications at this juncture (ROA.15 800-801); Morrison agreed to speak to officer Short, who again reminded Morrison of his *Miranda* rights (ROA.5 801); and then, Morrison made the statement (ROA.5 800-11), which included seeking to steal money from the victim and claiming that the victim's throat being accidentally cut twice during their struggle (ROA.2 374-75 Morrison's confession); Morrison led the police to the knife (ROA.5 801).

Also, Judge Davis found Morrison had waived his *Miranda*

rights "knowingly and voluntarily" (ROA.5 801); Morrison's consumption of alcohol and cocaine "does not support a finding that he was under the influence at pertinent times, including at the time he gave his statements almost 24 hours after his last consumption (ROA.5 801-802); and, Morrison's behavior was "sober and rational" (ROA.5 802).

At the postconviction evidentiary hearing, Dr. Eisenstein noted Morrison had a significant substance abuse problem, suffered head injuries, and had been born prematurely which might be a source of organic brain damage ("OBD") and was intellectually disabled. (PCR.15 2940-41, 2940-41, 2944-3043). Dr. Eisenstein also suggested that the OBD limited Morrison's cognitive flexibility and ability to plan. (PCR.15 3011). The doctor questioned Morrison's ability to make independent decisions. (PCR.15 2968)

Dr. Wu found Morrison had abnormal brain metabolism which is significant with someone who likely has significant impairment on IQ. Also, Dr. Wu found an abnormal pattern in Morrison's frontal lobe often seen in those who have sustained a head injury (PCR.15 2906-19).

Dr. Prichard, the State's expert acknowledged Morrison's severe substance abuse problem. (SPCR 183) Joseph Turner, a convicted felon twelve times over, testified that Morrison had confessed to other crimes he did not commit (PCR.13 2555).

According to Delores Tims, Morrison smoked crack at the time of his arrest and that Officer Richardson allowed that to occur (PCR.17 3236-47). Raymond Seels testified Morrison was with him the night Seels shot a man at a bar and that Morrison ran from the scene with him. (PCR.13 2554-55)

C. TRIAL COURT ORDER – With respect to the allegation counsel was ineffective for failing to retain experts for the suppression hearing, the trial court found:

> Given the findings of these mental health experts, it is likely Defendant has a significantly impaired mental state at the time of the interrogation. Because Defendant's statement was the key piece of evidence against Defendant, it was unreasonable for counsel not to investigate Defendant's mental state at the time of his statement. Dr. Wu's and Dr. Eisenstein's conclusions are extremely relevant to determining the impact Defendant's mental state had on his statement to the police. Had defense counsel presented such evidence, the Court at the suppression hearing or the jury at trial could have used it to evaluate the voluntariness and veracity of Defendant's statement.

(PCR.8 1547)

Respecting the allegation that counsel was ineffective for not presenting evidence of Morrison's crack use within hours of his interrogation, the trial court concluded that the record showed that Morrison had been using alcohol and drugs the night before his arrest and that the detectives had testified that they did not detect that Morrison was impaired or under the influence of drugs or alcohol at the time of the interrogation,

but that Dr. Eisenstein's (postconviction mental health expert) "challenges the Detectives' testimony" (PCR.8 1548) Pointing to Dr. Eisenstein's testimony that substance abuse "impairs cognitive abilities" "both in terms of acute and chronic usage" and that Dr. Prichard agreed that Morrison has a "severe drug addiction," the trial court rejected the State's argument that Morrison was no longer under the influence thirteen hours after he last used drugs/alcohol. (PCR.8 1548-49). The court found:

> Had counsel been more diligent, he would have addressed this point if not at the suppression hearing, then at the trial. Dr. Eisenstein's and Dr. Prichard's testimonies about the effects of Defendant's alcohol and drug abuse on his brain functions lend credence to Defendant's instant claim that his substance abuse had a deleterious effect on his statement to the police. Counsel failed to present evidence that Defendant's crack use before Defendant's arrest undermined his statement to the Detectives. Counsel's failure to present such testimony establishes "a probability sufficient to undermine confidence in that outcome." *Strickland*, 466 U.S. at 693-94).

(PCR.8 1548-49)

In addressing the claim that counsel was ineffective for not presenting evidence that Morrison had taken the blame for others' crimes he did not commit, the trial court pointed to the testimony of Joseph Turner and Terry Heatly giving examples where Morrison took the blame for others and Dr. Eisenstein's testimony noting Morrison's susceptibility to being a "fall guy.". (PCR.8 1550-51). The trial court found such evidence

"readily available" to trial counsel and that it was unreasonable for counsel not to have investigated that information. (PCR.8 1551). Continuing, the trial court stated:

> Moreover, coupled with Dr. Eisenstein's conclusions, this evidence would have illustrated how Defendant could inculpate himself in Mr. Dwelle's death and could have aided the jury in weighing the veracity of Defendant's statement. As discussed, the State relied heavily upon Defendant's confession at trial. Counsel's failure to present evidence of Defendant's propensity to take the blame for others undermines confidence in the outcome of the proceedings.

(PCR.8 1551)

In its Summary, the trial court reasoned:

> ...Defendant has, however, shown counsel's performance was deficient because he failed to retain mental health experts to describe and explain how Defendant's mental state during his interrogation with the police would impact the voluntariness and reliability of that statement. Similarly, counsel's failure to investigate Defendant's crack use within hours of his interrogation prevented the Court at the suppression hearing and the jury at the trial from learning the effects crack had on Defendant's statement. Finally, Defendant's history of admitting to crime he did not commit is evidence that challenges the veracity of Defendant's statement. Counsel's failure to reasonably investigate and locate this evidence constitutes deficient performance. It is reasonable to find this evidence, had it been presented, could have changed the outcome of the proceedings.

(PCR.8 1552).

D. ANALYSIS - The trial court erred in not finding this claim procedurally barred and in misapplying *Strickland*. In the suppression hearing, Morrison challenged the confession on the grounds that he never confessed to the police and that they had

refused to give him an attorney. On direct appeal, this Court found unpreserved the claim the confession should have been suppressed as it was given after the police obtained the confession only after making "illicit appeals" to Morrison's religious beliefs. This Court found that Morrison had testified that he had not confessed; and did not make a finding of fundamental error. *Morison*, 818 So.2d at 446. In his postconviction motion, Morrison repackages his claim of coercion and lack of voluntariness by claiming his substance abuse, brain damage, drug usage before his arrest, and propensity to take the blame for others rendered his confession involuntary and untruthful. *See State v. Riechmann*, 777 So.2d 342, 353 n.14 (Fla. 2000) (finding claims procedurally barred because defendant was couching them in terms of ineffective assistance when they had been raised and rejected on direct appeal); *Freeman v. State*, 761 So.2d 1055, 1067 (Fla. 2000); *Muhammad v. State*, 603 So. 2d 488, 489 (Fla. 1992) ("Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack.").

In *Miller v. State*, 161 So. 3d 354 (Fla. 2015), this Court found the ineffectiveness claim procedurally bared opining:

> On direct appeal, we rejected Miller's claim that the trial court erred when it denied the motion to suppress his confession on the basis that the officers who conducted the interrogation failed to advise him that he had the right to appointed counsel during

> questioning. *Id.* at 219–20. Miller now attempts to relitigate the voluntariness of his confession on the basis that evidence of his mental impairments and substance abuse was not uncovered until the postconviction proceedings. Since the voluntariness of Miller's confession was addressed and rejected by this Court on direct appeal, he cannot now relitigate a substantially similar claim under the guise of ineffective assistance of counsel.

Miller, 161 So. 3d at 372. This Court should find the bar here.

The ineffectiveness claim must be reviewed in light of Morrison's testimony at trial that he did not confess to the police. The trial court ignores this critical fact in its analysis. It is well settled that counsel may not be found ineffective were his client's actions, admissions, or the evidence circumscribe his decisions. *See Rivera v. State*, 717 So.2d 477, 485 (Fla. 1998) (opining, "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made."); *Squires v. State*, 558 So. 2d 401, 402-03 (Fla. 1990) (noting counsel's decisions circumscribed by defendant's admissions to counsel and evidence).

At the suppression hearing, Morrison testified that he knew he had the right to remain silent and the right to an attorney. He also testified that he had not confessed and was no longer under the influence of substances 13 hours after he last used any substances. Yet, on postconviction, he asked the trial court to find deficiency and prejudice for counsel not

presenting evidence that his confession was involuntary and false. This is diametrically opposite from his trial testimony and was considered even though Morrison did not testify that he was in fact intoxicated based on a specific amount of drugs/alcohol taken, had confessed to the police, and that he was taking the blame for others. The trial court's findings of deficiency likewise are unsupported as no expert opined as to the amount of drugs/alcohol ingested and necessary for impairment to the point of mania. This evidentiary failing establishes the trial court's error on finding deficiency. See, *Reaves v. State*, 942 So.2d 874 (Fla. 2006) (rejecting claim of ineffective assistance of counsel for not presenting a voluntary intoxication defense where defendant "did not present any evidence at the evidentiary hearing to show his level or state of intoxication at the time of the murder. There was no evidence to corroborate Reaves' assertions that he was "high" at the time of the offense. Importantly, although the mental health experts opined at the evidentiary hearing that Reaves was intoxicated, they did not have any objective evidence to support their conclusions.")

This Court has held it is "well settled that the drunken condition of an accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession, but may affect its

weight and credibility with the jury." *Lindsey v. State*, 66 Fla. 341, 343, 63 So. 832, 833 (1913). See *Rigterink*, 2016 WL 1592714 (Fla. 2016). In the instant case, the trial court employed a lesser standard by merely accepting that long-time drug abuse has a deleterious effect on the brain impacting cognitive ability. If this lesser standard were to apply, then taken to is logical conclusion, no drug addict could be found competent to make a knowing, intelligent, and voluntary waiver of his rights. Consistently, this Court has required something more than a mere drug problem before accepting voluntary intoxication as a defense.

