IN THE SUPREME COURT OF FLORIDA

RICHARD HENYARD,

Appellant,

v. Case No. SC02-1105
Lower Tribunal No. 93-159-CFA-MH

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

The following is offered to supplement the Statement of Facts contained in the Initial Brief of Appellant [hereafter IB]:

At the postconviction evidentiary hearing conducted on October 14, 1999, Appellant called a number of lay witnesses to testify regarding Appellant's childhood and upbringing. Rosa Lee Adams testified that Appellant was a "door to door" child, raised from one house to another. (PCR:967-68). She testified that Appellant's mother, Hattie Mae Gamble, was not much of a mother because she used drugs and was in the streets all the time. (PCR:968-74; 983-84). Similar to Rosa Adams' testimony, Lula Bell Davis also testified that Appellant was a "door to door" child, and that his mother was not involved in his life. (PCR:988-90).

Jacqueline Turner testified at both Appellant's penalty phase in June of 1994 and at the postconviction evidentiary hearing on October 14, 1999. (DAR:2278-95; 2436-39; PCR:993-1035). Because Appellant's mother could not properly take care of her child due to her drinking problem, Ms. Turner took Appellant into her home when he was about ten months old until he was three years old. (DAR:2279-85; PCR:993-1003). Appellant stayed with his mother until he was about eleven years old, at

which time Ms. Turner called Appellant's father and had him come pick Appellant up. (DAR:2285; PCR:1005-06).[1]

At the postconviction hearing, Ms. Turner testified that she visited Appellant while he was in jail awaiting trial on the instant charges, and he told her that he had been sexually abused by Bruce Kyle when he was living with Ms. Turner. (PCR:1017-18). She also testified that she was aware that Appellant was on suicide watch while in jail and that Appellant had expressed suicidal ideations to her. (PCR:1018-19). Ms. Turner testified that she spoke with Appellant's trial attorneys numerous times leading up to his trial, and she informed lead trial counsel T. Michael Johnson of her conversation at the jail with Appellant regarding the sexual abuse, but did not inform him about the suicidal ideations. (PCR:1033-34).

Collateral counsel called Jacqueline Turner's daughter, Angelette Wiley, at the evidentiary hearing to testify about her relationship with Appellant. Ms. Wiley testified that Appellant was ridiculed by children in the neighborhood because his mother had affairs with men and women. (PCR:1038). According to Ms. Wiley, when Appellant was about seven years old, he told her he had been raped by Bruce Kyle. (PCR:1038-39). Appellant's trial

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[1]During the time that Appellant was living with his mother, Ms. Turner testified that she took care of him on a regular basis. (DAR:2285-90; PCR:1005-06).

team had attempted to contact Ms. Wiley on a number of occasions prior to his trial, but were unsuccessful. (PCR:1046-54; 1126-27). Ms. Wiley testified that she called the Public Defender's Office on the weekend, but they were closed. She was too busy during the week to contact counsel, and she felt that it was their duty to locate her. (PCR:1046-54).

Collateral counsel presented the testimony of Appellant's "sister," Trena Lenon.[2] (PCR:1105). Ms. Lenon testified that Appellant told her that when he lived with his father in Pahokee, Florida from the ages of eleven until about fifteen, his father's live-in girlfriend would physically abuse him. (PCR:1107-09). Like Jacqueline Turner, Ms. Lenon also testified that she spoke to Appellant while he was in jail awaiting trial and he told her he had been sexually abused by Bruce Kyle. (PCR:1109-10). Ms. Lenon never spoke with Appellant's trial attorneys because she was living in St. Petersburg at the time and was unaware of Appellant's trial. (PCR:1113).

Dr. Russell Bauers, a clinical psychologist, testified at the evidentiary hearing that he reviewed the penalty phase testimony of Dr. Jethro Toomer and the lay witnesses regarding

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[2]Ms. Lenon testified that she was raised in the same house as Appellant and during her testimony, she often referred to him as her "brother" even though they were not actually related. (PCR:1110).

Appellant's upbringing and this testimony was "very consistent" with the information he received from Appellant. (PCR:1071-72). Dr. Bauers testified that Appellant told him he started drinking beer and smoking marijuana a couple of days a week between the ages of eight and ten. (PCR:1069). Appellant told him he never became seriously intoxicated and that his usage declined during the time he lived with his father in Pahokee.

Collateral counsel did not call any members of Appellant's trial team during the postconviction hearing, but the State called two of Appellant's three trial attorneys and one of their investigators in rebuttal. In addition to these witnesses, the State called Appellant's father, Richard Henyard, Sr., and his live-in girlfriend, Edith Ewing.[3]

Mr. Henyard testified that Appellant lived with him between the ages of eleven and seventeen. (PCR:1128). Mr. Henyard testified that he did not have any knowledge of Edith Ewing ever spanking or physically abusing Appellant. (PCR:1128-30). Ms. Ewing testified that she spanked Appellant on his legs "once or twice" with a belt because he stole a VCR and a pistol from her. (PCR:1135-37).

