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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER: SC13-1003

LOWER TRIBUNAL CASE NUMBER: 16-2005-CF-010263

ALAN LYNDELL WADE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Wade lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Wade.

PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's denial of Mr. Wade's Motion to Vacate Judgments of Conviction and Sentence. The motion was brought pursuant to Fla. R. Crim. Pro. 3.851.

Alan Lyndell Wade will be referred to as "Mr. Wade" or “Defendant Wade”. References to the record of the direct appeal of the trial judgment and sentence in this case are designated DIR. ROA followed by the Volume number-Vol., followed by the appropriate p. number, e.g. (DIR. ROA Vol. I, p. 123). Citations to the record from the post-conviction evidentiary hearing will be designated as PC, followed by the appropriate p. number-p. e.g. (PC, p.123). References to Exhibits are designated by the record, followed by the exhibit number, followed by the appropriate p. number, e.g. (DIR, ROA, Vol. I, Exh. 1, p. 1).

STATEMENT OF THE CASE

This is an appeal of the circuit court's denial of a 3.851 motion for post-conviction relief.

Mr. Wade, along with three co-defendants, Michael Jackson, Tiffany Cole and Bruce Nixon, were charged with two charges each of murder in the first degree, armed kidnapping, and armed robbery for the murders of Carol and Reggie Sumner on July 7, 2005. Court appointed counsel Refek Eler and Frank Tassone represented Defendant Wade at trial.

On October 22, 2007 trial commenced with jury selection for both Defendant Wade and Tiffany Cole, although the trials of each co-defendant had been severed. At the time of Defendant's jury selection, co-defendant Michael Jackson had already been convicted of all charges and sentenced to death. Co-defendant Bruce Nixon had plead guilty to a lesser included offense and was participating as a state witness. Mr. Nixon was subsequently sentenced to 45 years.

The trial ended on October 24, 2007, with a jury verdict of guilty on all charges. The trial court adjudicated Mr. Wade guilty of all charges on that date.

On November 15, 2007, penalty phase commenced before the same jury that was empanelled for the guilt phase. Prior to the start of the penalty phase, the Court, on its own motion, excused one of the original 12 members of the venire

and substituted an alternate juror. The jurors returned a verdict recommending the death penalty by a vote of 11-1 on November 15, 2007.

A *Spence*r hearing commenced on December 13, 2007. Following the *Spencer* hearing, Mr. Wade was sentenced to death for the first degree murder of Carol Sumner; he was sentenced to death for the first degree murder of Reggie Sumner; he was sentenced to a concurrent sentence of life in prison for the kidnapping of Carol Sumner; he was sentenced to a concurrent sentence of life in prison for the kidnapping of Reggie Sumner; he was sentenced to a concurrent sentence of fifteen years for the robbery of Carol Sumner and was sentenced to a concurrent sentence of 15 years for the robbery of Reggie Sumner. This Court on direct appeal upheld his convictions and sentences, including his death sentences. *Wade v. State*, 41 So.3d 857 (Fla. 2010).

Mr. Wade filed a notice of appeal on March 20, 2008, which was denied on May 6, 2010, rehearing denied August 4, 2010. *See Wade v. State*, 41 So.2d 857 (Fla. 2010). Thereafter, Mr. Wade filed a petition for writ of certiorari to the Supreme Court of the United States that was denied on January 18, 2011. *See Wade v. Florida*, 131 S.Ct. 1004 (2011).

Mr. Wade filed a Motion to Vacate Judgments of Conviction and Sentence on December 27, 2012. The State filed a Response on February 23, 2012. Thereafter, Mr. Wade filed an Amended Motion to Vacate Judgments of

Conviction and Sentence on April 5, 2013, and a Renumbered Amended Motion to Vacate Judgments of Conviction and Sentence on June 29, 2012.

The Court issued a written Order dated August 7, 2012 granting an evidentiary hearing on Claims 2 and 3 and reserving ruling on the remaining claims. The evidentiary hearing was conducted September 25, 27 and 28, 2013. The trial court ordered transcripts of the hearing. Mr. Wade filed his written closing argument, Defendant's Sentencing Memorandum, on January 18, 2013. The State filed its written closing argument, State's Post-Evidentiary Hearing Memo, on February 7, 2012.

STATEMENT OF THE FACTS

Mr. Wade relies on this Court's direct appeal opinion in *Wade v. State*, 41 So.3d 857 (Fla. 2010), for the statement of the facts of the trial. The evidence from the guilt phase was summarized by this Court in *Wade* from p.s 862 to 865 of its opinion. The evidence from the penalty phase was summarized by this Court in *Wade* on p. 865.

Mr. Wade presents the following statement of additional facts as to the evidence presented at trial and at the evidentiary hearing on each claim for which an evidentiary hearing was granted.

1. **Evidence presented as to Claims 2A, 2D, 2E, 2F, 2G, 2H, dealt with ineffective assistance of guilt phase counsel.**

Claim 2A argued that counsel failed to file a motion to suppress or otherwise object to the introduction of the contents of the motel room in which Defendant Wade was arrested, specifically keys purportedly belonging to the victim and Mr. Wade's cell phone. Testimony adduced during the original trial supported this claim: Police were aware that there were two missing persons in Jacksonville, Florida, and that the ATM card of the missing persons had been recently used in North Charleston (DIR. ROA, Vol. XI, p. 622). Surveillance photos from ATM machines were obtained (DIR. ROA, Vol XI p. 624). At the time it was known that Tiffany Cole rented a vehicle that fit the description of the vehicle used at the ATMs in the case (DIR. ROA, Vol. XI, p. 622). Police made contact with David Duncan, the brother of Tiffany Cole who advised that Tiffany, her boyfriend, Mr. Jackson, and a man named Allen were at a motel in North Charleston, South Carolina. David Duncan directed the police to a Best Western hotel and pointed out his sister's car and told them his sister was staying in Room 312 (DIR. ROA, Vol. XI, p. 624-626). Police talked to the hotel management and learned that two rooms were rented to Tiffany Cole, Room 312 and Room 302 (DIR. ROA, Vol. XI, p. 626-627). Police obtained keys to both rooms from hotel management, approached Room 302, and knocked on the door. Defendant Wade, the sole occupant of Room 302, answered the door (DIR. ROA, Vol. XI, p. 627-628). The curtains were drawn and it was dark (DIR. ROA, Vol. XI, p. 629). He was taken

into custody. A "protective sweep" was conducted of the motel room at that time (DIR. ROA, Vol. XI, p. 628). No additional persons were present in the room and there was no indication anyone else was staying in Room 302 (DIR. ROA, Vol. XI, p. 632). No female items were in the room (DIR. ROA, Vol. XI, p. 650). Police knew immediately that Mr.Wade was not the man in the ATM photographs and identified Jackson as the person in the photos (DIR. ROA, Vol. XI, p. 630). Nevertheless, Mr. Wade remained detained in handcuffs while a search warrant was obtained for his room. Keys to the victim's car and a cell phone were located in Defendant's room (DIR. ROA, Vol. XI, p. 631-632).

A search warrant was obtained for Room 302 subsequent to the arrest of Mr. Wade (PC. Def. Exh. 11). The warrant was insufficient on its face, and omitted relevant information that Wade was the sole occupant of Room 302 at the time of his arrest, omitted the fact of his arrest, omitted the fact that at the time of his detention police knew he was not the user of the victim's ATM card, omitted the fact that Michael Jackson and Tiffany Cole were the occupants of Room 312 and the fact of their arrest and continued detention, and omitted the fact that law enforcement had no information linking Alan Wade to the use of the victim's ATM card, or to any aspect of the disappearance of the victims.

Trial counsel Eler and Tassone testified in support of this claim at the evidentiary hearing. Mr. Tassone acknowledged that he did not know why a

motion to suppress the keys and cell phone was not filed (PC, p. 59), only that Mr. Eler was the lead counsel on the guilt phase (PC, p. 59). Mr. Tassone admitted he would have filed a motion to suppress if he had apprehended the issue (PC, p. 60). Additionally, Mr. Tassone did not recall any conference with Mr. Eler about discussing trying to suppress the keys or the cell phone, did not recall what Mr. Eler filed or did not file, and did not recall Mr. Eler adopting a motion filed by the attorney for Mr. Jackson relating to Room 312 where Jackson and Cole were located (PC, p. 59-60).

Mr. Eler stated at the evidentiary hearing that he did not file a motion to suppress the items found in Room 302 where Defendant was located, because he "didn't think Defendant had standing" (PC, p. 554). He admitted adopting codefendant's motion to suppress relating to portions of the evidence found in Room 312 because "some evidence pointing to Defendant was found in that room" (PC, p. 556), and that "if it was granted then the warrant was defective" (PC, p. 600).

Mr. Tassone admitted the keys were damaging to the defense (PC, p. 61). Mr. Eler indicated that the keys were one of the three most damaging pieces of evidence which linked Defendant to the crime (PC, Def. Exh. 8) (PC, p. 586). He acknowledged he failed to file a motion to suppress the contents of Room 302 despite agreeing to the above facts (PC, p. 587). He acknowledged the keys were

important because they linked Defendant Wade to the victims' car (PC, p. 595).

At trial the State argued the following:

> The key, the key to the crime, the Lincoln car keys…The Lincoln key was in his hotel room a few inches away from where he put his head down to bed, a few inches away from where his cell phone was. It was his room. It was in his room…Could you convict Alan Wade just based on that key? You probably could but it would be difficult…But when Bruce Nixon tells the police…that Alan Wade is the driver of that Lincoln he has no idea that key has been found in Alan Wade's room (DIR. ROA, Vol. XIII, p. 1054-55).

Claim 2D argued that counsel was ineffective for failing to object and therefore failing to preserve for appellate review the introduction during the State's case in chief of tape-recorded statements attributed to non-testifying co-defendant's Tifffany Cole and Michael Jackson. Detective Meecham recorded phone conversations between himself and Michael Jackson who was pretending to be victim Reggie Sumner. He also recorded phone conversations between himself and Tiffany Cole who was pretending to be victim Carol Sumner. During these phone conversations, Michael Jackson and Tiffany Cole were using subterfuge to try to convince the police that the victims were alive and well and they were legitimately accessing their own ATM card. These statements were set out at length at the trial and are contained in the trial transcript (DIR. ROA, Vol X, p. 532-553).

Trial counsel Eler and Tassone testified in support of this claim at the evidentiary hearing. Mr. Eler testified at the evidentiary hearing that it was "my

style" to let the State present "any evidence about Michael Jackson and Tiffany Cole anytime so a jury could hear how much they were involved" (PC, p. 557). Mr. Tassone thought maybe that the statements were admissible under a coconspirator theory but agreed no motion was filed to exclude this evidence (PC, p. 66).

Mr. Eler testified at the evidentiary hearing that he thought the statements of Cole and Jackson were "helpful" to his strategy of blaming Jackson and Cole. He could not recall if he researched their admissibility (PC, p. 603). He stated he was "aware" the State was trying to tie Defendant Wade to these two co-defendants at the time these statements were admitted (PC, p. 604). He said he "considered objecting but it was definitely strategy" (PC, p. 604). "I viewed it more of a penalty phase case even though the jury would use it to convict under a principal theory" (PC, p. 605).

Claim 2E argued that counsel was ineffective for failing to object and therefore failing to preserve for appellate review the introduction in the State's case in chief of all the evidence seized from the motel room occupied by the co-defendants and not linked to or associated with Defendant Wade (DIR. ROA, Vol. 1, Exh. 73, 82, 83, 84, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 105).

The State argued in guilt phase closing argument the following: "[w]hen the search warrant is served the hotel rooms reveal bags of the Sumner's property, the victim's mail, wallets, incriminating documents and receipts and an $8,000 check made payable to Alan Wade" (DIR. ROA Vol. XIII, p. 1044).

Counsel Eler testified in support of this claim. Mr. Eler admitted the State could not produce a witness to tie Defendant Wade to the items seized (PC, p. 605-606). He said his strategy was the "same" (PC. ROA, p. 607). Eler testified it "fit with his theme that Wade was an accessory after the fact" (PC, p.608).

The State argued in guilt phase closing argument the following: "[w]hen the search warrant is served the hotel **rooms** reveal bags of the Sumner's property, the victim's mail, wallets, incriminating documents and receipts and an $8,000 check made payable to Alan Wade" (DIR. ROA, Vol. XIII, p. 1044) (emphasis added). The State also argued at length about the $8000.00 check made out to Mr. Wade:

> Again we have 8,000 reasons more to prove this case, 8,000 reasons that Reggie Sumner on his account was going to pay Alan Wade for his services, and the memo line on this is blank but we all know what it was for…It was Michael Jackson's way of saying, hey, Alan, thanks for standing by that grave and shoveling dirt on those people. 8,000 reasons why we know he's guilty (DIR. ROA, Vol. XIII, p. 1059-1060)… Alan Wade, the only of the four defendants whose name is found on a check from the Sumners' account, that's who did this crime with Bruce Nixon, Michael Jackson and Tiffany Cole (DIR. ROA, Vol. XIII, p. 1094).

Claim 2F argued that counsel was ineffective for failing to object and therefore failing to preserve for appellate review the introduction during the State's

case in chief of surveillance still photos of co-defendant Michael Jackson using the victim's debit card at various ATM locations and related testimony and argument.

Attorneys Eler and Tassone testified in support of this claim. At the evidentiary hearing attorney Tassone admitted that he did not recall the state presenting any witness who could testify that Defendant Wade was present or had knowledge of the actions of Michael Jackson using the ATM machine (PC, p. 69-70). Mr. Tassone agreed that the State's theory was that Defendant Wade was guilty of the same things Jackson had done after the killings and that the State was trying to prove a "guilt by association" theme (PC, p. 70). Mr. Tassone admitted that photos of Jackson using the ATM machine helped the State establish the pecuniary gain aggravating circumstance (PC, p. 70). He did not know whether an objection should have been interposed or not (PC, p. 71).

Attorney Eler agreed he did not object to these photographs because "my strategy was as long as Michael Jackson's picture is plastered up there in front of the jury and Alan Wade's picture wasn't that was better" (PC p. 610).

During the prosecutor's guilt phase argument, the State argued:

> …the first ATM that was used was that 3:30ish ATM that was just a mile or so away from the Wal-Mart where Alan Wade and Tiffany Cole are (DIR. ROA, Vol. XIII p. 1042)… Michael Jackson and Michael Jackson alone is the person accessing that ATM card…He was the one accessing it but what we know, what we know is he (Alan Wade) was with them the whole time (DIR. ROA, Vol. XIII p. 1042).

Additionally, the State argued: "[y]ou can take Alan Wade's face and cut it out and you can stick it everywhere you see Michael Jackson's face on every one of those ATM pictures" (DIR. ROA, Vol. XIII, p. 1059).

Similarly, during the prosecutor's penalty phase closing argument:

> We know that after they were dead this defendant continued to victimize Reggie and Carol Sumner spending their money, pawning their property, utilizing the goods that they had earned during their lifestyle—during their lifetime (DIR. ROA, Vol. XIV, p. 1292-1293).

Defense counsel did not object to this. The State next argued, "Mr. Wade and his cohorts needed time. **They** had to hit those ATM machines, approximately $5000.00 worth. **They** had to pawn items. **They** had to read through documents, bank records, mail." (DIR. ROA, Vol. XIV, p. 1300) (emphasis added).

Claim 2G argued that counsel was ineffective for failing to object and therefore failing to preserve for appellate review testimony by Freida Ganey, Defendant's mother. The trial transcript reflects that Mrs. Ganey was called to testify that Defendant Wade had a drug problem and was hooked on drugs (DIR. ROA,Vol. X, p. 506-510), he dropped out of school in the 9th grade because of truancy (DIR. ROA, Vol. X, p. 508), he had no job or means of sustaining himself at the time of the offense (DIR. ROA, Vol. X, p. 509), he was thrown out of the her (his mother's) house (DIR. ROA, Vol. X, p. 509), and he did not make any statements to her that "Michael Jackson was going to pay him $40,000.00 to help him in this crime" (DIR. ROA, Vol. X, p. 512). Additionally, following Mrs.

