IN THE SUPREME COURT OF FLORIDA

MARVIN CANNON,

Appellant,

v.

CASE NO. SC19-84
L.T. NO. 2010 CF 000663B
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR GADSDEN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ASHLEY MOODY
ATTORNEY GENERAL

LISA A. HOPKINS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 99459
The Capitol, PL-01
Tallahassee, Florida 32311
Telephone: (850) 414-3300
Facsimile: (850) 414-0997
Lisa.Hopkins@myfloridalegal.com
Capapp@myfloridalegal.com

Counsel for Appellee

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

FACTS AND PROCEDURAL HISTORY

The relevant facts concerning the murder of Zechariah Morgan and the attempted murder of Sean Neel on December 24, 2010, are recited in this Court's opinion on direct appeal:

> Sean Neel and Zechariah Morgan were coworkers at Florida State Hospital and had been friends for over twenty years. In the fall of 2010, Mr. Morgan and Mr. Neel became involved in the purchase of corn, known as "deer corn," from the defendant, Marvin Cannon. On December 24, 2010, Mr. Morgan and Mr. Neel drove to a convenience store to pick up Cannon. Mr. Neel understood the purpose of this trip to be the completion of a corn purchase. While waiting at the store, the two men noticed two people walking down the street toward them. Mr. Neel had never met or spoken with Cannon, but was familiar with Cannon's father. Because of Cannon's resemblance to his father, Mr. Neel recognized Cannon as one of the two men walking toward the truck, but did not recognize the other man. Mr. Neel would later discover that the second man's name was Anton McMillian. Cannon and McMillian walked to Mr. Morgan's side of the truck, and Mr. Morgan began to explain that there was no additional room in the truck for anyone other than Cannon. Mr. Morgan was driving a four-door, Ford "King Ranch" truck with a crew cab. Cannon told them McMillian was his cousin from New York and that Cannon wanted him to ride with them also. After some discussion, Mr. Morgan agreed, and he and Mr. Neel began clearing the back seat by stacking the newspapers, jackets, and other items in the center of the back seat so Cannon and McMillian could sit on either side. Among these items was a knife that Mr. Morgan placed in the center console. When the seats were cleared, Cannon sat on the back passenger side behind Mr. Neel and McMillian sat directly behind Mr. Morgan on the driver's side.
>
> At Cannon's direction, Mr. Morgan drove onto Interstate Highway 10 (I–10). The four men conversed while driving and eventually turned off

of I–10 onto Flat Creek Road. While they were heading west on Flat Creek Road, Cannon informed them that they had missed their turn, and Mr. Morgan made a U-turn. As Mr. Morgan drove eastbound for about two miles, he inquired of Cannon about Cannon's familiarity with the area and how Cannon could let them travel two miles past where they were supposed to have turned, to which Cannon responded, "oh, we was talking" and "it just slipped my mind." During the drive, Mr. Neel was "quartered around" in the front passenger seat with his head turned, looking directly at McMillian and conversing with him. Cannon eventually directed them onto a little dirt road, described by Mr. Neel as a "little pig trail," in an overgrown, wooded area. As soon as they turned onto this dirt road, Mr. Neel heard Cannon fumbling in his jacket and saw Mr. Morgan turn around and look directly at Cannon. Cannon then began to talk as though he were on the phone; however, Mr. Neel was unsure whether Cannon had a cell phone because Mr. Neel was only looking at McMillian and did not turn to see Cannon.

Cannon then directed Mr. Morgan to turn behind an old, abandoned house. As Mr. Morgan made this turn, Mr. Neel glanced behind the house and simultaneously heard Cannon moving in the backseat. Suddenly, Mr. Neel was stabbed twice in the neck from behind. He testified that upon the first stab, he "looked right back at ... McMillian," who was sitting still in the same spot as before. Mr. Neel testified that although he could not see around his seat to see Cannon stabbing him, he knew it was Cannon because Mr. Neel was "looking right at [McMillian]" and "could tell 100 percent" that McMillian was not the one stabbing him.

As soon as Mr. Neel was stabbed, Mr. Morgan "looked dead at [Cannon]" and began to scream—"[l]ike a scared-to-death holler." Mr. Morgan floored the gas pedal, and Mr. Neel grabbed the knife in the console and also grabbed for the door handle. The truck was now "all over the place .... fishtailing everywhere," and when the door sprung open, Mr. Neel flew out of the truck, losing his shoes, his hat, and the knife he had in his hand. When Mr. Neel got back on his feet, he looked back in time to see the truck plow into a tree next to an old shed. He did

not see anyone at or near the truck and began running back up the dirt road to get help.

Upon reaching Flat Creek Road, Mr. Neel saw some people at a nearby home and ran toward them, yelling that they needed to "get the guns" and that his friend still needed help. The home belonged to the Renfroes. Upon seeing Mr. Neel, Vera Renfroe called 911 and ran toward Mr. Neel to help him. Some of the men from the home, who had retrieved their firearms, saw a man standing at the edge of the dirt road. Mr. Neel glanced in that direction, but could not say for certain which of the two men from the truck it could have been. Mrs. Renfroe also noticed this individual standing there looking around, but was not close enough to be able to identify him. The man eventually turned and ran in another direction toward a pond.

Alan Parrot, one of the men who had retrieved a firearm, drove his car toward the pond and found McMillian near the pond, looking confused and trying to run away. Mr. Parrot exited his vehicle and held his gun on McMillian until the police arrived. Shortly thereafter, Officer Michael Lawrence of the Gretna Police Department arrived. After Officer Lawrence handcuffed and put McMillian in the back seat of his patrol car, he and Mr. Parrot ran over to where Mr. Morgan's truck had crashed into the tree. They saw Mr. Morgan's body on the ground near the driver's side door, checked his pulse, and determined that he was deceased. Other officers began to arrive on the scene and eventually someone noticed smoke coming from Mr. Morgan's vehicle. When the passenger-side door was opened, the cab of the truck was engulfed in flames.

Lead Investigator Robbie Maxwell of the Gadsden County Sheriff's Department had McMillian removed from the back of Officer Lawrence's patrol car and photographed. One of the photographs documented some drops of blood on McMillian's face. McMillian was then transferred to the patrol car of Investigator Brian Faison of the Gadsden County Sheriff's Department for transport to the Sheriff's Office. During transport, McMillian heard talk on the police radio about

a search for a knife and told Investigator Faison that the knife they were looking for was in the back of the other patrol car. Upon inspection, Investigator Maxwell discovered a long, black-handled knife and a can or bottle opener on the back floorboard of the patrol car. The knife had a broken tip, which was later determined by a fiber and physical match analyst from the Florida Department of Law Enforcement (FDLE) to match a triangular piece of metal found in Mr. Morgan's head.

Also on the scene was Detective Eric Bryant with the State Fire Marshal's Office. He testified that there was only minimal fire damage to the front of the truck with no fire damage to the hood or engine compartment. By this evidence, he excluded as the cause of the fire the truck crashing into the tree. The greatest degree of damage occurred in the rear seats of the truck, and Detective Bryant concluded that the fire's point of origin was the rear passenger compartment behind the driver's seat. He eliminated accidental causes, such as smoking and electrical or mechanical malfunctions, and opined that under the circumstances, the only cause of the fire was human, not accidental, means. No accelerants were used, and the truck's fire retardant seats led Detective Bryant to conclude that the fire's ignition point was the miscellaneous combustibles on top of the rear seats.

Among the officers at the scene was Deputy Joseph Barnes, a canine handler with the Gadsden County Sheriff's Department. He had his tracking dog take a scent off of Mr. Morgan's body to track anyone who had touched him, and the dog alerted positive for the scent on a fence near I–10. Deputy Barnes was joined by handler teams from Apalachee Correctional Institution, and the officers soon noticed a footprint going across a field near the fence. Eventually, the dogs tracked about a half-mile to a mile away from the crime scene, across the interstate and into another field, where the officers found Mr. Morgan's wallet and some of its contents, including a credit card, strewn about the ground. The officers called someone else to secure the scene and kept tracking for about ten miles along the interstate toward a gas station.