Thomas Michael Johnson, currently a circuit court judge,

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[3]Both of these witnesses testified at Appellant's penalty phase. (DAR:2254-78; 2440-45).

testified that he was appointed to represent Appellant along with Assistant Public Defenders Mark Nacke and Bill Stone. (PCR:1140-44). In addition to these two attorneys, Mr. Johnson had three investigators working on the case, including J.T. Williams, a black investigator from Eustis who knew a number of the people involved in the case.[4] (PCR:1144-45). Because of the overwhelming evidence against Appellant, the defense team focused heavily on the penalty phase. (PCR:1145). In addition to meeting with numerous family members and lay witnesses and obtaining Appellant's school and medical records in preparation for the penalty phase portion of his trial, Mr. Johnson also had two mental health experts, Dr. Jethro Toomer and Dr. Elizabeth McMahon, examine Appellant.[5] (PCR:1146-47).

Mr. Johnson testified that he had numerous strategy sessions with the other attorneys and, after analyzing the pros and cons of each witness, they would attempt to form a consensus on which witnesses to present at the penalty phase. (PCR:1148-71; 1211-15). In addition, the attorneys' discussion of the case with Appellant dictated some of the evidence presented. For example,

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[4]Mr. Johnson also consulted with numerous other experienced capital defense attorneys regarding the strategy to employ in Appellant's case. (PCR:1152).

[5]Trial counsel did not call Dr. McMahon as a witness because she informed the trial team that it would not be wise to call her. (PCR:1158-61).

although Appellant apparently had smoked marijuana and used cocaine earlier on the day of the murders, he remembered everything and told his attorney that he was not intoxicated. (PCR:1156).

As to Appellant's alleged suicide attempt while in jail, Mr. Johnson testified that he spoke with Appellant about his behavior in the jail and was under the impression that Appellant's actions were simply an attempt to move to the medical wing in the jail. (PCR:1156, 1183). Dan Picus, the Lake County Jail's medical department supervisor, testified that Appellant was found lying on his bunk with a ligature mark on his neck. Appellant had placed a nylon cord around his neck and, while lying on his back, inched down the bed until it tightened. (PCR:1234-36). When discovered in his cell, Appellant pretended to be unconscious. (PCR:1235-36). Mr. Pincus informed Appellant's attorneys that this was not a legitimate suicide attempt. (PCR:1238).

With regard to the alleged sexual abuse suffered by Appellant, Mr. Johnson testified that he had no independent recollection, but his notes indicated that Appellant told him Bruce Kyle fondled him and vice versa when he was about eight or nine years old. (PCR:1181-82). However, defense counsel also possessed in his files a report from Dr. Allen Burns, a

psychiatrist who treated inmates at the Lake County Jail, that indicated Appellant denied any physical or sexual abuse. (PCR:1192). Trial counsel also possessed a Public Defender's Office Phase Two Assessment form which indicated that Appellant denied ever being sexually abused. (PCR:1216-18; 1228, 1232).

SUMMARY OF ARGUMENT

Appellant's claim of ineffective assistance of counsel at his penalty phase is without merit. Appellant has failed to establish either of the two prongs set forth in Strickland v. Washington, 466 U.S. 668 (1984) necessary to establish his claim. Contrary to Appellant's assertions, his trial counsel was not deficient. Trial counsel performed an extensive investigation into all available mitigation evidence and made strategic decisions not to present some of the evidence because it would have allowed the State to introduce evidence that would arguably be unfavorable to Appellant. Even if Appellant were able to show that his counsel's performance was deficient, he is unable to establish that any alleged deficiencies would have produced a different result. Accordingly, this Court should affirm the trial court's order denying Appellant's motion for postconviction relief.

ISSUE

THE LOWER COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS TRIAL.

Appellant argues that his trial counsel was ineffective at his penalty phase because counsel failed to investigate and present all available mitigating evidence. Specifically, Appellant argues that counsel failed to present the following nonstatutory mitigating factors: (1) Appellant's lack of stable parental contact and supervision; (2) Appellant's physical abuse at the hands of his father's common law wife; (3) Appellant's pattern of seeking out younger children as companions due to his lower IQ and "mental" age and to avoid harassment from children his own age; (4) Appellant's childhood sexual abuse; (5) Appellant's chronic use of alcohol; and (6) Appellant's mental state as characterized by his suicidal ideations. After Appellant presented his evidence to support this claim at an evidentiary hearing, the judge entered a detailed order finding that Appellant had failed to carry his burden of establishing ineffective assistance of counsel. (PCR:733-49).

In addressing a defendant's burden to prove an ineffective assistance of counsel claim, this Court in Valle v. State, 778 So. 2d 960, 965-66 (Fla. 2001), stated that a defendant must prove two

elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S. Ct. 2052; Rutherford v. State, 727 So. 2d 216, 219-20 (Fla. 1998).

