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IN THE SUPREME COURT OF FLORIDA

ALAN LYNDELL WADE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-1003

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant Wade as Appellant, Defendant, or by proper name, Wade. Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as Appellee, the prosecution, or the State.

The record on direct appeal will be cited throughout this brief as "ROA" with the appropriate volume and page number (ROA V#/page#). The postconviction record will be cited as "PCR" with the appropriate volume and page number (PCR V#/page#). Appellant's initial brief in this proceeding will be cited a "IB" with the appropriate page number (IB page#).

STATEMENT OF THE CASE AND FACTS

GUILT PHASE

In August 2005, Alan Wade, Michael Jackson, Tiffany Cole, and Bruce Nixon were indicted on two charges each of first-degree murder, armed kidnapping, and armed robbery in the murders of Carol and Reggie Sumner, a retired couple residing in Jacksonville, Florida. Pursuant to a plea agreement, Nixon pleaded guilty to two counts of second-degree murder in exchange for his cooperation with the State and his testimony against his three codefendants at their separate trials. Nixon was sentenced to concurrent sentences of 45 years. Prior to Wade's trial, Jackson was convicted and sentenced to death. *See Jackson v.*

State, 18 So. 3d 1016 (Fla. 2009), *cert. denied,* 558 U.S. 1151 (2010). Cole was also tried and sentenced to death.

A jury was selected for Wade's trial on October 15, 2007. The trial was held October 22-24, 2007. The relevant facts concerning the murders of Carol and Reggie Sumner on July 7, 2005 are recited in this Court's opinion on direct appeal:

> At Wade's trial, the evidence established the following. At the time of the murders, Wade had known codefendant Jackson for at least a year. In the summer of 2005, Wade had visited and partied with Jackson and his girlfriend Cole in South Carolina. In June, Wade arrived at his longtime friend Nixon's home in Jacksonville, driving a Mazda RX-8 that Cole had rented in South Carolina. Wade told Nixon of a vague plan to rob someone but offered no specifics. The next time Wade contacted Nixon was two evenings before the July 8 murders. Wade called and asked whether Nixon would like to join him, Jackson, and Cole in digging a hole. Nixon agreed and purloined four shovels from his neighborhood before his three codefendants appeared at his home in the Mazda.
>
> The foursome drove around before deciding on a good location for the hole-a remote, wooded area located just across the state line in Georgia. Leaving the car parked on the road, the foursome hiked into the woods, where the three men dug a large, deep hole, while Cole held a flashlight. When the group returned to the car, Wade asked Jackson whether Nixon could join their robbery plan, and Jackson agreed. The group then went to Wade's house but left when Wade's mother ordered Jackson out of her home. She considered Jackson a bad influence on her son.
>
> Over the next two days, the four codefendants moved forward with the plan to rob and kill the Sumners. Cole drove Nixon, Jackson, and Wade by the Sumners' Jacksonville home and called the Sumners on her cell phone. Cole knew the victims from when she and they had lived in South Carolina, and Jackson knew them through Cole. Both Reggie and Carol Sumner were sixty-one and in extremely poor health. The Sumners were

chosen as victims because of their vulnerability and the belief that they had considerable financial resources. The four codefendants planned to gain entry to the Sumners' house while the couple was at home and obtain information regarding their financial accounts and the means to access those accounts. Jackson said that he would kill the victims with a lethal injection of medication. He promised his codefendants that they would share the money obtained from the Sumners' accounts and that each would get about $50,000.

The codefendants made preparations to effect their plan. Shortly after midnight on July 7, 2005, Jackson, Cole, and Wade went to Wal-Mart and purchased disposable rubber gloves. Then, at about 8:30 on the evening of the murders, all four codefendants went to an Office Depot, where Cole purchased duct tape and a large roll of plastic wrap. Finally, they obtained a toy gun that shot plastic pellets.

At approximately 10 p.m. on July 8, 2005, Cole drove her three codefendants in the Mazda to the Sumners' home. She and Jackson remained in the car after dropping Wade and Nixon near the home. Wade had the duct tape in his waistband, and Nixon had the toy gun. As Wade and Nixon approached the victims' house, the pair donned plastic gloves. When Carol Sumner opened the door, they asked to use her phone, and she invited them in. Upon entering, Wade quickly pulled out the phone line, while Nixon pointed the toy gun at the couple. Wade grabbed Mr. Sumner around the neck and pushed him down into a chair. They told the couple that they wanted bank and credit cards. Mrs. Sumner began to cry and pleaded with Wade and Nixon not to hurt her and her husband. Nixon took the Sumners into the spare bedroom, where he used duct tape to secure their legs and hands and to cover their mouths and eyes. Jackson then entered the home after being signaled that the victims were secured, and he and Wade began searching for financial information. A pile of mail and financial statements and Reggie Sumner's coin collection were taken to the Mazda.

At Jackson's direction, Wade and Nixon walked the Sumners out to their own Lincoln Town Car and put the couple in its trunk. According to plan, the two cars headed for the predug grave, making only one stop to put gas in the Lincoln. After arriving near the

gravesite, Jackson opened the Lincoln's trunk and began screaming when he saw that the victims had worked their way out of the duct tape. The couple lay with their eyes uncovered and hugging each other in the trunk. Jackson ordered Nixon to bind them again. Then, when Wade was unable to back the Lincoln up to the edge of the grave, Nixon did so. Jackson then sent Nixon to wait with Cole at the road, where she had remained with the Mazda.

Later, Wade and Jackson drove the Lincoln up to the road where Cole and Nixon waited. Jackson held a yellow legal pad and reported that it contained the previously unknown personal identification numbers (PINs) for the Sumners' bank cards. Then, with Wade and Nixon in the Lincoln and Jackson and Cole in the Mazda, the foursome drove to Sanderson, Florida, where they abandoned the Lincoln after wiping it clean of prints. They left the four shovels in its trunk.

All four codefendants then returned to Jacksonville in the Mazda. They went to an automated teller machine (ATM), where Jackson withdrew money from one of the Sumners' accounts, and then the group went to their hotel. Subsequently, Wade and Cole went to Wal-Mart, where they purchased gloves and bleach. They also returned to the Sumners' home and stole the computer. Nixon stayed with his codefendants another day and then went home. Wade, however, stayed with Jackson and Cole and traveled with them to Charleston, South Carolina. There, Cole rented two hotel rooms-one for her and Jackson and the other for Wade.

Carol Sumners' daughter reported her inability to contact the couple to the Jacksonville Sheriff's Office on July 10, and the next day the couple was reported missing and a "BOLO" issued for the couple's car. On July 12 the car was found, and the law enforcement investigation of the Sumners' financial accounts revealed an unusual number of recent ATM withdrawals. Video from the ATMs revealed Michael Jackson's face and a silver Mazda in the background. Wade called Nixon to inform him that the Lincoln had been found and told Nixon to "be cool." About this same time, Nixon went to a keg party. There, while intoxicated, Nixon told a friend that he had buried someone alive and showed his wallet containing about $200 in $20 bills.

Posing as Reggie Sumner, Jackson contacted Jacksonville law enforcement officers by phone on July 12, and he assured the homicide detective that he and his "wife" were fine. Cole, posing as Carol Sumner, made the same assurances. Jackson also reported that he was having trouble accessing the Sumners' accounts and requested the detective's help. On July 14, Jackson, Cole, and Wade were located and arrested at their South Carolina hotel, and their rooms were searched pursuant to warrants. Carol Sumner's key ring containing the keys to the Lincoln was found on the nightstand in Wade's room. In the room with Jackson and Cole, law enforcement officers found a suitcase full of the Sumners' financial records, bags of recent purchases made on the Sumners' accounts, receipts for those purchases and for purchases made earlier in Jacksonville, and other items, including the Sumners' driver licenses, credit and bank cards, and checks and check register. Notably, a check for $8,000 on the Sumners' account had been made payable to Alan Wade. Officers also searched Cole's car, a Chevy Lumina, and the Mazda, which had not been returned to the rental agency but had been recovered by law enforcement officers. In the Lumina, the officers found Reggie Sumner's coin collection, and in the Mazda, they found Wade's fingerprints on one of the victims' magazines. They also found an unused roll of plastic wrap with Cole's and Jackson's fingerprints on it.

Nixon was arrested, and he took officers to the Georgia gravesite. A roll of duct tape was found there, and on the morning of July 15, law enforcement officers began excavation of the gravesite. Both victims were found fully clothed and sitting in crouched positions, with at least two feet of dirt over their heads. The medical examiner testified that both Reggie and Carol were alive in the hole before the dirt was shoveled on them. Their nostrils, mouths, throats, esophagi, and tracheae contained fine sprays of dirt, indicating that the dirt was inhaled. Both victims died of a combination of mechanical asphyxiation, as the dirt compressed their chests and abdomens, and smothering, as the dirt piled up around their heads and obstructed their noses and mouths.

Wade declined to testify in his own defense, and after inquiry, the trial court found the waiver voluntary.

The jury subsequently found Wade guilty of two counts of first-degree murder, determining that they were both premeditated and committed in the course of a robbery or kidnapping or both, and of two counts each of robbery and kidnapping.

PENALTY PHASE AND SENTENCING

During the penalty phase [on November 15, 2007], two witnesses gave victim impact statements. Wade then called six witnesses to testify: Bruce Nixon, Wade's mother and older sister, the mother of one of his friends, the assistant principal from his middle school, and the former youth pastor of his church. In sum, the witnesses testified that Wade's parents divorced when he was eight and his father essentially dropped out of Wade's life. His father's absence had a negative impact on Wade's life. Wade's mother, however, took him to church regularly, and as a young boy, he was kind, smart, and well-behaved. After the divorce, however, his mother was unable to spend a lot of time with him because she worked full time to support them, and during his teens, she struggled with breast cancer. In his early teens, Wade began using drugs. When he was in sixth grade, Wade was involuntarily committed to a rehabilitation center for seventy-two hours following a drug-related incident. The police had given his mother the option of commitment in lieu of his arrest. Later, when Wade was sixteen, his mother had to withdraw him from school to avoid being arrested herself because of his truancy. The next year, because of his continued drug use and escalating disregard for his responsibilities, she kicked him out of the house as a measure of "tough love." In 2004, Wade introduced his mother to Jackson, whom she deemed a bad influence on Wade for a variety of reasons. Since his arrest for the murders, however, Wade had become a model prisoner. He earned his general equivalency diploma, read dozens of books, tutored other inmates in math, and was a mentor to others. After deliberations, the jury voted eleven-to-one to recommend a death sentence for each murder.

[On December 13, 2007], the trial court held a *Spencer*[1] hearing at which Wade's mother testified, as did Wade's father. Carol Sumner's daughter also testified that she did not believe the death penalty was an appropriate sentence for Wade. Four other witnesses gave victim impact statements.

On March 4, 2008, the circuit court imposed sentences of death for both murders. The court found the following seven statutory aggravators were established beyond a reasonable doubt as to each murder: (1) Wade was previously convicted of a capital felony-the contemporaneous murder of the other victim; (2) the murder was committed in the course of a kidnapping; (3) the murder was especially heinous, atrocious, or cruel (HAC); (4) the murder was cold, calculated, and premeditated (CCP); (5) the murder was committed for financial gain; (6) the murder was committed to avoid arrest; and (7) the victim was especially vulnerable due to age or disability.

In mitigation, the court found three statutory mitigators, affording only one great weight, and twenty nonstatutory factors. With respect to the substantial domination mitigator, the court stated that the factor was "not clearly established" and entitled to little weight because "Wade alone was responsible" for bringing Nixon into the criminal scheme. Moreover, although Wade followed Jackson's instructions, no direct evidence established that Wade's "personality was subdued by" Jackson within the meaning of the mitigator. Similarly, the trial court found no direct evidence that Wade's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Ascribing some weight to the statutory factor, the court noted that the "evidence suggests that [Wade] knew exactly what he was doing" and was not under the influence of drugs or suffering a "mental aberration" at the time of the murders.

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[1] *See Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993) (requiring a hearing for the presentation of additional evidence to be held after the jury makes a sentence recommendation).

> Finally, the court ascribed great weight to the statutory mitigator of the defendant's age. Wade was eighteen when he participated in murdering the two victims.
>
> The trial court also found a number of nonstatutory mitigating factors, ascribing each only some or little weight and finding many to be either duplicative of others or "more an argumentative conclusion than a fact." The factors, which largely relate either to Wade's home life or his behavior since his arrest, are as follows: (1) Wade's parents were divorced, and he grew up without a father (little weight); (2) Wade was raised by an absentee mother (some weight); (3) Wade was raised in a negative family setting (argumentative, little weight); (4) Wade had difficulty in school (some weight); (5) Wade lacked emotional maturity (argumentative, little weight); (6) Wade lacked parental guidance (duplicative, some weight); (7) Wade had a history of substance abuse (little weight); (8) Wade had a difficult childhood (duplicative, little weight); (9) Wade had mental health issues in his youth (little weight); (10) Wade's mother threw him out of the house when he was sixteen (little weight); (11) Wade is a model prisoner (some weight); (12) Wade desires to help others (some weight); (13) Wade has changed for the better in prison (argumentative, some weight); (14) Wade is not known as a violent person in jail and has had only one disciplinary review (duplicative, some weight); (15) Wade exhibits positive personality traits in prison (duplicative, some weight); (16) Wade now has the affection and support of his family (little weight); (17) Wade was well-behaved at trial (duplicative, some weight); (18) Wade has demonstrated a potential for rehabilitation (duplicative, some weight); (19) Wade has helped others in prison and could contribute to society (duplicative, little weight); and (20) Wade would be a model prisoner with a purposeful life (duplicative, little weight).
>
> After considering the aggravating and mitigating factors in the case, the trial court concluded that the seven aggravators "far outweighed" the mitigation and that death was the appropriate penalty.

