IN THE SUPREME COURT OF FLORIDA

GENGHIS NICHOLAS KOCAKER,

Appellant,

v.

CASE NO. SC17-1975
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on direct appeal will be referred to as "DAR V_/_" with the appropriate volume number and page number inserted within the blank spaces. Additionally, the instant postconviction proceedings will be referred to as "PCR p. __" with the referenced page number of the record inserted in the blank.

STATEMENT OF THE CASE AND FACTS

Appellant, Genghis Kocaker, was convicted of first-degree murder and sentenced to death for the murder of Eric Stanton. On September 1, 2004, Kocaker called 911 to report the discovery of a cab driver inside a cab parked in a parking lot in Clearwater, Florida. (DAR V26/298-99, 323; V27/412-14). Kocaker advised that the man appeared to be dead. (DAR V26/300).

Clearwater Fire Rescue arrived at the scene within a few minutes and found a Yellow Cab parked in a parking space with the driver's side door slightly ajar. (DAR V28/550, 549; V26/323). Firefighter/paramedic Greg Boos opened the door and observed the cab driver, Eric Stanton, lying across the front seat, obviously deceased. (DAR V28/550; V27/478).

The interior of the cab had been intentionally set on fire by gasoline on the backseat passenger's side floorboard. (DAR

V26/363, 367-68). The backseat had been up during the initial stages of the fire, but at some point, Stanton had pushed the backseat forward and climbed into the cab from the trunk, ending up in the front seat. (DAR V26/332-33, 365; V29/741). The seatbelts had been cut from the front seats and were found in the trunk, presumably having been used to tie up Stanton. (DAR V26/340).

An autopsy determined that Stanton had a small incised wound to his neck, he also had first and second degree burns on his face and extremities. (DAR V27/449-52). He suffered a major stab wound to his left upper back region, which fractured a rib, penetrated a lung, and caused substantial blood loss. (DAR V27/451-55). The wound would have been fatal without treatment, but the cause of death was carbon monoxide saturation caused by the fire, with the stab wound characterized as a contributing factor. (DAR V27/462-66).

Kocaker told Greg Boos that he had happened upon the scene and called it in. (DAR V28/553). Boos suggested that Kocaker stay in the area and speak to detectives, but Kocaker stated that he was on probation and needed to go, and then left. (DAR V28/553). Detective James Beining secured Kocaker's phone number from the 911 call and subsequently met with Kocaker. (DAR V27/412-14). Kocaker advised that he had been walking home when

he saw change and items on the ground, which he figured the cab driver had dropped going in the store, so he walked over and noticed a driver's license on the ground. (DAR V27/416). He noticed the door was slightly cracked open, and he looked in through the window and saw the man laid out on the seat, possibly passed out. (DAR V27/416). He opened the door and saw that the guy was dead, his throat was "busted open," and the car was burnt up. (DAR V27/416). Video surveillance cameras revealed that Kocaker had his cell phone out and was making the 911 call about thirty seconds before he even reached the cab. (DAR V27/430-33; V29/758-59). On the video, Kocaker can be seen wearing different clothes than what he had on when talking to the detectives. (DAR V27/435).

Witnesses Antoine Powell, Heidi Kalous, and Stephanie Brzoska were among the group of friends that had seen Kocaker near the time of the murder. (DAR V28/577; V29/676, 698). Powell testified about how he sold crack to Kocaker and they partied together at the Belleair Motel. (V28/580-602). Kocaker ran out of money to purchase more crack, so Powell fronted him the money. (DAR V28/600). In the very early morning on September 1, 2004, Kocaker called Powell to meet up with him because he had money to pay Powell back. (DAR V28/602-03).

Powell had Stephanie Brzoska drive his car for him, and

they both went to pick up Kocaker at a Walgreens near where the murder occurred. (DAR V28/602-04). When they arrived, Kocaker walked to the car and got in the backseat. (DAR V28/603-06; V29/704-05). Powell noticed Kocaker was apprehensive, jittery, and counting cash. (DAR V28/606, 610).

Kocaker wanted a private conversation with Powell, so they drove to a 24-hour laundromat a few blocks away. (DAR V28/609). Brzoka waited in the car while Kocaker and Powell went inside the laundromat. (DAR V28/609-10). Once inside, Powell noticed that Kocaker had blood on his shirt. (DAR V28/610). Kocaker asked Powell if Powell "needed any killer on his team." (DAR V28/610). Kocaker was looking for soap and saying he needed to get his shirt cleaned. (DAR V28/610). Powell asked Kocaker whether he had robbed or killed someone, and Kocaker responded, "that's what I do." (DAR V28/611). They went back to the car, and Brzoska drove Kocaker to the Belleair Motel and then took Powell to Powell's house. (DAR V28/607, 611).

Heidi Kalous had seen Kocaker at the Belleair Motel. (DAR V29/680-87). A man named Alvin was having a party in his room with a number of other people. (DAR V29/687). Heidi was at the party, and she noticed that Kocaker was wearing a white shirt inside-out, with blood all over it. (DAR V29/688). Kocaker wanted to use Alvin's shower and borrow a change of clothes.

(DAR V29/688). Kocaker ended up getting a blue, collared, button-up shirt from Alvin but was still looking for new pants and shoes. (DAR V29/688-89).

When Brzoska and Powell returned to the Belleair later, they met Kocaker along the street. Kocaker had changed clothes, and the white shirt he had been wearing was in a brown paper bag. (DAR V28/611-14). Kocaker got in the car and they drove to a 7-11, where Brzoska went in to get Powell a cigar. (DAR V28/613-16). Kocaker took the bag and walked between the 7-11 and laundromat, returning a minute later without the bag. (DAR V28/613-16). A videotape from the 7-11 shows Kocaker in a blue shirt, walking along outside the store. (DAR V5/73; V29/714).

Kocaker testified in his own defense. (V30/843-887). According to Kocaker, he was not involved in Stanton's death. (DAR V30/844). Kocaker admitted that he had flagged down Stanton's cab at the Albertsons but testified that he directed Stanton to take him to the Belleair Motel. (DAR V30/844-45). Kocaker claimed that, on the way to the motel, Stanton asked why Kocaker was going down there. (DAR V30/848). When Kocaker said he was going to meet some girls, Stanton asked if Kocaker would introduce him and advised that he would not charge Kocaker for the fare if Kocaker introduced him to a girl. (DAR V30/848). Once they got to the motel, Kocaker went to find his new

friends. (DAR V30/848). He returned to the cab after a few minutes to let Stanton know he was still looking for the group but, according to Kocaker, Stanton was in the back of the cab with Crissy at that point. (DAR V30/848-49). Kocaker asked if they could go to the store, and Stanton did not want to be bothered, so Stanton gave Kocaker the keys and Kocaker drove the cab with Stanton and Crissy in the back. (DAR V30/848-49). They returned to the motel and Kocaker went about his business; later, he went by the cab and heard arguing. (DAR V30/849).

The jury convicted Kocaker as charged. (DAR V3/166; V31/1027). Following the penalty phase, the jury recommended a death sentence by a vote of eleven to one. (DAR V3/177; V33/1320). The court followed the recommendation of the jury and sentenced Kocaker to death. (DAR SV3/11-17). This Court affirmed Kocaker's conviction and sentence on direct appeal. *Kocaker v. State*, 119 So. 3d 1214 (Fla. 2013).

POSTCONVICTION COMPETENCY HEARINGS/INVOLUNTARY COMMITMENT

Postconviction counsel for Kocaker filed a Motion for Postconviction Relief and Motion for Competency Determination that was subsequently amended on July 14, 2014. (PCR pp. 426-37, 588-604). A competency hearing commenced on October 23, 2015, and the court held additional hearings on December 10, 2015, January 5, 2016, and January 20, 2016. (PCR p. 1525). Doctors Carpenter and

Bursten opined that Kocaker was incompetent. (PCR pp. 1527-29). Dr. Gamache opined that Kocaker was competent. (PCR pp. 1529-30). Kocaker also presented the testimony of Dr. Frank Wood, Dr. Michael Maher, and Dr. Hyman Eisenstein. (PCR pp. 1530-32). The postconviction court ultimately found Kocaker incompetent to proceed in an order rendered April 1, 2016. (PCR pp. 1525-63). The court's order summarized the relevant testimony from all six experts, and found that Doctors Carpenter, Bursten, and Maher were most credible, with Dr. Carpenter providing particularly compelling testimony. (PCR pp. 1525-63).

The court observed that Carpenter had found Kocaker to be competent on two occasions prior to trial but opined at the competency hearing that Kocaker's clinical presentation had markedly declined since the time of trial. (PCR p. 1528). Dr. Carpenter believed that Kocaker could manifest appropriate courtroom behavior but could not testify relevantly due to his diminished ability to grasp simple concepts or to respond relevantly to questioning. (PCR p. 1528). Dr. Carpenter also believed that Kocaker was unable to rationally understand the adversarial nature of the legal process. (PCR p. 1528).

Carpenter, Bursten, and Maher all agreed that Kocaker's mental illness, in conjunction with a degenerative neurocognitive condition, interfered with Kocaker's ability to

rationally understand the proceedings and communicate with counsel. (PCR pp. 1527-31). Based on the evidence presented, the court concluded that Kocaker did not have the ability to consult with counsel with a reasonable degree of rational understanding and he did not have a rational understanding of the pending collateral proceedings. (PCR pp. 1532-33). The court entered an involuntary commitment order, and Kocaker was subsequently transferred to the South Florida Evaluation and Treatment Center [SFETC] for competency restoration treatment. (PCR p. 1533).

COMPETENCY PROCEEDING AT ISSUE

On June 10, 2016, Dr. Debra Kirsch submitted a letter to the postconviction court, incorporating a report by Dr. Enrique Suarez, concluding that Kocaker did not present any indications of mental disease or defect and noting that testing and observations at SFETC demonstrated that Kocaker was competent to proceed. (PCR p. 2309). The court therefore directed that Kocaker be reexamined for competency, and hearings were held on September 15, 2016, October 11, 2016, and October 13, 2016. (PCR p. 2309). The following experts testified: Dr. Kirsch, Dr. Suarez, Dr. Bursten, Dr. Gamache, Dr. Carpenter, Dr. Maher, and Dr. Eisenstein. Their testimony is summarized below.

Doctor Debra Kirsch

Doctor Kirsch was the director at South Florida Evaluation

and Treatment Center. (PCR p. 1710). Upon his arrival at SFETC, Kocaker was given a full psychiatric evaluation by Dr. Kirsch. (PCR p. 1714). Dr. Kirsch continued evaluating and observing Kocaker on a weekly basis, but "informally" Kocaker was monitored "more often" than that. (PCR p. 1715). Kocaker was monitored by Dr. Kirsch and her staff and also by live-feed video. (PCR p. 1715). She explained that day-to-day interactions involving Kocaker included "[m]aking rounds on the unit, reviewing videotape from that unit which we do on a regular basis, meeting with staff in the morning report about the occurrences the day before, meeting with psychologists, social workers, and the treatment team. It would be a number of different ways." (PCR p. 1715). Further evaluations and observations, including a new neuropsychological examination directed by Dr. Suarez, led the doctors at SFETC to reject the suggestion that Kocaker suffered from any mental illness or neurocognitive impairment that rendered him incompetent to proceed with his postconviction litigation.