In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Brown v. State, 755 So. 2d 616, 628 (Fla. 2000) (quoting Strickland, 466 U.S. at 688-89, 104 S. Ct. 2052). This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected. See Shere v. State, 742 So. 2d 215, 220 (Fla. 1999). Moreover, "[t]o establish prejudice [a 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.'" Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1511-12, 146 L. Ed. 2d 389 (2000) (quoting Strickland, 466 U.S. at 694, 104 S. Ct. 2052); see Rutherford, 727 So. 2d at 220.

When reviewing a trial court's ruling on an ineffectiveness

claim, this Court must defer to the trial court's findings on factual issues, but must review the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the court's factual findings are supported by competent, substantial evidence and Appellant has failed to demonstrate any error in the court's conclusions denying Appellant's postconviction claim of ineffective assistance of counsel in the penalty phase.

In the instant case, Appellant has failed to carry his burden of showing either deficient performance or prejudice. Appellant argues that trial counsel failed to adequately prepare and investigate all of the available mitigation. Appellant first asserts that evidence from four lay witnesses[6] which were not called at the penalty phase would have demonstrated that Appellant's "childhood [was] characterized by an alcoholic teenage mother who abandoned her child to be raised by strangers and an emotionally and geographically distant father who was out of touch with the realities of his child's day to day existence." IB at 15. Although these four witnesses were not called at the penalty phase, the testimony they presented at the

[6]The four witnesses were Rosa Adams, Lula Davis, Angelette Wiley, and Trena Lenon.

evidentiary hearing regarding Appellant's childhood was cumulative to evidence introduced at Appellant's penalty phase through other witnesses.

Appellant's trial counsel testified at the evidentiary hearing to the extensive investigation of Appellant's background that the defense team engaged in prior to trial. The defense team consisted of three attorneys and three investigators. The defense team had extended interviews with the people primarily responsible for raising Appellant, namely, Jacqueline Turner (Appellant's godmother), Hattie Mae Gamble (Appellant's mother), Richard Henyard, Sr. (Appellant's father), and Edith Ewing (Appellant's father's common law wife). These witnesses presented testimony at Appellant's penalty phase regarding his childhood and enabled defense counsel to propose a number of mitigating factors regarding Appellant's childhood.[7] (DAR:1497-1504). The proposed mitigating factors regarding Appellant's upbringing included the following:

- during her pregnancy with Appellant, Hattie Mae Gamble used and abused alcohol and marijuana
- Appellant was born with a physical complication and was shunned as an infant due to a disfiguring skin disorder

[7]In addition to these witnesses, defense counsel called Jacqueline Turner's daughter, Nyoka Wiley, a teacher from Appellant's school, Edna McClendon, and a mental health expert, Dr. Jethro Toomer.

> • during his life, Richard Henyard, Jr. had no father figure to provide him with normal role models nor to provide him with those human basic needs provided by males in a normal family setting
>
> • Richard Henyard, Jr.'s only role model was his mother, who frequently had contact with the criminal justice system for her lawlessness
>
> • during his formative years, Richard Henyard, Jr. had little or no love or nurturing from his mother and extremely little contact with his father
>
> • during his lifetime, Richard Henyard, Jr.'s mother continued to use and abuse alcohol and drugs, including cocaine
>
> • at age 11, when Richard Henyard, Jr. went to live with his father, his mother, Hattie Gamble, had no direct contact with him for years, reinforcing his belief that no one cared about him
>
> • Richard Henyard, Jr. had an impoverished upbringing
>
> • Richard Henyard, Jr. was raised in a grossly dysfunctional family, with no stable living environment

(DAR:1497-99).

Appellant's argument that defense counsel was ineffective for failing to call Rosa Adams, Lula Davis, Angelette Wiley, and Trena Lenon is without merit. Specifically, Appellant has failed to establish deficient performance in failing to call the two elderly women who lived in Appellant's neighborhood, Rosa Adams and Lula Davis. These two women had only cumulative testimony to present about Appellant's mother and his upbringing, and both women had potentially harmful evidence

relating to Appellant. Rosa Adams testified at the hearing that Appellant possessed a gun at her house on the day of the murder. (PCR:980-82). Ms. Davis, like Rosa Adams, testified that Appellant had a number of people in his life that loved him and took care of him. (PCR:992-93). This testimony would have been contrary to the defense theory that Appellant was neglected by his family and had no role models.

