IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC14-1967

LANCELOT URILEY ARMSTRONG

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
Attorney General
Tallahassee, FL

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5016
Facsimile (561) 837-5108
CapApp@MyFloridaLegal.com

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

PRELIMINARY STATEMENT

Lancelot Uriley Armstrong, Defendant below, will be referred to as "Armstrong" and Respondent, State of Florida, will be referred to as "State". Reference to the appellate records will be:

Original direct appeal - "1994-ROA;"
First postconviction relief appeal "1-PCR;"
Re-sentencing direct appeal - "RS-ROA;" and
Postconviction appellate record - "2-PCR"
Supplemental records will be identified with an "S"

The citation will be followed by the appropriate volume and page number(s). Armstrong's initial brief will be notated as "IB"

STATEMENT OF THE CASE AND FACTS

On March 7, 1990, Armstrong was indicted with Ercely Wayne Coleman ("Coleman") for the February 17, 1990 first-degree murder of Broward Sheriff Deputy John Greeney, attempted first-degree murder of Broward Sheriff Deputy Robert Sallustio, and armed robbery. (RS-ROA.1 1-2). The jury returned a guilty verdict and a nine to three death recommendation which the trial court followed. In affirming the conviction and sentence on direct appeal, *Armstrong v. State*, 642 So.2d 730 (Fla. 1994),[1]

[1] In his original direct appeal, Armstrong raised 24 issues. Relevant here were the 15 penalty phase issues: "(1) the trial judge formulated his sentencing decision before giving Armstrong an opportunity to be heard; (2) & (3) certain aggravating circumstances were duplicative and the trial judge erred in denying Armstrong's requested limiting instruction on duplicate

cert. denied, 514 U.S. 1085 (1995), this Court found the following facts:

> The record reflects the following facts. In the early morning hours of February 17, 1990, Armstrong called a friend and asked him to go with him to rob Church's Fried Chicken restaurant. The friend refused. According to several employees of Church's, around two o'clock that same morning, Armstrong and Michael Coleman came to the restaurant asking to see Kay Allen, who was the assistant manager of the restaurant and Armstrong's former girlfriend. The restaurant employees testified that Allen did not want to see Armstrong[2] and asked him to leave. Armstrong and Coleman, however, remained at the restaurant and eventually Allen accompanied Armstrong to the vehicle he was driving while Coleman remained inside the restaurant. The employees additionally testified that Allen and Armstrong appeared to be arguing while they were sitting in the vehicle.

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aggravating circumstances; (4) & (5) the trial judge erred in refusing to find certain nonstatutory mitigating factors and in failing to consider certain nonstatutory mitigating factors in its sentencing order; (6) the death penalty is disproportionate in this case; (7) the trial court erred in not granting Armstrong's motion for a magnetic resonance imaging examination; (8) victim impact information was considered by the trial judge in sentencing Armstrong; (9) the trial judge improperly denied Armstrong's request for new counsel; (10) the trial judge erred in denying Armstrong's requested jury instruction that mitigating evidence does not have to be found unanimously; (11) the jury instruction given on sentencing minimized the jury's sense of responsibility, thus depriving Armstrong of a fair sentencing; (12) the trial judge failed to adequately define nonstatutory mitigating circumstances; (13) the trial judge failed to instruct the jury on the correct burden of proof in the penalty phase; (14) Florida's death penalty statute is unconstitutional; and (15) the aggravating circumstances used in this case are unconstitutional." *Armstrong v. State*, 642 So.2d 730, 734, n.2 (Fla. 1994).

[2] Although the Florida Supreme Court identified the co-defendant as Michael Coleman, the indictment was for Ercely Wayne Coleman (RS-ROA.1 1-2).

Allen testified that, while she was in the car with Armstrong, he told her he was going to rob the restaurant, showed her a gun under the seat of the car, and told her he might have to kill her if she didn't cooperate. Coleman then came out to the car, and Armstrong, Coleman, and Allen went back into the restaurant. Allen was responsible for closing the restaurant, and by this time, the other employees had left. Coleman and Armstrong ordered Allen to get the money from the safe. Before doing so, she managed to push the silent alarm. Shortly thereafter, Armstrong returned to the car. Coleman remained in the restaurant with Allen to collect the money from the safe.

Other testimony reflected the following facts. When the alarm signal was received by the alarm company, the police were notified and Deputy Sheriffs Robert Sallustio and John Greeney went to the restaurant where they found Armstrong sitting in a blue Toyota. Greeney ordered Armstrong out of the car and told him to put his hands on the car. After Greeney ordered Armstrong to put his hands on the car, Greeney holstered his gun to "pat down" Armstrong. Sallustio then noticed movement within the restaurant, heard shots being fired from the restaurant and from the direction of the car, and felt a shot to his chest. Apparently, when the movement and shots from the restaurant distracted the officers, Armstrong managed to get his gun and began firing at the officers.

According to Allen, when Coleman noticed that police officers were outside the building, he started firing at the officers. Allen took cover inside the restaurant, from where she heard Coleman firing more shots and heard a machine gun being fired outside the restaurant. Sallustio was shot three times, but still managed to run from Armstrong and radio for assistance. When other officers arrived, they found Greeney dead at the scene. Greeney had died instantly. Allen was found inside the restaurant; Coleman and Armstrong had fled.

That same day, Armstrong told one friend that he got shot and that he returned a shot; he told his girlfriend that a police officer had asked him to step out of his car and that, when he did so, the officer

> pulled a gun on him and tried to shoot him; and he told another friend that someone shot him while trying to rob him. Thereafter, Armstrong and Coleman fled the state but were apprehended the next day in Maryland. Before being apprehended, Armstrong had two bullets removed from his arm by a Maryland doctor.
>
> A number of shell casings were recovered from the scene. All of the bullets removed from Sallustio and Greeney were fired from a nine-millimeter, semi-automatic weapon; Greeney had been shot from close range. Evidence reflected that Armstrong had purchased a nine-millimeter, semi-automatic weapon the month before the crime. Armstrong's prints were found in the blue Toyota as well as on firearm forms found in the car. Additional ballistics evidence reflected that the shots fired from the restaurant did not come from a nine-millimeter, semi-automatic weapon. This indicated that only someone near the car could have fired the shots that wounded Sallustio and killed Greeney. Additionally, testimony was introduced to show that Armstrong was seen with a nine-millimeter, semi-automatic gun right after the incident. Armstrong was convicted as charged.FN1
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> FN1. Coleman was tried and convicted separately and received a sentence of life imprisonment.

Armstrong, 642 So.2d at 733-34. It was on this evidence that Armstrong's conviction was affirmed. *Id*. at 740.

Subsequently, Armstrong filed a motion for postconviciton relief, and was granted an evidentiary hearing. Following the trial court's denial of relief, this Court affirmed the denial of collateral relief on the guilt phase issues, but vacated the death sentence and remanded for a new penalty phase upon finding that a prior violent felony conviction used in aggravation had

been invalidated.[3] *Armstrong v. State*, 862 So.2d 705, 715 (Fla. 2003). The State filed a Petition for Writ of Certiorari with the United States Supreme Court, and on May 17, 2004, it was denied. *Florida v. Armstrong*, 541 U.S. 1056 (2004)

Armstrong's new penalty phase commenced on April 16, with the jury being sworn. (RS-ROA.20 24; RS-ROA.23 414). Following the State's presentation (RS-ROA.23 – RS-ROA.28), the defense presented mitigating evidence including Armstrong's testimony asserting that he was neither involved in the robbery nor was he the shooter of the two deputies. (RS-ROA.28 – RS-ROA.30) On April 25, 2007, the jury recommended death by a nine to three vote. (RS-ROA.2 448; RS-ROA.34 1862-65). The *Spencer v. State*,

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[3] In the appeal from the re-sentencing, the following history of the collateral proceedings was given:

> On appeal, Armstrong raised sixteen claims alleging that he was entitled to postconviction relief for various issues relating to both the guilt and penalty phase trial below. In his first penalty phase claim, Armstrong alleged that he was entitled to relief because his sentence of death was based on a prior violent felony conviction that was subsequently invalidated. Pursuant to *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), this Court agreed. Therefore, this Court affirmed all issues relating solely to the guilt phase trial, but vacated the death sentence and remanded the case for a new penalty phase and resentencing. *Armstrong II*, 862 So.2d at 721.

Armstrong, 73 So.3d at 163 (Fla. 2011) (footnote omitted, emphasis supplied). Given the ruling on the *Johnson v. Mississippi* claim, the remaining penalty phase claims were denied as moot. *Id*.

615 So.2d 688 (Fla. 1993) hearing was held on September 7, 2007, November 15, 2007, November 21, 2007, and November 30, 2007 where Armstrong presented additional witnesses and sought the mercy of the trial court. (RS-ROA.36 – RS-ROA.37; SRS-ROA.1 and 2). On August 7, 2009, the trial judge imposed a death sentence for the first-degree murder of Deputy John Greeney having independently found three aggravators, no statutory mitigators, and five non-statutory mitigating factors. (RS-ROA.5 758-95; SRS-ROA.3 54-126).

Armstrong appealed, and this Court set out the case and facts as follows:

> Armstrong's New Penalty Phase
>
> Prior to the new penalty phase, the State filed a motion in limine seeking to preclude Armstrong from presenting testimony, evidence, or any arguments concerning Armstrong's innocence pursuant to *Preston v. State*, 607 So.2d 404, 411 (Fla. 1992) (explaining that such arguments would be considered improper). The trial court granted the motion, but permitted Armstrong to challenge the extent of his involvement in the robbery and homicide based on the mitigating circumstances he raised. Armstrong claimed the mitigation revealed that Coleman was the shooter and that Armstrong's involvement in the crime was minor and a result of his acting under duress.
>
> Pursuant to this Court's mandate, jury selection for the capital resentencing hearing began on April 10, 2007. On April 11, 2007, the jury panel was accepted. During jury selection, the State and defense resolved a defensive challenge for cause by agreement to excuse the challenged juror.
>
> On April 16, 2007, the panel was sworn in and the evidentiary portion of the penalty phase proceeded. At the conclusion of the new penalty phase trial, the

trial court instructed the jury that its recommendation should either be for: (1) death, or (2) life imprisonment without the possibility of parole for 25 years. Specifically, the trial court instructed: "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five (25) years." The trial court further instructed the jury, "If a majority of the jury determine that Lancelot Armstrong should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of blank to blank, advised, recommend to the Court that it impose the death penalty upon Lancelot Armstrong." Additionally, the trial court instructed:

> On the other hand, if by six or more votes the jury determines that Lancelot Armstrong should not be sentenced to death, your advisory sentence would be, the jury advises and recommends to the Court by a vote of blank to blank that it impose a sentence of life imprisonment to Lancelot Armstrong without the possibility of parole for 25 years.

The written instruction was consistent with the verbal instruction.

The trial evidence revealed that Armstrong was originally incarcerated in 1990 and sentenced in 1991. After jury deliberations began, the jury submitted a question, asking, "Will the 17 yrs he served be included in his 25 yrs sentence?" The trial court relayed the jury question to counsel, stating, "Will the 17 years he served be included in his sentence?"

After considering the arguments presented, the trial court stated:

> THE COURT: I'm troubled by the language in the *Downs [v. State*, 572 So.2d 895 (Fla. 1990),] case because in the Downs case says under the facts presented we find that the trial court did not use the discretion.

> State argued that the Downs case created issue decision because he said, quote stands 25 more years. We haven't heard that here. They have narrowly by this case permitted the response.

Ultimately, the jury was instructed as follows: "The defendant will receive credit for the time served on this charge."

On April 25, 2007, the jury again recommended a sentence of death by a vote of nine to three.

Nelson FN3 Hearing

> FN3. Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973).

On May 31, 2007, Armstrong filed a "motion to discharge counsel of record and appoint counsel outside of Public Defender's office." On June 14, 2007, based on the contents of that motion, the trial court held a "modified" Nelson hearing. There, Armstrong announced the names of the witnesses he alleged to have asked counsel to contact, and complained that counsel had not provided him with a copy of the postconviction evidentiary hearing transcript. The matter was taken under advisement. On July 2, 2007, the trial court denied the motion to discharge counsel.

Spencer Hearing

On September 7, 2007, the trial court conducted a *Spencer* hearing. During the Spencer hearing, Armstrong presented testimony from (1) David Massar, a crime filmmaker who came to know Armstrong through a prison pen pal program; (2) Avia Joy McKenzie, a woman who befriended Armstrong after he was incarcerated and testified that Armstrong was there for her when her daughter died in 1996; and (3) Armstrong. However, at that time, Armstrong made several comments that were clearly an attempt to relitigate the 1991 guilt phase, the new penalty phase proceedings, the presentation of mitigation, and the motion to discharge counsel. The trial court categorized Armstrong's comments as a hybrid *Muhammad*,FN4 *Boyd*,FN5 and *Grim* FN6 claim. As a result, the trial court recessed. On October 7, 2007,

the trial court entered an order resetting the Spencer hearing.

> FN4. *Muhammad v. State*, 782 So.2d 343 (Fla. 2001).
>
> *FN5. Boyd* v. State, 910 So.2d 167 (Fla. 2005).
>
> FN6. *Grim v. State*, 841 So.2d 455 (Fla. 2003).

On November 15, 2007, and November 30, 2007, the trial court continued the Spencer hearing. Although the Spencer hearing concluded in November 2007, the trial court was unable to enter its sentencing order until 2009. The delay appears to be the result of extensive transcription problems.

The August 7, 2009, Sentencing Order

On August 7, 2009, the trial court entered it order sentencing Armstrong to death. In its extensive sentencing order, the trial court found and afforded "great weight" to each of the following three aggravating circumstances: (1) the Defendant was convicted of another capital felony or of a felony involving the use or threat of violence to the person (prior violent felony); (2) the capital felony was committed while the Defendant was engaged or was an accomplice in the commission of or an attempt to commit the crime of robbery (robbery); and (3) the victim in this capital felony case was a law enforcement officer engaged in the performance of his duties.FN7

> FN7. Below, the trial court specifically instructed the jury on improper doubling. The jury was also instructed on and found the avoid arrest aggravator. In Armstrong's first direct appeal, we noted that "the only evidence supporting the 'committed to avoid arrest' aggravating circumstance was the fact that the victim was a law enforcement officer." *Id.* at 738. Accordingly, the trial court declined to merge the avoid arrest aggravator with the aggravating factor that the victim was a law enforcement officer.

> ***
>
> The trial court weighed the aggravating factors and the mitigating factors and found that "the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are overwhelming." Armstrong was again sentenced to death for his conviction of first-degree murder. He was also sentence to two consecutive life sentences for the attempted first-degree murder and armed robbery convictions.
>
> This Appeal
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> In his second direct appeal following the completion of his new penalty phase and resentencing, Armstrong raises four issues: (1) whether the trial court abused its discretion in admitting into evidence a vial of blood or photographs of the victim that were taken at the scene of the crime and the medical examiner's office, (2) whether the trial court abused its discretion in admitting into evidence the remaining bullet fragment of the three original bullet fragments, (3) whether the trial court abused its discretion when it instructed the jury on the terms of a life sentence or when it answered the jury's question regarding credit for time served, and (4) cumulative error. The State raises proportionality as the fifth issue. Each of these issues is discussed below.

