

IN THE SUPREME COURT OF FLORIDA

ARTHUR JAMES MARTIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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CASE NO. SC18-214  
L.T. NO. 2009-CF-14374-A  
DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

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## **STATEMENT OF THE CASE AND FACTS**

The relevant facts concerning the October 28, 2009, murder of Javon Daniels is recited in this Court's opinion in the direct appeal:

Two days before the murder, Martin's friend and codefendant Franklin Batie (Batie) was involved in a shooting where he was grazed on the back of the head and neck. On October 28, 2009, the day of the murder, Batie drove Martin to the Weber 5B Apartments in Jacksonville so that Martin could visit someone. Batie drove his car, a white Ford, to the apartment complex, and he remained in the car while Martin got out of the car and engaged in conversation. In the back seat of the Ford was Batie's loaded .45 caliber handgun. The gun was equipped with a thirty-round magazine.

While Batie remained in the car and waited for Martin, he noticed a white sport utility vehicle (SUV) and thought that he recognized the driver of the SUV as the person who shot him days earlier. Batie retrieved his gun from the back seat and mentioned to Martin that he possibly recognized the driver as having tried to shoot him. Martin then took Batie's gun and went to the driver's side of the SUV and began firing multiple shots at the driver, nineteen-year-old Daniels. When Daniels tried to escape through the passenger side of the SUV, Martin walked around the front of the SUV to the passenger side and continued firing. Eyewitness Sebastian Lucas testified that upon reaching the passenger side, Martin "shot him [Daniels] back down in the car." When Martin finished shooting, he walked back to the Ford, and Batie drove Martin home. Daniels died at the scene. Batie drove home to Starke, Florida, where he disposed of his Ford and began driving another vehicle. The murder weapon was never located.

Following the murder, detectives interviewed multiple eyewitnesses who viewed photo spreads of possible suspects and identified Martin as the shooter. Some of the witnesses did not know Martin by his given name but by his nicknames, "Beer Belly" or "Shorty Fat."

Martin was arrested several days after the murder, and a grand jury later indicted him for first-degree murder. Three days after Martin's arrest, Batie was arrested in Starke. Batie later entered a guilty plea to second-

degree murder. After the conclusion of Martin's trial, Batie was sentenced to ten years' imprisonment for his role in the murder.

Martin's case proceeded to a jury trial in 2012. The presentation of evidence during the guilt phase occurred solely during the State's case-in-chief. The State presented eyewitness testimony in addition to testimony from the medical examiner and law enforcement officers. Multiple eyewitnesses, including codefendant Batie, testified and identified Martin as the person who shot Daniels. One of the eyewitnesses, Tasheana Hart, testified that in the days following the murder, Martin asked her "not to tell" what she saw on the day of the murder and offered her money in exchange for her silence.

The medical examiner, Dr. Valerie Rao, testified that Daniels sustained a total of twelve gunshot wounds. Daniels was shot in his left hand, left arm, right arm, left side, right side, right thigh, and chest. Four of the gunshot wounds produced fatal injuries to Daniels' lungs, heart, liver, and stomach. Daniels endured significant internal and external bleeding, and a total of 700 cubic centimeters of blood was collected from his chest cavity. The gunshot wounds to each of Daniels' arms broke the humerus in each arm, and the gunshot wound to his left hand broke two of the bones in his hand. These broken bones incapacitated Daniels and left him incapable of completing his attempted escape from the SUV.

At the conclusion of the State's case-in-chief, the defense rested without presenting evidence. After the jury deliberated and returned with a guilty verdict, the case proceeded to the penalty phase. During the penalty phase, in its initial case, the State presented two victim impact witnesses. The defense also stipulated to Martin's conviction for second-degree murder.

In its penalty phase case, the defense presented the testimony of three witnesses: Martin's mother, sister, and court-appointed mental health expert. Martin's mother and sister testified about Martin's personal life, including his childhood, family relationships, overall demeanor, work ethic, and health.

Martin's mental health expert was Dr. Stephen Bloomfield, a psychologist. Dr. Bloomfield testified that he reviewed background records, visited with Martin in jail, and administered psychological

testing. Dr. Bloomfield also interviewed multiple witnesses, including Martin's mother and sister. Although Dr. Bloomfield testified that he reviewed thousands of pages of records, he was unable to conduct an exhaustive review of Martin's Miami-Dade Public Schools records because the majority of the records were destroyed by the school district as a matter of course when Martin reached twenty-five years of age.

In order to evaluate Martin's IQ, in 2011, Dr. Bloomfield administered the Wechsler Adult Intelligence Scale, fourth edition, or the WAIS-IV. He also tried to administer the Wide Range Achievement Test 4 (WRAT-4), but Martin was unable to complete the test. Dr. Bloomfield testified that Martin's WAIS-IV full-scale IQ score of 54 placed him in the mildly mentally retarded range. However, Dr. Bloomfield was unable to diagnose Martin as mentally retarded because he was unable to determine the onset of mental retardation prior to age 18 nor Martin's adaptive functioning prior to age 18.

Dr. Bloomfield testified that Martin's Florida Department of Corrections (DOC) records revealed multiple mental health evaluations and IQ screening tests. According to those records, although Martin never showed signs of significant mental or emotional deficits and never demonstrated that he was incapable of living in the general population, he was deemed "low functioning." DOC records documented that between 1992 and 2008, Martin took four IQ screening tests, with scores ranging from a low of 58 in 2002 to a high of 94 in 2008.

Dr. Bloomfield concluded that Martin has low cognitive functioning, is functionally illiterate, and suffers from a learning disability because of his inability to read. Dr. Bloomfield observed that Martin's grades in school were mixed and that Martin had numerous absences and caused frequent disruptions. However, Dr. Bloomfield conceded that Martin's grades were not necessarily due to a lack of intellectual capability but due to his disruptive behavior and absences from school.

In rebuttal, the State offered the testimony of Miami-Dade Police Department Detective Chris Stroze. Detective Stroze was involved in a 1998 murder investigation that led to Martin's conviction for second-degree murder. Detective Stroze testified that Martin did not have any problems reading or understanding the waiver form that advised him of his constitutional rights.

At the conclusion of the penalty phase, by a nine-to-three vote, the jury recommended that Martin be sentenced to death. A Spencer<sup>1</sup> hearing followed, where both parties offered additional argument but did not present additional evidence. At the sentencing hearing, the trial court sentenced Martin to death, having found that sufficient aggravating circumstances existed to warrant the death penalty and that the aggravating circumstances outweighed any mitigating circumstances.

Martin v. State, 151 So. 3d 1184, 1187-90 (Fla. 2014) (footnotes omitted). In imposing the death sentence, the trial judge found the following aggravating factors: (1) prior violent felony; (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was cold, calculated, and premeditated (CCP). Id. at 1190. The court found one statutory mitigating circumstance, Martin’s age at the time of the murder, “to which it assigned slight weight based on minimal evidence of Martin’s significant emotional immaturity.” Id. “Additionally, the trial court evaluated fourteen nonstatutory mitigating circumstances proposed by the defense, and it found two other mitigating circumstances that were not proposed by the defense but were supported by the record.” Id. (footnotes omitted). The trial court concluded in part: “Despite the existence of mitigating factors and the weight assigned to each by this Court, the nature and quality of those factors pales in comparison to the enormity of the aggravating circumstances in this case.” Id. Martin’s conviction and sentence were affirmed on direct appeal. Id.

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<sup>1</sup> Spencer v. State, 615 So. 2d 688 (Fla. 1993).

On direct appeal, this Court addressed six issues: (1) whether the trial court made improper findings of fact and gave insufficient consideration in mitigation to Martin’s intellectual functioning; (2) whether the trial court failed to consider, find, and weigh as a mitigating circumstance that Martin had a history of drug and alcohol abuse; (3) whether the trial court erred in finding that the homicide was committed in a cold, calculated, and premeditated manner (CCP) and was especially heinous, atrocious, or cruel (HAC); (4) a Ring<sup>2</sup> claim; (5) sufficiency of the evidence; and (6) proportionality. Martin did not file a petition for writ of certiorari in the United States Supreme Court.

On February 18, 2016, Martin filed a “Motion to Vacate Judgments of Conviction and Sentence.” After it was struck for exceeding the 75-page limit as prescribed by law, Martin filed a “Second Amended Motion to Vacate Judgements of Conviction and Sentence” on March 31, 2016. The State filed its answer to Martin’s Motion on May 31, 2016. On September 30, 2016, Martin filed a “Third Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend.” The State filed an objection to the Third Amended Motion and a hearing was held on October 13, 2016. On October 24, 2016, the postconviction court struck the amendments made to Claims 1, 3, and 5, but did not strike Claim 10. On November 14, 2016, the State filed its Response to Martin’s

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<sup>2</sup> Ring v. Arizona, 536 U.S. 584 (2002).

Third Amended Motion. An evidentiary hearing was held on August 24 and 25, 2017, and November 9, 2017, where Martin presented testimony and exhibits to support his Motion. Likewise, the State presented documents in opposition to the Motion. At the conclusion of the hearing, the court granted the parties an opportunity to submit written closing arguments in support of the parties' respective positions on the Motion. The court directed that any such arguments contain proposed findings of fact and conclusions of law and that the memoranda be submitted to the court not later than 30 days after the filing of the transcripts. After the parties submitted written closing arguments, on January 8, 2018, the postconviction court filed its order, denying Defendant's Claims 2, 3, 4, 7, and 10 as they related to the guilt phase, granting Claim 9, and dismissing Claims 1, 2, 5, 6, and 8 as they related to the penalty phase as moot.

