

No. SC19-1512
Lower Tribunal No. 16-2008-CF-011059-BXXX-MA

IN THE
Supreme Court of Florida

BILLY JIM SHEPPARD,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

*On Appeal from the Circuit Court, Fourth
Judicial Circuit, in and for Duval County, Florida*

*Honorable Judge Linda McCallum
Judge of the Circuit Court*

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE¹

The Circuit Court for the Fourth Judicial Circuit in and for Duval County, Florida, entered the judgments of conviction and sentence at issue. On January 22, 2009, Mr. Sheppard, along with his co-defendant, Rashard Evans, were indicted on two counts of first-degree murder, attempted armed robbery, possession of a firearm by a convicted felon, and grand theft auto. (R. 31-34). Following conflicts by the public defender, regional conflict counsel, and other private conflict counsel, Chuck Fletcher and Julie Schlax were finally appointed to represent Mr. Sheppard. (R. 47-50; 458-58).

Mr. Sheppard's trial began on January 9, 2012.² The jury returned a guilty verdict as to all counts on January 12, 2012. (R. 572-79). The penalty phase of Mr. Sheppard's trial was held on January 20, 2012. Later that same day, the jury rendered an advisory verdict, recommending the death penalty by a vote of 8-4 for the death of Monquell Wimberly and a life sentence for the death of Patrick Stafford. (R. 592-93). A *Spencer*³ hearing was held on March 8, 2012. Thereafter, on March 30, 2012,

¹ The following will be utilized to cite to the record: "R."- record on direct appeal; "T." – trial transcript; "PCR." – postconviction record on appeal. Any additional citations will be self-explanatory.

² Mr. Sheppard and his co-defendant, Mr. Evans, were tried separately. Mr. Sheppard was tried first.

³ *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

the trial court followed the jury's recommendation and sentenced Mr. Sheppard to death for the murder of Monquell Wimberly.⁴ (R. 644-53). This Court affirmed Mr. Sheppard's convictions and sentence on direct appeal. *Sheppard v. State*, 151 So.3d 1154 (Fla. 2014).⁵ The United States Supreme Court denied the writ of certiorari on April 27, 2015. *Sheppard v. Florida*, 135 S.Ct. 1902 (2015).

⁴ The trial court found only one aggravating circumstance: (1) the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person and assigned it great weight. The court found the following mitigating circumstances: (1) Mr. Sheppard's age at the time of the crime; (2) Mr. Sheppard was a loving brother and son; (3) Mr. Sheppard showed concern for his family and was capable of having a positive impact on their lives; (4) Mr. Sheppard's mother abused drugs and alcohol during his childhood, forcing him to live with his grandmother; (5) Mr. Sheppard witnessed frequent violence as a young child; (6) Mr. Sheppard lacked any productive role models; (7) Mr. Sheppard had a limited education; (8) Mr. Sheppard suffered from poverty; (8) Mr. Sheppard lost his father at a young age; (9) Mr. Sheppard entered the penal system at a young age; (10) Mr. Sheppard was intoxicated at the time of the offense; (11) Mr. Sheppard is amenable to a productive life in prison; (12) Mr. Sheppard suffered from mental disabilities, which resulted in people taking advantage of him; and (13) Mr. Sheppard experienced three devastating hardships in the months leading up to the offense.

⁵ The following issues were raised in Mr. Sheppard's direct appeal: (1) the trial court erred in admitting the co-defendant's out of court statement, which implicated Mr. Sheppard in the murders and inferred that he disposed of the murder weapon; (2) the trial court erred in allowing the State to play a video of Mr. Sheppard's interrogation; (3) the trial court erred by failing to conduct an adequate prejudice inquiry into premature jury deliberations; (4) fundamental error occurred when Dtayla Barrett testified that she was worried that Mr. Sheppard was going to kill her and her family; and (5) Mr. Sheppard's sentence was disproportionate, due to the presence of only one aggravating circumstance and numerous mitigating circumstances.

On April 22, 2016, Mr. Sheppard filed his initial Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend, along with a Motion to Exceed the Page Limitation.⁶ (R. 589-975). On June 2, 2016, the circuit court granted in part Mr. Sheppard's motion to exceed page limits, allowing only an additional ten pages. (PCR. 1033-35). As a result, Mr. Sheppard filed an Amended

⁶ Mr. Sheppard raised the following claims in his 3.851 motion: (I) Mr. Sheppard's death sentence violates *Atkins v. Virginia*; (II)(A) IAC for failure to question prospective jurors about aggravating and mitigating circumstances; (II)(B) IAC for failure to conduct a meaningful death qualification; (II)(C) IAC for failure to inquire about racial bias; (II)(D) IAC regarding *Caldwell* error; (II)(E) IAC regarding *Batson* error; (III)(A) IAC for failure to present an insanity defense; (III)(B) IAC for failure to present a competent misidentification defense; (III)(C) IAC for failure to effectively cross-examine Dtalya Barrett; (III)(D) IAC for failure to hire a crime scene reconstructionist; (III)(E) IAC for failure to lodge proper objections; (III)(F) IAC for failure to exclude video recording of Mr. Sheppard's interrogation; (III)(G) IAC for failure to challenge the State's ballistics evidence; (III)(H) IAC for failure to investigate jury misconduct; (IV) Newly discovered evidence of Michael Roberts' recantation; (V) *Brady/Giglio* claim regarding Michael Roberts and Willie Carter; (VI) Prosecutorial misconduct; (VII)(A) IAC for failure to conduct a reasonably competent mitigation investigation and failure to present mitigation; (VII)(B) IAC for failure to obtain a mental health evaluation; (VII)(C) IAC for failure to establish and argue statutory mitigators; (VII)(D) IAC for stipulating to an aggravating circumstance; (VII)(E) IAC for failure to object to improper jury instructions; (VII)(F) IAC for failure to object to the State's improper closing argument; (VIII) *Ake v. Oklahoma* claim; (IX) Due process violation by Mr. Fletcher; (X) Cumulative error; (XI) *Hurst v. Florida* claim; and (XII) Lethal injection claim.

Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend on June 17, 2016.⁷ (PCR. 1043-1409).

A case management conference was held on July 21, 2017. The court issued its order on this case management conference on August 1, 2017, granting a hearing on Claims II(C), II(E), III(B)-(H), IV, V, VI, and IX(A) as they relate to the guilt phase of Mr. Sheppard's trial. (PCR. 1715-18). The court also noted that "[t]he State has conceded to a new penalty phase for Defendant in light of *Hurst v. State*, 202 So.3d 40 (Fla. 2016), thereby negating the need for an evidentiary hearing on Defendant's penalty phase claims at this time." (PCR. 1715).

On February 24, 2018, and as a result of ongoing investigation, Mr. Sheppard filed a Motion to Disqualify the Fourth Circuit State Attorney's Office based upon prosecutorial misconduct and witness tampering involving Michael Roberts, a jailhouse snitch who testified for the State at trial, but had since recanted his testimony regarding Mr. Sheppard's confession to him. Additionally, Mr. Sheppard filed a Motion to Continue Evidentiary Hearing and a Motion to Amend Defendant's

⁷ Mr. Sheppard raised the same claims as listed in his initial 3.851 motion, however, those claims were truncated due to the page limitations indicated in the postconviction court's order.

First Amended Motion to Vacate Judgements of Conviction and Sentence with Special Request for Leave to Amend.⁸ (PCR. 1739-1939).

On March 12, 2018, the circuit court issued its ruling on Mr. Sheppard's motion to amend, allowing Mr. Sheppard to amend his 3.851 motion to include Claims XIV and XV involving Khalilah Cook Mejors⁹, yet denying his request to include the prosecutorial misconduct and witness tampering claim. (PCR. 2037-39). The court also issued an amended order on the case management conference, permitting an evidentiary hearing on Claims XIV and XV.¹⁰ (PCR. 2032-34). The following day, on March 13, 2018, the court denied Mr. Sheppard's Motion to Disqualify the Fourth Circuit State Attorney's Office. (PCR. 2040-44). Mr. Sheppard appealed this ruling, but was ultimately unsuccessful. *Sheppard v. State*, No. SC18-421, 2018 WL 6729875 (Fla. Nov. 21, 2018).

⁸ Mr. Sheppard raised the following claims in his motion to amend: (XIII) Prosecutorial misconduct and witness tampering involving Michael Roberts; (XIV) Newly discovered evidence of Khalilah Cook Mejors; (XV) *Brady/Giglio* claim regarding Khalilah Cook Mejors.

⁹ During Mr. Sheppard's trial, Khalilah went by her married name, Khalilah Mejors. At some point after the trial, she went back to using her maiden name, Khalilah Cook. For purposes of this brief, she will be referred to as Khalilah Cook Mejors, as she is referenced in the postconviction court's order.

¹⁰ The court also permitted an evidentiary hearing on Claim X for Cumulative Error, which had not been previously granted by the prior postconviction judge handling the case. (PCR. 2033).

An evidentiary hearing was conducted on June 3, 4, and 20, 2019. (PCR. 3483-902). On August 6, 2019, the circuit court issued its order, granting in part and denying in part, Mr. Sheppard's 3.851 motion. (R. 2709-819). The court noted: "On May 2, 2017, the State conceded Defendant is entitled to a new penalty phase pursuant to *Hurst v. Florida* and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). The Court, therefore, need not consider Defendant's claims as they relate to the penalty phase." (PCR. 2716). The court granted Mr. Sheppard's *Hurst* claim, dismissed all other penalty phase claims as moot, and denied all guilt phase claims. (PCR. 2801). This appeal of the denial of Mr. Sheppard's guilt phase claims timely follows.

STATEMENT OF THE FACTS

I. MR. SHEPPARD'S TRIAL

The State's theory was that Mr. Sheppard and Mr. Evans came upon Patrick Stafford sleeping in his car and attempted to carjack him. When Mr. Stafford refused to give up his car, they shot him.¹¹ Mr. Sheppard and Mr. Evans then went to the Prime Stop Food Store, where they stole Dorsette James' car while he was inside the store.¹² It was this car, the State alleged, that was used in the shooting of Monquel

¹¹ There were no eyewitnesses to the shooting of Patrick Stafford.

¹² Although Mr. Sheppard admitted to taking the car for joyriding, he told police that he got out of the car before the shooting at Hollybrook Apartments. (T. 619-20).

Wimberly outside of Hollybrook Apartments. Mr. Sheppard's defense at trial was misidentification. The following witnesses testified to matters most relevant to the issues on appeal:

A. Dtalya Barrett

Dtalya Barrett was the State's star witness at trial. She testified that she was working as a security guard at the Hollybrook Apartments the morning of the shooting. (T. 414-15). She had been working there for approximately three months at the time of the shooting. (T. 414). Her job was to check in cars when they came into the apartments. (T. 415). Shortly after 10:00 a.m. on the day of the shooting, she was standing outside the guard gate and heard several gunshots. (T. 416-17). She then ran down to the entrance to the apartment complex and saw a person in the passenger seat of the car shooting at a boy on a bicycle. (T. 417-18). Ms. Barrett testified that both the boy on the bicycle and the car were facing her direction. (T. 418-19). She described the car as a gray Grand Marquis. (T. 419). When asked what she saw when she looked down in that directions, she stated: "I just seen the car. I mean, they were shooting and I just ran, you know, ran back." (T. 419). She testified that she ran back to the guard shack to call the police. (T. 420).

After calling police, Ms. Barrett testified that she went back down to the street and saw the vehicle again. (T. 421). At this point, the vehicle was on the other side of the entrance to the apartments, traveling away from her. (T. 421-22). Ms. Barrett

testified that the passenger of the vehicle turned around and looked back at her, and she saw his face. (T. 422). She testified that the window of the passenger door was down and the passenger was looking back at the boy. (T. 423). She was approximately ten to twelve feet away from the vehicle at this point. (T. 425). She described the passenger as a black man with dreads, “like plaits”. (T. 425).¹³ She testified that the shooting took place pretty quickly, that she was scared, and that she only had approximately four seconds to get a look at the shooter’s face. (T. 429-30).

Ms. Barrett later spoke with detectives at the police station. (T. 426). She was shown a series of photos on a computer. (T. 426). She testified that she picked out a photo of someone that looked like the individual, but claimed that was not the actual person involved in the shooting. (T. 426-27). She stated: “I told the detective that looked like the guy.” (T. 426).

Ms. Barrett spoke with detectives again at the police station, where she was shown a photo-spread and asked whether she could identify anybody as being the shooter. (T. 427). Ms. Barrett identified Mr. Sheppard in the photo-spread and identified him in court. (T. 428-29).

When asked about the vehicle, she identified a picture of Dorsette James’ car as being the one involved in the shooting. (T. 431). Although she did not get a look

¹³ She initially told police the shooter had short hair. (T. 565).

at the tag number, she testified that the back of Dorsette James' car looked like the rear of the vehicle that she saw.¹⁴ (T. 432).

Ms. Barrett testified that after she saw the shooter look back at her as the vehicle drove away, she "kept running down the street towards the baby that was on the – to the little boy that was on the ground." (T. 433). She testified that she didn't know the victim, but knew of him. (T. 433). Prior to running down the street towards the victim, she thought that it was her nephew. (T. 433).

The State then attempted to explain why Ms. Barrett initially ran off after the shooting. (T. 435). She stated: "cause I have kids and if – if that gentleman shot a baby in broad daylight, I'm thinking what he going to do to me and my kids?" (T. 435).¹⁵

Defense counsel's cross-examination of Ms. Barrett comprised a mere six pages of the trial transcript. (T. 437-42). Ms. Barrett agreed that as part of her job checking in people and vehicles to the apartment complex, that she has seen a lot of

¹⁴ Ms. Barrett initially told police on two separate occasions that the vehicle had a decal in the middle of the rear window. Dorsette James' car did not have a decal on the rear window. (T. 646).

¹⁵ None of these comments about a baby/boy on a bike, or Mr. Sheppard's propensity to kill were objected to by defense counsel. However, the trial court did express some concern about these comments, noting there was no objection, but cautioning the State to avoid the golden rule. (T. 464-65).

faces over the course of her employment there. (T. 437). She testified that she did not know whether the shooter had ever driven through there before. (T. 438). Defense counsel followed up that answer by asking: “So you’re not confusing him from some other time that you’ve seen him?” To which she responded, “No, I’m not.” (T. 438).¹⁶ Counsel then asked her questions about the gun, the number of doors on the car, and the license plate. (T. 438-41). Finally, defense counsel asked Ms. Barrett whether she ever said that “maybe that’s the one” when she picked out that photograph from the computer at the police station. (T. 442). Ms. Barrett denied having said this. (T. 442).¹⁷

On redirect by the State, Ms. Barrett further testified without objection: “I was looking at his face. I was really looking at him, making sure he wouldn’t come kill me...”. (T. 445).

B. Khalilah Cook Mejors

Khalilah Cook Mejors testified that she was living at Hollybrook Apartments when the shooting occurred. (T. 448). The morning of the shooting, she was standing

¹⁶ Ms. Barrett had previously told police that she had seen both the shooter and the car before at Hollybrook, and suggested that police obtain the security logs to help identify them. (PCR. 2518).

¹⁷ At the postconviction evidentiary hearing, trial counsel agreed that according to the police reports, when Ms. Barrett was shown the photograph at the police station, she said it looked “similar to the car.” (PCR. 3683).

in front of her apartment by the railing, smoking a cigar with her cousin, Kieva Sherrod. (T. 448-49).¹⁸ Her apartment was on the third floor, facing King Street. (T. 449). She noticed an individual on a bicycle, traveling towards the entrance to the apartments. (T. 450). She then saw a car hearing in the same direction, approach the individual on the bike. (T. 450). Ms. Cook Mejors described this car as being a dark, charcoal gray, and either a Ford Crown Vic or a Mercury. (T. 450). Ms. Cook Mejors testified that this car slowed down as it approached the individual on the bicycle, and the shot him several times. (T. 451). She could not see the shooter, only that the arm firing the black Glock type of gun was that of an African-American male. (T. 452-53). She described the license plate as a standard Florida plate. (T. 456). Right after the shooting, the car drove off down the road. (T. 455). After the car drove off, Ms. Cook Mejors ran back into her apartment to call 911. (T. 456-57). When shown a photograph of Dorsette James' car, she testified that it *appeared* to be the same vehicle. (T. 458). During her cross-examination, which consisted of less than two pages of transcript, she admitted that the car looked just like every other gray Grand Marquis, and that there were a lot of those out on the road in Jacksonville. (T. 460).

¹⁸ It was revealed in postconviction that Ms. Cook Mejors and Ms. Sherrod were both smoking marijuana, not merely a cigar. In addition, Ms. Cook Mejors is nearsighted, and was not wearing her glasses when she purported to see the car involved in the shooting.

C. Willie Lee Carter, Jr.

Willie Carter testified that he was at the Prime Stop Food Store with Dorsette James, when Mr. Sheppard jumped into the driver's side and Mr. Evan's jumped into the passenger side of Mr. James' car. (T. 469; 476). He identified a photograph of Mr. James' car as the one that Mr. Sheppard and Mr. Evans took that day. (T. 472). Mr. Carter testified that he knew Mr. Sheppard and Mr. Evans from around the neighborhood. (T. 473). When Mr. Sheppard and Mr. Evans jumped into Mr. James' car, Mr. Carter testified that he was around by the dumpster relieving himself, which Mr. James was inside the store. (T. 474-75). Mr. Carter heard the door chime and the door slam open, as Mr. James came out of the store and said, "Man, don't do it like that." (T. 474). Mr. Carter described Mr. Sheppard as having short dreadlocks and Mr. Evans as having a low haircut. (T. 475-76). At the time of trial, Mr. James had passed away, therefore, Mr. Carter was the only one who could testify as to what occurred at the convenience store with regard to Mr. James' car. (T. 478). Mr. Carter testified that after they drove away in the car, he asked Mr. James why he didn't rush them. (T. 477). Mr. James responded: "Man, one of them had a gun." (T. 477).¹⁹ During cross-examination, Willie Carter admitted that he was currently serving a

¹⁹ This out of court statement made by Mr. James, as testified to by Mr. Carter, was blatant hearsay, offered for the truth of the matter asserted – that Mr. Sheppard and Mr. Evans were carrying guns. However, no objection was made by defense counsel.

sentence of 12 years. (T. 486). He was initially facing a sentence of 30 years for these charges. (T. 486). He accepted a plea on these charges in 2010. (T. 485). He admitted to being a seven-time convicted felon. (T. 486). Finally, he admitted that he never saw any guns. (T. 490). On redirect, Mr. Carter testified that when he made his initial identifications to police in 2008, he did not have any pending charges. (T. 491). He was then asked a leading question by the prosecutor about his plea deal: “That had nothing to do with your identifications of Mr. Sheppard or Mr. Evans during the course of this trial.” Mr. Carter responded: “None at all”. (T. 491).²⁰

D. Detective Bobby Bowers

Detective Bobby Bowers was employed with the Jacksonville Sheriff’s Department and was the lead homicide detective on the Monquell Wimberly case. (T. 557-60).²¹ He described Dtalya Barrett as “panic-stricken”; “very nervous”; “concerned for her safety”; and “terrified”.²² (T. 562-64). He testified as to Ms. Barrett’s description of the shooter: “a short African-American male, with short

²⁰ Trial counsel did not challenge Mr. Carter on whether he was expecting any further reductions on his sentence in exchange for his testimony against Mr. Sheppard at trial. Postconviction investigation revealed that his sentence was further reduced to six years in Florida State Prison. See *infra* Brady/Giglio claim.