Although aware of a prior diagnosis of schizophrenia, Dr. Kirsch did not agree that Kocaker met the criteria for that diagnosis. (PCR pp. 1722-25). She was familiar with Kocaker's inaccurate report of being a helicopter pilot in Vietnam and growing in Tarpon Springs, although he actually grew up in New

York, but she did not find Kocaker to be delusional. (PCR p. 1723). She explained that people that have delusions usually have more bizarre delusions and they are accompanied by a host of other symptoms. (PCR p. 1723). “Merely describing historical information that is inaccurate is not enough.” (PCR p. 1723).

Dr. Kirsch further opined that hallucinations were often consistent with the theme of a person’s delusions, and hallucinations “must be vivid and have a full impact of a perceptual experience.” (PCR p. 1724). She did not agree that Kocaker’s claim to hear indistinct, infrequent voices meant that Kocaker experienced true psychotic hallucinations. (PCR p. 1724). Kocaker reported that he did not pay any attention to the voices he heard, so his report of hallucinations never actually interfered with any of his communications or behaviors, which was not typical of schizophrenia. (PCR p. 1724).

She observed cognitive strengths, as Kocaker was able to learn and retain complex information, including overlapping television schedules and programs, and he was not confused or distracted. (PCR pp. 1724-25). She noted that Kocaker’s medications were prescribed for medical conditions; he was not prescribed or given any medication for treatment of chronic mental illness. (PCR pp. 1726-27). Although he was given psychotropic medications on two occasions to calm him and to

help him sleep when he got agitated at SFETC, she did not believe that his behavior warranted that action. (PCR pp. 1726, 1734-35). She further noted that the medication a sedative, not an antipsychotic medication. (PCR. pp. 1726, 1734).

Dr. Kirsch was confident that the elaborate testing conducted had ruled out any possible neurocognitive disorder interfering with Kocaker's competency. (PCR p. 1729). She knew from experience that variations from near-average to critically-low across IQ and cognitive testing could be considered normal. (PCR p. 1737). On cross-examination, she acknowledged particular subtests that demonstrated deficiencies, but opined those were in very limited areas, and there was a possibility of malingering on some scores. (PCR p. 1736). She concluded that Kocaker was not disabled by any genuine deficiencies. (PCR p. 1743). She confirmed that, even in the low range on a bell-shaped curve, Kocaker remained within the normal range of functioning; he was actually within the normal ranges on most of the cognitive testing. (PCR pp. 1743-47). Dr. Kirsch testified that the motor skills assessments involved a different domain, and would not provide any insight into Kocaker's cognitive functioning. (PCR p. 1744). While she noted signs of impairment, she did not see any evidence of brain abnormality. (PCR pp. 1745, 1750).

Dr. Kirsch reviewed the MRI results and noted possible lesions, but many were asymptomatic with no clinical significance. (PCR p. 1750). She did not put much weight on brain imaging in the absence of some clinical correlation, and Kocaker's scattered low test scores did not corroborate any brain damage. (PCR pp. 1750-51). She doubted any connection between the nonspecific lesions, which were not concentrated in any particular area and presumably would cause more global deficits than Kocaker displayed. (PCR pp. 1751-52).

The MMPI given at SFETC was a very long test that required a lot of reading. (PCR p. 1746). Kocaker was able to complete it, but his results were invalidated by the computer scoring program, the Pearson program, which found that he reported exaggerated psychiatric symptoms. (PCR pp. 1746-47). Dr. Kirsch did not put much weight into the fact that Kocaker "passed" the validity measures that were given, as many of her patients were familiar with the tests and do well on them. (PCR pp. 1747-48). Dr. Kirsch acknowledged that recall and an accurate memory were important in order to assist counsel, but from her observations, Kocaker was able to effectively communicate and should be able to do so with counsel. (PCR p. 1755).

Dr. Enrique Suarez

Dr. Suarez, a medical staff consultant with SFETC, was a

psychologist practicing neuropsychology. (PCR pp. 1801-03). He had practiced forensic neuropsychology since 1989 and had worked on other capital postconviction cases. (PCR pp. 1803-04). He conducted a full neuropsychological evaluation on Kocaker, spending seven hours with him. (PCR pp. 1808-1810). Kocaker advised Dr. Suarez that he was in the facility because he was found to be incompetent during an appeal of his case. (PCR pp. 1810-11). Kocaker explained to Dr. Suarez that the doctors said that he was not competent, the court believed that he was incompetent, and his lawyer said he could not help him with his case. (PCR p. 1811). After questioning Kocaker about the legal process, Dr. Suarez believed that Kocaker understood the purpose, the proceedings, the roles of the parties, and the possible outcomes. (PCR pp. 1810-14).

Having read the reports of schizophrenia, brain damage, and multiple personalities, Dr. Suarez was surprised to find that Kocaker communicated spontaneously and very quickly. (PCR pp. 1814-15). Kocaker presented completely “normative,” especially for someone who had spent much of his life in prison. (PCR pp. 1814-15). Even when the discussion turned more sophisticated, Kocaker was able to absorb everything quite well without the need for repetition or clarification. (PCR p. 1815). The testing and evaluation refuted any suggestion of schizophrenia or an

inability to remember. (PCR pp. 1815-16). Dr. Suarez could not identify any functional impairment due to brain damage nor could he identify any mental, psychotic, or neurocognitive disorder. (PCR pp. 1816-17).

In addition to the testing, SFETC had Kocaker under close observation for two months, and he showed absolutely no sign of impairment of any kind over that period. (PCR pp. 1817-18). The purported hallucinations were not related to his false history reporting and were completely atypical to everything in the literature on genuine hallucinations. (PCR pp. 1818-19). Dr. Suarez noted that Kocaker had provided some false history, but he did not believe that the false history could be characterized as a delusion, as Kocaker did not talk about it constantly and there was no compelling consistent behavior, such as touting himself as a veteran. (PCR pp. 1820-21). Kocaker was able to discuss the facts of his case with Dr. Suarez, and Kocaker's story about the facts surrounding the murder was fairly specific, consistent, and detailed. (PCR pp. 1821-24).

Kocaker was given the Reitan Halstead Expanded Neuropsychological Test, a fixed battery of a series of tests that was validated on both normal and brain damaged people. (PCR p. 1825). It included tests for different facets of brain functioning, ranging from motor skills to cognitive ability to

executive functioning. (PCR p. 1825). On his intelligence test, Kocaker scored 80, which was in the low average range. (PCR pp. 1826-27). While some low abilities were indicated, he did not score so low as to be incapable of communicating with his lawyer with a reasonable degree of rational understanding. (PCR pp. 1827-28).

Dr. Suarez believed that competency turned on what a person was capable of doing rather than specific numbers from a test result or a certain diagnosis. (PCR p. 1828). He explained, “my opinion and my experience is that there is no equivalence with any of these numbers with what we would term ‘incompetency’ in the same way that there is no diagnosis or condition that would automatically render someone incompetent, including things like schizophrenia or brain damage or even, you know, intellectual disability. It all depends on what a person can do, not something that one infers they can’t do because of a specific number.” (PCR p. 1828).

Kocaker displayed fairly good recall and attention. (PCR p. 1830). Some areas of testing resulted in “incredibly” good scores. (PCR p. 1831). He could not have obtained the normal scores he did if he had memory problems. (PCR p. 1831). While he had a lot of variation in what he produced, there were indications that he did not put forth good effort on some

things, while giving fairly good effort on others. (PCR p. 1831). On the SIMS validity measure, the total score was not above the threshold to find global malingering, but his scores on the psychosis and low intelligence subscales were at the suspected feigning level. (PCR pp. 1831-32).

Dr. Suarez acknowledged that Kocaker had done well on most of the validity testing, and he noted a typographical error in his report with regard to an area of scoring. (PCR pp. 1858-64). Results on the Dot Counting Test, some of the WAIS tests, and some of the neuropsychological tests were suspicious and implied a poor effort. (PCR pp. 1832-34, 1864-65). For example, Kocaker did much better on the Trails B test than he did on Trails A, even though B was much more difficult and required a higher level of executive functioning. (PCR pp. 1846-47). Kocaker did much better on delayed recall testing, which did not make sense to Dr. Suarez because one cannot recall more than one originally learned. (PCR p. 1853). Dr. Suarez explained that it was important to look at the sequence of scoring rather than only focusing on the low scores; you cannot just pick a low score and assume it reflects impairment when twenty minutes later Kocaker's score has significantly improved. (PCR p. 1853). According to Dr. Suarez, that sequence from the Story Memory Test showed that Kocaker had internalized and memorized much

more than first appeared from the initial test; therefore, the initial test provided no basis to find neurological problems, despite the low score. (PCR pp. 1849-55).

Dr. Suarez stated that in his forty-two years of testing, he had never seen a zero on the delay recall testing for the Figure Memory Test. (PCR pp. 1855-58). Kocaker's score of zero did not make any neurological sense to Dr. Suarez because Kocaker performed well on other recall tests. (PCR pp. 1855-58). Dr. Suarez explained that Kocaker claimed that he did not recognize any of the figures presented to him even though it was a very easy test, but yet he remembered all the figures later in the recall memory test, which was much more difficult. (PCR p. 1857).

However, even if the zero were accepted as a valid score, the tests reflected that any problem would be so narrow in scope that it would not affect anything other than Kocaker's abilities with regard to drawing figures. (PCR pp. 1857-58). Dr. Suarez explained that no brain mechanism would cause Kocaker not to be able to do that one thing; therefore, his score could not be attributed to brain damage or schizophrenia. (PCR p. 1858). Dr. Suarez stated that it was just one idiosyncratic response that was surrounded by an overwhelming amount of scores that were not impaired. (PCR p. 1858).

Dr. Suarez emphasized that it was important to remember that no one scores well on every test they are given. (PCR p. 1843). The battery was tested and validated by Dr. Heaton, who looked at almost 1300 people that were neurologically normal, yet all of them were impaired in at least one area because all people have strengths and weaknesses. (PCR p. 1843). Dr. Suarez explained that "everyone had at least, you know, one, two, three, four, five, six, seven, eight, nine, ten scores in the impaired range even though they were all in the nonimpaired normal reference group." (PCR p. 1843). Dr. Heaton further looked at 300 neurologically impaired people, in order to set cutoffs for the scores. (PCR p. 1843). Dr. Suarez cautioned against finding impairment by cherry-picking the scores. (PCR p. 1844). He explained, "you don't just look at and cherry pick one or two scores or five scores and say that a person is language impaired because of certain things." (PCR p. 1844). He continued, "And again, because you have – the next thing down on that page 26 is he – Mr. Kocaker did quite well on the Reitan-Indiana Aphasia Test that is also looking at language functioning that would be brain based. And he comes across as above average when we test him in that area so that you can look at some of the other areas of language – and like I said before, information is one of the things that would be expected to be

low in someone who has spent as many years as he has in prison." (PCR p. 1844).