Ganey's denial of statements made to her by her son regarding Michael Jackson paying him for his assistance, and her failure to remember statements she made to Detective Gupton, the State called Detective Gupton. Without objection by Mr. Wade's trial counsel, Detective Gupton was allowed to present an audio recording between himself and Mrs. Ganey wherein she stated, "I will tell you this, because Bruce and Allen both told me this, that Mike promised them each $40,000.00 to help him" (DIR. ROA, Vol. X p. 518).

Counsel Tassone and Eler testified in support of this claim at the evidentiary hearing. Counsel Tassone testified at the evidentiary hearing that he thought an objection should have been interposed to questions that elicited information about the bad character of Defendant Wade during guilt phase (PC, p. 75), but could see a strategic reason for not objecting which he did not elaborate upon (PC, p. 76-77). Mr. Tassone agreed it was harmful to Defendant Wade that his mother testified in guilt phase regarding his bad behavior and character (PC, p. 77). Mr. Tassone agreed that calling Detective Gupton to impeach Mrs. Ganey could have been objected to but that it may have been a strategy (PC, p. 78). When asked to elaborate on the strategy he said that since it was the mother testifying they held out "hope" that she would say "something helpful" (PC, p. 80). Mr. Tassone had no recollection of researching the issue and said that researching issues relating to the guilt phase would have been Mr. Eler's responsibility (PC, p. 82-83).

Counsel Eler testified at the evidentiary hearing that he thought admission of Defendant Wade's bad character during the guilt phase was "good for mitigation" (PC, p. 611). Mr. Eler acknowledged he was aware through depositions that Mrs. Ganey had denied making these statements to Detective Gupton **but did not research the issue** (PC, p. 612). He did not object when Detective Gupton was called to impeach Mrs. Ganey and introduce the damaging statement of Mr. Wade because in his mind it demonstrated "bad State beating up on the poor guy's mom" (PC, p. 613). He went on to elaborate in general about his theory of objecting: "[t]o me it is a big red herring to keep objecting and if I were a juror I'd want to know what they are hiding" (PC, p. 614). When questioned about perhaps approaching the bench to raise the objection or making it via pretrial motion he said he considered it but "outweighed the fact that we would get more sympathy" (PC, p. 615).

Claim 2H argued that counsel was ineffective for failing to object and therefore preserving for appeal a variety of improper statements made by Detective Meecham and Officer Rowan in which they violated the confrontation clause, testified regarding hearsay and gave improper opinion testimony. The trial transcript reflected the following examples of this testimony: Det. Meecham learned the victims had health issues and should be on medication if not at home (DIR. ROA Vol. X, p. 522), Detective Meecham learned from a bank statement

that there was a balance of approximately $30,000.00 in the bank account of the victims (DIR. ROA, Vol. X, p. 523), Detective Meecham learned from the bank that there was a lot of unusual bank activity on the victim's bank account (DIR. ROA, Vol. X, p. 524), Detective Meecham viewed video footage of ATM video and saw a white male who he could tell was not Carol or Reggie Sumner (DIR. ROA, Vol. X, p. 525), Detective Meecham identified a Mazda RX8 in the video footage (DIR. ROA Vol. X, p. 526), Detective Meecham testified that $5000.00 was taken from the victims' bank account over the course of the case (DIR. ROA, Vol. X, p. 529), Detective Meecham identified the speakers of the voices on the tape recording as Michael Jackson and Tiffany Cole (DIR. ROA, Vol. X, p. 554), Detective Meecham learned from the US Marshall's service that the cell phone making the call was registered to a David Jackson and that the phone had called Triangle Rental (DIR. ROA, Vol. X, p. 556), Detective Meecham learned from Triangle Rental that they had rented a Mazda RX8 to Tiffany Cole and that it was overdue (DIR. ROA, Vol. X, p. 556-7), Detective Meecham testified he learned of Defendant's arrest from Charleston Police Department (DIR. ROA, Vol. X, 559), Detective Meecham testified to hearsay testimony that Tiffany Cole rented a motel room at the Budget Inn on July 8 (DIR. ROA, Vol. XII, p. 822-23), Detective Meecham testified to the identities of persons in a video from July 9-10 showing Tiffany Cole and Michael Jackson at the Holiday Inn (DIR. ROA, Vol. XII, p. 824-

25), Detective Meecham testified to hearsay regarding a rental by Tiffany Cole at the Comfort Inn in Jacksonville Beach (DIR. ROA, Vol. XII, p.s 825-26), Detective Meecham testified to the identities of persons in a video from the Wal-Mart and still photos from there on July 7 and July 9 (DIR. ROA, Vol. XII, p. 828), Detective Meecham testified to hearsay about a gas station video in Pooler, Georgia, and the identities of persons appearing therein (DIR. ROA, Vol. XII, p. 833), Detective Meecham testified to hearsay testimony concerning cell phone numbers, taken from the cell phone located in Mr. Wade's motel room, the identity of the persons whose numbers Defendant had in the phone and the contents of the phone (DIR. ROA, Vol. XIII, p. 839), Detective Meecham testified without being qualified to do so that duct tape found at the gravesite was the same type of tape purchased at Office Depot (DIR. ROA, Vol. XIII, p. 842), Detective Meecham testified to hearsay testimony concerning items pawned by Tiffany Cole (DIR. ROA, Vol. XIII, p. 842-3), Detective Meecham was allowed to relate hearsay testimony about FDLE expert analysts' inability to make a fracture match of the duct tape (DIR. ROA, Vol. XIII, p. 844), Detective Meecham was allowed to relate hearsay testimony about consensual contact Defendant Wade and other co-defendants had with the victims before their murders (DIR. ROA, Vol. XIII, p. 846), Detective Meecham was allowed to relate hearsay regarding photos taken of Tiffany Cole, Michael Jackson, Defendant Wade and a girl named "Niesha"(sic) in

Myrtle Beach sometime between June 15 and July 16 (DIR. ROA, Vol. XIII, p. 877).

Officer Rowan testified regarding information about the case related to him by the Jacksonville Sheriff's Office including: "fraudulent use of an ATM card" (ROA, Vol. XI, p. 622), Tiffany Cole being an "associate" of the Sumners (ROA, Vol. XI, p. 623), how and where he learned Cole lived in Charleston (ROA, Vol. XI p. 623-34), use of the Sumner's ATM in Charleston (ROA, Vol. XI, p. 624), information from Cole's brother that she had come back with "a couple of guys" and was staying at the Best Western (ROA, Vol. XI, p. 625), that the brother pointed out Cole's car (ROA, Vol. XI, p. 626), information from the brother about Defendant Jackson's nickname (ROA, Vol. XI, p. 626), the fact that Cole had two rooms registered to her at the Best Western, rooms 302 and 312 (ROA, Vol. XI, p. 627), the fact that a set of car keys were found in Defendant Wade's room that were Lincoln keys and that the keys had a US Airforce key ring and that Mr. Sumner was an Airforce veteran and that therefore the keys were the Sumners' (ROA, Vol. XI, p. 631), that a cell phone was located in Defendant Wade's room (ROA, Vol. XI, p. 632), multiple items of the Sumners, cell phones, jewelry, checkbook and receipts, an $8000.00 check made out to Defendant Wade, newly purchased items located in Room 312 belonging to Cole-Jackson, and items seized from Tiffany Cole's car (ROA, Vol. XI, p. 632-34).

At the evidentiary hearing, attorney Mr. Tassone agreed that objections could have been made to each of these issues (PC, p. 86-95). He testified that failure to object should be directed to co-counsel Eler (PC, p. 95, and 99), but agreed that strategically the attorneys wanted to link Cole and Jackson together and would not have objected to "anything linking Cole and Jackson" together (PC, p. 95). He went on to say he did not know if it would have been prudent to keep from linking Wade with Cole and Jackson (PC, p. 96). He testified he did not recall any specific joint discussion with attorney Eler about this strategy, but that it was a general strategy not to object, even if the matter could have been kept out of evidence altogether. (PC, p. 100-101).

Counsel Eler testified that it is his understanding that within limits the lead detective can "get up and lay out the case for the state"(PC, p. 616). "They summarize interviews, things of that nature" (PC, p. 617). He agreed that testimonial hearsay is objectionable when it hurts you (PC, p. 617). His strategy he said was "that Wade's portion was relatively minor" (PC, p. 623), and he had "to concede some issues to maintain credibility" (PC, p. 626). When asked why he did not object he said, "If it shows Tiffany Cole and Michael Jackson more involved that your client then it is helpful" (PC, p. 627). His response when confronted with the fact that he only made two objections the entire trial, "if you say so" (PC, p. 630). He admitted that certain of this evidence hurt Defendant (PC, p. 628).

Claim 2I argued that counsel was ineffective for failing to object and therefore failing to preserve for appellate review the testimony of Agent Alred who testified at trial that he arrested Defendant Wade after stating his job was to "locate and arrest fugitives" (ROA, Vol X, p. 591), he related hearsay testimony that he obtained cell phone information about a boost phone obtained by co-defendant Michael Jackson under an alias of David Jackson, and the identity of phone numbers called by the phone (DIR. ROA, Vol. X, p. 92-594), and he was allowed without objection and without any qualification based upon training or experience to testify how cell towers work (DIR. ROA, Vol. X, p. 597-600).

> The State used this "evidence" in closing argument at guilt phase as follows: Right after that trip to Office Depot, right after the duct tape is bought they're at the Sumner home. How do we know this? Because Michael Jackson's cell phone is pinging and using the tower closest to the Sumner home. In fact, not just the tower, but the side of the tower that faces the Sumner home. Remember the Mercedes medallion? Side one of the tower was hitting Michael Jackson's phone, which is right where Reed Avenue is, and we know Michael Jackson is calling Tiffany Cole. For what purpose?…so they can go out and do their final deed (DIR. ROA, Vol. XIII, p. 1038-39).

Counsel Eler and Tassone testified about this issue at the evidentiary hearing. Counsel Eler characterized his failure to object to this as only a "minor issue" (PC, p. 628). Counsel Tassone testified any failure to object was due to this being "Eler's area" (PC, p. 103).

2. Evidence presented as to Claim 2N that argued counsel was ineffective for failing to adequately communicate with Defendant Wade.

Claim 2N argues that counsel was ineffective during the guilt and penalty phase in failing to conduct adequate attorney/client interviews and in failing to have sufficient attorney/client communication.

The trial transcript revealed a claim by Defendant Wade during the January 14, 2008, "housekeeping" hearing that Mr. Eler had only seen him for a total of one hour at the jail and before court during the approximately two and one-half years of representation. The trial court had Defendant removed from the courtroom without further inquiry. (DIR. ROA, Vol. XI, p. 1146).

Counsel introduced a composite exhibit of investigative reports from Investigator Hurst to counsel Eler (PC, Def. Exh. 8). Those reports reflect: Defendant Wade asked to see counsel Eler on 6/06/2006 and wanted to know about any discovery, on 8/30/2006 Mr. Wade was concerned that Frank Tassone was not representing him properly, on 11/30/2006 Mr. Wade told the investigator he wanted to meet with Mr. Eler and discuss the case, on 3/01/2007 Mr. Wade wanted a copy of his file, on 4/16/2007 Mr. Wade wanted discovery, on 5/08/2007 Mr. Wade wanted to meet with counsel Tassone to give more penalty phase information, on 6/18/2007 Mr. Wade was wondering what was happening on his case, on 8/07/2007 Mr. Wade told the investigator he did not trust Mr. Eler, and on 10/18/2007 Mr. Wade refused to sign an "Acknowledgment" that stated *inter alia* that his attorney and investigator had done a thorough job of investigating his case.

Investigator Hurst testified during the evidentiary hearing that he shared office space with counsel Eler and that Mr. Eler used him as a conduit between Mr. Eler and Defendant Wade (PC, p. 532-533).

Mr. Eler also acknowledged that as of November 30, 2006 he had only seen Defendant Wade one time at the jail (PC, p. 634). He acknowledged he never went to the jail for the purpose of going over the entire file with Defendant (PC, p. 635). Mr. Eler testified he utilized the investigator to ferry depositions to and from the jail (PC, p. 636). Mr. Eler acknowledged that Mr. Wade had a deadline to decide if he was taking a plea bargain and that Mr. Wade wanted to review everything before making the decision (PC, p. 636). Mr. Eler admitted that he did not know if Mr. Wade did review everything, that the review wasn't with him (PC, p. 637).

Mr. Eler testified that after receiving Mr. Hurst's memo on May 16, 2007, regarding a lack of trust Defendant communicated to Mr. Hurst, Mr. Eler still did not go to the jail until September, an additional four months later (PC, p. 642). Mr. Eler testified that there are problems if the lead attorney spends "too much time holding the client's hand" (PC, p. 560). He acknowledged his time billing sheets (PC, Def. Exh. 8) showed he only visited Defendant Wade six times before trial (PC, 571-574). He said he was aware of the ABA Guidelines for the Appointment and Performance of Counsel and Death Penalty Cases regarding visiting clients (PC, p. 652).

Defendant Wade had written the Court on an unknown date complaining that counsel Eler had only seen him 4 times at the jail (PC, Def. Ex. 12).

Mr. Tassone's records reflected seeing the Defendant more often at the jail but he could not recall if he saw Defendant Wade or whether it was a member of his staff who visited Mr. Wade (PC, p.23, 38). Months would go by between some of his or his staff's visits (PC, p. 36-38). Mr. Tassone testified that "the plea was—essentially Mr. Eler was the lead attorney on that and I'm not too sure how I got involved with that, but I clearly supported the—and recommended to Mr. Wade that he enter into whatever plea deal was offered" (PC, p. 38).

3. Evidence presented as to Claims 3B and 3C, all of which dealt with ineffective assistance of counsel at the penalty phase.

Claim 3B argued that counsel was ineffective for failing to have Defendant Wade examined in any meaningful way by an expert in the field of psychology, psychiatry, or mental health counseling to attempt to develop mental mitigation, for failing to present mental mitigation, and failing to investigate and present testimony relating to Defendant Wade's history of drug and alcohol abuse.

Attorney Tassone testified that his first efforts to secure a mental health professional was in September 2006, some eleven months after he was appointed (PC, p. 43). He agreed that potentially there were four statutory mitigating factors: age, substantial domination of another, extreme mental or emotional disturbance

and ability to conform conduct to the requirements of the law were substantially impaired (PC, p. 113). Mr. Tassone acknowledged that a mental health professional would have been important for the establishment of three of these four mitigators (PC, p.114). Mr. Tassone stated on direct examination that Dr. Bloomfield told him Mr. Wade was not cooperative with him (PC, p. 16). He said that Dr. Bloomfield could not provide beneficial information so he asked him not to write a report (PC, p. 15). Mr. Tassone acknowledged that he himself did not try to get Defendant to cooperate with Dr. Bloomfield, nor did he attempt to get intervention from friends or family to talk to Defendant Wade (PC, p. 116-117).

Mr. Tassone acknowledged that brain trauma can be confirmed through testing (PC, p. 138). He also testified that he never considered hiring a neuropsychologist or a neurologist (PC, p. 138). He agreed he should have pursued Defendant's mental health more than he did (PC, p. 145). He did not recall giving the report of Shreya Mandal, the mitigation coordinator, to Dr. Bloomfield to see if that would assist him (PC, p. 146).

Mr. Tassone's time billing demonstrated that he did not interview any witnesses himself prior to the start of the guilt phase (PC, p. 178). He did not hire anyone who specialized in drug or alcohol abuse (PC, p. 177).

Dr. Bloomfield testified that he is supposed to begin with a clinical interview, review collaterals and records, and that he would rely on a mitigation

specialist for comprehensive family and social history (PC, p. 378). He testified he met with Mr. Tassone and thought he reviewed some records but no records were ever given to him (PC, p. 379). He did not have a list of what he reviewed. He did not specifically recall any records (PC, p. 379). He thought he looked at records before he saw Defendant in July 2006 and then again in November 2006 (PC, p. 380). He never received any interview summaries from family members or witnesses (PC, p. 381). He did not have an arrest and booking report (PC, p. 381).

