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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC18-9

DOUGLAS BLAINE MATTHEWS,

Appellant

vs.

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT......................................9

STANDARD OF REVIEW 10

ARGUMENT I & II...14

THE LOWER COURT PROPERLY DETERMINED, AFTER AN EVIDENTIARY HEARING, THAT MATTHEWS WAS NOT ENTITLED TO RELIEF PURSUANT TO *STRICKLAND*, AS PREJUDICE CANNOT BE SHOWN BY THE DISCOVERY OF AN IRRELEVANT FINGERPRINT ON ONE ITEM INSIDE A WALLET FOUND IN MATTHEWS' POSSESSION AT THE TIME OF HIS ARREST.

ARGUMENT III – V & VII......................................23

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE; ALSO, THERE WAS NO REASONABLE PROBABILITY THAT MATTHEWS WOULD HAVE BEEN ACQUITTED.

ARGUMENT VI...35

THE CIRCUIT COURT PROPERLY DENIED, AFTER AN EVIDENTIARY HEARING, THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADDRESS RACE AND DRUG ISSUES DURING VOIR DIRE AS THERE WAS NO DEFICIENCY AND THERE WAS NO REASONABLE PROBABILITY THAT MATTHEWS WOULD HAVE BEEN ACQUITTED.

ARGUMENT VIII...38

THE CIRCUIT COURT PROPERLY DENIED, AFTER AN EVIDENTIARY HEARING, THE CLAIM THAT THE CUMULATIVE EFFECT OF ERRORS TAINED MATTHEWS' TRIAL.

ARGUMENT IX..38

THE LOWER COURT PROPERLY DETERMINED THAT MATTHEWS' CLAIM THAT HE MAY BE INCOMPETENT AT THE TIME OF EXECUTION IS NOT YET RIPE.

CONCLUSION.. 39

CERTIFICATE OF SERVICE......................................40

CERTIFICATE OF TYPE SIZE....................................40

TABLE OF AUTHORITIES

Cases

Berman v. United States,
302 U.S. 211 (1937) 14

Booker v. State,
32 969 So. 2d 186 (Fla. 2007)............................... 13

Bryant v. State/Crosby,
901 So. 2d 810, 821-22 (Fla. 2005).......................... 38

Butler v. State,
100 So. 3d 638, 672 (Fla. 2012).................... 12, 31, 37

Carratelli v. State,
961 So. 2d 312, 324 (Fla. 2007)........................ 35, 37

Chestnut v. State,
538 So. 2d 820, 821-25 (Fla. 1989).......................... 28

Darling v. State/McDonough,
966 So. 2d 366 (Fla. 2007).................................. 32

Elmore v. Ozmint,
661 F. 3d 783, 784 (4th Cir. 2011) 17

Farina v. State,
191 So. 3d 454 (Fla. 2016).................................. 14

Ferrell v. State/Crosby,
918 So. 2d 163, 170 (Fla. 2005)............................. 11

Freeman v. State/Singletary,
761 So. 2d 1055, 1061 (Fla. 2000)...................... 12, 36

Green v. State,
975 So. 2d 1090, 1115-16 (Fla. 2008)........................ 38

Harrington v. Richter,
131 S. Ct. 770, 786 (2011).................................. 18

Henry v. State,
862 So. 2d 679, 682 (Fla. 2003) citing State v. Bias, 653 So. 2d 380, 382 (Fla. 1995)...................................... 28

Hurst v. Florida,
136 S. Ct. 616 (2016) 9

Hurst v. State,
202 So. 3d 40 (Fla. 2016) 13

Insignares v. Florida,
755 F. 3d 1273, 1278 (Fla. 11th Cir. 2014) 14

Johnson v. State,
104 So. 3d 1010, 1029 (Fla. 2012) 38

Jones v. State/Crosby,
845 So. 2d 55, 74 (Fla. 2003) 32

Jones v. State,
709 So. 2d 512 at 521 (Fla. 1998) 19

Kokal v. State,
901 So.l 2d 766, 776 (Fla. 2005) 19

Magwood v. Patterson,
561 U.S. 320 (2010) 14

Matthews v. State,
124 So. 3d 811 (Fla. 2013) 6, 8, 21, 22, 29

Matthews v. Florida,
134 S.Ct. 683, 187 L.Ed. 2d 555 (2013) 8

McKenzie v. State,
153 So. 3d 867 (Fla. 2014) 38

Nelson v. State,
875 So. 2d 579, 583 (Fla. 2004) 13, 24, 26

Nixon v. Singletary,
758 So. 2d 618 (Fla. 2000) 2, 3, 6, 17

Nixon v. State/McDonough,
932 So. 2d 1009, 1018 (Fla 2006) 36

Provenzano v. Dugger,
561 So. 2d 541, 545-46 (Fla. 1990) 25, 27

Provenzano v. State,
751 So. 2d 37 (Fla. 1999) 38

Raleigh v. State/McDonough,
932 So. 2d 1054, 1064 (Fla. 2006) 32

Sims v. State,
754 So. 2d 657, 662 (Fla. 2000) 19

State v. Preston,
376 So. 2d 3, 4 (Fla. 1979) 14

Strickland v. Washington,
466 U.S. 668 (1984) .... passim

Stewart v. State,
801 So. 2d 59, 65 (Fla. 2001) 12, 31, 37

Sweet v. State,
810 So. 2d 854, 863-64 (Fla. 2002) 12, 31, 37

Thompson v. State,
796 So. 2d 511, 515 n. 5 (Fla. 2001) 12, 38

Thompson v. State,
759 So. 2d 650, 668 (Fla. 2000) 38

Trepal v. State,
754 So. 2d 702, 706-07 (Fla. 2000) 14

Valle v. State,
705 So. 2d 1331, 1334-35 (Fla. 1997) 25, 27

Ventura v. State,
794 So. 2d 553 (Fla. 2001) 19

Walton v. State,
3 So. 3d 1000 (Fla. 2009) 13, 23

Whitfield v. State,
923 So. 2d 375, 384 (Fla. 2005) 12, 31, 37

Wike v. State,
813 So. 2d 12, 17 (Fla. 2002) 10, 11, 15

Zommer v. State,
160 So. 3d 368 (Fla. 2015) 38

STATEMENT OF THE CASE AND FACTS

Appellant is in custody and under a sentence of death. He is subject to the lawful custody of the State of Florida pursuant to a valid judgment of guilt entered on May 24, 2010 for the first-degree premeditated murder and felony murder of Kirk Zoeller, the lesser-included offense of manslaughter of Donna Trujillo, and armed burglary of a dwelling.