Wade v. State, 41 So. 3d 857, 862-65 (Fla. 2010).

DIRECT APPEAL

Wade appealed his judgments of conviction and death sentences. Wade raised seven issues on appeal. On May 6, 2010, the Florida Supreme Court rejected each of Wade's claims. The Court found that there was sufficient evidence to support Wade's murder convictions, and that Wade's sentences to death were proportionate. *Id*. at 878-880.

Wade filed a motion for rehearing on May 21, 2010. Rehearing was denied on August 4, 2010. Mandate issued on August 20, 2010. Wade filed a timely petition for a writ of certiorari in the United States Supreme Court on November 1, 2010. The United States Supreme Court denied review on January 18, 2011. *Wade v. Florida*, 131 S.Ct. 1004 (Mem) (2011).

POSTCONVICTION

On December 27, 2011, Wade filed an initial motion for postconviction relief raising 10 claims. Wade requested an evidentiary hearing on some claims and agreed that others could be decided as a matter of law from the record.

On May 4, 2012, the trial court held a *Huff*[2] hearing. On June 29, 2012, Wade served an amended motion correcting the numbering from his initial motion. The Renumbered Copy of Original Amended Motion to Vacate Judgments of Conviction raised

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

claims numbered 1-12: (1) trial counsel was ineffective for various reasons during voir dire, (2) trial counsel was ineffective for various reasons during the guilt phase, (3) trial counsel was ineffective for various reasons during the penalty phase, (4) the state violated the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to disclose the names and addresses of witnesses, (5) trial counsel was ineffective for failing to file to object to the introduction of inadmissible evidence and testimony, (6) cumulative error, (7) trial counsel was ineffective for failing to request a new penalty phase jury thereby preserving his claim that *Furman v. Georgia* requires the court to empanel two juries, (8) trial counsel was ineffective for failing to present evidence of Nixon's prison sentence at the *Spencer* hearing and to object when the trial court failed to consider Nixon's sentence in mitigation, (9) trial counsel was ineffective for failing to preserve Wade's *Ring* claim at trial and for appeal, (10) counsel was ineffective for failing to preserve the issue of whether the trial court erred in sentencing Wade to death without considering codefendant Nixon's sentence, (11) the trial court erred in failing to conduct a *Nelson* inquiry when Wade complained that counsel had only met with him for a total of one hour since his arrest, and (12) Wade may be incompetent to be executed. (PCR 3/494-568).

On August 7, 2012, the trial court entered an order granting Wade an evidentiary hearing on claims 2 and 3. (PCR 3/579-80). The trial court also ruled that each of Wade's other claims could be decided as a matter of law from the record. *Id.*

An evidentiary hearing was held September 25-28, 2012 on claims 2 and 3 (and their many sub-claims and sub-sub-claims). The following witnesses testified at the hearing: Refik Eler, Esquire, who handled primarily the guilt phase, Frank Tassone, Esquire, who handled primarily the penalty phase, Rick Sichta, Esquire, an attorney who worked in Mr. Tassone's office during Mr. Tassone's representation of the Defendant, Michael Hurst, private investigator retained by the defense attorneys, Stephen Bloomfield, Ph.D., a forensic psychologist, Hyman Eisenstein, Ph.D., a clinical psychologist, Shreya Mandel, mitigation expert retained by Mr. Tassone, Bruce Nixon, codefendant, Christie Thompson, Bruce Nixon's older sister, Jerry Ganey, Appellant's stepfather, Frieda Ganey, Appellant's mother, Vanessa Wilkerson, Appellant's childhood friend, Patricia Page, Appellant's half sister, Melissa Curbow, the mother of a childhood friend of Appellant, Alan Wade, Sr., Appellant's father, and Alan Mizrahi, Assistant State Attorney. (PCR 7-10/1087-1759).

Following the evidentiary hearing, both parties submitted post-evidentiary hearing memorandums of law. (PCR 5/786-940). On April 22, 2013 the trial court entered an Order denying each

claim of the Renumbered Copy of Original Amended Motion to Vacate Judgments of Conviction and Sentence. (PCR 5/941-80). This is Wade's appeal from the order denying postconviction relief.

SUMMARY OF ARGUMENT

ISSUE I: GUILT PHASE IAC

Wade claims that the trial court erred in denying his claim of ineffective assistance of counsel at the guilt phase of his capital trial. Wade made numerous sub-claims alleging that trial counsel was ineffective for failing to: file a motion to suppress, object to various evidence and testimony, and have an "adequate" attorney-client relationship.

The defense theory at trial was that Wade's codefendants planned and carried out the murders. The defense asserted that Wade did not plan the murders nor was he present during their commission. The codefendants were portrayed as the real murderers. Wade was framed as someone who just got caught up in the aftermath. The defense claimed that Wade was only guilty of being an accessory after the fact for sharing in the proceeds of the crimes.

Wade contends that trial counsel should have filed a motion to suppress items seized from the motel room in which he was staying at the time of his arrest. The items that are the subject of Wade's complaint are his cell phone and the victims' car keys. As compared to the weight of the many incriminating

items discovered in the codefendants' motel room, the items found in Wade's room were consistent with the defense theory that Wade was a minor player in the scheme. Nonetheless, Wade argues that there was insufficient probable cause to sustain the warrant issued for the search of the room.

The trial court rejected this claim and properly found no deficient performance. The court was correct that a motion to suppress would have been meritless because the phone and the keys were subject to inevitable discovery. Additionally, considering the totality of the other evidence implicating Wade, the court found no prejudice.

Wade also complains that his counsel was ineffective for failing to object to a variety of evidence and testimony admitted throughout his trial including: items seized from the codefendants' motel room, a recorded phone call between the codefendants and a homicide detective in which the codefendants posed as the Sumners (who had already been buried alive), photos of codefendant Jackson using the victims' ATM card, improper character testimony from Wade's mother, and hearsay testimony from law enforcement officers.

The trial court again rejected these sub-claims, finding that objections to the evidence and testimony at issue would have been meritless and overruled, and therefore, there was no deficient performance. The court found no prejudice because the

evidence and testimony at issue was consistent with the defense theory that the codefendants were the murderers and Wade was just sharing in the fruits of the aftermath.

On appeal, Wade's complaint regarding his relationship with his attorneys is only mentioned in the "Statement of Facts." It has been reduced to a complaint that his lawyers did not visit him often enough at the jail. The claim was insufficient and properly denied. The trial court made findings, supported by competent, substantial evidence, that the attorneys had far more contact with Wade than his allegation suggests.

All of Wade's sub-claims of ineffective assistance of counsel during the guilt phase were properly denied.

ISSUE II: IAC AT THE PENALTY PHASE

Issue II alleges that Wade received ineffective assistance of counsel at the penalty phase of his capital trial. Each sub-claim in Issue II was properly rejected by the trial court.

Wade's lengthiest Issue II sub-claim asserts that trial counsel was ineffective for failing to present mental health mitigation. Seven years after Wade's trial, Dr. Hyman Eisenstein was retained to testify in postconviction proceedings regarding mental health mitigation that Wade argues could have been presented at the penalty phase.

Dr. Eisenstein conducted psychological testing on Wade and found some variation in his visual and verbal I.Q. scores. Wade

now claims that this variation in scores *could* be due to brain trauma or injury, and that he should have had neurological testing prior to trial to explore the possibility of brain damage. However, there is no objective evidence that Wade actually experienced any brain trauma. Dr. Eisenstein testified only that brain trauma could be one *possible* explanation for the scoring variation, but admitted that there is proof of brain trauma. Furthermore, Dr. Eisenstein was deemed not credible by the trial court.

Wade's next claim is that counsel failed to utilize the services of a mitigation expert to any "meaningful extent." There is no requirement that a mitigation expert be used, let alone to any measurable extent. In any case, the claim is meritless because Wade did have a mitigation expert, she did work on the case, and counsel utilized her work in the penalty phase presentation.

Wade also asserts that trial counsel was ineffective for failing to put forth mitigation evidence regarding his drug and alcohol use, that he was under the substantial domination of codefendant Jackson, and that he was subject to extreme emotional disturbance. Wade's claim fails because trial counsel did present testimony of all of these potentially mitigating factors, and witnesses at the evidentiary hearing failed to add anything credible or significant to the evidence presented to

the jury. The trial court correctly determined that even if all the testimony that Wade presented at the evidentiary hearing had been presented at the penalty phase and at sentencing, there is still no reasonable probability of a different outcome or that death would not have been warranted.

The last allegation in Issue II is that counsel was ineffective for conceding certain aggravating circumstances at the penalty phase. The aggravating circumstances addressed were proven beyond a reasonable doubt. Counsel's decision to attempt to maintain credibility with the jury was a reasonable strategic decision, particularly in light of the horrendous evidence introduced in this case against Wade.

Each of Wade's IAC claims as to the penalty phase was properly denied by the trial court.

ISSUE III: IAC DURING JURY SELECTION

The trial court found no support in the record for Wade's claim of ineffective assistance of counsel during jury selection and summarily denied the claim. Wade claims that trial counsel gave the jury the impression that they must vote for death if they found that the aggravators outweigh the mitigators. There is no indication of this in the record. No reasonable person could have gotten that impression from counsel's attempt to rehabilitate two prospective jurors. The claim that trial counsel failed to request additional preemptory strikes was

insufficient because Wade has not identified the jurors he would have struck if he had been granted additional strikes. Wade's claim that trial counsel should have exercised challenges to four jurors who did sit on the jury is likewise meritless. Wade provides no indication that these jurors were actually biased against him. No relief is warranted and the trial court's summary denial of relief should be affirmed.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

Wade alleges that the trial court erred in denying his claim that trial counsel was ineffective at the guilt phase. This issue was initially referred to as claim 2 in Defendant's Renumbered Copy of Original Amended Motion to Vacate Judgments of Conviction and Sentence. (PCR 3/494-75). A number of sub-claims were included under the title of claim 2. The trial court denied claim 2 and all sub-claims after an evidentiary hearing. Only the sub-claims raised in this appeal are discussed herein.

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. *Mungin v. State*, 932 So. 2d 986, 998 (Fla. 2006). In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish two general components: 1)counsel's performance was deficient, and 2) the deficient

performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984)

As to the deficiency prong, the defendant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. The defendant must establish that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. 466 U.S. at 687.

Regarding the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

There is a strong presumption that counsel's performance was adequate. *Id.* at 690. The defendant bears the heavy burden of proving that counsel's representation was unreasonable under prevailing professional standards, was not a matter of sound trial strategy, and that prejudice resulted. *Id.*

A fair assessment of an attorney's performance requires the reviewing court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 689. Judicial scrutiny of attorney performance must be highly deferential. *Id.* It is all too tempting for a defendant to second-guess counsel's assistance after a conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Id.*

Both prongs of the *Strickland* test present mixed questions of law and fact. In reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing the postconviction court's application of the law to the facts de novo. *Mungin v. State,* 932 So. 2d 986, 998 (Fla. 2006).

A court considering a claim of ineffectiveness assistance of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice

component is not satisfied. *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted).

The Sumners' car keys and Wade's cell phone

A week after the murders of Reggie and Carol Sumner, Wade was located by law enforcement in room 302 at a Best Western in Charleston, South Carolina. (ROA XI/627-28). That room had been rented by Tiffany Cole. (ROA XI/626-27). A search warrant for room 302 was obtained and executed. (ROA XI/630-31; PCR 9/1675; Evidentiary Hearing Exhibit 11). In room 302, law enforcement found the keys to the Sumners' Lincoln Town Car and a cell phone containing the phone numbers of the codefendants. (ROA XI/631). Wade claims that trial counsel rendered ineffective assistance because no motion was made to suppress the phone and the keys from evidence. This claim was denied after an evidentiary hearing. (PCR 5/955-56).

The trial court denied relief because neither the argument in Wade's motion, nor the evidence introduced at the evidentiary hearing, provided any factual or legal support for this claim. (PCR 5/955). The trial court found no deficient performance for three reasons: 1) there was nothing invalid about the warrant and nothing inappropriate about counsel's not seeking to suppress the evidence found, 2) nothing found as a result of the search was inconsistent with the defense strategy of framing codefendants Jackson and Cole as the murderers, and (3) even if

the search warrant was invalid, the keys and telephone seized from room 302 would have been admissible pursuant to the inevitable discovery rule. (PCR 5/956).

In rejecting the claim of insufficient probable cause, the trial court reviewed the warrant and the attached probable cause affidavit and concluded that there was ample probable cause detailed in the affidavit to support the issuance of the warrant. *Id.* If a motion to suppress had been filed, the trial court would have reviewed the sufficiency of the probable cause with great deference to the issuing court. *Flowers v. State*, 15 So. 3d 886 (Fla. 4th DCA 2009). A motion to suppress based on insufficient probable cause would have been denied.

The trial court also noted that the matter of this very same search warrant has already been addressed by the Florida Supreme Court in Jackson's direct appeal. *Jackson v. State*, 18 So. 3d 1016, 1027-29 (Fla. 2009). The same search warrant also authorized the search of room 312, where Jackson and Cole were located. Although Wade suggests a different argument as to why trial counsel should have filed a motion to suppress in his case, the trial court determined that the results are the same. (PCR 5/956).