In Dr. Suarez's opinion, to a reasonable degree of medical psychological certainty, Kocaker had the ability to consult with counsel with a reasonable degree of rational understanding, if he chose to do so. (PCR p. 1834). He had a rational as well as factual understanding of the pending collateral proceedings, and he was competent to proceed. (PCR pp. 1834-35).

Dr. Peter Bursten

Dr. Bursten had evaluated Kocaker in November 2014 and July 2016, and he continued to believe that Kocaker was incompetent. (PCR pp. 1868-69). Dr. Bursten felt that Kocaker seemed more relaxed and more conversant during the second evaluation, but he did not believe that there was a difference in terms of his competency. (PCR p. 1868).

He disagreed with Dr. Suarez regarding the interpretation of the neuropsychological testing conducted at SFETC, finding that low scores on some subtests reflected impairment and a neurocognitive disorder. (PCR pp. 1869-70). According to Dr. Bursten, the scatter of scores presented a marked discrepancy that exceeded the typical strengths and weaknesses one can reasonably be expected to see in such testing. (PCR pp. 1869-74). He also disagreed with Dr. Suarez's opinion that Kocaker's

low scores still put him in the normal range, because Kocaker was “at the lowest end of the low-average range” (PCR pp. 1894-95). While Dr. Bursten was not a neuropsychologist, he knew enough about it to analyze testing and arrive at opinions. (PCR p. 1898).

Dr. Bursten was adamant that malingering could not be contemplated in any manner in this case because Kocaker did well on all of the validity testing. (PCR pp. 1872-73, 1877-78, 1887-88, 1886-87, 1905). The scatter of scores on the neuropsychological testing supported the conclusion that Kocaker was not malingering, since a malingerer will necessarily have low scores throughout all testing. (PCR pp. 1872-74). Dr. Bursten admitted that a better performance on the more difficult Trails B test suggested a lack of full effort on Trails A; however, he did not find it to be significant given Kocaker’s ability to pass all of the other malingering measures. (PCR p. 1905).

Dr. Bursten also took issue with the use of the Pearson computer scoring of Kocaker’s MMPI and found that when the raw scores were analyzed with the Caldwell program, which was more sensitive to neurological impairment, malingering was only a consideration, rather than definitive. (PCR pp. 1885-89). Dr. Bursten continued to maintain that Kocaker had genuine

hallucinations, but he attributed them to brain damage rather than schizophrenia or any psychosis. (PCR pp. 1883, 1887). Dr. Bursten agreed that whatever Kocaker may have heard did not interfere with his functioning and had no impact on his competency. (PCR p. 1904). He further agreed that any impairment in Kocaker's motor skills did not impact any competency concerns. (PCR pp. 1876-77). However, he thought that low scores in that area were relevant because they suggested that there was some brain impairment. (PCR p. 1877).

According to Dr. Bursten, the competency Kocaker needed to proceed required much higher functioning than competency to stand trial because there were more requirements of him in postconviction. (PCR p. 1892). He opined that although Kocaker had the surface knowledge and functioning to respond appropriately to the standard competency questions, his impairments were evident when he attempted to get detailed information pertinent to Kocaker's postconviction proceeding. (PCR pp. 1875, 1906-08). Dr. Bursten believed that Kocaker did not have adequate memory and recall. (PCR pp. 1875, 1906-08). Dr. Bursten believed that the memory impairments and inability to elaborate on details, along with Kocaker's irrational delusional system regarding his personal history, precluded his ability to assist his attorney or to testify relevantly (PCR pp.

1875-76, 1908-09).

Dr. Gamache

Dr. Gamache met with Kocaker to evaluate him in July 2016, and he had met with him twice prior to that. (PCR pp. 1925-26). Kocaker was able to comprehend and to describe the purpose of the meeting with Dr. Gamache as well as the purpose of his stay at SFETC. (PCR pp. 1924-25). Dr. Gamache observed Kocaker interact with attorney Gemmer and noted that even when Kocaker initially indicated he was confused or did not know something, his response to additional questioning reflected that he actually did know the answer. (PCR p. 1927). Kocaker correctly responded to the standard competency questions, and Dr. Gamache had no concerns about his capacity for a rational as well as factual understanding of the current proceedings. (PCR p. 1927).

In Dr. Gamache's opinion, there was no mental health or psychological condition that explained the inaccurate personal history maintained by Kocaker. (PCR p. 1927). He observed that Kocaker had long endorsed perceptual abnormalities or hallucinatory experiences, but his endorsement was entirely inconsistent with someone genuinely suffering any psychotic condition. (PCR pp. 1928-29). "There is no credible evidence that he suffers from a psychological disorder." (PCR p. 1932). Dr. Gamache noted that SFETC reached the same conclusion as he

did based not only on interviewing Kocaker, but based on observing him day after day. (PCR p. 1932).

Dr. Gamache was not familiar with Dr. Suarez, but observed that the battery of tests given to Kocaker at SFETC was very comprehensive, and included both psychological and neuropsychological testing. (PCR p. 1932). He agreed with Dr. Suarez's interpretation of the raw data, and he concluded that Kocaker's performance was in the normal range, with no evidence of significant cognitive impairment. (PCR p. 1933). He noted that the presence of a few borderline scores among numerous subtests should not be considered in isolation; rather, they must be looked at in the composite. (PCR p. 1933). Dr. Gamache confirmed that the literature was clear that with a typical neuropsychological battery, as many as five percent of the scores in a given normal subject may fall into the borderline or even the impaired range. (PCR p. 1933). He explained that because the extensive testing takes several hours to complete, attentions may drift and there may be distractions. (PCR p. 1934). He agreed that the number of scores Kocaker obtained in the borderline or impaired range were not indicative of an underlying condition with any impact on his cognitive abilities. (PCR p. 1934). Dr. Gamache observed that the total score from the battery was in the normal range, which was not typically

associated with someone with a neurological condition. (PCR p. 1934).

Dr. Gamache noted that the MMPI-2 given to Kocaker would test for psychological issues, while the other tests measured neuropsychological issues. (PCR p. 1935). The MMPI results were not valid, as Kocaker endorsed atypical symptoms of mental illness. (PCR p. 1935). Dr. Gamache opined that the other clinical presentation measure, the SIMS, also indicated malingering. (PCR pp. 1936-38, 1941). However, on malingering tests which focused on cognitive functioning based on performance rather than presentation, Kocaker did well, indicating that his test results in cognitive areas were probably valid. (PCR p. 1936).

Dr. Carpenter

Dr. Carpenter continued to believe that Kocaker was properly diagnosed as a schizophrenic, with an unspecified neurocognitive disorder and an unspecified personality disorder with antisocial and borderline features. (PCR p. 1966). Although not a neuropsychologist, he knew enough about basic testing and scores to interpret neuropsychological testing. (PCR pp. 1945-46). He had never heard that a five percent failure rate could be normal, but his review suggested that Kocaker exceeded that rate anyway, as many of his scores were below average. (PCR pp.

247-48). He identified the particular tests and scores where Kocaker had performed poorly, although he acknowledged that not all of the tests provided any insight into Kocaker's competency. (PCR pp. 1950-52).

Dr. Carpenter agreed with Dr. Bursten that any possibility of malingering was overwhelmingly refuted by Kocaker's performance on all validity measures. (PCR pp. 1954-44, 1960-61). He found no basis to conclude that Kocaker's hallucinations were feigned and characterized his inaccurate historical information as pure delusion. (PCR p. 1962). Dr. Carpenter believed that the only plausible explanation for Kocaker's inconsistent historical information and lack of malingering was that he was delusional. (PCR p. 1966).

According to Dr. Carpenter, the best evidence of Kocaker's incompetence was the Story Memory Test. (PCR p. 1959). That test directly related to the skills that Kocaker needed to be competent, such as learning and recalling information, and that is where Kocaker had deficiencies. (PCR pp. 1959-60). Dr. Carpenter described Kocaker as having a little superficial knowledge "but if you press and sort of dig down a little bit and drill down there's nothing there. He doesn't seem to know much of what's going on." (PCR p. 1960). Dr. Carpenter explained that when you asked Kocaker why he did not know, he would just

say something like, “Oh, it’s all Chinese to me” or “it goes in one ear and out the other.” (PCR p. 1960). Dr. Carpenter believed that Kocaker gave a “self-protective description,” but in reality, Kocaker could not actually listen and retain information that was imparted to him. (PCR pp. 1960-61). That was why Dr. Carpenter ultimately opined that Kocaker was incompetent. (PCR p. 1961).

Dr. Carpenter testified that Kocaker first developed schizophrenia, and then developed a neurocognitive disorder, which was supported by the brain imaging as well as the neurological testing. (PCR pp. 1966-68). He believed that Kocaker was deteriorating, and the neurocognitive problem was more prominent with his competency deficits than the schizophrenia, but Carpenter’s opinion of incompetence was based on both diseases. (PCR p. 1967).

Dr. Carpenter had reviewed the competency information Kocaker had been provided at SFETC and noted that they were not relevant or helpful for postconviction proceedings. (PCR pp. 1964-65). He was “struck by the fact that the evaluation by the hospital was all focused toward pretrial competence” and did not say anything about postconviction issues. (PCR p. 1965). He therefore rejected the finding of competency at SFETC because he believed it was not tailored to the particular proceeding at

hand. (PCR p. 1965).

Dr. Carpenter agreed that Kocaker could relay elements of what happened during trial and during the crime, but Dr. Carpenter felt that Kocaker had inadequate recall and could not provide sufficient details. (PCR pp. 1967-79). Dr. Carpenter was particularly concerned that Kocaker did not remember testifying at trial, did not remember who Tracy Paladino was, and could not identify what his attorney should have done differently to improve the outcome of the trial or what other witnesses might have been called. (PCR pp. 1976-86).

Dr. Carpenter testified that he thought that Kocaker could not do a good job of presenting information to his attorneys at the time of trial, even though he found him competent. (PCR pp. 1980-81). He explained that Kocaker was adequate the first time he saw him, and Dr. Carpenter gave him a "marginal pass" the second time he saw him. (PCR p. 1981). He did not think Kocaker passed that threshold today because he could not explain what his trial attorney might have done differently. (PCR p. 1978). According to Dr. Carpenter, it was "utterly preposterous" that Kocaker viewed the job of his attorneys in postconviction as finding the real perpetrator; the idea that attorney Gemmer would be doing such a thing was so illogical as to be a "manifestation of his psychotic reasoning." (PCR pp. 1984-86).