Davis v. State, 990 So.2d 459, 464 (Fla. 2008) supports a finding that the trial court misapprehended the facts and misapplied *Strickland*. In *Davis*, this Court rejected an ineffectiveness claim alleging "that his counsel should have presented an expert to testify as to the effects his LSD use had on giving the confession." In *Davis*, there was about a 15-hour gap between the defendant's LSD use and the interrogation. There, the proposed defense expert "testified that the effects of LSD generally last only twelve hours." Here, there has been no prima facie allegation indicating the specific duration of the effects of crack and alcohol, nor was an expert called to so testify at the evidentiary hearing. Again, there is no factual allegation or testimony about how much crack cocaine and/or

alcohol was consumed by Morrison either on the day of the murder or on the day of his arrest. *Davis* held that, "as with Davis's sleep deprivation, physical abuse, and age claims, we affirm the denial of relief on this claim." There, "officers who interviewed Davis testified that he appeared coherent and not tired." Here, officers testified that Morrison did not appear to be under the influence.[8] (ROA.8 1268-69, 1297-99, 1315-17)

Moreover, in *Baker v. State*, 71 So.3d 802, 814 (Fla. 2011), this Court recognized for there to be a finding of an involuntary confession "there must be a finding of coercive police conduct." (*citing Schoenwetter v. State*, 931 So.2d 857, 867 (Fla. 2006)) *See Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (opining "Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due

[8] The appellate record shows that on cross-examination of Officer Richardson, defense counsel elicited testimony acknowledging that he (the officer) had information that Morrison had been smoking crack "all night before you arrested him." (ROA.8 1292) Morrison himself swore at the motion-to-suppress hearing that he was consuming alcohol and drugs until about 2:30am the day he was arrested. (ROA.8 1392) Defense counsel also called Morrison's mother at the motion-to-suppress hearing, where she testified about Morrison consuming alcohol (ROA.8 1411-14). Defense counsel's memorandum followed-up by stressing Morrison's drug use. (ROA.7 773, 775) Based on the totality of the evidence, including evidence concerning alcohol and drugs, the suppression hearing court found that Morrison was not "under the influence at pertinent times" and his behavior was "sober and rational" (ROA.5 802). Morrison came forward with noting to undermine that finding.

Process Clause of the Fourteenth Amendment."). "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Connelly*, 479 U.S. at 164, 107 S.Ct. 515. Morrison produced no evidence of police coercion, thus, he has not shown that his claim of intoxication or mental issues establishes a lack of voluntariness especially in light of the fact that he admitted he knew his rights and exercised his right to remain silent by not confessing. On this point alone, the claim of ineffectiveness fails as Morrison has not shown that the result of the suppression hearing would have been different had his alleged mental condition, intoxication, and propensity of accepting blame were presented by counsel.

With respect to the trial court's treatment of the claim that counsel should have brought forward evidence that Morrison had taken the blame for others, the evidence is again lacking. Again, Morrison did not testify that he did confess to the police, but that he was taking to blame for others. Moreover, the mere fact that Morrison may have confessed in another crime is not proof that he was not guilty of the instant murder; there is no evidence that Morrison's confession was materially false or coerced.

Furthermore, the trial court's finding that Morrison's alleged propensity to confess for others "could have aided the

jury" is not the standard under *Strickland*.[9] Instead, the defendant must prove that counsel's performance fell below the standard guaranteed by the Sixth Amendment, and that but for the alleged deficiency, there is a reasonable probability that the result of the proceedings would have been different. *Strickland*, 466 U.S. at 688-89. When considering this, there is a strong presumption that counsel rendered effective assistance and Morrison had the burden to show a false confession bearing in

[9] The trial court's prejudice analysis with respect to the jury failed to consider that his confession established that he knew where the murder weapon could be found and that Dwelle's throat was sliced with the victim's knife. Also, Morrison's explanation that he held Dwelle's right arm as the knife was pulled across his throat is consistent with the forensic evidence that Dwelle was cut from behind, had abrasions and bruises on his arms and neck and chin from the struggle, and that the perpetrator may not have had blood on him as nether the jugular nor carotid vessels were cut. (ROA.14 782-99). When these factors are taken into account, this Court should find that Strickland prejudice was not established; it has not been shown that Morrison's mental health, substance abuse, or propensity to confess undercut in the least the facts contained in his confession, thus, this Court's confidence in the verdict has not been undermined. These factors support the verdict that Morrison was the person who killed Dwelle and hid the murder weapon.

Moreover, the assertion that Morrison false took the blame for another is refuted in part by Brown's testimony. First, Morrison did not establish that Brown would change her sworn trial testimony, thus, that remains un-assailed testimony for the jury. Her trial testimony established that Dwelle's apartment was directly across the hall from her unit and that Morrison was with her the afternoon and evening of January 8, 1997 and that near 8:00 or 9:00 PM Morrison put on some steaks to cook then announced he would be taking out the trash. Morrison never returned. Again, Brown has not recanted that account. This Court should find Strickland prejudice was not established; confidence in the proceeding has not been undermined

mind such a claim would open the door to a prosecution response that could detail Morrison's responses to each of his numerous arrests and illegal activities (See Morrison's arrest and disposition record in the PSI at ROA.6 1087-91), thereby patently negating *Strickland*'s deficiency and prejudice prongs. Opening the door to such harmful information would auger against such a strategy. This Court should so find it was error to find ineffectiveness here.

As noted above, the trial court did not conduct the proper *Strickland* prejudice analysis. The trial court merely found the alleged deficiencies "could have changed the outcome of the proceedings." (PCR.8 1552). As the claim was addressed to how counsel conducted the suppression hearing, that is the proceeding at issue. Yet, the trial court did not find that the confession would have been excluded. As *Strickland* prejudice is a legal matter, this Court should find that prejudice has not been shown for the reasons addressed above and that Morrison has not carried his burden under *Strickland*. The trial court's order should be vacated and postconviction relief should be denied.

ISSUE II

THE TRIAL COURT ERRED IN GRANTING RELIEF ON THE CLAIM OF INEFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL

Morrison alleged counsel rendered ineffective assistance

for failing to investigate and present: (1) an alibi defense; (2) challenges to the State's timeline; (3) evidence of voluntary intoxication; and (4) cross-examination of Sandra Brown on her alleged relationship with 82-year old victim, Albert Dwelle. The trial court's findings and *Strickland* analysis are in part unsupported by the evidence and law. While a prejudice finding was made with respect to the voluntary intoxication claim, the record is devoid of evidence of intoxication to support such a defense. The trial court's ultimate conclusion was that counsel failed to do an adequate investigation, therefore, his strategic decisions were unreasonable. However, the trial court did not make a prejudice finding. This does not satisfy Strickland, and relief should have been denied. Even were this Court to conduct an independent prejudice analysis, Morrison should be found not to have proven his case in light of the trial record and his evidentiary failing during the postconviction evidentiary hearing. This Court should reverse the trial court and deny collateral relief.

A. STANDARD OF REVIEW – The state incorporates the standard of review set forth in Issue I.

B. FACTS – In his signed confession, Morrison admitted that on January 8, 1997, after a day of doing crack cocaine with "Big Man" he no longer had any drugs or money so he sat on the steps to Apartment #68 drinking beer. At approximately 9:00 PM

and wanting a cigar, Morrison knocked on Dwelle's door. After Dwelle told Morrison he could not come inside and closed his door to get a cigar, Morrison opened the door, entered the apartment, and followed Dwelle into his bedroom area. Morrison stated that upon seeing money in the shirt pocket of Dwelle's shirt hanging on a chair, he took the money, however, Dwelle saw what Morrison did. According to Morrison, Dwelle picked up a knife and attacked. Morrison claimed he tried to defend himself and not hurt Dwelle.. Morrison said he had difficulty trying to get the knife as Dwelle was stabbing at him. The man was thrusting the knife back over his shoulder at Morrison. In time, Morrison confessed he grabbed the man by the arm and turned him around so Dwelle was facing away. The man was thrusting the knife back over his shoulder at Morrison. Eventually, Morrison got hold of Dwelle's right arm, but the man continued thrashing the knife trying to cut Morrison. It was during the struggle, Morrison stated Dwelle cut his own throat twice. Morrison told the police he just laid Dwelle on the floor and left the apartment and hid the knife under a brick in the apartment complex. (ROA.3 580-81, 586-89). Afterward, Morrison went to Big Man's house and had Big Man take him to the Chevron where they got gas and Big Man took Morrison to Marietta where he bought drugs with Dwelle's money before returning to Ramona Apts. He continued to smoke dope and drink until the

police picked D up in the afternoon. (ROA.3 588-89)

Sandra Brown testified at trial that Morrison was with her all day and that between 8:00 and 9:00 PM on January 8, 1997, they purchased and drank beer; Morrison had two to three tall bottles that night. After putting on a steak, Morrison left the apartment stating he was taking out the trash. Brown did not see him until the morning of January 10, 1997. (ROA.2 390-ROA.3 404, 406-07).

Reginald Early testified for the defense at trial and reported that he had taken Morrison to the grocery and shoe store near 4:00 or 4:30 PM on the afternoon of the murder. (ROA.5 847-49). He stated he did not see any blood on Morrison. (ROA.5 851). Early corroborated Brow's account of her coming to his apartment looking for Morrison later that evening. (ROA.5 854-55)

During the August 14, 1998 hearing, Eler discussed with the Court his alibi witnesses. Eler disclosed he had placed Reginald Early on the witness list and that Fred Austin and Gillis Seals may be added. (ROA.9 1538). With respect to Gillis, Eler stated "She is purportedly an additional alibi witness who could substantiate Mr. Morrison's whereabouts." (ROA.9 1538). Continuing, Eler advised this Court, "I can represent to the Court my investigator and I have been unable to find her. We're still looking. In the event she does surface" the State would

be entitled to depose her. (ROA.9 1539). Eler noted that Gilis had "existed" when Mr. Higbee had the case in the very early stages, but that Eler had sent his investigator to the last known address and found that it was a vacant lot. (ROA.9 1539). Eler anticipated that Mr. Early would be able to offer the same alibi testimony as Gillis. (ROA.9 1539). It was also disclosed by Eler:

> Let me announce for the record, the Court appointed Investigator Mr. Ken Moncrief to assist me in this defense in locating witnesses. I can assure the Court that myself, and Mr. Moncrief exercised diligent efforts in locating every person the Mr. Morrison indicated that may have some information as to a defense.
> And after careful consideration, have chosen the ones that we have listed, and the defense that we have chosen without revealing what that is right now.
>
> . . .
>
> But, yes, we have. We made ourselves available, read the correspondence, and are prepared.