At the time the search warrant was obtained, the police had sufficient probable cause to support the warrant. The Sumners had not been seen or heard from in several days and foul

play was suspected in their disappearance. (Evidentiary Hearing Exhibit 11, PCR 4/653; *see also* ROA X/520-577). Their Lincoln Town Car had been found abandoned in a wooded area approximately 45 miles from their home, and shovels and duct tape were found in the vehicle. *Id.*

Police knew that the Sumners' ATM card had been used subsequent to their disappearance.[3] Video footage was obtained from the ATMs where the victims' card had been used. ROA X/525). The video footage showed a white male exiting a Silver Mazda RX-8 and using the victims' card to access an ATM. (ROA X/525-27). Police also knew that Tiffany Cole had rented a silver Mazda RX-8, and that she had failed to return the vehicle to the rental agency at the time specified in the rental contract. (ROA X/556-57). GPS records from the Mazda RX-8 revealed that the vehicle had recently been near the location where the Sumners' Town Car was dumped. (Evidentiary Hearing Exhibit 11, PCR 4/653, ROA X/558).

The police located Tiffany Cole's brother in Charleston. (ROA XI/625). Cole's brother advised the police that Cole was at the Best Western and took police to the motel. *Id.* Cole's Chevrolet Lumina was parked at the motel when they arrived. (ROA

[3]David Meacham was able to track the use of the ATM card from Florida through Georgia and to South Carolina. (ROA X/529).

XI/626). Cole was located in room 312 in the company of Michael Jackson, who appeared to be the same man caught on video using the victims' ATM card. (Evidentiary Hearing Exhibit 11, PCR 4/653, ROA XII/828-33).

The facts stated above were known to law enforcement at the time they applied for the search warrant for rooms 302 (rented by Cole and occupied by Wade) and 312 (rented by Cole and occupied by Jackson and Cole). These facts were sworn to and detailed by Detective James Rowan in the probable cause affidavit attached to the search warrant. (Evidentiary Hearing Exhibit 11). The affidavit also included Detective Rowan's sworn statement that law enforcement had reason to believe that Cole and her accomplices (i.e., Wade and Jackson) may have caused harm to the victims, that they had been using the victims' financial resources without permission, and that there may be evidence of these crimes under the control of Cole and her accomplices within rooms 302 and 312. *Id.*

Law enforcement located many items belonging to the Sumners in room 312. (ROA XI/633-34). The only two relevant pieces of evidence found in room 302 were the keys to the Sumners' Lincoln and a cell phone containing the phone numbers of codefendants Nixon and Jackson. (ROA XI/631-32).

Wade contends that the warrant for room 302 was invalid because the warrant affidavit did not include the fact that Wade

was alone in room 302 when police arrived, that the police knew it was Jackson using the Sumners' ATM card, or that Jackson and Cole had been located in room 312. (IB 43). Wade claims that the affidavit violated the holding of *Franks v. Delaware*, 438 U.S. 154 (1978). *Franks* deals with false statements included in a warrant affidavit and the sufficiency of the remaining content of the warrant, absent the false statements.

Franks holds that if the affiant knowingly and intentionally, or with reckless disregard for the truth, includes a false statement in a search warrant affidavit, and, without the false statement, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of search excluded to the same extent as if probable cause was lacking on the face of the affidavit. 438 U.S. 154 (1978).

Wade does not allege that the warrant affidavit contained false statements; he alleges that it omitted information. Thus, *Franks* is not applicable here. The warrant affidavit clearly established probable cause for the search in spite of any "omissions."

The inclusion of the omitted information in the affidavit would not have defeated probable cause as Wade suggests. (IB 43). In fact, just the opposite is true. It makes no difference that Wade was in room 302 and Jackson and Cole were in 312 when

law enforcement arrived at the motel. Both rooms were rented by Tiffany Cole, and it was apparent that Wade, a Florida resident, was travelling with Jackson and Cole. The fact that Jackson was on video using the victims' ATM card did not defeat probable cause for the search either; it gave rise to probable cause to believe that the trio was still actively involved in ongoing crimes against the Sumners.

The warrant affidavit was more than sufficient to establish probable cause with or without the omitted facts. A motion to suppress would have been meritless. The competent, substantial evidence relied on by the trial court was the warrant affidavit itself, which was supported by the testimony at trial. Counsel is not ineffective for failing to file a meritless motion. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999).

Even assuming arguendo that the probable cause affidavit was insufficient, the trial court still would have denied a motion to suppress, because the phone and keys would have been subject to the inevitable discovery rule. (PCR 5/956). At the time the warrant was issued, the police had substantial information that linked Jackson and Cole to the Sumners' disappearance. There can be no dispute that law enforcement had far more evidence than would have been required to secure a warrant for room 312. When police searched room 312, they found an $8,000 check made out to Alan Wade from Reggie Sumner's

checking account. *Id.* Many other items belonging to the Sumners were also found: their mail, their driver's licenses, their bank statements, and their checkbook. (ROA XI/633-34). Their ATM card was found in Jackson's pocket. (ROA XI/634-35). Law enforcement also obtained and executed a search warrant for Cole's Lumina. (ROA XI/630). Inside the Lumina was a strongbox containing antique, "collector-type" coins that belonged to the Sumners. (ROA XI/634).

Wade's presence in a room rented by Cole, coupled with the evidence in Jackson and Cole's room linking them both to Wade and to the Sumners' disappearance, would have provided even more probable cause to support the warrant for room 302. Therefore, the trial court correctly determined that the keys and cell phone would have been discovered and admissible even if the initial warrant for room 302 had been rejected. (PCR 5/956).

There is no prejudice to Wade because a motion to suppress would have been denied, and because there is no reasonable probability that the outcome of the trial would have been different even the keys and phone were excluded from evidence. The impact of the keys and cell phone were minimal, and their presence in room 302 could easily be explained.

It was not incriminating that Wade had his codefendant's phone numbers in his phone. There was no hiding the fact that Wade was friends with, and communicated with, Nixon and Jackson;

everyone knew that. (PCR 9/1679). As trial counsel pointed out in his closing argument, the keys could have simply been left in Wade's room by Jackson or Cole. (ROA XIII/1075). Also, the keys were not contrary or antagonistic to the theory of defense. (PCR 9/1680).

There was substantial evidence of Wade's guilt presented at trial, aside from the keys and phone. There was direct evidence from Bruce Nixon that Wade was directly involved in the murders. Wade even recruited Nixon to participate in the murders. (ROA XII/882-85). It was Wade and Jackson who actually carried out the murders by placing the Sumners in a pre-dug hole in the ground and throwing shovelful after shovelful of dirt on them until they were buried alive. (ROA XII/912). After the murders, Wade travelled with Jackson and Cole to South Carolina where the trio was located lodging together. (ROA XI/628). There was video of Wade and the codefendants shopping before the murders for disposable rubber gloves, duct tape, plastic wrap, and a toy gun, and after the murders for bleach and gloves. (ROA XII/828-33). There was also the check made out to Wade on the Sumners' account (ROA XII/836-37), and Wade's fingerprint on one of the Sumners' magazines (ROA XI/749). In light of all the evidence linking Wade to the murders, there is no reasonable probability that the result of the proceeding would have been different if the keys and phone were not in evidence.

Wade has not demonstrated ineffective assistance of counsel under *Strickland*, and there is competent, substantial evidence to support the denial of relief as to this sub-claim.

Recording of Jackson and Cole posing as the Sumners

The statements at issue in this sub-claim were the subject of a recorded phone conversation that Detective Meacham had with Jackson and Cole. (ROA X/532-53). Detective Meacham was the lead officer from the Jacksonville Sheriff's Office Homicide Unit investigating the Sumners' disappearance. (ROA X/522). Foul play was suspected because the Sumners' appeared to have left home without telling anyone that they were leaving, without taking their necessary medications, and without arranging care for their dog, who was found alone in the home. (ROA X/522-23). Detective Meacham also discovered that there had been an unusually large number of ATM withdrawals on the Sumners' bank account in the days following their disappearance. (ROA X/524). The ATM card had been used in various places in Florida, then Georgia, and finally South Carolina. (ROA X/525). Videos from various ATMs showed that the withdrawals were made by a white male in his twenties. (ROA X/525).

The same evening that the Sumners' car was discovered in a wooded area with four shovels in the trunk, Detective Meacham was notified by dispatch that the Sheriff's Office had received phone calls from an individual identifying himself as James

(a.k.a Reggie) Sumner. (ROA X/531). The caller left a callback number. (ROA X/532). Detective Meacham called the number back and recorded the call. (ROA X/532-53).

During the call, Jackson and Cole posed as Reggie and Carol Sumner. *Id.* They told Detective Meacham that they were not missing persons. *Id.* They claimed that Carol's sister had passed away and they were attending the funeral in Delaware. *Id.* Jackson even sought advice from the Detective on how to lift the "freeze" that had been placed on the Sumners' accounts pending the investigation into their disappearance. *Id.*

The State introduced the recording of the phone call at trial without objection. (State's Trial Exhibit 23). Wade argues that trial counsel was ineffective for failing to object to the introduction of the phone call, and that the trial court erred in denying him postconviction relief on this claim.

After the evidentiary hearing, the trial court concluded that Wade failed "to advance a legal proposition wherein such an objection would have been sustained." (PCR 5/958). "There was no legal basis to interpose such an objection, and it would have been inappropriate for trial counsel to so object." *Id.*

The phone call was unquestionably relevant to link the callers to the murders. The callers and Wade were located together in South Carolina after the murders, and they were in possession of the Sumners' property. Bruce Nixon testified that

all four of the codefendants were involved in the planning and execution of the murders. (ROA XII/882). Evidence of the actions of all four codefendants before, during, and after the robbery, kidnapping, and murders was relevant and admissible evidence.

Wade makes an argument that the only possible legal basis for the admission of the phone call, would have been under section 90.803(18)(e), Florida Statutes, as a statement of a coconspirator. (IB 46). Although Wade suggests that section 803(18)(e) is a *possible* legal basis for an objection, he then goes on to explain that this section is inapplicable under the facts here because the phone call was made after the robbery, kidnapping, and murders, and therefore the conspiracy had ended by the time the phone call was made. *Id.*

Wade claims that trial counsel must not have understood the law because he did not object to the inadmissibility of the phone call under section 90.803(18)(e), and therefore his strategic decision not to object was not reasonable. This is a creative argument, but Wade provides no support for his proposition that it is unreasonable for counsel to decline to make a meritless objection.

Appellant's mention of section 90.803(18)(e) as a potential theory for admissibility shows the illogicality of this argument. Section 90.803(18)(e) provides for the admission of evidence, not its exclusion.

Section 90.803 is a listing of exceptions to the hearsay rule. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Section 90.801, Fla. Stat. The phone call was not hearsay. The entire phone call was a fraud and was not used to prove the truth of its content. It was not used to prove that Reggie and Carol Sumner were still alive on July 12, 2005. It was not used to prove that Carol's sister in Delaware had passed away or that the Sumners' dog and cat were both named Michael. Its purpose was to show that Wade's codefendants and travel companions posed as the murder victims and attempted to thwart the investigation.

This Court has recognized that a statement may "be offered to prove a variety of things besides its truth." *Foster v. State,* 778 So. 2d 906, 914–15 (Fla. 2000). When a statement is not offered for the truth of its contents, it is not hearsay. *Id.* at 915. Introduction of the phone call was a non-hearsay use of an out of court statement.

The phone call was relevant to show that the codefendants were involved in the murders. It showed that they were still involved in ongoing crimes against the Sumners, even after they had travelled to South Carolina with Wade. Relevant evidence is admissible. Section 90.402, Fla. Stat. Contrary to Wade's assertion that there was only one potential legal basis for

admission of the phone call, there was actually no legal basis for exclusion. Wade's mention of a hearsay exception as the only theory of admissibility confuses the issue because the phone call was not hearsay.

It was also a reasonable strategic decision not to object to the phone call. Mr. Eler testified that the more the names Jackson and Cole were mentioned, the better. (PCR 9/1633, 1638). He wanted to show how much Jackson and Cole were involved, and how little Wade was involved. (PCR 9/1638). Mr. Eler considered objecting to the phone call, but ultimately decided not to object because the phone call was consistent with the defense theory that "these two manipulative people have sucked Alan Wade into this, mak[ing] him a minor player as opposed to a major player." (PCR 10/1685-86). Reasonable strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Howell v. State*, 877 So. 2d 697, 703 (Fla. 2004).

Trial counsel could do nothing about evidence linking Wade to the murders, such as his presence in the motel room rented by Cole, his fingerprint found on a piece of the Sumners' mail, or the video of Wade shopping with his codefendants before and after the murders for rubber gloves, duct tape, plastic wrap, bleach and a toy gun. The only reasonable strategy was to argue

that although Wade may have been hanging out with Jackson and Cole near the time of the murders, he was only brought into the conspiracy after the murders.

Mr. Eler has over 26 years of experience in the practice of criminal law. (PCR 9/1627). He has been a criminal defense attorney for 23 years. *Id.* He handled more than a dozen other capital cases before Wade's trial. *Id.* at 1628. At the time of the evidentiary hearing and as of this filing, Mr. Eler is the Chief Assistant Public Defender for the 4th Judicial Circuit. *Id.* at 1627.

When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger. *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000) (noting defense counsel's extensive experience as a trial lawyer where counsel had 13 years experience and had tried more than thirty homicide cases, most of which were capital cases).

Mr. Eler used his experience to develop a reasonable strategy for Wade's defense, and the phone call advanced the defense theory significantly. (PCR 5/958-9). Wade has not overcome the strong presumption that the strategy was reasonable. He not met his burden to show that counsel's performance was deficient. The trial court properly determined that the decision not to object to evidence that implicated the

codefendants was a reasonable strategy.

