

IN THE SUPREME COURT OF FLORIDA

RICHARD TODD ROBARDS,

Appellant,

v.

CASE NO. SC15-1364

DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.

_____ /

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

ANSWER BRIEF OF APPELLEE

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RECEIVED, 04/13/2016 09:43:34 AM, Clerk, Supreme Court

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STATEMENT OF THE CASE AND FACTS

The facts underlying Robards' convictions for the murders of Frank and Linda Deluca are outlined in this Court's direct appeal opinion, Robards v. State, 112 So. 3d 1256, 1259-66 (Fla. 2013):

Around mid-morning on August 2, 2006, the Delucas' friend, John Baird, arrived at their home to visit Frank Deluca as the two planned just days earlier. Although both of the Delucas' cars were at the home, no one answered the door, so Baird let himself in, thinking that Frank Deluca simply did not hear him knock on the door. Once inside, Baird noticed that the inside of the home was blackened and scorched and he saw a gas can in the foyer. Although he did not see an active fire, he noticed about two inches of ash on the floor and saw a melted smoke alarm. Baird called out to see if anyone would respond and did not receive an answer. He walked toward the back of the home to the office and noticed a comforter on the floor and Frank Deluca lying next to it. Baird lifted the comforter and saw Linda Deluca lying underneath it. After trying unsuccessfully to get a response from either of the Delucas, Baird went to a nearby school and contacted the school resource officer, who then contacted emergency dispatch.

Around noon that day, various city and county emergency units responded to the Delucas' home. Extensive fire damage was observed inside the home, and it was determined that a fire occurred there but that it snuffed itself out due to a lack of oxygen. Because heat was radiating from the home and the air quality inside the home was compromised, paramedics and law enforcement officers coordinated a plan of action for processing the scene. Two deceased victims, one male and one female, were found inside the home. The bodies of both victims bore evidence of heat exposure as well as trauma to the neck and the chest, and both victims were declared dead as the result of unsurvivable trauma. Both deaths were ruled homicides

and the associate medical examiner confirmed that both victims suffered multiple sharp force injuries. No signs of forced entry were found at the home.

An arson investigation revealed that the fire was the result of arson and was set by a person who used a flammable fluid as an accelerant. The arson investigator determined that the fire started in the hallway that led to the office where the bodies were found, and he observed a trail of clothes and towels down the length of the hallway. Additionally, burnt newspapers and towels were found near the area where the bodies were found. The investigator concluded that the victims were inside the home when the fire was set; an accelerant detection dog alerted to sources of flammable fluid at the beginning and the end of the clothing/towel trail in the hallway and on the bodies of both victims.

Outside the home, two vehicles registered to Linda Deluca were found in the driveway sheltered underneath a carport. Gouge or scrape marks that ran down the length of the driveway between the two vehicles led investigators to believe that an item had been removed from the home and then moved down the driveway, and they soon learned that a safe was missing from the Delucas' home.

Investigators concluded that the murders and the fire occurred on or between July 31 and August 1. The timeline was based in part on information provided by an eyewitness who saw smoke coming from the Delucas' chimney late in the afternoon on August 1. Moreover, the Delucas' August 2 issue of the St. Petersburg Times was never retrieved from the front of their home and was found at the foot of the driveway near where the gouge marks ended.

The investigation and the search for possible suspects quickly focused on Richard Robards, who was once the Delucas' personal trainer. Robards became a suspect in the murders after investigators learned that he knew the Delucas and that his fingerprints were identified on a crumpled piece of newspaper that was found in the Delucas' southeast bedroom. The piece

of newspaper, which was not destroyed in the fire, was from the July 31 issue of the St. Petersburg Times and contained three of Robards' latent fingerprints. Further investigation of Robards' activities before, around the time of, and after the murders yielded additional evidence that linked Robards to a role in the Delucas' deaths, the theft of items from the Delucas' home, and the arson at their home.

In the weeks leading up to the murders, Robards told a number of witnesses that he owned or had access to a safe with a substantial amount of money in it. Several weeks before the murders, Robards asked his friend Shane Harper to help him steal a safe from the Delucas' home by serving as the getaway driver, but Harper refused.

During the month before the murders, July 2006, Robards was an inmate in the Pinellas County Jail. While he was in jail, he met another inmate named Robert Kenney. Kenney overheard Robards telling a criminal defense attorney that he had funds in a safe that could be used to pay for the attorney's services. Robards later told the attorney that he could not get into the safe because he lost the combination. Also while in jail, Robards called a bail bondsman and told him that he had a \$40,000 bond and money in a safe that he could access within twenty-four hours of release. Robards would not tell the bondsman where the safe was located.

After Robards was released from jail, he maintained contact with Kenney, who was at that time living with his girlfriend Jessica Ridpath in her home. Robards told Ridpath that he had \$50,000 in a safe and that he was planning to place a down payment on a townhome near where she and Kenney lived.

Around 10 a.m. on August 1, Robards came to Ridpath's home to see Kenney. Robards was acting nervously. He washed his shoes in the kitchen sink and Kenney saw him carrying Ridpath's gasoline can. Robards asked Kenney if he could borrow a pair of Kenney's shoes as well as Kenney's Ford Explorer so that he could move some personal belongings. Kenney

agreed to these requests. Robards also asked Kenney to keep a duffel bag that contained marijuana but Kenney refused to do so. After Kenney gave Robards the keys to the Explorer, Robards left alone.

At 11:23 a.m., Robards rented a utility dolly from a U-Haul store and provided his driver's license and credit card to secure the rental. Robards returned to Ridpath's home a couple of hours after borrowing the Explorer and asked Kenney to help him move a safe. Kenney went with Robards and noticed a red dolly in the back seat of the Explorer. Robards drove to the Delucas' neighborhood and first drove around it before going to their home. When they arrived, Kenney noticed that someone had already tried to move the safe down the driveway. When he realized that vehicles were parked in the driveway, he asked Robards why the people at the home could not help him move the safe. Robards replied that he was involved in an argument with them and he just wanted to get his belongings and leave.

Robards and Kenney tried to put the safe into the Explorer, but the safe was too large. Robards pushed the safe back underneath the carport between the vehicles, and the two men left in search of equipment that was durable enough to move the safe. At 2:28 p.m., Robards rented a trailer from Nations Rent. After an adapter was added to the Explorer, the Explorer was equipped to haul the trailer and the safe.

Again, Robards drove around the Delucas' neighborhood instead of directly to their home. When Robards and Kenney arrived at the home, they placed the safe onto the trailer and drove off. Kenney was unaware at the time that Robards intended to store the safe in Ridpath's garage. After driving for a short time, Robards stopped and put a tarp on top of the safe. Robards then convinced Kenney to let him hide the safe in Ridpath's garage.

Ridpath arrived home that evening after getting off of work at 5:15 p.m. and noticed that Robards' car was there, but Kenney's Explorer was not. Robards and

Kenney arrived about thirty minutes later and without Ridpath's knowledge, they placed the safe in the garage. Robards wiped the safe clean and made sure that it was not in plain view in the garage. Before leaving, Robards asked Ridpath for some air freshener because his car smelled "musty." He used it briefly and then left.

The evidence that implicated Robards also revealed that at the time of the murders, Robards was renting two storage units at a storage facility in Largo, Florida. Surveillance conducted there identified a vehicle linked to Robards coming and going from the storage facility in the days just after the murders. Although he had not accessed the units since May 24, 2006, in the days following the murders, Robards accessed his storage units on August 2, 4, and 5, 2006. After learning that a safe was taken from the Delucas' home, law enforcement obtained a search warrant for Robards' storage units. The Delucas' safe was not found there, but a rifle that belonged to Frank Deluca was retrieved from one of the units.

Robards was also linked to the murders through his possession of a scale that was taken from the Delucas' home. During the week following the murders, Robards went to the home of his friend Shane Harper with a scale and a cooler of marijuana and asked Harper to sell the marijuana for him. Harper took the marijuana and the scale but later decided to call law enforcement instead of selling the marijuana as Robards requested. Harper gave the items to the Clearwater police, but he agreed to call and tell Robards that he sold the marijuana and had the money from the sale. The police gave Harper \$900. When Robards arrived at Harper's home, Harper was wearing a wire so that the police could conduct surveillance of the meeting. Robards took the money and left, and the police subsequently arrested him for possession of marijuana. The serial number on the scale that Robards gave Harper matched the serial number on a box found at the Delucas' home.

Further incriminating evidence was found one week after the murders when a detective responded to a

contact from the City of Clearwater recycling department. Earlier that day while watching a cardboard-only recycling truck dump out its load from the day's route, an employee saw a purse fall out of the truck. The employee retrieved the purse from the load and determined that it belonged to Linda Deluca, whose name the department employees recognized from recent news coverage. Linda Deluca's wallet and Social Security and credit cards were found inside the purse. During a more detailed search of the entire truckload, the detective also found a white Dimmit Automotive t-shirt. The detective gathered the t-shirt as evidence because Robards had worked at Dimmit Automotive in May and June 2006, and he had been provided several identical t-shirts to wear as his work uniform.

Additional evidence was seized from motels where Robards stayed around the time of the murders. Robards stayed at the Clearwater Inn from July 22 to August 3, 2006. When the housekeeper went into Robards' room after he checked out of it, only one towel remained of the ones that were placed in his room. Blood stains were found on the room's doorknob and were consistent with Robards' DNA profile. Additionally, the trailer that Robards rented from Nations Rent was retrieved from the Clearwater Inn property. A later search of the Motel 6 where Robards stayed after leaving the Clearwater Inn yielded another Dimmit Automotive t-shirt.

After Robards was arrested, Robert Kenney called a locksmith about getting someone to open the safe that remained in Ridpath's garage. The locksmith told Kenney that he would call back with more information, but Kenney was not contacted again about the safe until detectives came to Ridpath's home about two weeks later. Kenney told the detectives that he had some of Robards' belongings and he showed them the safe, which the detectives seized as evidence. Later a locksmith opened the safe at the Pinellas County Sheriff's Office; it contained \$88,700 in cash as well as documents and wedding rings. The position of the wheels on the safe was consistent with the dimensions of the marks left in the Delucas' driveway.

Photographs taken of Robards at the Clearwater Police Department after his arrest revealed multiple scrapes and scratches on his hands. When Frank Deluca's fingernails were examined for DNA, two separate sources were identified. The profiles were consistent with Linda Deluca and Richard Robards.

While in jail on the possession charge, Robards contacted crime scene detective Anthony Monte, who worked very closely with lead detective Christopher Precious in conducting the Deluca homicide investigation. Robards tried to contact Detective Monte several times, and two weeks after the murders, he left a message for the detective about "mak[ing] a deal." Robards told Detective Monte that he was involved in the Delucas' murders but that the deaths were connected to a drug ring in Orlando. A detective was subsequently assigned to investigate Robards' claim. Although a trace amount of marijuana was found inside the Delucas' home, no evidence was found to substantiate the allegation.

