Filing # 173599337 E-Filed 05/19/2023 07:59:50 PM

No. SC22-1671
Lower Tribunal No. 2009-CF-233

IN THE
Supreme Court of Florida

STATE OF FLORIDA,
Appellant/Cross-Appellee,

v.

LEO LOUIS KACZMAR, III,
Appellee/Cross-Appellant.

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

APPELLEE/CROSS-APPELLANT'S ANSWER/CROSS-INITIAL BRIEF

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STATEMENT OF THE CASE[1]

The Circuit Court for the Fourth Judicial Circuit in and for Clay County, Florida, entered the judgments of conviction and sentence at issue. On March 2, 2009, Kaczmar was indicted for attempted sexual battery, arson, and first-degree murder of Maria Ruiz. (R1. 9-11). Following conflicts by the public defender and regional conflict counsel, Francis Jerome Shea and Christopher Anderson were appointed to represent Kaczmar. (R1. 15, 42).[2]

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[1] The following will be utilized to cite to the record: "R1.__"- record on direct appeal; "T.__" – trial transcript; "R2.__" - record on direct appeal following second penalty phase and resentencing; "PCR.__" – postconviction record on appeal. Any additional citations will be self-explanatory.

[2] Appellant/Cross-Appellee states that Shea and Anderson are "two extremely experienced defense attorneys who have never been held ineffective by any appellate court." (IB. 5). This is misleading. While Anderson contended that he was never held ineffective by any appellate court, Florida Statute § 27.7045 (2021) only requires that "*a court*, in a capital postconviction proceeding, determine[] that such attorney provided constitutionally deficient representation and relief was granted as a result." There is no requirement that *the Florida Supreme Court* rule on the matter. The only mention of the "highest court having jurisdiction to review" the finding of ineffective assistance, refers to the determination of the five-year period for which counsel can no longer represent clients in capital cases. "A court, in a capital proceeding" certainly encompasses Judge Cooper's court in *Phillips*. *See State v. Phillips*, Duval Cty. 16-2006-CF-15566-AXXX-MA (Order on Defendant's Motion for Postconviction Relief,

Kaczmar's trial began on August 9, 2010, before the Honorable William A. Wilkes. On August 12, 2010, the jury returned guilty verdicts on all three counts. (T. 997-98). The penalty phase of Kaczmar's trial was held on August 13, 2010. (T. 1001). That same day, the jury recommended the death penalty by a vote of 11-1. (T. 1193-96). The trial court followed the jury's recommendation and sentenced Kaczmar to death on November 5, 2010. (T. 1234).[3] This

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April 24, 2017). Furthermore, Phillips was granted relief by the postconviction court based upon its finding of ineffective assistance by Anderson. *Id*. The State chose not to appeal Judge Cooper's finding that Anderson provided constitutionally deficient representation. That determination was, therefore, final upon the expiration of time to file an appeal to the Florida Supreme Court. *See Galante Phillips v. State*, 249 So. 3d 596 (Fla. 2018). Additionally, the postconviction court in Kaczmar's case has found Anderson ineffective. (PCR. 1817).

[3] The trial court found four aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation (great weight); (2) the capital felony was committed while the defendant was engaged in the commission of or an attempt to commit a sexual battery (great weight); (3) the capital felony was especially heinous, atrocious, or cruel (great weight); (4) the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification (great weight). The court found the following mitigating circumstances: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (not proven); (2) the defendant was

Court affirmed Kaczmar's conviction on direct appeal and remanded for a new penalty phase, holding that the trial court's finding of two aggravators -- CCP and committed in the course of attempted sexual battery -- were in error and therefore, stricken. *Kaczmar v. State*, 104

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an accomplice in an offense but the capital felony was committed by another person and the defendant's participation was minor (not proven); (3) the defendant acted under extreme duress or under the substantial domination of another person (not proven); (4) the capacity of the defendant to appreciate the criminality of the conduct or to conform his conduct to the requirements of the law was substantially impaired (not proven); (5) the age of the defendant at the time of the crime (not proven); (6) the defendant was raised by an alcoholic father (slight weight); (7) the defendant was raised by a physically and emotionally abusive father (slight weight); (8) the defendant was emotionally traumatized as a child when he witnessed his grandfather's drowning and his mother shooting his father (slight weight); (9) the defendant had been taught to lie in court (slight weight); (10) the defendant lacked a normal, mother-son bonding and relationship (slight weight); (11) effects of being sentenced to adult prison while still a juvenile (not proven); (12) lack of adult male mentors during the crucial pre-teen and teenage years (not proven); (13) emotionally torn by extremes of parental abuse and parental overindulgence (not proven); (14) kind to animals (slight weight); (15) loyal friend (slight weight); (15) good, reliable business partner (slight weight); (16) good prison inmate (not proven); (17) loving relationship with aunt, Cathy Casleton (slight weight); (18) protective of younger family members (slight weight); (19) long term effects of illegal drug use (slight weight); (20) impaired by illegal drugs on the evening of the murder (slight weight); (21) absence of professional mental health counseling and treatment (slight weight); (22) respectful behavior in court (slight weight); and (23) disparate sentence of co-suspect Christopher Ryan Modlin (not proven). (R1. 1582-97).

So. 3d 990, 1008 (Fla. 2012).[4] This Court further stated that "[b]ased on the number of these errors during the penalty phase as reflected in the Sentencing Order, we cannot say beyond a reasonable doubt that such errors were harmless." *Id*.

Following a second penalty phase, the jury recommended the death penalty by a vote of 12-0 on August 20, 2013. (R2. 1098). The

[4] The following issues were raised in Kaczmar's direct appeal: (1) the court erred in denying Kaczmar's motion for a judgment of acquittal for the first-degree murder and attempted sexual battery allegations because the State failed to present sufficient evidence that the Defendant had attempted to sexually batter Maria Ruiz; (2) the court erred in allowing the State to call Priscilla Kaczmar, the Defendant's wife, to give testimony against her husband; (3) the court fundamentally erred when it failed to give a complete instruction to the jury on "heat of passion" as a defense to second-degree murder; (4) the court erred in limiting Kaczmar's closing argument and defense when it refused to let him rely on the language in the court opinions to explain or give examples of what is premeditation; (5) the court erred in excluding certain exculpatory statements Kaczmar made, which should have been admitted under the rule of completeness; (6) the court erred in finding that Kaczmar committed the murder in a cold, calculated, and premeditated manner without any pretense of legal or moral justification; (7) the court erred in denying Kaczmar's motion for a judgment of acquittal for the first-degree murder because the State presented insufficient evidence that he committed a premeditated first-degree murder; (8) the State presented insufficient evidence that Kaczmar committed an arson; and (9) this court wrongly decided *Bottoson v. Moore*, 863 So. 2d 393 (Fla. 2002) and *King v. Moore*, 831 So. 2d 403 (Fla. 2002).

trial court re-sentenced Kaczmar to death on October 11, 2013. (R2. 593-94).[5] This Court affirmed Kaczmar's sentence on January 31,

[5] The trial court found two aggravating circumstances: (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (great weight); and (2) the capital felony was especially heinous, atrocious, or cruel (great weight). The trial court found the following mitigating circumstances: (1) the capital felony for which defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance (not proven); (2) the capacity of the defendant to appreciate the criminality of the conduct or to conform his conduct to the requirements of the law was substantially impaired (not proven); (3) defendant's age at the time of the crime (not proven); (4) the defendant was raised by an alcoholic father (slight weight); (5) the defendant was raised by a physically and emotionally abusive father (slight weight); (6) as a child, the defendant was emotionally traumatized when he witnessed his grandfather drown and his mother shoot his father (slight weight); (7) the defendant was taught to lie in court (slight weight); (8) the defendant lacked a normal mother-son bonding and relationship (slight weight); (9) the effect of defendant's adult prison sentence while still a juvenile (not proven); (10) defendant lacked adult male mentors during his crucial pre-teen and teenage years (not proven); (11) defendant was emotionally torn by extremes of parental abuse and parental overindulgence (not proven); (12) the defendant is kind to animals (slight weight); (13) loyal friend (slight weight); (14) the defendant was a good, reliable business partner (slight weight); (15) the defendant is a good prison inmate (not proven); (16) the defendant has a loving relationship with his aunt (slight weight); (17) the defendant was protective of younger family members (slight weight); (18) the defendant suffers long term effects of illegal drug use (slight weight); (19) the defendant was impaired by illegal drugs on the evening of the murder (slight weight); (20) the defendant did not receive professional mental health counseling and treatment (slight weight); (20) the defendant was respectful in court (slight weight); (21)

2017. *Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017).[6] Following a motion for rehearing, this Court denied the motion without prejudice "to raise, in a separate habeas corpus proceeding alleging ineffective assistance of appellate counsel, the trial court's error in disclosing [Kaczmar's] prior death sentence for the crime at issue to the venire, which appellate counsel raised for the first time on rehearing." *Kaczmar v. State*, 2017 WL 4684336 (Fla. 2017). The United States

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co-suspect Christopher Ryan Modlin received a disparate sentence (not proven); and (22) the defendant is a loving father (slight weight). (R2. 528-51).

[6] The following issues were raised in Kaczmar's direct appeal following his second penalty phase and resentencing: (1) the trial court erred when it gave great weight to the jury's recommendation where Kaczmar refused to present any evidence in mitigation and the trial court provided no alternative means for the jury to be advised of the available mitigating evidence; (2) the trial judge improperly interfered with the jury's decision-making and usurped the jury's function when, in response to four questions the jury posed during its deliberations, the judge told the jury the questions were "not relevant"; (3) the prosecutor engaged in impermissible closing argument when he referred to the mitigating evidence as "excuses"; (4) the trial court erred in failing to find and give weight to the mitigating circumstance that Kaczmar was emotionally torn by extremes of parental abuse and parental overindulgence; (5) the death sentence is disproportionate; and (6) the trial court erred in sentencing Kaczmar to death because Florida's capital sentencing proceedings are unconstitutional under the Sixth Amendment pursuant to *Ring v. Arizona*.

Supreme Court denied the writ of certiorari on June 18, 2018. *Kaczmar v. Florida*, 138 S.Ct. 1973 (2018).

On May 25, 2019, Kaczmar filed his initial Motion for Postconviction Relief pursuant to Fla. R. Crim. P. 3.851. (PCR. 424-763). Amendments to this motion were filed on April 16, 2020, May 15, 2020, and December 11, 2020. (PCR. 847-56; 944-47; 1017-46).[7]

[7] Kaczmar raised the following claims in his Rule 3.851 motion: (1) counsel was ineffective through his failure to use available evidence and admissions of a state actor to discredit the basis for Filancia's knowledge of Kaczmar's alleged crimes; (2) counsel rendered ineffective assistance through his failure to move to suppress Kaczmar's alleged confession; (3) counsel was ineffective through his failure to impeach Filancia on the rational likelihood of his relationship with Kaczmar; (4) counsel was ineffective through his failure to object to Detective Sharman vouching for Filancia's credibility; (5) the State withheld *Brady* material with regards to Laura Fraser and Kaczmar suffered prejudice as a result of the State's actions; (6) counsel was ineffective through his failure to object to Filancia testifying that he knew Modlin was innocent and by compounding that error by asking Filancia why he knew Modlin was innocent; (7) counsel rendered ineffective assistance through his failure to object to Detective Matos' testimony about cell phone towers and Kaczmar's alleged proximity to certain cell phone towers; (8) counsel rendered ineffective assistance through his failure to utilize a retained DNA expert to better understand DNA evidence and argue reasonable doubt; (9) counsel was ineffective in failing to make arguments regarding the chain of custody of socks worn by Kaczmar; (10) counsel was ineffective in introducing harmful and misleading testimony that likely misled the jury and prejudiced Kaczmar; (11) counsel rendered ineffective assistance through his failure to place Kaczmar's exculpatory statements in evidence; (12) counsel rendered

ineffective assistance through his failure to refresh the memory of Julie Sims Ferrell and Kaczmar was prejudiced as a result; (13) counsel rendered ineffective assistance through his failure to object to drug use testimony and failure to object to the subsequent argument made by the State regarding that testimony and its relationship to the jury instruction regarding voluntary intoxication not being a defense; (14) counsel rendered ineffective assistance through his failure to investigate Maria Ruiz and whether she had training in self-defense; (15) counsel rendered ineffective assistance through his failure to object to State arguments that diminished the State's burden of proof and reasonable doubt burden; (16) counsel rendered ineffective assistance in not seeking individual voir dire in certain situations; (17) counsel rendered ineffective assistance in failing to have the jury properly instructed at resentencing; (18) counsel failed to protect Kaczmar's rights under the FL Constitution to have aggravators found by grand jury; (19) counsel rendered ineffective assistance through his failure to request a presumption of life instruction at sentencing; (20) FL death penalty constitutes cruel and unusual punishment as defined by court decisions regarding scenarios court have found to constitute especially heinous, especially atrocious, and most importantly--especially cruel; (21) counsel rendered ineffective assistance through his failure to ask for jury instruction on heat of passion; (22) counsel was ineffective during the penalty phase when he failed to object when the court interfered with the jury's decision-making and usurped the jury's function when, in response to four question the jury posed during deliberations, the judge told the jury their questions were "not relevant"; (23) counsel was ineffective during the penalty phase when he failed to object to the prosecutor's improper comments during closing argument regarding mitigation as "excuses"; (24) cumulative error; (25) counsel was ineffective for failing to investigate and challenge cell phone tower evidence presented by Detective Matos; (26) the State committed a *Giglio/Napue* violation during the guilt phase when the prosecutor failed to correct testimony regarding Filancia's possible sentence; (27) counsel was ineffective during the guilt phase when he failed to investigate Filancia and the nature of his plea deal; (28) counsel was ineffective during the penalty phase

The postconviction court issued its orders granting a hearing on Claims 1-2, 4-12, 14, 17, 21-23, 25-29. (PCR. 980; 1050).

An evidentiary hearing was conducted on April 11-12, 2022, May 6, 2022, and June 13, 2022. (PCR. 2650-3068). On November 3, 2022, the postconviction court issued its order, granting in part and denying in part, Kaczmar's Rule 3.851 motion for postconviction relief. (PCR. 1779-2225). The State filed an appeal of the postconviction court's grant of penalty phase relief. This answer and cross-appeal of the denial of Kaczmar's other claims timely follows.

STATEMENT OF THE FACTS

I. GUILT PHASE OF KACZMAR'S 2010 TRIAL[8]

The State's theory of the case was essentially that Kaczmar was using drugs on the night of the murder, wanted to sleep with the victim, and when she refused, he stabbed her to death and set the

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by failing to properly put evidence of Filancia's bias in front of the jury; and (29) the State committed a *Napue* violation during the penalty phase when the prosecutor failed to correct testimony regarding Filancia's possible sentence.

[8] This section will only address the guilt phase portion of Kaczmar's 2010 trial since he was granted to new penalty phase by this Court. *See Kaczmar v. State*, 104 So. 3d 990, 1008 (Fla. 2012).

house on fire to cover up the murder. According to the State, Kaczmar subsequently attempted to frame Ryan Modlin for the murder and threaten other witnesses. (T. 232-78). Kaczmar's defense at trial was reasonable doubt. (T. 278-87).