### **RECORD CITATIONS**

Citations to the record shall be designated as follows: The direct appeal record shall be referred to by "TR" and followed by the volume and page number; references to Martin's Initial Brief shall be referred to by "IB" followed by the page number; references to the evidentiary hearing transcripts shall be referred to by "EH Trans." followed by the volume number and the page number. Any other references will be self-evident.

## JURISDICTION

Initially, the State questions whether this Court has jurisdiction of this case given the postconviction court's order granting a new penalty phase pursuant to Hurst v. State, 202 So. 3d 40 (Fla. 2016). See State v. Preston, 376 So. 2d 3, 4 (Fla. 1979) (where this Court declined to hear an interlocutory appeal from a murder trial because the death penalty had not yet been entered); Trepal v. State, 754 So. 2d 702, 706-07 (Fla. 2000) (holding that this Court had jurisdiction to hear an interlocutory appeal arising during capital postconviction proceedings because a valid death sentence was imposed in the defendant's case). It remains the State's position that because there is no final judgment and sentence in Martin's case at this time, his appeal is untimely and this Court lacks the necessary jurisdiction to hear the appeal. Holding Martin's appeal in abeyance will moot any jurisdictional challenges to this appeal and prevent the possibility of relitigating his guilt-phase claims in the future.

Moreover, the judgment and sentence are not intended to be litigated separately. When a sentence is vacated, the judgment associated with that sentence is also vacated. Berman v. United States, 302 U.S. 211 (1937). If Martin's guilt-phase claims are litigated while no valid judgment exists in his case, Martin could potentially be provided the opportunity to relitigate those claims after his sentence is re-imposed, which would waste valuable state and judicial resources.

For these reasons, the State respectfully submits that Martin's appeal challenging the denial of his guilt-phase claims is untimely until his resentencing is completed and a new judgment is entered. Accordingly, the State respectfully requests that this Court hold Martin's appeal in abeyance pending completion of his resentencing proceedings.

### **SUMMARY OF THE ARGUMENT**

**CLAIM I:** Appellant failed to establish that his counsel rendered ineffective assistance of counsel. Appellant claims that trial counsel did not meet with Appellant during the pendency of the case enough times, that trial counsel did not investigate the facts or available leads, and that he did not hire an expert to challenge the ballistics. Trial counsel testified that he hired an investigator when he needed something done but he was able to do most of the work himself. Counsel also testified that he spoke with Larry Jones, a potential witness who described the shooter as a short, fat black male, which matched the Appellant's appearance. Counsel also took depositions of witnesses, including the codefendant who testified against Appellant. Counsel testified that his strategy for the trial was to disprove premeditation and attack the identification. The postconviction court also correctly found that counsel conducted adequate cross-examination of the witnesses and had a clear strategy in his approach for each one. Counsel did not challenge the photograph identifications because he did not want to lose credibility with the jury,

he did not think challenging a small issue would have changed the jury's verdict, especially since many of the witnesses knew who Appellant was prior to the murder. The ballistics expert Appellant presented at the evidentiary hearing had similar conclusions to the Florida Department of Law Enforcement (FDLE) expert and his testimony did not refute that Appellant was the shooter. Trial counsel's closing argument was not deficient because it was a proper attack on the credibility of the witnesses and on premeditation. The statements Appellant points to are taken out of context and the postconviction court properly found that the whole of counsel's closing argument was proper. Because Appellant failed to prove deficient performance as well as prejudice, the postconviction court properly denied this claim.

**CLAIM II:** The postconviction court was correct in finding that there were no violations under Brady and Giglio. The court correctly found Tasheana Hart's evidentiary hearing testimony to not be credible. The prosecutors who handled the trial and the detectives all testified that no one threatened Tasheana Hart to testify and she never told them she was lying about seeing the murders. The prosecution cannot be expected to know of conversations that did not occur. Therefore, the postconviction court was correct in finding no violations under Brady and Giglio.

## ARGUMENT

### CLAIM I: Trial Counsel Did Not Render Ineffective Assistance of Counsel During the Guilt Phase of the Trial.

This Court has held that there is a strong presumption that defense counsel render effective assistance and the assessment of their performance cannot be based on hindsight. “[A]n attorney is not ineffective for decisions that are a part of a trial strategy that, in hindsight, did not work out to the defendant’s advantage.” Mansfield v. State, 911 So. 2d 1160, 1174 (Fla. 2005). “Even if counsel’s decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was ‘so patently unreasonable that no competent attorney would have chosen it.’” Dingle v. Sec’y Dept. of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)). The defendant, on the other hand, must overcome the burden that what the attorney did is not considered trial strategy. See Darling v. State, 966 So. 2d 366 (Fla. 2007). Martin cannot overcome this burden and this claim must be denied.

To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668 (1984). “Judicial scrutiny of counsel’s performance must be highly deferential.” Pagan v. State, 29 So. 3d 938, 949 (Fla. 2009) (citing Strickland, 466 U.S. at 690). There is a strong presumption that trial counsel was effective in their representation. Id. (citing Strickland, 466 U.S. at 689). The standard for evaluation

is not whether an attorney could have done more. Id. ““A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”” Id. (citing Strickland, 466 U.S. at 689). “[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel’s decision was reasonable under the norms of professional conduct.”” Id. (quoting Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)).

The strong presumption that counsel’s performance was sound is even stronger when trial counsel is experienced. See Cummings v. Sec’y Dept. of Corr., 588 F.3d 1331, 1356 (11th Cir. 2009) (citing Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc)). In Florida, minimum standards have been established for appointment of defense attorneys in capital cases. Fla. R. Crim. P. 3.112. Those rigorous standards govern not just the qualifications of lead counsel on a capital case, but also co-counsel on a capital case in order to ensure the quality of representation afforded to a defendant facing capital punishment. As such, defendants facing capital punishment are often benefited with the legal expertise and experience of some of the most seasoned and knowledgeable lawyers available.

To establish prejudice, the defendant must show there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceedings

would have been different. Strickland, 466 U.S. 668. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998). “To assess that probability, we consider ‘the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding’ — and ‘reweig[h] it against the evidence in aggravation.’” Porter v. McCollum, 558 U.S. 30, 41 (2009) (citation omitted). Therefore, Martin must show that but for counsel’s alleged errors, he probably would have received an acquittal at trial. Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002).

**A: Trial counsel’s investigation was not deficient, Appellant failed to prove prejudice, and the postconviction court properly denied these claims.**

*1. Meeting and consulting with Martin*

Martin alleges that his counsel was ineffective for failing to meet and consult with him. He asserts that he only met with him a total of seven times from the date he was appointed until trial. He also asserts that his defense counsel failed to see him for an entire year. (IB:46). Martin argues this was mentioned at least twice to the court and yet defense counsel still did not make it to visit with Martin. Martin also maintains that co-counsel’s visitations were also limited.

To show that defense counsel was ineffective, the defendant has to prove that counsel’s failures were deficient and that it so undermined the outcome of the proceeding that the defendant was prejudiced. Strickland, 466 U.S. 668.

An attorney's "brevity of consultation" with his client is not grounds for postconviction relief. Kilgore v. State, 55 So. 3d 487, 501 (Fla. 2010). "Even if it is established that trial counsel's communication with his client was brief, a defendant maintains [the] burden of establishing actual prejudice." Id., see Peterson v. State, 221 So. 3d 571, 584 (Fla. 2017) (rejecting a claim of per se ineffectiveness for failing to establish an attorney-client relationship where actual prejudice was not proven); Hodges v. State, 213 So. 3d 863, 878 (Fla. 2017) (reasoning that defendant's argument "had trial counsel investigated, he would have discovered evidence" was speculative and did not show counsel was ineffective).

Francis Shea was called by the defense. He was Martin's lead counsel that was appointed in July 2012. (EH Trans. 1: 17). Shea was not the initial attorney on the case. (EH Trans. 1: 18). Shea testified that, while his billing statements were accurate for what he reported, the statements did not reflect every time he met with Martin. (EH Trans. 1: 14). "At the old courthouse the bailiffs would provide us with a jury room during the trial — pretrial proceedings where we could sit down and confidentially talk with our client and I would do that almost every occasion I was there on a pretrial, and I just didn't bill for that because I would have my time in court and so I didn't bill for those meetings specifically." (EH Trans. 1: 14-15). Shea also stated that there were times he was at the jail on other cases and, if he finished with another client more quickly than he anticipated, he would go over to see Martin

or other clients. (EH Trans. 1: 15). He stated that it “was a matter of how we practiced and how I practiced in those days.” (EH Trans. 1: 15). While it was his practice to normally bill for spending any significant amount of time with Martin discussing various matters about the case, he could not say that he would put those meetings down for billing “a hundred percent of the time.” (EH Trans. 1: 16).

Shea testified that he met with Martin to discuss the case and go over the discovery provided by the State. Shea testified that to establish a relationship with a client, he is honest with the client. (EH Trans. 1: 48).

When I meet with a client I go over the facts. I don't make him any promises that I'm not going to be able to fulfill. I don't pretend that his life is going to be great in the future. We got some problems, and — and in this case I communicated well with Mr. Martin. I felt Mr. Martin to be very articulate. He was very expressive. He would tell me what occurred out there.

(EH Trans. 1: 48). Shea went over the facts about his physical description, as well as the events of the day of the murder. (EH Trans. 1: 70). He and Martin also discussed what other witnesses were stating. (EH Trans. 1: 71).