Wade does not argue in his initial brief how he believes he was prejudiced by counsel's failure to object to the phone call. In his motion for postconviction relief, he made only a conclusory allegation of prejudice. There is no reasonable probability of a different outcome if counsel had objected. Any objection would have been overruled, and the existence of other substantial evidence against Wade would have resulted in a conviction even without the phone call. Wade has not sufficiently alleged or established prejudice. Denial of relief was proper as to this sub-claim.

Evidence from codefendants' motel room

The search warrant in this case provided for the searches of rooms 302 and 312 at the Best Western. Room 312 was rented by Cole and occupied by Jackson and Cole. Found in room 312 were: items purchased on a shopping spree with the victims' money (sport jerseys, sneakers, jewelry, a watch), a suitcase full of the Sumners' paperwork, the Sumners' mail, the Sumners' wallets, items indicative of a party-like atmosphere, items missing from the Sumners' home, the Sumners' bank records, and a check for $8,000 made out to Alan Wade to be drawn on the Sumners' bank account. (ROA XI/632-38, PCR 3/513).

Wade argues that the trial court erred in denying his claim that trial counsel was ineffective for failing to object to the

admission into evidence of the items seized from room 312. Wade acknowledges these items were relevant to show that someone took the items from the Sumners' home, but he argues that they were not relevant to prove that Wade committed the charged crimes. (IB 47).

The trial court found that the evidence seized from room 312, including the check made out to Wade, was relevant to link Wade to the murders. (PCR 5/959). The trial court therefore determined that the evidence was clearly admissible and any objection by trial counsel would have been without basis and inappropriate. *Id.*

The defense strategy was to show that Jackson and Cole were the real perpetrators, and that Wade was not involved with the murders, kidnapping or burglary. (PCR 9/1632-1633). Admission of these items into evidence fit into the defense strategy and aided in showing the jury how much Jackson and Cole were involved and how little Wade was involved. (PCR 9/1637-38). Trial counsel testified that the $8,000 check supported the theory that Wade was paid to get rid of evidence, and was just an accessory after the fact. (PCR 10/1689). For this reason, he did not object evidence that showed that Jackson and Cole were more culpable than Wade. (PCR 9/1638).

The trial court agreed that the weight and number of items discovered in the room occupied by Jackson and Cole gave the

impression that they were much more involved than Wade, and that was consistent with the defense theory. (PCR 5/959). Trial counsel made a reasonable tactical decision not to object.

There is no prejudice in the failure to object to the items founds in room 312 since any objection to this evidence would have been overruled. Wade failed to show that there is a reasonable probability that the outcome of the proceedings would have been different if trial counsel had performed as Wade alleges he should have. The trial court's order denying relief as to this sub-claim should be affirmed.

Still images of Jackson using victims' ATM card

Wade next argues that the trial court erred in denying his claim that trial counsel was ineffective for failing to object to the introduction of still images of Jackson using the Sumners' ATM card to make withdrawals from their account. (State's Trial Exhibits 19, 20, 22; ROA X/525-30). Wade acknowledges that this evidence was relevant to show the actions of codefendant Jackson, but contends that it was not relevant to show the culpability of Wade. (IB 49). Wade argues on appeal that the trial court erred in "fail[ing] to consider [that] there was no competent proof linking Defendant Wade to Jackson's actions." (IB 50).

The trial court ruled that this claim was without merit. The photos were clearly relevant to the State's case. (PCR

5/959-60). They demonstrated the timeline the defendants followed, the vehicle they used, and that there was a pecuniary interest in the crimes. *Id.* Additionally, the photos were consistent with Wade's theory that Jackson was the leader in carrying out the crimes against the Sumners. *Id.*

Trial counsel did not object to evidence that inculpated Jackson and Cole because such evidence aided the defense strategy theory. (PCR 9/1638). The trial record supports Mr. Eler's assertion that he did not object to the photos in order to use them to point to Jackson's guilt and draw the focus away from Wade. Mr. Eler took the opportunity in his cross examination of Detective Meacham and Detective Rowan to point out that these were pictures of only Jackson using the ATM card, and that there were no photographs of Wade doing the same. (ROA X/565, ROA XI/642).

As previously noted, trial counsel was not ineffective in exercising a reasonable strategic decision not to object to the admission of evidence consistent with the defense theory of the case. Whether there was "competent proof" linking Wade to Jackson's actions or not is irrelevant to the IAC claim. Trial counsel did not object to the photos because they were helpful to Wade's defense. Wade has not overcome the strong presumption that the strategy was reasonable under the circumstances.

In addition to the fact that any objection would have been

overruled, there is no reasonable probability of a different outcome if the photos had not been admitted. There was substantial evidence against Wade without the photos of Jackson using the victims' ATM card. Trial counsel was not ineffective for declining to object to this evidence, and the trial court did not err in denying relief.

Frieda Ganey's Testimony

Wade's mother, Frieda Ganey, was called by the prosecution to testify at the guilt phase to explain the relationship between Wade, Jackson, and Nixon. She testified that Wade was about 16 years old when he met the very manipulative Jackson. (ROA X/505-06). Nixon and Wade were childhood friends. (ROA X/504-05). Her testimony linked Wade to Nixon and Jackson near the time of the murders. (ROA X/510-13).

Improper Character Testimony

Wade claim that he received ineffective assistance of counsel because no objection was made to improper character testimony given by Ms. Ganey. (ROA X/503-514). Following the evidentiary hearing on this claim, the trial court found that Ms. Ganey's testimony was relevant and admissible in the State's case against Wade. (PCR 5/960). Trial counsel's decision not to object was not ineffective or inappropriate. *Id.* Rather, the decision not to object was a reasonable trial strategy, consistent with the theory of defense. *Id.*

Trial counsel's strategy was to show that Jackson manipulated Wade into the conspiracy after the murders, not before. Ms. Ganey's testimony that Wade was vulnerable to Jackson's influence because Wade was using drugs, he had been thrown out of the house, and because Jackson was older than Wade, was perfectly consistent with the defense strategy.

Ms. Ganey's testimony was also very helpful for mitigation purposes. (PCR 10/1692). It was consistent with the penalty phase theme that Wade was under the influence of drugs and alcohol at the time of the murders. As a whole, Ms. Ganey's testimony was helpful to Wade. Mr. Eler even wondered why the State had called her as a witness, given that she placed Jackson in the role of the manipulator. (PCR 9/1639). Penalty phase counsel Frank Tassone also testified that it helped the defense credibility to elicit the same testimony in the penalty phase that the State had elicited at the guilt phase. (PCR 7/1274).

Mr. Eler did consider objecting to parts of Ms. Ganey's testimony, but ultimately decided that any benefit of an objection would be outweighed by the sympathy the defense would get (PCR 10/1696) as a result of the prosecution "beating up" on Wade's innocent mother (PCR 9/1639). Because Ms. Ganey's testimony supported the defense theory, counsel's decision not to object was a reasonable trial strategy.

Wade also failed to demonstrate prejudice here. In light of

the strong evidence against Wade, there is no reasonable probably that the jury would have found Wade not guilty but for the alleged "improper character testimony."

Impeachment

Wade also argues that counsel should have objected to Ms. Ganey's testimony because she was called for the sole purpose of impeachment though Detective Gupton.

Prior to the trial, Ms. Ganey called Detective Gupton and told him that Wade had confessed to her that Jackson was going to give him and Nixon $40,000 for committing the murders. (ROA X/518-19). Although this statement was made during a recorded phone call, Ms. Ganey denied any memory of it or any other conversations with the Detective. (ROA X/512). At trial she denied that Wade ever spoke to her about the crimes or that he told her that Jackson was going to pay him for his participation in the murders. *Id.* Although she claimed not to remember the conversation with Detection Gupton, she also said that she would not have lied to him. *Id.* Detective Gupton testified after Ms. Ganey, and the recording of the phone call in which Ms. Ganey advised that Wade was promised $40,000 by Jackson was admitted into evidence without objection. (ROA X/518; State's Exhibit 178).

Wade claims that the trial court failed to address the impeachment of Ms. Ganey. (IB 52). It is clear that the trial

court found that Ms. Ganey's testimony was otherwise relevant and admissible (PCR 5/960), and therefore she was not called for the sole purpose of impeachment.

A witness who testifies to establish any significant fact in the litigation may be impeached by means of a prior inconsistent statement as to any other matter testified to. *Hernandez v. State*, 31 So. 3d 873, 879 (Fla. 4th DCA 2010) (citations omitted). The primary purpose of Ms. Ganey's testimony was to explain the relationship between Wade and Jackson and Nixon, and that they were together near the time of the murders. (ROA X/510). She also testified relevantly that Wade did not have a job and or any means to support himself at the time of the murders. (ROA X/509).

Ms. Ganey was not called for the sole purpose of impeachment. An objection on that ground would have been overruled. Counsel was not ineffective for failing to make a meritless objection. Wade has not demonstrated prejudice here. In light of the strong evidence against him, there is no reasonable probably that the jury would have found Wade not guilty, but for the alleged improper impeachment of Ms. Ganey. The trial court's order denying relief as to Ms. Ganey's testimony was proper and should be affirmed.

Testimony of Law Enforcement Officers

Wade next argues that the trial court erred in denying his

claim that trial counsel was ineffective for failing to object to "much of" the testimony of Detective Meacham, Detective Rowan, and Agent Alred. (IB 55-62). Wade claims that much of the testimony of these witnesses constituted improper hearsay and improper opinion. *Id.*

In its order denying postconviction relief, the trial court noted that virtually all of the evidence introduced through Detective Rowan, Detective Meacham, and Agent Alred was relevant to the State's prosecution. (PCR 5/961). Almost none of it was hearsay because it was not offered to prove the truth of the matter asserted. *Id.* The trial court also found that the bulk of the testimony offered by these witnesses supported the defense theory of the case. *Id.* Their testimony as a whole implicated Jackson and Cole in the murders and was consistent with the theory that Wade was not involved until after the murders. *Id.* Wade failed to meet his burden to show that the performance of trial counsel was deficient.

The trial court correctly determined that the testimony Wade identified as inadmissible hearsay was not actually hearsay, because it was not offered for its truth. For example, much of the testimony of the officers was used to show how law enforcement located the killers. Additionally, some of the evidence introduced through these three law enforcement witnesses was not hearsay for other reasons, e.g. business

records exception, statements generated by a machine, as opposed to human generated statements made by a declarant, *see e.g.*, *Bowe v. State*, 785 So. 2d 531 (Fla. 4th DCA 2001) (numbers on caller ID and pager display not hearsay because they were generated by a machine, not a person capable of being a "declarant" within the definition of the hearsay rule).

Many of the statements were readily admissible through other witnesses. Even if some hearsay statements were admitted through the officers, an objection would have been futile since the State could have called other witnesses (record custodians, etc.) to offer the same testimony.

Wade specifically addresses testimony given by Deputy United States Marshal David Alred regarding his job description and his knowledge of cellular technology. (IB 61-62). Wade mistakenly asserts that Agent Alred testified that he arrested Wade after stating that his job was to "arrest and locate" fugitives. (ROA X/591). Agent Alred did not testify that he arrested Wade, but he did testify factually that his job is to "arrest and locate fugitives." *Id.* The U.S. Marshal Service is the managing agency of the fugitive task force in Northeast Florida. *Id.* Wade does not provide a basis for an objection to this testimony. He does not explain how counsel's performance was deficient nor does he indicate how he was prejudiced by this testimony. Conclusory allegations cannot be the basis of a

finding that counsel was ineffective. *Randolph v. State*, 853 So. 2d 1051, 1055 n.3 (Fla. 2003) (conclusory allegations rendered several of Randolph's post-conviction claims insufficiently pled).

Wade's argument that counsel was ineffective for failing to object to Agent Alred's testimony regarding cellular towers was also properly rejected by the trial court. A review of the record demonstrates that Agent Alred explained that the Marshal Service is one of the leading agencies to use training and experience to exploit technical information pertaining to cellular phones. (ROA X/591). Agent Alred also testified that through the course of his work he has developed contact with various cell phone providers. *Id.* It is clear from the record that Agent Alred does have training and experience in cell phone technology. An objection to his testimony regarding cell phone towers would have been baseless. Counsel was not deficient for failing to make a baseless objection.

Even if trial counsel had performed as Wade alleges he should have, Wade cannot show that there is a reasonable probability of a different outcome. The objections would have been overruled. Even if sustainable objections had been made, the State would have been able to admit the evidence through other witnesses. The trial court's order denying relief as to this sub-claim should be affirmed.

Attorney-Client Relationship

On appeal, the IAC claim regarding Wade's relationship with his attorneys is addressed in the initial brief only under the heading of "Statement of the Facts." (IB 19-21). Wade simply restates part of the argument he made below and does not the reasoning for his claim that the trial court erred in denying relief. As such, the attorney-client relationship is not raised as an issue or sufficiently briefed, and it should not be considered here. To merely refer to arguments presented during the postconviction proceedings without further elucidation is not sufficient to preserve issues, and these claims are deemed to have been waived. *Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008). Should the Court decide to consider this claim, the State's response is as follows.

In *Downs v. State,* 453 So. 2d 1102, 1104-05 (Fla. 1984), this Court explained that a defendant seeking to present a claim of ineffective assistance of counsel must (1) identify a specific omission or overt act upon which the claim is based, (2) demonstrate that the omission or act was a substantial deficiency falling measurably below that of competent counsel, and (3) demonstrate that the deficiency probably affected the outcome of the proceedings. The only allegation Wade makes in his initial brief is that his attorneys did not visit him enough at the jail. Wade does not explain how he was prejudiced by the

number of jail visits he received. Denial of relief was proper based on Wade's failure to allege prejudice. *See Tanzi v. State*, 94 So. 3d 482, 494 (Fla. 2012) (postconviction relief properly denied relief where prejudice was not sufficiently alleged).