Dr. Bloomfield additionally testified that when he saw Defendant on July 9, 2006, Defendant wanted him to get his discovery from his attorneys for him, and that he did not like his attorneys (PC, p. 382). He said this was a 30-minute introductory meeting and that Defendant was upset he did not have his discovery (PC, p. 383).

Dr. Bloomfield said he next saw Mr. Wade on September 8, 2006 to gather some more information and Mr. Wade said again that he did not have his discovery, that he wanted more information from counsel, and that he thought Mr. Tassone had dropped out of his case (PC, p. 383-384). He spent one hour with Mr. Wade on this visit (PC, p. 385).

Dr. Bloomfield testified he next saw Defendant on November 15, 2006, and he got a little history about his Baker Act and his GED, he did "a little competency

stuff," and he told Mr. Tassone that Mr. Wade was preoccupied with the guilt phase (PC, p. 385).

He further testified that Mr. Tassone never went to the jail with him to see Mr. Wade (PC, p. 386), he never saw Mr. Wade after November 15, 2006 (PC, p. 388), and he reported to Mr. Tassone that Defendant Wade was "interested in discovery and was not interested in pursuing anything with me…and at that point there was nothing I could testify to" (PC, p. 389).

Dr. Bloomfield testified: he was never given any information from Shreya Mandal, the mitigation coordinator (PC, p. 21), was not given any information about Defendant's abuse of alcohol or drugs, but that would have been important (PC, p. 391), did not recall being given any information about the "choking game," but that could have been important (PC, p. 392), that he could have testified based on hypothetical questions even if the client had remained uncooperative (PC, p. 393), that he could have testified about adolescent brain development in general even without Defendant's cooperation (PC, p. 394), that he could have testified to hypothetical questions relating to alcohol, drugs and the choking game even without Defendant's cooperation (PC, p. 394), and that he could have testified to hypothetical questions about the effects of abandonment by a father, neglect by a mother and lack of a male role model even without Defendant's cooperation (PC,

p. 395). He testified he was never asked to revisit Defendant after November, 2006, even after the guilty verdict (PC, p. 395).

Co-defendant Bruce Nixon testified at the evidentiary hearing. He was also a witness at the penalty phase. He testified that he never discussed his testimony with Mr. Eler or Mr. Tassone prior to the penalty phase (PC, p. 243). He gave additional testimony at the evidentiary hearing: He testified Mr. Wade was very upset and hurt that his father "never came around" … "It hurt him…he was always talking about it" (PC, p. 244). He testified that Wade was involved in drugs and alcohol since he was 12. It started as marijuana and progressed to cocaine, methadone, Xanax, Oxycotin, pills in general, Lortabs, and Percocet as he got older (PC, p. 245). He further testified that Defendant was high at the time of the homicides, on cocaine and alcohol, he was "messed up," "beyond reality," "he wasn't here," "we were smoking and stuff getting messed up the whole time" (PC, p. 248-249). He testified Defendant Wade was popping pills, alcohol and cocaine (PC, p. 249). Co-defendant Nixon testified he was not as intoxicated as Mr. Wade because he (Mr. Nixon) was not doing cocaine (PC, p. 249).

Co-defendant Nixon also testified at the evidentiary hearing about the "choking game." He said they played the game from the age of 12 to 18. He described the game as "somebody chokes you and you pass out" (PC, p. 250). He testified Defendant Wade would play it "all the time" and that he personally

witnessed Wade fall on the floor and pass out (PC, p. 250-251). He also saw Mr. Wade lose consciousness from drugs and alcohol "a lot" (PC, p. 251).

Christie Thompson testified at the evidentiary hearing. She is Bruce Nixon's sister. She testified that she witnessed Defendant Wade's drug abuse escalate "when he moved to Jacksonville it got really bad…pills…the way he acted he was always messed up" (PC, p. 262). She saw him some time prior to the homicides and he was high on drugs, "slurring words and could barely talk" (PC, p. 263). She was available in 2005-2007 and no one from Defendant Wade's defense contacted her about testifying (PC, p. 264).

Jerry Ganey testified at the evidentiary hearing. He is the husband of Freida Ganey. He has known Defendant Wade since Defendant was 14. He only saw Defendant Wade's natural father visit once while Mr. Wade was a teen (PC, p. 267). Mrs. Ganey worked long hours and traveled to work so Defendant Wade was "left alone to do what he wanted" (PC, p. 267). Defendant Wade had no father figure because Mr. Ganey did not want to raise another child and made no attempt to be a father figure to Defendant Wade (PC, p. 268). No discipline was provided to Defendant Wade (PC, p. 268). It was obvious to him that Defendant Wade was getting involved in drugs and alcohol, but he never confronted Defendant Wade with it (PC, p. 269). Mr. Ganey was available to testify at Defendant's penalty

phase but was never contacted by the defense attorneys despite the fact that he came to the trial everyday (PC, p. 270).

Freida Ganey testified at the evidentiary hearing. She also testified at penalty phase and guilt phase. She is Defendant Wade's mother. She testified at the evidentiary hearing that her son Andrew, Defendant's brother, has been diagnosed with Asberger's syndrome. Additionally, she testified at the evidentiary hearing that Defendant Wade was eight at the time of her divorce from Mr. Wade (PC, p. 281). Mr. Wade, the father, never took Defendant Wade home for a visit and Defendant Wade felt abandoned and angry with her for separating them (PC, p. 281-282). She said that the father was not in the picture for discipline (PC, p. 282). She first noticed Defendant's use of drugs when he was 14 (PC, p. 282).

She acknowledged that she worked and did not get home until around 7 p.m. and there was "a lot of after-school stuff she was not aware of" (PC, p. 283). She was then diagnosed with breast cancer and on drugs that affected her memory (PC, p. 283). She was fairly certain Mr. Wade was heavily involved in drugs and alcohol (PC, p. 286). She heard about the "choking game" through kids in the neighborhood (PC, p. 287). Ultimately she told Mr. Wade at age 17 that he could not move with her to her new apartment. Trial counsel never asked her to try to get him to talk to a psychologist, never tried to take her to the jail to talk to him about a plea bargain, never tried to get the family behind a plea bargain, and never

explained the evidence to her (PC, p. 290-291). She was never asked to testify about this information during the penalty phase.

Vanessa Wilkinson testified at the evidentiary hearing that she has known Defendant since they were both around 12-13 and they grew up together. Defendant Wade was her best friend. She played the "choking game" with him around 20 times (PC, p. 410). She also learned he was involved in drugs and saw him under the influence (PC, p. 410). Defendant Wade's drug abuse got worse when he moved to Jacksonville. She saw him 2 months prior to the homicides and he was high on drugs. (PC, p. 411-412). She was available in 2005-2007 but was never contacted by defense counsel (PC, p. 414).

Shreya Mandal, the mitigation specialist, testified at the evidentiary hearing. She has a master's degree in clinical social work (MCSW) and a Juris Doctor (JD) degree. She did not testify during the penalty phase or the *Spencer* hearing. She conducted 3-4 interviews of Defendant Wade in May-July 2007 and found him extremely cooperative (PC, p. 422-423). She identified a list of witnesses that needed to be interviewed and submitted it to Mr. Tassone in August (PC, p. 425) (PC, Def. Exh. 5). Most of these witnesses were never interviewed including Carmen Massonet because she was constrained by time and money (PC, p.439). Mr. Tassone did not hire her until Spring 2007 (PC, p. 420). She submitted her final report October 22, 2007 as a blueprint to identify factors compelling enough

for a presentation (PC, p. 424). Mr. Tassone did not request any follow-up, nor was she told of the guilty verdict (PC, p. 442). She was never asked to facilitate a plea bargain even though she made Mr. Tassone aware that "I do these things" (PC, p. 442). She was never asked to testify at penalty phase although she has done so on other occasions to explain the effects of a person's background, family dynamics and family dysfunction (PC, p. 443).

Ms. Mandal testified she recommended to Mr.Tassone the need for him to hire a mental health professional to do psychological testing because she saw red flags and thought that a mental health professional could help (PC, p. 443-444). "I'm trained to know when a neuropsychologist should be involved and I made that recommendation to Mr. Tassone (PC, p. 452). She was never asked to meet with Dr. Bloomfield (PC, p. 444). Ms. Mandal testified she "got the impression" that Mr. Tassone had "given up" on Defendant Wade, that in her opinion he had a lack of interest, and that he told her he was bringing her on board because he did not want to deal with these cases (PC, p. 446).

Patricia Paige testified at the evidentiary hearing. She had previously testified at the penalty phase. She is Defendant's half-sister. She has a child who has been diagnosed with Asberger's syndrome. She is 16 years older than Defendant. She testified Defendant Wade would spend as many summers with her as she could get him (PC, p. 457). He was more of a son to her than a brother and

people mistook him for her son (PC, p. 457-458). Defendant's mother, Freida Ganey, treated Defendant like a friend rather than a mother and did not discipline him (PC, p. 458). Mr. Tassone only talked with her for 5 minutes before she walked into the courtroom to testify (PC, p. 460). She never met attorney Eler (PC, p. 460). She was never asked to facilitate a plea bargain, was not kept apprised of the facts and could have made a difference because Defendant "trusted her" (PC, p. 461).

Alan Wade, Sr., defendant's father, testified at the evidentiary hearing. He was not called during the penalty phase. He and Defendant's mother divorced when Defendant was 9-10 years old. He came home one day and there was a note on the table "she left with the kids…it took me 6 weeks to find them" (PC, p. 472). "The following Christmas I had no money and I didn't have any presents but Defendant said it was 'OK because I was there'" (PC, p. 473). Mr. Wade testified he would come to visit but the children would not be home and ultimately he told them if they wanted to see him to call (PC, p. 474). He testified Mrs. Ganey never told him that Defendant Wade was in trouble and he did not do anything to try to straighten out Defendant's drug problem (PC, p. 476-477).

Rick Sichta is an attorney who has been a member of the bar since 2003. At the time of Defendant's trial he worked with Frank Tassone and helped him on this case. He testified at the evidentiary hearing that he did not recall Dr. Bloomfield

being involved at all in the case (PC, p. 512). Mr Sichta recognized it was worth looking into a mental health professional expert because of issues involving substantial domination and age (PC, p. 505). He testified he made notes during a discussion with an investigator that they should look into drug abuse, cocaine usage, age and substantial domination mitigators (PC, p. 497-498) (PC, Def. Exh. 6). He testified Mr. Wade was not happy with Mr. Tassone, and he and another associate were used to try to talk to Defendant about a plea (PC, p. 505-508).

Dr. Hymen Eisenstein was hired for purposes of the post-conviction motion and testified at the evidentiary hearing. He is a clinical psychologist with a subspecialty in neuropsychology. He is board certified in neuropsychology. He has testified in about 50 death penalty cases. He received records, including the mitigation report of Shreya Mandal, and conducted a number of collateral interviews of his own (PC, p. 306-307).

He conducted five interviews with Defendant Wade and spent 20 hours with him, 5 hours of interviewing and 15 hours of testing (PC, p. 309). He was also provided with additional interviews conducted by an investigator hired by undersigned counsel for the post-conviction motion (PC, p. 309). He conducted comprehensive neuropsychological testing, including IQ, memory, executive functioning, language, and T.O.V.A, a test to determine attention and concentration (PC, p. 310).

Dr. Eisenstein testified he could address four statutory mitigating factors: age, inability to conform conduct to the requirements of law substantially impaired, substantial domination by another, and extreme mental and emotional disturbance.

Regarding age as a mitigating factor, Dr. Eisenstein thought that it was important that his testing was done when Defendant Wade was 25 years of age when he was cooperative, drug free, and stable so the results show true impairments (PC, p. 311). At the time of the offense, Defendant Wade was 18 years and 48 days old (PC, p. 309). The full development of executive functioning and frontal lobe functioning only begins at age 17 and extends up to age 25 so age 25 is a more accurate reflection of full development (PC, p. 311-312). Executive functioning is thinking processes, the ability to weigh options, to make decisions, to inhibit responses and the ability to say "no" (PC, p. 313). At age 18, the brain is not fully able to make those decisions (PC, p. 313).

Dr. Eisenstein testified that the time of the offense, Defendant Wade was functioning under significant stressors including coming from a broken home, academic failure, abandonment and neglect, no stability, and no job (PC, p. 314). Dr. Eisenstein testified it was a dark and dismal period of Mr. Wade's life as "there were suicidal thoughts." These things operated to his detriment in terms of his executive functioning (PC, p. 314). His development was arrested from age 13-18 due to drug usage but after he was put into a structured environment (jail) his brain

continued to develop and he started to function in a normal way and he became a model prisoner in the jail (PC, p. 315-316). Drugs and alcohol from 12-18 would have caused Mr. Wade to be depressed, hence the Baker Act. Drugs and alcohol also kills brain cells, and because of the abuse the development of his brain was put on hold (PC, p. 316). The "choking game" was important because any type of traumatic incident to the brain adds up and are "more than cumulative, they are exponential…a lack of oxygen results in dead brain cells and holds back normal development of the brain" (PC, p. 319). The tests Dr. Eisenstein conducted showed different patterns of abnormality. According to Dr. Eisenstein, Mr. Wade's brain does not process information as quickly as it should be able to do so (PC, p. 320-321). Mr. Wade's verbal understanding and ability to communicate is compromised (PC, p. 325). The T.O.V.A. showed an inability to remain focused (PC, p. 326). Dr. Eisenstein testified that in his opinion, Defendant Wade's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the offense (PC, p. 328). Drug and alcohol use would have worsened the problem and made him less likely to be able to conform his conduct (PC, p. 329). It is also Dr. Eisenstein's opinion that at the time of the offense Defendant Wade was under extreme mental and emotional disturbance: besides issues with the brain development and drug abuse, he was abandoned, he was in academic

failure, there was no stability in his life, he was depressed, he saw no future, had no guidance, and no sense of direction (PC, p. 332).

Dr. Eisenstein testified that in his opinion, at the time of the offense, Defendant Wade was also under the substantial domination of another, Michael Jackson. He testified that Defendant Wade wanted a male father figure, he was thirsting for someone to tell him what to do, he is passive by nature, there was no other father figure, Defendant found an individual in Michael Jackson who was conducting unlawful behavior and who was older. Jackson was the first significant male figure taking the role of "telling him what to do" (PC, p. 332-336).

Defendant Wade suffered from substantial drug and alcohol abuse at the time of the offense in Dr. Eisenstein's opinion. It was important to Dr. Eisenstein that other witnesses described the extent of the abuse. He testified that drugs and alcohol affect the perceptional processing abilities of an individual and Defendant Wade would have been in a state of blur the entire time (PC, p. 368).

Claim 3C argued that counsel was ineffective for conceding the statutory aggravating circumstances of pecuniary gain and heinous atrocious or cruel (HAC), and for failing to discuss these concessions with Defendant Wade.

During the penalty phase argument counsel for Defendant Wade stated the following:

> There was no good reason to murder Reggie and Carol Sumner and he did it to get money and indeed greed is the reason that Reggie and Carol Sumner

> are dead and greed is the reason that Alan Wade sits here today after spending two-and-a-half years in jail waiting on a recommendation—…without greed this case wouldn't hold up for a minute (DIR. ROA, Vol. XIV, p. 1314-15)…Alan Wade's acts were evil itself, that there was no moral justification. (DIR. ROA, Vol. XIV. p. 1316).

At the evidentiary hearing, Mr. Tassone admitted conceding pecuniary gain (PC, p. 27), stating "I had to concede something" (PC, p. 184), but said he did not "fully" concede HAC and it was not his position that the jury should find HAC (PC, p. 28-29).