Defense also called Christopher Anderson, who was the other attorney appointed to the case. Mr. Anderson focused on the penalty phase of the trial. (EH Trans. 1: 109). Mr. Anderson was with Shea when he met Martin after being appointed on this case. (EH Trans. 1: 112).

Martin has failed to establish any deficient performance by his attorneys, as well as any prejudice he might have sustained. Shea and Mr. Anderson testified to

meeting with Martin during the course of the case and going over the information. Shea testified that there were incidents where he met with Martin to discuss the case that he did not submit for billing. This was undisputed at the evidentiary hearing.

The postconviction court examined what Shea did to prepare the case for trial.

The timesheets show counsel spent significant time investigating Defendant's case. Shea, among other things, reviewed arrest and booking reports for Defendant and his codefendant Franklin Batie, the State's discovery exhibits and witness files, evidence and reports from the medical examiners, FDLE evidence, and the public defender's case file. Additionally, Shea met with co-counsel, Christopher Anderson, Esq.; deposed witnesses; and prepared numerous motions.

(Order at 13-14). The postconviction court correctly found that Martin failed to establish prejudice and Martin failed “to show the result of the proceeding would have been different if counsel spent more time with [Martin].” (Order at 14).

There is no evidence to show Martin was prejudiced by the number of visits and Martin failed to meet his burden to show how the outcome of the trial would have been different had Shea and Mr. Anderson meet with Martin more frequently.

## *2. Investigate facts*

Martin alleges that his counsel put little effort into investigating his case. He asserts that his counsel fired three investigators before finally settling on one, six months prior to trial. (IB:50). Therefore, he alleges, no investigation was being done on Martin's case for almost a year. Martin asserts that his counsel's failure to hire a

competent investigator means that a reasonable investigation was not performed pursuant to Strickland. (IB:50-52).

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Pagan, 29 So. 3d at 949 (citing Strickland, 466 U.S. at 689). Defense counsel was not ineffective because he did hire an investigator for Martin’s case.

Shea testified about the decision to hire an investigator. Shea took the deposition of Mr. Batie, the codefendant, as well as the depositions of the other witnesses in the case. (EH Trans. 1: 42, 45). Shea also visited the crime scene prior to taking the depositions. (EH Trans. 1: 46). An investigator was only hired if there was a specific job Shea needed the investigator to do. (EH Trans. 1: 52). Shea did much of the investigation for the guilt phase himself. (EH Trans. 1: 52). The investigators were directed to focus on the mitigation for the penalty phase. (EH Trans. 1: 52). “I had enough information to do the investigation and the one critical question which came really on that was from my conversation with the defendant.” (EH Trans. 1: 52-53). Shea’s main strategy at trial was to disprove premeditation and try to get either a second-degree murder conviction or a manslaughter conviction. (EH Trans. 1: 80).

Shea testified that it was not his practice to just send out investigators to see if they can locate any evidence. (EH Trans. 1: 83).

A: No. In fact, investigators wouldn't know what to do quite frankly, just drive around in a car looking for whatever evidence he could. I guess he could talk to witnesses and so forth, but it's always been my — my experience that you have to direct an investigator as to your — his task, where you want him to go, what you want him to look for.

Q: And in cases like this if the defendant had given you witnesses that he believed would have relevant evidence that he wanted you to locate, would you have the investigator then go out and attempt to locate the person?

A: Yes, definitely.

Q: And in this case there were no such witnesses that needed to be located, is that correct?

A: No, no.

(EH Trans. 1: 83-84). Because Shea was able to speak with Larry Jones and take the depositions of the other witnesses, there was not anything on the guilt side of this case for the investigator to do for him. (EH Trans. 1: 84).

As Shea testified, Martin did not give him any additional witnesses beyond those provided by the State that an investigator could have made contact with and followed up on leads. Shea was able to conduct his investigation and get all the information he needed for trial. Additionally, Martin has failed to show how he was prejudiced by an investigator being hired six months prior to trial.

The postconviction court found that Martin failed to “specify what exculpatory evidence investigators would have found that would change the

outcome of the guilty phase proceedings if counsel had given the investigators more information.” (Order at 15). The court correctly found that this claim was speculative, and that Appellant was unable to show prejudice in Shea’s decision to not rely on investigators. (Order at 15).

Shea had a clear strategy for the guilt phase and Martin has failed to show Shea’s performance was deficient, as well as that the outcome of the trial would have been different but for Shea’s performance.

### *3. Investigate available leads*

Martin alleges that although there was favorable witness testimony available, counsel failed to explore the leads. Martin asserts that if counsel had investigated the case, he would have discovered that a key witness failed to identify Martin as the shooter. (IB:52). He asserts that counsel failed to investigate Willie McGowan and Larry Jones. (IB:53-58).

This Court has held that there is a strong presumption that defense counsel render effective assistance and the assessment of their performance cannot be based on hindsight. “[A]n attorney is not ineffective for decisions that are a part of a trial strategy that, in hindsight, did not work out to the defendant’s advantage.” Mansfield, 911 So. 2d at 1174. “Even if counsel’s decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was ‘so patently unreasonable that no competent attorney would have

chosen it.”” Dingle, 480 F.3d at 1099 (quoting Adams, 709 F.2d at 1445)). The defendant, on the other hand, has to overcome the burden that what the attorney did is not considered trial strategy. See Darling, 966 So. 2d 366.

It is clear from Shea’s testimony that he investigated this case. It was undisputed at the evidentiary hearing that Martin did not give Shea any additional witnesses to investigate. Shea conducted the depositions and had conversations with the witnesses in the case. McGowan’s several sworn statements were consistent with the other witnesses. Four investigators testified at the evidentiary hearing: Liza Catron, Bruce Robinson, Kenneth Moncrief, and Fred Hillerich. Catron testified that she was hired by Mr. Anderson and that she was supposed to Transport witnesses to court but refused. (EH Trans. 2: 152-53). Catron was discharged from working the case after three months. (EH Trans. 2: 155-56). She did not have any real involvement in the case.

Robinson testified that he was hired on three cases, including Martin’s case. (EH Trans. 2: 158). Robinson stated that he mainly worked on one of the other cases. (EH Trans. 2: 159). He stated that he was told that once the other case was finished, Shea and Mr. Anderson wanted him to come back for the materials on Martin’s case. (EH Trans. 2: 163).

Moncrief testified that he was hired by Shea and Mr. Anderson. (EH Trans. 2: 166). He was told to focus on two other cases first because they had trial

approaching. (EH Trans. 2: 167). Moncrief was hired on the case for the penalty phase and was only on the case about three months. (EH Trans. 2: 167).

Hillerich testified that he was hired for mitigation purposes only on Martin's case. (EH Trans. 2: 174). Hillerich testified that Shea had him serve trial subpoenas. (EH Trans. 2: 175). He had spoken with Shea about doing more, but that "we didn't feel at the time there was any need for me to do anything other than the subpoenas." (EH Trans. 2: 175).

Counsel for Martin called Corey Davis to show that trial counsel did not conduct an adequate investigation. Davis, a 10-time convicted felon, testified that he knew Martin and would have testified for the defense had he been called. (EH Trans. 1: 124). However, around the time of the murder, he told Detective Nelson that he did not know anything about what had happened. (EH Trans. 1: 125). He also admitted during cross-examination that he was inside for the shooting and did not see anything at all. (EH Trans. 1: 131).

Q: So you don't know who did the shooting? You don't know what happened once you went inside?

A: No, ma'am.

(EH Trans. 1: 132). Davis contradicted himself. During his direct examination, he stated that he saw Martin drive off after the shooting.

Q: Okay. Did you see Mr. Martin drive off?

A: Yes, I did.

Q: Okay. And that was before the shooting?

A: Yes. That's before the shooting, I believe.

Q: So after –

A: After the shooting, I believe.

Q: I'm sorry?

A: After the shooting the happened.

(EH Trans. 1: 126-27). During his cross-examination, he then stated Martin had driven off before the shooting. (EH Trans. 1: 130-31).

Davis's testimony would not have helped the defense at all. Davis admitted to not seeing the shooting because he was inside the apartment. He cannot say who committed the murder. His testimony would have been completely irrelevant and would not have caused a different outcome in the trial.

Martin has failed to show how he was prejudiced by Shea not hiring additional investigators. Shea was clear that he did not feel the need to hire an investigator for the guilt phase, because he believed he had everything he needed. Additionally, Martin failed to present any testimony that what the investigators could find would have caused a different outcome in the trial.

The postconviction court addressed Shea's strategy in approaching McGowan and Jones. Shea testified that he did not believe McGowan's statement that the photograph looked like Martin did not help Martin because Martin shaved his beard after the murder and before he was arrested. (Order at 17; EH Trans. 1: 58, 79). Shea

believed that the evidence of Martin shaving his beard off after the murder could be considered evidence of guilt by a jury. (Order at 17-18).

The postconviction court also discussed the credibility of Jones. The court found that Jones's affidavit directly contradicted statements made to police shortly after the murder. (Order at 20). "Jones, on the day of the murder, said he could not see the face of the shooter. The Court wonders how Jones could say seven years later, with certainty, that [Appellant] was not the shooter." (Order at 20). Because Jones did not testify at the evidentiary hearing, the court correctly relied on the police reports and Shea's testimony regarding the matter. (Order at 20). Shea testified that Jones described the shooter as a "short, fat guy." (Order at 20; EH Trans. 1: 26). Jones's original description of the shooter "matched [Appellant's] appearance and corroborated testimony of other witnesses." (Order at 20-21).