Armstrong v. State, 73 So.3d 155, 163-66 (Fla. 2011)

During the new penalty phase, the State presented evidence and witnesses which comported with the facts presented in the initial trial in order to educate the jury about the crime and establish aggravating factors. The State re-established that on February 17, 1990, Broward Sheriff Deputies Robert Sallustio ("Sallustio") and John Greeney ("Greeney") responded to a silent hold up alarm from the Church's Chicken restaurant in Fort

Lauderdale where they encountered Armstrong sitting in his car and ordered him to exit. (RS-ROA.23 457-58, 463-65, 478, 487-88). From his covering position, Sallustio saw Armstrong standing at the open driver's door with Greeney starting the pat down. Next, Sallustio saw the kitchen door inside the restaurant open and Kay Allen ("Allen") poke her head out. Less than a second after Greeney ordered Armstrong to put his hands back on the car, Sallustio, wearing a bullet proof vest, was hit in the chest by a bullet fired from the restaurant. (RS-ROA.23 465-67, 472, 479, 488-89). Turning, Sallustio saw Wayne Coleman ("Coleman"), using Allen as a shield. Sallustio saw a muzzle flash and the window break just before being shot in the wrist and taking fire from the direction of the car and restaurant. (RS-ROA.23 466-69).

Sallustio could see Greeney lying on his back motionless as Armstrong, using a .9 millimeter semi-automatic weapon with a 32-round clip, and Coleman, with a revolver, continued to fire upon Sallustio, who had emptied his .9 millimeter. While being followed by Armstrong as he crawled away, Sallustio resorted to his .38 caliber ankle revolver to return fire. Realizing Sallustio was still armed, Armstrong fled with Coleman. (RS-ROA.23 469-72, 482-83).

Greeney died at the scene. Sallustio survived his three gunshot wounds. Greeney's autopsy revealed he had suffered a

grazing gunshot wound to his ear and two penetrating gunshot wounds to his neck and left side.[4] He was from a distance of 12 to 18 inches and could have survived only a few minutes. (RS-ROA.23 492-96; RS-ROA.24 531-34; RS-ROA.25 676-82, 684-85, 689-91). The ballistics from the scene revealed that bullets fired from inside the restaurant were from a revolver, Greeney did not fire his weapon, and Sallustio fired 19 shots (RS-ROA.23 469-72, 482-83, R.24 542, 554-56; RS-ROA.25 623, 630, 779-84). The bullets recovered from Sallustio and Greeney, along with the stippling noted on Greeney's wounds establish they were fired by Armstrong from a Tech-nine. (RS-ROA.23 498-504; RS-ROA.24 531-39; RS-ROA.25 635-36; RS-ROA.27 986-87, 995-1001, 1010).

Shortly after hearing gunfire, Vincent Rozier ("Rozier"), was approached by Armstrong carrying a "Uzi-like" weapon and Coleman holding a revolver. Rozier agreed to drive the men taking them first to Armstrong's home then to a Miami apartment. (RS-ROA.25 732-39). Upon arrival at Doris Harvard's ("Harvard") Miami home, she noticed Armstrong had been shot; there he tried to remove the bullet and treat his injury. (RS-ROA.26 850-51).

[4] One of the penetrating wounds was to Greeney's anterior neck which passed through his trachea, esophagus, carotid artery and spinal cord before exiting through the back of his neck and landing in the back of his bullet proof vest. The other entered his left side under his shoulder and went through the bone, aorta, and lungs before lodging under the skin of his lower back. (RS-ROA.25 676-82, 684-85, 689-91).

Also, Armstrong removed a long clip from his weapon which looked like a "machine gun" and placed the items in a bag along with a brown handled/black barreled revolver and bullets. Coleman left with the bag and returned five minutes later empty-handed. Harvard saw Armstrong had a bag with him. (RS-ROA.26 850-56)

The next day, Armstrong and Coleman were apprehended in Maryland carrying almost $1000.00 in cash and a receipt for a .9 millimeter Intertech Tech-nine pistol with a 32-round clip. Swabs taken from Armstrong's vehicle were tested for DNA revealing Greeney's blood was on the driver's seat of the car. (RS-ROA.25 751-57, 767-71 802; RS-ROA.26 830-31, 833-35, 838). Armstrong admitted he was shot by Sallustio. (RS-ROA.25 716-19, 723-25, 728-29; RS-ROA.27 1001-02; RS-ROA.28 1154-56). The State also presented evidence that Armstrong was convicted not only of the related violent felonies of attempted murder and armed robbery, but of a February 4, 1990 armed robbery. (RS-ROA.26 917-18; RS-ROA.27 946).

In mitigation, Dr. Rhodd discussed the chaotic political and poor socio-economic conditions that existed in Jamaica in the late 1970's and early 1980's. (RS-ROA.28 1051-75). Dr. Michael Morrison was called to testify Armstrong had a benign/non-cancerous lymphoma in his hip/groin area. (RS-ROA.30 1356-57, 1364-65, 1370-71).

Armstrong testified on his own behalf and offered that he

suffered several accidents, had medical problems, including dyslexia since childhood, and currently had medical issues. He complained that being on death row was very stressful. (RS-ROA.28 1076-82, 1097-98, 1123; RS-ROA.29 1209-10, 1322-23) Armstrong spoke of his impoverished childhood in Jamaica, his home life, siblings, and the punishment he suffered at the hands of his step-father. (RS-ROA.28 1082-97) He described his education, employment opportunities, political unrest in Jamaica, artwork he completed, and his religious beliefs. (RS-ROA.28 1097-1108, 1137; RS-ROA.29 1230, 1305-06). Armstrong testified about moving to the United States and development of a successful construction business, before losing it after his arrest. (RS-ROA.28 1103, 1107-11, 1113-21, 1130). Also, he claimed he always helped the police and that in both Jamaica and the United States he tried to stop children from becoming involved with drugs. (RS-ROA.28 1109-11; RS-ROA.29 1321-22). He revealed his daughter broke her neck in a car accident; that his brother was murdered; and there had been an attempt on his life. (RS-ROA.28 1110-12, 1121-22; RS-ROA.29 1258-62). Armstrong spoke of the children he had and noted how he supported their mothers (RS-ROA.28 1123-26; RS-ROA.29 1245-57, 1262-68)

Armstrong claimed he was a victim of circumstances as Coleman was with him the night he was to pick up Allen from Church's Chicken. It was once there that Coleman announced his

intent to rob the establishment. Armstrong testified that he complied with all police orders and refuted Sallustio's account, instead offering that it was Coleman who shot both deputies or that Greeney died from friendly fire. (RS-ROA.28 1126-35, 1137-38, 1141-60, 1188-89; RS-ROA.29 1214, 1220-22, 1226-27, 1229, 1231, 1233-37, 1268-71, 1273, 1276-77, 1287-88, 1301-02, 1305, 1323-25). Armstrong testified he purchased a Tech-nine pistol with a 32-round clip from A&B Pawn as well as other guns and ammunition prior to the February 1990 killing, but they were for security purposes. (RS-ROA.28 1180-84, 1186-88; RS-ROA.29 1230-31, 1242-43, 1258-60, 1319-21) Armstrong denied firing a gun or shooting Sallustio; Armstrong suggested evidence was planted. (RS-ROA.28 1188; RS-ROA.29 1194, 1207-08, 1213, 1224-25, 1285-87, 1321).

After affirming he was aware of the mitigation evidence available from the postconviction litigation, Armstrong averred that he did not wish to call any other witnesses for mitigation. (T.30 1382-85, 1388-90). The case was submitted to the jury which returned a sentencing recommendation of death by a nine to three vote. (RS-ROA.3 448; RS-ROA.34 1862-65). Following the bifurcated *Spencer v. State*, 615 So.2d 688 (Fla. 1993) hearing where Armstrong presented additional witnesses and again testified on his behalf, the trial court imposed the death penalty finding aggravation of: (1) prior violent felony; (2)

felony murder (robbery); and (3) victim was law enforcement officer. *Armstrong v. State*, 73 So.3d 155, 164-66 (Fla. 2011).

On direct appeal, this Court set out the trial court's mitigation findings as follows:

> However, the trial court did find one statutory mitigator: (1) the existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty. The trial court considered the following background mitigation under this statutory mitigator: (a) Armstrong was born and raised in an impoverished country (Jamaica) where living conditions were deplorable and there was a constant threat of erupting and escalating violence (little weight); (b) had a problematic health history as a child and suffered from dyslexia (little weight); (c) was a good prisoner and regularly attended religious ceremonies while incarcerated (little weight); (d) suffered abuse at the hands of his stepfather and his brother cut off a portion of his finger when he was working in the cane fields (some weight); and (e) assisted in raising his siblings in Jamaica (some weight).
>
> Finally, the trial court found that four of the nonstatutory mitigating circumstances were applicable after considering whether Armstrong (1) had problems growing up because he was biracial (little weight); (2) was a member of the police in Jamaica who assisted during times of rioting and political unrest (not applicable); (3) assisted and trained others for jobs and counseled young adults while in Boston and Florida (not applicable); (4) taught himself how to read and write while imprisoned (not applicable); (5) was suffering from a benign internal tumor, at the time of sentencing, the size of a golf ball which could turn into cancer in the future (not mitigating); (6) having been incarcerated for 18 years at that point, was deprived of seeing his children grow as a result of his incarceration (not mitigating); (7) was a kind, gentle man (not mitigating); (8) assisted the police in preventing the sale of drugs while in Massachusetts (nonexistent); (9) was a good businessman (rejected); (10) expressed sorrow for the death of Greeney and the

> shooting of Sallustio and for their families, but maintained that he did not commit the crimes (no remorse); and (11) properly raised a residual or lingering doubt (not appropriate).

Armstrong, 73 So.3d at 164-66 (footnote omitted).

Based on the foregoing evidence, this Court affirmed the death sentence. *Armstrong v. State*, 73 So.3d 155 (Fla. 2011) and on June 11, 2012, the United States Supreme Court denied certiorari. *Armstrong v. Florida*, 132 S.Ct. 2741 (2012).

On May 29, 2013, Armstrong filed his motion for postconviction relief pursuant to Rule 3.851, Fla. R. Crim. P. Following the State's response filed on August 2, 2013, a Case Management/*Huff v. State*, 622 So.2d 982, 983 (Fla. 1993) Hearing was held on October 25, 2013. (2-PCR.18 1559-97). This Court ordered an evidentiary hearing on:

> *** part of Defendant's claim IV that alleges ineffective assistance of counsel for failing to further inquire of juror Gail Bacchus what she meant by the statement that she could vote for the death penalty because "the defendant was in a situation"; part of claim VII that alleges ineffective assistance of counsel for failing to call witness Kengeral Allen who was at the crime scene and could have testified that Defendant was a minor participant in the crime; and claim VIII in which Defendant alleges ineffective assistance of counsel based on actual conflict of interest.

(2-PCR.5 730) The trial court found that none of the other claims required evidentiary development and held those claims in abeyance until after the evidentiary hearing.

The evidentiary hearing was held March 24-25, 2014 during

which Armstrong called four witnesses: Hilliard Moldof (former counsel), Kengeral Trunita Allen-Scott ("Kay Allen"),[5] David Patrick Rowe ("Rowe") (penalty phase counsel), and Dr. Laurie Gunst. Armstrong was granted an evidentiary hearing on that part of Claim IV where he alleged, Rowe was ineffective for failing to conduct an adequate *voir dire* of Juror Gail Bacchus ("Bacchus")[6] after she said that she could vote for a death sentence as Armstrong was "in a situation" and that Rowe did not question this juror at all. An evidentiary hearing was also granted on that portion of Claim VII challenging Rowe's decision not to call Kay Allen and that portion of Claim VIII alleging a conflict of interest between Rowe and Dr. Gunst, thus, leading to his failure to call Dr. Gunst as a witness.

For Claim IV below, Rowe, who was of Jamaican descent and a member of the Florida and Jamaican Bars, noted he was familiar with the surname Bacchus which was Guyanese and observed Bacchus was of Caribbean/American background. (2-PCR.23 1811-12). Rowe explained that the comment "was in a situation" in the Caribbean vernacular meant that a person is in a difficulty, which Rowe

[5] Generally throughout the litigation Kengeral Trunita Allen-Scott has been referred to as Kay Allen. As such, the State will continue to refer to her as "Kay Allen" for consistency.

[6] In the appellate record from the re-sentencing, the instant juror was identified as Gail Bacchus. (RS.21 238) However, in the postconviction evidentiary hearing transcripts, she is referred to as Gail Backhus. (2PCR.23 1811) The State will refer to the juror as "Bacchus."

pointed out was the case for Armstrong. Hence, Bacchus' comment "did not ring any bells" for Rowe; he thought it was a bland remark and he did not object (2-PCR.23 1790, 1811). Rowe was seeking those familiar with the Black-Jamaican businessman, thus he wanted as many black/non-white jurors or younger white females as Rowe strategized they would be fairer to Armstrong and not be biased against an immigrant who committed a crime. Bacchus fit into the defense idea of a good juror for Armstrong. (2-PCR.23 1787, 1789, 1797-92, 1811-12, 1825-27, 1831)

With regard to counsel not calling Kay Allen, Rowe testified that he and Armstrong had several discussions regarding Kay Allen's value to his case and Armstrong was interested in knowing what she would say before he made a final decision on the matter. (2-PCR.23 1793-94, 1854-55) According to Rowe, Armstrong played a very active role in his defense both pre-trail and during the re-sentencing. (2-PCR.23 1816-17) Rowe averred that while he had private investigators looking for Kay Allen, she was not found. (2-PCR.23 1795). Armstrong was not willing to present Kay Allen without an investigation as he too, was concerned about her inconsistent statements. They discussed Kay Allen testifying, but by the time of trial, Armstrong did not want to present her as a witness. (2-PCR.23 1816-17) While Rowe did not talk to Kay Allen, he based his decision on the multiple contradictory statements he had from her in the file

and determined she was a "very dangerous" witness.[7] However, Rowe acknowledged Kay Allen was consistent in naming Coleman as the aggressor. His assessment of Kay Allen was made given her recanted testimony in Armstrong's case, what she said subsequent to that which was again contradicted and inconsistent with her prior testimony and the fact that she had entered a guilty plea to perjury. (2-PCR.23 1795-96, 1815-16, 1827-30) Also, Rowe recalled what this Court had written about Kay Allen's testimony, i.e., that it was not believable. This played into Rowe's decision not to present Kay Allen; he was against using her from the start. (2-PCR.23 1811-12).

Dr. Gunst claimed that Rowe had sued her in Jamaica and New York on behalf of Edward Seaga ("Seaga"), the former Jamaican Prime Minister, but then admitted that she was the plaintiff in the federal case in New York. (2-PCR.24 1845-46, 1854). Both Rowe and Dr. Gunst agreed that Rowe at no time represented her. (1-PCR.23 1818-19; 2-PCR.24 1854). Rowe testified that he did not file a law suit against Dr. Gunst on Seaga's behalf although he was involved in the lawsuit between Dr. Gunst and Seaga. Rowe handled the Motion to Dismiss the federal case against

[7] Kay Allen testified during the evidentiary hearing and challenged what was contained in testimony from the trial, recantation hearing, various affidavits, police statements, and letters. She also discussed her perjury conviction and this Court's assessment of her recantation testimony. (2-PCR.23 1699-1750, 1764-66)

Seaga. The hearing on that motion was completed by the time Rowe took Armstrong's case, the federal case was dismissed formally on March 30, 2007 and the penalty phase in this case commenced on April 10, 2007. (2-PCR.23 1798-1801; RS-ROA.20 24) Rowe made full disclosure to Armstrong regarding the lawsuit and neither he nor Armstrong thought a conflict existed. Rowe did not reduce this discussion to writing nor did he put it on the record. (2-PCR.23 1798-1801, 180307)

Rowe explained he did not to utilize Dr. Gunst although he knew she had testified previously. The decision respecting Dr. Gunst was based on factors independent of the Seaga lawsuit and went directly to assessment of Dr. Rhodd's value to the case over Dr. Gunst's value. Dr. Rhodd, in Rowe's estimation, had better credentials which more closely matched Armstrong's experiences in Jamaica and fit the mitigation presentation Rowe was developing. Rowe determined that Dr. Gunst's professed "expertise" as a journalist/historian was questioned by other respected experts in Jamaican history and would present a picture of Armstrong that was inaccurate and would link him to violent drug gangs which Rowe wanted to avoid. Dr. Rhodd had written more books, had studied in the Caribbean, and was well respected, thus Rowe chose to present Dr. Rhodd, not Dr. Gunst. (2-PCR.23 1797-98, 1801-04, 1819-26)

On September 2, 2014, the trial court denied relief. (2-

PCR.8 1345-1400) This appeal followed and Armstrong filed his state habeas petition in case number SC15-767 at the same time he filed his initial brief.