SUMMARY OF THE ARGUMENTS

ARGUMENT I: The post-conviction court erroneously denied Claims 2A, 2D, 2E, 2F, 2G, 2H, 2I and 2N, raised in Mr. Wade's Motion To Vacate. Counsel failed to provided effective assistance of counsel in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There was no substantial competent evidence to support the post-conviction court's findings that counsel was not deficient as to the following claims: Claim 2A argued that counsel failed to research the law and failed to file a motion to suppress keys and a cell phone found in possession of Mr. Wade when he was arrested in his motel room. Counsel instead adopted the motion filed by counsel for co-defendant Jackson relating to the motel in which Mr. Jackson was residing and for which Defendant Wade did not have standing. The keys and cell phone found in Mr. Wade's possession were significant to his conviction. Claim 2D argued that

counsel failed to research and understand the law and thus failed to object to the introduction of the out of court recorded statements of co-defendants Jackson and Cole who did not testify at Defendant's trial. The statements were inadmissible in Mr. Wade's trial. The issue was not researched by trial counsel and therefore counsel did not utilize strategy. Claim 2E argued that counsel failed to research and understand the law and therefore failed to object to the introduction of items seized from the motel room belonging to co-defendants Jackson and Cole. Those items were not proven to be in the possession of or associated with Defendant Wade. Claim 2F argued that counsel failed to research and understand the law and therefore failed to object to the introduction of photographs of co-defendant Jackson using the debit card of the victims at various ATM machines. Defendant was not proven to have knowledge of these transactions and was not proven to have received the proceeds. Claim 2G argued that counsel failed to research and understand the law and therefore failed to object to improper bad character testimony about Defendant Wade elicited by the State during direct examination of Defendant Wade's mother. Also, that counsel failed to object when the State elicited from her a denial that Defendant Wade told her he had received money for helping co-defendant Jackson and then improperly impeached that denial with a recorded interview between her and Detective Gupton. Claim 2H argued that counsel failed to research and understand the law and therefore failed to object to a

variety of improper hearsay and opinion testimony by Detective Meecham, Officer Rowan and Agent Alred. Claim 2N argued that counsel rendered ineffective assistance of counsel for failing to conduct adequate attorney-client conferences. The post-conviction court failed to follow the law or misapplied the law to the facts of the case, and the court's denials should be reversed and Mr. Wade should be granted a new trial.

ARGUMENT II: The post-conviction court erroneously denied claims 3B and 3C and 2N as it relates to 3B and 3C, raised in Mr. Wade's Motion To Vacate. Claim 3B argued that counsel failed to competently investigate and pursue mental mitigation by fully utilizing the services of a competent mental health professional. A competent mental health professional would have been able to establish the mental mitigators of inability to conform conduct to the requirements of law substantially impaired, extreme mental or emotional disturbance and that Defendant Wade was under the substantial domination of another. A competent mental health professional would also have been able to elaborate on the age mitigator by explaining the chronological development of the brain and the effect of alcohol and drugs on the juvenile brain. Counsel failed to thoroughly investigate witnesses who had information relevant to Defendant's background, family history and social history. Counsel failed to thoroughly investigate Defendant's history of drug and alcohol abuse including his use of alcohol and

drugs at the time of the crime. Counsel failed to thoroughly investigate brain injury from a variety of causes including participation in the "choking game." Counsel's failure to investigate potential mitigation undermined the reliability of his death sentence. The post-conviction court assessment of the credibility of the defense witnesses was not supported by competent substantial evidence. Claim 3C argued that trial counsel improperly, and without discussion with Defendant Wade, conceded two statutory aggravating circumstances in penalty phase argument. As a result of these concessions, counsel rendered ineffective assistance of counsel. Claim 2N impacts these claims as it argues the counsel was deficient in failing to conduct adequate attorney-client conferences. The post-conviction court erred in denying these claims because the court's findings are not supported by substantial competent evidence and Defendant Wade should be granted a new penalty phase.

ARGUMENT III: Claim 1 argued that counsel was deficient for failing to utilize the proper law regarding the weighing process with the jury venire, failing to strike four jurors who said they were death scrupled and for failing to understand the law regarding the preservation of a denial of a request for additional peremptory challenges. The post-conviction court erroneously denied Mr. Wade a full and fair evidentiary hearing on Claim 1. An evidentiary hearing should have been granted to establish that counsel's conduct was deficient and not a sound trial tactic. These issues were plead with specificity and were not conclusively refuted by the record.

ARGUMENT

ARGUMENT I. After conducting an evidentiary hearing on Claims **2A, 2D, 2E, 2F, 2G, 2H, and 2N,** the post-conviction court erred in finding that Mr. Wade failed to establish deficient performance by trial counsel and prejudice at the guilt phase of his capital trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and his corresponding rights under the Article 1, Sections 9 and 16, Florida Constitution. Further, Mr. Wade's convictions are materially unreliable due to trial counsel's deficient performance.

A. Introduction

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. *Id*. at 688. Following *Strickland*, the Florida Supreme Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:

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

There is a strong presumption that trial counsel's performance was not deficient and the defendant carries the burden to "overcome the presumption that under the circumstances the challenged action might be considered sound trial strategy." *Strickland* at 689.

In *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000), the Florida Supreme Court held "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under norms of professional conduct."

B. Standard of Review

Review of a circuit court's resolution of ineffective assistance of counsel claims under *Strickland* is a mixed standard of review because both the performance and the prejudice of the *Strickland* test present mixed questions of law and fact. *Sochor v. State*, 883 So.2d 766 (Fla. 2001). The trial court's factual findings that are supported by competent, substantial evidence are given deference, but legal conclusions are reviewed de novo. *See Sochor* at 771-72.

C. The post-conviction court erred in denying claims 2A 2D, 2E, 2F, 2G, and 2H and 2N.

Claim 2A argued that trial counsel was ineffective for failing to file a motion to suppress the search of Defendant's motel room. The Court makes no factual findings and suggests "one need only look at the detailed summary of the

facts of this case to conclude the arresting officers had probable cause to arrest before they went to the hotel."

The Court's factual findings are not supported by competent and substantial evidence because a review of the trial transcript supports the filing of a motion to suppress the contents of Defendant Wade's motel room. While the trial court is accurate that the "very same search warrant was addressed by the Florida Supreme Court in Defendant Michael Jackson's direct appeal," there existed probable cause to arrest Michael Jackson since he could be identified as the person in the video using the victims' ATM cards. There existed no such probable cause to arrest Mr. Wade, nor was a protective sweep of his motel room justified.

The keys, cell phone and personal items were seized as the result of an illegal detention of Mr. Wade pursuant to *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) and were the fruit of the illegal detention in violation of *Wong Sun* v. *U.S.*, 371 U.S. 471 (1963).

A person's home "is accorded the full range of Fourth Amendment protections." *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). This protection is afforded because there is an expectation of privacy in one's dwelling that our society recognizes as justified to protect the occupant against an unreasonable entry. Thus, a nonconsensual entry into a home, a motel

room, or other residence constitutes a search. *Katz v. United States*, 389 U.S. 347, 88 S.Ct.507, 19 L.Ed.2d 576 (1967).

The constitutional rights and privileges that apply to those who occupy private permanent dwellings also apply to those who occupy a motel room when the "occupant is there legally, has paid or arranged to pay, and has not been asked to leave." *Turner v. State*, 645 So.2d 444, 447 (Fla. 1994); *Vasquez v. State*, 870 So.2d 26 (Fla. 2d DCA 2003); *Gilbert v. State*, 789 So.2d 426, 428 (Fla. 4th DCA 2001); *Holloman v. State,* 959 So.2d 403 (Fla. 2d DCA 2007).

The facts of this case indicate that Defendant had standing to contest the seizure of the keys and cell phone from Room 302. *See Hardin v. State*, 18 So.3d 1246 (Fla. DCA 2012); *Elson v. State*, 337 So.2d 959, 962-63 (Fla. 1976). Only one person was present in Room 302 (DIR. ROA, Vol. XI, p. 627), that person was identified as Alan Wade, (DIR. ROA, Vol. XI, p. 627). Alan Wade came to the door. All the lights were out. The curtains were drawn (DIR. ROA, Vol. XI, p. 629). There was no indication that anyone besides Alan Wade was staying in room 302 (DIR. ROA, Vol. XI, p. 632). There were no female items in room 302 (DIR. ROA, Vol. XI, p. 650).

A search warrant was obtained for Room 302 subsequent to the arrest of Mr. Wade. The warrant (PC, Exh. 11) was insufficient on its face, and omitted relevant information that Wade was the sole occupant of Room 302 at the time of

his arrest, omitted the fact of his arrest, omitted the fact that at the time of his detention police knew he was not the user of the victim's ATM card, omitted the fact that Michael Jackson and Tiffany Cole were the occupants of Room 312 and the fact of their arrest and continued detention, and omitted the fact that law enforcement had no information linking Alan Wade to the use of the victim's ATM card, or to any aspect of the disappearance of the victims. The affidavit violated the holding of *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct.2674, 57 L.Ed.2d 667 (1978). The omitted material if added to the affidavit would have defeated probable cause for the affidavit. Additionally, the omissions from the affidavit were intentional or reckless police conduct that amounted to deception. *Johnson v. State*, 660 So.2d 648, 656 (Fla. 1995). The good faith exception does not apply where the information presented to the magistrate or Judge is false or misleading in violation of *Franks, supra*.

Counsel's failure to raise this issue pretrial via a motion to suppress and/or a trial objection on 4th and 14th Amendment grounds is an omission which fell well below the standard that applies to counsel: "the broad range of reasonably competent performance under prevailing professional standards." *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986). Instead, counsel adopted a motion filed by co-defendant Jackson's attorney relating to items of evidence found in Room 312 for which he had no standing.

At the post-conviction evidentiary hearing, Mr. Tassone acknowledged that he did not know why a motion to suppress the keys and cell phone was not filed (PC, p.59), only that Mr. Eler was the lead attorney (PC, p.59). Mr. Tassone admitted he would have filed a motion to suppress if he had apprehended the issue (PC, p.60). Additionally, Mr. Tassone did not recall any conference with Mr. Eler about trying to suppress the keys or the cell phone, did not recall what Eler filed or did not file, and did not recall Eler adopting a motion filed by the attorney for Mr. Jackson relating to Room 312 where Jackson and Cole were located (PC, p. 59-60).

Mr. Eler stated at the evidentiary hearing that he did not file a motion to suppress the items found in Room 302 where Defendant was located because he "didn't think Defendant had standing" (PC p.554). He admitted adopting codefendant's motion to suppress relating to portions of the evidence found in Room 312 because "some evidence pointing to Defendant was found in that room" (PC, p. 556), and that "if it was granted then the warrant was defective" (PC, p. 600). This rationale did not constitute a strategic decision where alternate courses of conduct were considered and rejected.

The keys were the only tangible physical evidence which directly linked Defendant Wade to the crime. No other item of evidence directly linked Wade to the victim's kidnapping or burial. Mr. Tassone admitted the keys were damaging to

the defense (PC. P. 61). Mr. Eler admitted that the keys were one of the three most damaging pieces of evidence which linked Defendant to the crimes (PC Def. Exh. 8) (PC, p. 586).

At trial the State argued the following:

> The key, the key to the crime, the Lincoln car keys…The Lincoln key was in his hotel room a few inches away from where he put his head down to bed, a few inches away from where his cell phone was. It was his room. It was in his room…Could you convict Alan Wade just based on that key? You probably could but it would be difficult…But when Bruce Nixon tells the police…that Alan Wade is the driver of that Lincoln he has no idea that key has been found in Alan Wade's room (DIR. ROA, Vol. XIII, p. 1054-55).

Similarly, The State argued the cell phone extensively in closing argument:

> The relationships are exemplified in all of the cell phones…This is Alan Wade's cell phone. It says Big Wade on it, Big Wade…you press one button you got a few numbers on there…and then you have three other numbers, Wise, Bruce, and Tiffany…Michael Jackson, Bruce Nixon and Tiffany Cole are all on Alan Wade's phone…The relationship tells you everything that you want to know in this case. Now we spent a significant amount of time proving that Michael—that Bruce Nixon, Tiffany Cole and Alan Wade were guilty of these—and Michael Jackson were guilty of these charges. The reason we spent so much time proving their guilt is because when we proved Michael Jackson was guilty, when we proved Tiffany Cole was guilty and when we proved Bruce Nixon was guilty we are proving that he is guilty. (DIR. ROA, Vol. XIII p. 1057-59).

The post-conviction court failed to consider any of these facts or the admissions by counsel regarding their deficient performance. As a result the post-conviction court's findings are not supported by competent substantial evidence, and the findings are contrary to the law.

Claim 2D argued that counsel failed to object and therefore failed to preserve for appellate review the introduction during the State's case in chief of tape-recorded statements attributed to non-testifying co-defendants Tiffany Cole and Michael Jackson made to Detective Meecham (ROA, Vol. X, p. 532-553).

The post-conviction court found there was no legal object which could have been made and therefore failed to apply the proper law to the facts of the case. The only possible theory of admission for these statements is Section 90.803(18)(e), Florida Statutes, statements by co-conspirators in furtherance of the conspiracy. However, such statements must be made during the course of and in furtherance of the conspiracy. These statements contained in recordings between Detective Meecham and Tiffany Cole and Meecham and Michael Jackson were made long after the death, kidnapping and robbery of both Reggie and Carol Sumner and thus the conspiracy had ended. *See Brooks v. State*, 787 So.2d 765 (Fla. 2001). A conspiracy ordinarily ends once a crime has been committed. *Id*. at 779, *citing Krulewitch v. United States*, 336 U.S. 440, 444, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

The post-conviction court also found Mr. Eler's failure to object was strategic. Mr. Eler's "strategy" to let in any and all evidence dealing with the codefendant's in an effort to make them look worse than Defendant Wade was not valid or informed. A tactical or strategic decision is unreasonable if it is based on a failure to understand the law. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir.

1991). Here, by trial counsel's own admission, there was no effort to research the admissibility of these co-defendant statements.

Claim 2E argued that counsel failed to object and therefore failed to preserve for appellate review evidence seized from the hotel room occupied by co-defendants Jackson and Cole.

The post-conviction court failed to apply the applicable law to the facts of this case in holding that no proper objection to these items could have been made by trial counsel. Prior to the admission of these items in Defendant Wade's trial, it was not proven that Defendant Wade possessed these items, or had dominion or control over them or had knowledge of their presence in the room occupied by Jackson and Cole. The items may have been relevant to show that someone took them from the victims' home but they were not relevant to prove that Defendant was the person who committed that crime.

In Florida, all relevant evidence is admissible, unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. *Miller v. State,* 42 So.3d 204, 224 (Fla. 2010) *see also* Sections 90.402-403, Fla. Stat (2008) "An appellate court will not disturb a trial court's determination that evidence is relevant and admissible absent an abuse of discretion." *McGirth v. State*, 48 So.3d 777, 786 (Fla. 2010). A trial court's discretion is limited by the rules of evidence

and the principles of *stare decisis*. *Johnson v. State*, 969 So.2d 938, 949 (Fla. 2007).

Had a proper objection to relevancy been made and that the probative value was outweighed by prejudice, admission of these items would have constituted an abuse of discretion. None of the items recovered from the Cole/Jackson room were in any way tied to Defendant Wade. In the Cole/Jackson room were items missing from the home of the victims including bank records that directly linked Cole and Jackson to the crime. None of Mr. Wade's fingerprints were located on any of these items. A check made out to Alan Wade was found in the room but there was no testimony showing Mr. Wade knew a check had been written.

Because these items from the Cole/Jackson room were admitted, the prosecutor argued without objection that all of these items found in both motel rooms tied Defendant Wade to the murders. The introduction of the items, coupled with the prosecutor's argument, hopelessly confused the issues, confused the culpability of the parties, and mislead the jury as to Defendant Wade's culpability.

The post-conviction court found "all the items were clearly relevant and connected all of the Defendant's to the death of the Sumners." To the contrary, these items connected only Jackson and Cole to the deaths and demonstrates how the jury would have been confused by this evidence if the post-conviction court is

confused. Accordingly, the post-conviction court erred in failing to acknowledge counsel's deficient performance in failing to object.