Dr. Michael Scott Maher

Dr. Maher, a physician and psychiatrist, saw Kocaker in 2015 and again briefly in October 2016. (PCR p. 2007). He felt that Kocaker's cognitive impairments were more evident and were consistent with a fundamental brain disease such as dementia or encephalopathy. (PCR pp. 2009-2010). He testified that while Kocaker's psychiatric disorders had existed his whole life, his current presentation was more like a dementia patient, and he should be considered incompetent even if he did not suffer any psychosis. (PCR p. 2010). In Dr. Maher's opinion, Kocaker's brain scans showed an undeniable vascular disease, which has gotten worse over the years. (PCR pp. 2010-11). Having observed Kocaker interact with attorney Gemmer, he concluded that Kocaker was unable to engage with counsel meaningfully on relevant issues, even after many discussions. (PCR pp. 2011-12). Kocaker was unable to recall past sessions and had no real ability to understand, appreciate, or remember what was relevant and important. (PCR p. 2013). He could not provide specifics or details, and he tried to minimize his problems by confabulating facts to fill in the gaps of his memory. (PCR pp. 2013-14).

Dr. Maher opined that the neuropsychological testing at SFETC provided the clinical correlation necessary to find that the lesions and lack of tissue noted on the brain scans were

significant and impacted Kocaker's mental functioning. (PCR pp. 2016-17). The scattered nature of the scores reflected very severe impairments in some areas, along with adequate functioning in other areas where Kocaker scored well. (PCR pp. 2015-16). Dr. Maher felt the results were overall abnormal, and he rejected the possibility of any malingering because Kocaker passed all of the validity measures. (PCR pp. 2015-20). He admitted that while some tests may have suggested malingering, that was common with an atypical, very impaired individual. (PCR p. 2019). Given Kocaker's history of a major psychiatric illness, having been institutionalized most of his adult life, documented sexually transmitted diseases, and the vascular disease on his brain scans, he would expect the tests to reflect an unusual pattern. (PCR pp. 2019-20).

According to Dr. Maher, Kocaker's cognitive deterioration was continuing, and there was a poor prognosis for improvement. (PCR p. 2022). While he could function in a stable environment, there was no treatment that could improve his brain function, help him understand his case, or restore his memory and abilities. (PCR p. 2025).

Dr. Maher agreed that there was a distinction between competency for trial and competency for postconviction, and felt that the ability to communicate with counsel involved different

skills sets based on the nature of the proceeding. (PCR pp. 2029-2030). In his view, Kocaker did not have a reasonable, consistent understanding of the postconviction motion. (PCR p. 2030). The example he offered was Kocaker's confusion as to the possibility of having a jury, as Kocaker did not seem to understand that he might obtain a new trial with a new jury empaneled. (PCR p. 2032). It reflected a huge deficit that Kocaker did not understand he might have the opportunity to go back to court and present evidence of his innocence, and Dr. Maher considered it unreasonable that Kocaker would simply leave the legal stuff to his attorney when his attorney was clearly asking for his assistance. (PCR pp. 2032-34). Kocaker had the ability to provide a lot of detail on historical information, and the capacity to report things from the past, but not the capacity to relate them in a reasonable and rational way to his present circumstances. (PCR p. 2037). Dr. Maher agreed that Kocaker's understanding that attorney Gemmer might find the real perpetrator was such a highly simplistic, childish view of exoneration that it demonstrated Kocaker had no understanding at all. (PCR p. 2044).

Dr. Eisenstein

Kocaker's final witness was Dr. Eisenstein. Dr. Eisenstein was highly critical of the work at SFETC and claimed that Dr.

Suarez's report had clear deficiencies with both interpretation and failing to put the whole picture together cohesively. (PCR p. 2059). He faulted Dr. Suarez for characterizing Kocaker as a white Caucasian, even though Kocaker had Turkish and Hispanic origins; however, he could not identify any measurable impact this had on the test results. (PCR pp. 2062-63, 2106-07). He took issue with the entire concept of creating T-scores based on a number of tests to get an overall Global Deficit Score and cutoff number for impairment and felt, for a variety of reasons, that the Heaton norms were unreliable and inaccurate. (PCR pp. 2064-73. 2125-26). He referenced an article which concluded that clinicians wanting to find severe impairment might use something other than Heaton's norms, and those looking for only mild or no impairment would choose Heaton's method. (PCR p. 2072).

Dr. Eisenstein's preferred approach looked at all individual subtest scores and considered the issue on a continuum. (PCR p. 2068). He exhaustively reviewed Kocaker's scores on the Expanded Halstead-Reitan Battery and concluded that severe neurocognitive impairment was indicated. (PCR pp. 2077-88). He acknowledged that Kocaker's performance on the Trail Making tests had improved from the time he had given the same test in 2014; the result went from severe or moderate impairment to below average to average performance. (PCR pp.

2113-14).

With regard to intelligence testing, Dr. Eisenstein identified several subtests in the WAIS-IV given by SFETC where Kocaker's performance was poor and found deficiencies and impairment. (PCR pp. 2073-74). Dr. Eisenstein recalled that he had administered the same test in 2014 and the results were practically the same. (PCR pp. 2075-76). The impairments were in skills that would be needed to assist counsel, such as language and communication. (PCR p. 2075).

Dr. Eisenstein reviewed the validity testing and concluded that there were no indications of feigning or malingering. (PCR pp. 2088-94). He agreed that Kocaker's neurocognitive impairments were sufficient in and of themselves to render Kocaker incompetent, regardless of the presence of any psychosis. (PCR p. 2095). But as to psychosis, he reiterated that scoring the MMPI with the Caldwell program was preferable to the Pearson program, even though Pearson was "the MMPI company." (PCR pp. 2096-99). Dr. Eisenstein had also been able to obtain a valid MMPI result from Pearson when he administered it to Kocaker verbally rather than relying on Kocaker to read it himself, and the profile confirmed that Kocaker had psychosis from some major psychological disorder. (PCR pp. 2099-2100).

Dr. Eisenstein had also discovered that Kocaker suffered

from Attention Deficit Disorder. (PCR pp. 2100-01). This added one more component in an area of major deficit. (PCR pp. 2101-02). He concluded that Kocaker's neurological and psychological issues would each independently render him incompetent, but the neurocognitive impairment was continuing, perhaps deteriorating, and predominant at this point. (PCR pp. 2102-03).

After listening to the extensive testimony from all of the experts, reading the reports of the court-appointed experts, and watching *in camera* the recorded evaluations conducted by the court-appointed experts (which was at the request of Kocaker's postconviction counsel), the postconviction court entered an order finding Kocaker competent to proceed. (PCR pp. 2309-20). The court found that the sum of the credible expert testimony established that Kocaker was competent to proceed. (PCR p. 2318).

It explained that the "experts agree that Defendant has some measurable weaknesses in cognitive function. They disagree, however, on the degree of these deficiencies and the extent to which they affect Defendant's competence to proceed." (PCR p. 2318). The court credited Dr. Kirsch, Dr. Suarez, and Dr. Gamache's testimony opining that Kocaker did not suffer from any demonstrable mental illness and that whatever cognitive deficits he had were within the normal range of functioning, especially

for a person who has been institutionalized for most of his adult life. (PCR p. 2318). The postconviction court further found the testimony of Dr. Kirsch and Dr. Suarez to be more compelling because their evaluations were based not only on a thorough review of the records and of their own extensive testing, but on observation of Kocaker's behavior over several weeks. (PCR p. 2319).

Doctors Kirsch and Suarez both adamantly denied that Kocaker's inaccurate recitation of personal history was delusional or that Kocaker had memory problems akin to dementia. (PCR p. 2319). The court found that those doctors opinions were supported by their testing, "which reflects that Defendant not only has good immediate recall, but even better delayed recall, which Dr. Suarez found astounding for someone suspected of having dementia-like brain function." (PCR p. 2319).

The order relayed that it was apparent from the postconviction judge's review of the recorded evaluations of Kocaker conducted by the court-appointed experts that Kocaker remembered a remarkable amount of information about his version of the night of the offense and about what occurred at his trial. (PCR p. 2319). The court highlighted that although some of the experts testified that Kocaker could not learn and process new information, the evaluations reflected that Kocaker

was able to reproduce information he learned during competency training he received. (PCR p. 2319).

The court noted that Kocaker had consistently expressed that he was not interested in focusing on complex legal concepts and was content to leave his legal matters to his attorneys; but, Kocaker did not have to be capable of functioning as co-counsel to be considered competent to proceed. (PCR p. 2319). The court found that Kocaker had a rational understanding of the pending collateral proceedings and had sufficient present ability to consult with counsel with a reasonable degree of rational understanding. (PCR pp. 2319-20). Accordingly, the court ordered Kocaker competent to proceed.

Postconviction Motion At Issue

After competency was restored, Kocaker's attorneys again amended Kocaker's postconviction motion and added new claims. (PCR pp. 2387-2475). The new claims included an allegation that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding evidence that it had offered witnesses Antoine Powell, Stephanie Brzoska, and Paul Sands deals in exchange for their testimony. (PCR pp. 2397-2404). Kocaker also added a claim that his counsel was ineffective in its failure to investigate and impeach witnesses and for failing to object to the prosecutor's improper closing argument. (PCR pp. 2405-13). After

a case management conference was held, the court entered an order dismissing in part, denying in part, and granting in part, Kocaker's postconviction motion.

Kocaker's death sentence was vacated in order for Kocaker to be resentenced pursuant to *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). The court dismissed as moot claims IX and X concerning whether Kocaker's mental health and (in)competence precludes his execution (PCR p. 2817), and the court summarily denied Kocaker's remaining claims. (PCR pp. 2804-16).

This appeal follows.

SUMMARY OF THE ARGUMENT

Issue I: The lower court did not abuse its discretion in finding Kocaker competent. Dr. Gamache, a court appointed expert, and Doctors Kirsch and Suarez, who both worked at the facility Kocaker was committed to, all opined that Kocaker was competent to proceed. While there was some conflicting testimony from other experts, the court found Doctors Kirsch, Suarez, and Gamache to be most credible.

Kocaker's argument is essentially based on his view that the lower court should have accepted the experts' testimony finding him incompetent, but there is sufficient evidence to support the lower court's conclusion, and this Court does not substitute its judgment for that of the trial court regarding

the weight that should be given to conflicting testimony. *Mason v. State*, 597 So. 2d 776, 779 (Fla. 1992). The postconviction court's order finding Kocaker competent is supported by competent, substantial evidence and requires affirmance by this Court.