Cannon was next seen at a Shell gas station near the interstate. The gas station attendant testified that a nervous, sweaty man had approached the window on foot and asked her to get him something to drink. He also asked her to leave her shift early to give him a ride. When she refused, Cannon began asking other customers for a ride and was eventually successful in obtaining one. Investigator Maxwell showed up right after Cannon left. The attendant told him what had occurred and showed him the security footage from the store's video camera, depicting the man she had described. Investigator Maxwell recognized Cannon as the man in the video. Two days later, officers received a tip that Cannon was located in a motel off of Pat Thomas Parkway. Officers entered Cannon's motel room and took him into custody. He was wearing the same shirt as that observed on him in the security footage.

Dr. Lisa Flannagan, a forensic pathologist with the Medical Examiner's Office, testified that she conducted the autopsy on Mr. Morgan's body and determined the cause of death to be multiple stab wounds. Mr. Morgan suffered at least thirty major stab wounds and some additional, more superficial injuries. He sustained four wounds to his face, one of which passed through the cheek and into the mouth cavity. X-rays of the wounds revealed a small triangular piece of metal embedded in the right side of his forehead, which was later determined to be a piece from the tip of the knife found in the back of the patrol car where McMillian had been sitting.

The most severe and fatal of Mr. Morgan's wounds included a neck wound—which injured the carotid artery and the jugular vein, but would not have been immediately incapacitating—and stab wounds to the chest and upper back, which injured the pulmonary vein and punctured both lungs, causing them to collapse. There were several defensive wounds on his arms and hands and a curved configuration of small abrasions on the back of his left hand that were consistent with a bite mark or teeth impressions.

The medical examiner testified that Mr. Morgan's wounds could have all been inflicted by the knife with the broken tip. However, she could not rule out another knife having caused some of the injuries. She testified that, based on the extent of the injuries, Mr. Morgan was likely "upright" and "struggling" for a least part of the attack. Lastly, the medical examiner did not believe all of the injuries were sustained while Mr. Morgan was in the truck "because he's, obviously, moving and fighting and the injuries being in so many different locations on both sides of the neck, the left shoulder area, the forearms, his back, and his chest." She testified that there was no way to determine the sequence in which the wounds were inflicted.

Other testimony established that the murder occurred on a plot of land rented by Cannon's father for farming. There was never any corn found stored on the property. The knife Cannon used to stab Mr. Neel was never conclusively identified. A black, butcher-type knife contained blood for which Mr. Morgan, McMillian and Cannon were excluded as contributors, but the data was insufficient to determine Mr. Neel's possible contribution. Mr. Morgan's blood was found on Cannon's shirt, McMillian's clothing and shoes, and McMillian's face. The mixture of DNA on Mr. Morgan's back pockets excluded Cannon and Mr. Neel as contributors, but included Mr. Morgan and McMillian as possible contributors. The limited DNA evidence from the blood found under Mr. Morgan's fingernails excluded Cannon and Mr. Neel as possible contributors, but did not provide enough information to determine McMillian's possible contribution.

As to Mr. Morgan, the jury found Cannon guilty of first-degree murder—on theories of both premeditation and felony murder—and robbery with a deadly weapon. The jury also convicted Cannon of attempted first-degree premeditated murder and attempted armed robbery as to Mr. Neel and found Cannon guilty of arson for the burning of Mr. Morgan's truck. At the conclusion of the penalty phase, the jury recommended death by a vote of nine to three.

Cannon v. State, 180 So. 3d 1023, 1027-31 (Fla. 2015) (footnotes omitted). On appeal, this Court addressed nine claims: (1) whether the trial court improperly doubled the aggravators; (2) whether the trial court erred in applying HAC to Cannon; (3) whether the court erred in *sua sponte* modifying the jury instruction on attempted voluntary manslaughter; whether the State's evidence was insufficient as to Cannon's convictions for (4) robbery, (5) attempted robbery, and (6) arson; (7) whether the trial court erred in responding to a jury question during deliberations; (8) whether the court erroneously admitted hearsay statements into evidence; and (9) whether Cannon's death sentence was disproportionate. *Id*. at 1032. After briefing and oral argument, the Florida Supreme Court granted Claim 5, vacating Cannon's attempted robbery conviction based on insufficient evidence, and rejected all other claims. *Id.* at 1039, fn. 16. On May 31, 2016, the United States Supreme Court denied review. *Cannon v. Florida*, 136 S. Ct. 2389 (2016).

On May 16, 2017, postconviction counsel for Cannon filed a "Motion to Vacate Judgment of Conviction and Sentence." After the State filed its Response, a case management conference was held on November 27, 2017, where the evidentiary hearing was set to be held on March 27, 2018. At the evidentiary hearing, this Court ordered the parties to file written closing arguments to be filed by May 29, 2018. On November 8, 2018, the postconviction court issued its order, denying all guilt phase claims and granting relief under *Hurst v. State*. Cannon filed this

appeal for the denial of the guilt phase claims. No cross-appeal was filed by the State for the granting of *Hurst v. State* relief.

CITATIONS

Citations to the record shall be designated as follows: The direct appeal record shall be referred to by "R" and followed by the volume and page number; references to Cannon's Initial Brief shall be referred to by "IB" followed by 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 is the State's position that because there is no final judgment and sentence in Smith's case at this time, his appeal is untimely and this Court lacks the necessary jurisdiction to hear the appeal. Holding Smith'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 Smith's guilt-phase claims are litigated while no valid judgment exists in his case, Smith 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 Smith'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 Smith's appeal in abeyance pending completion of his resentencing proceedings.

SUMMARY OF THE ARGUMENT

ISSUE I: Appellant argues that trial counsel was ineffective during the guilt phase of his trial; specifically (1) during jury selection; (2) for failing to object when Investigator Maxwell testified he personally knew Appellant; and (3) for failing to object and move for a mistrial during closing arguments. As Appellant failed to establish both deficient performance and prejudice, this claim was properly denied by the postconviction court. To establish a claim of ineffective assistance of counsel, a defendant must show both deficient performance and prejudice under *Strickland*. To establish deficient performance, a defendant must show that counsel made

specific errors so serious that he was not functioning as the counsel guaranteed to Cannon by the Sixth Amendment. To establish prejudice, Cannon must show that there is a reasonable probability that but for trial counsel's deficiencies, he would have received a different outcome. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome.

Trial counsel was not deficient because the venire was adequately questioned. The State and trial counsel both conducted some death qualification with the entire venire panel. During the small-panel questioning that followed, the State questioned the small panels at length regarding their opinions and beliefs regarding the death penalty. Therefore, trial counsel did not have to repeat the same line of questioning the State had already covered.

Even if trial counsel was deficient, Cannon's claim fails because it is based on speculation and does not establish prejudice. There is no evidence in the record that the jurors were actually biased or unable to fulfill their juror duties adequately.

Trial counsel testified that they did not believe Investigator Maxwell's identification of Appellant was objectionable. In the context of how the testimony was presented, Mr. Garcia did not believe it to be objectionable, considering the small size of the community of Gadsden County, where the murder took place. Clyde Taylor, the other trial counsel for Cannon, testified that Gadsden County is a small community and that it is common that law enforcement officers know people in the

community because many of them grew up together. There was more than sufficient evidence aside from Investigator Maxwell's testimony to show that Cannon was the person on the surveillance video. Cannon was wearing the same clothes he was wearing on the video when he was arrested, which corroborates that he was the person on the surveillance video. Additionally, some of the victim's DNA was found on Cannon's clothes. There was also a surviving victim who identified Cannon as being there on the night of the murder. Appellant is unable to prove prejudice and this claim was properly denied.

