

CASE No. SC19-1624

In the
Supreme Court of Florida

KIM JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

APPELLEE'S ANSWER BRIEF

ASHLEY MOODY
ATTORNEY GENERAL

JASON W. RODRIGUEZ
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 125285

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)
capapp@myfloridalegal.com
COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, Kim Jackson, the Defendant/Petitioner in the postconviction court, will be referred to as Jackson. Appellee, the State of Florida, will be referred to as the State. The single volume record on appeal below will be referred to as “R.” and then the page number, i.e., “(R. at 1.)” The 13-volume record in Jackson’s direct appeal will be referenced as follows: SC13-2090 Vol. [number] at [PDF page for that volume]. All record cites will be to the PDF page number of the document referenced. Jackson’s initial brief shall be referred to as “I.B.” followed by the page number. His Petition will be referenced as “Pet.” followed by the page number.

STATEMENT OF THE CASE AND FACTS

I. Statement of the Case

This appeal arises from the trial court’s denial of guilt-phase relief and grant of a resentencing under this Court’s now overruled precedent in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016),¹ *receded from in part by State v. Poole*, 297 So. 3d 487, 497 (Fla. 2020). This Court

¹ The State sought to belatedly cross-appeal the trial court’s erroneous ruling after *Poole* overruled *Hurst*, but this Court denied the State’s motion on February 16, 2021.

issued its direct appeal mandate affirming Jackson's judgment and capital sentence on January 4, 2016. (R. at 51.)

Jackson filed his initial 3.851 motion on May 5, 2017. (R. at 390–409.) The State responded on October 6, 2017. (R. at 752–95.) The postconviction court granted an evidentiary hearing on certain guilt-phase claims on January 25, 2018, while recognizing Jackson was entitled to a new penalty phase under *Hurst*. (R. at 812–15.) Jackson filed an amended motion on January 26, 2018, and amended his claim arguing counsel ineffectively investigated DNA evidence on September 14, 2018. (R. at 816–87, 1276–95, 1492, 1494.)

The court held an evidentiary hearing on March 13, 2018, April 26, 2018, and December 17–18, 2018. (R. at 1492.) The trial court granted penalty-phase relief under *Hurst* while denying relief on Jackson's guilt-phase claims. (R. at 1616–1712.) Jackson timely appealed. (R. at 1713.)

II. *Statement of the Facts*

A. Case Facts

Jackson had two sets of attorneys while represented by the Public Defender's Office. The first set (Greggory Messoro and Todd

Niemczyk) was appointed around June 2009. (R. at 2021–22.) Messoro was first chair and began investigating Jackson’s alibi defense in late 2010 or early 2011. (R. at 2029.) In November 2012, Jackson’s case was transferred to another attorney, Michael Bateh (first chair), who worked with Alphonso Perkins (second chair), and James Armstrong (third chair) on the case. (R. at 2177, 2182, 2189, 2252.)

On direct appeal, this Court found the following facts underlying Jackson’s conviction:

Debra Pearce was stabbed to death in her kitchen on or around October 17, 2004. The murder remained unsolved until 2008, when DNA from a hair found on Pearce’s body was matched to Kim Jackson and a fingerprint found in blood on the sink above Pearce’s body was also matched to Jackson.

The Murder

Pearce was last seen by her mother between midnight and 1:30 a.m. on October 15 to 16, 2004. Pearce was discovered late in the evening on October 18, or in the early morning hours of October 19, by a neighbor and friend of Pearce who purchased drugs from her and used them at the house. That evening, the friend walked past Pearce’s house and saw that the gate was open. Over the previous days, he had called her several times, but received no answer, and he had noticed that her van was not in her driveway. When he approached the house, he saw that the sliding glass door was open. He entered and

found Pearce's body. He returned to his house and called the police.

The medical examiner determined that the cause of Pearce's death was hypovolemic shock due to vascular hemorrhage as a result of stab wounds to the neck and shoulder—in layman's terms, Pearce bled to death as a result of a fatal stab wound to her neck that struck her jugular vein and a fatal stab wound to her chest/shoulder area that struck her subclavian artery and vein. The stab wound to the chest pierced through Pearce's bra, sliced her left breast, continued across into the right side of her chest, and pierced her scapula. The knife, which had been left in Pearce's chest, was only five inches long, but it had penetrated seven to eight inches into her body. The blow with the knife was forceful enough to pierce the scapula and break off a 3/4 inch area of bone, and the wound would have caused a significant amount of blood loss as well as an arterial blood spurt pattern.

The medical examiner also found several other injuries. Because the body was in the early stages of decomposition, the medical examiner could not determine whether certain injuries were lacerations or incisions. One such injury was a superficial wound to Pearce's forehead, and another was a wound to her left cheek. Additionally, there were two wounds to Pearce's chin—one where the blade entered, and the other where the blade exited. Pearce also had two cuts across her ear, a scrape or abrasion on the left side of her head that indicated she had been hit or her body was dragged, and five shallow cuts on the left side of her head. Her right eye was bruised from a forceful blow. Additionally, Pearce had two lacerations/incisions to her right forehead that were jagged, due to either a knife with a dull blade, or the blade of a knife being raggedly ripped across her skin.

The medical examiner could not be certain as to whether Pearce was conscious throughout the attack, but

stated that it was possible because she bled to death—she was not knocked unconscious, her spinal cord was not severed, and no major organs were involved. Additionally, Pearce’s right pinky finger had a deep cut that penetrated the tendons and was consistent with a defensive wound. Pearce also had a cut on the back of her left forearm that went from shallow to deep, which could have occurred while she attempted to ward off a blow. Further, the medical examiner testified that minor blunt-force injuries which were present—including those to her forehead, head, and ear—demonstrated that she struggled.

A crime scene reconstructionist was called to Pearce’s house on October 19, and he noted that Pearce, who was face-down on the kitchen floor below the sink, had been dead for some time. The reconstructionist retrieved a dark-colored hair from the back of Pearce’s right calf that appeared out of place. He observed the knife that had been left in Pearce’s chest and also found a second knife beneath her body. Additionally, the reconstructionist found significant blood spatter in the kitchen and determined that the spatter around the sink was consistent with either a weapon being swung back, or from the impact when the weapon was swung down. He also discovered a fingerprint in blood on the lip of the sink.

The reconstructionist utilized luminal testing on red stains detected on the rug outside of the kitchen, which revealed an impression left by a person wearing a sock, and another impression left by a person wearing a shoe. He testified that it appeared as though the person who left the tread dragged his or her feet, and the tread appeared to lead toward the master bathroom. He could not determine whether the impressions had been left by more than one person and stated that it was possible more than one person had been at the scene.

The investigation revealed that around the time of the murder, an eyewitness saw three individuals near the back

of Pearce's house. The lead detective spoke with two of these individuals, who admitted that they took several items from the house, including a television, a VCR, and a DVD player. However, no forensic evidence linked these individuals to the home or Pearce.

Fingerprints that were found at Pearce's house were submitted to the Florida Department of Law Enforcement (FDLE) latent print unit in Jacksonville. The analyst there determined that none of the prints were of value. However, the lead detective discovered that the Pinellas County unit possessed equipment that could enhance latent prints, and the sink was transported there so that more detail could be obtained from the latent fingerprint located on the sink. Although the equipment did not prove to be particularly useful, the Pinellas County latent print unit examined the photographs of the sink fingerprint and determined that it was of value. However, no match for the fingerprint was found at that time. The lead detective also submitted photographs of several of the prints lifted from Pearce's house to the Federal Bureau of Investigation (FBI). The FBI determined that among the prints it received, one latent fingerprint was of value (the sink fingerprint), and one latent palm print was of value. The FBI was also unable to match either print to any known individual at that time.

Identification

It was only later that FDLE matched DNA extracted from the hair that was found on Pearce's calf to Jackson. After receiving this information, the lead detective located Jackson in Georgia, where he had been incarcerated since 2005. During an interview with Jackson on January 22, 2008, the lead detective asked whether Jackson knew Pearce or had been to her house. The detective showed Jackson a photograph of Pearce, as well as several pictures of her house. Jackson asserted that he had never met or seen Pearce, and had never been to her house.

After Jackson was identified as a suspect, latent print analysts with the FBI and Pinellas County were asked to compare Jackson's known prints with the fingerprint from the sink. Jacqueline Slebrch, the FBI latent print examiner, examined the photograph of the sink fingerprint. She noted spots or distortion on the fingerprint, and that the fingerprint was one of multiple prints left on top of each other. However, she determined that the print was of value and matched the right ring finger of Jackson. With respect to when the fingerprint could have been placed on the sink, Slebrch testified that she had never encountered a situation in which a fingerprint was left and, at a later date, captured and preserved by being coated in a substance such as blood, but that such an occurrence could be possible. She also explained that when a person has an excess amount of blood or other substance on his or her hand and then touches a surface, the substance will be pushed between the friction ridges on a fingerprint, and an imprint of the furrows will be left on the surface. She testified that this is a factor to consider when looking at a latent print such as the sink fingerprint.

The sink fingerprint was also examined by William Schade, who worked for the Pinellas County Sheriff's Office. Like Slebrch, he concluded that the sink fingerprint matched the right ring finger of Jackson, and that the fingerprint was left on the sink while Jackson's finger was coated in a wet substance, such as blood. When Schade made the comparison, he had no knowledge that Slebrch had also concluded that the sink fingerprint matched the right ring finger of Jackson.

However, during trial, Jackson presented the testimony of Michelle Royal, the Jacksonville Sheriff's Office latent print analyst who concluded that the sink fingerprint was of no value and could not be used to identify any suspect. She nonetheless testified that even

prints of no value can be used to exclude suspects, and acceded both that Jackson could not be excluded as the individual who left the sink fingerprint, and that similarities existed between the sink fingerprint and the known print of Jackson.

Alibi

Jackson presented as an alibi that he visited Adel, Georgia, between October 15, 2004, and October 22, 2004, to celebrate his birthday with his family, which he did every year for a weekend around his birthday. His birthday is October 13, which fell on a Wednesday in 2004. October 15 was the Friday that followed his birthday. The testimony of Jackson and his wife, sister, and father presented as an alibi that his cousin drove him to Adel on Friday, October 15, and he did not return until after the murder occurred. He had intended to return on Sunday with his cousin, but did not, and later obtained money from a friend for bus tickets, missed the initial bus, and eventually returned to Jacksonville by bus on October 22. The friend who provided Jackson with bus money testified that she recalled that Jackson visited her work place in October 2004, but she could not recall the date.

Jackson testified that he knew Pearce through her boyfriend, had met her between five and ten times, and had been to her house approximately five times. He had previously purchased crack cocaine from Pearce's boyfriend, as well as from Pearce. He also testified that he and Pearce had become comfortable interacting with each other, and that she would let him enter her house.

Jackson explained that when he was interviewed by the lead detective, he did not admit that he knew Pearce or that he had been to her house because he knew the detective was investigating a homicide, wished to distance himself from Pearce, and did not want to be implicated in something he did not do. He also testified that he did not

recognize Pearce in the photograph he was shown during the interview because it was in black and white, and she appeared dead in the photograph.

Jackson testified that he had been at Pearce's house one week before his trip to Adel, and he helped move a couch while he was there. Jackson explained that his fingerprint could be on the sink because he had removed a rag from the garbage disposal and placed his hand on the sink while he looked under it. He admitted that his hands were not bloody when he repaired the disposal, and that this occurred months before the murder.

In rebuttal, the State presented the lead detective, who testified that Pearce's vehicle was found on the same road where Jackson resided at the time of the murder. The vehicle was approximately one to one and a half miles from his residence. However, no evidence connected Jackson to the vehicle.

Because the evidence suggested that another person may have been present during the murder—i.e., the footprints and the second knife with DNA that did not match Pearce or Jackson—the State requested that a principal instruction be given. The trial court agreed, and a principal instruction was read to the jury. On April 17, 2013, the jury found Jackson guilty of the first-degree murder of Debra Pearce.

Jackson v. State, 180 So. 3d 938, 941–45 (Fla. 2015).

B. Postconviction Proceedings

Jackson filed his operative initial 3.851 motion on January 26, 2018, and amended claim 7 on September 14, 2018. (R. at 816–87,

1276–94.)² Relevant to this appeal, Jackson raised the following claims in his motion: (7) counsel failed to investigate the DNA evidence (R. at 1278–94);³ (8) counsel failed to investigate the fingerprint evidence (R. at 846–50); (9) counsel failed to object to the prosecutor’s closing arguments (R. at 850–51); (10) counsel failed to prepare Jackson for his testimony (R. at 851–52); (11) counsel failed to file a motion to dismiss for pre-indictment or pre-arrest delay (R.

² Jackson raised the following claims that are not at issue in this appeal: (1) counsel ineffectively failed to educate the jury on the burden of proof; (2) counsel failed to inquire about racial bias; (3) counsel failed to conduct meaningful death qualification; (4) counsel failed to educate the jury on the penalty phase process; (5) counsel failed to raise a challenge based on *State v. Neil*, 457 So. 2d 481 (Fla. 1984); (6) counsel failed to raise a challenge based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985); (13) counsel failed to investigate alternative suspects and challenge the thoroughness of police investigation; (14) counsel failed to make objections and invited harmful comments; (15) counsel failed to develop and present compelling social history mitigation; (16) counsel failed to develop and present compelling mental health mitigation; (17) counsel failed to investigate the prior violent felony aggravator; (18) counsel failed to present mitigating evidence at the *Spencer* hearing; (19) prosecutorial misconduct for overstating the value of the DNA evidence on the steering wheel; (20) prosecutorial misconduct for impugning the credibility of fingerprint examiner Michelle Royal; and (22) unconstitutional death sentence under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

³ This claim was later amended, and thus the record numbers of the operative amendment are given instead of the claim as initially filed.

at 852–54); (12) counsel failed to investigate and present an effective alibi defense (R. at 854–55); and (21) cumulative error (R. at 870–71.)

i. Claim 7: DNA (Issue I on Appeal)

Claim 7 alleged, in relevant part, that Jackson’s counsel were ineffective for failing to adequately investigate or challenge the DNA evidence in his case. (R. at 1276–94.) Specifically, Jackson argued counsel ineffectively failed to present a DNA expert who could have helped them challenge the DNA evidence: (a) on the steering wheel cover of the victim’s vehicle that was found near Jackson’s home with blood inside (expert could have testified Leigh Clark, the State’s analyst, changed her call and that Jackson could be excluded as a contributor); (b) from Jackson’s hair on the victim’s leg (expert could have provided testimony that a full DNA profile could be recovered from a naturally shed hair); (c) the ease of hair transference (expert could have better explained the ease of hair transference); (d) Clark did not run all required tests on some DNA samples (expert could have pointed that Clark failed to use Cofiler Kit on the victim’s known standard and this was a violation of protocol); and (e) Clark did not run proper positive controls on samples from a dishrag and a swabbing from the blade on the small knife under the victim (expert

could have pointed this out). (R. at 1286–91.) In a separate, miscellaneous subclaim, Jackson also noted Clark incorrectly testified that one of the hairs recovered from the crime scene excluded Jackson and the victim. (R. at 1293.)