The trial court rejected Wade's claim that trial counsel only met with him for a total of one hour in the two and a half years leading up to trial. (PCR 5/965). The court made findings that both attorneys met with Wade at the jail on numerous occasions. *Id.* There were even one or two occasions where Wade refused to come out of his cell to meet with his attorney. *Id.* The attorneys also consulted with Wade at each of the approximately 20 to 30 pretrial conferences. *Id.* Time was allowed at the pretrial conferences for Wade and his attorneys to meet and confer either in the courtroom, *id.*, or behind closed doors in the jury room (PCR 10/1738).

Wade claims that Mr. Eler testified at the evidentiary hearing that there are problems if the lead attorney spends "too much time holding the client's hand." (IB 20) (*citing* PCR 9/1641). That phrasing was not Mr. Eler's testimony but part of a compound question posed by collateral counsel. Mr. Eler did not indicate that he agreed with that statement. His response to the question focused on the first part of the compound question.

Contrary to his current claim, Wade overtly expressed his satisfaction with counsel on the record both prior to and during

trial. Prior to jury selection the trial court inquired of Wade:

> THE COURT: Mr. Wade, are you satisfied at this point, also [with the representation of counsel]?
>
> THE DEFENDANT: I didn't have anything to compare it to, so I guess –
>
> THE COURT: I understand. I understand. So as far as you know Mr. Eler's done everything that you wanted him to do?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: To this point has he done anything that you didn't want him to do?
>
> THE DEFENDANT: No, sir.

(ROA VIII/9-10).

The trial court conducted another colloquy with Wade prior to the presentation of the defense case at the guilt phase:

> THE COURT: To this point, Mr. Wade, are you satisfied with the representation that Mr. Eler and Mr. Tassone have given you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have they done anything you didn't want them to do?
>
> THE DEFENDANT: Not lately.
>
> THE COURT: Have they done everything you wanted them to do so far?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Other than the two witnesses that are going to be called, are there any witnesses that you want them to call that they're not going to or are you comfortable with their decisions and recommendations to you about who to testify and who should not

testify?

THE DEFENDANT: Yes, sir.

(ROA XII/994-95).

It would seem that Wade's satisfaction with his attorneys changed when he was convicted and sentenced to death. His allegation that he had inadequate interviews and insufficient communication with his attorneys is overly broad. *Strickland* requires only a review of the results of the relationship, and not particularly its quality.

Wade failed to meet his burden regarding either prong of *Strickland*. He has not identified any particular actions that should have been taken, nor has he alleged how the "inadequate" relationship prejudiced him. In fact, there can be no prejudice because Wade has never established any nexus between his relationship with counsel and the probability of a different outcome. The trial court properly denied relief.

ISSUE II

THE TRIAL COURT PROPERLY DENIED WADE'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Wade claims that penalty phase counsel was ineffective for failing to properly investigate potential mitigation and for conceding the pecuniary gain and HAC aggravators. This issue was numbered claim 3 in Defendant's Renumbered Copy of Original Amended Motion to Vacate Judgments of Conviction and Sentence. (PCR 3/494-75). A number of sub-claims were included under the

heading of claim 3. The trial court properly denied claim 3 and all sub-claims after an evidentiary hearing. Only the sub-claims raised on appeal are discussed herein.

Standard of Review

As discussed in Issue I, *supra*, this Court reviews claims of ineffective assistance of counsel de novo. *Mungin v. State,* 932 So. 2d 986, 998 (Fla. 2006). To prevail on a claim of ineffective assistance of counsel, a defendant must establish both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984).

To establish deficient performance, a defendant must show that the acts or omissions of the lawyer were outside the broad range of reasonably competent performance and so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687.

Establishing prejudice at the penalty phase requires a showing that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of the aggravating and mitigating circumstances would have been different. *Occhicone v. State,* 768 So. 2d 1037 (Fla. 2000).

In analyzing Wade's penalty phase IAC claim, the trial court properly identified the applicable law and correctly applied the law to the facts as presented. The trial court

correctly concluded that Wade is not entitled to relief.

Mental Health Mitigation

Wade claims that trial counsel was ineffective for failing to have Wade examined in any "meaningful way" by a mental health expert to attempt to develop mitigation.

Guilt phase counsel Refik Eler and penalty phase counsel Frank Tassone both testified that, based on their own personal observations and experiences, they had no reason to believe that Wade was mentally unstable in any way. Mr. Tassone did not observe any indication that Wade had any mental defect or even a below-average I.Q. (PCR 8/1296). Despite the fact that there was no indication that Wade had mental health problems, Dr. Stephen Bloomfield was retained by the defense in pursuit of possible mental health mitigation. (PCR 8/1297). Mr. Tassone hoped that Dr. Bloomfield would be able to provide some mental health mitigation. (PCR 7/1096).

Dr. Bloomfield visited Wade at the jail on three occasions. (PCR 8/1461). During the second meeting, Dr. Bloomfield confirmed that Wade was competent. (8/1466). He also discussed Wade's history with him. (PCR 8/1468). Wade was reluctant. *Id.* During Dr. Bloomfield's third visit to the jail, Wade refused to participate in psychological testing. (PCR 8/1471). Dr. Bloomfield emphasized the importance of psychological testing, but Wade still refused to participate. (PCR 8/1759).

Dr. Bloomfield reported to Mr. Tassone that Wade was not interested in pursuing mental health mitigation. (PCR 8/1471). In Dr. Bloomfield's professional opinion, Wade made a knowing, intelligent, and voluntary decision not to assist him in preparing any mental health mitigation. (PCR 8/1482). Dr. Bloomfield advised Mr. Tassone that he was not able to provide any usable testimony at the penalty phase due to Wade's refusal to cooperate and submit to psychological testing. (PCR 8/1471).

Mr. Tassone had worked with Dr. Bloomfield for at least 10 to 15 years prior to this case (PCR 7/1096), and it was an unusual position for Dr. Bloomfield not to be able to provide any useful mental health mitigation (PCR 7/1110). Mr. Tassone also expressed to Wade the importance of being forthcoming with Dr. Bloomfield and providing him with all the necessary information, but Wade still was not forthcoming. (PCR 7/1097). The trial court found that Wade "patently refused" to provide information to Dr. Bloomfield. (PCR 5/965).

Collateral counsel retained Dr. Hyman Eisenstein to evaluate Wade and testify at the evidentiary hearing. Dr. Eisenstein spent about 15 hours conducting testing on Wade and about 5 hours interviewing him. (PCR 8/1390). Wade was 18 years old at the time of the murders, but he was 25 years old at the time he was interviewed and tested by Dr. Eisenstein. (PCR 8/1391). Although Wade was not cooperative with Dr. Bloomfield

in preparing for the penalty phase seven years earlier, he was cooperative with Dr. Eisenstein in preparing for his postconviction proceedings. (PCR 8/1407).

Dr. Eisenstein did not review the police reports, the trial transcript, Bruce Nixon's guilt phase or penalty phase testimony, or the trial testimony of the family members he interviewed in preparation for the collateral proceeding. (PCR 5/972). Wade was involuntarily committed under the Baker Act when he was in the sixth grade because he had threatened to commit suicide, but Dr. Eisenstein did not review the Baker Act paperwork, despite the fact that it was in collateral counsel's possession. (PCR 8/1430). Nonetheless, Dr. Eisenstein gave his opinion at the evidentiary hearing regarding Wade's mental state at the time of the murders seven years earlier. *Id.*

In its order denying relief as to this claim, the trial court summarized the testimony presented at the evidentiary hearing as to this issue:

> Guilt phase counsel Eler and penalty phase counsel Tassone both testified that, based on their own personal observations and experiences, they had no reason to believe that the Defendant was mentally unstable in any way. Mr. Tassone did testify, however, that he nevertheless retained Dr. Stephen Bloomfield to assist in the preparation of mental health mitigation materials.
>
> Dr. Bloomfield testified that he has on at least three (3) separate occasions attempted to establish a rapport with the Defendant to begin that mental health mitigation

evaluation but the Defendant refused to participate. According to his testimony the Defendant was not forthcoming even though [he was] told what Dr. Bloomfield's responsibilit[ies] were in defending the Defendant. Dr. Bloomfield's observation that the Defendant refused to participate is consistent with Mr. Eler's testimony that on a number of occasions when he attempted to speak with the Defendant the Defendant would not talk to him . . . .

. . .

As previously detailed in this order, the Defendant's recalcitrance and attitude effectively prohibited his attorneys and Dr. Bloomfield from developing mitigation information. He cannot now complain that his attorneys should have done a better job in offering mitigation evidence to the jury.

In further support of this claim the Defendant called Dr. Hyman Eisenstein, a clinical psychologist with a sub-specialty in neuropsychology. According to his testimony Dr. Eisenstein has testified as a mental health mitigation specialist in at least fifty (50) cases.

To prepare himself for his testimony Dr. Eisenstein reviewed the opinion of the Florida Supreme Court in this case. He received some school records including FCAT records, some mental health records from Gateway Community Services (a local mental health and substance abuse assistance agency), some juvenile records and the report of defense mitigation specialist Shreya Mandal. He also interviewed family members and an ex-girlfriend named Vanessa Wilkinson (who also testified at the evidentiary hearing). It should be noted that some of these witnesses testified at both the guilt and penalty phases of the trial.

Dr. Eisenstein testified that he administered approximately fifteen (15) hours of testing to the Defendant and spent approximately five (5) hours in personal contact with him. In sum, his testimony opines that the differences in some of the testing results tell him that the Defendant did not have a fully developed executive function to his brain and that he was not capable of conforming to the norm. At one point Dr. Eisenstein opined that the Defendant must have had attention deficit disorder because he was noted to have been a "class clown" in school and because he had a bad attendance record. He offered nothing further to support this contention.

[Dr. Eisenstein] also believes that the Defendant has mental shortcoming because a half-brother has Asperger's Syndrome, though he also failed to provide any support for that contention. He also failed to note that the half-brother's diagnosis of Asperger's was only recently made and not known to anyone at the time of the penalty phase in this trial. See Mrs. Ganey's testimony at EH p 278.

Dr. Eisenstein also concluded that the test he administered showed brain dysfunction and speculated that this might have been contributed to by the Defendant's playing the "choking game" testified to [by] Bruce Nixon and Vanessa Wilkinson. Nixon and Wilkinson testified that as a game the player would be choked to the point of blacking out but, according to Wilkinson, would immediately recover. Ms. Wilkinson also testified that she had no reason to believe that there was anything detrimental about the game as she had played the game herself and was quite healthy. This Court notes that both Nixon and Wilkinson were clearly articulate witnesses with virtually no indication of mental shortcomings.

. . .

> One wonders how Dr. Eisenstein could possibly testify to the Defendant's mental health seven (7) years after these crimes were committed. He even admitted during this testimony that some of the issues are "difficult to pinpoint" and were based on his deductions in light of the Defendant's mental stability today. If this witness were planning to testify about Defendant's mental health at the time of the crimes, one wonders why he did not ask to review police reports, a transcription of the trial, Nixon's guilt phase and penalty phase testimony, or the guilt and penalty phase testimony of those family members he interviewed for this collateral proceeding. Perhaps then he would have noted the conflict with the current information with which he was provided to support the Defendant's current mental mitigation claim.
>
> After having sat through both phases of the trial in this cause, having heard Dr. Eisenstein's evidentiary hearing testimony, and having re-read the transcript of his testimony on several occasions, the undersigned is drawn to the conclusion that this witness is less than credible.

(PCR 5/968-73).

Wade complains that a mental health expert was not utilized to discuss with the jury the adolescent brain, the lack of brain development at age 18, and the effects of this brain development on impulsivity. Dr. Bloomfield could have testified in general about the literature on young adult brain development or in response to hypotheticals. (PCR 8/1475). However, his testimony would have come with the caveat that it cannot truly be applied to Wade. (PCR 9/1484). The door would have been opened to questions as to why Dr. Bloomfield's testimony could not be

specifically applied to Wade. (PCR 9/1484). The jury certainly would have learned that Wade refused to cooperate with the doctor. *Id.*

Mr. Tassone testified regarding another one of the reasons he did not employ an expert to testify in general about young brains:

> What I was concerned about was the issue of impulsivity on a crime that spanned 24 or 36 or 48 hours because the planning of this wasn't just a five-minute or one-hour event, so impulsivity to me I didn't– the last thing I needed was the state to beat Mr. Wade over the head with what are you saying, that his brain wasn't developed and it was impulsive, then he had impulses for 36 or 48 hours or whatever the number of hours may be.

(PCR 7/1216).

Mr. Tassone has practiced criminal law for over 39 years. (PCR 7/1089). He was a prosecutor for the first 9 or 10 years of his career and then went into private practice, concentrating in criminal defense. *Id.* Mr. Tassone has experience handling first-degree murder cases as a prosecutor and as a defense attorney. *Id.* As of 2005, he had prosecuted approximately 8 to 10 capital cases and defended 20 to 25 capital cases. (PCR 7/1089-90). Mr. Tassone clearly qualifies as highly experienced capital defense counsel. This strengthens the presumption that his strategic decisions were reasonable. *See Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000).

It was unquestionably a reasonable strategic decision not to have Dr. Bloomfield, or any expert, testify in general or in hypotheticals at the penalty phase. If Mr. Tassone had opened the door to such damaging cross-examination, Wade would now be claiming that counsel was ineffective because he *did* call an expert. In addition, there is no reasonable probability that testimony about young brain development would have led to a different outcome. It is common knowledge that 18 year olds are typically poor decision makers. The jurors were all 18 at one time. Information from an expert about the shortcomings of the 18 year old brain would not likely have changed any of their votes. Also, the trial court was able to give great weight to Wade's age as a mitigating circumstance without hearing from an expert. (ROA V/844).

