IN THE SUPREME COURT OF FLORIDA

MICHAEL JAMES JACKSON

Appellant,

v. CASE NO. SC12-238

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

PRELIMINARY STATEMENT

References to the appellant will be to "Jackson" or "Appellant". References to the appellee will be to the "State" or "Appellee".

References to Jackson's nineteen (19) volume direct appeal record will be to "TR" followed by the appropriate volume and page number. The four (4) volume record on appeal in the instant case will be referenced as "PCR" followed by the appropriate volume and page number. The one (1) volume supplemental record will be referred to as "SPCR" followed by the appropriate page number. References to Jackson's initial brief will be to "IB" followed by the appropriate page number.

STATEMENT OF THE CASE

On or about July 8, 2005, Jackson, along with Tiffany Cole, Alan Wade, and Bruce Nixon murdered sixty-one year old James ("Reggie") and Carol Sumner. The relevant facts of the murders were set forth in this Court's opinion on direct appeal:

> …In July of 2005, Jackson and codefendants Tiffany Ann Cole, Bruce Kent Nixon, Jr., and Alan Lyndell Wade robbed, kidnapped, and murdered James and Carol Sumner. The plan to rob and murder the Sumners evolved from knowledge Cole obtained about the couple from a prior relationship with them. Before moving to Florida, the Sumners had resided in South Carolina and Tiffany Cole became acquainted with them there. The Sumners had been neighbors of Cole's family and had sold Cole a vehicle.

Cole and Jackson were involved in a personal relationship and often traveled together. In June of 2005, this couple came to Florida to visit Alan Wade. During this visit, the Sumners allowed Cole and Jackson to stay with them in their Jacksonville home. During this initial visit, Jackson noticed that the couple was frail and would be easy victims. The Sumners were in their early sixties but in ill health which required a daily regimen of various prescription medications. Jackson informed Wade of the Sumners' financial position, which included $90,000 from the sale of their South Carolina home and multiple television sets. Following the initial visit, Jackson, Wade, and Cole began to develop a plan to rob the Sumners. Wade invited his best friend Bruce Nixon to join the scheme. At the time of the crimes, Wade and Nixon were eighteen years old, and Jackson and Cole were twenty-three years old.

Bruce Nixon testified at trial after entering into a plea agreement. He stated that the foursome planned the robbery together but Jackson was in charge. Jackson informed the codefendants that he would "take care" of the Sumners by injecting them with a shot of medicine to cause their deaths. In preparation for the robbery, Nixon stole several shovels to dig a hole and Cole rented a Mazda from a rental agency in South Carolina to transport the group. After arriving in Florida, the foursome secretly watched the house for several days as they developed a strategy for the logistics of the robbery. Several days before the murders, Nixon assisted Jackson and Wade in digging a six-foot-deep hole in a remote area of Georgia. The group left the shovels at that location when the excavation was completed. In further preparation for the attack, Jackson, Cole, and Wade purchased gloves, duct tape, and plastic wrap to be used in securing the victims. A "toy gun" was also obtained. Video surveillance captured the group entering and leaving the store where the items were purchased, and receipts for the purchases were found in the motel room where Jackson, Cole, and Wade were eventually apprehended.

On the evening of July 8, 2005, Nixon and Wade approached and knocked on the door of the Sumner residence. When Carol Sumner responded, Wade asked if he could use the telephone and Carol allowed Wade and

Nixon to enter the house. Once inside, Wade ripped the telephone wire from the wall. The Sumners were held at "gunpoint" with the toy gun as Nixon and Wade bound them with the duct tape.

While Nixon and Wade entered the Sumner residence, Cole and Jackson remained outside in the rented Mazda because the Sumners knew and could identify them from their previous visit. As the crime unfolded, the foursome communicated with Nextel phones which operated as two-way handheld transceivers. After the men inside the residence informed Jackson through the Nextel phone that the Sumners were restrained, Jackson entered the home and began searching for bank statements and automated-teller-machine (ATM) cards. The codefendants found and removed jewelry, a lockbox of rare coins, and documents which were in the house.

While Jackson searched the house, Nixon and Wade forced the Sumners to the garage where they ordered the victims to climb into the trunk of the Sumners' Lincoln Town Car. Nixon and Wade then drove the vehicle to a gas station and refueled as Jackson and Cole followed in the Mazda. The four then drove to the Georgia gravesite as the Sumners remained trapped in the trunk of the vehicle. The Lincoln was driven close to the hole which the group had previously prepared, while Cole remained with the Mazda at the edge of the road. When the codefendants opened the trunk, they discovered that the duct tape had released and the bindings were not secure. Jackson then ordered Nixon to tighten the bindings and Nixon complied. Nixon stated that Jackson had obtained the personal identification number for the ATM card of the victims which Jackson verified through a telephone call to their bank.

The Sumners, still alive and bound, were placed in the deep hole. Jackson admitted that he heard Carol Sumner moan while she was in the hole. Nixon asserted that he walked away from the open grave and left Jackson and Wade to bury the victims.FN3 Once the hole was filled with dirt, the group placed the shovels in the trunk of the Sumners' Lincoln and departed the Georgia site to return to Florida. After attempting to wipe the vehicle to remove any identifying information, the Lincoln was abandoned in Sanderson, Florida, which is

located approximately twenty miles from the gravesite. The shovels used in the episode remained in the trunk.

The next stop for the group was an ATM in Jacksonville from which Jackson withdrew a large sum of money. After distributing the money among the codefendants, the group retired to a motel for the night. Later that evening, Wade and Cole returned to the Sumner residence to retrieve a computer which they later pawned.

The following day, Bruce Nixon separated from the group and returned to his home in Baker County, Florida. He attended a party there where he displayed a plastic bag filled with multicolored prescription medications. During the party, Nixon announced that he had buried people alive and killed them without expressly stating that he had been assisted by others.

On July 10, 2005, Carol Sumner's daughter reported to law enforcement that her parents were missing. The Jacksonville Sheriff's Office (JSO) responded to the Sumner residence the following day to investigate. The back door of the Sumner home was unlocked. Ingredients that appeared to be associated with preparation for a dinner were on the stove and dirty plates were in the kitchen. Carol's shoe and surgical boot were discovered which was unusual because these items were necessary for Carol to walk. That same day a JSO officer spotted a Lincoln Town Car in Sanderson. A subsequent analysis of items found in the Lincoln revealed Jackson's fingerprints on an unopened roll of plastic wrap.

As the JSO continued to investigate the disappearance of the Sumners, Jackson continued to withdraw money from the Sumner bank account. Between July 9 and July 13, 2005, approximately $5,000 was removed from the bank account. Photo surveillance captured Jackson using the Sumner ATM card several times from July 9 to July 13. The rented Mazda could be seen in the background of some of the surveillance photos.

When Jackson began to have difficulty accessing the account, he contacted the bank purporting to be James Sumner. The bank informed Jackson that the daily withdrawal limit for the account had been exceeded.

Jackson then attempted to solicit assistance from the JSO in accessing the accounts. Continuing to pretend that he was James Sumner, Jackson explained to a member of the JSO that he had left town hurriedly with his wife to attend the funeral of her sister in Delaware. When the officer asked to speak to his wife, Tiffany Cole responded under the pretense of being a tired and ailing Carol Sumner.

The JSO detective suspected that he was not actually speaking to the Sumners. Accordingly, he contacted a United States Marshal to assist the JSO in tracking the cellular telephone used by the caller, who was later identified as Jackson. The cellular telephone had been used in the vicinity of the Sumner residence during the approximate time of the abduction. Using the rental car global positioning system, law enforcement determined that the Mazda was within blocks of the Sumner residence on the night of the murders. Based upon the ATM photos of the Mazda, South Carolina law enforcement were able to track Tiffany Cole to two motel rooms rented under her name in the Charleston, South Carolina, area.

On July 14, 2005, law enforcement found Jackson, Cole, and Wade at the motel. The police obtained a search warrant for the motel rooms. Upon receiving the entry code for the safe located in the motel room from the management, the police opened the safe and discovered identification, credit cards, a checkbook, and papers belonging to the Sumners. Some paperwork and mail were also in the motel room. A key ring that belonged to the Sumners was discovered in Wade's motel room. Law enforcement found and recovered the Sumner coin collection in the trunk of Cole's vehicle.

Cole, Jackson, and Wade were arrested. Jackson was interrogated by several detectives. Law enforcement discovered an ATM card in a trash can in the interrogation room which lacked an identifying personal name but had been issued by the Sumners' bank. Jackson informed the detectives that he had knowledge of the location of the Sumners but that Wade and Nixon were responsible for kidnapping and burying the victims. Jackson claimed that the ATM card belonged to Wade's mother and that Wade had convinced Jackson to make withdrawals from the account. Jackson

admitted that he was at the gravesite and saw the Sumners placed in the hole while they were still alive.

Bruce Nixon was also arrested and revealed the burial location of the Sumners to law enforcement. On July 16, 2005, the bodies were discovered four miles north of the Florida-Georgia border in Charlton County, Georgia. The medical examiner testified that death was caused by mechanical obstruction of the airways by dirt. In essence, they were buried alive and asphyxiated from the dirt particles smothering their airway passages. Once the dirt covered their heads, they would have fallen unconscious and died within three to five minutes.

Items of mail addressed to the Sumners were recovered from the rented Mazda. Both the Lincoln and the Mazda contained sand particles on the seats and floorboards. At the gravesite, law enforcement recovered cigarette packs, shell casings, and empty beer cans.

Jackson testified in his defense that the plan was limited to robbing the Sumners and did not involve murder. He stated that Wade and Nixon went into the home while Jackson and Cole waited outside. Wade and Nixon then drove off in the Sumners' vehicle and Jackson followed. At that point, Jackson asserted that he had no knowledge that the Sumners were bound and in the trunk. Jackson's version of the facts was that when they arrived in Georgia, Wade and Nixon directed Jackson and Cole where to park and asked Jackson to bring them a flashlight. Jackson thought they were abandoning the Lincoln but when he approached the codefendants he heard Carol Sumner moan. Jackson stated that he was surprised and questioned Wade and Nixon about their actions before returning to the Mazda where Cole waited. Jackson admitted that he impersonated James Sumner during telephone calls with the JSO. After deliberations, the jury returned guilty verdicts on all counts.

During the penalty-phase proceedings, Jackson was offered multiple opportunities to present mitigation evidence but he declined to do so. Instead, defense counsel proffered the mitigation evidence already prepared. The trial court conducted a colloquy and

> consequently found that Jackson knowingly, intelligently, and voluntarily waived his right to present mitigation evidence and also that he had been well informed by counsel of the potential ramifications of this waiver. After deliberation, the jury recommended death sentences for the murders of both victims by votes of eight to four.
>
> During the Spencer hearing, the State presented victim-impact evidence and a video recording of the Sumners' memorial service. Jackson refused to permit his counsel to present witnesses or introduce mental health and school records. Jackson apologized to the victims for their loss but stated that he could not show remorse for offenses that he did not commit. Jackson maintained that he did not plan or participate in the kidnappings or murders.