The Florida Supreme Court summarized the facts established during the guilt phase as follows:

> On the evening of February 20, 2008, Daytona Beach Police Department officers responded to a call that a man was outside an apartment building asking for help. When they arrived on the scene, officers discovered Kirk Zoeller sitting in front of an open apartment door, nonresponsive, covered in blood, and gasping for air with blood pulsing from his neck. The officers entered the apartment and found blood covering the floor and walls. While clearing the apartment, officers discovered Donna Trujillo's body on the bed in the bedroom. The officer who found Trujillo testified that she could not see her body from the main room of the apartment, which consisted of an open kitchen and living room, and that she stood in the bedroom doorway for 10 to 15 seconds before noticing the body because most of it was covered with a pillow. Zoeller and Trujillo were pronounced dead at the scene. According to the medical examiner, both victims had been stabbed to death.
>
> Later that evening, acting on a tip, officers went to the home of Theresa Teague. Teague allowed the officers into her home and consented to a search. Inside, officers saw bloody sneakers and jeans in plain view on the floor and found Matthews, dressed only in boxers and socks, hiding under a pile of clothes in the bedroom. Officers obtained and executed a search warrant for Teague's home and found a bloody shirt in a clear plastic bag and Kirk Zoeller's wallet together inside a different bag.

Matthews made a statement to police detectives outside of Teague's house, which Matthews' trial counsel admitted into evidence at trial. Matthews told detectives that Kirk Zoeller killed Donna Trujillo and attacked him over drugs. Once detectives informed Matthews that Zoeller was dead, Matthews stated that he killed Zoeller in self-defense.

Matthews was indicted for the first-degree premeditated and felony murders of Kirk Zoeller and Donna Trujillo and for burglary while armed.

During the guilt phase, Justin Wagner, who sold drugs from and was present in Trujillo's apartment when she and Kirk Zoeller were killed, testified. Wagner explained that Matthews, Zoeller, and Trujillo went into the bedroom of Trujillo's apartment together. A few minutes later, Wagner said that he heard everyone "freaking out" and screaming and saw Matthews chase Zoeller out of the bedroom with a knife. Wagner testified that Matthews was clearly the aggressor. Before Wagner fled the apartment in fear for his life, he testified that he saw Matthews on top of Zoeller, repeatedly stabbing Zoeller and pulling him back as Zoeller, who was begging for help, tried to flee the apartment. Wagner also testified that he saw Matthews with a big buck knife on the day Zoeller and Trujillo were killed and that they had used Matthews' knife to cut crack cocaine together earlier that day. Wagner further testified that, after witnessing Matthews attack Zoeller, he fled to Theresa Teague's home but hid outside when he heard Matthews arrive. While hiding, Wagner said he saw Matthews remove his shirt and put it in a clear plastic bag outside of Teague's house.

Theresa Teague also testified to incriminating statements that Matthews made to her on the night Kirk Zoeller and Donna Trujillo were killed. Teague said that, before the police arrived at her home looking for Matthews, she and Matthews went outside after they saw police and helicopter search lights and Matthews said, "That's for me." When Teague pressed him for details, she said that Matthews told her that he "ran into a couple of people that probably wish they had not run into him that evening" and that he "just eliminated a

couple of problems.” In addition, Teague testified that she had given Matthews a knife about nine to twelve inches long days before Zoeller and Trujillo were killed.

The crime scene investigator testified that he collected the bloody sneakers, bloody jeans, bloody shirt, and Kirk Zoeller's wallet from Theresa Teague's home and that he found a traffic citation with Matthews' name on it inside the pocket of the jeans. He also testified that he took pictures of Matthews the day of his arrest and that Matthews did not have any knife cuts or fresh injuries on his body.

Testimony linked the bloody clothes and shoes to Matthews. The DNA analyst testified that “wearer” DNA on the bloody shirt and sneakers matched Matthews' DNA and that the blood on the shirt, jeans, and sneakers matched Kirk Zoeller's. She also testified that swabs from four of Matthews' fingers revealed blood that matched Zoeller's and that one of the swabs also contained blood that was a possible match to Donna Trujillo's. The police officer who issued the traffic citation found in the pocket of the bloody jeans identified Matthews as the person to whom he had issued the citation.

The medical examiner testified that Kirk Zoeller had been stabbed to death and that he had 24 stab wounds to the head, neck, chest, and back and two defensive wounds on his forearms. She testified that Zoeller's stab wounds were up to six inches deep and that one wound was inflicted with such force that the tip of the knife broke off in his skull. The medical examiner also testified that Donna Trujillo had been similarly stabbed to death and that she had 11 stab wounds to the head, neck, and chest. The medical examiner testified that, in her experience, it was unusual for stabbing victims to have stab wounds to their heads. She also testified that both victims would have felt pain as they were being stabbed and would have remained conscious for a period of minutes before passing out due to blood loss and then would have remained alive for an additional period of minutes before their deaths.

Matthews testified that he acted in self-defense. He admitted to doing drugs on the day Donna Trujillo and

Kirk Zoeller were killed and stated that he went to Trujillo's apartment with Justin Wagner to trade cocaine for morphine pills. However, Matthews testified that Zoeller and Trujillo were arguing and went into the bedroom together while he stayed in the living area of the apartment's main room with Wagner. Matthews said it then got quiet and Zoeller came out of the bedroom into the main room of the apartment and started a fight with him over drugs. Matthews denied having a knife and denied that Theresa Teague ever gave him a knife. Matthews testified that Zoeller had the knife and that he took it away from Zoeller while they were fighting. At some point during their fight, Matthews said that he pinned Zoeller against the wall and saw Donna Trujillo's body on the bed. At that point, Matthews testified that he became afraid for his life because he saw what Kirk Zoeller did to Donna Trujillo. Then, Matthews testified that Zoeller kicked him and he “blacked out,” “snapped,” and started swinging at, but not stabbing, Zoeller. Matthews also claimed that several of the photographs in evidence taken by the crime scene investigator showed injuries he suffered during his fight with Zoeller, including a cut on his abdomen.

In addition, Matthews testified that he dropped the knife inside the front door of Donna Trujillo's apartment and fled to Theresa Teague's home, where he washed the blood off of his body in her bathroom. On cross-examination, Matthews acknowledged that he failed to include in his statement to detectives that he was injured during his fight with Kirk Zoeller and that he had “blacked out.” But he denied taking Kirk Zoeller's wallet and testified that he did not know how his bloody shirt ended up in a bag with Zoeller's wallet inside Teague's home. Matthews also admitted to removing his clothes, hiding from police, and telling Teague that the police and helicopter lights were for him. However, he denied that he made the statements to Teague about “run[ning] into a couple of people” and “eliminat[ing] a couple of problems.”

The jury found Matthews guilty of the first-degree premeditated and felony murder of Kirk Zoeller, of the lesser-included offense of manslaughter of Donna Trujillo, and of burglary while armed.

At the penalty phase, the State presented the testimony of several of Zoeller's friends and family, Matthews' probation officer, a North Carolina deputy, and the victim of a robbery that Matthews committed in North Carolina. The probation officer testified that, at the time of Zoeller's murder, Matthews was on felony probation for cocaine possession, and the State introduced the related judgment. The North Carolina deputy testified that Matthews confessed to robbing a convenience store in 1999, and the State introduced the judgment and sentence related to that felony conviction. The victim of an unrelated 2002 robbery testified that Matthews beat and urinated on him in his own home, robbed him, and left him bloody and unconscious on the floor, and the State introduced the judgment and sentence related to that felony conviction.