Below are portions of testimony relevant to the issues on appeal:

A. Julia Ferrell[9]

Julia Ferrell was a neighbor who lived next door to Kaczmar. (T. 309-10). Although she stated that she knew who Kaczmar was, she was not able to identify him in the courtroom. (T. 309). Ferrell testified that in the early morning hours of December 13, 2008, she was awakened by loud screams, angry voices, and what sounded to her like someone was trying to kick a door down. (T. 310). Her bedroom was located on the far end away from Kaczmar's house. (T. 310). She assumed it was between 5:00 a.m. and 5:30 a.m. when she was awakened. (T. 311). She heard "the word mother f'er used repeatedly in an angry tone over and over." (T. 311). She testified that

[9] Julia Ferrell is also referred to as Julie Sims and Julie Sims Ferrell throughout the record in this case. This brief will refer to her as Julia Ferrell or Ferrell, since that is how she is referenced in the postconviction court's order.

it was Kaczmar's voice that she heard repeating mother f'er over and over. (T. 311). She recognized his voice because she "listened to it every day for two months…every day when he got off work he would come into the yard and start doing the same thing, same words." (T. 311-12). When she was awakened that morning, she testified that it sounded like a very heated argument. (T. 312). She assumed it was Kaczmar and his Uncle Ed fighting. (T. 312). She testified that she put a pillow over her head and went back to sleep. (T. 312).

During cross-examination, trial counsel attempted to confirm that it was two male voices that she heard. (T. 313). At that point, Farrell answered: "I don't know if it was two males or not, but I do know the one voice that was over – very, very loud was Leo Kaczmar, the Third." (T. 314).

B. <u>Detective John Parker</u>

Detective Parker worked for the Clay County Sheriff's Office when he was called out to the scene on December 13, 2008. (T. 349). At some point, Kaczmar arrived at scene and gave Detective Parker a receipt for gas earlier that morning when he had gone fishing. (T.

352). Detective Parker subsequently followed up with the gas station to review the video surveillance. (T. 353).

During cross-examination, trial counsel attempted to ask Detective Parker about his interview of Julie Ferrell and the statements she made about the voices she heard coming from Kaczmar's house. (T. 354). However, the State objected: "it's not an inconsistent statement so it's hearsay and it's offered as an attempt to impeach. It's improper impeachment." (T. 355-56). The objection was sustained and no further questions were asked of this witness. (T. 356).

C. Detective Jerry Baker

Detective Baker worked with the State Fire Marshal's Office when he responded to the scene in this case. (T. 357). During cross-examination, trial counsel sought to proffer a question to Detective Baker outside the presence of the jury regarding statements made by Julie Ferrell as to the voices she heard. (T. 377-79). Trial counsel informed the court: "I intend to ask him the same question I asked the prior Detective Parker about the statement that Mrs. Sims had made to him…that she heard the voices of two men, and I'm bringing

that in as an inconsistent statement of prior testimony that she gave." (T. 378). Trial counsel then posed the question to Detective Baker about whether Sims Ferrell told him and Detective Parker that the voices she heard were of two men. (T. 379). Detective Baker answered in the affirmative. (T. 379). The State made the same objection as they had to Detective Parker testifying to these statements, that they were not inconsistent and this was improper impeachment. (T. 379). The court again sustained the objection and no further questions related to this matter were asked of this witness. (T. 379-80).

D. <u>Christopher Ryan Modlin</u>

Ryan Modlin was incarcerated during the time of his testimony, but prior to his arrest, lived down the street from Kaczmar. (T. 462). He testified that as part of his plea deal, he agreed to testify truthfully against the co-defendant in his own case and against Kaczmar. (T. 463). Modlin testified that he grew up with Kaczmar, they were friends since childhood, and at times during their lives, lived near each other. (T. 463).

Modlin recalled being at the Kaczmar house on December 12, 2008. (T. 467). Modlin first had contact with Kaczmar around 12:00

or 1:00 p.m. that day. (T. 467). He was at Kaczmar's house and they "smoked some weed." (T. 468). At some point, Modlin left Kaczmar's house and went home. (T. 468).

Modlin returned to Kaczmar's house around 5:00 p.m. (T. 467). They drove to Jacksonville to buy some cocaine. (T. 469). On the drive back to Kaczmar's house, they used some of this cocaine. (T. 470). When they returned to Kaczmar's house, they used more of the cocaine. (T. 470). At some point, Priscilla arrived at the house. (T. 470).

Modlin again left to go back to his house. (T. 471). He returned to Kaczmar's house a third time around 9:00 p.m. (T. 467; 471). Modlin testified that Kaczmar answered the door in his boxers and socks. (T. 472). Ruiz was in her bedroom. (T. 473). He followed Kaczmar down the hall to his bedroom. (T. 473). Modlin testified that he saw a baggie of crack cocaine, powder cocaine, and marijuana on the dresser in Kaczmar's room. (T. 474). He also noticed pornography playing on the television in his room. (T. 474). The two used more powder cocaine, and Kaczmar smoke some crack cocaine. (T. 476). Modlin noticed that Kaczmar was acting paranoid and hallucinating.

(T. 475-78). Modlin testified that Kaczmar made statements about wanting to get Ruiz to smoke dope so he could have sex with her. (T. 477). Modlin stated that he left Kaczmar's house around 11:00 p.m. and went home. (T. 479).

Modlin admitted that when he first spoke to police he lied to them about his whereabouts that night. (T. 480-82).

E. Detective Charlie Sharman

Detective Charlie Sharman was with the Clay County Sheriff's Office when he became involved in this case. (T. 542). Detective Sharman spoke with Kaczmar at the police station on the night of December 13, 2008, at approximately 9:30 p.m. (T. 543-44). Detective Sharman advised Kaczmar of his Miranda rights. (T. 544-47). Prior to this interview, Detective Sharman had been informed by another officer that Kaczmar's socks appeared to have blood on them. (T. 549). Because of this, Detective Sharman was focused on trying to observe Kaczmar's socks during this interview. (T. 549). Sharman testified that he saw what appeared to be blood on Kaczmar's socks and asked him about it. (T. 549). Kaczmar told him that it was his blood and he cut his leg on an oyster shell while fishing. (T. 550).

Kaczmar also showed him a small cut on his left thumb and linear marks in the palm of his right hand. (T. 551). He explained that these were from the fishing line wrapping around his hand. (T. 551-52). At some point during this interview with Kaczmar, Detective Sharman asked for Kaczmar's socks. (T. 553). Kaczmar complied and the socks were placed into evidence. (T. 553).

At some point after this initial interview with Kaczmar, Detective Sharman received information from a jailhouse snitch named William Filancia, that Kaczmar was attempting to fabricate and plant evidence as well as tamper with witnesses from the Clay County Jail. (T. 715). Sharman enlisted the help of an undercover officer, Charles Humphrey, to meet with Kaczmar at the jail to see if Kaczmar would solicit him to plant evidence or tamper with witnesses. (T. 716-17). Humphrey assumed the identity of a friend of Filancia's named Carlos Riviera. (T. 717). A plan was hatched to have "Carlos" meet with Kaczmar's wife, Priscilla, and she was supposed to pay him $300 to plant evidence and tamper with a witness, Ryan Modlin. (T. 722; 725). Subsequently, Priscilla was arrested and charged for these offenses. (T. 728-29).

F. Detective Danillo Matos

Detective Matos was working for the Clay County Sheriff's Office when he became involved in this case. (T. 639). As part of his investigation, he retrieved the cell phone records for Kaczmar's phone. (T. 646). He testified about the cell tower site data contained in those records. (T. 647). Based on his review of these records, he compiled the data onto a map to show Kaczmar's whereabouts during the early morning of December 13, 2008. (T. 657).

G. Maria Lam

Maria Lam was a crime laboratory analyst with FDLE when she became involved in the investigation of this case. (T. 659). She testified that she conducted testing to obtain a DNA profile for Ruiz. (T. 667). She also conducted testing on swabs collected from Kaczmar to obtain a DNA profile for him as well. (T. 669). Lam testified that she conducted testing on one pair of white socks. (T. 670). First, she performed serological analysis on the socks and it gave chemical indications for the presence of blood. (T. 670). She tested a total of 34 areas on the socks. (T. 672). All 34 areas were positive for blood. (T. 672). From those areas that tested positive for blood, she took five

cuttings from each sock to run STR DNA analysis. (T. 672). She was able to obtain a mixture profile from the socks. (T. 673). This mixture gave an indication of two or more individuals. (T. 675). Lam testified that Kaczmar was included as a possible contributor to this mixture. (T. 675). She further testified that Ruiz matches the DNA profile that she obtained from the socks for the major contributor. (T. 675).

H. Dr. Kevin McElfresh

McElfresh was the CEO and lab director of Casework Genetics, a forensic DNA company. (T. 696). He has a PhD in molecular and population genetics. (T. 698). He explained population genetics as a way to "predict and evaluate how common or rare a DNA type might be." (T. 698). He testified that he reviewed all of Lam's bench notes and the actual results she obtained in this case. (T. 702). He reviewed the computer calculations done by Lam, and did his own calculations by hand. (T. 702). His review of the case confirmed the statistical results obtained by Lam. (T. 702). He testified that "[t]he only reasonable scientific explanation is that that was Maria Ruiz's blood on those socks." (T. 705). During cross-examination, McElfresh stated that "[t]here are so many ways that [DNA] can get on that pair

of socks…I mean the world is covered with material and some of it has DNA in it and socks are a wearer item, so, you know --." (T. 706). He agreed that it could have come from a hand or someone's skin from their finger or even from walking on carpet while wearing the socks. (T. 706-07).

I. Detective Charles Humphrey

Detective Humphrey was employed with the Jacksonville Sheriff's Office when he was enlisted by Detective Sharman to go undercover and assume the identity of "Carlos." (T. 741-42). It was his understanding that Kaczmar wanted him to plant evidence and intimidate or beat up witnesses. (T. 742). He met with Kaczmar at the jail four times. (T. 742). Priscilla gave him $300 to plant evidence at Ryan Modlin's house. (T. 755). Additionally, Detective Humphrey testified that Kaczmar wanted him to persuade someone named Jacob to come forward and say that Modlin told him about some evidence and where to find it. (T. 754; 758; 761). There was some discussion of a buried knife and where that could be found. (T. 758). Kaczmar also wanted him to find a second person would could come forward with an alibi for him. (T. 762-63).

J. William Filancia

William Filancia, was the jailhouse snitch in this case. He testified that he was currently incarcerated and had entered into a plea on his case. (T. 780). Filancia testified that he could have received a maximum possible sentence of life on his charges. (T. 780). However, according to the plea he entered into regarding those charges, he expected to receive anywhere from zero to 20 years. (T. 780). As part of that plea deal, he agreed to tell the truth with respect to this case. (T. 780).

Filancia testified that he was housed with Kaczmar at the Clay County Jail. (T. 781; 783). He testified that he developed a friendly relationship with Kaczmar and they would discuss their cases with one another. (T. 785-86). Kaczmar told Filancia that the night of the murder, he and Modlin were using drugs and he was trying to get Ruiz to party with them. (T. 788). Kaczmar stated that he wanted to have sex with Ruiz that night. (T. 788). Filancia testified that Kaczmar told him Ruiz was lying down on her mattress, Ryan had left for the evening, and he started making passes at Ruiz. (T. 788). They got into a shoving match and Ruiz ran into the bathroom. (T. 789). Kaczmar

started pounding on the door and then ran outside and pounded on the bathroom window. (T. 789). When he realized she left the bathroom, he ran back into the house. (T. 789). Ruiz was in the kitchen and grabbed a knife. (T. 789). Kaczmar hit her in the head and tried to get the knife from her. (T. 789). As he was trying to grab the knife, he cut his thumb. (T. 789). Filancia testified that Kaczmar was really angry at this point and took a knife out of his pocket and started stabbing her. (T. 790).[10] At some point after the stabbing, Kaczmar drove to the gas station to buy some gas, and returned to the house and set it on fire. (T. 792-93).

On another occasion, Kaczmar talked to Filancia about getting someone to serve as an alibi for him, and planting evidence to frame Modlin. (T. 802-03). Filancia told his attorney about this, and subsequently had a meeting with Detective Sharman. (T. 804). This is what led to the "Carlos" undercover operation. (T. 808).

During cross-examination, trial counsel attempted to follow-up on a question that Filancia was asked on direct. Trial counsel asked

[10] This conflicts with Modlin's testimony where he stated that Kaczmar was wearing boxer shorts and socks when Modlin left the house for the night. (T. 472).

Filancia how he knows that Modlin is innocent. (T. 821). Filancia answered that question by stating that Kaczmar told him that Modlin passed a lie detector test. (T. 821).

K. Richard Kuritz

Richard Kuritz was the attorney for Filancia. (T. 830). He admitted that he also met with Kaczmar at the jail, but stated that he did not discuss the details of his criminal case. (T. 830-31). During cross-examination, Kuritz admitted to having a discussion with Kaczmar about a personal injury case and using the proceeds from that to represent him in the murder case. (T. 833). However, Kuritz testified that he ultimately told Kaczmar he was not interested in handling his cases. (T. 833). Kuritz was asked about Filancia's plea deal where he was "facing a life sentence." (T. 834). Kuritz testified that there were a number of factors that go into a sentencing range, and that "just because a person has a life felony, doesn't mean that's what they're going to get." (T. 834). And that he "wasn't necessarily looking at life but potential on the table." (T. 834).

L. Detective Michael Goldner

Detective Goldner was the only witness called by the defense during the guilt phase of Kaczmar's trial. (T. 852). He had been called by the State in their case-in-chief, however, trial counsel's attempted cross-examination was objected to as beyond the scope. (T. 521). Detective Goldner was assigned as a laboratory crime scene investigator. (T. 853). One of his assignments was to collect evidence out of Kaczmar's vehicle. (T. 853). He took photographs of the vehicle and then took swabs from the inside of the vehicle. (T. 854). Detective Goldner testified that the purpose of taking these swabs is to look for blood. (T. 855). When asked whether he visually saw anything that looked like blood, he answered: "I observed some stains but I wasn't -- I can't testify whether it was blood or not." (T. 855). Goldner also testified that he confiscated items of clothing from the back of Kaczmar's truck including a camouflaged jacket and a pair of socks with what looked like rust stains on them. (T. 856).

II. KACZMAR'S 2013 PENALTY PHASE AND RESENTENCING

At a hearing on August 8, 2013, trial counsel informed the court that Kaczmar did not want them to present any mitigation during his

upcoming penalty phase trial. (R2. 1113). Trial counsel stated: "I think Mr. Kaczmar has indicated to the Court at least once in the past, that part of his motivation for this is he feels he'll be guaranteed the best counsel forever if he's sentenced to death and he won't necessarily have court-appointed counsel if he's sentenced to life. (R2. 1118). When the court inquired, Kaczmar confirmed that his motivation for waiving mitigation was, in part, due to his wish to have counsel represent him to be able to challenge his guilt phase.

> THE COURT: The decision of whether or not you're guilty or not has already been decided, correct?
>
> THE DEFENDANT: Temporarily, yes, sir.