Defense claims that trial counsel was ineffective for failing to object during the State's closing argument. The claim focuses on the comments made by the State pertaining to the testimony from Johnnie Cannon regarding the corn that was supposed to be on the property. Defense argues that the State improperly burden shifted when they commented on Johnnie Cannon's lack of testimony regarding the presence of corn on the property, and trial counsel should have objected or moved for a mistrial. However, the State did not improperly shift the burden to defense and, therefore, trial counsel was not ineffective. Trial counsel had a clear, reasonable strategy for the case and Mr. Garcia's own initial reaction to the statements show he did not believe that the State was burden shifting. The State's closing argument was clearly a permissible rebuttal comment to the defense's closing argument. Additionally, the State's argument about the lack of corn was isolated and a short

portion of his rebuttal following a lengthy closing argument. Cannon's convictions were supported by compelling evidence, including the eyewitness account of the surviving victim, Mr. Neel, and Mr. Morgan's blood found on Cannon's shirt. Given the weighty evidence of guilt in this case, Cannon did not demonstrate that there is a reasonable probability that trial counsel's failure to object affected the outcome of the trial.

ISSUE II: A trial court may deny a postconviction motion without conducting an evidentiary hearing. When there is controlling precedent disposing of the claim or where the issue is solely a matter of law, it is proper for the trial court to summarily deny the postconviction motion.

Regarding the ineffective assistance of counsel claim during the guilt phase, the Defendant has failed to meet the burden to support an ineffective assistance of counsel claim because the discussions and arguments about an eye for an eye did not constitute a discussion about religion. While trial judges and attorneys should generally avoid discussing religious themes, courts have found that such comments do not always warrant reversal. This Court has stated that "there is no categorical rule prohibiting" the invocation of religious authority in capital sentencing proceedings. In the present case, trial counsel questioned each of the prospective jurors if they had any religious beliefs that were in favor of or against the death penalty. Each of the jurors, when questioned by the State and trial counsel, stated

that they could follow the law as instructed by the court. Counsel used the example of eye for an eye to help explain concepts of fairness. Neither the State nor trial counsel used the comments of "eye for an eye" or "reap what you sow" to appeal to the religious convictions of the jurors. As such, the comments did not taint the jury's recommendation and trial counsel was not deficient for failing to object. The rule against religious references is to prevent appealing to a jury's moral codes or asking them to enter a verdict based on their religious conviction. It is not intended to prohibit all references to religion.

ISSUE III: Appellant claims that the Florida Department of Corrections is detaining Appellant on a charge of attempted robbery that was vacated by this Court on direct appeal. Appellant argues that the Florida Department of Corrections' website shows Appellant being held on the vacated charge. However, the website has a disclaimer stating that there are no guarantees as to its accuracy. The site also provides contact information to notify the Department of any errors on its website.

There are available administrative channels to address this issue with the Florida Department of Corrections. This claim was properly denied by the postconviction court because a rule 3.851 motion is the improper venue to address this issue.

ISSUE I: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DURING THE GUILT PHASE OF THE TRIAL.

Cannon argues that trial counsel was ineffective during jury selection; for failing to object and move for a mistrial when Investigator Maxwell testified he knew Cannon for years; and for failing to object and move for a mistrial during closing arguments. (IB at 10-30). As Appellant failed to establish both deficient performance and prejudice, this claim was properly denied by the postconviction court.

To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy a two-prong test, establishing both deficient performance *and* prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish deficient performance a defendant must show that counsel made specific errors so serious that he was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Id.* at 688; *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. "Judicial scrutiny of counsel's performance must be highly deferential" and must be conducted in a manner that eliminates the "distorting effects of hindsight" and considered the conduct in light of the circumstances facing the attorney at the time. *Id.* at 689-90. "[T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id*. at 690.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000); *see Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) (stating "[o]ur strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel").

"[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)).

In the absence of testimony regarding trial counsel's strategy, a court presumes trial counsel exercised reasonable professional judgment in all decisions. *Gore v. State*, 964 So. 2d 1257, 1269-70 (Fla. 2007) (finding the defendant did not meet his burden of deficient performance when his lead counsel was not called to testify during the hearing, and defendant only presented testimony from co-counsel

which criticized the strategy of lead counsel); *see Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005). "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" *Harrington v. Richter*, 131 S. Ct. 770, 790 (2011) (citing *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam)). And 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." *Id*.

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. *Gaskin v. State*, 822 So. 2d 1243, 1247 (Fla. 2002) (citing *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995)). 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 [postconviction] proceeding[s]'—and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (citation omitted).

A. Ineffective assistance of counsel during voir dire

A trial attorney's failure to question a venire panel does not independently establish a basis for a deficiency. When the trial court and the State adequately question the venire panel, trial counsel is not deficient for choosing not to repeat the same line of questioning. *Johnson v. State*, 921 So. 2d 490, 503 (Fla. 2005) (upholding summary denial of *Strickland* claim because the prosecutor and the court sufficiently questioned the venire).

Likewise, an allegation of juror bias does not independently establish a basis for prejudice. Absent proof that jurors harbored actual bias, a claim of prejudice is based on conjecture about what could have occurred and is insufficient for *Strickland* relief. In *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007), this Court concluded that a *Strickland* claim for failing to preserve a denial of a challenge for cause must establish that an actually biased juror sat on the jury, and such bias must be plain on the face of the record. This Court went on to define an actually biased juror as one who is not impartial; one who is biased against the defendant. *Id.* at 324.

Defense relies on *Singer v. State*, 109 So. 2d 7 (Fla. 1959), arguing that the standard for determining whether trial counsel was ineffective in jury selection is whether there is reasonable doubt as to a juror's impartiality. However, that is not the standard for postconviction claims. Under *Carratelli*, the standard is whether

there is evidence on the face of the record that any of the jurors that served on Cannon's jury harbored actual bias. 961 So. 2d at 324.

A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). Therefore, actual bias means bias-in-fact that would prevent service as an impartial juror. *See United States v. Wood*, 299 U.S. 123, 133-34 (1936) (stating, in a case where U.S. government employees served as jurors in a criminal case prosecuted by the U.S. government, that the jurors' employment status did not automatically disqualify them, but the defendant had the ability during voir dire to "ascertain whether a prospective juror ... has any bias in fact which would prevent his serving as an impartial juror").

The *Carratelli* requirement for a defendant to establish actual bias extends to various types of *Strickland* claims involving jury selection. In *Johnston v. State*, 63 So. 3d 730 (Fla. 2011), this Court applied *Carratelli* to a *Strickland* claim for failure to sufficiently question potential jurors on exposure to pretrial publicity. Although some jurors did not confirm impartiality, actual bias was not plain on the face of the record, and this Court found that the *Strickland* claim necessarily failed.

In *Owen v. State*, 986 So. 2d 534 (Fla. 2008), this Court applied *Carratelli* to a *Strickland* claim for failure to challenge and remove three jurors. This Court

rejected the notion that Owen need only show that there was a question about juror impartiality. Although one of Owen's jurors gave confusing answers about weighing mitigation and said she would "probably" vote for death, counsel was not ineffective for failing to strike her because these facts did not establish actual bias on the face of the record. *Id*. at 550. *See Smithers v. State*, 18 So. 3d 460, 464 (Fla. 2009) (rejecting *Strickland* claim where juror indicated, "if they are guilty without a doubt they should get the death penalty," but that he could vote for life if he "[had] to," because actual bias was not clear on the face of the record).

In this case, the trial court questioned the entire venire about their opinions and attitudes about the death penalty.