This Court has consistently held that counsel is not ineffective for failing to present mitigation evidence which is cumulative and potentially harmful. See Sweet v. State, 810 So. 2d 854, 866 (Fla. 2002) (upholding trial court's denial of postconviction motion where mitigation testimony was cumulative and may have opened the door for the State to present negative information concerning the defendant's background). In this case, defense counsel was clearly not deficient for failing to present the testimony of these two lay witnesses. Defense counsel made an exhaustive search of all available mitigating evidence and presented evidence of Appellant's upbringing. Furthermore, even if counsel were found to be deficient for failing to present this cumulative evidence, Appellant has failed to establish any prejudice. See Rutherford v. State, 727 So. 2d 216, 224-25 (Fla. 1998) (explaining that essentially cumulative testimony presented during 3.850 evidentiary hearing

was insufficient to establish prejudice in failing to present additional mitigation); Ventura v. State, 794 So. 2d 553, 570 (Fla. 2001) (holding that defendant could not establish prejudice where the mitigation presented at evidentiary hearing was cumulative of evidence presented at trial).

Appellant further contends that defense counsel was ineffective for failing to call Trena Lenon and Jacqueline Turner's daughter, Angelette Wiley. At the outset, it must be noted that the defense trial team attempted to contact Angelette Wiley on a number of occasions. Ms. Wiley testified that she was too busy during the work week to return calls to defense counsel, but she did call once during the weekend when the office was closed. Similarly, Trena Lenon did not speak to defense counsel because she was living in St. Petersburg, Florida at the time and was unaware of Appellant's trial.

Collateral counsel argues in his brief that Angelette Wiley's testimony "about the physical harassment and actual injuries to Mr. Henyard [by neighborhood children] is not simply cumulative evidence." To the contrary, Angelette Wiley's mother, Jacqueline Turner, testified at Appellant's penalty phase that neighborhood children picked on Appellant because his mother was a lesbian. (DAR:2286). Ms. Turner testified that Appellant "got into a couple of spats" because of the teasing.

(DAR:2286). Similarly, at the evidentiary hearing, Angelette Wiley testified that neighborhood children picked on and beat up Appellant on two different occasions because his mother had affairs with men and women. (PCR:1038-40). According to Angelette, these incidents were nothing serious. (PCR:1055). Because Angelette Wiley was unavailable to defense counsel, it is impossible for counsel to be ineffective for failing to call her. Furthermore, her testimony was cumulative to both Jacqueline Turner's and Nyoka Wiley's (Angelette's sister)[8] testimony at the penalty phase.[9]

In denying this aspect of Appellant's ineffective assistance

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[8]Nyoka Wiley testified that she was raised with Appellant and they did everything together. When Appellant moved to Pahokee with his father, Nyoka moved there too and lived right down the street from Appellant. (DAR:2241-45).

[9]Collateral counsel also briefly discusses the 3.850 testimony of Jacqueline Turner and her daughter, Angelette Wiley, regarding an incident when Appellant did not want to enroll in ninth grade high school because his friends were still in eighth grade middle school. IB at 17; (PCR:1013-14, 1039). Appellant argues that this incident supports his contention that he had a "pattern" of seeking out younger children as companions due to his lower IQ and mental age and to avoid harassment from children his own age. IB at 17. Clearly, Appellant's desire to stay at the same school with his friends is not indicative of a "pattern" of seeking out younger children as companions due to his lower IQ and mental age, but rather, simply shows the desire of a teenager to associate with his friends and resist a new school. Furthermore, and most importantly, collateral counsel fails to note that this exact testimony was presented at Appellant's penalty phase through Jacqueline Turner's other daughter, Nyoka Wiley. (DAR:2244).

of counsel claim, the trial judge found that the testimony regarding Appellant being beat up on two occasions were "isolated incidents and remote in time from the murders, which Henyard committed when he was eighteen, and that there is no probability this evidence would have changed the outcome had it been presented in 1994. . . . Mr. Henyard also faults his attorneys for failing to present evidence that he was teased by his classmates. The Court finds that the jury was presented with this evidence (R-2286). This allegation is conclusively refuted in the record." (PCR:736). The State submits that substantial, competent evidence supports the trial court's conclusion. The evidence of Appellant's fights with neighborhood children was cumulative to the evidence presented at the penalty phase and there is no possibility that this evidence, even if not cumulative, would have changed the outcome and resulted in a life sentence given the substantial aggravating circumstances and slight mitigation present in this case. See also Routly v. State, 590 So. 2d 397, 401-02 (Fla. 1991) (stating that additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); Rutherford v. State, 727 So. 2d 216, 224-25 (Fla. 1998) (postconviction identification of

evidence cumulative to that at trial will not establish ineffectiveness of counsel).

Appellant next contends that his trial counsel was ineffective for failing to present evidence that his father's common-law wife, Edith Ewing, physically abused him. Appellant presented testimony from Trena Lenon that Appellant told her Edith Ewing "liked to beat on him and kick him out of the house, cuss him out, accuse him of doing things that, you know, I don't know whether or not he did do them because I wasn't there." (PCR:1107).