Claim 2F argued that trial counsel was ineffective for failing to object to the introduction of photos of Michael Jackson using the victims' ATM card to make withdrawals from the bank account of the victims. The post-conviction court failed to apply the applicable law to the facts of this case.

The State never proved Defendant Wade was present during any of these transactions nor did they prove his knowledge of these events. While this evidence was relevant to show the actions of codefendant Jackson, absent some testimony or evidence linking Defendant Wade to this activity, it was not relevant to show the culpability of Defendant Wade. However, references to Jackson using the ATMs to "clean out" the victims' bank accounts and Defendant Wade's knowledge and complicity in these matters were argued by the State in closing argument, with no objection by counsel for Defendant Wade.

At the evidentiary hearing attorney, Tassone admitted that he did not recall the state presenting any witness who could testify that Defendant Wade was present or had knowledge of the actions of Michael Jackson using the ATM machine (PC, p. 69-70). Mr. Tassone agreed that the State's theory was that Defendant Wade was guilty of the same things Jackson had done and that the State was trying to prove a guilty by association theme (PC, p. 70). Mr. Tassone

admitted that photos of Jackson using the ATM machine helped the State establish the pecuniary gain aggravating circumstance (PC, p. 70). He did not know whether an objection should have been interposed or not (PC, p. 71).

Attorney Eler agreed he did not object to these photographs because "my strategy was as long as Michael Jackson's picture is plastered up there in front of the jury and Alan Wade's picture wasn't that was better" (PC, p. 610).

The post-conviction court denied this claim on the basis that there was no legal objection. However, the court failed to consider there was no competent proof linking Defendant Wade to Jackson's actions. Counsel should have objected of ground of relevancy and that any probative value was outweighed by concerns of prejudice as discussed *infra*. At the least, a pretrial motion should have been filed. In the alternative, despite trial counsel's admission that he did not know whether an objection should have been interposed or not, the post-conviction court found this was strategic contrary to the law.

Claim 2G argues that trial counsel failed to object to and therefore failed to preserve for appellate review testimony by Freida Ganey, Defendant's mother, and Detective Gupton during the state's case-in-chief. Mrs. Ganey was called by the State to testify about four aspects of Defendant Wade's bad character: he had a drug problem and was hooked on drugs; he dropped out of school in the 9th grade because of truancy; he had no job or means of sustaining himself at the time of the

offense; and he was thrown out of the her (his mother's) house due to bad behavior. Additionally, without an objection she denied that Defendant Wade made any statements to her that "Michael Jackson was going to pay him $40,000.00 to help him in this crime."

The post-conviction court misapprehended the law of character evidence when the court found the testimony about Defendant's character to be relevant and admissible in the State's case against Mr. Wade during the guilt phase. Clearly the law is well settled that character evidence of a defendant is not admissible in the State's case-in-chief unless a defendant first places his character in issue.

The United State Supreme Court in *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218, 93 L.Ed.168, 173-74 (1948) summarized this rule:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character (citation omitted) but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Under Florida law, unless a defendant first puts his character into issue, the State may not introduce evidence of bad character. *Wyatt v. State*, 641 So.2d 355, 358 (Fla. 1994); *Flanagan v. State,* 625 So.2d 827 (Fla. 1993); *Jackson v. State*, 598 So.2d 303 (Fla. 3d DCA 1992); *See* Section 90.404, Florida Statutes.

Additionally, following Mrs. Ganey's denial of a statement made to her by her son regarding Michael Jackson paying him for his assistance, the State called Detective Gupton. Without objection by Mr. Wade's trial counsel, Detective Gupton was allowed to present a telephone audio recording between himself and Mrs. Ganey wherein Mrs. Ganey stated, "I will tell you this, because Bruce and Allen both told me this, that Mike promised them each $40,000.00 to help him" (DIR. ROA, Vol. X p. 518). The audio recording of Mrs. Ganey was inadmissible hearsay and admitted in violation of Defendant's right of confrontation guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

The post-conviction court failed to address the impeachment of Mrs. Ganey and subsequent introduction of Defendant's statement through Detective Gupton. However, it is well settled by Florida case law that it is error to allow the State to call a witness for the primary purpose of impeaching her with an otherwise inadmissible telephone conversation. *Morton v. State*, 689 So.2d 259 (Fla. 1997), *receded from on other grounds, Rodriquez v. State*, 753 So.2d 29 (Fla. 2000). Before Mrs. Ganey testified, the State knew her testimony would be favorable to

Defendant Wade but nonetheless called the witness for the purpose of impeaching her. This practice violated the rule enunciated in *Morton.* Mrs. Ganey's other testimony was not useful to prove a significant fact in litigation but instead was improper as discussed above. The purpose for the introduction of that testimony by the State was to establish the bad character of the accused and his propensity to violate the law.

Additionally the "confession" of Defendant introduced through Detective Gupton was devastating to the defense theory that he was an "accessory after the fact only." It also allowed the State to place in a bad light the most compelling witness any Defendant facing the death penalty can call on his behalf at a penalty phase: his mother. Yet, incredibly, defense counsel did not object.

Counsel Tassone testified at the evidentiary hearing that he thought an objection should have been interposed to questions that elicited information about the bad character of Defendant during guilt phase (PC, p. 75), but could see a strategic reason for not objecting, which he did not elaborate upon (PC, p. 76-77). Mr. Tassone agreed it was harmful to Defendant Wade that his mother testified in guilt phase regarding his bad behavior and character (PC, p. 77). Mr. Tassone agreed that calling Detective Gupton to impeach Mrs. Ganey could have been objected to but that it **may** have been a strategy (PC, p. 78). When asked to elaborate on the strategy he said that since it was the mother testifying they held

out “hope” that she would say “something helpful” (PC, p.80). Mr. Tassone had no recollection of reading the *Morton* case and said that research issues relating to the guilt phase would have been Mr. Eler’s responsibility (PC, p. 82-83).

Counsel Eler testified at the evidentiary hearing that he thought admission of Defendant Wade’s bad character during the guilt phase was “good for mitigation” (PC, p. 611). Eler acknowledged he was aware through depositions that Mrs. Ganey had denied making these statements to Detective Gupton **but did not research the issue** (PC, p. 612). He did not object when Gupton was called to impeach Mrs. Ganey and introduce the damaging statement of Defendant because in his mind it demonstrated “bad State beating up on the poor guy’s mom” (PC, p. 613). He went on to elaborate in general about his theory of objecting: “[t]o me it is a big red herring to keep objecting and if I were a juror I’d want to know what they are hiding” (PC, p. 614). When questioned about perhaps approaching the bench to raise the objection or making it via pretrial motion he said he considered it but “outweighed the fact that we would get more sympathy” (PC, p. 615).

Once again there can be no legitimate strategy because trial counsel never researched the issue. Therefore the post-conviction court erred in denying this claim because the court’s ruling is contrary to the law, and contrary to the evidence.

Claims 2H and 2I argues that trial counsel was ineffective for failing to object to much of the testimony of Detective Meecham, Officer Rowan and Agent Alred, as constituting improper hearsay and improper opinion.

The post-conviction court found all of this evidence relevant to the State's prosecution and found almost none of it offered for the truth of the matter asserted, and therefore not hearsay. It is hard to fathom how bank account balances, car rental information, cell phone account information, and hotel rental information are not offered to prove the truth of the matter asserted. For example, Detective Meecham testified to hearsay regarding a rental by Tiffany Cole at the Comfort Inn in Jacksonville Beach (DIR. ROA, Vol. XII, p. 825-26). The record contained hearsay on hearsay. Detective Meecham testified in place of Cole, the clerk and whomever else could be called to say who was present. He testified that the associated receipt showed Defendant, Alan Wade, Tiffany Cole and David (sic) Jackson stayed there, with Cole's address and a payment of cash. The State argued this point in closing argument: "Now on 7/11 of '05 we know 100 percent that Alan Wade was at the Comfort Inn with Michael Jackson and Tiffany Cole. And again how do we know that? Because we have the receipts to prove it. 7/11/05, Comfort Inn, Jax. Beach. Tiffany Cole, Alan Wade and interestingly enough, David Jackson." (DIR. ROA, Vol. XIII, p. 1043). Any reference to Defendant Wade was hearsay by Tiffany Cole to the motel clerk. She could just as easily

have said any name and written it on the receipt, if she even wrote it on the receipt. No witness was called to prove who was staying at the motel. No witness was called to prove Tiffany Cole was staying there and no one identified her as the person checking into the motel. No witness was called to say they saw Defendant Wade at the motel. The purpose of all this hearsay was to try to place Alan Wade with Cole and Jackson at or near the time of the homicides, and was clearly offered for the truth of the matter asserted.

Likewise, Detective Meecham was allowed to give improper opinion testimony regarding the identity of persons in various videotape. This issue was not addressed by the post-conviction court. Detective Meecham testified to hearsay about a video from the Wal-Mart and still photos from there on July 7 and July 9 (DIR. ROA, Vol. XII, p. 828). He identified Defendant Wade in the video. Detective Meecham was not competent to identify Defendant Wade. No proper predicate was laid that Detective Meecham had prior familiarity with Defendant or possessed a better ability than the jury to see the contents of the video. His testimony invaded the province of the jury. *See Edwards v. State*, 583 So.2d 740 (Fla. 1st DCA 1991).

Failure to object to this testimony violated Defendant's rights to due process and a fair trial in violation of Amendments 5 and 14, Constitution of the United States, and Article 1, Sections 9 and 16, Constitution of the State of Florida.

The State argued in guilt phase closing argument the following:

> 7/7/05 just after midnight Michael Jackson, Tiffany Cole and Alan Wade all enter Wal-Mart and disposable gloves are bought. Now how do we know that? We give you visual proof, visual evidence of Alan Wade entering that store just a few minutes after Tiffany Cole and Michael Jackson did on Thursday, July 7th just after midnight. . . .They were able to find these videos because of the receipts in Tiffany Cole and Michael Jackson's hotel room, …and we know Alan Wade was there because a picture says a thousand words. Participant from beginning to end.
> (DIR. ROA, Vol. XIII, p. 1037).

The State next argued,

> At 2:58 a.m. Alan Wade and Tiffany Cole, and only Alan Wade ad Tiffany Cole are seen on the video, are back in that Westside Wal-Mart buying Clorox and buying more gloves. And how do we know that this defendant did that? Visual proof. Alan Wade mind you wearing the same exact hat he's wearing on the 7/7 photo and Tiffany Cole with that red bandanna are walking into Wal-Mart at 2:41 a.m. buying those items. How do we know that the purchase was made at 2:58? Because the receipt tells us so. 7/9/05, 2:58, Clorox and gloves are purchased. We know Alan Wade is with them on the 7th. We know he's with them on the 9th. We know what happened in between (DIR. ROA, Vol. XIII, p. 1040-41).

However, the only witness who testified that the person with Tiffany Cole was Alan Wade was Detective Meecham who was not competent to testify to that fact.

The only evidence Defendant was present at the Wal-Mart was this so-called video evidence. Detective Meecham without objection offered his opinion as to the identity of persons appearing in videotape. The defense could have argued that the photo was of co-defendant Nixon or some other individual. There was no

proper predicate laid for the giving of the opinion and it invaded the province of the jury. *Id.*

An even more glaring example of improper hearsay-opinion testimony occurred when Detective Meecham testified to hearsay-opinion about a gas station video in Pooler, Georgia (DIR. ROA, Vol. XII, p. 833). There is no evidence that the video was ever shown to the jury, although it was apparently admitted in evidence. There was no testimony that the video in any way related to Alan Wade other than Detective Meecham's testimony that he viewed the video and identified Alan Wade (DIR. ROA, Vol. XIII, p. 833-34).

Detective Meecham testified that duct tape found at the gravesite was the same type of tape purchased at Office Depot. (DIR. ROA, Vol. XIII, p. 842). He was not qualified to do so.

Similarly, Officer Rowan testified: a set of car keys were found in Defendant Wade's room that were Lincoln keys and that the keys had a US Airforce key ring and that Mr. Sumner was an Airforce veteran and that therefore the keys were the Sumners' (DIR. ROA, Vol. XI, p. 631), information from Cole's brother that she had come back with "a couple of guys" and was staying at the Best Western (DIR. ROA, Vol. XI, p. 625), the brother pointed out Cole's car (DIR. ROA, Vol. XI, p. 626), information from the brother about Defendant Jackson's nickname (DIR. ROA, Vol. XI, p. 626), the fact that Cole had two rooms registered to her at the

Best Western, rooms 302 and 312 (DIR. ROA, Vol. XI, p. 627). The brother was not called to testify, therefore all references to him were hearsay.

The post-conviction court misapprehended the law of hearsay and of opinion evidence in its Order finding "almost none of it was hearsay in that it was not offered for the truth of the matter asserted. Furthermore, even if some of it had been hearsay it is implausible to think the State could not have introduced the matter in some other form."

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that admission of testimonial hearsay complies with the Confrontation Clause only if 1) the declarant testified at trial or was 2) unavailable and the accused had an opportunity for cross-examination. Most statements made to police during an investigative interview are testimonial. *Rogers v. State*, 948 So.2d 655 (Fla. 2006); *Franklin v. State*, 965 So.2d 79 (Fla. 2007). Additionally, records prepared for law enforcement and to prosecute the accused at trial are testimonial and are subject to confrontation. *Melendez-Diaz v. Massachusetts*, __U.S.__, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); *State v. Johnson*, 982 So.2d 672 (Fla. 2008).

Under this analysis, statements made to Meecham and Rowan during their interviews with various persons from whom they obtained records or other information would constitute "testimonial hearsay" when imparted from them to

the jury. Additionally, information about the FDLE expert's inability to obtain a fracture match was "testimonial hearsay." Information gleaned from civilian witnesses or co-defendants is also "testimonial hearsay." None of these witnesses testified at trial.

Counsel Eler testified that it is his understanding that within limits the lead detective can "get up and lay out the case for the state" (PC, p. 616). "They summarize interviews, things of that nature" (PC, p. 617). He admitted that certain of this evidence hurt Defendant (PC, p. 628).

The post-conviction court should have recognized that trial counsel did not know the law. The Florida Supreme Court has held,

> [A]n alleged sequence of events leading to an investigation and an arrest is not a material issue in this type of case [a murder prosecution]. Therefore, there is no relevancy for such testimony to prove or establish a nonissue. When the only possible relevance of an out-of-court statement is directed to the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a non-hearsay label.

Keen v. State, 775 So.2d 263, 274 (Fla. 2000); *see Saintilus v. State*, 869 So.2d 1280, 1282 (Fla. 4th DCA 2004).

Similarly, Agent Alred testified without objection: his job was to locate and arrest "fugitives" (DIR. ROA, Vol. X, p. 591), he related hearsay testimony about cell phone information of co-defendant Jackson under an alias name and the identity of persons called on that phone (DIR. ROA, Vol. X, p.592-594), and he

testified without qualification based upon training and experience about the content of cell phone records and how cell phone towers work (DIR. ROA, Vol. X, p. 597-600).

The post-conviction court erroneously found that Agent Alred was "qualified as someone with particular expertise." At trial the extent of Agent Alred's expertise relating to cell phones was limited to generalities about the Marshall's Service (DIR. ROA Vol. X, p. 591). There is nothing in the trial record establishing Agent Alred's expertise to interpret records or testify regarding how cell towers work or his ability to locate the direction from which a cell phone is transmitting (DIR. ROA, Vol. X, p. 599). Under the *Crawford* analysis discussed *supra,* Agent Alred related only hearsay information regarding the meaning of cell phone records prepared by Nextel. Agent Alred himself had no particular expertise in this area.

Trial counsel did not raise the issue of Defendant Wade being denied the right to confront witnesses at any time during the testimony of Agent Alred, nor was any general hearsay objection interposed at any time. As a result, Defendant Wade was denied his rights to confrontation and due process guaranteed by Amendments 5 and 14 Constitution of the United States and Article 1 Section 16, Constitution of the State of Florida.