Jackson v. State, 18 So.3d 1016 (Fla. 2009)(internal page numbers and footnotes omitted).

The trial judge followed the jury's recommendation and sentenced Jackson to death for both murders. The trial judge found: (1) Jackson had been previously convicted of a felony and was on probation at the time of the murders; (2) Jackson had been previously convicted of another capital felony because the murders occurred contemporaneously; (3) the murders for which Jackson was to be sentenced were committed while Jackson was engaged in the felony of kidnapping; (4) the murders were especially heinous, atrocious, or cruel (HAC); (5) the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP); (6) the murders were committed for financial gain; (7) the murders were committed to avoid or prevent a lawful arrest; and (8) the

victims were particularly vulnerable due to advanced age or disability. Jackson v. State, 18 So.3d 1016, 1024 (Fla. 2009).

Jackson waived his right to present mitigation evidence at the penalty phase of his capital trial. Nonetheless, the trial court considered mitigating evidence from the trial, the PSI, letters in support of Jackson and arguments of counsel. The trial court found one statutory mitigating circumstance; age, as Jackson was twenty-three years old at the time of the crimes. The court gave this mitigator only some weight because there was no evidence that Jackson's age contributed to his participation in the murders. The trial court also found three nonstatutory mitigating circumstances: (1) Jackson was amenable to rehabilitation and a productive life in prison (some weight); (2) Jackson's mother was a substance abuser and his parents abandoned him to be raised by his grandmother (some weight); and (3) Jackson's prior criminal record, although extensive, contained no acts of violence (some weight). Jackson v. State, 18 So.3d at 1024. The trial court concluded that the aggravating circumstances far outweighed the mitigating circumstances. In addition to the two death sentences for the murders of Reggie and Carol Sumner, the trial court sentenced Jackson to concurrent sentences of fifteen years for the robberies and life imprisonment for the kidnappings. Id.

Jackson appealed. Jackson raised nine issues in his initial brief: (1) whether the trial court erred in denying Jackson's motion for judgment of acquittal; (2) whether the trial court erred in failing to suppress evidence found in a locked safe inside a South Carolina motel room; (3) whether the trial court erred in failing to suppress recordings of telephone calls made by Jackson while he was incarcerated in South Carolina; (4) whether the trial court erred in admitting evidence that Jackson solicited his cellmate to assist him in escaping from jail; (5) whether the trial court erred in introducing the out-of-court statements of a non-testifying codefendant in violation of Jackson's confrontation rights; (6) whether the trial court erroneously gave great weight to the jury's recommendation without providing an alternative means for the jury to be advised of the available mitigation evidence; (7) whether this Court's comparative proportionality review is unconstitutional; (8) whether Jackson's death sentences are disproportionate; and (9) whether Florida's capital-sentencing scheme violates due process, the Sixth Amendment, and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Jackson v. State, 18 So.3d at 1025, n 5.

On September 24, 2009, this Court rejected each of Jackson's claims on appeal. Additionally, this Court found the evidence was sufficient to support Jackson's convictions and his

sentences to death were proportionate. Jackson v. State, 18 So.3d 1016, 1027, 1034-1036 (Fla. 2009). Mandate issued on October 15, 2009.

On November 3, 2009, Jackson filed a petition for certiorari review in the United States Supreme Court. The State filed a brief in opposition on December 9, 2009. On January 19, 2010, the United States Supreme Court denied Jackson's petition. Jackson v. Florida, 130 S.Ct. 1144 (2010).

On January 19, 2011, Jackson filed a motion, in the Florida Supreme Court, requesting an extension of time to file his Rule 3.851 motion.[1] On March 3, 2011, the Florida Supreme Court granted his motion. This Court also ordered the collateral court to conduct a Durocher hearing to inquire into Jackson's stated intent, through a series of letters, to waive his post-conviction proceedings and discharge collateral counsel.

Subsequently, Jackson reconsidered his decision to waive his post-conviction proceedings and to discharge post-conviction counsel. On April 25, 2011, Jackson filed a thirty-two (32) page motion for post-conviction relief. Jackson raised six (6) claims (numbered 1-7): (1) trial counsel was ineffective for failing to engage in any pre-trial victim outreach activities; (2) trial counsel was ineffective for failing to prepare and

[1] Jackson filed his motion for an extension of time exactly one year from the date his conviction became final.

adequately argue a motion to suppress recordings of Jackson's jail house telephone calls with his grandmother; (3) withdrawn; (4) trial counsel was ineffective in failing to object to allegedly argumentative and speculative questions posed by the prosecutor to witnesses; (5) trial counsel was ineffective in failing to object to improper victim impact testimony; (6)cumulative error and (7) Jackson's sentence to death is unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002).

On May 3, 2011, in light of Jackson's decision to file a motion for post-conviction relief, the collateral court judge filed a suggestion in this Court to discharge its March 3, 2011 order. On May 16, 2011, this Court discharged the Durocher order.

On August 10, 2011, the collateral court conducted a case management conference (AKA /Huff hearing), in accord with Rule 3.851(f)(5), Florida Rules of Criminal Procedure. The collateral court granted an evidentiary hearing on claim one and claim four of Jackson's Rule 3.851 motion and ruled that all others could be decided as a matter of law from the record. (PCR Vol. II 335).

On November 4, 2011, the collateral court conducted an evidentiary hearing on Jackson's motion for post-conviction relief. Jackson called two witnesses, trial counsels Richard

Kuritz and Greg Steinberg. The state called one witness, prosecutor Alan Mizrahi. (PCR Vol. II 335).

At the conclusion of the evidentiary hearing, the collateral court, at the request of the parties, permitted both sides to submit proposed orders granting/denying post-conviction relief. Both parties submitted proposed orders.

On January 30, 2012, the collateral court entered a thirty-one (31) page order denying Jackson's motion for post-conviction relief. (PCR Vol. II 325-355). On February 1, 2012, Jackson filed a notice of appeal.

On September 24, 2012, Jackson filed his initial brief raising six issues, numbered 1-2 and 4-7. Claim 3 was withdrawn. This is the State's answer brief.[2]

---

[2] Reluctantly, the State will follow Appellant's issue numbering system. Jackson's explanation for this numbering system is that he wishes to number his issues on appeal the same way he numbered them in his motion for post-conviction relief to avoid "confusion". Since at some point, before actually filing his initial motion, Jackson "withdrew" Claim III, Jackson numbers his six issues on appeal 1-2, and 4-7. The undersigned counsel suggests that it is wholly unnecessary to follow the same numbering of issues on appeal as in a defendant's motion for post-conviction relief. This is so because citations to the appellate record where the issue was raised and decided eliminate "confusion". Moreover, most defendants do not raise every claim on appeal that they raised below. Finally, logic dictates that defendant's should raise issues on appeal in the order "most likely to succeed." Such ordering often has no bearing on the numbering of issues before the collateral court which often follow a chronological sequence throughout the trial record(pre-trial matters, jury selection, opening statements, guilt phase, penalty phase, Spencer hearing, sentencing, constitutional issues etc). The State suggests that

SUMMARY OF THE ARGUMENT

ISSUE I: In this claim, Jackson alleges trial counsel was ineffective for failing to engage in victim out-reach activities. Jackson's claim centers on the notion that if trial counsel would have reached out to some of the victims' surviving family members, in particular, Carol Sumner's daughter, Rhonda Alford, there is a reasonable probability that Ms. Alford would have asked the state not to seek the death penalty and the state would have agreed. Alternatively, Jackson alleges that had counsel engaged in victim out-reach activities, Ms. Alford might have urged the judge to be merciful. (IB 14).

This claim is properly denied for several reasons. First, Ms. Alford did not testify at the evidentiary hearing. Accordingly, Jackson failed to introduce evidence to prove that, had counsel engaged in victim out-reach activities, Ms. Alford would have asked the state not to seek life or urged the judge to be merciful. Second, any victim out-reach activities would have been futile. Logic dictates that victim out-reach activities are only successful if the defendant is willing to admit guilt, express remorse, and give the victims' family members some sort of closure by fully disclosing what happened to their loved ones. At the evidentiary hearing, Jackson told

---

numbering six issues sequentially (1-6) in an initial brief is the best way to avoid "confusion."

the collateral court that he would not have been so amenable. Jackson told the court that he lied to his attorneys and would not have told the truth even if trial counsel would have come to him about reaching out to the victim's family members. Indeed, at trial and at the Spencer hearing, Jackson steadfastly denied any knowledge or involvement in the kidnapping and murders. Finally, this claim was not proven because even if Ms. Alford would have asked the State not to seek death, the State would have done so in this case. At the evidentiary hearing, one of the two prosecutors in this case testified that the decision to seek the death penalty in any given case does not turn on the victims' family members' view on the appropriateness of the death penalty. The prosecutor testified that only in a close call might the family members' view of the case affect the decision. This, however, was not a close case. Jackson wholly failed to prove this claim. Accordingly, the collateral court properly denied the claim.

ISSUE II: In this claim, Jackson alleges counsel was ineffective for failing to file an adequate motion to suppress Jackson's jailhouse telephone call with his grandmother. Jackson posits that there were two bases for suppression. First, the recording of the call was seized in violation of South Carolina's Wiretap Act. Second, Jackson's use of profane and

disrespectful language on the tape acted as an impermissible non-statutory aggravator.

The collateral court properly denied this claim. As this Court found on direct appeal, Jackson consented to the interception when the automated system advised Jackson that his conversation was being monitored and recorded. Under South Carolina law, consent is an independent basis for a lawful interception of the telephone call. Accordingly, any motion to suppress would have been properly denied. Counsel is not ineffective for failing to file a meritless motion to suppress. Moreover, Jackson offers no basis upon which this Court could conclude that Jackson's use of profane and disrespectful language during the telephone call acted as a non-statutory aggravator. The state did not argue the jury should consider his profane and disrespectful language as non-statutory aggravation, the court did not instruct the jury on this alleged non-statutory aggravation and the trial court did not find Jackson's profane and disrespectful language as a non-statutory aggravator. Counsel is not ineffective for failing to ensure that non-statutory aggravation is considered when none is.