(R2. 1120-21). Kaczmar's other reason was that he did not want to put his family through all of the heartache and pain of having to come testify. (R2. 1125).

The second penalty phase commenced on August 19, 2013. At the beginning of jury selection, the trial court made the following statements to the jury:

> Good morning, ladies and gentlemen. My name is William Wilkes, and I'm the Judge that will be handling this case.

> This case has a little history to it so let me explain your duty today. It's different than most trials we ever have.
>
> **The defendant was found guilty of murder in the first degree on 8/12/10, sentenced on 11/5/10 to life -- to death in this case.** Anyway, the Supreme Court always reviews any type of death case so the case went to the state Supreme Court, Florida State Supreme Court. They affirmed his conviction, that is they confirmed his conviction for first degree murder. However, the Supreme Court sent the case back here with instructions that the defendant is to have a new trial to decide what sentence should be imposed.

(R2. 622-23) (emphasis added).[11]

The State proceeded in this second penalty phase with only two aggravators, as opposed to the original four: (1) the murder was committed by a person previously convicted of a felony involving the use or the threat of violence to another person, that conviction being robbery; and (2) the murder was committed in an especially heinous, atrocious, or cruel manner." (R2. 795).

[11] This statement by the trial court was the subject of a motion for rehearing filed on direct appeal, wherein this Court declined to consider the matter since it was not raised in the initial brief, but rather raised for the first time in a motion for rehearing following the denial of the appeal. *See Kaczmar v. State*, 2017 WL 4684336 (Fla. 2017).

The State and defense counsel stipulated that on February 7, 2002, Kaczmar was convicted of the crime of robbery. (R2. 815). Kaczmar was 17 years old at the time of this offense that was committed on March 22, 2001, but was charged and sentenced as an adult. (R2. 816). The parties also stipulated that the matters set forth in this stipulation alone are sufficient for the State of Florida to meet its burden of proof and for the jury to find the existence of a prior violent felony aggravating circumstance. (R2. 816).

The State presented abbreviated testimony from the penalty phase portion of the 2010 trial to support the two aggravating circumstances, including testimony from Julia Ferrell, Ryan Modlin, Priscilla Kaczmar, William Filancia, Richard Kuritz, Maria Lam, Russell Monson, and Charlie Sharman.

III. KACZMAR'S EVIDENTIARY HEARING

Kaczmar's evidentiary hearing commenced on April 11, 2022, before the Honorable Michael Sharrit. Below are portions of testimony relevant to the issues on appeal:

A. William Filancia

William Filancia testified that he had already been working with detectives on another case when he first met Kaczmar. (PCR. 2794). He admitted that, though not at the beginning, but at some point, during his conversations with Kaczmar, he knew he would be giving the information to detectives. (PCR. 2794-95). He testified that he knew Laura Fraser and that she was his live-in girlfriend for about two and a half, three years. (PCR. 2795-96). He told Detective Sharman that he knew Fraser when he came upon her name while looking through some of Kaczmar's paperwork. (PCR. 2796). Detective Sharman told him not to worry about it and "not to mention it." (PCR. 2796).

B. Detective Charlie Sharman

Detective Sharman recalled that he was the detective on the case that Filancia had been arrested and charged with. (PCR. 2835). At some point, Filancia began assisting Sharman on other cases, including a case involving a defendant named Thornton. (PCR. 2835). After which time, Filancia also began assisting on Kaczmar's case.

(PCR. 2835-36). At some later point, Sharman officially documented Filancia as a confidential informant. (PCR. 2836).

C. Detective Russell Monson

Detective Monson testified that he received a pair of socks from Detectives Sharman and Matos on December 16, 2008. (PCR. 2851-52). He photographed the socks and conducted a presumptive test for blood. (PCR. 2852). He testified that he did not know when these socks were sent to FDLE for further testing. (PCR. 2852).

D. Detective Danillo Matos

Detective Matos testified that despite having signed the paperwork indicating that he placed the socks into evidence, he did not actually do so. (PCR. 2854-55). He stated that Detective Sharman collected the socks and brought them to Detective Monson. (PCR. 2855). He further stated that in the interest of getting some paperwork done to expedite the process, he completed the form, but did not actually collect or handle the socks. (PCR. 2855-56). Detective Matos admitted that the evidence is normally submitted by the person who collected it to maintain the integrity of the chain of custody, but that "there are exceptions." (PCR. 2856).

E. Detective Matthew Edmonson

Detective Edmonson testified that he and Detective Twisdale did the initial search of Kaczmar's truck on December 13, 2008. (PCR. 2861). He testified that he did not recover any items of evidence in Kaczmar's truck. (PCR. 2862).

F. Detective John Parker

Detective Parker testified that he interviewed Julie Ferrell after the murder. After reviewing his report, he testified that Ferrell advised him that it sounded like two men arguing at the Kaczmar residence at around 5:00 or 5:30 a.m. (PCR. 2925).

G. John Sawicki

John Sawicki is a forensic computer scientist and electronic evidence consultant. (PCR. 2874). He testified that most of the cell towers in use have multiple sets of antennas on the towers, and the typical layout of those antennas would be three different sectors, each covering a 120 degree radius around the antenna. (PCR. 2881). There is some overlap between the sectors themselves and between adjoining towers. (PCR. 2882). There has to be some overlap, otherwise you would get a dropped call. (PCR. 2882).

When asked if there was any way to know with any certainty which side of the tower a particular call came from, Sawicki testified that without knowing what specific direction the sectors point, we don't know exactly where they are located on the tower. (PCR. 2883).

In reference to Detective Matos' trial testimony, Sawicki stated that the concern was that Matos testified that the particular cell phone calls from Kaczmar's phone were consistent with the crime scene. (PCR. 2884). While not necessarily incorrect, there should have been a follow-up question as to what else it is consistent with, considering the cell towers are only three to four miles apart and have overlap built in. (PCR. 2884-85). Another point from Matos' testimony was that the cell tower records were consistent with Kaczmar being in a single location for those four calls. (PCR. 2885). Sawicki testified that again, although not inaccurate, it could also be consistent with the phone moving to multiple places within the coverage area of that sector. (PCR. 2885).

H. Candy Zuleger

Candy Zuleger testified as an expert in DNA typing, methodology, interpretation and forensic serology. (PCR. 2899). She

was initially contacted prior to trial by defense counsel and provided with documents to review on July 21, 2010. (PCR. 1552; 2899). After reviewing the relevant records from trial counsel, Zuleger drafted a report on July 26, 2010, but indicated that she needed additional information in order to finalize it. (PCR. 1549-50; 2900).[12] She did not testify at trial and defense counsel did not request that she do anything further on the case.

Zuleger testified that had she been asked, she could have assisted trial counsel in identifying inaccurate statements made by the State's witness at trial, Maria Lam, as well as inaccurate statements made by the prosecutor in opening statements and closing arguments. (PCR. 2911). For instance, Zuleger testified that the FDLE report and Lam's testimony did not explain that there were actually ten DNA samples taken, but rather makes it sound like there was just one DNA sample that was taken, and that Ruiz was the major contributor to that sample. (PCR. 2901). Additionally, there were ten different results for each one of the ten samples taken. (PCR.

[12] Kaczmar's trial began on August 9, 2010.

2904). In six of the ten samples, Kaczmar is the major donor. (PCR. 2090-91).

Zuleger testified that you cannot tell from the DNA testing whose blood it is on the sock because there were ten different samples, most of which were DNA mixtures. (PCR. 2903). The DNA could have come from blood, or saliva, or skin cells. (PCR. 2904). She would not be comfortable saying that the victim's DNA came from the blood on the sock. (PCR. 2922).

Although Lam testified that there were multiple samples, there is only testimony about one of the samples and no testimony about the nine other samples. (PCR. 2905). Zuleger notes that Lam never testified at trial that it was the victim's blood, because you cannot say that. (PCR. 2907). However, she noted that the prosecutor and trial counsel both stated that it was the victim's blood, which is not accurate. (PCR. 2908-10).

She testified that sources of DNA other than blood include semen, saliva, and epithelial cells. (PCR. 2911). She further explained that there can be a direct contact or an indirect contact or secondary

transfer of DNA. (PCR. 2912). DNA can even get mixed together if dirty clothes are stored or washed together. (PCR. 2912).

I. James Colaw

James Colaw was the prosecutor during Kaczmar's trial. (PCR. 2938). When asked if he ever disclosed to the jury that Filancia was facing a minimum of 65 years on his charges based on the sentencing guidelines, Colaw testified that he did not recall ever mentioning anything about Filancia's guidelines to the jury. (PCR. 2939). As to whether he ever disclosed this information to Kaczmar's attorneys, Colaw stated:

> [T]he guidelines are part of the rules of criminal procedure, so the guidelines are in 3.00(2)(A) and I know that Mr. Shea and Mr. Anderson had all of the same information about Mr. Filancia's cases and the charges he was facing and the charges he would be tendering a plea to. They had all that same information that I had about that.

(PCR. 2940). He disagreed that jurors heard misleading or false information about Filancia's possible sentence because defense counsel brought out that he was facing life in prison. (PCR. 2943-45). With regard to Kuritz's statements during trial about Filancia's sentence, Colaw recalled that Kuritz gave a convoluted and confusing answer, but he believed that Kuritz was attempting to give

a general description of how the guidelines work, and not talking about Filancia's case specifically. (PCR. 2942).

Colaw testified that he was the prosecutor when the case came back for the second penalty phase. (PCR. 2947). He recalls that the testimony of Filancia and Kuritz were again presented to the jury. (PCR. 2947). He agreed that Filancia was sentenced prior to the second penalty phase. (PCR. 2947). He also agreed that Filancia's sentencing sheet and guidelines were filed with the court and given to defense counsel prior to the second penalty phase. (PCR. 2949). Colaw testified again that he did not believe Filancia's or Kuritz's testimonies were misleading or false, but stated that "if Mr. Shea or Mr. Anderson had wanted or asked to stipulate in that he had since been sentenced and got 15, I mean I don't think I would have any problem with that." (PCR. 2950-51).

Colaw testified that Kaczmar's statements to Filancia "really tied it all together because it told [jurors] exactly from the defendant's own mouth, you know, how it went down and -- and what had occurred." (PCR. 2952).

J. Leo Kaczmar

Leo Kaczmar testified first about the blood on his socks. He recalled being in the interrogation room after taking off the socks to give them to Detective Sharman. (PCR. 2983). He stated that he put his own blood on the socks after Sharman left the room because he was high and his paranoid thinking was that if the police attempted to plant any evidence or switch the socks, that he would know they were his socks because they had his blood on them. (PCR. 2986). He assumed he was being recorded at the time while he was doing this. (PCR. 2986).

Kaczmar testified that everyone who lived in the house kept their dirty laundry together in the same clothes hamper because the washing machine did not work and it was either himself or Priscilla who would take the laundry to the laundromat to be washed. (PCR. 2987-89). If anyone in the house ran out of clean clothes, they would sometimes wear each other's clothes. (PCR. 2990-91).

Kaczmar testified about his conversations with Filancia regarding "Carlos." (PCR. 2991). Kaczmar stated that he kept complaining about how his lawyers were not doing anything to help

him. (PCR. 2991). Filancia suggested that he had someone who could help him locate witnesses -- "Carlos." (PCR. 2992). He testified that Filancia looked through all of his discovery in the jail. (PCR. 2992). Kaczmar testified that his attorneys and investigator were not doing any sort of investigation on his case to help him. (PCR. 2992). He stated that he met with the investigator, Mike Hurst, only one time for 30 minutes at the jail. (PCR. 2993). Hurst told him that this was the first and last time he would ever work with Shea because he would not even give him the case file to investigate. (PCR. 2993). As a result of all this, Kaczmar felt like he had to take matters into his own hands. (PCR. 2992).

During cross-examination, Kaczmar testified that he only showed Filancia his discovery and told him what he was being accused of. (PCR. 3001). He denied giving Filancia other details not contained in the discovery. (PCR. 3001-02). When asked about statements he made to detectives, he admitted he lied concerning the timeframe that he was asked about because detectives kept asking him for a time and he could only say it was dark out. (PCR. 3002-03).

SUMMARY OF ARGUMENT

ARGUMENT I: The postconviction court correctly found that Kaczmar was entitled to a new penalty phase because his court-appointed attorneys were ineffective in failing to object to the trial court's comments to the jury that Kaczmar had previously been sentenced to death.

ARGUMENT II: The postconviction court erred in finding that trial counsel was not ineffective in failing to object to Detective Sharman vouching for the credibility of William Filancia, the jailhouse snitch to whom Kaczmar supposedly confessed.

ARGUMENT III: The postconviction court erred in finding that trial counsel was not ineffective in failing to object to Filancia's testimony that Ryan Modlin was innocent, and then asking Filancia how he knew that Modlin was innocent, thereby eliciting testimony that Modlin had passed a polygraph which the court had ruled was inadmissible prior to trial.

ARGUMENT IV: The postconviction court erred in finding that trial counsel was not ineffective in failing to introduce Kaczmar's exculpatory statements in response to testimony from Filancia and

"Carlos", which would have explained to the jury that he was frustrated with his attorneys and felt like he had to take matters into his own hands.

ARGUMENT V: The postconviction court erred in finding that trial counsel was not ineffective in failing to impeach or refresh the recollection of Julia Ferrell. Ferrell's testimony was key to showing that there were two men arguing at the Kaczmar residence on the night of the murder, and not a man and a woman, i.e., the victim.

ARGUMENT VI: The postconviction court erred in finding that trial counsel was not ineffective in introducing harmful and misleading evidence through Detective Goldner, who testified that he saw some stains in Kaczmar's truck but could not say whether they were blood or not, leaving the impression with jurors that there was possibly blood in Kaczmar's truck after the murder.

ARGUMENT VII: The postconviction court erred in finding that trial counsel was ineffective in failing to move to suppress Kaczmar's alleged confession to Filancia, who was working as a state agent.

ARGUMENT VIII: The postconviction court erred in summarily denying this claim and in later finding that trial counsel was not

ineffective in failing to impeach Filancia on the rational likelihood of his relationship with Kaczmar, considering Filancia was in custody on charges that he had obtained sensitive information on individuals and then used that to blackmail them.

ARGUMENT IX: The postconviction court erred in finding that a *Brady* violation did not occur with regard to Laura Fraser, who had previously been in a long-term relationship with Filancia and who was also the foster mother of the victim's daughter.

ARGUMENT X: The postconviction court erred in finding that trial counsel was not ineffective for failing to utilize his DNA expert. Trial counsel did not call his DNA expert at trial or consult with her to refute misleading testimony from the FDLE analyst about the samples, and the State's inaccurate arguments that the DNA found on Kaczmar's socks was from the blood of the victim.

ARGUMENT XI: The postconviction court erred in finding that trial counsel was not ineffective in failing to challenge the chain of custody of Kaczmar's socks, which were not properly handled per the department's own guidelines.

ARGUMENT XII: The postconviction court erred in finding that trial counsel was not ineffective in failing to investigate and challenge the cell phone tower evidence presented by Detective Matos.

ARGUMENT XIII: The postconviction court erred in summarily denying the claim that counsel was ineffective in failing to object to the State's argument regarding Kaczmar's drug use and its relationship to the jury instruction regarding voluntary intoxication not being a defense.