The defense, during the penalty phase, presented the testimony of several members of Matthews' family, Matthews' childhood friend, and two expert witnesses- a psychiatrist and a neuropsychologist. Matthews' family testified that he is a loving person who had a difficult childhood filled with behavioral and mental health problems for which he received counseling and medication and was sent to camps and a group home. They also testified that Matthews suffered head injuries from a traumatic birth, from a childhood bicycle accident, and from being beaten with a brick. In addition, Matthews' brother testified that a stepfather physically abused Matthews.

The psychiatrist testified that Matthews was diagnosed with ADHD, conduct disorder, depression, dysthymia as a child, for which he was prescribed Prozac and Ritalin. He also testified that Matthews has a family history of mental illness, was exposed to violence as a child, had possible head trauma but did not appear to have severe cognitive defects, and has a history of alcohol and drug abuse, including in the days before and on the night of Kirk Zoeller's murder. The psychiatrist diagnosed Matthews with antisocial personality disorder and said he believed that Matthews also suffers from bipolar disorder but that he could not make that diagnosis because he did not observe Matthews in a manic state. However, the psychiatrist testified that the jail was medicating Matthews with Risperdal and Depakene, which

> are used to treat bipolar disorder. The psychiatrist testified that he did not disagree that Matthews knew right from wrong when he committed the murder, and he agreed that Matthews could choose to abide by the law and not to commit murder. The neuropsychologist testified that Matthews has an I.Q. of 104 and, though he has mild attentional issues, Matthews has no major cognitive problems.

Matthews v. State, 124 So. 3d 811, 812-14 (Fla. 2013).

After being found guilty of first-degree premeditated murder and felony murder of Kirk Zoeller and the lesser-included offense of manslaughter of Donna Trujillo as well as armed burglary of a dwelling, on May 28, 2010, the jury returned a 10-2 recommendation for a sentence of death. The *Spencer*[1] hearing was held August 5, 2010. Matthews was sentenced to death on August 12, 2010.

The trial court found and assigned weight to four (4) aggravating and forty (40) mitigating circumstances. As noted by this Court, the trial court found the following aggravating circumstances applied:

> (1) the capital felony was especially heinous, atrocious, or cruel (extremely great weight); (2) Matthews had been previously convicted of two prior unconnected violent felonies (great weight); (3) Matthews committed the capital felony while he was engaged in the commission of a burglary and Matthews committed the capital felony for pecuniary gain (considered as one aggravator and given significant weight); and (4) Matthews was on felony probation at the time of the capital felony (little weight).

Matthews v. State, 124 So. 3d 811, 816 n. 3 (Fla. 2013).

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[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

The trial court found two statutory mitigators: (1) the capital felony was committed while Matthews was under the influence of extreme mental or emotional disturbance (little weight); and (2) Matthews' substantially impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law (little weight). In addition, the trial court found the following nonstatutory mitigators: (1) long history of mental health problems (great weight); (2) treated for mental health issues from 1994 through 2005 (great weight); (3) suffered a head injury from a bicycle fall (some weight); (4) grew up without a true father figure (slight weight); (5) loved by his mother (slight weight); (6) loved by his brothers and sister (slight weight); (7) capacity to maintain loving relationships with family members before and during incarceration (slight weight); (8) has a young daughter (slight weight); (9) has the capacity to have long lasting relationships with friends (slight weight); (10) exhibited good behavior during trial (slight weight); (11) received a G.E.D. (slight weight); (12) long history of abusing multiple types of illegal drugs (slight weight); (13) was high on hallucinogenics, cocaine, and pot on the night of the murder (significant weight); (14) has drawn multiple pictures of his niece and daughter (slight weight); (15) was remorseful and apologized in court (slight weight); (16) had a traumatic birth that included a head injury (slight weight); (17) medicated with Ritalin and Prozac as a child (slight weight); (18) physically abused by his step dad as a young child (slight weight); (19) severely beaten with a brick in 2002 and hospitalized (some weight); (20) received a certification of recognition for an art exhibit (slight weight); (21) has a graduation certificate from the South Fork school (slight weight); (22) bullied by others because of a stuttering problem (slight weight); (23) went to counseling starting at age nine (some weight); (24) diagnosed with attention deficit hyperactivity disorder as a child (slight weight); (25) put in a residential group home as a child (some weight); (26) put in a camp program as a child (slight weight); (27) was in R.O.T.C. while in school (slight weight); (28) received a certificate of award from middle school (slight weight); (29) received the Young Citizen Award/Officer Friendly Program (slight

> weight); (30) received a certificate of completion from the D.A.R.E. program (slight weight); (31) made the honor roll in 1997 twice (slight weight); (32) assisted a friend with finding a lost pet (slight weight); (33) is known as a good hearted person by a long-time friend (slight weight); (34) raised in a single parent home with little adult supervision (slight weight); (35) assisted his brother by stopping someone from hurting his brother (slight weight); (36) witnessed violent behavior in the home while growing up (some weight); (37) has a long history of prior drug abuse (some weight); and (38) is receiving medication for a bipolar disorder (some weight).

Matthews v. State, 124 So. 3d 811, 816 n. 4 (Fla. 2013).

On direct appeal, this Court affirmed the convictions and the sentence of death. *Matthews v. State*, 124 So. 3d 811 (Fla. 2013). The United States Supreme Court denied certiorari on December 2, 2013. *Matthews v. Florida*, 134 S.Ct. 683, 187 L.Ed. 2d 555 (2013).

Matthews filed his original Motion to Vacate Judgments of Conviction and Sentence on November 21, 2014. At a case management conference held April 14, 2015, the State conceded the need for an evidentiary hearing on claims IIA, IIB, and III, and the Circuit Court granted leave to amend claims IA, IB, IC, ID, IE, IF, IG and IIC. The Circuit Court denied claim IV as premature. Matthews filed his First Amended Motion to Vacate Judgments of Convictions and Sentences on May 29, 2015. The state filed its response on June 29, 2015. The first part of the evidentiary hearing was held on December 7, 2015, after which Matthews' was granted leave by the Circuit Court to file a second amended motion to vacate judgments

of conviction of sentence (hereinafter "Second Motion") based upon *Hurst v. Florida*, 136 S. Ct. 616 (2016). Matthews' filed the Second Motion on March 11, 2016. The State filed its response on March 15, 2016. The remainder of the evidentiary hearing was held March 22-24, 2016. On December 5, 2017, the Circuit Court issued its ruling on Matthews' Second Amended Motion to Vacate Judgments of Convictions and Sentences. The ruling granted Matthews a new penalty phase but denied the guilt phase issues. Matthews' filed the instant appeal as to the guilt phase issues. Matthews filed his brief on July 16, 2018. This response follows.