Weeks after the murders, Kenney found a handgun wrapped in a towel inside of a suitcase that he kept stored in Ridpath's garage. The gun was not confirmed as having belonged to Linda Deluca but was linked to her through an identification by her son, Christopher. Linda Deluca was a surveyor who had a concealed weapon permit and carried a handgun for safety, yet no handgun was found in her purse, in the recycling load that contained her purse, or in the Delucas' home.

Robards was indicted on August 22, 2006, for two counts of first-degree murder. In September 2007, the trial court found that Robards was incompetent to proceed and that he met the criteria for involuntary placement in a mental health treatment facility. Robards was placed in the forensic unit of the State mental hospital where he remained for several months. During that time, with the help of two hospital employees, Robards and another patient attempted to escape. On the night of the attempt, hoping to elude the hospital staff, Robards and the patient used clothing and sheets to make dummies for their beds. Then, using tools provided by the two employees, they

sawed through security screens to pry open a window. They climbed up the plumbing of their housing pod to the roof and moved to the roof of another pod where they were caught. A few months later, in May 2008, the trial court found that Robards was competent to proceed.

Robards' trial began on May 18, 2010. At trial, the associate medical examiner who both reported to the crime scene and performed the autopsies on the Delucas testified to the following findings. Linda Deluca, who was five feet three inches tall and weighed 140 pounds, sustained multiple sharp force injuries consistent with a knife or other instrument with a sharp edge. Her most severe wound severed her neck and was described as follows: "And it injured the thyroid cartilage which is the—commonly known as the Adam's apple that you can easily feel on the front of your neck. It went through the major blood vessels. Mainly the internal jugular vein as well as the external carotid [sic] arteries. It also exposed the back of the spine of the neck which was, in medical terms, the vertebral column. So basically, it was a severely incapacitating injury." Linda Deluca also suffered additional stab wounds to the neck and back. She had no defensive wounds. The medical examiner testified that she likely lost consciousness within two to three minutes of the severing of her jugular and carotid arteries.

Frank Deluca, who was five feet nine inches tall and weighed 213 pounds, also suffered multiple stab wounds, including one on the right front of the neck that injured his carotid artery and jugular vein. He sustained additional wounds to his chest, hands, and lower extremities, including defensive wounds to his left hand. Like Linda Deluca's, Frank's injuries were consistent with a knife-like weapon.

The medical examiner was unable to determine either of the Delucas' exact time of death or which spouse died first, but he concluded that the multiple sharp force injuries sustained by both victims caused rapid bleeding and subsequently, their deaths.

On May 21, 2010, the jury returned verdicts finding Robards guilty of the first-degree murders of Linda and Frank Deluca. The trial proceeded to the penalty phase the following week. Robards' penalty phase was held on May 25, 2010. The State presented one penalty phase witness, Linda Deluca's sister. The defense presented several witnesses, most of whom were Robards' family members, friends, fellow inmates, or former clients. Most of the defense's presentation consisted of character evidence about aspects of Robards' personal life and professional life. Additionally, Shane Harper testified that Robards initially planned to rob the Delucas' home while they were on vacation and did not intend that anyone would be at home when the robbery took place.

For each of the murders, the jury was instructed to consider four aggravating circumstances: (1) prior conviction of another capital felony (based on the contemporaneous murder of the second victim); (2) murder committed during the commission of a robbery; (3) murder committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, or cruel (HAC). No statutory mitigation was presented during the penalty phase, but the jury was instructed to consider the following nonstatutory mitigating circumstances: (1) Robards' family background, employment, and good Pinellas County jail record; and (2) any circumstances of the offense that would mitigate against the imposition of the death penalty. For each murder, by a seven-to-five vote, the jury recommended that Robards receive the death penalty.

Prior to sentencing, the trial court conducted a three-part Spencer^{FN1} hearing on three dates in July, August, and October 2010. The State presented two witnesses, both of whom testified about the blood splatter found in the Delucas' home and provided additional context to the injuries that the victims suffered. There were significant stains of aspirated blood about four feet high on the hallway bathroom door. Another pattern of blood spatter on the door leading into the room where the bodies were found indicated that not all of the injuries were sustained in a single room in the Delucas' home. Another source

of blood found in the hallway a few feet away from the bathroom revealed that one of the victims was on the floor at one point and bled significantly; however, at some point, the victim moved or was moved to another area and someone stepped in the pool of blood and created significant blood splatter. Because of the severe fire damage to the Delucas' home, the blood evidence that was available for testing was very limited. However, a blood-stained blanket and two swabs of what was believed to be blood were submitted for testing. The results from the blanket and one of the swabs were consistent with the DNA profile of Linda Deluca.

[^{FN1}] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

Although mental health mitigation was not presented to the jury during the penalty phase, the defense presented three mental health expert witnesses during the Spencer hearing to support the existence of statutory mental mitigating circumstances: Dr. Joseph Charles Wu, Dr. Jonathan Lipman, and Dr. Robert Berland. Robards and his sister Tanya also testified at the hearing.

Dr. Wu interpreted the results of a Positron Emission Tomography (PET) scan that was administered to Robards before trial. The doctor concluded that the scan showed evidence of three types of brain damage: traumatic brain injury, toxic brain exposure, and a combination of traumatic injury and toxic exposure. Dr. Wu found decreased activity in the back of Robards' brain and observed that it "would be consistent with [Robards'] history of having been in multiple car accidents...." Dr. Wu also observed increased activity in Robards' posterior cingulate which he associated with toxic brain exposure. Robards' overactive occipital cortex, Dr. Wu opined, was consistent with some forms of psychosis. Dr. Wu testified that the traumatic brain injury found in Robards' PET scan represented a fourfold increase (from one percent to four percent) of the chance of developing a psychosis, and he noted that additional

damage evident on the scan appeared to be caused by a combination of toxic exposure and traumatic injury.

Between the first and second phases of the Spencer hearing, Robards was evaluated by Dr. Lipman. Dr. Lipman testified that Robards displayed a number of physical manifestations of anabolic steroid use, including acne scarification, distinct features of Robards' ear and nose cartilage, and the bony growth of Robards' jaw. Robards also had scars from the removal of large breasts that developed due to his steroid use. Robards began using steroids around age fifteen and graduated from using them in cycles to using them on a continuous basis. Dr. Lipman testified that Robards' withdrawal from steroids could have lasted from ten days to four months and concluded that Robards would have been experiencing steroid withdrawal at the time of the homicides and possibly for weeks afterward because he did not have any steroids when he got out of jail just days before the murders.

Dr. Lipman interviewed people who knew Robards, and he described Robards as violent, destructive, combative, irritable, and fractious, such that protective orders had to be taken against Robards. When Dr. Lipman confronted Robards with these descriptions, Robards "had any number of explanations for why [Dr. Lipman's] view of him was incorrect." He described Robards as paranoid in very subtle ways and testified that Robards reported symptoms consistent with psychotic hallucinations and delusions and paranoid fears. Dr. Lipman conceded that Robards' steroid use was not a determinative justification for Robards' acts of murder and agreed that Robards' attempted escape from the State hospital in 2008 occurred long after Robards' withdrawal symptoms would have passed.

Dr. Berland was hired by the Public Defender's Office as Robards' mental health expert. He administered the Minnesota Multiphasic Personality Inventory (MMPI) aloud to Robards in October 2006, and he scored the test himself. Dr. Berland concluded that the results reflected a substantial psychotic

disturbance and that although the MMPI does not measure brain injury, Robards' configuration of scores is consistent with people who "at least in part have their psychosis caused by brain injury."

Dr. Berland interviewed seven people who knew Robards, including five former girlfriends and two family members. Each of them recalled various events involving Robards. Based on the interviewees' accounts, Dr. Berland concluded that Robards exhibited behaviors that were consistent with a person who suffered from depression, experienced auditory hallucinations, and possessed prominent delusional paranoid beliefs.

During Robards' testimony, he denied having any memory of the murders or the events surrounding them, and he insisted that his sophisticated attempt to escape from the State hospital in 2008 was simply an effort to get to the roof of the building to stargaze and pray. Although Robards said during the second phase of the hearing that he prayed for forgiveness, he refused to acknowledge that he murdered the Delucas and would not specify what he sought forgiveness for. However, during the third phase, where the Deluca family was not present, Robards apologized for murdering the Delucas. Robards' sister Tanya testified that Robards was often the subject of physical abuse at the hands of their brothers and that she heard that Robards was once sexually abused as a child.

Robards' sentencing was held on October 29, 2010. The trial court followed the jury's recommendation and sentenced Robards to death for each of the Delucas' murders. In its sentencing order, the court found that four aggravating circumstances were proven by the State beyond a reasonable doubt and assigned each one of them great weight: (1) Robards was convicted of a prior capital felony (based on the contemporaneous murder of the second victim); (2) Robards committed each murder for pecuniary gain; (3) Robards committed each murder while engaged in a commission of a robbery (merged with pecuniary gain); and (4) each murder was especially heinous, atrocious, or cruel (HAC).

Although the jury did not receive evidence of mental health mitigation, the trial court weighed the evidence that was presented at the Spencer hearing and considered as statutory mitigation the following: (1) whether Robards suffered from an extreme mental or emotional disturbance; and (2) whether Robards suffered from an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The court rejected both of these statutory mitigating circumstances and explained its rationale in its sentencing order. The trial court did weigh Robards' mental health as a nonstatutory mitigating circumstance.

The trial court considered a total of twelve nonstatutory mitigating circumstances. The trial court rejected Robards' argument that Florida's budgetary crisis was a reason for not imposing the death penalty and his argument that the closeness of the jury's vote was a reason for not imposing the death penalty. Of the remaining ten mitigating circumstances, the trial court gave each one some weight: (1) family history; (2) no plan to murder; (3) good general conduct while in custody; (4) capacity to form positive relationships; (5) remorse and potential for rehabilitation; (6) traumatic injury based on PET scan and PET scan brain image comparison; (7) effect of steroids on brain injury and effect of steroids generally; (8) use of prescribed steroids, interactions with other prescribed drugs, and withdrawal; (9) mental health issues; and (10) history of steady employment. All of the trial court's findings were as to each murder.

On direct appeal to this Court, Robards raised the following issues:

ISSUE I: APPELLANT WAS DENIED HIS RIGHTS, GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS, TO A RELIABLE JURY PENALTY PROCEEDING AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND UNDER THE UNIQUE CIRCUMSTANCES SHOWN ON THIS RECORD RELIEF CAN AND SHOULD BE AFFORDED ON DIRECT APPEAL.

ISSUE II: TO THE EXTENT THAT FLORIDA'S CAPITAL SENTENCING SCHEME ALLOWS A DEATH RECOMMENDATION TO BE RETURNED BY A BARE MAJORITY (7-5) VOTE OF THE JURORS, IT IS CONSTITUTIONALLY INVALID.

ISSUE III: THE TRIAL JUDGE DEPARTED FROM JUDICIAL NEUTRALITY AND COMMITTED FUNDAMENTAL ERROR BY PROMPTING THE STATE TO ADD AN AGGRAVATING CIRCUMSTANCE WHICH IT HAD NOT LISTED IN ITS NOTICE.