Issue II: Kocaker failed to show that the lower court erred in summarily denying his *Brady v. Maryland,* 373 U.S. 83 (1963), claim that was based on pure speculation. Kocaker merely asserted that State witnesses Antoine Powell and Stephanie Brzoska received deals in exchange for their testimony against Kocaker based solely on speculation that Powell and Brzoska were sentenced more leniently for pending charges after testifying in Kocaker's case. Kocaker was not entitled to an evidentiary hearing to present Powell and Brzoska's sentences when Kocaker had no evidence showing that any actual deal or agreement existed.

Issue III: Kocaker's claims that his trial attorneys unreasonably failed to impeach Heidi Kalous, Stephanie Brzoska, and Antoine Powell through cross-examination are entirely without merit. First, with regard to Kalous, Kocaker's trial counsel could not have impeached Kalous at trial based on statements in other people's depositions. Next, Kocaker's counsel could not have impeached Brzoska about whether she saw blood on Kocaker's clothing when she never testified that she saw blood on his

clothing, and in her deposition, she admitted that she had not been paying attention. Nevertheless, any proposed questioning as to whether she saw blood on Kocaker's clothing would not have mattered given that she was not in a position to see it and other witnesses testified that Kocaker's shirt was covered in blood.

Lastly, Kocaker did not show that his counsel was deficient and that he suffered prejudice by his counsel's failure to cross-examine Powell based on the additional details added to his trial testimony that were not part of his previous statements. Even if Powell would have been questioned about the additional details, it would not have resulted in Kocaker's acquittal, especially given that other witnesses testified consistently with Powell's trial testimony and even Kocaker confirmed some of Powell's version of events when he testified in his own defense. Kocaker failed to meet his burden under *Strickland*, and the lower court's denial of this claim should be affirmed.

Issue IV: In Kocaker's final claim, he alleges cumulative errors of his trial counsel significantly tainted the guilt phase of his trial. Given that Kocaker's individual claims lack merit, his cumulative error claim fails.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT DID NOT ABUSE ITS DISCRETION IN FINDING KOCAKER COMPETENT TO PROCEED IN HIS POSTCONVICTION PROCEEDINGS WHEN ITS FINDINGS ARE SUPPORTED BY THE RECORD, INCLUDING THE OPINIONS OF THREE EXPERTS.

Kocaker argues that the lower court erred in finding him competent given his long history of mental illness and his neurocognitive disease. Kocaker was originally evaluated for competency prior to his trial, and Kocaker was deemed competent to stand trial. (PCR p. 2309). During the postconviction proceedings, Dr. Gamache, Dr. Carpenter, and Dr. Bursten were appointed to evaluate Kocaker for competency. The postconviction court subsequently found Kocaker incompetent on March 28, 2016. (PCR pp. 1525-63). The court committed Kocaker to the custody of the Department of Children and Families (DCF), and he was subsequently transferred to the South Florida Evaluation and Treatment Center (SFETC). (PCR p. 1533).

Notably, on June 10, 2016, the court was notified by SFETC that Kocaker had been deemed competent to proceed. (PCR p. 2309). As a result, the court ordered that Kocaker be re-evaluated for competency, and the court appointed Dr. Bursten, Dr. Gamache, and Dr. Carpenter to reexamine Kocaker for competency. (PCR p. 2309). Doctors Kirsch and Suarez from SFETC testified at the competency hearing in addition to the court-

appointed experts, and Kocaker also presented the testimony of Dr. Maher and Dr. Eisenstein. (PCR pp. 1710-2103). Doctors Kirsch, Suarez, and Gamache opined that Kocaker was competent, while the remaining experts opined that Kocaker was incompetent. The court ultimately found Kocaker competent to proceed, finding Doctors Kirsch, Suarez, and Gamache to be more credible. (PCR pp. 2318-2320). Now on appeal, Kocaker argues that the court erred by not agreeing with the experts finding him incompetent.

In order to determine whether a defendant is competent to proceed in postconviction proceedings, the court must discern "whether he has sufficient present ability to consult with counsel with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the pending collateral proceedings." *Huggins v. State*, 161 So. 3d 335, 344 (Fla. 2014) (quoting *Hardy v. State*, 716 So. 2d 761, 763 (Fla. 1998)). In cases where there is conflicting testimony from experts regarding a defendant's competency, **this Court has traditionally afforded great deference to the trial court's resolution of conflict**. *Huggins*, 161 So. 3d at 344 (emphasis added).

This Court will affirm a postconviction court's decision regarding competency unless it is shown that the court abused its discretion. *Huggins*, 161 So. 3d at 345. "In addressing that

issue, [this Court remains] mindful that a trial court's decision does not constitute an abuse of discretion 'unless no reasonable person would take the view adopted by the trial court.'" *Huggins*, 161 So. 3d at 345 (quoting *Scott v. State*, 717 So. 2d 908, 911 (Fla. 1998)). Kocaker has not shown that the lower court abused its discretion in finding him competent to proceed in postconviction.

First, Kocaker merely complains that the lower court failed to consider or weigh Dr. Maher's testimony; however, the lower court included a section in its order summarizing Dr. Maher's testimony. (PCR p. 2317). The court explained that it reviewed the thirty-nine page report from SFETC, the reports from the court-appointed experts, and that it heard extensive testimony from eight witnesses over the course of several hearings. (PCR p. 2318). The court also watched the recordings of the court appointed expert's evaluations *in camera*. (PCR p. 2319). The court's decision was made after **"[h]aving considered the totality of the experts' reports, the testimony, and the record in this case** […]" (PCR pp. 2319-20). Kocaker has failed to show that the lower court abused its discretion.

The court ultimately relied upon the opinions of Doctors Kirsch, Suarez, and Gamache, finding that testimony to be more credible. (PCR p. 2318-19). The court explained that Dr. Kirsch,

Dr. Suarez, and Dr. Gamache suggested that Kocaker did not suffer from any demonstrable mental illness and whatever cognitive deficits he has are within the normal range of functioning, "particularly for a person who has been institutionalized for almost the entirety of his adult life." (PCR p. 2318).

The court found the testimonies of Dr. Kirsch and Dr. Suarez to be "particularly compelling" because their evaluations were based on Kocaker's behavior over several weeks. (PCR p. 2319). Kocaker complains that it was wrong for the lower court to give more weight to the testimony of Dr. Kirsch and Dr. Suarez because they only spent minimal time with Kocaker. Initial Brief at 47-48. The record, however, shows that both doctors based their opinions on their evaluations of Kocaker as well as Kocaker's behavior throughout his stay at SFETC.

Dr. Kirsch testified that she evaluated Kocaker when he arrived at SFETC and continued to evaluate and observe Kocaker formally on a weekly basis, but "informally" Kocaker was monitored "more often" than that. (PCR p. 1715). Kocaker was monitored by Dr. Kirsch and her staff and also by live-feed video. (PCR p. 1715). She explained that day-to-day observations of Kocaker included "[m]aking rounds on the unit, reviewing videotape from that unit which we do on a regular basis, meeting

with staff […] about the occurrences the day before, meeting with psychologists, social workers, and the treatment team. It would be a number of different ways." (PCR p. 1715). Dr. Suarez conducted comprehensive testing on Kocaker, and he based his opinion on Kocaker's behavior because Kocaker was under close observation for two months. (PCR pp. 1808-10, 1817-18). Kocaker has not shown that the court abused its discretion for relying more heavily on the opinions of the SFETC doctors who monitored Kocaker's behavior more closely over his stay at SFETC.

Kocaker further argues that it was wrong for the court to discredit the testimony relating to psychosis, brain damage, or dementia. (PCR pp. 1817-18). Kocaker's arguments amount to nothing more than Kocaker's repeated disagreement with the lower court's credibility findings with regard to Dr. Kirsch, Dr. Suarez, and Dr. Gamache. As this Court has recognized, it is the lower court's duty to determine the weight that should be given to conflicting testimony. *Mason v. State*, 597 So. 2d 776, 779 (Fla. 1992). Where there is sufficient evidence to support the conclusion of the lower court, this Court does not substitute its judgment for that of the trial judge. *Mason*, 597 So. 2d at 779 (quoting *State v. Sireci*, 536 So. 2d 231, 233 (Fla. 1988)).

Here, the lower court provided thorough and detailed reasons for why it found the opinions of Dr. Kirsch, Dr. Suarez,

and Dr. Gamache more credible, and those opinions were based on the record, as well as the court's own observations of Kocaker in the recorded evaluations. As the postconviction court properly found, in the entirety of Kocaker's stay at the SFETC, he showed no observable symptomatology indicative of psychosis, brain damage, or dementia. (PCR p. 2319). The court further found that the opinions of Dr. Kirsch and Dr. Suarez were supported by the testing, which showed that Kocaker not only had good immediate recall, but that he had even better delayed recall, "which Dr. Suarez found astounding for someone suspected of having dementia-like brain function." (PCR p. 2319).

Doctors Kirsch and Suarez conducted elaborate testing on Kocaker, and Kocaker scored within the normal range of functioning; **the testing refuted any suggestion of schizophrenia, inability to remember, or any other functional impairment due to brain damage or a mental, psychotic, or neurocognitive disorder**. (PCR pp. 1743-47; 1815-17). Dr. Kirsch was confident that the elaborate testing conducted had ruled out any possible neurocognitive disorder interfering with his competency. (PCR p. 1729). Dr. Suarez testified that Kocaker could not have obtained the scores that he did on the testing if he had memory problems. (PCR p. 1831). Furthermore, some areas of testing showed that Kocaker did not put forth good effort,

and Kocaker's scores in the areas of psychosis and low intelligence subscales were in the suspected feigning level. (PCR pp. 1831-34, 1846-58, 1864-65). Even if those scores were valid, they would not have proven Kocaker to be incompetent. Dr. Suarez explained that it was very important not to cherry pick scores to conclude that a person is impaired; everyone scores low in some areas of testing even if they are neurologically normal. (PCR pp. 1843-44). He explained that "there is no equivalence with any of these numbers with what we would term 'incompetency' in the same way." (PCR p. 1828).

Dr. Gamache similarly testified that the presence of a few borderline scores among numerous subtests should not be considered in isolation; rather, they must be looked at in the composite. (PCR p. 1933). Dr. Gamache agreed with Dr. Suarez's interpretation of the raw data, and he concluded that Kocaker's performance was in the normal range, with no evidence of significant cognitive impairment. (PCR p. 1933). Kocaker's total score would not typically be associated with someone with a neurological condition. (PCR p. 1934). Dr. Gamache did not find any of Kocaker's scores indicative of an underlying condition with any impact on his cognitive abilities. (PCR p. 1934). Competent, substantial evidence supports the court's determination that the totality of the testing performed belied

a finding that Kocaker suffered from a mental illness or neurocognitive condition that affects his memory. (PCR p. 2319).

