IN THE SUPREME COURT OF FLORIDA

EDDIE LEE SEXTON,

Appellant,

v.

CASE NO. SC07-286
L.T. No. 94-1299 B

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following factual history is taken from this Court's opinion affirming Sexton's convictions and death sentence on appeal after a retrial.

> . . . Sexton was initially tried and convicted of first-degree murder and sentenced to death in 1994 for the killing of Joel Good, the husband of Sexton's daughter, Estella Mae Good ("Pixie"). Joel was murdered by Sexton's mentally challenged twenty-two-year-old son, Willie Sexton, who strangled him to death under Sexton's direction. On appeal, this Court reversed the judgment and sentence and ordered a new trial. See id. at 838. The Court determined that the testimony of five of Sexton's children concerning bizarre behavior and abuse they had endured from their father should not have been admitted because the relevance of the testimony was outweighed by its prejudicial impact. See id. at 837-38.
>
> Upon retrial, Sexton was again convicted of first-degree murder and sentenced to death. Although much of the testimony introduced at the second trial was similar to the testimony introduced at the first trial, Willie testified. [n1] In exchange for his testimony against Sexton, Willie pled guilty to second-degree murder and was sentenced to twenty-five years imprisonment. The State's theory of prosecution was that Sexton so totally dominated, controlled and directed every facet of Willie's life that Willie killed Joel at Sexton's direction. On retrial, the State introduced the following evidence.
>
> > [n1] As noted in this Court's opinion in Sexton, 697 So.2d at 834-35, Willie was named a codefendant in Joel's death in the first trial but was later found incompetent to stand trial.
>
> Sexton fled to Florida in 1993 with his family and the victim to avoid arrest and prevent the Ohio Department of Human Services ("DHS") from removing his children from the home. [n2] Sexton was the father of thirteen children, not counting the three children he allegedly fathered with his two daughters. After leaving Ohio, Sexton and his family moved to Oklahoma, Indiana, and eventually to Hillsborough River State

Park in Florida. During this time, Sexton trained his children to use guns and a garrote, an apparatus used in strangulation, in case authorities came to return the children to foster care.

> [n2] DHS had Sexton's six youngest children removed from the home in 1992. Several months later, three of the children were returned to Sexton's wife, Mrs. Sexton, but Sexton was ordered to have no contact with the children or with Mrs. Sexton. Following a hearing on the matter in November 1992, Sexton barricaded himself and his family in their home demanding the immediate return of his three children who remained in foster care. Sexton threatened to kill anyone from Child Protective Services or the police department who tried to take his children. Eventually, Sexton turned himself in to the authorities. A search of the Sexton residence revealed a .357 revolver, a 20-gauge shotgun, and seventy rounds of ammunition. After his release, the Sextons failed to appear at a scheduled court hearing. Arrest warrants were issued for Sexton and his wife in October 1993.

While residing in Hillsborough River State Park, Sexton's infant grandchild, Skipper Lee Good, the son of Pixie and Joel, died under suspicious circumstances. Several of the Sexton children, including Pixie, testified about the events surrounding the baby's death. Pixie testified that the baby had been ill for several weeks, but Sexton would not allow her to take the child to a doctor out of fear that authorities would find him and his family. One night, the baby would not stop crying. Sexton ordered Pixie to quiet the baby or else he would do it for her. Pixie put her hand over the baby's mouth until the child stopped crying. The next morning the baby was dead. Sexton instructed Willie and Joel to bury the baby in the woods inside the Hillsborough River State Park. Pixie was eventually arrested for the death of the baby and entered into a plea bargain with the State. [n3]

> [n3] In exchange for a plea to manslaughter and testimony against Sexton,

Pixie was sentenced to twelve years imprisonment.

According to Pixie, Joel was very upset over the loss of his child and wanted to bring the child back to Ohio for a proper burial. Shortly before the death of his infant son, Joel had learned Sexton was the father of Pixie's two daughters. After Joel confronted Sexton with this information, Sexton and Joel got into a fight. Because Joel knew about the baby's death and the fact that Sexton fathered two children with his daughter, Pixie, Sexton would not allow Joel and Pixie to return to Ohio. Sexton feared Joel would provide authorities with information pertaining to the Sexton family's current whereabouts, the death of the baby, and ongoing child abuse.

Several of the Sexton children, including Willie, Pixie, Matthew and Charles testified that Sexton often referred to Joel as a “snitch” and stated that a “good snitch is a dead snitch.” According to their testimony, Sexton often stated that Joel had to be disposed of because he “knew too much.” In addition to the testimony of the Sexton children, Gail Novak, a librarian at the University of South Florida, also testified about a statement Sexton made in which he indicated his desire to have Joel killed. Novak testified that Sexton, Pixie, Joel and Willie came into the library in November 1993 and that Pixie requested information about crib death. Novak stated that she had overheard Willie telling Sexton that Joel intended to go back to Ohio. Sexton replied that the only way that Joel would be returning to Ohio would be in a “body bag.”

At some point, the Sextons moved to Little Manatee State Park, the place where Joel was killed. Willie testified to the following course of events surrounding the murder. [n4] As Joel continued to express his interest in returning to Ohio, Sexton began telling his son, “Willie, I got a job for you to do,” and that he wanted Willie to “put Joel to sleep.” On the day of Joel's murder, Sexton told his wife that “today is the day that Willie is going” to kill Joel. Thereafter, Sexton, his wife, and a few of the younger Sexton children left the campsite for a picnic. Sexton's daughters Sherri Sexton, [n5] Pixie, and their respective children, along with Willie and Joel, stayed behind. Soon thereafter, Willie and Joel left the campsite and went into the woods. Both Pixie and

Willie testified that Sexton returned from the picnic and joined Willie and Joel in the woods. According to Willie, Sexton told him to take the garrote out of his pocket and place it around Joel's neck. After placing the garrote around Joel's neck, Sexton told Willie to turn it “fast and hard.” Willie told Joel that he was “just trying to put you to sleep.” While Willie twisted the rope, Joel yelled “Eddie” (Sexton). After Willie saw blood coming out of Joel's ears, he asked Sexton what had happened. Sexton stated that Willie had just killed Joel. Sexton subsequently kicked the body and, upon seeing Joel's leg move, told Willie to “finish him off.”

> [n4] On cross-examination, Willie admitted that he previously had told different versions of the events surrounding the murder of Joel. According to Willie, he told different versions of the murder because he feared Sexton and because he wanted to get back at Sexton for all of the bad things that Sexton did to him.
>
> [n5] Sherri testified for the defense in the first trial, see Sexton, 697 So.2d at 835, but did not testify in this trial.

In addition to Willie, several other Sexton children testified to the events surrounding the murder of Joel and provided testimony that differed from Willie's recollections of the homicide. For instance, according to Pixie, on the day of Joel's murder, Sexton and Willie had gone for a walk. Approximately thirty minutes later, Sexton and Willie returned. After Sexton and several family members left for the family picnic, Pixie and Sherri went into the camper to prepare lunch, while Joel and Willie watched television together. Thereafter, Pixie saw Willie and Joel go into the woods. She followed them and found them smoking cigarettes. Upon her return to the campsite, she heard Joel yelling, “Ed.” Pixie and Sherri ran into the woods and found Willie holding a rope around Joel's neck. Thus, Pixie and Sherri ran back to the campsite and told Sexton, who had returned from the picnic, that Willie was hurting Joel. After leading Sexton into the woods to find Joel and Willie, Pixie observed Willie holding Joel in his lap. According to Pixie, Sexton proceeded to kick Joel's leg and, when Joel's leg moved, ordered Pixie to

return to campsite and told Willie to “finish him off.”

