

IN THE SUPREME COURT OF FLORIDA

TIFFANY ANN COLE,

Appellant,

v.

CASE NO. SC13-2245

STATE OF FLORIDA,

Appellee.

_____ /

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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

The record on appeal from the direct appeal will be referenced as "TR" followed by the appropriate volume and page number. References to Cole's postconviction record on appeal will be designated as "PCR" followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

(i) Overview of Proceedings and Disposition on Direct Review

Tiffany Ann Cole and three other co-defendants were prosecuted for the first degree murders of Reggie and Carol Sumner, a retired elderly couple living in Jacksonville, Florida. Cole and her codefendants entered the Sumners' home, bound them and then kidnapped them, by stuffing Reggie and Carol Sumner into the trunk of their Lincoln Town Car. They were driven to an isolated, wooded area in Southern Georgia and buried alive in a grave dug days before the planned murders. Thereafter, the defendants, including Cole, withdrew and spent a significant sum of money drawn from the Sumners' bank account, using the victims' ATM card, with the numbers acquired at the grave site from the victims before they were buried alive.

At Cole's trial, the evidence showed that codefendant Jackson and Tiffany Cole, planned and participated with Alan Wade and Bruce Nixon, in robbing, kidnapping and murdering Carol and Reggie Sumner. The jury found Cole guilty of two counts of first degree murder, two counts of robbery and two counts of kidnapping. Following the penalty phase of the trial, the jury recommended imposition of the death penalty by a vote of 9-3 for each murder.

In sentencing Cole to death for these murders, the trial court found seven (7) aggravators to exist beyond a reasonable doubt. The Court also found and weighed four (4) statutory mitigators and a number of non-statutory mitigators.¹ *Cole v. State*, 36 So.3d 597, 606 (Fla. 2010).

¹ In the Corrected Order, the trial court found seven (7) aggravating circumstances: 1) previous conviction for a capital felony based upon the contemporaneous convictions for each of the two murders; 2) the homicides were committed during the commission of the kidnappings; 3) the homicides were especially heinous, atrocious, or cruel; 4) the homicides were committed in a cold, calculated and premeditated manner; 5) the homicides were committed for financial gain; 6) the homicides were committed to avoid arrest; and 7) the victims were particularly vulnerable due to advanced age or disability (TR III 465-477).

The four (4) statutory mitigating circumstances found were 1) Cole had no significant history of prior criminal activity, given some weight; 2) Cole was an accomplice to the homicide committed by another and her participation was relatively minor, given little weight; 3) Cole's age of 23, was given some weight; and 4) Cole acted under the substantial domination of another, given little weight (TR III 477-479). As to non-statutory mitigating circumstances, the trial court found, 1) Cole's minimal involvement, given little weight; 2) Cole's minimal criminal history, given some weight; 3) Cole's psychological

On appeal, Cole raised two guilt phase claims, *Cole v. State*, 36 So.3d at 603, 606-607 (Fla. 2010), and four penalty phase issues. In affirming the convictions and sentences, the Florida Supreme Court as to the penalty phase, found that under prevailing case law the HAC aggravating circumstance was found in error however that error was harmless. *Cole*, 36 So.3d at 609-610.

(ii) Statement of the Facts

The Florida Supreme Court specifically set out the facts, *Cole*, 36 So.3d at 599-603, however, the following facts are pertinent to the issues on appeal from the denial of postconviction review.

(a) Pertinent Facts

When the Sumners ended up missing, Detective David Meacham contacted the Sumners' bank and inquired about their account usage (TR VII 529, 533-534). Within hours of the murders, a number of ATM transactions totaling thousands of dollars

problems, given little weight; 4) Cole's model behavior while incarcerated awaiting trial and the likelihood of good adjustment to prison life, given some weight; 5) Cole's family history, caring for her younger siblings and ill father, given some weight; 6) Cole's history of alcohol and drug abuse and resulting personality changes, given little weight; 7) Cole's positive character traits, including a history of caring for others, good employment record, and expressions of concern and remorse for the victims, given some weight. (TR III 479-482).

occurred, starting on the morning of July 9, 2005 (TR VII 534, 536). Det. Meacham identified the ATMs used around north Florida and obtained security videos of the transactions (TR VII 534-535). The bank videos revealed that a white male made the ATM withdrawals and that person was not Reggie Sumner (TR VII 539).

On July 12, 2005, Jacksonville Sheriff's Patrol Officer Vindell Williams discovered the Sumners' Lincoln Town Car abandoned in Baker County (TR VII 518-520), at the end of a dirt road near a small area of woods (TR VII 520-521). On the same day the Lincoln was located, the Jacksonville Sheriff's Office received telephone calls from a male identifying himself as James R. Sumner (TR VII 542). Det. Meacham returned the call and recorded the conversation (TR VII 542-565) (State Exhibit 23). The male identified himself as James Sumner and a female, who the detective later spoke to, identified herself as Carol Sumner (TR VII 542-543). They were later identified as Michael Jackson and Tiffany Cole (TR VII 542-543). Jackson, pretending to be James Sumner, inquired about the "Sumners'" bank accounts because the ATM cards did not work (TR VII 557).

The telephone call to the sheriff's office was tracked to a Charleston, South Carolina address of Jackson (TR VII 566-567; 590-593). Based on the cell tower usage, the cell number was linked to calls made in Jacksonville on July 8, 2005, in the vicinity of Reed Avenue, the Sumners' residence, between 9:49

and 10:15 p.m. (TR VII 596; TR VIII 606). One call at 12:50 a.m. was made using the cell tower in MacClenny, Florida (TR VII 600; TR VIII 604-606). Cell phone records recorded the call to Triangle Rental Car, where Cole rented the Mazda RX-8 (TR VII 567-568). The company's GPS tracking system in the car, when triggered on several occasions because the rental was overdue, showed the car was in Jacksonville near the Sumners' residence on the evening of July 8 (TR VII 568-569), and at an ATM machine where the Sumners' ATM card usage was photographed (TR VII 569-570).

Michael Jackson, Alan Wade and Tiffany Cole were ultimately arrested in Charleston, South Carolina (TR VIII 632-644). A search warrant executed for the two motel rooms used by the trio and Tiffany Cole's car, a green Chevy Lumina parked at the motel, revealed several items with the Sumners' name, and property later identified as the Sumners' (TR VIII 644-659). Det. Meacham traveled to Charleston where he interviewed Cole and obtained a recorded statement from her (TR VIII 754 - TR IX 909) (TR VIII 759) (State Exhibit 42).

(b) Tiffany Cole's recorded statement

Cole knew that Jackson and Wade were going to the Sumners' to get property and credit cards (TR IX 830-831). Cole's story evolved and, upon further interrogation, she stated she did not

know everything that took place inside the Sumners' house, but she knew the Sumners were bound with duct tape (TR IX 843).

After leaving the house, Cole drove Jackson in the rental car, and Wade and Nixon drove the Sumners' Lincoln, to a remote wooded area west of Jacksonville. On the way, Jackson talked with Nixon and Wade via cell phone and on one of the calls, Cole overheard Jackson mention that the Sumners were in the Lincoln's trunk (TR IX 854-856). After Jackson secured the PIN numbers for the Sumners' bank accounts and the murders, they left the burial site in both cars and, after a long drive, abandoned the Lincoln in Sanderson, Florida (TR IX 858, 863-864, 866).

Cole never saw Carol or Reggie Sumner afterwards (TR IX 890), and admitted she thought they were dead, and that the bodies would never be found in the remote wooded area (TR IX 890). Thereafter, Jackson accessed the Sumners' account and withdrew money from a number of ATM machines (TR IX 878-881). Cole, Jackson and Wade returned to the Sumners' home after the murders and stole coins, jewelry and a computer (TR IX 894). Cole was the one who pawned the computer and some of the Sumners' jewelry a day or two later (TR IX 913). They left Jacksonville a few days later and drove to Charleston, South Carolina (TR IX 884-886).

While Cole admitted discussing taking property from Carol and Reggie Sumner, she claimed there were no discussions

concerning killing anyone (TR IX 887). Cole did however, purchase items needed during the days leading up to the crime, including the duct tape and plastic wrap (TR IX 871-874, 915-917), and latex gloves used during the crimes (TR IX 917). When arrested in Charleston, a plethora of property including bank statements, mail, account numbers on a yellow pad, personal birth dates, Sumners' SSNs information and their wallets and other personal items, were found strewn throughout the motel rooms registered in Cole's name.

(c) Bruce Nixon's testimony regarding Cole's participation

Bruce Nixon testified and admitted he participated in the murder of the Sumners in July 2005, with Wade, Jackson and Cole (TR IX 963-964). A day after he assisted in digging the grave, Nixon learned they were getting money from the Sumners' bank accounts and then killing the Sumners. All four of them discussed getting rid of the Sumners (TR IX 974-976), but he had no idea what the other three may have discussed about killing the Sumners before that time (TR X 1059). He testified that when it became apparent the Sumners would be killed, that no one, including Cole, backed out (TR X 975). Jackson had discussed killing the Sumners by injecting them with a lethal dose of some medicine (TR X 1048-1049). Nixon testified Cole knew Carol and Reggie Sumner had doctors' appointments because Cole had been calling them (TR IX 977). There was no specific plan what to do

once inside, however, they had prepared for the robbery, they had fake guns, Wade had the duct tape to bind the Sumners and they knew the Sumners' schedules (TR X 977-978). Once inside they were to tie up the Sumners and then call Jackson (TR X 1050).

When they reached the wooded area near the burial site, they stopped the Lincoln in front of the gate leading into the woods; the Mazda stopped on the road (TR IX 988). When Nixon opened the trunk, Jackson got angry because some of the duct tape covering the Sumners' faces and eyes came off (TR IX 988). Jackson told Nixon to re-tape them (TR X 1058). Jackson said it was a "mind thing" for him, he did not want to see their eyes when he killed them (TR IX 988-990). Once they were at the grave, Jackson told Nixon to go back to the road with Cole (TR IX 990-991).

Less than an hour later, they drove out of the woods to the Mazda where Cole was located (TR IX 991). When Jackson got into the Mazda with Cole (TR IX 991-992), he had a yellow note pad with the PIN codes obtained from the Sumners for the accounts (TR IX 996). They abandoned the Lincoln in Sanderson after Jackson, Wade and Nixon wiped down the car, leaving the four shovels in the trunk (TR IX 992-993). Even before getting to their hotel, Jackson used an ATM and obtained money from the Sumners' account (TR IX 997)

(iii) The Penalty Phase

At the penalty phase of the trial, two victim impact witnesses, Reggie Sumner's sister, Jean Clarke, and his sister-in-law, Carolyn Sumner, testified (TR XIV 1478, 1484). Carolyn Sumner also read a statement from Carol Sumner's daughter, Rhonda Alford (TR XIV 1484-1488).

The defense called Tiffany Cole's mother; a prison classification officer; two jail correctional officers; a friend she met in jail; other relatives, Cole's aunt and two cousins; and a psychiatrist, Dr. Earnest Miller (TR XIV 1489, 1596, 1579, 1603, 1612, 1622, 1626, 1631, 1634). Detective David Meacham was called in rebuttal (TR XV 1702).

Shirley Duncan, Cole's mother, testified extensively about Tiffany's childhood (TR XIV 1489-1558). Throughout Ms. Duncan's testimony she produced and displayed photographs of Tiffany growing up. She also identified other family members in the courtroom during the penalty phase proceedings (TR XIV 1494 (Dawn Phillips, Tiffany's grandmother); 1495 (Rosanna, Tiffany's cousin); 1497 (Aunt Nancy Harris, grandmother's friend); 1505 (Shirley Duncan's sisters Tammy and Nancy), and 1530 (Tiffany's cousins Amber and Jonathan).

Shirley Duncan was 16 years old and unmarried when Cole was born on December 3, 1981, in Charleston, South Carolina (TR XIV 1489, 1491, 1541). Cole's father, David Duncan, was imprisoned

at the time of her birth (TR XIV 1492). As a result Cole and her mother moved a number of times and required government assistance for support for a time (TR XIV 1492-1493). Ms. Duncan stated that as early as age three years old Tiffany was helpful (XIV 1493). Her parents did marry (TR XIV 1494-1496). Cole's brother was born when she was five (TR XIV 1541). Tiffany got along well with her brother Ricky. She loved her brothers and took care of them (XIV 1509). David Duncan provided financial support for the family, but he had little interest in Cole or her younger brother, D.J. (TR XIV 1496). Her parents divorced and Cole was shuttled back and forth between them (TR XIV 1528). Her mother met another man, Rick, when Cole was twelve, who acted as a stepfather to her (TR XIV 1498, 1541). A younger stepbrother resulted from that relationship (TR XIV 1498).

Ms. Duncan testified that Tiffany had an eating problem and would gain weight when she was under stress. In 2002 or 2003, she "was going through the emotions with breaking up with her boyfriends and stuff and just kind of stressed, so she picked up an eating habit which she eventually lost the weight." (TR XIV 1512). Additionally, Tiffany loved pets (TR XIV 1512-1513).

Although a good student with good grades, Cole dropped out of tenth grade (TR XIV 1515) and ran away from home (TR XIV 1543, 1550, 1555-1556), however she subsequently obtained her GED (TR XIV 1517). The testimony reflected that she would flip

flop from one school to another depending upon who she was living with (TR XIV 1517). Ms. Duncan showed one of Tiffany's yearbooks from 1993 or 1994 where a number of students and friends and teachers wrote in that book (TR XIV 1515-1516). A passage was read by Ms. Duncan in court from an "unnamed teacher" wrote, "Tiffany, there have-there have been days where everything was not what it should be-should have been. Do not let others influence you in the wrong way..." (TR XIV 1516).

Ms. Duncan looked through a number of school records which reflected Tiffany's reports cards, citizen awards, evidence that Tiffany was in the band, went on field trips, did sports, attended Bible studies and had perfect school attendance (TR XIV 1516-1519). In 1995, Tiffany, with her mother and brother, moved to Indiana for two months. That experience was a little disruptive because the students in that school were more advanced than in the South Carolina schools (TR XIV 1519-1520).

Ms. Duncan testified about Tiffany's first boyfriend Steven, who was a firefighter, who Tiffany dated for a long time (TR XIV 1525). She did not know what happened between them but testified that he never spoke badly about Tiffany (TR XIV 1525). Ms. Duncan stated she was a strict mother when it came to the boys Tiffany dated, she was overprotective (TR XIV 1527-1528). Tiffany's life was different when she lived with her real father verses living with her mother (TR XIV 1528).

Cole dated her second boyfriend, Wayne, who was very abusive (TR XIV 1526, 1543). Brian, her boyfriend before Jackson, suffered from a grand mal seizure disorder leaving him on disability (TR XIV 1528-1529, 1543). When they broke up in April or May of 2005, Cole was heartbroken (TR XIV 1543). Additionally, during this time her father was suffering with terminal cancer and had become weak and dependant. She personally cared for him (TR XIV 1429-1530, 1543).

After leaving school, Tiffany worked at a number of jobs (TR XIV 1533-1537). Ms. Duncan showed one picture of her daughter that showed her birthmark over her right eye. Because of the red mark, Tiffany got picked on about it and her mother had to console her about it. Tiffany always tried to cover it up. Her mother felt it contributed to Tiffany's self-confidence and self-esteem issues (TR XIV 1538-1539).

Cole's mother throughout her testimony told about Tiffany through a plethora of pictures depicting her daughter with family and friends (TR XIV 1490-1539). Her mother read her own statement summarizing the circumstances in Tiffany's life (TR XIV 1540-1544), and also read letters from other people who knew Tiffany but were not able to testify (TR XIV 1544-1548), such as Dr. Wesley Adams, who found Tiffany to be a reliable worker and carried out tasks that were delegated to her (TR XIV 1545). "Aunt Nancy" Harris, a family friend, who summarized her

experiences with Tiffany and stated that "I don't believe Tiffany would be part of something unless she was forced or had no other choice." (TR XIV 1547). Hazel D. Simmons, Ms. Duncan's co-worker, wrote that Tiffany loved to dance and sing and make a fashion statement. Tiffany was a helpful person (TR XIV 1547-1548).

Ms. Duncan finally testified that her daughter would be a productive member of society even if she were sentenced to prison for life without the possibility of parole (TR XIV 1549).

On cross-examination, Ms. Duncan admitted her daughter was bright but not as mature as she should be, especially when it came to men (TR XIV 1550). While absent early in Tiffany's life, her father did provide for her and was a part of her life (TR XIV 1552). While not well off, Tiffany had an average life growing up going fishing, boating, camping, going to beaches, swimming, and an assortment of other activities (TR XIV 1553.) She followed the rules and although her mother was strict, she was able to do and go where she wanted (TR XIV 1554). Tiffany had a close family and they all helped her and her mother in tough times (TR XIV 1557-1558).