The trial court was correct in finding that Mr. Tassone used his experience and made a reasonable strategic decision that having Dr. Bloomfield testify in general or hypotheticals had the potential to do more harm than good for Wade.

Trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony. *Griffin v. State,* 866 So. 2d 1, 9 (Fla. 2003); *see also Reed v. State,* 875 So. 2d 415, 437 (Fla. 2004) ("An ineffective assistance claim does not arise from the

failure to present mitigation evidence where that evidence presents a double-edged sword."). If counsel pursued mental health mitigation and received unusable or unfavorable reports, the decision not to present the expert's findings does not constitute ineffective assistance of counsel." *Hodges v. State*, 885 So. 2d 338, 348 (Fla. 2004).

The suggestion that Wade may have brain trauma, and that trial counsel was ineffective for failing to present evidence of the possibility of brain trauma is without merit. There was no evidence of any brain trauma at the time of Wade's trial, and there is no evidence now. In preparing for the collateral proceedings, Dr. Eisenstein performed psychological testing on Wade. Dr. Eisenstein was asked if any of those test results yielded hard results as to whether Wade suffered brain trauma or brain injury. (PCR 8/1401). Dr. Eisenstein responded that there were "patterns of abnormality" demonstrated on several of the tests (PCR 8/1402), although there is no objective proof of any brain trauma (PCR 8/1433).

One of the tests administered by Dr. Eisenstein was the Wechsler Adult Intelligence Scale (WAIS), which is an I.Q. measure. (PCR 8/1402). Wade scored 98 on his verbal comprehension and 111 on "perceptional." *Id.* Dr. Eisenstein testified that "the difference between the highest score and the lowest score which was perceptual reasoning or the visual and

processing speed which means how fast he is capable of doing the task there was a difference of 111 to 89 which is a 22-point split." (PCR 8/1403).

Dr. Eisenstein testified that the "patterns of abnormality" he observed in the test results are, in layman's terms, that Wade's visual skills are better than his auditory skills. (PCR 8/1435). He sees better than he hears. *Id.* Dr. Eisenstein admitted that this scoring variation may have nothing to do with any brain trauma or alcohol use or "anything like that." *Id.*

Dr. Eisenstein also testified that Wade's visual skills allow him to process information he visually sees at an above average or very high level. *Id.* Dr. Eisenstein was asked if Wade saw dirt piling on top of Reggie and Carol Sumner, would he be able to process that information at a higher level than if he had heard about that happening? *Id.* Dr. Eisenstein said yes. *Id.*

Dr. Eisenstein also administered the T.O.V.A. (Test of Variable of Attention). (PCR 8/1408). According to Dr. Eisenstein, Wade's performance on the T.O.V.A. "suggests an attentional problem including attention deficit disorder." *Id.* Dr. Eisenstein believes that Wade's alcohol use and participation in the "choking game" may have exacerbated an unspecified and unsubstantiated underlying condition (PCR 8/1403), but there is no objective proof that Wade has ever suffered any brain damage or brain injuries. (PCR 8/1433). There

is evidence in the record however, to indicate Wade's brain is just fine.

Ms. Ganey testified that Wade tutored other inmates at the jail. (ROA XIV/1192). He scored almost 100% on the G.E.D. test. (ROA XIV/1191). He read over 80 books from the time of his arrest until the penalty phase. (ROA XIV/1191). Wade is "very bright" (ROA XIV/1197) and a "mathematical wizard" (ROA XIV/1189). Teresa Rhoden also said that Wade is intelligent. (ROA XIV/1226). Even Dr. Eisenstein admits that Wade has an average I.Q. (PCR 8/1435-36).

Unlike some of the cases cited by Wade in which counsel failed to present evidence of brain damage that was documented in medical records, here, as Dr. Eisenstein admitted, there is no proof or strong indication that Wade has brain damage. Dr. Eisenstein could only say that brain damage *could be* one explanation as to why Wade's visual skills are better than his verbal skills. (PCR 8/1433-34).

Even if Wade had established that he suffered from brain trauma, he could not establish that counsel was deficient for failing to discover it. Counsel attempted to uncover any mental health mitigation and any irregularities in Wade's brain by involving Dr. Bloomfield. Wade thwarted those attempts by knowingly refusing to be forthcoming with Dr. Bloomfield and refusing to engage in psychological testing.

Wade's argument that trial counsel should have presented the jury with a mental health expert to testify as Dr. Eisenstein did is problematic. First, we would have to assume that the results of the testing done by Dr. Eisenstein were valid. We would also have to assume that the results would have been the same when Wade was 18 as they were when he was 25. Second, we would have to assume that Wade would have cooperated with a mental health expert prior to his trial in 2007. We know that Wade refused to open up to Dr. Bloomfield and to engage in psychological testing prior to his trial, and there is nothing to suggest that Wade would have cooperated with a different mental health expert. Wade made it clear that he did not want to pursue any mental health mitigation or take part in any psychological testing. This Court has repeatedly recognized that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. *Henry v. State*, 937 So. 2d 563, 573 (Fla. 2006).

Counsel is not ineffective when the defendant thwarts counsel's efforts to seek mental health mitigation. *Spann v. State*, 985 So. 2d 1059, 1070 (Fla. 2008); *see also Gore v. State,* 784 So. 2d 418, 438 (Fla. 2001) (counsel not ineffective where defendant thwarted counsel's efforts to secure mitigating evidence by refusing to cooperate with or be examined by mental health experts). The fact that trial counsel did not retain an

additional expert to make yet another attempt to persuade Wade to partake in psychological testing is not conduct that falls outside the broad range of reasonably competent performance under prevailing professional standards. Defense counsel is not required to go expert shopping to be effective. *Dufour v. State*, 905 So. 2d 42, 55-59 (Fla. 2005).

Another problem with Wade's argument is that the trial court determined that Dr. Eisenstein is "less than credible." (PCR 5/973). The trial court opined that if Dr. Eisenstein had reviewed the discovery and trial transcripts, perhaps he would have noticed the conflict between the information contained therein and the information with which he was provided to support the Defendant's current claim. (PCR 5/972-73).

Even if another mental health expert was retained to provide penalty phase testimony like Dr. Eisenstein did at the evidentiary hearing, there is no reasonable probability of a different outcome given the lack of credibility of the testimony and the weakness of the asserted mitigation. This is especially true in light of the substantial and compelling aggravating factors proven in this case and the horrific circumstances of the murders.

As this Court stated in *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001):

> So long as [the trial court's] decisions are supported by competent, substantial

> evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. (Citations omitted).

If deference is properly given to the trial court's judgment that Dr. Eisenstein was not credible, there is no credible evidence that any mental health mitigation actually existed that was not before jury. Counsel cannot be deemed deficient for failing to investigate or present mitigation evidence unless the defendant establishes that mitigation exists. *Gore v. State,* 846 So. 2d 461, 469-70 (Fla. 2003).

Wade has not met his burden of establishing prejudice. He cannot show that there is a reasonable probability that presenting a witness like Dr. Eisenstein would have resulted in a different outcome. As the trial court stated, "[e]ven in the light most favorable to the Defendant, if all of the testimony offered at the evidentiary hearing had been presented to the jury, the jury was still confronted with the horrible facts of this case and the evidence supporting seven (7) separate aggravating circumstances." (PCR 5/979).

In this case, the most powerful of the seven aggravating factors proven were: (1) Wade was previously convicted of a capital felony-the contemporaneous murder of the other victim,

(2) the murder was committed in the course of a kidnapping, (3) the murder was especially heinous, atrocious, or cruel (HAC), (4) the murder was cold, calculated, and premeditated (CCP). These, and the three other aggravators, were balanced against the three statutory mitigating factors: age, substantial domination (although not clearly established), his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (although no direct evidence), and the non-statutory mitigating factors.

HAC and CCP are two of the weightiest of the aggravators. *Wade v. State*, 41 So. 3d 857, 879 (Fla. 2010); *Owen v. State*, 862 So. 2d 687, 703 (Fla. 2003). In *Bradley v. State,* 33 So. 3d 664, 680, this Court found no deficient performance and no prejudice from trial counsel's failure to present a mental health expert at the penalty phase. This Court explained that there was no reasonable probability that testimony from a mental health expert would have resulted in a lesser sentence in a case where there were four aggravating factors, including HAC and CCP. *Id.* at 680.

The trial court did not err is denying relief as to the claim that counsel was ineffective for failing to have Wade examined in a meaningful way in order to develop mental health mitigation. Wade failed to demonstrate both deficiency and

prejudice. Counsel attempted to obtain a meaningful evaluation and Wade thwarted those attempts. There is no prejudice because there Wade has not established that any unpresented mitigation actually exists. This Court should affirm the trial court's ruling denying relief.

Mitigation Expert

Wade's claim that the trial court erred in denying his claim that trial counsel was ineffective for failing to "utilize a mitigation expert to any meaningful extent" is nothing more than a regurgitation of his postconviction argument, and a conclusory statement that the trial court misapplied the facts to the law. (IB 84-85). This issue is insufficiently briefed, not preserved for review, and should be deemed waived. *See Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008). Should the Court consider this claim, the trial court's denial of relief should be affirmed for the following reasons.

Mr. Tassone retained Shreya Mandal to act as the mitigation specialist for the defense. (PCR 7/1232, 9/1501). Ms. Mandal has a Master's of Clinical Social Work and a Juris Doctorate. (PCR 9/1499-1500). She has been a mitigation specialist in capital cases approximately 12 times. (PCR 9/1500).

Mr. Tassone provided Ms. Mandal with every bit of background information that the defense team had gathered regarding Wade. (PCR 7/1100). Mr. Tassone had frequent

conversations with Ms. Mandal. *Id.* He offered to provide her with anything else that she may need and offered to obtain subpoenas for additional records. *Id.* Prior to the start of the penalty phase, Mr. Tassone received a 17-page final report from Ms. Mandal. (PCR 4/593-610).

Much of Ms. Mandal's report addressed the environment in which Wade was raised and Wade's feelings of abandonment. Mr. Tassone testified that he used Ms. Mandal's services to try to put together a package so that he could prepare for the penalty phase "as to all dynamics in Alan's life." (PCR 7/1249). He used the information he received from Ms. Mandal and her advice and input to make his case at the penalty phase. *Id.* He incorporated her findings in his presentation to the jury and the trial court. (PCR 7/1100). Although Ms. Mandal did not testify at the penalty phase, many of the witnesses who provided her with the information she used in her report did testify.

Ms. Mandal did between 80 and 100 hours of work. (PCR 9/1529). She does not believe she had the "ideal" amount of time to spend on this case. (PCR 9/1520). She normally gets to spend a year or two on a case, but was not allotted the "typical standard 400 hours" on this case. (PCR 9/1520-21). Her rate was $100 to $150 per hour. (PCR 9/1529). She did as much work as she was compensated for and nothing more. (PCR 5/974). The court found Ms. Mandal "less than credible." *Id.*

The only additional task that Ms. Mandal stated she would have done with the additional 300 hours she would have liked to have spend on the case, would have been to follow up with (unspecified) witnesses. *Id.* There is no indication that any follow up with witnesses was done in preparation of the collateral proceedings to determine if any follow up would have been helpful.

Mr. Tassone testified that a strategic decision was made not to call Ms. Mandal to testify because virtually all of the information contained in her report was produced through other witnesses at the penalty phase. (PCR 7/1234). This statement is supported by a comparison of Ms. Mandal's report (PCR 4/593-611), and the testimony offered at the penalty phase (ROA XIV/1196-1275). Ms. Mandal also stated that if she had testified penalty phase, her testimony would have been limited to what other people had told her. (PCR 9/1530).

The trial court properly found that trial counsel was not deficient. "Ms. Mandal prepared a mitigation report and trial counsel used it." (PCR 5/974). This is supported by competent, substantial evidence in the record. For the defense to call Ms. Mandal or other additional witnesses on the issues already addressed by other witnesses would have been cumulative. Trial counsel's decision not to call a cumulative witness was a reasonable strategic decision. *See Victorino v. State*, 2013 WL

5567079 (Fla. Oct. 10, 2013) (*citing Davis v. State,* 928 So. 2d 1089, 1108 (Fla. 2005) ("once counsel secured Davis's mother to testify with regard to all of the pertinent information, his decision to forego further pursuit of other members of Davis's family and friends was not an unreasonable decision or approach")); *Henyard v. State,* 883 So. 2d 753, 759, 761 (Fla. 2004) (concluding that counsel was not ineffective where the evidentiary hearing testimony was cumulative of the testimony at the penalty phase). Which witnesses to call, if any, is the epitome of a strategic decision. *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995).

Wade failed to show that trial counsel's performance with respect to the mitigation expert was deficient. The record demonstrates that trial counsel did retain a qualified mitigation expert to be part of the defense team, the expert spent 80 to 100 hours working on the case and compiling her report, and counsel used that report in developing his penalty phase presentation.

The trial court also properly found that prejudice was not established. "Nothing has been advanced by the Defendant indicating that the outcome [] would have been any different had [additional] witnesses been called." (PCR 5/973). Wade failed to meet his burden to demonstrate a reasonable probability that the outcome of the proceeding would have been different had the

mitigation expert been used in a more "meaningful" way. Wade did not identify any additional mitigating evidence that Ms. Mandal would have found if she had more time to work on the case. Wade also failed to identify any evidence that Ms. Mandal could have presented at the penalty phase that would have been substantially different from what actually was presented. *See Dufour v. State,* 905 So. 2d 42 (Fla. 2005) (holding that defendant failed to demonstrate prejudice where additional mitigating evidence did not substantially differ from that presented during the penalty phase).