At the evidentiary hearing, Armstrong (third-chair trial counsel) testified he had done multiple cross-examinations of DNA experts and consulted with them in past cases as well. (R. at 2097, 2142–43.) The records he reviewed did not have specific allele calls and he did not use an expert to prepare for Clark’s cross-examination. (R. at 2137.) He believed that expert testimony that the results are inconclusive is the same as saying no one can be excluded. (R. at 2137.) In his assessment, the best thing a defense attorney could hope to get out of an expert is that there was DNA evidence pointing at someone else. (R. at 2145–46.)

Bateh (first-chair trial counsel) testified that he spoke with a DNA expert, Ms. Nancy Peterson, who ultimately could not help him. (R. at 2272–90, 2312.) The only item of interest she found was that DNA on a knife matched neither Jackson nor the victim. (R. at 2289–90.) But Bateh already knew that from Clark, and he argued this DNA came from the killer at trial. (R. at 2305, 2312–13.) Clark’s testimony

was “huge” for the defense, and thus Bateh avoided attacking Clark or her methods. (R. at 2312–13.) Bateh also believed it was better to leave that third party’s DNA unknown so as not to exclude anyone other than Jackson. (R. at 2314–15.)

Peterson testified at the evidentiary hearing that she received the DNA record, case file, and bench notes from Bateh on April 4th and finished her review on the 15th at 3:00 p.m. (R. at 2330–33.) Her review determined there was blood on a knife that did not match Jackson. (R. at 2333.) She also determined that:

the analysis and interpretation of DNA profiles obtained from the crime scene by Leigh Clark was correct and what she did was correct, including finding DNA that didn’t match Mr. Jackson. And I didn’t find any data that was incorrect or improperly analyzed. There were no issues with the data reports that could be used to discredit the analyst.

(R. at 2336.) Clark did everything right “[o]n the samples that were in her reports that the DNA analysis was correct on, you know, the items of evidence that she looked at.” (R. at 2342.) Peterson was unaware of any other information she could have provided the defense other than that DNA found on a knife did not match Jackson. (R. at 2342.)

On redirect, Peterson testified that although there were some issues with positive controls, Clark did not use that data. (R. at 2343.) Clark redid the sample and what she got was accurate. (R. at 2343.) There was also no issue with not using the Cofiler kit other than a general failure to follow protocol. (R. at 2344.) Peterson did not convey to Mr. Bateh that there was a problem with not using the Cofiler kit. (R. at 2344.) She also believed Clark changed her call from “inconclusive” to “cannot exclude” Jackson about DNA on the steering wheel cover of the victim’s vehicle. (R. at 2345.)

Jackson also presented his own DNA expert, Ms. Zuleger, at the postconviction hearing. (R. at 2359.) In relevant part, she testified that: (1) Clark did not use the Cofiler test on the victim’s known sample, that was a failure to follow protocol, and could affect preservation of the victim’s sample for future testing (R. at 2375–81); (2) the DNA from the small knife could have been uploaded to a DNA Index System to see if there was a hit (R. at 2383–84); (3) Clark had an issue with positive controls on the dishrag and did not comply with protocol (R. at 2385–88); (4) naturally shed hair can contain one to ten nanograms of DNA and give a full profile and she did not believe the evidence supported Clark’s conclusion the hair was not naturally

shed hair (R. at 2391–98); (5) Clark testified beyond her certification and report when she stated the hair was not naturally shed (R. at 2402–04); (6) there was a single allele present in one of the hairs from the victim’s hands that did not match the victim or Jackson, and Clark should have called this hair a DNA mixture with the victim and a minor contributor other than Jackson (R. at 2409–17); (7) Jackson should have been excluded as a contributor for the DNA found on the steering wheel of the victim’s vehicle and Clark changed her call by saying she could not exclude instead of simply that her results were inconclusive (R. at 2417–29, 2435–37); and (8) there is potentially confirmation bias in law enforcement labs (R. at 2431–34.) On cross, she testified that the hair on the victim matched Jackson. (R. at 2438.) The dishrag only had the victim’s DNA on it, and there was a significant amount of the victim’s blood at the crime scene. (R. at 2443–44.) She also admitted the amount of DNA found in Jackson’s hair was higher than what a naturally shed hair would give based on the studies she was aware of. (R. at 2446.) She could not testify whether the foreign allele in the hair from the victim’s hand was a somatic point mutation. (R. at 2447.) Confirmation bias existed for her as well. (R. at 2450.)

Clark testified at the evidentiary hearing and explained the points raised by Peterson and Zuleger. (R. at 2477–99.) The DNA from the small knife with the unidentified contributor could not have been uploaded to a DNA Index System. (R. at 2477–79, 2522–23.) Regarding the victim’s known standard, there was no issue with failing to use the Cofiler test because “the only purpose the victim’s sample serves in a case like this is to determine what DNA could not have come from the victim.” (R. at 2480–81.) Regarding the dishrag, the controls worked in accordance with the procedure at the time and there was no forensic concern. (R. at 2842.) Clark maintained her testimony that Jackson’s hair was not naturally shed and that she was qualified to make that assessment. (R. at 2483–89.) The amount of DNA recovered from Jackson’s hair, 34 nanograms, is well outside the one-to-ten nanogram range proposed by the study Jackson relied on, and other studies suggest the range is much lower. (R. at 2489, 2519–21.) When it came to the hair in the victim’s hand, Clark testified the additional allele was a sematic point mutation since the hairs were similar and the DNA was otherwise consistent with the victim’s profile. (R. at 2489–94, 2511.) With the steering wheel DNA, Clark testified she did not change her call; inconclusive is the same

as saying cannot exclude. (R. at 2495–98, 2523–32.) The allele Zuleger used to exclude Jackson was in the stutter position and she would not have used it. (R. at 2498–99, 2532.)

The postconviction court generally found deficient performance for failing to consult a DNA expert sooner, but no prejudice. (R. at 1632–53.) When analyzing the DNA on the steering wheel, the court found neither deficient performance nor prejudice. (R. at 1635–37.) The court found neither deficient performance nor prejudice when analyzing the subclaim argument that a full DNA profile could come from a naturally shed hair. (R. at 1638–40, 1642–43.) Similarly, the court found neither deficiency nor prejudice in counsel’s failure to secure an expert to help explain how easily hair could be transferred. (R. at 1643–44.) The court grouped the failure to use the Cofiler kit and follow protocol on the dishrag and small knife into one claim and held there was no prejudice without mentioning deficiency. (R. at 1646–48.) Regarding the hairs, the court determined there was no prejudice, particularly since one of the defense experts agreed with Clark’s assessment of the hair that allegedly did not match either the victim or Jackson. (R. at 1651–52.)

The court therefore denied this claim. (R. at 1653.)

ii. Claim 8: Fingerprints (Issue II on Appeal)

Claim 8 alleged counsel ineffectively failed to investigate the fingerprint evidence. (R. at 846–50.) Relevant to this appeal, Jackson also took issue with counsel’s: (a) failure to confront the State experts with the fact that the Automatic Fingerprint Index System (AFIS) runs before the DNA cold hit on Jackson were negative; (b) failure to object to the prosecutor’s comments about examiner Royal in closing; (c) decision to call examiner Royal to testify Jackson’s print was of no value when she also stated she could not exclude him; and (d) cross-examination of the State’s fingerprint experts (this argument contains a footnote that mentions counsel’s failure to make confrontation, relevance, and bolstering objections to some of the experts’ testimony). (R. at 848–50). Jackson did not argue counsel’s supposed contradictory claims about the print—whether it was of no value or matched Jackson—constituted ineffective assistance of counsel. And during the evidentiary hearing, Bateh testified he consulted with a fingerprint expert who could not help him. (R. at 2315.) Jackson did not put on a fingerprint expert.

The postconviction court found neither deficient performance nor prejudice. (R. at 1653–63.) On Jackson’s AFIS claim, the court

found neither deficiency nor prejudice since counsel repeatedly made the jury aware of unsuccessful attempts by fingerprint experts to determine who the print belonged to until they had Jackson's print to compare it to. (R. at 1657.) Next, the court found it was reasonable for counsel to call Ms. Royal to the stand to testify the print was of no value, and that trial counsel made a strategic decision not to object to the State's bolstering of Royal in closing. (R. at 1657.) As part of its examination of this claim, the court noted that Jackson improperly attempted to raise an additional claim in closing arguments: that counsel were ineffective for conceding the fingerprint belonged to Jackson in closing. (R. at 1658.) The court found this issue waived and meritless. Regarding inadequate cross-examination on confirmation bias, the court found this claim insufficiently developed because Jackson put on no experts dealing with it. (R. at 1656.) The court found neither deficiency nor prejudice on counsel's alleged failure to challenge the subjectivity of fingerprint analysis. (R. at 1660–63.) Counsel did, in fact, question one of the State's experts in detail on this issue. (R. at 1660–61.)

Therefore, the court denied this claim.

iii. Claim 9: Prosecutor's Closing Argument (Issue II on Appeal)

Claim 9 alleged counsel ineffectively failed to object to improper closing arguments by the prosecutor. (R. at 850–51.) Jackson argued the prosecutor improperly argued that defense witness Michelle Royal was an old school fingerprint examiner who would stand by her calls no matter what. (R. at 851.) In these same comments, the prosecutor referred to Royal as a good and useful witness. (R. at 851.) During the evidentiary hearing, counsel testified he strategically chose not to object to the State’s comments because the State was, in part, vouching for and bolstering a defense witness. (R. at 2313–14.)

The court found counsel did not object to these comments due to trial strategy, since the comments were mostly bolstering the defense witness. (R. at 1663–64.) There was also no prejudice. (R. at 1664.)

iv. Claim 10: Preparing Jackson to Testify (Issue III on Appeal)

Claim 10 alleged counsel ineffectively failed to prepare Jackson to testify in his own defense. (R. at 851–52.) Specifically, Jackson argued his attorneys were ineffective because he: (1) obtained no preparation for trial other than being instructed to repeat his story and say he had five felony convictions when he actually only had four;

(2) testified against his judgment; and (3) that he testified poorly and callously. (R. at 851–52.) Jackson did not argue, as he does on appeal, that his counsel were ineffective for giving him conflicting advice on whether to testify.

Perkins and Bateh disagreed on whether Jackson should testify. Bateh did not want him to testify, but recognized it was Jackson's decision. (R. at 2316.) Perkins believed there was no other way to explain Jackson's print after he denied ever being in the victim's home. (R. at 2161–63.) Both Bateh and Perkins recognized the choice was ultimately Jackson's, and that this decision is usually made last minute based on how the trial is going. (R. at 2166, 2316.) Ultimately, Jackson exercised his right to testify after consulting with counsel. (SC13-2090 Vol. 10 at 95–100.)

At the evidentiary hearing, Perkins testified that he has a general practice of preparing his clients to testify by going over: (1) their testimony; (2) things they should not bring up (like past crimes and being in prison); (3) the specifics of his alibi defense; (4) the need to be honest and answer questions on cross unless there is a sustained objection; and (5) the need to correctly answer questions

about being a convicted felon and, if so, how many convictions. (R. at 2164, 2169–70, 2177.)⁴

Perkins also testified that he believed he reviewed the judgments and sentences in Jackson’s case to determine how many felony convictions he had. (R. at 2165.) In Jackson’s trial, counsel informed him that he had five felony convictions. (SC13-2090 Vol. 10 at 98.) Then, during the penalty phase, the State referenced that one of those was actually a misdemeanor; the judgment and sentence stated it was a felony, but that was crossed out and misdemeanor written in. (SC13-2090 Vol. 12 at 12.) Jackson has not supplied a copy of this judgment and sentence into the postconviction record.

The postconviction court found counsel were not ineffective. (R. at 1664–70.) The court first rejected any notion that Jackson testified against his will considering his colloquy with the trial court before testifying. (R. at 1664–67.) The court also found it was also reasonable strategy to advise him to testify. (R. at 1667–68.) The court next found that counsel did not insufficiently prepare Jackson;

⁴ The court in Jackson’s trial explicitly informed him that it was impossible to know what the State would ask on cross and Jackson chose to testify anyway. (SC13-2090 Vol. 10 at 98.)

they went over how the testimony would proceed and advised him to tell the truth. (R. at 1668–69.) They also advised Jackson about cross-examination, that he would be asked about his felony record, and must answer all questions truthfully unless an objection was sustained. (R. at 1669.) Regarding the number of convictions, the court specifically found there was no prejudice without addressing performance. (R. at 1669–70.)

v. Claim 11: Pre-indictment Delay (Issue VI on Appeal)

Claim 11 alleged counsel ineffectively failed to file a motion for pre-indictment delay. (R. at 852–54.) Jackson argued the investigative delays were unreasonable and led to: (1) the loss of bus records supporting Jackson’s alibi; (2) witnesses’ memories fading; and (3) loss of a witness since Jackson’s grandfather passed away before trial. (R. at 853–54.) At the evidentiary hearing, Bateh testified he did not believe there was a basis for a motion to dismiss for pre-indictment delay. (R. at 2302.)

The postconviction court found neither deficient performance nor prejudice because the motion would have been meritless. (R. at 1670–83.) The court pointed out that Jackson failed to support his allegations of prejudice at the hearing because he never produced

evidence the bus records existed and how they might have been lost, or evidence of what his grandfather would have testified to. (R. at 1672.) The court found Jackson's allegations of prejudice speculative. (R. at 1672.) And the court also noted that Jackson was able to call five witnesses who, despite the passage of time, were able to present favorable testimony to support Jackson's alibi. (R. at 1672–74.) The court then determined that, even if there was actual prejudice, the investigative delay was justified in this case. (R. at 1674–77.) Since the motion would have been denied, the court found no deficient performance or prejudice. (R. at 1677, 1683.)

Therefore, the Court denied this claim.

vi. Claim 12: Alibi Defense (Issues IV and V on Appeal)

Claim 12 alleged that counsel ineffectively investigated and presented Jackson's alibi defense. (R. at 854–55.) In relevant part, Jackson argued his counsel were infective because they offered alibi witnesses who were inexact about when Jackson was in Georgia (in this paragraph, Jackson made a one-sentence assertion that counsel did not advise Deborah Jackson—his wife—that she would be impeached with a worthless check conviction and nothing to ameliorate the damage). (R. at 854–55.) Jackson's motion did not

claim, as he does on appeal, that counsel were ineffective for failing to put on additional evidence from Ms. Penny Williams about other life events that helped her remember when Jackson visited Adel, Georgia. He did not even mention Williams in his motion. Nor did Jackson's motion argue, as he also does on appeal, that counsel were ineffective for instructing family members not to mention this was his last birthday with them before prison.