The defense called Diana Lee, a senior classification officer at Lowell Correctional Institute, who described what happens to inmates who are processed through that institution (TR XIV 1580-1581). Delores G. Jones, a corrections officer for

Jacksonville Sheriff's Office, testified she was around Tiffany Cole for approximately two years while Cole was awaiting trial. She was treated as a trustee and worked in the mental health dorm as a volunteer. She delivered food carts and picked up dirty trays after meals (TR XIV 1599-1600). She did not cause problems and Ms. Jones was unaware whether Cole received any disciplinary reports (TR XIV 1600). On cross-examination, Ms. Jones did not know about a possible disciplinary report for getting involved in an altercation with another inmate (TR XIV 1602).

B.N Quarrels, a correctional officer at the Pretrial Detention Facility, testified he met Cole in 2005 when she was incarcerated (TR XIV 1604). Cole got along well with the staff and other inmates however he knew about her 2005 disciplinary report (TR XIV 1605-1608).

Carla Luchins testified that while working at an animal clinic, she met Cole who was in jail (TR XIV 1612-1613). Ms. Luchins, at the time they met, was also incarcerated and was in a substance abuse program (TR XIV 1614). Cole was very compassionate towards her and they became friends. Ms. Luchins visits Cole every Sunday on Cole's visiting day and believes Cole will be a model prisoner (TR XIV 1619). It was Ms. Luchins view that Cole was a strong person and did not let other inmates take her down the wrong path (TR XIV 1622).

The defense then called Terrie Duncan, Tiffany's aunt. She testified that her brother, Tiffany's father, David Duncan, died in 2005 (TR XIV 1623). Tiffany spent a lot of time in her home and she always was kind, good-natured and wanted to help others; she was a very giving person (TR XIV 1624).

The final three lay witnesses called by the defense, Amber Jones testified Cole was her cousin and best friend. They were a close family and Cole helped her stay out of trouble (TR XIV 1628-1629). Ms. Jones knew the victims because they were neighbors, living across the street. She had been with Tiffany and the Sumners when they lived in South Carolina (TR XIV 1629). Tiffany told her cousin to go back and get her GED just like Cole did. Cole showed leadership qualities (TR XIV 1630-1631). Rosanne Bustamante, another of Cole's cousins, read from a previously prepared letter about Tiffany being raised in a very strong and united family that loved and cared for her. Tiffany was always caring and helpful and they would have fun dancing. Tiffany made friends easily and she was a likable funny person (TR XIV 1634). Lastly, Deana McConnell testified she knew Shirley Duncan in high school when Ms. Duncan was pregnant with Tiffany (TR XIV 1635). Over the years she and Shirley Duncan would take pictures of the children. In her view Tiffany would be a productive member of the community even if she received a

life sentence without the possibility of parole. She would touch other peoples' lives (TR XIV 1638-1639.)

Dr. Earnest Miller, a psychiatrist, evaluated Tiffany Cole (TR XIV 1641 - XV 1697). As to any issues of competency to stand trial and insanity at the time of the offense, Dr. Miller found Cole competent and sane (TR XIV 1647-1648.) Miller did find that Cole suffered from mental problems but there was no evidence of a psychotic disorder (TR XIV 1648-1653). Cole abused drugs and alcohol and suffered from substance dependency (TR XIV 1651-1652). She was chronically depressed (TR XIV 1652), and had a personality disorder not otherwise specified² (TR XIV 1653-1654, TR XV 1683-1685). His diagnosis also included the "lifelong stressors" in Cole's life history that shaped her (TR XIV 1655). Dr. Miller believed Cole's adaptive functioning was relatively good, given the several mental problems she suffered (TR XIV 1655).³

² The personality disorder was based on an abnormal dependency on others; "masochism" by seeking things that caused her problems in life; "cluster B" features that led to failures of conscience to stop behaviors.

³ Cole's mental health problems (TR XV 1660-1695), were premised upon:

1. Her abnormal dependency problems and masochism which came from experiences she had early in life (TR XV 1660);
2. Her parents divorced during her early, critical formative years, never feeling support nor a home (TR XV 1660);
3. She was a surrogate mother to her brothers and took care of them (TR XV 1660-1661), thus she never had a childhood. Her

While minimizing the testimony about a happy childhood presented by some of Cole's relatives (TR XV 1662-1663), Dr. Miller observed that parents who raise children in an abusive environment do not usually come forth and talk about it (TR XV 1663; 1685).

Dr. Miller viewed Cole's use of street drugs (Xanax, Valium, cocaine) and alcohol as self-medication for psychological pain (TR XV 1665-1666). Dr. Miller opined, given Cole's low self-esteem, her drug supplier, Brian, provided some acceptance and leadership in that he could get drugs (TR XV 1666). She got away from drugs but Dr. Miller was unimpressed since Cole did not receive treatment for any underlying dependency (TR XV 1666-1667). Dr. Miller observed Cole's relationship with Michael Jackson and the murders of Carol and Reggie Sumner (TR XV 1667-1670), was a part of her pathological need to be in abusive relationships (TR XV 1667). Based upon his

stepfather's abuse of her younger brother and the puppy incident which Dr. Miller opined had a profound impact on her (TR XV 1661)

4. Cole's natural father sexually molested her at 16 or 17 (TR XV 1661), about the time she ran away from home (TR XIV 1543, 1550, 1555-1556; TR XV 1684). The betrayal of trust caused feelings of confusion, guilt and being dirty (TR XV 1663-1664). She told no one except her mother about the sexual molestation (TR XV 1661.) Her mother did not believe her, resulting in a feeling of no parental support (TR XV 1661).

5. Her low self-esteem and guilt left her entering abusive relationships with men (TR XV 1661-1665).

knowledge of the crimes and Cole's personality pathology, Dr. Miller noted she was a follower and would not have initiated the crimes (TR XV 1668).

Acknowledging that Cole unquestionably followed and pushed aside her conscience (TR XV 1668), Dr. Miller found no diagnosis termed a "major conscience" problem (TR XV 1669). Dr. Miller did not conclude Cole was trying to rationalize her conduct; she could not discern that she could be involved with an abusive person (TR XV 1669-1670). Cole had no insight as to her role in terms of her "personality disorder." (TR XV 1670).

(iv) Spencer Hearing Held January 31, 2008

At the *Spencer* hearing held before the trial court on January 31, 2008, the parties presented additional evidence (TR XV 1789-1810).⁴

⁴ **Donna Phillips**, Tiffany Cole's grandmother, read a statement previously prepared (TR XV 1790-1794), addressing various aspects of Cole's life and concluding that "I know that Tiffany is very distraught and remorseful over what has happened. There have been a lot of hurt on both sides for this and I am truly very sorry. So I ask that she be given a chance and that you spare her life. She just got tied up with the wrong people." (TR XV 1794).

Nancy Mairs read a statement that revealed she knew the family for about 35 years as a friend of Tiffany's grandmother. Ms. Mairs also pleaded to spare Tiffany Cole's life (TR XV 1794-1796). Cole's Aunt Terry also read a statement that Tiffany was very vulnerable after losing her father to cancer and believed Tiffany did not know what she was doing. She asked that her life be spared because "she'll never be able to see another day outside. She'll never be able to harm anybody." (TR XV 1796-1797).

(v) Postconviction Litigation

As a result of Cole's filing a timely motion for postconviction relief in September 2011, and an amended motion in March 2012, the trial court, following a case management conference, set the matter for evidentiary hearing. The Court limited the hearing to issues relating to Cole's claims of ineffectiveness of trial counsel regarding the presentation of Cole's mental status and whether a mitigation specialist was requested or needed.⁵ The trial court denied all relief on October 17, 2013, finding that Cole's trial counsels did not render ineffective assistance of counsel on any pre-trial claims, during trial claims or penalty phase claims. That court likewise found no cumulative error as to all claims raised.

(vi) Evidentiary Hearing March 18-20, 2013.

At the court ordered evidentiary hearing, Cole's postconviction counsel called thirteen (13) witnesses, family

Finally Tiffany Cole prepared a statement to the Court and a letter to Rhonda Alford and read them in Court. Both asked for forgiveness and requested mercy (TR XV 1798-1800).

The State called Fred Hallach, Carol Sumner's son and Rhonda Alford's brother (TR XV 1801-1803), who spoke about his mother Carol Sumner and that he believed Tiffany Cole deserves no mercy and receives the punishment for which she is eligible. Tom Harvey, Reggie Sumner's first cousin, spoke on behalf of Reggie Sumner and Carol Sumner (TR XV 1804-1805).

⁵ The Court observed that other issues that trial counsel failed to suppress fruits of an unlawful arrest and seizure; trial counsel's failure to raise jurisdiction or move to dismiss the indictment; and a cumulative error claim did not warrant further evidentiary consideration.

and friends, her two trial defense counsels and a new mental health psychologist, Dr. Michael Herkov, in support of her allegation regarding her convictions and imposed sentences.

The following is a summary of the testimony presented by Cole's witnesses, some had previously testified or produced evidence at the penalty phase of Cole's trial.

Quentin Till, an experienced defense counsel, testified he was appointed in September 2005, to represent Tiffany Cole on the first degree murder charges for the death of Carol and Reggie Sumner (PCR V 710). He went to South Carolina in January 2006 to investigate and locate possible witnesses and took depositions (PCR V 711-12). It was evident to him that Cole's mother and her grandmother were the most likely family members who would provide information. When Shirley Duncan, Cole's mother, came to Florida to visit her daughter in jail, Mr. Till talked with Cole's mother (PCR V 712). Early on in his representation, Till hired an investigator and testified that he started to review possible mental health issues. Till's investigator went to South Carolina and spoke with family members, including Cole's mother and brother and also took aerial photos of the community where they lived (PCR V 713).

At this stage, Mr. Till's concerns focused on the guilt portion of Cole's case. Till had discussions with Cole's co-defendants' counsels regarding the preparation in their cases

and was particularly interested in what co-defendant Nixon's attorney Mr. Chipperfield was doing. Because Nixon was trying to work out a deal with the State, it was clear to Till that the prosecution would also be amiable to working a deal with Cole for her testimony against co-defendants Jackson or Wade (PCR V 718-19). He admitted that he waited before asking for a mitigation specialist because he was talking with other co-defendants' counsels. Till testified he told Cole about the possible deal and explained to her why he believed this was a good strategy (PCR V 719-20). He testified that Cole was not willing to deal because she was adamant that she did not "bury the bodies and therefore was not guilty." (PCR V 720). Although Cole admitted her role in the crimes, she finally started to come around to the idea of a deal with the State. Till believed Cole, as well as her family, were in agreement on the deal being offered by the State (PCR V 720-21). When time came after a year and a half of working out a deal, Cole decided not to consummate the deal because she stated she did not kill the Summers; she wanted only to plead guilty as an accessory to the lesser charges (PCR V 721-22).

Till observed that because of the guilt issues and whether Cole would take a deal, he did not work much on the penalty phase of Cole's case early on (PCR V 721-22). The unconsummated deal was very similar to the deal Nixon received - plead guilty

to two counts of second degree murder and the other charges, testify truthfully and the sentence would be 52.1 years under the guidelines (PCR V 724-27). The deal fell through in mid-2007.

Till was aware of Cole's mental health issues but he did not see any red flags about her competency to stand trial. He had reviewed the doctors' reports regarding co-defendant Jackson and was aware that Jackson was interviewed by Dr. Miller for competency. He also knew that Dr. Miller was not called to testify at Jackson's trial (PCR V 727-29).

Till knew about Cole's schooling, knew about her work history, her outside activities, her health history and spoke to Cole's mother about Cole (PCR V 729-33). He requested the appointment of a second chair attorney soon after the deal was rejected by Cole. Defense counsel Greg Messoro was appointed to assist Till with Cole's penalty phase and Messoro started working to develop material for the penalty phase of Cole's case (PCR V 744-46).

Till testified that he did not believe Cole acted under duress, although he agreed that Jackson was the ringleader in the Sumners' murders (PCR V 751-54).

He had received letters from family and friends regarding Cole's life and provided the materials to Dr. Miller who had been appointed as a mental health expert (PCR V 737, 756-63).

Greg Messore, following his appointment, met with Cole's family, sought to have a mitigation expert appointed (which was denied) and filed a number of death penalty motions (PCR V 759-63).

Dr. Miller evaluated Cole (PCR V 769). Till testified that he and Messore discussed whether there was any conflict with Dr. Miller doing Jackson's competency to stand trial evaluation and decided that Dr. Miller could be used to help develop mental health mitigation for Cole (PCR V 766-69).

Till knew Cole had done cocaine, went to a number of different schools, had a disruptive family, moved quite a bit, quit school in tenth grade, but she also got her GED, and had no serious criminal history (one bad check). As a result he decided that their strategy should be to put a positive spin on mitigation - to portray Cole as a good person who became involved with Jackson and as a consequence she exhibited aberrant behavior, her conduct was not her normal behavior (PCR V 775-76). Cole was a non-violent, good person who went to school, had a job, had "some drug issues" and then, suddenly she meets Jackson and gets sucked in by him - this was 3 to 4 days of her otherwise normal life (PCR V 776). He testified that bringing out the bad things about her would not be helpful, for example that she was a prostitute (PCR V 776-77). Till knew Cole was a drug dealer and was dealing drugs to Jackson when they met. Instead of bringing out the bad things she had done, they

elected to place a favorable face on Cole through a power point presentation of her life (PCR V 779-80). As a result of their strategy the jury recommended 9-3 for death (PCR V 779).

Till and Messoro joined in the motions to suppress evidence seized from the motel rooms Cole rented, which she and her confederates occupied prior to their capture in South Carolina (PCR V 783-84).

Mr. Till testified that Dr. Miller's report, prepared following Cole's evaluation on November 20, 2007, did not conclude that further testing was necessary. Dr. Miller found Cole was of average intelligence, she had drug and alcohol problems and a venereal disease (PCR V 789-93).

Mr. Till stated that at the guilt portion of her trial, the defense argued that Cole was unaware what was happening and never heard any statement that the Sumners were going to be killed. She denied knowing that any harm would come to them (PCR V 794-97).

Finally on direct examination by defense counsel, Till observed that whatever negative mitigation being urged in postconviction would have directly conflicted with the strategy to present favorable evidence of Cole's life at trial in 2007 (PCR V 813-21).

On cross-examination by the State, Till reaffirmed that Cole was psychologically sound, competent, articulate and

understood the system, which was supported by Dr. Miller's evaluation (PCR V 835). Till noted that, for example, it did not matter that they were unable to perpetuate her dying father's testimony about his daughter because Cole testified at the penalty phase that her father sexually abused her (PCR V 838). Till reaffirmed that the defense at the guilt phase was to show that Cole's participation was marginal and she was not involved in the kidnappings and murders. At the penalty phase the defense was not going negative. Rather, the defense was geared toward showing that Cole could overcome her circumstances and she came from a good family (PCR V 839-42). Till felt having Dr. Miller on board was helpful since his knowledge of Jackson's circumstances helped Cole (PCR V 843).

Till believed that Shirley Duncan, Cole's mother, recognized the importance of the penalty phase and that she would be very helpful and willing to collect the requested information about her daughter's life (PCR V 846).

As to the possible plea agreement, Till felt it would have been a good outcome based upon the circumstances of her case. He felt this was Cole's best chance (PCR V 847-486). Till further noted that Cole had admitted to him that she had a bigger role in the kidnappings and murders than she had previously admitted (PCR V 848-49).

On redirect Mr. Till stated that had there not been a possible deal he would have started preparing for the penalty phase as soon as he started preparing for the guilt phase (PCR V 850-55).

Greg Messore was appointed to sit as second chair in the first degree murder trial of Tiffany Cole.⁶ He spoke with Till about the case and what was needed to be done; Till would do the guilt portion and he would do penalty phase (PCR VI 1088). Till provided Messore materials he had acquired and records about Cole he obtained from Cole's mother and other people from Charleston (PCR VI 1089). Messore also received information from Shirley Duncan directly and met with her a number of times (PCR VI 1090, 1093, 1096).

Shortly after Messore's appointment, Till and he talked about the case and getting a mitigation specialist or investigator to assist them as to possible mitigation (PCR VI 1090-91, 1097-98). In discussing their strategy for the penalty phase, both agreed that they should develop a theme that Cole was a good person and that she just got involved in this terrible event (PCR VI 1092-93). Messore had worked with the mental health expert appointed, Dr. Miller, on a number of cases

⁶ He worked for the Public Defender's Office until October 2005 and then moved to private practice handling criminal cases (PCR VI 1079). He sat second chair in a few murder cases at the PD's office and went to the Life After Death or Death is Different class in the summer 2007 (PCR VI 1082).

and was familiar with his work (PCR VI 1100). Based on his understanding of the case he decided to create a power point presentation for Cole to counter the prosecution's trial power point (PCR VI 1100-01). He traveled to South Carolina to acquire information for his presentation, meeting with Cole's mother and other people in South Carolina who collected and provided information for him (PCR VI 1101).