²¹ Detective Warkentien was the lead detective on the Patrick Stafford case. (T. 560).

²² This extensive testimony about Ms. Barrett’s state of mind was not relevant, highly prejudicial, and yet not objected to by defense counsel.

dreads, brown skin...some facial hair.” (T. 565). He testified that after looking at a computer database, she pointed to one individual and said: “this looks like him”. (T. 566).

Detective Bowers testified about the investigation into an auto theft at the Prime Stop Food Store that occurred earlier that same day. (T. 567). He testified that the vehicle belonging to Dorsette James was a gray Crown Victoria.²³ (T. 567). And that it matched the description given to him by Dtalya Barrett and other witnesses of the vehicle used during the shooting at Hollybrook Apartments. (T. 567).²⁴

Next, Detective Bowers testified about the arrest of Mr. Sheppard. “We had the career criminal team here in town. We had the U.S. Marshals involved, and ultimately he was captured by the U.S. Marshals.” (T. 578). Although there was no objection made by defense counsel, the trial court admonished Detective Bowers about this testimony inasmuch as he mentioned the career criminal team, insinuating that Mr. Sheppard was a career criminal, when in fact, he is not. (T. 583). In a feigned attempt to clarify to the jury that Mr. Sheppard was not a career criminal, Detective Bowers stated: “It’s just the name of a unit within the SWAT team. They go out and

²³ This auto theft occurred the day of the shooting, and the vehicle was recovered later that same day. (T. 568; 576).

²⁴ In fact, this vehicle did not match the description given by Dtalya Barrett because it did not have a decal in the rear window. (T. 646).

they try to serve high-risk ...” At which point, the trial court cut him off and told the State to move along. (T. 594).

During Detective Bowers’ testimony, the State played Mr. Sheppard’s interrogation video for the jury. (T. 596-625). Defense counsel stipulated to the admission of this videotape into evidence at trial. (T. 592). Despite being redacted, this videotaped interrogation contained highly prejudicial material, including, but not limited to: (1) Detective Bowers accusing Mr. Sheppard of being a gang member, a stone-cold killer and a liar; (2) telling Mr. Sheppard that the clerk at Prime Stop Food Store thought he and Rashard Evans were going to rob the store; (3) insisting that Mr. Sheppard is either the driver or the trigger man; (4) asserting that Mr. Sheppard has “been in the system long enough, enough times that you know that this time is a hard charge”; (5) declaring that “[t]hey wouldn’t have sent the U.S. Marshals after you if it was some little trumped up charge”; (6) insisting that if Mr. Sheppard cannot convince him now, then he won’t be able to convince 12 people at trial; and (7) claiming that “[t]hose kinds of things, if they don’t come out when we’re in this room and they come out six months, eight months, two years down the road when it’s in trial, it kind of loses its punch; loses its credibility ... it’s an excuse.” (T. 608-09; 613-15; 617-18; 624-25).

During this interrogation, Mr. Sheppard denied killing anybody. (T. 616). However, he did admit to jumping into the driver's seat of Dorsette James' car, but insisted that he got out of the car before the shooting occurred. (T. 619-20; 627).

On cross-examination, defense counsel asked about Ms. Barrett's identification of an individual from the computerized mug book. (T. 635). Detective Bowers admitted that they took this identification seriously and conducted surveillance on him. (T. 635-36). He agreed that significant resources were put into watching that individual because Ms. Barrett picked out his photograph. (T. 636-37).

During redirect, the State promptly asked: "So this defendant admitted that he at first was the person driving Dorsette James' car, but at some point in time on Acorn Street, he allowed Rashard Evans to assume the driver's position?" Detective Bowers responded in the affirmative.²⁵ (T. 643).

Finally, Detective Bowers was asked about whether Ms. Barrett and Ms. Cook Mejors were able to identify Dorsette James' car as the one involved in the shooting and whether their descriptions were consistent with each other. (T. 646). Detective

²⁵ This was not what Mr. Sheppard said during his interrogation, nor was it what Detective Bowers had previously testified to on direct examination. Mr. Sheppard was very clear that he got out of the car and Rashard Evans left in the car. This question by the State improperly inferred to the jury that they switched seats with each other, placing Mr. Sheppard squarely in the passenger seat as the shooter.

Bowers' responded: "Yes. The only difference was the – I think there was a decal they claimed was on the car." (T. 646). After which the State promptly stopped Detective Bowers from elaborating any further on the decal and abruptly redirected his testimony to a different issue.²⁶ (T. 646).

E. Kieva Sherrod

Kieva Sherrod testified that she was living at Hollybrook Apartments during the time of the shooting. (T. 651). The morning of the shooting, she was outside her third-floor apartment on the balcony with her cousin Khalilah Cook Mejors. (T. 652). She testified that they were smoking a cigarette. (T. 652).²⁷ Ms. Sherrod testified that she saw a young black man riding a bicycle past the apartments on King Street. (T. 652). She observed a gray Crown Vic approach the individual on the bicycle. (T. 653). The passenger of the car then fired shots at the young man on the bicycle. (T. 654-55). After the shooting, the car drove off down King Street, and she ran into her apartment to call 911. (T. 656-57). When shown a photograph of Dorsette James' car, she testified that it *appeared* to be car involved in the shooting. (T. 660). During trial counsel's brief cross-examination of Ms. Sherrod, she testified

²⁶ Despite being given the opportunity to recross Detective Bowers, trial counsel failed to follow up on his mention of a decal.

²⁷ As referenced *supra* in FN 18, postconviction investigation revealed that Ms. Sherrod and Ms. Cook Mejors were actually smoking marijuana on the balcony the morning of the shooting.

that the tires on the car were not the standard rims, consistent with the photograph of Mr. James' car that she had just been shown. (T. 663). However, she admitted she did not mention these special rims to police when she spoke to them after the shooting. (T. 663).

F. Michael Roberts

Michael Roberts was incarcerated at the Nassau County Jail at the time of his testimony at Mr. Sheppard's trial. (T. 714). He testified that in April of 2009, he was incarcerated at the Duval County Jail where he met Mr. Sheppard. (T. 715). Mr. Roberts shared a room with Mr. Sheppard and another inmate. (T. 716). Mr. Roberts testified that during his incarceration, other inmates would ask him for legal advice on their cases, and that after seeing this Mr. Sheppard eventually asked Mr. Roberts for legal advice as well. (T. 717-20). He testified that Mr. Sheppard asked him his opinion about the weight of eyewitness testimony and about how statements made by the co-defendant to another inmate could affect his case. (T. 720). Mr. Roberts testified that Mr. Sheppard indicated that Rashard Evans was his co-defendant and had been "bragging to another guy about a carjacking into the place and the guy bucked and that they shot him." (T. 721).

Mr. Roberts testified that he and Mr. Sheppard were housed together for about three months and spoke almost every night. (T. 721). He testified that one night Mr. Sheppard was bragging about "going hard" and "being on powder and pills" with

Mr. Evans for three or four days. (T. 727-28). He testified that Mr. Sheppard stated they were going hard and trying to find a car, and they tried to rob a guy for his car, but he “bucked” and they both “put fire on him.” (T. 728). Mr. Roberts testified that Mr. Sheppard told him that later that same day they pulled up next to a guy on a bike and Mr. Sheppard shot him. (T. 733). Mr. Roberts testified that prior to this conversation, he heard Mr. Sheppard bragging at jail about the shooting. (T. 729).

Mr. Roberts further testified that Mr. Sheppard stated that when they were pulling away after the shooting, there was a lady looking right at his face, and that he wished he would have killed her. (T. 734). He testified that Mr. Sheppard asked Mr. Roberts, who was about to be released from jail at the time, to kill Ms. Barrett so that she would not be able to testify against him. (T. 735). In exchange, Mr. Sheppard offered to give Mr. Roberts the money he was supposed to get back from his income taxes, which Mr. Roberts helped him file, as well as the money that Mr. Evans was supposed to receive from his taxes. (T. 735-36). A few weeks later, Mr. Sheppard was moved out of that dorm, and Mr. Roberts never saw him again until his testimony at trial. (T. 737).

Mr. Roberts never came forward with this information until he was arrested on his current pending charges. (T. 739). He testified that he had a burglary pending where he was facing 30 years in prison. (T. 739). He had his girlfriend call the State Attorney’s Office regarding this information on Mr. Sheppard’s case. (T. 740). He

testified that he was trying to find a way to help himself, trying to find a way to get his charges reduced, and was hoping that this information will be taken into consideration when he's sentenced on his case. (T. 740-41). He testified that he had not been promised anything, yet stated that he "pled guilty to [his] charges over a year ago" at the time of Mr. Sheppard's trial. (T. 741).

During cross-examination, Mr. Roberts admitted he had nine felony convictions, and was currently awaiting sentencing on a second-degree felony and facing 30 years in prison. (T. 745). He admitted that his sentencing had been put off until he could testify in this case. (T. 747).²⁸

G. David Warniment

David Warniment testified that he worked as a firearms examiner for the Florida Department of Law Enforcement ("FDLE"). (T. 797). He was tendered as an expert in the field of firearms identification and examination. (T. 800). Mr. Warniment examined shell casings and bullets recovered from both crime scenes. (T. 808-25).²⁹

²⁸ In fact, one of his cases got dismissed entirely, while he received reduced sentences on two other cases. See *infra* Brady/Giglio claim.

²⁹ The Hollybrook Apartments on King Street is the location where Monquell Wimberly was shot. Academy Street is where Patrick Stafford was shot.

From the Hollybrook Apartments crime scene, the following items were recovered: six cartridge or shell casings; two fired bullets; and three bullets from Mr. Wimberly at autopsy. (T. 808-10). Mr. Warniment testified that all six cartridge cases were fired from the same firearm, and that the caliber of the firearm was a 9mm Luger-caliber. (T. 809). He then testified that all five bullets – two from the scene and three from autopsy – were fired from the same firearm (T. 810). Furthermore, he testified that all five bullets were consistent with 9mm, full metal-jacketed bullets, and were consistent in caliber and style to the six cartridge cases. (T. 811).

From the Academy Street crime scene, the following items were recovered: six cartridge or shell casings; and two bullets from Mr. Stafford at autopsy. (T. 811-13; 821). Mr. Warniment testified that the four of the six cartridge cases were fired from the same firearm. (T. 812). He also testified that the two bullets recovered from Mr. Stafford at autopsy were both fired from the same firearm. (T. 819).

In connecting the two crime scenes, Mr. Warniment testified there was “no doubt in [his] mind” that the six cartridge cases found at the Hollybrook crime scene and four out of the six cartridge cases found at the Academy Street crime scene were fired in the same firearm. (T. 812-13; 818-19). He also testified that the three bullets recovered from Mr. Wimberly at autopsy and the two bullets recovered from Mr.

Stafford at autopsy had all been fired in the same firearm. (T. 820-21). He agreed that all of the bullets recovered at the two autopsies were a “match”. (T. 819-21).

Finally, when asked about whether he could link the bullets to the shell casings without the unknown firearms, Mr. Warniment testified that the ten cartridge cases he identified as being a match, all “have characteristics consistent with having been fired in a Smith & Wesson semiautomatic pistol.” (T. 824). As for the bullets, he testified that they also have “class characteristics consistent with a Smith & Wesson firearm, so, therefore, those bullets and cartridge cases are consistent with a Smith & Wesson firearm.” (T. 824).³⁰

As evidence of at least two firearms being discharged at the Academy Street scene, Mr. Warniment testified that the two other shell casings found at the Academy Street location, were both fired from the same firearm. (T. 821). However, this was not the same firearm from which the other bullets and casings testified to had been fired, indicating a second firearm having been discharged at Academy Street. (T. 822).

³⁰ After this explanation by Mr. Warniment the State continued to ask leading questions about these bullets and casings being fired from one, i.e., the same firearm and even had Mr. Warniment read his FDLE report which was full of hearsay into the record without any objection by defense counsel. (T. 825; 834-36). This testimony is problematic in no-gun-recovered cases such as this. *See* William Tobin evidentiary hearing testimony *infra*.

In response to Mr. Warniment's testimony, defense counsel merely asked whether he was able to tell the jury anything about who shot the firearm, or whether it was two separate people holding the firearms at Academy Street or one person holding two firearms. (T. 831).

II. EVIDENTIARY HEARING

Mr. Sheppard presented the following witness testimony at the evidentiary hearing in support of his claims for postconviction relief:

A. Chuck Fletcher

Chuck Fletcher was lead counsel on Mr. Sheppard's case, or as he put it: "I was the main guy in the guilt phase". (PCR. 3655). When asked about his defense at trial, he testified: "Well, I guess we tried to run a 'you got the wrong guy,' so a misidentification and he didn't confess to the inmate." (PCR. 3657).

He agreed that defense attorneys have an obligation to do an independent investigation into the facts of the case. (PCR. 3656). When asked whether defense counsel should consult with experts in areas that require specialized knowledge of issues affecting the case, trial counsel stated: "If there's something that I don't understand, then, yes, probably I would try to look to an expert." *Id.*

Trial counsel testified that he received all of the police reports from the State in discovery, and at some point reviewed them as part of his preparation for the case. *Id.* He agreed that he took several, if not all, of the depositions in the case with the

second chair attorney. *Id.* If he did not take a deposition, he testified that he would have reviewed the transcript. *Id.*³¹

When questioned by the State as to his trial preparation, Mr. Fletcher claimed that Mr. Sheppard confessed to the murder of Mr. Wimberly. (PCR. 3718). He elaborated by stating that Mr. Sheppard told him: “there’s no way that bitch could have seen me.” *Id.* This statement was in reference to Ms. Barrett’s identification of him as the shooter. Mr. Fletcher stated that this shocked him because it was such a “clear admission”. *Id.* He also claimed that he and Mr. Sheppard discussed that statement – the admission – “several times”. *Id.* In attempting to concoct a *post hoc* rationalization for Mr. Fletcher’s failure to properly defend Mr. Sheppard, the State asked him whether he took into account these admissions when considering what evidence to challenge and what witnesses to call on behalf of the defense. (PCR. 3719). “Because obviously the last thing you want to do as a defense lawyer is potentially create more evidence against your defendant?” *Id.* To which Mr. Fletcher responded: “That’s very true.” *Id.*³²

³¹ Due to the page restrictions of this brief, Mr. Fletcher’s testimony regarding the specific claims raised in this appeal are included *infra* in the Argument section.

³² It seems to be a strategy of certain trial attorneys in Duval County to routinely claim at a postconviction evidentiary hearing that a defendant confessed to them, believing that this insulates them against any IAC claims against them. The defense of not wanting to create any more evidence against the client is also commonly asserted by defense counsel in Duval County as a *post hoc* rationalization of their

Mr. Fletcher was asked about this supposed confession by Mr. Sheppard on redirect. (PCR. 3744-47). He claimed that Mr. Sheppard's statement about Ms. Barrett not seeing him led to further conversations about this. (PCR. 3744). He agreed that the characterization of this as a confession was his interpretation of what Mr. Sheppard said. *Id.* Mr. Fletcher then stated that he "had subsequent conversations with him about that and why I couldn't put him on the stand and things like that...and from the context it was clearly a confession." (PCR. 3747). Mr. Fletcher denied being asked by postconviction counsel prior to the evidentiary hearing whether he ever had any follow up conversations in order to clarify or understand what Mr. Sheppard meant by that statement and claiming that there had not been any. (PCR. 3744-47).³³

B. Julie Schlax

Julie Schlax was the penalty phase attorney in Mr. Sheppard's case. (PCR. 3638). She testified that the defense at trial was misidentification and reasonable doubt. (PCR. 3640). Although Ms. Schlax was responsible for all penalty phase issues, she also handled a few witnesses in the guilt phase. *Id.* One of the witnesses

deficient representation. *See Martin v. State*, SC18-214 and SC18-1696, 2020 WL 238546 (Fla. Jan. 16, 2020); *Smith v. State*, SC18-1763 and SC19-680.

³³ This is directly refuted by former co-counsel, Kathleen Pafford, whose testimony is included *infra*.

she was responsible for cross-examining during the guilt phase was David Warniment from the FDLE, who testified about the ballistics involved in the case. (PCR. 3641). Ms. Schlax testified that she would have reviewed Mr. Warniment's deposition in preparation for trial. *Id.* She agreed it was important to challenge assertions made by Mr. Warniment that connected the two crime scenes. (PCR. 3642). Ms. Schlax also agreed that defense counsel has a duty to conduct an independent investigation into the facts of the case, and should be knowledgeable about any forensic issues involved in the case. *Id.* She conceded that she was not a ballistics expert. (PCR. 3643). Finally, Ms. Schlax testified that if she had information that would have challenged not only Mr. Warniment's findings as to the matches that connected the crime scenes, but also would have challenged the scientific validity of his findings, she would have presented that to the jury. (PCR. 3643-44).

C. Jeffrey Neuschatz

Dr. Jeffrey Neuschatz, Ph.D., an expert in eyewitness identification, was retained by postconviction counsel and testified at the evidentiary hearing about the factors affecting memory and eyewitness identification. Dr. Neuschatz is a tenured professor of psychology at the University of North Alabama in Huntsville. (PCR. 3595; 2103-2122). Dr. Neuschatz has conducted research on eyewitness

identification and authored the book *The Psychology of Eyewitness Investigation*. (PCR. 3597).