At the evidentiary hearing Gregory Messoré stated he first began investigating the alibi defense toward the end of 2010 or beginning of 2011. (R. at 2029.) He was assigned to Jackson's case in June 2009, and the victim had already been dead for five years when the Public Defender's Office was appointed. (R. at 2021–22, 2047.) Messoré did not believe the delay was critical because the alibi defense was already stale and, more importantly, the alibi was tied to a specific event: Jackson's birthday. (R. at 2048, 2053.) When Bateh was appointed, he sent investigators to Georgia to meet with alibi witnesses. (R. at 2296.) Perkins helped prepare some of the alibi witnesses; they remembered Jackson's visit due to his birthday. (R. at 2167.)

In Perkins' assessment, the fact that it was his birthday provided a believable reason for the jury to credit the alibi. (R. at 2178, 2180.) By contrast, it would be detrimental for the jury to learn this was Jackson's last birthday before he was incarcerated for four years. (R. at 2178–80.) Learning Jackson was a convicted felon was not the same as learning he had committed a serious crime during this timeframe. (R. at 2178–80.) Perkins also testified that, while he could not remember if he reviewed Ms. Jackson's prior conviction with her, it is his general practice to do so. (R. at 2172.) He also has a standard practice of going over witness testimony before putting any witness on the stand. (R. at 2177.)

Armstrong concurred with Perkins' assessment that it would be much worse if the jury knew the defendant was committing crimes around this time than if they just knew he was a convicted felon. (R. at 2093–94, 2142.) Investigators prepared the alibi witnesses, including Williams, to testify and Armstrong went over everything with them before trial. (R. at 2095.) He ensured they were "prepared" and that his questions would not surprise them. (R. at 2095.) He did not recall whether he questioned the alibi witnesses about other significant life events around this time. (R. at 2096.)

Deborah Jackson testified Perkins only prepared her for fifteen minutes outside of court before she testified. (R. at 2353.) According to Ms. Jackson, Perkins knew about her conviction and did not mention she could be impeached with it. (R. at 2353–54.) The conviction was twenty years old, over a \$50 bad check, occurred when she was a single parent raising three kids, going to school, working, and had recently lost a child. (R. at 2354–55.) She “just missed it” in her words. (R. at 2354.) Perkins knew about these circumstances and did not bring them up at trial. (R. at 2354–55.)

Williams (one of Jackson’s alibi witnesses) also testified at the evidentiary hearing. Prior to testifying at trial, Williams met with individuals from the defense team to talk about the alibi, and the day of trial Perkins spoke with her for five or ten minutes. (R. at 2462.) Perkins’ main instruction was not to bring up Jackson’s Georgia trial and the fact that he went to prison for a long time soon after the victim’s murder. (R. at 2462.) None of Jackson’s counsel asked her about other significant events that might help her remember his visit. (R. at 2465.) There were other such events that counsel failed to bring out: she lost her job, was unable to buy gifts for her children in December 2004 (the only Christmas this happened), felt like a failure

as a result, and married in July 2005 right after starting a new job. (R. at 2463–64.) Nonetheless, her testimony was truthful when she took the stand. (R. at 2466.)

The postconviction court found this issue without merit. (R. at 1683–90.) Without addressing performance, the court found no prejudice stemming from counsel’s delay in contacting witnesses because the alibi defense was already years old when Jackson received counsel. (R. at 1686–88.) Finally, the court addressed Jackson’s one-sentence claim that counsel failed to prepare Deborah Jackson for cross-examination. The court found neither deficiency nor prejudice for failing to prepare her on this minor point; her conviction was a fact and drawing more attention to it may not have been wise. (R. at 1689–90.)

vii. Cumulative Error (Issue VII on Appeal)

Jackson raised a boilerplate cumulative error claim incorporating “all other allegations and factual matters contained elsewhere” in his motion to argue that he suffered. (R. at 870–71.) The court found no cumulative error since Jackson’s claims were all meritless, moot, or procedurally barred. (R. at 1710.)

Ultimately, the trial court granted Jackson a resentencing under *Hurst* while denying his guilt-phase claims. (R. at 1632–1712.) Jackson timely appealed. (R. at 1713.)

SUMMARY OF THE ARGUMENT

Issue I

Counsel was not ineffective for failing to investigate/challenge the DNA evidence. Counsel strategically chose to avoid taking issue with Clark’s expert testimony because she found DNA on a pocketknife that did not match either Jackson or the victim. There was also no prejudice since the Jackson primarily argues ineffectiveness for failing to challenge Clark’s testimony on insignificant points. The jury heard testimony that Jackson’s transfer fingerprint was found in the victim’s blood, that his hair was found on her body, that her vehicle (with her blood inside) was found near his home, and that he denied ever knowing her or being in her house.

Issue II

Counsel was not ineffective for failing to investigate/challenge the fingerprint evidence. As the postconviction court found, Jackson waived his argument that counsel ineffectively conceded the fingerprint was Jackson’s while simultaneously putting on an expert

who testified the fingerprint was of no value because he raised it for the first time in closing arguments.

On the merits, counsel were not ineffective. Counsel strategically presented this evidence as a hail Mary in the hopes that it would sow reasonable doubt. There is also no prejudice in light of the evidence produced at trial.

Trial counsel was also not ineffective for failing to argue more vigorously that there were no print matches until examiners had Jackson's print. Counsel, strategically, focused more on when Jackson's print was placed than whether it was his print. And, considering the evidence against him, Jackson suffered no prejudice.

In the same vein, counsel strategically chose not object to the prosecutor's "Old School" comments since most of the surrounding comments were the State bolstering a defense witness. There is also no prejudice considering counsel's concession that the print belonged to Jackson. Jackson's final missed-objections argument was not presented on appeal or below because it was only raised in a footnote in his motion.

Issue III

Counsel was not ineffective for failing to prepare Jackson to testify. Initially, Jackson failed to preserve his conflicting-advice argument. On the merits of that claim, having different perspectives on whether to testify does not constitute deficient performance or prejudice. Counsel adequately prepared Jackson by telling him to be honest, answer questions truthfully, that he would undergo cross, and going over his alibi defense with him. There was also no prejudice considering the evidence against Jackson and lack of specificity on what counsel should have done differently.

Jackson also points out his counsel told him the wrong number of convictions (5 instead of 4). Jackson cannot establish deficiency because the disputed, altered, out-of-state judgment that undergirds this argument is not in the record. Counsel testified he reviewed the judgments and thought Jackson had five felonies. Alternatively, there was no prejudice from the jury believing Jackson was a five-time (instead of a four-time) convicted felon.

Issue IV

Counsel did not ineffectively investigate/present an alibi defense. Jackson's witnesses provided a good alibi defense. There is

also no prejudice considering Jackson's bloody fingerprint, hair on the victim, lie that he did not know the victim and had not been in her house, and the fact that her vehicle was recovered near his home.

Jackson's unpreserved argument (never raised in his motion) about Williams' additional life events does not demonstrate ineffectiveness either. These events occurred months after Jackson visited, and Williams testified to a memorable event (meeting Jackson's daughter) that happened during this visit. Williams' trial testimony was certain about when this happened. There was also no prejudice considering the evidence against Jackson.

Finally, counsel made a reasonable, strategic decision to instruct the alibi witnesses not to mention that this was Jackson's last birthday with them before going to prison. And Jackson suffered no prejudice considering the evidence against him.

Issue V

Counsel did not ineffectively prepare Deborah Jackson for her testimony. The State properly impeached her for a crime of dishonesty and Jackson raises no contrary argument. Pursuing the amelioration Jackson suggests would have opened the door for the State to impeach her further with what it had to prove to convict her

and, worse, made her appear like someone who would lie about a twenty-year-old conviction. Counsel were not deficient, and Jackson was not prejudiced.

Issue VI

Counsel did not ineffectively fail to investigate/file a motion to dismiss for pre-indictment delay. First, (as a tipsy-coachmen argument) this Court should overrule its precedent and require bad faith for this claim. Florida's rule is based on overruled federal precedent and contrary to Supreme Court precedent. Alternatively, under the balancing test used by the postconviction court, the motion would have been meritless. Jackson was able to present a good alibi defense, so he did not suffer actual prejudice. He failed to introduce any evidence other than speculative assertions that the memory of his witnesses faded with time. And the Supreme Court has found investigative delay is insufficient to raise a due process claim. Counsel cannot be ineffective for failing to file a meritless motion.

Issue VII

Jackson failed to prove cumulative error. The burden is on him to do so and he has failed to carry that burden. Counsel were not deficient and Jackson suffered no prejudice for this Court to

cumulate. And even if this Court finds counsel deficient in some respects, the evidence against Jackson survives any cumulative claim based on the issues Jackson has raised here.

ARGUMENT

In this appeal, Jackson raises six claims of ineffective assistance of counsel and one claim of cumulative error. The postconviction court denied his ineffectiveness claims for failure to meet the standard outlined in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), and deemed his cumulative error claim meritless. This Court should affirm.

The United States Supreme Court has interpreted the right to counsel as providing the “right to the effective assistance of counsel.” *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). In order to prevail on an ineffective assistance of counsel claim, a defendant must meet the demanding two-pronged standard laid out in *Strickland*. *State v. Barnes*, 24 So. 3d 1244, 1248 (Fla. 1st DCA 2009) (citing *Floyd v. State*, 18 So. 3d 432, 443 (Fla. 2009)). Under this standard, the defendant must show that the defendant’s counsel were deficient, and that the defendant was prejudiced by that deficiency. *Strickland*, 466 U.S. at 687. The

defendant must prevail on both the deficiency and prejudice prongs, *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001), and “bears the burden of proving a claim of ineffective assistance.” *Barnes*, 24 So. 3d at 1248. Courts need not consider both prongs if the defendant fails to prevail on one. *Id.*

Under the first prong of *Strickland*, “the defendant must establish that counsel’s performance was deficient.” *Barnes*, 24 So. 3d at 1248. “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. In other words, counsel’s performance must be “unreasonable under ‘prevailing professional norms.’” *Barnes*, 24 So. 3d at 1248 (quoting *Strickland*, 466 U.S. at 688). “The defendant must ‘overcome the presumption that . . . the challenged action “might be considered sound trial strategy.”’” *Id.* at 1248–49 (quoting *Strickland*, 466 U.S. at 689). “[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel’s decision was reasonable under the norms of professional conduct.” *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). “A fair assessment of attorney performance requires that

every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

The inquiry regarding whether counsel's performance was unreasonable under prevailing professional norms is not "what [an] ideal attorney might have done in a perfect world or even what the average attorney might have done on an average day." *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992). Rather, the question is whether any reasonable attorney would have acted as trial counsel did under circumstances identical to those faced by trial counsel. See *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992); see also *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) ("Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so."). Accordingly, to prevail on this prong, Appellant "must establish that no competent counsel would have taken the action that his counsel did take." *Putman v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001) (citation omitted).

“There is a strong presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” *Barnes*, 24 So. 3d at 1248 (quoting *Strickland*, 466 U.S. at 690). “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. Ultimately, “judicial scrutiny of trial counsel’s performance is highly deferential.” *Barnes*, 24 So. 3d at 1249.

Under the second prong of *Strickland*, “[t]o establish prejudice, the defendant must show that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, *the result of the proceeding* would have been different.’” *Barnes*, 24 So. 3d at 1248 (quoting *Strickland*, 466 U.S. at 694) (emphasis added). “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had *a reasonable doubt respecting guilt*.” *Strickland*, 466 U.S. at 695 (emphasis added). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Carter v. State*, 225 So. 3d

881, 883 (Fla. 1st DCA 2017) (quoting *Strickland*, 466 U.S. at 694). “In order to sufficiently undermine the court’s confidence in the outcome, a claimant ‘must rely on more than mere speculation.’” *Id.* (quoting *Derrick v. State*, 983 So. 2d 443, 462 (Fla. 2008)). Further, “[t]he claimant must demonstrate a likelihood of a different result that is ‘substantial, not just conceivable.’” *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

This Court should affirm the postconviction court’s rejection of Jackson’s ineffectiveness and cumulative claims. Each issue is dealt with in turn below, but none warrant relief.

I. THE POSTCONVICTION COURT CORRECTLY DETERMINED TRIAL COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO INVESTIGATE AND CHALLENGE THE DNA EVIDENCE.

Preservation

Jackson raised this issue, and the specific arguments in support of it, in his postconviction motion below. Therefore, this issue and Jackson’s arguments in support of it are preserved for review.

Standard of Review

This Court reviews a postconviction court’s decision to deny an ineffective assistance of counsel claim as a mixed question of law and fact. The lower court’s legal determinations of whether counsel was

deficient and whether that deficiency caused prejudice are reviewed de novo. *Martin v. State*, 311 So. 3d 778, 792 (Fla. 2020). But the postconviction court's factual findings are reviewed for competent, substantial evidence. *Id.* Additionally, this Court reviews the evidence below in the light most favorable to sustaining the postconviction court's decision. *Steinhorst v. State*, 695 So. 2d 1245, 1248 (Fla. 1997). This is true even when the trial court fails to make express factual findings because the trial court's decision is presumed correct. *Cf. Brown v. State*, 247 So. 3d 86, 87 (Fla. 1st DCA 2018).

Merits

Jackson argues trial counsel's investigation and handling of five distinct pieces of DNA evidence was deficient and that this deficiency prejudiced him. Each of his claims are discussed below, but none demonstrate the trial court erred.

A. Blood on the Steering Wheel Cover of the Victim's Car

Jackson argues that a timely consultation with a DNA expert would have helped trial counsel challenge the various aspects of the blood recovered from the victim's car steering wheel cover. This vehicle was found near Jackson's home after the murder and had the victim's blood inside. *Jackson*, 180 So. 3d at 945 & n.4. No evidence

connected Jackson to the vehicle. *Id.* But DNA expert Clark testified there was “an indication” male DNA was found in the vehicle in a mixture with the victim’s DNA. (SC13-2090 Vol. 9 at 77.) The “Y signal” was below the reporting threshold and so the mixture was deemed inconclusive. *Id.* Clark could not exclude Jackson from the mixture. (SC13-2090 Vol. 9 at 77.)

Jackson first argues his attorneys were deficient for not consulting a DNA expert and challenging expert Clark’s testimony that she could not exclude Jackson as a “change in call” from her report. The postconviction court determined he failed to show either deficient performance or prejudice on this sub-argument. (R. at 1635–36.)

At the evidentiary hearing below, Clark stated her testimony that she could not exclude Jackson was not a change in call from her report. “Saying that I cannot exclude someone is the same as saying that is an inconclusive result with respect to Mr. Jackson.” (R. at 2525.) The trial court held counsel were not deficient for failing to challenge Clark’s testimony because the jury understood the DNA results for the minor donor were inconclusive. (R. at 1635–36.) “The fact that [the inconclusive finding] came out in [expert Clark’s] direct

testimony, rather than an attack during cross-examination by Defense counsel is of no consequence.” (R. at 1635–36.)