Mr. Messore accompanied Dr. Miller when the doctor first went to see Cole (PCR VII 1111). Messore only went once, however Dr. Miller saw Cole on four occasions from September 27th through October 3, 2007 (PCR VII 1111). Messore testified Till had provided information to Dr. Miller regarding materials on Cole (PCR VII 1111). Messore testified that Dr. Miller was the one who identified negative information in Cole's life (PCR VII 1113). Messore testified that they had Cole prepare a hand written letter that was turned over to Dr. Miller for his review. Dr. Miller also got copies of the investigator's report on the interviews of all of Cole's co-defendants that were done (PCR VII 1116-20, 1121).

Messore testified that when he went to South Carolina and met with Cole's aunts and cousins and other relatives they had very little negative information to report (PCR VII 1113). He testified that after the guilt phase was complete he began arranging for family members to come down to Florida, and

deciding who would prepare letters and other materials for trial proceedings (PCR VII 1128). Messore noted that all the family members were told that this was a death case and the nature of the case was discussed (PCR VII 1130-31). He noted that, at that time, plea negotiations were still in progress until shortly before trial (PCR VII 1132).

Messore reported that he spoke on the phone with Dr. Miller after his report was completed (PCR VII 1132), however, at the hearing, Messore had no real memory of Dr. Miller's report. He did point out there was an issue with Cole's and Jackson's relationship that came out at the penalty phase that he would have preferred had not. Messore observed that since the guilt defense strategy that Cole was being dominated by Jackson was not successful, the penalty strategy was that she was a good person caught up in a tragic circumstance (PCR VII 1137-39).

On cross examination by the State, Messore testified that he went to the course Life Over Death just before trial, which proved to be helpful (PCR VII 1149). Although he was responsible for collecting materials for the penalty phase, he acknowledged that Till had already started working on the penalty phase strategy and had also collected materials (PCR VII 1149). He noted that Cole's mother was helpful in providing information regarding the good and not so good things in Cole's life (PCR VII 1153.) Messore stated he thought that in some cases it would

not be appropriate to try to diminish negative information, but in Cole's case he "went with what I thought was the most appropriate strategy for this case." (PCR VII 1153).

Specifically Messoro felt that a "duress theme" was not a good theory to present at the penalty phase since it was not well received in the guilt phase. This was so because there was "a lot of evidence at trial (that) would have flown in the face of that theory and probably the jury would not have given much credibility to it." (PCR VII 1156-57). He was aware that they could have changed their strategy at the penalty phase, but felt that the evidence dictated where they needed to go (PCR VII 1158).

On redirect by defense counsel, Messoro stated he did not want the jury to know Cole had been a prostitute (PCR VII 1161). It was not consistent with the defense's theme (PCR VII 1162). Anything that would have made Cole look like a "thuggish street girl" was not a good strategy for penalty phase. The state was trying to do that by showing photos of her partying in the limo with others with a bunch of cash and champagne and things like that. "I was trying to show the jury that she wasn't that person. She was a very nice person." (PCR VIII 1263). Messoro testified that he did not know about Cole's thumb-sucking as a child or that she had toileting difficulties (PCR VII 1164-65). In speaking with Cole about her growing up with her mother she

said it was alright. She wasn't negative about it (PCR VII 1167-68). Further, Cole was not cooperating when it came to her legal defense (PCR VII 1168).⁷

Dr. Michael Herkov, a psychologist at the University of Florida, was called by the defense regarding his recent examination of Cole (PCR VIII 1226-27). He was asked to examine Cole, look for any underlying mitigation and review Mr. Miller's work and evaluation (PCR VIII 1230). He interviewed Cole at Lowell Correctional Institute for 10 to 12 hours, and performed a number of tests as part of his neuropsychological evaluation. He interviewed a number of family members, specifically speaking with Raymond Phillips, Donna Phillips, Shirley Duncan, Tammy Muckenfuss, David Duncan, Ricky Roush, and Danny Newman (by phone). He reviewed school records, trial transcripts, the sentencing order, Dr. Miller's report and Dr. Miller's penalty phase testimony. Based on his efforts he observed that Cole was prejudiced by the misleading, inadequate information regarding Cole's mental health (PCR VIII 1230-33).

⁷ The trial court sought clarification of Messoro as to whether the negatives discussed during direct examination had been known, would Messoro have used them. He answered no (PCR VII 1171). Further the trial court inquired - was there anything in Dr. Miller's report or discussions with him that would have suggested there was any kind of mental health aberrations or retardation or low self-esteem. Messoro answered only that perhaps Cole had low self-esteem (PCR VII 1172).

His criticism of Dr. Miller's evaluation was based in part on the fact that Dr. Miller had "little collateral data," since it was Herkov's "belief no family contact was made." He further observed that there were no records of Cole's life, no school records, and felt the power point used was inadequate and misleading.

What he ultimately found, based upon his review of records provided, was that Cole did not do very well in the 5th grade, in 6th grade she was impulsive and acted inappropriately, in 7th grade she made low C's, 9th grade she made D's in math and biology and quit school in the 10th grade, although she ultimately got her GED (PCR VIII 1234-35). He noted Cole's behavioral problems in the number of schools she attended and took issue with Dr. Miller's report that she never was suspended from school (in 8th grade Cole got a 2-day suspension for misbehavior) and she went to summer school (PCR VIII 1235).

As to Cole's family, Dr. Herkov acknowledged that Dr. Miller "mentioned" her family was dysfunctional and there was some abuse, but contended that these were "neglect" facts because Cole had to take care of herself and her siblings. He discussed the time when Cole's mother found Cole with the mother's boyfriend in bed. There was also evidence that an interstate trucker friend gave Cole and her brother alcohol and, possibly sexually abused Cole. Dr. Herkov noted that Cole had a

history of prostitution which did not come out at the penalty phase (PCR VIII 1235-36).

It was Dr. Herkov's view the information he found would have been important to show how submissive and pliable Cole was and she could be dominated by others (PCR VIII 1237.) He did note that Dr. Miller acknowledged Cole's substance abuse, but that was not enough because Cole used cocaine. His example was that her mother had to take her to the hospital one time because Cole thought she was having a heart attack. It turned out she was using cocaine (PCR VIII 1237).

Apparently Cole used a number of drugs, based upon self-reporting, including ecstasy, LSD, valium, opiate pain killers and marijuana. Dr. Herkov was quick to suggest that Cole was impairing her brain development but admitted that Cole knew the difference between right and wrong (PCR VIII 1238.) He was critical that there was no mention of her cocaine use in Dr. Miller's report (PCR VIII 1239). Dr. Herkov discussed a series of tests he performed and basically took issue with Dr. Miller's finding that Cole had average intelligence (PCR VIII 1239-46.) Dr. Herkov scored Cole's IQ at 81 and then stated that Miller "seriously overstated" Cole's IQ (PCR VIII 1245-46). Cole had underlying brain damage attributable to her drug use and he diagnosed Cole as having cognitive disorder with NOS (PCR VIII 1249-51). While Dr. Miller assessed her GAF, Dr. Herkov

testified that Dr. Miller had the wrong scale and while Cole had an "acceptable level of depression", it was not as acceptable as Dr. Miller made it out to be (PCR VIII 1251-53).

Herkov opined that the statutory mitigation of under the influence or dominated by another existed at the time of the offense (PCR VIII 1254). Although Dr. Miller stated that Cole was dependent on others and was a follower, easily led, had reduced self-esteem and suffered from a facial birthmark, these factors plus the drugs given to her by adults and sexual abuse should have been tied to her abusive relationships and why she was a prostitute (PCR VIII 1255-57). Dr. Herkov discussed how her problems led her to someone like Jackson and based upon a telephone call with Danny Newman really reveals that she was "under significant influence of Jackson" (PCR VIII 1258-59).

Dr. Herkov observed that Cole was surrounded by males and they could not understand her issues. That would explain why she was not able to talk to her male attorneys (PCR VIII 1260). He observed that Dr. Miller noted Cole's yeast infection but did not mention her Axis III problems (PCR VIII 1267).

On cross by the State, Dr. Herkov stated he did not do a report as a result of his evaluation, and after being questioned about his testing and the reported results, reconsidered his results to reflect that Cole's IQ was close to average, her

executive function was average, her decision making was average, and in some sub-sets she was above average (PCR VIII 1269-71).

He did not review the family members' trial testimony, only some parts of Cole's mother's testimony that she was neglectful, and admitted people "might lie to make a point." He admitted that Cole did not say she was molested by the mother's boyfriend and that the incident "occurred" when Cole was 9 or 10 (PCR VIII 1272-74). He further admitted there was no clear evidence of abuse and Cole did not report abuse from the incident. Further he stated there was no supportive evidence for his conclusions and observed that he believed Cole was a prostitute although he did not have a chance to speak to a "john" (PCR VIII 1276). The incident about the father touching her breast was an isolated event (PCR VIII 1277).

Dr. Herkov reaffirmed that in doing forensic work collateral data is always needed, however it would appear his testimony demonstrated a lack of collateral data. He made observations about Cole and her being dominated by others but did not listen to all of Cole's recorded statements, he did not review Jackson's multiple statements, he did not read Jackson's testimony, he did not read Bruce Nixon's statements and interview, and he was not aware that Nixon testified that Cole knew all about the murders and that they all knew what was going to happen (PCR VIII 1279, 1284-86). He could not explain why

Cole was not easily led into accepting a plea offer, which she personally rejected, and he admitted that his results were not very different from the findings of Dr. Miller's, he just got "more history." (PCR VIII 1286-88).

Dr. Herkov found Cole had no schizophrenia or mental disorder (PCR VIII 1283).

Other Family and Friends Testimony

Cole's collateral counsel called **Raymond Phillips**, her grandfather, who testified about Cole's parents and brother (PCR V 872). He did not believe Cole's home life was very good; the family was divided, the father was not there and Tiffany had to care for her brother. She became a surrogate mother at an early age and had too many responsibilities, which resulted from her mother working and there was no one around to supervise the children (PCR V 873-74). Cole's mother would scream and holler at her when something wasn't done right; and she never got much praise (PCR V 874). As Cole got older her mother tried to control her more and conflicts arose (PCR V 875). Cole's mother had emotional problems regarding men - multiple partners, however he could not point to anything specific. Cole eventually moved in with them (PCR V 876). There were no problems when Tiffany lived with them because she was outside her mother's rule and they did not try to force her to do things (PCR V 877). He observed that Cole's mother seemed to have issues with Cole

growing up and her mother did not have control over her (PCR V 879). On cross by the State, Mr. Phillips admitted he came into Tiffany's life when she was 8 or 9 (PCR V 883). However he never witnessed or heard about any child abuse, saw any injuries or heard about any sexual abuse against Cole (PCR V 884-85).

Donna Phillips, Cole's grandmother (PCR V 886), recalled that she had testified at Cole's trial by reading a letter she had prepared (PCR V 888). She spoke to Mr. Till in his office prior to trial and went over the case. He wanted background information about how she grew up and how she ended up in Jacksonville (PCR V 889-90). Her letter discussed what Cole's life was like, a little about Cole's and her mother's relationship and noted Cole was using drug (PCR V 891). After Tiffany was born, her grandmother took care of her while Shirley worked. Shirley would take care of Tiffany during the day and her grandmother would care for her at night. Other friends would also care for her (PCR V 895-96). Shirley loved her baby but was not ready to settle down (PCR V 896-97). When Tiffany was still a child about 4 or 5, she took care of her baby brother D.J., carrying him around and changing his diapers (PCR V 898).

When Cole became a teenager, she and her mother would have screaming matches. Mrs. Phillips noted that Cole was into a lot of activities and played the clarinet and was a cheerleader, however she and her mother did not get along (PCR V 898-900).

Tiffany did not want to live under Shirley's rules. When Tiffany came home from school Shirley wanted her to take care of her brother and do her homework instead of going out. At the time Shirley was working three jobs to provide for the family and she needed Cole to care for her brother (PCR V 900).

Mrs. Phillips wrote in her letter that Tiffany was vulnerable and gullible; she did not make good choices in friends (PCR V 902). She felt Tiffany was a follower, not a leader, and easily influenced (PCR VI 908). She felt Tiffany at 18 years old was too immature to live on her own (PCR VI 909). On cross-examination by the State, Mrs. Phillips clarified that she read her letter at the "Spencer hearing" at the penalty phase of Cole's trial. Her testimony was geared toward presenting mitigation and she was prepared to do whatever she could within reason (PCR VI 911-12). She noted that she could not come down for the sentencing because she had to work (PCR VI 913).

David Duncan, Cole's brother, testified (PCR VI 915) about his childhood. He indicated that his sister watched him and that she was his caretaker (PCR VI 915-17). Life with his mother was rough because his mother would not let them do anything. Everything was "no." It was not a normal childhood (PCR VI 917-18). Tiffany ran away because she could not get along with their mother. She had to care for him and she did not want to watch him. She was a teenager (PCR VI 918). Their mother was verbally

abusive to Tiffany (PCR VI 918). His father had to come get Tiffany because she and her mother were fighting so much and they "didn't have a great relationship." (PCR VI 919). At their father's house they had their way; he would give in to them. Both his father and Shirley's boyfriend Rick Roush used a number of different drugs from marijuana to pain pills, alcohol and cocaine around the kids (PCR VI 920-21). He never saw his mother use any drugs, however (PCR VI 921). Tiffany would also use drugs with her father (PCR VI 921). Family members on his father's side knew about the drugs, but not the mother's side (PCR VI 922).

When Tiffany got older she "took to the streets" selling drugs and doing anything to get money. She was involved in prostitution for 6 months to a year and used drugs with her cousins Amber Jones and Kesha (PCR VI 922-23). Her brother believed that she was making money and she seemed happy when he was around her (PCR VI 924-25). Cole had boyfriends around her that treated her badly and were mostly involved with drugs (PCR VI 925).

Cole met Jackson when Jackson robbed her, taking her cocaine and checkbook (PCR VI 927). Her brother observed that after she returned to South Carolina (after the murders), anytime he was around Tiffany, Alan Wade or Jackson was with her (PCR VI 928, 929).

He spoke to Quentin Till about their upbringing, but did not recall whether he told Till that Cole was a prostitute. He testified that the reason Till did not want him to testify at Tiffany's trial was because he had second degree murder charges pending against him (PCR VI 930). He also spoke to Greg Messoro who wanted to know Tiffany's background. Duncan also spoke to Randy Justice, the investigator hired for Cole (PCR VI 931). They rode around town and tried to locate the black girl seen in some photographs (PCR VI 932). He testified that the family moved around quite a bit and were shuffled around back and forth between their family members (PCR VI 933), and moved from school to school (PCR VI 934).

On cross, Mr. Duncan stated that Cole, as a teenager, was exposed to drugs by their stepfather (PCR VI 935). To sustain her drug habit Cole would sell drugs and engage in prostitution (PCR VI 936). Duncan admitted that Cole and Jackson were together and were planning to go to Jacksonville to "start a business". He knew Jackson was known as "Wise A.K.A. Gotti". (PCR VI 941).

Shirley Duncan, Cole's mother, also testified that she worked with Greg Messoro on the penalty phase of Cole's trial. She collected pictures and materials for a power point video created about Cole's life. She narrated the video and answered questions about what was occurring in the photos. She also

prepared a letter which she read to the court at the *Spencer* hearing (PCR VI 944-45). She stated that she had no idea about her daughter's whereabouts or who Cole was associating with until after it all occurred and she learned more in speaking with Quentin Till. She knew nothing about Michael Jackson or Alan Wade or Nixon. She was unaware about the trips to Myrtle Beach and Jacksonville. In fact Cole's mother threatened to call the police because she had not heard from her daughter (PCR VI 945-48). Although Cole was 23 years old her mother was concerned she had not heard from her (PCR VI 948-51). Shirley admitted she has issues with her daughter and wanted Tiffany to follow Shirley's rules (PCR VI 951).

Shirley first heard of her daughter's troubles when her son told her about federal agents looking for her and that they took Tiffany's car. Once Cole was arrested Shirley called a South Carolina lawyer and he went to see Cole the next day (PCR VI 953-54). A few months later she met Quentin Till, Tiffany's Florida lawyer.