(ROA.9 1540-41)

Prior to opening statements, Eler and the trial court discussed Morrison's letters addressed to alibi witnesses and where he was at the time of the crime. (ROA.2 334). The discussion revealed:

> THE COURT: There is one person, Sandra Brown. Mr. Eler do you know anything about a Sandra Brown?
> MR. ELER: Judge, yes, I was provided those letters, as well, forwarded to my investigator and have sought out and interviewed, or attempted to seek out and interview those folks. And based on that information which my investigator provided, have made

> the decision who to call and who not to call, who to list, not to list, and advised Mr. Morrison of that.
>
> THE COURT: How about Big Man?
>
> MR. ELER: Big Man is Reginald Early, Your Honor. He is under subpoena for trial.
>
> THE COURT: How about some salesperson at a Foot Locker, security guard. Anything about these?
>
> MR. ELER: Judge, those names were provided. Based on that letter we have investigated and are continuing to investigate these matters. However, I don't anticipate calling them at trial.
>
> THE COURT: How about Fred Morrison. It says here -
>
> . . .
>
> THE COURT: his uncle.
>
> MR. ELER: Fred Austin, Your Honor. He's in state prison being transported.
>
> THE COURT: So, Fred Morrison, Fred Austin are the same people?
>
> MR. ELER: Yes, sir.
>
> THE COURT: Then we have Gillis here. That's the person you've been telling me about?
>
> MR. ELER: Yes, sir. As of this morning, during the lunch break the latest report, as I indicated, a vacant apartment. But as I mentioned, also, Gillis Seals, her testimony would basically be duplicative of Mr. Reginald Early, who is under subpoena, Your Honor.

(ROA.2 334-35)

When testifying as a State witness at the evidentiary hearing and after refreshing himself with a review of the defense files, Eler reported that the alibi defense rested on Mr. Early, also known as "Big Man." (PCR.9 345). Ken Moncrief, ("Moncrief"), confirmed that a letter Morrison wrote was found in the Clerk's file and that it had been there unbeknownst to either party. Eler asked Moncrief to investigate, but he "came up empty." Moncrief could not find the people listed and the shoe store to which Morrison referred had been "closed for some

time." The letter had been buried in the Clerk's file; it had not been given to Eler. There was nothing relevant Moncrief could find. (PCR.17 3217-18), However, he admitted at the evidentiary hearing that he never visited the Marietta area of Jacksonville where some of the alibi witness were alleged to have resided. (PCR.17 3221).

During the postconviction evidentiary hearing and in support of his alibi and voluntary intoxication claims, Raymond Seels testified he saw Morrison on January 8th between 7:45 PM and 8:30 PM. He did not see any blood on Morrison.[10] (PCR.12 2256-59) Gillis Payton testified that she saw Morrison at her home on January 8th when it was dark. Morrison was "high" on drugs. She did not see any blood on him. (PCR.16 3164-66). Fred Austin stated he had been with Morrison sometime before 10:00 PM that night and they had been using drugs and drinking. Austin reported that Morrison had a long-standing drug problem. (PCR.17 3254, 3257, 3262-63). Charlene Wright testified she saw Morrison between 8:00 or 9:00 PM in the Marietta area on the night of the crime. (PCR.17 3328-31). Tangy Allen testified that she had phone conversations with Morrison on January 8th and

[10] The record established that blood was found under Dwelle's body, on a towel, and two spots were found on a trash can near the body. (ROA-T.3 555). The medical examiner testified that Dwelle most likely was killed from behind, but that neither of the major blood vessels in the neck were cut. Dwelle died from loos of blood and that he "aspirated the blood caused by the knife wounds." *Morrison*, 818 So.2d at 437-38.

she could tell he had been drinking and probably using drugs. The last conversation they had was at approximately 4:30 PM. (PCR.14 2840-43). She too, reported Morison had a drug addiction problem. (PCR.14 2828, 2852, 2861). Joseph Turner, Terry Heatly, and Morrison's father, Raymond, Sr., all attested to Morrison's drug problems since he was a teenager. (PCR13 2551; PCR.14 2868-69; PCR.16 3149-50). However, none testified about how much Morrison may have taken on the day of the murder or on the day of his confession.

As noted above, Dr. Eisenstein diagnosed Morrison with a drug addiction problem and that such a problem could affect brain functioning and cause impairment leading to OBD. (PCR.15 2941-42, 2971-72). However, he did not offer what Morrison's leval of intoxication was at the relevant times and would only say that drinking "compromises cognitive abilities, cognitive flexibility, reasoning abilities." (PCR.15 2973)

While Isaia Medina ("Medina"), a neighbor of Dwelle's did not testify at trial or the postconviction hearing, the record reflects that Detective Davis gave a pre-trial deposition in which he reported that Medina had reported hearing the sounds of a chair moving in Dwelle's apartment near 9:00 PM on the evening of the murder. (ROA.4 577-78) Through his postconviction investigator, Morrison alleged that Medina deposition contained a report that he heard the chair noises between 7:30 and 8:00 PM

that night when he was starting to watch the movie, *The Abyss*. The investigator reported that the television schedule had the movie starting at 7:00 PM. Eler pointed out Medina was referring to normal movement of chairs. (PCR.12 2330-34).

With respect to the claim counsel failed to cross-examine Sandar Brown on her alleged relationship with Dwell, Morrison called Delores Tims. Tims repeated what Sandra Brown was alleged to have stated, namely, that she had a relationship with Dwelle and that she would exchange sexual favors for beer and cigarettes. Charlene Wright merely offered that Brow's relationship with Dwelle involved her beer and cigarettes for him. (PCR.17 3337)

C. TRIAL COURT ORDER – The trial court found that:

> ...the entire record shows Mr. Eler did not adequately investigate or prepare an alibi defense. Although Mr. Eler called Mr. Early as a witness, he did not call any other witnesses who could either corroborate Mr. Early's testimony or offer their own additional testimony as they did at the evidentiary hearing. These witnesses testified they saw Defendant in Marietta at or about the time Ms. Brown placed Defendant at the scene. Such evidence showing Defendant was not present at the scene of the crime at the time the State alleged the murder occurred could have raised a reasonable doubt among the jurors.

(PCR.8 1558). Similarly, in addressing Mr. Medina's account, the court stated:

The Court must consider Mr. Medina's testimony[11] along

[11] As this Court is aware, Mr. Medina did not testify at trial or in the instant evidentiary hearing.

> with the testimony of Mr. Early, Mr. Seels, Ms. Payton, and Mr. Austin. This testimony could reasonable lead a jury to infoer Defendant was not at Ms. Brown's apartment and not in proximity to Mr. Dwelle at the alleged time of the murder. Consequently, it would have been reasonable for counsel to investigate Mr. Medina's statement and deposition testimony.

(PCR.8 1560)

The court also reasoned:

> The lay witness testimony, along with Dr. Eisenstein's and Dr. Prichard's testimony. Provides substantial evidence to show Defendant suffered from severe substance abuse that caused long-term effects. Counsel's failure to locate and present this evidence to the jury undermines the Court's confidence in the outcome of the proceedings.

(PCR.8 1564)

Addressing the cross-examination of Sandra Brown, the trial court noted Eler could not recall anything about Sandra Brown at the evidentiary hearing and that in spite of arguing in closing she had been in Dwells apartment previously, he never asked her about that relationship. (PCR.8 1567). Continuing, the court stated: "more importantly, despite available evidence of Ms. Brown's relationship with Defendant and her relationship with Mr. Dwelle, Mr. Eler never interviewed Ms. Brown prior to trial." (PCR.8 1567)

In its Summary and Conclusion, the trial court reasoned:

> Counsel's paucity of investigation and presentation for the guilt phase is evident in counsel's failure to interview witnesses who could have challenged the State's theory that Defendant was at Ms. Brown's

apartment at approximately 9:00 p.m. on January 8, 1997. Postconviction counsel presented a number of credible witnesses who testified Defendant was not at Ms. Brown's apartment at or about the time Mr. Dwelle was murdered.

Likewise, counsel failed to investigate Mr. Medina's report of hearing noises from Mr. Dwelle's apartment the night of the murder. Mr. Eler admitted Mr. Medina's testimony would have been valuable in the timeline was important. Because the timeline was important, counsel should have investigated witnesses who could challenge the State's theory of when the murder occurred.

Counsel also failed to properly investigate Defendant's intoxication at the time of the murder. Given all the evidence available to Mr. Eler that he failed to investigate, the Court cannot find he made a reasonable strategic decision not to present this evidence to show Defendant was intoxicated at the time of Mr. Dwelle's murder. Finally, although Ms. Brown was the source of much information about the night of the murder, Mr. Eler never interviewed her before trial.

. . .

By Mr. Eler's admission, he did little in the intervening eight months (from appointment) to prepare for Defendant's trial. It was unreasonable for Mr. Eler to believe Defendant's case was ready for trial when the Court appointed him to represent Defendant. The absence of any significant investigation by Mr. Eler renders his decisions unreasonable as they related to challenging the validity of Defendant's statement, introducing evidence of Defendant's mental health problems as well as Defendant's drug and alcohol abuse, and calling witnesses who would testify Defendant was not in proximity to Mr. Dwelle at the time the police say he was murdered.

In light of these findings and the requirements in Strickland, the Court finds counsel did not thoroughly investigate the facts surrounding this crime. Consequently, counsel's strategic decisions not to pursue certain avenues were unreasonable. Defendant

is entitled to relief on Claim I.

(PCR.8 1567-69)

D. ANALYSIS – The trial court made certain findings and assumptions unsupported by the evidence and the law. More important, the trial court did not complete a proper prejudice analysis taking into account Morrison's confession and the corroborating testimony and forensic evidence.

First, the court assumed that it was the State's theory that the crime took place sometime after 9:00 PM. However, that time was based on Morrison's own confession corroborated by Sandra Brown. As such, the trial court should have considered how the result of the trial would have been impacted by alibi and timeline testimony when Morrison confessed to committing the murder. For the reasons set forth in Issue I and incorporated here, the confession was admissible and powerful evidence which Morrison has not shown to be untrustworthy.