The postconviction court correctly found that Martin failed to establish both deficient performance and prejudice and the claim was properly denied.

*4: Forensic consultant and/or ballistics expert*

Martin alleges that defense counsel was ineffective for failing to retain any experts to challenge the testimony of two State witnesses, Lauren Burns and Sebastian Lucas. (IB:59-62). Martin asserts that a forensic expert would have been able to refute Burns's testimony showing that the shooter never fired at the victim from the passenger side of the car. Further, he asserts that a ballistics expert would

have also revealed that there was a discrepancy in the amount of shots fired and bullets recovered. Martin maintains that this evidence would have raised the possibility of more than one gun being fired and refuted the State's theory of premeditation. However, as Martin failed to establish how hiring an expert would have changed the outcome of the trial and how he was prejudiced, this claim was properly denied by the postconviction court.

This Court has repeatedly rejected a claim of ineffectiveness for failing to hire various experts when the proffered testimony would not have assisted in the defense. Reed v. State, 875 So. 2d 415, 422-23, 425, 427 (Fla. 2004); Beasley v. State, 18 So. 3d 473 (Fla. 2009) (finding defense counsel was not ineffective for failing to hire experts, when the experts would not have presented any testimony contrary to the State's position). The test to be applied in a claim of ineffective assistance of counsel for failure to retain an expert is whether counsel's performance was deficient and whether the defendant was prejudiced by that deficiency. Reed, 875 So. 2d 415. But, in this case, any such testimony from an expert would have been fruitless. Two eyewitnesses testified to the actions of Martin regarding the shooting. (T.9:310, 331, 348).

Shea did not think hiring an expert would be helpful to the defendant. (EH Trans. 1: 61). Shea testified that hiring an expert to determine when the victim's vehicle was moved would not have had any effect. (EH Trans. 1: 89).

The shell casings were still located in a pretty close pattern around the driver's side on the street and also in front of the vehicle, there were a couple there, and where the vehicle had been parked, so it wouldn't have had any effect to call an expert down to say, well, the vehicle was moved so back where the vehicle was located, could these shell casings still have been deposited there? There would be no benefit in calling an expert.

(EH Trans. 1: 89-90). Hiring an expert to testify about trajectory, casings, or blood spatter would have no effect on the identity of the shooter. (EH Trans. 1: 90).

In fact, it would have worked against us because they would have had to claim that Dr. Rao's Medical Examiner's report and being shot in the back and being shot in both arms and hand prevented him from opening the door and — and all of the blood basically was on the passenger side of the vehicle and where had he climbed over the seat when he was being shot through the driver's side.

(EH Trans. 1: 90).

Christopher Robinson, an expert in the field of ballistics, also testified. Robinson reviewed the reports from the police department, the crime laboratory, photographic evidence, and the autopsy reports. (EH Trans. 2: 202). However, Robinson did not examine any of the physical evidence in this case. (EH Trans. 2: 230). He did agree that the bullet found at the number 17 marker is consistent with the four bullets that were examined by the FDLE. (EH Trans. 2: 231). Robinson agreed that a Masterpiece ACP, which is the kind of gun that Batie testified to Martin using to commit the murder, has six grooves, with a right-hand twist that could have accounted for the bullets recovered. (EH Trans. 2: 232-33). Because the gun was not recovered, the bullets could not be matched to a specific gun. (EH Trans. 2: 233).

Robinson also agreed that the shooter likely started at the driver side of the vehicle and moved towards the front of the vehicle, ending near the front of the vehicle on the passenger side. (EH Trans. 2: 235).

Furthermore, Robinson agreed that “if a scene is chaotic and multiple people are rushing to the car to attempt to aid a victim such as in this case that casings and bullets can be moved or kicked around.” (EH Trans. 2: 238). The bullet by marker number 17, which Robinson had the most concern about, could move a distance if kicked. (EH Trans. 2: 239). Robinson also conceded that the wounds were consistent with the victim sitting in the driver’s seat and then moving across the vehicle, to attempt to get out of the vehicle on the passenger side. (EH Trans. 2: 240-41).

Even though Robinson noted some issues with the way the investigation was handled, his testimony was consistent with that of the FDLE reports. (Order at 46). Additionally, his testimony failed to prove prejudice to Martin. The main issue in this case was identity. It was undisputed that the victim was shot while he was still in his vehicle. The testimony of Robinson or another forensic expert would not negate the eyewitness testimony that Martin was the shooter. Therefore, even if an expert had been hired, it would not have refuted the testimony of the eyewitnesses, including the codefendant, Batie, and Martin has failed to establish prejudice.

In light of the totality of the evidence, there is no reasonable probability that counsel’s consultation with experts would have made any difference to the outcome of the trial. Whether [Appellant] shot Daniels from the passenger’s side of the front of the SUV and not while standing

directly next to the passenger's door would not change the outcome of the proceedings.

(Order at 45). Additionally, the court found that there was substantial evidence that Martin was the only shooter and that Martin cannot speculate that an expert would have concluded there was another shooter. (Order at 49). "Counsel's tactics were based on years of experience as well as the specific facts of the case and amounted to sound trial strategy." (Order at 49). The court also found that there was competent and substantial evidence that the murder was premeditated, regardless at the rate that the gun used could fire. (Order at 50). Martin's own expert, Robinson, acknowledged there "had to be some break before the movement to the front of the car and the firearm being shot into the passenger side." (EH Trans. 1: 234). "Certainly, [Appellant] had sufficient time to be conscious that his actions would result in Daniels's murder." (Order at 50). See Boyd v. State, 910 So. 2d 167, 181 (Fla. 2005) ("Premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.") (citations and punctuation omitted). The court correctly found that Shea's consultation with an expert about the firing rate of the type of gun observed by witnesses being used by Martin would not have made any difference in the outcome of the trial. (Order at 50).

The postconviction court correctly found that Appellant failed to establish prejudice and this claim was properly denied.

**B: Trial counsel’s presentation was not deficient, and appellant was not prejudiced by counsel’s performance.**

Martin argues that even if this Court finds that trial counsel’s investigation was adequate, trial counsel’s presentation of the evidence was deficient. (IB:62-63). However, trial counsel’s performance was not deficient, and Martin failed to prove prejudice at the evidentiary hearing. The postconviction court properly denied these claims.

**Trial counsel did not fail to adequately cross-examine witnesses.**

Martin alleges that his counsel was ineffective for failing to effectively cross-examine witnesses from the guilt phase. (IB:63-84). In particular, he asserts that counsel did not effectively cross-examine Lauren Burns, Sebastian Lucas, Ronnie McCrimager, Tasheana Hart, Detective Chizik, and Maria Pagan. Martin also alleges that defense counsel failed to inquire about the trajectory analysis performed on the victim’s vehicle to determine the direction of the bullets.

However, Martin’s claim lacks merit as defense counsel did question the State’s witnesses. While courts may not indulge in *post hoc* rationalization, they also cannot insist that counsel “confirm every aspect of the strategic basis for his or her actions.” Harrington v. Richter, 131 S. Ct. 770, 790 (2011). “There is a ‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer neglect.’” Id. (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam)). Therefore, with the presentation of each witness

defense counsel is not deemed automatically defective for not choosing the method that current counsel would have chosen. Further, unlike current counsel, defense counsel does not have the benefit of hindsight in determining what would be effective and what would not work. See Pagan, 29 So. 3d at 949.

Martin has not been able to establish prejudice. To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland, 466 U.S. 668. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford, 727 So. 2d at 219.

*1. Lauren Burns*

Martin claims that there was a contradiction between the police report and the trial and whether she had seen him before the day of the murder and that trial counsel did not follow up with that contradiction during cross-examination. Shea confirmed that during her deposition, she said Martin looked familiar. (EH Trans. 1: 85-86). Burns indicated that she knew Martin because he had previously tried to "holler" at her and she was not interested in him because he was a "coke user." (Order at 25; ROA Vol. 2 at 213). It would have been detrimental to the defense's case to bolster the fact that she knew the defendant prior to the date of the murder and that her identification was more reliable. Impeaching Burns on the fact that she knew who

Martin was bolsters her identification of him. Shea clearly had a reasonable strategic reason to make Ms. Burns's identification less reliable to the jury.

The postconviction court correctly found the difference in Burns's deposition testimony and trial testimony to be "scant in light of Robinson's testimony." (Order at 26). "Whether [Appellant] fired directly into the passenger's side door or fired from the front of the passenger's side of the SUV is a distinction without a difference. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986)." (Order at 26). Any error that occurred from Shea not impeaching Burns on the difference in her testimonies is harmless.

## *2. Sebastian Lucas*

Martin also claims that trial counsel's cross-examination of Sebastian Lucas was deficient. He points out to the conflict in Lucas's statements about the shooter's facial hair. Shea testified that he tried to minimize testimony that identified Appellant as the shooter. (EH Trans. 1: 58). The postconviction court correctly found that Shea's strategy was reasonable. (Order at 28). See Marquard v. State, 850 So. 2d 417, 427 (Fla. 2002) (counsel not ineffective when he did not call witnesses who "did not exonerate the defendant, but in fact, confirmed that [the defendant] was a participant in the crime").