According to Dr. Neuschatz, memory “doesn’t work like a video recorder” and does not produce a “faithful presentation of exactly what happened.” (PCR. 3602-03). A person retains “bits and pieces” of an event and the memories are not structured or organized. (PCR. 3603). In order to fill in the gaps, people “add structure, organization, and detail to those bits and pieces. And you do that in a way that makes sense within the world.” *Id.* Memory is not static, and it can change as you collect additional information. *Id.* According to Dr. Neuschatz, “some of the information changes can be accurate, but it can also be inaccurate and this is why we have memories that are confidently held and are not accurate with what happened.” *Id.*

Dr. Neuschatz also discussed several factors that affect memory. Exposure time in eyewitness identification is how long the witness had to look at the person’s face. (PCR. 3606). The longer period of time the witness has to study the person’s face, the more accurate the identification. *Id.* Dr. Neuschatz testified that four to five seconds is a short period of exposure time. *Id.*

Retention interval in terms of eyewitness identification would be the length of time between the witness observing the suspect and the witness being “tested” on a photo lineup. (PCR. 3606-07). Dr. Neuschatz testified that a retention interval of

roughly 24 to 25 days is a long retention interval, and “it’s harder to remember things accurately because many things can interfere with your memory during that time period.” (PCR. 3607).

Stress is also a factor that affects memory because “when you’re extremely stressed out, your memory is not as good, meaning that your facial recognition and your eyewitness identification is worse when you’re extremely stressed out as opposed to when you are not stressed.” (PCR. 3607-08).

Weapon focus affects eyewitness identification because “when there’s a weapon present it serves as an intentional magnet so people stare at the weapon.” (PCR. 3608-09). A person’s memory of an event is much worse if the person is staring at the weapon because “you’re not looking at other aspects of the event.” (PCR. 3609).

D. Michael Knox

Postconviction counsel retained crime scene reconstructionist Dr. Michael Knox to review Ms. Barrett’s trial testimony and take measurements at the crime scene to determine whether or not Ms. Barrett’s testimony was consistent or inconsistent with the physical evidence. (PCR. 3771). Prior to opening his own consulting business, Dr. Knox was a major crime scene investigator and training coordinator for the crime scene investigation unit of the Jacksonville Sheriff’s Office. (PCR. 3762; 2425-2447). Dr. Knox reviewed the evidence technician

photographs, including photographs of the apartment complex and vehicle. (PCR. 3772). Dr. Knox also reviewed several police reports and the 911 call. *Id.* Dr. Knox also went to Hollybrook Apartments and took several measurements in the front entrance area “from the guard shack to the street, and then over to the area that was documented where there was some physical evidence where the shooting took place.” (PCR. 3773). Dr. Knox created a PowerPoint presentation to illustrate his measurements and testified at the evidentiary hearing.

Dr. Knox measured the distance between the guard shack where Ms. Barrett was working when she heard the gunshots and the general area at the end of the driveway that Ms. Barrett testified she ran to after she heard the shots. Ms. Barrett could not pinpoint the exact spots on the road she stood or the exact spot at the guard shack she was standing when she heard the shots, so Dr. Knox made estimates based on the testimony he reviewed. (PCR. 3775). Dr. Knox took “upper bound” and “lower bound” measurements based on Ms. Barrett’s testimony. Dr. Knox testified that when “estimating distances from nonspecific evidence or things that don’t pinpoint an exact spot, then what you do is look for boundary values. What’s the furthest reasonable value and what’s the closest reasonable value based upon what somebody has described and then use that range to be able to estimate timing and things.” (PCR. 3776). According to Dr. Knox’s measurements, the approximate distance between the guard shack where Ms. Barrett was working at the time of the

shooting and the area by the sign at the entrance to the apartment complex was approximately 80–100 feet. (PCR. 3779). This is the distance Ms. Barrett had to cover to travel back and forth from the guard booth when she initially heard the gunshots, observed the shooting, and called 911.

Dr. Knox also took measurements of the upper and lower bounds of the approximate distance between the area by the sign at the entrance to the apartment complex and the location of the victim's body. (PCR. 3780). According to Dr. Knox's measurements, the distance of the upper and lower bounds of these points is approximately 300 feet. (PCR. 3781). This is the distance that Ms. Barrett claimed she saw the shooter's arm and gun (T. 420), and the approximate distance the suspect's car traveled during the time Ms. Barrett returned to the guard shack and called 911.

Dr. Knox also created a video that demonstrates "driving a vehicle from the location where the shooting took place to the driveway that's the entrance into Hollybrook and driving the vehicle at different speeds." (PCR. 3786; PCR. Exh. 13: Knox video on CD). At a speed of 7 mph, the vehicle took approximately 30 seconds to cover the distance. (PCR. 3788). At a speed of 10 mph, the trip took approximately 20 seconds. (PCR. 3789). At a speed of 20 mph, it approximately 11 seconds to cover the distance. At a speed of 25 mph, it took about 8 seconds to cover the distance. *Id.*

E. William Tobin

Mr. Sheppard presented the testimony of William Tobin at the evidentiary hearing. Mr. Tobin is a forensic metallurgist materials scientist who testified as an expert in forensic science metallurgy. (PCR. 3808, 3521; 2093-102).

Mr. Tobin testified that the National Academy of Sciences is one of the two organizations considered the most respected voices of the scientific community. (PCR. 3533). The NAS put out two reports that apply to Mr. Sheppard's case. *Id.* The first was the 2008 Ballistic Imaging Report, and the second was the 2009 Strengthening Forensic Science in the United States report. *Id.* Both of these reports were available to the public prior to Mr. Sheppard's trial in 2012 and were critical of firearms toolmarks identifications. *Id.* He testified that there is a consensus among the scientific community that firearms toolmarks identification is not a science. (PCR. 3535). He also testified that there is a consensus among the scientific community that specific source attribution is without scientific empirical or heuristic foundation. "In other words, it has no foundational validity." *Id.*

The sole guideline utilized by firearms toolmarks examiners was issued by the AFTE, which is not a scientific body, but rather a trade association. *Id.* This is the basic guideline by which examiners are guided to render their opinions. *Id.* According to this guideline, opinions of common origin can be made when the unique surface contours of two toolmarks are in sufficient agreement. (PCR. 3536).

However, “sufficient” is scientifically objectionable because of its ambiguity. (PCR. 3536-37). What is sufficient for one examiner may not be sufficient for another examiner. (PCR. 3537).

Mr. Tobin explained that the characteristics used by firearms toolmarks examiners for comparisons are referred to as striations and impressions. (PCR. 3526). The categories of characteristics include class characteristics, subclass characteristics, and individual characteristics. (PCR. 3527). Class characteristics, such as caliber, are introduced by design, and they are intentionally introduced into the product by way of the manufacturing process. *Id.* Subclass characteristics, on the other hand, are *unintentionally* introduced through the manufacturing process. *Id.* Individual characteristics are also incidental characteristics. *Id.* It is the last two categories of characteristics – subclass and individual – which are easily confused. For example, Mr. Tobin testified that two cartridge cases fired from two completely different firearms from the same production lot are virtually analytically indistinguishable. (PCR. 3546). This sort of thing would almost certainly result in a misattribution or a false identification, as subclass characteristics are easily mistaken for individual characteristics. *Id.*

With regard to the characteristics observed by an examiner, it is absolutely critical that he or she be able to assess whether the striations are of subclass origin, meaning from the manufacturing process, or whether they are, in fact, truly

individual characteristics. In Mr. Tobin's experience as a plant metallurgist, the overwhelming majority of characteristics transferred in any type of heading operation or impact operation are going to be subclass from the manufacturer. And that means that every other sample or specimen in the same production lot would also likely exhibit those same characteristics. (PCR. 3544-45).

In no-gun-recovered cases, such as Mr. Sheppard's case, there is a serious problem because the gun is not available for an examiner to know how the breechface was manufactured. And if you don't have that information, you have no idea whether the striations that you used for an identification come from the production, manufacturing process, or whether they're truly individual. (PCR. 3550). As a result, some crime laboratories do not even allow their examiners to opine an individualization if a gun was not recovered. *Id.*

There is no evidence that is supportable by science or empirically or even heuristically where examiners can accurately and reliably opine on an individualization. (PCR. 3549). Individualization or specific source attribution indicates, for example, that "A" bullets were fired from the "B" gun or the "C" and "D" cartridge cases were fired in the same firearm. Any specific source attribution is an individualization." (PCR. 3547).

The critical difference between an "identification" and a "match" is explained as follows:

A match merely means that in the examiner's opinion there is concordance in the indicia or the characteristics that present themselves. So in other words, one might have several cartridge cases that match ... but that should not imply ... an identification.

A match only means that the examiner agrees or concludes that there is consistency in the characteristics observed. *An identification would be a specific source attribution.* So it would be one thing for an examiner to say these cartridge cases from one scene, for example, and the cartridge cases from another scene match, but they should not imply a specific source attribution, in other words, that they came from the same firing platform.

(PCR. 3531-32) (emphasis added).

F. Avery Evans

Mr. Evans testified at the evidentiary hearing. He lived at Hollybrook Apartments and was the second shift supervisor of the security booth on the day of the shooting. (PCR. 3491). Mr. Evans was working inside the booth and his employee, Dtalya Barrett, was outside the booth checking cars in. (PCR. 3492). When Mr. Evans heard gunshots, Ms. Barrett “started freaking out” and ran to the victim. (PCR. 3493). Mr. Evans was concerned about Ms. Barrett’s safety, so left the booth and followed “four or five steps” behind her. *Id.* The victim was outside the fence around the apartment complex. *Id.* When Mr. Evans and Ms. Barrett ran out to the street, there was no car there. (PCR. 3494). Although Mr. Evans vaguely recalled speaking to the police, he truthfully told them that he did not see the shooting. *Id.* He only heard the shooting. (PCR. 3492).

Nobody from the State Attorney's Office or the defense team ever tried to talk to Mr. Evans about the shooting. (PCR. 3495). If they had, he would have agreed to speak with them.

G. Ava Webb

She testified at the evidentiary hearing. She lived in Hollybrook Apartments on July 20, 2008. (PCR. 3883). On the morning of the shooting, she was walking home from the convenience store on Beaver Street. (PCR. 3884). As she was approaching the railroad tracks, a guy rode his bicycle across the tracks. *Id.* She could hear his loud music. *Id.* When the guy on the bicycle was almost to the tree in front of Hollybrook Apartments, a blue-green car with a Jaguars tag and dark tinted windows came flying past her. *Id.* She recalled the car because it was "just pretty." (PCR. 3887). She saw a black hand come out and shoot. (PCR. 3884). The car took off and drove all the way down to the tech school and McCoy Creek and then turned around. (PCR. 3884, 3889). When the car turned around, Ms. Webb hid in the bushes. *Id.* The police showed her a picture that "looked like the car" but she did not testify that it was the same car. (PCR. 3888).

Ms. Webb spoke to law enforcement after the shooting and gave a deposition. (PCR. 3885). Trial counsel was present at her deposition. She was not subpoenaed for trial by the State or the defense. *Id.* If she had been subpoenaed for trial, her

testimony would have been the same information she provided at the evidentiary hearing. (PCR. 3885-86).

H. Asia Iszard

Asia Iszard lived at Hollybrook Apartments at the time of the shooting. She testified at the evidentiary hearing. She was eight years old at the time of the shooting. (PCR. 3498). She lived at Hollybrook Apartments with her mother. *Id.* Her building faced King Street. (PCR. 3499). When the shooting happened, she was by the staircase of her building on the way to her aunt's house. *Id.* She saw a light-colored car slowly driving down the street playing very loud music. *Id.* The car stopped beside a guy on a bicycle, the shooting occurred, and the car sped off. (PCR. 3499-500). Ms. Iszard did not see the shooter's face. She only saw his arm. (PCR. 3500).

Nobody from law enforcement, the State Attorney's Office, or the defense team contacted her after the shooting. (PCR. 3501). She would have cooperated with them if they had contacted her. *Id.* Ms. Iszard's testimony was critical because it would have contradicted Ms. Barrett's testimony that the car involved in the shooting drove slowly away from the scene. Ms. Iszard testified that the car sped off after shooting the victim.

I. Jayson Shannon

Jayson Shannon is an investigator with CCRC-North that was assigned to Mr. Sheppard's case. (PCR. 3797). As part of his work on the case, he interviewed Michael Roberts, the jailhouse snitch that testified at trial that Mr. Sheppard confessed to him while they were in the Duval County Jail together. (PCR. 3798). Just prior to the evidentiary hearing, Mr. Roberts was killed in an automobile accident. (PCR. 2448-49).

The first time he met with Mr. Roberts was at Baker Correctional Institution in 2016. (PCR. 3800). It was during this visit that Mr. Roberts admitted that his entire testimony at trial was a lie. (PCR. 3803). Specifically, Mr. Roberts admitted that Mr. Sheppard never told him anything about his case; that Mr. Sheppard never confessed to two murders to him; and that Mr. Sheppard never asked him to kill a witness. (PCR. 321). Mr. Shannon further testified that Mr. Roberts told him that he obtained his information about the case from detectives, and that he expected a favorable sentence on his own cases if he testified against Mr. Sheppard. (PCR. 3803-04; 3806).

Mr. Shannon testified that after this meeting with Mr. Roberts at Baker C.I., he spoke with attorneys on the case, who instructed him to get an affidavit from Mr. Roberts. (PCR. 3807-08). He immediately scheduled another prison visit for himself and Kathleen Pafford, who was co-counsel on Mr. Sheppard's case at that time.

(PCR. 3808-09). During this next visit with Mr. Roberts, he repeated the same information that he told Mr. Shannon during their first visit. This information was committed to writing, reviewed and signed by Mr. Roberts, and then notarized by Mr. Shannon. (PCR. 3809-10; 2312-17).

Additionally, Mr. Shannon testified that Mr. Roberts expressed concerns that he was going to be charged with perjury. (PCR. 3817). However, he was still willing to testify concerning his recantation of trial testimony. (PCR. 3817-18).

J. Kathleen Pafford

Kathleen Pafford was previously employed by CCRC-North and was assigned to Mr. Sheppard's case as co-counsel. (PCR. 3826). She testified as to a meeting she and Mr. Shannon had with Michael Roberts at Baker C.I. in 2016. *Id.* Mr. Roberts told her during that meeting that the entirety of his testimony in Mr. Sheppard's trial was false, and that he was given the details that he testified to by three detectives from the Jacksonville Sheriff's Department. (PCR. 3827). Mr. Roberts said that he lied when he testified at trial that Mr. Sheppard had confessed to two murders to him. (PCR. 346). He also said that he lied when he testified that Mr. Sheppard asked him to kill a witness. (PCR. 3828).

Mr. Roberts told Ms. Pafford that in exchange for his testimony, he was promised assistance in his pending cases in Nassau County, Washington County, and Duval County. (PCR. 3827). Mr. Roberts stated that the prosecutor came to see

in while he was at the Nassau County jail, along with his attorney. (PCR. 3829). The prosecutor told Mr. Roberts that he was facing between 10 and 99 years on his pending cases and that if he cooperated, he would get assistance on his cases. (PCR. 3829). Mr. Roberts did not immediately agree to cooperate with the State, but when he did, he was told by his attorney that there was no need for him to give a sworn statement because the State wanted to keep him on the backburner to prevent having to disclose him as a witness. (PCR. 3830-31). He was also told by his attorney that he had to enter an open plea in the Nassau County case so there were no written promises that could be used against him at trial. (PCR. 3831).

Prior to Mr. Sheppard's trial, Mr. Roberts said that he was prepped for his testimony by the prosecutor, wherein he was told to: "focus on the security guard's identification, the shooting of the boy on the bike, and to mention that Mr. Sheppard said that he went to a convenience store after he shot the guy in the car." *Id.* Mr. Roberts was also told by the prosecutor "to keep it brief, not to offer any additional information, to feel free to swear and to just act like he was sort of a fly on the wall in the cell." (PCR. 3832).

After Mr. Sheppard's trial, Mr. Roberts said that he was sentenced to eight years in prison on his Nassau County case, and he was told that was because the State was so happy with his testimony at Mr. Sheppard's trial. *Id.* He was also sentenced to seven years on his Washington County case, which was to run

concurrent with the eight years he received on his Nassau County case. (PCR. 3833). His Duval County case was dismissed entirely. *Id.*

Ms. Pafford also testified as an impeachment witness regarding Chuck Fletcher's denial about having been asked whether Mr. Sheppard ever confessed to him or whether there were any follow-up discussions concerning his statement about Ms. Barrett not seeing him. (PCR. 3834-36). Ms. Pafford testified about two conversations with Mr. Fletcher where this was asked about. (PCR. 3834). During the first conversation, Mr. Fletcher was asked whether Mr. Sheppard ever confessed to him. Mr. Fletcher "leaned in and said...Billy told me that bitch didn't see him." *Id.* Ms. Pafford took that to mean that "she didn't see him because he wasn't there." (PCR. 3835). During the second conversation with Mr. Fletcher at his office, he was asked directly, whether Mr. Sheppard ever confessed, and Mr. Fletcher said "no". *Id.* Ms. Pafford testified that he was again asked about "the bitch didn't see me" statement and whether he considered the alternative explanation that it meant she didn't see him because he wasn't there and he said that he did not. *Id.* Mr. Fletcher was also directly asked whether there were any follow-up communications regarding that statement by Mr. Sheppard, to which he answered that there were not. (PCR. 3835-36).

SUMMARY OF ARGUMENT

ARGUMENT I: Mr. Sheppard's court-appointed attorneys failed to provide effective assistance of counsel at the guilt phase of his capital trial by failing to present a reasonably competent misidentification defense, failing to effectively cross-examine Dtalya Barrett who identified Mr. Sheppard as the shooter, failing to hire a crime scene reconstructionist to challenge Ms. Barrett's identification of Mr. Sheppard as the shooter, failing to lodge objections to improper and inflammatory testimony, failing to object to the video recording of Mr. Sheppard's interrogation, and failing to challenge the State's ballistics evidence which connected the two crime scenes and implicated Mr. Sheppard in not one, but two, murders.

ARGUMENT II: The circuit court erred in finding that newly discovered evidence regarding Michael Roberts' recantation of his trial testimony, including Mr. Sheppard's confession to him, was inadmissible hearsay and therefore, Mr. Sheppard was not entitled to relief.

ARGUMENT III: The circuit court erred in finding that *Brady/Giglio* violations did not occur at Mr. Sheppard's trial concerning Michael Roberts and Willie Carter, both of whom received a deal in exchange for their testimony against Mr. Sheppard. Additionally, Mr. Roberts' trial testimony was a result of information given to him by police.