Another one of Sexton's children, Charles Sexton, who did not testify at the first trial, also testified that he witnessed Joel's murder. His version of the murder differed from both Pixie and Willie's version. In particular, Charles testified that he witnessed the murder and that Sexton actually committed the final act that led to Joel's death. Charles claimed that although he initially went along on the family picnic, he returned from the picnic sooner than the rest of the family. After finding the campsite empty upon his return, Charles walked into the woods and observed both Sexton and Willie killing Joel. Charles claimed that while Joel was fighting for his life, he overhead Sexton telling Willie, “It's either Joel or the both of you.” Charles also testified that although Willie initially had placed the choking device around Joel's neck, Sexton actually “finished Joel off” by pulling on the choking device.

As to the post-murder events, Pixie testified that when Sexton returned from the woods, he instructed her to get rid of Joel's belongings and told her that if she ever talked about Joel's murder that she “would be next.” She also testified that Sexton ordered her and Charles to go and purchase a shovel. Willie stated that before placing Joel's body in the grave, Sexton ordered him to chop Joel's hands off with a machete so that there would be no fingerprint evidence to identify the body. [n6] Willie, however, was unable to complete this task.

> [n6] The State's medical examiner, Doctor Marie Hermann, confirmed portions of Willie's testimony. According to Dr. Hermann, who assisted in the recovery of Joel's body and performed the autopsy, she observed a deep wound on the victim's right hand that was caused by a sharp instrument with great amount of force. The wound was consistent with an attempted dismemberment of the right hand. Dr. Hermann also observed that, upon recovery of Joel's body, there was a ligature device around Joel's neck. Dr. Hermann opined that the cause of death was asphyxiation as a result of ligature strangulation.

Later that evening, Pixie overheard Sexton discussing the killing with Mrs. Sexton, at which time, Sexton stated that he had Willie murder Joel. According to all of the Sexton children who testified, they were instructed by their father to tell anyone, if asked, that Joel had taken the baby and had returned to Ohio. Matthew Sexton also testified that his father told him not to say anything about Joel's death because Sexton and Willie "could get the electric chair."

The State presented evidence that Willie had killed Joel because he was ordered to do so by Sexton and because he was afraid of his father. Doctor Eldra Solomon, a clinical psychologist with extensive training in the treatment of child abuse and post-traumatic stress disorder, testified that Willie was controlled by his father, whom Willie "was very eager to please." After reviewing Willie's school records and having Willie conduct the Wechsler Intelligence Test, Dr. Solomon concluded that Willie was developmentally behind and that he had problems with language, speech, memory and motor coordination. The I.Q. test revealed that Willie functioned at the level of a seven or eight-year-old and that ninety-nine percent of the people in his age group would have performed better on the test. Dr. Solomon opined that Willie could not comprehend the concept of death, suffered from post-traumatic stress disorder, and was incapable of planning a homicide.

When Willie talked about Sexton, Dr. Solomon noticed that Willie's demeanor changed dramatically. She observed that Willie began to shake, stammer and stutter, which Dr. Solomon believed were physical manifestations of his fears of his father. Both Dr. Solomon and many of the Sexton children, including Willie himself, testified regarding how Sexton had physically and mentally abused Willie. According to Willie, Sexton began having anal intercourse with him at age nine. This activity continued during the Sextons' stay in Florida. Sexton physically beat Willie with his fists, a belt, a baseball bat, and an electric belt. In addition, Sexton mentally abused Willie by calling him "retarded" and a "stutter bug." Sexton often told Willie, "I brought you into this world, I can take you out of it."

In contrast to the first trial, at the conclusion of the State's case, Sexton presented no defense

> during the guilt phase of the trial. The jury convicted Sexton and recommended death by a vote of eight to four. The trial court found the following aggravating circumstances: (1) Sexton was previously convicted of a prior violent felony (robbery) (little weight); (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest (great weight); and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP) (great weight). In mitigation, the trial court found one statutory mitigator, that Sexton was under an extreme mental or emotional disturbance at the time the murder was committed and gave this mitigator great weight. This mitigator was established based upon the testimony of two psychologists, Doctors Irving Weiner and Frank Wood, who observed Sexton. Dr. Weiner's testing of Sexton revealed that Sexton has an I.Q. in the low 80's, suffers from brain dysfunction, has limited tolerance to stress, and has diminished self-control. Additionally, testing by Dr. Wood revealed that Sexton's brain was diseased, causing him to be non-responsive to emotional situations.
>
> In addition, the trial court found and gave some weight to several nonstatutory mitigators: (1) Sexton was capable of kindness to children and would even act as Santa Claus at Christmas; (2) Sexton was the pastor of a church attended by family and friends; (3) Sexton often helped his mother and sisters with household chores and repairs; (4) Sexton's father died when the defendant was ten years old, depriving him of a male role model; and (5) the codefendant, Willie, received a lesser sentence of twenty-five years' imprisonment. Finding that the aggravators outweighed the mitigators, the trial court sentenced Sexton to death.

Sexton v. State, 775 So. 2d 923, 925-29 (Fla. 2000).

On March 21, 2002, Appellant filed in circuit court an Amended Motion to Vacate Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.851. After reviewing the State's written response, and after hearing argument from counsel at a case management conference, the trial court entered

orders on March 11 and 13, 2003, denying all of Appellant's postconviction claims with the exception of Claims II and VIII. Pursuant to these orders, an evidentiary hearing was conducted on these claims on April 6, 2006, May 12, 2006, and July 28, 2006.

At the evidentiary hearing, Appellant presented the testimony of trial attorneys Rick Terrana and Robert Fraser, and a social worker, Janet Vogelsang. The State called Dr. Barbara Stein as an expert witness. In addition, the parties stipulated that the following deposition transcripts would be filed as exhibits for the trial court's consideration in lieu of hearing testimony from the witnesses at the evidentiary hearing: David Sexton's deposition dated April 20, 2005; Otis Sexton's deposition dated June 13, 2006; and defense expert witness Dr. David McCraney's deposition dated June 8, 2005.

Penalty phase counsel Robert Fraser testified at the evidentiary hearing that he represented Sexton at his original trial in 1994 when the jury returned a 7-5 recommendation, and after this Court reversed for a new trial, Fraser and co-counsel Rick Terrana were again appointed to represent Sexton. (PCR V18:152-57, 181). Prior to the first trial, Fraser had retained Dr. Michael Maher as a mental health expert, but he did not use him at the original penalty phase because Dr. Maher opined that

Sexton was a "sadistic sexual psychopath."[1] (PCR V18:159, 215-17). Despite the lack of mental mitigation presented at the first trial, the jury returned a recommendation of 7-5 in favor of death. (PCR V18:181-82).