ISSUE IV: THE COMBINED IMPACT OF HIGHLY IMPROPER ARGUMENT IN WHICH THE PROSECUTOR COMMENTED ON APPELLANT'S FAILURE TO TESTIFY AND SHIFTED THE BURDEN OF PROOF, AND TOLD THE JURORS THAT THE STATE DIDN'T EVEN SHOW THEM ALL OF THE EVIDENCE ("WE WOULD HAVE BEEN HERE FOREVER"), VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL.

Initial Brief of Appellant at i-ii, Robards v. State, SC11-0425. On April 25, 2013, this Court affirmed Robards' convictions and sentences. Robards v. State, 112 So. 3d 1256, 1259-66 (Fla. 2013). This Court issued its mandate on May 16, 2013, and Robards did not file a petition for writ of certiorari to the United States Supreme Court.

On June 18, 2014, Robards filed a motion for postconviction relief in the trial court and raised three claims of ineffective assistance of counsel (Claims 1-3), a cumulative error claim (Claim 4), a claim challenging the constitutionality of Florida Statutes, section 945.10 prohibiting the disclosure of the identity of execution team members (Claim 5), and a claim that Robards may not be competent at the time of his execution (Claim

6). (PCR V1:1-71).¹ Robards sought an evidentiary hearing on his first two claims alleging ineffective assistance of counsel, and on March 24, 2015, the trial court conducted an evidentiary hearing on Robards' claims.

At the evidentiary hearing, Robards presented testimony from his two trial attorneys, Larry Hoffman and Richard Watts; two mental health experts who testified at the Spencer² hearing, Drs. Joseph Wu and Robert Berland; one of Robards' prior trial attorneys, Assistant Public Defender Ron Eide; and from two lay witnesses who were personal training clients of Robards, William Jonassen and Bonnie Ruggles.

Richard Watts, a very experienced criminal defense attorney,³ testified that he was appointed in Robards' case around January, 2010, to handle the penalty phase. At that time, Robards was also represented by privately-retained counsel, Larry Hoffman, who was responsible for the guilt phase. (PCR V3:257-61). Watts was aware when he came onto the case that there had been delays due to competency issues with Robards and

¹ Citations to the postconviction record on appeal will be cited as "PCR" followed by the volume and page number. Citations to the direct appeal record ("DAR") will follow the same format.

² Spencer v. State, 615 So. 2d 688 (Fla. 1993)

³ Watts testified that he had handled over 80 capital trials, including at least 50 death penalty phases during his lengthy career. (PCR V3:257-58).

his sovereign citizen stance, but Robards agreed to drop that issue once Watts came onto the case. Watts testified that he was familiar with the reports of the various mental health experts who had examined Robards prior to trial and found that he was malingering, but Watts purposefully did not want to use this information in mitigation because it was not favorable to Robards. (PCR V3:298-300, 312-13).

In regards to his mitigation investigation, Watts testified that he investigated mental health mitigation and knew where that aspect of the case was headed, but had not yet completely finished this part of his investigation at the time of the May 25, 2010, penalty phase. (PCR V3:263, 274-76). Rather, he made the strategic decision to present a mitigation theory of humanizing Robards before the jury. (PCR V3:308-09). In support of that theory, Watts relied on lay witnesses and Robards' family members. Watts testified that he spoke to lay witnesses and had a star witness, Robards' former high school sweetheart, whom he thought would offer compelling testimony resulting in the jury recommending a life sentence. (PCR V3:273, 309). Watts obtained funding for and utilized the services of a mitigation specialist, Carol Springer, who travelled to Kentucky and made a DVD of her interviews with Robards' family members and friends. (PCR V3:284-86). Watts testified that he utilized the video

presentation because it prevented the State from cross-examining the witnesses. (PCR V3:303-04, 358-59). In fact, Watts knew that the State was prepared to elicit information from Robards' high school girlfriend, Lynn Whited-Triplett, that she was the only girlfriend Robards had ever broken up with who had not obtained an injunction against him. (PCR V3:310-11).

Regarding his investigation into mental mitigation, Watts testified that he continued using predecessor counsels' mental health expert, Dr. Robert Berland, and was aware prior to the penalty phase that Robards had sustained head injuries in accidents as prior counsel had obtained the medical records. (PCR V3:277-78; see also DAR SV9:1246). Based on Dr. Berland's recommendation, Watts obtained a PET scan test a few weeks prior to the penalty phase.⁴ At the same time, counsel filed a notice of intent not to present mental mitigation. (PCR V3:262-63; DAR V9:1480). Watts testified that he was aware prior to the penalty phase that there were abnormalities in Robards' PET scan results as Dr. Berland had given him this information. (PCR V3:263-65). Dr. Berland informed Watts that he wanted to send the PET scan results to Dr. Wu for further interpretation, and also suggested

⁴ Although Watts testified that predecessor counsel Ronald Eide thought Watts should have obtained the PET scan earlier or moved for a continuance, Watts noted that Eide had never sought a PET scan when representing Robards. (PCR V3:276-77, 300).

that Watts have Robards evaluated by Dr. Lipman, a neuropharmacologist, due to Robards' extensive use of steroids. (PCR V3:267).

Based on Dr. Berland's recommendations, Watts sent Robards' PET scan results to Dr. Joseph Wu in California and arranged for Dr. Jonathan Lipman to evaluate Robards. Following the penalty phase, Dr. Lipman met with Robards for a nine-hour non-stop visit and this evaluation resulted in Dr. Lipman opining that Robards was suffering from steroid withdrawal at the time of the murders. Dr. Lipman's evaluation also marked a turning point in Robards as well, as Robards began accepting responsibility for his actions after meeting with Dr. Lipman. (PCR V3:267-69).

Watts testified that although he had not fully finished investigating Robards' mental mitigation at the time of the penalty phase, he had a view of where the mental mitigation evidence was headed and he made the strategic decision to present this evidence at the Spencer hearing rather than before the jury. (PCR V3:274-76). Watts ultimately presented testimony from Drs. Berland, Wu, and Lipman at one of the three Spencer hearings. Watts testified that he was confident that if he had wanted to obtain a continuance of the penalty phase to investigate further, the court would have granted the request. (PCR V3:271-72). However, Watts did not want a continuance and

purposefully made the strategic decision to head straight into the penalty phase. (PCR V3:274-76, 304-07).

In making these decisions, Watts testified that his prior experience in handling capital penalty phases factored into his decision-making process in the instant case. For example, shortly before the instant case, Watts had a capital case where he presented the mental mitigation to the jury and then regretted the decision because of the prosecutor's cross-examination of the experts before the jury. Given this recent experience, Watts made the strategic decision in Robards' case to present the mental mitigation before the judge only at the Spencer hearing. (PCR V3:293-95). Watts was aware that numerous mental health professionals had evaluated Robards pre-trial and there was a great deal of unfavorable and damaging information in their reports. (PCR V3:300). For example, there was an abundance of information concerning Robards' threatening and violent nature towards women in his life. (PCR V3:314-19). Watts stated that he did not want to present this information in front of the jury as it was detrimental to Robards. (PCR V3:318-19). Additionally, Watts acknowledged that presenting his experts on steroid withdrawal (Dr. Lipman) and the PET scan results (Dr. Wu) would also lead to negative information being presented to the jury. Although Dr. Lipman opined that Robards committed the

murders while in steroid withdrawal, Watts was aware that there was an abundance of evidence of Robards' violent and threatening nature, while taking steroids, which could be presented by the State if Dr. Lipman testified before the jury. Watts also expressed a desire to present his expert witnesses to the judge only as the court would likely understand it better than the jury and it would give the court a reason to override the jury's recommendation if they recommended death. (PCR V3:313-22). Finally, Watts noted that if he presented any mental mitigation to the jury, the State would be able to introduce more detailed evidence regarding his malingering and his escape attempt from the state mental health hospital. (PCR V3:326-28). Watts acknowledged that even with the benefit of hindsight, if he had been able to obtain all the mental health mitigation prior to the penalty phase, he would not have presented it to the jury. (PCR V3:331-33).

In regards to Tanya Robards, Appellant's sister, Watts testified that he had spoken to her over the phone and she was videotaped by the defense mitigation specialist, Carol Springer, prior to the penalty phase. (PCR V3:284-85). Watts possessed a report written by his mitigation specialist prior to trial where she had interviewed Tanya Robards and Ms. Robards mentioned the sexual abuse at that time, but Watts testified that that

testimony did not become important until after the penalty phase when the State argued in their closing argument that the Defendant had a "rosy" childhood. (PCR V3:286-91). In fact, Watts testified that her testimony about alleged sexual abuse against Robards was inconsistent with the mitigation theory they were presenting to the jury, which was the positive side of the Appellant's life. (PCR V3:286, 322, 360-61). Watts stated such testimony was more appropriate for the upcoming discussion of Robards' steroid use because their theory was that the sexual abuse was the trigger for Robards to begin bodybuilding and using steroids. (PCR V3:289-90). Watts also testified that Tanya Robards was a hesitant witness who had difficulty leaving her home and had "mixed feelings" about testifying on behalf of her brother. (PCR V3:323-24).

At the evidentiary hearing, collateral counsel presented testimony from Dr. Wu that he was retained by Watts and did not become involved in Robards' case until May, 2010, when Dr. Berland sent him Robards' PET scan results to review. Dr. Wu received the PET scan on May 20, 2010, and though he did not look at them until about a week later. (PCR V4:376-77). Dr. Wu testified that, to the best of his recollection, his initial review of the PET scans did not occur until after May 25, 2010, and he subsequently performed a detailed, formal review on June

21, 2010. (PCR V4:378). After performing his review, Dr. Wu had a conference call with Watts on August 9, 2010, and testified at the Spencer hearing on August 24, 2010. (PCR V4:379-80).

Dr. Robert Berland testified regarding his involvement in Robards' case and noted that he was originally hired in 2006 by the Public Defender's Office to investigate mitigation evidence and Robards' competency. (PCR V4:387-88). Dr. Berland testified at Robards' competency hearing in August, 2007, and opined that Robards may have brain damage as a result of his steroid use and brain trauma. (PCR V4:388-89; DAR SV2:100-54). At the postconviction evidentiary hearing, Dr. Berland testified that he thought a PET scan would confirm his suspicions of brain damage so he recommended to the attorneys that they hire a specialist in PET scans, Dr. Wu, and a neuropharmacologist, Dr. Lipman. (PCR V4:390). Dr. Berland noted that his billing indicated that Richard Watts hired him in April, 2010, but the witness had no recollection of his involvement with Watts or his testimony at Robards' Spencer hearing. (PCR V4:392-95). He also did not recall drafting a report from 2007 which was provided to Robards' counsel at that time, Assistant Public Defenders Ron Eide and Violet Assaid, which contained substantial negative information from Robards' ex-girlfriends. (PCR V4:395-98; DAR V16:2667-72).