Ms. Duncan testified that Till was able to talk to David Duncan, Cole's father, before he died in October 2005 (PCR VI 955-56). When she came to Jacksonville to visit her daughter in jail, she would also see Till (PCR VI 957-58). She spoke more frequently with him by phone. She learned that Cole was facing the death penalty in her conversation with the prosecutor when

he called her to discuss the possibility of Tiffany cooperating and working out a plea agreement (PCR VI 958). However, Till also mentioned it and wanted to discuss it with her (PCR VI 959). She thought that the prosecutor wanted to convict Jackson and she did not realize that Tiffany could possibly be convicted and given the death penalty (PCR VI 959-60). Till was frustrated with them because he wanted Cole to take the plea. He wanted her to help him get Tiffany to agree to the state's plea offer (PCR VI 960-62). Tiffany did not want to take the plea instead of trial and the possibility of the death penalty. The plea offer was for 52.1 years. Shirley tried to explain to Cole that the state wanted her to take the plea and testify against the other co-defendants. Tiffany did not want to plea to the charges against her (PCR VI 961-62).

Shirley recalled that Messore came to Charleston as did the prosecutor and a defense investigator (PCR VI 964). When Messore came to Charleston he wanted upbringing and school records; he got pictures and a "tubful" of materials. He wanted to paint a picture that Tiffany was a good person (PCR VI 966-67). Although Messore was looking for good things about Tiffany, Shirley did tell him about Cole's drug usage and how she would run away and finally moved out of the house (PCR VI 967). Shirley spoke to Messore about Cole's school records, but also mentioned that she had been a good student in school until the tenth grade (PCR VI

968). Her grades started slipping and she suffered from depression and was running away. Messoro was interested in contacting people Cole was around (PCR VI 969). Although Cole was never on medication for her depression and was never diagnosed with mental issues, it was evident that she had low self-esteem. One reason was due to her birthmark under her eye which was a particularly big problem, which she could not overcome. Cole used cocaine and would have periods when she would be anxious (PCR VI 970-71). Shirley was aware that her daughter would be examined by a mental health specialist (PCR VI 972).

Shirley did not know her children were using drugs until after it came out at trial. Cole was involved in some school activities but not for long (PCR VI 974-75). When asked how they got along, Cole's mother said that they argued, sometimes loudly, about the rules Shirley wanted followed. They argued about how Cole dressed, and the standards that Shirley wanted Cole to follow (PCR VI 975).

Shirley recalled that Cole had told her that Cole's father had touched her breast. Shirley discussed it with Cole and asked if it was an accident since they used to wrestle around - they never discussed it after that (PCR VI 975-77). Shirley stated she did watch them more closely after that. She also watched Cole more closely around Shirley's then-current boyfriend,

Roush. Shirley felt if Cole had been improperly touched, it would have been by Roush not Cole's father (PCR VI 977).

On cross examination, Shirley recalled speaking to the prosecutor's office, however she was not clear how often. Shirley came to the trial and testified at the penalty phase, actually narrating the power point presentation (PCR VI 980). She spoke with Till and Messoro and had meetings with them prior to her testimony (PCR VI 980-81). She was asked to obtain information about her daughter and did so. She was asked to tell the jury about her daughter, but was never asked to "bash" her or "tell the dirt" (PCR VI 981-82).

Rosanna Cricks, a cousin, testified by phone that she came down during the trial (PCR VI 984). In discussing her knowledge of Cole, she recalled that Cole was a drug user, and that they both used cocaine and marijuana together (PCR VI 986). Cole and her brother lived together growing up but moved around a lot. Cole was insecure growing up based upon her facial birthmark, and was insecure about her appearance. She took care of her brother D.J. and fought with her mother because Shirley was too strict (PCR VI 987-88). Shirley was overly protective of the kids (PCR VI 988). It was Ms. Cricks' view Cole had been manipulated by people in the past (PCR VI 989). On cross Ms. Cricks stated she testified at Cole's penalty phase but had no recollection about when or with whom she spoke (PCR VI 990-91).

Deborah Cole, Shirley Duncan's older sister, was the next witness (telephonically), who detailed Tiffany's and her brother's upbringing. She felt that Tiffany had to grow up fast because her mother worked all the time. Shirley was never home and the same was true about the father. Tiffany and her brother were left for periods of time and she felt they did not have a fair childhood (PCR VI 993). Deborah Cole actually sought custody of Tiffany and her brother so they would have a "more stable home environment" however, Shirley would not agree. At this time Tiffany was 15 years old and her mother was "trying to relive her youth". The kids were street smart but not book smart (PCR VI 994). Tiffany had issues with wetting the bed and sucking her thumb as a kid (PCR VI 997). She did not testify at trial because she was not asked to and she did not attend because she was on military active duty (PCR VI 997). On cross, Ms. Cole reaffirmed that she really was not around a lot since she was in the military and only saw the kids at family affairs (PCR VI 998-99). If she had seen abuse she would have reported it and, except for spankings, she really knew nothing about anything else (PCR VI 999).

Nancy Ware, Shirley Duncan's younger sister, testified by phone (PCR VI 1010), the family was separated, Shirley became pregnant when she lived with their mother and Ms. Ware lived with their father (PCR VI 1012). When Tiffany was a year old,

Ms. Ware moved back with her mother and Shirley and was around Tiffany as she grew up (PCR VI 1012). She characterized the kids' home life as unstable; she and her mother babysat Tiffany a lot, because Shirley worked all the time (PCR VI 1013). Shirley finally moved in with Tiffany's father after Tiffany's brother was born (PCR VI 1014). Tiffany was always in trouble and her mother would "holler at her" - not discipline her because "it was not the correct kind of discipline." (PCR VI 1014-15).

Ms. Ware never spoke to Tiffany's lawyers. An investigator came to Shirley's house and she briefly spoke to him then. She came down for Cole's penalty phase, but never spoke to any lawyers (PCR VI 1016). She could not recall whether she wrote a letter (PCR VI 1016). Ms. Ware described Tiffany's early school years as very dysfunctional, no structure, unstable; Tiffany would care for her brother while Shirley worked (PCR VI 1017). She witnessed one time when both of Tiffany's parents were screaming at Tiffany - it was harsh, using profanity (PCR VI 1018). However she noted that Cole was in high school, Tiffany "pretty much wanted to do what she wanted to do and she wanted to be boss and no one was going to tell her what to do." (PCR VI 1018). This attitude did not play well with Shirley because Tiffany had to follow Shirley's rules (PCR VI 1019). Tiffany, on one occasion, ran away and Ware had to pick her up. Tiffany was

found at a neighbor's house hiding in a closet (PCR VI 1020). Tiffany did not finish high school because she was mixed up with her friends and did not want to follow Shirley's rules (PCR VI 1022).

Tiffany was bothered by the birthmark on her face. Shirley would try and get cosmetics to help cover it (PCR VI 1025). Ms. Ware observed that Tiffany was flirtatious and needed attention (PCR VI 1026). She heard that Tiffany's father used drugs and that Tiffany and he would smoke pot together, but she never saw them (PCR VI 1026). In summary Shirley spoke to Tiffany very harshly (PCR VI 1027).

On cross, Ms. Ware admitted that Shirley worked all the time throughout Tiffany's childhood and supported them (PCR VI 1027). There were a number of family members that helped out and assisted in raising Tiffany, and the kids did go to daycare (PCR VI 1028). Ms. Ware believed that Shirley did not spend enough time with Tiffany, it was not a loving relationship and punishment was extreme (PCR VI 1028-29). Although there was nothing criminal about how Shirley disciplined Tiffany, Ms. Ware felt it was harsh (PCR VI 1029).

Dena McConnell telephonically testified that the last time she saw Tiffany, she was 18 or 19 years old (PCR VI 1033). She was around when Cole was about 11 or 12 (PCR VI 1033). She heard about Tiffany's troubles from Shirley and was contacted by Greg

Messore. She found pictures of when Tiffany was a flower girl in her wedding (PCR VI 1034-35). She gathered different pictures of Tiffany as a young girl, taking care of her brother, et.al. - trying to show Tiffany's good character. Tiffany was a typical happy-go-lucky girl. Although Cole's lawyer asked about all aspects of Cole's life, she knew nothing bad about Tiffany - never saw a bad side (PCR VI 1035-37).

Nancy Mairs also testified by phone that she read a prepared letter to the court regarding Tiffany Cole. She knew Tiffany since Tiffany was born and has been a life-long friend of Tiffany's grandmother, Donna Phillips (PCR VI 1039). She volunteered to come down because she wanted to help Tiffany. She spoke with Quentin Till and accompanied Mrs. Phillips when she came to Jacksonville (PCR VI 1041-42). **Hazel Simmons** testified by phone that she wrote a letter on November 12, 2007, on Tiffany's behalf at the request of Tiffany's mother (PCR VI 1044-45). She was Shirley's friend and co-worker. At 18, Tiffany got a job at the Charleston Women's Medical Center with her and Shirley. Ms. Simmons observed that Cole was a great worker, always humorous and in good spirits. She was easy to instruct (PCR VI 1046-48).

Richard Roush testified (by phone) that he was with Shirley Duncan for approximately 17 years (PCR VI 1051). They had a son together, Ricky, and also knew Shirley's husband, David (PCR VI

1052). He observed that Shirley was pretty strict on Cole, she wanting Tiffany to act like her. As a result they butted heads, Shirley was verbal but not abusive (PCR VI 1053-54). He witnessed the time Tiffany said something to Shirley about her father touching her, it got heated and Shirley "smacked her in the face" and then Shirley called David to come get Tiffany. It was after that Tiffany moved in with her father (PCR VI 1054-55). Roush testified that there were a lot of screaming and yelling between Shirley and Tiffany. He observed when Shirley was at work, Tiffany had to take care of D.J. when they were young and it wasn't fair. Tiffany's childhood was stolen (PCR VI 1055-56).

Terri Duncan, Cole's father's sister, testified by phone that she was around Tiffany most of Tiffany's life (PCR VI 1064). She knew a little about Tiffany's troubles but learned about it from Shirley. Shirley indicated that she and Cole's attorney were handling everything (PCR VI 1065). She did however meet with Greg Messoro in Jacksonville. Messoro told her that she should try and portray Cole's life as a good, healthy life (PCR VI 1064-65). She felt she was being asked to paint a picture different than it was. She believed that Cole's life wasn't as happy as they portrayed, Cole suffered mental injuries as a result of her parent's choices and was forced to take care of her brother when she was young (PCR VI 1066). It was her

belief Shirley thought her children were better than Ms. Duncan's. Ms. Duncan's view was Tiffany and D.J. did not get attention on a regular day but on holidays they got lots of gifts - Shirley was trying to buy their love (PCR VI 1067). Tiffany had a history of running away and she believed Tiffany ran away to get away from her dysfunctional family. Shirley was very strict and Cole was her brother's babysitter. Cole and Ms. Duncan's daughter Amber would run away together, they would eventually call and she would pick them up (PCR VI 1068). Tiffany did not feel that her parents loved her and she did not know where she belonged (PCR VI 1069). She witnessed what she called psychological abuse by Shirley towards Cole; Shirley told Cole she was no good, she would not turn out to be anything and that Cole was an embarrassment to Shirley (PCR VI 1070). She felt the family was strained by the control Shirley had over the families - she controlled everything - if Cole got into trouble in school she would be grounded for months (PCR VI 1071-72).

Cole had a drug problem starting at an early age. It was Ms. Duncan's view that Cole used drugs to "camouflage or hide her true feelings" that she wanted to be loved by her mother (PCR VI 1072). Cole had unhealthy relationships with men (PCR VI 1073). When Cole was of age she moved in with Ms. Duncan and they were very close (PCR VI 1074). In court, Ms. Duncan said

her testimony had nothing to do with what she knew about Cole, it portrayed an untrue childhood (PCR VI 1074-75).

SUMMARY OF THE ARGUMENT

ISSUE I: Whether trial counsel was ineffective for failing to move to suppress statements and evidence derived from an unlawful arrest and search.

ISSUE II: Whether trial counsel's performance was deficient in failing to identify, call, or prepare witnesses at the penalty phase; and was deficient in the presentation of mitigation and pursuing background investigation regarding a duress defense.

ISSUE III: Cumulative error which places this jury's death recommendation in doubt.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS STATEMENTS AND EVIDENCE DERIVED FROM AN UNLAWFUL ARREST AND SEARCH.

In this case, the State presented the eyewitness testimony of Bruce Nixon. Nixon testified that Michael Jackson planned and, along with Alan Wade, Tiffany Cole and Bruce Nixon, they executed the robbery, kidnapping and murders of Carol and Reggie Sumner.

Cole argued below that trial counsel's failure to "move to suppress the fruits of Cole's initial detention wherein Cole was arrested and detained without probable cause and subjected to

interrogation" resulted in an insufficiently based search warrant and her arrest and violated her constitutional rights. Defense counsel Quentin Till filed, on August 29, 2007, Cole's Motion to Suppress (Evidence Seized From Motel Room), in particular, the search of a laptop computer and the motel safe, as well as other items in motel rooms 302 and 312 "registered" in Tiffany Cole's name (TR I 62-64). On September 19, 2007, a second Motion to Suppress was filed seeking to suppress "any and all evidence obtained from the hotel room safe and laptop computer during the execution of a search warrant of a hotel room in which the Defendant was staying." Additionally suppression was sought for "all evidence relating to telephone calls and contents of those calls involving Defendant from the county jail in Charleston, South Carolina in which she was detained." (TR I 80-83). Additionally, on October 12, 2007, Cole's counsel filed a Motion to Adopt Motions and Records Of Prior Proceedings, involving all litigation on these matters in Cole's three co-defendants' cases, Bruce Nixon, Alan Wade and Michael Jackson.

The record reflects that all defendants filed similar motions to suppress evidence obtained from the motel rooms in Charleston, South Carolina, where Cole and her confederates were captured and arrested, as evidenced by the motion hearing October 12, 2007, where pending motions were under review (TR

III 333-441). Cole's motions were denied as were those motions filed by Jackson and Wade.

On appeal in Michael Jackson's case, *Jackson v. State*, 18 So.3d 1016, 1027-1030 (Fla. 2009), the Florida Supreme Court dealt with the very issues that Cole's counsel raised pretrial, denying same. "Here, the search warrant specifically authorized the officers to search the motel room for several classes of items and extended to a search of any associated area where these items could reasonably be located. See, e.g., *State v. Weber*, 548 So.2d 846, 847 (Fla. 3d DCA 1989)." *Jackson v. State*, 18 So.3d at 1027-1030. To the extent that Cole now asserts that the search of the motel rooms required suppression, the Court resolved the validity of the search of the motel rooms and the items found therein. Cole, in postconviction, asserts that the search was the product of an "illegal detention" based upon the "insufficient" information contained in the affidavit prepared for the search warrant and therefore all fruits of the search were tainted.

Initially, counsel cannot be found ineffective if in fact he raised a motion to suppress albeit not on the identical grounds now asserted. Cole's counsel sought to suppress items found in the motel room rented by Cole, focusing upon evidence of the Sumners' items found in the safe in room 312. While

clearly a tactical decision made by Jackson's, Wade's and Cole's⁸ counsels, it was also a reasonable decision. As such, that decision satisfies *Strickland's* two-prong test for effective assistance. Neither deficient performance nor prejudice can be shown.

Moreover, to suggest that there was defect in the affidavit presented to South Carolina judge who issued the search warrant is neither viable nor meritorious. The trial court in co-defendant Jackson's case, reviewed the very search warrant which permitted police to search for items such as any and all checkbooks, identification cards, bank statements, bank registers or other documents or papers in any way related to James Reginald Sumner or Carol Sumner (Jackson, TR V 393). The warrant allowed for the search of any and all documentation bearing the names of the defendants, any and all ATM receipts, sales receipts, transaction records related to the Heritage Trust ATM card, weapons or instruments that may be used as a weapon, duct tape, or any material that can be used to bind a

⁸ Interestingly, this issue was discussed at the end of Quentin Till's testimony at the postconviction hearing on March 18, 2013 (PCR V 860-868). Mr. Till, after acknowledging that he knew about the circumstances of Cole's detention, noted that although he felt the North Charleston Police had probable cause to detain Cole, her statement made thereafter was helpful to the defense and supported their theory that she knew nothing about the kidnapping and murder. Thus, there was a strategic reason not to move to suppress Cole's statement (PCR V 868).

person or persons (Jackson, TR V 393). The trial court denied Jackson's motion to suppress (Jackson, TR VI 406-407).

To further suggest that trial counsels for Cole were ineffective for not challenging Cole's (and her confederates') arrest because there was no probable cause to arrest, is equally without record support or merit. Following the murders on July 8, 2005, Jackson, Cole, Wade and Nixon returned to Jacksonville in Cole's rented Mazda RX8.⁹ On the way back, Jackson used the Sumners' PIN codes at an ATM to withdraw a sum of money from the Sumners' account. They again returned to the Sumners' house and took some coins, a computer and other items.