ISSUE IV: In this claim, Jackson alleges that counsel was ineffective for failing to object to several improper questions and answers offered by several witnesses at trial. With the exception of Bruce Nixon's invited speculation about what

Michael Jackson meant when he used the term "mind game," all of the questions and answers about which Jackson complains were either proper or innocuous. As to Bruce Nixon's testimony, trial counsel had a strategic reason for not objecting. Even if this Court were to find counsel should have posed an objection, Jackson can show no prejudice. Jackson's claim fails because he cannot show both deficient performance and prejudice.

ISSUE V: In this claim, Jackson avers trial counsel was ineffective for failing to object to improper victim impact evidence. However, none of the victim impact testimony was improper. The victim impact testimony was limited to testimony that demonstrated the victims' uniqueness and the loss to the community caused by the victims' death. None of the victim impact witnesses offered any opinion of the defendant, the crime, or an appropriate sentence. Trial counsel is not ineffective for failing to object to victim impact testimony that is not improper.

ISSUE VI: In this claim, Jackson raises a cumulative error claim. The collateral court correctly found no error. When there is no error, there can be no cumulative error.

ISSUE VII: In his final claim, Jackson raises a Ring claim. This claim is both procedurally barred and without merit. The claim is procedurally barred because Jackson raised, and this Court rejected, this same claim on direct appeal. Claims raised

and rejected on direct appeal are procedurally barred in post-conviction proceedings. The claim is also without merit. This Court has consistently found that Ring is not implicated when the defendant was previously convicted of a violent felony, was under a sentence of imprisonment, and committed the murders in the course of an enumerated felony, all three of which apply in Jackson's case.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ENGAGE IN VICTIM OUT-REACH ACTIVITY

In this claim, Jackson alleges that trial counsel was ineffective for failing to engage in victim out-reach activity. (IB 13-27). Jackson sets forth some possibilities that may have come to pass if trial counsel engages in victim out-reach activities. For instance, Jackson alleges that a defense attorney, who engages in victim out-reach activities, may be able to craft some sort of plea agreement which gives some emotional relief to the family while still sparing the defendant the death penalty. (IB 14). Jackson posits, as well, that a trial counsel who engages in victim out-reach activities "perhaps" may motivate a survivor to urge the judge to be merciful. (IB 14).

Jackson raised this claim in his motion for post-conviction relief. (PCR Vol. I 104-110). The collateral court granted an evidentiary hearing on the claim.

No surviving family member testified at the evidentiary hearing. Although scheduled to appear by telephone, Rhonda Alford, Carol Sumner's daughter, changed her mind and decided not to testify. Ms. Alford informed the prosecutor, in an email, that it was too stressful. She did not want to open up old wounds. (PCR Vol. III 485-486). [3]

Jackson did not request a continuance or seek to compel Ms. Alford's appearance. Indeed, Jackson personally waived his right to present Ms. Alford's testimony at the evidentiary hearing. (PCR Vol. 489-490, 504-505).

Two witnesses, and the defendant, offered testimony on this claim. Trial counsel, Richard Kuritz, testified that he began his career as an Assistant State Attorney in 1993. He tried his first capital case about 17-18 years ago. (TR Vol. III 521). Prior to defending Michael Jackson, he had handled 10-12 capital cases. (PCR Vol. III 523).

Mr. Kuritz testified that Jackson did not want to put on any mitigation whatsoever in the course of this case. (PCR Vol. III 509). Jackson's position was that he was not guilty of what they were accusing him. Mr. Kuritz believed that if you engage

[3] Rhonda Alford lived in South Carolina.

in victim out-reach activities, you come to the family and say "I am responsible. I am accepting responsibility. I want you to forgive me. I want you to understand what really happened so they could get some better closure with it." (PCR Vol. III 510). During his representation of Jackson, "Michael was never of that mindset." (PCR Vol. III 510). Jackson was always adamant that he was not guilty, that he did not know the kidnappings and murders were going to happen. In Mr. Kuritz' view, victim out-reach activities were so inconsistent with Jackson's position that he and Jackson never discussed it. (PCR Vol. III 510).

Alan Mizrahi testified that he was a member of the prosecution team in the case against Michael Jackson. (PCR Vol. III 532-533). When asked what impact the surviving family members' views on the outcome of the case or the prosecution of the case, Mr. Mizrahi told the court that while his office takes victims' family members' views into account, the office makes an independent determination as to what charges to file and what sentence to seek. (PCR Vol. III 533). The considerations in whether to seek the death penalty against a defendant are far greater than the victims' family members' view about the case. The state must look at the legal issues involved and determine whether there is sufficient aggravation and if the aggravation outweighs potential mitigation. (PCR Vol. III 534). The victims' family members thoughts about whether they want the

death penalty or not are not legal considerations into the decision. While the prosecution team would listen to the victims' family members' views, it is not even close to being dispositive on the decision whether or not to seek the death penalty. (PCR Vol. III 534).

Mr. Mizrahi was asked whether it would have an impact on the State's decision if the victims' family members came forward and told the prosecutors they did not want to live with the case for the next 20-30 years and simply want to put the death behind them. Mr. Mizrahi told the collateral court that such a question is impossible to answer because it depends on the facts and circumstances of the case. In a close call on the death penalty, the victims' family members' plea to the prosecutors not to seek the death penalty might push the prosecutors not to seek the death penalty. (PCR Vol. III 535). This case was not a close call. (PCR Vol. III 535).

Michael Jackson told the collateral court that he was guilty of the crimes charged. Jackson wanted to address the court because of the many lies he told. At trial, he downplayed his involvement to look as if he was not guilty but the truth is, that it was his idea to do this. All were willing participants but he was the leader. (PCR Vol. III 538). Jackson told the court that he lied to the Court, to Mr. Mizrahi, and to his trial counsels, Mr. Kuritz and Mr. Steinberg. He also lied

to the people who deserve the truth the most, the family of Mr. and Mrs. Sumner. Jackson told the court that he was sorry for what he had done. (PCR Vol. III 538-539).

Jackson also told the collateral court that if Mr. Kuritz and Mr. Steinberg had come to him at the time of trial and asked him whether he would tell the truth, he would not have. (PCR Vol. III 507). He was adamant about lying and telling his lawyers he was innocent. (PCR Vol. III 507). Jackson told the collateral court that if his counsel had done that [approach him about victim out-reach), he would have said no. He would have still lied "no matter what". (PCR Vol. I 507).

Jackson's testimony at the evidentiary hearing was consistent with the position he took at trial. Both at trial and during the Spencer hearing, Jackson professed his innocence of the kidnappings and murders. Jackson v. State, 18 So.3d 1016 (Fla. 2009).

The collateral court Jackson's the claim. The court ruled that:

> …In his first claim, Jackson alleges trial counsel was ineffective for failing to engage in any pre-trial victim out-reach activities in an attempt to open up communications between Defendant's trial counsel and the victims' survivors. The gist of Jackson's claim seems to be that if trial counsel would have engaged in such activities, the survivors "needs and anger" could be addressed and they might have asked the Office of the State Attorney to refrain

from seeking the death penalty in this case. Although Jackson's motion seems to encompass all of the Sumners' family members, Jackson clarified, at the evidentiary hearing, that his claim was directed to Rhonda Alford, Carol Sumner's daughter and Reggie Sumner's step-daughter.

This Court has grave doubts about whether this claim even presents a legally cognizable claim. This Court has been able to find no authority for the notion that trial counsel violates his duty under the Sixth Amendment if he fails to contact the victims' family members in an attempt to persuade them to go to the prosecutor and plead for mercy.

However, even if there was such a duty, counsel's performance would not be deficient in this case. Prior to and up through the time of trial, Jackson proclaimed his innocence of both the kidnapping and the murder. Although Jackson admitted that he was a principal in the robbery of the Sumners, as well as to accessing the Sumners' bank accounts to steal their money, he adamantly denied he knew about or actively participated in the kidnappings and the murders. At the evidentiary hearing, trial counsel, Richard Kuritz, testified that, in his view, even if victim outreach activities would be appropriate in some capital cases, it would not be in this one because such activities are only effective if the defendant is remorseful and willing to fully admit his involvement. Trial counsel advised that during the course of his representation of Jackson, Jackson consistently denied prior knowledge of, and participation in, the events that directly led to the Sumners' death under the most horrific of circumstances. This Court finds trial counsel's testimony credible and that trial counsel was not deficient for failing to engage in victim outreach activities with Ms. Alford.

> Moreover, even if this court were to assume that Ms. Alford would have asked the State not to seek the death penalty in this case had counsel contacted her to address her needs and anger, this Court finds that the State would have still sought the death penalty in this case. Accordingly, Jackson has not met his burden to show Strickland prejudice. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998).
>
> At the evidentiary hearing, one of the two trial prosecutors in this case testified that in evaluating the appropriateness of seeking the death penalty, prosecutors evaluate the facts of each case and whether there is evidence to support statutory aggravating factors sufficient to warrant and support the death penalty. Additionally, any known mitigation is evaluated. Mr. Mizrahi testified that while the survivors' views are taken into consideration, they are not a key factor, and certainly not the dispositive factor, in the State's decision to seek the death penalty. Only in close cases might the survivor's views tip the decision to life. Mr. Mizrahi testified that the case against Michael Jackson was not a close case. This Court finds Mr. Mizrahi's testimony at the evidentiary hearing credible. Accordingly, even if Jackson would have presented evidence that Ms. Alford would have asked the State not seek the death penalty if trial counsel would have engaged in unspecified victim out-reach activities, which he did not, the State would have done so in this case.

(PCR Vol. 338-340).

Claims of ineffective assistance of counsel are reviewed under the two-pronged standard established in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984). The defendant bears the burden of proof. To succeed on a claim of ineffective assistance of counsel, the defendant must, first, establish that the performance of counsel was deficient. To do this, the defendant must identify specific acts or omissions that demonstrate the performance of counsel was unreasonable under prevailing professional norms. Hoskins v. State, 75 So.3d 250, 253–54 (Fla.2011). To satisfy Strickland's deficient performance prong, the defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687.

Judicial scrutiny of counsel's performance is highly deferential. Occhicone v. State, 768 So.2d 1037, 1048 (Fla.2000). This deference means that strategic decisions made by counsel do not constitute deficient performance. As long as counsel has thoroughly researched the facts and law, strategic decisions are virtually unchallengeable. Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). It is the defendant's burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Valentine v. State --- So.3d ----, 2012 WL 1722588 (Fla. 2012).

Second, the defendant must establish that the deficient performance of counsel prejudiced the defendant. In order to

prove prejudice, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Reynolds v. State, --- So.3d ----, 2012 WL 4449126 (Fla. 2012).

It is not enough that a defendant show deficient performance or prejudice. Rather to prevail on a claim of ineffective assistance of counsel, a defendant must satisfy both the deficiency and prejudice prongs of the Strickland test. Butler v. State, --- So.3d ----, 2012 WL 2848844 (Fla. 2012).