ARGUMENT XIV: The postconviction court erred in finding that trial counsel was not ineffective for failing to object to the prosecutor's arguments that diminished the burden of proof and reasonable doubt.

ARGUMENT XV: The postconviction court erred in finding that the State had not committed a *Giglio/Napue* violation when the prosecutor failed to correct testimony regarding Filancia's possible sentence during Kaczmar's trial. While jurors heard that he was facing up to a life sentence, he was actually facing a minimum of over 65 years in prison based on the sentencing guidelines.

ARGUMENT XVI: The postconviction court erred in finding that trial counsel was not ineffective in failing to investigate Filancia and the nature of his plea deal with the State. Filancia had received a plea offer of 0-20 years in prison, effectively a 45-65 year downward departure from the minimum sentence that he was facing under the sentencing guidelines.

ARGUMENT XVII: The postconviction court erred in finding that trial counsel was not ineffective during the second penalty phase for failing to put evidence of Filancia's bias in front of the jury. Prior to the second penalty phase, Filancia had been sentenced and his sentencing scoresheet specifying how much time he was actually facing before the plea deal was a matter of record, yet not utilized by defense counsel to impeach his credibility.

ARGUMENT XVIII: The postconviction court erred in finding that the State had not committed a *Napue* violation during the penalty phase when the prosecutor failed to correct testimony regarding Filancia's possible sentence. Again, jurors only heard that he was facing a *maximum* sentence of life in prison, but was offered a plea offer of 0-20 years. He was actually facing a *minimum* of

approximately 65 years, which would effectively have been a life sentence given his age. Prior to the second penalty phase, however, Filancia was sentenced to only 15 years in prison, in part, due to his cooperation and testimony against Kaczmar. This was a downward departure of approximately 50 years from the minimum sentence he was facing under the sentencing guidelines before he made a deal with the State.

ARGUMENT XIX: The postconviction court erred in finding that trial counsel was not ineffective in failing to request a jury instruction on heat of passion, when such evidence was presented at trial.

ARGUMENT XX: The postconviction court erred in finding that trial counsel was not ineffective in failing to object to the prosecutor's characterization of mitigation as "excuses" during closing argument.

ARGUMENT XXI: The postconviction court erred in finding that trial counsel was not ineffective in failing to object when the court told the jury that they posed to the court during deliberations were "not relevant."

ARGUMENT XXII: The postconviction court erred in finding that that trial counsel was not ineffective in failing to have the jury

properly instructed at resentencing. Jurors were not given certain preliminary instructions as required by this Court, including instructions regarding the prohibition of any outside or online investigation into the facts of the case.

ARGUMENT XXIII: The postconviction court erred in finding that trial counsel was not ineffective in failing to request a presumption of life instruction at sentencing.

ARGUMENT XXIV: The postconviction court erred in finding that Florida's death penalty does not constitute cruel and unusual punishment as defined by its decisions regarding scenarios this Court has determined to be especially heinous, atrocious, and cruel.

ARGUMENT XXV: The postconviction court erred in finding that cumulative error did not deprive Kaczmar of a fundamentally fair trial.

ARGUMENT

I. THE POSTCONVICTION COURT CORRECTLY HELD THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT OR REQUEST A NEW VENIRE WHEN THE JUDGE TOLD THE VENIRE THAT KACZMAR WAS PREVIOUSLY SENTENCED "TO LIFE -- TO DEATH."

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

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

In this case, the postconviction court correctly held that trial counsel was ineffective for failing to object or request a new venire when the judge told the venire that Kaczmar was previously sentenced "to life -- to death". (PCR. 1817).

> **The defendant was found guilty of murder in the first degree on 8/12/10, sentenced on 11/5/10 to life -- to death in this case.**

(R2. 622-23)(emphasis added).

Since Appellee does not dispute the postconviction court's finding of deficient performance by trial counsel, any subsequent argument regarding this prong is hereby waived. As such, Kaczmar will only address the prejudice component of this *Strickland* claim.

Appellee argues that Kaczmar suffered no prejudice because (1) *Strickland* requires this Court to presume the jury followed the resentencing court's instructions; (2) this comment by the resentencing judge was only made once; and (3) the State proved two aggravators and Kaczmar provided "essentially no mitigation because he wanted a death sentence."

While Appellee argues that this Court is required to presume that the jury followed the court's instructions, it is important to note

that the resentencing court failed to give the jury proper instructions per this Court's guidelines. *See also* Issue XXII *infra*. Additionally, even though this comment was only made once, this Court has cautioned against mentioning a defendant's prior sentence. *Hitchcock v. State*, 673 So. 2d 859, 863 (Fla. 1996). **"Making the present jury aware that a prior jury recommended death ... could have the effect of preconditioning the present jury to a death recommendation."** *Id*. (emphasis added).

This Court has specifically instructed trial courts not to inform the jury about a prior jury verdict of death. *Hitchcock v. State*, 673 So.2d 859 (Fla. 1996) (emphasis added). In *Hitchcock*, this Court ruled that the following instruction *shall* be read to juries in resentencing trials:

> An appellate court has reviewed and affirmed the defendant's conviction for the murder of [victim's name]. However, the appellate court sent the case back to this court with instructions that the defendant is to have a new trial at this time to decide what sentence should be imposed.
>
> **No other instruction is to be given by the court as to a prior jury's penalty-phase verdict or why the case is before the jury for resentencing at this time.**

Id. at 863. (emphasis added). In Kaczmar's case, this Court had already decided *Hitchcock* by the time of Kaczmar's new penalty phase in 2013.

Furthermore, this Court has previously commented on this issue during Kaczmar's direct appeal of his resentencing. After denying Kaczmar's appeal, his appellate counsel filed a motion for rehearing, wherein he argued for the first time the issue involving the trial court's error in disclosing Kaczmar's prior death sentence. *Kaczmar v. State*, 2017 WL 4684336 (October 19, 2017). The majority denied without prejudice in order for postconviction counsel to file a habeas petition alleging ineffective assistance appellate counsel who was filing the motion for rehearing at issue. The dissent went further and unambiguously stated that they "would have granted rehearing rather than requiring Kaczmar to file a separate habeas petition because **the trial court's improper comments to the jury about Kaczmar's prior death sentence, which appear on the face of the record, warrant reversal based on our precedent in *Hitchcock v. State*, 673 So. 2d 859, 863 (Fla. 1996)."** The dissent further

referred to this as **"constituting clear reversible error."** *Id.* (emphasis added).

While Kaczmar recognizes that this is an ineffective assistance of counsel issue, based on the fundamental nature of this error, prejudice is established. *Cf. Lowe v. State*, 2 So. 3d 21, 38 (Fla. 2008) (holding that because the Court found no fundamental error on direct appeal, Lowe fails to demonstrate that counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the trial under *Strickland*); *Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003) (because Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* standard).

Since jury instruction errors are considered fundamental error by this Court, the number of aggravators or the extent of mitigation is not relevant to the prejudice prong analysis of *Strickland* in this instance.

Here, the court failed to instruct the jury according to the mandate set by this Court, and the jury's knowledge that the prior death sentence had the effect of preconditioning Kaczmar's jury to a death recommendation. *Hitchcock*, 673 So. 2d 859.

The postconviction court has already found trial counsel rendered deficient performance, and Appellee has chosen not to appeal that finding. This improper comment made to the jury was reversible fundamental error, thereby establishing prejudice to Kaczmar. The postconviction court correctly granted Kaczmar relief, and this Court should affirm that decision and remand for a new penalty phase.

II. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO DETECTIVE SHARMAN VOUCHING FOR FILANCIA'S CREDIBILITY.

Trial counsel rendered ineffective assistance when he failed to object to Detective Sharman's testimony wherein, he vouched for Filancia's credibility. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit

court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

As to this Issue, the postconviction court held: "It is not entirely clear from Shea's testimony how objecting to the improper vouching would have opened the door to other information. Nevertheless, assuming counsel was deficient, Kaczmar has failed to establish prejudice." (PCR. 1793).

The postconviction court erred in its finding as to this Issue because Kaczmar can establish both deficient performance and prejudice. Since the postconviction court did not explicitly say whether Shea's conduct was deficient, Kaczmar will address both prongs of *Strickland* herein.

During the guilt phase of Kaczmar's trial, Detective Sharman testified during redirect about jail calls wherein Kaczmar complained about his attorneys because they were not helping him and would not give him all of his discovery. (T. 735-36). The point of this testimony was for the State to show that Filancia was not looking at Kaczmar's discovery, but rather had gained any information about the case from Kaczmar himself. Sharman was then asked about the

evidence that Kaczmar supposedly told Filancia about while they were in jail together. (T. 736-38). Sharman testified that Filancia told him and Sergeant Jett about a knife that was either used in the crime or was in his possession. (T. 736). "[T]he knife was supposed to be somewhere behind the Kaczmar property on Dothan Road near a beer can in the woods next to a path." (T. 736-37). The knife was also supposed to be buried underneath a specific type of beer can and was near a path that may have existed at the time of the murder. (T. 737-38). Sharman testified that the area had grown over quite a bit from what he remembered the day of the murder. (T. 738). It was then that Sharman commented: **"The information that Bill Filancia gave whether it's good or bad or indifferent came from Kaczmar. He didn't make that up."** (T. 738) (emphasis added). This was presumably an attempt to explain away the fact that the knife, the supposed murder weapon, was never recovered despite very specific information as to where it was located.

During the evidentiary hearing, trial counsel was asked whether he recalled Detective Sharman vouching for Filancia by saying "well he didn't make that up." Trial counsel responded: "I did – seems that

we objected to that." (PCR. 2688). Trial counsel admitted that it is improper for one witness to vouch for another witness. (PCR. 2692). He then claimed that he did not object to this improper vouching by Detective Sharman because he thought it would open the door and incriminate Kaczmar. (PCR. 2693).

> A: **If I had filed an objection I – it's – I would have opened the door to the testimony of the background as to what he was talking about which would have educated the jury that there was a conversation about how he buried the knife out there** because our whole defense is he wasn't there to commit the murder so **it would have opened the door, ma'am.**
>
> Q: **Can you explain to me how making an objection for a witness improperly commenting on another witness or vouching for their credibility, can you explain to me how that objection opens the door to all that other information?**
>
> A: **Well, that would have been up to the State Attorney then to show the background as to why that came up.** Again, not keeping it isolated just to that one comment.
>
> …
>
> And I understand what you are saying, counselor. And **the answer to your question is, yes, a statement should not be bolstered but in the context of what was said here it just wasn't bolstering the statement but it could have led to additional proof – we kept – we kept that out about the knife being buried out there because they never found it, so now I am going to raise that issue and have the officer now explaining why he made the statement? I mean that's a potential. He may not**

> **even have gone there but I can't take that chance. I have always got to be thinking ahead as to what he might say that would open the door and be further damaging to proof** that Mr. Kaczmar was because his whole defense he wasn't there. He was up at Heckscher Drive.

(PCR. 2690-92).

"An attorney's performance must be reasonable under the prevailing professional norms, considering all of the circumstances, and viewed from the attorney's perspective at the time of trial." *Cabrera v. State*, 766 So. 2d 1131, 1133 (Fla. 2d DCA 2000). **"While strategic decisions of counsel are subject to great deference in postconviction review, patently unreasonable decisions, although characterized as tactical, are not immune."** *Lamb v. State*, 124 So. 3d 953, 957 (Fla. 2d DCA 2013)(*quoting Cabrera v. State*, 766 So. 2d at 1133-34 (Fla. 2d DCA 2000))(internal quotations omitted) (emphasis added).

As held by this Court in *Tumblin v. State*, 29 So. 3d 1093 (Fla. 2010):

> **"[A]llowing one witness to offer a personal view on the credibility of a fellow witness is an invasion of the province of the jury to determine a witness's credibility."** *Seibert v. State*, 923 So. 2d 460, 472 (Fla. 2006) (*quoting Knowles v. State*, 632 So. 2d 62, 65-66 (Fla.

> 1993)). "**It is clearly error for one witness to testify as to the credibility of another witness.**" *Acosta v. State*, 798 So. 2d 809, 810 (Fla. 4th DCA 2001). **Moreover, "[i]t is especially harmful for a police witness to give his opinion of a witness's credibility because of the great weight afforded an officer's testimony."** *Seibert*, 923 So. 2d at 472 (*quoting Page v. State*, 733 So. 2d 1079, 1081 (Fla. 4th DCA 1999)); *see also Acosta*, 798 So. 2d at 810. **"Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions ..."** *Bowles v. State*, 381 So. 2d 326, 328 (Fla. 5th DCA 1980); *see also Lee v. State*, 873 So. 2d 582, 583 (Fla. 3d DCA 2004) (holding police officer's comment that witness was credible and positive in her pretrial lineup identification was error requiring new trial); *Olsen v. State*, 778 So. 2d 422, 423 (Fla. 5th DCA 2001)("[I]t is considered especially harmful for a police officer to give his or her opinion of a witness' credibility because of the great weight afforded an officer's testimony."); *cf. Perez v. State*, 595 So. 2d 1096, 1097 (Fla. 3d DCA 1992)(stating that **improper admission of police officer's testimony to bolster the credibility of a witness cannot be deemed harmless**).

Tumblin, 29 So. 3d at 1101-02.

Trial counsel admitted that it is improper for one witness to vouch for another witness (PCR. 2692). He even thought that he had objected to this at trial. (PCR. 2688). However, when he realized that he did not, in fact, object to this improper testimony, he claimed that objecting to improper vouching would somehow open the door to all sorts of information that would harm his client. It is important to

note that Shea never could articulate anything that would have been said to further incriminate Kaczmar had he in fact "opened the door." Vague references to the "background of what he was talking about" and testimony that might be "further damaging" are insufficient to excuse this deficient performance.

This is a textbook objection that should have been immediately sustained by the court. It is well-settled law that a witness is not allowed to comment on the credibility of another witness. In this case, it was a police detective commenting on the truthfulness and credibility of another witness who had been informing on multiple cases to this detective. Such an objection would not have opened the door to anything. Shea seems to misunderstand the legal concept of "opening the door." As stated previously by this Court:

> As an evidentiary principle, the concept of "opening the door" allows the admission of otherwise inadmissible testimony to "qualify, explain, or limit" testimony or evidence previously admitted. *Ramirez v. State*, 739 So. 2d 568, 579 (Fla. 1999)(*quoting Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986). The concept of "opening the door" is "based on considerations of fairness and the truth-seeking function of a trial." *Id.* (*quoting Bozeman v. State*, 698 So. 2d 629, 631 (Fla. 4th DCA 1997)); *see McCrae v. State*, 395 So. 2d 1145, 1151-52 (Fla. 1980)....**The concept of "opening the door" is also based on "the consideration that without the fuller explication, the testimony that**

> **opened the door would be "incomplete and misleading."** *Peterson v. State*, 94 So. 3d 514, 534 (Fla. 2012) (*quoting Lawrence v. State*, 846 So. 2d 440, 452 (Fla. 2003)).