Second, the alibi witnesses Ray Seals and Gillis Payton offered that they saw Morrison approximately 30 minutes before Morrison confessed to having committed the crime. Fred Austin said he say Morrison sometime before 10:00 PM and Charlene Wright said she saw Morrison in Marietta sometime between 8:00 and 9:00 PM. Again, Morrison's confession was that he murdered Dwelle at approximately 9:00 PM. Morrison did not testify at the evidentiary hearing, thus, he has not established that his

confession is inaccurate.

Third, the fact that witnesses claiming to having seen Morrison at 4:00 to 4:30 PM and between 7:45 and 9:00 PM[12] outside in Marietta, but not noting any blood on him, does not establish deficient performance or *Strickland* prejudice. By Morrison's own account, the murder did not take place until after 9:00 PM, thus, the fact he did not have any blood on him before then is of no moment.

Fourth, the trial court placed too much emphasis on the report of Mr. Medina's noting of a chair moving in Dwell's apartment. Mr. Medina was not presented by Morrison at the hearing to explain the allegedly inconsistent time reports nor did Morrison establish the that the chair sounds were as a result of the homicide. Assuming Mr. Medina's report that the chair was heard when moving was starting and that the movie started at 7:00 PM, Morrison confessed to committing the murder after 9:00 PM, thus, the chair sounds are unrelated to the

[12] This Court could take judicial notice that it is dark by 7:45 PM in January. Minimal weight should be given to such testimony; especially Charlene Wright's testimony where she claimed to have spotted Morrison at the end of the road and they did not have a conversation, but just hollered "Hey" to each other while Wright continued to do what she had been doing in her yard. The encounter was alleged to have taken place between 8:00 and 9:00 PM at night. In response to police questioning, Wright stated she told the police Morrison did not have any money that night and was wearing a white shirt and dark pants. Wright did not see any blood on his clothing. She estimated they saw each other from a block away. (PCR.17 3329-31)

murder and *Strickland* prejudice has not been established. *Jennings v. State*, 583 So. 2d 316, 319-20 (Fla. 1991) (finding "the existence of another theory of defense, which may be inconsistent with the chosen theory of defense, does not mean that counsel was ineffective.") *See also Hall v. Thomas*, 611 F.3d 1259, 1293 (11th Cir. 2010) ("[I]t is well-settled in this Circuit that a petitioner cannot establish an ineffective assistance claim simply by pointing to additional evidence that could have been presented." *Rhode*, 582 F.3d at 1284.")

Fifth, the trial court apparently put more credence in Eler's 18-year old memory and lack of documentation than in his contemporaneous report to the court that the alibi witnesses were being investigated without success. (ROA.2 334-35; POA.9 1540-41). Eler had a private investigator appointed and tasked him with investigating the alibi witnesses Morrison had noted in his letter to the court. Even though the investigator admitted he did not visit the Marietta area of Jacksonville, Moncrief testified he could not find the people listed and the shoe store to which Morrison referred had been "closed for some time." There was nothing relevant Moncrief could find. (PCR.17 3217-18). This Court has found that an attorney may rely on an investigator and is not deemed ineffective merely because the investigator is unsuccessful. *See Pooler v. State*, 980 So.2d 460, 467 (Fla. 2008) (rejecting claim of ineffectiveness where

counsel sent investigator to find information/witnesses, but the investigator was unsuccessful in finding documentation). This is especially true were the defendant has confessed to certain facts and new witnesses are sought to discredit the defendant's factual account.

Sixth, the trial court failed to recognize the evidentiary failure in Morrison's claim of voluntary intoxication. The State reincorporates its argument from Issue I and again presses that there is no evidence that the defendant was intoxicated on the night of the crime to the point where he could not form the necessary intent. Reaves is on point and supports the finding that Morrison has not carried his burden under *Strickland* here. In Reaves, this Court stated:

> In order to assert the defense of voluntary intoxication, Reaves must present evidence of intoxication at the time of the offense that would show his inability to form the requisite specific intent. *See Rivera v. State*, 717 So.2d 477, 485 (Fla. 1998); *Linehan v. State*, 476 So.2d 1262, 1264 (Fla. 1985). ***Reaves did not present any evidence at the evidentiary hearing to show his level or state of intoxication at the time of the murder***. There was no evidence to corroborate Reaves' assertions that he was "high" at the time of the offense. Importantly, although the mental health experts opined at the evidentiary hearing that Reaves was intoxicated, they did not have any objective evidence to support their conclusions.
>
> Other than his own statements during his confession, there is no direct evidence that Reaves was intoxicated at the time of the offense. During his confession, Reaves said he was "high" at the time he shot Deputy Raczkowski, but he also made statements

> indicating he knew exactly what he was doing at the time of the shooting. These statements essentially negated any voluntary intoxication defense that trial counsel could have presented on Reaves' behalf on retrial. *See Pace v. State*, 854 So.2d 167, 177 (Fla. 2003) (finding counsel's rejection of an intoxication defense was not deficient performance where Pace's confession "indicated a clear recollection of the facts of the offense and involved deliberate behavior"); *Davis v. State*, 875 So.2d 359, 367 (Fla. 2003) (finding competent, substantive evidence supported trial court's determination that counsel made an informed, strategic decision not to pursue an intoxication defense where defendant gave detailed confessions as to the circumstances of the crime that "substantially undermined the viability of a voluntary intoxication defense"); *Damren v. State*, 838 So.2d 512, 517-18 (Fla. 2003) (holding counsel's strategic decision not to present a voluntary intoxication defense did not constitute ineffective assistance of counsel where counsel determined the murder was not committed while Floyd was under the influence of cocaine).

Reaves v. State, 942 So. 2d 874, 879-80 (Fla. 2006)

Even if this Court were to conclude counsel did not investigate or consider a voluntary intoxication defense, Morrison did not come forward with any evidence that such was a viable defense. Again, Morrison presented no evidence of his level of intoxication at the time of the crime or during his confession other than offering he had two to three beers and had been doing crack cocaine. That is not substantive evidence of the level of intoxication. Moreover, his confession was clear and detailed as to the struggle with and killing of Dwelle. The evidence does not support a voluntary intoxication defense and the trial court's ruling on the matter should be reversed.

Furthermore, to the extent that the trial court considered evidence of Morrison attempts to combine intoxication with alleged brain damage, in support of a voluntary intoxication defense, such fails. Dr. Krop was contracted to conduct an evaluation and he caused a neuropsychological evaluation to be done. At trial, Dr. Krop outlined the testing conducted and the records/witnesses interviewed. (ROA.17 1220-21). Dr. Krop found Morrison to have a 78 full scale IQ, substance abuse problems which in a person with a borderline IQ causes him to become frustrated and impulsive. However, the doctor did not find any evidence of Organic Brain Damage ("OBD"), although he saw some deficits, but nothing conclusive. There was no significant neurological impairment found. (ROA.17 1221, 1223-26). Dr. Krop did not repudiate his former testimony.

Moreover, at best, Dr. Eisenstein offered Morrison had OBD as a result of his substance abuse and that drinking "compromises cognitive abilities." It is important to note that Dr. Eisenstein offered no tangible evidence of intoxication or the Morrison was not compromised that he could not form premeditated intent. Again, this is fatal to Morrison's claim.

In *Buzia v. State*, 82 So.3d 784, 795 (Fla. 2011) counsel was "not ineffective for failing to present evidence of brain damage in the guilt phase" "because he was entitled to rely on his mental health expert, who found no evidence of brain damage

resulting from the 1994 incident." Additionally, "no one testified that the brain damage alone negated premeditation." This Court concluded previously that competent, substantial evidence demonstrates not only that Buzia was capable of forming premeditation, but that the evidence supported the trial court's finding that the CCP aggravator applied to this murder" *Buzia* supports the rejection of relief here.

Seventh, the mere fact that Sandra Brown may have been having some sort of relationship with her neighbor Dwell does not given rise to the conclusion that she was the perpetrator. Such a situation, were it to be a fact, pales in light of Morrison's confession which was supported by the forensic evidence from the medical examiner and fact that Morrison led the police to the knife used in the killing. This Court should find that *Strickland* prejudice has not been established even if counsel failed to investigate or query Brown about any such relationship. *See Hall v. Thomas*, 611 F.3d at 1293 (noting "it is well-settled in this Circuit that a petitioner cannot establish an ineffective assistance claim simply by pointing to additional evidence that could have been presented." *Rhode*, 582 F.3d at 1284.")

Eighth, the trial court did not conduct a *Strickland* prejudice analysis. As addressed in part, any claim of lack of alibi witnesses, an attempt to change the timeline of the

murder, or note others had relationships with Dwelle must be viewed in light of Morrison's confession which is corroborated by the medical examiner and other forensic evidence. Morrison has not shown that his confession was inaccurate or false. It remains admissible evidence of Morrison's actions and must have been factored into the prejudice analysis along with all other testimony and forensic evidence.

All that the trial court found in its conclusion was that counsel did not conduct a reasonable investigation, thus, any decisions he made were unreasonable. However, that is not the standard. *Strickland* requires that counsel be given the presumption of competent representation. In fact, even were counsel to have failed to investigate entirely, clearly a professionally unreasonable decision, it remains the defendant's burden to prove that but for that failing, prejudice resulted. See *Strickland*, 466 U.S. at 691 (stating "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment" and "[a]ccordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.") As the Supreme Court provided: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually

every act or omission of counsel would meet that test, . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.*, 466 U.S. at 693. To prove *Strickland* prejudice, "[t]he defendant must show that 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." *Id.* 466 U.S. at 694.

Upon review of the entire record, including Morrison's confession to the robbery and killing of Dwelle, the medical examiner's testimony corroborating the events as described by Morrison, his bringing the police to the place where he had hidden the murder weapon, and the balance of the forensic evidence and testimony, this Court should find that there is no reasonable probability that the outcome of the trial would have been different had life-long family and friends testified they has seen Morrison prior to the time he claimed to have attacked and killed Dwelle, that noises were heard coming from Dwelle's apartment before the murder, and that Sandra Brown may have had a relationship with Dwelle. Likewise, as Morrison failed to present any evidence of his alleged level of intoxication, the allegation of ineffectiveness on that ground should not even have entered into the prejudice analysis. Surely, confidence in

the outcome of the trial has not been undermined and this Court should vacate the order granting postconviction relief.