Viewed in the light most favorable to the State,⁵ trial counsel were not deficient for failing to seek an expert’s assistance and challenge Clark’s testimony as a change in call. Clark’s evidentiary hearing testimony, which the trial court credited, was that no change in call was made. (R. at 1635–36.) Trial counsel cannot be faulted for failing to launch a meritless attack on a State’s expert witness. *Cf. McMillian v. State*, 214 So. 3d 1274, 1287 (Fla. 2017) (counsel cannot be ineffective for failing raise a meritless objection). This is particularly true when Clark was firm in her testimony that the results of her testing were inconclusive, incapable of either including or excluding Jackson. *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009) (recognizing counsel often forgo technical violations of the confrontation clause to avoid “antagoniz[ing] the judge or jury by wasting their time”). It is a matter of “common sense” that “inconclusive” results cannot include or exclude anyone. (R. at 2524.)

⁵ *See Steinhorst*, 695 So. 2d at 1248 (“When the evidence adequately supports two conflicting theories, this Court’s duty is to review the record in the light most favorable to the prevailing theory.”).

And in closing, defense counsel argued that “inconclusive” results from the blood on the steering wheel were simply not good enough on the State’s part in a homicide investigation without attacking Clark’s testimony. (SC13-2090 Vol. 11 at 13–14.)

Defense counsel would have gained nothing by attacking Clark’s testimony as a change in call when she repeatedly testified her results were “inconclusive.” But counsel had much to lose. Clark testified at trial that a pocketknife found under the victim’s body was covered in the victim’s blood. (SC13-2090 Vol. 9 at 13, 76). Crucially, a third party’s DNA was also present, and Clark *excluded Jackson as the third party*. (SC13-2090 Vol. 9 at 76; *see also* R. at 2312–13 (counsel confirming that he chose not to attack Clark’s testing methods because such attacks would “reduce [his] argument, that [Clark] found the real killer’s DNA on the knife that was found under the victim’s body”).) Trial counsel seized upon this fact in closing argument to assert that it was this unknown party who murdered the victim instead of Jackson. (SC13-2090 Vol. 11 at 13–14.) This strategic decision by trial counsel does not show deficient performance. And, as the postconviction court recognized, attacking an expert witness on a “change in call” when she testified her results

are “inconclusive” does not demonstrate *Strickland* prejudice either. This sub-argument fails both of *Strickland*’s prongs and this Court should affirm the postconviction court’s decision here.⁶

Jackson’s second sub-argument asserts that counsel should have discovered and put on testimony that Jackson could be excluded as the minor donor on the steering wheel mixture. The postconviction court found Jackson suffered no prejudice without addressing deficient performance. (R. at 1635–37.)

Clark testified at the evidentiary hearing and reaffirmed her testimony that Jackson could not be excluded. The evidence Jackson’s expert relied on to exclude him was a “stutter.” (R. at 2498–2500.) Clark maintained her “inconclusive” determination for the second contributor on the steering wheel mixture. (R. at 2499.)

In this case, counsel were not deficient, and Jackson was not prejudiced. Counsel made a strategic decision to avoid arguing

⁶ Jackson’s arguments that Clark violated FDLE protocols by making a change in call and misleading the jury through her change in call fail for the same reasons. Counsel were not deficient, and Jackson was not prejudiced, because Jackson’s allegations are factually unsupported by the postconviction court’s findings, counsel’s strategy would have been thwarted by impeaching Clark’s results, and the evidence against Jackson was too strong anyway to be overcome by these insignificant points.

against Clark's findings because some of her findings were advantageous to Jackson's case. (SC13-2090 Vol. 9 at 76; R. at 2146, 2312-13.) This was not unreasonable since Clark testified her findings were inconclusive and counsel reminded the jury of that in closing. (SC13-2090 Vol. 11 at 12-13.) While the State in closing mentioned Jackson could not be excluded (an argument the State would have been able to make using Clark's testimony even if counsel produced contradictory testimony), the State relied more heavily on the location of the vehicle than "inconclusive" DNA results to connect the vehicle to Jackson. (SC13-2090 Vol. 11 at 34-35.) The State even mentioned that Clark could not even call the mixture donor as male "for sure." (*Id.*) By contrast, the State hung its hat securely on the location of the vehicle as near Jackson's home. (*Id.*) In sum, the State could have made the same arguments even if counsel made it a "battle of the experts" on whether Jackson could be excluded or, as Clark testified, the results were "inconclusive" and she could neither exclude nor include him. But going down that road would have gone against counsel's strategy to avoid taking issue with Clark's results and using her advantageous testimony that a knife with the victim's blood and a third-party's DNA was recovered from the crime scene.

Clark's results on that front were not inconclusive as to Jackson. She excluded him from that much more important mixture. Counsel were not deficient for pursuing this strategy, and Jackson was not prejudiced regardless in light of the evidence against him (his denial of knowing the victim and being in her house, his fingerprint encased in her blood, and his unnaturally shed hair on her leg).

Therefore, Jackson has failed to demonstrate his counsel were ineffective on this subclaim and this Court should affirm.

B. Jackson's Hair on the Victim's Leg

Jackson argues his counsel ineffectively dealt with his hair on the victim's leg in two ways. First, Jackson contends that counsel permitted Clark to bolster her conclusion that the hair was not naturally shed by referring to scholarly articles that agreed with her. The postconviction court found Jackson suffered no prejudice on this sub-argument. (R. at 1642–43.) Second, Jackson urges that counsel should have retained a DNA expert and put on evidence that a naturally shed hair could give a full DNA profile. The postconviction court found this sub-argument failed on both the deficient performance and prejudice prongs of *Strickland*. (R. at 1638–40.)

Jackson's first sub-argument fails to show either deficient performance or prejudice. While an expert may not bolster their opinion by referring to scholarly articles, counsel is not deficient for failing to make every conceivable objection he could have when he has a strategic reason for forgoing the objection. *King v. State*, 260 So. 3d 985, 999 (Fla. 2018) (recognizing counsel could strategically fail to object to hearsay that did not harm his client). In this case, counsel had made a tactical decision to avoid disputing Clark's findings because she provided helpful testimony to Jackson's case. (SC13-2090 Vol. 9 at 76; R. at 2146, 2312–13.) Objecting to exceptionally minor bolstering by Clark contradicts this strategy. Trial counsel desired Clark to appear as learned as possible in front of the jury because she had excluded Jackson from the bloody pocketknife found under the victim while recognizing some other party's DNA was on that knife. (See SC13-2090 Vol. 9 at 76; R. at 2146, 2312–13.) And no expert produced at trial or in postconviction could contradict Clark's determination that the hair was not naturally shed considering the amount of DNA found in it. Under these circumstances, Jackson has failed to demonstrate his counsel performed deficiently in failing to object to this minor bolstering.

Alternatively, there was no prejudice. As the trial court recognized, the bolstering at issue was extremely minor and unfocused upon at Jackson's trial. There is no likelihood a jury would have returned a different verdict if Clark simply stated her findings without referring to treatises. This is particularly true since no witness produced in postconviction could affirmatively disagree with her ultimate conclusions that the hair belonged to Jackson and was not naturally shed.

Likewise, Jackson has failed to establish deficient performance and prejudice on his second sub-argument. The expert testimony Jackson faults counsel for failing to investigate and obtain would not have helped him under the facts of this case. At the evidentiary hearing, Jackson adduced testimony that there were scientific articles at the time of his trial that indicated a naturally shed hair could contain one to ten nanograms of DNA and give a full profile. (R. at 2392.) But Clark testified the hair Jackson left on the victim had about thirty-four nanograms of DNA. Both experts agreed that amount of DNA was higher than what a naturally shed hair would retain. (R. at 2446, 2489.)

Counsel is not deficient for failing to investigate or retain experts that would not have been helpful to the defendant's case. In this case, an expert's testimony that a naturally shed hair could have between one to ten nanograms of DNA was not helpful to Jackson because the hair he left had over three times as much DNA as the high end of that range. Jackson has therefore failed to demonstrate deficient performance. For the same reason, in addition to the evidence against him, he also cannot demonstrate prejudice for any failure to investigate/retain an expert on this sub-argument. Therefore, this Court should affirm.

C. Easy Transference of Hair

Jackson argues his counsel ineffectively failed to investigate/put on expert testimony about how easily hair is transferred. The postconviction court found neither deficient performance nor prejudice. (R. at 1644.) This Court has rejected the argument that of failure to retain an expert to explain the ease hairs are transferred renders counsel ineffective. *Reed v. State*, 875 So. 2d 415, 423 (Fla. 2004). "[T]he fact that hairs shed and are easily transferred is within the average person's realm of knowledge. We find no error in the conclusion that trial counsel did not provide

deficient performance by failing to retain an expert to explain to him a fact commonly known.” *Id.* Moreover, as the postconviction court found, counsel were able to establish the ease of hair transference through the State’s own witnesses. (SC13-2090 Vol. 9 at 41; R. at 1644.) Jackson has failed to rebut the lower court’s reasoning, demonstrate deficient performance, or demonstrate prejudice. Therefore, this Court should affirm. *See Reed*, 875 So. 2d at 423.

D. Expert’s Failure to Run Cofiler Test

Jackson next asserts his counsel were ineffective because counsel did not argue Clark’s failure to use the Cofiler kit, in tandem with the Profiler kit, to obtain her results *on the victim’s known standard DNA* rendered Clark’s results unreliable. The postconviction court found Jackson suffered no prejudice without specifically addressing deficient performance. (R. at 1647.)

Jackson has failed to demonstrate deficient performance or prejudice. Counsel made a strategic decision to avoid attacking Clark’s testing methods because such attacks would “reduce [his] argument, that [Clark] found the real killer’s DNA on the knife that was found under the victim’s body.” (R. at 2312–13.) Additionally, Peterson—the DNA expert counsel consulted with prior to trial—

testified at the evidentiary hearing that there was not necessarily a problem with Clark's use of the Profiler test without the Cofiler test. (R. at 2344.) It *may* not have been protocol, but it did not change the results, especially considering Clark was only trying to determine the victim's known standard. (R. at 2344, 2479–81.) A reasonable trial attorney could certainly forgo this attack on Clark to reinforce the value of her other, more helpful testimony. This is doubly true since the evidence would have been disputed about whether Clark's failure was of any forensic concern. (R. at 2481.) (Clark testifying there was no forensic concern from her or her agency about her testing using only the Profiler kit to obtain the victim's known standard). Counsel were not deficient in this regard for failing to consult a DNA expert and launch this attack on Clark's methods.

Jackson has also failed to show prejudice. No one at the evidentiary hearing testified that Clark's *results* were incorrect. There is no reasonable probability that highlighting a supposed failure to follow protocol while ascertaining the victim's *known* DNA standard would have caused the jury to find Jackson not guilty. In context of this case, the victim's known standard DNA was immaterial. The focal points were Jackson's hair on the victim's leg, his bloody

fingerprint on her sink, his denial of ever knowing her or being in her house, and her vehicle being near his house with her blood in it. For either alternative reason, this Court should affirm this sub-issue.

E. Expert's Issues with Positive Controls on Samples from a Bloodstained Dishrag

Jackson's final argument on this issue asserts his counsel were ineffective in two ways. First, for failing to attack Clark's alleged difficulty with positive controls on samples taken from a bloodstained dishrag. The postconviction court determined Jackson failed to demonstrate prejudice without explicitly analyzing deficient performance. (R. at 1647.) Second, for failing to discover and produce evidence that one of the hairs recovered from the victim's hands did not match Jackson or the victim. The postconviction court found no prejudice without addressing performance. (R. at 1652.)

On his first sub-argument, Jackson has failed to demonstrate either deficient performance or prejudice. Clark testified there were no forensic concerns about her analysis of the dishrag; "the controls worked in accordance with the procedure at the time." (R. at 2481–82.) Moreover, only the victim's DNA was found on the dishrag. (R. at 2443.) A reasonable attorney could easily forgo this disputed attack.

Unsurprisingly, counsel chose not to make an issue of this minor matter at trial because some of Clark's testimony was helpful. (R. at 2312–13.) It makes little sense for counsel to engage in a “battle of the experts” on a disputed issue that is not helpful to the client's case. While Jackson now argues counsel could have used Clark's failure to follow protocol on minor pieces of evidence to more broadly assert her analysis was flawed, Jackson's argument is a non sequitur. Assuming Clark failed to run proper controls on undisputed, minor pieces of evidence, it does not logically follow that her conclusions were wrong or that her other analyses were subject to attack. No expert below testified her *conclusions* were incorrect, whatever her methodology. Counsel cannot be deemed deficient for failing to consult an expert who would only have told him Clark failed to follow technical protocol on insignificant pieces of evidence, but her conclusions could not be disputed. This is the definition of an unhelpful expert. Counsel here made a strategic decision to avoid disputing Clark's results and was not deficient in his investigation on this point.

For similar reasons, there was no prejudice. Attacking Clark's results on insignificant pieces of evidence does not give rise to a

reasonably possibility the jury would have acquitted Jackson. Clark's analysis of the dish rag was insignificant because it only contained the victim's blood, an unremarkable fact considering the crime scene. Since Jackson has failed to show either deficient performance or prejudice, this Court should affirm on this sub-argument.

Jackson's second sub-argument similarly fails. Clark testified she labeled her results on the hair in question as "inconclusive" because, in her view, the extra allele found in that hair was a "sematic point mutation." (R. at 2490–93.) Jackson's expert did not contradict Clark's analysis on that point, but testified she would have determined this singular allele matched neither Jackson nor the victim. (R. at 2409–17, 2447.) Counsel were not deficient for failing to discover and utilize this testimony. Jackson's expert below could not contradict Clark's analysis that this third allele was a sematic point mutation. (R. at 2447.) Had she been called at trial, the jury would have heard conflicting testimony about whether the DNA on this hair should have been deemed inconclusive or a mixture that excluded Jackson and the victim as the minor contributor. Counsel were not deficient for failing to discover this disputed testimony, particularly where Jackson's proposed expert could not dispute

Clark's testimony that the allele was a sematic point mutation. It was reasonable for counsel to avoid this expert battle, which would have gone against his strategy of not attacking Clark's results, and instead utilize Clark's *undisputed* testimony about the DNA on the pocketknife that helped him. Additionally, there was no prejudice. Clark would have disputed the opposing expert's testimony at trial and there is no reasonable probability the jury would have acquitted Jackson based on this disputed testimony, which is far less compelling than the fact that someone else's DNA (neither Jackson's nor the victim's) was indisputably found on the bloody pocketknife.