In rebuttal, the State called Edith Ewing who testified that she spanked Appellant on his legs "once or twice" with a belt because he stole a VCR and a pistol from her.[10] (PCR:1135-37). The State also called Appellant's defense counsel in rebuttal, and lead attorney T. Michael Johnson testified that he made a strategic decision, in consultation with the other defense trial team members, that he would not present Edith Ewing at the penalty phase. (PCR:1149-51, 1157). Mark Nacke, one of the other attorneys representing Appellant, testified that Appellant told the defense team about the alleged abuse by Ms. Ewing, and he investigated it and found out that the allegation revolved

[10]Jacqueline Turner also testified that Appellant stole a number of items from her when he lived at her house. (PCR:1026-27).

around Appellant stealing from Ms. Ewing and she caught him in the act. (PCR:1205-07). After discussing the matter with the defense team, a decision was made not to call Ms. Ewing because it would simply lead to more negative information being presented to the jury. (PCR:1207).

Appellant acknowledges that counsel had a strategic reason for not presenting Ms. Ewing, but because the State called her at the penalty phase, collateral counsel argues that the postconviction court "should have found that trial counsel failed to adequately present the true nature of the strained relationship between Mr. Henyard and Ms. Ewing and the resulting physical abuse suffered by Mr. Henyard." IB at 16. Clearly, Appellant's argument is without merit. As the court found, "trial counsel made a wise strategic decision not to present this spanking evidence to the jury. Had this evidence been presented, there is no likelihood that the jury's recommendation or this Court's sentence would have been any different." (PCR:736).

This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected. See Shere v. State, 742 So. 2d 215, 220 (Fla. 1999). As a strategic decision, trial counsel's performance is virtually unassailable in

postconviction litigation. See Maharaj v. State, 778 So. 2d 944 (Fla. 2000) (recognizing that counsel cannot be ineffective for strategic decisions made during a trial), cert. denied, 533 U.S. 935 (2001); United States v. Oliveras, 717 F.2d 1, 3 (1st Cir. 1983) ("[T]actical decisions, whether wise or unwise, successful or unsuccessful, cannot ordinarily form the basis of a claim of ineffective assistance.").

Here, counsel obviously had sound strategic reasons for deciding not to call Edith Ewing as a witness. Even though she testified for the State, counsel was not deficient for failing to show the allegedly "true nature of the strained relationship" between Appellant and Ms. Ewing. Contrary to collateral counsel's assertions, Ms. Ewing testified at both the penalty phase and evidentiary hearing that she loved Appellant. (DAR:2445; PCR:1137). Even if counsel were somehow deemed deficient for failing to present evidence that Ms. Ewing spanked Appellant on two occasions when he stole a VCR and pistol from her, there is no possibility that this evidence would have changed the outcome in any manner. See Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002) (stating that in order for a defendant to prevail on this type of issue, he must demonstrate that but for counsel's errors, he probably would have received a life sentence).

Appellant next asserts that trial counsel was ineffective for failing to present evidence that he was sexually abused as a child. At the 3.850 hearing, Appellant presented evidence that he told witnesses about this alleged sexual abuse. In denying Appellant's ineffective claim regarding the alleged sexual abuse, the trial court stated:

> Mr. Henyard alleges he suffered "repeated sexual abuse" which his attorney neglected to present to the jury, and relies upon this supposed oversight in support of his ineffectiveness claim. Several witnesses presented evidence on this issue:
>
> Jackie Turner: She asked the defendant, while he was in jail charged with rape and murder, if there was any explanation for his behavior, and he told her he had been sexually abused. (H-63).
>
> Angelette Wiley: She quotes Henyard as telling her he was sexually abused by Bruce Kyle. She says he told her about this when he was seven years old, more than a decade before the crimes occurred in this case. (H-79 to 80).
>
> Trena Lennon: After Henyard had been charged with rape and murder, he called Ms. Lennon and told her he had been sexually abused by "the Big Red Man," a/k/a Bruce Kyle. (H-150 to 151).
>
> The Court notes that there is no evidence in the evidentiary hearing record that any of these witnesses [Turner, Wiley and Lennon] made Henyard's lawyers aware of this information. Indeed, before trial, Ms. Lennon was placed in foster care in another county, and remained there until after the defendant was sentenced, completely unaware that the trial was taking place. (H-154 to 155). Likewise, Ms. Wiley never contacted Henyard's lawyers; she was working every day and felt it was their obligation to come find her. (H-87 to 93).
>
> Dr. Russell [Bauers]: The defendant told him in a clinical interview more than five years after trial, (H-102), that he had been molested at the age of eight or nine. (H-135).
>
> The Court also notes that **none** of these witnesses

[Turner, Wiley, Lennon and Bauers] knows whether the alleged sexual abuse actually occurred. Although hearsay evidence is admissible in a penalty phase, it is far less compelling than direct knowledge of an event.