ISSUE III

THE TRIAL COURT ERRED IN FINDING INEFFECTVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE

The trial granted postconviction relief on a finding that Morrison received ineffective assistance arising from counsel's lack of a diligent investigation into the social history and mental health matters and failure to give an opening statement. This was error as the trial court did not announce what mental mitigation was proven on collateral review that had not been presented previously. Likewise, the court did not analyze the impact of Morrison's change in strategy from presenting Morrison in a favorable light to now highlighting negative mitigation was deficient and prejudicial under *Strickland*. A proper assessment of the mitigation offered on collateral review in light of what was presented at trial shows that Morrison has not carried his burden under *Strickland* and that relief should not have been granted.

A. STANDARD OF REVIEW – Recently this Court has instructed on claims of ineffective assistance of penalty phase counsel stating:

> Penalty phase claims of ineffective assistance of counsel are reviewed under the two-prong test established by *Strickland*. First, to establish deficiency, the defendant carries the burden to prove

> that counsel's performance was unreasonable under prevailing professional norms. *Hoskins v. State*, 75 So.3d 250, 253–54 (Fla. 2011) (*citing Duest v. State*, 12 So.3d 734, 742 (Fla. 2009)). "It is unquestioned that under the prevailing professional norms ... counsel ha[s] an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (*quoting Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "Trial counsel cannot make a reasonable strategic decision when counsel does not 'conduct a thorough investigation of the defendant's background.'" *Diaz v. State*, 132 So.3d 93, 110 (Fla.2013) (*quoting Sears v. Upton*, 561 U.S. 945, 953, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010)). Moreover, counsel must not "ignore[ ] pertinent avenues for investigation of which he should have been aware." *Porter*, 558 U.S. at 40, 130 S.Ct. 447.
>
> Additionally, the defendant must demonstrate that he was prejudiced by trial counsel's failure to investigate and present mitigation. *Hoskins*, 75 So.3d at 254. The defendant "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [postconviction] proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter*, 558 U.S. at 41, 130 S.Ct. 447 (*quoting Williams*, 529 U.S. at 397–98, 120 S.Ct. 1495). A reasonable probability is a probability sufficient to undermine our confidence in the outcome. *See id.* at 43, 130 S.Ct. 447.

Salazar v. State, 41 Fla. L. Weekly S50 (Fla. Feb. 18, 2016), reh'g denied (Apr. 11, 2016). In order to be entitled to relief on a claim of ineffective assistance of penalty phase counsel, a capital defendant "must demonstrate that but for counsel's errors he would have probably received a life sentence." *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995). *See also, Sears v.*

Upton, 561 U.S. 945 (2010), *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (1996).

Butler v. State, 100 So.3d 638, 666-67 (Fla. 2012) provides:

> While trial counsel's failure to present mitigating evidence may under some circumstances entitle a defendant to a new penalty phase, the evidence must be of such significance that its absence has resulted in the deprivation of a reliable sentencing proceeding. *See, e.g., Hildwin v. Dugger*, 654 So.2d 107, 109–10 (Fla. 1995) (finding both deficiency and prejudice under *Strickland* where trial counsel "***failed to unearth a large amount of mitigating evidence," including two weighty statutory mitigating circumstances). By contrast, where the additional mitigation is minor or cumulative and the aggravating circumstances substantial, we have held that confidence in the outcome of the penalty phase is not undermined.*** *See, e.g., Breedlove v. State*, 692 So.2d 874, 877–78 (Fla. 1997) (finding no prejudice under *Strickland* where mitigating evidence presented in postconviction, particularly testimony concerning the defendant's drug addiction and beatings by his father, would not have changed the outcome in light of substantial aggravation in the record); *see also Asay*, 769 So.2d at 988 ("[T]his Court has reasoned that where the trial court found substantial and compelling aggravation, ... there was no reasonable probability that the outcome would have been different had counsel presented mitigation evidence of the defendant's abused childhood, history of substance abuse, and brain damage.").

Butler, 100 So.3d at 666-67.

B. POSTCONVICTION HEARING TETIMONY – During the evidentiary hearing, Tangy Allen testified Morrison was a day laborer (PCR.14 2821) Dr. Eisenstein stated poverty was present in this case. (PCR.15 3036) In spite of not informing counsel of

any child abuse inflicted upon Morrison, during the evidentiary hearing, neither Morrison nor his mother, father, or sister reported physical abuse by Georgia Morrison, such abuse is alleged here and Betty Harris, Georgia, Willie Morrison, and Paula Wilson, testified to physical and emotional abuse. Betty Harris reported Georgia beat Morrison with a belt and called him names such as "stupid", "crazy," and "retarded." Ms. Harris found Georgia could be mean and nasty if she were angered. (PCR.16 3177-78). Georgia admitted she had a temper when Morrison was young and if her children were noisy she put them in a closet and beat them with switches and sticks leaving marks on their flesh. To make sure no one discovered the beatings, she kept her children home from school. She tried to hide her abuse of her children because she was ashamed. (PCR.17 3278, 3290-93, 3310). Gloria offered that once her grandchildren were born, she realized what she had done to her children and impacted their lives severely. Now she is able to control her anger. (PCR.18 3413-15)

Willie Morrison, the thrice convicted felon and younger brother to Morrison, reported that his mother treated her children roughly; there was physical abuse and whippings inflicted. Sometimes Georgia would slap her children in the head. The "whippings" would end when his mother's arm got tired. (PCR.17 3360, 3365-67, 3370). Paula Wilson, Morrison's

sister, testified that her brothers received more whippings than she. Her mother would use extension cords and switches. Sometimes their mother would lock them in the closet for an hour and a half at a time. (PCR.17 3382, 3388; PCR.18 3408) In spite of the alleged mistreatment by Georgia, Wilson allows her mother to care for her grandchildren. Wilson saw a change in her mother after her grandchild was born. Wilson claimed her mother helped her a lot by watching her daughter. (PCR.18 3407-09)

Tangy Allen testified that she had phone conversations with Morrison on January 8th and she could tell he had been drinking and probably using drugs. The last conversation they had was at approximately 4:30 PM. (PCR.14 2840-43). She too, reported Morison had a drug addiction problem. (PCR.14 2826-29, 2852, 2861). Joseph Turner, Terry Heatly, and Morrison's father, Raymond, Sr., all attested to Morrison's drug problems since he was a teenager. (PCR.13 2551-52, 2558-60; PCR.14 2868-69; PCR.16 3149-50).

Joseph Turner knew Morison as a child and characterized him as "slow" and one who was manipulated by others. (PCR.13 2548-49, 2552-53). Former school principal, Irving Huffingham, did not remember Morrison, however, the school records showed Morrison had been referred for special (IQ) testing and that he tested in the "top end of the borderline range for mental

retardation" and was ***not*** placed in special education. (PCR.13 2573-79).

Tangy Allen testified that living with Morrison was like having another child in the house as she had to tell him everything to do. (PCR.14 2816-19). She related that Morrison once put beer in his baby's bottle. (PCR.14 2819). Also, Allen reported that Morrison did not drive. He did not have a checking account, so he gave her his paycheck and she paid the bills. (PCR.14 2815, 2820-22). Terry Heatly also characterize Morrison as "very mentally slow" and manipulated by others including getting him to hold drugs for others. (PCR.15 2872-76)

The postconviction testimony of Raymond Sr. and Georgia Morrison were different that their penalty phase testimony as they focused here on the more negative aspects of Morrison's life including Morrison's premature birth while Gloria was incarcerated, their divorce, Gloria's physical abuse of Morrison, and his substance abuse. (PCR.16 3134-38, 3142-43, 3149-50; PCR.17 3277-80, 3290-94). Gloria also re-characterized her testimony regarding how helpful Morrison was around the house. In the evidentiary hearing she claimed Morrison's help with his grandmother was very limited and not independent. She now reported that Morrison was slow and unable to do things other children could do around the house. (PCR.17 3288-3301).

Dr. Eisenstein noted Morrison had a significant substance abuse problem, suffered head injuries, and had been born prematurely which might be a source of organic brain damage ("OBD") and was intellectually disabled. (PCR.1-14-15 700-01, 704-803). Dr. Eisenstein also suggested that the OBD limited Morrison's cognitive flexibility and ability to plan. (PCR.1-15-15 771). The doctor questioned Morrison's ability to make independent decisions. (PCR.1-14-15 728)

Dr. Wu found Morrison had abnormal brain metabolism which is significant with someone who likely has significant impairment on IQ. Also, Dr. Wu found an abnormal pattern in Morrison's frontal lobe often seen in those who have sustained a head injury (PCR.15 2906-19).

Dr. Krop claims he did not receive all of the school records, and received no DOC or medical records. (SPCR 31-35, 47) At trial, Dr. Krop stated that he reviewed school records, police reports, and interviewed Georgia Morrison. (ROA.17 1221) During the evidentiary hearing, Dr. Krop stated that he had affidavits from Joseph Turner, Terry Heatly and Willie Morrison in addition to the 1976 school psychological evaluation of Morrison and the raw data of the testing of Morrison done by Drs. Eisenstein and Taub. (SPCR 29-30) Georgia Morrison had mis-informed Dr. Krop that Morrison had been placed in a special education class by the school system when in reality Morrison

was merely placed in an alternative school. (SPCR 41) It was Dr. Krop's opinion that reviewing the school's psychological testing, Morrison would not qualify for special education services. (SPCR 117)

Dr. Krop noted that he had never received Morrison's DOC records which showed that Morrison had walked away from a work release program and was charged with an escape, he would not have altered his opinion that Morrison could do well in a structured environment. (SPCR 49). Morrison failed to ask whether the new records would change Dr. Krop's opinion.

C. TRIAL COURT ORDER – After reviewing the mental health testimony offered at the evidentiary hearing, the trial court opined:

> In light of the substantial mental health mitigation evidence experts presented at the evidentiary hearing, counsel's failure to adequately investigate the mitigating nature of Defendant's mental health was not reasonable and deprived Defendant of valuable mitigation. Even if Defendant does not qualify as intellectually disabled, the experts shed light on Defendant's mental health and provide valuable mitigating evidence.
>
> There were sufficient facts in this case to place counsel on notice that further investigation of mental mitigation was necessary. As Dr. Krop so aptly stated "[p]retty much everything from the point that Mr. Elere got involved was last minute."