Jackson has failed to point to a single case from this Court, or any other court for that matter, to establish that trial counsel is ineffective for failing to engage in victim out-reach activities. Even the ABA guidelines, upon which Jackson relies, demonstrate that counsel was not deficient. As the commentary to the ABA guidelines makes clear, victim out-reach activities involve expressions of remorse and a desire to allow the victims' family members immediate closure. The commentary notes that a willingness to forego appeals is one offer that a defendant may make to allow immediate closure. Implicit in effective out-reach activities is a willingness on the part of the defendant to enter a guilty plea. (IB 14).

At the time of trial, Jackson was never willing to come forward and tell the truth. Indeed, as Jackson, himself, put it so eloquently at the evidentiary hearing, he "still would have lied." (PCR Vol. III 507). Counsel is not deficient in his performance for failing to engage in victim out-reach activities when the defendant is unwilling to do the things necessary to "satisfy the needs of the victim's family" such as tell the truth, enter a guilty plea and/or waive appeals.[4]

Even if Jackson could prove deficient performance, which he cannot, Jackson can show no prejudice. If the victims' family members would have asked the prosecutors not to seek death in this case, the prosecutors still would have done so. The prosecutor's testimony at the evidentiary hearing, which the collateral court found credible, established that the State does not seek the death penalty because the victims' family asks it to do so. Nor does the state forgo seeking death if family members ask the prosecution not to seek the death penalty. Instead, seeking the death penalty is a legal determination based on an evaluation of each case on its merits. Only in a

[4] Jackson posits that if counsel would have engaged in effective victim out-reach activities, Reggie Sumner and Rhonda Alford may have softened the blow of the usual victim impact testimony during the penalty phase of Jackson's capital trial. However, Jackson failed to present the testimony of either of the victims' family members to establish this premise. Jackson's speculative approach to this entire claim on appeal does nothing to actually prove counsel was ineffective.

close case might the victims' family members view tilt the state in favor of life. This was not a close case.

The prosecutor's testimony establishes that even if Rhonda Alford would have asked the state not to seek the death penalty in this case, it would have. As such, Jackson cannot meet Strickland's prejudice prong. The collateral court's denial of this claim should be affirmed.

ISSUE II

WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO PREPARE AN ADEQUATE MOTION TO SUPPRESS JACKSON'S JAILHOUSE TELEPHONE CONVERSATION WITH HIS GRANDMOTHER

In this claim, Jackson alleges trial counsel was ineffective for failing to prepare an adequate motion to suppress Jackson's jailhouse telephone conversation with his grandmother. Jackson raised this claim in his motion for post-conviction relief. (PCR Vol. I 110-121).

The collateral court denied the claim. (PCR Vol. II 340-345). The collateral court ruled that:

> …In this claim, Jackson avers that trial counsel was ineffective for failing to adequately prepare a motion to suppress telephone conversations that Jackson had with his grandmother while Jackson was in a South Carolina jail waiting to be returned to Florida. Jackson does not deny that counsel actually filed and argued a motion to suppress Jackson's recorded telephone conversations with his grandmother. (TR Vol. I 92). Jackson does not deny that trial counsel relied on South Carolina law

during his argument on the motion and argued the seizure and use of the telephone recordings were illegal because the police did not have a warrant authorizing them to seize the recordings. (TR Vol. I 92).

Instead, the gist of Jackson's claim is that counsel did not do a good enough job arguing the motion. In particular, Jackson avers counsel was ineffective for failing to find, present, and use proper legal authority which would have supported suppression of the evidence. (Motion at page 18).

The statutes at issue in this claim are parts of the South Carolina Code which governs interception of oral, wire or electronic communications. Two portions of the statute are relevant to Jackson's post-conviction claim.

The first is § 17-30-30(B). This portion of the Code provides that it is lawful for a person acting under the color of law to intercept a wire, oral, or electronic communication if the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

The second is § 17-30-25(B)(2). Section 17-30-25(B)(2) provides in pertinent part that providers of wire or electronic communications services may provide information, facilities, or technical assistance to a person authorized by law to intercept wire, oral, or electronic communications if the provider has been furnished with a court order directing such assistance or alternatively, a certification in writing by a person specified in Section 17-30-95 that no warrant or court order is required by law. Id. Resort to this provision is unnecessary if Jackson consented to the interception because consent provides a separate and independent

authority to intercept oral, wire, or electronic communications.

Jackson alleges, without directly saying so, that counsel was ineffective for failing to offer South Carolina case law that would support his argument that Jackson did not lawfully consent to the interception and that prior to the acquisition of Jackson's taped recorded calls, the police were required to, but did not, furnish the jail with a court order directing release of the recordings or a certificate in writing, signed by an authorized person, that no warrant or court order is required by law. In support of this claim, Jackson offered two items of evidence. First, Jackson submitted the pre-trial deposition testimony of Detective James Rowan. At trial, trial counsel, in support of his motion to suppress, pointed to Detective Rowan's deposition testimony that a warrant was required to obtain jail telephone recordings. In his deposition, Detective Rowan testified that a warrant is required to get the recordings of inmates' telephone conversations from the jail. Detective Rowan testified that both South Carolina law and, to his knowledge, Charleston County Jail policy required a warrant. Detective Rowan also testified that he rarely has gone to get jail recordings for a case. (Rowan deposition at pages 61-64).

I find this evidence wholly unpersuasive. Jackson did not call Detective Rowan to testify at the evidentiary hearing. Accordingly, Jackson presented nothing to establish that Detective Rowan is knowledgeable of, or qualified to testify about, South Carolina's wiretapping laws. Even if that were not the case, Detective Rowan's testimony does impact the question of whether Jackson consented to the monitoring.

The second item of evidence in support of his claim is a boilerplate motion to suppress recordings of inmates' telephone conversations typically filed by the Office of the Public Defender in Charleston, South Carolina. This evidence is also unpersuasive. Jackson did not include a ruling by any trial court on this particular motion or any other similar motion filed by the Charleston Public Defender's Office. Likewise, Jackson offered no proof that any such motion had ever been granted.

This Court finds no deficient performance and no prejudice. Counsel cannot be ineffective for failing to find, present, and use proper legal authority which would have supported suppression of the evidence, if there is no legal authority that would have supported suppression. In his motion, Jackson fails to point to even a single case in which a South Carolina appeals court has ruled that prisoners do not impliedly consent to monitoring when the system advises them they may, can, or will be monitored and, post-warning the inmate engages in a telephone conversation with another person. Likewise, Jackson has failed to point to even a single case in which a South Carolina appeals court has held that one South Carolina law enforcement agency must get a court order to obtain already existing taped telephone calls from another South Carolina law enforcement agency.

Counsel for the State, however, offered two cases from other states, that have analyzed similar statutes. This Court finds these cases persuasive.

In Banargent v. State, 228 S.W.3d 393 (Tex. App. - Houston, 2007), the defendant claimed the trial court erred in admitting into evidence certain recordings of telephone calls appellant made from the county jail. In pertinent part, the defendant claimed

that the recordings were intercepted and then admitted into evidence in violation of law. Texas Penal Code section 16.02(b)(1) provides that a "person commits an offense if the person ... intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication." Id. § 16.02(b)(1). An affirmative defense, however, exists when "a person acting under color of law intercepts ... a wire, oral, or electronic communication ... if one of the parties to the communication has given prior consent to the interception." Id. § 16.02(c)(3)(A).

The Texas Appeals court ruled that interception and use of Banargent's recorded telephone calls did not violate state law because Banargent impliedly consented to the monitoring when, after he was warned by the county jail system his conversations were subject to monitoring, Banargent continued his conversation. Banargent v. State, 228 S.W. 3d 403-403.

A Wisconsin appeals court came to the same conclusion pursuant to a nearly identical statute. In State v. Riley, 704 N.W.2d 635 (Wis. App. 2005), the Court examined Wis. Stat. § 968.31(2)(b), which authorizes a individual acting under the color of law to lawfully intercept oral and wire communications where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception.

The Court ruled that an inmate who is given meaningful notice that his or her telephone calls over institutional phones are subject to surveillance, impliedly consents to monitoring if he continues his conversation over monitored lines. The Court defined meaningful notice as, inter alia, an informational handbook or orientation session or a recorded warning that is heard

> by the inmate through the telephone receiver, prior to his or her making the outbound telephone call. State v. Riley, 704 N.W.2d at 640-641. See also Packer v. State, 800 N.E.2d 574 (Ind.App. 2003)(no violation of Indiana's wiretap law because Packer consented to interception of his jail telephone calls to an outside party when he was warned his conversations would be monitored and continued his conversation).
>
> Finally, and most importantly, in the Florida Supreme Court's decision in the defendant's case, the Florida Supreme Court noted that the relevant Florida statute was "essentially identical" to the provisions of the South Carolina wiretapping act at issue in Jackson's case. The Court went on to find that Jackson consented to interception when he continued to speak with his grandmother even though he was aware through repeated, automated warnings that the jail would record and monitor his communication. Jackson v. State, 18 So.3d 1016, 1030 (Fla. 2009).
>
> In short, Jackson has failed to demonstrate any deficient performance or any prejudice in counsel's failure to "effectively" argue Jackson's motion to suppress his jailhouse telephone conversations with his grandmother.

(PCR Vol. II 340-345)

Before this Court Jackson asserts two bases for his claim. First, Jackson alleges the recording of Jackson's telephone conversation with his grandmother should have been suppressed because it was illegally seized in violation of South Carolina's Wiretap Act. Second, Jackson alleges that, at the very least, portions of the telephone conversation should have been redacted

because Jackson used profane and disrespectful language when speaking to his grandmother. (IB 41). Jackson claims his portrayal - by his own words of course- as a "profane and disrespectful" son constituted impermissible non-statutory aggravation.

(a) ***The alleged violation of South Carolina law***

At the outset, it is important to note that Jackson omits a pertinent part of Jackson's telephone call to his grandmother. On pages 28-33 of Jackson's initial brief, Jackson sets forth the conversation that Jackson avers should have been suppressed. However, on page 28, Jackson omits part of the conversation, marking the omission with asterisks (* * *). Such an omission, in a recitation of supportive facts, would normally be appropriate if the omitted portion was not relevant to the claim presented on appeal. This is not the case here.

Before Jackson asks "Hey, what's up," the jail telephone automated system informed his grandmother that she could decline the collect call or accept it by dialing five. The automated system also informed both Jackson and his grandmother the call is monitored or recorded. In the part of the call that Jackson omitted from his initial brief and marked with asterisks, the telephone system advised:

FEMALE VOICE: Hang up to decline the call or [to] accept the call dial five now. This call is monitored or recorded. (TR Vol. IX 1064). [5]

In order to prove counsel was ineffective for failing to file an "adequate" motion to suppress, Jackson must show that an "adequate" motion to suppress probably would have been granted. [6] Trial counsel is not ineffective for failing to file an "adequate" motion to suppress when the trial court would have denied the motion. Kormondy v. State, 983 So.2d 418, 430 (Fla. 2007)(trial counsel cannot be deemed ineffective for failing to argue a non-meritorious motion to suppress).