ARGUMENT IV: The circuit court erred in finding that Mr. Sheppard waived this claim of newly discovered evidence concerning Khalilah Cook Mejors that she was smoking marijuana the morning of the shooting, thereby compromising her ability to accurately identify the car involved in the shooting.

ARGUMENT V: The circuit court erred in finding that Mr. Sheppard waived this *Brady/Giglio* claim regarding Khalilah Cook Mejors that she was not wearing her glasses the morning of the shooting, thereby further compromising her ability to accurately identify the car involved in the shooting.

ARGUMENT VI: The circuit court erred in finding that cumulative error did not deprive Mr. Sheppard of a fundamentally fair trial.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF MR. SHEPPARD’S CAPITAL TRIAL.

An ineffective assistance claim has two components: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Performance is deficient if it falls below an objective standard of reasonableness, which is defined by prevailing professional norms. *Id.* at 688. To establish prejudice, Mr. Sheppard “must show . . . a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. “In

assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Strickland claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So.2d 766, 771-72 (Fla. 2004).

A. Failure to present a reasonably competent misidentification defense

Trial counsel recalled telling the jury in opening statements that this was a case of misidentification. (PCR. 3657). Counsel agreed that in presenting a misidentification defense that one of the things you want to do is challenge eyewitnesses regarding their identification of the client as the shooter. *Id.* He also agreed that another thing you want to do in a misidentification defense case is to bring out any inconsistencies among the identifications made by the eyewitnesses. *Id.* However, counsel failed to retain a misidentification expert; failed to present to the jury the different descriptions of the car involved in the shooting; failed to conduct an independent investigation and present witnesses to support his defense;

and failed to challenge the photo lineups that were not conducted pursuant to JSO standard operating procedures.

1. Failure to retain a misidentification expert

Eyewitness identification is anything but infallible, and several factors impact its reliability, including (1) the passage of time; (2) witness stress; (3) exposure time; and (4) weapon focus. Ms. Barrett testified that she saw observed the shooter for four or five seconds. (T. 430). Ms. Barrett allegedly saw the shooter on July 20, 2008, but she did not pick Mr. Sheppard out of a photo spread until August 14, 2008. (T. 427). Ms. Barrett was clearly stressed out and scared at the time of the shooting. (T. 429). Detective Bowers described her as “panic-stricken.” (T. 562). Avery Evans, her supervisor in the guard shack on the day of the shooting, followed her to the street when they heard the gunshots. Mr. Evans testified at the evidentiary hearing that Ms. Barrett was “freaking out.” (PCR. 3493). Ms. Barrett testified that when she heard gunshots and ran from the guard shack to the sidewalk at the entrance of the apartment complex, she saw the shooter’s arm and his gun. (T. 420).

Trial counsel failed to point out the problems with Ms. Barrett’s identification, even though he testified that the factors related to the unreliability of eyewitness identifications are “common sense.” (PCR. 3660). Had counsel consulted with an expert on eyewitness identification, he would have been able to expose the problems with Ms. Barrett’s identification of Mr. Sheppard and educate jurors on the factors

affecting eyewitness identification as testified to by Dr. Neuschatz at the evidentiary hearing. Even if trial counsel did not call such an expert to testify at Mr. Sheppard's trial, consulting with an expert on eyewitness identification would have educated trial counsel and assisted him in the presentation of his misidentification defense. Even though counsel claimed these factors were common knowledge to jurors, he had no idea about the factors himself until he read Mr. Sheppard's 3.851 motion. (PCR. 3659).

2. Failure to present to the jury the different descriptions of the car involved in the shooting that would have supported a misidentification defense

Descriptions of the car involved in the shooting at the Hollybrook Apartments varied, according to witnesses at the scene. At the evidentiary hearing, trial counsel refused to acknowledge how such evidence could have supported his defense of reasonable doubt and misidentification. This is in contrast to what he actually argued at trial: "[I]f I could boil this case down to one or two words, I would say misidentification is an important one, and it all rests on one other word and that word is 'decal'." (T. 970); "If this isn't the same car, this case is over." (T. 974); "Everything rests on it being the same car. Their entire theory rests on it being the same car. That's a big hole in their case." (T. 975); "I started this case, real simple opening statement. It's a case about misidentification. And it goes to the car, and it goes to the person. And that is a serious legitimate question for you because if it's

not the same car, their case fails.” (T. 977); “The identification of the car is in question. The identification of Mr. Sheppard is in question. Those by themselves raise a reasonable doubt.” (T. 983); “Whether or not it’s the same car, I think I’ve beaten that horse to death. That’s shaky.” (T. 993); “If you’re vacillating over whether it’s the same car, if you’re vacillating over whether or not the identification was right, then you will not have an abiding conviction ... telling you what to do.” (T. 994).

While it appears that counsel recognized the importance of this issue at trial, he failed to utilize the available evidence to challenge the identification. Bringing out inconsistencies in the vehicles described by witnesses at the scene could have allowed counsel to argue that the vehicle involved in the shooting was indeed not the same vehicle as the one taken from the convenience store by Mr. Sheppard. By failing to adequately challenge the description of the car identified at trial as the one involved in the shooting, he all but conceded that the car Mr. Sheppard got into at the convenience store was the same one involved in the shooting, thereby cementing Mr. Sheppard’s involvement in the murder.

When trial counsel was asked whether he agreed that the eyewitnesses at the scene of Hollybrook Apartments differed in their descriptions of the vehicle involved in the shooting, he replied: “slight variations, yes.” (PCR. 3661). Trial counsel testified that the different descriptions of the car involved in the shooting by

eyewitnesses were merely little details. (PCR. 3675). Throughout his testimony, trial counsel refused to acknowledge the importance of these inconsistencies. Trial counsel did, however, recall there being an issue as to either the license plate or the sticker on the back of the car. (PCR. 3662). There were, in fact, inconsistencies as to both the license plate and the sticker on the back of the car. However, he inexplicably failed to bring out either of these discrepancies to the jury.

a. Decal on window

Ms. Barrett initially told police that the car involved in the shooting was “a gray Grand Marquis, four-door, *white sticker on top center of back of the window*”. (PCR. 3663) (emphasis added). Police put out a BOLO based on this description of the car. *Id.* In fact, two other vehicles were stopped and the occupants questioned because their vehicles fit this description involving the sticker. *Id.*

At trial, Ms. Barrett identified Dorsette James’ car as the car that was involved in the shooting. (T. 431). Mr. Sheppard admitted to taking Dorsette James’ car from the convenience store. (T. 619). Dorsette James’ car *did not* contain a sticker on the back window. (PCR. 3664; 2236-37) (emphasis added).

The implication is obvious. The car Mr. Sheppard took did not contain a sticker in the back window. The car involved in the shooting did. If it wasn’t the same car, then Mr. Sheppard was not involved in the shooting, as there was no evidence whatsoever that Mr. Sheppard ever got into another vehicle. This was not

merely a “slight variation” as trial counsel tried to claim. This was a significant discrepancy tending to indicate that it was a different car – other than the car that Mr. Sheppard was in – that was involved in the shooting.

The only evidence that came out at trial regarding a decal was from Detective Bowers on redirect when asked whether the descriptions of the vehicle by Ms. Barrett and Khalilah Cook Mejors were consistent with each other and he responded: “Yes. The only difference was the – I think there was a decal they claimed was on the car.” (T. 646). Following this statement, the prosecutor abruptly cut off Detective Bowers: “Let me – let me stop you for a second”, before moving on to another topic. (T. 646). There were no further questions regarding the decal by either the State or defense counsel. It was not clear from this testimony who claimed to have seen a decal on the car.³⁴

³⁴ Defense counsel later tried to argue this brief mention of a decal in his closing argument. The State objected and claimed that this testimony referred to witnesses who were not called to the stand and not subject to cross-examination. This was false. This statement was in reference to descriptions of the vehicle made by Ms. Barrett and Ms. Cook Mejors, who both testified at trial. The difference between their descriptions of the car was the decal described by Ms. Barrett but not by Ms. Cook Mejors. By failing to bring out further information regarding this decal through either Ms. Barrett or Detective Bowers, defense counsel was unable to correct this misinformation given to the court, and was unable to argue to the jury that Ms. Barrett made inconsistent statements regarding her description of the car involved in the shooting. (T. 970-74).

Trial counsel tried to justify not bringing out these inconsistencies about the sticker on the rear window that were made by Ms. Barrett by claiming that she “backed up and said that she didn’t really remember if ... she had said that to police.”³⁵ He further testified:

I was in a deposition and it was frustrating because you think when they say it in the police report, they're going to say it in deposition. And she backed up from it and it just – it just kind of messes with that.

(PCR. 3668). Trial counsel seems to be saying that if a witness initially tells police one thing and then changes their story in deposition, then his hands are tied. This is nonsense. A witness’s deposition testimony does not wipe out prior inconsistent statements made by that witness. Counsel could have easily brought out these prior inconsistent statements that were initially made to police, and that were contained in police reports, describing the car as having a sticker. He could have done this through cross-examination of Ms. Barrett and through the officers to whom she made the statements. This would have bolstered counsel’s reasonable doubt and misidentification defenses by giving the jury a reasonable doubt as to whether the

³⁵ Trial counsel was not sure about whether this was referring to the sticker on the back of the car which would be Ms. Barrett’s deposition, or if it was in reference to the Jaguars tag from Ms. Webb’s deposition. (PCR. 3666). Since Ms. Webb never wavered in her description of the vehicle, trial counsel is presumably referring to Ms. Barrett’s deposition wherein she states: “At first I thought I seen like something, like a glare in the back window, but I’m not sure.” (PCR. 2202).

car that Ms. Barrett initially described and the car that she identified at trial were the same car.

Mr. Sheppard was only associated with one car, the one belonging to Dorsette James. He admitted to taking this car. If it was a different car involved in the shooting, then there is a reasonable doubt that Mr. Sheppard was the shooter. Trial counsel fails to see how Mr. Sheppard and Dorsette James' car are inextricably tied together by way of Mr. Sheppard's own admission to taking Mr. James' car. If Mr. James' car was not actually the car involved in the shooting, then the logical conclusion is that Mr. Sheppard was not the shooter, and that Ms. Barrett's identification of him as the shooter was erroneous.

Ms. Barrett was so emphatic about the sticker on the rear window, that police put out a BOLO based on this description and stopped two other cars fitting the description. This is key because even though she was so insistent about the sticker in the beginning, somehow she ended up identifying Dorsette James' car as the one involved in the shooting, even though it did not have a sticker on the rear window. The significance of this cannot be overstated.

It is important to note that before she made this positive identification of Mr. James' car, Ms. Barrett was shown a picture of Raymond Larry's car, which had been stopped by police pursuant to her description of the vehicle involved in the shooting. (PCR. 3670; 3681). Ms. Barrett told police that Mr. Larry's vehicle looked

similar to the one she had seen during the shooting *except the decal appeared lower on the window than she remembered*. (PCR. 3681) (emphasis added).

Trial counsel agreed that Mr. Larry's vehicle had a white sticker on the back window, and that Mr. James' car did not. (PCR. 3670). He conceded that this vehicle fit the description Ms. Barrett initially gave to police. *Id.* Trial counsel was asked about the importance of bringing this information out to the jury and attempted to give a few justifications:

I think it would have shown that the police were stopping every car that was even close to the description of the car. That's what it would establish, but nobody identified anybody in the car as the shooter so I don't know.

I don't know that that would have helped my misidentification defense because the misidentification was that Billy Sheppard was not the shooter. Nobody could have identified anybody in those other cars as the shooter. So I would just be pointing out that there were differences in the description of car.

But I didn't have a witness that would say -- that would come in and say it wasn't that guy. It was some other guy.

(PCR. 3671-72). Counsel misses the point. The importance of this testimony was not to show that individuals in the other cars that were stopped were the ones that were actually involved in the shooting. The importance of this testimony was to show that the car taken by Mr. Sheppard at the convenience store was not the car involved in the shooting, ergo, Mr. Sheppard was not involved in the shooting.

Specifically, this testimony would have showed: (1) that the car that was initially described by Ms. Barrett had a sticker on the rear window; (2) that as a result of that description by Ms. Barrett, police stopped two vehicles because fitting the description; (3) that when Ms. Barrett was shown a picture of Mr. Larry's car, she said that the sticker appeared lower on the window than she remembered, again affirming that there was a sticker on the rear window of the car involved in the shooting; and finally (4) that this evidence is at odds with Ms. Barrett's trial testimony and her identification of Mr. James' car as the car involved in the shooting. This evidence not only supports his defense of misidentification, but it also creates a reasonable doubt as to whether Mr. James' car and therefore, Mr. Sheppard, were involved in the shooting at Hollybrook Apartments.

Trial counsel ultimately conceded that testimony regarding Ms. Barrett's two prior statements about having seen a sticker on the car would have been important for the jury to hear. (PCR. 3682-83). Counsel's own admission establishes that he was deficient in failing to present this information to jurors. Mr. Sheppard was prejudiced because the jury never heard evidence that the car Ms. Barrett saw was not Mr. James' car and the one Mr. Sheppard admitted to taking. By extension, the jury was deprived of evidence challenging her identification of Mr. Sheppard as the shooter. This evidence of inconsistencies between her initial description of the car and the one she identified at trial would have challenged the reliability of her

identifications of both Mr. James' car as the car involved in the shooting, and Mr. Sheppard as the shooter.

b. License plate

Counsel recalled "something about a Jaguars license plate." (PCR. 3662). In fact, Ava Webb told police and testified under oath in her deposition that she saw the vehicle involved in the shooting and described it as having a Jacksonville Jaguars license plate. (PCR. 3672). This was information that counsel had available to him prior to trial, yet he failed to bring out this information before the jury.

During trial, Ms. Barrett identified Mr. James' car as being the car involved with the shooting. Trial counsel admitted that Mr. James' car did not have a Jacksonville Jaguar's license plate. *Id.* The implication with regard to the license plate is clear. Ms. Webb stated that the car had a Jaguar's tag. Ms. Barrett identified a car that did not have a Jaguar's tag. There is a reasonable doubt that Ms. Barrett identified the correct car. The defense at trial was reasonable doubt and misidentification. (PCR. 3650; 3657). Evidence of inconsistencies with regard to the type of license plate would have indeed supported such a defense.

However, when asked whether such evidence would have supported his defense, trial counsel stated:

A: It -- I mean, what it tells me is people are getting the cars wrong, so that's what it tells me. Nobody came in and said, I looked at the occupants in that car that was misidentified and then

identified one of them as the shooter. I mean, I'm not defending a car. I'm defending Billy Sheppard and they identified Billy Sheppard, right?

Q: Right, but if they're identifying the wrong car, that's issue, correct?

A: I'll give you -- yeah. Sure. You might get little -- very small points. Okay.

(PCR. 3673). Although trial counsel seems to concede the importance of witnesses describing different cars, he again misses the point. Mr. Sheppard admitted to being in Mr. James' car. If witnesses are describing cars *other than Dorsette James' car* as being involved in the shooting, then there is reasonable doubt as to whether Mr. Sheppard himself was involved in the shooting.

3. Failure to conduct an independent investigation and call witnesses to support a misidentification defense

The circuit court found that: "Defendant's claim that other witnesses would contradict Barrett's testimony falls short. There were no witnesses who could refute Barrett's identification of Defendant as the shooter, there were multiple witnesses who corroborated Barrett's description of the car in which the shooter rode when Wimberly was shot, and witnesses placed Defendant in a car matching these descriptions the morning of the murder." (PCR. 2749).

Had counsel conducted an independent investigation, he would have uncovered several witnesses who would have rebutted Ms. Barrett's testimony.

a. Avery Evans

Simply reading the police reports would have led trial counsel to Avery Evans, a witness who spoke to police on the day of the murder. Mr. Evans testified at the evidentiary hearing that he was working at the security booth with Dtalya Barrett on the day of the shooting. (PCR. 3491-92). Upon hearing the gunshots, Ms. Barrett “freaked out” and ran out to the victim, with Mr. Evans just steps behind her. (PCR. 3493). Critically, Mr. Evans testified that when they ran out towards the street, there was no car there. (PCR. 3494).

This directly contradicts Ms. Barrett’s testimony that upon hearing the shots, she ran out toward the street, saw the car coming towards her, ran back to the guard booth to call 911, then ran back out toward the street and saw the car, still driving in her direction, at which time she saw the shooter look back out the window and make eye contact with her. According to Mr. Evans, the car was already gone the first time they ran out to the street. Ms. Barrett’s testimony that the car was still driving past the entrance of the apartments the second time she ran out to the street is simply not plausible. Mr. Evans’ testimony casts a great deal of doubt on the veracity of Ms. Barrett’s statements, and could have created reasonable doubt in the minds of the jurors.

b. Ava Webb

Ava Webb listed as a witness in the police reports and was actually deposed by counsel. She testified at the evidentiary hearing that she saw a blue-green car with a Jaguars tag and dark tinted windows drive past her. (PCR. 3884). She then saw a black hand come out of the passenger's side window and shoot the individual on the bicycle, before speeding off towards McCoys Creek. *Id.*

Ms. Webb is a compelling witness because her recollection of the car involved in the shooting has remained consistent for over a decade. She gave an identical description to investigators in the days after the shooting and in her sworn deposition testimony several years later. (PCR. 2208-33). Her testimony would have been critical to Mr. Sheppard's defense because the car she described could not have been Mr. James' car because his car did not have a Jacksonville Jaguars specialty license tag. Ms. Webb would have been an effective and compelling witness to counter Ms. Barrett's identification of Mr. James' Grand Marquis as the vehicle involved in the shooting.

c. Asia Iszard

Asia Iszard testified at the evidentiary hearing that when the shooting happened, she saw a light-colored car slowly driving down the street playing very loud music. (PCR. 3499). The car stopped beside a guy on a bicycle, the shooting occurred, and the car sped off. (PCR. 3499-500).

Ms. Iszard's testimony was critical because it would have contradicted Ms. Barrett's testimony that the car involved in the shooting drove slowly away from the scene. Ms. Iszard testified that the car sped off after shooting the victim. Ms. Iszard's testimony also corroborates Mr. Evans' testimony when he and Ms. Barrett ran out to the street, the car was already gone.

4. Failure to challenge photo lineups which were not conducted pursuant to JSO standard operating procedures

The circuit court held: "Counsel's strategy not to challenge Bowers and/or Barrett about the way the police administered the photospread was reasonable especially when doing so could likely lead to more testimony about Barrett's certainty that Defendant shot Wimberly, while Fletcher's closing argument alerted the jury to weaknesses in the photospread. Defendant's allegation that counsel failed to point out to the jury that Barrett's verbatim statement to police was not documented merely speculates that Barrett made statements that could have undermined the outcome of the proceedings." (PCR. 2749).