The following days Wade, Cole and Jackson made more withdrawals from the Sumners' account and then went shopping. They returned to South Carolina. During this period up until the police detained the trio, further developments occurred to support the police's probable cause to arrest them. The police knew the Sumners were missing from their home in Jacksonville, Florida. Their Lincoln Town Car had been found abandoned miles from the Sumners' home. Four shovels covered in sand, a wad of rolled up duct tape, and a roll of duct tape was found in the Lincoln. The presence of four shovels with sand on them in the

⁹ After the murders, Jackson and Cole followed in the Mazda, Wade and Nixon, who drove the Sumners' Lincoln to a location in Sanderson, Florida, where they abandoned the car after it was wiped of prints. They left the four shovels in the trunk then all drove to Jacksonville in the Mazda.

back of Sumners' Lincoln gave rise to a reasonable belief that there were four perpetrators.

The Sumners' ATM card was being used by a white male who was seen, by way of ATM security video, exiting a Mazda RX. Detective David Meacham was able to track the use of the ATM card from Florida to Charleston, South Carolina.

Additionally, on July 12, 2005, a man and a woman called and spoke with Florida law enforcement officers. The man and woman identified themselves as Reggie and Carol Sumner. Detective Meacham was able to track the caller's phone number to a phone owned by "David" Jackson. Detective Meacham learned the phone was used in the vicinity of a rental car company called Triangle Rent-a-Car. Further investigation, prior to the time the police located Cole, Jackson and Wade, revealed that Cole rented the Mazda like the one seen in the ATM videos. GPS records put Cole's rented Mazda near the Sumners' home prior to the murders, at the murder site and in the vicinity of the location where the Sumner's Town Car was dumped. Just prior to their arrest in South Carolina, the GPS installed in the Mazda located the car back in Charleston, South Carolina.

The police located Tiffany Cole's brother in Charleston. Cole's brother advised the police that Cole was at the Best Western Motel with her boyfriend, Michael Jackson. Cole's brother also identified Tiffany Cole's Chevrolet Lumina parked

in the parking lot of the Best Western Motel where the trio was found.

The record reflects that on July 14, 2005, South Carolina law enforcement located Jackson, Cole and Wade, at the behest of Florida authorities. Cole had rented two rooms at the Best Western Motel in Ladsden, South Carolina, one room for Cole and Michael Jackson and the other for Alan Wade. James Rowan, a police detective for the North Charleston Police Department and Deputy U.S. Marshall David Alred, a member of the fugitive task force, knocked on Cole's motel door. When Jackson opened the door, the police immediately patted him down, and in his pocket they found an ATM card from Heritage Credit Union, and some other papers. The officers did a sweep of the motel room and located Cole in bed. She was detained and handcuffed for officer safety. Armed with probable cause to arrest following the pat down of Jackson, the officers detained both Jackson and Cole at the motel and obtained a search warrant for the entire room.

Once the warrant was obtained, the officers searched the motel rooms. In Cole's and Jackson's room, in a suitcase, the officers found paperwork and mail belonging to the Summers. Numerous items of evidence were seized and several photographs taken. Also in the room were several newly purchased items, including a watch, sports jerseys, hats and a game console. A key ring was found in Alan Wade's room. The key ring belonged to

the Sumners (TR VII 692). In the trunk of Cole's vehicle, the police found Reggie Sumner's coin collection. The search of a locked safe in Cole's and Jackson's room produced more personal items belonging to the Sumners, including the Sumners' credit cards and checkbook.

At that point, Jackson, Cole and Wade were transported to the police station, where they were interviewed and subsequently formally arrested for the murders of the Sumners.

Citing *Payton v. New York*, 445 U.S. 573 (1980), counsel now argues that Cole was illegally detained and as a result any evidence obtained via the subsequent search warrant is tainted. No violation of *Payton* occurred herein. The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The text of the Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. *Payton*, 445 U.S. at 584.

In the instant case, James Rowan, a police detective for the North Charleston Police Department and Deputy U.S. Marshall,

David Alred, a member of the fugitive task force, knocked on Cole's and Jackson's motel door. Once they identified co-defendant Jackson, who opened the motel door, as the person they were looking for, they detained him and secured a search warrant to search the premises. The subsequent search was proper and nothing seized was unconstitutionally obtained. There was probable cause to detain Cole. *State v. Hendrix*, 855 So.2d 662 (Fla. 1st DCA 2003) (visitor to premises being searched pursuant to a warrant may be detained during search). Under the aforementioned, there is nothing in the assertions made or in the record that would support a finding that Cole's constitutional rights were violated.¹⁰

Moreover based on the record there is nothing to support a finding that defense counsels' actions were defective under *Strickland's* two-prong test. Counsel is not ineffective for failing to file a meritless motion. See *Farr v. State*, 124 So.3d 766, 776 (Fla. 2012), wherein the Court held:

Farr claims that Slaughter was ineffective in failing to present a voluntary intoxication defense, FN9 which led to Farr's decision to plead guilty. FN10 To prevail on this claim, Farr must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). It is well-established that "strategic decisions do not

¹⁰ Notably no personal items of Cole's were either seized or incriminated her.

constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." See *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000). We do not "second-guess counsel's strategic decisions about whether to pursue an intoxication defense." See *Jones v. State*, 855 So.2d 611, 616 (Fla.2003). Whether or not counsel's strategy was the correct one in hindsight is irrelevant to the question of ineffective assistance of counsel. See *Cherry v. State*, 659 So.2d 1069, 1073 (Fla.1995)

(footnotes omitted).

Clearly Cole's statement that was made after she was taken to the police station would have been admissible since there was adequate probable cause to arrest her when she was found in the motel room she rented with Jackson. Further, there was evidence presented on March 18, 2013, at the end of defense counsel's testimony that he would not have challenged, via a motion to suppress, Cole's statements made after she was arrested because the statements she made were consistent with the defenses theory of the case (PCR V 868).

The trial court, in rejecting this issue, found:

a. Seizure of Evidence

Counsel is not ineffective for failing to file a motion that he did, in fact, file. *Bates v. State*, 3 So.3d 1091, 1106, n.20 (Fla. 2009) (noting that "counsel cannot be held ineffective for what counsel actually did"). Furthermore, counsel is not ineffective for raising an argument that ultimately failed. *Ferguson v. State*, 593 So.2d 508, 511 (Fla. 1992). "Although in hindsight one can speculate that a different argument may have been more effective, counsel's argument does not fall to the level of

deficient performance simply because it ultimately failed . . . "9 *Id.* As long as the argument falls within the "wide range of professionally competent assistance," counsel cannot be deemed ineffective. *Id.* (quoting *Strickland*, 466 U.S. at 609).

The record reflects that, contrary to Defendant's allegations, trial counsel filed *numerous* suppression motions throughout the pendency of Defendant's case. (R. Vol. I 62-64, 80-83, 103-12.) On August 29, 2007, trial counsel filed a "Motion to Suppress (Evidence Seized from Motel Room)" the evidence gathered from the laptop computer and the safe inside Defendant's motel room. (R. Vol. I 62-64.) Trial counsel filed a second Motion to Suppress any and all evidence found on the laptop computer and in the motel safe on September 21, 2007. (R. Vol. I 80-83.) On October 12, 2007, the Court granted trial counsels "Motion to Adopt Motion and Record of Prior Proceedings," which adopted various rulings by the Court in her co-defendant's cases, including motions to suppress. (R. Vol. I 103-12.) Notably, on direct appeal in co-defendant Jackson's case, the Supreme Court of Florida specifically upheld the legality and validity of this very search that occurred at the motel in South Carolina. *Jackson v. State*, 18 So.3d 1016, 1027-30 (Fla. 2009).

9 This case referred to arguments made in closing statements. The Court, however, finds the general idea applicable to the instant case.

Defendant's contention that trial counsel should have made an argument attacking the *sufficiency* of the search warrant and the probable cause basis for the arrest warrant, pursuant to *Payton* and *Wong Sun*, is meritless. It is clear from the record that trial counsel made numerous arguments to suppress the evidence seized from the motel room, all of which were within the wide range of acceptable professional assistance. Even if, in hindsight, trial counsel could have made a better argument to suppress the evidence, it does not rise to the level of prejudice required by *Strickland*. Defendant fails to demonstrate that counsel's actions fell below a reasonable standard and, therefore, is not entitled to relief.

b. Incriminating Statements

Defendant also alleges in this claim that counsel did not file a motion to suppress incriminating statements made by Defendant.¹⁰ At the evidentiary hearing, defense counsel clarified this allegation, explaining to the Court that the "incriminating statements" were those made during the police interrogation in South Carolina shortly after her arrest. (P.C. Vol. I 155-59, 163, 166.)

¹⁰ The record shows that trial counsel filed a Motion to Suppress statements Defendant made during telephone calls from the jail, which the Court denied. (R. Vol. I 80-83.)

Although not specifically a part of the evidentiary hearing Order, the Court, without objection from either party, briefly inquired as to why Mr. Till chose to forego filing a Motion to Suppress the statements made during the interrogation by Detective Meacham in Charleston, South Carolina. (P.C. Vol. I 155-59.) Mr. Till acknowledged that he made a tactical decision to use Defendant's statements because they were beneficial and supported the theory that Defendant was a minor participant in the robbery, kidnapping, and murder of Reggie and Carol Sumner. (P.C. Vol. I 162-63, 166-67.) The following exchange occurred:

THE STATE: Was that audio recorded statement [to police in South Carolina], did that go with your theory of the case based on other evidence that she was a -- although a participant, a minor participant?

MR. TILL: Oh, yea. It supported that theory.

THE STATE: Because there was additional evidence besides what Tiffany Cole said to police that indicates she was a participant including as you mentioned earlier her phone call to the Jacksonville Sheriff s Office pretending to be Carol Sumner?

MR. TILL: Right.

THE STATE: And so her original custodial interrogation to the police after her arrest in North Charleston was consistent with your theory of defense?

MR. TILL: Correct.

DEFENSE: So you intentionally didn't want to suppress it?

MR. TILL: It was there. I could live with it.

(P.C. Vol. I 159, 166, 167.)

At trial, Defendant testified that she did not knowingly participate in the robbery, kidnapping, or murder of Reggie and Carol Sumner; she believed her co-defendants meant to plan a simple theft. (R. Vol. XI 1241-42.) A review of the record shows that Defendant's testimony at trial coincided with the statements Defendant made in the interrogation tapes. (R. Vols. IX 828-848, 855-909; XI 1204-24, 1225-35.) Defendant's testimony coupled with the interrogation tapes bolstered her credibility as a witness and supported the defense theory that her co-defendants masterminded the murder of Reggie and Carol Sumner. (R. Vol. XI 1204-24, 1225-35, 1241-42.)

Thus, the Court finds these actions on the part of trial counsel well within the reasonable range of assistance provided for in Strickland. The Court remains mindful that during his testimony, Mr. Till acknowledged that certain statements Defendant made during the interrogation were harmful, but he made a strategic decision to use the interrogation to benefit the defense's case. (P.C. Vol. I 51, 159, 166, 167.) There is a presumption that Mr. Till acted reasonably and competently in this case, and Defendant has failed to show any evidence to the contrary in this claim. Accordingly, Defendant is not entitled to relief.

Postconviction Order (PCR III 470-473).

The evidence of Cole's involvement in this murder was not premised only on "the strongbox" found in her car which is the

basis upon which she contends her arrest and conviction were based. Rather her arrest and subsequent conviction was a result of her involvement and full participation in these murders from the outset to completion. See *Cole v. State*, 36 So.3d at 605-606.

Cole is entitled to no relief as to this issue.

ISSUE II and ISSUE III

WHETHER TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT BY FAILING TO IDENTIFY, CALL, OR PREPARE WITNESSES AT THE PENALTY PHASE; AND WAS DEFICIENT IN THE PRESENTATION OF MITIGATION AND PURSUING BACKGROUND INVESTIGATION REGARDING A DURESS DEFENSE AND DEFICIENT IN PROVIDING MENTAL HEALTH EXPERT WITH ADEQUATE INFORMATION.¹¹

Cole next contends that trial counsel Quentin Till rendered ineffective assistance of counsel for failing to "complete a competent background and mitigation investigation" which resulted in "a failed duress defense, inadequate and missed mitigation, and inadequate and misleading information for mental health expert." (IB p. 25).

While Cole contends that deficiencies occurred in the guilt and penalty phases of trial, the only evidence offered pertaining to this complaint is Cole's assertion that trial counsel did not timely and completely provide Dr. Miller sufficient historical material and opportunity to fairly

¹¹ Arguments concerning Appellant's Issues II and III will be combined to mirror the arguments presented by Cole in her initial brief before the Court.

evaluate her. Defense witness, Dr. Michael Herkov's testimony at the March 18, 2013, evidentiary hearing reflects that he spent much of his time nit-picking Dr. Miller's report but ultimately admitted on cross examination that his opinion "is not that different from Dr. Miller's" and the real difference was that "Dr. Herkov got more (collateral) history." (PCR VIII 1286). Doctors Herkov and Miller reach the same conclusions as to Cole's life history and nothing was added by Dr. Herkov that would have changed Cole's conviction and sentence results.

When filing a postconviction motion and raising such assertions as noted above, the rules for postconviction relief contemplate that there is some tangible basis for the assertions. Cole has the burden and has done nothing but insufficiently plead her case and failed to come forward with any evidence at the hearing to support her assertions. Cole has not shown within the confines of her allegations that "an adequate showing of duress was not presented by Dr. Miller" due to trial counsel's "failure to provide adequate information to Dr. Miller."

Duress Defense

The record, as outlined herein, reveals that the defense presented at Cole's trial evidence, via Dr. Miller, regarding Cole's psychological problems pertaining to depression, dependency, masochism, low self-esteem, drug usage, lack of

attention, sexual abuse, neediness and being easily led. Dr. Miller admitted that most of the evidence supporting his findings was from Cole's self-reporting. Also presented was Cole's family history that showed a childhood where individual family members cared about each other and there appeared to be a paucity of unhappiness. Albeit the product of a broken home, Cole lived or was around both parents during her early years, attended school, engaged in family outings and other normal events. The "differences" between the two scenarios, the one presented at trial and the one at postconviction evidentiary hearing was neither remarkable nor a sufficient basis to suggest trial counsel was ineffective for not providing more "collateral data" to reach a similar result. What evolved at the evidentiary hearing was an attack **not** on the nature of mitigation presented but rather an assault on what a strict and uncaring mother Shirley Duncan was. Such evidence, while important, was insignificant here where the theme was Cole's character as a good person who overcame some youthful issues and, unfortunately, she got caught up with an unsavory person, Michael Jackson.

The Florida Supreme Court on direct appeal found the record showed Cole's extensive involvement as a full participant in the Sumners' murders was more than just a "minor role". *Cole*, 36 So.3d at 599-601.

The Court also found that Cole's activities involved pretending to be Mrs. Sumner when she spoke on the phone with Detective Meacham; driving Jackson to the several ATMs so he could use the Sumners' ATM card; renting the Mazda they used; purchasing materials to be used in the murder; assisting at the burial site; renting the hotel rooms where they stayed; secreting stolen items from the Sumners' home in her car and ultimately benefiting from the money drawn from the Sumners' bank account. *See Cole*, 36 So.3d at 602. In light of the forgoing there was no credible evidence presented at the March 2013 hearing that would have changed the outcome of the sentence imposed.

Moreover in this case it is clear that, although the defense counsel wanted helpful information regarding Cole's childhood and life, there was clear reluctance by Cole to adequately provide information. She never told Mr. Till she had been a prostitute, yet postconviction counsel for Cole urged at the evidentiary hearing that the evidence would have been compelling and the jury should have been told this fact.

Courts have repeatedly rejected arguments as to counsel's effectiveness where a defendant may hide or refuse to disclose information concerning abuse or other aspects of a defendant's life from his counsel. "In evaluating the reasonableness of a defense attorney's investigation, we weigh heavily the

information provided by the defendant." *Newland v. Hall*, 527 F.3d 1162, 1202 (11th Cir. 2008). Consequently, "an attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him." *Id.* (citation omitted). *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1210-11 (11th Cir. 2007) ("The Constitution imposes no burden on counsel to scour a defendant's background for potential abuse given the defendant's contrary representations or failure to mention the abuse."); *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) ("An attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him.") (citations omitted); *Lambrix v. Singletary*, 72 F.3d 1500, 1505-06 (11th Cir. 1996) (defense counsel cannot be considered ineffective for failing to discover evidence of abuse in childhood where neither the defendant nor his relatives gave counsel reason to believe that such evidence existed); *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1324-25 (11th Cir. 2002) (*same*). Thus a defendant may not play the equivalent of hide and seek with information at her disposal and, when counsel fails to uncover the information later, obtain postconviction relief, based on an ineffectiveness of counsel claim.