Additionally, Lucas's testimony that the murder was committed like an "execution" was detrimental to the defense. (Order at 28). As Shea explained,

"[h]earing all these people tell about the way the execution of this guy took place would have been very harmful in trying to get a second-degree murder conviction on the table." (EH Trans. 1: 80). Lucas also testified about the shooter's facial hair. In his statement to the prosecutor, Lucas described the shooter as having a "patchy" beard, while at trial, "Lucas acknowledged the shooter had a full beard and he could see the shooter's eyes and nose." (Order at 29). Martin shaved his face immediately after the murder and Shea testified that the evidence of him shaving would suggest consciousness of guilt. (EH Trans. 1: 58-59). Shea's strategy in approaching his questioning of Lucas was reasonable and challenging the descriptions of the shooter's beard would not have changed the outcome of the proceedings. (Order at 29).

### *3. Ronnie McCrimager*

Martin claims that trial counsel did not conduct sufficient cross-examination of McCrimager. McCrimager admitted during the trial that he was unable to identify the shooter from the photographic lineup, even though the officer administering the lineup suggested he should identify the shooter. (EH Trans. 1: 22-23). McCrimager never saw the face of the shooter. Additionally, Shea testified that McCrimager's testimony went the way he hoped. (EH Trans. 1: 86). It was presented to the jury that McCrimager did not see the shooter and he only signed the photograph because

he was harassed. (EH Trans. 1: 86-87). The jury was able to consider McCrimager's vision problems and his inability to identify the shooter. (Order at 30).

While counsel may not have discussed the influence of others on McCrimager, counsel nevertheless questioned McCrimager's credibility by emphasizing his difficulty seeing. Counsel "cannot be considered deficient for failing to do what he actually did." Banks [v. State], 219 So. 3d [19,] 29 [(Fla. 2017)]. Moreover, challenging McCrimager on what he learned from others would only highlight and corroborate others' identification of Defendant as the shooter. Counsel's strategy was reasonable in light of the evidence presented at trial.

(Order at 30). The postconviction court properly found that Shea's performance was not deficient and Martin failed to prove prejudice.

#### *4. Tasheana Hart*

Martin argues trial counsel was ineffective for failing to challenge Hart regarding how long she knew Martin, whether he offered her money so she would not go to police, and whether she saw Martin in a store the morning before the murder. (IB:76-78).

Shea testified that he needed to be careful with his cross-examination of Tasheana Hart. (EH Trans. 1: 93). Hart met Martin as soon as he got out of prison for a prior murder. (EH Trans. 1: 93). "[I]n opening that door I would have opened the door that he was a convicted felon who just got out of jail on a murder and we did a sidebar on that and I elected not to do any further questioning there to avoid that answer." (EH Trans. 1: 94). Because of that information, there was nothing

further for Shea to cross-examine Hart regarding her knowledge of Martin. (EH Trans. 1: 95).

The postconviction court correctly found that Shea's decision to not pursue the line of questioning about how Hart knew Martin to be a reasonable strategy. (Order at 31). Shea's strategy to not bring in Hart's statement that Martin was "real excited" and "bragging about" the murder was completely reasonable. (Order at 30-31).

As the court noted, Shea did challenge Hart's testimony that Martin offered to pay her not to testify.

Shea questioned Hart at trial about Defendant's alleged statement to pay her not to testify and inquired whether *she* asked Defendant for money not to testify. (TT at 408-11.) For instance, Shea asked Hart if she was sure she "didn't ask [Defendant] to pay you something to be sure you didn't turn him in." (TT at 409.) Later, he asked if she "didn't say to [Appellant] for some money I won't say anything." (TT at 410.) Counsel's questions could raise doubt in the jurors' minds as to whether Defendant offered to pay Hart or whether Hart sought payment from Defendant. Counsel "cannot be considered deficient for failing to do what he actually did." Banks, 219 So. 3d at 29.

(Order at 32) (emphasis in original). As the postconviction court correctly found, even if Hart had been impeached about seeing Martin at the convenience store, it does not negate that she knew Appellant prior to the murder and saw him shoot Daniels. (Order at 33). Additionally, Hart's testimony was consistent with that of the other witnesses. (Order at 33). "Looking at the totality of the State's evidence, whether Defendant was at the convenience store before the murder would not refute

the overwhelming evidence that [Appellant] later shot Daniels multiple times while Daniels was trapped inside the SUV.” (Order at 33). As such, Martin failed to establish “a sufficient probability that impeaching Hart where [Appellant] was before the murder would undermine confidence in the outcome of his trial.” (Order at 33).

#### *5. Detective Mitchell Chizik*

Appellant argues that Shea failed to use evidence he had to cross-examine Detective Chizik. (IB:78-81). McGowan’s description of a “short, fat guy” accurately described Martin’s appearance. McGowan’s statement also described the execution-style murder and Shea did not want to bring those facts before the jury. (Order at 16-17). McGowan also picked Appellant’s photograph out of a lineup, stating “this looks like the guy, but it’s not him.” (Order at 16). As Shea testified, McGowan’s statement that Martin looked like the shooter did not help Martin because Martin had shaved his beard shortly after the murder and before his arrest. (Order at 17; EH Trans. 1: 58, 79). A person changing their appearance when they had their photograph taken is further evidence of guilt that would go before a jury. (Order at 17). Jones, in a statement to police shortly after the murder, described the shooter as a short, fat, black male “as a black male, 5’8”, 160 . . .” (Order at 19). During a pretrial phone call with Shea, Jones described the shooter as a short, fat black male. (Order at 19). The postconviction court, in considering Jones’s and

McGowan's inability to identify the shooter, found it was a reasonable strategy not to question Chizik about the inability of Jones and McGowan to identify Appellant in the photographic lineups.

Appellant also argues that Shea failed to question Chizik about why he did not investigate the alibi of Frazier, who was shot during a "botched robbery." (IB: 80-81). The prosecutor, Richard Mantei, spoke with Frazier and confirmed that after he was released from the hospital, Frazier was transported to his parents' home in south Florida to recover and was not in Jacksonville at the time of Daniels's murder. (Order at 34; ROA, Vol. 2 at 216). As the court properly noted, the theory that Frazier was involved was purely speculative and no evidence was presented to contradict Frazier's alibi. (Order at 34). "Moreover, given the number of witnesses whose description of the shooter mirrored [Appellant's] distinct appearance," questioning Chizik about Frazier would not have changed the outcome of the proceeding. (Order at 34).

#### *6. Maria Pagan*

Martin claims that Shea was ineffective for failing to adequately cross-examine Maria Pagan, who worked as a laboratory analyst for the FDLE. (IB:81-84). Martin argues that Shea should have asked more questions regarding why all the bullets were not examined and why there was no proper trajectory analysis performed.

The postconviction court found Shea's strategy to be reasonable. "Challenging Pagan on the number of bullets recovered at the scene would highlight the number of times [Appellant] shot Daniels and confirm his intent to murder Daniels." (Order at 37). Appellant also does not point to any specific testimony of Pagan that, if challenged, would have changed the outcome of the trial. Pagan's testimony supported the testimony of the eyewitnesses and even Appellant's own expert, Robinson, testified consistently with Pagan. Appellant merely speculates that the outcome would have been different. However, speculation is not sufficient to grant a claim of ineffective assistance of counsel. See Hampton v. State, 219 So. 3d 760, 770 (Fla. 2017); Bradley v. State, 33 So. 3d 664, 672 (Fla. 2010); Maharaj v. State, 778 So. 2d 944, 951-52 (Fla. 2000) ("Postconviction relief cannot be based on speculation or possibility.").

## 7. *Conclusion*

Shea had very clear strategic reasons for asking the questions that he did. His trial strategy was to attack the identification of Martin, which he successfully did on Burns and McCrimager, and to try to negate the element of premeditation, which is needed for first-degree murder. Martin failed to show what additional evidence could have been gleaned from further examination of the witnesses at the evidentiary hearing. As such, Martin has failed to show that trial counsel's performance was

deficient and what prejudice he experienced as a result of Shea's representation. This claim was properly denied by the postconviction court.

**C: Trial counsel was not deficient for not presenting Larry Jones and Willie McGowan to testify.**

Martin alleges that defense counsel was ineffective for failing to present two key eyewitnesses at trial. He asserts that Willie McGowan told detectives that the defendant looked like the guy, but it was not him. (IB:86). Martin also argues that defense counsel was ineffective for failing to present the testimony of Larry Jones, who also saw the suspect and described the codefendant, Batie, as the shooter. (IB: 86). Martin asserts that these witnesses would have raised reasonable doubt in the minds of the jurors.

Shea testified that he did not speak with Willie McGowan, but he did speak with Larry Jones while he was preparing this case for trial. (EH Trans. 1: 55-56). McGowan's multiple statements that he made to police were all consistent with each other and there was no conflict in his testimony of what he said to the police. (EH Trans. 1: 76-77).

His — his statement would have been equally as detrimental if he appeared as a witness. He confirmed basically about the — going to the drug filled apartment of Mr. Corey. He confirmed he passed him going — well, he was going in and Mr. Martin was coming out. He confirmed that he looked him right in the face. He confirmed that shortly moments later he heard gunshots. He came back. He observed a short, fat guy who he just passed, a black gentleman, shooting into the vehicle walking around execution — actually shooting his friend who was flailing around in the vehicle.

So he had all that testimony and the fact that when he was shown a photospread and said that's not the guy, the photo was of a person clean-shaven, not the same person that had the full facial hair or had facial hair the day of the murder.

But the other facts that are at issue in order to challenge just that one small issue about the identification didn't — wouldn't have eliminated his eyewitness testimony identifying the shape, the size, confirmed everybody else's statement as the shooter out there, so anyway, I didn't pursue for that and for other reasons.