The Jacksonville Sheriff's Office has standard operating procedures for conducting photo lineups. (PCR. 3619-21). The detectives in Mr. Sheppard's case did not follow their own procedures when they conducted the photo lineup with Ms. Barrett, and trial counsel failed to challenge the photo lineup at trial.

Among other things, officers are required to advise the victim or witness that “the person suspected of committing the crime may or may not be contained in the photo spread. The victim or witness shall be reminded it’s just as important to clear innocent persons from suspicion as to identify guilty parties.” (PCR. 3620). It is not clear that the detectives followed this procedure in Mr. Sheppard’s case. Ms. Barrett was deposed prior to trial and testified that she was just asked if she recognized any of the people in the pictures. (PCR. 2196). If Detective Bowers actually gave that instruction to Ms. Barrett before she reviewed the photographs, it was not documented in the police reports or on the photograph Ms. Barrett identified. This requirement that the victim or witness be told that the suspect may or may not be included in the photo spread is critical because “[i]t leads to more false identifications when it is not followed.” (PCR. 3624).

JSO detectives are also required to “document verbatim statements made by the victim or witness as to their selection or non-selection. I am positive that this is the person who robbed me. I think this was the person, but I’m not exactly sure. I did not see the person in the photo. Their statement shall be recorded in the supplemental report.” (PCR. 3621). This is also known as a confidence statement. The detectives in Mr. Sheppard’s case did not document and preserve exactly what Ms. Barrett said when she selected Mr. Sheppard’s photograph and include it in the supplemental report. The preservation of a witness or victim’s verbatim confidence

statement immediately after the identification is critical because “if the confidence statement is taken immediately after the identification and the procedures that you’re supposed to use are followed correctly, then there’s a high correlation between confidence and accuracy.” (PCR. 3616).

Trial counsel was asked about the photo lineups at the evidentiary hearing. He agreed that one way to challenge an identification made by a witness is to challenge the photo lineup. (PCR. 3684). Nevertheless, at trial, he stipulated to Ms. Barrett’s photo lineup where she identified Mr. Sheppard as the shooter. (PCR. 3685). Although he testified that he was familiar with JSO’s protocols for conducting photo lineups “in the big sense,” he was not aware of any specifics. *Id.* In fact, despite the policy’s availability and the fact that his defense in Mr. Sheppard’s capital murder was misidentification, trial counsel has never actually reviewed JSO’s protocols. (PCR. 3686). Trial counsel refused to answer direct questions about whether it would have been important to challenge Ms. Barrett’s identification if it did not comply with JSO procedures, only stating: “it depends”. (PCR. 3686-87). Counsel was then asked about the effect of stipulating to Ms. Barrett’s photo lineup:

Q: Do you agree that those -- the photo line-up that Ms. Barrett did and was entered into evidence, do you think that bolstered her in-court identification of Mr. Sheppard as the shooter?

A: I think it just shows that she has identified him twice.

Q: Yes.

A: Once by photo and once in court.

Q: Exactly. So you think that bolstered the credibility?

A: Sure.

(PCR. 3686-87). This is clearly deficient performance by trial counsel. The defense at trial was misidentification. Mr. Sheppard was identified as the shooter by Ms. Barrett in a photo lineup, and challenging her identification was critical to Mr. Sheppard's defense. Trial counsel should have obtained a copy of JSO's standard operating procedures for conducting photo lineups and challenged all aspects of the photo spread and her identification that violated JSO procedure. Mr. Sheppard was prejudiced by trial counsel's deficient performance and had counsel effectively challenged Ms. Barrett's identification and the procedural defects in the photo lineup, there is a reasonable likelihood that the outcome of Mr. Sheppard's trial would have been different.

B. Failure to effectively cross-examine Dtalya Barrett

Ms. Barrett made several prior statements that were inconsistent with her trial testimony. Trial counsel failed to expose these inconsistent statements to the jury, which would have supported a defense of misidentification and reasonable doubt.

Dtalya Barrett was an eyewitness at the Hollybrook Apartments. (PCR. 3674). She gave a description of both the shooter and the vehicle that the shooter was riding

in. *Id.* She was the only eyewitness at trial who identified Mr. Sheppard as the shooter. *Id.* Also at trial, she identified the vehicle that the shooter was riding in that day as belonging to Mr. James. *Id.*

Trial counsel agreed that she was a crucial witness in the case. *Id.* When asked whether he agreed that it was therefore, important to challenge her identifications, trial counsel stated: "If I could, yes." *Id.* The following exchange occurred with regard to impeaching Ms. Barrett's testimony:

Q: One of the ways to challenge a witness' testimony is to cross examine them on their prior inconsistent statements, would you agree?

A: Yes.

Q: You took Ms. Barrett's deposition, correct?

A: Yes.

Q: And would you agree that one of the purposes for taking a deposition is to lock a witness into their testimony?

A: It's to discover what their testimony would be, yes, but I --

Q: If they later change their testimony --

A: Yeah.

Q: -- they can be impeached with these statements --

A: Sure. Sure.

Q: -- right?

A: Yeah. Yes. And my experience after 130 trials is it rarely works. When they mess -- when they mess up on little tiny details, it just rarely works.

(PCR. 3674-75). According to counsel's reasoning, it's permissible to overlook discrepancies in a witness' testimony if they only amount to "tiny details" because "it just rarely works."

The circuit court endorsed trial counsel's *post hoc* rationalization for his failure to impeach this critical witness and found that Ms. Barrett's "discrepancies, if any, are insignificant and do not directly contradict or materially differ from Barrett's trial testimony." (PCR. 2750). However, this finding is not based upon competent substantial evidence and is refuted by the record.

Ms. Barrett was a key witness for the State, and the discrepancies in her testimony were not tiny little details, but rather went to the heart of her identification of Mr. Sheppard as the shooter. Ms. Barrett had multiple encounters with police in this case and gave several different statements. Inconsistencies in her statements involved: (1) her evolving description of the shooter; (2) her evolving description of the vehicle involved in the shooting; (3) whether she had seen the shooter and the vehicle before; and (4) whether she knew the victim.

1. Ms. Barrett's evolving description of the shooter

When Ms. Barrett initially spoke to police, as reflected in police reports, she described the shooter as having a short haircut. (PCR. 3678). By the time she gave a

deposition, she stated: “he had like long plats.” (PCR. 2189). And finally at trial, she testified: “he had dreads ... like plaits”. (T. 425). By failing to bring out this evolving description of the shooter by Ms. Barrett, trial counsel allowed the State to argue in closing that: “Ms. Barrett described Billy Sheppard to a tee, from his hair and facial features.” (T. 1012). This argument by the State insinuated to the jury that Ms. Barrett had been consistent in her descriptions of the shooter from the beginning, which was not accurate. (T. 1007). Bringing out these inconsistent statements made by Ms. Barrett with regard to her description of the shooter would have supported his defense of misidentification and reasonable doubt.

Trial counsel did not recall Ms. Barrett’s descriptions of the shooter upon being questions about it at the evidentiary hearing. (PCR. 3678). When asked whether he agreed that any change in a witness’ description of the shooter should have been brought out in front of the jury, counsel responded: “If it was a significant detail, then I would have tried to, yes.” *Id.* Yet again, counsel is invading the province of the jury. It is not up to him to decide which details and inconsistencies are significant. His defense was reasonable doubt and misidentification and bringing out all of the discrepancies in Ms. Barrett’s evolving statements about the shooter would support such a defense. The critical question in this case, even according to trial counsel, was: did Ms. Barrett identify the right person as the shooter? Bringing

out inconsistencies in her statements about this provide a reasonable doubt as to whether she identified the right person.

2. Ms. Barrett's evolving description of the car

Trial counsel acknowledged that Ms. Barrett gave statements to police, in addition to a sworn statement and deposition. (PCR. 3677). Counsel agreed that part of a defense attorney's trial preparation includes reviewing witnesses' statements to police and their depositions in order to be prepared to cross-examine those witnesses. (PCR. 3675-76). However, he failed to use any of Ms. Barrett's prior inconsistent statements about the car to impeach her trial testimony.

Q: And I want to go back to what you said about you thought in one of the depositions she didn't say that she saw the decal, Ms. Barrett?

A: I don't remember which one. It was either the license or the decal. I don't remember which one.

Q: Okay. But let me ask you this: If one of those witnesses had initially told police in police reports that either, you know, it was the Jacksonville Jaguars tag or that a -- the decal existed, whichever one it was, if they initially told police that and then you took their deposition and they didn't say that, do you agree those are inconsistent statements?

A: Sure.

Q: Do you agree that that is something to bring out in front of a jury, to challenge a witness' credibility?

A: You can, yes.

Q: Do you recall that there's a jury instruction that talks about inconsistent statements?

A: Yes, but you also -- as a trial lawyer you know how witnesses are. All they have to do is, well, I just can't remember that well or, I mean, they change their testimony.

A: Witnesses change their testimony all the time and it's really hard to lock them in.

Q: But that's for a jury to decide, right?

A: Sure.

Q: Don't juries decide credibility?

A: Sure. And juries understand --

Q: Right.

A: -- that when a car goes flying by, you're going to get ten different descriptions of it.

Q: And the jury instruction goes to reasonable doubt, right?

A: Yes.

(PCR. 3676-77). While trial counsel agreed that inconsistent statements were made in this case and that “you can” bring this out in front of the jury, he failed to do so, claiming that “witnesses change their testimony all the time and it’s really hard to lock them in.” (PCR. 3677). That is precisely the point of taking depositions of witnesses in preparation for trial. Ms. Barrett testified at trial that Mr. James’ car was the one involved in the shooting. (T. 431). Regardless of this trial testimony,

and regardless of her deposition testimony wherein she stated: “At first I thought I seen like something, like a glare in the back window, but I’m not sure” (PCR. 2202), her initial statements to police concerning the description of the car were directly at odds with this testimony. (PCR. 3663; 3681-82). Trial counsel failed to use the information at his disposal to impeach Ms. Barrett with her prior inconsistent statements and challenge the reliability of her testimony.

Q: Upon being shown a picture of Raymond Larry's car, [Ms. Barrett] told police that the vehicle looked similar to the one she had seen during the shooting except the decal appeared lower on the – on the window than she remembered. Do you recall that?

A: Yes.

(PCR. 3681-82). While counsel had this impeachment information available to him, he failed to utilize it.

Q: Do you think that would have been important to bring out?

A: Dtalya Bartlett [sic] was identifying my client because he drove by her and stared at her.

A: She -- she wasn't identifying the cars.

(PCR. 3683). Trial counsel’s justification that Ms. Barrett “wasn’t a witness against a particular car” misses the point again. *Id.* It is also inconsistent with his own arguments at trial. (T. 970; 974-75; 977; 983; 993-94). These inconsistent statements would have challenged the credibility of this witness, and the reliability of her

identification of Mr. Sheppard as the shooter. This argument was entirely lost on trial counsel.

Q: I'm asking you specifically if she was wrong about the car -- if her descriptions about the car kept changing and there was evidence it was another car, couldn't she have also been wrong about her identification of the shooter?

A: In theory, yes, and I suppose you could argue that.

Q: Do you think that affects her credibility?

A: I don't think it did in this case. She was describing a four-door car, older model four-door, the kind you see that these young guys get ahold of out in the neighborhood.

(PCR. 3714-15). Trial counsel had an obligation to put this evidence of prior inconsistent statements made by Ms. Barrett before the jury. It is the job of the jury to evaluate the credibility of witnesses. Instead, trial counsel usurped this vital responsibility from jury members. His job was to challenge the State's evidence, not vouch for a witness's credibility.

3. Whether Ms. Barrett had seen the shooter and car before at Hollybrook

Police reports reflect that Ms. Barrett told police that she had seen the shooter and the car before at Hollybrook:

Ms. Barrett also said she had noticed the car and the front passenger out at Hollybrook Apartments in the past. She also said I should check the vehicle logs to Hollybrook Apartments to possibly get the vehicle information.

(PCR. 2518). However, at trial Ms. Barrett testified that she had worked as a security guard at the apartment complex for a few months prior to the shooting. (T. 437). It was her job to check people in. *Id.* She agreed that over the course of a couple of months, she saw a lot of faces. *Id.* She was asked whether she knew if the shooter had ever driven through there before and she answered: "No." (T. 438). She was further asked whether she was confusing him from some other time that she'd seen him and she responded: "No, I'm not." *Id.*

It appears as though trial counsel attempted to ask about this inconsistency, but stopped short of impeaching her on it, despite having the ability to do so.

Q: Do you recall that during her trial testimony Ms. Barrett denied seeing Mr. Sheppard previously and confusing him as the shooter because of it?

A: Do you remember -- say that again.

Q: I believe that was your question to her. You asked her whether she had seen Mr. Sheppard previously and that's why she was confusing him as the shooter. Do you recall asking her that?

A: I don't, but that's certainly something in the realm of what I would ask.

Q: Do you recall that she initially told police that she had seen both the shooter and the car at the apartment complex before and would recognize them again?

A: I don't remember, but if it's in the police reports --

(PCR. 3679). Had trial counsel reviewed the police reports and other statements made by Ms. Barrett in preparation to cross-examine her at trial, he would have been aware that she was working as a security guard at Hollybrook Apartments on the day of the shooting. Additionally, he would have been aware of her statements to police that she had seen both the shooter and the car before at Hollybrook, and she suggested that police obtain the security logs to help identify them. (PCR. 2518).

Trial counsel had no reasonable explanation as to why he failed to use the police reports to impeach Ms. Barrett with her prior inconsistent statements. When the credibility of a key witness is at issue, it is imperative to use any means available to impeach that witness. Counsel had the means available to impeach her, yet he failed to do so, thereby foregoing an argument to the jury that she was not a reliable or credible witness because she had previously given inconsistent statements regarding her identification of the shooter and the vehicle.

Additionally, although trial counsel agreed that he had a duty to investigate the facts of the case, he failed to obtain the security logs from the apartment complex. (PCR. 3679-80; 3690). Had police found something incriminating that they could have used against Mr. Sheppard, surely they would have done so, leading to the implication that they did not contain what Ms. Barrett purported. Indeed, the security logs revealed that neither Mr. Sheppard nor Dorsette James' car had ever been

checked into Hollybrook Apartments by Ms. Barrett, as she previously claimed. (PCR. 2530-82).

4. Whether Ms. Barrett knew the victim of the shooting

At trial, Ms. Barrett testified that she initially thought the victim was her nephew and that was “the only thing that was on [her] mind”. (T. 433; 441). Counsel agreed that this was one of the stress factors that could have affected the reliability of her identification. (PCR. 3680-81). When asked whether bringing this out would have supported his misidentification theory, counsel stated: “Sure, a little bit.” (PCR. 3681). Yet counsel failed to bring out this stress factor and argue it to the jury.

Ms. Barrett further testified that although it was not her nephew, she did “[know] of him”, referring to the victim. (T. 433). However, she did not elaborate on this and was not questioned any further about it. In her deposition, Ms. Barrett was questioned about whether she knew the victim and stated that she didn’t know him personally, but knew his family. (PCR. 2201). When asked to elaborate on the relationship, she acknowledged that the victim was her nephew’s half-brother, that they shared the same father. *Id.* Even if she did not know this at the time of the shooting, she certainly knew it at the time of her deposition. Counsel failed to bring out Ms. Barrett’s relationship with the victim, and forfeited any argument that she had an interest in how the case was decided. This was not just someone she “knew of”, this was extended family. Counsel was aware of this information from her

deposition and failed to use it to show that Ms. Barrett had an interest in making sure the person arrested was convicted.

Counsel's failure to adequately cross-examine and impeach Ms. Barrett, especially as to these four issues, severely prejudiced Mr. Sheppard. There is a reasonable probability that, but for these errors by trial counsel, the result of the proceeding would have been different, and confidence in the outcome is undermined.

C. Failure to hire a crime scene reconstructionist that would have challenged Dtalya Barrett's identification of Mr. Sheppard as the shooter

The circuit court found that defense counsel's strategy not to use such an expert was reasonable in light of [Sheppard's] admission and the risk that an expert could have provided damaging evidence for his client. (PCR. 2762). The court further found that since Knox could not pinpoint Ms. Barrett's movements or the speed of the car as it drove past Barrett after Wimberly was shot, [Sheppard] provided no evidence to undermine Ms. Barrett's testimony at trial. *Id.* Such findings by the court are not based upon competent substantial evidence.

Trial counsel chose to move forward with a misidentification defense at Mr. Sheppard's trial. (PCR. 3657). To assist in the presentation of an adequate eyewitness misidentification defense, and to further cast doubt on the plausibility of Ms. Barrett's identification, trial counsel should have consulted with a crime scene

reconstructionist. Had counsel done so, he would have been able to present the jury with powerful visual tools to demonstrate how Ms. Barrett's version of events and identification of Mr. Sheppard were impossible.

Ms. Barrett testified that she was outside the guard shack when she heard gunshots. (T. 417). She ran to the end of the sidewalk by the Hollybrook sign at the entrance to the apartment complex and looked down King Street in the direction of the gunshots (T. 418). She saw the passenger of a gray Grand Marquis shoot a guy on a bicycle. (T. 418-19). The bicycle and the car were both coming towards Ms. Barrett's direction. (T. 418). Ms. Barrett returned to the guard shack to call the police. (T. 420). She spent 55 seconds on the phone with the 911 operator, although it is unknown how long it took her to dial 911, how long it took for the phone call to connect, and how long it took her hang-up the phone. (PCR. 3793; PCR Exh. 14: Barrett's 911 call on CD). After concluding the call, Ms. Barrett returned to the sidewalk at the entrance to the apartment complex, and testified that the suspect car had already passed her position but was only 10-12 feet away. (T. 425). Ms. Barrett testified at this point she was able to get a clear view of the passenger's face. (T. 424).