SUMMARY OF THE ARGUMENT

Arguments I & II- The lower court properly determined that Matthews was not entitled to relief based on newly discovered evidence nor *Strickland*, as prejudice cannot be shown by the discovery of an irrelevant fingerprint on one item inside a wallet found in Matthews' possession at the time of his arrest. This Court should affirm the lower court's order denying postconviction relief.

Arguments III-V & VII The lower court properly determined that trial counsel was not ineffective during the guilt phase and that there was no reasonable probability that Matthews would have been acquitted. This Court should affirm the lower court's order denying postconviction relief.

Argument VI- The lower court properly determined that trial counsel was not ineffective during voir dire and that there was no reasonable probability that Matthews would have been acquitted. This Court should affirm the lower court's order denying postconviction relief.

Argument VIII- The lower court properly determined that since there was no individual error, there was no cumulative error. This Court should affirm the lower court's order denying postconviction relief.

Argument IX- The lower court properly determined that Matthews claim that he may be incompetent at the time of execution is not yet ripe. This Court should affirm the lower court's order denying postconviction relief.

STANDARD OF REVIEW

Claims of ineffective assistance of counsel are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). As recognized in *Wike v. State*, 813 So. 2d 12, 17 (Fla. 2002), to establish a claim that defense counsel was ineffective, a defendant must prove two elements: First, Matthews 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 Matthews by the Sixth Amendment. Second, Matthews must show that the deficient

performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive Matthews 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.

In order to establish deficient performance under *Strickland*, Matthews "must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." 466 U.S. at 688; *see Wike*, 813 So. 2d at 17. In order to establish the prejudice prong under *Strickland,* "[t]he 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." 466 U.S. at 694; *see Wike*, 813 So. 2d at 17.

Failure to establish either prong results in a denial of the claim. *Ferrell v. State/Crosby*, 918 So. 2d 163, 170 (Fla. 2005). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. A defendant fails to establish

the prejudice prong by failing to advance any argument concerning prejudice. As such, he is not entitled to relief under *Strickland*, and this Court need not reach the deficiency prong. *See Whitfield v. State*, 923 So. 2d 375, 384 (Fla. 2005) ("[B]ecause the *Strickland* standard requires establishment of both [deficient performance and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong.") (quoting *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001)); *see also Sweet v. State*, 810 So. 2d 854, 863-64 (Fla. 2002) (declining to reach deficiency prong based on finding that there was no prejudice).

The burden is on Matthews to establish a legally sufficient claim. *See Freeman v. State/Singletary*, 761 So. 2d 1055, 1061 (Fla. 2000); *Nixon v. State/McDonough*, 932 So. 2d 1009, 1018 (Fla. 2006). The rule of sufficiency is equally applicable to claims of ineffective assistance of counsel. Conclusory allegations of ineffective assistance of counsel are legally and facially insufficient to require relief under *Strickland*; *Thompson v. State*, 796 So. 2d 511, 515 n.5 (Fla. 2001). When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the

witnesses who would have testified prejudiced the case." *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004), cited in *Bryant v. State/Crosby*, 901 So. 2d 810, 821-22 (Fla. 2005) (concluding that a 3.851 claim of ineffective assistance was legally insufficient where the substance of the testimony was not described in the motion and the motion did not allege the specific facts to which the witness would testify). If testimony is cumulative, a defendant must specify what the precise testimony of each new witness would be, how his testimony would have differed from the experts who testified at trial, or how counsel was deficient in selecting the witnesses who did testify. *See Booker v. State*, 32 969 So. 2d 186 (Fla. 2007). If a claim is insufficiently pled, a defendant should be given leave to amend his claim; however, if the claim is not amended, then the denial may be with prejudice. *See Nelson v. State*, 875 So. 2d 579, 583-84 (Fla. 2004).

Summary denial of claims for postconviction relief is reviewed by this Court *de novo*, accepting the Appellant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively establishes that the Appellant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009).[2]

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[2] The State questions whether this Court has jurisdiction over this appeal given the trial court's order vacating Matthews' penalty phase pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See State v. Preston*, 376 So. 2d 3, 4 (Fla. 1979) (declining to hear an interlocutory appeal from a murder

ARGUMENT
ISSUES I & II

THE LOWER COURT PROPERLY DETERMINED, AFTER AN EVIDENTIARY HEARING, THAT MATTHEWS WAS NOT ENTITLED TO RELIEF BASED ON NEWLY DISCOVERED EVIDENCE NOR PURSUANT TO *STRICKLAND*, AS PREJUDICE CANNOT BE SHOWN BY THE DISCOVERY OF AN IRRELEVANT FINGERPRINT ON ONE ITEM INSIDE A WALLET FOUND IN MATTHEW'S POSSESSION AT THE TIME OF HIS ARREST.

Matthews alleges that newly discovered evidence of Justin Wagners' fingerprints, found on a post-it note located in the victim's wallet, is of such a compelling nature that it would probably produce an acquittal at retrial and that trial counsel was ineffective for failing to hire a fingerprint expert. These claims are meritless as this evidence is of no value in this case in light of the facts on record.

Ineffective Assistance of Counsel

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trial because a death sentence was not imposed); *Trepal v. State*, 754 So. 2d 702, 706-07 (Fla. 2000) (exercising jurisdiction over an interlocutory appeal from a capital postconviction proceeding because a death sentence was imposed); *cf. Farina v. State*, 191 So. 3d 454 (Fla. 2016). As there is no final judgment and sentence in Matthews' case, his appeal is untimely and this Court lacks jurisdiction to hear it. Holding Matthews' appeal in abeyance will moot any jurisdictional challenges and prevent the possible relitigation of his guilt phase claims in the future.
Moreover, a judgment and sentence are not intended to be litigated separately. When a sentence is vacated, the related judgment is also vacated. *Berman v. United States*, 302 U.S. 211 (1937). If Matthews' guilt phase claims are litigated absent a valid judgment, he could potentially relitigate those claims after his sentence is re-imposed, wasting valuable state and judicial resources. *See Magwood v. Patterson*, 561 U.S. 320 (2010); *Insignares v. Florida*, 755 F.3d 1273, 1278 (Fla. 11th Cir. 2014). For these reasons, this appeal is untimely until Matthews is resentenced and a new judgment is entered. Accordingly, the State prays this Court hold Matthews' appeal in abeyance pending completion of resentencing.

Matthews argues that trial counsel was deficient for failing to discover Wagner's fingerprint on Zoeller's wallet and for failing to hire a fingerprint expert because Wagner's fingerprint supports Matthews' assertion that he did not take the wallet, and undermines the State's theory of intent for first degree murder and that the murders were committed during the course of a felony. This failure was neither deficient nor did it prejudice Matthews.

Under *Strickland*, to establish a claim that defense counsel was ineffective, a defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. In order to establish deficient performance under *Strickland*, Matthews "must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." 466 U.S. at 688; *see Wike*, 813 So. 2d at 17. In order to establish the prejudice prong under *Strickland,* "[t]he 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."