(EH Trans. 1: 77-78). Additionally, McGowan would have confirmed that there were drugs involved in the case and Shea did not want the jury to hear of another bad act by Martin. (EH Trans. 1: 79). McGowan would have also confirmed the execution style of the murder. "This would have been one more witness to bring before a jury that would confirm the — the execution style of this murder and the way it went about, and that was a major concern that, you know, you got this person trapped in a car and he's walking around shooting a guy who can't get out of the vehicle. That's a terrible impression to leave with a jury." (EH Trans. 1: 80).

Q: And you believe that Willie McGowan's testimony would have been very difficult had it come out the way that he — that you believed it would in the police reports?

A: It would **never** have benefitted the defendant.

(EH Trans. 1: 80-81) (emphasis added).

Shea testified that he spoke directly with Jones. (EH Trans. 1: 81). Jones described a short, fat man, which was the same description as Martin. (EH Trans. 1: 81).

The postconviction found Shea's strategy to be reasonable. McGowan's description accurately described Martin's appearance and "his account of the shooting illustrated the brutality of the attack." (Order at 17). Shea also testified that he did not call McGowan "because McGowan told police something no other witness testified to, that [Appellant] shot at McGowan as well." (Order at 17; EH Trans. 1: 78). McGowan's testimony was also cumulative of the testimony of other witnesses describing Martin as the shooter. (Order at 18). Jones described the shooter as a short, fat black man to police and to Shea. On the day of the murder, Jones "said he did not see the face of the shooter." (Order at 20). His statements in his affidavit directly contradict his statements to police shortly after the murder, as well as his conversation with Shea. (Order at 20). His description of the shooter did not exonerate Martin.

Neither witness would have been helpful to the defense. Trial counsel clearly had a strategic reason for not calling either man as a witness and his performance was not deficient. Additionally, Martin cannot establish how he was prejudiced by these witnesses not testifying. As such, this claim must be denied.

**D: Shea was not deficient in his challenging of the photographic identifications during the trial.**

Martin alleges that his counsel was ineffective for failing to challenge the Jacksonville Sheriff's Office (JSO) investigative procedures in regards to showing witnesses photospreads of Martin. (IB:87). Martin asserts that the conduct by the

JSO in administering the photographic lineups also calls into question their conduct during additional witnesses' identification of Martin.

Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Strickland, 466 U.S. at 687. Additionally, if a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong. Waterhouse v. State, 792 So. 2d 1176 (Fla. 2001). See also Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999) (finding no need to address prejudice prong where defendant failed to establish deficient performance prong); Kennedy v. State, 547 So. 2d 912, 914 (Fla. 1989) (noting that where defendant fails to establish prejudice prong court need not determine whether counsel's performance was deficient).

However, defense counsel was not ineffective, and Martin was not prejudiced. At trial, defense counsel questioned the other witnesses about their out-of-court identification of the defendant through the police photo identification. (T.9:318-20; 340). Based on these questions there was no evidence of any error on the part of the JSO. Additionally, Martin has not shown that he suffered any prejudice by the failure of defense counsel to object to the photo identification of the witnesses. The result of the proceedings would have been the same as the codefendant and other witnesses clearly identified Martin as the shooter during trial. (T.9:308, 356). Further, defense

counsel did attempt to impeach Lauren Burns's identification of Martin during the trial. (T.9:323). Defense counsel also brought out that witness McCrimager felt hassled into picking the defendant's picture. (T.9:354).

At the evidentiary hearing, Shea was asked about the photographic lineups. Shea testified that, while the lineups were a part of the trial, he did not think that they were a feature of the trial. (EH Trans. 1: 57). Shea also stated that, even though it would be interesting to know if an officer had violated the proper procedures for administering a photographic lineup, it would not have had any kind of an effect on the outcome of the jury. (EH Trans. 1: 57-58).

A: . . . Because defending the challenging on that the other information as to why the identity of that person was being — being — why he was looking at those photographs would come out in sworn testimony about the other facts, about the physical aspect of the person they were looking at and, of course, the fact — on of — one of the facts is that the defendant in this particular case was wearing a facial beard by definition of all of the witnesses out there who identified him and he shaved it off by the time his photograph was taken and so they were being shown a photograph of a person without a beard, but the person they witnessed out there had facial hair, heavy facial hair, and so that would have been one issue that I would have been concerned about, that it would be another evidence of guilt that would go before a jury that a person is changing their appearance when they had their photograph taken so —

Q: So that's why you — that was one of your reasons for not challenging the photo identifications?

A: Well, I thought it through and it didn't seem significant because the photo I.D. was not a significant part of proof beyond a reasonable doubt.

(EH Trans. 1: 58-59). Shea did not think challenging a small issue would have changed the jury's verdict and he thought that challenging the procedures would likely have caused him to lose credibility with the jury. (EH Trans. 1: 59-60). Shea's decisions about the photographic lineup were clearly a reasonable strategy. Shea needed to stay credible with the jury so that his arguments would not be ignored by the jury. Attacking the photographic lineup would not have changed the outcome of the trial because there were multiple witnesses who knew Martin personally that identified him as the shooter.

Moreover, Shea testified Defendant conceded he was at the scene. (EH1 at 74). According to Shea, Defendant told him Franklin Batie handed him the gun and that he did not go around to the passenger's side to shoot Daniels. (EH1 at 74). Christopher Anderson, Shea's co-counsel, testified at the evidentiary hearing that Defendant "acknowledged that the police reports were accurate and he was the shooter." (EH1 at 113).

(Order at 40). The court found that given the facts Shea had and "his reasonable belief in the jury's reaction to challenging the police procedures, his trial strategy was sound and fell well within the wide range of reasonable professional conduct. See Bolin [v. State], 41 So. 3d [151,] 156 [(Fla. 2010)] (finding counsel's tactics reasonable in light of evidence at trial)." (Order at 40).

Regarding McCrimager, Shea was able to elicit testimony for the jury that McCrimager could not positively identify Martin as the shooter and he was pressured to make an identification. (Order at 41).

Shea made reasonable attempts to challenge the evidence and counsel is not deficient “for failing to do what he actually did.” Banks, 219 So. 3d at 29. The postconviction court looked at Shea’s testimony that he believed challenging the police procedures in administering the lineups would have hurt Appellant’s case. (Order at 42). Additionally, the court held that Appellant “has no competent evidence to show the detective deviated from the proper language” in administering the lineup to Burns. (Order at 42). Appellant “presented *no evidence* at the evidentiary hearing to substantiate this claim.” (Order at 42) (emphasis added).

The record conclusively refutes Defendant's allegations that counsel was ineffective in handling the photo identifications. Counsel made a reasonable tactical decision not to highlight the photo identifications. Moreover, Defendant fails to show the procedures were flawed. Finally, counsel effectively elicited testimony from Ronnie McCrimager that he was "hassled" by police when looking at the photospreads. Defendant is not entitled to relief on this subclaim.

(Order at 42-43).

Therefore, as Martin did not show how Shea was deficient in his performance or how he was prejudiced, this claim was properly denied by the postconviction court.

**E. Counsel did not render ineffective assistance of counsel during closing arguments.**

Martin alleges that his counsel was ineffective for the statements he made during closing arguments, as well as for not adequately challenging the State’s closing arguments. (IB:103-10). Martin asserts that defense counsel undermined his

own theory of the case during closing arguments. Martin argues that defense counsel also incorrectly argued facts that were outside of evidence and prejudiced Martin's defense and counsel unreasonably conceded the accomplice jury instruction. Martin did not establish ineffective assistance of counsel during the closing arguments and this claim was properly denied.

During closing arguments, an attorney is to assist the jury in analyzing, evaluating, and applying the evidence. Miller v. State, 926 So. 2d 1243, 1254 (Fla. 2006). As the jury is instructed prior to closing arguments, what the lawyers say is not evidence. The assistance that is allowed includes the attorney's right to state his contention as to the conclusions that the jury should draw from the evidence. Id.; see Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999). Moreover, "[t]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Robinson v. State, 610 So. 2d 1288, 1290 (Fla. 1992) (quoting Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985)). Further, as long as an argument is based on the evidence presented, an attorney can argue reasonable inferences from the evidence, or any relevant issue. Miller, 926 So. 2d at 1254-55. Therefore, to the extent that the state attorney went through the evidence presented at trial and explained it to the jury, there was no reason for defense counsel to object.

Moreover, even if the State's closing arguments are deemed improper, it does not necessarily mean that Martin was deprived of a fair trial or was prejudiced. In Braddy v. State, 111 So. 3d 810, 842-44 (Fla. 2012), this Court concluded that any improprieties contained in the prosecutor's statements did not deprive the defendant of a fair trial because the comments did not go to the heart of the case. In Braddy, the state attorney made comments that denigrated defense counsel, that the jury would be committing a miscarriage of justice if it convicted the defendant of a lesser-included offense instead of first-degree murder, and describing the victim's fear by using the pronoun "you" thereby having the jury place themselves in the position of the victim. Id. at 842-43. This Court held that individually none of the comments were fundamental error. Id. This Court also held that the cumulative effect of any errors in the State's closing argument did not compromise the integrity of the trial and when viewed in the full context of the lengthy trial they were not sufficient to vitiate the defendant's right to a fair trial. Id. at 844. Similarly in this case, the state attorney's comments in closing argument did not go to the heart of the case. Individually or cumulatively any comments made by the state attorney in Martin's case would not have changed the jury's verdict.