SUMMARY OF THE ARGUMENT

Issue I - The trial court's factual findings following the evidentiary hearing are supported by substantial, competent evidence and its legal conclusion that Rowe's representation was constitutionally professional comported with *Strickland v. Washington*, 4666 U.S. 668 (1984). Rowe explained his reasoned strategy and for following his client's wishes not to present mental mitigation developed in the prior postconviction litigation. He offered his reasoned basis for not calling Kay Allen to testify at the resentencing given her multiple, conflicting prior testimony and statements. This Court even found her not credible as a witness. Moreover, the finding that Rowe was not suffering under a conflict of interest, and his decision not to call Dr. Gunst in favor of calling Dr. Rodd to discuss Jamaican history at the time Armstrong lived there was supported by the evidence, and no prejudice was shown. The voir dire conducted by Rowe was constitutionally professional and Armstrong has not shown that an actually biased juror sat on his jury. Postconviction relief was denied properly.

ISSUE II – Armstrong's complaint that he was denied due process and access to the courts merely because he was denied an

evidentiary hearing on portions of claims he asserts required factual development is without merit. It is well settled that claims which are insufficiently pled, procedurally barred, or refuted from the record may be denied without a hearing. Due process and access to the courts has not been denied as Armstrong obtained a complete review and ruling on each of his claims.

ARGUMENT

ISSUE I

THE TRIAL COURT DENIED THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOLLOWING AN EVIDENTIARY HEAIRNG PROPERLY AS ARMSTRONG FAILED TO CARRY HIS BURDEN UNDER STRICKLAND; COUNSEL'S DECISIONS WERE STRATEGIC AFTER PROPER INVESTIGATION AND NO PREJUDICE RESULTED (restated)

Armstrong was granted an evidentiary hearing on several issues of three claims related to his counsel during the resentencing. The trial court denied relief and Armstrong asserts such was error as his penalty phase counsel rendered ineffective assistance for failing to: (1) investigate and present mitigating evidence (IB 46); (2) preclude that State from presenting evidence of the crime and for failing to present Kay Allen (IB 52); disclose a conflict of interest, obtain Armstrong's waiver, and present Dr. Gunst (IB 57); and (4) challenge various jurors. (IB 66). The trial court's factual and legal resolution of these sub-claims was proper and Armstrong failed to carry his burden under Strickland as neither deficiency nor prejudice were shown. Relief was denied properly.

A. STANDARD OF REVIEW

1. SUMMARILY DENIED CLAIMS

"When evaluating claims that were summarily denied without a hearing, this Court will affirm "only when the claim is

'legally insufficient, should have been brought on direct appeal, or [is] positively refuted by the record.'" *Jackson v. State*, 127 So.3d 447, 459-60 (Fla. 2013) (citations omitted).

2. DENIAL FOLLOWING AN EVIDENTIRIARY HEARING

Where an evidentiary hearing is held, the following standard of review is applied:

> This Court accords deference to the postconviction court's factual findings following its denial of a claim after an evidentiary hearing. . . . "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" . . . The postconviction court's legal conclusions, however, are reviewed *de novo*....

Jackson, 127 So.3d at 459-60 (citations omitted). *See Pagan v. State*, 29 So.3d 938 (Fla. 2009); *Arbelaez v. State*, 898 So.2d 25 (Fla. 2005); *Davis v. State*, 875 So.2d 359 (Fla. 2003).

3. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

To establish ineffective assistance of counsel, a defendant must prove (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different; a reasonable probability means that confidence in the outcome is undermined. *Strickland*, 466 U.S. at 687-89. This Court has reiterated:

> * * * to establish a claim of ineffective assistance of trial counsel, a defendant must prove two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In *Valle*, we further explained:

> In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternate courses of action have been considered and rejected. Moreover, "[t]o establish prejudice, [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

Id. at 965-66 (citations omitted)(quoting *Brown v. State*, 775 So.2d 616, 628 (Fla. 2000), and *Williams v. Taylor*, 529 U.S. 362, 391 (2000)).

Arbelaez, 898 So.2d at 31-32. *See Orme v. State*, 896 So.2d 725, 731 (Fla. 2005) (Fla. 2005). When considering a claim of ineffectiveness of counsel, a court "need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986).

With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Davis*, 875 So.2d 365; *Chandler v. United States*, 218 F.3d 1305, 1313 n.12 (11th Cir. 2000). "The test for ineffectiveness is not whether counsel could have done more; perfection is not required." *Id.*, at 1313 n. 12. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The ability to create a more favorable strategy years later, does not prove deficiency. *See Patton v. State*, 784 So.2d 380 (Fla. 2000); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

Cullen v. Pinholster, 131 S.Ct. 1388, 1407 (2011) provides:

> The Court of Appeals was required not simply to "give [the] attorneys the benefit of the doubt," 590 F.3d,

> at 673, but to affirmatively entertain the range of possible "reasons Pinholster's counsel may have had for proceeding as they did," *id.*, at 692 (Kozinski, C.J., dissenting). *See also Richter, supra*, at 1427, 131 S.Ct., at 791 ("*Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind").

Moreover, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. *See Strickland*, 466 U.S., at 690, 104 S.Ct. 2052 (counsel is "strongly presumed" to make decisions in the exercise of professional judgment)." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). As set out in *Wong v. Belmontes*, 558 U.S. 15, 16-17, (2009), "In light of 'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant,' the performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.' *Id.*, at 688–689, 104 S.Ct. 2052."

From *Williams v. Taylor*, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Also, as noted in *Chandler*, 218 F.3d at 1318, "...counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense

thoroughly. *See Strickland*, [466 U.S. 690-91] ('Strategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.')"

With respect to *Strickland* prejudice, *Harrington v. Richter*, 131 S.Ct. 770, 787-88 (2011) provides:

> It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052.
>
> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, 131 S.Ct. at 787-88.

B. WHETHER COUNSEL RENDERED EFFECTIVE ASSISTANCE IN INVESTIGATING, DEVELOPING, AND PRESENTING PENALTY PHASE MITIGATION

Armstrong asserts that the trial court failed to follow *Porter v. McCollum*, 13 S.Ct. 447, 463 (2009) and properly weigh and consider the mitigation he presented in the 2001 postconviction litigation when rejecting this claim of counsel's ineffective assistance in investigating and presenting mitigation. Contrary to Armstrong's position, the trial court considered whether there had been a knowing, intelligent, and voluntary waiver of the mitigation presented in 2001, and found there had been such a waiver in favor of the mitigation presentation developed by Rowe for the 2007 resentencing. (2-PCR.8 1368-78) That determination is supported by the record which refutes completely Armstrong's claim here and the trial court's analysis meets the dictates of *Strickland* and its progeny *Porter*. Relief was denied properly.

1. TRIAL COURT'S RULING – The court rejected Armstrong's allegation that his mitigation waiver was not knowing, intelligent, and voluntary because counsel failed to investigate mitigation, thus, Armstrong, given his cognitive deficits, did not understand what mitigation meant and the trial court's colloquy was insufficient. (2-PCR.8 1365-81) The trial court determined the allegation of trial court error for not following *Koon v. Dugger*, 619 So.2d 246 (Fla. 1993) during Armstrong's

mitigation waiver was procedurally barred. (2-PCR.8 1366)

> Notwithstanding the procedural bar, this Court finds that the trial court error claim is without merit, because the requirements of Koon are inapplicable to the instant case. The record clearly reflects that Defendant did not waive mitigation entirely, but chose to limit the scope of the mitigation evidence presented before the jury and that resentencing court at the Spencer hearing. Such cases are controlled by Boyd v. State, 910 So.2d 167 (Fla. 2005). ***
>
> Although in the instant motion, Defendant cites to limited portions in the trial record that best fit with the allegation that his waiver of mitigation was not knowing, intelligent, and voluntary, the record is more extensive and clearly refutes his claim. During the penalty phase, prior to the defense calling its witnesses, there was a discussion on the record regarding the decision not to present mental health mitigation to the jury. An extensive dialogue transpired between the attorneys of record and the court:
>
> ***
>
> (ROA Vol. 28 at 1023-29)
>
> The record further reflects that the defense presented three witnesses during the penalty phase: Dr. Rupert Rhodd (ROA. Vol. 28 at 1051-76), Defendant (ROA Vol. 28 at 1076-1172; Vol. 29 at 1179-1342); and Dr. Michael Morrison (ROA Vol. 30 at 1352-73) When the defense rested, the court conducted an inquiry to determine whether Defendant had any additional witnesses to present. A lengthy discussion took place between the trial court, Defendant, and the attorneys of record to determine whether Defendant knowingly, intelligently, and voluntarily waived the presentation of additional mitigation:
>
> ***
>
> (ROA. Vol. 30 at 1374-91)
>
> The record further reflects that during the part of the Spencer hearing held September 7, 2007,

Defendant presented testimony of David Massar and Avia Joy McKenzie. (ROA Supp Vol. 1 at 5-20; 21-28). Defendant also chose to exercise his right to an allocution before the sentencing court on November 15, 2007. During part of the Spencer hearing on November 15, 2007, Defendant brought to the court's attention what he believed to be a conflict regarding two witnesses he wanted to present during the hearing:

***

(ROA. Vol. 36 at 19-24)

As a result, Defendant's motion, Dorrette English, testified during the Spencer hearing held November 30, 2007. (ROA Vo. 37 at 8-19) However, the court was unable to locate Defendant's daughter via telephone because her number had been disconnected. (ROA Vol. 37 at 6, 19)

This Court finds that the above referenced portions of the record clearly refute all of Defendant's allegations. The record reflects that the resentencing court had reviewed the postconviction record and was aware of the existing mitigating evidence. Defendant sat through his first trial and his first postconviction proceedings during which extensive mitigation evidence was presented. Thus, he was aware of the existing mitigation available to him. Defendant acknowledged on the record that he had discussed with counsel the mitigation strategy. He was aware that in the first postconviction proceeding he had raised an ineffective assistance of counsel claim for failing to present mental health mitigation during the initial penalty phase. He was also aware that he was granted an evidentiary hearing on that issue. Defendant knowingly, intelligently, and voluntarily chose not to present any of that mitigation during the resentencing proceedings.

Defendant was also aware of the list of witnesses available to testify on his behalf. However, after consulting with counsel he decided to call only certain witnesses. The record further reflects that rather than acquiescing to the sentencing court's authority when responding to questions regarding his decision to waive mitigation, Defendant took the

opportunity to consult with counsel prior to responding. Furthermore, when Defendant disagreed with counsel's opinion as to what mitigation he wanted to present he expressed his disagreement and concerns on the record. As a result, the court continued the Spencer hearing to allow Defendant to secure the testimony of his mother and daughter.

The claim that Defendant's cognitive deficits and learning disabilities prevented him from making a knowing, intelligent, and voluntary waiver is also refuted by the record. During the penalty phase, Defendant testified before the jury for approximately eight (8) hours. (ROA Vol. 28 at 1076-1172; Vol. 29 at 1179-1342). As the record reflects, he was coherent in his answers and able to withstand the rigors of cross-examination. He spoke about his health problems, his social background while growing up in Jamaica, the political unrest and violence in Jamaica, and dropping out of school because of dyslexia. The image he conveyed during his testimony was that notwithstanding his health problems and dyslexia he did well in Jamaica, where most of his jobs were as a civil servant and even as an auxiliary police officer. (ROA Vol. 28 at 1102-03, 1104-05, 1107-08). He also did well in the United States and managed to build a successful company, started working as a carpenter as soon as he arrived in the U.S.; had side jobs to earn more money, was "dedicated" to his work; started acquiring real estate in Florida and Boston; in late 1988 he started his "corporation business in Miami," and by 1989 he was getting a lot of work because people liked the quality of his work on house repairs; he had a lot of contracts and had some general contractors working for him; he owned several cars; by February 1990 he was "financially stable" due to his successful construction business; he owned several guns and each time he purchased one he passed the criminal background check. (ROA. Vol. 1107-09; 1111; 1113-17; 1120-21; 1130-33; Vol 29 at 1179-84) He presented himself to the jury as the victim of circumstances, implying that his co-defendant, Wayne Coleman, was in fact the perpetrator of the crimes. (ROA Vol. 28 at 1135, 1137-72) Defendant's testimony also revealed that upon his arrest, he was aware of his rights not to make a statement to the police and to consult with an attorney, he understood his rights,

> and chose to exercise them, rather than acquiesce to police authority. (ROA Vol. 28 at 1195-1200)
>
> Therefore, for the reasons set forth herein this Court finds that Defendant's waiver was knowing, intelligent, and voluntary.

(2-PCR.8 1366-78)(footnotes omitted)

With respect to the sub-claim that counsel failed to investigate and present mitigation, the trial court reasoned:

> The record is abundantly clear that both counsel and Defendant were aware of the evidence presented during the 2001 evidentiary hearing in Defendant's first postconviction proceedings. However, defense counsel in consultations with Defendant chose a different strategy than the one chosen by Defendant's postconviction counsel during the fist postconviction proceedings. They chose to humanize the Defendant in the eyes of the jury. Defendant was portrayed as a person who managed to overcome a difficult social history, numerous health problems, including dyslexia, and became a successful business person, financially independent, who had no need to commit the instant crimes, and who was the victim of circumstances and a minor participant.[8] This, Defendant's argument that his counsel failed to investigate the available mitigation is nothing more than mere disagreement with the strategy chosen during resentencing.
>
> Applying the principles enunciated in Strickland, this Court finds that counsel's strategy of humanizing Defendant is an accepted strategy that falls within the broad range of competent performance under the prevailing professional standards. ***
>
> In addition, this Court finds that Defendant could not show any prejudice under Strickland. ***
>
> The postconviction record reflects that the testimony of the four mental health experts who testified during the 2001 postconviction proceedings (Dr. Appel, Dr. Dudley, Dr. Goldberg, Dr. Hyde) would

[8] The trial court referenced its order at 2-PCR.8 1368-78)

not have undermined confidence in the sentence. When assessing their credibility, the postconviction court made the following findings:

> Through their testimony, it is apparent to this Court that none of the three experts called had an accurate understanding or grasp of the salient facts of the crimes for which the Defendant was convicted. All three doctors described the Defendant as having frontal lobe dysfunction which would have impaired the Defendant's ability to control his impulses. This would have also affected the Defendant's executive decisions, such as planning. This Court gives very little weight to the experts' conclusions because the facts of the record have established that this was not a random, impulsive crime as the Defendant intended to rob Church's Chicken where his former girlfriend was assistant manager. The Defendant possessed a loaded firearm and made the conscious decision to commit the robbery at closing time which afforded the opportunity to obtain greater cash receipts. All these facts strongly suggest that the Defendant had the ability to plan the robbery. All three experts opined that the shooting was impulsive. Again, this Court gives little weight to the experts' conclusion that the shooting was impulsive, because the Defendant, by plan, intentionally placed himself in this stressful situation where it was likely that police would respond.