T. Michael Johnson: (Henyard's lead trial attorney): Although he did not recall ever learning about the alleged sexual abuse, he reviewed notes indicating that Henyard told him that Bruce Kyle and he fondled each other when Henyard was about eight or nine, roughly a decade before these murders. (H-222). Judge Johnson reviewed other records from Henyard's trial file which show that his client told the jail psychiatrist on July 26, 1993 that he had **never** been sexually abused. (H-234).

Mark Nacke: (member of trial team): He reviewed records in Henyard's trial file which show that the defendant **did not recall ever being sexually abused.** (H-259). Mr. Nacke did not recall the defendant ever telling his attorneys he had been sexually abused. (H-266).

James Tyrone Williams (defense investigator): Mr. Henyard told this witness that **he could not remember ever being sexually abused.** (H-269).

Strickland Test: Prong One

This Court is reminded in Strickland v. Washington, 80 L. Ed. 2d 674 (1984) at 695 that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions", and at 694 that: "The performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances" ... "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

Due to the passage of time, Henyard's lawyers cannot recall what efforts they made to investigate the non-statutory mitigator of possible sexual abuse. (H-222 to 223; H-234). What the attorneys do recall is that they did everything they could think of to develop mitigating evidence in an effort to save Henyard's life. (H-187 to 196; H-212; H-223; H-234; H-239 to 240; H-252 to 254).

Taking into account all the surrounding circumstances, as Strickland says this Court must,

including the many efforts expended by the trial team to explore and present all possible mitigating evidence, the crucial fact that apparently no one ever told the trial team that Ms. [Turner], Ms. Lennon and Ms. Wiley had heard the defendant talk about this alleged abuse, and the fact that their client on one occasion said it happened, and on two other occasions said it didn't, the Court finds that the defendant has not come forward with evidence to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable assistance." Strickland, 80 L. Ed. 2d at 694. For example, we do not know whether the defense team attempted to locate and interview Mr. Kyle, whether Mr. Kyle was even available to testify, and whether Mr. Kyle would have admitted to any sexual contact with the defendant if he had been called to the stand. All we do know is that on two occasions Henyard said it didn't happen, and that he adamantly refused to testify. (H-256).

The first prong of Strickland has not been established.

Strickland Test: Prong Two

Henyard at trial freely and voluntarily chose not to take the witness stand and the Court notes at the outset that the best evidence of this alleged abuse would be the testimony of Henyard himself. This evidence was not presented to the jury, through no fault of the attorneys. (H-193 to 194; H-234 to 235). Assuming that Ms. [Turner], Ms. Wiley and Ms. Lennon had testified the Court and jury would have been reminded of the remoteness in time between the alleged abuse and the murders. What is highly significant is that this Court and jury would have weighed that evidence against the cold-blooded murder of two little girls, the facts of which are blood-curdling and delineated in the attached opinion of the Florida Supreme Court. This Court, having considered carefully the overwhelming evidence presented at trial, the penalty phase, and all post-trial proceedings, including the evidentiary hearing on this motion, comes to one inescapable conclusion: this hearsay evidence of alleged sexual abuse would not in any way have affected the two very rare unanimous recommendations of the jury, or the sentences of this Court.

(PCR:736-39).

The State submits that competent, substantial evidence supports the trial court's finding denying this aspect of Appellant's ineffectiveness claim. Appellant has failed to establish that his attorneys were deficient for failing to present this evidence of alleged sexual abuse. Although T. Michael Johnson apparently had notes regarding the alleged abuse, he also possessed records in his file indicating that Appellant personally denied ever being sexually abused. This Court has recognized that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. See Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000). In Stewart v. State, 801 So. 2d 59, 67 (Fla. 2001), this Court found that trial counsel adequately investigated and presented mitigation evidence when the defendant never told his counsel that he suffered any type of abuse and never mentioned any abuse to the defense psychiatrist. The Stewart court stated that "by failing to communicate to defense counsel (or the defense psychiatrist) regarding any instances of childhood abuse, Stewart may not now complain that trial counsel's failure to pursue such mitigation was unreasonable." Id. Likewise, in the instant case, Appellant cannot establish that his counsel was deficient in

failing to present this evidence when the defense team possessed documents detailing Appellant's denial of sexual abuse.

Even if counsel were deficient in failing to present this evidence, the trial court correctly noted that Appellant failed to establish the second prong of Strickland, i.e., that he suffered prejudice as a result. In order to prevail on this claim, Appellant must demonstrate that but for counsel's errors, he probably would have received a life sentence. Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002). As the court noted when denying Appellant's claim, any evidence of sexual abuse would not have overcome the blood-curdling facts of Appellant's murder of the two little girls in this case.[11]

Appellant also alleges that his counsel was ineffective for failing to present evidence of his "chronic use of alcohol." IB at 18-19. The only evidence presented at the evidentiary hearing concerning Appellant's use of alcohol was from Dr. Bauers. Dr. Bauers examined Appellant prior to the evidentiary