Collateral counsel also presented brief testimony from Robards' guilt phase trial counsel, Larry Hoffman, in support of his allegation of ineffective assistance of guilt phase counsel.⁵ Hoffman testified that he was privately retained by Robards' mother in December, 2009. Hoffman sought the appointment of a penalty phase attorney as he only handled the guilt phase. (PCR V4:428). Hoffman testified that he was aware of Robards' taped phone call to Detective Monte regarding the possibility of making a deal, but counsel did not file a motion to suppress this evidence, or object to this testimony, because he did not find it objectionable and he handled the issue on cross-examination. (PCR V4:430-32).

Robards' initial counsel, Assistant Public Defender Ronald Eide, testified at the evidentiary hearing that his office hired Dr. Berland and had begun investigating potential mitigation and mental health issues. Eide testified that they were looking into potential brain damage based on Robards' steroid use and head trauma. (PCR V4:406-07). Eide testified that after his office conflicted off the case, he met with Richard Watts prior to the guilt phase and discussed the PET scan and other matters. (PCR

⁵ Hoffman, like Watts, is a very experienced trial attorney who has been in practice for over forty years and has handled multiple capital trials. (PCR V4:426-27).

V4:408-10). According to Eide, he recalled Watts telling him that they had obtained the PET scan, but not the results, and were not going to seek a continuance because co-counsel Hoffman wanted to get the case over with and did not want to seek a continuance and annoy the judge. (PCR V4:409). Eide testified that he saw Watts again after the verdict was rendered and discussed the PET scan results. Eide testified that Watts said "words to the effect" that he should have moved for a continuance and he would "fall on his sword" when the time came.⁶ (PCR V4:410-11).

Finally, collateral counsel presented testimony from two lay witnesses who utilized Robards' services as a personal trainer. William Jonassen testified that he used Robards as a personal trainer and also hired him to train his son. He found Robards to be very dedicated and concerned about his clients' physical condition. (PCR V4:434-37). Mr. Jonassen was unaware that Robards had been charged and convicted of murder and had

⁶ Watts testified that he met with Eide regarding Robards' case and they had different approaches to the mitigation case as Eide was more "conservative." (PCR V3:277). Watts recalled having multiple conversations with Eide and Eide suggesting that they should have moved for a continuance, and Watts recalled that he may have agreed with Eide in that conversation. (PCR V4:278). Of course, as previously discussed, Watts repeatedly testified that he could have asked for a continuance, but purposefully chose not to do so for strategic reasons.

only recently learned this information from collateral counsel. (PCR V4:438-39). Similarly, Bonnie Ruggles testified that Robards trained her and her husband in 2001-02. (PCR V4:444). She testified that she thought Robards was a very caring person and kind. (PCR V4:446). She was aware of Robards' arrest and charges, but never contacted Robards' trial counsel. (PCR V4:459).

After hearing the testimony and reviewing the parties' written closing arguments, the postconviction court issued a detailed order on June 18, 2015, denying Robards' postconviction motion. (PCR V5:578-602). This appeal follows.

SUMMARY OF THE ARGUMENT

The postconviction court properly concluded that Robards' failed to carry his burden of establishing that his penalty phase counsel was ineffective for failing to timely, diligently, and reasonably investigate Robards' available mitigation. As the court noted, trial counsel was generally aware of the available mental mitigation at the time of the penalty phase, and made a strategic decision to present "humanizing" evidence to the jury and to present the mental mitigation to the judge at the Spencer hearing. Counsel was aware that if he presented the mental mitigation to the jury, it would open the door to very damaging evidence which counsel did not want the jury to hear. In addition to failing to establish deficient performance, the lower court correctly found that Robards failed to establish prejudice as the sentencing court was aware of all the available evidence and there was no reasonable probability of a different result had trial counsel presented the mental mitigation to the jury.

Competent, substantial evidence supports the postconviction court's finding that Robards failed to establish that his guilt phase trial counsel was ineffective for failing to object to Robards' unilateral and unsolicited statements to a detective to "make a deal." Robards' trial counsel correctly found that there

was no legal basis to object to Robards' statements. As trial counsel and the lower court properly found, Robards' statements were admissible and were not statements made in connection with plea negotiations. Even if Robards could have established that the statements were inadmissible and that trial counsel performed deficiently by failing to object to this evidence, the court properly found that Robards could not establish prejudice.

Robards' attempt to combine two meritless claims into a claim of "cumulative error" is unavailing and without merit.

ARGUMENT

ISSUE I

THE LOWER COURT PROPERLY DENIED ROBARDS' CLAIM THAT PENALTY PHASE COUNSEL PERFORMED INEFFECTIVELY FOR FAILING TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE TO THE JURY.

Appellant claimed in his postconviction motion that his penalty phase counsel was ineffective for failing to adequately and timely investigate available mitigation and for failing to present all available mitigation to the jury.⁷ After conducting an evidentiary hearing and hearing testimony from Robards' penalty phase counsel, Richard Watts, as to his investigation into mitigation and his strategic decision to present certain mitigation to the court at the Spencer hearing, the postconviction court denied Robards' claim and found that Robards failed to carry his burden under Strickland v. Washington, 466 U.S. 668 (1984), of establishing that counsel performed deficiently and that he suffered prejudice. The State submits that competent, substantial evidence supports the lower court's ruling.

⁷ Appellant previously raised this claim on direct appeal, and this Court declined to consider the claim at that time. See Robards, 112 So. 3d at 1267 ("Without commenting on the merits of Robards' claim that his penalty phase counsel provided ineffective assistance of counsel, we decline to consider this claim on direct appeal in order that such claims may first be properly raised, then developed and ruled upon in the trial court.").

In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States Supreme Court's decision in Strickland, a defendant must establish two general components.

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

Strickland v. Washington, 466 U.S. 668 (1984); Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). When addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Id. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome

the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

When reviewing a trial court's ruling on an ineffectiveness claim, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prong *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly identified the applicable law in analyzing Appellant's claim, correctly applied this law to the facts as presented in the trial and postconviction proceedings, and concluded that Robards was not entitled to postconviction relief as he failed to carry his burden of establishing that penalty phase counsel's representation was constitutionally ineffective.

Contrary to Appellant's arguments in his brief, this is not a case where trial counsel failed to timely investigate and discover available mitigation prior to making his strategic decision as to which evidence to present to the jury. Rather, as the record reflects, and as properly found by the postconviction court, trial counsel was generally aware of the mental mitigation at the time of the penalty phase and made a strategic decision not to present this evidence to the jury because of concerns with the State's ability to cross-examine the mental health experts and to introduce damaging rebuttal evidence.

Rather, trial counsel strategically chose to present "humanizing" evidence to the jury and to present the mental health mitigation to the judge at the Spencer hearing. (PCR V5:586-96). Additionally, as the court correctly concluded, Robards failed to establish Strickland prejudice as his speculative claim that the jury would have recommended a life sentence had it heard the Spencer hearing mitigation is insufficient to undermine confidence in the two death sentences.⁸

Robards' major contention regarding this claim is based on the faulty premise that his penalty phase counsel failed to investigate mental mitigation prior to the penalty phase and therefore could not make a "knowing" strategic decision to forego presenting this evidence until the Spencer hearing. As the record reflects, however, trial counsel was aware of the type of mental mitigation that could be presented to the jury, namely, brain damage and steroid/drug abuse, but counsel made a valid and sound strategic decision not to present this evidence to the jury. Counsel was aware that if he presented mental mitigation to the jury, the State would be able to introduce

⁸ In postconviction, Robards did not introduce any new mitigation that was not heard by the trial court. Although Robards presented two lay witnesses at the evidentiary hearing who were clients of Robards' personal training business, the postconviction court correctly noted that this testimony was cumulative to the more compelling penalty phase testimony of another of Robards' clients, Mindy Bickey. (PCR V5:594-95).

very damaging rebuttal evidence that Robards had previously been diagnosed as malingering, had an antisocial personality, a history of violence against women, uncooperative and outrageous courtroom behavior, and had attempted to escape from the Florida State Hospital with a well-organized and manipulative plan.

At the evidentiary hearing, Richard Watts testified to the circumstances surrounding his appointment as penalty phase counsel approximately five months prior to Robards' trial. Following Robards' indictment in August, 2006, Robards was initially represented by the Public Defender's Office.⁹ In August, 2007, Robards was found incompetent to proceed. (DAR V1:93-96). After being evaluated by numerous mental health professionals as malingering and having attempted to escape from the state hospital, Robards was found competent to proceed in May, 2008. (DAR V1:105). The Public Defender's Office moved to withdraw and regional counsel was appointed for Robards. After Robards elected to represent himself, regional counsel was appointed as stand-by counsel. In December, 2009, Robards retained Larry Hoffman as his attorney, and Richard Watts was

⁹ The Public Defender's Office retained Dr. Robert Berland as a confidential mental health expert in 2006 to do competency and mitigation work (DAR V1:14-15; DAR SV2:100-03; PCR V4:388), and Watts' continued working with Dr. Berland following his appointment as penalty phase counsel. (PCR V3:277).

appointed as co-counsel on January 28, 2010. (DAR V7:1229, V8:1310). Robards case proceeded to a jury trial on May 21, 2010.

Richard Watts, a very experienced capital trial attorney and Robards' penalty phase counsel, testified that he was aware of the lengthy procedural history of Robards' case prior to his involvement and he and Hoffman were comfortable with the timeframe to prepare for trial and the penalty phase. (PCR V3:271-72). Watts indicated that if he had wanted a continuance to conduct further mental mitigation investigation prior to trial, he was confident the court would have granted such a request. (PCR V3:272). However, although Watts had not fully completed his investigation into Robards' background, he was informed enough to make the decision to not present the mental health evidence to the jury, but rather, present such evidence to the trial court at the Spencer hearing. (PCR V3:275-76).

Prior to the penalty phase, Watts had consulted with his retained mental health experts and had reviewed the reports of other mental health experts involved with Robards' competency proceedings.¹⁰ (PCR V3:297-300). These experts reported that

¹⁰ Collateral counsel erroneously asserts in her brief that Watts "clearly admitted that he never read the competency hearing transcripts," and claims that any information from the competency hearing was of no value to him. Initial Brief at 36.

Robards was malingering or exaggerating his mental health symptoms,¹¹ had very violent relationships with a number of prior girlfriends, and had engaged in an elaborate plan to escape from the state mental health hospital. (PCR V3:297-300). Trial counsel was also aware of Robards' steroid abuse and had conferred with Robards' prior attorney, Assistant Public Defender Ron Eide, regarding Robards' motorcycle accidents and hospital records. (PCR V3:277-78; DAR SV9:1230-51).¹² Watts had

Actually, on direct examination, Watts initially stated that he "*did not recall*" if he had read the competency transcripts (PCR V3:261), and on cross-examination, he clarified his testimony and indicated that he wanted to "reanswer" those direct examination questions because he now recalled the information from the competency reports. Also, contrary to collateral counsel's assertion, Watts did not claim that the information had no value to him, but rather, he was not interested in presenting that information to the jury because it would open the door to the introduction of damaging information. (PCR V3:299-300, 360).