Prior to the 1998 retrial, penalty phase counsel Fraser retained Dr. Irving Weiner to perform psychological testing on Sexton. (PCR V18:176). Dr. Weiner found some evidence of brain damage and penalty phase counsel successfully utilized Dr. Weiner to prepare an affidavit in support of his motion to have a PET scan performed on Appellant. (PCR V18:157-61, 176-81). Counsel testified that, at retrial, his theory in mitigation was to stress Sexton's brain damage and to visually show the jury evidence of such brain damage via the PET scan results and to also introduce anecdotal evidence from Teresa Boron and family

[1] The record indicates that Dr. Maher wrote a letter to penalty phase counsel indicating that he had examined Sexton "thoroughly with regard to possible mental health defenses and found none that would be even remotely possible." (PCR V13:2505). Dr. Maher further stated in his letter:

> I also examined Mr. Sexton with regard to mental health factors which might be relevant to sentencing mitigation and found a number of abnormalities including a substantial history of rather bizarre and criminal sexual behavior which might in some way substantiate mental illness, however, I also believe that providing this testimony in mitigation would tend to inflame and possibly enrage the jury in a manner which would more than counteract any possible mitigating consideration.

members.[2] (PCR V18:180-81). Counsel felt that Appellant's brain injury "was a pretty good mitigator . . . [a]nd if you could demonstrate it graphically, which the PET scan could, then that would be pretty heavy evidence in terms of mitigation." (PCR V18:158). Despite the fact that counsel presented much more mental mitigation evidence at the retrial, the jury returned a verdict recommending death by a vote of 8-4.[3] (PCR V18:181).

Penalty phase counsel Fraser testified that he conducted a thorough investigation into Appellant's childhood and family history but did not find any compelling mitigation evidence to present to the jury. (PCR V18:166). Counsel testified that there was no indication that Appellant grew up in impoverished or abusive conditions; in fact, the information counsel obtained from Appellant's siblings indicated that he had a relatively normal childhood with a loving, religious family. (PCR V18:165-67, 199-202). Counsel did, however, find it difficult to obtain mitigating information from the family because they were not

[2] Counsel presented evidence from Dr. Weiner regarding his psychological evaluation of Sexton and presented testimony from Dr. Frank Wood regarding Sexton's brain damage and the PET scan results. (DAR V11:909-39, 958-92). In addition, counsel presented mitigation evidence from Teresa Boron regarding her interactions with Sexton and from Sexton's sister, Nellie Hanft and her daughter, Caroline Roher. (DAR V11:939-58).

[3] A significant difference between the two trials was that Willie Sexton, Appellant's son, testified at the guilt phase of the 1998 retrial. See Sexton v. State, 775 So. 2d 923, 926 n.1 (Fla. 2000).

very forthcoming. (PCR V18:170, 196). Counsel further explained that he did not feel that evidence surrounding Appellant's childhood would have been very persuasive given the fact that Appellant committed the instant offense as an older adult. (PCR V18:165). Likewise, counsel did not find that Appellant's medical conditions were relevant or mitigating in any fashion. (PCR V18:163-64, 227).

Collateral counsel presented evidence from a social worker, Janet Vogelsang, regarding her bio-psychological assessment of Appellant. Ms. Vogelsang focused her evaluation on the first ten years of Appellant's life and found that he was born into a family that was economically and culturally limited. (PCR V19:321). Appellant was raised without much adult supervision because his mother was in poor health and his father was not home often. (PCR V19:321). Ms. Vogelsang based most of her conclusions on family members' reports, rather than documented evidence. Like trial counsel, Ms. Vogelsang found it difficult to obtain reliable information from Appellant's family members because they often engaged in a pattern of "accuse and deny." (PCR V19:343). According to the information she obtained from Appellant's younger brother, David Sexton, Appellant's older brother, Otis Sexton, often physically abused Appellant when

they were children.[4] Appellant described Otis Sexton's childhood treatment of him as "rough," but never stated that there was a consistent pattern of physical abuse. (PCR V19:341).

Dr. David McCraney, Appellant's postconviction forensic neurologist, testified at his 2005 deposition that although he did not find that Dr. Weiner's evaluation was thorough, Dr. Weiner had "lucked out" and reached the correct conclusions regarding Appellant's inability to form intent. (PCR V3:511-13). Dr. McCraney did not think the relevant issue was ineffective assistance of trial counsel, but rather a deficiency of the expert in failing to perform a detailed neuropsychological evaluation. (PCR V3:511).

The State presented evidence from Dr. Barbara Stein, a forensic psychiatrist, who opined that Appellant suffered from paraphilia, not otherwise specified, a sexually deviant disorder, a history of alcohol and prescription medication dependence, and antisocial personality disorder with histrionic personality traits. (PCR V18:245-46). Dr. Stein testified that Appellant's mental disorders were not "extreme mental or emotional disturbances" that influenced his conduct at the time of the crime, nor did they substantially impair his capacity to

[4] Ms. Vogelsang's testimony regarding the alleged abusive relationship between Otis Sexton and Appellant came from David Sexton, a sibling who admittedly had a considerable bias against Otis Sexton. (PCR V19:339-51).

appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (PCR V18:249-51).

On January 23, 2007, the trial court entered a detailed order denying Appellant's postconviction motion. (PCR V4:760-87). The instant appeal follows.

SUMMARY OF THE ARGUMENT

Issue I: The lower court properly denied Appellant's claim of ineffective assistance of penalty phase counsel. At the evidentiary hearing, penalty phase counsel explained his thorough investigation into potential mitigation and explained his strategic reasons for focusing primarily on Appellant's brain damage at the penalty phase. As the trial court found, Appellant failed to carry his burden of establishing deficient performance. Even if this Court were to find that penalty phase counsel's representation was deficient, Appellant failed to establish prejudice as a result. As the lower court found, even if counsel had presented all of the potential mitigation presented at the postconviction evidentiary hearing, there is no reasonable probability that this additional mitigation would have resulted in the imposition of a life sentence.

Issue II: The lower court did not err in summarily denying Appellant's claim of ineffective assistance of guilt phase trial counsel. Each of the sub-issues raised by Appellant were conclusively refuted by the record.

Issue III: The lower court properly denied Appellant's claim of cumulative error. Because Appellant has failed to demonstrate any error, he is not entitled to combine meritless issues together in an attempt to create a valid cumulative error claim.

Issue IV: The lower court acted within its broad discretion in denying Appellant's claim to interview jurors in order to discover possible misconduct and properly denied Appellant's constitutional challenge to Florida's rule regulating motions to interview jurors. The instant claim is procedurally barred because Appellant did not raise the issue on direct appeal. Furthermore, the claim lacks merit. Appellant has never alleged any specific allegations of misconduct and is simply seeking to engage in a fishing expedition. Additionally, this Court has consistently rejected constitutional challenges to the rule regulating motions to interview jurors.

Issue V: The lower court properly denied Appellant's claim that execution by lethal injection constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Appellant's claim is procedurally barred as it was not raised on direct appeal. Furthermore, this Court has consistently rejected per se challenges to the constitutionality of lethal injection.

Issue VI: Appellant's argument that he may be incompetent at the time of his execution is premature and should be denied.

ARGUMENT

ISSUE I

WHETHER THE POSTCONVICTION COURT ERRED IN DENYING THE CLAIM THAT TRIAL COUNSEL WERE PREJUDICIALLY INEFFECTIVE IN THE PENALTY PHASE BECAUSE THEY FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE, FAILED TO PROVIDE THE MENTAL HEALTH EXPERTS WITH THIS MITIGATION, AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE?

Appellant asserts in his first issue that he was denied the effective assistance of trial counsel during the penalty phase of his trial. Specifically, Appellant alleges that trial counsel was ineffective for failing to adequately investigate and prepare mitigation evidence, failing to provide the mental health experts with this mitigation, and failing to adequately challenge the State's case. Contrary to Appellant's assertions, the State submits that trial counsel provided effective assistance of counsel.