> The question is, do you have opinions or views or attitudes concerning the death penalty that would or might interfere with your ability to follow the law.
>
> I must emphasize again that the defendant is presumed innocent throughout the trial phase, and our discussion of the potential of the death penalty must not influence your determination of whether the defendant is guilty not guilty of any charged offense if you are selected to serve on the jury.
>
> You are not to consider these questions in any way implying that the defendant is guilty of the crime charged. You are not to assume from the questions asked as any indication whatsoever that anyone in the courtroom, the lawyers, the Court, the judge, anyone else, believes at this stage of the proceedings that the defendant is guilty. You should not presume that these questions mean that a finding of guilt should or will be made in this case.
>
> These questions are asked solely because the law requires a separate inquiry be made with respect to your attitudes regarding the death penalty. Because you may be asked to render a sentencing verdict, your

attitudes, beliefs and views regarding the death penalty are proper subjects of inquiry by the Court and the lawyers in this case.

The fact you may have some views regarding the death penalty in general, either generally for or generally against the death penalty, does not disqualify you from serving on the jury. Reservations about or conscientious or religious objections to the death penalty in certain cases does not automatically disqualify you as a juror.

The question is whether you can put aside your person beliefs and views and, in light of your sworn duty as a juror, follow the law concerning the potential penalty of death.

It is up to each of you to search your conscience to determine whether you can follow the law as I give it to you and render a verdict as the evidence and the law may warrant.

There are no right or wrong answers on the issue of the death penalty. We must, however, require that you give us your honest views and answers. When I ask about your views or feelings about the death penalty, I mean in the broadest sense, including philosophical views, political views, emotional views or feelings, moral views, religious views or any opinions or attitudes of any sort.

All right. So what I will do now is ask you row by row, three questions and I'm not going to ask you to say anything at this point. I'm just going to ask you to think about these questions, and then raise your hand if it applies to you.

So here's the first question for the jurors on the first row. If you feel that all persons convicted of killing another person must or should be sentenced to death, please raise your hand. I'll read it again. If you feel that all persons convicted of killing another person must or should be sentenced to death, please raise your hand. Anyone on the first row feel that way?

PROSPECTIVE JUROR BENZENBERG: Can I say something?

THE COURT: No. Just raise your hand if you feel that way, and I will tell you why. If you raise your hand, we're going to talk to you about that in private.

PROSPECTIVE JUROR BENZENBERG: Okay.

THE COURT: Fair enough. You helped us with the example, so now everybody will have a better idea of how we're proceeding.

So jurors on the second row, if any of the jurors on the second row feel all persons convicted of killing another person must or should be sentenced to death, please raise your hand. I'll read it again. If you feel that all persons convicted of killing another person must or should be sentenced to death, please raise your hand, jurors on the second row. Mr. Keys -- I'm sorry. Mr. Hatcher. I'm having a hard time with my chart. Anybody else on the second row? Ms. Weaver. I saw your hand, Thank you, ma'am.

MR. GARCIA: I'm sorry. Did Ms. Weaver raise her hand?

THE COURT: She did. Juror ten. Sorry about that, Mr. Garcia.

MR. GARCIA: Thank you, Your Honor.

THE COURT: And on the third row, if you feel that all persons convicted of killing another person must or should be sentenced to death please raise your hand, jurors on the third row. All right. Mr. Cox. Mr. Cox, juror 19. And Mr. Dutton, did you raise your hand, juror 25? Thank you so much, Mr. Dutton.

All right. Now I will ask you the second question. This is again for the jurors on the first row. If you feel that you could not vote to impose the death penalty under any circumstances, please raise your hand. Jurors on the first row who feel they could not vote to impose the death penalty under any circumstance, please raise your hand, front row? Very well.

On the second row, if you feel that you could not vote to impose the death penalty under any circumstances, please raise your hand. All right. Mr. Keys? All right. Ms. Robinson. Thank you. Anybody else on the second row that I missed? I have Ms. Robinson and Mr. Keys. Thank you so much.

And on the third row, if you feel you could not vote to impose the death penalty under any circumstances, please raise your hand. Anybody on the third row feel that way? Ms. Gates. And Ms. Jefferson. So that's juror 20 and juror 27. All right. Anybody else on the third row I missed,

> Ms. Jefferson, and Ms. Gates? All right.
>
> And then question number three, this is a broader, more general question. If you are concerned in any way that your feelings might interfere with your ability to follow the law regarding the penalty to impose, please raise your hand. If you are concerned that your feelings might interfere with your ability to follow the law, jurors on the front row, anybody that we haven't already identified?
>
> And on the second row, if you are concerned that your feelings might interfere with your ability to follow the law, please raise your hand. Ma'am, your name?
>
> PROSPECTIVE JUROR HARVIN: Lakleshia Harvin.
>
> THE COURT: That's juror 15, Ms. Harvin. Anybody else on the -- I guess that reminds me. I should have told everybody by now. My name is Sjostrom. I'm Judge Sjostrom. If I mispronounce anybody's name, you will forgive me. Nobody pronounces my name right. I don't know how to pronounce my name, not speaking any Swedish.
>
> So on the third row, if you are concerned that your feelings might interfere with your ability to follow the law, please raise your hand, if we haven't already identified you. Anybody else?
>
> All right. So what we will do now at this time is talk to some of you -- quite a few of you in private.

(R 1:34-39). As prospective jurors were excused, new jurors were brought in and asked the same questions, verifying that they could follow the law. The first question asked to the entire venire was if anyone believed that if a person were convicted of first-degree murder, they must get the death penalty. When new prospective jurors were brought in, the judge asked them the same questions. (R 1:89-90).

Cannon claims that trial counsel was ineffective for failing to strike Jurors Wike, Bentley, Wells, Robinson, Skipper, Hosey, and Calderon from the jury. This claim is refuted by the record and was properly denied.

Juror Wike

Cannon claims that Juror Wike should have been stricken for his statements regarding his beliefs about the death penalty and that trial counsel was ineffective for failing to strike Juror Wike. Specifically, Cannon takes issue with Juror Wike's statements that suggested that imposing the death penalty served "justice," for agreeing that the death penalty may be acceptable in non-homicide cases, and for failing to give examples of murder cases that did not deserve the death penalty. (IB at 11). As Cannon's claim fails to establish deficiency or prejudice, and the facts are fully contained in the record, this claim is meritless and was properly denied.

Trial counsel was not ineffective in failing to move to strike Juror Wike from the jury. This Court held in *Owen*, 986 So. 2d at 534, that Owen's counsel was not ineffective for failing to strike jurors under circumstances similar to Cannon's case. One of Owen's jurors gave confusing answers on how she would consider mitigation and said she would "probably" vote for death, but counsel was not ineffective for failing to strike her because Owen was unable to establish actual bias on the face of the record. *Id*. at 550. Though there may have been a doubt as to her impartiality, the

Court held that such facts do not rise to the level of actual bias and Owen's claim necessarily failed. *Id*.

The trial court questioned Juror Wike individually at the beginning of the jury selection, when prospective jurors were being qualified.

> THE COURT: So you heard everything about how the trial works. Cannon is presumed innocent. We have an initial what's called a trial phase, where the jury has to decide whether or not the State proved Cannon's guilt beyond a reasonable doubt by evidence.
>
> And then if the jury does decide that he has been proven guilty, we have what is called a sentencing or penalty phase, and the jury has to decide what the appropriate sentence is, or punishment. That punishment can be either life in prison without the possibility of parole, or the sentence of death, or capital punishment. So what we brought you back here for is to talk about any feelings or opinions, views that you have about those subjects.
>
> PROSPECTIVE JUROR WIKE: None, really.
>
> THE COURT: Well, let me ask you the three questions, and you think about it and you respond to each of them.
>
> Do you feel that all persons convicted of killing another person must or should be sentenced to death?
>
> PROSPECTIVE JUROR WIKE: Not necessarily.
>
> THE COURT: Okay. Do you feel that you could not vote to impose the death penalty under any circumstances?
>
> PROSPECTIVE JUROR WIKE: I'm sorry?
>
> THE COURT: Do you feel that you could not vote to impose the death penalty under any circumstances?
>
> PROSPECTIVE JUROR WIKE: No.