¹¹ Counsel was aware that, prior to his representation, Robards engaged in bizarre behavior in court, and even the defense's own mental health expert opined that Robards was exaggerating his mental health symptoms. (PCR V3:311-13).

¹² At a status hearing conducted on April 16, 2010, a little more than a month before Robards' scheduled trial, Watts indicated that he had reservations about his ability to be fully prepared for the penalty phase based on his conversations with prior counsel (Assistant Public Defender Ron Eide) about mental mitigation which had not yet been completed. (DAR SV9:1233-34). Watts indicated that he was meeting with his expert and would know more after the weekend. (DAR SV9:1234). The following week, on April 22, 2010, Watts indicated at a hearing that he was aware of Robards' head injuries and was seeking funds for a PET and/or CT scan. (DAR SV9:1245-50).

vague recollections of discussing the need for a PET scan with Eide during their meetings. When asked if he recalled Eide mentioning that Watts should request a continuance in order to obtain a PET scan around the time of the jury's verdict, Watts testified that he may have agreed with Eide during that conversation. (PCR V3:278). Ultimately, Watts obtained a PET scan on May 13, 2010, and his retained expert, Dr. Berland, informed Watts that there were brain abnormalities, but the PET scans needed to be forwarded to Dr. Wu for interpretation. (PCR V3:263-65).

As trial counsel explained at the evidentiary hearing, he made the strategic decision to forego presenting mental mitigation to the jury because he was too concerned with the potential damaging evidence which the State would elicit if counsel presented such information before the jury. As the lower court stated, "Watts indicated that, based on his experience in capital cases, he knew that the State would not subject lay witnesses to intense cross-examination in front of the jury," and that Watts "knew that if he put on expert witnesses to testify regarding Robards' mental state, it would 'draw the fire' from the State." (PCR V5:591). Trial counsel specifically explained that he did not want to present expert witnesses and have the jury hear all of the information concerning Robards'

violent past history with his ex-girlfriends; almost all of which ended with injunctions. (PCR V3:311). Trial counsel was aware that Dr. Susan Murray had conducted a competency examination in 2007 and had reviewed documents relating to Robards' actions with his prior girlfriends.¹³ (PCR V3:314-20). In Dr. Murray's report, she chronicled Robards' abusive relationships and numerous threats to kill these women, even including a threat to kill one woman's child by "slashing her from her belly to her throat." (PCR V5:667-68). Obviously, trial counsel testified that he did not want the jury to hear this type of information, and counsel noted that all of this violence occurred while Robards was actively taking steroids. (PCR V3:315-20). Additionally, counsel wanted to utilize the mental mitigation at the Spencer hearing to "tip the scales" and argue for the judge to override the jury's recommendation. (PCR V3:321-22).

After making his decision not to present any mental health mitigation to the jury, and after conducting the penalty phase, trial counsel received Dr. Wu's detailed interpretation of the PET scan, and also obtained an evaluation from

¹³ The defense's retained expert, Dr. Berland, had likewise spoken to some of these witnesses and noted Robards' violent history. (DAR V16:2669-71).

neuropharmacologist Dr. Lipman regarding Robards' steroid use and his theory that Robards committed the murder during a period of steroid withdrawal.¹⁴ Trial counsel testified at length regarding his strategic decision not to seek a continuance and to head straight into the penalty phase despite the fact that he had not completely investigated all aspects of Robards' mental health. As Watts explained at the evidentiary hearing, he had a general idea of the type of mental health mitigation available to present to the jury such as brain damage and steroid abuse, but he purposefully chose not to request a continuance to obtain more detailed information on these areas from other experts because he wanted the tactical advantage of going straight to the penalty phase following the guilt phase. (PCR V3:304-07).

Collateral counsel asserts that the lower court factually erred in concluding that "Watts knew that he would have an interpretation of an abnormal PET scan" prior to the penalty phase conducted on May 25, 2010. (PCR V5591). The record reflects that the PET scan occurred on May 13, 2000, and Watts filed a notice of intent not to present mental mitigation on May

¹⁴ Trial counsel testified that he did not want to attempt to make a distinction to the jury that Robards merely threatened to kill his prior girlfriends while utilizing steroids, and actually brutally murdered two victims when in a withdrawal state. (PCR V319-20).

12, 2000. (PCR V3:263; DAR V9:1480). Dr. Wu testified that Dr. Berland requested that he review a PET scan, which was received by Dr. Wu around May 20, 2010. (PCR V4:377). Dr. Wu testified that he thought he reviewed the PET scan a week later, and to his best recollection, it was after May 25, 2010. (PCR V4:377). On May 27, 2010, Watts stated on the record that he was aware that the PET scan showed abnormalities. (DAR SV10:1280). Furthermore, at the evidentiary hearing, Watts testified that he was aware from Dr. Berland of the PET scan abnormalities prior to the penalty phase. (PCR V3:263-65). While the record is not entirely clear whether Watts was aware at the time of the penalty phase of Dr. Wu's preliminary review indicating abnormalities on the PET scan, it is clear that Watts was aware that mental health experts had opined that Robards had suspected brain damage and abnormalities, had abused steroids and other drugs, and had a history of head injuries. The defense's retained mental health expert, Dr. Berland, opined in 2007 that Robards' test results on the Minnesota Multiphasic Personality Inventory (MMPI-2) indicated likely brain damage as a result of steroid abuse and head injuries.¹⁵ (DAR V16:2668-72). Likewise,

¹⁵ Dr. Michael Maher, another defense mental health expert, also testified in 2007 that Robards had abused steroids and had numerous head injuries. (DAR SV2:158-61).

Watts had other mental health reports from multiple sources indicating that Robards' had a polysubstance dependence and an antisocial personality disorder.¹⁶ (DAR V16:2673-76, 2679-84). Accordingly, even assuming that Watts was unaware of Dr. Wu's interpretation on May 25, 2010, that Robards' PET scan showed abnormalities, it is abundantly clear that trial counsel knew prior to the penalty phase that he could present mental health mitigation regarding brain damage and steroid abuse.

In addition to arguing that counsel was deficient for failing to timely investigate and present mental mitigation, collateral counsel also argues that trial counsel performed deficiently by presenting "humanizing" mitigation evidence at the penalty phase and for failing to show that Robards' childhood was not as "rosy" as counsel presented to the jury. Trial counsel testified at the evidentiary hearing that his mitigation specialist travelled to Kentucky and interviewed a number of Robards' family members and friends and made a videotape of their testimony so that the State would not be able to cross-examine the witnesses. (PCR V3:283-91, 303-04). Trial counsel testified that his star witness for the penalty phase

¹⁶ Drs. Murray, Rothschild, Poorman, Uppu, and psychologists at the state hospital all diagnosed Robards with polysubstance dependence and antisocial personality disorder. (DAR V16:2681-96).

was going to be Lynn Whited-Triplett, a former girlfriend of Robards; perhaps the only one who did not seek an injunction against him. (PCR V3:273, 303-11). Ms. Whited-Triplett had travelled down for the trial and was prepared to testify in person at the penalty phase, but because the guilt phase went longer than expected, she had to return to Kentucky and was not available for live testimony and had her testimony videotaped and played for the jury. (PCR V3:309-10). When questioned about his thought process on potentially seeking a continuance of the penalty phase due to the continuing investigation into mental mitigation, trial counsel stated that the *only* reason he would have sought a continuance was to secure the live testimony of Whited-Triplett. However, after the guilt phase went longer than expected and Ms. Whited-Triplett had to leave Florida, he secured her testimony via videotape and did not move for a continuance. (PCR V3:309-11).

Trial counsel testified that he recalled that Robards' sister had told the defense's mitigation specialist about physical and alleged sexual abuse suffered by Robards as a child at the hands of his step-brothers. (PCR V3:287-91, V5:657-59). Watts testified that the relevance of the alleged sexual abuse took on greater importance after the penalty phase when he connected the steroid abuse to Robards' desire to stand up to

the abuse. (PCR V3:287-91). However, Watts testified that he never intended to present this evidence to the jury as he wanted to focus on the positive features of Robards' life and counsel also testified that Tanya Robards had mixed feelings about being a witness and had her own personal issues which made it difficult for her to even leave the house. (PCR V3:289, 322-24).

At the penalty phase, Watts presented evidence from multiple lay witnesses, including Tanya Robards, to humanize Robards and focused on Robards' positive experiences, but after the State argued to the jury, and again at the Spencer hearing, that Robards had a normal childhood, Watts presented teleconferenced evidence from Tanya Robards to the court at the third Spencer hearing to rebut this contention. At the Spencer hearing, Tanya Robards testified that they were raised in a blended family with step-siblings and the step-brothers were physically and emotionally abusive to Appellant when they were growing up. (DAR V23:3556-61). Tanya Robards also vaguely testified to hearing of an incident where Robards' older step-brothers made Appellant perform oral sex on another person when they were drinking or smoking pot or cigarettes. (DAR V23:3562, 3569). She testified that when Robards began playing football in high-school, he began taking steroids and lifting weights. (DAR V23:3563-64).

Collateral counsel also presented evidence from two of Robards' personal training clients at the evidentiary hearing and argued that trial counsel should have presented similar evidence at the penalty phase. However, as previously noted in footnote 8, supra at 31, trial counsel presented one of Robards' personal training clients at the penalty phase and trial counsel explained that he did not look for any other clients as this witness was very good because of her vibrant personality and she had great stories to tell regarding Robards. (PCR V3:285, 324-25).

In order for Robards to establish that his trial counsel was ineffective, he must establish that trial counsel's performance was "outside the broad range of reasonably competent performance under prevailing professional standards." Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). There is a strong presumption that trial counsel performed effectively, Pagan v. State, 29 So. 3d 938, 949 (Fla. 2009), and courts have often recognized that this presumption is even stronger when dealing with a highly experienced capital defense counsel such as Richard Watts. See Reed v. Secretary, Fla. Dept. of Corr., 593 F.3d 1217, 1244 (11th Cir. 2010) (noting defense counsel's "extensive experience as a trial lawyer" where counsel had thirteen years' experience and had tried more than thirty

homicide cases, most of which were capital cases, and explaining that the presumption that counsel's performance is reasonable is "even stronger" when counsel is particularly experienced) (citing Chandler v. United States, 218 F.3d 1305, 1316 & n.18 (11th Cir. 2000) (en banc)). Furthermore, "[a] fair assessment of an attorney's 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." Pagan, 29 So. 3d at 949 (quoting Strickland, 466 U.S. at 689).

The law is well established that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). Here, as the lower court properly found, experienced trial counsel made a reasonable investigation into mental mitigation by reviewing the various experts' reports from the competency hearing and by retaining Dr. Berland and obtaining a PET scan prior to the penalty phase. As previously noted, although counsel had not obtained a comprehensive evaluation of the PET scan results from Dr. Wu or Dr. Lipman's diagnosis regarding Robards' steroid use, counsel was aware prior to the penalty phase that Robards had

abused steroids and suffered head trauma which may have caused brain damage. Based on this investigation, trial counsel made the strategic and informed decision not to seek a continuance or present mental mitigation because there was too much negative information which would come before the jury if he presented such evidence. Counsel also wanted the jury to immediately make its recommendation following the guilt phase because counsel felt this increased his chances of obtaining a life sentence for the two brutal homicides. Additionally, counsel explained that his strategy was to hold the mental mitigation back until the Spencer hearing so he could present it to the judge and provide the Court with a substantive reason to override the jury's recommendation.