As will be discussed in further detail, trial counsel conducted an extremely thorough investigation into Appellant's background and potential mitigating factors and provided all relevant information to his mental health expert witnesses. Experienced trial counsel made strategic decisions during his representation as to what evidence to present to the jury in mitigation. Trial counsel had the advantage of having represented Appellant at his previous trial and penalty phase, and counsel made the tactical decision to forego presenting

certain evidence at the retrial that portrayed Appellant as a "sadistic sexual psychopath."[5] The lower court found that Appellant failed to carry his burden of establishing ineffective assistance of penalty phase counsel by failing to establish either deficient performance or prejudice. (PCR V4:764-79).

In order for a defendant to prevail on a claim of ineffective assistance of trial counsel claim pursuant to the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), a defendant must establish two general components.

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

Id. at 710 (quoting Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986)); see also Davis v. State, 915 So. 2d 95 (Fla. 2005). Furthermore, as the Strickland Court noted, there is a strong presumption that trial counsel's performance was not

[5] As previously noted, penalty phase counsel Robert Fraser testified that he had retained Dr. Maher as a mental health expert prior to the original trial in 1994, and after being informed that Dr. Maher had diagnosed Appellant as a "sadistic sexual psychopath", counsel decided that he would not call Dr. Maher as a witness. (PCR V18:155, 215-17).

ineffective. Id. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91 (1955)).

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but must review the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the court denied the claim because Appellant failed to meet his burden of proof as to both prongs of Strickland. Briefly stated, the trial court found that trial counsel performed a reasonable investigation into Appellant's childhood and background and provided this information to his experts. The lower court found that, although counsel was aware of other potential mitigation, counsel made an informed and strategic decision to focus his attention primarily on Appellant's brain damage. In addition to finding that counsel did not perform deficiently, the lower court further found that an alleged

deficiency did not prejudice the outcome of the proceedings. (DAR V4:764-79).

In the instant case, the testimony from the evidentiary hearing clearly establishes that trial counsel conducted a thorough and reasonable investigation into Appellant's background in order to discover any potential mitigating evidence. Appellant had the benefit of two experienced defense attorneys that represented him at both his original trial in 1994, and at his retrial in 1998. Penalty phase counsel Fraser testified that he reviewed the transcripts of the first trial in preparation for the 1998 retrial, and he continued to investigate mitigation throughout his representation. As previously noted, prior to the first trial, trial counsel had retained a mental health expert that diagnosed Appellant a "sadistic sexual psychopath". Trial counsel testified that presenting this type of evidence, or opening the door for the State to present such evidence, would be "tantamount to stipulating to death." (PCR V18:217). Trial counsel obviously was aware of this diagnosis when conducting his mitigation investigation for the retrial, and was able to go in a different direction with his two mental health experts by stressing Appellant's brain damage and Appellant's PET scan results.

For the retrial, trial counsel testified that he retained Dr. Irving Weiner in order to conduct psychological testing of

Appellant. During his evaluation of Appellant, Dr. Weiner found evidence of a brain injury, which enabled trial counsel to file a motion with the trial court to obtain PET scan testing of Appellant's brain. As a result of the PET scan testing, Dr. Frank Wood, an expert on PET scans, became involved in the case. Both Drs. Weiner and Wood testified at Appellant's penalty phase proceeding. (DAR V11:909-38; 958-92). As a result of their expert testimony, the trial judge found the statutory mitigating factor that Sexton was under an extreme mental or emotional disturbance at the time the murder.

In preparing the mental health experts for their evaluations and testimony, trial counsel provided them with medical records and witnesses' statements. Dr. Weiner testified that he reviewed these records as part of his evaluation. (DAR V11:913-14). Defense counsel testified at the evidentiary hearing regarding his efforts to obtain Appellant's medical records, which sometimes proved difficult due to Sexton's inability to remember his doctors' names. (PCR V18:161-64, 211-27). Obviously, as the lower court properly found, trial counsel did not perform outside the broad range of reasonably competent performance under prevailing professional standards when conducting his investigation and presentation of expert mental health mitigation. In fact, one of Appellant's own postconviction mental health experts testified that he could not

fault trial counsel, but opined that it was more a deficiency of the experts. (PCR V3:511). Accordingly, this Court should affirm the lower court's finding that trial counsel's investigation of potential mitigation evidence was reasonable. See Strickland v. Washington, 466 U.S. 668, 689 (1984) (noting that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"); Ragsdale v. State, 798 So. 2d 713, 716 (Fla. 2001) (holding that "an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence") (emphasis added).

Appellant asserts in his brief that if trial counsel had utilized the "shotgun" approach, rather than the "rifle" approach, to presenting mitigation, he could have presented evidence that Appellant had (1) a family history of mental disorders; (2) a family history of possible mental retardation; (3) a limited education;[6] (4) a family history of possible

[6] Trial counsel testified to his actions in obtaining Appellant's school records. (PCR V18:207-09). Counsel was aware that Appellant graduated from high school in 1959, had scored "above average" in all his subjects in the eighth grade, and had obtained an average IQ score of 90 when he was ten years old. (PCR V18:198, 208).

Although trial counsel made the decision not to present testimony regarding Appellant's school history, counsel was able to introduce testimony that Appellant had low intelligence. According to Dr. Weiner's testimony from Appellant's penalty phase, Appellant had an IQ in the low 80s. (DAR V11:915-16).

learning disabilities; and (5) multiple sclerosis. Collateral counsel faults trial counsel for failing to present evidence that Appellant had multiple sclerosis because trial counsel did not find it relevant or related in any way to Appellant's conduct.[7] This strategic decision was supported by Dr. Stein's expert opinion that, even assuming Appellant had MS at the time of the crime or at the time of his trial, it did not affect or influence Appellant's behavior in any way. (PCR V18:279-80).

The other potential mitigating evidence regarding Appellant's family history stemmed largely from the testimony of a social worker, Janet Vogelsang. At the evidentiary hearing, trial counsel explained that at the time of Appellant's retrial, the defense attorney acted as a social worker and was responsible for obtaining all the background information themselves. (PCR V18:174-75). As part of his investigation, trial counsel and his investigator interviewed numerous family members. Trial counsel explained that obtaining information from Appellant and his family members was extremely difficult because nothing was volunteered.[8] Counsel stated that

[7] Trial counsel was aware of the potential diagnosis of MS and had asked his expert to look into the issue to determine whether it had any impact on Appellant's behavior. (PCR V18:220-21).

[8] As the lower court noted, trial counsel's investigation cannot be "deemed deficient simply because family members are now – 12 years after the murder and 8-10 years after the penalty phases – providing potential mitigation information." (PCR V4:774).

Appellant's family members were probably the most "impenetrable" family he had ever dealt with in his vast experience in representing capital defendants. (PCR V18:170, 196). Further complicating matters was the fact that the family often had "shifting alliances," and would love the Appellant one day, and hate him the next. Additionally, Appellant's children had all suffered horribly from Appellant's sexual abuse, and obviously would not make good witnesses. (PCR V18:195-96, 209).

Trial counsel Fraser testified that he did not find much of Appellant's childhood relevant and persuasive to a jury. After interviewing Appellant and other family members, counsel learned that Appellant's childhood, while not ideal, certainly was not deprived. Appellant had a happy childhood and was raised in a religious atmosphere. Counsel found no evidence that Appellant lived in any particular squalor, that he did not eat well, or that he did not have clothes to wear. Counsel testified that he had a strategic reason for not "cluttering up" the jury's perception with this childhood upbringing evidence because he did not find it persuasive, especially given the fact that there was no connection between any childhood trauma and the crimes Appellant committed some forty years later. (PCR V18:165-67, 199-201).