Jackson points out that the DNA evidence was critical evidence in this case. This is indisputably true when it comes to the hair on the victim's leg, which his own expert agreed belonged to him. (R. at 2438.) But it is not true of the "inconclusive" DNA from one of the hairs in the victim's hand, similarly inconclusive results from the victim's vehicle, or the victim's known standard test results. Jackson's arguments conflate the important DNA evidence in this case with DNA minutia that a reasonable trial attorney could easily choose not to wade into. Counsel were not deficient for failing to consult with experts that would have ultimately, and unhelpfully,

assisted only in dealing with the minutia without actually addressing the linchpin evidence in this case: (1) Jackson's unnaturally shed hair on the victim; (2) Jackson's fingerprint encased in the victim's blood on her sink; (3) Jackson's denial that he knew the victim and had ever been to her home; and (4) the victim's vehicle, with her blood inside, found near Jackson's home. And considering this evidence, Jackson suffered no prejudice.

In this case, Jackson's counsel chose their weapons and ably fought on Jackson's behalf. But they were unable to overcome the trail of evidence leading directly to their client as the one who murdered the victim and signed the murder in blood with his fingerprint. Faulting counsel for failing to prevail in the face of this evidence is exactly the type judicial second-guessing that *Strickland* precludes. This Court should find neither deficient performance nor prejudice on this issue and affirm.

II. THE POSTCONVICTION COURT CORRECTLY DETERMINED TRIAL COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO INVESTIGATE AND CHALLENGE THE FINGERPRINT EVIDENCE.

Preservation/Waiver

This issue is generally preserved, but Jackson's primary argument in support of it was waived. Jackson now argues that his

counsel were ineffective for conceding the bloody fingerprint was his while also relying on an expert who testified the print was of no value. (I.B. at 91–98.) But he did not raise this issue in his motion below. (R. at 846–50.) The postconviction court expressly found this argument waived because it was raised for the first time in closing arguments. (R. at 1658.) Jackson fails to mention or dispute the postconviction court’s waiver determination. On that basis alone, this Court should affirm this issue. *See State v. J.V.*, 184 So. 3d 662 (Fla. 1st DCA 2016) (recognizing courts are constrained to affirm when an appellant fails to challenge an independent basis the court below specifically used to reach its decision). This Court should not countenance Jackson’s failure to address the postconviction court’s explicit determination that he waived the issue or permit him to do so for the first time in his reply brief when the State does not have an opportunity to respond.

Standard of Review

The State adopts its Issue I standard of review.

Merits

On the merits, Jackson argues trial counsel ineffectively handled the fingerprint evidence because counsel conceded the print

belonged to Jackson in opening and closing while putting on expert testimony that the print was of no value. He also appears to briefly advance arguments that: (1) counsel should have pointed out no examiners identified the bloody fingerprint as a match to Jackson until they compared it to his prints; (2) counsel should have taken issue with the prosecutor's assertion that the expert who determined the print was of no value would not change her opinion no matter what the evidence was; and (3) counsel should have raised objections to the fingerprint experts testifying to what other non-testifying analysts found.⁷ Each argument is discussed below.

A. Inconsistent Approaches to Jackson's Bloody Print

Jackson argues his counsel were ineffectively inconsistent about whether the bloody fingerprint belonged to Jackson. The postconviction court found neither deficient performance nor

⁷ These three arguments are insufficiently presented for review and should be dismissed on that basis. Jackson has not explained why his trial counsel were deficient for failing to do things his way or argued how he suffered prejudice. It is unclear whether these are independent ineffectiveness claims or simply bolstering the primary claim that counsel were ineffectively inconsistent. Additionally, the third argument was only presented in a footnote and went unaddressed by the postconviction court. (See R. at 850 n.65.) It is therefore unpreserved.

prejudice after determining Jackson waived the issue. (R. at 1657–59.) But since Jackson raised this argument for the first time in closing, it was undeveloped at the evidentiary hearing and trial counsel has not had an opportunity to explain why he conceded the fingerprint belonged to Jackson while also putting on the expert who determined the print was of no value.

Nonetheless, Jackson has failed to demonstrate counsel were deficient. Trial counsel contacted a fingerprint expert who said he could not provide helpful information for Jackson’s case. (R. at 2315.) Jackson failed to produce any helpful fingerprint expert at the evidentiary hearing. At trial, two independent fingerprint examiners—FBI Expert Slebrch and Pinellas County Examiner Schade—testified they determined the print was of value and matched Jackson. (SC13-2090 Vol. 9 at 92–98, 125–37.) And the initial expert who determined the print was of no value, Royal, agreed there were similarities between the print and Jackson. (SC13-2090 Vol. 9 at 112.)

Considering this evidence, counsel could not successfully argue to the jury that the print did not belong to Mr. Jackson. And so, in opening and closing, counsel conceded the print belonged to

Jackson. (SC13-2090 Vol. 8 at 166.) He instead opted to focus on the argument that no one could say *when* that print was placed and that it could have been there before the murder, an argument that the FBI expert agreed was possible. (SC13-2090 Vol. 8 at 166, Vol. 9 at 107.)

But counsel also mentioned the jury would hear evidence that the print was of no value. (SC13-2090 Vol. 8 at 165, Vol. 11 at 24.) Clearly, while counsel did not want to risk losing credibility with the jury by affirmatively arguing it was not Jackson's print, he wanted to put Royal's testimony before the jury and let them evaluate it in hopes that it might sow reasonable doubt despite his concession. While this strategy did not work, counsel were not effective for pursuing it. Nor is it evidence of a haphazard strategy. Instead, it appears a relatively subtle attempt to sow reasonable doubt while maintaining face with the jury and focusing on the more important aspects of the case. With two experts testifying the print belonged to Jackson, and another stating it was of no value but was similar to his, counsel were not deficient for choosing to focus more on *when* Jackson's print was placed in the victim's home than *if* it was in fact his print. For the same reason, counsel were not deficient for pursuing this strategy while attempting to sow reasonable doubt

without making an affirmative argument that the jury should view the print as of no value. Counsel cannot be deemed deficient for putting on exculpatory evidence even if it does not precisely flow with his theory of the case.

Moreover, there is no prejudice here. There is no reasonable probability the jury would have acquitted Jackson if counsel vigorously argued the print was of no value. The jury had two experts—one from the FBI—telling them it was of value and matched. On the other hand, if counsel simply did not put on Royal to testify that, in her view, the print was of no value, then the jury would have been faced with effectively the same evidence and nothing to contradict it. Jackson has failed to present any argument explaining why the jury would have acquitted him if counsel altered his strategy. Simply pointing out what counsel “could have done” is insufficient. Every attorney trying a case will pursue it differently. Those differences do not violate the Sixth Amendment. The Sixth Amendment is only violated in this context when no reasonable attorney would have pursued the course of action pursued by counsel and there is a reasonable probability the outcome would

have been different under a different course. That is not the case here and this Court should affirm this sub-issue.

B. No AFIS Match

Jackson contends his counsel should have argued more vigorously that there were no matches made until the examiners were given Jackson's prints. The postconviction court found neither deficiency nor prejudice and pointed out that trial counsel repeatedly brought out on cross examination that there was no match until examiners received Jackson's known fingerprints. (R. at 1656–59.) Whether trial counsel could have made this point better is not the standard for ineffective assistance of counsel, particularly when trial counsel's strategy was to focus on *when* the fingerprint was placed rather than if it belonged to Jackson. This was reasonable strategy under the circumstances. And there is no reasonable probability the jury would have been swayed into acquitting if counsel pressed this issue harder, particularly when the State spent a great deal of trial time going through the blind verification methods the FBI used to avoid confirmation bias. (SC13-2090 Vol. 9 at 86–97.) Since Jackson has failed to demonstrate either prong of a valid *Strickland* claim, this Court should affirm this sub-issue.

C. Old School vs. New School

Jackson next contends his counsel ineffectively failed to challenge the State's assessment of Royal as an old school expert who would not change her assessment under any circumstances. The postconviction court determined there was neither deficient performance nor prejudice on this sub-issue. (R. at 1685.)

Considering counsel's reasonable strategy to concede the print belonged to Jackson (demonstrated in opening and closing arguments), this argument fails to demonstrate either deficiency or prejudice. On this issue at least, trial counsel clearly decided not to make an issue of something that did not particularly harm his strategy. In fact, most of the prosecutor's comments surrounding this one were bolstering examiner Royal, a defense witness. (SC13-2090 Vol. 11 at 37 (prosecutor stating Royal is "a good woman" who he had used to convict defendants before).) Defense counsel testified this was why he did not object to the prosecutor's comments. (R. at 2313-32.)

Defense counsel's use of Royal's testimony was effectively a hail Mary approach to sow reasonable doubt. But his primary strategy was to argue no one could say when the print was placed on the sink. Considering two experts, one from the FBI, testifying the print

belonged to Jackson, this was not unreasonable. And Jackson does not even assert that taking issue with the prosecutor's comments would have given rise to a reasonable probability the jury would have acquitted him. Jackson was linked to this crime by his bloody fingerprint, DNA found on the murdered victim, his own lies demonstrating consciousness of guilt, and the victim's bloodied vehicle parked near his home. No reasonable jury would have acquitted because the defense and prosecution engaged in a spat over whose expert was new school and whose expert was old school. This Court should affirm this sub-issue.

D. Objections

Jackson makes a one-sentence assertion that his counsel failed to make confrontation, relevance, and bolstering objections about testimony that referred to what non-testifying examiners did or said. Such one-sentence assertions are insufficient to present an issue for review and this Court should reject any such arguments on that basis. Apart from appellate presentation, Jackson's argument on this ground was relegated to a similarly conclusory footnote in his motion. (R. at 850 n.65.) This was insufficient to present the issue to the lower court, which unsurprisingly did not rule on the issue. This argument

has been waived and should not be addressed by this Court. See *Brown v. State*, 304 So. 3d 243, 272 (Fla. 2020) (recognizing rule 3.851 requires each claim to be separately pled).

Finally, even the United States Supreme Court has recognized that counsel may tactically forgo minor confrontation clause objections and the like:

It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 328 (2009).

Jackson's single sentence assertion of error does nothing to demonstrate either deficiency or prejudice under *Strickland* and was not adequately presented to the court below. This Court should thus affirm.

III. THE POSTCONVICTION COURT CORRECTLY DETERMINED TRIAL COUNSEL DID NOT INEFFECTIVELY PREPARE MR. JACKSON FOR HIS TRIAL TESTIMONY.

Preservation

This issue is generally preserved for review, but Jackson's argument that counsel ineffectively gave him conflicting advice on

whether to testify is not. This Court should not consider this unpreserved argument.

Standard of Review

The State adopts its Issue I standard of review.

Merits

Jackson argues trial counsel ineffectively prepared him to testify on what appear to be three distinct bases: (1) that he received conflicting evidence on whether to testify; (2) that he was not prepared for aggressive cross-examination, appeared callous, and admitted to other crimes; and (3) that he was incorrectly informed about the number of felony convictions he had. The trial court found neither deficiency nor prejudice on this issue. (R. at 1667–70.)

A. Conflicting Advice on Whether to Testify

Jackson appears to contend his counsel were ineffective since he received conflicting advice on whether to testify. Jackson did not argue his counsel were ineffective because of their conflicting advice below and therefore this sub-issue is unpreserved for review. (See R. at 852.) Jackson’s veiled references to this conflict on appeal also fall far short of presenting this as an actual issue to this Court. For either of these two reasons, this Court should disregard this sub-issue.

On the merits, however, counsel were not deficient and Jackson was not prejudiced. Jackson had a right to testify and exercised that right after a colloquy with the court. (SC13-2090 Vol. 10 at 95–101.) The court even gave Jackson additional time to talk with his attorneys about the advantages and disadvantages of testifying. (*Id.* at 95.) Jackson stated they had answered all his questions, was satisfied with their advice, and chose to testify. (*Id.* at 95–96.) While Jackson’s counsel disagreed whether he should testify, their only role was to give their respective opinions to help him make the decision. (R. at 2162, 2166, 2315, 2351–52.) A reasonable attorney could advise Jackson not to testify in order to exclude his criminal record. Another reasonable attorney could advise Jackson he needed to explain how his fingerprint came to be in the victim’s house, particularly in light of his denial that he knew her and had ever been in her house. Jackson was able to avail himself of both points of view by discussing the matter with his attorneys—who each had a different perspective on the matter—before ultimately deciding to testify. Accessing these different perspectives is an advantage and certainly not demonstrative of deficient performance under *Strickland*. In any event, there was also no prejudice considering the

evidence against him, which would have been even stronger had he not testified. The jury would have been left with his fingerprint in the victim's blood and hair on the victim's leg, his post-*Miranda* denial he had ever been in her house, the victim's vehicle found near his house with her blood in it, and *no* explanation for the hair or fingerprint. There is no reasonable probability the jury would have acquitted him if he had not testified. This Court should affirm this sub-issue.

B. Preparation

For his next sub-issue, Jackson argues his counsel ineffectively failed to prepare him to testify, which led to him appearing to be callous, selfish, and a drug user in front of the jury. The trial court found neither deficient performance nor prejudice on this issue. (R. at 1667–70.)

Jackson's trial counsel were not ineffective. Regarding deficiency, Perkins testified, although he did not recall precisely what preparation he did with Jackson, that he would generally "go over and talk to them and things like that." (R. at 2163.) Perkins agreed that cross-examination and criminal records were important aspects of testifying that criminal defendants must be warned about:

Any client we have that will testify and they're told that if you — if you take the stand you have to answer the questions unless someone objects to it and after the judge rules on it you have to answer the question. If you take the stand, you have to be honest about what happened. You'll be asked by either side if you've been convicted of a felony, if so, the answer has to be yes or no and how many times.

(R. at 2164.) Perkins also testified that he would go over the defendant's testimony, go over things he should not bring up *like past crimes and being in prison*, and the specifics of his alibi defense. (R. at 2169–70.) This was enough to render constitutionally adequate preparation for testifying. Counsel is not required to be omniscient and either anticipate all prosecutor questions or rehearse all possible questions to ensure a defendant will not portray himself in a negative light on cross-examination. *See Taylor v. State*, 3 So. 3d 986, 996 (Fla. 2009) (rejecting ineffectiveness claim for failure to adequately prepare the defendant to testify where counsel did not rehearse the defendant's testimony and told him to testify truthfully); *Zack v. State*, 911 So. 2d 1190, 1198 (Fla. 2005) (rejecting ineffectiveness claim that counsel failed to adequately prepare a defendant for cross-examination). Indeed, the trial court in Jackson's guilt-phase warned him about this exact fact:

The Court: And also you know you can — you can prepare with your attorneys for — for your own direct examination, you can talk about what you’re going to testify about, *but there’s no predicting what the State is going to ask you and how they’re going to ask you those questions during cross-examination.* As long as it’s a relevant question when you’re on that stand you’ve got to respond. You understand that?

[Jackson]: Yes, sir.