(PCR at 803-04)

In addition, the initial postconviction court also found that most of the information presented through family members was cumulative to the evidence presented during the initial penalty phase. (PCR at 793-96) This Court finds that even if Defendant had presented during the resentencing proceedings all the evidence presented during his 2001 postconviction proceedings there is no reasonable probability that he would have received a different sentence.

(2-PCR.8 1379-81)(footnotes omitted)

2. ANALYSIS - Armstrong sets out for this Court the evidence he claims was proven in 2001. However, the focus must be on the fact that even knowing what evidence was available, Armstrong waived that mitigation in favor of a different mitigation presentation as was his prerogative under *Boyd v. State*, 910 So.2d 167, 189-90 (Fla. 2005)(holding a competent defendant may limit his mitigation presentation or waive it in its entirety). The instant case is not one where counsel did not investigate, but one where Armstrong dictated and knowingly limited the mitigation presentation. As such, *Sears v. Upton*, 561 U.S. 945 (2010), *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (1996); and *Parker v. State*, 3 So.3d 974 (Fla. 2009) are distinguishable from the situation here and do not further Armstrong's position.

The record reflects that resentencing counsel moved for the disclosure of Dr. Griesemer's raw data collected during a neurological exam, for travel funds for State mental health experts Drs. Martell and Griesemer, and for additional funds for defense mental health expert, Dr. Harvey. (RS-ROA.1 100-01, 142, 146-52; RS-ROA.2 257-58, 263). Just before and following Armstrong's mitigation presentation before the jury, and as a result of Armstrong's original penalty phase and postconviction

allegations, the State requested, and the trial court inquired whether Armstrong had any other witnesses he wished to present. (RS-ROA.28 1023-29; RS-ROA.30 1374-91) Armstrong affirmed that he had discussed strategy and defenses with Rowe and that he had nothing further to present in mitigation. (RS-ROA.30 1374, 1382-86). Also, Armstrong confirmed that this was his opportunity to present mitigation to the jury, that he knew he could call friends and family members, but that he elected not to call these witnesses. (RS-ROA.30 1382-83). Again, Armstrong averred that he had conferred with counsel in formulating the defense mitigation case and that counsel had answered all his questions and presented the case that he wanted presented with the exception of alleging prosecutorial misconduct.[9] (RS-ROA.30 1382-85, 1388-90).

Armstrong also agreed that in his postconviction litigation he had raised the claim of ineffectiveness of counsel for failing to present mental health issues in the original 1991 penalty phase and that he had received an evidentiary hearing on the matter. Further, he averred that he now had chosen **not** to

[9] The trial court questioned Rowe about this matter and counsel reported he believed prosecutorial misconduct would fall under the "catch all" mitigator, but in this case he did not find evidence to support the mitigation. Both defense counsel, Rowe and Donovan Parker, discussed the matter and reached the same conclusion that there was no evidence of prosecutorial misconduct and that they would not participate in any filings alleging prosecutorial misconduct. (RS-ROA.30 1385-86)

present the mental health information to the 2007 jury. (RS-ROA.30 1382-85, 1388). Following the State's listing of the 15 names on the **defense witness list from the postconviction litigation**, Armstrong affirmed he was aware of those witnesses and, upon discussions with counsel, decided not to call those witnesses, but instead, to present just those witnesses he presented to the resentencing jury. (RS-ROA.30 1389-90). The court found Armstrong was making a knowing and intelligent waiver of other witnesses and mitigation. After being given additional time to confer with counsel, Armstrong reaffirmed he was waiving presentation of his children and other mitigation. (RS-ROA.30 1390-91).

On May 31, 2007, between the end of the penalty phase and commencement of the *Spencer* hearing, Armstrong moved to discharge counsel and to appoint new counsel. (RS-ROA.3 468-75; R.35 2-3). A *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973) was conducted during which Armstrong complained counsel had not interviewed certain witnesses he wanted and that he had not been given all of the witness lists to compare when he waived further testimony at the end of the penalty phase. (RS-ROA.35 4-6) Armstrong complained counsel had not provided him with a copy of the postconviction evidentiary hearing transcript and announced

the names[10] of the witnesses he alleged to have asked counsel to contact, **none of which were the mental health experts at issue here**. The trial court took the matter under advisement and continued the *Spencer* hearing.[11] (RS-ROA.35 13-14).

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[10] In support of his motion, Armstrong informed the trial court that he had asked penalty phase counsel to "get in touch with:" "Kendrel (phonetic) Allen and Kendreal (phonetic) Allen," "Direct English regarding the testimony for the proceeding," "Arlene Foster, Superintendent Clinton Lynn, Veran," "Render Armstrong," "Vance Carter," "Oliver Allicock," "David Massar," "Robert Gordon," "Wally Dunkin, Tony Mangrieve (phonetic), Patsy Gray, Gerald" (first name only), "Neva (phonetic) Foster, Elliot Gray, Fayann," "Dennys Dunkin, Ruth Banks, and Eva Hutchinson, Milton Beach, Wayne Coleman, Marcel Foster, Palmara (phonetic) Ware Mitchell, Adrian Lawson, Danny Miller, Ean Swavey, Ariel Valentive." Armstrong also stated that he had asked for a copy of the 2001 hearing so he "could recall some of those expert witness (sic) and a few other witness (sic) which are not listed." (RS-ROA.35 9-11)

[11] On direct appeal from the re-sentencing, this Court found.

> On September 7, 2007, the trial court conducted a *Spencer* hearing. During the *Spencer* hearing, Armstrong presented testimony from (1) David Massar, a crime filmmaker who came to know Armstrong through a prison pen pal program; (2) Avia Joy McKenzie, a woman who befriended Armstrong after he was incarcerated and testified that Armstrong was there for her when her daughter died in 1996; and (3) Armstrong. However, at that time, Armstrong made several comments that were clearly an attempt to relitigate the 1991 guilt phase, the new penalty phase proceedings, the presentation of mitigation, and the motion to discharge counsel. The trial court categorized Armstrong's comments as a hybrid *Muhammad*,FN4 *Boyd*,FN5 and *Grim* FN6 claim. As a result, the trial court recessed. On October 7, 2007, the trial court entered an order resetting the *Spencer* hearing.
>
> On November 15, 2007, and November 30, 2007, the trial court continued the *Spencer* hearing.

Based on this record, it is clear that Armstrong made a knowing, intelligent, and voluntary waiver of the 2001 mental health expert testimony. Such was done after counsel had investigated the mitigation case, including the postconviction record, decided not to present mental health testimony in consultation with Armstrong, and Armstrong did not list mental health experts as those he wished to call to testify. Moreover, Armstrong presented[12] his mother, Dorrett English,[13] David Massar, prison pen pal, Avia Joy McKenzie, and himself. That is competent, substantial evidence that Rowe investigated the case professionally, and that Armstrong agreed with counsel and waived the mitigation he now complains should have been presented. Armstrong did not carry his burden under *Strickland*.

The trial court determined properly than no *Strickland* prejudice was established in light of the questionable defense expert opinions and the fact that the lay witness testimony was cumulative, thus, the result of the sentencing is not undermined. Contrary to Armstrong's complaint, the trial court assessed the value of the 2001 evidence and determined it did not weigh in favor of undermining confidence in the sentence.

Armstrong, 73 So.3d at 164-66 (footnotes omitted).

[12] Armstrong's daughter apparently rendered herself un-reachable.

[13] The State suggests that "Direct English" listed by Armstrong as a person he wished to call was really "Dorrett English."

Such comported with *Strickland*; *Porter*. Much of what was presented by way of background related to Armstrong's upbringing and medical history was covered in the 2007 resentencing, thus it would have been cumulative, and the mental health testimony would have opened the door to some very devastating testimony.

As the original sentencing record and 2001 collateral proceedings show, Armstrong in 2007 did not emphasize the alleged physical abuse he suffered, although some was discussed. In fact, the trial court presiding over the postconviciton litigation found that much of the information presented through family members was in large part cumulative to that which was presented at the original penalty phase. (1-PCR 793-796). Merely because Armstrong resorts back to the postconviction evidence which placed more emphasis on the negative aspects of his life, rather than positive, in no way undermines confidence in the sentencing, especially in light of the mitigation waiver, Armstrong's testimony before the jury and in the *Spencer* hearing. Armstrong's periodic reversal of mitigation theme depending upon who is representing him and at which stage of the litigation, does not entitle him to relief. *Asay v. State*, 769 So. 2d 974 (Fla. 2000) (observing presentation of positive and loving aspects of defendant and family was reasonable irrespective of postconviction evidence that family life was marred by abuse and poverty); *Haliburton v. Singletary*, 691

So.2d 466, 471 (Fla. 1997) (denying claim of ineffective assistance as strategy was to "humanize" defendant and focus on positive aspects of life, therefore new information regarding emotional problems and deprived upbringing would have been in conflict with strategy chosen).

Likewise, each suggested mental health expert brought with him testimony damaging to Armstrong. As such, testimony from Dr. Appel,[14] Dr. Dudley,[15] Dr. Goldberg,[16] Dr. Hyde,[17] does not

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[14] In the original trial, Dr. Appel responded to a question whether Armstrong had brain damage as follows: "**I am not telling you the head injury was responsible for any of this**. I am telling you that if his mother's report is accurate, and that's why I said it's important, if that should become a bone of contention to get an MRI, that that **might be responsible for his difficulty with reading and writing**. There was no way I was trying to make any attribution other than that." (1994-ROA 142). *See Van Poyck,* 694 So. 2d at 692 (finding reasonable counsel's decision not to pursue mental health defense since doctor stated that he had nothing helpful to offer).

[15] Dr. Dudley conceded that Armstrong, in spite of his cognitive deficiencies was able to teach himself basic carpentry skills, he started a business which generated enough money to support himself, his immediate and extended family, as well as his friends. (1-PCR 1269).

[16] The doctor's report and testimony indicate that Armstrong suffers from **moderate** impairment to cognitive control resulting in impulsivity, inability to plan or develop a reasonable strategy in non-routine situations. (1-PCR 144, 151). Although asserting knowledge of the case facts, Dr. Goldberg conceded on cross-examination that he did not know the details. (1-PCR 155-159). In an attempt to diffuse the damage his ignorance of the facts had on his overall assessment of Armstrong, Goldberg explained that his opinion was based primarily on the neuropsychological testing and the facts/background were of minimal significance. Yet it is the facts of the instant case which strikingly reveal Armstrong's mind-set, planning, thought

undermine confidence in the sentence imposed. In fact, the trial court which assessed the doctors in the collateral proceedings opined:

> Through their testimony, it was apparent to this Court that none of the three experts called had an accurate understanding or grasp of the salient facts of the crimes for which the Defendant was convicted. All three doctors described the Defendant as having frontal lobe dysfunction which would have impaired the Defendant's ability to control his impulses. This would have also affected the Defendant's executive decisions, such as planning. This Court gives very little weight to the expert's conclusions because the facts of record have established that this was not a random, impulsive crime as the Defendant intended to rob Church's Chicken where his former girlfriend was assistant manager. The Defendant possessed a loaded firearm and made the conscious decision to commit the robbery at closing time which afforded the opportunity

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processes, motivation and capabilities on the day of the crimes when he killed Greeney at point blank range and chased Sallustio in an attempt to kill him.

[17] Dr. Hyde testified that his examination suggested deficiency in that part of Armstrong's brain that is responsible for executive functioning, math skills and memory and **Armstrong was competent to stand trial**. (1-PCR 175-179, 183, 212). On cross-examination Hyde acknowledged that Armstrong had two normal CAT scans and very recently, a normal EEG. (PCR 188, 196, 216). Dr. Hyde conceded that the normal EEG is most likely indicative of the fact Armstrong's alleged seizures terminated after childhood. (1-PCR 188, 216). When asked to identify which facts of the crime demonstrate that Armstrong has organic brain damage, Dr. Hyde stated: (1) Armstrong was caught and (2) instead of fleeing, he reacted (1-PCR 206). When it became apparent Dr. Hyde was unfamiliar with the facts of the crime he stated the facts were an exceedingly minor part of the evaluation. Hyde qualified his response by explaining that the facts were minor in the sense that he had a voluminous amount of material. Yet he was never able to recount even the most basic detail, i.e., how many victims were shot by Armstrong. (1-PCR 206-208, 215-219).

> to obtain greater cash receipts. All of these facts strongly suggest that the Defendant had the ability to plan the robbery. All three experts opined that the shooting was impulsive. Again, this Court gives little weight to the experts' conclusion that the shooting was impulsive,[18] because the Defendant, by plan, intentionally placed himself in this stressful situation where it was likely that the police would respond.

(1-PCR 803-804). The trial court also noted Armstrong possessed skills which afforded him the opportunity to make a living as a businessman and carpenter which "required long range planning and were not the product of impulsive conduct." (1-PCR 804). Such a review indicates that *Strickland* prejudice has not been established as the 2014 trial court found. *See Gilliam v. State*, 817 So.2d 768 (Fla. 2002) (upholding denial of relief where court found expert's testimony to be deserving of little weight); *Asay v. State*, 769 So.2d 974 (Fla. 2000) (upholding

[18] The record also shows that Armstrong caught off guard by the responding officers first offered that he was there for his girlfriend then acquiesced to their commands until the deputies were distracted by Coleman's gunfire. It was at this point that Armstrong retrieved the weapon he had in the front seat of the car and shot Deputy Greeney multiple times at close range before turning his weapon on Deputy Sallistio and firing upon him as the deputy retreated. It was only upon hearing other police officers coming to the scene did Armstrong break off his attack and flee the scene. Following this, and already planning his escape, Armstrong solicited the help of a neighborhood resident by reporting he had been in a gunfight during a drug deal, and needed a ride to Armstrong's apartment to get clothes and then to Miami. Once in Miami, he discarded his gun, packed for a trip out of state, and left for New York in a car different than the one used in the robbery. (RS-ROA.23 461-72; vol.25 676-84, 735-37; vol.26 850-63) These actions show Armstrong's ability to plan and amend his plan when an unexpected intervening event occurs.

rejection of expert opinions such were speculative given that experts were unfamiliar with significant facts of crime); *Bryant v. State*, 785 So.2d 422 (Fla. 2001) (upholding rejection of mental health expert's opinion as defendant's own actions during the robbery/murder belie expert's testimony); *Walls v. State*, 641 So.2d 381, 390-391 (Fla. 1994) (recognizing expert's credibility increases when supported by facts of case and diminishes when facts contradict same).

Armstrong points to several comments by Rowe to suggest that he did not understand mitigation and could not explain it to Armstrong. (IB 46-48). Throughout his brief, Armstrong takes words out of contexts, elevates others beyond their meanings, and exploits the parties' short-handed speech to suggest Rowe was uninformed and/or ineffective. For example, when Rowe noted that the defense was not claiming that Armstrong was "schizophrenic" (RS-ROA.28 1026) Armstrong asserts counsel failed to do a proper investigation. Yet, counsel was merely indicating mental health would not be at issue and it is clear from the record Rowe had the 2001 postconviction records and discussed same with Armstrong.