While some of the experts thought Kocaker must be delusional because he provided false accounts of his past, Dr. Kirsch, Dr. Suarez, and Dr. Gamache all testified that Kocaker's inaccurate reporting did constitute valid delusions. (PCR pp. 1723, 1820-21, 1927). According to Dr. Kirsch, people that have delusions usually have more bizarre delusions and they are accompanied by a host of other symptoms. (PCR p. 1723). "Merely describing historical information that is inaccurate is not enough." (PCR p. 1723). Similarly, Dr. Suarez did not classify Kocaker's false history, such as being a pilot in Vietnam, a delusion because Kocaker did not talk about it constantly nor did he exhibit compelling consistent behavior, such as touting himself as a veteran. (PCR pp. 1820-21). In Dr. Gamache's opinion, there was no mental health or psychological condition that explained the inaccurate personal history maintained by Kocaker. (PCR p. 1927).

Furthermore, Dr. Kirsch did not believe that Kocaker's report of hearing voices meant that he experienced psychotic hallucinations because he reported that he ignored the voices, but true psychotic hallucinations are vivid and have a full impact on a person's perceptual experience. (PCR pp. 1724-25).

Dr. Suarez agreed that the purported hallucinations were completely atypical to everything in the literature on genuine hallucinations, and they were not related to Kocaker's false history reporting. (PCR pp. 1818-19). Likewise, Dr. Gamache testified that Kocaker's endorsement of hallucinatory experiences was entirely inconsistent with someone genuinely suffering from a psychotic condition. (PCR pp. 1928-29). According to Dr. Gamache, "There is no credible evidence that he suffers from a psychological disorder." (PCR p. 1932). Indeed, the lower court's findings and resolution of the conflicting evidence are supported by competent, substantial evidence.

In light of the testimony from Dr. Kirsch, Dr. Suarez, and Dr. Gamache, Kocaker was not shown to have a mental illness or brain impairment. Therefore, Kocaker's argument that those conditions preclude him from having a rational understanding of the pending collateral proceedings is without merit. Dr. Suarez testified that Kocaker demonstrated that he understood the legal process, the proceedings, the role of the parties, and the possible outcomes of his case. (PCR pp. 1810-14). Kocaker correctly responded to the standard competency questions, and Dr. Gamache testified that he had no concerns about his capacity for a rational as well as factual understanding of the current proceedings. (PCR p. 1927).

Notably, the postconviction court's order was based not only on the experts' opinions finding Kocaker competent, but also based on its own observations, which were consistent with the credited experts. The court determined that it was "apparent from the video of the court-appointed expert evaluations that, despite maintaining details about his personal life that conflict with the record, Defendant remembers a remarkable amount of information about his version of the night of the offense and what occurred at his trial." (PCR p. 2319). "Additionally, though some experts testified the Defendant is incapable of learning and processing new information, the evaluations reflect that the Defendant was able to reproduce information he learned during competency training at the SFETC." (PCR p. 2319). Kocaker has not shown any abuse of discretion.

Lastly, Kocaker argues that the court erred in finding that he had the ability to consult with counsel. Kocaker claims that the court used the wrong "standard," but this is entirely incorrect. Kocaker claims that the correct "standard" is whether he has the ability to disclose collateral facts pertinent to the postconviction proceeding; however, that is merely a consideration that should be analyzed in an expert's report. *See* 3.851(g)(8)(B) Fla. R. Crim. P. This Court has repeatedly emphasized that a court's obligation in determining whether a

defendant is competent to proceed in postconviction proceedings is to determine "**whether he has sufficient present ability to consult with counsel with a reasonable degree of rational understanding**—and whether he has a rational as well as a factual understanding of the pending collateral proceedings." *Huggins*, 161 So. 3d at 344; *Alston v. State*, 894 So. 2d 46, 54 (Fla. 2004) (emphasis added). Again, Kocaker has failed to demonstrate any abuse of discretion.

While Kocaker claims that he does not have the ability to consult with his counsel, he fails to make any showing of how the court abused its discretion in determining otherwise. Dr. Suarez testified that he was surprised with how well Kocaker was able to communicate with him given the other expert's reports of schizophrenia, brain damage, and multiple personalities. (PCR pp. 1814-15). Dr. Suarez opined that even Kocaker's low test scores did not show that Kocaker was incapable of communicating with his lawyer with a reasonable degree of rational understanding. (PCR pp. 1827-28). Dr. Suarez believed that competency turned on what a person was capable of doing rather just on specific numbers from a test result or a certain diagnosis. (PCR p. 1828). In Dr. Suarez's opinion, Kocaker had the ability to consult with counsel with a reasonable degree of rational understanding, and Kocaker was competent to proceed.

(PCR pp. 1834-35). Dr. Kirsch opined that Kocaker was able to effectively communicate and that he should be able to do so with counsel. (PCR p. 1755).

In sum, Kocaker has not shown that the lower court abused its discretion in finding him competent to proceed. *See Huggins v. State*, 161 So. 3d 335 (Fla. 2014) (affirming the lower court's order finding the defendant competent after the defendant had previously been deemed incompetent to proceed several times. The court's order finding the defendant competent to proceed relied upon the report filed by a doctor who evaluated the defendant through the Department of Children and Families and had determined that the defendant was competent to proceed and no longer met the criteria for involuntary commitment); *see also Gore v. State*, 24 So. 3d 1, 10 (Fla. 2009) (holding that competent, substantial evidence supported the postconviction court's finding that the defendant was competent to proceed where two experts found the defendant incompetent, but two other experts found the defendant competent and the court observed the defendant's behavior and other court records); *Franklin v. State*, 137 So. 3d 969, 979 (Fla. 2014) (where the postconviction court did not abuse its discretion in finding Franklin competent to proceed where it relied on the State's experts, rather than Franklin's expert). Given that the

postconviction court relied heavily on the consistent and thorough opinions of Dr. Gamache, Dr. Kirsch, and Dr. Suarez, Kocaker certainly cannot show that no reasonable person could take the view adopted by the postconviction court. The postconviction court's finding of competency should be affirmed.

ISSUE II

THE LOWER COURT PROPERLY DENIED KOCAKER'S *BRADY* CLAIM THAT WITNESSES ANTOINE POWELL AND STEPHANIE BRZOSKA ALLEGEDLY RECEIVED DEALS IN EXCHANGE FOR THEIR TRIAL TESTIMONY MERELY BECAUSE THEIR SENTENCES WERE SHORTER THAN KOCAKER'S POSTCONVICTION COUNSEL THOUGHT THEY SHOULD BE.

Kocaker next asserts that the lower court failed to grant an evidentiary hearing on his claims alleging that the State failed to disclose material, exculpatory evidence, as required by *Brady v. Maryland,* 373 U.S. 83 (1963). In his postconviction motion below, Kocaker's claim also included additional allegations regarding *Giglio v. United States*, 405 U.S. 150 (1972), violations as well as a claim regarding witness Paul Sands. Because those claims were not raised under this issue in Kocaker's Initial Brief, he has waived any arguments concerning G*iglio* violations and Paul Sands. *Simmons v. State*, 934 So. 2d 1100, n. 12 (Fla. 2006) (finding claims regarding prosecutor's alleged misconduct and alleged improper remarks waived because they were not properly briefed on appeal). The arguments that Kocaker does raise

regarding Antoine Powell and Stephanie Brzoska were insufficient, and Kocaker certainly was not entitled to an evidentiary hearing.

This Claim Was Improperly Raised

While the lower court considered the merits of this claim, this Court should know that Appellant improperly raised this claim in an amended petition after competency had been restored. Pursuant to rule 3.851(g)(11), of the Florida Rules of Criminal Procedure, when a defendant's competency has been restored, his prior postconviction motion may be amended within sixty days **only as to those issues that the court found required factual consultation with counsel**.

The lower court entered an order finding Kocaker competent to proceed December 15, 2016. (PCR pp. 2309-20). Kocaker had sixty days to amend his motion by February 13, 2017. Kocaker, however, filed an amended motion March 6, 2017, and it contained claims that did not require Kocaker's consultation with counsel. The instant claim was not part of Kocaker's original motion, and the claim was not premised on any information obtained by Kocaker. As this issue was not included in any of Kocaker's prior motions, does not identify any information obtained from Kocaker, and did not require any input from Kocaker, it should have been dismissed under Rule 3.851(g)(11).

This Claim Was Insufficient, And Kocaker Has Not Shown That The Lower Court Erred In Summarily Denying It.

Kocaker has not shown any error in the lower court's summary denial of this claim because Kocaker's claim was insufficient to establish a *Brady* violation. In order to establish a *Brady* violation, Kocaker was required to show that there is evidence (1) favorable to him—either exculpatory or impeaching; (2) that was willfully or inadvertently suppressed by the State; and (3) that caused Appellant to be prejudiced because it was material. *State v. Woodel*, 145 So. 3d 782, 804 (Fla. 2014) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). A postconviction court's decision whether to grant an evidentiary hearing is tantamount to a pure question of law that is subject to *de novo* review. *Franqui v. State*, 59 So. 3d 82, 95 (Fla. 2011). When no evidentiary hearing is held, this Court accepts the defendant's factual allegations as true to the extent that the record does not refute them. *Jones v. State*, 998 So. 2d 573, 587 (Fla. 2008), *as revised on denial of reh'g* (Dec. 23, 2008). "However, the defendant must establish a legally sufficient claim." *Id.* (citing *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000)).

Here, the postconviction court properly denied this claim without an evidentiary hearing because Kocaker's allegations were insufficient to establish a *Brady* violation. Kocaker first alleges

that, through a public records request, he discovered a note in the prosecutor's file documenting that a relative of witness Antonie Powell approached the prosecutor about helping Powell with his charges, and that the prosecutor advised the relative "that we won't be able to discuss that until after the trial." Initial Brief at 65. Kocaker concludes that this note "clearly reveals that the expectation for a deal was there" even though Powell testified at trial that he had not been promised anything in exchange for his testimony. Kocaker argues that by not disclosing this conversation, the State committed a *Brady* violation.

As indicated by the postconviction court, Kocaker relied solely upon the prosecutor's note without alleging that Powell or any other witness was available to testify that Powell had an agreement with the State for a particular outcome in his case in exchange for his testimony at Kocaker's trial. (PCR p. 2806). "However, this is insufficient to establish a *Brady*" violation; the note "does not establish that the State had a deal with Mr. Powell that it failed to disclose." (PCR p. 2806). "To the contrary, it reflects that the State did not have an agreement with him and was not interested in discussing any deal until after he testified." (PCR p. 2806). Kocaker has failed to show how the trial court erred.