Jackson cannot show the trial court probably would have granted an "adequate" motion to suppress. This is so because Jackson cannot show Jackson's taped conversation with his

[5] As Jackson has never denied he was on notice that his jailhouse telephone calls were monitored and recorded and because Jackson does not omit from his recitation of the conversation other warnings given during the phone call, the State presumes this was an inadvertent omission on Jackson's part. Nonetheless, it is important that this Court, as did trial counsel, have objective evidence that Jackson was on notice, before he spoke with his grandmother about the murders of Carol and Reggie Sumner, that the call was being monitored and recorded. (TR Vol. IX 1064).

[6] Jackson's claim on appeal presumes that trial counsel can been deemed ineffective if he filed a motion to suppress but failed to ensure the motion was "adequate." This Court has rejected this notion in the context of a claim of ineffective assistance of appellate counsel. Thompson v. State, 759 So.2d 650, 657, n. 6 (Fla. 2000).

grandmother was seized in violation of South Carolina's Wiretap Act.

On direct appeal, Jackson averred that the trial judge erred in admitting the conversation because it was seized in violation of the South Carolina Wiretap Act. In denying the claim, this Court made two relevant findings: (1) Jackson consented to the interception and (2) Jackson did not have a legitimate, reasonable expectation of privacy in a recorded phone call that was placed while incarcerated after receiving warning that the call was being recorded. Jackson v. State, 18 So.3d 1016, 1030 (Fla. 2009). This latter finding makes clear that Jackson did not have a reasonable expectation that his conversation was not subject to interception.

These findings are relevant because under South Carolina law, consent is an independent basis for the lawful interception of a telephone conversation. *Section 17-30-30(B), South Carolina Code (*it is lawful for a person acting under the color of law to intercept a wire, oral, or electronic communication if the person is a party to the communication or one of the parties to the communication has given prior consent to the interception). [7] Likewise, if the defendant does not have a reasonable

[7] South Carolina Code § 17-30-30(C) provides that it is even lawful for a person not acting under the color of law to intercept a wire, oral, or electronic communication if the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

expectation that his conversation is not subject to interception, the conversation does not fall within the definition of an oral communication that is protected by South Carolina's Wiretap Act. *Section 17-30-15, South Carolina Code* (defining an oral communication as an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation). Even if trial counsel would have filed an "adequate" motion to suppress, the trial court would have denied the motion because Jackson consented to the interception and/or because it was not a communication protected under South Carolina's Wiretap Act. Kormondy v. State, 983 So.2d 418, 430 (Fla. 2007)(trial counsel cannot be deemed ineffective for failing to argue a non-meritorious motion to suppress).

Before this Court, Jackson presents two primary arguments in support of his claim that trial counsel was ineffective. The first argument is that trial counsel should have presented Detective Rowan's deposition testimony to support the notion that a court order or warrant is required in order to obtain jail telephone conversation. In a pre-trial deposition, Detective Rowan testified that a warrant is required to get recordings of jail telephone conversations. Detective Rowan testified that "South Carolina law, and to his knowledge,

Charleston County Jail policy" requires a warrant. (PCR Vol. I. 58).

Jackson's argument is without merit for two reasons. First, trial counsel advised the trial court of Detective Rowan's deposition testimony and placed the deposition in the court record. Indeed, Jackson admits that trial counsel did so. (IB 33). Second, Detective Rowan is wrong. As noted above, South Carolina's Wiretap Act provides that it is lawful for a person to intercept a wire, oral, or electronic communication if the person is a party to the communication or one of the parties to the communication has given prior consent to the interception. *Section 17-30-30(B) and (C), South Carolina Code.* Accordingly, if Jackson consented to the recording, which this Court found he did, no warrant is required. [8]

The second argument that Jackson makes is that trial counsel failed to provide to the trial court citations to various South Carolina and federal court cases that would have "at least indirectly" supported trial counsel's motion to suppress. (IB 38). Jackson cites to several cases in his initial brief.[9] Without offering any insight about what these

---

[8] The state does not concede that a warrant or court order is required absent consent. It is just that this Court need to go no further than the defendant's consent to decide this issue.

[9] Jackson relies on a boilerplate motion used by Charleston County Public Defender's office to challenge the admissibility of recorded jailhouse conversations. Jackson claims that trial

cases are about or how these cases would be relevant, at all, to the suppression motion filed by trial counsel, Jackson avers these cases would have supported the proposition that Jackson's requisite voluntary consent to the jail phone recording had not been obtained. Jackson is mistaken.

Jackson first cites to State v. Mattison, 575 S.E.2d 852 (Ct. App. 2003). In Mattison, the police stopped a car traveling along a South Carolina highway or byway because the car had no rear license plate. Mattison was a passenger, riding in the backseat. When one of the officers approached the car, he observed the front seat passenger "concealing something in his left hand and reaching between his legs." A consensual search of the front seat passenger revealed the passenger possessed crack cocaine.

When the officer noticed Mattison, the officer opened the rear passenger door and asked Mattison, "Do you have anything on you?" Mattison replied, "No." Jones then asked Mattison, "Do you

---

counsel should have called the Charleston County PD's office, gotten the boilerplate motion, and presented the cases cited therein to the trial court. What Jackson overlooks is that the boilerplate motion would not be helpful to the trial court. Nor does it prove counsel is ineffective. The fact the Public Defender's Office cites to these cases in a boilerplate motion is meaningless unless the cited to cases actually support suppression. In his motion to the post-conviction court, Jackson offered not a single case from a South Carolina appellate court in which the Court suppressed jail telephone conversations under the same circumstances under which Jackson made his call. He likewise fails to do so here.

mind if I check?" Mattison responded, "Go ahead." The officer conducted a pat-down of Mattison. During the pat-down, Mattison kept taking his hands down from the hood (or trunk) and apparently reaching down in the direction of his trousers. The officer told Mattison several times of keep his hands on the hood (or trunk). Mattison complied. The officer found crack cocaine in Mattison's crotch.

On appeal, Mattison claimed, *inter alia*, his consent was coerced and, as such, involuntary. The South Carolina Court of Appeals disagreed.

In a hardly novel observation, the court noted that whether consent to search was voluntary or a product of duress or coercion is a question of fact to be determined from the totality of the circumstances. The court went on to conclude, that under a totality of the circumstances test, Mattison's consent was voluntary and not coerced. State v. Mattison, 575 S.E.2d at 855-856.

The South Carolina Appeals Court decision in Mattison has not the slightest bearing on Jackson's claim before this Court. Jackson has never claimed his consent was involuntary because it was coerced by the automated jailhouse telephone recording system. Nor was the "consent" at issue in this case, as it was in Mattison, a result of police conduct in a custodial situation. Instead, the consent at issue is whether Jackson

consented to the interception and recording of a telephone conversation with his grandmother when, after receiving an automated warning his call would be monitored and recorded, Jackson elected to continue his conversation. Jackson is mistaken when he claims trial counsel was ineffective for failing to present the trial court with Mattison to support his motion to suppress.

Jackson is also mistaken when he claims counsel was ineffective for failing to present the trial court with the other cases to which Jackson simply string cites in his initial brief. (IB 38). None of the cases support the proposition that Jackson did not consent to the interception of his phone conversation with his grandmother. Likewise, none of the cases support the notion that Jackson's conversation fell within an oral communication that is protected by South Carolina's Wiretap Act.

In U.S. v. Turner, 169 F.3d 84, 87 (1st Cir. 1999), the First Circuit Court of Appeals found that the police exceeded the defendant's consent to search his apartment, car, and personal property for evidence related to an assault on Turner's next door neighbor when they searched his computer files and found child pornography. As was the case in Mattison, the First Circuit's decision in Turner has absolutely no bearing on Jackson's case.

In U.S. v. Lanoue, 71 F.3d 966 (1st Cir. 1995), the First Circuit Court of Appeals observed that under federal law and subject to certain exceptions, the interception of telephone conversations in the absence of a court order, even jail phone calls, is unlawful. The Court went on to observe that if a person consents to the interception of the phone call however, no court order is required. The Court also observed that if an inmate is put on adequate notice his phone conversation will be monitored or recorded, case law supports a finding the inmate impliedly consented to the interception. U.S. Lanoue, 71 F.3d at 981.

Nothing in Lanoue, which interpreted the federal statute, would have supported Jackson's motion to suppress. Indeed, if anything, the case would have supported the trial court's decision to deny the motion because Jackson impliedly consented to monitoring or recording when, after warning, he spoke with his grandmother on the jail's telephone. [10]

In Katz v. United States, 389 U.S. 347 (1967), the Court considered the issue of whether the police lawfully listened

[10] Nothing in Lanoue suggested the defendant had been warned by an automatic system his conversation would be monitored or recorded and the First Circuit never reached the issue of whether any exception to the federal wiretap law would allow the admission of the defendant's jailhouse conversation. The Court did provide some guidance to the trial court on retrial as to the admissibility of the communication if the warning he received was inadequate, a claim that Jackson has never made.

into the defendant's telephone conversation, by way of a listening and recording device that the police placed on the outside of a public telephone that Katz used to make his call. The Court found the police interception was an unlawful search and seizure because the police violated Katz' reasonable expectation of privacy in his conversation by using, what was then, a high tech device to intercept his conversation.

As is true with the other cases to which Jackson cites, Katz is not even remotely relevant to the claim Jackson makes here. Mr. Katz was not put on notice that his telephone conversation was being monitored or recorded while Jackson was. Mr. Katz was not in jail. Jackson was. Katz did have a reasonable expectation his conversation was not subject to interception. Jackson didn't. Trial counsel was not ineffective for failing to provide the trial court with the decision in Katz.

In In the Matter of An Anonymous Member of the S.C. Bar, 404 S.E.2d 513 (S.C. 1991), the South Carolina Supreme Court determined that an attorney may not ethically electronically tape record a conversation without the knowledge and consent of all parties, as an alternate means of taking notes. Nothing in this case is relevant to the case at bar. Both Jackson and his mother were aware their call was being monitored or recorded. Jackson (and his grandmother for that matter) impliedly

consented to recording and monitoring, when after warning, he continued his conversation with his grandmother. As such, a case that requires an attorney to get consent before recording a conversation in lieu of taking notes would be singularly unhelpful to trial counsel, and to the trial court, in Jackson's case.