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[11]In 1994, the trial court followed the two unanimous jury recommendations and found four aggravating circumstances in each of the two murders: (1) that Appellant has been previously convicted of a capital felony and six non-capital felonies involving the use or threat of violence to the person; (2) Appellant committed the murders while engaged in the commission of kidnapping; (3) the murders were committed for pecuniary gain; and (4) the murders were especially heinous, atrocious or cruel. The court found one statutory mitigating factor, the defendant's age, and several nonstatutory mitigators.

hearing and testified that Appellant told him he began drinking beer and smoking marijuana a couple of days a week between the ages of eight and ten, but he never became seriously intoxicated. (PCR:1069). Appellant's use of alcohol and marijuana decreased when he went to Pahokee to live with his father at about age eleven. (PCR:1069). Significantly, Appellant did not present *any* evidence that this information was made available to any members of the defense team prior to Appellant's trial. In fact, as the court properly noted when denying this claim:

> Dr. Jetrho Toomer, the psychologist who testified for the defense in the penalty phase, did not tell the jury about Henyard's alleged history of alcohol or marijuana use. What is unclear is **why** that evidence, if true, was not presented to the jury. Henyard elected not to testify, and this Court has no way of determining if Mr. Henyard simply didn't tell Dr. Toomer about substance abuse in the past, or whether trial counsel neglected to present it. Put more concretely, this Court **simply cannot determine** whether the failure to present this evidence was the result of deficient performance by trial counsel or an apparent lack of candor on the part of Mr. Henyard during Dr. Toomer's examination of him. Consequently, the first prong of Strickland has not been met.
>
> Again, it is important to point out that the defendant told Dr. Bauers that his beer and marijuana consumption never resulted in "serious intoxication." (H-110). The Court finds that, in context of all the evidence in this case, the inclusion of this evidence in 1994 would most certainly not have affected the jury's recommendations or this Court's sentences.

(PCR:740). The State submits that substantial, competent

evidence supports the court's finding that Appellant failed to meet the two-prong requirements of Strickland.

Appellant's contention that counsel was ineffective for failing to present evidence of Appellant's alleged suicide attempt is also without merit. Lead trial counsel T. Michael Johnson testified that after he spoke with Appellant about his behavior in the jail, he came away with the impression that Appellant faked the suicide attempt in order to move to the medical wing in the jail. (PCR:1156, 1183). Dan Picus, the Lake County Jail's medical department supervisor, testified that Appellant placed a nylon cord around his neck and inched down the bed until it tightened. (PCR:1234-36). When Mr. Pincus examined Appellant, he pretended to be unconscious. As a result of his actions, Appellant was moved to the medical wing of the jail. Mr. Pincus informed Appellant's attorneys of his opinion that this was not a legitimate suicide attempt. (PCR:1238). In analyzing this claim, the trial court stated:

> Had the jury and Court heard about this incident, in all likelihood it would have established only that Henyard is a prevaricating manipulator of the system. Even if the jury somehow concluded that this suicidal gesture was sincere, which the Court sincerely doubts, when viewed in light of Henyard's villainous deeds, it is trivial and would not have changed the jury's recommendations or the Court's sentences.

(PCR:742).

The record supports trial counsel's strategic decision not

to present evidence of Appellant's fake suicide attempt. As the trial judge found, the jury would not have found this to be a sincere effort at suicide, but rather, would have seen it for what it was; a manipulative action by Appellant to move to the medical wing of the jail.[12] Even if counsel was deficient for failing to present this evidence, Appellant has failed to establish any prejudice as a result. Obviously, this evidence would not have overcome the substantial aggravation in this case and changed the unanimous recommendations of the jury or the court's sentences.

Appellant's final claim is that his counsel was ineffective for failing to adequately prepare one of his mental health experts, Dr. Jethro Toomer, for his testimony at the penalty phase.[13] Specifically, collateral counsel questions defense counsel's preparation of Dr. Toomer because the doctor did not

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[12]The fact that one of Appellant's three trial attorneys, Mark Nacke, did not know of Appellant's actions at the jail does not affect the analysis of Appellant's ineffective assistance of counsel claim. T. Michael Johnson, Appellant's lead attorney, as well as J.T. Williams, the primary defense team investigator, both testified that it was their understanding that Appellant faked the suicide attempt in order to move to the medical wing. Attorney Mark Nacke was not on the case from the beginning and the defense team could have made the decision not to present this evidence prior to Mr. Nacke's involvement in the case.

[13]Defense counsel also had Dr. Elizabeth McMahon examine Appellant, but she advised counsel not to call her as a witness because she did not find any statutory or nonstatutory mitigators. (PCR:1164-65).

speak with Richard Henyard, Sr., Edith Ewing, or Jacqueline Turner's husband.[14] Dr. Toomer testified at the penalty phase that defense counsel supplied him with Appellant's school records and the names of family members and individuals to talk to prior to examining Appellant. (DAR:2303). Dr. Toomer interviewed Appellant's mother and Jacqueline Turner, but did not speak to Appellant's father because his involvement in Appellant's life was "somewhat limited compared to the other individuals" he spoke with. (DAR:2305, 2386). In addition to speaking with family members and other individuals and reviewing school records, Dr. Toomer also examined Appellant on two occasions for a couple of hours at each session. (DAR:2303-05).