The Florida Supreme Court in *Gordon v. State*, 863 So.2d 1215 (Fla. 2003) held that where cell phone records are properly admitted, and a cell phone employee has explained those records, a police officer can compare the locations on the phone records to cell site maps for the jury. Unlike the facts of *Gordon*, no one from the cell phone company was called to explain the contents of the cell phone records or to authenticate any cell phone maps or sites. The post-conviction court should have recognized that trial counsel was defective for failing to object.

The cell phone and cell tower information directly placed codefendant Jackson near the home of the victims. In conjunction with all the other inadmissible evidence which trial counsel failed to object to, this connected Defendant Wade to the crime.

All of the hearsay, and improper opinion testimony discussed in Claims 2H and 2I were apparent in the record and the post-conviction court erred in finding that counsel was not ineffective for failing to object.

ARGUMENT II

After conducting an evidentiary hearing on claims 2N, 3B, and 3C**,** the post-conviction court erred in finding that Mr. Wade failed to establish deficient performance by trial counsel and prejudice at the penalty phase of his capital trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States

Constitution and his corresponding rights under Article 1 Sections 9 and 16, Florida Constitution.

a. Introduction

Counsel has an obligation to conduct a through investigation of Defendant's background. *Porter v. McCollum*, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary. *Hurst v. State*, 18 So.3d 975, 1008 (Fla. 2009). The Florida Supreme Court has found counsel's performance deficient where counsel "never attempted to meaningfully investigate" mitigation although substantial mitigation could have been presented. *Asay v. State*, 769 So.2d 974, 985 (Fla. 2000); *Shellito v. State*, ___So.3d___, 2013 WL 3334922 (Fla. July 3, 2013)

b. Standard of Review

"Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Hurst v. State*, 18 So.3d. 975, 1013 (Fla. 2009). That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.' " *Porter v. McCallum*, 558 U.S. 30, S.Ct. 447 455-

56, 175 L.Ed2d 398 (2009)(alteration in original) (quoting *Strickland*, 446 U.S. at 693-94, 104 S.Ct 2052 (1984)) “To assess that probability, [the Court] consider[s] ‘the totality of the available mitigation evidence ...’ and ‘reweigh[s] it against the evidence in aggravation.’ ” *Id*. at 453-54 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

Because 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 post-conviction court's factual findings that are supported by competent, substantial evidence, but reviewing the post-conviction court's application of the law to the facts de novo. *Mungin v. State,* 932 So.2d 986, 998 (Fla.2006).

C. **Claim 3B** argues the trial court misapplied the law to trial counsel’s failure to properly investigate potential mitigation, including mental mitigation and drug and alcohol abuse. Also, the trial court misapplied the law to trial counsel’s failure to interview and develop potential mitigation witnesses including the following: counsel failed to have Defendant examined in any meaningful way by an expert in the field of psychiatry, psychology or mental health counseling to attempt to develop mental mitigation, counsel failed to utilize the services of a mitigation expert to any meaningful extent, counsel failed to properly investigate Mr. Wade’s

history of drug and alcohol abuse, counsel failed to develop statutory mitigation that Defendant was under the substantial domination of another (co-defendant Michael Jackson), counsel failed to develop the statutory mitigating circumstances of age and extreme mental or emotional disturbance, counsel failed to locate and interview Carmen Massanet, a close associate of Defendant's and of Michael Jackson and a person who had knowledge of and could testify about Defendant's recent drug and alcohol abuse, and counsel did not prepare or properly develop the testimony of any of the witnesses he called to testify in penalty phase.

The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing on the particular characteristics of the defendant. By failing to provide such evidence to the jury, trial counsel's deficient performance prejudices a defendant's ability to receive an individualized sentence. Consistent with this concept, "[t]he Eleventh Circuit has enunciated the rule that effective representation, consistent with the sixth amendment also involves the independent duty to investigate and prepare." *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984) (internal citations omitted).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. "[E]ven where a client is recalcitrant, courts have been ambivalent in whether counsel is relieved of any further duty of

investigation, particularly where the client exhibits signs of instability." *Marshall v. Hendricks*, 307 F.3d 36, 103 (3d Cir. 202) (citing *Johnson v. Singletary*, 162 F.3d 630, 641-42 (11th Cir. 1998)). "While we do not require that a lawyer be a private investigator in order to discern every possible avenue which may hurt or help the client, we do require that the lawyer make an effort to investigate the obvious." *House v. Balkcom,* 725 F.2d 608, 618 (11th Cir. 1984).

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the United States Supreme Court held "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id*. at 2538.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness

Id. at 2535.

Counsel's highest duty is the duty to investigate and prepare. Where counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, *see Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or

prepare. *See Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *Kimmelman v. Morrison*, 477 U.S. 365 (1986). A reasonable strategic decision is based on informed judgment. "[T]he principal concern . . . is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsel's decision not to introduce mitigating evidence. . . was itself reasonable." *Wiggins,* 539 U.S. at 2536. In making this assessment, the Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id*. at 2538.

In *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), the United States Supreme Court held that counsel rendered deficient performance and cited counsel's failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of Rompilla's prior incarcerations, and failure to gather evidence of a history of substance abuse. *Id.* at 2463. The *Rompilla* Court found that "this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts..." *Id.* at 2462. However, despite the scope of this mitigation investigation, the Court still found that counsel rendered deficient performance. *See also Haliym v. Mitchell*, 492 F.3d 680, (6th Cir. 2007)(Trial counsel rendered deficient performance where

they "failed to discover important mitigating information that was reasonably available and suggested by information already within their possession." *Id.* at 30). The United States Supreme Court recently reiterated that according to "prevailing professional norms" counsel has an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 130 S.Ct. 447 (2009) (*citing Williams v. Taylor,* 529 U.S. 362, 396 (2000)). In *Porter*, the Court held that a state court unreasonably applies *Strickland's* prejudice standard when it fails to give weight to mitigating evidence of a capital defendant's abusive childhood, brain damage, and post-traumatic stress disorder. *Id.*

In *Sears v. Upton*, 130 S.Ct. 3259 (2010), the United State Supreme Court reversed a death sentence where trial counsel's deficient performance resulted in an inaccurate portrayal of the defendant's childhood. Trial counsel unreasonably relied on information from family members and therefore told the jury Sears' "childhood [w]as stable, loving, [middle class], and essentially without incident." *Id.* at 3261. "The prosecutor ultimately used the evidence of Sears' stable and advantaged upbringing against him during the State's closing argument. In *Sears*, the prosecutor told the jury, [w]e don't have a deprived child from an inner city; a person whom society has turned its back on at an early age. But, yet, we have a person, privileged in every way, who has rejected every opportunity that was afforded him." *Id. at* 3262 (internal citations omitted).

The post-conviction trial court completely disregarded the following facts and circumstances developed at the evidentiary hearing which trial counsel failed to present to the sentencing jury or court:

a. Defendant had threatened to commit suicide at the age of 13 and suffered from depression, significant parental abandonment and neglect, and low self-esteem. He was essentially alone for most of his life and left to flounder and to desperately seek love guidance and attention. Records indicate he lacked the psychological and emotional growth of a normal child and his development was significantly stagnated. Counsel attempted to argue to the penalty phase jury the mitigating circumstance that Defendant's ability to conform his conduct to the requirements of law was substantially impaired without presenting any of this information, despite the existence of school records, Gateway Community Services records and HRS records to support these facts.

b. Defendant was 18 years and 48 days old. Both Dr. Bloomfield and Dr. Eisenstein testified counsel could have utilized a mental health expert to discuss with the jury the adolescent brain, the brain's lack of development at this age and the effects of this brain development on impulsivity.

c. Defendant was raised in a dysfunctional and broken family. His younger brother suffers from Asperger's syndrome, an autism disorder, and Defendant's Wade's school records indicated he had social and developmental delays. This is

suspected to be genetic. His older brother Andrew suffered from a chemical imbalance. His half-brother Robert Craig became addicted to crack and heroin. Robert had a criminal record for armed robbery. Defendant had no positive male role models. His mother was at one time believed to be suffering from bipolar disorder. That diagnosis was never confirmed or disproved. His natural father acknowledges suffering from depression. Shreya Mandal, Dr. Bloomfield and Dr. Eisenstein testified at the evidentiary hearing that a mitigation specialist or mental health professional should have testified at the penalty phase regarding the effects of family history, genetics and dynamics on Defendant's ability to conform his conduct to the requirements of law.

d. Defendant had a history of head trauma as confirmed by family members. Medical records were not obtained by trial counsel and no testing was performed which could have established brain trauma. Additionally, it was known to trial counsel that Defendant played the "choking game" as an adolescent where he and friends would choke one another to unconsciousness. Brain trauma is known to affect impulsivity and decision-making capabilities. Dr. Eisenstein, a forensic neuropsychologist testified during the evidentiary hearing that a forensic mental health expert or neuropsychologist could have performed testing to see if Defendant suffered from any type of brain trauma. There is nothing in the record to suggest trial counsel requested this type of testing and was denied by the Court.

Impulsivity and decision-making capabilities affect a person's ability to conform conduct to the requirements of law, a recognized mitigating circumstance. Dr. Eisenstein himself conducted recent testing that disclosed evidence of brain dysfunction, discussed *infra*.

e. Defendant had a length history of drug and alcohol abuse, beginning before his teens and continuing to the time of his arrest. He was "completely wasted" at the time of the offense on a variety of drugs including marijuana, Xanax, a variety of pain killers, and cocaine. Dr. Bloomfield and Dr. Eisenstein testified at the evidentiary hearing that a mental health specialist could have testified at the penalty phase to the effect of this alcohol and drug abuse on Defendant's ability to conform his conduct to the requirements of the law as well as his ability to control his impulsivity and his ability to think in a rational manner.

Failure to ensure that a reasonably competent mental health evaluation was conducted and to investigate potential mental mitigation and present mental mitigation fell below an objective standard of reasonableness. As a result of these unprofessional errors, there is a reasonable probability that the result of the penalty phase of the trial would have been different and Defendant Wade would have been sentenced to life.

Counsel failed to ensure that Mr. Wade received a reasonably competent mental health evaluation designed to uncover mitigation. Furthermore, Dr.

Bloomfield was not even utilized to assist the jury in understanding Mr. Wade's biological, social and psychological history, drug and alcohol abuse and other factors that might have a bearing on the jury's understanding of mitigating circumstances. Dr. Bloomfield was never provided with any birth records, medical records, statements of friends or family members, statements of teachers, detailed family history and other factors relevant to mitigation.

Attorney Tassone testified that his first effort to secure a mental health professional was in September 2006, some eleven months after he was appointed (PC, p. 43). He agreed that potentially there were four statutory mitigating factors: age, substantial domination of another, extreme mental or emotional disturbance and his ability to conform his conduct to the requirements of the law were substantially impaired (PC, p.113). Tassone acknowledged that a mental health professional would have been important for the establishment of three of these four mitigators. (PC, p. 114). Tassone admitted at the evidentiary hearing that Bloomfield said Defendant was not cooperative with him (PC, p. 16). He said that Bloomfield could not provide beneficial information so he asked him not to write a report (PC, p. 15). Tassone acknowledged that he himself did not try to get Defendant to cooperate with Dr. Bloomfield, nor did he attempt to get intervention from friends or family to talk to Defendant (PC, p. 116-117).

The trial court erroneously found significant that trial phase counsel "had no reason to believe that the Defendant was mentally unstable in any way." This is not the proper test for mental mitigation.

Mr. Tassone acknowledged that brain trauma can be confirmed through testing (PC, p. 138). He also testified that he never considered hiring a neuropsychologist or a neurologist (PC, p. 138). He agreed he should have pursued Defendant's mental health more than he did (PC, p. 145). He did not recall giving the report of Shreya Mandal, the mitigation coordinator, to Dr. Bloomfield to see if that would assist him (PC, p. 146).

Mr. Tassone's time billing demonstrated that he did not interview any witnesses himself prior to the start of the guilt phase (PC, p. 178). He did not hire anyone who specialized in drug or alcohol abuse (PC, p. 177).

Dr. Bloomfield testified that he generally begins with a clinical interview, reviews collaterals and records, and that he would rely on a mitigation specialist for comprehensive family and social history (PC, p. 378). He met with Tassone and thought he reviewed some records but no records were ever given to him (PC, p. 379). He did not have a list of what he reviewed. Nor did he specifically recall any records (PC, p. 379). He thought he looked at records before he saw Defendant in July 2006 and then again in November 2006 (PC, p. 380). He never

received any interview summaries from family members or witnesses (PC, p. 381). He did not have an arrest and booking report (PC, p. 381).

Dr. Bloomfield only saw Defendant for 30 minutes on July 9, 2006, and only saw him for one hour on September 8, 2006 (PC, p. 385). Dr. Bloomfield testified he again saw Defendant on November 15, 2006, he got a little history about his Baker Act and his GED, he did a little competency stuff, and he told Tassone that Defendant was preoccupied with the guilt phase (PC, p. 385). He further testified that Mr. Tassone never went to the jail with him to see Defendant (PC, p. 386), he never saw Defendant after November 15, 2006 (PC, p. 388), and he reported to Mr. Tassone that Defendant Wade was "interested in discovery and was not interested in pursuing anything with me…and at that point there was nothing I could testify to" (PC, p. 389).

Dr. Bloomfield said he was never given any information from Shreya Mandal, the mitigation coordinator (PC, p. 21), was not given any information about Defendant's abuse of alcohol or drugs, but that would have been important (PC, p. 391), did not recall being given any information about the "choking game", but that could have been important (PC, p. 392), that he could have testified based on hypothetical questions even if the client had remained uncooperative (PC, p. 393), that he could have testified about adolescent brain development in general even without Defendant's cooperation (PC, p. 394), that he could have testified to

hypothetical questions relating to alcohol, drugs and the choking game even without Defendant's cooperation (PC, p. 394), that he could have testified to hypothetical questions about the effects of abandonment by a father, neglect by a mother and lack of a male role model even without Defendant's cooperation (PC, p. 395). He testified he was never asked to revisit Defendant after 11/06 even after the guilty verdict (PC, p. 395).

The Sixth Amendment requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. *Ragsdale v. State*, 798 So.2d 713 (Fla. 2001). Meaningful assistance of counsel in capital cases requires counsel pursue and investigate all reasonably available mitigating evidence, including brain damage and mental illness. *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003). A new sentencing hearing is mandated in cases that entail psychiatric examinations so grossly insufficient that they ignore clear indicators of mental retardation or brain damage. Counsel renders deficient performance when he fails to ensure an adequate and meaningful mental health examination. *Ponticelli v. State*, 941 So.2d 1073, 1095 (Fla. 2006); *Sochor v. Florida*, 833 So.2d 766, 722 (Fla. 2004). Counsel's failure to pursue mental health mitigation despite "red flags" amounts to deficient performance; "a competency and sanity evaluation as superficial as the one [Dr. Bloomfield] performed for [Mr. Wade] obviously cannot substitute for a thorough mitigation evaluation." *Arbelaez v. State*, 898

So.2d 25, 34 (Fla. 2005). Prejudice is established when counsel fails to investigate and present evidence of brain damage and mental illness. *Ragsdale v. State*, 798 So.2d 713, 718-19 (Fla. 2001); *Rose v. State,* 675 So.2d 567, 571 (Fla. 1996) (citing *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994)).

In a case involving Mr. Eler, the Florida Supreme Court has recently found ineffective assistance of counsel at the penalty phase under facts very similar to those in Defendant Wade's case. In *Douglas v. State*, __So.3d__, 2012WL 16745 (Fla. Jan. 5, 2012), the record established counsel hired a licensed psychologist to examine Defendant's mental status and look into possible mitigation. The expert conducted a battery of tests, determined he was competent to proceed and requested counsel provide a variety of depositions, records and other documents relevant to potential mitigation. The expert report requested additional follow-up with counsel. The expert did not receive additional documents or any request for additional follow-up from counsel. At penalty phase no mental health professional was called to testify. Instead, twelve witnesses were called to testify that Defendant was a good person who could be productive in prison. This Court found that trial counsel's failure to follow up with the forensic psychologist constituted ineffective assistance of counsel at the penalty phase of this capital trial.