The excerpt from the State Attorney's file reading, "she wants us to help Powell out w/ charges, told her that we won't be able to discuss that until after trial" refutes Kocaker's own assertion that any deal existed. The note confirms that there was **no discussion prior to trial** of Powell getting any possible benefit from his testimony. Moreover, the note does not even involve a conversation with Powell, so it certainly does not show that Powell had any expectation of receiving a deal. Accordingly, this information does not establish that the State willfully or inadvertently suppressed any impeaching, material evidence.

Kocaker does not offer any specific allegations that support his claim. Instead, he solely claims that the sentence Powell received after testifying during Kocaker's trial was lenient, and he infers that the purported leniency shows the existence of an improper, withheld deal. This Court has repeatedly recognized that these bare allegations, in the absence of evidence that any actual deal or agreement existed, are insufficient to demonstrate a violation under *Brady* or *Giglio v. United States*, 405 U.S. 150 (1972). *State v. Woodel*, 145 So. 3d 782, 805-07 (Fla. 2014); *Floyd v. State*, 18 So. 3d 432, 451-52 (Fla. 2009); *Lamarca v. State*, 931 So. 2d 838, 852-53 (Fla. 2006).

In *Woodel*, this Court found *Brady* and *Giglio* claims were properly denied absent evidence of information which was

suppressed by the State. Woodel argued, as Kocaker does, that a State witness received relatively lenient sentences on new convictions after testifying against Woodel, despite being a habitual felony offender who had been in and out of prison for twenty-five years. This Court observed that purported "inexplicable leniency" shown in later sentencing was insufficient; Woodel's burden of proving these claims was not satisfied "by his use of inductive reasoning with regard to White's supposedly lenient sentences." *Woodel*, 145 So. 3d at 806.

Likewise, in *Floyd*, 18 So. 3d at 451-52, this Court considered a claim that counsel had been ineffective, and the State had violated *Brady*, because the jury had not heard that the State *nolle prossed* a domestic violence charge against the boyfriend of a State witness. This Court rejected both claims, noting that there had been no evidence that the *nolle prosequi* was in any way related to Floyd's criminal case. This Court explained, "Further, Floyd's inability to demonstrate that the *nolle prosequi* was relevant impeachment evidence -- other than pure speculation that Lamb might have reached an agreement with the State to testify against Floyd in exchange for the *nolle prosequi* of the charges against her boyfriend -- defeats his *Brady* claim." *Floyd*, 18 So. 3d at 452. *See also Lamarca*, 931 So. 2d at 852-53 (rejecting *Brady/Giglio* claims based on a witness having received

a downward departure sentence where there was no evidence that the sentence was promised in advance or given in exchange for the witness's trial testimony). Here, just like in *Woodel* and *Floyd*, Kocaker has not met his burden. Kocaker's claim was legally insufficient, and the lower court's summary denial of his sub-claim should be affirmed.

Kocaker's allegation of a deal with State witness Stephanie Brzoska fails for the same reason. The mere fact that a witness receives a sentence less than the maximum penalty available under the law after testifying against a defendant does not, in and of itself, demonstrate any constitutional error at trial. As Kocaker has offered nothing further, this sub-claim was properly denied by the postconviction court as "speculative and insufficient to establish a *Brady* or *Giglio* violation." (PCR p. 2807).

While Kocaker argues that he was entitled to an evidentiary hearing on these claims, "postconviction claims may be summarily denied when they are legally insufficient[.]" *Duest v. State*, 12 So. 3d 734, 745 (Fla. 2009) (quoting *Connor v. State*, 979 So 2d 852, 868 (Fla. 2007). Kocaker's claims were based solely on insinuation and speculation rather than specific facts to support these general conclusions. Therefore, contrary to Kocaker's assertions, there was absolutely no need for further factual development of this claim through an evidentiary hearing. The only

evidence that Kocaker alleges he would have offered in support of his claim (other than the note from the State Attorney's file documenting that the prosecutor would not discuss a deal with Powell) were the files and records confirming that the sentences received by Powell and Brzoska after they testified were less than Kocaker's postconviction attorneys would expect based on their records. That sort of speculation would not provide a basis for relief. *See Rodriguez v. State,* 39 So. 3d 275, 290-91 (Fla. 2010) (quoting *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000) ("Postconviction relief cannot be based on speculation or possibility"). Since Kocaker's allegations were insufficient for relief, the lower court's summary denial of this claim was proper. *See Duest v. State*, 12 So. 3d 734, 746-47 (Fla. 2009) (affirming the summary denial of a *Brady* claim where the defendant failed to establish any of the requirements for a *Brady* violation.); *Davis v. State*, 26 So. 3d 519, 531 (Fla. 2009) (affirming the postconviction court's summary denial of a *Brady* claim because the conclusory allegations in the motion did not demonstrate a prima facie case that the State willfully or inadvertently suppressed material evidence that was favorable to the defense). Accordingly, this Court should affirm the lower court's summary denial of this purely speculative claim.

ISSUE III

KOCAKER'S ARGUMENTS THAT HIS COUNSEL SHOULD HAVE CONDUCTED A BETTER CROSS-EXAMINATION OF WITNESSES HEIDI KALOUS, STEPHANIE BRZOSKA, AND ANTOINE POWELL ARE COMPLETELY MERITLESS WHEN ANY ADDITIONAL QUESTIONING WOULD NOT HAVE RESULTED IN HIS ACQUITTAL, AND THERE WAS NO BASIS FOR FURTHER CROSS-EXAMINATION, AND IN SOME INSTANCES, IT WAS PRECLUDED BY THE RULES OF EVIDENCE.

In this issue, Kocaker alleges that his counsel was ineffective for failing to properly cross-examine the State's witnesses. Just like the previous issue, this issue was improperly added to Kocaker's amended postconviction motion after competency had been restored, as it did not involve an issue that required Kocaker's factual consultation with his postconviction counsel. Accordingly, dismissal under rule 3.851 (g)(11), was warranted.

Nevertheless, the lower court reviewed this claim on the merits, and summary denial was appropriate because Kocaker's allegations were legally insufficient and/or refuted by the record. To be entitled to postconviction relief, Kocaker had to show that his counsel's performance was deficient and that there was a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Both the deficiency prong and the prejudice prong of the *Strickland* test present mixed questions of law and fact,

requiring this Court to employ a mixed standard of review. *Wickham v. State*, 124 So. 3d 841, 858 (Fla. 2013). This Court defers to the postconviction court's factual findings so long as those findings are supported by competent, substantial evidence. *Wickham v. State*, 124 So. 3d at 858. However, this Court reviews the postconviction court's legal conclusions *de novo*. *Lebron v. State*, 135 So. 3d 1040, 1052 (Fla. 2014).

Here, Kocaker specifically asserted that his trial attorneys unreasonably failed to impeach Heidi Kalous, Stephanie Brzoska, and Antoine Powell through cross-examination. While Kocaker raised other allegations relating to Heidi Kalous, Paul Sands, and Jacquelyn Consentino under this issue in this postconviction motion below, he has waived them by not raising them on appeal. *Simmons*, 934 So. 2d 1100, n. 12. With regard to the remaining allegations that were raised in Kocaker's Initial Brief, they are all meritless because Kocaker failed to prove deficient performance and resulting prejudice, as required by *Strickland*.

First, Kocaker alleges that his trial counsel should have impeached the portion of Heidi Kalous's testimony where she stated that Kocaker said there was a knife under the bed in the hotel room. Kocaker asserts that Toni Haynes and Stephanie Brzoska both testified in sworn **depositions** that they did not remember Kocaker

saying there was a knife under the bed. Initial Brief at 72. Kocaker therefore argues that his counsel should have cross-examined Kalous **about what Haynes and Brzoska said in their depositions.** However, the rules of evidence do not permit the impeachment of one witness based on statements from a deposition by another witness. Section 90.608, Florida Statutes, provides that a witness may be impeached by introducing prior inconsistent statements by that same witness, but there is no mechanism permitting impeachment of a witness by a deposition given by another person.

Additionally, as pointed out by the postconviction court, it is not permissible to question one witness about the truth of another witness's testimony. *Knowles v. State*, 632 So. 2d 62 (Fla. 1993). (PCR p. 2811). Given that Kocaker's counsel could not actually impeach Kalous in the manner that Kocaker contends, his counsel could not be deficient, nor could Kocaker establish any resulting prejudice. *See Davis v. State*, 136 So. 3d 1169, 1193 (Fla. 2014) (where the defendant failed to demonstrate how additional cross-examination would have impeached the witness). Accordingly, the lower court properly rejected this claim, finding that "it would not have been permissible for defense counsel to cross-examine Ms. Kalous at trial about the testimony or statements of other witnesses. Counsel cannot be deficient for

failing to attempt to elicit inadmissible testimony." (PCR p. 2811). On appeal, Kocaker has not presented any argument or authority to show how the lower court could have erred in summarily denying this meritless claim.

By the same token, Kocaker's assertion that his counsel was deficient in his cross-examination of Stephanie Brzoska is equally meritless. Kocaker claims that his trial counsel should have cross-examined Brzoska about the how she never mentioned seeing any blood on Kocaker in her initial statement to law enforcement, and she did not admit to seeing blood on Kocaker during her deposition. Initial Brief at 72-73. **Significantly, Brzoska never testified during trial that she saw blood on Kocaker's clothing.** (DAR V28/698-725). Because the deposition and trial testimony were not inconsistent, the deposition could not have been used as a prior inconsistent statement to impeach Brzoska. *Davis*, 136 So. 3d, 1169, 1194 (Fla. 2014). Nor could the deposition have been used as a prior consistent statement. *Monday v. State*, 792 So. 2d 1278, 1280-81 (Fla. 1st DCA 2001) (explaining when a prior consistent statement is admissible). Kocaker absolutely fails to explain how his counsel could have cross-examined Brzoska about her previous statements when she never testified that she saw blood on Kocaker's clothing in the first place.

Furthermore, even if his counsel would have questioned Brzoska about her previous statements, she admitted in her deposition that she "wasn't really paying attention" to Kocaker's clothing. (PCR p. 2812). Thus, the proposed questioning would not have provided any probative testimony as to whether there was actually blood on Kocaker's clothing. In rejecting this claim, the lower court properly noted that "[e]ven if counsel elicited Ms. Brzoska's testimony about not observing blood, it would have been tempered by her indication that she 'wasn't really paying attention,' and the fact that she observed [Kocaker's] clothing while he was seated in the back of a dark car at night." (PCR p. 2812). The court determined that under these circumstances, counsel was not deficient for failing to question Brzoska about whether or not she saw blood on Kocaker. (PCR pp. 2812-13). The court further held that Kocaker failed to establish prejudice because Brzoska's testimony would not have been so probative to impact the outcome of trial, especially given that other witnesses who were in a better position to observe Kocaker testified that they observed blood on his clothing. (PCR p. 2813).