Finally, in State v. Forrester, 541 S.E.2d 837 (S.C. 2001), the South Carolina Supreme Court considered whether police officers must inform a suspect that he has the right to refuse a request for consent to search. The South Carolina Supreme Court answered the case in the negative. State v. Forrester, 541 S.E.2d 837, 841 (S.C. 2001),

The Court also considered whether the police exceeded the course of a consented to search of Ms. Forrester's purse. When an officer asked Ms. Forrester for consent to search her purse, Ms. Forrester held it out and opened the bag so the officer could look inside. She did not let go of her purse, however. Rather than simply visually inspecting the inside of the bag while it was still in Ms. Forrester's possession, the officer took purse from her hands, felt it inside and out, tore out the bottom lining, and discovered crack cocaine. The South Carolina Supreme Court found the officer had exceeded the scope of Ms. Forrester's consent to search by taking the purse and conducting

such an extensive physical inspection. State v. Forrester, 541 S.E.2d at 843.

The South Carolina Supreme Court's decision in Forrester is, once again, singularly unhelpful and completely irrelevant to Jackson's allegation that the taped conversation should have been suppressed. Trial counsel was not ineffective for failing to present the trial court with cases, like Forrester, that have no bearing on the issue of the admissibility of Jackson's telephone conversation with his grandmother. [11]

While none of the cases to which Jackson points have any relevancy to whether trial counsel was ineffective, there are several cases that do. While counsel for the State has not been able to find a case from a South Carolina appeals court that is particularly instructive, other states and Florida have examined statutes that are similar to South Carolina's Wiretap Act. [12] These courts have held both that a prisoner, notified by the telephone system that his call is subject to monitoring or recording, is deemed to have consented to the monitoring if he continues the phone call post-warning and that such a prisoner has no reasonable expectation of privacy in that conversation.

---

[11] Jackson also cites to Bell v. Wolfish, 441 U.S. 520 (1979). Jackson points to nothing in this case that would have required the trial court to suppress Jackson's jailhouse telephone conversations

[12] South Carolina's Wiretap Act was enacted in 2002. State v. Whitner, --- S.E.2d ----, 2012 WL 2847614 (S.C. 2012).

In Banargent v. State, 228 S.W.3d 393 (Tex. App. - Houston, 2007), the defendant claimed the trial court erred in admitting into evidence certain recordings of telephone calls appellant made from the county jail. In pertinent part, the defendant claimed that the recordings were intercepted and then admitted into evidence in violation of law.

Texas Penal Code section 16.02(b)(1) provides that a "person commits an offense if the person ... intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication." Id. § 16.02(b)(1). An affirmative defense, however, exists when "a person acting under color of law intercepts ... a wire, oral, or electronic communication ... if one of the parties to the communication has given prior consent to the interception." Id. § 16.02(c)(3)(A).

The Texas Appeals court ruled that interception and use of Banargent's recorded telephone calls did not violate state law because Banargent impliedly consented to the monitoring when, after he was warned by the county jail system his conversations were subject to monitoring, Banargent continued his conversation. Banargent v. State, 228 S.W. 3d 403-403.

A Wisconsin appeals court came to the same conclusion pursuant to a nearly identical statutory provision. In State v. Riley, 704 N.W.2d 635 (Wis. App. 2005), the Court examined Wis.

Stat. § 968.31(2)(b), which authorizes a individual acting under the color of law to lawfully intercept oral and wire communications where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception. The Court ruled that an inmate who is given meaningful notice that his or her telephone calls over institutional phones are subject to surveillance, impliedly consents to monitoring if he continues his conversation over monitored lines. The Court defined meaningful notice as, *inter alia*, an informational handbook or orientation session or a recorded warning that is heard by the inmate through the telephone receiver, prior to his or her making the outbound telephone call. State v. Riley, 704 N.W.2d at 640-641. *See also* Packer v. State, 800 N.E.2d 574 (Ind.App.,2003)(no violation of Indiana's wiretap law because Packer consented to interception of his jail telephone calls to an outside party when he was warned his conversations would be monitored and continued his conversation).

In Florida, this Court has come to the same conclusion. In this Court's decision in Jackson's direct appeal, this Court concluded that the relevant Florida statute was "essentially identical" to the provisions of the South Carolina wiretapping act at issue in Jackson's case. This Court went on to find that Jackson consented to interception when he continued to speak

with his grandmother even though he was aware through repeated, automated warnings that the jail would record and monitor his communication. Jackson v. State, 18 So.3d 1016, 1030 (Fla. 2009). *See also* Mosley v. State, 46 So.3d 510, 524 (Fla. 2009)(no reasonable expectation of privacy in his jailhouse telephone conversation with his wife when the call, as did this one, began with a prerecorded warning that "this call is subject to monitoring and recording).

Jackson cannot show trial counsel was ineffective for failing to file an "adequate" motion to suppress because even an adequate motion would have been denied. Jackson had no reasonable expectation his conversation would not be intercepted once the automated jail telephone system advised Jackson his call would be monitored and recorded. Accordingly, Jackson's conversation does not constitute an "oral communication" protected by South Carolina's statute. Additionally, Jackson consented to monitoring when he continued to speak with his grandmother even though he was aware his conversation was subject to monitoring or recording. As such, Jackson's telephone conversation was lawfully seized and properly admitted into evidence. This portion of Jackson's claim should be denied.

(b) The alleged non-statutory aggravator

In the second portion of his claim, Jackson alleges that trial counsel was ineffective for failing to seek redaction of

Jackson's profane, inflammatory and disrespectful language. Jackson argues that the defendant's profane language became a non-statutory aggravating factor. (IB 39). Jackson also alleges that given the fact Jackson was tried in a "very conservative, southern, bible belt" venue - allegations which are, by the way nowhere in the record - it is likely the Defendant's profane and disrespectful statements to his mother tipped the scales of justice against the defendant and motivated his jury to recommend death. (IB 40).

Jackson raised this claim in his motion for post-conviction relief. (PCR Vol. I 110-121). The collateral court's order did not specifically mention this portion of Jackson's claim. Jackson did not file a motion for rehearing asking for a ruling on this specific part of his claim. Failing to request a ruling waives the issue on appeal. *See generally* Aguirre-Jarquin v. State, 9 So.3d 593, 604 (Fla. 2009). *See also* Lambrix v. State, 39 So.3d 260, 273 n. 13 (Fla. 2010).

Even if this Court were to determine the issue was preserved for appeal, there is no need to remand for a ruling from the collateral court. In light of this Court's *de novo* review of ineffective assistance of counsel claims and because the facts underlying the claim are not in dispute (the defendant used profane language in his telephone conversation with his

grandmother), this Court can decided this portion of the claim as a matter of law.

In deciding this issue, a couple of legal principles are relevant. First, a trial judge's ruling on the admissibility of evidence is within the sound discretion of the Court. *See* Brooks v. State, 918 So.2d 181, 203 (Fla.2005). Accordingly, in order to find that trial counsel is ineffective for failing to file a motion to exclude evidence, this Court would have to conclude that if the motion was filed, the trial court would abuse his discretion in denying it.

The second principle is that in Florida, the only aggravating circumstances that may be presented are limited to those set out in the death penalty statute. *Section 921.141(5), Fla. Stat. (2010).* Accordingly, the state would not be able to offer, and the trial judge would not be able to consider, evidence in aggravation that Jackson is a profane and disrespectful grandson.

However, the state did not offer, and the trial judge did not consider, Jackson's use of profanity as a non-statutory aggravator. The state did not argue that Jackson's profanity should be considered in the jury's recommendation. The prosecutor did not argue that Jackson should be convicted or condemned because he was profane or disrespectful.

The jury was instructed on the aggravators it could consider and none of them included that Jackson is a profane and disrespectful grandson. (TR Vol. XIII 1675-1678). Likewise, the trial judge in his sentencing order did not consider, in aggravation, that Jackson is a profane and disrespectful son. (TR Vol. II 270-274). Because Jackson's own words to his grandmother were not considered in non-statutory aggravation, Jackson cannot show counsel's performance was deficient because he failed to file a motion to redact the profanity from Jackson telephone conversation.

Trial counsel is also not ineffective because Jackson can show no prejudice. It borders on the absurd, indeed crosses over it by a mile or two, to suggest that if trial counsel would have successfully moved to redact Jackson's profane and disrespectful language from the recorded telephone call he made to his grandmother, there is a reasonable likelihood of a different result. Jackson's and his co-defendants broke into the home of 61 year old Carol and Reggie Sumner, bound them with duct tape, transported them to a pre-dug grave in Georgia in their own Lincoln Town car, and buried them alive. The fact that Jackson is profane and disrespectful to his grandmother – who expressed no objection to Jackson's language - did not tilt his verdict to conviction or to a sentence of death. Instead, the overwhelming evidence of Jackson's guilt and the eight

aggravators found to exist beyond a reasonable doubt did that. This claim should be denied.

ISSUE IV

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO ALLEGEDLY ARGUMENTATIVE AND SPECULATIVE WITNESS QUESTIONS

In this claim, Jackson alleges that trial counsel was ineffective for failing to object to "argumentative and speculative" witness questions and answers. Jackson complains that trial counsel should have objected to the following:

> (1) During the State's direct examination of North Charleston Police Department Detective James Rowan, Detective Rowan testified regarding a wristwatch appearing in a police photograph of the Defendants' hotel-room night stand. Detective Rowan testified that police determined that it had been purchased subsequent to the subject incident, "probably with money that he (Defendant Jackson) had obtained from the (victim's) ATM" (card). (IB 43).
>
> (2) During the prosecution's examination of co-conspirator-turned-State's-witness Bruce Nixon, the prosecutor elicited testimony that Defendant Jackson was dominant actor who planned the subject crimes, including the burial of the victims and who took and maintained sole possession of the victims' bank ATM card. (IB 43).
>
> (3) On re-direct of Bruce Nixon, the State asked Bruce Nixon, "If you were the mastermind . . . would you have let anyone else have that ATM card? (IB 44)

> (4) When the prosecutor asked Bruce Nixon why Defendant Jackson had Bruce Nixon blindfolded the victims and what Defendant Jackson meant when he responded "It is a 'mind thing,'" Bruce Nixon testified, "I guess he (Defendant Jackson) didn't want – he didn't want them to see him kill them, I guess." (IB 44).
>
> (5) When the Defendant was on the witness stand testifying on his own behalf, the State asked him on cross-examination; "The truth as to any of this hurts you, right?" (IB 45).
>
> (6) During the State's cross-examination of Jackson, after the Defendant had testified that he had walked up to the grave with a flashlight in his hand, the State asked if the Defendant had been holding the flashlight "like a stage hand." (IB 45).