> While '*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence ... [or] present mitigating evidence at sentencing in every case,' *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), 'an attorney has a strict duty to conduct a reasonable

investigation of a defendant's background for possible mitigating evidence,' *State v. Riechmann*, 777 So.2d 342, 350 (Fla. 2000). 'Among the topics that counsel should consider presenting in mitigation are the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences,' *Parker v. State*, 3So.3d 974, 985 (Fla. 2009). As to counsel's duty of securing evidence of mental health mitigation, this Court has recognized that '[w]here available information indicates that the defendant could have mental health problems, such an evaluation is fundamental in defending against the death penalty.' *Jones v. State*, 988 So.2d 573, 583 (Fla. 2008) (quoting *Arbelaez v. State*, 898 So.2d 25,34 (Fla. 2005)). In light of its significance, 'a reasonable investigation into mental mitigation is part of defense counsel's obligation where there is *any* indication that the defendant may have mental deficits,' *Hurst,* 18 So.3d at 1010 (emphasis added).

The testimony of Douglas's penalty-phase witnesses demonstrates counsel must have known, at the very least, that Douglas had difficulty reading, was placed in a special academic program, dropped out of school in the seventh grade due to a learning disability, and had a father who was physically and emotionally abusive. Despite having access to this information, there is no evidence that counsel sought to further investigate Douglas's mental health either by seeking background records or by consulting with a mental health expert. In fact, even after Dr. Krop's request for additional materials, the record does not disclose that counsel made any effort to provide Dr. Krop with readily available evidence. Certainly, counsel should not have considered Dr. Krop's competency evaluation as 'a reliable substitute for a thorough mitigation evaluation, ' *Ponticelli v. State*, 941 So.2d 1073, 1096 n. 24 (Fla. 2006) (quoting *Arbelaez*, 898 So.2d at 34; *Id*. at 1095-96)(noting that counsel should not have considered a mental health expert's fifteen-minute competency evaluation conducted prior to trial as a reliable substitute for a thorough mitigation evaluation). We conclude that there were sufficient facts in this case to place counsel on notice that further investigation of mental health mitigation was necessary. Consequently, counsel's failure to investigate this line of defense was not reasonable under prevailing professional norms.

Id.

"Mitigating evidence, when available, is appropriate in every case where the defendant is placed in jeopardy of receiving the death penalty. To fail to do any investigation because of the mistaken notion that mitigating evidence is inappropriate is indisputably below reasonable professional norms." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). The Eleventh Circuit Court of Appeals, in *Hardwick v. Cros*by, 320 F.3d 1127, 1162 (11th Cir. 2003), held when mental health evidence was available, and "'absolutely none was presented [by counsel] to the sentencing body, and …no strategic reason [w]as…put forward for this failure,' our court determined that this omission was 'objectively unreasonable,'"(quoting *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

The post-conviction court erroneously found that the record supported a finding that Defendant Wade's "recalcitrance and attitude" effectively prohibited his attorneys and Dr. Bloomfield from developing mitigation information. This is not a case like *Evans v. State*, 975 So.2d 1035 (Fla. 2007) where trial counsel presented significant mental health testimony at the penalty phase and the *Spencer* hearing, and the record showed a very uncooperative client who absolutely refused to let counsel present a mental status defense.

Rather, the facts of the evidentiary hearing established Mr. Wade's "recalcitrance and attitude" to be the result of counsel's failure to establish any

meaningful attorney-client relationship. Mr. Eler acknowledged he never went to the jail to review the entire file with Defendant (PC, p. 635), and utilized the investigator to ferry depositions (PC, 636). Eler admitted that he did not know if Wade ever did review everything – that, if he did it wasn't with him (PC, p. 637).

Mr. Eler testified that there are problems if the lead attorney spends "too much time holding the client's hand" (PC, p. 560). He acknowledged his time billing sheets (PC, Def. Exh. 8) showed he only visited Defendant Wade six times before trial (PC, 571-574). He said he was aware of the ABA Guidelines for the Appointment and Performance of Defense Counsel regarding visiting clients (PC, p. 652).

Mr. Tassone's records reflected seeing the Defendant more often at the jail but he could not recall if he saw Defendant Wade or it was a member of his staff (PC, p.23, 38). Months would go by between some of his or his staff's visits (PC, p. 36-38).

Ms. Mandal the mitigation specialist did not find Mr. Wade recalcitrant or uncooperative nor did Dr. Bloomfield.

Contrary to the Court's findings, Counsel Tassone acknowledged that he did not try to get Defendant to cooperate with Dr. Bloomfield (PC, p. 116-117). He also testified that he never considered hiring a neuropsychologist or a neurologist (PC, p. 138). He agreed he should have pursued Defendant's mental health more

than he did (PC, p. 145). He did not recall giving the report of the mitigation coordinator to Dr. Bloomfield (PC, p. 146). Mr. Tassone's time billing demonstrated that he did not interview any witnesses prior to the start of the guilt phase of the trial (PC, p. 178). He did not hire anyone who specialized in drug or alcohol abuse (PC, p. 177).

Co-defendant Bruce Nixon testified at the evidentiary hearing. He was also a witness at the penalty phase. He testified that he never discussed his testimony with Mr. Eler or Mr. Tassone prior to the penalty phase (PC, p. 243). At the evidentiary hearing he testified he and Mr. Wade were best friends (PC, p. 243). Wade was very upset and hurt that his father "never came around…It hurt him…he was always talking about it" (PC, p. 244). He testified that Defendant Wade was involved in drugs and alcohol since he was 12. The drug abuse started as marijuana and progressed to cocaine, methadone, Xanax, Oxycotin, various pills, Lortabs, Percocet as he got older (PC, p. 245). He further testified that Defendant was high at the time of the homicides, on cocaine and alcohol, he was "messed up", "beyond reality", "he wasn't here", "we were smoking and stuff getting messed up the whole time" (PC, p. 248-249). Defendant Wade was popping pills, alcohol and cocaine (PC, p. 249). The witness testified he was not as intoxicated as Wade because he was not doing cocaine (PC, p. 249). None of this testimony was presented to the sentencing jury or court.

The post-conviction court found Mr. Nixon's trial testimony to be in conflict with the testimony adduced at the post-conviction hearing, and therefore the trial court found his testimony unbelievable. The trial court's finding was in error. A review of Mr. Nixon's trial testimony (DIR. ROA, Vol. XII, pp 880-948) shows only one question directed to Mr. Nixon during his trial testimony relating to alcohol or drug abuse. That question involved Mr. Nixon's use of alcohol and drugs after the crime:

> Q During this period of time after you got dropped off but before you got arrested, did you go to a party and get wasted?
> A Yes, sir.
> Q Tell the jury about how you got so inebriated.
> A I was taking—I was on pills and I was drinking, drinking beer out of a keg. (DIR ROA, Vol. XII, p. 917-18)

There were no questions asked of Mr. Nixon during the trial about Mr. Wade's use of drugs or alcohol before, during, or after the crime. Contrary to the finding of the post-conviction court, no questions were posed by the jury during the guilt phase (DIR ROA, Vol. XII, p. 946) or during the penalty phase (DIR ROA, Vol XIV, p. 1261). The post-conviction court's findings are not supported by competent substantial evidence.

Nixon also testified at the evidentiary hearing about the "choking game." He and Defendant Wade played the game from the age of 12 to 18. He described the game as "somebody chokes you and you pass out" (PC, p. 250). He testified Defendant Wade would play it "all the time" and that he personally witnessed Mr.

Wade fall on the floor and pass out (PC, p. 250-251). He also saw Wade lose consciousness from drugs and alcohol "a lot" (PC, p. 251). None of this testimony was presenting to the sentencing jury or court.

The post-conviction court found evidence about the "choking game" unpersuasive because neither witness Nixon nor Wilkinson showed any "indication of mental shortcomings." No expert testimony was presented by the State on this point and neither witness was examined by a mental health professional to determine whether either had mental deficiencies. The post-conviction court court's findings are not supported by competent substantial evidence.

Christie Thompson testified at the evidentiary hearing. She is Bruce Nixon's sister. She testified that she witnessed Defendant Wade's drug abuse escalate, "when he moved to Jacksonville it got really bad…pills…the way he acted he was always messed up" (PC, p. 262). She saw him some time prior to the homicides and he was high on drugs, "slurring words and could barely talk" (PC, p. 263). She was available in 2005-2007 and no one from Defendant Wade's defense contacted her about testifying (PC, p. 264).

Jerry Ganey testified at the evidentiary hearing. He is the husband of Freida Ganey. He has known Defendant since Defendant was 14. Defendant had no father figure, the witness did not want to raise another child and made no attempt to be a father figure to Defendant Wade (PC, p. 268). It was obvious to him that

Defendant was getting involved in drugs and alcohol, but he never confronted Defendant (PC, p. 269). The witness was available to testify at Defendant's penalty phase but was never contacted by the defense attorneys despite the fact that he came to the trial everyday (PC, p. 270).

Freida Gainey testified at the evidentiary hearing. She also testified at penalty phase and guilt phase. She is Defendant Wade's mother. Her son Andrew, Defendant's brother has been diagnosed with Asberger's syndrome. At the evidentiary hearing she testified that Defendant was eight at the time of her divorce from Mr. Wade, Sr. (PC, p. 281). Defendant felt abandoned and angry with her for separating the family (PC, p. 281-282). She first noticed Defendant's use of drugs when he was 14 (PC, p. 282).

She thought Defendant Wade was heavily involved in drugs and alcohol (PC, p. 286). She heard about the "choking game" through young persons in the neighborhood (PC, p. 287). Ultimately she told him at age 17 that he could not move with her to her new apartment.

Vanessa Wilkinson testified that she has known Defendant since they were both around 12-13 and they grew up together. Defendant Wade was her best friend. She played the "choking game" with him around 20 times (PC, p. 410). She also learned he was involved in drugs and saw him under the influence (PC, p. 410). It got worse when he moved to Jacksonville. She saw him 2 months prior

to the homicides and he was high. (PC, p. 411-412). She was available in 2005-2007 but was never contacted by defense counsel (PC, p. 414).

Shreya Mandal, the mitigation specialist, testified at the evidentiary hearing. She has a master's degree in clinical social work (MCSW) and a Juris Doctor (JD) degree. She did not testify during the penalty phase or the *Spencer* hearing. She conducted 3-4 interviews of Defendant Wade in May-July 2007 and found him extremely cooperative (PC, p. 422-423). She identified a list of witnesses she felt needed to be interviewed and submitted it to Tassone in August (PC, p. 425) (PC, Def. Exh. 5). Most of these witnesses were never interviewed, including Carmen Massonet, because she was constrained by time and money (PC, p. 439). Tassone did apply to have Mandal hired until Spring 2007 (PC, p. 420). She submitted her final report October 22, 2007 as a blueprint to identify factors for Mr. Tassone which were compelling enough to use during the penalty phase (PC, p. 424). Tassone did not request any follow-up, nor was she told of the guilty verdict (PC, p. 442). She was never asked to testify at penalty phase although she had done so on other occasions to explain the effects of a person's background, family dynamics and family dysfunction (PC, p. 443).

She recommended to Tassone the need for him to hire a mental health professional to do psychological testing because she saw red flags that a mental health professional could help diagnose and use to explain Defendant Wade's

conduct (PC, p. 443-444). "I'm trained to know when a neuropsychologist should be involved and I made that recommendation to Tassone" (PC, p. 452). She was never asked to meet with Dr. Bloomfield (PC, p. 444).

She testified Mr. Tassone seemed to have a lack of interest, and that he told her he was bringing her on board because he did not want to deal with "these cases" (PC, p. 446).

The post-conviction court found this witness less than credible because "based on her responses and her tone of voice, one wonders what ax she had to grind with Mr. Tassone." It should be noted that Ms. Mandal testified telephonically. The post-conviction court misapplied the facts to the law, and the court's findings with respect to Ms. Mandal's testimony are not supported by competent substantial evidence.

Patricia Paige testified at the evidentiary hearing. She had previously testified at the penalty phase. She is Defendant's half-sister. She has a child who has been diagnosed with Asberger's syndrome, consistent with this disease being genetically inherited. She is 16 years older than Defendant. Defendant would spend as many summers with her as she could get him (PC, p. 457). He was more of a son to her than a brother and people mistook him for her son (PC, p. 457-458). Defendant's mother, Freida Ganey treated Defendant like a friend rather than a mother and did not discipline him (PC, p. 458). Tassone only talked her with for 5

minutes before she walked into the courtroom to testify (PC, p. 460). She never met attorney Eler (PC, p. 460).

Alan Wade, Sr., defendant's father, testified at the evidentiary hearing. He was not called during the penalty phase. He and Defendant's mother divorced when Defendant was 9 or 10. He came home one day and there was a note on the table "she left with the kids…it took me 6 weeks to find them" (PC, p. 472). The following Christmas I had no money and I didn't have any presents but Defendant said it was "OK because I was there" (PC, p. 473). Mrs. Ganey never told him that Defendant was in trouble and did not do anything to try to straighten out Defendant's drug problem (PC, p. 476-477). Counsel was ineffective for failing to call Mr. Wade, Sr. to establish Defendant Wade's abandonment issue.

Rick Sichta is an attorney who has been a member of the bar since 2003. At the time of Defendant's trial he worked with Frank Tassone and helped him on this case. He testified at the evidentiary hearing that he did not recall Dr. Bloomfield being involved in Defendant Wade's case at all (PC, p. 512). He recognized a mental health professional would have be helpful to address issues involving substantial domination and age (PC, p. 505). He made notes during a discussion with an investigator that they should look into drug abuse, cocaine usage, age and substantial domination mitigators (PC, p. 497-498) (PC, Def. Exh. 6). He testified

Defendant Wade was not happy with Mr. Tassone and he and another associate were used to try to talk to Defendant about a plea (PC, p. 505-508).

Dr. Hymen Eisenstein was hired for purposes of the post-conviction motion and testified at the evidentiary hearing. He is a clinical psychologist with a subspecialty in neuropsychology. He is board certified in neuropsychology. He has testified in approximately 50 death penalty cases. In this case, he received records, including the mitigation report of Shreya Mandal, and conducted a number of collateral interviews of his own (PC, p. 306-307).

His examination of Defendant Wade consisted of 5 visits with Defendant over a period of 20 hours, 5 hours of interviewing and 15 hours of testing (PC, p. 309). He was also provided with additional interviews conducted by a post-conviction investigator (PC, p. 309). He conducted comprehensive neuropsychological testing including IQ, memory, executive functioning, language, and T.O.V.A, a test to determine attention and concentration (PC, p. 310).

The post-conviction court had difficulty with Dr. Eisenstein's evaluation, specifically his reliance on the testimony of Mr. Nixon regarding Defendant's use of alcohol and drugs, and testimony about the "choking game." The post-conviction court did not address Dr. Eisenstein's reliance on the history of alcohol and drug abuse presented by witnesses Jerry Ganey, Freida Ganey, Vanessa

Wilkinson and Christie Thompkins. The post-conviction court also "wonder[ed] how Dr. Eisenstein could possibly testify to the Defendant's mental health seven (7) years after these crimes were committed." Absent any evidence or expert witness presented by the State to the contrary, the post-conviction court substitued its own opinion for that of a qualified expert and found Dr. Eisenstein "less than credible." Respectfully, the post-conviction court has misapprehended the law, misapplied the facts to the law, and the court's finding with respect to Dr. Eisenstein's testimony are not supported by competent substantial evidence.

Dr. Eisenstein testified his examination supported a finding of four statutory mitigating factors: age, inability to conform conduct to the requirements of law substantially impaired, substantial domination by another, and extreme mental and emotional disturbance.