In denying this claim, the postconviction court properly found that Watts provided credible testimony that, prior to trial:

[H]e was generally aware of the mental mitigation that he would be developing and the cross-examination and rebuttal evidence that the State would present in response. In light of this, the Court finds that Mr. Watts made an informed, strategic decision under the circumstances of this case to put a 'humanizing' presentation before the penalty phase jury through lay witness testimony and to defer the presentation of mental mitigation until the Spencer hearing. The fact that counsel had not completed his development of the mental mitigation prior to the commencement of the penalty phase does not equate to a finding that his penalty phase decision-making was uninformed. See

Jennings v. State, 123 So. 3d 1101, 1113 (Fla. 2013) (quoting Wiggins v. Smith, 539 U.S. 510, 523 (2003) ("The focus of review should be 'whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable.'"") (emphasis in original)). Mr. Watts considered and rejected the possibility of presenting mental mitigation to the jury through expert testimony because he knew that the State would then elicit detrimental testimony regarding Robards' history of violence while not experiencing steroid withdrawal syndrome, the fact that a number of mental health professionals previously found him to be malingering, and the details of his convoluted escape attempt from the Florida State Hospital. Instead, Mr. Watts chose to present expert testimony regarding mental mitigation to the Court only at the Spencer hearing. In doing so, counsel assured that the jury was not exposed to the damaging testimony, but that the sentencing judge had the benefit of this evidence in conducting its independent weighing of aggravating and mitigating circumstances. **Accordingly, the Court finds that counsel made an informed, strategic decision to not present mental mitigation to the jury in favor of a "humanization" presentation that would not elicit detrimental testimony, and to then present mental mitigation to the Court.**

(PCR V5:592-93) (emphasis added).

As the lower court correctly concluded, although trial counsel obtained more detailed mental mitigation following the penalty phase, this does equate to a finding that his strategic decision was uninformed. Watts knew of the mental mitigation before the penalty phase based on his investigation, but he simply made the strategic choice not to present it to the jury and to instead utilize a strategy of humanizing Robards. Even now, with the benefit of hindsight, trial counsel would not have

acted differently as counsel felt the jury's recommendation would have been even stronger for death if he had presented the mental mitigation. (PCR V3:330). Because trial counsel's strategic decision was based on an "informed and reasoned plan of action," this Court should affirm the lower court's denial of this claim. See Carter v. State, 175 So. 3d 761, 768-76 (Fla. 2015) (finding that trial counsel was not ineffective for presenting humanizing, "good guy" evidence at penalty phase and refusing to change strategy at Spencer hearing to show that defendant was violent and abusive as trial counsel's strategic decision not to present the mental health testimony to the jury was reasonable as it would have opened the door to extremely negative acts committed by Carter in the past); Bradley v. State, 33 So. 3d 664, 678-79 (Fla. 2010) (holding that trial counsel was not deficient for failing to present mental health experts because it would not be beneficial, would open the door to the prosecution's cross-examination, and would conflict with his mitigation theory); Dufour v. State, 905 So. 2d 42, 57 (Fla. 2005) (recognizing that trial counsel was not deficient where he made a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony that the defendant was a sociopath who knew what he was doing at the time of the

murder); Gaskin v. State, 822 So. 2d 1243, 1248 (Fla. 2002) (“Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.”).

Collateral counsel belatedly and erroneously argues that the State would not have been able to introduce any of this harmful testimony because it was inadmissible hearsay. Of course, experienced trial counsel testified that he knew the State would introduce such evidence, either through cross-examination or rebuttal, if he presented experts in mental mitigation. Trial counsel’s testimony was unrebutted at the evidentiary hearing and collateral counsel never raised any hearsay objections below. Additionally, it is clear that this evidence would have been admissible when cross-examining defense mental health experts regarding their opinions and would have opened the door to the State presenting rebuttal testimony. See generally Wong v. Belmontes, 130 S. Ct. 383, 388 (2009) (“What is more, expert testimony discussing Belmontes’ mental state, seeking to explain his behavior, or putting it in some favorable context would have exposed Belmontes to the Howard [uncharged prior murder] evidence.”); Snelgrove v. State, 107 So. 3d 242, 255-56 (Fla. 2012) (holding that, in the penalty phase, a

prosecutor may cross-examine a defendant's mental health expert regarding their opinion on matters not admissible in other contexts); Coday v. State, 946 So. 2d 988, 1006-07 (Fla. 2006) (noting that Florida law allows for broader admissibility of evidence at the penalty phase and it is entirely proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis); Parker v. State, 476 So. 2d 134, 139 (Fla. 1985) ("We find that it is proper for a party to fully inquire into the history utilized by the [defense mitigation] expert to determine whether the expert's opinion has a proper basis.") (citations omitted).

Because the postconviction court correctly found that Robards failed to establish that his penalty phase counsel performed deficiently, this Court is not even required to address Strickland's prejudice prong. See Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) (stating that when a defendant fails to make a showing as to one prong under Strickland, it is not necessary to delve into whether he has made a showing as to the other prong). Nevertheless, the State submits that competent, substantial evidence supports the postconviction court's finding that Robards also failed to carry his burden under Strickland of establishing prejudice. (PCR V5:593-96). In

addressing the prejudice standard, this Court stated in Hildwin v. State, 84 So. 3d 180, 186-87 (Fla. 2011):

"Penalty phase prejudice under the Strickland standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." Stewart v. State, 37 So. 3d 243, 253 (Fla. 2010) (quoting Hurst v. State, 18 So. 3d 975, 1013 (Fla. 2009)). That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" Porter v. McCollum, --- U.S. ---, 130 S. Ct. 447, 455-56, 175 L. Ed. 2d 398 (2009) (alteration in original) (quoting Strickland, 466 U.S. at 693-94, 104 S. Ct. 2052). "To assess that probability, [the Court] consider[s] 'the totality of the available mitigation evidence ...' and 'reweigh[s] it against the evidence in aggravation.'" Id. at 453-54 (quoting Williams v. Taylor, 529 U.S. 362, 397-98, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).

In the instant case, Robards failed to offer any compelling additional evidence in the postconviction proceedings than was offered by penalty phase counsel at the time of Robards' sentencing. Rather, Robards' argument is based entirely on speculation that he suffered prejudice because the jury did not hear the mitigation evidence presented at the Spencer hearings. As the lower court noted, however, "speculation as to the possibility that the jury's seven-to-five death recommendation would have differed is insufficient to undermine confidence in Robards' death sentences." (PCR V5:596) (citing Derrick v.

State, 983 So. 2d 443, 462 (Fla. 2008) (“[I]n order to sufficiently undermine this Court’s confidence in the outcome of the resentencing,” where the jury returned a seven-to-five death recommendation, “Derrick must rely on more than mere speculation.”). Certainly if Robards seeks to engage in speculation, deference must be given to Robards’ experienced trial counsel’s speculation that, had the mental mitigation been presented to the jury, thus opening the door to damaging cross-examination and rebuttal evidence, the jury’s vote would have been even greater for death. (PCR V3:330).

At the jury penalty phase, trial counsel presented humanizing character evidence from Robards’ family members (his mother, sister, and grand-father), as well as from friends and clients. Counsel also presented evidence from Shane Harper that Robards initially planned to rob the Delucas’ home while they were on vacation and did not intend that anyone would be at home when the robbery took place.

At the Spencer hearing conducted on August 24, 2010, trial counsel presented to the judge the mental health mitigation from Drs. Joseph Wu, Jonathan Lipman, and Robert Berland. (DAR V21:3343-92; V22:3415-69). Dr. Wu testified that he reviewed Robards’ PET scan and noted that it showed abnormalities in the “parietal cortex” area of his brain, consistent with having been

in multiple car accidents with traumatic brain injury. (DAR V21:3347-50). Dr. Wu testified that Robards also had abnormalities in the "emotional area of the brain" which are seen in people with toxic chemical brain exposure. (DAR V21:3351-52). Lastly, Dr. Wu found a third type of brain abnormality usually associated with people suffering from schizophrenia. (DAR V21:3352-53). According to Dr. Wu, people with brain abnormalities are at a greater risk of developing psychosis and behavioral problems. (DAR V21:3353-54).

Dr. Jonathan Lipman, a neuropharmacologist from Tennessee, testified that elevated levels of anabolic steroids would be harmful to someone suffering from a brain injury. (DAR V21:3366-67). Dr. Lipman testified that chronic high use of anabolic steroid results in irritability and low frustration tolerance and a predilection toward uncontrolled temper, rage, and paranoia. The psychotic symptoms associated with taking the drug can last for as long as four months after cessation of the use of steroids. When the usage stops, the effects are similar to cocaine withdrawal with depressed mood, sleeplessness, agitation, and despair. (DAR V21:3371-72).

Dr. Lipman suspected that Robards had anosognosia, a condition where Robards was in denial as to the negative effects of the steroid use. Dr. Lipman spoke to Dr. Berland and found

that Robards' ex-girlfriends and other friends described him as a violent and destructive person and they had to take out protection orders from him. (DAR V21:3373-74). Dr. Lipman opined that when Robards was incarcerated shortly before the murders, he could have been undergoing withdrawal symptoms at the time of the instant murders if he did not have any steroids upon his release. (DAR V21:3378). Dr. Lipman explained that the crime scene evidence was consistent with Robards committing the murders during "roid rage" given the disorganized, chaotic, and excessively violent nature of the crime. (DAR V21:3378-79).

Dr. Berland testified that Robards is psychotic and has delusional paranoid thinking. (DAR V22:3416). Dr. Berland summarized Robards' scores on the Minnesota Multiphasic Personality Inventory (MMPI-2) and concluded that the results indicated substantial psychotic disturbance, including hallucinations and paranoid thought disorder. (DAR V22:3416-24). Dr. Berland also received information that Robards had suffered two head injuries while involved in motorcycle accidents in 2001 and 2003, and other head injuries during his life. (DAR V22:3426-29). Dr. Berland agreed with Dr. Wu's testimony regarding Robards' PET scan results and opined that Robards' steroid use or amphetamine use was the cause of the toxic brain injury. (DAR V22:3430). Dr. Berland opined that Robards suffered

from extreme mental or emotional disturbance at the time of the murders and that his ability to conform his conduct to the requirements of the law was substantially impaired. (DAR V22:3434-36).

On cross-examination, Dr. Berland acknowledged that Robards had previously been diagnosed by mental health experts as malingering. (DAR V22:3439-48, 3459). Dr. Berland also noted that the violent nature of these murders was not out of character for Robards as he was described as a violent person by his ex-girlfriends. A number of these women were so scared of Robards they would not even talk to the doctor until they were reassured that he had been convicted and would never be released. (DAR V22:3448-50).