Wade failed to establish that counsel was ineffective under either prong of *Strickland*. This claim was properly denied and this Court should affirm as to this issue.

Substance abuse

Wade complains in Issue I of his brief that Ms. Ganey testified without objection during the guilt phase regarding his substance abuse issues. Here, he claims that trial counsel was ineffective for failing to introduce evidence of his substance abuse at the penalty phase.

The trial court addressed part of this issue when it addressed sub-sub-claim 3b1:

> The Court concluded that based on the specificity and clarity of what the Defendant told his attorney as to his involvement in the crimes, counsel had no reason to believe that he was under the influence of drugs or under the substantial

> domination of another individual. See Mr. Eler's testimony at EH pp 549-50 and Mr. Hurst's testimony at pp 536-8.
>
> . . .
>
> Dr. Eisenstein also based his conclusion on information that the Defendant had been significantly under the influence of assorted drugs for the three (3) days surrounding the murders. However, the specific number of *three (3)* days appears in this file only upon the post conviction preparation of Bruce Nixon. Nixon now says that he and Wade were under this significant cloud for that number of days. That is completely inconsistent with the trial evidence and Nixon's own trial testimony.
>
> . . .
>
> Of course, Bruce Nixon was a primary source in presenting this tale of horrendous facts to the jury. At no point in his trial testimony did he assert that any of [the four codefendants] were significantly impaired. In fact, in an answer to a specific question posed to him by one of the jurors at the conclusion of his testimony he suggested that "Lord Calvert" and "some weed" were what had been consumed. Also from Nixon's testimony – it was not until after the murders and after the group had parted company that he went on a bender. It was during this bender that he probably mentioned in public his involvement in the murders which later led to his arrest. See TT p 943.
>
> It seems appropriate at this point to specifically state that this Court finds that the Co-defendant Bruce Nixon's evidentiary hearing testimony is in significant conflict with his trial testimony such that the undersigned finds him to be presently unbelievable.

(PCR 5/969, 971-72).

Aside from the testimony of Bruce Nixon at the evidentiary hearing, Wade offered no clear indication he was under the influence of drugs and alcohol during the time of the murders. (PCR 5/975). At trial, Nixon testified only that Wade was using marijuana and alcohol ("weed and Lord Calvert"). (ROA XII/943-44). At the evidentiary hearing, Nixon added that Wade was also using cocaine and various pills during the three days surrounding the murders. (PCR 8/1330). Despite Nixon's claims that Wade was "messed up" during the murders, Wade was still able to drive on the interstate to the gravesite. (PCR 8/1336). He was also able to drive the Lincoln in reverse through the woods up to the hole in which the Sumners were buried alive. *Id.*

In his initial brief, Wade argues that the trial court's finding of conflict between Nixon's trial testimony and evidentiary hearing testimony is not supported by competent, substantial evidence, because "[c]ontrary to the finding of the post-conviction court, no questions were posed by the jury during the guilt phase." (IB 81) (*citing* ROA XII/946 and ROA XIV/1261). Wade is mistaken.

The jury asked Nixon, "were drugs and or alcohol involved prior to the robbery or kidnapping?" (ROA XII/943). Nixon responded affirmatively and was asked to be more specific. *Id.*

Nixon stated, "[w]e smoked weed and we drank Lord Calvert[4]." (ROA XII/943-44). The trial court's finding that Nixon's postconviction testimony was in conflict with his trial testimony (PCR 5/969, 975) is clearly supported by competent, substantial evidence in the record. Therefore, the trial court correctly concluded that there was no credible evidence that Wade was impaired in the days surrounding the murders.

Wade's claim that the jury should have been aware of his drug and alcohol abuse is without merit because the jury was aware of the substance abuse issues. (ROA XIV/1178-1200). Ms. Ganey testified that Wade began to use drugs at age 14. (ROA XIV/1181). Wade was committed to a rehab center because of his drug problem. (ROA XIV/1182). Despite her efforts, Wade continued to use drugs. (ROA XIV/1188). Ms. Ganey eventually kicked Wade out of the house because she "couldn't take his disrespect any more [sic] and the drug abuse and the running with Michael [Jackson]." (ROA XIV/1185).

Trial counsel cannot be deficient for failing to present evidence of his substance abuse problem, because such evidence actually was presented. The trial court correctly ruled that "the Defendant has not offered anything regarding this claim which indicates a deficient performance on the part of trial

[4] Lord Calvert is brand of whiskey.

counsel." (PCR 5/975). There is no prejudice to Wade in trial counsel's failure to introduce evidence that was actually introduced. Additionally, the trial court determined that, even in a light most favorable to the Defendant, had the testimony proposed at the evidentiary hearing been added to the penalty phase, it is highly unlikely that the outcome would have been any different. *Id.* The denial of relief as to this sub-sub-claim was proper and should be affirmed.

Substantial domination and extreme emotional disturbance

Wade's next sub-sub claim was that trial counsel was ineffective for failing call witnesses to develop mitigation testimony to any "meaningful degree" that he was under the substantial domination of another or subject to extreme emotional disturbance at the time of the murders. This claim was correctly denied by the trial court.

In his Renumbered Copy of Original Amended Motion to Vacate Judgments of Conviction and Sentence, Wade listed at least 54 witnesses that he claims could have been called at the penalty phase to establish these two statutory mitigators. (PCR 3/547). Of the 54 witnesses listed, only Jerry Ganey, Vanessa Wilkerson, and Alan Wade, Sr. testified at the evidentiary hearing. None of these witnesses offered any proof that Wade was under the substantial domination of Michael Jackson or that Wade was under an extreme emotional disturbance at the time of the murders.

Jerry Ganey did not testify that he knew Jackson or that he was in a position to observe any alleged domination of Wade by Jackson. (PCR 8/1346-1356). Likewise, Jerry Ganey offered no evidence that Wade was under the extreme emotional distress. *Id.*

Alan Wade, Sr. spent little time with his son as a teenager and none, or almost none, at or near the time of the murder. (PCR 9/1550-1565). He did not offer any testimony in support of either mitigator, and would not have been a helpful witness to establish these mitigating factors at trial.

Vanessa Wilkerson testified that she last saw Wade two months prior to his arrest. (PCR 9/1492). She did not testify that she knew Jackson or that she observed any interaction between Jackson and Wade. (PCR 1489-1495). Wade claims that Wilkerson could have provided support for the substantial domination and extreme emotional disturbance mitigators, but she did not provide any testimony in support of that claim at the evidentiary hearing.

Bruce Nixon testified at the evidentiary hearing that Wade had been committing crimes before he even knew Jackson existed. (PCR 8/1440). Nixon said at the guilt phase that Wade was a voluntary participant in the robbery, kidnapping, and murders. (ROA XII/939). Wade alone recruited Nixon to participate in the crimes. (ROA XII/883-85, XIV/1260). Jackson was in another car while Wade drove to the gravesite with Sumners in the trunk of

their Lincoln. (ROA XII/904).

Nixon testified again at the penalty phase that Wade alone recruited him to participate in the crimes. (ROA XIV/1260). Jackson was not even aware that Wade was recruiting Nixon. *Id*. Nixon said that Jackson had some type of control over Wade, but only in the sense that Jackson was buying Wade's allegiance by paying for clothes, liquor, limos, and girls for Wade, who enjoyed that kind of stuff. (ROA XIV/1255, 1259). Even though Jackson was able to convince Wade and Nixon to do things they may have not done otherwise, Nixon admitted that both he and Wade participated in the crimes freely and voluntarily. (ROA XIV/1259-60).

In the order denying relief, the trial court reasoned:

> Of the litany of witnesses proposed by the Defendant in his motion, almost none of them were called at the [evidentiary] hearing. Those that were called offered virtually no support for the proposition that the Defendant was subject to the 'substantial domination or control' of Michael Jackson at least not to the degree required by Florida law. Following the team leader is what team members do. That is not in and of itself an indication of the substantial domination or control required for this mitigator.
>
> . . .
>
> The suggestion that Wade was subject to Jackson's domination is absolutely inconsistent with [Nixon's trial] testimony that Wade, on his own, sought out Nixon to involve Nixon in these murders. It is also completely inconsistent with what the Defendant told his trial counsel about his

> intentional involvement in the murders.
>
> Based on trial counsel's testimony, this Court concludes that his defense theory never was to establish [Wade's] domination by another as there was no evidence to do so. Instead, [the defense] theory was that Michael Jackson was capable of manipulating the younger Wade into participating in the consumption of the spoils after the Sumners had been murdered.

(PCR 5/975-76).

The trial court was correct that the testimony presented at the evidentiary hearing offered virtually no support to the claim that Wade was under the domination of Jackson; certainly not to the extent required by Florida law. On the contrary, the record at trial and the evidentiary hearing supports the trial court's rejection of this claim in both the order denying postconviction relief (PCR 5/975), and the order imposing sentence (ROA V/843).

Furthermore, this claim is meritless because trial counsel *did* call witnesses at trial in an attempt to develop the substantial domination mitigator. Both Bruce Nixon and Frieda Ganey were called at the penalty phase in an attempt to establish this mitigator.

Nixon testified at the penalty phase that Jackson had some type of control over Wade. (ROA XIV/1255). Ms. Ganey also testified at the penalty phase regarding Jackson's influence over Wade. (ROA XIV/1185-87). Ms. Ganey was also helpful during

the guilt phase in placing Jackson in the role of the manipulator. (PCR 9/1639). The trial court agreed that Ms. Ganey's testimony suggested that Jackson was manipulative of Wade (PCR 5/960), but any manipulation by Jackson did not rise to the level of the domination suggested by the statutory mitigator (ROA V/843).

The only witness to offer any testimony at the evidentiary hearing regarding extreme mental or emotional disturbance was Dr. Eisenstein. His opinion was that Wade was under extreme mental and emotional disturbance at the time of the murders. (PCR 8/1410). Reasons given by Dr. Eisenstein in support of his opinion included: brain impairment, cognitive impairment, head trauma, longstanding attention deficit disorder, feelings of abandonment, academic failure, instability, feelings that he would not have productive life, feeling depressed, his parents were not "on the same page," "he wanted to go into the service but each time he took the test he was drunk so there was no [] ability for anyone to monitor his behavior to make the changes that [were] necessary." (PCR 8/1410-1413). The court deemed Dr. Eisenstein not credible. (PCR 5/968-73).

As argued in previously, there was no evidence of any brain impairment. Cognitive impairment and attention deficit disorder are very common. If Wade does suffer from those issues, they would not rise to the level of to extreme mental disturbance.

Wade's failure to gain acceptance into the Army National Guard, because he could not pass a drug test,[5] was the result of his own poor choices. There is no evidence to explain how Wade's failure to qualify for the National Guard, because of his own choice to partake in the use of illicit drugs, would have resulted in extreme mental or emotional disturbance.

The other reasons given by Dr. Eisenstein for his opinion are normal human thoughts and emotions that most people probably experience at one time or another in their lives. They do not result in *extreme* mental or emotional disturbance.

The trial court was correct in determining that Wade failed to demonstrate that under the substantial domination of Jackson or that he suffered any extreme mental or emotional disturbance at the time of the murders. (PCR 5/975). There is competent, substantial evidence in the record to support the conclusion that Wade was not under the substantial domination of Jackson, and the only witness to testify regarding extreme mental or emotional disturbance was not credible. (PCR 5/968-73).

Wade failed to overcome the presumption that trial counsel was effective. Trial counsel was not deficient. Witnesses were

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[5] Although Dr. Eisenstein testified that Wade could not get into the service because "each time he took the test he was drunk" (PCR 8/1413), he was actually rejected from the Army National Guard after failing two drug tests, (PCR 4/609).

called to attempt to develop these mitigators to a "meaningful degree." Wade also failed to demonstrate that he was prejudiced by trial counsel's performance. The trial court's denial of relief as to this claim should be affirmed.

Carmen Massonet

Wade next complains that trial counsel was ineffective for failing to locate and interview Carmen Massonet. Wade claims that Ms. Massonet could have testified about Jackson and Wade's drug and alcohol abuse as well as about Jackson's influence over Wade. Relief was properly denied as to this claim for two reasons.

First, Wade's failure to call Ms. Massonet at the evidentiary hearing precludes a finding that counsel was ineffective for failing to call her at trial. *See Lukehart v. State*, 70 So. 3d 503, 522 (Fla. 2011)(declining to even address claims that counsel was ineffective for failing to call several witnesses to testify at trial when Lukehart did not call the witnesses at the evidentiary hearing).

Second, the defense investigator, Michael Hurst, testified at the evidentiary hearing that he *did* track down and interview Ms. Massonet. (PCR 4/636; 9/1610-11). Based on the testimony of Mr. Hurst, and his report regarding his interview of Ms. Massonet (Defendant's Evidentiary Hearing Exhibit 8, PCR 4/636), the trial court concluded that it would have been inappropriate

for the defense to call Ms. Massonet at either stage of the trial. (PCR 5/976). Ms. Massonet would have provided no benefit to Wade, and instead, her testimony might very well have been detrimental to his case. (PCR 5/974, 977). Mr. Eler agreed that Ms. Massonet would be a bad witness for Wade. (PCR 10/1725).

Wade cannot prevail on either prong of *Strickland*. He failed to show that counsel was deficient for locating, interviewing, and then declining to call Ms. Massonet to testify. Further, he cannot show that he was prejudiced by trial counsel's strategic decision not to call a witness who would likely have been detrimental to his case. Denial of relief as to this sub-sub-claim should be affirmed.