Notably, Powell testified at Kocaker's trial that he went with Kocaker to a twenty-four-hour laundromat when it was pretty late at night. (DAR V28/609-11). Kocaker was "shaken," and his "shirt had a lot of blood on it." (DAR V28/610). Kocaker kept

asking if Powell knew of anyone who “wants some killers.” (DAR V28/610). Kocaker was further saying that he needed to get his shirt cleaned. (DAR V28/610-11). Powell asked Kocaker if he had been in a fight because there were “blood marks on his shirt [...] It was a pretty dirty shirt.” (DAR V28/611).

Additionally, Klaous testified that Kocaker showed up at Alvin’s house wanting to borrow a change of clothes and to take a shower. (DAR V29/688). Klaous testified that upon seeing Kocaker’s shirt, she kicked her friend’s foot and nodded at her friend to get her to look at Kocaker’s shirt. (DAR V29/688). Kocaker was wearing a white shirt inside out that had “blood all over it.” (DAR V29/688). According to Klaous, Kocaker ended up taking a shower and borrowing a shirt from Alvin. (DAR V29/688-89).

Given the definitive trial testimony from two different witnesses clearly observing Kocaker’s blood-stained shirt, as well as their testimony regarding Kocaker’s statements about needing to clean his shirt, borrowing a shirt and showering, and asking if anyone needed killers, any potential testimony from a witness who was not paying attention to Kocaker’s clothing would not have made any difference whatsoever in Kocaker’s trial. In sum, Kocaker’s claim could not establish his counsel’s deficient performance or prejudice, and summary denial was warranted under the circumstances.

Lastly, Kocaker's assertions that defense counsel should have impeached Antoine Powell about statements made at trial that had not been part of his initial statement to law enforcement are also without merit. Here, Kocaker argues that Powell added details to his trial testimony regarding Kocaker changing his clothes, how long Kocaker went behind the dumpster at 7-11, and what was inside the bag Kocaker was carrying.

Kocaker specifically alleges that Powell testified at trial that Kocaker changed his clothes even though he never mentioned that in his initial statement to law enforcement. Next, Kocaker complains that Powell testified that he noticed Kocaker with a bag containing shoes, shirts, and pants; however, in his initial statement to law enforcement, he stated Kocaker had a bag but that he could not see what was inside the bag. Kocaker lastly argues that Powell testified that Kocaker disappeared behind the dumpster at 7-11 for "not even a minute, two minutes tops" and returned without a plastic bag, but during his previous statement, Powell said that Kocaker was by the dumpster for five to seven minutes and he did not mention Kocaker returning without a bag. Kocaker argues that this change in testimony contradicted Powell's earlier statement and the "valuable information that could have been presented through the cross-examination of the witness was unreasonably forfeited by counsel." Initial Brief at 74.

It is first worth pointing out that Kocaker completely failed to establish prejudice because even if his counsel had cross-examined Powell about the details of his statements, there were other witnesses at trial who corroborated Powell's trial testimony. As previously mentioned, Kalous testified about how Kocaker changed from his white, blood-stained shirt to a new one he borrowed from Alvin. (DAR V29/688). According to Kalous, Kocaker got a blue button-up, collared shirt from Alvin. (DAR V29/688). Brzoska also testified that Kocaker was originally wearing a white shirt and jeans but when she saw him later she thought he was wearing something else. (DAR V29/710-11). Deputy James Beining with the Pinellas County Sheriff's Office testified that when he talked with Kocaker after Kocaker had called 911, Kocaker was wearing different clothes than the ones he was wearing in the surveillance video. (DAR V27/435). **Notably, Kocaker admitted to changing his clothing.** (DAR V27/435). Law enforcement asked Kocaker if they could collect the clothing he was wearing, and Kocaker led them into a garage/laundry room in his house and retrieved wet clothes from the washing machine that he claimed to have been wearing. (DAR V27/435).

Moreover, when Kocaker testified at trial, he confirmed that he had changed clothing. (DAR V30/852). According to Kocaker, he was wearing a light colored t-shirt, but he gave it to Crissy

because she tore her shirt. (DAR V30/852-53). Kocaker claimed that, in return, Crissy got some clothes for him to wear. (DAR V27/864). Accordingly, any cross-examination from Powell about whether Kocaker had changed clothes would not have impacted Kocaker's trial.

Likewise, a cross-examination about the exact amount of time Kocaker went behind the dumpster at 7-11 would have made no difference, especially given that there was surveillance video (DAR V29/775), and Kocaker admitted that he threw something away at 7-11. (DAR V30/881). Significantly, the surveillance video showed Kocaker walking in front of 7-11 and throwing something away. (DAR V30/775). Brzoska further testified that after going to 7-11, Kocaker walked in between two buildings to where a trash can was, and he threw something in the trash can. (DAR V29/712). Cross-examination from Powell about how long Kocaker went behind the trash at 7-11 would not have impacted Kocaker's trial.

Further, cross-examination about what Powell thought was inside the bag would not have resulted in Kocaker's acquittal. Kocaker admitted that he had clothes and his shoes in a bag that night. (DAR V30/864-65). The evidence against Kocaker was beyond overwhelming. Any contention that Kocaker would have received a different outcome at his trial is completely meritless. If Kocaker's counsel would have attempted to impeach Powell about

whether he actually saw what was inside the bag Kocaker discarded, it would not have resulted in Kocaker's acquittal. The lower court properly considered all the testimony and found that Kocaker failed to establish that the outcome of trial was prejudiced by counsel's failure to impeach Powell. (PCR p. 2814). In light of Kocaker's failure to establish the prejudice prong of *Strickland*, this Court need not make a specific ruling on the deficiency prong. *Evans v. State*, 975 So. 2d 1035, 1043 (Fla. 2007).

Nevertheless, Kocaker has also failed to establish deficient performance. Kocaker has not even shown that Kocaker's counsel could have impeached Powell. A witness may only be impeached by a prior statement that omitted part of the testimony given where the omission is material and would naturally have been mentioned. *State v. Smith*, 573 So. 2d 306, 313 (Fla. 1990) (to be used for impeachment, omissions in prior statements must be of material, significant fact rather than mere details); *Davis v. State*, 756 So. 2d 205, 207 (Fla. 4th DCA 2000). "Nit-picking" is not permitted under the guise of prior inconsistent statements. *Pearce v. State*, 880 So. 2d 561, 569 (Fla. 2004). Kocaker has not shown that any of the alleged inconsistencies in Powell's testimony were material or that they would have been naturally mentioned.

As the trial court correctly noted, Powell's statement about Kocaker changing clothes is not something that would have been naturally mentioned when he was speaking with law enforcement. (PCR pp. 2813-14). The trial court specifically noted that Powell's statement to law enforcement was in narrative form, with some specific questions from law enforcement. (PCR p. 2813). The court explained,

> Mr. Powell stated that, after he noticed blood on Defendant's shirt at the laundromat, he dropped Defendant off at the Belleair Hotel and later saw Defendant walking the road near the hotel carrying a plastic bag. Neither of the interviewing officers asked Mr. Powell about what clothes Defendant was wearing at that point. […] There is no reasonable basis to conclude from the interview transcript that Mr. Powell naturally would have mentioned Defendant changing his clothes over the course of the evening. Mr. Powell answered all of the detectives' questions and was very forthcoming with details. While the details about Defendant's clothing became relevant to law enforcement over the course of the investigation, Mr. Powell, a lay witness, would not have thought this detail important. Indeed, Mr. Powell's numerous statements about Defendant's bloody shirt did not prompt even the investigators to inquire further about whether Defendant had changed clothes by the time Mr. Powell saw him later.

(PCR pp. 2813-14). The court determined that the police report would not have been admissible to impeach Powell and counsel could not be ineffective for failing to elicit inadmissible testimony. (PCR p. 2814).

Similarly, Powell's original statement to the police that he had not "noticed the bag as he [Kocaker] was walking, but I didn't

look back to see what was - what as (sic) in the bag" does not "directly contradict or materially differ from" his trial testimony that there were clothes in the bag as necessary for impeachment by a prior inconsistent statement. Also, the amount of time that Kocaker was by the trash at 7-11 was not material, especially when it was uncontested that Kocaker threw something away in the trash. Kocaker has failed to show that his counsel was deficient by not cross-examining Powell on these points.

Kocaker's counsel certainly used other avenues to attack Powell's credibility on cross-examination. Kocaker's counsel notably cross-examined Powell about having sixteen or seventeen felony convictions, being on probation, being charged with violation of probation, and the fact that the violation of probation charge was pending at the time of Kocaker's trial. (DAR V28/625-29). Kocaker's counsel also asked Powell about how he could possibly be facing a prison sentence with his pending violation of probation charge and how he was being prosecuted by the same State Attorney's Office for his violation of probation office that was prosecuting Kocaker's case. (DAR V28/629-31). Kocaker's counsel's questioning intended to show that Powell was given favorable treatment by the prosecutor. (DAR V28/630-33, 42-43). Counsel also impeached Powell about inconsistencies in his testimony regarding whether he referred to girls as prostitutes

(DAR V28/637-38), and counsel cross-examined Powell about what clothing Kocaker was wearing. (DAR V28/641-42). Kocaker has not shown that his counsel was ineffective in his cross-exmamination of Powell. *See, e.g., Mungin v. State*, 932 So. 2d 986, 998-99 (Fla. 2006) (no ineffective assistance of counsel where counsel attacked witnesses credibility in other ways). Moreover, given the corroborating evidence regarding Kocaker's change of clothes and his carrying and disposal of a bag, as well as the overwhelming evidence presented of Kocaker's guilt, the proposed questioning by Kocaker would not have affected the outcome of Kocaker's trial. *See Deparvine v. State*, 146 So. 3d 1071, 1088-91 (Fla. 2014). For all these reasons, the lower court's denial of this claim should be affirmed.

ISSUE IV

BECAUSE KOCAKER'S INDIVIDUAL CLAIMS LACK MERIT, HIS CLAIM OF CUMULATIVE ERROR IS EQUALLY WITHOUT MERIT.

In his final claim, Kocaker alleges that he did not receive a fundamentally fair trial due to the "[r]epeated instances of ineffective assistance of counsel and prosecutorial misconduct." Initial Brief at 75. As discussed under the previous issues, Kocaker's alleged errors are meritless, as they do not meet the *Strickland* standard for ineffective assistance of counsel or establish that any *Brady* violation occurred. As this Court has acknowledged, when individual claims of error are without merit,

the cumulative error claim must fail. *Lowe v. State*, 2 So. 3d 21, 33 (Fla. 2008); *Griffin v. State*, 866 So. 2d 1 (Fla. 2003). Given that Kocaker's previous claims lack merit, his cumulative error claim must fail.

CONCLUSION

Based on the foregoing, Appellee respectfully requests that this Honorable Court affirm the postconviction court's order finding Kocaker competent and affirm the challenged portions of the postconviction court's order summarily denying postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of August, 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: Chelsea Rae

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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).

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