Mr. Nielson testified at the evidentiary hearing that he viewed the evidence before the trial. PCR 1:51. There was no need to consult a fingerprint expert. PCR 1:111. Mr. Nielson did concede that it may have been helpful if Mr. Wagner's prints were found **on** the wallet. However, Mr. Nielson also testified that Matthews gave

Mr. Wagner some items to hold for him, and it would not be surprising if his fingerprints were on the wallet. Therefore, Mr. Wagner's print on the wallet may not have made a difference in undermining the State's assertion that Matthews took the wallet. PCR 1:111-112. The fingerprint expert, Kenneth Zercie, testified the wallet was not conducive to retaining prints as the leather was too porous. PCR 3:211. Therefore, neither Matthews' nor Mr. Wagner's prints would be found on the wallet.

Strickland states; "…counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgement." *Strickland* at 2066. Mr. Nielson testified that because the evidence supported Matthews' claim of self-defense, he saw no need to consider other investigative leads. This was a reasonable decision based on the facts and evidence he was provided.

Even if this court were to decide that Mr. Nielson did not conduct a thorough investigation, that does not mean his performance was deficient. *Strickland* clearly states that, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable;

and strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation." *Id.* Matthews contends that, because of trial counsel's failure to obtain a fingerprint expert, he was deprived of evidence that would have created reasonable doubt. Matthews argues that Mr. Wagner's fingerprints on the post-it note inside the wallet undermine Mr. Wagner's testimony at trial, claiming that Mr. Wagner's denial of taking the wallet is false given the fact that his fingerprint was found on an item in the wallet. This evidence does no such thing. There could be many reasons why his fingerprints were on the post-it note. Mr. Wagner himself provided plausible explanations. Mr. Wagner testified that Kirk Zoeller either handed him the post-it note to write down a telephone number or to put drugs on. Depending on the type of drug, if you touch it the drugs could dissolve. Items are used to scoop drugs up, such as a post-it note. PCR 3:380.

Matthews likens his case to that of *Elmore v. Ozmint,* 661 F.3d 783, 784 (4th Cir. 2011), where the 4th Circuit Court of Appeals ruled that trial counsels' failure to investigate the state's forensic evidence constituted ineffective assistance of counsel. In *Elmore*, Elmore maintained that he did not commit the murder. Trial counsel admitted that he never considered another

person as a possible suspect because he thought it was ludicrous that this person could be involved. Trial counsel also admitted that he made no inquiry into the evidence collected because he had the utmost respect for the Police Department and Prosecution, and only looked at the evidence a few days before trial. The court noted that the situation in Elmore was one of the exceptional cases of "extreme malfunctions in the state criminal justice systems." (Quoting *Harrington v. Richter,* 131 S.Ct. 770, 786 (2011)). This is clearly distinguishable from Mr. Nielson's actions, especially given the fact that Matthews admitted to killing Kirk Zoeller.

Further, Matthews has failed to demonstrate prejudice, especially considering the other evidence implicating him in the murders, such as Matthews' confession, the police finding bloody sneakers and jeans in plain view, as well as Matthews in his boxer shorts and socks hiding under a pile of clothes, a bloody shirt in a clear plastic bag with Mr. Zoeller's wallet, and considering the testimony of Mr. Wagner that he saw Matthews stabbing Mr. Zoeller (including multiple stabs in the back) and the incriminating statements made by Matthews to Theresa Teague that he "ran into a couple of people that probably wish they had not run into him that evening" and that he "just eliminated a couple of problems", coupled with Ms. Teague's testimony that she had given Matthews a knife days before the murders. Mr. Wagner's fingerprints on the

post-it note does nothing to undermine the confidence in the outcome of the trial. Matthews cannot be found to have been prejudiced by trial counsel's failure to present this evidence in light of the totality of the circumstances.

Newly Discovered Evidence

In order to set aside a conviction based on newly discovered evidence, Matthews must demonstrate that the evidence was unknown by the parties, could not have been discovered by the exercise of due diligence and the evidence is of such a nature that it would probably produce an acquittal on retrial. *Jones v. State*, 709 So. 2d 512 at 521 (Fla. 1998). The elements under *Jones* apply to the penalty phase as well in that the evidence would have to be of such a nature that it would probably have resulted in a lesser sentence. *Ventura v. State*, 794 So. 2d 553 (Fla. 2001).

When assessing the impact of this evidence at a retrial or resentencing, a court must also take into account all other evidence previously presented at trial as well as any other evidence presented in previous postconviction proceedings. *See Kokal v. State*, 901 So. 2d 766, 776 (Fla. 2005)(explaining that when conducting an analysis of newly discovered evidence, courts must evaluate that evidence along with evidence from the trial as well as evidence presented at prior evidentiary hearings); *Sims v. State*, 754 So. 2d 657, 662 (Fla. 2000)(explaining that in order

for trial courts to obtain a "total picture" for purposes of establishing the effect of "newly discovered evidence" trial courts must, "consider the newly discovered evidence in conjunction with the newly discovered evidence at the prior proceedings and then compare with evidence introduced at trial.").

The Circuit Court granted an evidentiary hearing on this claim after which it correctly concluded that the evidence was not of such a nature that it would probably produce an acquittal on retrial. In doing so, the Circuit Court noted as follows:

> The testimony from trial indicates that the police obtained a search warrant for Theresa Teague's home…Ms. Teague was the girlfriend and Mr. Matthews was found hiding in the home. Testimony indicated that when they searched the premises, the search yielded a shirt, jeans, and sneakers that were covered in Kurt Zoeller's blood and that they also found Mr. Zoeller's wallet. It is noted that Mr. Matthews had previously told the detectives that he had killed Mr. Zoeller in self-defense. Additionally, at the evidentiary hearing, Mr. Wagner offered at least a reasonably plausible explanation for why his fingerprints were found on that Post-it note…he indicated that they could have been found there because, possibly, Mr. Zoeller had asked him to write down a phone number on that Post-it note or that they might have used the Post-it note to exchange drugs or pass drugs back and forth…it is noted that in Mr. Matthews original statement to police that he in no way suggested that Mr. Wagner committed the crime.

(12/5/17 Order, page 25-26).

The Circuit Court was correct. Finding someone's fingerprint on an item located inside a murder victim's wallet is significantly different than finding their fingerprint *on the wallet itself*,

particularly when evaluating culpability for the theft of the wallet. Of significant importance to the evaluation of this new evidence is the undisputed fact that **the victim's wallet was found in a house where Matthews was found hiding shortly after the owner of the wallet was stabbed to death, admittedly by Matthews**. Matthews fails to explain how the print found on the post-it note would undermine the fact that the wallet was never found to be in Wagner's actual or constructive possession at any time (only the post-it note itself can be linked to Wagner).