As the record and the testimony from the evidentiary hearing clearly establishes, Appellant has failed to carry his

burden of establishing deficient performance by trial counsel. Trial counsel conducted a thorough investigation in this case by hiring mental health experts, obtaining school and medical records, and speaking with friends and family members. Trial counsel made sound strategic decisions regarding the presentation of the mitigation evidence, and such decisions do not equate to a finding of ineffective assistance of counsel. See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

The State submits that it is not even necessary for this Court to address the second prong of Strickland to determine whether Appellant has made a showing of prejudice because, as the lower court properly found, he has failed to establish the deficiency prong. See Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."). Trial counsel thoroughly investigated the potential mitigation in this case and made the strategic decision to present this evidence via four witnesses: Appellant's sister, his niece, and two mental health experts. Even assuming that this Court were to find that

trial counsel was deficient in investigating and presenting the mitigation evidence, Appellant has failed to establish prejudice. As the trial court noted after considering the potential mitigation presented during the evidentiary hearing, "[t]here is no reasonable probability that such additional mitigation evidence would have outweighed the aggravating circumstances and resulted in the imposition of a life sentence." (PCR V18:779).

As previously noted, in order to prevail on an ineffective assistance of penalty phase counsel claim, a defendant must establish deficient performance and prejudice. To establish prejudice, "the defendant must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). In this case, even assuming that trial counsel had presented everything that was presented at the postconviction hearing, there is no reasonable probability that the outcome of the penalty phase would have been any different. Given the three aggravating factors present in this case: (1) Appellant was previously convicted of a prior violent felony (robbery); (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (3) the murder was committed in a cold, calculated

and premeditated manner without any pretense of legal or moral justification, there is no reasonable probability that the mitigation evidence presented at the evidentiary hearing would have resulted in a life sentence. Accordingly, this Court should affirm the lower court's denial of the instant claim.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S GUILT PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS?

In Claim II, Appellant asserts that the trial court erred in summarily denying his guilt phase ineffective assistance of counsel claims. Appellant argued in his motion that trial counsel was deficient for failing to make numerous objections during the trial. (PCR V1:51-53). In its response to the motion and again at the case management conference, the State argued that this was a rare example of a case where the trial court could summarily deny Appellant's guilt phase ineffective assistance of counsel claims because the record clearly established that Appellant was not entitled to relief. (PCR V2:103-11, V17:38-40). The trial court subsequently issued a detailed order summarily denying Appellant's claim of ineffective assistance of guilt phase counsel and attached the relevant portions of the record. (PCR V2:201-221). The State submits that the trial court properly denied the instant claim without an evidentiary hearing.

As a general rule, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. Davis v. State, 875 So. 2d 359, 367-68 (Fla. 2003). In this case, the postconviction motion and record conclusively

establish that Appellant was not entitled to relief on his claims involving trial counsel's failure to make certain objections during the guilt phase. See Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.").

Appellant argued in his motion that he was entitled to an evidentiary hearing in order to establish his claims that trial counsel was ineffective for:

(1) Failing to object to the State's reference to his "able" investigator thereby advancing the State's own opinion as to that witness' credibility;

(2) Failing to object about certain venire members walking in and out of the courtroom during jury selection;

(3) Failing to object when the State introduced a religious reference by thanking God that the lawyers were not on trial;

(4) Failing to request individual voir dire after four venire members indicated they had heard details of the case;

(5) Failing to object to the State referencing the expected testimony regarding sexual abuse by Appellant towards his son, Willie;

(6) Conceding to the sexual abuse and unusual family relationships in the Sexton family, thereby bolstering that component of the State's case instead of challenging it;

(7) Failing to object or require the State to make a foundation in the State's introduction of testimony from the Ohio social worker about Appellant fathering two of his daughter's children;

(8) Failing to object to the speculation requested of how Willie Sexton felt, and failing to object to numerous hearsay statements regarding a variety of third party conversations;

(9) Failing to object to a statement from daughter Pixie about a threat from Appellant that was covered by the previous motion in limine;

(10) Failing to object to the State's introduction of the videotape addressed to President Clinton; and

(11) Failing to object to the State's disparaging remarks about counsel during the State's closing.

(PCR V1:51-53). The trial court addressed each of these sub-issues and found that Appellant was not entitled to an evidentiary hearing because the record conclusively established that he had not met his burden of proving ineffectiveness pursuant to Strickland v. Washington, 466 U.S. 668 (1984).

As to the first sub-issue regarding trial counsel's failure to object to the State's reference to his "able" investigator during voir dire, thereby allegedly "advancing the State's own opinion as to that witness' credibility," the trial court correctly found that Appellant had failed to met the first prong

of Strickland by failing to establish deficient performance. During voir dire, the prosecutor stated:

> Let me, if I can, I'll be the sole attorney prosecuting this for the State of Florida. I will have the able assistance of Dick Hurd, who is one of my investigators. So you'll see him come and go and with court permission will sit with me during portions of the trial. I just want to let – so when you see another face there, that's who he is.

(DAR V4:31). The lower court noted that the investigator, Dick Hurd, never testified at the trial, and thus, trial counsel was not deficient for failing to object to the prosecutor's reference to Mr. Hurd. Because Appellant had not met the first prong of Strickland, the trial court did not address the prejudice prong. See Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."). Clearly, the trial court did not err in summarily denying the instant sub-issue given the innocuous comment by the prosecutor concerning the investigator who never even testified at Appellant's trial.

In his second sub-issue, Appellant claims that his counsel was ineffective when he failed to object "when the State approached the court about certain venire members walking in and out of the courtroom during jury selection." (PCR V1:51). As the lower court noted, a review of the record reflects that

Appellant's guilt phase trial counsel, Rick Terrana, brought the matter to the trial court's attention:

> TERRANA: Judge, I've never seen in this courtroom any jurors just getting up and walking out like they've been doing pretty freely this morning, I don't want the Court - - I would ask the Court to tell them something about that or address that issue, but I would ask the Court not to do it as soon as we sit down so they know we're the ones that put you up to it, but I have some concerns about them walking out.
> COURT: I wouldn't worry about it. We're not talking to them yet.
> TERRANA: Well, okay.
> COURT: Some of the people here may not be paying attention.
> TERRANA: We definitely know they're not paying attention if they're outside.

(DAR V4:57-58). As the record reflects, it was trial defense counsel Terrana, not the State, who expressed concern about jurors walking out of the courtroom. The trial court noted that there was no need for concern because they were not being questioned yet. The court allowed questioning during voir dire of only those twelve members of the panel that were seated in the jury box. Peremptory and cause strikes were allowed only as to those twelve veniremen questioned. Excused veniremen would be substituted by the remaining members of the venire, who then would be questioned individually. Those venire members that had walked out of court were awaiting their turn to be questioned in the jury box.

In denying this sub-issue, the lower court properly found that the individuals walking in and out of the courtroom were

awaiting their turn to be questioned in the jury box and were not members of the panel of twelve who were currently being questioned in the jury box. Consequently, Appellant failed to meet the first prong of the Strickland test in that he failed to prove that trial counsel acted deficiently by failing to object. As the record established it was defense counsel, not the State, who brought the matter to the Court's attention. Since Appellant failed to meet the first prong of Strickland, this Court does not even need to address the prejudice component. See Downs v. State, 740 So. 2d 506, 518 n.19 (Fla. 1999).