> THE COURT: And are you concerned that you have feelings or opinions that might interfere with our ability to follow the law that I will give you?
>
> PROSPECTIVE JUROR WIKE: No, I don't.
>
> THE COURT: You said not necessarily to one of the questions. What were you talking about?
>
> PROSPECTIVE JUROR WIKE: I'm sorry. I can't remember which question it was.
>
> THE COURT: Do you feel all persons convicted of killing another person must or should be sentenced to death?
>
> PROSPECTIVE JUROR WIKE: It really depends on the case.
>
> THE COURT: So you would have to wait for the evidence?
>
> PROSPECTIVE JUROR WIKE: Yes.
>
> THE COURT: Wait to hear what the law is?
>
> PROSPECTIVE JUROR WIKE: Totally.
>
> THE COURT: Okay. As you are sitting here at this moment, assuming Cannon were to be convicted, and I don't mean to imply that he will be, but assuming that he is, are you leaning one way or the other as to what the appropriate penalty would be for the offense?
>
> PROSPECTIVE JUROR WIKE: Not until I heard all the evidence.

(R 1:147-49). Juror Wike gave clear answers that he would have to listen to the evidence before he could make a determination as to an appropriate sentence. Trial counsel specifically asked Juror Wike if a person can be found guilty of first-degree murder and still not get the death penalty. (R 4:516). Juror Wike responded yes. (R 4:516).

Cannon is likewise unable to demonstrate prejudice because the record does not show that Juror Wike was actually biased in any way. Unlike the *Owen* case, where the juror equivocated and gave answers that raised concerns of partiality, Juror Wike was unequivocal in his assurances that he could be impartial. (R 7:274). This claim is wholly unsupported by the record and the law and it was properly denied.

Juror Bentley

Juror Bentley, during voir dire, expressed the opinion that the death penalty should be an option for someone who is incompetent or mentally disabled. According to Cannon, this shows bias and trial counsel should have moved to dismiss her. However, the question posed to Juror Bentley is one that she would not have to consider and does not demonstrate bias. This claim is refuted by the record and was properly denied.

Under the law, a person who is incompetent or intellectually disabled cannot receive the death penalty.[1] This question posed did not establish Juror Bentley has a bias in favor of the death penalty. Her response to the question is that it should be a possibility. Additionally, the law regarding what classes of defendants could be

[1] *See* Florida Statute § 916.12 (2016); *Dusky v. United States*, 362 U.S. 402 (1960) (setting for the standards for determining whether a defendant is competent to proceed). *See also Atkins v. Virginia*, 536 U.S. 304 (2002) (holding it is unconstitutional to execute persons with intellectual disabilities); and *Oats v. State*, 181 So. 3d 457 (Fla. 2015).

executed was not explained to Juror Bentley before she gave her answer. Juror Bentley's uninformed opinion about a legal issue that is well outside the scope of her duties as a juror does not express a true reflection of whether she had actual bias.

During his questioning, trial counsel asked Juror Bentley if she would be able to follow the law. Juror Bentley indicated that she would vote in favor of the death penalty if it were appropriate. (R 3:378). Under *Carratelli*, the record does not show that Juror Bentley had an actual bias.

Juror Wells

Cannon claims that when Juror Wells demonstrated bias when she expressed an opinion that the death penalty may be appropriate for a crime other than murder "*if* it were my child,"[2] and asked questions about whether someone could be released after being sentenced to life without parole. Cannon further claims that trial counsel was ineffective for failing to strike her as a juror. None of Juror Wells' responses reflects bias that is plain on the face of the record. As this claim is unsupported by the record, it was properly denied.

Juror Wells' questions about whether life without parole had any "loopholes" were in response to a question by trial counsel that required legal knowledge to answer. Trial counsel asked, "Do you believe a person sent to prison the rest of their life without the possibility of parole, do you think that person will get out of prison

[2] (R 4:521) (emphasis added).

alive?" Juror Wells responded by asking whether a life without parole sentence provides an opportunity for release. (R 4:521). Her questions about whether loopholes exist do not indicate that she could not be fair and impartial. (R 4:521). After expressing her concern about loopholes, the court explained that "you're not being tested on your knowledge of the law that I haven't instructed you on. And it's perfectly okay if you don't have an opinion on these subjects to say I don't have an opinion, an opinion on it. The instruction that I give you will be life without the possibility of parole. And that's the choice that you'll have to make." (R 4:522). A juror's lack of legal knowledge does not demonstrate a bias in favor or against the death penalty.

Similarly, Juror Wells' response that the death penalty should be used for crimes other than murder if it was her own child clearly does not demonstrate bias in her role as a juror in Cannon's case. Her comment does not reflect any bias toward Cannon or toward applying the death penalty in his case. Rather, her comment reflects the heightened emotional response one would expect to see in a case where her own child was the victim. As Juror Wells was not serving as a juror in a case involving her child, her comment does not demonstrate bias.

Additionally, during prior questioning, Juror Wells indicated she could make a recommendation of death if it were appropriate. (R 3:377). As defense would be unable to prove actual bias of Juror Wells, defense would also be unable to prove

deficient performance by trial counsel. This claim is wholly unsupported by the record.

Jurors Robinson, Skipper, and Hosey

Cannon argues that Jurors Robinson, Skipper, and Hosey's opinion that it takes too long for death sentences to be carried out shows that they are biased in favor of the death penalty. Cannon claims trial counsel should have moved to strike them and he was ineffective for failing to do so. The record conclusively refutes this claim and it was properly denied.

To be entitled to postconviction relief, the standard for obtaining a reversal is to demonstrate that a juror was actually biased, not merely that there was doubt about his or her impartiality. *Owen*, 986 So. 2d at 550. With regards to the jurors who indicated that they believed death row inmates should be executed more quickly, this does not demonstrate a bias in favor of the death penalty.

Each juror, when asked if they could follow the law or if they could impose the death penalty if it were appropriate, indicated that they could.

> THE COURT: If you're selected to serve, will you listen and follow the law?
>
> PROSPECTIVE JUROR SKIPPER: Absolutely.

(R 2:260-61).

> THE COURT: So if you are on the jury trying the case, can you and will you make your determinations based only on the evidence presented in court?

PROSPECTIVE JUROR G. ROBINSON: I will do that.

THE COURT: And only on the law in which I will instruct you?

PROSPECTIVE JUROR G. ROBINSON: Yes, sir.

(R 2:171). Mr. Hosey, when being questioned by the court, did not indicate that he believes someone convicted of murder must receive the death penalty. (R 2:201-02).

Defense has failed to establish actual bias when the record is viewed in its entirety. No "evidence of bias" is "plain on the face of the record." *Carratelli*, 961 So. 2d at 324. As the record conclusively refutes this claim, it was properly denied.

Juror Calderon

Cannon claims that trial counsel was ineffective during voir dire for failing to question the jury on religious bias or explaining that a death penalty prosecution did not follow the "eye for an eye" standard. He further claims that trial counsel was ineffective for failing to strike Juror Calderon after he used the "eye for an eye" phrase during jury selection. Juror Calderon's comments did not demonstrate bias on the face of the record and the jury panel was adequately questioned. As such, this claim is refuted by the record and should be summarily denied.

When asked on his opinion of the death penalty, Juror Calderon stated "[y]ou know, like she said, an eye for an eye, tooth for a tooth." (R 4:507). Defense counsel had a conversation with the prospective jurors regarding their understanding of an eye for an eye. (R 4:507-10). "Eye for an eye" is a common phrase. It is used as a way to illustrate equity and fairness. It does not reflect that Juror Calderon believed

"eye for an eye" is a rule that he must follow in his role as a juror.

At no point did Juror Calderon express an inability to follow the law. During the court's initial questioning of Juror Calderon, he stated: "No, sir. I don't have friends that's been victims like of a crime or anything like that. And yes, I will follow the law." (R 2:277).

As Juror Calderon's comments do not demonstrate bias on the face of the record, and the jury panel was adequately questioned, Cannon's claim is unsupported by the record and it was properly denied.