Further, even if the fingerprint would be admissible at a new guilt phase, it does not in any way overcome the overwhelming evidence of Matthews' guilt including Matthews' own **admission** that he killed Zoeller and the testimony of Mr. Wagner, an eye witness to the murder. His testimony, which was recounted by this Court on direct appeal, was as follows:

> Wagner explained that Matthews, Zoeller, and Trujillo went into the bedroom of Trujillo's apartment together. A few minutes later, Wagner said that he heard everyone "freaking out" and screaming and saw Matthews chase Zoeller out of the bedroom with a knife. Wagner testified that Matthews was clearly the aggressor. Before Wagner fled the apartment in fear for his life, he testified that he saw Matthews on top of Zoeller, repeatedly stabbing Zoeller and pulling him back as Zoeller, who was begging for help, tried to flee the apartment. Wagner also testified that he saw Matthews with a big buck knife on the day Zoeller and Trujillo were killed and that they had used Matthews' knife to cut crack cocaine together earlier that day.

Matthews v. State, 124 So. 3d 811, 812-14 (Fla. 2013).

The jury also heard the testimony of Ms. Teague, to whom Matthews made admissions. Her testimony, which was recounted by this Court on direct appeal, was as follows:

> Teague said that, before the police arrived at her home looking for Matthews, she and Matthews went outside after they saw police and helicopter search lights and Matthews said, "That's for me." When Teague pressed him for details, she said that Matthews told her that he "ran into a couple of people that probably wish they had not run into him that evening" and that he "just eliminated a couple of problems." In addition, Teague testified that she had given Matthews a knife about nine to twelve inches long days before Zoeller and Trujillo were killed.

Matthews v. State, 124 So. 3d 811, 812-14 (Fla. 2013).

In addition, **Matthews' own guilt phase defense was that he killed Zoeller but that the crime was self-defense.** It is against this very damaging background, that this court must assess the impact of the fingerprint. There is no reasonable probability that the fingerprint would result in an acquittal or a lesser sentence. The meager fingerprint is irrelevant and in direct contradiction to the overwhelming and consistent evidence presented at trial and in the collateral proceeding that Matthews killed Mr. Zoeller in a premeditated manner as well as in a manner consistent with felony murder. The Circuit Court was correct that "the prints would not have had much evidentiary value because the wallet was found in Matthews' possession at the time he was arrested" and "even if this had been discovered in advance and had been presented to the

jury that Mr. Wagner's fingerprints were found on the Post-it note in Mr. Zoeller's wallet, it would not have probably produced an acquittal." (12/5/17 Order, page 14). The Circuit Court's denial of these issues should be upheld.

ISSUES III-V & VII

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE; ALSO, THERE WAS NO REASONABLE PROBABILITY THAT MATTHEWS WOULD HAVE BEEN ACQUITTED.

Matthews alleges that the circuit court erred when it summarily denied claims regarding ineffective assistance of counsel for failing to employ a crime scene expert or medical examiner, failing to investigate or properly cross-examine witnesses, failing to investigate Matthews' mental health at the time of the crime, and failing to preserve a cause challenge during jury selection. Summary denial of claims for postconviction relief is reviewed by this Court *de novo*, accepting the Appellant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively establishes that the Appellant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009).

(III) Failing to employ a crime scene expert or medical examiner

Matthews claims that trial counsel's assistance was ineffective because counsel failed to hire a crime scene expert or

medical examiner. In regard to the crime scene expert, this assertion is based on the claim that Barie Goetz would have testified that Matthews' assertion at trial that he could see into the bedroom where Ms. Trujillo's body was found from where he struggled with Mr. Zoeller before killing Mr. Zoeller was possible which would have supported Matthews' self-defense claim and that Goetz would have testified that the crime scene photographs did not show evidence of a struggle in the bedroom, which contradicts what Wagner testified to in trial.

When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case." *Bryant v. State*, 901 So. 2d 810, 821 (Fla. 2005) *citing Nelson v. State,* 875 So. 2d 579, 583 (Fla. 2004).

As to the purported testimony of Goetz regarding the crime scene photographs not showing evidence of a struggle in the bedroom, this testimony would have been cumulative to the photographs themselves and also to the testimony of Detective Robert Kay. As acknowledged by the defense in their brief (page 35) Detective Kay testified at trial that "there was really no blood spatter on the floor, and nothing on the walls, of the

bedroom." Failing to present cumulative evidence is not ineffective assistance of counsel. *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990).

As to the purported testimony of Goetz regarding whether Matthews' could see into the bedroom where Ms. Trujillo's body was found from where he struggled with Mr. Zoeller before killing Mr. Zoeller, and as to the purported testimony of Dr. Spitz who would have testified that while the wounds may indicate a similar weapon was used on both victims, the wound patterns do not indicate who the perpetrator was and whether the victims were definitively killed by the same person, neither testimony would do anything to undermine the State's theory or otherwise support Matthews' self-defense claim in light of Matthews' admission to being Zoeller's killer combined with testimony of Ms. Teague to the incriminating statements made by Matthews that he "ran into a couple of people that probably wish they had not run into him that evening" and that he "just eliminated a couple of problems", as well as the irrefutable testimony of the medical examiner who established that Zoeller was violently stabbed 24 times, <u>including multiple stabs in the back</u>. Such testimony would utterly fail to undermine the reliability of the results of Matthews' trial, thus fail to establish prejudice as required by *Strickland.* Matthews' vague and

conclusive argument does nothing to demonstrate “how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case.” *Bryant v. State*, 901 So. 2d 810, 821 (Fla. 2005) citing *Nelson v. State,* 875 So. 2d 579, 583 (Fla. 2004). Further, this claim failed to meet the specificity standards set forth by this Court in *Bryant* and *Nelson* and did not present a facially sufficient claim of ineffective assistance of counsel. The circuit court’s summary denial was appropriate.

(IV) Failing to investigate or properly cross-examine witnesses

Matthews claims that trial counsel’s assistance was ineffective because counsel failed to impeach Justin Wagner with his prior convictions. This claim was conclusively refuted by the record. Both the State and the defense elicited the fact that Wagner had two shoplifting convictions. (V16, R1285, 1311). Defense counsel established during cross that Wagner had done things in the past that he was “not really proud of.” (V16, R1298). Defense counsel also established that Wagner was a drug dealer and a drug user at the time he witnessed the murder. (V16, R1291, 1293).

Also conclusively refuted by the record, is Matthews’ claim that his counsel did not confront Wagner on his inconsistent statements. During cross examination, Wagner explained to counsel

that he initially lied to the police because he was "scared," "wanted nothing to do with [the situation,]" and was in possession of morphine at the time. (V16, R1299). The State also confronted Wagner about his inconsistent statements (V16, R1263) and defense counsel impeached Wagner regarding his prior statement that Mr. Zoeller fell in his lap. (V16, R1305). Further, trial counsel's cross examination elicited impeachment evidence regarding the fact that Wagner received help from the State Attorney's Office with changing one of his court dates. (V16, R1295). Any additional impeachment of Wagner would have merely been cumulative. Failing to present cumulative evidence is not ineffective assistance of counsel. *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990).