Postconviction counsel retained crime scene reconstructionist Dr. Michael Knox to review Ms. Barrett's trial testimony and take measurements at the crime scene to determine whether or not Ms. Barrett's testimony was consistent or

inconsistent with the physical evidence. (PCR. 3771). Had trial counsel retained a crime scene expert, like Dr. Knox, the jury would have learned that it was impossible for Ms. Barrett to see the shooter when she returned from making the 911 call in the guard shack because the suspect vehicle was already gone from the vicinity of the apartment complex. After Ms. Barrett saw the shooting from her position on the sidewalk at the entrance to the apartment complex, she traveled 80-100 feet to the guard booth, placed a 911 call that lasted at least 55 seconds, and then traveled 80-100 feet back to the sidewalk at the entrance to the apartment complex. If the vehicle was creeping down the road at a mere 7 mph hour after the victim was shot, it would have taken the vehicle approximately 30 seconds to cover the distance, at least 25 seconds less than Ms. Barrett's 911 call alone. Based on this, the suspect vehicle would no longer have been in the vicinity of Ms. Barrett, making it impossible for her to have seen the passenger in the car. As the speed of the car increases, the veracity of Ms. Barrett's identification decreases.

Based on Dr. Knox's calculations – calculations that any crime scene reconstructionist retained by trial counsel could have done – there is no feasible way that Ms. Barrett could have traveled from the sidewalk at the entrance to the apartment complex to the guard shack, called 911 and remained on the line for 55 seconds, and then traveled back to the sidewalk at the entrance to the apartment complex and observed the passenger of the car in the way she testified. Such expert

testimony would have seriously called into question the legitimacy of Ms. Barrett's identification and severely weakened the State's case against Mr. Sheppard.

Trial counsel testified at the evidentiary hearing that even though he had a duty to investigate the facts that supported his defense of misidentification, he did not retain a crime scene reconstructionist. (PCR. 3690). In fact, trial counsel's testimony about his failure to challenge Ms. Barrett's identification continues his theme of taking the State's case at face value and his theory that any challenge to the State's witnesses or version of events would somehow offend the jury:

Q: If you had information from a crime scene reconstructionist to say that based on the timing of her 911 call that she could not have been where she said she was when she saw the car drive by and then couldn't have seen the shooter as claimed, do you think that's something you would have presented to the jury?

A: So she is not an eyewitness, is that what you're trying to tell me?

Q: I'm saying if you had a witness that could have said --

A: I'm -- I'm going to -- I'm going to go after her and say that every single thing she said is just a made-up fabricated lie?

Q: You have a duty to challenge her testimony. That's what I'm asking you about.

A: Okay. Well, I didn't have a crime scene reconstructionist if that's what you're asking me.

Q: If you had -- my question is: If you had a crime scene reconstructionist to say that what she claims to have done -- the length of the call, if they could have shown that there's no way she could have been where she said she was and the car could

have been where she said she was, therefore, she couldn't have seen the shooter, is that something you would have presented?

A: I think that would come off as kind of worthless to a jury because your -- your expert would be required to hold her to -- in other words, if she said I saw the shooting and then I ran over here and it took me ten seconds to run over here, then you're holding her to that and I don't think jurors don't buy that. I think that they would -- they bought what she said. She heard it, she looked up, he drove by and looked straight at her and then turned around.

(PCR. 3689-90).

Although trial counsel stated that the defense at trial was misidentification, he did not have any plan or strategy to present this defense to the jury. He accepted the State's case and Ms. Barrett's testimony at face value, and his failure to retain a crime scene reconstruction expert to challenge Ms. Barrett's identification of Mr. Sheppard as the shooter was deficient performance that prejudiced Mr. Sheppard. Had the jury been afforded the benefit of this information, there is a reasonable likelihood that the outcome of Mr. Sheppard's trial would have been different.

D. Failure to lodge objections to improper and inflammatory testimony

Trial counsel agreed that he had an obligation to raise contemporaneous objections throughout the course of a trial when appropriate. (PCR. 3690). Yet, he failed to object to basic hearsay and speculation, as well as irrelevant and unduly prejudicial statements made by witnesses. The circuit court found that trial counsel's

strategy in not objecting to this testimony was reasonable and/or the testimony was not improper or prejudicial. (PCR. 2763-78).

1. Baby/little boy on a bike

During trial, Ms. Barrett testified that she ran towards the victim, saying “I kept running down the street towards that baby that was on the – to the little boy that was on the ground.” (T. 433). When questioned by the State about why she fled the crime scene, she stated: “[I]f that gentlemen shot a baby in broad daylight, I’m thinking what he going to do to me and my kids ... I mean, to me they didn’t think about whether he can come kill us or whatever.” (T. 435). And again, when asked about the weapon, Ms. Barrett stated: “I could see a gentlemen sticking a gun on a little boy on the bicycle.” (T. 439).

Ms. Barrett’s statements about Mr. Wimberly being a “baby” and a “little boy” were false and misleading, and served no other purpose other than to inject emotion and sympathy into the trial. Counsel was asked about making objections with regard to testimony that is more prejudicial than probative and serves no other purpose other than to inflame members of the jury:

Q: Do you agree that it's important to object to testimony that could be detrimental to your client?

A: Almost all of it is detrimental to my client.

Q: Do you agree it was prejudicial to allow testimony where a witness, Ms. Barrett, kept referring to Mr. Wimberly as a baby or a boy on a bike. Do you think that prejudicial to Mr. Sheppard?

A: No, not really.

(PCR. 3691). Mr. Wimberly was neither a baby nor a boy. Yet this language used by Ms. Barrett painted a picture of a young child that was gunned down while riding his bicycle. In contrast, Mr. Sheppard was portrayed as a thug and a gang member. This language used to describe Mr. Wimberly was unnecessary and only served to conjure up sympathy from the jury. Rather than object to this prejudicial testimony, trial counsel seems to suggest that since everything was detrimental to his client, there was no point in objecting. This is not a legitimate reason for not objecting, and it should not be given any deference by this Court.

2. Going to come kill me

As mentioned above, Ms. Barrett testified during trial that: “[I]f that gentlemen shot a baby in broad daylight, I’m thinking what he going to do to me and my kids ... I mean, to me they didn’t think about whether he can come kill us or whatever.” (T. 435). At another point in her testimony, she stated: “I was really looking at him, making sure he wouldn’t come kill me.” (T. 445).

When counsel was asked whether he agreed that it was unduly prejudicial and objectionable for Ms. Barrett to testify on more than one occasion about how

terrified she was that the shooter was going to come back and shoot her, he simply stated: “No.” (PCR. 3692-93).

These statements regarding her fear about being killed by Mr. Sheppard were irrelevant and did nothing but place prejudicial and misleading inferences in front of the jury. Her comments impermissibly suggested that Mr. Sheppard had a propensity to kill. By failing to object to these inflammatory and unduly prejudicial statements, counsel rendered deficient performance.

3. Detective Bowers’ testimony

Detective Bowers’ testimony was also full of objectionable statements. He echoed Ms. Barrett’s objectionable testimony that she was in fear due to being seen by the shooter. (T. 563-64). Detective Bowers testified that Ms. Barrett was “terrified”. (T. 564). These statements suggested to the jury that Mr. Sheppard had a propensity to kill and were unduly prejudicial. Trial counsel did not think it was prejudicial for Detective Bowers to comment on Ms. Barrett’s state of mind. (PCR. 3693). He also testified as to speculation by Detective Bowers: “I assume [he] was testifying as to what he saw and what he observed. I don’t know how that’s speculation.” *Id.* However, Detective Bowers was allowed to testify at trial about what Ms. Barrett *meant* when she identified a photograph while looking through a “mug book”. (T. 566). This is clearly speculation and should have been objected to by defense counsel. Detective Bowers also repeatedly testified as to hearsay

statements involving Ms. Barrett concerning her description of the shooter, as well as “other witnesses” regarding their identifications of the vehicle. (T. 628-29; 567-68; 645-46). Those statements unduly prejudiced Mr. Sheppard by bolstering Ms. Barrett’s testimony and attempting to cure the defects in her identifications.

E. Failure to object to the video recording of Mr. Sheppard’s interrogation

The circuit court held that since this Court determined that there was no fundamental error when Defendant challenged the video recording on direct appeal, there was therefore, no prejudice for an ineffective assistance of counsel claim on this matter. (PCR. 2786). While recognizing this Court’s findings on direct appeal and other relevant caselaw, Mr. Sheppard still asserts that this finding on direct appeal, as well as the circuit court’s ruling, was erroneous. *Sheppard*, 151 So.3d at 1165.

During Mr. Sheppard’s trial, the videotape of his interrogation by police was played for the jury by stipulation. (T. 590-625). Although this videotape was redacted in part, it still contained material that was inadmissible and highly prejudicial. Mr. Sheppard said very little on the video, which consisted almost entirely of Detective Bowers repeatedly accusing Mr. Sheppard of being a liar; providing his own theories of how the crime occurred, including an accusation that Mr. Sheppard was either the shooter or the driver; expressing his personal belief that

Mr. Sheppard was guilty; commenting on how Mr. Sheppard should know that the charges were serious because he's been in the "system"³⁶ long enough; and suggesting that, if Mr. Sheppard did not give him a defense now, a jury would know that he concocted an excuse not worthy of belief. (T. 606-25).³⁷

Trial counsel agreed that he had a duty to object to misstatements or mischaracterizations of the evidence that are harmful to his client. (PCR. 3694). He agreed that this is especially important when the misstatement is coming from someone with authority like a prosecutor or a police detective. (PCR. 3694-95).

Nevertheless, counsel stipulated to this highly prejudicial interrogation video coming into evidence at trial. He testified that he and Mr. Caliel went back and forth and Mr. Caliel "agreed to cut stuff out" and finally stipulated to a redacted version of the video. (PCR. 3695). He agreed that he had some say in what was redacted from the video. *Id.* When asked about the reason for the redactions, trial counsel testified:

Q: And was it redacted to -- not only for time but to take out anything that may have been, I guess, objectionable or harmful to Mr. Sheppard?

³⁶ Not only did trial counsel fail to object to the mention of Mr. Sheppard's prior contacts with the "system", he also alluded to his prior arrest record in his closing when he argued that Ms. Barrett was mistaken about her identification of Mr. Sheppard because she may have seen him in the "mug book" shown to her by police.

³⁷ During deliberations, the jury asked to see the transcript of Detective Bowers' testimony which included the video interrogation. (T. 1097).

A: Well, it's all harmful. Hopefully I got most of the stuff that was objectionable.

Q: So if it was all harmful, why did you stipulate to it?

A: Well, it's a statement of the defendant. It's going to come in.

Q: But it was a self-serving statement, correct, so it would not have been admissible?

A: Well, if it was an entirely self-serving statement, I would not be able to admit it. Mr. Caliel could admit it, though. He can put in whatever he wants.

Q: Is there a reason you think Mr. Caliel would have put in a self-serving statement from Mr. Sheppard?

A: Well, he did put the statement in, so there must have been something in there.

(PCR. 3696). In a capital murder case such as this, it is simply not good enough to for defense counsel to haphazardly state: “Hopefully I got *most* of the stuff that was objectionable.” *Id.* (emphasis added). There is no reason counsel should have stipulated to this video coming into evidence.

Although trial counsel testified that burden shifting “can be” harmful to a defendant, he further stated: “they get so many instructions, I don’t know how the jury could get confused.” (PCR. 3695). He did not recall Detective Bowers statements on the video to Mr. Sheppard that if he did not give his defense now, then later down the line a jury would know that he concocted an excuse not worth of

belief. (PCR. 3695-96). Counsel testified that he didn't "see how it's burden shifting, it's just a detective saying, tell me your story." (PCR. 3697). In reality, what was on the video was a far cry from Detective Bowers simply saying, tell me your story. The detectives repeated accusations and name-calling only served to prejudice the jury against Mr. Sheppard. No reasonable counsel would have stipulated to such a video being played before a jury.

Additionally, during his cross-examination of Detective Bowers, trial counsel testified that he did not elicit the fact that police are allowed to lie during interrogations. (PCR. 3697). This left the jury with the impression that everything Detective Bowers said on the video, including his opinion as to Mr. Sheppard's guilt, must have been truthful. When asked whether he agreed that it was harmful for Detective Bowers to give his opinion during this interrogation video that was played for the jury, trial counsel stated: "I feel like I remember ... the pauses when he was being accused ... *felt like* admissions." (PCR. 3697-98) (emphasis added).

The only admission by Mr. Sheppard on the videotape was that he took the car belonging to Dorsette James. (T. 619). However, Mr. Carter had already testified to this same information about Mr. Sheppard taking Mr. James' car. (T. 471-72). Mr. Sheppard denied shooting anyone, though, and told Detective Bowers that he got out of the car down the street and his co-defendant drove off in it. (T. 616; 620; 622). These were self-serving statements, which otherwise would not have been

admissible. One has to wonder why the State would seek to introduce these statements. It was this statement – about getting out of the car – that allowed the State to argue that while Mr. Sheppard took Mr. James’ car and was the driver, at some point, he got out of the car and *switched seats* with his co-defendant. This is important because otherwise, the State’s theory of the case would not have made sense. Ms. Barrett supposedly identified Mr. Sheppard as the shooter, not his co-defendant. This would not have made sense if Mr. Sheppard was driving the car, since Ms. Barrett said the shooter was in the passenger seat. This was the only evidence at trial of Mr. Sheppard getting out of the driver’s seat. Even though he said he got out of the car and walked down the street, the State latched onto this statement, twisting Mr. Sheppard’s words, and arguing that they switched seats. There was no actual testimony at trial that Mr. Sheppard and his co-defendant switched seats, only the prosecutor’s comments misconstruing Mr. Sheppard’s words. (T. 643). Mr. Sheppard only stated that he got out of the car. (T. 616; 620; 622). This statement was misconstrued by prosecutors and used to bolster their theory of the case. If trial counsel’s reason for stipulating to the video was so he could argue in closing that Mr. Sheppard got out of the car, counsel failed to do so.

F. Failure to challenge the State’s ballistics evidence

The circuit court held that trial counsel’s strategy of not challenging the State’s ballistics expert was a reasonable one, as “the procedures the State’s trial

expert used to test the evidence is accepted science and challenging that witness would not sit well with the jury.” (PCR. 2786). This finding is not based upon competent, substantial evidence for the following reasons:

Although Mr. Fletcher was the lead attorney and the primary attorney handling the guilt phase, Ms. Schlax handled the cross-examination of David Warniment from FDLE. (PCR. 3701). Mr. Fletcher recalled that Mr. Warniment’s testimony involved something “having to do with toolmarks”. (PCR. 3702). Counsel did not recall that Mr. Warniment testified that the bullets recovered from Mr. Stafford’s body and the bullets recovered from Mr. Wimberly’s body were all fired from the same firearm, but conceded that would be correct if that’s what was reflected in the trial record. *Id.* He did recall that there were no eyewitnesses to the shooting of Patrick Stafford. *Id.* When asked whether he agreed it was important to challenge the assertions made by Mr. Warniment which connected the two crime scenes, thereby implicating Mr. Sheppard in not one, but two murders, trial counsel stated: “If we had something to challenge, sure.” *Id.*

Counsel agreed that defense counsel should be knowledgeable about any forensic issues in a particular case. *Id.* However, he did not consult with any experts regarding Mr. Warniment’s reports or his proposed testimony, and conceded that he is not an expert in ballistics himself. (PCR. 3703). When asked about whether he

would have presented evidence challenging Mr. Warniment's findings as to the matches that connected the two crime scenes, trial counsel testified:

Q: If you had information that would challenge the scientific validity or scientific basis for Warniment's findings, is that something you would have presented to the jury?

A: You mean if I had -- if I had an expert that would say that what FDLE does is all wrong, is that what you're saying?

Q: That there's no scientific basis for Warniment's findings?

A: I think you would be laughed out of the courtroom.

Q: You are familiar with certain scientific techniques that were once used and are no longer used because they've been discredited, right?

A: Yes. I -- I remember that the Earth was once flat, yes.

Q: Okay.

A: But we're talking about toolmarks on shell casings and bullets, right?

Q: Uh-huh.

A: That's pretty well-established science and every single juror watches all those shows that I can't stand.

Q: Okay. But you're allowed to voir dire --

A: And for me -- me to say that that's a bad science --

Q: You're allowed to voir dire on that, right? Aren't you allowed to voir dire on the fact that this isn't CSI, this isn't Law and Order, things don't work that way? Aren't you allowed to voir dire on that?

A: Sure.

Q: Did you voir dire on that?

A: Probably not because with respect to the toolmarks, that is exactly how they work.

Q: Are you familiar with a report put out -- I think there was one in 2008 and one in 2009 -- by the National Academy of Sciences regarding firearms and toolmarks identification?

A: What year were they put out?

Q: 2008 and 2009, so prior to the trial in this case.

A: No.

Q: You're not familiar with that?

A: No.

Q: Okay. Would it surprise you to learn that they call into question the validity of firearms and toolmark science and that it's not a science actually?

A: I would be very curious to read it and see who pays them and what kind of expert witnesses they are because I had a trial four weeks ago down in Putnam County and they had put an expert on.

Q: Well, it's available to the public.

A: They keep -- they keep using --

Q: And it's paid for by the government, so --

A: They keep using that kind of evidence.

(PCR. 3703-05). Incredibly, Mr. Fletcher seems to believe: (1) that the FDLE could never be wrong; (2) that challenging their practices would be unheard of and would get an attorney “laughed out of the courtroom”; (3) that testimony concerning toolmarks was “well-established science” because “that is exactly how [toolmarks] work”; (4) that jurors agree with this assertion because they watch “those shows”; and (5) that the findings by the National Academy of Sciences (“NAS”) with regard to firearms and toolmarks identification is suspect because courts continue to allow this type of testimony. *Id.*

Unfortunately, these beliefs are not based upon any independent investigation into the facts of the case, which counsel acknowledged he had a duty to conduct. Additionally, despite counsel’s testimony that defense counsel should be knowledgeable about forensic issues involved in the case, he clearly was not. The NAS, which is comprised of the country’s leading scientific researchers, published a report that was available to the public prior to Mr. Sheppard’s trial, challenging the “scientific” underpinnings of firearms toolmarks identifications and therefore, the validity and reliability of such testimony. Had counsel actually been knowledgeable about forensic matters in Mr. Sheppard’s case, he would have been aware of this information that could have been utilized at trial to challenge Mr. Warniment’s testimony connecting the two crime scenes.