Postconviction Court's Order

The postconviction court, relying on *Carratelli*, found that the record does not demonstrate actual bias against Appellant. (Order at 2).

Conclusion

When the trial court and the State adequately question the venire panel, trial counsel is not deficient for choosing not to repeat the same line of questioning. *Johnson*, 921 So. 2d at 503 (upholding summary denial of *Strickland* claim because the prosecutor and the court sufficiently questioned the venire). Furthermore, Cannon's allegation that additional questioning could have revealed proof of bias is insufficient to demonstrate prejudice. *Id*. at 503-04. Absent proof that jurors harbored actual bias, Cannon's claim is based on conjecture about what *could have* occurred and is insufficient for *Strickland* relief. In *Reaves v. State*, 826 So. 2d 932,

939 (Fla. 2002), this Court affirmed the trial court's summary denial of Reaves' *Strickland* claim. The Court held that counsel's failure to further question jurors who indicated possible bias was not deficient, and Reaves' claim that trial counsel would have discovered bias upon further questioning was mere conjecture because there was no evidence that a cause challenge was warranted. *See Boyd v. State*, 200 So. 3d 685, 699-700 (Fla. 2015). To establish actual bias, "the defendant must demonstrate that the juror in question was not impartial—*i.e.*, that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record." *Carratelli*, 961 So. 2d at 324.

Trial counsel was not deficient because the venire was adequately questioned. The State and trial counsel both conducted some death qualification with the entire venire panel. During the small-panel questioning that followed, the State questioned the small panels at length regarding their opinions and beliefs regarding the death penalty. (R 3:338-411). Therefore, trial counsel did not have to repeat the same line of questioning the State had already covered.

Even if trial counsel was deficient, Cannon's claim fails because it is based on speculation and does not establish prejudice. Much like the *Strickland* claims raised in *Johnson* and *Reaves*, Cannon alleges that trial counsel's error was failing to question jurors further to find bias. However, there is no evidence in the record

that the jurors were actually biased or unable to fulfill their juror duties adequately, as required by *Reaves* to justify relief.

Finally, Cannon was consulted during jury selection by both trial counsel and the court, and he consented to each member of the jury that was seated in his case. (R 4:549); *Boyd*, 200 So. 3d at 699-700 (holding trial counsel not ineffective in failing to question juror where defendant consented to selected jury) (citing *Gamble v. State*, 877 So. 2d 706, 714 (Fla. 2004)). Because the jurors were thoroughly questioned, and the record does not reflect actual bias in any of the jurors, this claim was properly summarily denied.

B. Ineffective assistance of counsel for failing to object and/or move for a mistrial when a law enforcement witness identified Cannon from a video

Cannon claims that defense counsel was ineffective for failing to object when Investigator Robert Maxwell testified that he had known the Defendant for a number of years. (IB at 24-26). This testimony was not inadmissible and trial counsel was not ineffective for failing to object to its introduction.

In various cases, Florida courts have permitted witnesses to identify a defendant's voice or image where the witnesses were previously familiar with the defendant. *Evans v. State*, 177 So. 3d 1219, 1229 (Fla. 2015). In *Hardie v. State*, 513 So. 2d 791 (Fla. 4th DCA 1987), the Fourth District Court of Appeal held that the cumulative effect of five police officers' testimonies that they recognized Hardie on a store surveillance videotape and "one officer's reference to knowing the appellant

through an 'investigation,' when combined with their identification of themselves as police officers, caused reversible error." *Mayes v. State*, 718 So. 2d 852, 853 (Fla. 4th DCA 1998). However, the Fourth District Court of Appeal has also found no reversible error in a case where an officer testified to the identity of a defendant. *Id*. In *Mayes*, the court found no reversible error where an officer identified the defendant off a videotape and there was corroborating evidence that it was defendant on the video. *Id*. at 853-54. "Because there was abundant evidence proving that [Mayes] was the individual who sold drugs to the undercover officer, we find that appellant has not carried his burden of showing that a prejudicial error was made by the trial court in overruling the objection to Officer Key's gratuitous remarks." *Id*. at 854.

When Investigator Maxwell identified Cannon in the videotape, he stated that he personally knew him for a number of years. (R 10:351). The videotape depicted Cannon in the gas station after the murder had already happened and was used as an investigative tool to help Investigator Maxwell determine a suspect. Similar to *Mayes*, Cannon is unable to show prejudicial error in this case and does not meet the second prong of *Strickland*. While the standard applied on direct appeal for determining harmful error[3] is far more lenient than the *Strickland* prejudice prong,

[3] *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) (holding the harmless error test requires the State to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict").

Mayes demonstrates that Cannon does not even meet the more permissive direct appeal standard. Cannon cannot demonstrate a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different.

The evidence against Cannon was overwhelming. Mr. Neel testified that he knew it was Cannon stabbing him because he was able to look right at the codefendant and "could tell 100 percent" that the codefendant was not the one stabbing him. *Cannon*, 180 So. 3d at 1028. Additionally, other testimony established that the murder occurred on a plot of land rented by Cannon's father for farming and Mr. Morgan's blood was found on Cannon's shirt. *Id*. at 1031.

At the evidentiary hearing, Armando Garcia, one of Cannon's defense attorneys for the trial, testified that he did not believe Investigator Maxwell's identification of Cannon on the video was objectionable. (Evid. Hrg. Trans. 35). Investigator Maxwell testified that he "personally knew" Cannon. (R 10:338). Mr. Garcia testified that in a county like Gadsden County, many of the people know each other. (Evid. Hrg. Trans. 35). He believed that in the context of Investigator Maxwell testifying that he personally knew Cannon, he did not have a basis to object. (Evid. Hrg. Trans. 35).

> In this context, I saw that it was not objectionable. I think we need to consider that this is a very small community, Gadsden County. The Cannon family had been farming there for years. Maxwell had lived there for years. People know each other in these small, little towns. And so I did not see that as Marvin Cannon being familiar to Maxwell in

> some sort of criminal or bad way, just that he's personally familiar with him. So I didn't see that as an objectionable thing.

(Evid. Hrg. Trans. 35).

Clyde Taylor, the other trial counsel for Cannon, testified that Gadsden County is a small community and that it is common that law enforcement officers know people in the community because many of them grew up together. (Evid. Hrg. Trans. 18). Mr. Taylor stated that the Cannon family had been in Gadsden County for "probably a generation or so." (Evid. Hrg. Trans. 15). "They had been farming forever." (Evid. Hrg. Trans. 15).

There was more than sufficient evidence aside from Investigator Maxwell's testimony to show that Cannon was the person on the surveillance video. Cannon was wearing the same clothes he was wearing on the video when he was arrested, which corroborates that he was the person on the surveillance video. (Evid. Hrg. Trans. 14). Additionally, some of the victim's DNA was found on Cannon's clothes. (Evid. Hrg. Trans. 14). There was also a surviving victim who identified Cannon as being there on the night of the murder. (Evid. Hrg. Trans. 15).

The postconviction court properly denied this claim.

> This record demonstrates no prejudice much less a reasonable probability that the outcome would have been different without the testimony. The statement by Investigator Maxwell was brief, innocuous and non-responsive; the prosecutor never elicited the source of the investigator's knowledge; the source of knowledge was never mentioned by the witness or prosecutor; and identity was never contested. *Cf. Spike v. State*, 251 So. 3d 1017 (Fla. 2d DCA 2018)

(admission of officer identification based on explicit law enforcement contacts over defense objection was harmless error).

(Order at 3-4).

The reason as to why trial counsel did not object to Investigator Maxwell's identification of Cannon on the surveillance video was that counsel did not believe it to be objectionable. Additionally, Cannon failed to prove prejudice as the evidence was overwhelming without the complained-of evidence. As such, trial counsel's performance was not deficient, and the defense has failed to establish prejudice, as required under *Strickland*, and the postconviction court properly denied this claim.