Nock v. State, 256 So. 3d 828 (Fla. 2018). **"Opening the door is not an all-or-nothing concept. Rather, a court must consider 'how wide' the defendant opens the door."** *Farr v. State*, 230 So. 3d 30, 34 (Fla. 4th DCA 2017) (*citing Ross v. State*, 913 So. 2d 1184, 1187 (Fla. 4th DCA 2005) (emphasis added). When a witness attempts to mislead the jury, the other party is entitled to inquire further, only insofar as such questioning would dispel any false impression given to the jury. *See Farr*, 230 So. 3d at 33-34. *See also Ramirez,* 739 So. 2d at 581 (holding that defense counsel opened the door to the State clarifying that codefendant's statement implicated defendant but "[i]t did not open the door to the questions on redirect regarding the details of what [codefendant] stated"); *Pacheco v. State,* 698 So. 2d 593, 595 (Fla. 2d DCA 1997) (holding that defense opened door to question explaining that codefendant had implicated defendant but defense "did not throw the door open wide enough to admit" the substance of codefendant's hearsay statement to detective).

Trial counsel claimed that he was trying to keep out evidence about the knife and prevent the police from searching for it. This *post hoc* rationalization has no merit. He did not keep this evidence out and the police did search for it. Sharman testified to this at trial. (T. 736-38). In fact, after Sharman's comment vouching for Filancia, Shea was able to re-cross and asked Sharman about whether he went out there to search for the knife with any sort of equipment like a metal detector, to which Sharman replied in the affirmative. (T. 738). The police did look for the knife where Filancia claimed that Kaczmar said it was buried and they did not find it. If anything, this calls the veracity of Filancia's testimony into question.

Trial counsel could not point to any specific harmful information that would have come out if he had somehow opened the door by an objection for improper bolstering of another witness. Moreover, Kaczmar testified at the evidentiary hearing and his version of the events were introduced into evidence via his jail calls. Kaczmar maintains his innocence and strongly denies committing this murder. Given this evidence, we also know what Kaczmar told

his attorneys and what could have possibly come out, and there is nothing that would have further implicated him as the murderer.

Trial counsel further testified at the evidentiary hearing that he reviewed police reports and took the deposition of Filancia. (PCR. 2679). He also took the deposition of Sharman. Therefore, he should have been prepared for anything damaging that either Filancia or Sharman could have said on the stand. Even if Filancia or Sharman testified to something for the first time on the stand, Shea could have impeached them for not having previously stated such a thing or included such a statement in police reports. Shea's attempts at justification for his failure to object in this instance do not hold water.

Sharman vouched for the truthfulness of another witness that was critical to the State's case against Kaczmar. This is improper. There was nothing "incomplete" or "misleading" about this testimony that would have opened the door to further testimony. It was simply *improper*. There is no further information needed to explain this testimony. It should have been stricken. None of Shea's justifications are logical or reasoned and certainly cannot be considered a sound trial strategy. Shea's failure to object and move to strike this improper

testimony is not reasonable under prevailing professional norms, and is therefore, deficient performance under *Strickland*.

The postconviction court reasoned that "[t]his is not a case where Filancia was the only witness to the crime or a victim pitted against his or her attacker." (PCR. 1793-94). This is a case where there were no witnesses to the crime and the only "confession" was supposedly made to Filancia. Therefore, this reasoning by the court as to why this statement by Sharman was not prejudicial, is flawed. Shea failed to make a textbook objection to something that this Court has routinely held is reversible error if such testimony is admitted. By his own admission, it is improper for one witness to vouch for another witness's credibility. It is especially harmful when the witness doing the vouching is a police detective because of the great weight that is given to their testimony. Kaczmar was no doubt prejudiced by this unsolicited comment made by Sharman about Filancia.

Filancia, a jailhouse snitch, testified that Kaczmar confessed to him to murdering Ruiz. Had jurors not been exposed to such a prejudicial comment by a detective in the case, they may have

questioned the veracity of Filancia's testimony and whether Kaczmar ever actually confessed to the murder to him. Instead, Sharman's unsolicited statement vouching for Filancia left jurors with the impression that it was proper for them to rely on Sharman's opinion of Filancia's testimony as truthful and credible. This is critical because not only did the jury hear evidence from Filancia through Sharman, but the jury heard from Filancia himself when he testified at trial. Filancia gave Sharman information about the supposed murder weapon, and he also testified about Kaczmar's supposed confession to the murder. Shea agreed that Filancia's credibility was important to the State's case. (PCR. 2674). He also agreed that attacking Filancia's credibility was critical to the defense. (PCR. 2674). However, Shea did the opposite by not objecting to this improper comment by Sharman. Rather than attempting to discredit Filancia, Shea let the jury hear the testimony of a detective vouching for his truthfulness.

Additionally, this was "an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness." *Page v. State*, 733 So. 2d 1079, 1081 (Fla. 4th

DCA 1999). "Improper bolstering can result in harmful error when the credibility of the bolstered witness is of critical importance to the State." *Calloway v. State*, 210 So. 3d 1160, 1190 (Fla. 2017) (officer testimony that informant provided "very trustworthy and reliable" information was reversible partially because the main goal of the defense was to question the credibility of that informant); *cf. Perez v. State*, 595 So. 2d 1096, 1097 (Fla. 3d DCA 1992) (improper admission of police officer's testimony to bolster the credibility of a witness cannot be deemed harmless); *Tumblin*, 29 So. 3d at 1101-03 (finding an abuse of discretion to permit bolstering by a key witness).

Filancia was, no doubt, the State's star witness against Kaczmar. He provided testimony about Kaczmar's supposed confession to the murder, information supposedly from Kaczmar about where the murder weapon could be found, and information about a scheme to get the police to investigate Modlin for the murder. Without his testimony, the State did not have a case. Shea's failure to object to this improper critical bolstering must not only be deemed deficient performance, but also prejudicial to Kaczmar.

"The benchmark for judging claims of ineffectiveness … is whether the conduct of counsel 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Cabrera*, 766 So. 2d at 1133 (*quoting Downs v. State*, 453 So. 2d 1102, 1106 (Fla. 1984) (*quoting Strickland*, 466 U.S. at 686)). In *Sierra v. State*, 230 So. 3d 48 (Fla. 2d DCA 2017), the credibility of the witness was the pivotal issue in the case, and the lead detective vouched for the witness's credibility. By failing to object to the bolstering testimony or move for a mistrial, the jury was left with the impression that it could properly consider the detective's opinion. In *Sierra*, this opinion testimony "so undermin[ed] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Sierra*, 230 So. 3d at 52. Similarly, in Kaczmar's case, this breakdown in the adversarial process has rendered the result of his trial unreliable. Kaczmar should be granted a new trial, as confidence in the outcome is undermined.

III. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO FILANCIA'S TESTIMONY THAT HE KNEW RYAN MODLIN WAS INNOCENT AND THEN ASKING HOW FILANCIA KNEW MODLIN WAS INNOCENT.

Trial counsel was ineffective when he failed to object to Filancia's testimony that he knew Ryan Modlin was innocent and by then exacerbating the error by asking Filancia how he knew Modlin was innocent. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction court found that trial counsel was not deficient because Filancia had already testified that Kaczmar admitting to killing Ruiz and this response by Kaczmar was simply incidental. (PCR. 1797). The court found that it was reasonable to forego objecting to Filancia's answer and to directly address it, "which Shea attempted to do." (PCR. 1797). The court found that although "Shea's questioning was not perfectly structured to avoid Filancia's

mishap, it was reasonable for Shea to expect that Filancia would not discuss the polygraph test in light of the motion in limine, and from Filancia's previous deposition response, Filancia could have sufficiently answered the question without disclosing the polygraph test." (PCR. 1797). The court further held that "Kaczmar is not entitled to perfect or error-free counsel, only reasonably effective counsel and the [c]ourt does not find that Shea fell below this required standard. (PCR. 1788). The court found no prejudice as to this claim. (PCR. 1797).

The postconviction court's reasoning is flawed and not based upon competent substantial evidence. Even if Filancia had already testified that Kaczmar supposedly admitted to killing Ruiz, trial counsel's performance was still unreasonable under prevailing professional norms.

Prior to trial, Shea filed a motion in limine regarding certain statements that came out during the deposition of William Filancia. This motion was granted. At trial, however, Shea proceeded to violate his own motion in limine, bringing out damaging information that Modlin, the alternative suspect, was innocent because he passed a

polygraph. During Filancia's pretrial deposition, the following exchange occurred:

> Q: **What led you to believe that Modlin was not guilty?**
>
> A: [Kaczmar] told me that he wasn't guilty. He told me that he had left before it happened. **He told me that Modlin had taken a lie detector test and passed** and that he didn't want to take a lie detector test. And we had gone over a lot of the details about the murder already.

(PCR. 1470-1521) (emphasis added). After Filancia's deposition, Shea filed a motion in limine to keep out any mention that Modlin had passed a polygraph. (R1. 1341-42). This motion specifically stated that "**any reference to Ryan Modlin successfully passing a polygraph test**" or the "introduction of or any testimony by any State witness that Ryan Modlin successfully passed a polygraph test" **is "not admissible as relevant evidence", should be excluded "on grounds of prejudice or confusion", "would be unfairly prejudicial", and "would constitute a denial of the Defendant's due process, equal protection and would make it legally impossible for the Defendant to obtain a fair and impartial trial in this case."** (R1. 1341-42) (emphasis added). The trial court granted this motion. (R1. 1371).

At trial, the following exchange occurred during Shea's cross-examination of Filancia about a statement made by Filancia during his direct testimony:

> Q: You made a statement earlier that you knew Modlin was innocent. I mean how do you know that? Isn't it true that you don't know that, I guess, is my question.
>
> A: No. I know that. **Kaczmar told me that he was not guilty of it and he also told me that he passed a lie detector test.**

(T. 821). Shea's co-counsel, Anderson immediately asked the court to approach, and the jury was sent out. (T. 821). The following argument by counsel then took place:

> SHEA: Well, Your Honor, first of all, we have the Motion in Limine there could be no person who would mention anything about the – about Modlin passing a polygraph and –
>
> …
>
> SHEA: That motion was granted and I guess should have instructed at least not to mention that, but I didn't – when I asked him the question how he knew –
>
> …
>
> COLAW: And I believe that's the answer consistent – I'll look for it but I believe that's what Mr. Filancia told Mr. Shea in deposition, so the Motion in Limine and that are two separate things. **The state never presented evidence of this and never intended to, but when you ask a witness a question that you know what the answer is the only way he can answer it truthfully is to say that. Again I don't know what the objection is.**

ANDERSON: Your Honor, I think if I voir dire this – Chris Anderson speaking here. I don't want to be disrespectful to the Court because Mr. Shea is handling this, but if I may offer what my thoughts are on it.

This witness has obviously been very thoroughly prepared. I could ask him how many times he's met with Mr. Colaw, how many times he met with the police officers or Detective Sharman. I don't know but his testimony there's no hesitation. It's flowing like a storybook. There is no way Mr. Shea or I could have seen this testimony coming.

This witness should have been admonished not to blurt out anything about a lie detector test. **It's very prejudicial, Your Honor. It's a mistrial.**

…

COLAW: Judge, before you bring [the jury] out can I just – so the record is clear on the issue for the Court on **page 18 of the sworn deposition taken by Mr. Shea and Mr. Anderson very recently, Monday, August 2nd, 2010, they asked that question, got that answer. They asked the question a week ago and got the answer and they come in and ask the identical question and expect a different answer.**

SHEA: **Well, that's why we filed a Motion in Limine.** We filed a Motion in Limine in reference to that deposition.

COLAW: **Then how do you expect a witness to answer – there's no way to have a witness answer a question if you file a motion saying he can't answer it. You don't ask the question.**

(T. 821-24) (emphasis added).

At the evidentiary hearing, Shea was asked whether he agreed that Filancia had stated in his deposition that he thought Modlin was innocent because he passed a lie detector test. Shea's response was as follows:

> Well, actually there is more to it than that, ma'am. That was one piece of why he said that, and in his deposition that we had taken earlier Mr. Filancia said that Mr. Kaczmar admitted to murdering Ms. Ruiz and that Ms. Ruiz – and that Modlin had passed a lie detector test and that he didn't want to have to take a lie detector test himself, so there was a lot more to that statement than that, and **I didn't want to get in and probe that again opening the door to a confession that we had already – we filed a Motion to Suppress on.**

(PCR. 2699) (emphasis added). Shea was also asked about why he asked the same exact question that he asked during Filancia's deposition that elicited the testimony about Modlin passing a polygraph, Shea stated: **"Ma'am, I don't have a memory for what I was thinking at that time or what his answer would have been."** (PCR. 2703) (emphasis added).

Shea's attempted justification for this debacle was two-fold. First, he claimed that he did want to "open the door." (PCR. 2699). Second, he claimed to not remember what he was thinking at the time. (PCR. 2703).

Shea's understanding of the legal concept of "opening the door" is flawed. Attempting to fall back on some amorphous excuse of not wanting to "open the door" is simply not credible. Shea testified that he didn't want to "get in and probe that again opening the door to a confession that we had already -- we filed a Motion to Suppress on." (PCR. 2699). The only motion to suppress filed in this case was in reference to recorded jail calls between Kaczmar and his wife, other family members, and friends. (R1. 1025-42). This was denied by the Court. (R1. 1340). There was no confession by Kaczmar on these calls. Furthermore, there was no confession to police in this case. The only supposed confession from Kaczmar was allegedly made to Filancia, the jailhouse snitch in this case.

Additionally, at the point in trial when Shea asked this question about Modlin, Filancia had already testified that Kaczmar confessed to him. That was the whole point of Filancia's testimony. Shea would therefore not be opening the door to anything the jury hadn't already heard if Shea was really worried about "opening the door to a confession that [he] had already filed a Motion to Suppress on." (PCR. 2699).

This attempted justification by Shea is also not credible because Shea was the one who asked the question of Filancia. To then claim that he was trying to not open the door simply doesn't make any sense in this instance. He knew what the answer to his question was going to be because he asked the very same question at Filancia's deposition just a week prior to the trial.

When this occurred at trial, Anderson tried to interject, stating: "This witness has obviously been very thoroughly prepared….I don't know but his testimony there's no hesitation. It's flowing like a storybook. There is no way Shea or I could have seen this testimony coming." (T. 822). It's almost as if neither Shea nor Anderson remembered taking Filancia's deposition just one week earlier, where Filancia stated the exact same thing. Either way, it is obvious that they were unprepared to deal with this key witness at trial.

Preparing for trial most certainly encompasses reviewing police reports, deposition transcripts, and most importantly, knowing what a witness is going to say. Nothing in Filancia's testimony came as a surprise. He stated nothing at trial that he had not previously stated that was included in police reports or in his deposition. For Shea and

Anderson to be unprepared to question Filancia, the State's main witness against Kaczmar, at trial is nothing less than deficient performance. There was no sound strategy behind asking this question of Filancia regarding the innocence of the alternate suspect, which resulted in damaging testimony that Shea had previously sought to keep out through his own motion in limine.

Furthermore, Shea claims to not remember what he was thinking during trial when he asked Filancia that question. Despite having testified at the evidentiary hearing that he always must thinking ahead to what the witness might say, he clearly did not do that in this situation. Here, he knew in advance what the witness would say because he asked the exact same question during deposition. Not remembering why he did something at trial is not any kind of strategy, much less a reasoned strategy under prevailing professional norms.