In contrast, Ms. Schlax testified that Mr. Warniment was an important witness in the case because he tied the two crime scenes together. (PCR. 3641-42). She recalled that there were no eyewitnesses to the shooting of Patrick Stafford. (PCR. 3642). And testified that she would “certainly do everything that was possible” to challenge the assertions made by Mr. Warniment connecting the two crime scenes. *Id.* She also recalled that the other witness at trial whose testimony connected the two crime scenes was Michael Roberts, based upon statements allegedly told to him by Mr. Sheppard while they were in jail together. *Id.* When asked whether she agreed that challenging the ballistics evidence or Mr. Warniment’s testimony would have also had the effect of challenging the testimony of Michael Roberts, she stated: “Sure. I mean, any time any State witness testifies you're going to attempt to cross examine them such that it's favorable to your case.” *Id.*

Counsel agreed that defense counsel has a duty to conduct an independent investigation into the facts of the case. (PCR. 3643). She also agreed that defense counsel should be knowledgeable about any forensic issues involved in the case. *Id.* Counsel acknowledged that she was not a ballistics expert herself. *Id.* Counsel was asked about whether she would have presented information from an expert to challenge Mr. Warniment’s assertions and, unlike Mr. Fletcher, testified as follows:

Q: If you had information that challenged Warniment's finding as to the matches that connected the crime scenes, is that something you would have presented to the jury?

A: Absolutely.

Q: And if you had information that could challenge the scientific validity or the scientific basis for his findings, for Warniment's findings, is that also something you would have presented to the jury?

A: Yes.

(PCR. 3643-44).

Trial counsel both conceded that they were not experts in ballistics. Yet, it never occurred to either one of them to consult with an expert in this area. This was crucial evidence at trial, as it linked the two murders together. Critically, Mr. Warniment of the FDLE testified at trial that the bullets recovered at autopsy from Mr. Stafford and the bullets recovered at autopsy from Mr. Wimberly were a match and were fired from the same firearm. (T. 820-21). The only challenge defense counsel mounted to this weighty testimony was to point out that Mr. Warniment was not there and does not know who pulled the trigger. This was unreasonable and insufficient, and it prejudiced Mr. Sheppard. At the very least, counsel should have consulted with a ballistics expert to prepare to cross-examine Mr. Warniment and mount a challenge to this critical evidence by the State.

While Mr. Warniment could have given an opinion that there is consistency in the characteristics observed between shell casings and bullets found at one scene and shell casings and bullets found at the other scene, he could not have testified to

a specific source attribution, i.e., that the shell casings and bullets all came from the same firearm. At trial, however, Mr. Warniment did just that, testifying that the bullets recovered from Mr. Stafford at autopsy and the bullets recovered from Mr. Wimberly at autopsy were a ballistics match and were fired from the same firearm. (T. 820-21). In fact, jurors were repeatedly told that the bullets recovered from the two scenes were a match and were fired from the same weapon. (T. 807-31).

Jurors were never told that a “match” was not the same thing as an “identification” or specific source attribution. Instead, jurors were left to assume that the terms were synonymous with each other. As a result, jurors were given the impression that the firearm used to shoot Mr. Stafford, was the same firearm used to shoot Mr. Wimberly, and therefore, the same person who shot Mr. Stafford, also shot Mr. Wimberly.

This overstated testimony by Mr. Warniment was the only evidence at trial, other than the now recanted testimony of Michael Roberts that linked the two crime scenes together. There were no eyewitnesses or other physical evidence as to the murder of Mr. Stafford. Thus, it was crucial to challenge this evidence. Had trial counsel consulted with an expert in the area of forensic science metallurgy, such as Mr. Tobin, he would have been able to present this compelling evidence to the jury, calling into question the “scientific” basis for Mr. Warniment’s conclusions and

raising a reasonable doubt as to whether the same firearm, and therefore, the same shooter, was actually involved in both shootings.

Ms. Schlax admitted that she would have presented this testimony had it been available to her. (PCR. 3643-44). Mr. Tobin testified that he would have been available to testify to this same information at the time of Mr. Sheppard's trial. Counsel's failure to consult with such an expert and present such testimony was unreasonable and prejudiced Mr. Sheppard because the jury was never able to hear about the scientific unreliability of this testimony.

II. THE CIRCUIT COURT ERRED IN FINDING THAT NEWLY DISCOVERED EVIDENCE REGARDING MICHAEL ROBERTS' RECATANTION WAS INADMISSIBLE HEARSAY AND THEREFORE, MR. SHEPPARD WAS NOT ENTITLED TO RELIEF ON THIS CLAIM.

To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 591 So.2d 911, 916 (Fla. 1991); *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998). Newly discovered evidence satisfies the second prong of this test if it weakens the case against the defendant and gives rise to a reasonable doubt as to his culpability. *Jones v. State*, 678 So.2d 309, 315 (Fla.

1996). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones v. State*, 591 So.2d at 915.

In applying this two-prong test, the court must “consider all newly discovered evidence which would be admissible,” and must “evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.” *Jones*, 591 So.2d at 916. This determination necessarily includes consideration of whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence; whether this evidence is cumulative to other evidence in the case; whether this evidence is material and relevant; as well as whether there are any inconsistencies in this newly discovered evidence. *Jones*, 709 So.2d at 521.

When the circuit court rules on a newly discovered evidence claim after an evidentiary hearing, this Court “reviews the trial court’s findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence.” *Marek v. State*, 14 So.3d 985, 990 (Fla. 2009), *citing Green v. State*, 975 So.2d 1090, 1100 (Fla. 2008). In addition, this Court reviews the trial court’s application of the law to the facts *de novo*. *Id.*

In Mr. Sheppard’s case, the circuit court held with respect to this claim that since Mr. Roberts was deceased at the time of the evidentiary hearing and therefore, could not testify as to his recantation, his statements were inadmissible hearsay. The

court further held that testimony by Mr. Shannon and Ms. Pafford corroborating Mr. Roberts' recantation, was also inadmissible hearsay, and as a result, Mr. Sheppard was not entitled to relief on this claim. (PCR. 2789). Due to the court's finding as to the inadmissibility of these statements, the court did not conduct a newly discovered evidence analysis of the evidence.

As argued at the evidentiary hearing, this testimony regarding statements by Michael Roberts is admissible as a hearsay exception under Section 90.804(2)(c), Florida Statutes. (PCR. 3800-01). This rule provides that statements against interest are not excluded, provided that the declarant is unavailable as a witness. At the evidentiary hearing, Mr. Sheppard provided the court proof of Mr. Roberts' unavailability in the form of his death certificate. (PCR. 2448-49). This rule also provides:

A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

Section 90.804(2)(c) Fla. Stat. (2019).³⁸

³⁸ The second sentence in this quote does not apply to this case because although Mr. Roberts was exposing himself to criminal liability, i.e., perjury, he is not exculpating Mr. Sheppard of the murders. Mr. Roberts' recantation is that Mr. Sheppard did not

“The reliability of these statements flows from the fact that they are against the interest of the declarant at the time they are made. A person does not make statements which will subject him or her to civil or criminal sanctions unless they are true.” *Brooks v. State*, 787 So.2d 765, 774 (Fla. 2001) (quoting Charles W. Ehrhardt, *Florida Evidence* §804.4 (2000 ed.)).

In order to admit a declaration against interest, the trial judge must find that a person in the declarant’s position would not have made the statement unless he or she believed it to be true. The statement not only must be against the declarant’s interest when made, but also the declarant must be aware of that fact. *Dinter v. Brewer*, 420 So. 2d 932, 935 n.4 (Fla. 3d DCA 1982). In this case, Mr. Roberts was aware that he could be charged with perjury due to his recantation. (PCR. 335). Indeed, perjury in a capital case is a second-degree felony, punishable by up to fifteen years in prison. *See* §837.02(2) Fla. Stat. (2019).

confess to him. Mr. Roberts was not present during the murders and would not have any personal knowledge as to who committed them. Additionally, this is different than a situation where a declarant would be taking responsibility for a crime while simultaneously exculpating the accused of that same crime. Mr. Roberts is not taking responsibility for these murders, nor is he exculpating Mr. Sheppard of these murders. He is simply admitting that Mr. Sheppard did not confess to these murders to him. Furthermore, certified court documents corroborate Mr. Roberts’ statements that he received reduced sentences on two of his cases and a dismissal on the other case immediately following his testimony at Mr. Sheppard’s trial.

Furthermore, this evidence as presented in the form of testimony by Mr. Shannon and Ms. Pafford, as well as a sworn affidavit establishes the claim of newly discovered evidence under *Jones*. First, the evidence – Mr. Roberts’ recantation – was not known by the trial court, Mr. Sheppard, or counsel at the time of trial. Mr. Roberts made this recantation during a visit with Mr. Shannon in 2016, well after Mr. Sheppard’s trial. Second, this newly discovered evidence is of such nature that it weakens the case against Mr. Sheppard and gives rise to a reasonable doubt as to his culpability.

Mr. Roberts has admitted that his trial testimony was a lie. Mr. Sheppard never confessed to two murders to him, nor did he ever ask Mr. Roberts to kill a witness. There is no question that this testimony at trial was damaging to the defense. Mr. Roberts tied everything together, and thereby tied Mr. Sheppard to all the crimes he was charged with. Mr. Roberts gave a motive for the Stafford murder; he placed Mr. Sheppard at the Stafford crime scene; he gave a motive for the Wimberly murder; and placed Mr. Sheppard in the passenger seat with a gun during the Wimberly murder. He further gave credibility to the questionable eyewitness identification by Ms. Barrett. Without Mr. Roberts’ testimony the State would not have been able to place Mr. Sheppard at the Stafford crime scene. Although there was testimony of a purported ballistics “match” there were no eyewitnesses, no fingerprints, no DNA, and no motive tying Mr. Sheppard to this crime. As to the Wimberly murder, while

the police could only speculate as to a motive, Mr. Roberts solidified that motive when he testified that Mr. Sheppard confessed to shooting Mr. Wimberly.

Furthermore, Mr. Roberts' testimony gave credence not only to Ms. Barrett's identification of Mr. Sheppard, but to her fears that he was going to kill her. Without Mr. Roberts' testimony, the State was left with only overstated ballistics evidence tying the weapon to both crime scenes. But the same gun does not equal the same shooter. Without Mr. Roberts' testimony, the State could not have proven either premeditated or felony murder as to the Stafford murder, since Roberts was the only person that testified the murder of Mr. Stafford was also an attempted carjacking. Additionally, since Willie Carter's testimony placed Mr. Sheppard in the *driver's* seat of the car from the convenience store, Mr. Roberts' testimony was the only evidence the State had placing Mr. Sheppard in the *passenger* seat. A theory that the State argued in its closing:

[W]e know [Sheppard] drove the car because he said it.

...

I put it to you, ladies and gentlemen, they drove off. They switched positions. [Sheppard] got in the passenger seat, and he told Rashard Evans to pull up next to Monquell Wimberly so he could gun him down in cold blood. The physical evidence tells you that. The testimonial evidence tells you that. And your God-given common sense tells you that.

(T. 1027-28).

Lastly, Mr. Roberts' testimony gave credence to Ms. Barrett's highly questionable eyewitness testimony. The State was free to argue that, of course, Ms. Barrett's testimony is credible and true, because otherwise, why would Mr. Sheppard ask Mr. Roberts to kill her. In fact, in its closing, the State made that very argument: "[L]et's talk about Ms. Barrett's identifications because even this defendant knows her identification is damning. That's why he wanted her dead." (T. 1006). This left the jury to believe that Mr. Sheppard had already killed two people and was attempting to have another killed because she saw what happened. Very telling is the fact that Mr. Sheppard was never charged with conspiracy to commit murder for his role in this alleged plot to have Ms. Barret killed. The State was only able to get this highly prejudicial information before the jury because of Mr. Roberts' testimony.

In denying relief, the circuit court made an improper evidentiary determination and did not conduct a newly discovered evidence analysis of the evidence. Had the court done a proper analysis, Mr. Sheppard should have been granted a new trial, as this evidence weakens the case against him and gives rise to a reasonable doubt as to his culpability.

III. THE CIRCUIT COURT ERRED IN FINDING THAT *BRADY/GIGLIO* VIOLATIONS DID NOT OCCUR AT MR. SHEPPARD’S TRIAL CONCERNING MICHAEL ROBERTS AND WILLIE CARTER

To establish a violation under *Brady v. Maryland*, 373 U.S. 83 (1963), a defendant must demonstrate that (1) favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced.” *Mungin v. State*, 79 So.3d 726, 734 (Fla. 2011). The materiality prong is met where the defendant demonstrates a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, with a reasonable probability being one that is sufficient to undermine confidence in the outcome. *Id.*

To establish a violation under *Giglio v. United States*, 405 U.S. 150 (1972), the defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the evidence was material. *See Tompkins v. State*, 994 So.2d 1072, 1091 (Fla. 2008). “If there is a reasonable possibility that the false testimony may have affected the judgment of the jury, a new trial is required.” *Craig v. State*, 685 So.2d 1224, 1226 (Fla. 1996).

Claims under both *Brady* and *Giglio* present mixed questions of law and fact. *See Sochor*, 883 So.2d at 785. This Court defers to the lower court's findings of fact if they are supported by competent, substantial evidence. *See Hurst v. State*, 18

So.3d 975, 988 (Fla. 2009); *see also Taylor v. State*, 62 So.3d 1101, 1114 (Fla. 2011) (noting that “[q]uestions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence”). This Court reviews the trial court's application of the law to the facts de novo. *Hurst*, 18 So.3d at 988.

A. Michael Roberts

The circuit court found that Mr. Sheppard's evidence supporting this claim was inadmissible hearsay and therefore, did not establish either a *Brady* or *Giglio* violation by the State regarding Mr. Roberts' deal to testify against Mr. Sheppard at trial. (PCR. 2791).

Mr. Sheppard offered evidence in support of this *Brady/Giglio* claim in the form of certified court documents as well as an affidavit and statements made by Mr. Roberts regarding his recantation and the circumstances surrounding his deal with the State. (PCR. 2450-66, 2467-78, 2312-17, 2318-17; 3797-833).

The testimony by Mr. Shannon and Ms. Pafford concerning Mr. Roberts' recantation, as well as the signed and notarized affidavit by Mr. Roberts are admissible as a hearsay exception under Section 90.804(2)(c), Fla. Stat. This evidence is further corroborated by certified court documents showing the reduced sentences Mr. Roberts received in two cases and the outright dismissal of his Duval

County felony case immediately following his testimony at Mr. Sheppard's trial.³⁹ These certified court documents are admissible under §90.803(8) and §90.902 Fla. Stat. (2019).

This evidence presented by Mr. Sheppard at the evidentiary hearing establishes a *Brady/Giglio* violation by the State involving Mr. Roberts. At the time of his testimony at Mr. Sheppard's trial, Michael Roberts had cases pending in three separate counties in Florida – Washington, Nassau, and Duval. (PCR. 2450-66, 2467-78, 2524-29). When asked about these pending charges, he was emphatic that he was receiving no deal from the State in exchange for his testimony. (T. 739-42).

However, following Mr. Sheppard's trial, all three of these matters were resolved favorable for Mr. Roberts. In his Nassau County case, Mr. Roberts was sentenced to 8 years for a second-degree felony – burglary of an occupied dwelling. (PCR. 2467-78). Subsequently, the warrant for his felony burglary case in Duval County, for which the State had DNA evidence against Mr. Roberts, was withdrawn by the State Attorney's Office and no charges were ever filed. (PCR. 2524-29). Finally, in Washington County, Mr. Roberts received a 7-year concurrent sentence

³⁹ The State Attorney's Office was quite pleased with Mr. Roberts' performance. According to ASA Caliel, "Roberts did great. Probably the best inmate witness I ever put on." (PCR. 1760).

for his violation of probation, after originally having been sentenced to 15 years of probation. (PCR. 2450-66).

Trial counsel agreed that Michael Roberts was an important witness for the State and gave damaging testimony against Mr. Sheppard. (PCR. 3707). In addition to Mr. Warniment's testimony, he tied the two shootings together. *Id.* Mr. Roberts claimed that Mr. Sheppard confessed to him while they were in jail together. *Id.* He also claimed that Mr. Sheppard tried to have Ms. Barrett killed. *Id.* Trial counsel testified that he would have presented evidence to the jury that proved Mr. Sheppard never told Michael Roberts anything about his case, stating: "Sure. I'd put that in." (PCR. 3707-08). Counsel also testified that he would have presented to the jury evidence that Mr. Roberts was given a deal in exchange for his testimony against Mr. Sheppard. (PCR. 3709). However, defense counsel was not in possession of such evidence at the time of trial. *Id.*

This critical impeachment evidence for Mr. Roberts was concealed by the State, as trial counsel testified at the evidentiary hearing that he did not have this information prior to Mr. Sheppard's trial. (PCR. 3709-10). As a result, jurors were led to believe that Mr. Roberts had not received any deals in exchange for his testimony against Mr. Sheppard. This evidence would have significantly impeached his credibility. Instead, his testimony served to bolster the testimony of Ms. Barrett. Michael Roberts' testimony about Mr. Sheppard's supposed confession to him,

confirmed Ms. Barrett's identification of Mr. Sheppard as the shooter. Had his credibility been called into question, the already questionable testimony of Ms. Barrett would have been further weakened. There is no doubt that this evidence is material and the result of the proceedings would have been different had the jury been aware of this information.

B. Willie Carter

The circuit court found that Mr. Sheppard presented no evidence at the evidentiary hearing to rebut the prosecutor's testimony or Mr. Carter's trial testimony and show there was a deal with the State to get Mr. Carter to testify against Mr. Sheppard at trial, and therefore, Mr. Sheppard failed to show either a *Brady* or *Giglio* violation. (PCR. 2792).

Contrary to the postconviction court's finding, Mr. Sheppard did, in fact, present evidence to support his claim of a *Brady/Giglio* violation involving Mr. Carter in the form of certified court documents, which are self-authenticating. (PCR. 2479-86, 2487-511). These records show the reduced sentence received by Mr. Carter immediately following his testimony at Mr. Sheppard's trial. This is certainly impeachment evidence that would be admitted as such at trial. *See* §90.803(8) and §90.902 Fla. Stat. (2019).

This evidence presented by Mr. Sheppard at the evidentiary hearing establishes a *Brady/Giglio* violation by the State involving Mr. Carter. Much like

Michael Roberts, Willie Carter testified that he was receiving no deal whatsoever in exchange for his testimony against Mr. Sheppard. (T. 490-91). At the time of trial, he was already serving a prison sentence for a case which had been prosecuted by the same state attorney's office that was prosecuting Mr. Sheppard. (T. 486). Mr. Carter was a seven-time convicted felon who was facing 30 years for his charges, but was only sentenced to 12 years in prison. *Id.* However, on February 27, 2012, just after his testimony against Mr. Sheppard, the state attorney filed a substantial assistance motion on his behalf. (PCR. 2479-2486). During the hearing on this motion, the state attorney noted that Mr. Carter had just testified in a capital case for Mr. Caliel. (PCR. 2498). Thereafter, the State's motion was granted and Mr. Carter's sentence was modified to 6 years in Florida State Prison. (PCR. 2479-86). He was to receive all credit for time already served, as well as gain time as determined by Florida State Prison. *Id.* His sentence was effectively cut in half.