Regarding age as a mitigating factor, Dr. Eisenstein thought that it was important that his testing was done when Defendant was 25 years of age, when he was cooperative, drug free, and stable, so the results reflected true impairments (PC, p. 311). At the time of the offense, Defendant was 18 years and 48 days old (PC, p. 309). Dr. Eisenstein testified the full development of executive functioning and frontal lobe functioning only begins at age 17 and extends up to age 25, so age 25 is a more accurate reflection of full development (PC, p. 311-312). He explained executive functioning is thinking processes, the ability to weigh options,

to make decisions, to inhibit responses—the ability to say "no" (PC, p. 313). He additionally testified at age 18, the brain is not fully able to make those decisions (PC, p. 313).

Dr. Eisenstein testified that at the time of the offense, Defendant Wade was functioning under significant stressors including coming from a broken home, academic failure, abandonment and neglect, no stability, and no job. According to Dr. Eisenstein, it was a dark and dismal period of his life, "there were suicidal thoughts." These things operated to Defendant Wade's detriment in terms of his executive functioning (PC, p. 314). His development was arrested from age 13-18 due to drug usage, but after he was put into a structured environment his brain continued to develop and he started to function in a normal way and he became a model prisoner in the jail (PC, p. 315-316). Drugs and alcohol from 13-18 would have caused him to be depressed, hence Defendant Wade's Baker Act admission, which trial counsel failed to introduce during the penalty phase. Dr. Eisenstein testified drugs and alcohol also kill brain cells, and because of the drug abuse the development of his brain was put on hold (PC, p. 316).

Dr. Eisenstein further testified the "choking game" was important because all traumatic incidents to the brain add up and are more than cumulative, they are exponential. A lack of oxygen results in dead brain cells and holds back normal development of the brain (PC, p. 319). The tests he conducted showed different

patters of abnormality. Mr. Wade's brain does not process information as quickly as it should (PC, p. 320-321). His verbal understanding and ability to communicate is compromised (PC, p. 325). The T.O.V.A. showed an inability to remain focused (PC, p. 326). Dr. Eisenstein testified that in his opinion Defendant Wade's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the offense (PC, p. 328). Drug and alcohol use would have worsened the problem and made him less likely to be able to conform his conduct to the requirements of the law (PC, p. 329). It is also Dr. Eisenstein's opinion that at the time of the offense Defendant Wade was under extreme mental and emotional disturbance. Additionally, besides issues with the brain development and drug abuse, he was abandoned, he was in academic failure, there was no stability in his life, he was depressed, he saw no future, had no guidance, and no sense of direction (PC, p. 332).

Dr. Eisenstein testified that in his opinion at the time of the offense Defendant Wade was also under the substantial domination of another, Michael Jackson. He testified that Defendant Wade wanted a male father figure, he was thirsting for someone to tell him what to do, he is passive by nature, there was no other father figure, and Defendant found Michael Jackson. Jackson was the first significant male figure taking the role of telling Defendant Wade what to do (PC, p. 332-336).

Defendant Wade suffered from substantial drug and alcohol abuse at the time of the offense in Dr. Eisenstein's opinion. It was important to him that others described the extent of the abuse. He testified that drugs and alcohol affect the perceptional processing abilities of an individual and Defendant would have been in a state of blur during the entire criminal event (PC, p. 368).

Had Mr. Wade's attorneys presented a comprehensive picture of Mr. Wade's background, mental health and drug and alcohol abuse by utilizing the full services of a competent mental health expert, the balance of the aggravating and mitigating circumstances would have been different and there is a substantial probability that Mr. Wade would have received a life sentence.

Regarding mental health mitigating evidence, the Eleventh Circuit Court of Appeals has distinguished between its use during the guilt phase to establish competency to stand trial and presenting mental health mitigating evidence at penalty phase.

> There is a great difference between failing to present evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider.

Hardwick v. Crosby, 320 F.3d 1127, 1163 (11th Cir. 2003) citing *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

When mental health evidence is "available and absolutely none presented [by counsel] to the sentencing body, and…no strategic reason [w]as…put forward for

this failure," the Eleventh Circuit determined this was "objectively unreasonable." *Id*. at 1164, citing *Middleton v. Dugger*, 849 F.2d 491, 493-95 (11th Cir. 1988). Additionally, the Eleventh Circuit has recognized that psychiatric mitigating evidence cannot only act in mitigation, it can also significantly weaken aggravating factors. *Id.* at 1164, citing *Elledge v. Duggar*, 823 F.2d 1439, 1447 (11th Cir.), *withdrawn in part on denial of rehearing en banc*, 833 F.2d 250 (11th Cir. 1987) (withdrawing only unrelated Part III of the opinion). Absent any effort to acquire or develop mental health mitigation, there can be no strategy as to whether to present it nor any basis for informing or advising the defendant. Eler and Tassone clearly had enough information as to defendant's mental status and history to alert a competent defense attorney to pursue this avenue of investigation yet did nothing. It is contrary to the law to find, as did the post-conviction court, that trial counsels' failure to present mental mitigation was the result of strategy.

But for trial counsel deficient performance there is a probability that the penalty phase recommendation would have been for a life sentence, and that defendant would have received a life sentence. Instead, the lack of mental mitigation in Mr. Wade's case is similar to the deficient mitigation found in *Douglas*, *supra*. *See also Rose v. State*, 675 So.2d 567 (Fla 1997); *Hildwin v. Dugger*, 654 So.2d 107, 109 (Fla.) *cert. denied*, 516 U.S. 965, 116 S.Ct. 420, 133 L.Ed.2d 337 (1995); *Baxter v. Thomas*, 45 F.3d 1501, 1512-13 (11th Cir.) *cert.*

denied 516 U.S.946; 116 S.Ct. 385, 133 L.Ed.2d 307 (1995); *Shellito v. State*, __So.3d __, 2013 WL 3334922 (Fla. 2013).

Counsel's failure to investigate and present mitigation evidence fell below an objective standard of reasonableness and as a result of these unprofessional errors there is a reasonable probability that the result of the penalty phase of the trial would have been different and Mr. Wade would have been sentenced to life.

Claim 3C argued that penalty phase counsel's closing argument conceded the aggravating circumstance of pecuniary gain and the capital felony was committed in a heinous atrocious or cruel manner.

Failure to discuss these concessions with Defendant and obtain Defendant's consent fell below an objective standard of reasonableness and as a result of this unprofessional error there is a reasonable probability that the result of the penalty phase of the trial would have been different.

Specifically, during the penalty phase argument counsel state the following:

> There was no good reason to murder Reggie and Carol Sumner and he did it to get money and indeed greed is the reason that Reggie and Carol Sumner are dead and greed is the reason that Alan Wade sits here today after spending two-and-a-half years in jail waiting on a recommendation—…without greed this case wouldn't hold up for a minute." (DIR. ROA, Vol. XIV, p. 1314-15).
> Alan Wade's acts were evil itself, that there was no moral justification. (DIR. ROA, Vol. XIV. P. 1316).

As a result of these concessions, counsel for Defendant did not even make an attempt to rebut or minimize two significant statutory aggravating

circumstances. This is contrary to the evidence that suggested that all of the victim's belongings were found in the possession of the other codefendants and that Defendant Wade actually received very little in terms of pecuniary gain. Additionally, referring to the Defendant's acts as "evil" tended to destroy trial counsels' stated strategy that Defendant Wade was merely a follower, or an accessory after the fact, as opposed to an aggressive, active participant in the crime.

"[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Counsel's strategy to concede these two aggravating circumstances was unreasonable under the standard prescribed by *Strickland*. Counsel's mission in a penalty phase is to persuade the trier of fact that his client's life should be spared. *Florida v. Nixon*, 543 U.S. 175, 191, (2004). The concession of two aggravating circumstances does not promote that objective. Additionally, while *Nixon* holds that a defendant does not have to affirmatively and explicitly agree to a strategy to concede guilt, here the concession was never even discussed with Defendant.

At the evidentiary hearing, Mr. Tassone admitted conceding pecuniary gain (PC, p. 27), stating "I had to concede something" (PC, p. 184), but said he did not

"fully" concede HAC and it was not his position that the jury should find HAC (PC, p. 28-29).

Given this statement, it was obviously an error on his part to make the statement, "Alan Wade's acts were evil itself, that there was no moral justification." This statement is the epitome of the HAC aggravating circumstance.

The post-conviction court found "nothing inappropriate" regarding trial counsel's concessions "in light of the horrendous evidence introduced in this case against the Defendant." The post-conviction court fails to recognize that regardless of the nature of the facts of the case, trial counsel's duty under the law during a penalty phase is to convince the jury and the court that his client's life should be spared. Respectfully, the post-conviction court has misapplied the law to the facts and its finding is not based upon competent substantial evidence.

Argument III. The trial court erroneously denied Mr. Wade a full and fair evidentiary hearing on Claims 1A, 1B and 1C. An evidentiary hearing should have been granted to establish that counsel's conduct was deficient and not sound trial tactic. These claims dealt with whether counsel had sufficient familiarity with the law, and understood the significance of leaving death scrupled persons on the jury.

A. Introduction and Standard of Review

When evaluating claims that were summarily denied without a hearing, this Court will affirm "only when the claim is 'legally insufficient, should have been

brought on direct appeal, or [is] positively refuted by the record.' " *Reynolds v. State,* 99 So.3d 459, 471 (Fla. 2012) (quoting *Connor v. State,* 979 So.2d 852, 868 (Fla. 2007)), *cert. denied,* ___ U.S.___ , 133 S.Ct. 1633, 185 L.Ed.2d 620 (2013); *Freeman v. State,* 761 So.2d 1055, 1061 (Fla. 2000).

B. The post-conviction court erred in finding that Mr. Wade failed to establish deficient performance by trial counsel and prejudice at the jury selection phase of his capital trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and his corresponding rights under the Article 1, Section 9 and 16, Florida Constitution. Further, Mr. Wade's convictions are materially unreliable due to counsel's deficient performance.

Counsel while exhausting his peremptory challenges, failed to request additional peremptory challenges, and failed to identify any juror he would have stricken if given additional peremptory challenges.

Trial counsel should have known that under Florida law, "[t]o show reversible error, a defendant must show that all peremptory challenges had been exhausted and that an objectionable juror had to be accepted." *Pentecost v. State*, 545 So.2d 861, 863 n.1 (Fla. 1989). This was subsequently explained in *Trotter v. State*, 576 So.2d 691 (Fla. 1990), to mean the following:

> Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant

> either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted.

Id. at 693. Counsel also needs to request additional peremptory challenges and have that request denied.

The post-conviction court correctly assessed that that this issue was addressed by the Florida Supreme Court on direct appeal but neglected to acknowledge that the Florida Supreme Court found counsel failed to identify any juror he would have stricken if the trial court had granted his request for additional peremptory challenges. *Wade,* 41 So.2d at 873.

Counsel's performance was deficient in that he apparently did not know the requirements of the law during jury selection in a capital trial.

Additionally, the post-conviction court failed to apprehend that trial counsel failed to apply the proper law governing the death penalty weighing process during his questioning of prospective jurors, thereby misleading them on their duties as a juror during deliberations. Specifically, during the jury selection counsel Eler made the following references to the juror's responsibilities during penalty phase deliberations:

> …if they presented aggravation, factors that beyond a reasonable doubt outweighed the mitigators, then you could apply the law and follow the law and vote death, is that right?" (DIR. ROA, Vol. IX, p. 248). Okay. Let me ask you one other question: I take it then that you could if the aggravating circumstances outweighed the mitigating circumstances apply the law and if the case were appropriate vote death? (DIR. ROA, Vol. IX, p. 265).

Nowhere during jury selection did counsel for the defense tell the jury that death is never required, even when the aggravating circumstances outweigh the mitigating. Instead, counsel for the defense left the entire venire with the impression that they must vote for death when the aggravating circumstances outweigh the mitigating.

The post-conviction court found this occurred during trial counsel's efforts to rehabilitate the juror, and found "nothing inappropriate." The post-conviction court has misapprehended the law and these findings are not supported by competent substantial evidence. It is immaterial when defense counsel's comments occurred. The fact they occurred demonstrate the counsel did not know the law that death is never required. These comments made by defense counsel Mr. Eler were not cured by the giving of the standard instruction and were not corrected by defense counsel Mr. Tassone during his closing remarks during penalty phase.

Failure to properly recite the law during the jury selection fell below an objective standard of reasonableness and as a result of this unprofessional error there is a reasonable probability that the result of the penalty phase of the trial would have been different.

The trial court failed to apprehend the significance of counsel's failure to adequately explore juror's feelings in support of the death penalty and failure to

excuse either for cause where appropriate or by peremptory challenge jurors who were most strongly for the death penalty (5 on a scale of 1-5). Specifically, counsel failed to remove from the jury Mr. Isleib, Mr. Baesler, Ms. Smith, and Ms. Bragg all of whom expressed that they were most strongly for the death penalty. Ms. Bragg was the first alternate who ultimately was seated for the penalty phase.

The post-conviction court found that this does not "indicate that an actually biased juror sat on the jury."

During the questioning of Mr. Isleib, the following colloquy occurred:

MR. ELER: Islieb. I'll get it right before the day is through.
THE PROSPECTIVE JUROR: Most definitely a five.
MR. ELER: A five. Okay. Now that doesn't mean you would automatically vote, right, for death? You would listen to all the facts?
THE PROPECTIVE JUROR: Absolutely." (DIR. ROA, Vol. IX, p. 252).
Defense counsel asked no additional questions.
During the questioning of Ms. Bragg (DIR. ROA, Vol. IX, p. 259) and Mr. Baesler (DIR. ROA Vol. IX, p. 252), counsel asked no questions after the juror announced each was a "five".
During the questioning of Ms. Smith, the following colloquy occurred:
"MR. ELER: Okay. All right. Thank you. Ms. Smith, on my scale of one to five, where would you be?
THE PROSPECTIVE JUROR: Five.
MR. ELER: Okay. And once again does that mean you wouldn't automatically vote death but you would listen to the aggravation and mitigation, apply the law that Judge Weatherby tells you to and come to your own individual vote?
THE PROSEPCTIVE JUROR: Yes.
MR. ELER: Okay. So you could—you could foresee a case where somebody may be guilty of first-degree murder that deserves a life sentence without parole—spend the rest of his life in prison as opposed to death, you could see yourself voting for life or death depending on the circumstances?
THE PROSPECTIVE JUROR: Yes." (DIR. ROA, Vol. IX, p. 256-257).

The questioning by defense counsel did nothing to uncover the true feelings of the jurors and more importantly did not ask any of the jurors whether or not they could follow the law requiring the state's burden of proof, the defense burden of proof, the weighing process, and the fact that voting for death is never required. Moreover, the question of whether or not the juror would require the defendant to prove why he should live was never asked.

Presumably, leaving these four jurors on the jury resulted in four of the eleven votes for death. Any juror who expresses the strongest support for the death penalty that can be expressed, by saying they are a five on a scale of one to five, expresses actual bias and lack of impartiality, i.e. that the juror is biased in favor of voting for death. *See Carratelli v. State*, 961 So.2d 312 (Fla. 2007). Neither the prosecutor not the Court asked any questions to mitigate the professed bias of these jurors.

The post-conviction court's finding that defense counsel was not defecient is not supported by competent substantial evidence.

CONCLUSION.

Alan Lyndell prays this Honorable Court reverse and remand the trial court's denial of his Motion to Vacate Judgments of Conviction and Sentence entered on April 22, 2013, thereby entitling Mr. Wade to a new trial and/or penalty phase proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has, been provided to the Alan Mizrahi, Office of the State Attorney, Fourth Judicial Circuit, 200 W. Bay St. Jacksonville, Fl. by e-service; and to Carolyn Snurkowsky, Assistant Attorney General, Office of the Attorney General, 4519 Camden Rd., Tallahassee, Fl, 32303-7224 by e-service this 11th day of October , 2013.

CERTIFICATE OF COMPLIANCE REGARDING FONT.

I HEREBY CERTIFY that this Appellant's Initial Brief is submitted using Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure, Rule 9.210. Further, the undersigned, pursuant to Florida Rule of Appellate Procedure, Rule 9.210(a)(2), gives this his Notice and files this Certificate of Compliance regarding the font in this Initial Brief.

Respectfully Submitted,

/s/ Ann E. Finnell_____________

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