(PCR.8 1591)

The trial court also set out the testimony offered by Morrison's family and friends at the evidentiary hearing. It

found "[u]nlike trial counsel, whose efforts were to paint Defendant in a positive light, postconviction counsel sought to expose the negative elements of Defendant's background and show how these constituted mitigation." (PCR.8 1594) The trial court also noted that penalty phase counsel "failed to put on Defendant's significant alcohol and drug use before the Court" at the Spencer[13] hearing. (PCR.8 1605).

Ruling on the sub-claim that counsel was ineffective for not challenging the conviction used to support the prior violent felony aggravator, the trial court rejected the claim of ineffectiveness. Relying upon *Johnson v. State*, 104 So.2d 1032, 1043 (Fla. 2012); *Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006) and related cases, concluding Morrison was not permitted to challenge the validity of his prior conviction, thus, "counsel cannot be deemed ineffective for failing to pursue a meritless claim." (PCR.8 1606).

In the trial court's "Conclusion" it noted the difference between Eler's assessment of how trial-ready the case was when he took over for the Public Defender and former counsel, Alan Chipperfield's, assessment. Eler believed the case was trial-ready, while Mr. Chipperfield did not. (PCR.8 1614, 1616). Continuing, the trial court reasoned:

Here, Mr. Eler's failure to investigate Defendant's

[13] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

mental health and social background mitigation does not amount to a reasonable strategic decision based on adequate investigation. Dr. Krop's communication with previous counsel, alone, should have alerted Mr. Eler and Mr. Anderson to pursue mental health mitigation. Although Mr. Eler testified he relied on Dr. Krop, he admittedly did not investigate the doctor's involvement in Defendant's case. Doing so would have revealed Dr. Krop's request for more information. Moreover, contacting Dr. Krop only days before the penalty phase was irresponsible especially because Mr. Eler's files contained the doctor's request for more information well before the penalty phase conmmenced.

Mr. Eler misguidedly believed Defendant's case was ready for trial when he was assigned to represent Defendant. These attorney's believed previous counsel had completed the investigation of mitigation in Defendant's case. The only evidence of Mr. Eler's contact with the public defenders, however, is Mr. Eler's testimony that he thought he spoke with one Assistant Public Defendant [sic] and did not think he spoke to Mr. Chipperfield. (E.H., Mar 18, 2015 at 31) Mr. Chipperfield, however, was forthright in his opinion that investigation for the penalty phase was in no way complete when Mr. Eler came on board.

Looking at the notes Mr. Chipperfield scribbled on one piece of paper, which Mr. Eler testified he relied on, the Court finds an unreasonable lack of preparation and investigation for the Defendant's penalty phase. Mr. Chipperfield's notes amount to no more that a very cursory attempt to come up with ideas for mitigation. There is nothing to show a well thought out strategy based on a reasonable investigation as characterized by Mr. Eler. The postconviction evidence of Defendant's mental health deficiencies and of his family background is far weightier and paints a far different picture of Defendant from that presented at trial. See Shellito, 121 So.3d at 459. Clearly, Mr. Eler's inaction constitutes deficient performance.

The Court now considers whether counsels' deficient performance prejudiced the outcome of Defendant's penalty phase. . . .

This Court cannot state with confidence that the

> outcome of Defendant's case would have been the same had Mr. Eler diligently investigated – or even looked into – Defendant's compelling mental health and social history. There is a reasonable probability the jury would have considered the substantial amount of evidence from Defendant's troubled history for possible non-statutory mitigation and arrived at a different recommendation. Consequently, the jury would have benefitted, had Defendant presented this mitigation, from an opening statement. The Court grants relief on Sections III(A), (B), C(C), and (D).

(PCR.8 1616-18)(footnote omitted)

D. ANALYSIS – Although the trial court made some findings, those findings were incomplete to conduct a proper prejudice assessment under *Strickland*. Moreover, the finding of ineffectiveness for not presenting an opening statement is not supported by the law and the finding of ineffectiveness on the claim of failing to challenge the prior violent felony aggravator is in opposition to the trial court's ruling in the body of the order. These errors will be addressed in turn. This Court should vacate the order granting relief on the penalty phase claim. A proper prejudice analysis reveals that the result of the sentence would not have been different had a different mitigation strategy been followed given this highly aggravated case.

First, the trial court failed to explain how the decision not to present an opening statement was deficient performance or who prejudice resulted. It is well settled, "the mere fact that counsel did not make an opening statement is not sufficient for

a defendant to prevail on a claim of ineffective assistance." *United States v. Mealy*, 851 F.2d 890, 909 (7th Cir. 1988). Peterson v. State, 154 So.3d 275, 280 (Fla. 2014), reh'g denied (Dec. 2, 2014)(finding rejection of claim of ineffectiveness for failing to make opening statement meritless without further discussion); *Ross v. State*, 392 So.2d 23, 24 (Fla. 4th DCA 1980) (rejecting claim of ineffective assistance alleging failure to make opening statement as "[m]any lawyers waive opening so as not to disclose their defense, if any, and trial strategy.") (ANSTEAD, J., concurs specially with opinion); *Jones v. Smith*, 772 F.2d 668, 674 (11th Cir.1985) (finding "[t]he attorneys' decision to waive opening argument at the guilty phase was one of reasonable trial strategy. It left the defense uncommitted to a particular position and thus free to develop any defense that might materialize as the State presented its case."); *Moss v. Hofbauer*, 286 F.3d 851, 863 (6th Cir. 2002) ("A trial counsel's failure to make an opening statement, however, does not automatically establish the ineffective assistance of counsel."); *United States v. Haddock*, 12 F.3d 950, 955 (10th Cir.1993) (concluding "failure to present an opening statement itself is not ineffective assistance."). Neither Morrison in his closing memorandum, nor the trial court in its order identified how prejudice resulted from cousel's failure to give an opening statement. As such, this factor should not have gone

into the final analysis.

Second, the claim that counsel was ineffective for not challenging the validity of conviction supporting the prior violent felony aggravator was rejected by the trial court citing *Lukehart v. State*, 70 So.3d 503, 513 (Fla. 2011). (PCR.8 1606). However, in its conclusion, the trial court listed this sub-claim as a ground on which relief was granted. This is error in light of the trial court's written analysis and while this may have been a typographical error, this Court should not consider this sub-claim in the prejudice calculus.

Third, this is hardly a case where Morrison received no assistance in his mitigation presentation. Eler utilized prior counsel's investigation and conducted additional work. The United States Supreme Court in *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) stated: "the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla*, 125 S.Ct. at 2463. The Court also cited to *Wiggins*, 539 U.S. at 525 which likewise does not require counsel to investigate every conceivable line of mitigation. Furthermore, where witnesses fail to disclose evidence such as an abusive home, counsel should not be deemed ineffective. *See Diaz v. State*, 132 So.3d 93, 114 (Fla. 2013) (rejecting claim of

ineffective assistance for not discovering evidence of abuse when defendant and family were not forthcoming with that information); *Asay v State*, 769 So.2d 974, 987–88 (Fla. 2000) (same). *Cf. Squires v. State*, 558 So. 2d 401, 402-03 (Fla. 1990) (noting counsel's decisions circumscribed by defendant's admissions to counsel and evidence). However, to the extent the trial court determined that an incomplete/cursory investigation was conducted, prejudice still must be found. The prosconviction evidence, when evaluated properly in light of the trial record does not support the granting of relief here. This will be addressed more fully below.

Fourth, coming forward years later with new witnesses and a new strategy to offer negative instead of positive mitigation from expert and lay witnesses does not demand a finding of ineffective assistance. This Court has reasoned that finding a postconviction mental health expert who disagrees with "the extent or type of testing performed, or the type of mitigation presented" does not automatically render trial counsel ineffective. *Sexton v. State*, 997 So.2d 1073, 1085 (Fla. 2008).[14] Similarly, in *Woods v. State*, 531 So.2d 79, 82 (Fla.

[14] *See Butler v. State*, 100 So.3d 638, 666-67 (Fla. 2012); Stephens v. State, 975 So.2d 405, 415 (Fla. 2007) (reasoning that "[b]eing able to secure an expert witness to provide an opinion as to mental health mitigation during postconviction proceedings, which arguably could have been helpful to [the defendant], does not, in and of itself, render trial counsel's

1988) this Court has found that "the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better." The Eleventh Circuit Court of Appeals has also recognized that "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort" *Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir.) *modified on other grounds*, 833 F.2d 250 (11th Cir. 1987).

Fifth, as noted above, the trial court did not identify the new mitigating factors it found established by Morrison in his postconviction litigation. Equally important, Dr. Krop did not testify that any of the recently provided records would have

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performance ineffective."); *Peede v. State*, 955 So.2d 480, 494 (Fla. 2007) (recognizing "[t]he fact that Peede produced more favorable expert testimony at his evidentiary hearing is not reason enough to deem trial counsel ineffective."); *Asay v. State*, 769 So.2d 974, 986 (Fla. 2000) (reasoning that first expert's evaluation is not less competent merely upon the production of conflicting evaluation by another expert); *Van Poyck, v. State*, 694 So. 2d 686 692-94 (Fla. 1997) (finding defendant failed to prove ineffective assistance of counsel where the life-history account argued for in postconviction litigation was, in large measure, presented to the jury); *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999) (reasoning mental health expert's evaluation is not rendered inadequate or incompetent merely because the defendant had found an expert who would provide testimony conflicting with the original expert).

altered his opinion or the mitigation he suggested existed. This is fatal to Morrison's claim as counsel obtained the services of a respected mental health professional who in turn contacted with other professionals to develop a mitigation presentation. *See Pooler v. State*, 980 So.2d 460, 468 (Fla. 2008) (rejecting claim of ineffectiveness for not providing his experts with additional documentation or for not obtaining a more in depth psychological evaluation in part because defendant failed "demonstrate that [the trial mental health experts] would have changed their opinions had they conducted more in-depth psychological evaluations or been provided with his records")

Sixth, the jury was provided evidence of Morrison's alcohol and drug problems and the trial court found such was mitigating and accorded it some weight. (ROA.7 1186) As such, any alleged deficiency in not presenting lay witness testimony on Morrison's drug use has not been shown to be deficient and prejudicial. Additional witness testimony would have been cumulative, and counsel cannot be deemed deficient for failing to present cumulative evidence. It is well settled that counsel does not render ineffective assistance by not placing before the jury cumulative evidence. *Rutherford v. State*, 727 So. 2d 216, 225 (Fla. 1998) (finding additional evidence offered at postconviction evidentiary hearing was cumulative to that presented during penalty phase, thus, claim was denied

properly); *Van Poyck*, 694 So. 2d at 692-94 (finding defendant failed to prove ineffective assistance of counsel where the life-history account argued for in postconviction litigation was, in large measure, presented to the jury); *Woods v. State*, 531 So.2d 79, 82 (Fla. 1988) (reasoning "[t]he jury, however, heard about Woods' [psychological] problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better."); *Card v. State*, 497 So.2d 1169, 1176-77 (Fla. 1986) (holding that counsel cannot be deemed ineffective for failure to present cumulative evidence). Likewise, having obtained the non-statutory mitigator, Morrison cannot show that but for counsel's actions, the result of the proceeding would have been different and the trial court erred to the extent that it considered this in finding *Strickland* prejudice.