This Court has held that there is a strong presumption that defense counsel render effective assistance and the assessment of their performance cannot be based on hindsight. "[A]n attorney is not ineffective for decisions that are a part of a trial

strategy that, in hindsight, did not work out to the defendant's advantage.” Mansfield, 911 So. 2d at 1174. “Even if counsel’s decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was ‘so patently unreasonable that no competent attorney would have chosen it.’” Dingle, 480 F.3d at 1099 (quoting Adams, 709 F.2d at 1445)). The defendant, on the other hand, has to overcome the burden that what the attorney did is not considered trial strategy. See Darling, 966 So. 2d 366.

Martin failed to present any evidence at the evidentiary hearing about the closing arguments. As such, the trial record must be relied upon to determine whether trial counsel was ineffective. Shea testified extensively about his strategy for trial.

This would depend on the strategy that I’m looking at and the information and facts I have in the case. Sometimes going out and reaching beyond — reaching beyond the allegations, the indictment and — and finding information that would be supporting the state’s case of proof beyond a reasonable doubt and I’d have to give you a global view of how I looked at this case as I look at every case when I first take it.

I do a very strong analysis because that’s my background. I’m an analyst by training and by skill, so when I look at a case I just don’t look at the indictment. That’s one thing, but I look at all of the police reports and I think in my — in my file record you probably saw the approximately 12 to 15 detailed pages of all the information that I had about this case, and so there’s certain things that I would — I would not reach out and do if it wasn’t going to be helpful to our defense but was going to strengthen the allegations contained in the indictments as far as the state proving their case beyond a reasonable doubt.

(EH Trans. 1: 34). Shea's focus was to attack the identification and to negate the aggravators and the element of premeditation. (EH Trans. 1: 36-37). "There wasn't any kind of a separate felony involved that would raise it to the death penalty, so premeditation was the issue. As I looked at the facts we were also looking at the effect of the cold, calculated and premeditated issue." (EH Trans. 1: 37). "Looking at the heinous, atrocious and cruel issue which was all part of — of my defense in this case to be sure the state didn't raise those issues to the degree that the jury would sentence him to death." (EH Trans. 1: 37). Shea considered both the penalty and guilt phases because it would be the same jury who had heard the facts of the case that would be making the sentencing recommendation. (EH Trans. 1: 37).

[M]y theme was a misidentification and that came about because of our trial strategy and who I prevented in coming and putting — being called as witnesses. In other words, I eliminated — tried to eliminate premeditation. Also I raised some doubt in the testimony of Mr. Batie who was the key witness there, and so identification was a major issue.

(EH Trans. 1: 39). Martin appears to argue that if there is error in another part of the trial, it proves error in the closing arguments. However, that is not the standard. Trial counsel's conduct must be so egregious that it undermines the outcome of the trial. Martin has failed to meet that standard. Trial counsel's performance did not fall below normal standards. Martin simply cannot overcome his burden of proof.

The court found that it was a reasonable inference, in considering the evidence, that Daniels was trying to escape moving towards the passenger side of

the car while Appellant was shooting him. (Order at 53). Daniels sustained defensive wounds on his hands, his body was lying across the passenger seat, and his foot was still on the driver's side. (Order at 53-54).

The court also found Shea's statement, "the jury will, and perhaps should, find Martin guilty of first degree [murder,]" to be taken out of context with the rest of his statement. (Order at 57).

Defense counsel described the "missing pieces from this case," including DNA analysis, fingerprint identification, the missing gun, and reasons for Daniels to shoot at Batie days before Daniels's murder. (TT 571-75.) Counsel's approach to highlight possible avenues that were not investigated was a good way to explain to the jury what the state had not proven.

(Order at 57). Martin also argues that Shea made inconsistent arguments during his closing argument, including arguing that "the rest of the evidence tends to agree with Batie's testimony," implicating Martin. The postconviction court rejected this argument, finding this statement was taken out of context. (Order at 58-59). Shea continued to argue to the jury about Batie waiting to be sentenced for his part in this murder, how Batie was reluctant to share what happened during the murder and why it actually occurred. (TR 587-90). Shea argued that Batie was not straightforward in answering his questions. (TR 587-90). When taken in the whole context of his statements, Shea was not suggesting that he supported Batie's testimony. (Order at 60). The court found Shea's closing argument was "reasonable given the evidence presented at trial." (Order at 60).

Martin did not establish deficient performance or prejudice and, accordingly, this claim was properly denied by the postconviction court.

**CLAIM II – Martin Was Not Deprived of His Constitutional Rights as the State Did Not Commit a Brady and Giglio Violation.**

Martin alleges that a Brady<sup>3</sup> and Giglio<sup>4</sup> violation occurred in his case when Detective Nelson threatened at least two witnesses and attempted to harass a third witness. (IB:110-18). Martin asserts that Detective Nelson threatened Tasheana Hart into picking the Defendant during a photo lineup by telling her that he would arrest her if she refused. (IB:112). Martin maintains that even after Hart met with Detective Nelson a few days later he again told her that she should lie and say she saw the Defendant after the shooting and that the Defendant offered her money to keep quiet even though it was a lie. (IB:112-13). Martin also asserts that when Hart told the prosecutor that she had not seen anything, she was told it was too late to change her testimony. Lastly, Martin asserts that Detective Nelson tried to threaten Pamela Hart and Corey Davis. (IB:112-13).

To establish a claim of newly discovered evidence, Martin had to show that the newly discovered evidence is of such a nature that it would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). However, Martin failed to meet his burden. In his motion to vacate, Martin admits that Tasheana Hart allegedly admitted that she gave false testimony at trial, right after Martin's conviction, which was on March 28, 2012. (Mot. to Vacate at 69). Martin asserts

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<sup>3</sup> Brady v. Maryland, 373 U.S. 83 (1963).

<sup>4</sup> Giglio v. United States, 405 U.S. 150 (1972).

that after he was convicted, Hart confessed that she lied at the trial and that she only testified against the Defendant because she had been threatened by Detective Nelson with imprisonment if she did not testify that Martin was the shooter. (IB:112). However, this information would not have produced an acquittal on retrial as Martin was identified as the shooter by three other witnesses at trial. At trial Lauren Burns and Sebastian Lucas both positively identified Martin as the person they saw shooting into the victim's car. (TR 318-22, 332). The codefendant, Franklin Batie, also testified that Martin was the shooter. (TR 364-68).

Tasheana Hart testified at the hearing. She claimed that she did not actually see the murder and that she lied at trial. (EH Trans. 2: 8-9). Tasheana Hart claims that, while she knew of Martin, she did not know him personally. (EH Trans. 2: 10). Tasheana Hart claimed that Detective Nelson bullied her into giving the sworn statement. (EH Trans. 2: 11). She also claimed that she told someone from the State Attorney's Office that she did not want to go forward with testifying. (EH Trans. 2: 13). She claimed that she was told what to say and that Martin did not hang around the neighborhood, contrary to what she testified to at trial. (EH Trans. 2: 19). Tasheana Hart also denied testifying in this case in front of a jury; but then contradicted herself and stated that she did testify. (EH Trans. 2: 22-23). During the evidentiary hearing, Tasheana Hart acted very combatively by talking over the state attorney and would not let her ask questions. (EH Trans. 2: 23). She also claimed

that Mr. Mantei was not the person who took the sworn statement. (EH Trans. 2: 23). Tasheana Hart also refused to answer questions. (EH Trans. 2: 26). She was confronted with her deposition and claimed everything was a lie. (EH Trans. 2: 26-29). Tasheana Hart admitted to seeing the car drive off after the shooting, which is different from what she told defense. (EH Trans. 2: 32).

Detective Nelson testified at the hearing. Detective Nelson was not the lead detective on the case. (EH Trans. 2: 53). On the day of the shooting, he spoke with Tasheana Hart, who told him that “she was outside when the shooting occurred and that she thought she recognized the suspect as someone she knew.” (EH Trans. 2: 54). The day after the shooting, detectives met with Tasheana Hart, who gave them a description of the shooter and what she saw. (EH Trans. 2: 56). Other witnesses gave similar accounts to what Tasheana Hart gave about the description of the shooter, as well as how the incident occurred. (EH Trans. 2: 57). The codefendant was arrested a few days after Tasheana Hart met with detectives and he gave a very similar account of what happened. (EH Trans. 2: 60-61). Detective Nelson adamantly denied threatening to put Tasheana Hart in jail if she did not identify the shooter. (EH Trans. 2: 61). He also denied continually showing her one photograph of Martin and telling her that she needed to pick his photograph. (EH Trans. 2: 61). Detective Nelson did not offer to pay Tasheana Hart if she would testify, nor did he tell her that he would have her misdemeanor possession of cannabis dropped if she

testified. (EH Trans. 2: 61-62). Detective Nelson did not threaten Tasheana Hart in any manner to get her to testify. (EH Trans. 2: 62).

Detective Chizik also testified. He interviewed Tasheana Hart during the investigation of the murder. (EH Trans. 2: 64). On the date that detectives administered the photographic lineup, Detective Chizik stated that no one threatened to send Tasheana Hart to jail if she did not identify someone, that no one offered her money for her statement, or that anyone promised to erase her record if she came forward in this case. (EH Trans. 2: 66). He testified that he recorded an interview with Pamela Hart, who stated in the recording (entered into evidence at the evidentiary hearing as Exhibit 8), that a person tried to get her to say that the detectives were harassing her but that she was not harassed. (EH Trans. 2: 67). Detective Chizik believes Tasheana Hart is now lying about seeing the murder based on “the information that I had and after talking to – to her mother, Pamela, and her telling me that the defense drove up to Georgia in an attempt to get her to make negative statements against Detective Nelson.” (EH Trans. 2: 69-70). Detective Chizik stated that, when he first interviewed Tasheana Hart after the murder, she did not seem scared or like she was being threatened. (EH Trans. 2: 70). Tasheana Hart gave the detectives information that she did not previously provide to Detective Nelson, “information that we didn’t even know until she told us.” (EH Trans. 2: 70).