In rejecting a similar claim, the Florida Supreme Court, in *Correll v. Dugger*, 558 So.2d 422, 426, n.3 (Fla. 1990),

observed:

As to Correll's claim that his trial counsel was ineffective for failing to delve deeply enough into his purported family history, the record is sufficient for us to conclude that counsel was not ineffective. Counsel presented the testimony of Correll's mother, his brother, and his brother's wife. Neither the brother nor the sister-in-law had known Correll well as a child (the brother being fifteen years older), but the mother described her son as a "happy-go-lucky" boy who had a normal childhood. When Correll testified, he too, painted a picture of a normal boyhood and said he was close to and loved his father. Correll now alleges an abusive upbringing with his deceased father as the cause of his misery. If this account is true, trial counsel cannot be faulted for failing to know it, given the fact that diametrically opposite testimony was given by Correll and his mother.

(emphasis added).

See also Strickland, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

Notwithstanding the inability of Cole to obtain relief on the basis of his own failure to disclose information to counsel, the record in this case reflects that counsel conducted an extensive and inherently reasonable investigation into Cole's background for potential mitigation and made strategic decisions regarding what would be a compelling presentation to the jury. Trial counsel's lack of success is not the marker by which to

judge whether the strategy utilized was reasonable. See *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000) (“[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel’s decision was reasonable under the norms of professional conduct.”). The court, in *Occhicone*, concluded that trial counsel was not deficient for choosing to focus on the alibi defense rather than the independent act defense urged by the defendant.

In *Bradley v. State*, 33 So.3d 664, 671 (Fla. 2010), the Court explained:

All four of Bradley’s claims allege that his attorney provided ineffective assistance of counsel during his trial. As we have explained before, the test when assessing the actions of trial counsel is not how, in hindsight, present counsel would have proceeded.

The Court further held that Bradley failed to prove entitlement to postconviction review:

At the evidentiary hearing on Bradley’s postconviction motion, he failed to provide a legal basis to support the claim that pursuing an “independent act” theory as his primary defense at trial would have exonerated him from his role in beating Mr. Jones to death. Further, Bradley has failed to show that by using the independent act doctrine exclusively, there is a reasonable probability that it would have changed the result of his trial.

Bradley v. State, 33 So.3d at 675.

Moreover, postconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and

observations of the demeanor and credibility of witnesses. See *Cox v. State*, 966 So.2d 337, 357-58 (Fla. 2007). As a result, this Court has deferred to the postconviction trial court's factual findings as long as that court's findings are supported by competent, substantial evidence. The trial court rejected Cole's assertion that a "duress defense was viable":

Defendant alleges that trial counsel could not make an adequate showing of duress at the guilt phase because they failed to conduct a reasonable investigation of her background and psychological deficiencies during the pendency of her case. She maintains that, had counsel conducted a reasonable investigation, they would have discovered that she does not interact well with men and that she is generally fearful, intimidated, and willing to please. Defendant maintains that with this information, trial counsel could have successfully moved for a duress instruction at the guilt phase. Defendant alleges that this omission contributed to the lack of a duress defense at trial.¹²

12 At the evidentiary hearing, Defendant further alleged that trial counsel was ineffective in waiting to have Dr. Miller evaluate her until after the guilt phase. Dr. Miller's report, however, indicates that he began his evaluation of Defendant prior to trial. (P.C. Ex. 16.)

Although a defense strategy chosen by trial counsel and a defendant may not prevail, that fact alone does not render the strategy unreasonable or deficient. *Bradley v. State*, 33 So.3d 664, 680 (Fla. 2010). "Were that the test, all defendants sentenced to death would have claims for ineffective assistance of trial counsel." *Id.*; see *Heath v. State*, 3 So.3d 1017, 1029 (Fla. 2009) ("The fact that this defense strategy was ultimately unsuccessful with the jury does not render counsel's performance deficient."); see also *Henry v. State*, 948 So.2d 609, 616 (Fla. 2006) ("It is all too tempting for a defendant to second-guess counsel's

assistance after conviction or adverse sentence") (citation omitted).

After his appointment in 2005, Mr. Till testified that he began compiling information for the guilt and penalty phases. (P.C. Vol. I 13, 143-44.) He hired an investigator, Randy Justice, to go to South Carolina and gather information, speak to family, and find possible witnesses for the defense.¹³ (P.C. Vol. I 10, 11, 12, 135.) To prepare for the guilt phase, Mr. Till scheduled depositions in South Carolina, engaged in discovery with the State, met with family members, observed Jackson's trial, and began to formulate possible defenses. (P.C. Vol. I 9, 10, 24, 143.)

¹³ Mr. Justice was a retired detective from the Jacksonville Sheriff's Office with over forty-three years of experience. (P.C. Vol. I 12.)

Mr. Till and Mr. Messoro both stated during the evidentiary hearing that they had difficulty communicating with Defendant because she was not forthcoming with information. (P.C. Vols. I 53, 75, 108, 113; III 442-43, 453-54, 456-57.) Throughout his various interactions and conversations with Defendant, Mr. Till testified that he never had the impression that she suffered from any mental health infirmities or was of below average intelligence. (P.C. Vol. I 27, 71.) Even in the course of interviewing family members, especially Defendant's mother and grandmother, he found nothing that raised serious concerns about Defendant's mental health. (P.C. Vol. I 27.) Mr. Till testified that he hired Dr. Miller in an abundance of caution to ensure that he did not overlook anything and for the Doctor's experience and likeability. (P.C. Vol. I 131-32, 133, 135-36.)

Mr. Till gained a thorough understanding of the case due to his investigation and formulated possible defenses for the guilt phase based on that understanding. (P.C. Vol. I 49-52.) At the evidentiary hearing, Mr. Till testified that he composed a defense that centered on the idea that Defendant did not knowingly participate in the murder of Reggie and Carol Sumner. (P.C. Vol. I 94-95.) Mr. Till tried to show the jury at the guilt phase that Defendant was marginally involved in the crime in that she knew

about the planned theft, but did not knowingly participate in the kidnapping and murder of the Summers; those criminal actions were independent acts of her co-defendants.¹⁴ (P.C. Vol. I 94-95, 136-37.) Furthermore, Mr. Till stated that the duress theory was not the focus of his defense due to his conversations with Defendant. (P.C. Vol. I 53.)

¹⁴ Defendant testified at the guilt phase that she believed the purpose of digging the hole was to hide items they stole from the Summers' home; not to bury them alive. (R. Vol. X 1191-92, 1196-98.)

The chosen strategy was most effective, according to Mr. Till, to counter the State's evidence. (P.C. Vol. I 50-53.) He observed the evidence introduced at Jackson's trial and knew that the State's evidence would overshadow the theory that Defendant was under duress of her co-defendants during the course of the criminal events. (P.C. Vol. I 24, 50-53.) Evidence at trial revealed that Defendant knew the victims and was the linking factor between the co-defendants and the victims. (R. Vols. IX 943-44; X 1158, 1175-77; XI 1246.) The State presented evidence that Defendant partied with Jackson and Wade in Myrtle Beach, purchased duct tape and saran wrap for the crimes, and held a flashlight while Jackson, Nixon, and Wade dug the grave. (R. Vols. IX 916-17, 922, 959; X 1196; XI 1209, 1261, 1263, 1267-()8, 1300.) After the Summers were buried alive, Defendant further engaged in the crime by pretending to be Mrs. Sumner while speaking to the Jacksonville Sheriff's Office (in an attempt to have the victims' bank accounts unfrozen), returning to the victims' home to clean, and pawning the victims' belongings. (R. Vols. VII 543; IX 912-13, 948-49; XI 1243-44, 1276, 1301; P.C. Vol. 196.) Finally, the State maintained that Defendant had multiple opportunities to "escape" from Jackson or to call the police for assistance but she did not. (R. Vol. XI 1214, 1233, 1271-72; P.C. Vol. I 96-97.)

Mr. Till thought that he would lose all credibility with the jury if he tried to present a duress defense, and credibility was critical to the successful representation of his client. (P.C. Vol. I 49, 52, 137.) When questioned at the evidentiary hearing concerning the duress defense, Mr. Till testified

about Defendant's state of mind at the time of the offense:

[L]et's set all this aside and let's talk about this duress. Now, this darn Jackson guy, you know, I think it's something that [the jury could think about, but for me to focus on she did this but did because he told her to do it and then she was in fear of her life if she didn't do it, those pictures, her testimony, her interrogation tapes about sitting up in those rooms, she's running with the big dogs. She's having a good time. That's her new lifestyle. She's even going to the pawn shop and pawning items by herself, I think, and Wade and getting money items from the pawn shop independently.

(P.C. Vol. I 127.) Nevertheless, trial counsel argued, albeit unsuccessfully, for a duress instruction for the jury. (P.C. Vol. I 94.) After the Court denied the instruction, Mr. Till and Mr. Messoro preserved this issue for appellate review. (R. Vols. XI 1290-92; XII 1440.)

Trial counsel conducted a reasonable investigation and obtained a great deal of information despite Defendant's lack of cooperation prior to the guilt phase. Trial counsel developed their theory and defenses based on the facts of the case, their investigation, and their understanding of Defendant. Thus, trial counsel's actions did not constitute ineffective assistance of counsel. Even if counsel acted deficiently, the Court is convinced that a presentation of a more comprehensive duress defense would not have changed the ultimate outcome of the proceedings, given the State's evidence in this case. Trial counsel's actions did not fall below a reasonable standard of performance and, therefore, Defendant is not entitled to relief.

Postconviction Order (PCR III 475-478).

Inadequate and Missed Mitigation

Cole argues that trial counsels were ineffective at the penalty phase because Quentin Till and Greg Messoro began the

mitigation investigation in late 2007, shortly before Cole's trial and "missed mitigation" that could have been presented.

At the evidentiary hearing, Quentin Till and Greg Messoro testified as to what was considered and investigated in mitigation in Cole's case. They testified that after reviewing Cole's background, her history, having her evaluated by Dr. Miller and assessing the State's case, they sought to focus on her positive attributes and not bring forth negatives issues. Cole contends "Mr. Till advised that he and Mr. Messoro portrayed Ms. Cole as a pretty good person who led a pretty good life and just had a bad day. The lack of investigation into Cole's background led Mr. Till's view that Ms. Cole's behavior was 'aberrant,' out of the norm of how she was raised. (5 PCR 776)" (IB p. 36). Cole asserts that Mr. Messoro came into her case late in the process and based on his and Mr. Till's "limited perception" "decided to portray Ms. Cole in the best possible light, that her involvement in this case was just one small piece of her entire life, that she was a good person, and that this was a tragic, terrible event. (6 PCR 1094)." (IB p. 37).

At the evidentiary hearing held in March 2013, Cole called many of the witnesses she called for her penalty phase, as well as a few other witnesses that she asserts should have been called. Many of the people who were called at trial testified

"differently" at the postconviction hearing. Their theme was no longer that Cole had a normal childhood, rather they portrayed Cole's life as difficult and focused more on the unhappy relationship Cole had with her mother. A number of witnesses stated that Cole's mother was not interested in Cole and that Cole's mother was too strict and made her care for her brother while her mother was at work.

Each witness identified in her postconviction pleadings "who should have been called," presented mostly cumulative evidence to the evidence introduced at the penalty phase or the *Spencer* hearing.¹²

¹² For example:

Margaret "Peg" Sordlett (who was not called at the March 2013 hearing) wrote a short passage in Cole's school yearbook which suggested Tiffany was easily led. At trial however Dr. Miller testified that Cole could be easily led. Shirley Duncan, Cole's mother, read the identical passage by Ms. Sordlett to the jury at the penalty phase of her trial.

Donna Phillips could have told the jury what she wrote in a letter to the Court at the "*Spencer* hearing" about Cole's mother's pregnancy. Shirley Duncan, Cole's mother, testified at the penalty phase about the facts of Cole's birth and Cole's childhood.

Danny Newman (who was not called at the March 2013 hearing) one of Cole's boyfriends, would have testified, if called, that Cole had personal problems and a bad home situation. Dr. Miller related circumstances of Cole's childhood and home life touching upon Cole's personal problems; bad home life; the fact that Cole's father was dying of cancer; that she took care of him and her siblings and that she had no real childhood.

Keisha Grier (who was not called at the March 2013 hearing) would have also testified that Cole was helpful, talked to her when Grier's father died and was easily manipulated by men. Dr.

These minor nuances articulated through their postconviction testimony would not have been of such significance to change the overall knowledge the jury had regarding the mitigation available and presented regarding Tiffany Cole. If these were omissions or errors of trial counsel, they still would not have undermined the Court's confidence in the sentence of death when viewed in the context

Miller presented similar evidence and the trial court specifically found that Cole was helpful and that Dr. Miller had addressed Cole's personal issues with men.

Shawn Walsh (who was not called at the March 2013 hearing), if called, would have said Cole was a good person, easily led and used drugs. Dr. Miller presented similar evidence of Cole's drug abuse, low self-esteem and dependence on men.

Hazel Simmons would have spoke to Cole's character. A number of witnesses at trial testified as to Cole being a good person who was very caring.

Nancy Mairs read a letter during the *Spencer* hearing but would have testified about Cole's childhood and how she was neglected and had to care for her brothers. The penalty phase record is replete with testimony about Cole's childhood, and Dr. Miller testified about Cole's shortcomings and hard childhood.

Deborah Marie Cole, Cole's aunt, could have addressed Cole's birth to her 16 year old mother; how uninterested Shirley Duncan was of her daughter; and the fact that depression ran in the family. Dr. Miller believed Cole suffered from depression and noted that Cole's mother was young when Tiffany was born and that her father was in prison.

Ray Phillips, Cole's step-grandfather, would have testified, if called, that depression ran in the family and Tiffany's mother did not have time for her. There was a plethora of evidence through Dr. Miller of Cole's suffering with depression and other evidence that Cole and her brother were on their own at a young age, although Shirley Duncan did have other relatives take care of her children when she worked.

of the penalty phase evidence and the mitigators and aggravators heard by the jury and found by the trial court.

Cole's reliance on *Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259 (2010), is misplaced. In *Sears*, the Supreme Court held that because defense counsel had not done a "complete investigation" as to all possible mitigation deficient performance and prejudice occurred. That Court observed:

We did so most recently in *Porter v. McCollum*, 558 U.S. 30, ----, 130 S.Ct. 447, 449, 175 L.Ed.2d 398 (2009) (*per curiam*), where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief, *id.*, at 453-54. Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U.S.C. § 2254(d)(1)—we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed Porter's claim. *Porter, supra*, at ----, 130 S.Ct., at 454-55.

FN11. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 515-516, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 700, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[6] We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.FN12 In the *Williams* decision, for instance, we categorically rejected the type of truncated prejudice inquiry undertaken by the state court in this case. 529 U.S., at 397-398, 120 S.Ct. 1495. And, in *Porter*, we recently explained:

FN12. Whether it did so implicitly is far from apparent, notwithstanding Justice SCALIA's suggestion to the contrary. See post, at 3268 - 3269. The trial court stated that the record was "largely silent" on "what [evidence] would have been shown if [additional mitigating evidence] had been sought." App. to Pet. for Cert. 28B. This is a curious assertion in light of the 22 volumes of evidentiary hearing transcripts and submissions in the record, which spell out the findings discussed above. It also undermines any suggestion that the court did, in fact, do the reweighing Justice Scalia believes it undertook; it is plain the record is not "largely silent." And it also undermines any suggestion that the court simply discounted the value of the testimony; had it made any such finding, the court could have easily stated, instead, that the record evidence was unpersuasive.

"To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation." 558 U.S., at ----[, 130 S.Ct., at 453-54] (internal quotation marks omitted; third alteration in original).

That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial *3267 penalty phase. Indeed, it is exactly this kind of probing inquiry that Justice SCALIA now undertakes, post, at 3268-3271, and that the trial court failed to do. In all circumstances, this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of a penalty phase mitigation investigation.

III

A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' "significant" mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to

assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation. See *Porter, supra*, at ----, 130 S.Ct. at 453-54; *Williams, supra*, at 397-398, 120 S.Ct. 1495; *Strickland, supra*, at 694, 104 S.Ct. 2052. It is for the state court—and not for either this Court or even Justice SCALIA—to undertake this reweighing in the first instance.

That analysis was exactly what was done by the trial court in its postconviction order. This Court, in *Hildwin v. State*, 84 So.3d 180, 186-187 (Fla. 2011), explained:

. . . "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *187 *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* In *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000), this Court held that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."

"Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Stewart v. State*, 37 So.3d 243, 253 (Fla.2010) (quoting *Hurst v. State*, 18 So.3d 975, 1013 (Fla.2009)). That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in

[that] outcome.'" *Porter v. McCollum*, --- U.S. ----, 130 S.Ct. 447, 455-56, 175 L.Ed.2d 398 (2009) (alteration in original) (quoting *Strickland*, 466 U.S. at 693-94, 104 S.Ct. 2052). "To assess that probability, [the Court] consider[s] 'the totality of the available mitigation evidence ...' and 'reweigh[s] it against the evidence in aggravation.'" *Id.* at 453-54 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

As to the application of the *Strickland* standard in a case involving the presentation of mitigating evidence, the United States Supreme Court has explained:

We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires [a] ... probing and fact-specific analysis....

Sears v. Upton, --- U.S. ----, 130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010).

Both prongs of the *Strickland* test present mixed questions of law and fact. *Sochor v. State*, 883 So.2d 766, 771-72 (Fla.2004). "In reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court defers to the factual findings of the trial court to the extent that they are supported by competent, substantial evidence, but reviews de novo the application of the law to those facts." *Mungin v. State*, 932 So.2d 986, 998 (Fla.2006).

See also, *Troy v. State*, 57 So.3d 828, 835-836 (Fla. 2011).

In the instant case there is nothing different contained in the paucity of additional evidence tendered by Cole regarding the evidence each "identified witness" would have testified to had they been called. Indeed a review of the evidence presented

at the March 2013 hearing reflects that Cole has failed in meeting her burden. Nothing new was revealed. The only difference in the evidence submitted was that Till/Messore sought to paint Cole's life in a more favorable light and, current post-conviction counsel, at the evidentiary hearing, presented evidence that was orchestrated to use some of Cole's life history negatively. Cole's postconviction counsel wanted to look at Cole's life as a glass half empty rather than a glass half full.

The trial court evaluated Cole's claims as to trial counsels' failures regarding investigating and unearthing possible mitigation and concluded Cole was not entitled to relief.

Evaluating multiple factors present in the instant case, the Court finds that trial counsel acted reasonably pursuant to the *Strickland* standard. As to the issue of time, trial counsel acted competently despite the time constraint.¹⁸ Mr. Messore was appointed to represent Defendant on August, 30, 2007, approximately six weeks before the guilt phase.¹⁹ (R. Vol. I 76-77.) Mr. Messore also had six weeks between the guilt phase and penalty phase to prepare mitigation for the jury.²⁰ There is no merit to the claim that Mr. Messore's twelve week/three month assignment to the case prejudiced the outcome of Defendant's case, given that Mr. Till began accumulating information for the penalty phase when he assumed the case on August 1, 2005.

¹⁸ Defendant maintains in the instant Motion that the delay also contributed to trial counsel's failure to obtain the testimony of David Duncan, Sr., before his death in 2005. It is clear from the testimony at the evidentiary hearing that Mr. Till attempted to obtain

Mr. Duncan's testimony before his death but was unsuccessful. (P.C. Vol. I 13, 136.) Moreover, Defendant did not suffer prejudice; Mr. Till stated that because of the allegations that David Duncan, Sr., sexually abused Defendant, his statements would not have been beneficial or helpful during the instant case. (P.C. Vol. I 136.)

19 Some evidence presented at the evidentiary hearing indicated that Mr. Messoro began work on Defendant's case prior to the entry of this Order.

20 Mr. Till testified that despite Defendant's trial occurring before Wade's trial, the Court scheduled Defendant's penalty phase after Wade's penalty phase to give trial counsel additional time to prepare. (P.C. Vol. I 63.)

(R. Vol. I 1.) A review of the penalty phase transcripts clearly shows that trial counsel presented a theory based on their diligent investigation.

* * *

Trial counsel consulted with a mental health expert who provided testimony at trial, and presented numerous witnesses at the penalty phase and Spencer hearing.²¹ There is no indication that their combined experience handicapped Defendant's penalty phase preparations. Accordingly, Defendant is not entitled to relief.

Postconviction Order (PCR III 484-487).

The trial court ultimately held that Cole had failed to meet her burden on the two prongs of her *Strickland* assault:

At the penalty phase, trial counsel called several family members and friends to testify on Defendant's behalf. Ms. Duncan testified that (1) she had a difficult teenage pregnancy because Mr. Duncan was incarcerated, and Mr. Duncan was absent during the first year of Defendant's life, (R. Vol. XIV 1492, 1493, 1496, 1549, 1552); (2) Defendant lived in numerous homes during her childhood, (R. Vol. XIV 1492-95); (3) Defendant had a thumb-sucking habit, (R. Vol. XIV 1496, 1508, 1513); (4) Defendant cared for

her brother when she was young (Roseanna Bustamante testified to the same), (R. Vol. XN 1500, 1511, 1541, 1554, 1633); (5) she was a strict mother and that Defendant began to "act up" during high school, (R. Vol. XIV 1515, 1527- 28, 1542, 1553-55); (6) Defendant did well in school and received numerous awards and achievements but dropped out in the tenth grade, (R. Vol. XIV 1515, 1517-19, 1542, 1550);²⁷ (7) Defendant was immature with respect to dating and had abusive boyfriends, (R. Vol. XIV 1526, 1550); (8) the birthmark on Defendant's face caused her to have low self-esteem, (R. Vol. XIV 1538-39, 1542); (9) Defendant held numerous jobs after she obtained her GED, (R. Vol. XIV 1551); (10) Defendant's birthmark cause her to have low self-esteem, (R. Vol. XIV 1551); (11) Defendant ran away a few times in her teenage years, (R. Vol. XIV 1555); (12) Defendant had a close family, (R. Vol. XIV 1557); and (13) Defendant cared for her father during his illness, (R. Vol. XIV 1530, 1543.)

27 Defendant maintains in the instant Motion that trial counsel never asked Ms. Duncan about Defendant's schooling or what caused Defendant's "downward spiral." It is clear from her testimony at the penalty phase that Ms. Duncan addressed these issues. (R. Vol. XIV 1515, 1517-19, 1542, 1550.)

While preparing for the guilt phase, Mr. Till testified that he accumulated materials for the penalty phase and gathered a "library" of pertinent evidence including pictures, photo albums, and records. (P.C. Vols. I 143-44; II 387; III 447.) Mr. Messore testified that after his appointment, he personally visited South Carolina on two occasions to gather additional information for the penalty phase. (P.C. Vols. II 393; III 409.) Mr. Till and Mr. Messore both stated during the evidentiary hearing that they had difficulty communicating with Defendant because she was not forthcoming with information. (P.C. Vols. I 53, 75, 108, 113; III 442, 454, 456-57.) Throughout the process, Mr. Messore testified that he explained to Defendant the gravity of the situation and his role as her "conduit" to the jury. (P.C. Vol. III 453, 457.) Defendant, however, remained taciturn. (P.C. Vol. III 453, 457.) Mr. Messore acknowledged during his testimony that he spent time trying to gather

information from Defendant and did the best he could; this was not a situation where he walked away after Defendant declined to give answers. (P.C. Vol. III 454, 457.) In fact, to help develop possible mitigation and a theory for the penalty phase, trial counsel had Defendant write her social history. (P.C. Vol. I 75, 110.)

Due to Defendant's reticence, Mr. Messoro sought other avenues to obtain information about his client. (P.C. Vol. III 442-43, 457.) While Defendant's social history provided some guidance, Mr. Messoro relied on Ms. Duncan, Defendant's mother, to coordinate meetings with various family members and friends, and David Duncan, Jr., Defendant's brother, for information. (P.C. Vol. III 410, 411, 412, 442-43, 450, 457.) Mr. Till testified that he and Mr. Messoro communicated well with Ms. Duncan and informed her of the purpose of the penalty phase.²⁸ (P.C. Vol. I 138, 145.) Trial counsel testified that they interviewed numerous aunts and uncles, and Mr. Messoro arranged for witnesses to testify at the penalty phase and write letters in support of Defendant. (P.C. Vols. I 139; III 426, 430, 444.)

²⁸ Despite allegations at the evidentiary hearing that Ms. Duncan was abusive and controlling, trial counsel testified that neither Defendant, nor family members, spoke negatively of Ms. Duncan during the investigation. (P.C. Vols. I 105-06; III 442, 465.)

To gain a more complete understanding of their client, trial counsel also obtained a mental health expert to provide further insights. (P.C. Vol. I 35, 61, 1321-34, 135.) Mr. Till armed Dr. Miller with Defendant's handwritten personal history, in which she detailed various aspects of her life. (P.C. Vols. I 73; III 409.) Dr. Miller completed an evaluation based on, among other things, his numerous interviews with Defendant and a review of her written social history. (P.C. Vol. III 414; P.C. Ex. 16.) Mr. Till testified that Dr. Miller's report provided no "earth-shattering" information or "red flags" that warranted further mental health investigation. (P.C. Vol. I 71, 72, 86, 87, 88.) Before the penalty phase, Dr. Miller spoke to Mr. Messoro about his findings. (P.C. Vol. III 413, 430.) According to the testimony of trial

counsel, there are two statutory mitigators affected by the mental health statues of the defendant, and Dr. Miller's findings about her mental health did not support either of those statutory mitigators.²⁹ (P.C. Vols. I 71-72; III 411.)

²⁹ The Court infers, based on section 921.141(6), Florida Statutes (2005), that trial counsel are referring to the "extreme duress or under the substantial domination of another person" and "under the influence of extreme mental or emotional disturbance" mitigators.

Based on their diligent investigation, trial counsel knew many negative aspects of Defendant's background, including her drug abuse, disruptive home life, and prostitution.³⁰ (P.C. Vols. I 77; III 451-52, 459.) Counsel also discovered, however, many positive aspects about her life through their diligent investigation; for example, she was very close to her family, obtained her GED, and did not have an extensive criminal record. (P.C. Vol. III 449.) Mr. Messoro stated that depending on the underlying case, a strategy may keep out certain elements of a person's background, and in this case, trial counsel chose to put more emphasis on the positive aspects of her background. (P.C. Vol. III 449, 451-52, 459.) By showing that her activities with Wade, Nixon, and Jackson were an isolated event in Defendant's otherwise good life, trial counsel attempted to portray her as someone whom the jury should spare. (P.C. Vols. I 73-74; II 391; III 448.) As Mr. Messoro told the Court at the evidentiary hearing, presenting certain "negative" aspects of Defendant's life would provide a justification as to why she committed the crimes, antithetical to their defense that she did not commit the offense. (P.C. Vols. I 73-74, 94; III 448, 461.) Furthermore, those negative aspects of Defendant's life were not consistent with the theory they presented throughout the guilt phase and presenting that type of theory to the jury at the penalty phase would have been damaging to Defendant.³¹ (P.C. Vols. I 94; III 436-37, 454- 55.)

³⁰ Mr. Till testified that he was unaware of Defendant's prostitution history. (P.C. Vol. I 74.) He stated that she never disclosed this information to

him during their numerous conversations. (P.C. Vol. I 74.) There is record evidence, however, that Mr. Messore knew of this information based on his testimony at the evidentiary hearing. See *Peede v. State*, 955 So. 2d 480, 496 (Fla. 2007) ("While defense counsel DuRocher had no memory of seeing the diary prior to preparing for the evidentiary hearing, defense counsel Bronson testified that he was aware of the substance of the information that was contained in the diary generally Under these circumstances there is record evidence to support the conclusion of the trial court that the diary and its contents were disclosed to the defense.").

31 For example, Mr. Messore felt that it was problematic to present the evidence of duress at the penalty phase because the jury did not give much credibility to that defense in the face of the State's evidence during the guilt phase. (P.C. Vol. III 436-37, 454-55.)

Overall, Mr. Messore felt that the strategy he designed for the penalty phase coincided with the presentation at the guilt phase and that his strategy was the most appropriate for this case. (P.C. Vol. III 448-49, 451.) When asked at the evidentiary hearing if he "pigeon-holed" his investigation to fit the theory he wanted, Mr. Messore testified that the evidence led him to this theory. (P.C. Vol. III 455.) Mr. Messore further testified that he would have changed his strategy if the evidence had led him in another direction. (P.C. Vol. III 455-56.) Mr. Messore stated, however, that the people he spoke to, including Ms. Duncan, did not present anything to that effect.³² (P.C. Vol. III 437.)

32 Contrary to Defendant's allegations at the evidentiary hearing, Mr. Messore testified that Defendant's family knew she faced the death penalty. (P.C. Vol. III 429.)

Trial counsel was not deficient for choosing to pursue other mitigation evidence that they determined would be more likely to help Defendant. See *Jennings v. State*, 38 Fla. L. Weekly S481 (Fla. June 27, 2013). Trial counsel testified at the evidentiary hearing that they were concerned that certain mitigation had

the potential to do more harm than good. Thus, trial counsel's strategy of emphasizing Defendant's many positive character traits was appropriate. See *Jennings v. State*; 38 Fla. L. Weekly S481 (Fla. June 27, 2013). Through numerous witnesses, trial counsel detailed for the jury Defendant's home life and upbringing, mental health and substance abuse issues, educational background, and employment history. See *Parker*, 3 So.3d at 985. Moreover, the penalty phase transcripts reveal that the witnesses testified to much of what Defendant now claims trial counsel failed to show the jury. See *Troy*, 57 So.3d at 835. The Court also rejects Defendant's argument that counsel's omission in obtaining the mitigation information "was made worse" by the fact that the Court erroneously instructed the jury on the Heinous, Atrocious, and Cruel aggravator. The Supreme Court of Florida found that error harmless given the other aggravators found in this case. *Cole v. State*, 36 So.3d 597, 610 (Fla.2010) ("Without the HAC aggravating factor, there are *six remaining valid aggravators*"). Defendant simply has not demonstrated a substantial deficiency on the part of counsel that has undermined the Court's confidence in the penalty phase proceeding.

* * *

Defendant states throughout her post-evidentiary hearing memorandum that trial counsel was deficient because *they failed* to discover numerous pieces of mitigation information and present it to the jury. Defendant fails to realize, however, that this burden is not solely on trial counsel; *Strickland* dictates that trial counsel may base their actions, quite properly, on information *supplied by Defendant*. Thus, the Court cannot find fault in trial counsel's alleged omissions because Defendant withheld the information. To do so, would invite every defendant to withhold evidence and successfully attack their counsel's actions through a postconviction motion.

Assuming for the sake of argument that counsel was deficient, Defendant's claim still fails because she does not meet the prejudice prong of *Strickland*. The potential mitigation evidence presented at the evidentiary hearing is not strong enough to shake the Court's confidence in the outcome of Defendant's

penalty phase. The jury found Defendant guilty of the murder, kidnapping, and robbery of Carol and Reggie Sumner. The Court found numerous aggravators, including one of the weightiest aggravators: that the murder was cold, calculated, and premeditated. The jury recommended the death penalty by a 9-3 vote for the death of Carol Sumner, and by a 9-3 vote for the death of Reggie Sumner. Evidence that Defendant engaged in prostitution to support her drug habit or that she wet the bed would not have been nearly enough to counterbalance the powerful aggravating factors in this case.

Counsel made reasonable, informed strategic decisions and were not ineffective when they opted against presenting certain negative aspects of Defendant's life in their mitigation presentation. As such, the Court denies this claim.

Postconviction Order (PCR III 491-499).

As to Cole's contention that a mitigation specialist should have been secured for trial, the record reflects that defense trial counsel Quentin Till did ask for a mitigation specialist but the court appointed only an investigator. Till testified that they asked a second time but that request was also denied. And when Mr. Messore was appointed, a third request was made for a mitigation specialist which again was denied. While Till and Messore asked for a specialist, Cole failed to show in her presentation at the postconviction hearing that the "refusal by the court to appoint a mitigation expert" impacted her case. A comparison between the penalty phase and *Spencer* hearing and the March 2013 postconviction hearing does not show any significant

omissions of evidence that would have changed the outcome of the penalty imposed.

In *Diaz v. State*, 132 So.3d 93, 114 (Fla. 2013), the Court held in a similar challenge, that the failure to secure a mitigation specialist did not necessarily support a *Strickland* assertion. And, in *Johnson v. State*, 104 So.3d 1010, 1020-1021 (Fla. 2012), the Court held:

Finally, the postconviction court denied Johnson's claim that his counsel was ineffective in failing to hire a mitigation expert to investigate and testify at Johnson's penalty phase trial. The court determined that counsel was not deficient because mitigation had been a central focus of the defense, as evidenced by Ms. Ackerman's *1021 investigation. The court found that Ms. Hammock would have performed substantially the same in investigating and reporting mitigating evidence as did Ms. Ackerman. The court concluded that Johnson's argument that an expert such as Ms. Hammock would have presented the evidence more articulately or credibly was nothing more than second-guessing his trial counsel's strategic decisions. The court further concluded that Johnson had failed to establish prejudice because much of the information testified to by Ms. Hammock was expressed clearly, articulately, and credibly by Johnson's family members during his penalty phase trial.