In his third sub-claim, Appellant claims that trial counsel was ineffective for failing to object during voir dire when the prosecutor introduced a religious reference by thanking God that the lawyers were not on trial. The record establishes that the prosecutor's comment was made during voir dire in response to a venire member's stated concern that too often the outcome of a defendant's trial was contingent upon the respective abilities of the attorneys, rather than the quality and weight of the evidence:

> MS. QUEENEY: I'm not sure about that. Then it goes back into the – into the case of depending on the defense versus the prosecution. You know, the – it always seems that the more effective one ends up getting the decision that they want in a case.

(DAR V4:70). The prosecutor responded to this concern as follows:

> PRUNER: Okay. Well, let me bootstrap that into something else, okay? You're going to hear an instruction, and I always thank God for this instruction, that the lawyers aren't on trial. Okay. And part of that is as you sit there as jurors inevitably, it's human nature, you're going to draw judgments about the attorneys as human beings, as professionals, whether we're jerks, whether you like us, whether my part is a little too wide in my hair, whether my suit is a little too dirty, whatever it is, inevitably, because you're going sit up there and there's passage of time, and that's what we do as individuals; we observe.
>
> And my question to you is selecting - - or sitting as a juror, ma'am, can you promise us that you'll base your verdict on the evidence that you hear and the law that Judge Padgett gives you and set aside any personal observation, opinion, as to whether you think Mr. Fraser or Mr. Terrana kicked my butt in this trial and just outtalked me or outargued me or whatever you think about me personally, can you do that?
>
> MS. QUEENEY: I'll try.

(DAR V4:70-71).

The trial court found that the prosecutor's comments were merely reminding Ms. Queeney and the other potential jurors that they must decide the case based on the evidence and the trial judge's instructions, rather than the personalities of the lawyers. Consequently, the Court found that Appellant failed to meet the first prong of the Strickland test in that he failed to prove counsel acted deficiently in failing to object when the State introduced a religious reference by thanking God that the lawyers were not on trial when the record clearly reflects that the prosecutor's comments were in response to Ms. Queeney's

answer to a question during voir dire. As with the other sub-claims, because Appellant failed to meet the first prong of Strickland, it is unnecessary to address the prejudice component.

In his next sub-issue, Appellant claims his trial counsel was ineffective when he failed to request individual voir dire after four venire members indicated they had heard details of the case. Specifically, Appellant claims that Mr. Thielman, Mr. Hudson, Ms. Tanner, and Mr. Hart indicated that they recalled reading, hearing, or having knowledge about the case. (DAR V4:83). The record reflects that the State subsequently exercised a challenge to remove Mr. Thielman (DAR V5:231), the trial court removed Ms. Tanner for cause (DAR V4:127), and the defense excused Mr. Hudson from serving on Appellant's case (DAR V5:267). Thus, as the lower court properly noted, Appellant failed to meet the second prong of Strickland with respect to Mr. Thielman, Mr. Hudson, and Ms. Tanner as all three of them were excused from serving as jurors on Appellant's case.

During the questioning of Mr. Hart, he stated that he had not formed any fixed opinions (DAR V4:89), that he had read a newspaper "way back" and had no opinions at the time of his examination based on what he saw or read. (DAR V4:91). Trial counsel accepted the panel and Mr. Hart served on the jury. (DAR V10:871). The lower court denied this aspect of the claim

because Appellant failed to meet the first prong of Strickland based on his failure to prove how counsel acted deficiently in failing to request individual voir dire of Mr. Hart when he expressly stated that he did not have any opinions of the case based on what he had previously read in the newspaper. As the record clearly establishes that Appellant is not entitled to relief, this Court should affirm the trial court's ruling.

In Appellant's fifth and sixth sub-claims, he claims that trial counsel was ineffective during the State's opening statement when counsel failed to object to the State referencing the expected testimony regarding sexual abuse by Appellant towards his son, Willie, and when trial counsel conceded to the sexual abuse and unusual family relationships. Specifically, Appellant takes issue with the following comments made by the prosecutor during opening statements:

> What the evidence will show you is that through the isolation of his son, through the social isolation of his son and through this abuse, he developed Willie Sexton into essentially his simple-minded puppet. At an early age, the evidence will show, this defendant began to sodomize Willie Sexton, since the age of nine, and what this defendant told Willie Sexton on that first occasion at age nine was that this is what parents and children do, thereafter setting the stage for what Willie Sexton knew and believed to be an appropriate 'elation (sic) between father and son.

(DAR V6:332). As defense counsel acknowledged during his opening statement, there was reprehensible conduct between Appellant and his children. (DAR V6:345-46).

The lower court denied these sub-claims because this Court had previously found that evidence regarding Appellant's control over Willie was relevant and admissible. See Sexton v. State, 697 So. 2d 833, 837-38 (Fla. 1997). The prosecutor's comments referenced Appellant's control over Willie Sexton. As such, the lower court found that trial counsel was not deficient for failing to object to admissible and relevant evidence. Furthermore, trial counsel was not deficient in his opening statement for mentioning the abuse because it did not alter the defense theory of the case that Sexton was not the culpable party but rather Pixie Good was to blame.

In his seventh sub-claim, Appellant asserts that trial counsel was ineffective when he failed to object or require the State to make a foundation in the State's introduction of testimony from the Ohio social worker about Appellant fathering two of his daughter's children. As the lower court found, a review of the record reflects that Pixie Good testified that Appellant was the father of her two girls. (DAR V7:542). Moreover, this Court, in its opinion on Appellant's first conviction and death penalty trial, specifically ruled that evidence of Appellant's paternity of Pixie Good's two children was relevant and admissible to prove motive. See Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997). Accordingly, as the lower court properly noted, Appellant could not meet the second

prong of Strickland of establishing prejudice to the introduction of the testimony from the Ohio social worker when Pixie Good testified at trial that Defendant was the father of her two girls and this Court had previously ruled that such testimony was relevant and admissible.

In his eighth sub-claim, Appellant claims that trial counsel was ineffective during the State's examination of codefendant Willie Sexton, when counsel failed to object to the requested speculation of how Willie felt,[9] and failed to object to numerous hearsay statements regarding a variety of third party conversations. During the questioning of Wilie Sexton, the following exchange took place:

> STATE: Okay. Was your father, Eddie Sexton - - well, how did he feel about the fact that his kids had been taken away from him when you moved with him to the campground?
>
> SEXTON: I don't know.
>
> STATE: Well, do you recall whether he was happy or sad?
>
> SEXTON: He was sad.

(DAR V6:411-12). As the court noted, the first question was the one that called for speculation on how Eddie Sexton felt, but Willie Sexton answered that question with "I don't know."

[9] As the lower court noted, when read in context, the postconviction claim was probably directed to speculation as to how Eddie Sexton felt, not Willie Sexton. See PCR V1:52, V2:106; DAR V6:411-12).

Consequently, as the lower court found, Appellant failed to meet the second prong of Strickland in that he failed to prove how counsel's alleged failure to object to the first inquiry resulted in prejudice when Willie Sexton answered that he did not know the answer to that question.

With regard to Appellant's sub-claim regarding trial counsel's failure to object to hearsay statements during the testimony of codefendant Willie Sexton and Pixie Good, the lower court addressed each of these allegations in great detail and found that the statements were admissible as admissions against a party opponent, cumulative to other evidence admitted at trial, or relevant and admissible as motive evidence as previously noted by this Court. (PCR V2:210-17). As the record supports the trial court's finding that Appellant could not establish deficient performance, this Court should affirm the lower court's ruling.