Armstrong takes issue with the trial court's conclusion that his waiver was knowing and voluntary. As discussed above, the record supports the finding of a knowing, intelligent, and voluntary waiver. Armstrong's reference to the prosecutor's

frustration with his long answers as indicative of some sort of cognitive deficiency is unsupported. A review of the record reflects that Armstrong testified for some eight hours before the jury, remained composed, answered the questions posed, and held himself out as a person who overcame any early health problems and dyslexia to build a thriving construction business, helped the police and children, and was able to provide for his family and multiple girlfriends. (RS-ROA.28 1076-1172; RS-ROA.29 1179-1342) Armstrong showed a great capacity to recall the facts of his case and to weave them to his advantage in arguing he was a victim of circumstances undeserving of the death sentence, and that Coleman was the perpetrator. At no time did he exhibit any signs of incompetence.[19] In fact, Armstrong's testimony, colloquy with this Court, and *pro se* filings regarding his desire to discharge counsel prove his competency.

C. THE TRIAL COURT PROPERLY REJECTED ARMSTRONG'S CLAIM THAT COUNSEL FAILED TO CHALENGE THE STATE'S CASE AND FAILED TO CALL KAY ALLEN TO TESTIFY.

Armstrong challenges the trial court's denial of this claim and makes a three-fold attack on counsel's resentencing decisions. First, Armstrong complains counsel should have objected to the State's presentation of evidence establishing

[19] The original direct appeal and 2001 collateral proceedings show that Armstrong has been found competent to stand trial. Dr. Seligson, a defense mental health expert, found Armstrong to be sane and competent to stand trial. He found no evidence of organic brain damage. (1-PCR 799).

the events which resulted in Armstrong's conviction. Second, given the strength of the State's case, counsel should not have sought the statutory mitigators: (1) §921.141(6)(d); defendant was minor participation and (2) §921.141(6)(e); extreme duress/substantial domination. Third, Armstrong suggests that having made the erroneous decision to seek those mitigators, it was incumbent upon Rowe to call Kay Allen. (IB 54-55). The trial court's summary determination that the allegation Rowe failed to challenge the State's case was insufficiently pled because Armstrong did not state what successful objections Rowe could have raised and what *Strickland* prejudice resulted are proper legal conclusions as is the finding the matter is meritless. Further, the finding that Rowe had a reasoned strategy not to call Kay Allen is supported by competent, substantial evidence and meets the dictates of *Strickland*.

1. TRIAL COURT'S RULING

a. FAILLING TO CHALLENGE STATE'S CASE - The trial court found the claim that Rowe deficiently allowed the State to **re-litigate the guilt phase during the resentencing** was insufficiently pled as Armstrong did not identify what objections Rowe "could have raised to prevent the State from introducing evidence in support of the three aggravators it sought to establish" nor did he plead *Strickland* prejudice. (2-PCR.8 1383)

The trial court continued and found the claim meritless under *Teffeteller v. State*, 495 So.2d 744, 745 (Fla. 1986) and *Way v. State*, 760 So.2d 903, 907 (Fla. 2000)(*citing Valle v. State*, 581 So.2d 40. 45 (Fla. 1991). (2-PCR.8 1384). It found and reasoned:

> The State in this case sought to prove three statutory aggravators: (1) prior violent felony; (2) felony murder; and (3) the victim was a law enforcement officer engaged in the performance of his duties. The state properly introduced relevant evidence that showed Defendant was the individual who shot and killed Deputy Greeney, shot at and attempted to kill Deputy Sallusitio, and committed the robbery at Church's Chicken. Defendant failed to allege what successful objection his trial counsel could have raised to prevent the State from introducing any of the evidence presented during the resentencing proceedings. This Court, having presided over the resentencing proceedings in this case, finds that the State did not relitigate the guilt phase and that the evidence presented was relevant to establishing the aggravators. Any objection by counsel would have been unsuccessful, and therefore, counsel cannot be deemed ineffective.

(2-PCR.8 1384)

b. ELECTING TO ESTABLSIH MITIGATION THAT (1) DEFENDANT HAD MINOR ROLE IN MURDER AND (2) DEFENDANT ACTED UNDER EXTREME DURESS OR SUBSTANTIAL DOMINATION OF ANOTHER - The trial court found the claim insufficiently pled as *Strickland* prejudice was not specified and determined that deficiency could not be shown as the "complaint is nothing more than a disagreement with trial counsel's mitigation strategy which is not a sufficient basis to warrant relief." (2-PCR.8 1385) The trial court reiterated that

Armstrong consulted with Rowe and stated under oath "his counsel answered all his questions concerning his defense, and confirmed that he wanted to present that defense by way of mitigation. Thus, he cannot go in the instant postconviction proceedings behind the sworn representations made to the resentencing court." (2-PCR.8 1368-78, 1385)

c. CLAIM VII(3) BELOW – FAILURE TO CALL KAY ALLEN - In rejecting this sub-claim after an evidentiary hearing, the trial court set out Rowe's evidentiary hearing testimony on his decision regarding Kay Allen and found that "Kay Allen was impeached extensively with her prior inconsistent statements." (2-PCR.8 1387-88). The trial court found:

> ***Defendant failed to prove deficient performance and prejudice as required under *Strickland*. First, this Court notes that Defendant failed to establish what Kay Allen's testimony would have been had she been called to testify during Defendant's resentencing proceedings in 2007. Merely because she would have been available to testify does not mean that she would have actually testified consistent with her testimony during the evidentiary hearing in the instant postconviction proceedings. Such cannot be assumed, especially given the fact that she had previously recanted her testimony.
>
> Even assuming that Kay Allen's testimony *** would have been the same *** this Court finds that there was no deficient performance for failing to call her as a witness. Mr. Rowe's testimony shows that he made an informed strategic decision well within the wide range of reasonable professional assistance. He was aware of all the previous statements made by Kay Allen and of the fact that she recanted her testimony when she discovered that Defendant was the father of her twins. He considered her to be a very dangerous

> witness, subject to cross-examination that would not only have called into question her credibility with the jury, but also the credibility of Defendant's own testimony. This Court had the opportunity to observe Kay Allen on the witness stand during the evidentiary hearing, and finds that the extensive cross-examination by the prosecution, her impeachment with inconsistent statements, and her answers during cross-examination were very damaging to her credibility as a witness. Moreover, her testimony on cross-examination merely validated trial counsel's strategic decision not to call her as a witness due to his belief that she would be subject to devastating impeachment. ***
>
> In addition, this Court finds that Defendant did not establish any prejudice. The record in this case corroborates Mr. Rowe's testimony during the evidentiary hearing that by the time of trial, Defendant no longer wanted Kay Allen as a witness. (EH Vol. 1 at 157) *** When the prosecutor read Defendant's witness list that included Kay Allen, Defendant confirmed that he did not want any of those witnesses called on his behalf. Thus, he is now precluded from going in the instant postconviction proceedings behind the sworn representations made to the resentencing court. See Kelley v. State, 109 So.3d 811, 812-13 (Fla. 1st DCA 2013), review denied, 119 So.3d 443 (Fla. 2013) and Stano v. State, 520 So.2d 278, 279 (Fla. 1988)
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> Furthermore, Kay Allen's testimony would not have called into question any of the statutory aggravators which were established by the State beyond a reasonable doubt. *** More importantly, her testimony would not have helped establish any additional mitigators, but given its unreliability it would have most certainly undermined Defendant's version of the events. Therefore, this Court finds that there is no reasonable probability that the outcome of the case would have been different had Kay Allen testified during the resentencing proceedings.

(2-PCR.8 1388-90)(footnote omitted)

2. ANALYSIS - Even after obtaining the ruling the claim was pled in legally insufficient terms, Armstrong does not identify

what argument could have been raised to preclude the State from presenting testimony to familiarize the resentencing jury with the facts of the case and in support of statutory aggravation. At best, Armstrong suggests Rowe should have filed a motion in limine, made legal argument and objected to extraneous evidence. However, he does not identify for this Court what arguments should have been made by motion or orally or what evidence should have drawn an objection. Furthermore, he does not plead Strickland prejudice arising from Rowe's failure to object. The claim below and as raised on appeal are legally insufficient as pled. Conclusory allegations are legally insufficient on their face and may be denied summarily. *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000) (opining "[the] defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden.")

As this Court has held, in a resentencing the State may present to the jury evidence "which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum." *Teffeteller*, 495 So.2d at 745. "While the State is not allowed to relitigate guilt during resentencing proceedings, it may introduce evidence concerning the facts and circumstances

of the crime in order to prove the aggravating circumstances beyond a reasonable doubt." *Way*, 760 So.2d at 917.

Relevant here, the State sought aggravation of: (1) prior violent felony; (2) felony murder; (3) victim was a law enforcement officer. The circumstances of the instant crimes were necessary to show Armstrong was the person who shot and killed Deputy Greeney, shot at and attempted to kill Deputy Sallustio, and robbed Church's Chicken, which necessitated presenting eye-witness, forensic, ballistic, and DNA experts/evidence that Armstrong committed those crimes to establish aggravation. Each witness called offered relevant evidence to the acts committed by Armstrong or collection of evidence to establish those facts.

Armstrong has failed to offer what successful objection could have been raised given the relevancy of the State's evidence. In fact, given the relevancy, any objection would have been unsuccessful. Counsel cannot be deemed deficient where he fails to raise a meritless objection. *See Dennis v. State*, 109 So.3d 680, 692 (Fla. 2012) (recognizing "counsel was also not ineffective for failing to raise a meritless objection"); *Johnston v. State*, 70 So.3d 472, 484 (Fla. 2011) (finding "trial counsel cannot be deemed ineffective for failing to raise a meritless challenge").

As with the first sub-claim, the trial court found that

Armstrong's challenge to the chosen mitigation was insufficiently pled as Strickland prejudice was not identified. Furthermore, the challenge was nothing more than disagreement over strategy. (2-PCR.8 1385) The court reincorporated its analysis set out previously in the order (2-PCR.8 1368-78) to find the record established Armstrong consulted with counsel and affirmed under oath that the mitigation case presented was the one he wanted presented. The court rejected Armstrong's attempt to go behind his 2007 sworn representations to the court. (2-PCR.8 1385-86)

As the trial court found, Armstrong failed to allege how counsel was deficient in seeking mitigation based on Armstrong's own testimony or what prejudice resulted, thus, rendering the matter insufficiently pled. *Bryant v. State*, 901 So.2d 810 (Fla. 2005) (finding claim insufficiently pled where defendant merely asserted counsel was ineffective without specifically pleading deficiency and prejudice); *Cole v. State*, 841 So.2d 409, 428 (Fla. 2003) (same). Even here, Armstrong offers nothing but a disagreement with counsel's strategy of seeking those statutory mitigators. *See Stewart v. State*, 801 So.2d 59, 65 (Fla. 2001) (finding "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient").

Moreover, the record refutes the claim especially in light of Armstrong's testimony and the facts presented to the jury.

Exercising his right to testify, Armstrong told the jury about his association with and superior position to Coleman. He averred that he knew nothing of the planned robbery until Coleman announced it once they were at Church's Chicken. Also, Armstrong claimed he was not strapped for cash, insinuating he did not need to rob Church's. (RS-ROA.28, 1116-21, 1130-35) It was Armstrong's account that he did not have a gun and that after letting Allen know he was there, he returned to the car to wait for her to finish work. It was then, he claims, that Colman announced the planned robbery and assaulted Armstrong with a gun before taking Allen back into the restaurant. Armstrong remained in the car where the Deputies found him. (RS-ROA.28 1137-50) According to Armstrong he tried to tell the Deputies of Coleman's robbery just before Coleman exited the restaurant and the fire fight began. Armstrong testified he was unarmed, caught in the cross-fire, and shot by Sallustio. He got in the car driven by when Coleman. (Rs-ROA.28 1151-57).

While such tends to support both mitigators offered, the State's evidence showing Armstrong was armed with a .9 millimeter, shot Greeney at point blank range, attempted to kill Sallustio, and was involved in the robbery, was credited by the jury, trial court, and this Court. (RS-ROA.23 457-58, 463-72, 478-79, 482-83, 487-89, 492-96, 498-504; Vol.24 531-39 542, 554-56; Vol.25 623, 630, 635-36, 676-85, 689-91, 732-39, 751-57,

767-71, 779-84, 802; Vol.26 830-31, 833-35, 838, 850-56; R.27 986-87, 995-1001, 1010). *See Armstrong*, 73 So.3d at 155-66; *Armstrong*, 642 So.2d at 730-34. Given this, counsel was not deficient in seeking the mitigators supported by Armstrong's account. Confidence in the outcome is not undermined, because even if the mitigators challenged here were not requested, the State's case established the aggravation and there is no reasonable probability the sentencing decision would be different. Relief was denied properly.

Continuing, Armstrong asserts that given Rowe's decision to present the above mitigators, it was incumbent upon him to present Kay Allen to testify so that Armstrong's testimony would not be so easily dismissed. The trial court rejected the claim following an evidentiary hearing finding Rowe had a well reasoned strategy for not calling Kay Allen which fell within the wide range of professional conduct and that Armstrong had not shown that he wanted Kay Allen to testify or that her testimony would be of assistance to the defense given her history of inconsistent statements. (2-PCR.8 1386-90)

Although granted an evidentiary hearing, Armstrong did not testify that he wanted Kay Allen to testify, thus, Armstrong's last sworn testimony from the resentencing record was that he did not want Kay Allen to testify. (RS-ROA.3 468-75; RS-ROA.30 1382-85, 1388-90; RS-ROA.35 2-6, 9-11). Rowe testified that he

and Armstrong had several discussions regarding Kay Allen's value to his case and Armstrong wanted to know what she would say before making a final decision on the matter as he was concerned about her inconsistent statements. Armstrong played a very active role in his defense. Rowe averred that while he had private investigators looking for Kay Allen, she was not found. By the time of trial, Armstrong did not want to present her. (2-PCR.23 1793-95, 1815-17)

While Rowe did not talk to Kay Allen personally, he thought she was a "very dangerous" witness based on the information and affidavit he had in the file including Kay Allen's taped police statements, her in court testimony, her affidavit to Hilliard Moldof, her January 24, 1991 deposition, her testimony in co-defendant Coleman's case and Kay Allen's hand written statement. All were contradictory, but Rowe acknowledged Kay Allen was consistent in naming Coleman as the aggressor. His assessment of Kay Allen was made given her recanted testimony in Armstrong's case, what she said subsequent to that which was again contradicted and inconsistent with her prior testimony and the fact that she had entered a guilty plea to perjury. (2-PCR.23 1795-96, 1815-16, 1827-30)

Cognizant of the case law on recanted testimony, Rowe recommended against calling Kay Allen. (2-PCR.1 135-36) He knew Kay Allen would be subject to severe, terrible cross-

examination[20],[21] because of her recantation and perjury charges. Irrespective of whether there had been a withhold of adjudication, Rowe did not want to complicate the case with recanted testimony. The defense was that Armstrong did not enter the Church's Chicken crime scene at all, yet Kay Allen changed her position multiple times regarding when and how Armstrong entered the establishment. (2-PCR.23 11795-97, 1813-16)

Kay Allen was inconsistent regarding whether Armstrong said he would kill her; whether a gun was visible under the seat; and whether automatic gun fire was heard. She had testified that Armstrong had the nine millimeter gun and Rowe knew that Deputy Greeney was shot and killed with a nine millimeter and that in this case that was a central issue. Rowe's strategy was to give Armstrong the best opportunity to be heard by the jury and for the jury to believe that account. In Rowe's estimation, Kay

[20] This assessment was borne out by her cross-examination during the evidentiary hearing. The trial court found Kay Allen "was impeached extensively with her prior inconsistent statements." (2-PCR.8 1388).