Seventh, the trial court erred in its prejudice analysis and conclusion. To evaluate the prejudice prong of *Strickland* properly, it is important to review what Eler developed from the pre-trial investigation conducted by the Public Defender before conflicting off the case, developed. As noted above, initial counsel, Mr. Higbee, had Dr. Krop appointed in January 1997 and provided him with initial documentation and made Morrison available for evaluation. That evaluation which started in

January 1997 included testing by Dr. Krop along with Drs. Scales and Risch. Eler had Dr. Krop reappointed to continue his evaluation and had contact with him in July 1998 and again before the penalty phase. Dr. Krop was selected in part because Eler had worked with him previously and found the doctor was able to make the complex simple for the jury to understand; Dr. Krop was "preeminent in the area." (ROA.1 19-21, 25-26, 37-38, 40-41; ROA.6 996-1015; 1080-83; PCR.12 2401-11, 2447-48)

Eler relies on his mental health expert to address those mental issue which are mitigating. (PCR.12 2411). Dr. Krop's penalty phase testimony was presented to the jury through videotaped perpetuation. (ROA.17 1217-32) where he testified that he and his associates evaluated/tested Morrison three times on February 12, 1997, February 19, 1997, and September 28, 1998. During these sessions, Morrison was interviewed about his background/history, given psychological and neuropsychological tests including an IQ test. Dr. Krop reported that he reviewed school records, police reports, and interviewed Morrison's mother. (ROA17 1220-21) It was Dr. Krop's opinion that Morrison has limited intellectual ability, was in special education classes; was retained several times, and dropped out in the seventh grade. (ROA.17 1221). Continuing, Dr. Krop reported that Morrison's IQ testing yielded a full scale score of 78 putting him in the 5th to 9th percentile. Dr. Krop found

Morrison "reads pretty well;" reads at the high school level and is in the 23rd percentile. However, Morrison was very poor in math. (ROA.17 1222)

Dr. Krop diagnosed Morrison with a substance abuse problem, which was his primary diagnosis and noted Morrison began drinking at age eleven and was drinking heavily for the year before the murder. Morrison's reported blackouts were disclosed to the jury (ROA.17 1223-24). Additionally, the jury was told of Morrison's use of powdered and crack cocaine as well as marijuana. Morrison was drinking and using drugs around the time of the crime. Such resulted in Dr. Krop finding Morrison had a polysubstance abuse problem. Yet, Dr. Krop did not opine that either statutory mental mitigators were present. (ROA.17 1224). What Dr. Krop opined was that alcohol and drug problems in a person with borderline IQ will impact that person's judgment causing him to get frustrated and impulsive, unable to think about the consequences of his actions. Such a person may engage in anti-social behavior to support his habit. (ROA.17 1224-25)

The jury learned that in February 1997, Morrison was given a neuropsychological evaluation where Dr. Krop found no evidence of any type of organic brain damage ("OBD"), although he notes some deficits. It was his opinion that the results were not conclusive of OBD. Dr. Scales, also evaluated Morrison and

found no significant neurological impairment. (ROA.17 1225-26). Dr. Krop found no neurological disease. (ROA.17 1227). During his evaluation by Dr. Krop, Morrison reported that the confession was the result of manipulation by the police and that he was not capable of the crime. (ROA.17 1227)

Dr. Krop's findings included that Morrison understands the value of money, and that such is needed to support his drug habit. Also, Morrison understands the value of property and the concept of value. Likewise, he understands the concepts of pain and suffering. (ROA. 1228-29, 1231). Dr. Krop opined that Morrison is not mentally retarded and that his IQ score appeared to be valid. (ROA.17 1229). It was the doctor's opinion that Morrison would be able to do simple math and know the proper change to expect. (ROA.17 1229). While Dr. Krop noted Morrison's judgment was impaired, Morrison knew right from wrong. (ROA.17 1230-31)

In addition to Dr. Krop, Eler presented Paula Yvette Wilson ("Wilson"), Morrison's sister (ROA.16 1127-36); Dr. Peter Lardizabal, a forensic pathologist (ROA.16 1136-72); Raymond Morrison, Sr. ("Raymond"), defendant Morrison's father (ROA.16 1173-85); and, Georgia Gail Morrison ("Gloria"), defendant Morrison's mother (ROA.16 1197-1215). Paula Wilson related that Morrison was friendly and nice to his siblings and cousins; he helped his family greatly. She spoke of Morrison watching his

siblings and cousins so their mother could work. When the children would fight, Morrison would tell them to get along and be nice to one another because they were family. Morrison would take care of the cooking, make sure the children were bathed, and clothed properly and see them to school. When their grandmother took ill and was bed-ridden, Morrison took care of her also. He combed his grandmother's hair, helped her to the bathroom, went to the store and cleaned for her (ROA.16 1129-30, 1133-34). Wilson also reported that Morrison did simple things for his neighbors such as taking out the trash, going to the store, and helping in the yards. Morrison helped Wilson with her problems, and would give her advice, he protected her, and told her to stay on the straight and narrow path. (ROA.1131-32, 1135) Morrison did kind things for the neighborhood children such as cookouts, parties, and skating rink trips. (ROA.16 1132). When Morrison had children, he spent time with them taking them to the park. (ROA.16 1133).

Raymond Morrison, Sr. ("Raymond, Sr.") admitted that starting when Morrison was two years old, he was absent from his son's life during his 10-year incarceration. After his release from prison, he tried to reconnect with Morrison visiting on the weekends like other divorced fathers. (ROA.16 1174-75). Raymond, Sr. tried to counsel his son against drinking, but was rebuffed with Morrison noting his father had not been there for him so he

would take care of himself. (ROA.16 1176-77). Raymond, Sr. testified before the jury he presently had a relationship with Morrison; they were in each other's lives. (ROA.16 1180)

Morrison had been working and going to church. Now that he had two little girls, Morrison was drinking less. Morrison had a good relationship with his children, including his son. He took them to the zoo. Morrison's presence in his four-year old son's life had meaning to the child. (ROA.16 1178-79, 1181). Morrison will be missed by his family. (ROA.16 1181). Like Wilson, Raymond, Sr. reported that Morrison helped around the neighborhood, did yard work and went to the store for others. (ROA.16 1178) Morrison's father testified that his son had a job with a paving company and was good at it. Also, Morrison was good at cutting hair. (ROA.16 1178-79)

In response to the question whether her son was born healthy, Gloria Morrison ("Gloria"), said he was; she did not speak of a premature birth or that she was incarcerated at the time. (ROA.17 1198). Gloria related that she worked when Morrison was young and that she held down two jobs. (ROA.17 1199) When her mother took ill and while Gloria was working two jobs, Morrison elected to drop out of school in the seventh grade, when he was about 15 years old, to help care for his grandmother. (ROA.17 1202-04) Morrison took care of his grandmother while his mother was at work. He would give his

grandmother her medication which Gloria had set out, turn his bed-ridden grandmother, change her bed, and feed her. (RAO.17 1202-04, 1213-15) Likewise, he cared for his siblings, and later Gloria's god-son; he got them ready for school and walked his young sister to school. He took his young sister to the movies, counseled her, and bought her ice cream and candy. Gloria reported that Morrison kept the house in order, cooked for his siblings, cleaned, and did laundry. (ROA.17 1199-1206, 1212) Gloria identified Morrison's school records noting he got an "E" in Math (ROA.17 1203-04). She also acknowledged that Morrison had been absent 83 days his final year of school, but that those absences were due in part to his bad asthma (ROA.17 1215).

In addition to caring for his grandmother and siblings, Morrison did chores for an elderly neighbor, Rebecca Bryan. (ROA.17 1204-05). According to Gloria, Morrison taught neighborhood children baseball. Morrison was said to have a close relationship with his younger sister and his son. (ROA.17 1206). During her testimony, Gloria identified photographs of Morrison in the park with his three children and at the beach. Gloria noted Morrison was developing a relationship with his fiancé', Tangy. (ROA.17 1208-12) It was also reiterated that Morrison did yard work and cut hair. (ROA.17 1212) Gloria noted that Morrison had been a positive influence on her; he was good to his mother and never raised his voice to her. (ROA. 17 1212)

Morrison was good to his children. He never abused them. (RAO.17 1213).