(SC13-2090 Vol. 10 at 98) (emphasis added). Explicitly understanding this risk, Jackson elected to exercise his right to testify anyway. (*Id.*) Counsel were not deficient on this front. And perhaps equally importantly, Jackson has done nothing to identify what counsel could have done differently other than vague allegations of failing to prepare him for his trial testimony. See *Spencer v. State*, 842 So. 2d 52, 63 (Fla. 2003) (In rejecting an ineffectiveness claim this Court noted that post-conviction relief cannot be predicated on “conjecture.”) (citing *Sullivan v. State*, 303 So. 2d 632, 635 (Fla. 1974)).

Alternatively, there was no prejudice to Jackson. There is no likelihood that counsel’s failure to give Jackson some unspecified preparation would have enabled him to deal better with the prosecutor’s cross or to come across less callously. Criminal

defendants are not robots that can be programmed to avoid the pitfalls of cross-examination. But more to the point, there is no reasonable probability that such preparation would have resulted in a not guilty verdict considering the evidence against him. This Court should affirm this sub-issue.

C. Number of Felony Convictions

Jackson next contends his counsel ineffectively informed him that he had five felony convictions instead of four. The trial court found there was no prejudice without addressing deficient performance. (R. at 1669–70.) Under the unique circumstances of this case, Jackson has failed to prove either deficient performance or prejudice on this issue.

First, Jackson has failed to *prove* deficiency. During the Fifth Amendment colloquy, Jackson’s trial counsel stated he had determined Jackson had five felony convictions. (SC13-2090 Vol. 10 at 98.) During the penalty phase, the prosecutor made the following clarification:

Just to keep the Court in the loop and put things on the record, in preparing for the penalty phase the State realized that one of the felonies — one of the crimes the State thought was a felony, an escape charge out of Georgia, actually Georgia classifies escape as a

misdemeanor. One of the judgments and sentences had felony and then it was crossed out and written misdemeanor. So I think that's how some of the controversy came up. It was even on the judgment and sentence some controversy about whether it was a felony or a misdemeanor, however, I'm confident that it was a misdemeanor.

(SC13-2090 Vol. 12 at 12) (emphasis added.) It does not appear Jackson ever attempted to supply this escape conviction into the record below. Without a copy of this Georgia judgment and sentence, it is impossible to determine whether counsel were deficient for failing to second-guess an out-of-state court document that had the felony determination “crossed out” and “misdemeanor” written by it. Such a determination would necessarily require reviewing the judgment and sentence, particularly since counsel reviewed them. (See R. at 2165 (“I thought we had gone through the judgments and sentences beforehand. Generally that’s what I do.”).) Since it does not appear Jackson has supplied this judgment and sentence into the record, he cannot meet his burden to show deficient performance.

Additionally, counsel may not have been deficient for failing to contradict the State on this minor point. The State at trial was clearly convinced Jackson had five felony convictions, and Jackson never affirmatively stated otherwise. But if counsel had urged counsel to

only answer “four” convictions when asked, Jackson risked the prosecutor admitting the certified copies of his convictions into the record for the jury’s review. *See Brown*, 304 So. 3d at 259. Counsel were not deficient in this unique situation, where there was only a minor difference between whether it was five or four convictions, and where the State had a plausible reason for urging this conviction as a felony conviction.

But in any event, Jackson certainly suffered no prejudice. There is simply no reasonable probability the jury would have acquitted him if they heard he was “only” a four-time convicted felon instead of a five-time convicted felon. In this particular trial, this was a minor impeachment point. It was much less damning than Jackson’s lie that he did not know the victim and had never been in her house, particularly considering his hair and fingerprint in her blood found at the crime scene. As Jackson has failed to demonstrate prejudice, this Court should affirm this sub-issue.

IV. THE POSTCONVICTION COURT CORRECTLY DETERMINED TRIAL COUNSEL DID NOT INEFFECTIVELY INVESTIGATE AND PRESENT AN ALIBI DEFENSE.

Preservation

This issue is generally preserved, but Jackson's arguments that counsel ineffectively failed to bring out additional details from Penny Williams and ineffectively instructed the alibi witnesses not to mention this was Jackson's last birthday before going to prison for a long time are not. This Court should disregard these two sub-issues completely.

Standard of Review

The State adopts its Issue I standard of review.

Merits

Jackson argues trial counsel ineffectively investigated and presented his alibi defense because: (1) the alibi witnesses, except Deborah Jackson, were inexact about when Jackson was in Georgia and easily cross-examined; (2) counsel failed to bring out additional testimony from Penny Williams to explain why she remembered his visit; and (3) counsel instructed the family not to mention this was the last birthday party Jackson came up to visit with them before

going to prison. But none of these issues—discussed in turn—demonstrate counsel were ineffective under the Sixth Amendment.

A. Inexact Alibi Witnesses

Jackson first argues that counsel were ineffective because the alibi witnesses that trial counsel presented were inexact about when Jackson was in Georgia due to counsel’s failure to investigate and contact them sooner. The postconviction court found Jackson suffered no prejudice without making a finding on the performance prong. (R. at 1686–89.) The court noted that Jackson was first assigned counsel in June 2009 and the murder occurred in October 2004, and that Jackson “provided no specific testimony or evidence at the postconviction evidentiary hearing that would support his argument that his attorney’s delay in contacting the alibi witnesses further eroded the strength of his alibi testimony over and above what may have been the result of the initial five-year delay.” (R. at 1686–88.)

As an initial matter, Jackson has waived this argument by failing to present evidence in support of it at the postconviction hearing. He has also failed to rebut the lower court’s reasoning that

he failed to support this claim with evidence. Either reason is enough for this Court to affirm this sub-issue.

On the merits, Jackson has failed to establish that he suffered any prejudice from his counsel's delay. As the court pointed out, there is no evidence to support the claim that his witnesses would have testified better if they were contacted sooner by counsel. Jackson failed to establish prejudice and this Court should affirm this sub-issue.

In addition, as the postconviction court noted, Jackson's witnesses were hardly as inexact as he makes them out to be. (See R. at 1688–89.) Defense counsel drew out testimony establishing the victim was murdered either late on October 16 or early on October 17, 2004. (SC13-2090 Vol. 10 at 41, 45.) With this range pinpointed, counsel were able to assemble a relatively plausible alibi defense that was simply unable to overcome the State's evidence, including that Jackson signed this murder with his fingerprint in the victim's blood and left an unnaturally shed hair on her.

Trial counsel first called Deborah Jackson—Jackson's wife—in support of Jackson's alibi. She testified that Wednesday, October 13 was Jackson's birthday, and he had a tradition of going home to Adel,

Georgia (two and a half hours away), on his birthday weekend. (SC13-2090 Vol. 10 at 61, 64.) According to her, Jackson left for Georgia on Friday, October 15 with his cousin. (*Id.* at 61–62.) Jackson’s cousin came back the night of October 17 (after the murder), but Jackson was still in Georgia and did not return until the following Friday, October 22 on a Greyhound bus. (*Id.* at 62, 64.) Ms. Jackson remembered this event vividly because Jackson did not have the money to go to Georgia that weekend and she was “furious” with him. (*Id.* at 63.) Ms. Jackson weathered the prosecutor’s questions and maintained her insistence that Jackson went the weekend after his birthday, not before, and she could remember it vividly since she was angry at him. (*Id.* at 66–71.) She also volunteered that he called her on Monday (the 18th, after the murder) from a Georgia number to tell her that he missed his ride. (*Id.* at 70–71.)

Trial counsel called Jackson’s sister, Penny Williams, next. (SC13-2090 Vol. 10 at 72.) She also remembered that Jackson came home for the weekend *after* his birthday. (*Id.* at 72, 76.) This trip was unusual because Jackson had missed his ride to return home and Ms. Williams effectively became his chauffeur. (*Id.* at 74–76.) She took him to see a friend, Ms. Franklin, at her job so Franklin could give

him money for a bus. (*Id.* at 75.) Then she took him to the bus station, but the bus had already left, and she had to bring him back with her to Adel, Georgia. (*Id.* at 76.) These trips occurred the Wednesday after Jackson's birthday. (*Id.* at 75–76.) This coincides with Ms. Jackson's testimony that Jackson was up in Adel, Georgia, well after the victim was murdered. Williams also testified that Jackson's father took him to the bus station the next day; she was unable to because she was scheduled to work. (*Id.* at 76.) Under cross-examination, Williams maintained her testimony that she was certain this visit took place the weekend after his birthday and she drove him around the Wednesday a week after his birthday. (*Id.* at 77–78.) She was "sure" about this particular weekend because Jackson brought his daughter to see her during this period of time. (*Id.* at 79.)

Franklin corroborated this story, and that she gave Jackson money for a bus ticket, although she was uncertain about the dates other than that it was during a weekday in October. (SC13-2090 Vol. 10 at 83–84.) Franklin even referenced Jackson telling her that his sister was riding in the car with him, again, corroborating Williams' testimony. (*Id.* at 84.) On cross, Franklin maintained her certainty this occurred in October 2004 around Jackson's birthday; she

explicitly rejected the prosecutor's notion that this could have taken place in November or September. (*Id.* at 85.)

Trial counsel then called Jackson's father, Walter Jackson. Jackson's father testified that Jackson came and stayed with him a few days after Jackson's birthday in 2004. (SC13-2090 Vol. 10 at 88–89.) Jackson's father was not sure whether it was “Thursday or Friday” after his birthday, but knew Jackson came after his birthday and stayed for more than a day or two. (*Id.* at 88–89.) Jackson's father also remembered he took Jackson to the bus station for his return trip and that had to be either “Wednesday or Thursday.” (*Id.* at 90.)

Finally, for alibi purposes, Jackson testified in his own defense that he arrived in Georgia on Friday, October 15, got on a bus late October 21, and arrived back in Jacksonville very early (12:30/12:45 a.m.) on October 22. (*Id.* at 126–32.)

This is simply not an ineffective alibi defense. Other than Franklin, all of Jackson's witnesses testified that Jackson: (1) went up to Adel, Georgia, *after* his Wednesday, October 13 birthday in 2004; and (2) that he stayed there until the following Wednesday or Thursday. While there was some play in Jackson's father's testimony (who could not remember precisely whether Jackson came up

Thursday or Friday, and whether he left the following Wednesday or Thursday), these admitted failures of memory were immaterial. Even if Jackson came up the Thursday after his birthday and left the following Wednesday, he was still in Georgia for the victim's late Saturday/early Sunday murder. Ms. Jackson and Williams held up strongly under the prosecution's cross-examination and both explicitly stated reasons to remember these events in addition to the fact that it was Jackson's birthday. And Franklin (the only witness who could not give an exact timeframe other than around Jackson's birthday) corroborated Williams' testimony.

It is difficult to see what counsel could have done to present a better alibi defense under the circumstances. Counsel were not deficient, and Jackson certainly was not prejudiced, on this sub-issue. Counsel's alibi defense cannot be faulted for failing to overcome: (1) the transfer print in blood that Jackson left on the murder victim; (2) Jackson's unnaturally shed hair on her body; (3) Jackson's guilty-conscious denial that he had never met the victim or been in her house; and (4) the victim's vehicle, with her blood inside, located near Jackson's home. This Court should affirm this sub-issue.

B. Penny Williams

Jackson next appears to contend that his counsel were ineffective because they failed to put on additional testimony from Penny Williams about significant life events that helped her remember Jackson's visit. Jackson did not raise this argument in his postconviction motion, and the circuit court did not address it. (See R. at 854–55, 1683–90.) This argument is therefore unpreserved and should not be addressed by this Court.⁸ *Deparvine v. State*, 146 So. 3d 1071, 1102 (Fla. 2014) (holding defendant waived subclaim by failing to raise it until closing argument); *Henyard v. State*, 883 So. 2d 753, 759 (Fla. 2004) (“Initially, we would note that this specific claim was not made in Henyard’s postconviction motion, and therefore it is procedurally barred.”).

On the merits, Jackson has failed to show his counsel were ineffective. Williams testified at the evidentiary hearing that she remembered that weekend because: (1) she left her job (at some unspecified point; she was working when Jackson went to Adel in

⁸ The trial court referenced an argument by Jackson that his counsel failed to prepare his alibi witnesses for their testimony. (R. at 1688 n.21.) But failure to prepare is vastly different from failing to discover and put on specific testimony.

October); (2) December 2004 she was unable to buy gifts for her children; (3) she got another job in 2005; and (4) she married her husband in 2005. (R. at 2463–64.) She also confirmed that her trial testimony was truthful to the best of her recollection. (R. at 2466.) Counsel were not deficient for failing to elicit this testimony from Williams. The questions they asked, of her and the other alibi witnesses, were narrowly focused on October 2004 and the tradition that Jackson had to come visit his family every year around his birthday. These events in Williams’ life are at least somewhat removed from the critical date. Williams’ trial testimony was certain and did not require counsel to go through other details that happened in her life months later to affirm her testimony. (SC13-2090 Vol. 10 at 72–79.) This is especially true since Williams testified to a real-life event (seeing Jackson’s daughter during the critical time period of October 15–22, 2004). This was the “only time [Williams] could see” Jackson’s daughter, and it happened during this weekend. (*Id.* at 79.) Jackson has failed to establish deficient performance.

Alternatively, there was no prejudice. Jackson adduced a fairly solid alibi defense at trial despite the passage of time. If the jury believed him, his father, his sister, or his wife, the jury would have

acquitted. But this defense was unable to overcome the forensic evidence tying him to the crime, his own denial, and the location of the victim's blood-covered vehicle near his home. The additional details Jackson suggests counsel could have drawn from Williams do not provide a reasonable probability the jury would have acquitted him considering this evidence. Therefore, Jackson has failed to demonstrate prejudice as well. This Court should affirm this sub-issue.

C. Last Birthday Before Prison

In his final sub-issue here, Jackson contends his counsel were ineffective for instructing the alibi witnesses not to mention the fact that this was Jackson's last birthday with them before going to prison. Jackson did not raise this argument in his postconviction motion, and the circuit court did not address it. (*See* R. at 854–55, 1683–90.) This argument is therefore unpreserved and should not be addressed by this Court. *E.g.*, *Deparvine*, 146 So. 3d at 1102; *Henyard*, 883 So. 2d at 759.

On the merits, one of Jackson's trial counsel testified this was a strategic decision. (R. at 2179–80.) "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have

been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone*, 768 So. 2d at 1048.

Jackson appears to argue counsel's strategy was unreasonable because Jackson's criminal record would come in anyway once he testified. But this does not diminish counsel's strategic choice for several reasons. First, the right to testify is personal to the accused and cannot be forced by counsel. While counsel had a strategy that involved Jackson testifying, they would not really know if he would go through with it until he took the stand. Counsel cannot be deemed deficient for hedging their bets and not introducing evidence their client is a convicted felon (who happened to be committing felonies around the time the State was accusing him of murder) when Jackson might have changed his mind about testifying. Second, and more importantly, it is one thing to learn that the defendant is a convicted felon and quite another to learn that he was committing felonies, which ultimately lead to lengthy prison sentences, around the time the State is now accusing him of murder. Reasonable trial counsel could certainly view the latter as significantly worse than the former. And this so happened to be trial counsel's view. (*E.g.*, R. at

2179–80 (trial counsel agreeing that the jury simply hearing Jackson was a convicted felon was very different from hearing he committed a felony and got a lengthy prison sentence shortly after the victim’s murder).)