In Appellant's ninth sub-claim, he asserts that his trial counsel was ineffective when he failed to object to a statement from Appellant's daughter, Pixie Good, about a threat from Appellant that was covered by an order granting a motion in limine. Specifically, Appellant argues that trial counsel was ineffective for failing to object when Pixie testified that Appellant threatened her that she "would be next" if she talked about the murder. (DAR V7:553). Although this comment was the

subject of Appellant's motion in limine, the trial court denied the motion and found the comment admissible. (DAR V6:315-18). Obviously, as the lower court properly found, Appellant is unable to establish prejudice based on trial counsel's failure to object when the trial court had already ruled that the statement was admissible.

In his tenth sub-claim, Appellant argues that trial counsel was ineffective for failing to object to the State's introduction of the videotape Appellant addressed to President Clinton. (DAR V13:631). The record reflects that on the previous day of trial, the exhibit had been introduced into evidence without objection and by joint stipulation. (DAR V7:577). The record also reflects that prior to the beginning of trial, defense trial counsel referred to the videotape Appellant had sent to President Clinton and inquired if the prosecutor was going to show the excerpt where Appellant asked Willie Sexton if he had beaten him or had sex with him. (DAR V6:328-29). Trial counsel indicated that he had no problem with the State introducing the portion of the tape where his client was simply talking, but did not want the portion with Appellant's children admitted. The prosecutor responded that was acceptable with the State and he did not anticipate introducing the other portion unless the defense opened the door to this testimony. (DAR V6:328-29). When the tape was played

before the jury, the State fast-forwarded the portion in compliance with trial counsel's previous request. (DAR V8:631-73).

As the lower court properly noted, Appellant's claim of ineffectiveness was without merit as trial counsel was not deficient for failing to object to the State's introduction of the videotape when trial counsel agreed to the admissibility of the tape and the State complied with Appellant's request to not show the jury the portions of the tape when Appellant's children spoke. Because Appellant failed to allege any facts to support his ineffective assistance of counsel claim and the record refutes the argument that trial counsel acted deficiently, this Court should affirm the lower court's ruling. See Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) ("Although this Court encourages trial courts to conduct evidentiary hearings, a summary or conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record").

In his final sub-claim, Appellant asserts that trial counsel was ineffective for failing to object to the State allegedly making disparaging remarks about counsel during closing argument. Specifically, Appellant argues that the State made disparaging remarks when the prosecutor stated:

> I would ask that when you consider the evidence and determine what is evidence, that you rely not only on the questions that you've heard someone ask but

> upon the answers. Anyone can stand in a crowded room and yell loudly at another man, when did you stop beating your wife, knowing full well that by asking that question you have raised the specter that a fact exists that that person beats the wife. Evidence is not the mere asking of a question and raising the inference. Evidence is proving something.
>
> So when Mr. Terrana asks questions, as he has over the last two days, didn't this happen or didn't that happen or didn't that happen, or didn't Willie have sex with Joel and all of these things, it was all denied and all unsubstantiated or unproven. What that is, ladies and gentlemen, is that inflammatory question yelled in a crowded room to somebody: When did you stop beating your wife. The damage is done with asking the question, whether it's true or not, the implication that arises therefrom.

(DAR V10:824-25).

Appellant's trial counsel did not object to the prosecutor's comments, but responded to the prosecutor's argument with the following:

> And unlike the prosecutor told you, I'm not up here to attack anyone. I'm not going to scream and yell about Pixie or anyone else. I'm simply going to tell you what the evidence was, and I'm going to point out things that I think you ought to consider with respect to that evidence.
>
> Each of you has to evaluate each witness; and if I tell you something that any witness said or the prosecutor told you something that the witness said and you remember it differently, by all means, rely on your own memory. You're the ones that are judging this case. But it's important to know that you can believe or disbelieve any witness. That's your right.
>
> And the judge is going to tell you that part of the law that you're to follow as jurors, your duty bound to follow, deals with evaluating witnesses, whether or not they were credible. Credibility is a critical issue, not only in this trial, in any trial. You're talking about whether or not someone's guilty of a crime.

(DAR V10:826).

The trial court denied the instant sub-claim and found that the State was merely advising the jury that they should consider the evidence when rendering their verdict and the evidence included both the questions and the answers given by the witnesses, and not just a question which may have raised an inference. The prosecutor noted that many of the questions raised by defense counsel were denied and remained unsubstantiated or unproven, and again urged the jury to focus on answers given by the witnesses. Appellant's trial counsel did not object, but rather responded that it was not his purpose to upset or anger a witness but simply "to find out what the facts are, what really happened here." (DAR V10:828). Consequently, as the court found, Appellant failed to meet the first prong of Strickland in that he failed to prove counsel acted deficiently in failing to object to the alleged disparaging remarks about counsel when the State's comments were not improper, but were simply comments advising the jury to consider the evidence, which included not only questions which raised inferences, but the answers that were given to such questions. Because this sub-claim, like the other ten sub-claims raised by Appellant, did not require an evidentiary hearing, this Court should affirm the trial court's summary denial of the claim.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING THE CLAIM THAT APPELLANT'S CONVICTION IS MATERIALLY UNRELIABLE DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND IMPROPER RULINGS OF THE TRIAL COURT?

Appellant claims in his third issue that the cumulative effect of trial counsel's ineffectiveness renders his conviction materially unreliable. The State has shown, however, that none of Appellant's ineffective assistance of counsel claims have merit. The lower court agreed and found that because Appellant had failed to establish any of his allegations of ineffective assistance of counsel, he was not entitled to relief under a cumulative error analysis. (PCR V4:785-86).

Counsel asserts that because the lower court summarily denied his guilt phase claims, he is unable to fully develop his claim for appeal. However, as noted in Issue II, supra, the trial court properly denied these claims because the record clearly refutes Appellant's allegations. Additionally, Appellant asserts that there are two instances of deficiencies that this Court recognized on direct appeal, that when combined with the other alleged errors, demonstrate that he is entitled to relief. Contrary to Appellant's assertions, the two instances cited by Appellant do not establish ineffectiveness, much less give rise to a finding that his conviction is materially unreliable.

On direct appeal, this Court addressed Appellant's issue that the trial court erred in admitting into evidence testimony relating to the death of the infant, Skipper Lee Good. See Sexton v. State, 775 So. 2d 923, 929-30 (Fla. 2000). This Court noted that the issue was not preserved because trial counsel did not raise an objection to this testimony. Although the issue was not preserved, this Court addressed the issue and found that the evidence was relevant. Id. Furthermore, this Court noted this evidence was consistent with the defense strategy of trying to show that Pixie Good orchestrated Joel's murder, not Appellant. Id. Because trial counsel was not ineffective for failing to raise an objection to relevant and admissible evidence, and this Court found that the trial court did not make any erroneous rulings concerning this evidence, Appellant's reliance on this "deficiency" is without merit.

Likewise, the second deficiency cited by Appellant does not support his cumulative error claim. On direct appeal, Appellant argued that the trial court erred in admitting victim impact evidence that erroneously focused on the death of Joel Good's deceased infant, Skipper Lee Good. Sexton, 775 So. 2d at 931-33. This Court found that the issue was not preserved below based on trial counsel's objections on other grounds, but nonetheless found that the error did not constitute reversible error. This Court specifically noted that "even if it had been

preserved by proper objection, we would find this testimony harmless beyond a reasonable doubt." Id. at 933. Appellant is unable to establish prejudice under Strickland when this Court has already examined the issue and found that the error is harmless beyond a reasonable doubt. See generally Darling v. State, 966 So. 2d 366 (Fla. 2007) (stating that defendant is unable to establish prejudice based on prosecutorial misconduct when issue has previously been found to be harmless error); Cox v. State, 966 So. 2d 337, 347 (Fla. 2007) (finding that this Court's previous finding of harmless error on direct appeal was fatal to defendant's subsequent ineffective assistance of counsel claim); Chandler v. State, 848 So. 2d 1031, 1045-46 (Fla. 2003) (finding that because defendant could not show that the prosecutor's comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the Strickland test in postconviction proceedings).