Detective Strawn, the lead detective on the case, testified at the evidentiary hearing that Tasheana Hart was cooperative in the initial investigation. (EH Trans. 2: 73). Based on the interview with Tasheana Hart, detectives were able to obtain an arrest warrant for the codefendant, who gave a sworn statement that was consistent with Tasheana Hart's statement. (EH Trans. 2: 74-75). Detective Strawn denied pressuring Tasheana Hart to pick Martin out of a photographic lineup and no one offered her money to give a statement. (EH Trans. 2: 76). At no point during the case did Tasheana Hart indicate to Detective Strawn that she was lying, or that she was being forced to testify. (EH Trans. 2: 77-78).

Richard Mantei, the assistant state attorney who handled the trial, also testified. He was the lead prosecutor from the beginning of the case. (EH Trans. 2: 79). Tasheana Hart came to the annex voluntarily to give a statement. (EH Trans. 2: 80-81). Mr. Mantei met with Tasheana Hart several times during the pendency of this case, including being present for her deposition. (EH Trans. 2: 80-83). Mr. Mantei testified that he did not have any indication that Tasheana Hart was being forced to testify. (EH Trans. 2: 84). Tasheana Hart did not ever tell Mr. Mantei that she was lying.

If a witness tells me they're lying I certainly wouldn't make the following statement to that. Hart never told me she was lying at all. Matter of fact, her statements were pretty consistent every time she made them to the police, to me at the sworn, at depo and at trial. I believe even early in the investigation with the police when they first talked to her she actually not only told them what they asked her but

she — she called them back for a second meeting and said, oh, I've seen him since and that's when the incident came up about him offering money and him shaving his beard and that sort of thing, so she actually was proactively seeking some of that out.

(EH Trans. 2: 84-85). Even though Tasheana Hart was one of the first witnesses to identify Martin as the shooter, there were also multiple other witnesses that they had spoken with prior to Tasheana Hart who gave statements and identified Batie as the codefendant. (EH Trans. 2: 85). Mr. Mantei believed Tasheana Hart to be credible based on her consistent statements. (EH Trans. 2: 86). No other prosecutors met with or interviewed Tasheana Hart. (EH Trans. 2: 88).

The prosecutor who sat second chair in the case, Richard Komando, testified that he never spoke with Tasheana Hart. (EH Trans. 2: 90). Tasheana Hart never told him that she was lying or that she was being forced to testify. (EH Trans. 2: 90).

Tasheana Hart's testimony was clearly refuted by several witnesses. Not a single detective indicated that she told them that she did not see the murder. Additionally, her mother, Pamela Hart, informed the court that she had introduced Martin to Tasheana Hart prior to the murder, contradicting Tasheana Hart's claim that she did not personally know Martin. (EH Trans. 2: 37). Tasheana Hart's claims that she did not see the murder or that she was pressured to testify are not credible. Even if she were to testify at a new trial, her testimony would not produce an acquittal at trial because there were several other witnesses, including the

codefendant, that identified Martin as the shooter, as well as how the murder occurred.

The postconviction court found Tasheana Hart to not be credible at all. The court noted her combative demeanor when she testified she was in her house at the time of the shooting and did not witness anything. (Order at 68).

Considering Tasheanna's testimony at the evidentiary hearing in light of her previous statements and testimony and observing Tasheanna's combative demeanor, the court finds the testimony from the State's witnesses' was more credible and persuasive than [Appellant's] allegations and Tasheanna's testimony. There can be no Brady or Giglio violation here because there is no proof that Tasheanna lied or was pressured when she testified at trial. Moreover, Tasheanna's trial testimony was merely a part of the case the State presented against [Appellant]. Her testimony matched that of numerous other witnesses whose descriptions of the shooter as a short, fat, black man led police to [Appellant].

(Order at 70). Tasheana Hart's inconsistent statements about what she actually saw the day of the murder were a sufficient basis for the postconviction court to find her not credible.

Nevertheless, Martin has also not asserted viable claims under either Brady or Giglio. To establish a Brady violation, the Defendant has the burden to show prejudice when (1) the State possessed favorable evidence for the defense — either exculpatory or impeaching; (2) the State wilfully or inadvertently suppressed that evidence; and (3) the evidence was material. Mungin v. State, 79 So. 3d 726, 734 (Fla. 2011). However, this claim is meritless. Martin has not shown that the

prosecutor knew or had any evidence that Hart was being threatened by Detective Nelson. In fact, Hart's trial testimony was consistent with her sworn testimony given at deposition. Moreover, even if Hart's testimony was false and she was being threatened, this does not rise to the level of material evidence since three other witnesses testified to seeing the shooting and identifying the defendant as the shooter. See Wickham v. State, 124 So. 3d 841, 852 (Fla. 2013) (finding that based on the testimony of two other witnesses, even if the prosecutor's notes had been disclosed, there is no reasonable probability that the outcome would have been different). Further, the codefendant also testified that Martin was the shooter. (TR 364-68). Therefore, based on the evidence presented at trial, even without Hart's testimony, the result of the proceedings would have been the same.

Martin also asserts that there was a Giglio violation as well. A Giglio violation is demonstrated when (1) the prosecutor presents or fails to correct false testimony; (2) the prosecutor knows the testimony is false; and (3) the false evidence is material. See Guzman v. State, 941 So. 2d 1045, 1050 (Fla. 2006). Once the two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. See id. at 1050-51. With regard to the third prong of Giglio, "the false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003) (quoting United States

v. Agurs, 427 U.S. 97, 103 (1976)). Undoubtedly, even if Hart's testimony had not been included at trial, it would not have changed the outcome as the Defendant was positively identified by two other witnesses as well as the codefendant. Therefore, Hart's testimony and identification were not material to the case.

Further, even without Hart's testimony Martin would have still been convicted. Tasheana Hart's alleged change in testimony is merely that she could not see who the actual shooter was because he was being blocked by the victim's car. Her testimony does not place an alternative suspect at the scene of the crime, does not affect the testimony of the three other eyewitnesses who identified the defendant, and can only be used as impeachment evidence. See Sims v. State, 754 So. 2d 657, 662-63 (Fla. 2000) (denying claim because the defendant did not present any evidence that directly refuted the State's case). Therefore, it would not have changed the outcome of the proceeding and this claim should be denied.

In regard to Pamela Hart and Corey Davis, Martin cannot show that there was an actual Brady or Giglio violation as they did not testify to the jury and their statements would not have been material. In his motion, Martin asserts that Pamela Hart told Detective Nelson that she did not see the shooting and he allegedly threatened her. (DM:70). Corey Davis also told the detective that he did not see the shooting and was allegedly threatened by Detective Nelson. (DM:70). However, Martin's allegations are complete speculation as Martin does not even assert how

being threatened by Detective Nelson affected his case regarding these two witnesses who did not see anything. Pamela Hart testified at the evidentiary hearing. She testified that she did not see the shooting, she was not interviewed by police, and she did not see the shooter. (EH Trans. 2: 36). She took her daughter, Tasheana Hart, to the annex building for her to speak with detectives on the case. (EH Trans. 2: 39). Pamela Hart was not in the room when the interview occurred. (EH Trans. 2: 39). While Pamela Hart admitted that Tasheana Hart told her that she would be charged with contempt if she did not testify, she also stated she did not remember the full conversation with her daughter. (EH Trans. 2: 44). “I don’t really remember what it was because honestly and truly it was in one ear and out the other.” (EH Trans. 2: 45). Pamela Hart also stated that she and her daughter did not talk about the case because they were going through their own personal issues at the time. (EH Trans. 2: 48). She further stated that Detective Nelson never threatened her. (EH Trans. 2: 51).

The court found no Brady or Giglio violation in regards to Pamela Hart, who testified that Nelson never threatened her, and Pamela Hart’s “only knowledge that Tasheanna was ‘harassed’ was vague and did not show Nelson threatened or pressured Tasheanna to lie.” (Order at 71).

Pamela Hart’s testimony refutes Martin’s claim that Detective Nelson threatened her. Corey Davis’s testimony regarding his knowledge of Detective

Nelson was found to be inadmissible hearsay. Even after allowing Davis to proffer his testimony, the postconviction court, in its order, found Davis's testimony was "not sufficiently broad-based and [was] based on Davis's personal opinion." (Order at 73). Additionally, there was no testimony from Davis that Detective Nelson threatened or harassed him, other than an inadmissible hearsay statement that Detective Nelson got in touch with Davis's sister, telling her to have Davis contact Detective Nelson. (Order at 74).

Therefore, Martin cannot show how he was prejudiced or how this negatively affected the outcome of the proceeding. As such, the postconviction court was correct in denying this claim.

**CONCLUSION**

Appellee respectfully requests that this Honorable Court affirm the order of the postconviction court.

Respectfully submitted,

PAMELA JO BONDI  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 21st day of December, 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: Dawn Macready, Dawn.macready@ccrc-north.org, and Elizabeth Salerno, Elizabeth.salerno@ccrc-north.org, attorneys for Appellant.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of the type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

*/s/ Lisa A. Hopkins*  
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