[21] Armstrong asserts Rowe was ineffective for not investigating Kay Allen's perjury charge and discovering a withhold adjudication was entered. (IB 56-57) Such does not undermine the fact that Rowe made a decision not to call Kay Allen due to her testimony at Armstrong's trial and motion for new trial and the treatment of her recantation on appeal. Irrespective of the additional inconsistencies and revised accounting of the events on the night of the crime, Kay Allen's credibility was of dubious worth and she would have faced devastating cross examination. Rowe reasonably determined that Kay Allen should not be used in Armstrong's re-sentencing.

Allen would be "fatal" to any testimony Armstrong gave because she had not told the truth on at least one occasion. (2-PCR.23 1813-14, 1831) Rowe thought Kay Allen's recantation, which only came after she received blood tests results showing Armstrong fathered her twins, would further complicate the case. He knew what this Court had written about Kay Allen's testimony, i.e., that it was not believable. *See Armstrong*, 642 So.2d at 735-36 This played into his decision not to present Kay Allen; he was against using her from the start. (2-PCR.23 1814-15).

As the trial court found, neither deficiency nor prejudice was proven as is Armstrong's burden. Based on the foregoing, Rowe, a practicing criminal attorney for 31 years, concluded that Kay Allen should not be used in Armstrong's case and that her inconsistent statements made her a dangerous witness for the defense as she would be subject to severe and terrible cross-examination. He thought her testimony would drown out Armstrong's account of the night of the crime. "[I]t is reasonable for trial counsel to forego evidence that, if presented in mitigation, could damage a defendant's chances with the jury." *Nelson v. State*, 43 So.3d 20, 32 (Fla. 2010); *Reed v. State*, 875 So.2d 415, 437 (Fla. 2004) ("ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.").

Rowe's decisions were made after investigation and

consultation with his client, and thus, were reasoned strategy which is the epitome of effective representation. *See Everett v. State*, 54 So.3d 464, 474 (Fla. 2010) (recognizing "[t]his Court has also consistently held that a trial counsel's decision to not call certain witnesses to testify at trial can be reasonable trial strategy."); *Rhode v. Hall*, 582 F.3d 1273, 1284 (11th Cir. 2009)(noting "which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess."). "[D]efense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected." *Spencer v. State*, 842 So.2d 52, 62(Fla. 2003). Rowe made the strategic choice not to present Kay Allen.[22] Equally

[22] Given that Kay Allen's recantation testimony had been rejected previously and calling her would merely have subjected her to sharp-devastating impeachment, and in Rowe's estimation drowned out Armstrong's testimony, Rowe was not ineffective for choosing not to call such Kay Allen. *See Diaz v. State*, 132 So.3d 93, 109 (Fla. 2013) (finding counsel's decision not to call a witness whose testimony would be harmful to the defense was not ineffective); *Evans v. State*, 995 So.2d 933, 943 (Fla. 2008) (rejecting claim of ineffective assistance where counsel "had tactical reasons for not calling [witnesses] to testify, including the fact that both had questionable credibility); *Hertz v. State*, 941 So.2d 1031, 1039 (Fla. 2006) (holding counsel not ineffective for failing to call a witness at the penalty phase when counsel decided that he "was not a good witness and not that helpful" during the guilt phase). *Breedlove v. State*, 692 So.2d 874, 877-78 (Fla. 1997) (holding that trial counsel was not ineffective for failing to present testimony of friends and family members that would have been subject to cross-examination and therefore would have countered any value defendant might have gained from favorable evidence).

important, when asked by the trial court, Armstrong averred that he did not want Kay Allen called.

Strickland prejudice was not shown as Armstrong averred at the resentencing that he did not want Kay Allen called as a witness. (2-PCR.23 1817) Moreover, Kay Allen's testimony does not call into question the State's evidence showing that Armstrong came to the robbery armed, was the person who shot Deputy Greeney, and attempted to kill Deputy Sallustio. Kay Allen's testimony does not refute any of the ballistic and DNA evidence establishing that Armstrong was the person, and only person, who shot and killed Deputy Greeney, and tried to kill Sallustio. Moreover, the footprint evidence put Armstrong in the restaurant that evening. Witness and forensic evidence established he had the proceeds of the robbery. Furthermore, the trial evidence refutes Kay Allen's inconsistent statements attempting to downplay Armstrong's involvement in such critical areas. Hence, confidence in the sentencing outcome has not been undermined and Armstrong has failed to carry his burden under *Strickland*.

D. ROWE WAS NOT LABORING UNDER AN ACTUAL CONFLCIT OF INTEREST

It is Armstrong's position that counsel had a conflict of interest with Dr. Gunst as a result of Rowe's representation of Mr. Seaga and Rowe failed to disclose the matter to Armstrong

and resulting in his failure to call Dr. Gunst as a witness. The trial court's factual findings that no conflict existed and that Rowe had strategic reasons not to call Dr. Gunst are supported by competent, substantial evidence and the law. Armstrong failed to carry his burden under *Strickland*. This Court should affirm the denial of relief after an evidentiary hearing.

1. TRIAL COURT'S RULIING - CLAIM VIII BELOW – CONFLICT OF INTEREST/FAILURE TO CALL DR. GUNST

After citing *Dennis v. State*, 109 So.3d 680, 697 (Fla. 2012) and *Quince v. State*, 732 So.2d 1059, 1064 (Fla. 1999) as the controlling law, the trial court found Armstrong failed to prove Rowe was "actively representing conflicting interests and that an actual conflict adversely affected his performance" and that Rowe never represented Dr. Gunst and his representation of Mr. Seaga ended before Armstrong's resentencing commenced. "Rowe was not actively representing any potentially conflicting interests of Mr. Seaga and Defendant" and had disclosed the association to Armstrong, but did not reduce it to writing as neither thought a conflict existed "as far as Dr. Gunst was concerned." The trial court further found "Mr. Rowe's decision not to call Dr. Gunst to testify during the resentencing proceedings was a very well-reasoned strategic decision,

justified with solid reasons."[23] (2-PCR.8 1391-92)

The trial court concluded that "counsel cannot be deemed ineffective merely because current counsel disagrees with his strategy and choice of witnesses." (2-PCR.8 1394. Continuing, the court found *Strickland* prejudice was not proven and that:

> *** the only benefit of Dr. Gunst's testimony over that of Dr. Rhodd that Defendant discussed in his post-hearing memorandum is that Dr. Gunst's testimony put Defendant's social history in context, while Dr. Rhodd's testimony was allegedly very general. Defendant did not specify any additional mitigators that Dr. Gunst would have been able to establish through her testimony that were not already established during Defendant's resentencing.

(2-PCR.8 1394-95)

The trial court found Dr. Gunst had given two reasons for declining to testify for Armstrong. One was related to Mr. Seaga, but the other was unrelated to Mr. Seaga and provided "there was nothing that she could do for his case and nothing further she could say that she has not already done or said in

[23] Those reasons included: (1) that Dr. Gunst's book was not well respected, focused upon urban issues while Armstrong was from a rural area, and centered on a violent Jamaican drug-dealing/gun-running gang; (2) she had not attended a Caribbean university and did not have an Afro-centric view of the socioeconomic problems of the area, but instead applied American norms to Caribbean realities; and Dr. Gunst's knowledge was irrelevant and unhelpful to Armstrong's mitigation case which focused on Armstrong's ability to overcome dire circumstances in Jamaica to become a successful business man in the United States; and (4) Dr. Rhodd was a better fit for the defense as he had the Caribbean background having lived there, was familiar with the area Armstrong lived, attended a West Indies university, and wrote several "distinguished books" on the economics of the area. (2-PCR.8 1393-94).

her sworn testimony during the initial postconviction proceedings."(2-PCR.8 1395)

It was the trial court's conclusion that its comparison of the experts' testimonies from the initial postconviction evidentiary hearing and the resentencing showed they were similar. (2-PCR.8 1396) However, the trial court determined that although Dr. Gunst's testimony was more detailed and spoke of violence, corporal punishment, and Armstrong's fear of the police and his robbery charge in Jamaica, "[t]his testimony would have clearly undermined Defendant's own testimony during the resentencing proceedings that he worked as a auxiliary police officer in Jamaica." (2-PCR.8 1396-97). The trial court found: "Dr. Gunst's testimony did not establish any additional mitigator that this Court could now consider to reweigh the aggravators and mitigators established in this case. *** Therefore, there is no reasonable probability that Defendant would have received a different sentence." (2-PCR.8 1397)

2. ANALYSIS – Addressing a claim of conflict of interest, this Court reiterated:

> *** as to most claims of ineffective assistance of counsel based upon conflict of interest, a more limited presumption of prejudice applies. *** ("Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'") ***

> Accordingly, a defendant is required to allege that trial counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'*** And this Court has explained:
>
> > A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." *** the defendant must identify specific evidence in the record that suggests that his or her interests were compromised. *** *A possible, speculative or merely hypothetical conflict is "insufficient to impugn a criminal conviction."* ***

Dennis v. State, 109 So.3d 680, 697-98 (Fla. 2012).

In her evidentiary hearing testimony, Dr. Gunst claimed Rowe had sued her in Jamaica and New York on behalf of Edward Seaga ("Seaga"), the former Jamaican Prime Minister, but then admitted she was the plaintiff in the federal case in New York. (2-PCR.24 1845-46, 1853-54). Both Rowe and Dr. Gunst agreed that Rowe at no time represented her. (2-PCR.23 1818-19; 2-PCR.24 1854). Contrary to Dr. Gunst's account, Rowe testified that he did not file a law suit against Dr. Gunst on Seaga's behalf although he was involved in the New York lawsuit between Dr. Gunst and Seaga and handled the Motion to Dismiss the federal case against Seaga. He was not involved in the Jamaican suit. The hearing on that motion was completed by the time Rowe

took Armstrong's case, the federal case was dismissed formally on March 30, 2007 and the penalty phase in this case commenced on April 10, 2007. (2-PCR.23 1798-1801; RS-ROA.20 24) Rowe made full disclosure to Armstrong regarding the lawsuit and neither he nor Armstrong thought a conflict existed; the matter was not reduced to writing nor was it put it on the record. (2-PCR.23 1799-1801, 1803-07).

Here, Armstrong has failed to show that Rowe was suffering under an actual conflict of interest. Rowe was not actively representing interests, i.e., Edward Seaga's interests, which were adverse to Armstrong. *Dennis*. Moreover, at no time did he represent Dr. Gunst. Her professed unwillingness to involve herself in Armstrong's case due to Rowe's representation of Seaga does not create a conflict on Rowe's part, but one personal to Dr. Gunst. (2-PCR.24 1848, 1853-55) These facts are competent, substantial evidence supporting the trial court's denial of relief.

Rowe's decision not to utilize Dr. Gunst, was based on factors independent of the Seaga lawsuit and went directly to Rowe's assessment of Dr. Rhodd's value to the case over Dr. Gunst's value. Rowe testified that he knew Dr. Gunst had testified in Armstrong's 2001 postconviction litigation and was familiar with her testimony. Also, he knew of Dr. Gunst's

background[24] and made a strategic decision that Dr. Rhodd[25] had better credentials which more closely matched Armstrong's experiences in Jamaica and fit the mitigation presentation Rowe was developing. Rowe determined Dr. Gunst's professed "expertise" as a journalist/historian was questioned by other respected experts in Jamaican history and would present a picture of Armstrong which was inaccurate.[26] Further, Rowe and

[24] Rowe determined that Dr. Gunst should not be utilized in Armstrong's case because she had not gotten her first, second or doctorate degree in Caribbean studies from a Caribbean-based university. In Rowe's estimation Dr. Gunst did not have the "Afro-centric view of the socio-economic problems that affect Jamaica and similar countries . . . in the post-independence era," although she was making statements about those countries. Rowe determined that Dr. Gunst was applying American norms to Caribbean realities which Rowe found to be scientifically inappropriate and rejected by most Caribbean scholars. Given this, Rowe did not think Dr. Gunst was the proper expert on conditions in the Caribbean. (2-PCR.23 1819-20). It was Rowe's intent to distance Armstrong from the Posse because he and his mother both averred he was not in the Posse. (2-PCR.23 1823-25).

[25] Rowe selected Dr. Rhodd who was a professor at Florida Atlantic University and the University of the West Indies. Dr. Rhodd had written six distinguished books on Caribbean and Jamaican economics, the problems related to non-development or poverty associated with post-independence Jamaica, and the socio-economic conditions of post-independent Jamaica. Some of Dr. Rhodd's writings dealt with why some Jamaicans are very poor under circumstances similar to Armstrong's and the scientific basis for that situation. (2-PCR.23 1820). Rowe chose Dr. Rhodd because the doctor could talk about the countryside and conditions where Armstrong had lived in Jamaica as Dr. Rhodd was familiar with that area. Dr. Rhodd has studied there, published there, and he has been accepted in the United States.

[26] Rowe considered that Dr. Gunst merely spoke of Jamaicans without water and lights and characterized them as being savages. She did not speak of the relationship between

would link him to violent drug gangs[27] which Rowe wanted to avoid and did not fit Armstrong's experience in Jamaica. The expert witness choice was discussed with Armstrong. (2-PCR.23 1797-98, 1801-04) The decision was strategic and was made after reasonable investigation. Such virtually is unassailable and fails to support a claim of ineffectiveness of counsel.

This was reason, constitutionally professional representation. See *Reed v. State*, 875 So.2d 415, 437 (Fla. 2004) (recognizing "ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword."); *Asay v. State*, 769 So. 2d 974 (Fla. 2000); *Rutherford v. State*, 727 So.2d 216, 223 (Fla. 1998) (*quoting State v. Bolender*, 503 So.2d 1247, 1250 (Fla.1987))); *Haliburton v. Singletary*, 691 So.2d 466, 471 (Fla.

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colonialism, slavery, and post-independence development in the Caribbean where countries have tried to develop an infrastructure, but had yet to do so. (2-PCR.23 1821).

[27] Dr. Gunst's book did not mention rural Jamaica where Armstrong grew up. It only mentions downtown Kingston and the movement of guns. Rowe questioned how much Dr. Gunst knew of Jamaican rural conditions. Rowe chose a "country conditions" expert in Dr. Rhodd; he just did not choose Dr. Gunst. (2-PCR.23 1821-22) Dr. Gunst wrote of the JLP-Shower Posse which ran drugs from Columbia to the United states. It was a violent group out of Kingston and killed its competition with a "shower of bullets" or by driving cars over their heads. Armstrong was never a member of this or any other criminal gang. Instead, he was a Jamaican law enforcement officer and served on the Tourist Board. Armstrong came from a poverty stricken background, but not one involved in criminal activity. According to Rowe, he did not believe Dr. Gunst's background was relevant to Armstrong. (2-PCR.23 1821-23).

1997). *Cf. Winkles v. State*, 21 So.3d 19, 26 (Fla. 2009) (finding "no deficiency where trial counsel made a strategic decision not to present expert witness testimony after investigating and concluding that the testimony would be more harmful than helpful.")

Dr. Gunst offered similar testimony,[28] to that of Dr.