Matthews claims that trial counsel's assistance was ineffective because counsel failed to impeach Officer Penny Dane who testified that, based on her observations, it was impossible for Matthews to have seen the body of Ms. Trujillo lying on the bed from where he struggled with Mr. Zoeller; Matthews' asserts a crime scene photograph proves he could have seen Ms. Trujillo and that trial counsel was ineffective for failing to use that photograph to cross-examine Officer Dane. Matthews fails to even identify the photograph that allegedly belies Dane's opinion. Further, this claim fails because Matthews is unable to establish

prejudice in light of Matthews' admission to being Zoeller's killer combined with the testimony of Ms. Teague of the incriminating statements made by Matthews that he "ran into a couple of people that probably wish they had not run into him that evening" and that he "just eliminated a couple of problems", as well as the testimony of the medical examiner that Zoeller was stabbed 24 times, including multiple stabs in the back. Such cross-examination would utterly fail to undermine the reliability of the results of Matthews' trial, thus fail to establish prejudice as required by *Strickland.* Summary denial was appropriate.

(V) Failing to investigate mental health at time of murder

Matthews claims trial counsel failed to provide their mental health experts with adequate information in order to make accurate diagnoses and further support the trial counsel's theory of the case. This claim was properly summarily denied as facially deficient because it failed to identify any conclusions Dr. Danziger would have reached that could legally be considered by the jury when assessing Matthews' guilt. Matthews notes that jail records show that Matthews has bipolar disorder and **possibly** schizophrenia with paranoid aspects and claims these disorders can alter a person's perceptions of a situation and this could have assisted trial counsel in explaining why Mr. Matthews reacted to the threat in the manner that he did. However, this argument fails

because Matthews' sanity was never raised and **Florida law does not recognize a "diminished capacity" defense to murder.** *Henry v. State*, 862 So. 2d 679, 682 (Fla. 2003) *citing State v. Bias,* 653 So. 2d 380, 382 (Fla. 1995); *Chestnut v. State,* 538 So. 2d 820, 821-25 (Fla. 1989) (emphasis added).

Further, Matthews' own trial testimony as to how and why he reacted to the alleged threat from Zoeller was unambiguous.

> Matthews testified that Zoeller had the knife and that he took it away from Zoeller while they were fighting. At some point during their fight, Matthews said that he pinned Zoeller against the wall and saw Donna Trujillo's body on the bed. At that point, Matthews testified that he became afraid for his life because he saw what Kirk Zoeller did to Donna Trujillo. Then, Matthews testified that Zoeller kicked him and he "blacked out," "snapped," and started swinging at, but not stabbing, Zoeller.

Matthews, 124 So. 2d at 813-14. There can be no "conclusion" Dr. Danziger could have reached that would have helped the jury assess guilt in the instant case, particularly in light of Matthews' straightforward explanation as to why he reacted the way he did to Mr. Zoeller. Furthermore, any mental health opinion regarding Matthews' state of mind during the incident would have done nothing to bolster the credibility of Matthews' version of the events, which was clearly rejected by the jury.

Not only did Matthews fail to show deficiency, but Matthews also failed to show prejudice as required by *Strickland* in light of Matthews' admission to being Zoeller's killer, the testimony of

Mr. Wagner that he saw Matthews stab Mr. Zoeller repeatedly, the testimony of Ms. Teague of the incriminating statements made by Matthews, as well as the testimony of the medical examiner that Zoeller was stabbed 24 times, including multiple stabs in the back. Summary denial was appropriate.

(VII) Failing to preserve a cause challenge

Matthews alleges that trial counsel was deficient by failing to properly preserve for appeal the denial of counsel's cause challenge against juror Boehmler and by allowing juror Boehmler to be seated as a juror. Matthews claims Boehmler expressed ambivalence as to whether she could follow the law regarding Mr. Matthews' right to remain silent. This claim was properly summarily denied as it was facially insufficient and conclusively refuted by the record.

At the outset, Matthews' claim that he was prejudiced by counsel's alleged error in failing to strike juror Boehmler, who expressed ambivalence about Matthews exercising his right to remain silent, is untenable in light of the fact that **Matthews testified at trial**. The only conceivable risk of prejudice created by seating Boehmler would be Boehmler's potential to be improperly swayed by Matthews' choice to remain silent, which is a factor that became a nullity once Matthews took the stand in his own defense. Accordingly, logic would defy any finding of prejudice

under these circumstances. As such, *Strickland* prejudice cannot be proven. *See Whitfield v. State*, 923 So. 2d 375, 384 (Fla. 2005) ("[B]ecause the *Strickland* standard requires establishment of both [deficient performance and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong.") (quoting *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001)); *see also Sweet v. State*, 810 So. 2d 854, 863-64 (Fla. 2002) (declining to reach deficiency prong based on finding that there was no prejudice).

Furthermore, counsel cannot be deemed deficient for failing to preserve the alleged error in denying the cause challenge against Boehmler because Boehmler had been properly rehabilitated. Matthews' claim that Boehmler was not properly rehabilitated is conclusively refuted by the record. During *voir dire*, four prospective jurors in Boehmler's panel raised concerns about how they felt about the right to remain silent. (V11, R673). The State followed up with these prospective jurors by explaining more about the right to remain silent and asking each prospective juror if they would be able to set aside their feelings and follow the law. (V11, R673-8). Prospective juror Ott was the only prospective juror who voiced any doubt that he could, stating, "I'm afraid it's still going to be in the forefront of my mind." (V11, R678). (Juror Ott

was not seated on the jury.) Prospective jurors Boehmler, Alfano, and Scapino all affirmatively stated they could separate their feelings about Matthews' right to remain silent and render a verdict based on the evidence. (V11, R677-8). Accordingly, the State sufficiently rehabilitated Boehmler, the trial court properly denied Matthews' challenge for cause, and Matthews' trial counsel cannot be deemed ineffective for failing to preserve a meritless claim. *Darling v. State/McDonough*, 966 So. 2d 366 (Fla. 2007); *Raleigh v. State/McDonough*, 932 So. 2d 1054, 1064 (Fla. 2006); *Jones v. State/Crosby*, 845 So. 2d 55, 74 (Fla. 2003). Summary denial was appropriate

Matthews also claims trial counsel was ineffective for failing to peremptorily challenge Juror Anselmo. The record regarding the statements Anselmo made during *voir dire* that are relevant to the instant claim reads as follows:

> MR. DAVIS: With regard to the death penalty, are you in the middle, kind of, just not sure? Just kind of give me an idea about your feelings?
>
> VENIREWOMEN ANSELMO: I'm not sure.
>
> MR. DAVIS: Okay. Is it a situation where you can see yourself voting for the death penalty in some circumstances and – and not voting for it in some, but you would have to hear it first? How – How –
>
> VENIREWOMAN ANSELMO: **I have to hear it first**.
>
> MR. DAVIS: Okay. Do you kind of lean one way or the other, or is it just –

> VENIREWOMAN ANSELMO: Years ago, I was – was – I was against the death penalty, but here in the last ten years, there's been so much violent crime that **I'm slowly starting to lean the other way**.
>
> MR. DAVIS: Okay. And, obviously, you're talking just kind of generally speaking, right?
>
> VENIREWOMAN ANSELMO: Yes.
>
> MR. DAVIS: But – but – and you agree, saying in this case just to fully consider all the facts and circumstances first and then make up your mind.
>
> VENIREWOMAN ANSELMO: Yes.
>
> MR. DAVIS: So you wouldn't go in there, kind of before you started, predisposed one way or the other? You would just have to hear everything first?
>
> VENIREWOMAN ANSELMO: **I have to hear everything first**.