Third, and finally, counsel’s decision was reasonable because of what the alibi witnesses were going to testify to. As outlined above, Jackson’s counsel put forward a substantial alibi defense where the jury crediting any of the alibi witnesses he put on (other than Franklin) would have resulted in an acquittal. The timeframes used by any of those witnesses excluded him as the killer and were based on quite a significant life event: Jackson’s birthday. (R. at 2179.) Additionally, Deborah Jackson and Penny Williams both testified to additional reasons, independent of his birthday, why they remembered these events so clearly. In light of this testimony, it was eminently reasonable for counsel to prevent the jury from learning Jackson was more than just a convicted felon; he committed a felony that sent him to prison for a long time around the same time that the State was currently alleging he murdered someone. Jackson has failed to show either deficient performance or prejudice on this front and this Court should affirm this sub-issue.

V. THE POSTCONVICTION COURT CORRECTLY DETERMINED TRIAL COUNSEL DID NOT INEFFECTIVELY PREPARE DEBORAH JACKSON FOR THE CROSS-EXAMINATION OF HER PRIOR CONVICTION.

Preservation

This issue, and the specific arguments raised in support of it, are preserved for review.

Standard of Review

The State adopts its Issue I standard of review.

Merits

Jackson argues trial counsel ineffectively prepared Deborah Jackson for her testimony because counsel permitted her to be impeached with a twenty-year-old conviction and elected not to bring out the circumstances of the check conviction in redirect. The trial court found neither deficient performance nor prejudice. (R. at 1689–90.) This Court should affirm for several reasons.

First, Ms. Jackson was properly impeached for a crime of dishonesty, passing a bad check. See § 90.610(1), Fla. Stat. This crime is codified in section 832.05.⁹ Notably, none of the crimes in

⁹ This crime has been codified in the same section since at least 1990, more than twenty years before Jackson’s trial. See *Small v. State*, 587 So. 2d 597, 597 (Fla. 5th DCA 1991).

this section are strict liability crimes; instead, the State must prove the prohibited action was performed *knowingly* to secure a conviction. § 832.05, Fla. Stat. *Morin v. State*, 790 So. 2d 588, 589 (Fla. 5th DCA 2001) (recognizing that the 1999 version of section 832.05 required the State to prove “the defendant *knowingly* wrote a bad check with the purpose of obtaining something of monetary value”) (emphasis added). Knowingly and dishonestly writing a bad check certainly bore on Ms. Jackson’s credibility since her honesty was central to her alibi testimony. *See Children’s Palace, Inc. v. Johnson*, 609 So. 2d 755, 757 (Fla. 1st DCA 1992) (“It is apparent from the plain language of the worthless check statute that the crime has deceit as its basis.”). Jackson has not argued otherwise in this appeal and cannot do so for the first time in his reply brief. In any event, this would be a matter within the trial court’s discretion. *See Riechmann v. State*, 581 So. 2d 133, 140 (Fla. 1991); *Nehring v. State*, 225 So. 3d 916, 918 (Fla. 1st DCA 2017). Counsel were not deficient, and Jackson was not prejudiced, for permitting the State to properly impeach Ms. Jackson.

Second, no preparation could have changed this proper impeachment evidence. Jackson does not articulate what counsel

could have done to prepare Ms. Jackson better. Even assuming counsel failed to tell her she could be impeached with this crime, informing her of that fact would not have changed anything. Ms. Jackson's testimony was central to Jackson's alibi claim and counsel certainly could not forgo it because of a misdemeanor conviction. Counsel were not deficient, and Jackson was not prejudiced, because counsel failed to take unarticulated steps to better prepare Ms. Jackson. *See Taylor v. State*, 3 So. 3d 986, 996 (Fla. 2009) (rejecting ineffectiveness claim for failure to adequately prepare the defendant to testify where counsel did not rehearse the defendant's testimony and told him to testify truthfully); *Zack v. State*, 911 So. 2d 1190, 1198 (Fla. 2005) (rejecting ineffectiveness claim that counsel failed to adequately prepare a defendant for cross-examination).

Third, counsel were not ineffective for failing to ameliorate this impeachment on redirect. Whether, and how, to ameliorate the effects of a misdemeanor impeachment conviction on an important witness is a quintessential strategic decision for counsel to make. It is not enough that postconviction counsel disagrees with counsel's choice or would have done things differently. *E.g.*, *Taylor*, 3 So. 3d at 996.

While counsel could not remember why he did not redirect Ms. Jackson on the details of her crime, there is an objectively obvious reason why his failure to do so does not constitute deficient performance. Jackson argues his counsel should have redirected Ms. Jackson on the age of the conviction and that she simply made a mistake with her checks. But this line of questioning would have opened the door for the State to show what it had to prove to secure the conviction, including that it proved beyond a reasonable doubt that Ms. Jackson was *intentionally* dishonest. See *Fotopoulos v. State*, 608 So. 2d 784, 791 (Fla. 1992) (“[W]hen a defendant attempts to mislead or delude the jury about his prior convictions, the State is entitled to further question the defendant concerning the convictions in order to negate any false impression given.”); *McCrae v. State*, 395 So. 2d 1145, 1151 (Fla. 1980) (holding defense counsel opened the door because “his questions on direct examination[] tactfully attempted to mislead the jury into believing that appellant’s prior felony was inconsequential”). Additionally, as the postconviction court pointed out, it would have drawn the jury’s focus even more strongly on Ms. Jackson’s crime. (R. at 1690.) Jackson has failed to overcome the presumption that counsel’s decision not to redirect Ms.

Jackson on her misdemeanor conviction was sound strategy. See *Patrick v. State*, 302 So. 3d 734, 741 (Fla. 2020).

Alternatively, there was no prejudice. Ms. Jackson was properly impeached with her misdemeanor conviction for a crime of dishonesty. And redirecting her the way Jackson now suggests would have opened the door for the State to go into detail about what it needed to prove beyond a reasonable doubt to convict her. The State's obvious re-cross would have painted Ms. Jackson as someone willing to lie about the facts underlying a twenty-year-old misdemeanor conviction. And if she was willing to lie about that relatively small matter, her testimony on behalf of her husband in his first-degree murder trial would have seemed even less credible (something the State could have vigorously argued in closing). In addition, Jackson's fingerprint was recovered from the victim's home in her blood, his hair was found on her body, her vehicle was found near his house, and he denied knowing her or being in her house. With all this evidence, in addition to what Jackson's proposed redirect would have permitted the State to introduce about Ms. Jackson's credibility, there is no reasonable probability the jury would have acquitted Jackson if counsel attempted to introduce Ms. Jackson's version of

the facts underlying her conviction. Likely, Jackson's proposed redirect would have made his situation worse. Therefore, this Court should affirm this issue.

VI. THE POSTCONVICTION COURT CORRECTLY DETERMINED TRIAL COUNSEL DID NOT INEFFECTIVELY INVESTIGATE/FAIL TO FILE A MOTION TO DISMISS FOR PRE-INDICTMENT DELAY.

Preservation

This issue, and the specific arguments raised in support of it, are preserved for review. The trial court determined this issue failed to demonstrate either the performance or prejudice prongs of a valid *Strickland* claim.

Standard of Review

The State adopts its Issue I standard of review.

Merits

Jackson argues the trial court erred by determining his counsel provided effective assistance of counsel despite failing to investigate/file a motion to dismiss for pre-indictment delay. Since a motion to dismiss would have failed under the correct standard, along with the improper one urged by Jackson, the State disagrees. The trial court correctly ruled that trial counsel were not ineffective on this ground because the motion would have been meritless: "Law

enforcement, through no fault of their own, could not connect Defendant to [the fingerprint and hair] evidence for almost three years.” (R. at 1675.)

The familiar *Strickland* standard requires Jackson to prove that his counsel failure was deficient and that he was prejudiced by that deficiency. It is well established that the failure to make a meritless argument does not constitute deficient performance. *Peterson v. State*, 154 So. 3d 275, 280 (Fla. 2014). Counsel’s failure to file a motion can only constitute *Strickland* prejudice if the motion would have been successful. *E.g.*, *Sanchez-Torres v. State*, No. SC19-211, 2020 WL 1173750, at *4 (Fla. Mar. 12, 2020) (defendant must demonstrate motion to suppress would have been successful to establish *Strickland* prejudice).

The United States Supreme Court has recognized that legislatively enacted statutes of limitations provide the primary guarantee against the State pursuing overly stale criminal charges. *United States v. Lovasco*, 431 U.S. 783, 789 (1977). But it has also acknowledged that the “Due Process Clause has a limited role to play in protecting against oppressive delay” in bringing criminal charges. *Id.* This limited role is only implicated where the State’s pre-

indictment delay violates fundamental notions of justice that undergird civil and political institutions and the community's sense of fair play and decency. *Id.* at 790. Courts may not, under the guise of due process, violate the separation of powers and impose their personal or private notions of fairness on the executive branch. *Id.*

In dictum, the Supreme Court noted that due process “requires the dismissal of an indictment, even if it is brought within the statute of limitations, *if the defendant can prove* that the Government’s delay in bringing the indictment was a *deliberate device to gain an advantage over him* and that it caused him *actual prejudice* in presenting his defense.” *United States v. Gouveia*, 467 U.S. 180, 192 (1984) (emphases added). The Court “has never held that a due-process violation” for pre-indictment delay “results from mere negligence.” *Oppelt v. Glebe*, 550 F. App’x 499, 500 (9th Cir. 2013) (denying federal habeas prisoner’s six-year pre-indictment delay claim based on governmental negligence because the Supreme Court has no clearly established law on this issue).

There is presently a federal circuit split on what a defendant must show to demonstrate a due process violation based on pre-indictment delay. The First, Third, Fifth, Sixth, Seventh, Eighth,

Tenth, Eleventh,¹⁰ and D.C. Circuits all recognize that deliberate, governmental bad faith actions taken to gain a tactical advantage over the defendant are required to demonstrate a valid due process claim.¹¹ The Fourth¹² and Ninth Circuits utilize a balancing test that

¹⁰ *United States v. Foxman*, 87 F.3d 1220, 1223 n.2 (11th Cir. 1996) (“[W]here the record shows no reason for the delay (or where delay is due to simple negligence), no due process violation exists.”); *Stoner v. Graddick*, 751 F.2d 1535, 1542 (11th Cir. 1985) (“The thrust of binding precedent in this circuit requires the defendant to show both actual prejudice and deliberate prosecutorial delay to gain tactical advantage.”) (emphasis omitted).

¹¹ *United States v. Irizarry-Colón*, 848 F.3d 61, 71 (1st Cir. 2017); *United States v. Diallo*, 732 F. App’x 94, 100 (3d Cir. 2018); *United States v. Crouch*, 84 F.3d 1497, 1510–15 (5th Cir. 1996) (en banc) (replacing a balancing test that weighed the actual prejudice against the government’s reasons for delay in favor of an actual prejudice plus bad-faith requirement); *United States v. Lively*, 852 F.3d 549, 566–67 (6th Cir. 2017); *United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994) (recognizing the Supreme court indicated “nothing short of bad faith by the government in turning the prejudice to its tactical advantage will rise to the level of a due process violation”); *United States v. Meyer*, 906 F.2d 1247, 1251 (8th Cir. 1990); *United States v. Quirk*, 459 F. App’x 712, 713 (10th Cir. 2012); *United States v. Barragan*, 752 F. App’x 799, 800–02 (11th Cir. 2018); *United States v. Bridgeman*, 523 F.2d 1099, 1112 (D.C. Cir. 1975).

¹² The Fourth Circuit noted that it was an extreme outlier on this issue but could not overrule its prior precedent without going en banc. *Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996) (“On the authority of [four Supreme Court cases], every circuit, other than our own and the Ninth Circuit, has indeed held that, in order to establish that a lengthy pre-indictment delay rises to the level of a due process violation, a defendant must show not only actual substantial

weighs the reasons for the delay against the prejudice suffered by the defendant.¹³ Under this outlier balancing standard, governmental bad faith is not required for a valid due process claim, but it is weighted heavier than mere negligence. *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). The Second Circuit appears to have an intra-circuit conflict on the issue. Compare *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987) (declining to find a due process violation for pre-indictment delay where the prosecution did not intentionally delay to gain a tactical advantage), with *United States v. Ray*, 578 F.3d 184, 199 (2d Cir. 2009) (balancing the reasons for the delay, which was identified as prosecutorial negligence, against the prejudice suffered by the defendant).

Currently, Florida utilizes the outlier, balancing approach when evaluating due process claims of pre-indictment delay. The First District adopted this approach based on the Fifth Circuit's now overruled precedent in *United States v. Townley*, 665 F.2d 579, 581–

prejudice, but also that ‘the government intentionally delayed the indictment to gain an unfair tactical advantage or for other bad faith motives.’”).

¹³ *Angelone*, 94 F.3d at 905; *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985).

82 (5th Cir. 1982), *overruled by United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir. 1996) (en banc). This Court approved the First District's adoption of the *Townley* balancing test in 1987. *Rogers v. State*, 511 So. 2d 526, 531 (Fla. 1987). As a result, only this Court, or the United States Supreme Court, can restore the correct due process analysis for pre-indictment delay in Florida. *See State v. Hope*, 89 So. 3d 1132, 1136 (Fla. 1st DCA 2012) (rejecting the State's argument to reject *Townley*, in part, because the First District was bound to this Court's holding in *Rogers*).

Here, the trial court correctly denied this claim for two reasons. First, under the correct bad-faith standard, Jackson failed to prove the State intentionally delayed bringing charges to gain a tactical advantage over Jackson. This Court should recede from its prior precedent and hold bad faith is a necessary pre-requisite to a due process claim for pre-indictment delay. Second, under Florida's current standard, the State's inaction did not cause actual prejudice and was reasonable.

A. This Court Should Recede from Its Prior Precedent and Hold Bad Faith Is a Necessary Prerequisite to a Due Process Claim of Pre-indictment Delay.

This Court should find that bad faith is a prerequisite to a due process claim of pre-indictment delay and recede from its adoption of the Fifth Circuit’s now-defunct test.

First principles of constitutional construction compel this Court to arrive at a fair meaning of the text with a view towards “how a reasonable member of the public would have understood the text at the time of its enactment.” *Thompson v. DeSantis*, No. SC20-985, 2020 WL 5048539, at *5 (Fla. Aug. 27, 2020). Precedent normally must yield when it “clearly conflicts with the law [the Justices of this Court] are sworn to uphold.” *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020), *reh’g denied, clarification granted*, No. SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020). Departing from *Rogers*’ adoption of the *Townley* balancing test requires this Court to “conclude that [the] relevant precedents clearly erred in their understanding of” the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *See Thompson*, 2020 WL 5048539, at *3 (discussing the proper analysis for this Court to utilize when receding from prior precedent). Once a precedent of this Court is deemed

clearly erroneous, the “proper question becomes whether there is a valid reason *why not* to recede from that precedent.” *Poole*, 297 So. 3d at 507 (emphasis in original).