In the defense memorandum in support of a life sentence, Eler suggested mitigation of deprived childhood, and absent father/father in prison. This Court rejected both mitigators. (ROA.6 1069-70; ROA.7 1185-86). This Court stated that it had considered and weighed the aggravating and mitigating circumstances it found existed and "that the aggravating circumstances present in this case far outweigh the mitigating circumstances found to exist. The Court further finds that the sole aggravating factor that the Defendant has been previously convicted of two (2) prior violent felonies, as well as any combination of aggravating factors, substantially outweighs the mitigating [factors] found to exist." (ROA.7 1187)

With respect to the sentencing, this Court found on appeal:

> Morrison did not present evidence of any of the statutory mitigating circumstances listed in section 921.141(6)(a)-(g), Florida Statutes (1997). The trial court, however, found the following nonstatutory mitigating circumstance and afforded it 'great weight': Morrison's low intellectual ability combined with drug and alcohol abuse would result in exercise of bad judgment. The trial judge also found several other nonstatutory mitigating circumstances and afforded them 'some weight,' including: Morrison's good jail conduct; the fact that there was no parole or other release available to Morrison; Morrison's cooperation with police; Morrison's abuse of alcohol and use of cocaine; Morrison's employment; Morrison's assumption of familial responsibility at an early age; and Morrison's positive adjustment while incarcerated.

Morrison, 818 So.2d at 457.

At the postconviction evidentiary hearing, Eler testified that he had not reviewed his file before testifying in January, 2015, but had reviewed them when he testified in February and March, 2015. (PCR.20 3811). Before Eler got involved in Morrison's case, the Public Defender's Office had the matter and Alan Chipperfield and Ron Higbee were assigned counsel who were assisted by three investigators. (PCR.20 3812). Mr. Chipperfield testified that he thought his involvement in the case was minimal, however, Eler thought the case had been investigated rather well and needed "fine-tuning." (PCR.12 2325). Nonetheless, Eler reported that the files contained reports from Dr. Krop and associated doctors, school records, medical records, Department of Corrections ("DOC") records, and employment letters. (PCR.20 3813-15) Eler relied on and trusted the materials he received from the Public Defender's Office and had the reports the Public Defender's investigators completed. (PCR.20 3820-21, 3835). Eler testified that he talked to everyone who would talk to him and assist the defense; he investigated all names disclosed to him or in a deposition. (PCR.20 3855). While there were no specific references in his files that Morrison's family was poor, it was obvious such was the case given the father had been in prison (PCR.9 368).

As this Court will recall, Dr. Krop did not find organic

brain damage, but some deficits were seen; there were no significant neurological impairments. There was no neurological disease detected. Dr Krop found Morrison had an IQ of 78 which falls within the 5th to 9th percentile, and that he reads at the high school level, although Morrison has limited intellectual ability. (ROA.17 1221-22, 1225-27). In fact, Dr. Krop opined that the IQ score obtained by Dr. Eisenstein in the instant litigation did not fall within the intellectual disabled range. (SPCR 90)

Dr. Eisenstein, who always is called by the defense, reported that Morrison had organic brain damage ("OBD"). Additionally, Dr. Eisenstein noted Morrison had a substance abuse problem, suffered head injuries, and had been born prematurely which might be a source of the OBD. (PCR.15 2944-3043). The doctor also found Intellectual Disability ("ID") (PCR.15 2941). Dr. Eisenstein opined that these factors, OBD, drug usage, and ID combined to support a finding of the mitigator of extreme mental or emotional disturbance at the time of the crime.

The statutory aggravators were contested at the evidentiary hearing where Dr. Prichard offered:

> I do not see Mr. Morrison as having a mental disability, I do not see him as having an intellectual disability. I don't see him as having a mental illness like schizophrenia or like bipolar disorder. I see him as an individual who has a severe drug

> addiction problem. There's information in the records that he started huffing gas and sniffing glue when he was ten, that he was drinking daily everyday (sic) since the age of 13, that he had the $800 a day drug habit and at some point that he had a hundred dollar a day crack cocaine habit in close proximity to the crime.
>
> I see him as an adult who has a severe drug addiction problem. I also see him as an individual with antisocial personality disorder, which is a charaterological issue which is expressed typically in criminal conduct that begins prior to the age of 15. Mr. Morrison, I believe was first arrested at the age of 11, as I mentioned, he's been to prison I think five times.
>
> So what was standard in his over the course of time has been his criminal conduct and his drug use and I think that those are the primary issues. So I do not think that there was any impairment at the time of the crime that would qualify for that type of mitigation.

(PCR.19 3662-63). Dr. Prichard would not find either statutory mental health mitigator. He opined that Morrison has no mental illness, just drug addiction impaired by some personality issues. (PCR.19 3665)

The trial court did not make specific findings on newly established mitigation, but for purposes of this analysis, the State will assume arguendo the establishment of mitigation of: (1) deprived childhood based on poverty and lack of a father's presence, (2) physical abuse/punishment by Morrison's mother, (3) severe substance abuse problems, (4) low IQ,[15] (5) Morrison

[15] While Dr. Eisenstein diagnosed Intellectual Disability, Dr. Prichard disagreed and Dr. Krop did not change his findings that Morrison's IQ was a 78. The trial court did not make a finding

is manipulated easily, (6) organic brain damage, (7) cognitive deficits, and that the statutory mental mitigator of extreme mental or emotional disturbance at the time of the crime. However, when considered in light of the mitigation found for the original sentencing,[16] he would lose the factor of "assumption of familial responsibility at an early age" given the new testimony. When these factors are considered in light of what had been produced at trial and given the aggravation,[17]

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of ID, thus, the State will include only a low IQ in its analysis.

[16] With respect to the sentencing, this Court found on appeal:

> Morrison did not present evidence of any of the statutory mitigating circumstances listed in section 921.141(6)(a)-(g), Florida Statutes (1997). The trial court, however, found the following nonstatutory mitigating circumstance and afforded it 'great weight': Morrison's low intellectual ability combined with drug and alcohol abuse would result in exercise of bad judgment. The trial judge also found several other nonstatutory mitigating circumstances and afforded them 'some weight,' including: Morrison's good jail conduct; the fact that there was no parole or other release available to Morrison; Morrison's cooperation with police; Morrison's abuse of alcohol and use of cocaine; Morrison's employment; Morrison's assumption of familial responsibility at an early age; and Morrison's positive adjustment while incarcerated.

Morrison, 818 So.2d at 457.

[17] The trial court found in aggravation:

> (1) Morrison was previously convicted of a felony involving the use or threat of violence to the person; (2) the crime for which Morrison was to be sentenced was committed while he was engaged in the commission

Strickland prejudice has not been established. The differences between the original mitigation and that offered in postconviction is the statutory mental health mitigator of extreme mental or emotional disturbance,[18] deprived childhood, and physically abused as a child.[19]

On direct appeal, this Court noted that it had found proportionality:

> even where at least some statutory mitigation was presented. *See, e.g., Bates v. State*, 750 So.2d 6, 12 (Fla. 1999) (holding death penalty proportionate in stabbing death where court found three aggravators, including that the murder was committed during of, or an attempt to commit, or flight after committing or attempting to commit the crime of armed robbery or burglary with an assault or both; (3) the crime for which Morrison was to be sentenced was especially heinous, atrocious, or cruel; and (4) the victim of the capital felony was particularly vulnerable due to an advanced age or disability.

Morrison, 818 So.2d at 456-57.

[18] As noted above, the State is accepting for purposes of this analysis the statutory aggravator, but contests its existence as Dr. Prichard rejected the existence of both statutory mental health mitigatora as Morrison has no mental illness, just drug addiction impaired by some personality issues. (PCR.2-18-15 185)

[19] *See Gudinas v. State*, 816 So.2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation); *Cherry v. State*, 781 So.2d 1040, 1051 (Fla. 2000) (determining that "even if trial counsel should have presented witnesses to testify about Cherry's abusive background, most of the testimony now offered by Cherry is cumulative.... Although witnesses provided specific instances of abuse, such evidence merely would have lent further support to the conclusion that Cherry was abused by his father, a fact already known to the jury.").

> kidnaping and sexual battery, was committed for pecuniary gain, and was HAC, versus two statutory mitigators and several nonstatutory mitigators and where testimony also indicated some neurological impairment of defendant); *Pope v. State*, 679 So.2d 710 (Fla. 1996) (holding death penalty proportionate in stabbing death where two aggravating factors of commission for pecuniary gain and appellant's prior violent felony conviction outweighed two statutory mitigating circumstances of commission while under the influence of extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of the conduct, as well as nonstatutory mitigating circumstances of intoxication and that defendant acted under the influence of mental or emotional disturbance); *Spencer v. State*, 691 So.2d 1062, 1063-65 (Fla. 1996) (holding death penalty proportionate where victim beaten and stabbed and court found two aggravators of prior violent felony and HAC versus two statutory mental mitigators plus drug and alcohol abuse and paranoid personality).

Morrison, 818 So.2d at 457-58. Such supports a finding of no *Strickland* prejudice here.

Morrison's case remains a highly aggravated case with weighty aggravators of HAC and prior violent felony.[20] The addition of the noted mitigation should have been found to have no reasonable probability of resulting in a life sentence. In *Jordan v. State*, 176 So.3d 920, 936-37 (Fla. 2015), this Court upheld a death sentence based on HAC, "during the course of a

[20] *See Hodges v. Sta*te, 55 So.3d 515, 542 (Fla. 2010) (opining "[q]ualitatively, prior violent felony and HAC are among the weightiest aggravators set out in the statutory sentencing scheme."); *Offord v. State*, 959 So.2d 187, 191 (Fla. 2007) (noting "HAC is a weighty aggravator that has been described by this Court as one of the most serious in the statutory sentencing scheme."); *Rivera v. State*, 859 So.2d 495, 505 (Fla. 2003) (finding HAC and prior violent felony aggravators are weighty factors)

felony" and prior violent felony defendant and the statutory mitigator of under the influence of extreme mental or emotional disturbance, and 37 non-statutory mitigators. *See Brant v. State*, 21 So.3d 1276, 1285-88 (Fla. 2009) (finding defendant's "impairment due to abnormal brain functioning and drug use, while mitigating, is not so mitigating as to make his death sentence disproportionate," given HAC and murder during felony weighed against three statutory mitigating circumstances and ten non-statutory mitigating circumstances); *Johnston v. State*, 863 So.2d 271, 286 (Fla.2003) (concluding the death sentence was proportionate where the trial court found the prior violent felony and HAC aggravators, the statutory mitigator regarding impaired capacity, and twenty-six non-statutory mitigating factors). This Court should find that *Strickland* prejudice has not been established in this case.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the e-portal filing system to: Linda McDermott, Esq., at lindamcdermot@msn.com, this 5th day of May, 2016.

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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