Pecuniary gain and HAC aggravators

In the final sub-claim made with regard to the penalty phase, Wade complains that counsel did not consult with him before conceding that the capital felony was committed for pecuniary gain, and that the capital felony was especially heinous, atrocious, or cruel ("HAC"). Wade did not testify at the evidentiary hearing, and therefore he failed to prove that trial counsel did not consult with him regarding the concession of these two aggravating circumstances.

Mr. Tassone testified at the evidentiary hearing that he believed the State presented a very powerful case against Wade. (PCR 7/1265, 1281). Mr. Tassone attempted to maintain some

credibility with the jury on Wade's behalf. (PCR 7/1281). It was a strategic decision by Mr. Tassone to concede certain points to the jury in order to make his other points more credible. (PCR 7/1190). He was ultimately trying to get the jury to recommend life over death. (PCR 7/1265).

Mr. Tassone's statement to the jury that Wade was on trial because of greed was "intended to express the theory that Wade participated in the fruits of this crime and not the murder itself." (PCR 7/1263-64). It was part of the defense to present Wade as a participant in a theft, but nothing more than a theft. (PCR 7/1108-09). Wade acknowledged that he discussed this theory with counsel was agreeable to this strategy on the record prior to opening statements. (ROA X/416-17). The concession that money the only reason Wade involved was made with Wade's consent, long before the penalty phase. Considering that the guilt phase strategy conceded Wade's involvement in a theft, and that the jury had convicted him or robbery, it would have been difficult, to say the least, to argue against the concept of pecuniary gain at the penalty phase. (PCR 7/1109).

With regard to pecuniary gain, the trial court's Order Imposing Sentence (Corrected) read:

> It is clear from the evidence that the group intended to harvest the contents of the Sumners' meager bank accounts. The trail of ATM withdrawals from Jacksonville to Charleston bears this out. Alan Wade's financial interest is substantiated by the

> $8,000 check on the Sumners' account made out to him and found in the motel with the [co]defendants.

(ROA V/842). The trial court determined that this aggravating circumstance was proven beyond a reasonable doubt. *Id.*

Mr. Tassone said that he does not agree that he fully conceded the HAC aggravator. (PCR 7/1109-10). It was not his position that the jury should find that the murders were HAC. (PCR 7/1110). Given Mr. Tassone's evidentiary hearing testimony, Wade now argues in his initial brief that "it was obviously an error on Mr. Tassone's part to make the statement, 'Alan Wade's acts were evil itself [sic], that there was no moral justification.'" (IB 95). The issue of moral justification, however, is an element of CCP, not HAC. *See* § 921.141(5)(i) (The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification).

The HAC aggravator "applies in physically and mentally torturous murders" and "focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death." *Wade v. State*, 41 So. 3d 857, 870 (Fla. 2010) (*quoting Barnhill v. State,* 834 So. 2d 836, 849-50 (Fla. 2002)). With regard to the HAC aggravator, the trial court

wrote in its Order Imposing Sentence (Corrected):

> The evidence in this cause has established clearly that Reggie and Carol Sumner, frail and failing in health, were both bound and gagged and buried alive. This Court has had a hard time in coming up with a manner of death that could be more heinous, atrocious or cruel, or more painful and vile.

(ROA V/839-40). The trial court determined that the HAC aggravator was proven beyond a reasonable doubt. *Id.*

The pecuniary gain and HAC aggravators were clearly proven by the evidence at trial. This is not a close call where the scales may have been tipped by an especially persuasive argument from counsel that these aggravating circumstances do not apply. Wade has not overcome the presumption that conceding certain aggravation in order to maintain credibility with the jury was not a reasonable strategic decision under the circumstances.

Wade also failed to establish that he was prejudiced by trial counsel's performance. The trial court did not rely on any concessions in determining that these aggravating circumstances apply. The ruling was that the aggravators were proven beyond a reasonable doubt by the evidence at trial. After the evidentiary hearing, the trial court determined that there was nothing inappropriate about any concessions made to the jury, particularly in light of the horrendous evidence introduced in this case against the Defendant. (PCR 5/978-79). There is no reasonable probability that the aggravators would not have been

proven, or that the outcome would have been different, but for counsel's performance.

In addition to HAC and pecuniary gain, four more circumstances proven beyond a reasonable doubt: the murder were CCP, Wade was previously convicted of a capital felony, the murders were committed in the course of a kidnapping, the murders were committed to avoid arrest, and the victims were especially vulnerable due to age or disability. *Wade v. State*, 41 So. 3d at 866; (ROA V/838-43). Even without the pecuniary gain and HAC aggravators, there is no reasonable probability that the mitigation presented would have outweighed the four other aggravating factors. The trial court's denial of relief as to this sub-claim should be affirmed.

ISSUE III

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING JURY SELECTION

Issue III was numbered claim 1 in Wade's Renumbered Copy of Original Amended Motion to Vacate Judgments of Conviction and Sentence. (PCR 3/500-04). Claim 1 included sub-claims 1A, 1B, and 1C. *Id.* Wade claims that the trial court erred in denying an evidentiary hearing as to claim 1. Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record. *Gore v. State*, 24 So. 3d 1, 11 (Fla. 2009) (citations omitted). The trial court properly denied relief to this claim.

Each part of the claim is conclusively refuted by the record. The summary denial of claim 1 should be affirmed.

Standard of Review

A court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court and its ruling is tantamount to a pure question of law, subject to de novo review. *Seibert v. State*, 64 So. 3d 67, 75 (Fla. 2010) (citations omitted).

Recitation of the law during jury selection

During the prosecution's voir dire, Prospective Juror Butler indicated that she had mixed feelings on the death penalty and that she would hold the State to a higher burden of proof in this case because of the possibility of the death penalty. (ROA/VIII 158-61). Prospective Juror Green stated that she was against the death penalty and her views of the death penalty would impair her ability to act as a fair and impartial juror. (ROA/VIII 176).

Realizing that Ms. Butler and Ms. Green would tend to lean away from imposing the death penalty but may be successfully challenged for cause by the State, trial counsel Eler attempted to rehabilitate the prospective jurors. Wade now claims that this attempt at rehabilitation resulted in a failure to properly recite the law that left the jurors with the impression that

they must vote for death when the aggravators outweigh the mitigators. (IB 97-8).

In the portion of the record cited by Wade, Mr. Eler asked Prospective Juror Butler, "—if [the State] presented aggravation, factors that beyond a reasonable doubt outweighed the mitigators, then you could apply the law and vote death, is that right?" (ROA IX/248). Mr. Eler asked Prospective Juror Green, "[s]o even if the aggravators prove to you beyond a reasonable doubt, outweighed [sic] the mitigators and the law allowed you to [vote death] you couldn't?" (ROA IX/265).

In denying relief, the trial court stated:

> In this claim the Defendant suggests that trial counsel had left jurors with an impression that they must vote for death when the aggravators outweigh the mitigators. This Court has found nothing in the record which would indicate that this was in any way even intimated by trial counsel. That portion of the record upon which the Defendant relies for this claim is really nothing more than trial counsel's attempt to rehabilitate the juror. There is nothing inappropriate about attempting to rehabilitate a juror in the hope that the juror would be selected particularly when it seemed clear that the juror was equivocal as to her feelings about the death penalty or even opposed thereto.

(PCR 5/949).

The trial court did not err in denying relief without an evidentiary hearing. No reasonable person could interpret trial counsel's attempt to rehabilitate these two prospective jurors

as "leaving the jurors with the impression that they must vote for death when the aggravators outweigh the mitigators." Trial counsel did not day or imply that. He was simply trying to get two prospective jurors, who were uncomfortable with the death penalty, to say that they *could* vote for death if the law allowed. He was zealously representing his client by trying to force the State to use preemptory strikes to get favorable jurors for Wade off the jury.

Trial counsel was not deficient in attempting to rehabilitate favorable jurors. There is no prejudice since neither Ms. Green nor Ms. Butler served on the jury, and no reasonable person would have interpreted counsel's questions to Ms. Green or Ms. Butler in the manner suggested by Wade. Relief was properly denied without a hearing. Wade's claim of improper recitation of the law was conclusively refuted by the record.

Additional preemptory strikes

At jury selection, the defense used all available preemptory strikes. A request for additional preemptory strikes was denied. (ROA IX/384). Wade argues that the trial court erred in summarily denying his claim that trial counsel was ineffective for failing to request additional preemptory strikes, and for failing to identify any juror he would have struck if given additional preemptory strikes.

Wade incorrectly states in his brief that no additional

preemptory strikes were requested. However, the record is clear that Mr. Eler did move the court to grant additional preemptory strikes, and that the request was denied. (ROA IX/384). This Court acknowledged on direct appeal that defense counsel timely requested additional peremptories after exhausting his allotted challenges. *Wade v. State*, 41 So. 3d 857, 873 (Fla. 2010).

Neither trial counsel nor collateral counsel has identified the jurors that would have been struck additional preemptory strikes had been granted. Without identifying the objectionable juror(s), this claim is facially insufficient and Wade cannot demonstrate deficiency. The Court cannot determine if counsel was deficient for failing to object if the Court cannot determine the identity of the alleged objectionable juror.

Prejudice cannot be shown either. A defendant alleging that counsel was ineffective for failing to object or preserve a claim of reversible error during jury selection must demonstrate prejudice at the trial, not on appeal. *Caratelli v. State*, 961 So. 2d 312, 323 (Fla. 2007). In order to show prejudice, a defendant must show that a juror who was actually biased against him sat on his jury. *Id.* at 324. Wade cannot show prejudice because he has not identified any juror that was biased against him. The claim is insufficient on its face because Wade fails to indicate that he would have exercised additional preemptory strikes and he fails to identify the jurors he would have struck

with additional preemptory strikes. *See Ragsdale v. State*, 720 So. 2d 203, 208 (Fla. 1998) (finding that trial judge properly denied evidentiary hearing where defendant provided insufficient facts as to "how the outcome would have been different had counsel acted otherwise").

Wade also acknowledges that this issue was addressed by this Court on direct appeal. (IB 97) (*citing Wade v. State*, 41 So. 3d 857, 873 (Fla. 2010)). Because Wade has again failed in postconviction to identify any jurors that he would have struck with additional strikes, the issue raised here seems to be the very same issue that this Court already considered, i.e., trial counsel failed to identify jurors he would have struck with additional preemptory strikes.

This sub-claim was insufficiently pled, procedurally barred, and meritless. The trial court did not err in its summarily denial.

Challenges not exercised on jurors

Lastly, Wade argues that the trial court erred in summarily denying his claim that counsel was ineffective for failing to develop the record to support a challenge to four jurors for cause: Mr. Iselib, Mr. Baesler, Ms. Bragg, and Ms. Smith. Wade claims that the trial court erred in failing "to apprehend the significance of counsel's failure to adequately explore juror's [sic] feelings in support of the death penalty" and to challenge

those jurors. (IB 98).

Claims of ineffective assistance of counsel for failing to preserve or raise a cause challenge are governed by this Court's decision in *Caratelli v. State*, 961 So. 2d 312 (Fla. 2007). In order to show prejudice, Wade must show that a juror who was actually biased against him sat on his jury. *Id.* at 324. Under the actual bias standard, the defendant must demonstrate that a juror was not impartial, but actually biased against the defendant, and the evidence of bias must be plain on the face of the record. *Id.*

Wade points to nothing in the record indicating that an actually biased juror sat on the jury. (PCR 5/949). In fact, Wade did not seem to think that any of the jurors were biased against him when they were selected. Before the jury was sworn, the trial court inquired of Wade as to whether he approved of those selected to serve on his jury, and whether he had had enough time to discuss the selection of the jurors with counsel. (ROA IX/371). Wade responded affirmatively to each inquiry. *Id.*

The mere fact that a juror supports the death penalty, established law in the State of Florida, is not enough to show actual bias. It is not even enough to justify a successful cause challenge where, as here, the juror has subsequently indicated an ability to follow the court's instruction. *Aguirre-Jarquin v. State*, 9 So. 3d 593, 605 (Fla. 2009); *see also Conde v. State*,

860 So. 2d 930, 939 (Fla. 2003) (upholding the denial of a cause challenge of a juror who initially stated the death penalty should be mandatory in some instances, but later stated he could follow the court's instruction to weigh the aggravators and mitigators); *Barnhill v. State,* 834 So. 2d 836, 845 (Fla. 2002) ("[J]urors who have expressed strong feelings about the death penalty nevertheless may serve if they indicate an ability to abide by the trial court's instructions.").

Each of the four jurors mentioned here indicated during voir dire that they could follow the law and would not automatically vote for death. Trial counsel was not deficient for failing to challenge jurors because there is nothing in the record to show they were actually biased against Wade.

Wade suggests that leaving these four jurors on the jury resulted in four of the eleven votes for death. (IB 100). Even assuming the validity of that presumption, Wade still cannot demonstrate prejudice by counsel's failure to strike these jurors. The vote in favor of death was 11-1. (ROA XIV/1351). If these four jurors had been replaced by four jurors who voted against death, the total vote still would have been 7-5 in favor of death. The outcome would be the same even if these four jurors were struck as Wade asserts they should have been.

Wade again failed to demonstrate deficiency or prejudice. The trial court did not err in deciding this sub-claim as a

matter of law. The denial of relief as to this sub-claim should be affirmed.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's denial of postconviction relief.

CERTIFICATE OF SERVICE

I CERTIFY that copy of the foregoing document has been furnished to Ann Finnell, Counsel for Appellant, AFinnell@fmnlawyers.com, 2114 Oak St., Jacksonville, FL 32204, by e-mail on this 20th day of December, 2013.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted,

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