This Court’s precedent permitting due process claims without a showing of bad faith is clearly erroneous. The United States Supreme Court has repeatedly viewed bad faith as a prerequisite for a valid due process claim in the pre-indictment context. *United States v. Marion*, 404 U.S. 307, 325 (1971) (holding defendants failed to demonstrate a due process claim for pre-indictment delay where there was “no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them”); *Lovasco*, 431 U.S. at 795 (holding investigative delay does not rise to a due process violation because it is “fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused”) (citation omitted) (internal quotation marks omitted); *Gouveia*, 467 U.S. at 192 (stating in dictum that due process only requires dismissal of an indictment “*if the defendant can prove that the Government’s delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense*”) (emphases added). And in a

related context, the Supreme Court noted its due process decisions have “stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government.” *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988).

These decisions and statements by the United States Supreme Court convinced the Fifth Circuit to go en banc, recede from its erroneous balancing test in *Townley*, and require defendants to demonstrate bad faith on the government’s part as a prerequisite to a due process claim of pre-indictment delay. *Crouch*, 84 F.3d at 1510 (“[T]he better reading of these opinions is that the Supreme Court, in instances where the statute of limitations has not run, has refused to recognize a claim of preindictment delay absent some bad faith or improper purpose on the part of the prosecution”).

The en banc Fifth Circuit also provided three additional reasons why the *Townley* test is inherently unworkable and implicates serious separation of powers concerns. First, the Fifth Circuit noted:

The *Townley* test purports to weigh or balance the extent or degree of the actual prejudice against the extent to which the government’s “good faith reasons” for the delay deviate from what the court believes to be appropriate. However, what this test seeks to do is to

compare the incomparable. The items to be placed on either side of the balance (imprecise in themselves) are wholly different from each other and have no possible common denominator that would allow determination of which “weighs” the most. Not only is there no scale or conversion table to tell us whether eighty percent of minimally adequate prosecutorial and investigative staffing is outweighed by a low-medium amount of actual prejudice, there are no recognized general standards or principles to aid us in making that determination and virtually no body of precedent or historic practice to look to for guidance. Inevitably, then, a “length of the Chancellor’s foot” sort of resolution will ensue and judges will necessarily define due process in each such weighing by their own “personal and private notions’ of fairness,” contrary to the admonition of [the Supreme Court].

Crouch, 84 F.3d at 1512.

Second, grounding a due process violation on the good faith but “inadequate, ineffective, or insufficient governmental personnel or management leading to preindictment delay” runs counter to basic due process principles. *Crouch*, 84 F.3d at 1512–13. Historically, the due process clause only pertains to deliberate actions by government officials, not negligence. *Id.* at 1513. While the Fifth Circuit noted due process issues could arise post-indictment in certain circumstances of negligence, those issues are inapplicable to pre-indictment due process. *Id.* at 1513 n.17. “Contrary to these principles, however, the *Townley* test would find a due process violation where the

government acted in good faith and did not deliberately seek to prejudice the party ultimately accused.” *Id.* at 1513.

Finally, and most importantly, the Fifth Circuit noted the serious separation of powers concerns that arise when courts perform the *Townley* test. *Crouch*, 84 F.3d at 1513. For example, in *Crouch*, the original panel had determined the lack of manpower and low priority the government assigned to the investigation did not outweigh the actual prejudice to the defendant. *Id.* This determination was, in essence, a judicial decision that greater resources and priority should have been placed on the case. *Id.* But decisions about manpower and resources are “committed to the legislative and executive branches.” *Id.* As the Fifth Circuit eloquently concluded:

What are we to make of all this? Are we to say that there would be no due process violation if the President had vigorously and timely requested additional funds to investigate and prosecute these cases, but Congress had refused? Or, that even so we will find a due process violation because Congress shouldn’t have refused? Of course, funds must come from somewhere. Are we to say that such additional funding is better than increasing taxes or the deficit or decreasing funding for some other programs? Are we to judge whether financial institution fraud should be assigned a higher priority than drug or other offenses? It seems to us that all those decisions are quintessentially the business of either the legislative or the

executive branch, or both, rather than the judiciary. Yet, a *Townley* approach—so long as it actually tries to “balance” or “weigh” instead of merely find a due process violation on the basis of the extent of the prejudice alone—inevitably involves us in grading or evaluating the merit of resource allocation and management decisions that are properly the province of the executive and/or legislative branches. Delay due to such causes is fundamentally unlike intentional delay to gain tactical advantage or for other improper purpose.

Id. at 1514.

The Fifth Circuit’s separation of powers concerns echo louder in Florida, where our state constitution expressly demands a strict separation of powers between the coequal branches of state government. *See Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978) (recognizing the federal constitution does not have an express separation of powers provision while Florida’s does); *B.H. v. State*, 645 So. 2d 987, 991 (Fla. 1994) (“This Court has stated repeatedly and without exception that Florida’s Constitution absolutely requires a ‘strict’ separation of powers.”). Florida’s constitution requires that the “powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to

either of the other branches unless expressly provided herein.” Art. II, § 3, Fla. Const.

This Court has recognized that the judicial branch would violate the separation of powers required by Florida’s constitution by entangling itself in fundamental questions of policy and planning by the executive or legislative branch. *Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989). This reality gave rise to the discretionary-function immunity exception to Florida’s otherwise broad waiver of sovereign immunity. *Id.* In Florida, prosecutors are insulated by discretionary-function immunity, provided by article II, section 3 when exercising their “judgment and expertise in determining whether or not a charge should be made for violation of the state’s criminal laws.” *Weston v. State*, 373 So. 2d 701, 703 (Fla. 1st DCA 1979); *see also State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) (“We apply these principles and hold that article II, section 3, of the Florida Constitution prohibits the judiciary from interfering with this kind of discretionary executive function of a prosecutor.”).

Since the immunity enjoyed by prosecutors when making charging decisions in the tort context arises from the article II, section 3, this Court’s current Due Process test runs afoul of Florida’s

strict separation of powers. The current test requires the judicial branch to balance the prejudice to the defendant with whether the executive branch's reasons for the delay are good enough, in the court's view, to outweigh that prejudice. This analysis requires courts to second-guess the executive branch's discretionary decisions on when to charge an individual within the permissible statute of limitations period imposed by the legislative branch. Such an analysis requires Florida courts to invade the province of both the executive and legislative branches in violation of article II, section 3. This Court should therefore recede from the clearly erroneous *Townley* test, which requires Florida courts violate the Florida Constitution by second guessing the discretionary decisions of the executive and legislative branches.

In sum, this Court should finally put to rest the *Townley* balancing test that the Fifth Circuit killed and buried twenty-five years ago, but that has repeatedly risen from its grave to twist Florida's due process jurisprudence and frighten unsuspecting criminal victims with the unjustified, untimely release of criminal

defendants.¹⁴ *Cf. Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (referring to the *Lemon*¹⁵ test as a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried”).

Applying the correct, bad-faith test, Jackson’s claim of ineffective assistance is meritless. He has never provided any evidence that the pre-indictment delay in this case was made in bad faith to pursue a tactical advantage. Without such evidence, counsel cannot be faulted for failing to file a legally meritless due process claim. Therefore, this Court should affirm this issue.

B. Alternatively, the Pre-indictment Delay Did Not Cause Actual Prejudice and the Executive Branch’s Reasons for the Delay Were Reasonable

Even if this Court adheres to the Fifth Circuit’s overruled *Townley* test, Jackson’s claim is meritless. Under this incorrect

¹⁴ See, e.g., *State v. Ellis*, 273 So. 3d 1126, 1129 (Fla. 3d DCA 2019) (affirming trial court finding that counsel was ineffective for failing to file a motion to dismiss for pre-indictment delay despite no showing the delay was caused by bad faith); *Hope*, 89 So. 3d at 1137 (affirming trial court’s grant of motion to dismiss for pre-indictment delay despite no showing the delay was caused by bad faith).

¹⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

standard, the first step is determining whether the defendant has suffered actual prejudice. *Rogers*, 511 So. 2d at 531. Actual prejudice is not shown by “speculative allegations made here of faded memories or the purported disappearance of alibi witnesses whose significance or existence was doubtful.” *Id.* If, and only if, a defendant meets the first prong, the demonstrable reasons for the delay are balanced against the gravity of the prejudice on a case-by-case basis. *Id.* “The outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play embodied in the Bill of Rights and fourteenth amendment.” *Id.*

The postconviction court correctly denied this claim for two reasons. First, Jackson has failed to demonstrate actual prejudice. The circuit court found he had failed to do so:

Defendant argues the preindictment or prearrest delay in his case caused actual prejudice to his defense as a result of: (a) lost records that could corroborate his claim of traveling from Adel, Georgia, to Jacksonville shortly after the murder; (b) each testifying witness fading memory of the details surrounding Defendant’s visit to Adel; and (c) the death of his grandfather, Lawyer Jackson, who was an alibi witness. Defendant, however, provided no evidence that any bus company records ever existed and how they might have been lost over the passage of time between the date of the crime and his indictment or arrest. Defendant also failed to provide any specific details about the testimony his grandfather might offer if he were alive at

the time of trial. Defendant's allegations are, at best, speculative and are insufficient for a successful motion to dismiss based on a possible violation of his due process rights.

(R. at 1672.) The court's determination of whether a defendant suffered actual prejudice is reviewed for abuse of discretion. *Hope*, 89 So. 3d at 1137.

Jackson has failed to demonstrate the postconviction court abused its discretion in determining he suffered no actual prejudice and the motion to dismiss was meritless. Jackson simply repeats his contentions that records for his bus trip were no longer available, witnesses had difficulty remembering the exact days they saw Jackson in Georgia, and his grandfather had died. But the postconviction court found Jackson failed to adduce any evidence of what his grandfather would say or that the bus ticket records were ever available. (R. at 1672.) As argued in Issue IV, Jackson's witnesses testified relatively well and pinned down the date for his alibi. Under these circumstances, there was certainly no abuse of discretion by the court in determining Jackson did not suffer actual prejudice here. Even the Ninth Circuit has questioned whether lost testimony resulting from the "dimming of memory" would "ever

qualify for the level of prejudice necessary to establish a due process violation.” *Moran*, 759 F.2d at 782; *see also United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998) (“This court normally considers lost testimony to have been adequately protected when the government brings charges within the applicable statutes of limitation.”). Counsel cannot be deficient for failing to file a meritless motion.

Second, the balancing test favors the State. The trial court found as a factual matter that “[l]aw enforcement, through no fault of their own, could not connect Defendant to [the fingerprint and hair] evidence for almost three years.” (R. at 1675.) No matter what test is used, the State does not run afoul of the due process clause by investigative delays like this one. *See Lovasco*, 431 U.S. at 792–95 (holding an investigative delay where the only reason given was “additional investigation” needed did not run afoul of due process). Prosecutors are not even required to file charges promptly when they have assembled sufficient evidence. *Id.* at 792–93. Therefore, the postconviction court was correct. This motion was meritless, and counsel were not deficient for failing to file it. This Court should affirm.

VII. JACKSON HAS FAILED TO DEMONSTRATE CUMULATIVE PREJUDICE
STEMMING FROM COUNSEL’S ACTIONS.

Preservation

This issue, and the specific arguments raised in support of it, are preserved for review.

Standard of Review

This Court reviews the legal issue of whether a defendant was prejudiced by his counsel’s deficient performance de novo. *Washington v. State*, 835 So. 2d 1083, 1085 (Fla. 2002). Therefore, the question of whether Jackson suffered cumulative prejudice is also reviewed de novo. But of course, the lower court’s factual determinations are presumed correct and deferred to. *Id.*

Merits

For his final issue, Jackson argues that the cumulative effect of counsel’s deficient performance prejudiced him even if no one error on its own rose to that level.

As an initial matter, the burden to prove cumulative prejudice in this postconviction appeal rests exclusively with Jackson. Jackson incorrectly argues the burden is on the State to show the errors are harmless by citing numerous *direct-appeal* cases using that standard

for cumulative error. This standard is not applicable to a postconviction cumulative error claim, where the burden to show prejudice never leaves the defendant. *See Parker v. State*, 89 So. 3d 844, 867 (Fla. 2011) (“[W]e consider the impact of these errors cumulatively to determine whether [the defendant] *has established prejudice*.”) (emphasis added). The State has no burden on this issue at all, and Jackson has failed to carry his.

Jackson argues that the “sheer number and types of errors” in his guilt and penalty phases “virtually dictated the sentence of death” and denied him a fundamentally fair trial. But he has failed to show his claims were not procedurally barred or that counsel were deficient. Here, there is no deficient performance; there is therefore no need to consider cumulative prejudice. *See Morris v. State*, No. SC20-155, 2021 WL 1310349, at *10 (Fla. Apr. 8, 2021) (explaining there is no need to conduct a cumulative prejudice analysis where there is no deficient performance); *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003) (because the alleged individual errors are meritless, procedurally barred or do not meet the *Strickland* test for ineffective assistance of counsel, cumulative error is without merit). As discussed in Issues I-VI, counsel were not deficient on any of the

grounds raised by Jackson, which mostly relate to counsel's strategic choices, unimportant pieces of evidence, meritless motions, or unpreserved claims. And although Jackson argues the State's case was weak, this simply is not the case. The State produced evidence Jackson had been in the victim's home during the murder (his transfer fingerprint encased in her blood and unnaturally shed hair on her body), that he had a guilty mind (his denial that he had ever been in her house or knew her), along with evidence that her vehicle, with her blood inside, was found near his house. *E.g.*, *Jackson*, 180 So. 3d at 951–52 (noting the crime scene reconstructionist testified that Jackson's fingerprint "was a transfer impression that was not left before the attack and could not have been there before the blood" and another expert's testimony "supports the conclusion that Jackson's finger was coated in wet blood before he touched the sink"). Jackson's claim of cumulative prejudice does not diminish or alter the strength of the State's case. "Because [Jackson] has failed to show that trial counsel's deficiencies, individually or cumulatively, establish the prejudice required by *Strickland*," this Court should affirm. *See Brown*, 304 So. 3d at 271.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirms the postconviction court's denial of Jackson's initial postconviction motion.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to all counsel of record via the e-portal.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Bookman Old Style 14-point font and contains 23,432 words pursuant to Florida Rule of Criminal Procedure 9.210(a)(2)(C), excluding the sections listed in rule 9.210(a)(2)(E).

Respectfully submitted and certified,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Jason W. Rodriguez
By: JASON W. RODRIGUEZ
Florida Bar No. 125285

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 (VOICE)
(850) 922-6674 (FAX)

Attorney for the State of Florida