[28] In the 2001 postconviction litigation, Dr. Gunst, a United States born citizen, testified she took up studies in Caribbean history specializing in Jamaican history as a result of her travels to Jamaica in 1980. (1-PCR.11 1390-92). She reported on the warring political factions in the 1980's. Yet, as this Court will recall, Armstrong was born in Jamaica in 1963 and moved to the United States in 1983. (RS-ROA.28 1102-03, 1107). Dr. Gunst spoke of Armstrong's birthplace as a very poor rural community and that Armstrong grew up in poverty without electricity and running water. (1-PCR.11 1398-1400) According to Dr. Gunst, Armstrong lived in a notoriously violent area which was a hotbed for warring political factions. (1-PCR.11 1401) Also, his school life was "torture" because of his learning disabilities and pronounced stammer. He was subjected to cruelty from his peers and was punished harshly in school; corporal punishment was employed. (1-PCR.11 1401-02) Corporal punishment was inflicted frequently at home by an abusive, extremely brutal, step-father. (PCR.11 1403-04) Due to political strife and a growing drug trade, Jamaica in the 1970's and 1980's was in a state of undeclared civil war; the police were feared and not trusted. There were gun battles during the elections in the 1970's; some years the death toll was near 1000. The police were brutal and committed half the annual homicides. (1-PCR.11 1404-11) Yet, Armstrong was holding himself out as a policeman. (RS-ROA.28 1102-03) Armstrong feared the police who would make night raids and hold citizens at gunpoint. (1-PCR.11 1411). Armstrong was arrested and held by the police for none months on a robbery charge. During this time he was tortured. (1-PCR.11 1412). Jamaica in the 1980's started to calm, but the economy worsened and the drug trade was expanding; crime was soaring. In the 1980's, Armstrong moved to the United States where he developed a construction business in Boston, then Miami. Pictures of Armstrong's Jamaican concrete-block constructed home and coking shed were shown. (1-PCR.11 1413-17).

Rhodd,[29] thus, *Strickland* prejudice cannot be found. This claim is reduced to a disagreement in strategy; the selection of one expert over another. In Rowe's estimation, Dr. Rhodd offered more to the case given his credentials, Jamaican heritage and schooling than Dr. Gunst. Now Armstrong wishes Dr. Gunst had been called. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000) (citations omitted).

Moreover, Armstrong has not shown that he would have

[29] Dr. Rhodd was Jamaican-born, educated in the Caribbean region and Florida, and had a doctorate in Economics with a concentration in developmental economics. Developmental economics concerns the economic development of a country and considers the economic theory, politics, and sociology of a country over time. (RS-ROA.28 1051-52). Dr. Rhodd described Jamaican politics in the 1970's and 1980's as violent and caught between Cuban and United States influences. (RS-ROA.28 1055-57, 1067) During this time, Jamaican economic conditions were that of a third-world nation. Its citizens made an average of $1000 annually. There were constant clashes between the competing police forces and the Cuban military had a presence on the island. (RS-ROA.28 1057-59). Living conditions in rural Jamaica were terrible; there was no running water or proper sanitation. Many homes had no windows, indoor plumbing, or kitchens. The area in which Armstrong grew up was under-developed. Dr. Rhodd spoke of the tourism and sugar industries. He reported that Armstrong worked as a plumber and did agricultural work where he lost a finger in the cane fields. (RS-ROA.28 1059-65, 1071).

received additional mitigation or a different sentence had Dr. Gunst been called in place of Dr. Rhodd. Given that both experts gave similar testimony, confidence in the sentencing result has not been undermined. Postconviction was denied properly.

E. COUNSEL PROVIDED EFFECTIVE ASSITANCE DURING VOIR DIRE

Armstrong challenges the trial court's rejection of his claim counsel rendered deficient performance during voir dire for failing to question jurors thoroughly regarding biases and criminal histories and failing to strike several jurors. The trial court summarily denied all those challenges, save the one addressed to Juror Bacchus which was denied after an evidentiary hearing. Those rulings are supported by the record and comport with the law. This Court should affirm the denial of relief.

1. TRIAL COURT'S RULING

a. JUROR GAIL BACCHUS

Following the evidentiary hearing testimony on Rowe's basis for not questioning Gail Bachus ("Bacchus") on her meaning that Armstrong was "in a situation" the trial court found Rowe had a reasoned strategy for his actions and that "there was no actual bias apparent from the face of the record." (2-PCR.8 1361-62) The trial court noted that Rowe was seeking non-white jurors or younger white females and Bacchus was non-white and of Caribbean descent based on her surname, had a brother who had been

arrested on immigration charges making her a "desirable" juror, one who would be more sympathetic and fairer to Armstrong. (2-PCR.8 1361-62) Rowe "wanted to portray Defendant as a black Jamacain business man, who had no business committing crimes, and having jurors like Ms Bacchus was important because she would understand that cultural reference." (2-PCR.8 1362)

Further, the trial court considered Rowe's testimony that he did not inquire of Bacchus what she meant by Armstrong "was in a situation" because once he decided he liked Bacchus for the jury, he did not want to give the State a basis to strike her and the phase was a "bland remark" that in "Caribbean English" meant "in difficulty which clearly applied to Armstrong. (2-PCR.8 1362) The trial court found the record reflected that Bacchus was "comfortable" with her sentencing role, "was willing to listen to the testimony, view evidence, and follow the instructions of the judge." (2-PCR.8 1362) "Juror Bacchus stated that she did not think there was anything that could affect her ability to be fair and impartial that she should bring to the court's attention." (2-PCR.8 1362-63)

It was the trial court's conclusion:

> Based on the testimony presented during the evidentiary hearing and the resentencing record this Court finds that Defendant failed to establish ineffective assistance of counsel. Trial counsel's decision not to question juror Bacchus was based on the reasonable strategy of sitting a jury with as many minority members as possible, who would be sympathetic

> to Defendant. *** Moreover, there is no actual bias apparent from the face of the record, as required to show prejudice under Strickland.

(2-PCR.8 1363)

b. ALTERNATE JUROR RHONDA MCKAY

The trial court rejected the ineffectiveness claim that counsel failed to question Rhonda McKay ("McKay") thoroughly about her criminal history and failed to strike her. It reasoned that McKay had not disclosed her criminal history when asked directly by the trial court and prosecutor, thus, "there is no indication that had trial counsel asked her the same question again she would have changed her answer." (2pPCR.8 1358-59) It was the trial court's finding that Armstrong merely stated in conclusory fashion that counsel should have stricken McKay, but Armstrong failed to identify what questions counsel could have asked to cause McKay to disclose her history, thus, ineffectiveness was not shown. Further, relying in part on its analysis for Claim III below (2-PCR.8 1354-55) the court found no *Strickland* prejudice as McKay was an alternate and did not deliberate on Armstrong's sentence. (2-PCR.8 1358)

c. JUROR MARY FAYED

The trial court found the record reflected that Mary Fayed ("Fayed") stated she thought she could vote for death "'after seeing evidence and everything;" that she had a close cousin and friend who were police officers that might affect her, but

"twice stated she could be fair and impartial." Citing to *Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007), the court determined "the record here does not demonstrate actual bias" as Fayed said she could be fair and impartial after expressing initially "an equivocal doubt." (2-PCR.8 1359)

d. JUROR HEATHER HEDMAN-DEVAUGHN

"The record reflects that juror Hedman-Devaughn disclosed that she knew Deputy Sallustio and his wife, who was her secretary *** and admitted that she had some knowledge about the case, but stated that she would listen to the testimony and consider the evidence presented in the case and that she had not made up her mind about the appropriate penalty." Further, Hedman-Devaughn "believed she could be fair notwithstanding the information she already knew *** and there was no other reason that could affect her ability to be fair and impartial.' (2-PCR.8 1360) The trial court concluded that actual bias was not shown and that:

> *** Defendant was present during the jury selection, and that counsel conferred with Defendant after the examination of juror Hedman-Devaughn. Counsel represented to the court that he had specifically taken the time to explain the situation to Defendant and that Defendant was aware of everything that was going on. The record further reflects that Defendant approved of juror Hedman-Devaughn.

(2-PCR.8 1360)

e. JUROR RACHEL WERTZ

The trial court review of the record revealed that Rachel Wertz ("Wertz") had two family members who had been arrested previously; her father for shooting a robber and her cousin for being an accomplice in a second degree murder. Also, her mother-in-law worked as a court deputy in a civil division at the Broward Courthouse. Wertz stated she could be fair and impartial, would listen to all the evidence, follow the court's instructions, and wait until the end of the case before making a decision. (2-PCR.8 1361) Citing to the resentencing record, the trial court noted that Rowe had remarked that Wertz knew "'something about Jamaicans, their circumstances and surroundings.'" (2-PCR.8 1361) Again, the trial court found Armstrong had the opportunity to consult with counsel and accepted Wertz as a juror and "that actual bias is not apparent from the face of the record." (2-PCR.8 1361)

f. JUROR STACEY MINCHEW

The trial court reviewed the voir dire conducted with Stacy Minchew ("Minchew") where she disclosed she had been a witness for the State in another case. It was the court's finding the record showed Minchew stated she was a fair person who needed to hear more facts before making a decision about the death penalty, but that she was "not opposed one way or another." She agreed to weigh whatever aggravators were established beyond a reasonable doubt against the mitigators and "would recommend the

death penalty only if she felt strongly about it, because it was 'a very serious matter.'" (2-PCR.8 1363-64) Minchew reiterated when questioned by Rowe that she would not be opposed to the death penalty if it were supported by reason and facts and that she did not predetermine the punishment Armstrong should receive, but would make that decision "only after she heard the evidence and weighed it pursuant to the judge's instructions." Further, Minchew "did not believe that the life of a law enforcement officer was more valuable that that of another individual." She also noted she had been to Jamaica and had enjoyed it. (2-PCR.8 1364)

Ruling against Armstrong, the court stated:

> Based on the trial record, this Court finds that Defendant could not establish deficient performance by counsel for failing to ask more questions regarding juror Minchew's experience as a State witness in another case. She already stated that her experience with that case had not caused her to have any negative feelings about the criminal justice system. Furthermore, all her answers suggested that she would be a fair juror, who would listen to all the evidence, follow the court's instructions, and take her role to render a recommendation very seriously. There is no actual bias apparent from the face of the record, as required to show prejudice under Strickland.

(2-PCR.8 1364)

The trial court also found:

> Finally, this Court finds that even assuming agruendo that counsel was ineffective for not attempting to strike these jurors for cause or to use peremptory challenges, Defendant "cannot go behind his representation to the trial court that he was

> satisfied with the jury by alleging that his counsel was ineffective in jury selection." Kelley v. State, 109 So.3d 811, 814 (Fla. 1st DCA 2013) The record reflects that Defendant was actively engaged in the jury selection and that he ratified the selection. When asked by the court whether his attorneys followed his instructions during the jury selection, Defendant expressed his concern regarding the fact that he did not have a jury of his peers. However, Defendant stated that his attorneys have done everything else that they were supposed to do under the law. When the trial court asked Defendant whether there was anyone else on the jury he wanted stricken, he responded that he wanted Ms. Levy stricken because she had an emergency. (ROA Vol 22 at 393-96)
>
> For the reasons set forth herein, Defendant's instant claim is denied.

(2-PCR.8 1364-65)

2. ANALYSIS – In *Carratelli v. State*, 961 So.2d 312 (Fla. 2007), this Court addressed the issue of whether trial counsel was ineffective for failing to object to a juror who should have been stricken for cause. There, this Court determined that in order to obtain postconviction relief, the defendant must demonstrate that an actually biased juror sat on the jury. *See Davis v. State*, 928 So.2d 1089, 1118 (Fla. 2005) (rejecting claim of ineffectiveness of counsel for the alleged failure to question the jurors about their views on certain issues relevant to the case because the defendant failed to demonstrate that any unqualified juror served in the case or that any juror was biased or had an animus toward the defendant's theory of the case). The State will address the jurors in the order presented

by Armstrong.

a. JUROR GAIL BACCHUS – Armstrong takes issue with Rowe's testimony that he chose her because of her Caribbean heritage and his belief she would be sympathetic to Armstrong's situation without confirming on the record his beliefs. Armstrong claims that is unreasonable without questioning the juror. However, Rowe was present for the questioning conducted by the trial court and prosecutor before conducting his own voir dire and selecting the jury. Whether or not Rowe failed to question a particular juror does not automatically render his voir dire deficient. Counsel is permitted to rely on the answers given to others who questioned the juror and to make observations based on physical and auditory cues. *See Teffeteller v. Dugger*, 734 So.2d 1009, 1020-21 (Fla. 1999) (recognizing it is not deficient performance for counsel to rely on the *voir dire* conducted by the trial court and prosecution to develop the defense jury selection strategy or to select jurors.)

Rowe, who was of Jamaican descent, had practiced criminal and civil law for 31 years, had handled four capital cases, and had taken the death penalty seminar presented by the Broward County Bar Association before being retained by Armstrong's family and taking the case in May 2006. (2-PCR.23 1767-71, 1780-82, 1807-10, 1825). Rowe noted he had represented people of Caribbean and South American heritage and was familiar with the

surname Bacchus which was Guyanese. He also **observed** Bacchus was of Caribbean/American background. With respect to Bacchus' comment that Armstrong "was in a situation," Rowe explained that in the Caribbean, that statement merely means that a person is in difficulty, which Rowe pointed out was the case for Armstrong. Hence, Bacchus' comment "did not ring any bells" for Rowe; he thought it was a bland remark. (2-PCR.23 1790, 1811-12)

Given the mitigation defense selected, Rowe wanted to present the afro-centric viewpoint and wanted those who were familiar with the Black-Jamaican businessman. His v*oir dire* was to seat as many black/non-white jurors or younger white females; he felt that those with an immigrant experience would be fairer to Armstrong than those who did not have those experiences. (2-PCR.23 1788, 1825-26) Rowe estimated that there was a low probability that fellow immigrants would be biased against immigrants who committed crimes. Bacchus was a non-white juror of Caribbean descent and Rowe thought she would be a good juror for the defense. Rowe thought Bacchus would be sympathetic to Armstrong given her background and his belief she would be familiar with Black-Jamaican businessmen. (2-PCR.23 1811-12, 1825-27). Rowe wanted her because of her Caribbean connection and he discussed this with Armstrong. (2-PCR.23 1789) Because Bacchus fit the profile of the jurors he wanted, he did not believe he needed to question her about the "bland remark" that

Armstrong was in a situation. Also, he did not want to put her in a situation where she may say something which would allow the State to strike her. Once Rowe realized Bacchus was of Caribbean descent, had connection with immigrants, and that her brother had been arrested on an immigration issue, he was very careful with Bacchus as he had determined she would be a good juror for Armstrong. (2-PCR.23 1791-92, 1711-12, 1827, 1831).

This, as the trial court found, was a reasoned strategy and does not fall outside the wide range of reasonable conduct. *See Johnston v. State*, 63 So.3d 730, 738 (Fla. 2011) (rejecting claim of ineffectiveness given that retained juror fit strategy of selecting young minority jurors); *Ferrell v. State*, 29 So.3d 959, 973-74 (Fla. 2010) (reasoning counsel was not ineffective in not questioning potential jurors as trial court and State had questioned them first *Dillbeck v. State*, 964 So.2d 95, 103 (Fla. 2007) (concluding counsel's strategy was reasonable to seat jurors he felt more likely to recommend life sentence); *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995) (finding reasonable counsel's strategy not to strike juror who he felt would be less likely to recommend the death penalty, even though the juror had been exposed to pretrial publicity and stated during *voir dire* that she could not be impartial).

Moreover, Bacchus said she was "comfortable" with her role of listening to testimony, viewing evidence, listening to the

Court's instructions, and fulfilling her responsibility on rendering a recommendation in this case. (RS-ROA.21 237-38). Bacchus affirmed that there was nothing that she thought should be brought to the Court's attention that would affect her ability to be fair and impartial. (RS-ROA.21 239). Armstrong's jury was instructed that the sentencing recommendation "should be based upon the evidence that has been presented to you in these proceedings." (RS-ROA.30 1458). It is assumed jurors follow the Court's instructions. *See Sutton v. State*, 718 So.2d 215, 216 n. 1 (Fla. 1998) (recognizing jury is presumed to follow its instructions absent evidence to the contrary).