Shea clearly had no defense strategy for asking this question and Kaczmar was prejudiced as a result. In asking this question that he knew the answer to and had sought to exclude, Shea put before the jury evidence that the alternative suspect, Modlin, passed a

polygraph test. Such a statement undermined his own defense that Kaczmar didn't commit the murder and that it someone else, i.e., Modlin, who was the only other person at the house that night.

Shea even filed a motion in limine to keep this testimony out. And then after this testimony did come out at trial following a direct question by Shea, his co-counsel Anderson argued that it was so prejudicial that it should have been a mistrial. This was testimony that Shea specifically sought to exclude, yet he was the one who elicited this testimony. The prejudice for this deficient performance is clearly stated in Shea's own motion in limine to exclude this testimony as "unfairly prejudicial", "would constitute a denial of [Kaczmar's] due process and equal protection and would make it legally impossible for [Kaczmar] to obtain a fair and impartial trial." (R1. 1341-42).

It is well established in Florida that "[a]bsent consent by both the state and the defendant, polygraph evidence is inadmissible in an adversary proceeding in this state." *Walsh v. State*, 418 So. 2d 1000, 1002 (Fla. 1982); *see Duest v. State*, 12 So. 3d 734, 746 (Fla. 2009). "A polygraph cannot be recognized as a sufficiently reliable or

valid instrument to warrant its use." *Davis v. State*, 520 So. 2d 572, 573-74 (Fla. 1988). "By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations." *United States v. Scheffer*, 523 U.S. 303, 313 (1998). Cases finding harmful error when a polygraph is referred to involve testimony revealing the results of the examination or where the only inference to be drawn from the testimony would be that the testimony of a critical witness had been corroborated by the polygraph. *See Dean v. State*, 325 So. 2d 14, 17 (Fla. 1st DCA 1975). In *Walsh v. State*, 418 So. 2d 1000 (Fla. 2010), this Court held that there was sufficient manifest necessity for the trial court to grant a mistrial after defendant had commented on the witness stand that he passed a polygraph examination, where the trial court had previously ruled the polygraph results inadmissible. In granting the mistrial, the trial court in Walsh noted that it "cannot feel that the jury can adequately disregard what they heard and what they heard would not influence their decision." *Walsh*, 418 So. 2d at 1002-03. Upon review of the case, this Court agreed that "this type of testimony would be difficult for the jurors to

disregard and that the evidence would likely influence the jury's decision." *Id.*

Kaczmar's case is no different. During trial, it was revealed that a State witness and the alternative suspect in the case, Modlin, had passed a polygraph. The implication is clear. This left jurors with the impression that Modlin was innocent of this murder and gave credibility to Filancia's story about Kaczmar's supposed confession to him. Trial counsel knew this was prejudicial because he filed a motion in limine to preempt any such testimony related to the polygraph. Trial counsel also knew this was prejudicial because his co-counsel immediately asked to approach the bench and reminded the court of the motion in limine and stated: "It's very prejudicial, Your Honor. It's a mistrial." (T. 823). There is no dispute that this was prejudicial testimony heard by the jurors, brought out by Kaczmar's own counsel. This not only diminished the jury's role in determining the credibility of Modlin and Filancia, but it was the type of testimony that jurors could not simply set aside and not allow to influence their verdict. Confidence in the verdict is undermined and Kaczmar must be granted a new trial.

IV. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO INTRODUCE KACZMAR'S EXCULPATORY STATEMENTS INTO EVIDENCE AT TRIAL.

Trial counsel was ineffective for failing to introduce Kaczmar's exculpatory statements into evidence at trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So .2d 766, 771-72 (Fla. 2004).

The postconviction court held that trial counsel's "strategic decision not to open the door to Kaczmar's felony status was reasonable, especially since Kaczmar was not testifying in his own defense. Further, given the evidence against Kaczmar and the fact that he made his statements during a conversation where he was trying to have Modlin set up for the murder, the [c]ourt is not persuaded there was a reasonable probability that the jury would have acquitted him." (PCR. 1806-07). These findings by the court are not based upon competent substantial evidence.

On July 26, 2010, suspecting that defense counsel would try to elicit exculpatory statements made by Kaczmar during trial, the State filed a motion in limine seeking to exclude such statements as self-serving inadmissible hearsay. (R1. 996-97). On August 6, 2010, the court initially heard arguments on this motion in limine concerning exculpatory statements made by Kaczmar. The State argued that the only way for these statements to be admitted would be via the Rule of Completeness, but then the jury would hear that Kaczmar had prior felony convictions. (R1. 1778). Later in that same proceeding, the issue was again addressed. (R1. 1784-85). Shea argued that under the Rule of Completeness, the State should be required to introduce the full statement, without editing out the exculpatory statements. (R1. 1785-86). The State again agreed that these exculpatory statements could be elicited at trial, however, as a result, the jury would also be instructed that Kaczmar had these prior felony convictions. (R1. 1785). Shea did not address the issue regarding the introduction of Kaczmar's prior convictions. Instead, he informed the court that he needed to review the caselaw cited in the State's motion.

(R1. 1785-86). The court deferred ruling on this motion. (R1. 1779; 1786-87).

Thereafter, on August 10, 2010, Anderson filed a response in opposition to the State's motion in limine seeking to have Kaczmar's exculpatory statements admitted under the rule of completeness. (R1. 1360-64). Anderson attempted to distinguish the caselaw provided by the State by claiming that it all involved "defense-elicited hearsay exculpatory statements" versus "state-elicited testimony." (R1. 1360-61). Also on August 10, 2010, the court heard further arguments on this motion just prior to opening statement in the trial. (T. 221-27). Anderson argued that Kaczmar's exculpatory statements should be admitted pursuant to the rule of completeness, but that his priors should not come in because the statements were not "defense elicited" according to him. He stated: "We're not calling these witnesses. The state is, and so none of these opinions have anything to do with this." (T. 222). The State argued that this was an incorrect statement of the law, which is well-settled in Florida. (T. 222-25). "The defense elicited is when they elicit it through cross or under the rule of completeness that they want the other portions in, and if they

do I'll give it to them but then this jury is entitled to know he has three prior felony convictions." (T. 225). The court thereby denied Anderson's request to elicit these exculpatory statements without introducing Kaczmar's prior convictions. (T. 227).

During trial, the State introduced the calls recorded between the undercover officer and Kaczmar, with all exculpatory statements redacted. Before the recordings were introduced into evidence, the court informed jurors that the recordings had been edited and that inadmissible portions have been removed by agreement of the parties. (T. 743-44).

Shea did not seem to remember this issue concerning Kaczmar's exculpatory statements coming up at trial. (PCR. 2743). After repeatedly trying to refresh his recollection, Shea continued to insist that this was somehow a character evidence issue:

> Q: Do you recall the Court would not admit his exculpatory statements under the rule of completeness unless evidence of his prior felony convictions came in? Do you recall that issue?
>
> A: Yes, because you are talking about character, and it's character evidence and that's the exclusion under character evidence. If he is going to testify then you have got to bring in his background, his felony background.
>
> …

Q: Why did you choose not to admit the statements?

A: I have no idea other than -- I don't see a basis for doing it. I don't see a legal basis for admitting the statement.

…

A: We tried to -- we tried to admit it, and so I believe it was denied.

…

A: **Unless we brought in his character evidence that this guy was a great guy and never did anything in the past and didn't have a criminal record then possibly his exculpatory statement matched his character but that's -- that issue wasn't there.**

Q: I think we are talking about two different things. I am not talking about character evidence. …

A: **… When you give a (sic) exculpatory as to that you try to declare your innocence because that's a character issue.** I don't care how you want to label it that's a character issue. If he has a prior criminal record that has to come in, and in this case is really what the Court was ruling was that, well, if you are going to try to bring that in we have to bring in the fact that this guy isn't perfect.

…

A: **… You have to take the overall person when he is making those statements and it does bring in the fact that if you are going to bring up -- if you are denying you committed a murder that's a character evidence (sic), that you are a person of good moral character and you didn't commit it, so your past record can be brought in that you are not a perfect person, that you have committed felonies in the past.**

(PCR. 2744-47) (emphasis added). Shea seemed to agree that if exculpatory statements were admitted through recorded statements, then the jury is allowed to hear whether the declarant of those exculpatory statements has ever been convicted of a felony or crime of dishonesty. (PCR. 2748). Shea was pressed about why he thought it was more important for the jurors not to hear about any prior convictions rather than hear Kaczmar declare his innocence.

> Q: And are you saying that you didn't want his priors to come in and that's why you chose not to admit the exculpatory statements?
>
> A: It wasn't what I chose, ma'am. It's what the Court ruled on.
>
> …
>
> A: We tried to get it in, ma'am. The Court wouldn't let us get it in. I don't' know what other argument I could have given.
>
> Q: Because you didn't want the jury to hear about the priors, is that what it comes down to?
>
> A: Well, we never want that because juries -- I have found juries -- well, wait a minute. This guy -- you know, he is a felon. He is a convicted felon.
>
> …
>
> A: Ma'am, it was my decision not to go there.
>
> …
>
> A: My decision was not to let that come in regardless of what the jury instructions or the Court's instructions to the jury would be.

> Q: It was more important to keep out the fact that he had been -- that he had a prior conviction rather than proclaiming his innocence? You thought that was more important?
>
> A: Well, he has already declared his innocence when he entered a plea of not guilty, and the Court is -- the jury is fully aware of that.

(PCR. 2746-49). It is important to note that these recorded calls between Kaczmar and the undercover officer were facilitated by Filancia, the jailhouse snitch in this case. (PCR. 2683). Kaczmar wanted help getting his case investigated and potential witnesses interviewed. (PCR. 2991-94). Kaczmar testified that the reason for this was because his attorneys were not doing anything to help him and had prevented the court-appointed investigator from looking into anything for him. (PCR. 2993). Filancia set him up with "Carlos" the undercover officer who could assist him with this.

Shea was asked repeatedly about his strategy for dealing with this testimony from Filancia and "Carlos." (PCR. 2673-78). He testified that his strategy was to "not open the door on issues that we knew were in existence in the record" and "to try to discredit his statement." (PCR. 2678). He also added "we were dealing with facts

that were difficult to discredit him without raising facts that were detrimental to Kaczmar as far as the trial strategy." (PCR. 2678). Shea testified that "it didn't appear that there was anything to object to legally." (PCR. 2687). In other words, he had no strategy. Shea then added that they were trying to keep out the information about Kaczmar's wife paying "Carlos." "I know it was our trial strategy to try to keep that information as low key as we could but there was no legal objection as far as being a violation of his constitutional rights where we could suppress. That was my opinion and my decision." (PCR. 2687).

Trial counsel had no reasoned strategy for failing to introduce Kaczmar's exculpatory statements and seems to be laboring under a misapprehension of the law regarding this issue. This is not a character evidence issue. Shea's statements that "declaring your innocence is a character issue" and "denying you committed a murder [is] character evidence, that you are a person of good moral character" are not accurate statements of the rules of evidence, nor do they apply in this instance.

Trial counsel claimed that they tried to admit these exculpatory statements, but the court would not allow them to do so. This is not what occurred at trial. Anderson attempted to distort well-settled caselaw by claiming that if the exculpatory statements came in via the Rule of Completeness, then they would not be considered "defense elicited" and therefore, would not trigger an instruction informing the jurors of Kaczmar's prior convictions. There is no caselaw to support this argument. The court did not *prevent* introduction of exculpatory statements, rather trial counsel *chose* not to introduce them because they did not want the jury to know about Kaczmar's prior convictions.

When asked why he prioritized the convictions over Kaczmar's exculpatory statements professing his innocence, Shea stated that "he has already declared his innocence when he entered a plea of not guilty -- the jury is fully aware of that." (PCR. 2749). This is also not an accurate statement of the law. Pleading not guilty is not the same thing as proclaiming your innocence. Just as being found not guilty is not the same thing as being declared "innocent." This is basic criminal law.

When asked about why he did not *voir dire* potential jurors on the topic of prior convictions, Shea stated: "We don't want to even plant in their mind that a person may have prior convictions"; "We want a pure jury. I don't want them thinking about prior convictions of why did he ask that question, does this guy have prior convictions, so there are things that you don't educate during *voir dire* a jury on that you don't want them to hear about." (PCR. 2750). However, Shea did concede that the point of bringing out bad facts such as prior convictions in *voir dire* is to weed out the jurors who may not be fair and impartial upon hearing that information. (PCR. 2750-51). Yet he failed to do this.

Trial counsel also had no reasoned strategy for dealing with testimony from Filancia and "Carlos." This is important, because this is the context in which the exculpatory statements were made. Kaczmar reasonably feared that Shea and Anderson were doing nothing to help him. Filancia set him up with his friend "Carlos." The exculpatory statements involve Kaczmar professing his innocence to "Carlos" and saying that he needed to do this because his attorneys would not investigate anything on his case. These exculpatory

statements would have explained to the jury why he was hiring "Carlos" to plant evidence on Modlin. Claiming that his strategy was to "not open the door on issues that we knew were in existence in the record" is not credible. We know from Kaczmar's statements what happened and what he told Shea. There is nothing that Kaczmar told Shea that would have further implicated him as the murderer. Shea stated that "it didn't appear that there was anything to object to legally", as if this absolves him of his responsibility to defend his client and have some reasoned strategy for dealing with this evidence.

Trial counsel's failure to introduce Kaczmar's exculpatory statements in response to this evidence from Filancia and "Carlos" cannot be considered a reasoned strategy. Counsel was seemingly unfamiliar with controlling caselaw about the admissibility of exculpatory statements and presumed that because he saw no legal objection to the "Carlos" testimony, that there was nothing he could do about it. This is clearly deficient performance. Trial counsel's actions in this instance are outside the broad range of reasonably competent performance under prevailing professional standards. At the very least, when defense attorneys go to trial, they have a strategy

for dealing with evidence that they know will be introduced and they familiarize themselves with relevant caselaw that they know will be at issue. Here, trial counsel did neither. This decision was not reasonable under the norms of professional conduct, and this cannot be considered a sound trial strategy.

Prejudice is established because jurors never heard Kaczmar proclaiming his innocence and because jurors never heard any explanation from the defense as to why Kaczmar would want to hire "Carlos" to supposedly frame Modlin. Instead, jurors were left to wonder why Kaczmar would do such a thing unless he was guilty of the murder. Because of this lack of any reasoned defense put forth by trial counsel, jurors likely believed that if someone was innocent, they would not be trying to frame someone else for the crime.

This testimony from both Filancia and "Carlos" was undoubtedly harmful and certainly made Kaczmar look bad. The jury never heard any explanation for it but were left to make their own assumptions that he must be guilty if he wanted to frame someone else. Had trial counsel elicited Kaczmar's exculpatory statements, it would have explained to the jury that he feared his attorneys were

doing nothing to help him on his case and he had to take matters into his own hands. The jury would have also heard him proclaiming his innocence in this case. Confidence in the verdict is undermined and Kaczmar must be granted a new trial.

V. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO IMPEACH OR REFRESH THE RECOLLECTION OF JULIA FERRELL.

Trial counsel rendered ineffective assistance in failing to impeach or refresh the recollection of Julia Ferrell with her deposition testimony. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction court held that trial counsel was not ineffective because it was not necessary to refresh Ferrell's memory when her response was not wholly inconsistent with her deposition testimony and there was no evidence that Ferrell would have altered her testimony after review of her deposition testimony. The court

further stated that "while Ferrell did not unequivocally testify that she heard two men arguing, she did testify that upon hearing the voices she assumed it was Kaczmar and his uncle fighting, thereby implying she heard two men's voices." (PCR. 1809).

Prior to trial, Shea took the deposition of Julie Ferrell. (PCR. 1319-36). She testified in her deposition as follows:

> Q: Okay, ma'am. Now as far as the voices, were they men's voices, women's voices or could you discern?
>
> A: **There was two men, very loud, very argumentative. I mean they sound like they were very angry** along with the kicking. I couldn't understand everything they were saying except the mother F, mother F.
>
> Q: Are you sure that one of the voices was not a woman's voice?
>
> A: I am not sure but I don't think it was. **It sounded like men to me.**
> Q: Okay.
>
> A: **I mean I never heard a woman's voice that rough.**

(PCR. 1319-36)(emphasis added). At trial, however, she testified on direct as follows:

> A: I was awakened by loud screams, angry voices and sound to me like a kicking of a hollow wooden door, like someone is trying to kick a door down.
>
> …

A: The word mother f'er used repeatedly in an angry tone over and over.

…

A: **It sounded like a very heated argument, very heated but I couldn't make out what the other voice was.** I really – at that time I just assumed it was Leo and his Uncle Ed into another fight.

(T. 310-12) (emphasis added). During cross-examination by Shea, Ferrell testified:

Q: **Now the loud voices that you heard that morning, was it – you heard two males' voices?**

A: **I don't know if it was two males or not, but I do know the one voice that was over – very, very loud was Leo Kaczmar, the Third.**

Q: But you heard another voice?

A: **I couldn't tell if it was another voice or – or – it just was – sound like a heated argument, a very heated argument, but the voice that stood out was Leo Kaczmar, very loud**, and I couldn't hear what else was said. I really wasn't interested.

(T. 313-14) (emphasis added). Shea failed to refresh her recollection or impeach her with her own deposition. Shea also failed to set up impeachment of Ferrell using another witness. When Ferrell was questioned by police after the murder, she told Detective Parker that she heard two male voices arguing loudly that night. (PCR. 1140-68). Detective Parker testified about this statement by Ferrell in his

deposition. (PCR. 1140-68). To impeach Ferrell with Detective Parker, Shea would have had to first confront Ferrell with her statement made to Detective Parker during the investigation of the case. Shea failed to do any of this.

During his cross-examination of Detective Parker, Shea attempted to ask about his interview with Julie Ferrell and her statements to him but failed to get out the critical information because he had not laid the proper foundation for asking such questions:

> Q: And did [Ferrell] shed any light to you as to what she heard, any sounds that she heard coming from the house?
>
> COLAW: Your Honor, I would object as to hearsay.
>
> SHEA: Your Honor, she was here testifying and she testified that she had heard voices coming from next door but **at that time, this is, of course, a year-and-a-half later, she said they were loud voices, but she had made a statement to this detective describing the voices that she heard.**
>
> COLAW: Judge, the objection is that she – it's not an inconsistent statement so it's hearsay and it's offered as an attempt to impeach. It's improper impeachment.

(T. 354-56). The court thereafter sustained the objection and Shea asked no further questions of Detective Parker. (T. 356).

At the evidentiary hearing, Shea recalled Julie Ferrell's testimony at trial where she equivocated about the voices that she heard. (PCR. 2751). When asked why he did not use Ferrell's deposition to refresh her recollection or impeach her, Shea gave the following non-answer which contained some outrageous speculation on his part:

> **Well, let me be very plain. When you are stabbed 50 times and your throat is bleeding and full of blood you can sound like a man.** There were issues that I didn't want to raise that could have been brought in as to why she sounded like a man because knowing the prosecutor, Mr. Colaw, could have brought that in. Also information that during my discussions with Mr. Kaczmar indicated that the testimony given by Ms. Earl had a strong material foundation to the actual facts that were going on out there and I can recite those if you'd like.

(PCR. 2751-52) (emphasis added).

One can only conclude that Shea is not familiar with the rules of evidence and associated procedures when it comes to cross-examination and impeaching a witness.

> Q: Do you recall that you attempted to ask Detective Parker about a statement that Julie [Ferrell] gave to him regarding two male voices?
>
> A: Yes.

Q: Okay. And this question was objected to by the state and sustained, right?

A: That's correct.

…

Q: Yes. And do you agree that this was improper impeachment of the witness of Julie [Ferrell]?

A: No, I don't agree.

…

Q: Well, I am suggesting that you didn't set up the impeachment by asking [Ferrell] if she'd ever made a statement to Detective Parker and then if she denied it then you ask Detective Parker about that.

…

A: Well, it was two things. **I believe she was a state witness so I am somewhat limited to direct examination, and I didn't call Parker as my witness as I recall.**

(PCR. 2753-54).

Q: So I am asking – so at some point Ms. [Ferrell] in her deposition she testified that both voices sounded like men, yes?

A: Correct.

Q: And when she got to trial she equivocated, right?

A: Correct.

Q: Basically it could have been a woman and a man?

A: That's correct.

Q: And you didn't use her deposition to attempt to refresh her recollection?

A: No.

Q: Okay. And you also didn't use her deposition to impeach her?

A: **Well, I was careful not to get into much detail with her. Her testimony was pretty limited to the voices at the juncture but I had other information that – given to me by Mr. Kaczmar that would have incriminated him even further so I wanted to be very careful asking her too much.** She identified Mr. Modlin as I remember walking down the road that morning and she saw him leave at the time he left before the murder.

Q: So are you suggesting that if you cross-examined her or if you impeached her on anything that would open the door to whatever else she might have to say?

A: Well, ma'am – I apologize. **To me that wasn't something to impeach. Under the circumstances a concern there obviously would be then enhancing that scene out there what she heard with the state coming in and cross-examining her and saying, well, have you been around anybody who has blood in their throat after they been stabbed and has their voice changed or does it sound like a deeper voice that could be a male.** We all have different octaves, men and women.

…

Q: Do you remember the state's argument that the victim and Kaczmar were alone in the house together?

A: Yes.

Q: Okay. And do you agree that Julie [Ferrell's] deposition testimony established that there was another man there?

A: No.

Q: She didn't say that there were two men?

…

A: She didn't say there were two men, ma'am. She had no observation**. It sounded in her mind that the victim sounded like a man.**

Q: Okay. Do you agree that her trial testimony weakened the defense's case?

A: No.

Q: Do you think that her trial testimony made it appear as if she heard a man and a woman versus –

A: **I don't think it's relevant, ma'am. That was my decision at the time. I didn't think it was relevant to get deeply into it because I was concerned she would bring up other issues what she heard out there the night other than what she heard was two men's voices.**

Q: **What other issues were you afraid she was going to bring up?**

A: **She didn't really change her testimony in trial.** She heard – she identified because she has been around him, Mr. Kaczmar, enough that one of those voices was Mr. Kaczmar.

Q: **What other – what were you afraid – what made you afraid to cross-examine her? What evidence was she going to put in –**

A: **I don't get afraid of anything, ma'am.**

Q: Well, you said you didn't cross-examine her because you didn't want this other information to come in. What other information?

A: Well, I had no idea what she is going to say. She is liable to say anything about the story that I heard from Mr. Kaczmar that went on out there.

Q: But if you just are impeaching her on this very limited issue or just even refreshing her recollection it's just this one issue, just about her saying she heard two voices that sounded like males versus one could have been a woman. It's different but it's significant, do you agree?

A: Well, once the – you open the door, ma'am, she can bring in testimony that he was outside banging on the window outside. It seems like that's a recollection and then later –

Q: What does that have to do with the voices?

A: Well, it has a lot to do with Mr. Kaczmar being present at the scene and committing the murder.

Q: Do you agree it doesn't have anything to do with the gender – what gender the voices sounded like?

A: Immaterial, ma'am, in my mind, and that's my answer.

(PCR. 2754-58).

Shea gave a variety of reasons to explain why he failed to either refresh Julie Ferrell's memory or impeach her with her deposition, none of which are within the realm of reasonable strategic decisions under prevailing professional norms and none of which should be given any deference.

First, Shea made the outrageous claim that if a woman was stabbed fifty times in the neck, she would sound like a man. One can reasonably assume that this was an attempt at deflection by trial counsel. This was not, however, a reasonable strategic decision for failing to impeach Ferrell or at least refresh her recollection concerning her prior testimony that it was two male voices that she heard loudly arguing the night of the murder.

Second, Shea claimed that since Ferrell was a state witness, he was "somewhat limited to direct examination." (PCR. 2753-54). While a correct statement of the law, it is not clear how this prevented Shea from impeaching or attempting to refresh the recollection of Ferrell.[13]

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[13] In *Pearce v. State*, 880 So. 2d 561 (Fla. 2004), the Florida Supreme Court stated: The introduction of a prior statement that is inconsistent with a witness's present testimony is one of the main ways to attack the credibility of a witness. *See* § 90.608(1), Fla. Stat. (2001); *see also* Charles W. Ehrhardt, Florida Evidence § 608.4 (2002 ed.). Before a witness can be impeached with a prior inconsistent statement, the proper foundation must be laid. Prior to questioning a witness about the contents of a previous inconsistent statement, counsel must call to the witness's attention the time, place, and person to whom the statement was allegedly made. *Rowe v. State*, 174 So. 820, 821 (1937); see also Florida Evidence § 614.1. As provided in section 90.614(2), Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing

She testified at trial that she could not tell whether she heard two male voices, but one was Kaczmar's voice. Since she testified to this on direct, it was fair game for impeachment. In her deposition, she clearly stated that she heard two male voices. There was nothing stopping Shea from either impeaching her or at the very least showing her the deposition transcript to refresh her recollection. As stated *supra*, Shea did ask her during cross-examination about the two voices she heard, but she simply reiterated her direct testimony. Either Shea had not prepared and did not have her deposition handy, or he simply did not understand the rules of evidence when it comes to cross-examination of a witness to impeach using prior inconsistent statements. But either way, this was deficient conduct and not a reasonable strategic decision.

Third, Shea claimed that it was not something to impeach, that he did not think it was relevant, and that it was immaterial. (PCR.

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party is afforded an opportunity to interrogate the witness on it.... If the witness denies making or does not distinctly admit making the prior inconsistent statement, extrinsic evidence of such statement is admissible.

2755-58). This *post hoc* rationalization was contradicted by his own actions at trial whereby he attempted to ask Detective Parker about Ferrell's statements to him regarding two males loudly arguing the night of the murder. (T. 354-56). On one hand, Shea did not want to acknowledge the importance of this testimony. On the other hand, this was the only thing he asked Ferrell about during cross-examination. Furthermore, he clearly thought it important enough to ask Detective Parker about it. However, because he did not lay the proper foundation, the State's objection was sustained and the jury never heard the answer -- that Ferrell initially stated that she heard two male voices arguing loudly the night of the murder. Instead, the jury was left with the impression that it was a male and a female -- or rather the victim and Kaczmar -- arguing that night, which supported the State's case that it was Kaczmar who killed the victim. Failure to utilize basic rules of cross-examination to further your defense is not a reasonable strategic decision.

Fourth, Shea again claimed that he did not want to open the door to other incriminating testimony and gave an array of flawed examples. Shea stated that there were "issues that could have been

brought in as to why she sounded like a man." As mentioned *supra*, Shea imagined that was due to the victim being stabbed fifty times in the throat. This was not based on any actual evidence, since there was no testimony that the victim was stabbed fifty times in the throat. He also claimed that impeaching Ferrell could have opened the door to testimony that she heard him banging outside on the window. However, she only *heard* banging. She did not *see* anything, so she would not have seen who was doing the banging or what they were banging on, and therefore, would not have been able to testify to any of this. It would have been pure speculation. She did not *hear* anything other than loud arguing and banging that night. Therefore, Shea's statement that he "was concerned she would bring up other issues what she heard out there the night other than what she heard was two men's voices" has no merit. There was nothing else she could have said, other than she saw Modlin walking down the road at some point. Shea also stated that he "had other information given to him by Kaczmar that would have incriminated him even further so I wanted to be very careful asking her too much." (PCR. 2755). This also has absolutely no merit because we heard testimony from

Kaczmar himself at the evidentiary hearing, as well as his jail calls, about what occurred that night and adamantly denied killing the victim. Kaczmar testified that this is what he told his trial counsel prior to trial. Therefore, we know what information Kaczmar had given to him and it in no way incriminates him in the murder. Shea's attempted rationalization here should be given no weight whatsoever.

Finally, Shea claimed that he "had no idea what she [was] going to say. She [was] liable to say anything about the story that I heard from Kaczmar that went on out there." (PCR. 2757-58). Again, we know what Kaczmar told Shea. He told him that Modlin killed the victim. It is important to consider that at the time Shea testified at the evidentiary hearing, Kaczmar had not just testified or even suggested that he would be testifying, and Shea was not aware of the jail calls that later came into evidence at the hearing. Shea's claim that he had no idea what she was going to say at trial likewise has no merit. He had her deposition, as well as the police reports containing every statement she had ever made to police. There is no excuse for failing to be prepared to cross-examine such a crucial witness in this case.

Florida courts have consistently held that defense counsel was ineffective for failing to sufficiently impeach the State's key witness. *Bentley v. State*, 867 So. 2d 515 (Fla. 1st DCA 2004); *see Nelson v. State*, 126 So. 3d 1195, 1199 (Fla. 4th DCA 2012) (reversing summary denial of claim that counsel was ineffective for failing to impeach the victim with his prior statements, which "would have significantly impacted the credibility of the victim's version of events"); *Bentley v. State*, 867 So. 2d 515, 516 (Fla. 1st DCA 2004)(finding that the failure to impeach the State's key witness with a prior inconsistent statement constituted deficient performance despite counsel's impeachment of the witness with his prior convictions and motives); *see also Ventura v. State*, 794 So. 2d 553, 567 (Fla.2001); *Williams v. State*, 673 So. 2d 960, 961-62 (Fla. 1st DCA 1996); *Nixon v. State*, 773 So. 2d 607 (Fla. 4th DCA 2000); *Porter v. State*, 626 So. 2d 268, 269 (Fla. 2d DCA 1993).

In Kaczmar's case, trial counsel was deficient when he failed to bring out evidence that Julie Ferrell heard two male voices loudly arguing the night of the murder, instead leaving open the possibility that Kaczmar was arguing with a female, i.e., the victim in this case,

on the night of the murder. Trial counsel failed to correct Ferrell's testimony at trial that she "didn't know if it was two males or not" by failing to impeach her with her own deposition. He further allowed her testimony to go unrefuted by failing to lay the proper foundation to otherwise impeach Ferrell with a statement she made to Detective Parker.