Likewise the trial court concluded that no relief was warranted based on Cole's allegations:

Defendant failed to present any testimony at the evidentiary hearing to show that a mitigation specialist would have been more valuable than Mr. Messoro. Furthermore, Defendant did not produce mitigation testimony that was not known to trial counsel, or that the jury should have heard, such that a different result would have occurred. Accordingly, Defendant is not entitled to relief.

Postconviction Order (PCR III 488-489).

Cole is entitled to no relief. See *Hoskins v. State*, 75 So.3d 250, 256 (Fla. 2011) (Hoskins argues that counsel was deficient solely for failing to hire a mitigation specialist, "the claim is conclusory. Failure to use an "expert" in mitigation investigation does not per se constitute ineffective assistance.").

Cole's last sub-issue asserts that trial counsel did not provide adequate information to Dr. Miller, the mental health expert, used at trial to evaluate Cole for possible mitigation, regarding Cole's life history. She argues that Dr. Herkov reviewed what Dr. Miller had available at trial and Dr. Miller's report and found that the information provided was "inadequate" and the report was "filled with errors concerning Cole."

The record reflects that trial counsel conducted an inherently reasonable investigation, with the aid of an investigator, into Cole's background and provided his mental health expert with the evidence as well as access to Tiffany Cole. Cole's defense at trial was not that she acted under duress but rather she did not know Jackson would murder the Summers. After interviewing Tiffany Cole, Dr. Miller testified he reported that Cole was competent to stand trial and sane (TR XIV 1647-1648). As a psychological consultant for the defense, Dr. Miller only testified at the penalty phase.

At the penalty phase Dr. Miller presented the evidence for mitigation about Cole's abuse of drugs and alcohol and that she suffered from substance dependency (TR XIV 1651-1652). He testified that she was chronically depressed (TR XIV 1652), and had a personality disorder, not otherwise specified (TR XIV 1653-1654, TR XV 1683-1685.) In other words, Cole's personality disorder was based on an abnormal dependency on others; "masochism" by seeking things that caused her problems in life; "cluster B" features that lead to failures of conscience to stop behaviors. His diagnosis also included that there were "lifelong stressors" in Cole's life history that shaped her (TR XIV 1655). Dr. Miller believed Cole's adaptive functioning was relatively good, given the several mental problems she suffered.

He found that Cole's mental health problems (TR XV 1660-1695,) were premised upon:

1. Her abnormal dependency problems and masochism which came from experiences she had early in life (TR XV 1660).
2. Her parents divorced during her early, critical formative years, never feeling support or a home (TR XV 1660).
3. She was a surrogate mother to her brothers and took care of them (TR XV 1660-1661), thus she never had a childhood. Her stepfather's abuse of her younger brother and the puppy incident which Dr. Miller opined had a profound impact on her (TR XV 1661).
4. Cole's natural father sexually molested her at 16 or 17 (TR XV 1661), about the time she ran away from home (TR XIV 1543, 1550, 1555-1556; TR XV 1684). The betrayal of trust caused her to have feelings of confusion, guilt and of being dirty (TR XV 1663-1664). She told no one except her mother about the sexual

molestation (TR XV 1661). Her mother did not believe her, resulting in a feeling of no parental support (TR XV 1661).

5. Her low self-esteem and guilt left her entering abusive relationships with men (TR XV 1661-1665).

While minimizing the testimony about a happy childhood presented by some of Cole's relatives (TR XV 1662-1663), Dr. Miller attributed the difference to the unlikelihood of parents who raise children in an abusive environment coming forth and talking about it (TR XV 1663; 1685).

Dr. Miller viewed Cole's use of drugs (Xanax, Valium, street drugs, cocaine) and alcohol as self-medication for psychological pain (TR XV 1665-1666). Dr. Miller opined that given her low self-esteem, her drug supplier/boyfriend, Brian, provided some acceptance and leadership in that he could get drugs (TR XV 1666). He offered that Cole sought out abusers, as evidenced by Cole's relationship with Michael Jackson and the murders of Carol and Reggie Sumner (TR XV 1667-1670). This clearly was a part of her pathological need to be in abusive relationships (TR XV 1667). He found Cole's personality pathology supportive of her "follower" profile which would not cause her to initiate these crimes (TR XV 1668).

Acknowledging that Cole unquestionably followed and pushed aside her conscience (TR XV 1668), Dr. Miller found no diagnosis termed a major conscience problem (TR XV 1669). Dr. Miller did not conclude Cole was trying to rationalize her conduct; she

could not discern how she could be involved with an abusive person (TR XV 1669-1670). Cole had no insight as to her role in terms of her "personality disorder." (TR XV 1670).

In the trial court's sentencing order, the court rejected the statutory mitigator that Cole was only an accomplice when it came to these murders compared to co-defendants Jackson and Wade:

While this defendant might not have turned the spade onto the Summers, this Court cannot say that her participation was relatively minor. Accordingly, this matter is afforded little weight.

(TR III 477-478).

The court further considered these factors as a non-statutory mitigating circumstance, finding:

The defense has suggested some thirty (30) non-statutory mitigating circumstances. The Court has considered each circumstance and the evidence and argument pertaining to it. In doing so, the Court has noted that several are related to each other. Accordingly, instead of addressing each suggested mitigator separately, the Court has collected them in groups for discussion.

Defendant's minimal involvement in criminal activity.

The defense has asked this Court to consider the defendant's relative involvement in these crimes and the fact that she did not actually participate in the murders. The defendant specifically seeks a comparison with the actions of codefendant Bruce Nixon and the sentence he received. They also have suggested that the Court consider that the defendant committed no acts of violence and that she has no prior reputation for violence.

Lastly, the defense suggests that the defendant has been a good and responsible worker who has refrained from committing crimes, even though she could have done so.

Upon consideration, the Court concludes that these issues merely restate the defense suggestions on the statutory mitigators regarding the degree of the defendant's participation in the murders and her lack of significant record. As discussed with regard to the statutory mitigator on the degree of her participation, the Court concludes that the evidence in this cause simply does not substantiate the argument. The defendant's participation in all of this was thorough and varied and was not as simple as her just being there. This suggestion is afforded little weight.

With regard to the suggestion that the defendant has little criminal record, the Court has already noted that this mitigation is afforded some weight.

(TR III 479-480).

In mitigation the trial court found four (4) statutory mitigating circumstances and eight non-statutory mitigating circumstances and weighed each.

Unquestionably, there was nothing presented at the evidentiary hearing that would cast doubt about the trial court's findings. Even reviewing Dr. Herkov's testimony in a more favorable light for the defense, Dr. Herkov said his findings were akin to Dr. Miller's and any criticism was based upon an apparent lack of "collateral data" obtained by Dr. Miller. Dr. Miller reported he got much of his information from Cole's discussions with him.

The trial court, following the postconviction evidentiary hearing, found:

Among Dr. Herkov's observations was that Dr. Miller misstated the range for the Global Assessment Function ("GAF") test during his testimony at the penalty phase, telling the jury that the scale ranges from 0-70, not the actual range of 0-100. (P.C. Vol. IV 550-52.) Dr. Herkov testified that this "woefully mislead" the jury. (P.C. Vol. N 552.) The Court finds that Defendant has failed to demonstrate that a misstatement of the GAF score range invalidates the jury's verdict, given Dr. Miller's other testimony and the overwhelming evidence in this case.

Furthermore, it is apparent from Dr. Herkov's testimony that Defendant's contributions played a pivotal role in the differences between his opinion and that of Dr. Miller. There are numerous examples that come to mind based on the testimony given at the evidentiary hearing. Dr. Herkov stated that Dr. Miller mentioned substance abuse in his report but failed to realize the magnitude of the abuse. (P.C. Vol. IV 535.) Dr. Herkov testified, however, that he gained this understanding of Defendant's substance abuse during his conversations with Defendant. (P.C. Vol. N 535.) Similarly, Mr. Till testified that he was unaware of Defendant's prostitution history because she never disclosed it to him during their conversations. (P.C. Vol. I 74.) Dr. Herkov testified that he learned of Defendant's history of prostitution through Defendant's self-reporting. (P.C. Vol. IV 555.) The Court cannot fault trial counsel for relying on Dr. Miller's evaluation when Defendant was uncooperative and withheld information from her mental health expert. *Strickland*, 466 U.S. at 69.

As mentioned above, Defendant's own witness, Dr. Herkov, acknowledged that the underlying conclusions in the respective mental health evaluations are similar. While the two experts took different approaches in evaluating, the end results are substantially similar, if not identical. This is simply not enough to establish that *trial counsel* was deficient. See *Jennings v. State*, 38 Fla. L. Weekly S481 (Fla. June 27, 2013).

As to Defendant's claim that trial counsel failed to supply Dr. Miller with sufficient information, the Court finds that trial counsel conducted a sufficient background investigation of their client and supplied Dr. Miller with her background history. Trial counsel's decision to employ their theory and forego certain mental health mitigation at the penalty phase was a tactical decision based on a thorough investigation and information received from a competent mental health expert. See *Peede*, 955 So. 2d at 494; *Jennings v. State*, 38 Fla. L. Weekly S481 (Fla. June 27, 2013). Mr. Till was entitled to rely on the evaluation conducted by Dr. Miller during the pendency of this case, even if, in retrospect, his evaluation may not have been complete as Defendant now suggests. Trial counsel's actions were not deficient and did not fall below the reasonable standard pursuant to Strickland.

Assuming *arguendo* that trial counsel was deficient, Defendant has failed to demonstrate the necessary prejudice to obtain relief. The Court found multiples aggravating factors in this case, including that the murder was committed in a cold, calculated, and premeditated manner, one of the weightiest aggravators. Furthermore, the State's evidence at trial overwhelmingly demonstrated that Defendant actively participated in the offenses. Even with Dr. Herkov's evidence of a statutory mitigator of "under the undue influence or domination of another," there is no reasonable probability that the outcome would have been different, in light of the entire body of aggravation and the State's evidence at the guilt phase. See *Owen v. State*, 986 So. 2d 534, 552-53 (Fla. 2008) (holding expert testimony at postconviction evidentiary hearing concerning movant's increased impulsivity related to history of substance abuse would not likely have changed sentence, where evidence at trial largely refuted theory movant acted impulsively at time of murder). Dr. Herkov's evaluation does not present evidence that rises to the level of prejudice necessary to warrant relief. Thus, Defendant did not meet her burden pursuant to Strickland and is not entitled to relief.

Lastly, Defendant avers that counsel was ineffective for failing to provide Dr. Miller with Defendant's hospital or school records. Defendant alleges that Dr. Miller only met with her for seven hours, and that he reviewed police reports, the Indictment, Defendant's handwritten narrative and background, and the investigator's notes.³⁷ Specifically, Defendant maintains trial counsel never obtained records from a head injury she suffered from a car accident, a panic attack, and an incident of heart palpitations.

As to the alleged head injury from the car accident, Donna Phillips, Defendant's maternal grandmother, testified at the evidentiary hearing that Defendant was never hospitalized for a head injury following the car accident. (P.C. Vol. II 208.) Furthermore, Dr. Miller's report reflects that Defendant reported no major medical/surgical problems. (P.C. Ex. 16.) Similarly, Dr. Herkov testified that no medical or hospital records were available when he evaluated Defendant. (P.C. Vol. IV 581.) Defendant did not produce these records at the evidentiary hearing, thus failing to meet her burden. See *Woodward v. State*, 992 So. 2d 391, 393 (Fla. 1st DCA 2008) (holding defendant must present records to court to show entitlement to relief). Defendant produced school records at the evidentiary hearing, which Mr. Messorre and Mr. Till both testified they had during the pendency of this case. (P.C. Vols. II 388; III 447.) Accordingly, the Court finds no merit to Defendant's claim of ineffective assistance of counsel for failing to obtain these alleged records.

³⁷ The investigator, Randy Justice, compiled a "synopsis of investigation" dated December 2005.

Postconviction Order (PCR III 508-510).

Cole has failed to demonstrate that trial counsels actions were deficient.

ISSUE IV

CUMULATIVE ERROR WHICH PLACES THIS JURY'S
DEATH RECOMMENDATION IN DOUBT.

In *State v. Woodel*, ___ So.3d ___, 2014 WL 2532480 at *17 (Fla. 2014), the Court, in rejecting a cumulative error claim, held:

We find no cumulative error because the allegedly unexplored mitigating circumstances were: (1) cumulative to those presented during the second penalty phase; (2) insufficiently demonstrated during the postconviction evidentiary hearing; or (3) otherwise failed to satisfy the *Strickland* standard. See generally *Bradley v. State*, 33 So.3d 664, 684 (Fla.2010) ("Where, as here, the alleged errors urged for consideration in a cumulative error analysis 'are either meritless, procedurally barred, or do not meet the *Strickland* standard for ineffective assistance of counsel[,] ... the contention of cumulative error is similarly without merit.' ") (quoting *Israel*, 985 So.2d at 520). Furthermore, because we do not find multiple errors in this case, there is no cumulative error effect that establishes prejudice. See *Johnson v. State*, 104 So.3d 1010, 1029 (Fla.2012) ("[B]ecause multiple errors did not occur in this case, Johnson's claim of cumulative error must fail."). Despite the lower tribunal's detailed order granting Woodel postconviction relief as to the penalty phase, most of its findings relate to its judgments about counsel's deficiency, and there are only conclusory statements regarding prejudice.

The trial court herein found as to the cumulative error claim, Cole was entitled to no relief.

Defendant opines that due to the above-stated claims and the omission of mitigation information, coupled with the fact that the Court erroneously instructed the jury of the HAC aggravator, the validity of the jury's death recommendation is questionable. It is well-settled that a claim of cumulative error cannot stand in cases where, following individual evaluation,

alleged errors are found to be without merit or procedurally barred. *Lukehart v. State*, 70 So. 3d 503, 524 (Fla. 2011); see *Suggs v. State*, 923 So. 2d 419, 442 (Fla. 2005) (holding that when a defendant does not successfully prove any of his individual claims and, consequently, counsel's performance is deemed sufficient, a claim of cumulative error must fail); *Parker v. State*, 904 So. 2d 370, 380 (Fla. 2005) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit."). Here, Defendant has not demonstrated that counsel was ineffective under either prong of Strickland. Moreover, as stated supra, the Supreme Court of Florida found the HAC aggravator error harmless. See *Cole v. State*, 36 So. 3d 597, 610 (Fla. 2010). Accordingly, Defendant is not entitled to relief.

Postconviction Order (PCR III 529-530).

Additionally, the court found claims not developed at the evidentiary hearing were also abandoned.

Defendant failed to call certain individuals listed on the evidentiary hearing witness list.⁵⁴ Defendant's claim of ineffective assistance of counsel with regard to these witnesses required further development at the evidentiary hearing. At the conclusion of the evidentiary hearing, Defendant declined to call these witnesses and the Court inquired as to whether Defendant understood the waiver of this right. (P.C. Vol. IV 602-03.)

⁵⁴ Defendant failed to call the following witnesses: (1) Michael Edwards, (2) Charles Fletcher, (3) Michael Hurst, (4) Keisha Grier, (5) Robert Hatcher, (6) Tammy Muckenfuss, (7) Danny Newman, (8) Margaret Sordlett, (9) Shawn Walsh.

⁵⁵ The Court briefly addresses two claims waived at the evidentiary hearing by Defendant: (1) failure of trial counsel to call Danny Newman at trial; and (2) failure to locate Nakeyia Smalls. At trial, Defendant agreed, under oath, that she did not want trial counsel to call Mr. Newman. (R. Vol. X 1134.) The record reflects that trial counsel was concerned about

possible hearsay objections to his testimony. (R. Vol. X 1134.) Moreover, the alleged information he would have testified to would have made little difference; the State presented overwhelming evidence that despite her alleged call for help, she continued to stay actively involved with her co-defendants. Thus, counsel made a strategic decision to forego testimony from Danny Newman. See *Johnston*, 63 So. 3d at 741 (finding whether certain witnesses testify falls under umbrella of reasonable trial strategy provided for in *Strickland*). Lastly, the Court finds no merit in Defendant's claim that counsel was ineffective for failing to locate Nakeyia Smalls. To date, neither the Defendant, nor the State, has been able to locate this witness.

Postconviction Order (PCR III 530).

The trial court was correct in denying all relief as to any of Cole's postconviction claims.

CONCLUSION

Based upon the foregoing, the State requests this Court affirm the trial court's denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and email to Wayne F. Henderson, 222 San Marco Avenue, Suite B, St. Augustine, Florida 32084-2723, hoteon@gmail.com, this 30th day of September 2014.

/s/Carolyn M. Snurkowski
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CERTIFICATE OF COMPLIANCE

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

/s/Carolyn M. Snurkowski
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