C. Ineffective assistance of counsel for failing to object and/or move for a mistrial for burden shifting during closing arguments

Appellant claims that trial counsel was ineffective for failing to object during the State's closing argument. The claim focuses on the comments made by the State pertaining to the testimony from Johnnie Cannon regarding the corn that was supposed to be on the property. (IB at 26-30). Appellant argues that the State improperly burden shifted when they commented on Johnnie Cannon's lack of testimony regarding the presence of corn on the property, and trial counsel should have objected or moved for a mistrial. However, the State did not improperly shift the burden to defense and, therefore, trial counsel was not ineffective.

The standard of review is whether trial counsel's performance was deficient and whether, but for trial counsel's deficiencies, he would have received a different

outcome. *Strickland*, 466 U.S. 668. In *Jackson v. State*, 575 So. 2d 181, 188 (Fla. 1991), this Court explained that "the [S]tate cannot comment on a defendant's failure to produce evidence to refute an element of the crime." This Court further explained impermissible burden shifting:

> The standard for a criminal conviction is not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt.

Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998). However, "[a] prosecutor's comments are not improper where they fall into the category of an 'invited response' by the preceding argument of defense counsel concerning the same subject." *Walls v. State*, 926 So. 2d 1156, 1166 (Fla. 2006). Under the invited response doctrine, "the State is permitted 'to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the response.'" *Scott v. State*, 66 So. 3d 923, 930 (Fla. 2011) (quoting *Caballero v. State*, 851 So. 2d 655, 660 (Fla. 2003)).

"[A] prosecuting attorney may comment on the jury's duty to analyze and evaluate the evidence and state his or her contention relative to what conclusions may be drawn from the evidence." *Bell v. State*, 108 So. 3d 639, 648 (Fla. 2013) (quoting *Evans v. State*, 838 So. 2d 1090, 1094 (Fla. 2002)). "When considered in

context, the prosecutor's comment is properly understood as a statement on the jury's duty to analyze the evidence presented at trial followed by the prosecutor's argument regarding what conclusion the jury should reach from the evidence." *Id*.

Trial counsel, during his closing argument, discussed the fact that no corn was found on Cannon's property. Purchasing the corn was Cannon's explanation for the victims to meet with Cannon and go to his property:

> There was no corn on the property. Since there was no corn on the property, we're going [sic] use the word lured. He was lured there to rob and kill them.
>
> Well, here are some interesting facts. In the daylight hours, law enforcement's attention was focused on McMillian, Morgan, and the track. Looking for Cannon. The track. They search around. Dusk becomes dark. They bring in the lights. They don't see any corn, but they really weren't looking for corn then. They come back to the scene and take the photographs, the daylight photographs that you all have seen three days later. Three days later? In my thinking about that, you know, I think about those officers who are charged to do what they do. God bless them, they don't get paid enough money for what they do. Here they are, Christmas Day -- you know, why can't daddy be with us for Christmas, mommie? Daddy is out working a homicide. That is, for those families, an interruption to what you would expect a normal family routine would be on Christmas. So maybe that explains why those photographs aren't taken or why there's no one there at the scene for a couple of days or so.
>
> But the truth is, when you see pictures with the crime scene broken, the crime scene tape being broken, that's an indication that someone was there at the scene. There was no officer posted there. There was no -- that scene was not secured for three days.
>
> When they look for the corn two or three days later and it's not there, who else had been in the scene and out of the scene? We don't know. We know this. They didn't secure the scene. We know there was no one posted there, guarding to make sure there's no people coming in and no

> people coming out. We know that.
>
> Was there corn when Morgan and Neel drove to this area where the death occurred? We don't know. We don't know.

(R 13:778-80).

In response to trial counsel's closing argument, the State argued:

> I also thought it was very interesting that the defense presented Mr. Johnnie Cannon. Did you hear Mr. Johnnie Cannon testify oh, yeah, there was corn out there; they just didn't see it. That's where I put corn. Did Cannon say anything like that, that I stock corn out at this location?
>
> No. He farms that area, which would make sense, then, that Mr. Marvin Cannon is very familiar with that particular location. As he testified to, his sons help him do the farming. So he is familiar, even though he lives in Shiloh, he [sic] familiar with this property on Flat Creek Road.

(R 13:792). The State's response was a permissible rebuttal to trial counsel's argument. The issue of the corn went to prove why the victims were on the Flat Creek Road property. The State commented on evidence that was before the jury. The State's rebuttal arguments were not improper when looking at the entire context of his argument and did not constitute a shifting of the burden of proof.

Mr. Garcia even admitted at the evidentiary hearing that he did not believe the State's argument to be improper at the time he heard it. (Evid. Hrg. Trans. 46). In fact, Mr. Garcia stated that he did not "see that [the State is] highlighting Cannon's failure to prove anything." (Evid. Hrg. Trans. 46). After reading the statements again, Mr. Garcia stated his answer remained the same. (Evid. Hrg. Trans. 46).

Mr. Taylor testified that Mr. Garcia was the one who handled the closing argument and could not recall if the issue about corn was discussed during the closing arguments. (Evid. Hrg. Trans. 12, 18-19). He stated that "[i]t just wasn't a big deal." (Evid. Hrg. Trans. 19). Mr. Taylor stated that the strategy for trial was to put the murder on the codefendant because there was not much doubt that Cannon was present during the murder. (Evid. Hrg. Trans. 7). The defense's goal was to focus on the physical evidence that pointed to the codefendant as the actual killer and to portray Cannon as someone who was merely present during the murder. (Evid. Hrg. Trans. 8).

Trial counsel had a clear, reasonable strategy for the case and Mr. Garcia's own initial reaction to the statements show he did not believe that the State was burden shifting. The State's closing argument was clearly a permissible rebuttal comment to the defense's closing argument. As such, trial counsel's performance was not deficient for not objecting to the State's comments about the corn during closing argument.

Furthermore, even if the arguments were improper, trial counsel's failure to object was not prejudicial. The State's argument about the lack of corn was isolated and a short portion of his rebuttal following a lengthy closing argument. Cannon's convictions were supported by compelling evidence, including the eyewitness account of the surviving victim, Mr. Neel, and Mr. Morgan's blood found on

Cannon's shirt. Given the weighty evidence of guilt in this case, Cannon did not demonstrate that there is a reasonable probability that trial counsel's failure to object affected the outcome of the trial.

As such, trial counsel was not ineffective when they did not object to the State's comments and the claim must be denied.

ISSUE II: INEFFECTIVE ASSISTANCE OF COUNSEL FOR ALLOWING RELIGIOUS THEMES DURING BOTH GUILT AND PENALTY PHASES.

This claim as it pertains to the penalty phase is moot as Appellant has been granted a new penalty phase under *Hurst v. State*, and Appellee has not appealed the decision, making the postconviction court's order final.

A trial court may deny a postconviction motion without conducting an evidentiary hearing. When there is controlling precedent disposing of the claim or where the issue is solely a matter of law, it is proper for the trial court to summarily deny the postconviction motion. In *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013), this Court rejected a claim that the trial court was required to conduct an evidentiary hearing regarding a claim raised in a fifth successive postconviction motion that was controlled by existing precedent. This Court explained, that "[b]ecause Mann raised purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief." *Id*. Furthermore, a court may summarily deny a postconviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. *See Franqui v. State*, 59 So. 3d 82, 101 (Fla. 2011).