Not only has Armstrong failed to show deficiency and prejudice arising from Rowe *voir dire* of Bacchus, but he has failed to show that a biased juror sat on his jury. *See Conahan v. State*, 118 So.3d 718, 731 (Fla. 2013) (finding *Strickland* prejudice has not been proven as defendant failed to "demonstrate that an unqualified or biased juror actually served on his jury," thus "there is not a reasonable probability of a different sentence, and our confidence in the outcome is not undermined."); *Carratelli*, 961 So.2d at 324 (opining "where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased.") *Davis*, 928 So.2d at 1117 (concluding even if counsel were

deficient in not questioning jurors on their views of certain issues the defendant has failed to show prejudice as he did not show that any unqualified or biased juror, or one with animus toward his case sat on his jury). Relief was denied properly.

b. ALTERNATE JUROR RHONDA MCKAY – Armstrong suggests this Court overlook the fact that McKay was an alternate and never deliberated with his jury in favor of speculating that her mere presence with the jury during the penalty phase was prejudicial and tainted his jury because she failed to disclose a prior conviction. (IB 69-70) The cases cited by Armstrong are distinguishable from the instant matter as there the challenged jurors deliberated the merits of the case. *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984) (*quoting United States v. Bynum*, 634 F.2d 768, 771 (4th Cir. 1980);[30] *Conaway v. Polk*, 453 F.3f 567, 590-91 (4th Cir. 2006); *Chester v. State*,

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[30] *Jones v. Cooper*, 331 F.3d 306, 314, n.3 (4th Cir. 2002) provides:

> It also appears that the court in *Bynum* concluded that the juror's concealment impaired the rights of the defendants to "exercise intelligently a peremptory challenge," and that this, standing alone, entitled the defendants to a new trial. Id. Insofar as this reasoning was subsequently rejected by the Supreme Court in *McDonough*, 464 U.S. at 555, 104 S.Ct. 845, it is no longer good law. *See Zerka*, 49 F.3d at 1185 ("The Supreme Court in *McDonough* explicitly rejected the argument that a plaintiff who is prevented from intelligently utilizing his peremptory challenges is entitled to a new trial, and it counseled against exactly this sort of endless second-guessing.").

737 So.2d 557 (Fla. 1999); *Young v. State*, 720 So.2d 1101, 1103 (Fla. 3d DCA 1998); *Lowrey v. State*, 705 So.2d 1367 (Fla. 1998). Here, McKay, as Armstrong admitted, did not deliberate Armstrong's case. McKay, however, she never deliberated (RS-ROA.34 1862-65) thus, she could not have had any impact on the verdict and her answers in *voir dire* are irrelevant at this juncture. Furthermore, the jurors were told not to discuss the case amongst themselves. It is well settled that the jurors are presumed to follow the court's instructions, *Sutton v. State*, 718 So.2d 215, 216 n. 1 (Fla. 1998) (recognizing jury is presumed to follow its instructions absent evidence to the contrary). As a result, McKay's alleged "lack of candor" would have no effect on the jury's deliberations or verdict. As a result, Armstrong cannot show ineffectiveness flowing from counsel's failure to uncover a conviction which McKay refused to disclose when asked by the trial court and prosecutor.[31] This Court should affirm the summary denial of relief.

c. JUROR MARY FAYED – In addition to admitting she had a

[31] Armstrong attempts to make much of the trial court's noting that McKay's failures to disclose were consistent when asked by the court and prosecutor. The point was that Armstrong had not come forward with any suggestion who Rowe was to obtain a different answer from McKay after she had just hidden her conviction from the trial court; Armstrong did not suggest what Rowe could have asked or how he could investigate the matter in the middle of voir dire. Such highlights the insufficiency in Armstrong's pleading as he failed to identify what actions counsel should have taken.

close cousin and friend who were police officers that might affect her, Juror Fayed stated she was capable of voting for a death recommendation only "[a]fter seeing all the evidence and everything;" and she thought she could be fair. (Rs-ROA.21 141-42) Also, she answered in the affirmative when asked if she "could be fair and impartial." (RS-ROA.21 143). Given those record answers, Armstrong did not carry his burden under *Strickland* and *Carratelli* to show counsel was deficient and an actually biased juror sat.

d. JUROR HEATHER HEDMAN-DEVAUGHN – In support of his claim of bias by the juror and ineffectiveness for moving to strike, Armstrong points to Hedman-Devaughn's knowledge of the case and Deputy Sallustio and his family. Armstrong points to the prosecutor's inquiry whether Armstrong was "okay with having her on?" (IB 73; RS-ROA. 280) Armstrong suggests Rowe's response that Armstrong knew everything that was going on as Rowe explained it to him, was vague. (IB 73) However, that does not call into question the trial court's ruling or satisfy the *Strickland* burden. Contrary to Armstrong's claim, the record showed the juror could be fair and impartial.

Hedman-Devaughn disclosed that her brother had been prosecuted in Broward County for a robbery committed 20 years before Armstrong's 2007 penalty phase and that she knew Deputy Sallustio and his wife. In fact, Mrs. Sallustio was Hedman-

Devaughn's secretary. (RS-ROA.22 273-74). The juror admitted she had heard about the case, but averred she would listen to the evidence and believed she could be fair and that she had not made up her mind as to the appropriate penalty. (RS-ROA.22 275, 278). Rowe questioned Hedman-Devaughn further about her fairness/impartiality and heard she believed she could be fair. In response to the question, "other than your knowledge of some of the players, is there any other reason why you don't think you could be fair?" Hedman-Devaughn replied "No." (RS-ROA.22 278-79) **After conferring with Armstrong and co-counsel**, Rowe reported that Armstrong "knows everything that is going on" and indicated Armstrong was fine with having Hedman-Devaughn on his jury and later Armstrong approved of the juror. (R.22 280, 393-96). The jury was instructed that the sentencing recommendation "should be based upon the evidence that has been presented to you in these proceedings." (RS-ROA.30 1458). It is assumed Juror Hedman-Devaughn followed the Court's instructions. *See Sutton*, 718 So.2d at 216 n. 1. As such, Armstrong has not brought forward sworn allegations, that if true, shows a biased juror sat on his jury and counsel was ineffective in not discovering this and striking the juror. This Court should affirm the summary denial of relief.

e. JUROR RACHEL WERTZ – It is Armstrong's complaint that Rowe failed to ascertain whether Wertz's relationship with her

mother-in-law who was a deputy at the courthouse in the civil division would affect her or to ask what her feelings were about Jamaica and Jamaicans. (IB 74). The trial court resolved this issue against Armstrong and the record and law support that ruling.

The record shows that Wertz had two family members charged with murder, her father for shooting an intruder and her cousin for his role as an accomplice in a felony murder. (RS-ROA.22 285-88) Wertz also disclosed that her mother-in-law was a court deputy in the Broward County Courthouse in the civil division (RS-ROA.22 288). She averred that she could be fair, impartial and follow the Court's instructions (RS-ROA.22 289-90, 292). She was willing to listen to all of the evidence and to wait until the end of the case before making a decision. (RS-ROA.22 292). Further, as a senior in high school, she visited Jamaica and worked in an orphanage during her spring break. Rowe noted Wertz knew something of Jamaicans,[32] their circumstances and surroundings. (RS-ROA.22 292). Also, the record shows Rowe consulted with Armstrong before accepting Juror Wertz. (RS-ROA.22295). Armstrong has not made legally sufficient allegations to show *Strickland* deficiency and prejudice and the record refutes any claim that an actually biased juror

[32] This Court will recall that part of Rowe's strategy was to find minorities and/or females that knew something of Jamaica or the Caribbean.

deliberated.

f. JUROR STACY MINCHEW – Armstrong takes issue with Rowe for not being concerned that Minchew had been a state witness in another case and failing to ask her whether she had any negative feelings about defendants and defense counsel. (IB 74-75) Minchew averred she had no problem fulfilling her role in recommending the appropriate penalty for Armstrong who had been found guilty of first-degree murder by another jury. (RS-ROA.21 187-88) The fact that she had been a witness in another case did not cause her to have negative feelings toward the judicial system or the State Attorney's office. (RS-ROA.21 188) More important, Minchew testified she was "not opposed (sic) one way or the other" to the death penalty; she needed to hear facts and evidence before rendering an opinion on the death penalty. She characterized herself as a fair person, one willing to determine what aggravators and mitigators existed and to weigh them in recommending a sentence. **She would recommend the death penalty only if she felt strongly about it; it was a "very serious matter."** (RS-ROA.21 189-90) **While she could recommend death, it was not something that she wanted to do.** (RS-ROA.21 191). Minchew could not think of any reason why she could not be a fair and impartial juror; she was a "very fair person." (RS-ROA.21 191). These are all comments which show an open mind, willingness to follow the law, and to make a sentencing

recommendation based on the facts and law. Actual bias was not shown on the record, in fact, the opposite was clear.

Moreover, when questioned by Rowe, Minchew reaffirmed that she would recommend the death penalty only if she felt it were warranted and she felt the facts were there. She was not opposed to the death penalty. Minchew swore she was "absolutely" prepared to listen to both sides and that she had "absolutely not" made up her mind on which sentence to recommend. She would make that decision only after weighing what she heard and following the Court's instructions. (RS-ROA.21 197-98) It was Minchew's belief that a police officer's life was not more important than someone not in law enforcement. (RS-ROA.21 198) Like Wertz, Minchew had been to Jamaica. (RS-ROA.21 198). Here again, Armstrong has failed to offer facts which show deficiency on counsel's part. Rather, the record refutes completely any suggestion of a biased juror or *Strickland* deficiency or prejudice. Relief was denied properly.

ISSUE II

THE SUMMARY DENIAL OF A PORTION OF ARMSTRONG'S CLAIMS DID NOT DENY HIM DUE PROCESS OR ACCESS TO THE COURTS (restated)

Armstrong admits he was granted an evidentiary hearing on portions of Claims IV and VII and an evidentiary hearing on Claim VII, however, he asserts it was error to deny him an evidentiary hearing on the remaining portions of those claims

and on Claims V and VI. He then proceeds to reargue, in large measure, his challenges to the trial court's resolution of those claims which he raised in the first issue of this postconviction appeal. To the extent that Armstrong reargues the resolution of Claims IV, V, VII here, the State reincorporates its arguemtn form Issue I. With respect to Issue VI, the trial court properly denied the claim of trial court error for not considering the 2001 postconviciton evidence under *Muhammad v. State*, 782 So.2d 343 (Fla. 2001) and ineffective assistance of counsel failing to to ensure that the trial court consider the evidence in sentencing Armstrong. Rule 3.851, Fla.R.Crim.P. provides for summary denial of claims which are procedurally barred, legally insufficient, and/or refuted from the record. Such does not equate to a denial of access to the courts or a denial of due process. The pith of Armstrong's claim is his disagreement with the trial court's resolution. That does not elevate the matter to a constitutional violation. This Court should reject this matter.

It is well settled that claims which are procedurally barred, legally insufficient as pled, or are refuted from the record may denied without an evidentiary hearing. See *Duest v. State*, 12 So.3d 734, 745 (Fla. 2009)(recognizing "postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are

positively refuted by the record.")(*quoting Owen v. State*, 986 So.2d 534, 543 (Fla. 2008) (*quoting Connor v. State*, 979 So.2d 852, 868 (Fla. 2007)). "When evaluating claims that were summarily denied without a hearing, this Court will affirm "only when the claim is 'legally insufficient, should have been brought on direct appeal, or [is] positively refuted by the record.'" *Jackson v. State*, 127 So.3d 447, 459-60 (Fla. 2013) (citations omitted)

"Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Muhammad v. State*, 603 So.2d 488, 489 (Fla. 1992); *Spencer v. State*, 842 So.2d 52, 60-61 (Fla. 2003); *Vining v. State*, 827 So.2d 201, 218 (Fla. 2002). It is inappropriate to use a different argument, such as ineffective assistance of counsel, to re-litigate the same issue raised on direct appeal. State v. Riechmann, 777 So.2d 342, 353 n.14 (Fla. 2000) (finding claims procedurally barred because defendant was couching them in terms of ineffective assistance when they had been raised and rejected on direct appeal); *Medina v. State*, 573 So.2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"); *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995). Procedurally barred claims can be denied without an evidentiary hearing. *Jones v. State*,

855 So.2d 611, 616 (Fla. 2003) (reaffirming that issues which were raised and rejected on direct appeal are procedurally barred in postconviction litigation). All other claims may be summarily denied "when the motion and the record conclusively demonstrate that the movant is entitled to no relief." *Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989).

Armstrong's challenge to the resolute of Claim VI below is without merit. As touched on in Issue I and reincorporated here, Armstrong knowingly, intelligently, and voluntarily waived the mitigation developed in his 2001 postconviction litigation. (2-PCR.8 1365-81) In its place he testified and presented other witnesses in an attempt to humanize himself and show he was a victim of circumstances. *Armstrong*, 73 So.3d at 164-66. As such, the trial court was not required to follow the dictates of *Muhammad*, but instead, to follow *Boyd v. State*, 910 So.2d 167 (Fla. 2005).

The claim of resentencing court error for not following *Muhammad* was found procedurally barred properly. A claim of trial court error was a matter which could have and should have been raised on direct appeal. Having failed to do so barred the claim on collateral review. *See Robinson v. State*, 913 So.2d 514, 524 n. 9 (Fla. 2005) (holding claim of trial court error is procedurally barred on a postconviction appeal because it should have been raised on direct appeal).

The trial court also found the claim meritless and there had not been a complete waiver of mitigation, thus, as this Court reiterated in *Eaglin v. State*, 19 So.3d 936, 945 (2009)there is a distinction between cases where there has been a complete waiver and those where the defendant limited mitigation. Quoting Eaglin, the trial court reasoned

> "the duty of the trial court to consider all mitigating evidence contained in the record to the extent if is 'believable and uncontroverted,' Muhammad v. State, 782 So.2d 343, 363 (Fla. 2001)" was extended "only to cases in which there is a complete waiver of all mitigation." Eaglin, 19 So.3d at 945-46. See also, McCray v. State, 71 So.3d 848, 879-80 (fla. 2001) ("Since Muhammad, this Court has made clear that a trial court is required to implement the Muhammad safeguards only in cases where there is a complete waiver of all mitigation and not where a defendant decides to simply limit mitigation.").

(2-PCR.8 1382)

Continuing, the trial court declined to find counsel ineffective for not following the requirements of *Muhammad* which were inapplicable to Armstrong's case. The court reiterated its prior determination that the record reflected that the resentencing court was aware of the 2001 mitigation presentation. (@-PCR.8 1370, 1383) Armstrong's prior waiver dictated the options he had to challenge his resentencing on collateral review and he was not permitted to swear to one decision at trial and when dissatisfied with the result, swear to the diametrically opposite position on collateral review.

Armstrong had his day in court, his disagreement with the outcome does not prove a constitutional violation or a denial of access to the court. This Court should affirm the denial of postconviciton relief.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail through the e-portal to: Rachel L. Day, Esq., at dayr@ccsr.state.fl.us and Nicole M. Noel, Esq. at noeln@ccsr.state.fl.us this 10th day of July, 2015.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

__/S/ Leslie T. Campbell_____
LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1515 N. Flagler Dr.; Ste. 900
Telephone: (561) 837-5016
Facsimile: (561) 837-5108
CapApp@MyFloridaLegal.com
Secondary e-mail:
Leslie.Campbell@MyFloridaLegal.com

COUNSEL FOR APPELLEE