In denying this aspect of Appellant's ineffective claim, the trial court stated:

> Here the defendant claims that trial counsel failed to adequately prepare Dr. Toomer. Again, Henyard fails to include any specifics about what available mitigation his attorneys allegedly failed to inform Dr. Toomer about. This claim is legally

[14]Collateral counsel alleges that Appellant resided with Ms. Turner's husband "during much of his childhood." IB at 21. However, there is no evidence in the record to support this allegation. In fact, the only testimony regarding Ms. Turner's husband was on the State's cross-examination of Jacqueline Turner. She testified that right before Appellant left to live with his father, her husband gave her an ultimatum to choose either him or Appellant. (PCR:1024-25). Ms. Turner chose Appellant and her husband moved out.

> insufficient and therefore denied.
>
> Nonetheless, the Court allowed the defendant the opportunity to present evidence on this claim. Yet a close review of the record from the evidentiary hearing reveals no evidence to support this claim. To the contrary, the testimony of T. Michael Johnson established that the defense team consulted not one but two experienced forensic psychologists, Dr. Elizabeth McMahon and Dr. Jethro Toomer. The attorneys arranged a conference call between the two doctors and the defense team, during which each of the statutory mental mitigators was discussed. It was the consensus of the doctors that the statutory mental mitigators did not apply, and it was the advice of Dr. McMahon that she not be called as a defense expert. The defense team followed her advice and did not call Dr. McMahon as a witness.
>
> Dr. Jethro Toomer was called on the defendant's behalf. He examined the defendant twice, reviewed a variety of background materials, including depositions of Henyard's mother and godmother and school records, and interviewed members of Henyard's family. Dr. Toomer also gave the defendant numerous psychological tests. His conclusions are essentially the same as Dr. Bowers' [sic]: low-average IQ and no severe psycho pathology.
>
> There is **absolutely no** evidence that Dr. Toomer was inadequately prepared by trial counsel. Indeed, Henyard's current expert, Dr. Bowers [sic], does not feel that Dr. Toomer erred either in his examinations of the defendant or in his (Toomer's) testimony on Henyard's behalf.

(PCR:743-44).

As the trial court properly found, there is absolutely no evidence to support Appellant's claim that counsel was ineffective for failing to prepare Dr. Toomer. Defense counsel provided Dr. Toomer with an abundance of information, including school records, depositions of family members, police reports, and a confidential psychological report. (PCR:1162-63).

Compare Cherry v. State, 781 So. 2d 1040, 1052 (Fla. 2000) (wherein this Court rejected an ineffective claim, but stated that the first prong of Strickland was a close question because counsel did not send the mental health expert school records or affidavits from family members, but rather, the psychological report prepared by the doctor indicated that he received background information from the defendant during a two-hour interview and self-report).

Even if counsel could be considered to have rendered deficient performance by providing Dr. Toomer with this extensive amount of information, Appellant would not be entitled to relief because he has failed to demonstrate prejudice as a result of counsel's alleged failure to provide Dr. Toomer with sufficient information. See Carroll v. State, 815 So. 2d 601, 618 (Fla. 2002) (stating that the fact the defendant has now secured the testimony of more favorable mental health experts simply does not establish that the original evaluations were insufficient). Here, Appellant is not even able to show that he has obtained a more favorable evaluation. Dr. Bauers' testimony at the evidentiary hearing essentially mirrors the testimony of Dr. Toomer at the penalty phase. As the trial court correctly noted, both experts came to essentially the same conclusions: Appellant has a low-average IQ and no severe psycho pathology.

Accordingly, this Court should find that the trial judge properly denied this aspect of Appellant's ineffective assistance of counsel claim.

In sum, as the trial court found after conducting the evidentiary hearing in this case, "most if not all of Henyard's grounds contained within his motion were flimsy at best and amount to an abuse of the legal system." (PCR:749). Clearly, Appellant has failed to establish either prong of the Strickland analysis. Appellant's trial counsel performed an extensive investigation into his background and childhood, and counsel made strategic decisions in determining which evidence to present to the jury. Even if this Court were to find that counsel was deficient in some manner at the penalty phase, Appellant cannot establish that he was prejudiced and that the result would have been different. Given the facts of this case and the overwhelming aggravation, there is no possibility that Appellant would have obtained a different result. Accordingly, this Court should affirm the lower court's denial of Appellant's postconviction motion.

CONCLUSION

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

Respectfully submitted,

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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert T. Strain, Assistant Capital Collateral Counsel, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this 6th day of March, 2003.

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COUNSEL FOR APPELLEE

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).

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COUNSEL FOR APPELLEE