Jackson raised this claim in his motion for post-conviction relief. (PCR Vol. I 121-124). The collateral court granted an evidentiary hearing on the claim.

Trial counsel, Richard Kuritz, testified that Jackson's theory of defense at trial that Jackson was not the killer but was a thief who had stolen the Sumners' money. Mr. Kuritz told the trial court that Jackson's face was clearly seen on the ATM videos and photographs using the Sumners' ATM card. (PCR Vol. III 523).

Trial counsel was asked about why he posed no objection to each comment about which Jackson takes issue here. Trial counsel testified that he did not object to Detective Rowan's supposition that Jackson has probably bought a watch, found in

Cole and Jackson's hotel room at the time of their arrest, with the money Jackson had taken from the victims. Trial counsel testified that he made no objection in order to maintain credibility with the jury. He wanted the jury to believe the defendant's theory of the case. (PCR Vol. III 513). The defendant's theory was that Jackson was a thief but not a murderer. (PCR Vol. III 523). Trial counsel believed that Detective Rowan's testimony on this point was a trivial matter. He did not want to appear to be an obstructionist. He also believed that Detective Rowan's conclusion was one that the jury would have come to as a matter of common sense anyway. (PCR Vol. III 513).

Trial counsel also testified that he did not object to Bruce Nixon's characterization of Jackson as the ringleader nor the State's "smart-alecky" question to Nixon on the issue of letting anyone, except the mastermind, have the ATM card. Trial counsel told the court that he saw no reason to object. He saw both comments as a small issue. (PCR Vol. III 514).

When counsel was asked whether he should have objected to Bruce Nixon's comment that Jackson's instructions to blind fold the Sumners was a "mind thing" and "I guess he (Defendant Jackson) didn't want – he didn't want them to see him kill them, I guess," trial counsel agreed the latter comment was clearly speculation. Trial counsel told the collateral court that once

again, Nixon's testimony was a matter of common sense deduction. He made the strategic call not to object. Trial counsel did not want the jury to speculate that there was something more sinister going on. (PCR Vol. III 515).

Finally, when asked why he did not object to the two questions the prosecutor posed to Jackson during cross-examination, trial counsel testified that, in his opinion, Jackson did an excellent job during his direct examination. (PCR Vol. III. 515). Trial counsel believed that Jackson was likeable on the witness stand. He believes the 8-4 vote bears that view out especially since this case was one that would call out for a stronger recommendation, 10-2 or 12-0. (PCR Vol. III 515).

Trial counsel did not want to object to those questions because he did not want to give the appearance of trying to hide something. In his opinion, Jackson was handling the prosecutor's questions very well. He did a good job and trial counsel decided to let Jackson continue on his own. (PCR Vol. III 516). Indeed, trial counsel thought that in, comparison, the prosecutor might lose some credibility by being condescending or facetious. (PCR Vol. III 517).

The collateral court denied the motion. The court ruled:

> In this claim, Jackson argues that counsel was ineffective for failing to object to six argumentative and speculative witness

questions and answers. Jackson identifies the allegedly argumentative and speculative questions and answers about which he takes issue and to which trial counsel posed no objection:

(1) During the State's direct examination of North Charleston Police Department Detective James Rowan, Detective Rowan testified regarding a wristwatch appearing in a police photograph of the Defendants' hotel-room night stand. Detective Rowan testified that police determined that it had been purchased subsequent to the subject incident, "probably with money that he (Defendant Jackson) had obtained from the (victim's) ATM" (card).

(2) During the prosecution's examination of co-conspirator-turned-State's-witness Bruce Nixon, the prosecutor elicited testimony that Defendant Jackson was dominant actor who planned the subject crimes, including the burial of the victims and who took and maintained sole possession of the victims' bank ATM card.

(3) On re-direct of Bruce Nixon, the State asked Bruce Nixon the argumentative question, "If you were the mastermind . . . would you have let anyone else have that ATM card?

(4) When the prosecutor asked Bruce Nixon why Defendant Jackson had Bruce Nixon blindfolded the victims and what Defendant Jackson meant when he responded "It is a 'mind thing,'" Bruce Nixon testified, "I guess he (Defendant Jackson) didn't want – he didn't want them to see him kill them, I guess."

(5) When the Defendant was on the witness stand testifying on his own behalf, the State asked him on cross-examination., "The truth as to any of this hurts you, right?"

(6) During the State's cross-examination of Jackson, after the Defendant had testified that he had walked up to the grave hole with a flashlight in his hand, the State asked if the Defendant had been holding the flashlight "like a stage hand."

This Court granted an evidentiary hearing on the claim. At the evidentiary hearing, Mr. Kuritz, a very experienced capital trial lawyer, testified that his strategy at trial was to establish credibility with the jury. In accord with their trial strategy, Jackson testified on his own behalf at trial.

Jackson openly admitted to the jury that he actively participated in both the robbery and in stealing the Sumners' money by way of ATM cards stolen in the robbery. Jackson told the jury that sometime before the robbery, he and Tiffany Cole had stayed at the Sumner home. Afterward, he called Alan Wade and told him the Sumners had TV's and stuff at their home. (TR Vol. X 1367). A few weeks later, he and Cole hatched the plan to rob the Sumners. (TR Vol. X 1369-1370).

Jackson testified that he and Cole knew they could not go into the house because the Sumners knew them. They drafted Alan Wade to help. Jackson told Wade he could not do it alone. Bruce Nixon was brought in to help Wade. Jackson testified that, prior to the robbery, he sat down with Cole, Wade and Nixon and talked about how to do the robbery. (TR Vol. X 1375). The plan was to rob the Sumners of their credit cards, A.T.M. cards and things of that nature. (TR Vol. X 1377). Jackson testified that Wade and Nixon were told to subdue the Sumners and get their PINs. Jackson told Wade and Nixon not to leave any prints in the Sumners' home. (TR Vol. XI 1423). Jackson gave Wade and Nixon advice about how to do the robbery. (TR Vol. XI 1424). Jackson told the jury that after the robbery, the

plan was to hit the A.T.M., get as much money as possible. (TR Vol. X 1378).

Jackson denied, however, knowing that Wade or Nixon intended to kidnap and kill the Sumners. He denied any participation in pre-digging the grave. (TR Vol. XI 1406-1407). Jackson testified the only thing he participated in was the robbery and using the A.T.M. card after the murder. Jackson testified his plan was to call the police after hitting the ATMs, to ensure the police went to the Sumner home to untie them. (TR Vol. X 1378).

At the evidentiary hearing, trial counsel testified that he did not find any of the questions or answers that Jackson challenges to be objectionable. Trial counsel told this court that in cases where the defense's credibility is at stake, as it was in this one, it is important to judiciously object before the jury in order to maintain credibility. Trial counsel did not see the need to object to these questions and answers which in his view did not harm his case. Moreover, counsel believed that during Michael Jackson's testimony, Michael Jackson testified very well and was more than holding his own during cross-examination. Counsel believed that there was no need to object to when Jackson was doing so well against Mr. Plotkin's cross-examination. This court finds trial counsel's testimony on this issue to be credible.

This court finds that even if counsel could have objected to some of the challenged questions and answers, this very experienced trial counsel's judicious objection strategy was a reasonable strategy in this case. Any reasonable counsel would have realized, especially in the face of the evidence pointing to Jackson's involvement in the robbery including his admissions to law enforcement officers and exclusive use of

the Sumners' ATM cards after the murders, that saving Jackson's life could very well hinge on the jury believing that Jackson did not actively participate in the kidnappings and murders. Accordingly, this court find trial counsel's failure to object to questions that, in counsel's view, did not harmfully affect his trial strategy did not constitute deficient performance as set forth in Strickland. See Wright v. State, 581 So.2d 882, 883 (Fla.1991) (holding that the ineffective assistance claim with regard to the failure to object had no merit, because this error was "strategic in nature and this Court will not second guess trial strategy employed by trial counsel"). FN

FN: Some of the testimony was clearly admissible. For instance, Bruce Nixon's testimony that Jackson was a dominant actor who planned the subject crimes, including the burial of the victims and who took and maintained sole possession of the victims' bank ATM card was relevant to Jackson's guilt the offenses charged. Likewise, the prosecutor's question to Nixon on re-direct, was relevant to rebut trial counsel's vigorous attack on Nixon's credibility during cross-examination as well as Jackson's suggestion at trial that it was Wade and Nixon would "took over" the attack against the Sumners and turned a planned robbery into a kidnapping and murder. Counsel's failure to object to questions that are not improper is not deficient performance. Rogers v. State, 957 So.2d 538, 550 (Fla.2007) (explaining that trial counsel cannot be deemed ineffective for failing to object to comments that are proper).

As to the prejudice prong, Jackson does not really explain, in his motion for post-conviction relief, how any of these questions and answers impacted the jury's findings of guilt or recommendation of death or the sentencing court's weighing of

> aggravating and mitigating factors. Even so, for the most part, the questions and answers were fairly innocuous and did not go directly to the heart of the state's case against Jackson or Jackson's defense at trial. Accordingly, Jackson failed to show there is a reasonable probability the jury would not have found him guilty of the crimes charged or recommended he receive a life sentence had counsel objected. Certainly, Jackson has failed to show trial counsel's failure to object to any or all of these questions and answers undermine confidence in the outcome of the case. Gonzalez v. State, 990 So.2d 1017, 1025 (Fla. 2008).

(PCR Vol. II 345-348).

The collateral court committed no error. Jackson cannot show trial counsel was ineffective for failing to object, even if some of the prosecution's questions or the witnesses' answers were objectionable.

Some of the questions and answers were clearly relevant and admissible. For instance, Bruce Nixon's testimony that Jackson was a dominant actor who planned the subject crimes, including the burial of the victims and who took and maintained sole possession of the victims' bank ATM card was relevant to Jackson's guilt the offenses charged. Likewise, the prosecutor's question to Nixon on re-direct concerning control of the ATM car, was relevant to rebut trial counsel's attack on Nixon's credibility during cross-examination as well as Jackson's suggestion at trial that it was Wade and Nixon would "took over"

the attack against the Sumners and turned a planned robbery into a kidnapping and murder. As the collateral court found, trial counsel's failure to object to questions that are not improper is not deficient performance. Rogers v. State, 957 So.2d 538, 550 (Fla.2007) (explaining that trial counsel cannot be deemed ineffective for failing to object to comments that are proper).

Other questions, even assuming they were objectionable, did nothing to hurt Jackson's theory of the case or were so innocuous as to do no harm. At trial, Jackson testified he participated in planning the robbery. Jackson told the jury that he and Tiffany Cole stayed at the Sumner home sometime prior to the murder. Afterward, he called Alan Wade and told him the Sumners had TV's and stuff at their home. (TR Vol. X 1367). A few weeks later, he and Cole hatched the plan to rob the Sumners. (TR Vol. X 1369-1370).