As previously noted, at the final Spencer hearing conducted on October 7, 2010, trial counsel presented additional videoconference testimony from Robards' sister, Tanya Robards, to rebut the State's argument that Robards had an "all-American childhood." Tanya Robards testified that Robards was often the subject of physical and emotional abuse from her brothers, and she heard that Robards was once sexually abused by a neighbor. (DAR V23:3555-92).

The postconviction court, the same judge who sentenced Robards to death, properly concluded that Robards failed to

establish prejudice based on penalty phase counsel's informed and strategic decision to present this information to the court at the Spencer hearing rather than before the jury. Trial counsel acknowledged the significant negative and prejudicial information which would have been elicited had counsel put on this testimony before the jury. Trial counsel was aware that the prosecuting attorney would have questioned the experts on Robards' extensive violence towards women which contained extremely detrimental information. For instance, had trial counsel presented opinion evidence from Dr. Lipman that Robards committed the instant murders as a result of steroid withdrawal, the State could have easily painted a picture of Robards acting in a violent and threatening manner prior to the murders while using steroids. Additionally, if counsel had presented mental mitigation evidence to the jury, the State would have rebutted this evidence with the competency experts' opinions that Robards was malingering and would have also introduced detailed testimony regarding his escape attempt from the state mental health hospital.¹⁷

¹⁷ Collateral counsel argues that the jury was already aware of the escape attempt based on testimony at the guilt phase and thus, this was not a valid strategic reason. Robards fails to recognize that trial counsel expressed concern about the State's ability to focus on the details of the escape attempt at the

Given the strong aggravators in this case,¹⁸ there is no reasonable probability that the jury would have recommended a life sentence after hearing the mitigation evidence presented at the Spencer hearings. As experienced trial counsel speculated, the jury's recommendation would likely have been much stronger in favor of death if they had been made aware of the mental mitigation as the State would have elicited very damaging testimony about Robards violent history, his feigning of mental illness, and his manipulative escape attempt. Certainly, confidence in the two death sentences has not been undermined when considering the totality of the available mitigation evidence; all of which was known by the sentencer.¹⁹ See Merck v.

penalty phase and to make it a theme, as opposed to the rather limited mention of it at the guilt phase. (PCR V3:325-28).

¹⁸ The four aggravating factors found by this Court, applicable to each murder count, were given great weight: (1) Robards was previously convicted of another capital felony; (2) the capital felony was committed for pecuniary gain; (3) the capital felony was committed while Robards was engaged in the commission of a robbery (merged with pecuniary gain); and (4) the murders were especially heinous, atrocious, or cruel.

¹⁹ In sentencing Robards to death for the two murders, the trial judge rejected the two statutory mental mitigators, but gave some weight to the following mitigators: (1) family history; (2) no plan to murder; (3) good general conduct while in custody; (4) capacity to form positive relationships; (5) remorse and potential for rehabilitation; (6) traumatic injury based on PET scan and PET scan brain image comparison; (7) effect of steroids on brain injury and effect of steroids generally; (8) use of prescribed steroids, interactions with other prescribed drugs,

State, 124 So. 3d 785, 797-98 (Fla. 2013) (finding that defendant could not establish prejudice when trial counsel purposefully did not present mental mitigation to the jury because it would have included detrimental information, and the trial court rejected the mental mitigation after the mental health expert testified at the Spencer hearing). Because Robards failed to establish both deficient performance and prejudice with respect to his ineffective assistance of penalty phase counsel claim, this Court should affirm the lower court's denial of this claim.

and withdrawal; (9) mental health issues; and (10) history of steady employment.

ISSUE II

THE POSTCONVICTION COURT PROPERLY FOUND THAT ROBARDS FAILED TO CARRY HIS BURDEN UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), OF ESTABLISHING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO, OR ATTEMPT TO SUPPRESS, TESTIMONY, EVIDENCE, OR PROSECUTORIAL ARGUMENT REGARDING ROBARDS' UNSOLICITED STATEMENTS TO A DETECTIVE THAT HE WANTED TO "MAKE A DEAL."

Robards claimed in his postconviction motion that his guilt phase trial counsel was ineffective for failing to object to, or attempt to suppress, testimony, evidence, or prosecutorial argument regarding Robards' offer to "make a deal" with Detective Anthony Monte in a voicemail message left on the detective's phone on August 15, 2006. Robards alleged that his unsolicited statements amounted to inadmissible plea discussions pursuant to Florida Statutes, section 90.410 and Florida Rule of Criminal Procedure 3.172(i). The lower court granted Robards an evidentiary hearing, and Robards presented brief testimony from guilt phase counsel Larry Hoffman regarding this claim. Hoffman testified that he was aware of Robards' statements to Detective Monte regarding the possibility of making a deal, but counsel did not file a motion to suppress or object to this testimony because he did not find it objectionable and he handled the issue on cross-examination. (PCR V4:430-32). After hearing the evidence and reviewing the record, the lower court issued an

order finding that Robards failed to carry his burden under Strickland of establishing deficient performance and prejudice. (PCR V5:583-86). The State submits that competent, substantial evidence supports the lower court's ruling.²⁰

At trial, the prosecutor noted in opening statements that it intended to present evidence that Robards made an unsolicited phone call to Clearwater Police Department Detective Anthony Monte seeking "to make a deal," but as the prosecutor noted, the police department does not make deals. (DAR V26:353-54). The State subsequently presented testimony from Detective Monte that, on August 15, 2006, after Robards had been arrested for possession of marijuana, he called from the jail and left a voice message for Detective Monte and stated, "I'm down here at the Pinellas County Jail. . . . Listen if you can come here and talk to me, and you guys are ready to make a deal, come in and talk to me, all right?" (DAR V32:1173-74). Detective Monte then testified that the Clearwater Police Department does not make deals. (DAR V32:1174).

On cross-examination, defense counsel elicited much more

²⁰ As noted in Issue I, *supra*, when reviewing a trial court's ruling on an ineffective assistance of counsel claim, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prong *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

information from the detective regarding Robards' phone call and subsequent statements. Detective Monte testified that at the time of the phone call, Robards was only under arrest for possession of marijuana and never indicated whether he was seeking a deal on the marijuana case or on the uncharged dual homicides. (DAR V32:1178-80). Robards made the call from jail on August 15, 2006, and was not arrested for the instant murders until August 18, 2006. (DAR V32:1178). The following exchange occurred during defense counsel's cross-examination:

Q: And on that tape he didn't say he wanted to make a deal about any kind of a homicide, anything like that, did he?

A: He was aware that I was a homicide detective, and I had spoken with him already about the Frank and Linda Deluca homicide case. So I'm not a vice and narcotics detective.

Q: So if his intent was to talk about the homicide and make a deal about his marijuana case, you can't say which case he was talking about? In other words, if he had knowledge about somebody and wanted to trade that for some leverage on his marijuana case, you can't say that's not true?

A: During my contacts with him, I spoke with him about the Linda and Frank Deluca homicide case. I didn't speak with him about the drug case. So if he's contacting me, I would believe that about the homicide case.

Q: And he never confessed, never made any confessions whatsoever? He never confessed -

A: He made statements that he had some knowledge about what it was related to.

Q: Okay. But that doesn't mean he hadn't anything to do with it because he didn't tell you he had anything to do with it, did he?

A: He had knowledge of it. He said - he referred to another case, that he knew that it was associated

with another case, so he did make statements that he had some knowledge as to what was going on.

Q: So if that was associated with another case then that might have been - if you had the capacity to make a deal with him on the marijuana case, he might have been able to help out on this one because he said he had knowledge about it?

A: He was wanting to make a deal, but I don't have the power to make a deal with him. So --

Q: You don't know what kind of deal he was going to make really, bottom line?

A: We never got into details as far as what deal.

Q: So you didn't think it was important to get somebody up there to find out what the deal was?

A: As far as making contact with him?

Q: Yeah, to find out what the deal was. Sit down with him and find out what is the deal?

A: I actually did go sit down with him.

Q: Did he tell you he wanted to make a deal about his involvement in a homicide or did he tell you he knew who did it?

A: He made reference to who was involved. He said he wanted to make a deal. I told him I wasn't in a position to offer him a deal. I don't have the power to do that. And he spoke no further about it.

Q: Okay. So for all you know he was talking about knowledge of the homicide, trying to trade off for the marijuana charge for all you know?

A: I don't know. He never spoke in detail as far as what type of deal he wanted to make, so I don't know what -

Q: Okay. So in other words, you can't say - you can't say what kind of deal he was talking about?

A: Well, through his statements, he was referencing Frank and Linda Deluca's murder.

Q: He had knowledge of it, correct?

A: That he knew - he had knowledge of who was involved.

(DAR V32:1178-80). On redirect, Detective Monte testified that in his opinion, Robards was seeking a deal on the homicide case as opposed to the marijuana case because Robards stated that "he

was involved . . . it's bigger than me, and there's drug dealers involved." (DAR V32:1182-83).

Robards argued in his postconviction motion that trial counsel was ineffective for failing to move to suppress his statements to Detective Monte, or for failing to object when the prosecutor elicited this testimony or commented on it during opening and closing arguments, because these statements should be characterized as inadmissible plea discussions. In arguing that Robards' statements were inadmissible, Robards' collateral counsel relied on Florida Statutes, section 90.410, and Florida Rule of Criminal Procedure 3.172(i). Florida Statutes, section 90.410 states:

Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

Similarly, Florida Rule of Criminal Procedure 3.172(i) provides:

Except as otherwise provided in this rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

Contrary to collateral counsel's interpretation, Robards' unilateral, unsolicited statements were not inadmissible as part

of "plea negotiations." As both Robards' experienced trial counsel and the postconviction court properly concluded, there was no valid legal basis to object to these comments. Because trial counsel properly concluded that Robards' statements to Detective Monte were not objectionable or inadmissible, counsel cannot have performed outside "the broad range of reasonably competent performance under prevailing professional standards." Strickland, 466 U.S. at 688. The law is well established that trial counsel cannot be deemed ineffective for failing to raise a meritless objection. Deparvine v. State, 146 So. 3d 1071, 1107 (Fla. 2014); Valentine v. State, 98 So. 3d 44, 56 (Fla. 2012).