Because there are no individual ineffective assistance of counsel errors to consider, Appellant is not entitled to combine meritless issues together in an attempt to create a valid "cumulative error" claim. See Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003) (upholding lower court's denial of cumulative error claim when each of the individual claims of ineffective

assistance of counsel had been denied); Mann v. Moore, 794 So. 2d 595 (Fla. 2001) (finding no cumulative effect to consider where all claims were either meritless or procedurally barred); Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit). Accordingly, this Court should deny the instant claim.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HIS CONSTITUTIONAL RIGHTS WERE DENIED AND HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING COLLATERAL COUNSEL FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT?

Appellant claims on appeal that the lower court erred in denying his claim regarding juror interviews. The lower court found the claim procedurally barred because the claim should have been raised on direct appeal, but was not. (PCR V2:228-29); citing Ragsdale v. State, 720 So. 2d 203, 205 n.1 & 2 (Fla. 1988); Gaskin v. State, 737 So. 2d 509, 530 n.6 (Fla. 1999). In addition, the lower court noted that this Court has previously rejected similar claims in Johnson v. State, 804 So. 2d 1218 (Fla. 2001), and Arbelaez v. State, 775 So. 2d 909 (Fla. 2000). The State submits that the lower court properly denied Appellant's claim regarding his right to conduct post-trial juror interviews.

In the recent case of Marshall v. State, 32 Fla. L. Weekly S797 (Fla. Dec. 6, 2007), this Court stated that the appropriate standard of review for a trial court's ruling on a motion to interview jurors is abuse of discretion. See also Shere v. State, 579 So. 2d 86, 94-95 (Fla. 1991). In the instant case, the trial court acted within its broad discretion in denying

Appellant's procedurally-barred claim relating to juror interviews.[10]

Appellant alleged in his postconviction motion that he was denied his constitutional rights to a fair trial because he could not investigate "possible misconduct and biases" of the jury. Appellant did not identify any specific incident of possible juror misconduct in his motion. Appellant further asserts that the rule prohibiting his counsel from interviewing jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar, is unconstitutional because it violates his constitutional rights of equal protection and due process.[11]

In Barnhill v. State, 32 Fla. L. Weekly S671, S675 (Fla. Oct. 25, 2007), this Court recently rejected the same claim that Appellant raises in the instant case:

> Barnhill argues that rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar and Florida Rule of Criminal Procedure 3.575 violate his constitutional right of equal protection and deny him adequate assistance of counsel in pursuing his postconviction remedies. The State argues this issue is procedurally barred because it was not raised on direct appeal. The State also argues that Barnhill fails to identify a specific incident of juror misconduct. We deny relief on this issue consistent with our prior

[10] The State submits that the lower court properly found the instant claim procedurally barred because Appellant failed to raise it on direct appeal. See Ragsdale v. State, 720 So. 2d 203, 205 n.1 & 2 (Fla. 1998).

[11] Appellant notes that since he filed his motion, a new rule governing motions to interview jurors has taken effect. See Fla. R. Crim. P. 3.575 (effective January 1, 2005).

> decisions which have found that rule 4-3.5(d)(4) and rule 3.575, which collectively restrict an attorney's ability to interview jurors after trial, do not violate the defendant's constitutional rights. See Power v. State, 886 So. 2d 952, 957 (Fla. 2004); Sweet v. Moore, 822 So. 2d 1269, 1274 (Fla. 2002); Johnson v. State, 804 So. 2d 1218, 1225 (Fla. 2001).

Because Appellant's claim is procedurally barred and lacks merit, this Court should affirm the lower court's denial of the instant issue.

ISSUE V

WHETHER EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE FLORIDA CONSTITUTION?

In his postconviction motion, Appellant asserted that execution by lethal injection constitutes cruel and unusual punishment. (PCR V1:66-68). The trial court found that the claim was procedurally barred because Appellant did not raise the issue on direct appeal and, relying on precedent from this Court, also found that the claim lacked merit. (PCR V2:229); citing Provenzano v. State, 761 So. 2d 1097 (Fla. 2000); Sims v. State, 754 So. 2d 657 (Fla. 2000); Thompson v. State, 796 So. 2d 511, 515 n.3 (Fla. 2001).

Appellant recognizes in his brief that this Court has consistently denied the instant claim, Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005) and Diaz v. State, 945 So. 2d 1136 (Fla. 2006), and also asserts that "the disposition of similar claims may be affected by the outcome of Lightbourne v. McCollum, No. SC06-2391 (Fla. Petition filed Dec. 14, 2006)." In the recent case of Lightbourne v. McCollum, 32 Fla. L. Weekly S687 (Fla. Nov. 1, 2007), this Court noted that the issue before the Court was not whether lethal injection is per se unconstitutional, the claim raised by Appellant in the instant case, but "whether the method of execution through lethal injection, as currently

implemented in Florida, is unconstitutional because it constitutes cruel and unusual punishment." Id. at S689. After conducting a lengthy analysis, this Court ultimately rejected Lightbourne's claim that Florida's current lethal injection procedures, as actually administered through the Florida Department of Corrections, are constitutionally defective in violation of the Eighth Amendment of the United States Constitution. Id. at S696. Because Appellant's instant claim is procedurally barred and has been consistently rejected by this Court, and the recent decision in Lightbourne does not impact Appellant's claim, this Court should affirm the lower court's summary denial of the instant claim.

ISSUE VI

WHETHER APPELLANT'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS APPELLANT MAY BE INCOMPETENT AT TIME OF EXECUTION?

In his final claim, Appellant asserts that his Eighth Amendment right against cruel and unusual punishment will be violated if he is found incompetent at the time of his execution. Appellant acknowledges that the claim is not ripe for review and that he raised the issue only in order to preserve the claim for federal review. The lower court denied the instant claim as premature based on this Court's precedent. (PCR V2:231). As this Court recently noted in Barnhill v. State, 32 Fla. L. Weekly S671, S675 (Fla. Oct. 25, 2007):

> Barnhill concedes that his claim involving competency to be executed is not ripe for review as he has not yet been found incompetent and a death warrant has not been signed. He contends that he is only raising this issue for preservation purposes. This Court has repeatedly found that no relief is warranted on similar claims. See State v. Coney, 845 So. 2d 120, 137 n.19 (Fla. 2003) (rejecting the defendant's claim that he is insane to be executed where he acknowledged that claim was not yet ripe and was being raised only for preservation purposes); Jones v. State, 845 So. 2d 55, 74 (Fla. 2003) (finding claim that defendant may be insane to be executed "not ripe for review" where defendant was not yet found incompetent and death warrant not yet been signed; noting that defendant made claim "simply to preserve it for review in the federal court system"); Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001) (stating that it is premature for a death-sentenced individual to present a claim of incompetency or insanity, with regard to his execution, if a death warrant has not been signed).

Because the instant claim is not ripe for review, this Court should deny the instant claim.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert T. Strain, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136 and Jay Pruner, Assistant State Attorney, County Courthouse Annex, 5th Floor, 800 East Kennedy Boulevard, Tampa, Florida 33602-4199, this 20th day of December, 2007.

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,

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