Regarding the ineffective assistance of counsel claim during the guilt phase, the Defendant has failed to meet the burden to support an ineffective assistance of counsel claim because the discussions and arguments about an eye for an eye did not constitute a discussion about religion. While trial judges and attorneys should generally avoid discussing religious themes, courts have found that such comments

do not always warrant reversal. *Ferrell v. State*, 686 So. 2d 1324, 1328 (Fla. 1996). In *People v. Wash*, 6 Cal. 4th 215 (Cal. 1993), the California Supreme Court analyzed a prosecutor's reliance on the biblical commandment forbidding murder.[4] The prosecutor's comments asserted that the Bible sanctions capital punishment, and the court held that such comments were an improper appeal to religious principles. Though the court criticized the prosecutor's comments, the court found the comments were not prejudicial when viewed in context of the evidence of guilt and the remaining portions of the prosecutor's argument. *Id*. In *Ferrell*, the trial judge stated during voir dire,

> Let me add one thing here, counsel, every time this comes up we have different opinions about it.
>
> This is not the first time this has come up during the course of a jury selection in a capital case.
>
> Inquiry has been made over the last twenty or thirty years that both Hebrew and Christian scholars, they tell us—these are students who have been studying it for long years—they tell us in the original Bible, in Greek, Hebrew, and Arabic, the Ten Commandments say "Thou shalt not commit murder." It doesn't say anything about "Thou shalt not kill." It says, "Thou shall not commit murder." It does not say, "Thou shalt not kill."
>
> That translation of the Hebrew, Greek and Arabic Bible have [sic] translated it from "murder" to "Thou shalt not kill." But in the original Bible it is, "Thou shall not commit murder."

[4] The prosecutor's comments were not objected to at trial and thus were not preserved for appellate review. However, the court elected to review the merits of the claim and determined that they were not prejudicial.

> And also when you say—when attorneys ask you, can you sit in judgment, you are not talking about sitting in judgment of a person morally or socially or any other thing, but just make a determination of guilt or innocence. That is what you are asked to do, not with judgment.
>
> With that proceed.

686 So. 2d at 1327-28. Counsel for Ferrell did not object to the judge's comments and claimed that the comments were fundamental error. *Id*. at 1328. However, this Court stated that the trial judge's brief discussion was not fundamental error when viewed in light of the entire record. *Id*. Additionally, the Court found the comments in *Ferrell* to be less egregious than those in *Wash*. *Id*.

This Court has stated that "there is no categorical rule prohibiting" the invocation of religious authority in capital sentencing proceedings. *Farina v. State*, 937 So. 2d 612, 629 (Fla. 2006). Instead, this Court reasoned that "[c]ounsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law … *as may be appropriate to the case*." *Id.* (citing *Street v. State*, 636 So. 2d 1297, 1303 (Fla. 1994) (emphasis added) (quoting *Paramore v. State*, 229 So. 2d 855, 860-61 (Fla. 1969), *vacated in part on other grounds*, *Paramore v. Florida*, 408 U.S. 935 (1972)). In other cases, this Court has "consistently held that a prosecutor's references to biblical authority during closing argument were not fundamental error." *Id.* at 630. *See, e.g., Lugo v. State*, 845 So.

2d 74, 110 (Fla. 2003) (where the prosecutor made "no mercy"[5] and "religion"[6] arguments); *Lawrence v. State*, 691 So. 2d 1068, 1074 (Fla. 1997) (concluding that the prosecutor's statements, which equated the jury's sentencing task to "God's judgment of the wicked," were similar to the prosecutor's comments in *Bonifay v. State*, 680 So. 2d 413 (Fla. 1996)). In *Lawrence*, this Court concluded that the comments made by the prosecutor, when viewed in context of the entire argument, did not amount to fundamental error. 691 So. 2d at 1074. Additionally, this Court stated that "any error was harmless as it did not taint the jury's recommendation." *Id.*

In the present case, trial counsel questioned each of the prospective jurors if they had any religious beliefs that were in favor of or against the death penalty. Each of the jurors, when questioned by the State and trial counsel, stated that they could follow the law as instructed by the court. Counsel used the example of eye for an eye to help explain concepts of fairness. Neither the State nor trial counsel used the comments of "eye for an eye" or "reap what you sow" to appeal to the religious convictions of the jurors. As such, the comments did not taint the jury's recommendation and trial counsel was not deficient for failing to object.

[5] The prosecutor argued that Lugo deserved "no mercy" and "no leniency."
[6] The prosecutor argued that "[i]n any society, in any religion, [Lugo's case was] the worst."

Even if this Court were to find that defense counsel's performance was deficient, it still would not pass the second prong of *Strickland*. This Court has "rarely found that such conduct rises to the level of fundamental error." *Farina*, 937 So. 2d at 630. As this conduct would not meet the fundamental error standard, it similarly will not meet the *Strickland* prejudice prong. *See Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003). The rule against religious references is to prevent appealing to a jury's moral codes or asking them to enter a verdict based on their religious conviction. It is not intended to prohibit all references to religion. Most of the religious references made by both the State and trial counsel were to examine the religious biases of the potential jury and ensure that no one had any religious beliefs that would prevent them from rendering a fair and impartial verdict.

The postconviction court correctly found:

> The defense counsel, juror and prosecutor allusion to the religious themes were de minimis. Indeed, the sole reference asserted in the motion as to the prosecution's guilt-phase closing argument is "this man reaps what he sowed." To the extent that defense counsel asked jurors about their religious convictions, the strategic forethought is obvious — juror religious concerns about the death penalty and homicide are ubiquitous. Defense counsel did no more than permit the jurors to disclose their views; neither defense counsel nor the prosecutor injected a discussion of religious philosophy.

(Order at 2). The claims raised by Appellant were clearly refuted by the record and the postconviction court was able to deny them without a hearing.

As such, this claim was properly denied.

ISSUE III: WHETHER CANNON REMAINS SENTENCED FOR ATTEMPTED ROBBERY WITH A DEADLY WEAPON, A CHARGE THAT WAS VACATED BY THIS COURT.

Cannon claims that the Florida Department of Corrections (hereinafter, "FLDOC") is detaining Cannon on a charge of attempted robbery that was vacated by this Court on direct appeal. (IB at 46-47). This claim is legally insufficient and was properly denied.

On direct appeal, this Court vacated Cannon's attempted robbery conviction based on insufficient evidence. *Cannon*, 180 So. 3d at 1039, fn.16. This Court stated that "there was no evidence of any desire to rob Mr. Neel. We vacate that conviction because stabbing Mr. Neel in the neck, without more, is not competent, substantial evidence of attempted robbery." *Id*. Cannon now alleges that he is being illegally held on this charge by FLDOC solely because the charge still appears on the FLDOC publicly available website.[7] The FLDOC website contains numerous disclaimers, including that "[i]nformation contained herein includes current and prior offenses." The website further provides that the information on the website is made available as a public service, and that the FLDOC makes no guarantees about the accuracy of the information on the website. The FLDOC provides contact information for members of the public to notify the FLDOC of any potential errors on its website.

[7] http://www.dc.state.fl.us/appcommon/searchall.asp (fill in Marvin Cannon's name in the appropriate boxes; open Inmate Population Search Results).

Cannon makes no representations that he has taken steps to get confirmation from FLDOC that he is being detained on the vacated attempted robbery charge. He also has not demonstrated that he has attempted to address the alleged discrepancy through readily available administrative channels. This claim fails to allege an error that is contemplated in Rule 3.851 and fails to allege facts that demonstrate that an error of any kind has occurred.

The postconviction court stated that "[t]he court is unfamiliar with any authority supporting the use of serial orders vacating a sentence as an appropriate method for correcting a website — the motion sites no authority." (Order at 7). Any order issued by the court would be superfluous in light of this Court's mandate.

The postconviction court properly denied this claim.

CONCLUSION

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

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ *Lisa A. Hopkins*
Lisa A. Hopkins
Assistant Attorney General
Florida Bar No. 99459
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
Telephone: (850)414-3336
Facsimile: (850)414-0997
capapp@myfloridalegal.com
Lisa.Hopkins@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this ___ day of July, 2019, 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: James L. Driscoll, driscoll@ccmr.state.fl.us; David Dixon Hendry, hendry@ccmr.state.fl.us; and Gregory W. Brown, brown@ccmr.state.fl.us, 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*

COUNSEL FOR APPELLEE