In Schoenwetter v. State, 46 So. 3d 535, 544-46 (Fla. 2010), this Court addressed a similar claim of ineffective assistance of counsel for failing to object to the introduction of evidence of Schoenwetter's letter to the judge confessing his guilt and to in-court admissions made pre-trial on the grounds that they were made in connection with a plea offer. This Court noted that, in order to establish deficient performance under Strickland for failing to object to this evidence, Schoenwetter had to establish that trial counsel's failure to object "was outside the broad range of reasonably competent performance under prevailing professional standards," and counsel cannot be deemed deficient for failing to make a meritless objection. Id.

at 546. As Schoenwetter failed to establish deficient performance, this Court affirmed the summary denial of the claim.²¹

In analyzing the claim, this Court in Schoenwetter first noted that under Florida Statutes, section 90.803(18)(a) , "a statement that would otherwise be excluded as hearsay is admissible where that statement is offered against a party and is '[t]he party's own statement in either an individual or a representative capacity.' Thus, unless excludable under another rule, the challenged statements are admissible as party admissions." Schoenwetter, 46 So. 3d at 546. This Court agreed with the lower court that Schoenwetter's statements were admissible as a party admission and were not made as part of a plea negotiation. Id. In making this determination, the court applied a two-tier analysis:

First, a court "must determine 'whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion.'" Richardson v. State, 706 So. 2d 1349, 1353 (Fla. 1998) (quoting United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978)). Second, the court must discern "whether the accused's expectation was reasonable given the totality of the circumstances." Id. (quoting Robertson, 582 F.2d at 1366). "In applying the first

²¹ In this case, the court granted Robards an evidentiary hearing on his claim and trial counsel testified he had no legal basis to object and he would handle the vague statements on cross-examination. (PCR V4:430-32).

prong, the trial court must carefully distinguish between the accused's admissions and the accused's attempts to negotiate a plea bargain. In other words, the trial court 'must appreciate the tenor of the conversation.'" Id. (quoting Robertson, 582 F.2d at 1367).

Id. at 547; see also Owen v. State, 986 So. 2d 534 (Fla. 2008) (postconviction court properly denied claim that trial counsel was ineffective for failing to argue that defendant's confession should be suppressed because he reasonably believed the statements were made during plea negotiations); Serrano v. State, 15 So. 3d 629 (Fla. 1st DCA 2009) (defendant's letter to judge was properly admitted as the letter did not reflect "an attempt to plea-bargain or that it was written under circumstances suggesting plea negotiations had begun or would begin, as the law would require for suppression"); Melendez v. State, 747 So. 2d 1011 (Fla. 2d DCA 1999) (defendant's repeated calls to police officer and subsequent statements to officer that defendant wanted to enter a plea deal with the State were nothing more than an "unsolicited, unilateral offer" made by the defendant which do not fall within the protection of either section 90.410 or rule 3.172).

In denying Robards' claim, the postconviction court properly applied this Court's two-part analysis:

Any subjective expectation to negotiate a plea for the murder charges when Robards left the voicemail

message for Detective Monte would not have been reasonable when considering the totality of the circumstances. First, as Mr. Hoffman testified at the evidentiary hearing, the timing of the call was significant. As counsel elicited on cross-examination of Detective Monte, at the time that he left the message on August 15, 2006, Robards was only under arrest for possession of marijuana; he was not arrested for the instant homicides until August 18, 2006. Second, the manner of the communication is significant. Robards made an unsolicited phone call from a monitored jail line and left a voicemail message for Detective Monte offering to "make a deal" to an unspecified crime. Robards did not speak directly with Detective Monte. When Detective Monte went to the jail to follow up on Robards' call, he informed Robards that he did not have the authority to offer him a deal and Robards did not speak any further about the matter. When considering the totality of the circumstances surrounding Robards' attempt to "make a deal" with Detective Monte, it is clear that it was an unsolicited, unilateral offer from which Robards could have had no reasonable subjective expectation of negotiating a plea. See Melendez v. State, 747 So. 2d 1011, 1014 (Fla. 2d DCA 1999) (holding that there was no reasonable subjective expectation of plea negotiations where an unsolicited, unilateral offer was made from a defendant to a law enforcement officer, and that any statement made in connection with such an offer does not fall within the protection of rule 3.172(h) or section 90.410, Florida Statutes); see also Bottoson v. State, 443 So. 2d 962, 965 (Fla. 1983) (holding that unsolicited, unilateral statements do not create a reasonable expectation of involvement in plea negotiations and therefore do not fall "under the aegis of [section 90.410, Florida Statutes]"). Thus counsel's conclusion that the statement was not objectionable was legally correct, and he was not deficient for failing to object to or move to suppress the statement. See Schoenwetter, 46 So. 3d at 546 (quoting Hitchcock v. State, 991 So. 2d 337, 361 (Fla. 2008)) ("Clearly, '[c]ounsel cannot be deemed ineffective for failing to make a meritless objection.").

(PCR V5:584-85) (record citations omitted).

As the lower court correctly noted, Robards could not have had a reasonable subjective expectation to negotiate a plea on a double homicide case when he had not even been arrested for those murders at the time of the phone call. Robards unilaterally called the detective from a monitored jail line after his arrest on marijuana charges and left a voicemail and did not engage in any "plea discussions" with the detective. When Detective Monte subsequently personally spoke with Robards, the detective informed Robards that he did not have any authority to offer him a deal. As such, the postconviction court properly found that Robards' unilateral and unsolicited offer "to make a deal" to unnamed charges did not fall within the protection of Florida Statutes, section 90.410. Accordingly, the court found that trial counsel was not deficient for failing to move to suppress these statements or for failing to object to testimony or argument regarding Robards' statements.

While this Court need not even address Strickland's prejudice prong given Robards' failure to establish deficient performance, the State submits that competent, substantial evidence supports the lower court's finding that Robards also failed to establish prejudice. See Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) (stating that when a defendant fails

to make a showing as to one prong under Strickland, it is not necessary to delve into whether he has made a showing as to the other prong). As trial counsel explained at the evidentiary hearing, he handled the issue on cross-examination by eliciting from Detective Monte testimony that the detective did not even know what case Robards was referring to when he offered to make a deal because Robards was in jail for a drug offense and had not even been charged with the two murders at the time. (PCR V4:430-32). Even assuming that trial counsel was deficient for failing to object to the testimony and prosecutorial argument regarding Robards' offer to "make a deal" with Detective Monte, the result of the proceedings would not have been different had counsel performed as alleged. See Bradley v. State, 33 So. 3d 664, 671-72 (Fla. 2010) ("Prejudice is met only if 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.'") (quoting Strickland, 466 U.S. at 694).

With regard to the guilt phase, the lower court noted that this Court outlined the "overwhelming" and "compelling" evidence of Robards' guilt for the murders of Linda and Frank Deluca. This Court stated on direct appeal:

Robards discussed for weeks, if not months, before the murders, his desire to obtain the Delucas' safe, and he knew that there was a substantial amount of money inside of it. At one point, he discussed with Shane Harper his plans to steal the safe and unsuccessfully tried to recruit Harper to be his getaway driver. The morning of the murders, Robards borrowed Robert Kenney's Explorer and rented a dolly to remove the safe from the Delucas' home. When these measures were deemed inadequate, Robards enlisted Kenney's help and rented a trailer to remove the safe.

Additionally, Robards' fingerprints were found on a newspaper at the crime scene that was dated within one day of the murders. A rifle that belonged to Frank Deluca was found in Robards' storage unit, and shortly after the murders, Robards gave Shane Harper a scale that was taken from the Delucas' home.

Linda Deluca's purse was found in a load of cardboard recycling along with a Dimmit Automotive t-shirt, and Robards owned several Dimmit Automotive t-shirts because of his employment there two months before the murders. A handgun identified as likely having belonged to Linda Deluca was found by Robert Kenney. The handgun was hidden in a suitcase in the same garage where Robards hid the Delucas' safe.

Moreover, Robards' blood was later found on a doorknob to a motel room that he stayed in from July 22 until August 3, 2010. Towels, among the items used to fuel the fire in the Delucas' home, were noticeably missing from the room after Robards' stay there.

And, DNA evidence linked Robards to the murder of Frank Deluca, whose fingernails contained DNA that was consistent with Robards' DNA profile. Frank Deluca tried in vain to fight his attacker with his hands and sustained defensive wounds as a result. Because competent substantial evidence supports each of Robards' convictions for first-degree murder, we affirm Robards' convictions.

Robards, 112 So. 3d at 1272 (emphasis added).

Any evidence related to Robards' offer to "make a deal" was not even cited by this Court in outlining the evidence establishing Robards' guilt. Indeed, the evidentiary value of Robards' offer to "make a deal" is inconsequential when viewed against the overwhelming evidence in this case. Furthermore, any arguable prejudice was mitigated by trial counsel's cross-examination of Detective Monte where the testimony revealed Robards never indicated he was seeking to "make a deal" on the uncharged homicide cases. Thus, the result of the guilt phase would not have been any different even had trial counsel been successful in excluding evidence or argument related to Robards' offer to "make a deal."

With regard to the penalty phase, the lower court also found that Robards failed to establish prejudice. Even if this evidence had been excluded, Robards would still have been sentenced to death for the two brutal murders. Robards committed a senseless and heinous double murder when he robbed the Delucas and stabbed them to death in their home, and his death sentences are supported by four aggravators - prior violent felony (based on the contemporaneous murders), pecuniary gain, committed during the commission of a robbery (merged with pecuniary gain), and HAC. As this Court noted on direct appeal, the HAC aggravator is among the weightiest in Florida's statutory

scheme. Robards, 112 So. 3d at 1273; see also Zommer v State, 31 So. 3d 664, 750-52 (Fla. 2010); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Thus, even if trial counsel had successfully excluded evidence or argument related to Robards' offer to "make a deal," in light of the considerable aggravation in this case, there is no reasonable probability that the outcome of the penalty phase proceeding would have been different. Accordingly, this Court should affirm the lower court's denial of the instant claim.

ISSUE III

CUMULATIVE ERROR

In his last claim, Robards asserts that he is entitled to relief because of the "cumulative" error identified in Issues I and II, supra. However, as previously argued, Robards' two claims of ineffective assistance of counsel are without merit and his attempt to combine these two meritless claims together does not equate to an entitlement of relief. As this Court has repeatedly held, where the individual errors alleged are without merit, a claim of cumulative error fails. Pham v. State, 177 So. 3d 955, 962 (Fla. 2015) (denying cumulative error claim after court conducted evidentiary hearing on numerous issues); State v. Woodel, 145 So. 3d 782, 801-03 (Fla. 2014) (addressing cumulative effect of allegations of ineffective assistance of counsel); Turner v. State, 143 So. 3d 408, 419 (Fla. 2014) (rejecting defendant's claim that cumulative error of ineffective assistance of penalty phase counsel and other claims entitled him to relief); Bradley v. State, 33 So. 3d 664, (Fla. 2010) ("Where, as here, the alleged errors urged for consideration in a cumulative error analysis 'are either meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel[,] ... the

contention of cumulative error is similarly without merit.'" (quoting Israel v. State, 985 So. 2d 510, 520 (Fla. 2008)).

Robards attempts to distinguish his case because it involved factual development at an evidentiary hearing as opposed to the court summarily denying all of his claims. This attempted distinction is unavailing as it is axiomatic that a defendant cannot combine two meritless claims into a single "cumulative" claim requiring relief, even when the claims involve factual development at an evidentiary hearing. As noted in the cases cited above, all of which involved evidentiary hearings, this Court does not grant relief under a cumulative error analysis when the individual claims lack merit. As such, this Court should deny the instant claim and affirm the lower court's denial of postconviction relief.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2016, I filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: Raheela Ahmed, Capital Collateral Regional Counsel - Middle Region, 12973 N. Telecom Parkway, Temple Terrace, Florida 33637 [ahmed@ccmr.state.fl.us].

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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