(V13, R899-900) (emphasis added).

Anselmo clearly maintained that she would not enter deliberations predisposed to vote either way regarding the death penalty. Anselmo twice confirmed that she would have to hear everything first. Nothing in the above colloquy could reasonably lead to the conclusion that Anselmo was a proponent of the death penalty and certainly not that she was actually biased against Matthews as Matthews contends. In fact, if her prior stance against the death penalty had not changed, the State would have had grounds to challenge Anselmo for cause. In truth, Anselmo's prior opposition to the death penalty followed by a relatively balanced opinion about it, when combined with her interest in hearing

everything first before making a decision, made her a clearly proper juror to serve in a capital case.

Trial counsel also adequately questioned Anselmo regarding the fact that her 9-year-old niece had been raped and murdered fifteen or sixteen years earlier. Counsel asked about any lingering resentment she may have or whether hearing the instant case could stir up unpleasant memories. Anselmo stated that she did not hold any resentment about the incident, that she was not concerned about the case stirring up bad memories, and that the incident would not affect her ability to serve as a juror. (V14, R1025-6). The fact that the instant case had no sexual overtones or child involvement whatsoever combined with the amount of time that had passed since the incident supported the credibility of Anselmo's responses to counsel's questions.

Trial counsel was not deficient by failing to strike prospective jurors Anselmo or Boehmler and Matthews cannot demonstrate prejudice. "[P]rejudice can be shown only where one who was actually biased against the defendant sat as a juror." *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). Matthews not only fails to facially demonstrate deficient performance by trial counsel but also fails to identify, in anything other than a conclusory way, any legitimate juror bias that existed against him, which Matthews must do in order to facially demonstrate that

he was prejudiced. Ultimately, because every aspect of this claim is refuted by the record, summary denial was appropriate.

ISSUE VI

THE CIRCUIT COURT PROPERLY DENIED, AFTER AN EVIDENTIARY HEARING, THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADDRESS RACE AND DRUG ISSUES DURING VOIR DIRE AS THERE WAS NO DEFICIENCY AND THERE WAS NO REASONABLE PROBABILITY THAT MATTHEWS WOULD HAVE BEEN ACQUITTED.

Matthews alleges that trial counsel was deficient for failing to discuss the issue of drug use and race with prospective jurors, claims that failure to do so resulted in one or more objectionable jurors being seated on the panel, and claims that had trial counsel done so, Matthews would have been convicted of a lesser offense or acquitted. This claim was properly denied after an evidentiary hearing as neither deficiency nor prejudice could be shown.

Trial counsel was not deficient for failing to question jurors about race or drug issues. The burden is on Matthews to establish a legally sufficient claim. *See Freeman v. State/Singletary*, 761 So. 2d 1055, 1061 (Fla. 2000); *Nixon v. State/McDonough*, 932 So. 2d 1009, 1018 (Fla. 2006). The rule of sufficiency is equally applicable to claims of ineffective assistance of counsel. Even if the court had decided that trial counsel should have questioned the jurors more, that would still not mean counsel's performance was deficient. *Strickland* clearly states that, "strategic choices

made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation." *Id.* Trial counsel testified at the evidentiary hearing that he did not question jurors in depth about racial bias because racial bias was not an issue in this case. (ROA 219-220). This was a strategic decision.

Matthews claims that he was prejudiced by counsel's failure to discuss race with the jury because he is biracial and because the victims were white, but Matthews fails to identify any prospective jurors who were of any particular race who should have been seated on his panel or identify any selected jurors who should have been stricken because of racial bias. "[P]rejudice can be shown only where one who was actually biased against the defendant sat as a juror." *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). Matthews not only fails to demonstrate deficient performance by trial counsel but also fails to identify, in anything other than a conclusory way, any legitimate juror bias that existed against him, which Matthews must do to demonstrate that he was prejudiced. *Strickland* prejudice, therefore, cannot be proven. *See Whitfield v. State*, 923 So. 2d 375, 384 (Fla. 2005)

("[B]ecause the *Strickland* standard requires establishment of both [deficient performance and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong.") (quoting *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001)); *see also Sweet v. State*, 810 So. 2d 854, 863-64 (Fla. 2002) (declining to reach deficiency prong based on finding that there was no prejudice). Matthews fails to advance any argument other than a conclusive and speculative claim. Conclusory allegations of ineffective assistance of counsel are legally and facially insufficient to require relief under *Strickland*; *Thompson v. State*, 796 So. 2d 511, 515 n.5 (Fla. 2001). Relief must be denied.

ISSUE VIII

THE CIRCUIT COURT PROPERLY DENIED, AFTER AN EVIDENTIARY HEARING, THE CLAIM THAT THE CUMULATIVE EFFECT OF ERRORS TAINTED MATTHEWS' TRIAL.

Matthews alleges that the individual errors claimed add up to cumulative error. However, as outlined above, there was no error. When there has been no error, there can be no cumulative error. *Zommer v. State*, 160 So. 3d 368 (Fla. 2015); *McKenzie v. State*, 153 So. 3d 867 (Fla. 2014). Relief must be denied.

ISSUE IX

THE CIRCUIT COURT PROPERLY DETERMINED THAT MATTHEWS' CLAIM THAT HE MAY BE INCOMPETENT AT THE TIME OF EXECUTION

IS NOT YET RIPE (WHICH APPELLANT STIPULATED TO BELOW).

Matthews claim that he may be incompetent at the time of execution is not yet ripe. "[A] claim of incompetency to be executed cannot be asserted until a death warrant has been issued." *Butler v. State*, 100 So. 3d 638, 672 (Fla. 2012) (quoting *Green v. State*, 975 So. 2d 1090, 1115-16 (Fla. 2008); *Thompson v. State*, 759 So. 2d 650, 668 (Fla. 2000); *Provenzano v. State*, 751 So. 2d 37 (Fla. 1999); *Johnson v. State*, 104 So. 3d 1010, 1029 (Fla. 2012); ("Considering that no death warrant has been signed in this case, the postconviction court's summary denial of Johnson's claim was proper."). Relief must be denied.

CONCLUSION

Each claim raised in Appellant's motion is without merit and provides no basis for relief. In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief. The State objects to oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 19th day of September 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Julissa Fontan, Esq., Maria Deliberato, Esq., Chelsea Shirley, Esq., and Kara Ottervanger, Esq., attorneys for Appellant. A true copy was furnished by electronic mail to Julissa Fontan, Esq., Maria Deliberato, Esq., Chelsea Shirley, Esq., and Kara Ottervanger, Esq., attorneys for Appellant.

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).

/s/ Donna M. Perry
COUNSEL FOR APPELLEE