Jackson told the jury that he and Cole knew they could not go into the house because the Sumners knew them. They drafted Alan Wade to help. Jackson told Wade he could not do it alone. Bruce Nixon was brought in to help Wade. Jackson sat down with Cole, Wade and Nixon and talked about how to do the robbery. (TR Vol. X 1375). The plan was to rob the Sumners of their credit cards, A.T.M. cards and things of that nature. (TR Vol. X 1377). Jackson testified that Wade and Nixon were told to

subdue the Sumners and get their PINs. Jackson told Wade and Nixon not to leave any prints in the Sumners' home. (TR Vol. XI 1423). Jackson gave Wade and Nixon advice about how to do the robbery. (TR Vol. XI 1424).

Jackson told the jury that after the robbery, the plan was to hit the A.T.M., get as much money as possible, then call the police and tell them the Sumners' address. Jackson testified the phone call to the police would ensure the police went to the Sumner home to untie them. (TR Vol. X 1378).

Jackson denied knowing that Wade or Nixon intended to kidnap and kill the Sumners. He denied any participation in pre-digging the grave. (TR Vol. XI 1406-1407). Jackson testified the only thing he participated in was the robbery and using the A.T.M. card after the murder.

Detective Rowan's testimony about the watch did not nothing to undermine Jackson's theory that he participated only in the robbery and use of the victims' ATM card. Moreover, the prosecutor's questions to Jackson during cross-examination were innocuous and relevant to Jackson's credibility and motive to lie.

The only testimony that arguably bears any scrutiny is Bruce Nixon's explanation as to what Jackson meant when Jackson told Nixon that taping the victim's eyes was a "mind game". (TR

Vol. X 1235). The following testimony occurred during the State's re-direct examination of Bruce Nixon:

Q. *Something I think that was unclear.* Were you taping the *Sumner's eyes so they couldn't identify you later?*

A. No sir, so they couldn't identify Michael.

Q. Okay, tell the jury why Michael said he wanted their eyes taped even though the plan was to kill them. Tell the jury why he wanted their eyes taped.

A. He said it was a mind thing.

Q. What does that mean?

A. Sir?

Q. What does that mean, a mind thing? Tell the jury?

A. I guess he didn't want—he didn't want them to see him kill them, I guess.

(TR Vol. X 1235).

Certainly, trial counsel could have objected to Nixon's "guess" about Jackson' meaning when he told Nixon the taping of the victim's eyes was a "mind game." However, trial counsel explained his strategy concerning objections at the evidentiary hearing held on Jackson's motion for post-conviction relief. In counsel's view, the case against Michael Jackson came down to a credibility battle between Michael Jackson and the state's case. Counsel believed that the judicious use of objections assisted in maintaining his, and Jackson's, credibility with the jury. *See* Brown v. State, 846 So.2d 1114, 1122 (Fla. 2003)(affirming the collateral court's denial of a claim of ineffective

assistance of counsel premised on a failure to object when the trial counsel testified that part of his style is being judicious with his objections in order to avoid antagonizing the jury and losing credibility).

Even if this Court were to find there was no strategic reason for failing to object, Jackson suffered no or only slight harm from Nixon's "guess." Accordingly, Jackson cannot meet Strickland's prejudice prong.

In his initial brief, Jackson makes no attempt to point to any specific prejudice caused by Nixon's guess about Jackson's use of the term "mind game." For instance, Jackson makes no attempt to show that without Nixon's guess, the State could not have proven an element of any of the crimes charged. Jackson also makes no showing that without Nixon's "guess" the State could not have established one or more of the eight aggravators proven beyond a reasonable doubt. Instead of attempting to actually show how Nixon's testimony undermines confidence in the outcome of his capital case, Jackson simply makes a conclusory allegation that the testimony "changed the tenor of Defendant's trial and distracted Defendant's jurors from their legal responsibilities as neutral finders of fact." (IB 47). Such conclusory statements do not establish Strickland's prejudice prong. This Court should affirm the collateral court's denial of this claim.

ISSUE V

WHETHER THE COLLATERAL COURT ERRED IN DENYING JACKSON'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S VICTIM IMPACT EVIDENCE

In Florida, victim impact evidence is admissible. Under section 921.141(7), Florida Statutes (2009), the State may introduce victim impact evidence, subject to the following statutory parameters:

> Victim impact evidence.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

In this claim, Jackson alleges that trial counsel was ineffective for failing to object when Mr. Revis Sumner, Reggie Sumner's brother, testified during the penalty phase that:

> ...Losing them (victims James and Carol Sumner) has been very difficult for the family and it's been hard for me because Reggie was not only my brother, he was my best friend. I feel this part of me is – this part of me is missing because we were so close. After a time the tears stop flowing, but the pain of losing Reggie and Carol will never go away.

(TR Vol. XIII 1639).

Jackson raised this claim in his motion for post-conviction relief. (PCR Vol. I 124-128). The collateral court denied the claim. The collateral court, citing to this Court's decisions in Gonzalez v. State, 990 So.2d 1017 (Fla. 2008), Wheeler v. State, 4 So.3d 599, 608 (Fla. 2005) and Abdool v. State, 53 So.3d 208 (Fla. 2010), found that Mr. Sumner's testimony did not stray from permissible victim impact evidence. In particular, the collateral court found that Mr. Sumner's testimony did not include characterizations and opinions about the crime, the defendant, or an appropriate sentence. The collateral court found that, instead, Mr. Sumner's testimony simply described his relationship with his brother and the resulting impact of Reggie and Carol Sumner's deaths on him personally. (PCR Vol. II 319-323).

The collateral court was correct. Victim impact evidence is permissible when offered to demonstrate the victim's uniqueness and the loss to the community caused by the victim's death. Kormondy v. State, 845 So.2d 41, 54 (Fla.2003). A loss to a family member is both a loss to community of the family and a loss to the community outside the family. A family member's emotions resulting from the loss of the victim, including feelings of pain, anger, or fear, are directly related to the family's affection for the victim and the impact caused by his or her death. Accordingly, testimony which explains the

emotional pain caused by the death of a family member, on the family as a whole and on individual members within the family, is permissible victim impact evidence. *See* Abdool v. State, 53 So.3d 208, 222 (Fla.2010).

Examination of Revis Sumner's testimony shows that Mr. Sumner's testimony did not constitute impermissible victim impact evidence. Mr. Sumner did not comment on the shocking, consciousless, and vile nature of the murders. Nor did Mr. Sumner comment on Michael Jackson's depravity, iniquity, and complete lack of a moral compass. Finally, Mr. Sumner did not ask the jury to sentence Mr. Jackson to death or offer an opinion on an appropriate sentence. Instead, Mr. Sumner told the jury about the emotional impact the loss of Reggie and Carol Sumner had on both him and his family. This the law allows.

Trial counsel is not ineffective for failing to object to testimony this is not objectionable. Mungin v. State, 932 So.2d 986, 997 (Fla. 2006). This Court should deny this claim.

ISSUE VI

WHETHER THE COLLATERAL COURT ERRED IN DENYING JACKSON'S CLAIM OF CUMULATIVE ERROR

In this claim, Jackson raises a claim of cumulative error. Jackson raised this claim in his motion for post-conviction relief. (PCR Vol. I 128-130). The collateral court denied the

motion. The collateral court found no error and, as such, no cumulative error. (PCR Vol. II 322-323).

The collateral court was correct. Where there is no error, there can be no cumulative error. Atwater v. State, 788 So.2d 223, 238 (Fla. 2001) (where no errors occurred, cumulative error claim is without merit); Downs v. State, 740 So.2d 506, 509 (Fla. 1999)(finding that where allegations of individual error are found without merit, a cumulative error argument based thereon must also fail); Johnson v. Singletary, 695 So.2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless).

Jackson failed to show that trial counsel was constitutionally ineffective. Jackson also failed to show his convictions and sentences to death violated the dictates of Ring v. Arizona, 536 U.s. 584 (2002). Because there was no error, there can be no cumulative error. Bradley v. State, 33 So.3d 664, 684 (Fla.2010)(where the alleged errors are meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel, a post-conviction claim of cumulative error is also without merit).

ISSUE VII

WHETHER JACKSON'S SENTENCES TO DEATH ARE UNCONSTITUTIONAL PURSUANT TO RING V. ARIZONA, 536 U.S. 584 (2002)

In this claim, Jackson avers his death sentence is unconstitutional pursuant to Ring v. Arizona, 536 U.s. 584 (2002). Jackson raised this claim in his motion for post-conviction relief. The collateral court denied the claim as procedurally barred and without merit. (PCR Vol. II 323-324).

Jackson implicitly acknowledges this Court has rejected the same claim he raises here but invites this Court to reconsider. This Court should decline the invitation. This is so for two reasons.

First, the claim is procedurally barred. Jackson already raised this claim on direct appeal from his convictions and sentence to death. Jackson v. State, 18 So.3d 1016, 1025 n.6 (Fla. 2009). Accordingly, the claim is procedurally barred in post-conviction proceedings. Finney v. State, 831 So.2d 651, 657 (Fla. 2002)(claims are barred in post-conviction proceedings when they were raised and rejected on direct appeal).

Second, it is without merit. In this case, Jackson had previously been convicted of a prior violent felony; the contemporaneous murder of the other victim. Jackson was also convicted of kidnapping by a 12 person jury, unanimously, beyond a reasonable doubt and the trial judge found, in aggravation,

that the murders were committed in the course of that kidnapping. Jackson v. State, 18 So.3d 1016, 1024 (Fla. 2009).

This Court has repeatedly held that Ring will not act to disturb a sentence to death when the defendant was previously convicted of a violent felony, including a contemporaneous felony. Frances v. State, 970 So.2d 806, 822–23 (Fla.2007) (rejecting application of Ring when the death sentence was supported by the prior-violent-felony aggravating circumstance based on contemporaneous convictions of murder). This Court has also rejected Ring claims when the defendant committed the murder in the course of an enumerated felony. Baker v. State, 71 So.3d 802 (Fla. 2011)(explaining that Ring is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony).

Finally, Jackson was under a sentence of imprisonment at the time of the murders. This Court has found Ring to be satisfied when the defendant was under a sentence of imprisonment at the time of the murder. Allen v. State, 854 So.2d 1255 (Fla. 2003). This Court should deny Jackson's final claim on appeal.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

_____
MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
PL—01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to Christopher Anderson, Esquire, 2217 Florida Blvd., Suite A, Neptune Beach, Florida 32233 this 24th day of October 2012 at the following email address: christopheranderson@clearwire.net

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

_____
MEREDITH CHARBULA
Assistant Attorney General