Trial counsel testified that he would have presented to the jury evidence that Mr. Carter was given a reduced sentence in exchange for his testimony against Mr. Sheppard. (PCR. 3709). However, he was not in possession of this information at the time of trial. (PCR. 3710).

This critical impeachment evidence for Mr. Carter was concealed by the State, as trial counsel testified at the evidentiary hearing that he did not have this information prior to Mr. Sheppard's trial. (PCR. 3709-10). As a result, jurors were

led to believe that Mr. Carter had not received any deals in exchange for his testimony against Mr. Sheppard. This evidence would have significantly impeached his credibility. Instead, his testimony only served to bolster the testimony of Ms. Barrett. Willie Carter's testimony about Mr. Sheppard getting into Dorsette James' car, confirmed Ms. Barrett's identification of that car as the one involved in the shooting. Had his credibility been called into question, the already questionable testimony of Ms. Barrett would have been further weakened. There is no doubt that this evidence is material and the result of the proceedings would have been different had the jury been aware of this information.

IV. THE CIRCUIT COURT ERRED IN FINDING THAT MR. SHEPPARD WAIVED THE CLAIM OF NEWLY DISCOVERED EVIDENCE BY KHALILAH COOK MEJORS AND THAT MR. SHEPPARD WAS OTHERWISE NOT ENTITLED TO RELIEF AS TO THIS CLAIM.

In order to obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: (1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence; and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 591 So.2d 911, 916 (Fla. 1991); *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998).

When the circuit court rules on a newly discovered evidence claim after an evidentiary hearing, this Court “reviews the trial court’s findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence.” *Marek v. State*, 14 So.3d 985, 990 (Fla. 2009), *citing Green v. State*, 975 So.2d 1090, 1100 (Fla. 2008). In addition, this Court reviews the trial court’s application of the law to the facts *de novo*. *Id.*

In this case, the circuit court held that Mr. Sheppard had waived his claim of newly discovered evidence of Khalilah Cook Mejors, stating: “Although Cook Mejors was listed as a witness for the evidentiary hearing, defense counsel was unable to locate her. Cook Mejors did not testify, and Defendant did not present evidence to support this claim.” (PCR. 2796). This holding does not accurately reflect what occurred at the evidentiary hearing with regard to this witness and these findings are not based upon competent substantial evidence.

A. The circuit court erred in failing to grant a continuance, and thus finding that Mr. Sheppard waived this claim.

On March 22, 2019, and well in advance of the evidentiary hearing, Mr. Sheppard filed a Petition for Certificate Declaring Out-of-State Witness Khalilah Cook Material to the Defense’s Case. (PCR. 2054-56; 2064-66). On March 25, 2019, the circuit court signed a Certificate to the Criminal Court for Shelby County, Tennessee, of Materiality, Necessity, and Need for a Witness within its Jurisdiction,

for the Purpose of a Criminal Proceeding in the Circuit Court for Duval County, Florida. (PCR. 2067-68). Mr. Sheppard promptly filed this certificate, along with the appropriate pleadings for an out-of-state subpoena through local counsel in Shelby County, Tennessee. Ms. Cook Mejors was duly served to appear before Judge Mark Ward on May 24, 2019 regarding the petition for out-of-state witness. (PCR. 2512-14). Ms. Cook Mejors failed to appear, the court found that she was properly served, and issued a warrant for her arrest. *Id.* At the time of the hearing, this warrant for Ms. Mejors was still outstanding. *Id.*

Mr. Sheppard provided this information to the circuit court, proffered an affidavit signed by Ms. Mejors as to what she would testify to in court. (PCR. 1956-58; 2512-14). Mr. Sheppard also emphasized her materiality to this claim and requested a continuance. (PCR. 3897-900). The court denied Mr. Sheppard's request for a continuance and concluded the evidentiary hearing. (PCR. 3900).

The court noted: "You certainly have done all that you can to get her here." (PCR. 3897). Indeed Mr. Sheppard had done everything within his legal means to procure Ms. Mejors' testimony at the evidentiary hearing in support of this newly discovered evidence claim. However, at that point it was incumbent upon the circuit court to have its order enforced. The court had already signed a certificate acknowledging that this witness was material and necessary to Mr. Sheppard's claim. When Ms. Cook Mejors failed to abide by the Tennessee court's order to

appear after being properly served, that judge issued a warrant for her arrest. Mr. Sheppard was within his rights to rely upon the courts ability to enforce its orders.

In asking for a continuance, Mr. Sheppard was asserting his rights to have this witness called in support of his claims. At no time did Mr. Sheppard affirmatively waive this claim.

B. The circuit court erred in finding that Mr. Sheppard failed to establish a claim of newly discovered evidence.

The circuit court also found that had Mr. Sheppard been able to present the testimony of Ms. Cook Mejors, he would otherwise not be entitled to relief. (PCR. 3796). The circuit court conceded that Mr. Sheppard “clear[ed] the first prong of the newly discovered evidence analysis.” (PCR. 2797). However, the court found that Mr. Sheppard failed to meet the second prong, that this evidence would probably produce an acquittal on retrial, because “Mejors’ testimony about the car and the shooting was cumulative to testimony from Barrett, Sherrod, and Carter.” (PCR. 2799). This finding is not based upon competent substantial evidence.

Khalilah Cook Mejors was called as a witness for the State at Mr. Sheppard’s trial. She lived at the Hollybrook Apartments where the shooting occurred. She testified that she was on the balcony in front of her third-floor apartment and smoking a cigar when she saw the shooting. (T. 448-49).

Her testimony at trial included a detailed description of the car that approached the individual on the bicycle: “It was, like, a dark gray in color, either Ford Crown Vic or Mercury – the police type car.” (T. 450-51); “..a charcoal kind of gray” (T. 451); and had “a Florida State tag” (T. 456). She then identified the car shown in State’s Exhibit No. 5 as the vehicle that she saw fire the shots at the individual on the bike. (T. 458). Ms. Cook Mejors also gave a detailed description, via leading questions from the prosecutor, as to the gun that she saw: “it was some kind of black maybe GLOCK type of gun”; “a semiautomatic pistol style”; “similar to the type police officers carry”; “black in color”. (T. 452-53).

Postconviction counsel’s ongoing investigation revealed that the “cigar” that she had been smoking on her balcony the morning of the shooting actually contained marijuana, rather than tobacco. Ms. Cook Mejors did not tell law enforcement about this before because she did not want to incriminate herself. She was already scared enough due to witnessing the shooting, and did not want to get into trouble with police. In fact, when she called 911 she asked them not to send to police to her door for that very reason. (PCR. 1956-58).

This information could not have been ascertained at the time of trial because Ms. Cook was afraid to tell anyone at that time. Therefore, defense counsel could not have known this information until now, years after the shooting occurred. Furthermore, defense counsel could have used this evidence to impeach Ms. Cook

Mejor's description as to the car and the gun, as well as her identification of the car shown in State's Exhibit No. 5. In deciding the effect of this newly discovered evidence, the court's cumulative analysis must not only include the evidence that Ms. Cook was smoking marijuana that morning, but also the evidence as detailed below in Argument V that she was not wearing her corrective lenses. When taken together, those two facts allow for substantial impeachment of her testimony.

Furthermore, in conjunction with this newly discovered information, the court must consider all of the admissible evidence that could be introduced at a new trial. When considered in this light – the newly discovered evidence of Ms. Cook Mejors; the *Brady* evidence concerning Ms. Cook Mejor's prescription eyeglasses; the expert testimony to impeach eyewitness identifications; the crime scene reconstructionist to show that Dtayla Barrett could not have seen what she claimed to have seen; the witnesses not called at trial who describe a different car; a ballistics expert to dispute the scientific validity of FDLE's findings; the recanted testimony of Michael Roberts; the *Brady* information concerning the deal that Michael Roberts and Willie Carter received in exchange for their testimony – it is clear that the case has been so weakened as to give rise to a reasonable doubt as to Mr. Sheppard's culpability.

To the extent that trial counsel was or should have been aware of this newly discovered evidence, counsel was ineffective in failing to discover it and utilize it. It is well established that counsel has a duty to bring to bear such skill and knowledge

as will render the trial a reliable adversarial testing process. *Strickland v. Washington*, 466 U.S. 668 (1984). Where counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See *Kimmelman v. Morrison*, 477 U.S. 365, 384-88 (1986); *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991).

V. THE CIRCUIT COURT ERRED IN FINDING THAT MR. SHEPPARD WAIVED THE *BRADY/GIGLIO* CLAIM REGARDING KHALILAH COOK MEJORS AND THAT MR. SHEPPARD WAS OTHERWISE NOT ENTITLED TO RELIEF AS TO THIS CLAIM.

In order to establish a violation under *Brady v. Maryland*, 373 U.S. 83 (1963), a defendant must demonstrate that (1) favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced.” *Mungin v. State*, 79 So.3d 726, 734 (Fla. 2011). To establish a violation under *Giglio v. United States*, 405 U.S. 150 (1972), the defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the evidence was material. See *Tompkins v. State*, 994 So.2d 1072, 1091 (Fla. 2008).

Claims under both *Brady* and *Giglio* present mixed questions of law and fact. See *Sochor*, 883 So.2d at 785. This Court defers to the lower court's findings of fact if they are supported by competent, substantial evidence. See *Hurst v. State*, 18

So.3d 975, 988 (Fla. 2009). This Court reviews the trial court's application of the law to the facts de novo. *Hurst*, 18 So.3d at 988.

In this case, the circuit court held that Mr. Sheppard had waived his *Brady/Giglio* claim regarding Khalilah Cook Mejors, stating that Ms. Cook Mejors did not testify at the evidentiary hearing and Mr. Sheppard did not present any evidence to support this claim. (PCR. 2799). As argued *supra*, this holding does not accurately reflect what occurred at the evidentiary hearing with regard to this witness and these findings are not based upon competent substantial evidence.

A. The circuit court erred in failing to grant a continuance, and thus finding that Mr. Sheppard waived this claim.

As argued above in Mr. Sheppard's claim for newly discovered evidence involving Ms. Cook Mejors, the court erred in finding that this claim had been waived. On March 22, 2019, Mr. Sheppard filed a Petition for Certificate Declaring Out-of-State Witness Khalilah Cook Material to the Defense's Case. (PCR. 2054-56; 2064-66). On March 25, 2019, the circuit court signed a Certificate to the Criminal Court for Shelby County, Tennessee, of Materiality, Necessity, and Need for a Witness within its Jurisdiction, for the Purpose of a Criminal Proceeding in the Circuit Court for Duval County, Florida. (PCR. 2067-68). Mr. Sheppard promptly filed this certificate, along with the appropriate pleadings for an out-of-state subpoena through local counsel in Shelby County, Tennessee. Ms. Cook Mejors was

duly served to appear before Judge Mark Ward on May 24, 2019 regarding the petition for out-of-state witness. (PCR. 2512-14). Ms. Cook Mejors failed to appear, the court found that she was properly served, and issued a warrant for her arrest. *Id.* At the time of the hearing, this warrant for Ms. Mejors was still outstanding. *Id.*

Mr. Sheppard provided this information to the circuit court, proffered an affidavit signed by Ms. Mejors as to what she would testify to in court. (PCR. 1956-58; 2512-14). Mr. Sheppard also emphasized her materiality to this claim and requested a continuance. (PCR. 3897-900). The court denied Mr. Sheppard's request for a continuance and concluded the evidentiary hearing. (PCR. 3900).

The court noted: "You certainly have done all that you can to get her here." (PCR. 3897). Indeed Mr. Sheppard had done everything within his legal means to procure Ms. Mejors' testimony at the evidentiary hearing in support of this *Brady/Giglio* claim. However, at that point it was incumbent upon the circuit court to have its order enforced. The court had already signed a certificate acknowledging that this witness was material and necessary to Mr. Sheppard's claim. When Ms. Cook Mejors failed to abide by the Tennessee court's order to appear after being properly served, that judge issued a warrant for her arrest. Mr. Sheppard was within his rights to rely upon the courts ability to enforce its orders.

In asking for a continuance, Mr. Sheppard was asserting his rights to have this witness called in support of his claims. At no time did Mr. Sheppard affirmatively waive this claim.

B. The circuit court erred in finding that Mr. Sheppard failed to establish a *Brady/Giglio* violation.

The court further stated that even if Ms. Cook Mejors had testified, Mr. Sheppard would still not be entitled to relief because her testimony was cumulative to testimony from Barrett, Sherrod, and Carter, and there is not a reasonable probability that the result of the proceedings would have been different. (PCR. 2799-2800). This finding by the court is not based upon competent substantial evidence. Ms. Cook Mejors was a witness to the shooting at the Hollybook Apartments and testified at Mr. Sheppard's trial. Her testimony included a detailed description of the car, the gun, and the shooting. (T. 447-61). The vantage point for what she witnessed was the balcony of her third-floor apartment. (T. 448-49).

Postconviction counsel's ongoing investigation revealed that Ms. Cook Mejor's was not wearing her corrective lenses when she witnessed the shooting. In fact, she has been wearing glasses since 1994, is diagnosed as nearsighted, and has a restriction for corrective lenses on her driver's license. (PCR. 1956-58).

When she was questioned by detectives just days after the shooting, she told them that she was not wearing glasses that morning when she witnessed the shooting.

She remembers it coming up when she was describing the arm that she saw and when detectives asked her whether the arm had any tattoos. It was at that time that she let them know that she was not wearing her glasses. Nobody ever asked me about it again.

Indeed this information is not contained in any of the police reports that were written during the investigation into this case which have been handed over to the defense. She was only asked a very specific and limited question at trial by the State as to whether there were any trees blocking her vantage point, to which she replied “no”. (T. 455). Witnesses are typically instructed to only answer the questions that they are asked. It is reasonable to conclude that this is the reason she did not volunteer any additional information on the witness stand.

Her testimony at trial included a detailed description of the car that approached the individual on the bicycle: “It was, like, a dark gray in color, either Ford Crown Vic or Mercury – the police type car.” (T. 450-51); “..a charcoal kind of gray” (T. 451); and had “a Florida State tag” (T. 456). She then identified the car in State’s Exhibit No. 5 as the vehicle that she saw fire the shots at the individual on the bike. (T. 458). Ms. Cook Mejors also gave a detailed description, via leading questions from the prosecutor, as to the gun that she saw: “it was some kind of black maybe GLOCK type of gun”; “a semiautomatic pistol style”; “similar to the type police officers carry”; “black in color”. (T. 452-53).

Had trial counsel been privy to Ms. Cook Mejor's diagnosis as nearsighted, he could have used that information to impeach her detailed descriptions of both the vehicle and the gun, as well as her identification of the car in State's Exhibit No. 5. This information was possessed by the State and was concealed by way of leaving it out of any police reports. The State has a duty to investigate a case and turn over any such impeaching evidence to the defense. They cannot simply look the other way. Furthermore, knowledge by the police is imputed to the prosecutor. The prosecutor cannot then present misleading evidence by way of not asking certain questions of the witness so as to omit unfavorable facts known to them. Had the jury been aware of this information, the result of the proceedings would have been different. Confidence in the verdict has been undermined, and a new trial is warranted.

To the extent that trial counsel was or should have been aware of this information, counsel was ineffective in failing to discover it and utilize it. It is well established that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland v. Washington*, 466 U.S. 668 (1984). Where counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See *Kimmelman v. Morrison*, 477 U.S. 365, 384-88 (1986); *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991).

VI. THE CIRCUIT COURT ERRED IN FINDING THAT CUMULATIVE ERROR DID NOT DEPRIVE MR. SHEPPARD OF A FUNDAMENTALLY FAIR TRIAL

Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because “even though there was competent substantial evidence to support a verdict...and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.” *McDuffie v. State*, 970 So.2d 312, 328 (Fla. 2007).

A series of errors may accumulate a very real prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967); *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). These errors prejudiced Mr. Sheppard. This Court is required to analyze the prejudice not only individual, but also cumulatively. *See Parker v. State*, 89 So. 3d 844, 867-68 (Fla. 2011); *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996).

In this case, the circuit court found that “[b]ecause none of the alleged individual errors warrants relief, the contention of cumulative error in regard to Defendant’s guilt phase is without merit.” (PCR. 2795). As Mr. Sheppard has argued

throughout this initial brief, those findings as to individual errors are not based upon competent substantial evidence and should be reviewed by this Court.

Counsel failed to present a reasonably competent misidentification defense by failing to: (1) retain a misidentification expert; (2) present to the jury the different descriptions of the car involved in the shooting; (3) conduct an independent investigation and call witness to support his defense; and (4) challenge photo lineups that were not conducted pursuant to JSO standard operating procedures. Counsel failed to effectively cross-examine the State's key witness, Dtalya Barrett, as to her evolving descriptions of both the shooter and the vehicle; whether she had previously seen both at the apartments; as well as, her relationship to the victim. Trial counsel could have hired a crime scene reconstructionist to challenge Ms. Barret's identifications, yet he failed to do so. Counsel failed to lodge objections to improper and inflammatory testimony throughout Mr. Sheppard's trial, and failed to object to a video of Mr. Sheppard's interrogation being admitted into evidence and played before the jury. Finally, trial counsel failed to challenge the State's ballistics evidence, which linked effectively linked Mr. Sheppard to two murders. These instances of ineffectiveness by trial counsel, coupled with the *Brady/Giglio* violations that occurred at trial involving Michael Robert, Willie Carter, and Khalilah Cook Mejors, ensured that Mr. Sheppard would be found guilty.

As a result, Mr. Sheppard did not receive the fundamentally fair trial to which he was entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). Addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution. These errors cannot be harmless. Under Florida caselaw, the cumulative effect of these errors denied Mr. Sheppard his fundamental rights under the United States and Florida Constitutions. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Ray v. State*, 403 So. 2d 956 (Fla. 1981).

CONCLUSION AND RELIEF SOUGHT

Mr. Sheppard respectfully requests this Honorable Court reverse the postconviction court's denial of his 3.851 motion and remand for a new guilt phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished via electronic service to Michael Kennett, Assistant Attorney General, on this 23rd day of March, 2020.

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CERTIFICATE OF COMPLIANCE

This is to certify that the Initial Brief of Appellant was generated in Times New Roman 14-point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

/s/ Dawn B. Macready
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