Trial counsel's strategic decisions must be reasonable under the norms of professional conduct. *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). It is not reasonable to be ignorant of basic rules of evidence and procedure. It is not reasonable to be unprepared to cross-examine State witnesses on key issues in the trial. This can only be considered deficient performance.

Prejudice is established because neither Ferrell's credibility nor her testimony was ever challenged. Jurors heard testimony that on the night of the murder, she heard loud voices arguing and that one of them was most definitely Kaczmar. Unfortunately, the jury was left to believe that Kaczmar was arguing with a woman, i.e., the victim, rather than another male. This only bolsters the State's narrative that the victim and Kaczmar were home alone together when the murder

occurred. Had jurors heard that Ferrell previously testified about hearing two male voices arguing loudly, this would have caused reasonable doubt as to the State's theory of the case. Moreover, jurors could have decided to disregard Ferrell's testimony altogether if they heard that she had given two different accounts of the voices she heard. This may have caused them to question whether she saw Modlin walking down the road *away* from the victim's residence that night. Ferrell's testimony not only put Kaczmar at the scene of the crime, but implied that he was arguing with the victim and therefore, must have killed her. Ferrell's credibility was important to the State's case because she was a neighbor, with no personal involvement. Whereas Modlin was the alternative suspect investigated by police, and Filancia was a jailhouse snitch. It was important for the State to have testimony from an independent witness who appeared to have no interest in the case to corroborate Modlin's and Filancia's testimony. Trial counsel's failure to impeach this important witness undermines confidence in the verdict. Kaczmar should be granted a new trial.

VI. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN INTRODUCING HARMFUL AND MISLEADING TESTIMONY THROUGH DETECTIVE GOLDNER.

Trial counsel was ineffective for introducing harmful and misleading testimony during the guilt phase of Kaczmar's trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction court held that trial counsel was not ineffective for calling Detective Goldner as a witness because, although Shea had no memory of his reasons for doing so, the record shows that Goldner's testimony was used during closing arguments to raise reasonable doubt. (PCR. 1805). The court held that casting doubt on the thoroughness of an investigation is a reasonable strategic decision, *citing Banks v. State*, 219 So. 3d 19, 29 (Fla. 2017). (PCR. 1805). The court further found that even without Goldner's testimony, there was substantial evidence presented to the jury to

convict. (PCR. 1806). These findings are not based upon competent substantial evidence and should not be given deference.

The only defense witness called during the guilt phase of Kaczmar's trial was Detective Goldner, a crime scene investigator who was assigned to collect evidence from Kaczmar's vehicle. (T. 852). He testified, in part, as follows:

> Q: **Just from the appearance did you visually see anything that looked like blood on any of those objects?**
>
> A: We – I observed some stains but I wasn't – **I can't testify whether it was blood or not**, but I did collect some stains and may have been some other material.
>
> Q: Okay. But those stains were also collected and they were sent for the FDLE. Do you know whether any results came back, negative or positive, on those?
>
> A: No, I do not.

(T. 854-55) (emphasis added). At the conclusion of Detective Goldner's testimony, Shea stated:

> Your Honor, we're going to enter into a stipulation as to what happened to **the evidence collected by the detective that was never actually sent to FDLE so it was never tested so we have no results as to whether there was blood in the vehicle or not.**

(T. 860) (emphasis added).

At the evidentiary hearing, Shea recalled the testimony by Detective Goldner, but had no strategy for calling him as a defense witness. (PCR. 2738-42). Shea failed to give a straight answer to questions about whether this testimony was harmful to his case.

> A: As I recall his answer was there was some fishing poles and possibly some issues that Mr. Kaczmar claimed that could have been fish blood, but to my knowledge **there was nothing tested out of the truck, and that was good for us. I wasn't going to ask them or force them to test something that could possibly turn out – and again not knowing the answer. But as I recall that there was – there wasn't any evidence collected out of the truck to test that would exonerate Mr. Kaczmar.**
> Q: Do you recall that his answer to your question about whether he saw anything that looked like blood his answer was that he saw some stains in the truck but didn't know if they were blood? Do you recall him saying that?
>
> A: Yes, ma'am.
>
> Q: Okay.
>
> A: And neither did I.
>
> Q: **So do you agree that this testimony could have left the jury wondering if the stains were blood if he couldn't confirm or deny this?**
>
> A: **Well, ma'am, I don't confirm things that I don't know the answer to.** That blood could have been transmitted from blood from Mr. Kaczmar to his vehicle that was Ms. Ruiz's blood. I have no knowledge of what that would be, so I am not going to force evidence that may turn out to work against my case.

…

Q: You asked the witness whether he saw anything that looked like blood, and he said he saw some stains but didn't know if they were blood. So the question is kind of out there like you didn't answer that for the jury. The jury is left to wonder whether it's blood or not. Do you agree?

A: **I don't know what the jury is left to answer, ma'am. I know that I don't ask questions that I don't know the answers to, and I wouldn't certainly reach out and have them testing it and have it turn out to be Ms. Ruiz's blood.**

Q: **Well, you didn't know whether it was blood or not and you asked that question.**

A: **That's correct.**

Q: Do you agree that if the jury did think the stains were blood that it would harm Mr. Kaczmar's case if blood was found in his truck?

A: Ma'am, I – juries think differently than me sometimes. I have no way of knowing what a jury would have been thinking about the blood… **I wasn't going to start raising issues here that I didn't have an answer on.**

Q: But you were the one that called Detective Goldner.

A: Well, he was given as a witness so we had no option.

Q: Well, you called him as a defense witness.

A: Yes, we did.

(PCR. 2738-41) (emphasis added).

Shea seemed to recall that Detective Edmonson stated that he found no evidence in the truck. (PCR. 2741). **When asked about whether calling Detective Edmonson would have been more helpful to the defense than calling Detective Goldner, Shea responded:**

> A: **It probably would have, ma'am.** I don't think it would have had any impact at all on the jury's decision. It wasn't a material issue in the case**. I don't know -- I can't give you an answer why we decided to call Mr. Goldman (sic).**
>
> Q: Well, I mean do you agree that calling a defense witness at trial is a pretty important decision to make?
>
> A: Every -- every decision, every decision in that trial is important.
>
> Q: But you putting on evidence that's something to think about before trial, right?
>
> A: I can't answer your question, ma'am. **I don't have a memory for why we would have done that.**

(PCR. 2741-42) (emphasis added).

Detective Edmonson testified at the evidentiary hearing. (PCR. 2860). He recalled doing the initial search of Kaczmar's truck on December 13, 2008. (PCR. 2861). Detective Edmonson testified that "it was mainly a security search" and he was "just searching for

weapons or anything that could be disturbed in the transporting of the vehicle." (PCR. 2861). However, after reviewing his report, he confirmed that he did not identify any items of evidence in Kaczmar's truck. (PCR. 2861; 1431-37). Additionally, although he stated that his recollection was that he was just searching for weapons, his report states that "Kaczmar gave consent for us to search his vehicle. L. Kaczmar was read the Voluntary Consent to Search, and he stated he understood the form and signed the form giving us consent to search his vehicle. Detective Twisdale and myself conducted the search and did not find any items of evidence inside of L. Kaczmar's vehicle." (PCR. 1431-37). Clearly, this was more than a cursory search for weapons. This was a search for evidence of a crime, and the report clearly reflects that no such evidence was found.

"[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). Shea admitted that it would have been more helpful to his defense to call Detective Edmonson, rather than Detective Goldner. (PCR. 2741).

Importantly, he did not have any answer as to why Detective Goldner was called as the only defense witness at trial. The decision to call a defense witness at trial is a critical one which requires preparation and forethought. Detective Goldner's testimony did nothing to further the defense. Furthermore, the stipulation entered into evidence after Detective Goldner's testimony also did nothing to further the defense. In contrast, this evidence allowed the jurors to believe that there could have been blood in Kaczmar's truck, further implicating him in the murder. Despite Shea's repeated statements during the evidentiary hearing that he was trying to keep out bad information that would have implicated Kaczmar in the murder, that is exactly what he did in this instance.

When asked about whether this testimony could have left the jury wondering if the stains were blood, Shea all but assumed that the stains Detective Goldner testified about were blood stains. "That blood could have been transmitted from blood from Kaczmar to his vehicle that was Ms. Ruiz's blood. I have no knowledge of what that would be, so I am not going to force evidence that may turn out to work against my case." (PCR. 2739-40). But that is exactly what he

did here. He clearly thought the stains were blood, yet called a witness who would testify about some dubious stains that were never tested, leaving the jury to assume that there were, in fact, blood stains in Kaczmar's truck.

He could not give a reason as to why he called Detective Goldner at trial. He did not remember that he was the one that called Detective Goldner as a defense witness. This cannot be considered a reasoned strategy. Not only did Shea not have a strategy for calling this witness, but he did not consider the alternative of calling Detective Edmonson who definitely stated in his report that no evidence of the murder was found in Kaczmar's truck. This would have been preferable to testimony that there was evidence, some stains that looked like blood, but it was not tested, as Detective Goldner testified at trial. In this instance, counsel's decision was not reasonable under the norms of professional conduct. This cannot be considered a sound trial strategy.

Not only did Detective Goldner's testimony not do anything to further the defense, but it also actually harmed the defense. Before his testimony, there had been no other testimony or evidence before

the jury that any evidence had been found in Kaczmar's truck. Leaving jurors to believe that blood stains were found in Kaczmar's truck only served to further the State's theory that he killed the victim, then got into his truck to buy gas to set the house on fire.

Shea thought it was a good thing that none of the items from Kaczmar's truck were tested. However, the only testimony that would have been helpful was if the stains tested negative for blood. Anything short of this, left the jury to believe that the stains were, in fact, blood stains from when Kaczmar drove to the gas station after killing the victim, in accordance with the State's theory of what happened. This evidence only benefitted the State, to Kaczmar's detriment. This would have no doubt had an influence on the jury's finding that Kaczmar committed the murder. Confidence in the outcome has been undermined.

VII. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO MOVE TO SUPPRESS KACZMAR'S ALLEGED CONFESSION.

Trial counsel rendered ineffective assistance in failing to move to suppress Kaczmar's alleged confession made to Filancia. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims

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

In dismissing this claim, the postconviction court mistakenly concluded that: 1) counsel could not have successfully argued for suppression of statements made prior to the date (November 25th, 2009) when Filancia is documented as an informant, and 2) even though it was "arguable" that Filancia was a state agent at the point in time that the sting operation was initiated, there was still "substantial evidence" to convict Kaczmar had the motion to suppress been granted.

William Filancia, an inmate classified as a confidential informant, was a state witness who testified that Kaczmar confessed to him and confided details of the crime. (PCR. 1457). Aside from obtaining the alleged confession, Filancia referred Kaczmar to a man named "Carlos," who provided services such as planting evidence. (T. 768). "Carlos" was in fact Officer Humphrey, an undercover officer with the Jacksonville Sheriff's Office. (T. 741). He testified at trial as

to statements made to him by Kaczmar. (T. 740-78). Kaczmar's wife, Priscilla, also testified to her interactions with "Carlos." (T. 329-348). The testimony presented about Kaczmar's attempt to incriminate another individual was used to argue consciousness of guilt. (T. 898-99).

Although Kaczmar disputes he ever gave any information to Filancia, defense counsel should have filed a motion to suppress the alleged confession. If the confession occurred, it was in violation of Kaczmar's right to counsel under the Sixth Amendment. *United States v. Henry*, 447 U.S. 264 (1980).

Even though Filancia was only documented as an informant as of November 25, 2009, he already had a well-established relationship and rapport with the detectives. In fact, he met with detectives on at least five occasions spanning from August 5 through November 25, 2009. (PCR. 1456-57). The first recorded interview on August 5, 2009, suggests that Detective Sharman and Filancia already had some familiarity with one another, as Detective Sharman refers to Filancia simply as "Bill." (PCR. 1183).

In dismissing the idea that he is a state agent, the postconviction court relied heavily on Filancia's testimony that the detectives told him that they did not want him to give them details about the case. (PCR. 1788). Additionally, the postconviction court gave credit to Filancia's testimony that he was not anticipating giving the information Kaczmar provided to him to detectives until Kaczmar was tried to frame someone. (PCR. 1788).

This testimony from Filancia is highly suspect. Filancia was facing a minimum of 65 years and possibly life in prison. His recorded interview from August 5, 2009, makes it apparent that he involved himself in whatever case would benefit him. (PCR. 1182-1240). He engaged in "two way conversations" with Kaczmar, with the knowledge that he had access to detectives. (PCR. 2794). On August 27, 2009, Filancia turned over to detectives the communications between Kaczmar and Kuritz well before Kaczmar tried to frame someone else for this crime. (PCR. 1456-1458). The fact that he passed information about Kaczmar to the detectives before there was any discussion of Kaczmar framing Modlin, should dispel any

reliance on Filancia's supposed benevolent reasons for coming forward.

This Court should consider the circumstances in *Gorham* instructive. *Gorham v. State*, 597 So. 2d 782 (Fla. 1992). While *Gorham* is ultimately a *Brady* claim, there are similarities that merit discussion. Gorham's case also relied heavily on the testimony of Johnson, a confidential informant. *Id* at 784. In *Gorham*, the court found that it was not only important that Johnson was paid in relation to Gorham's case, but that Johnson's status as an informant in other cases was also relevant under § 90.608(1)(b) as "a witness' relationship to a party, personal obligations to a party, or employment by a party all have been recognized as …going to the interest and bias of the witness." *Id*. Even though Filancia was not documented as a confidential informant until November in Kaczmar's case, he already had a well-established and goal-oriented relationship with detectives. Any information he allegedly gained from Kaczmar after August 8, 2009, should be suppressed as he was acting as a state agent as soon as he started reporting information back to the detectives.

Filancia was working as a state agent, and any information he gleaned from Kaczmar ought to have been suppressed as it was essentially the product of a non-consensual custodial interrogation. Shea had all the police reports documenting these interactions and his failure to file a motion to suppress was ineffective assistance. (PCR. 2679-82).

Furthermore, Shea ought to have moved to suppress testimony about the subsequent ploy to incriminate someone else, and all testimony related to that. In the discovery that Shea received was a recorded interview with Filancia from August 5, 2009. (PCR. 2679-82). In that August interview with the detectives, Filancia and the detectives planned to set Keith Healy up at visitation with someone who would intimidate Healy's jurors into acquitting him. (PCR. 1182-1240). The detectives originally asked Filancia to wear a wire in order to document discussion of Healy's scheme. (PCR. 1229) The idea to involve a third person and have that person come to visitation at the jail came from Filancia and his attorney, Richard Kuritz. (PCR. 1232). Visitation at the jail is not face-to-face, but through glass with the individuals speaking to each other using a phone. (PCR. 1233).

Having a third party meet with the defendant at visitation is the same trap that was used on Kaczmar with "Carlos," or rather Detective Humphrey. (PCR. 1459; 2798). Filancia facilitated this set up. (PCR. 1459; 2798). Shea could have used the August 5, 2009, recorded interview where this arrangement was discussed to argue for suppression because detectives worked with Filancia to arrange this entrapment.

If the motion to suppress was not granted, Shea could have argued entrapment to the jury to explain why Kaczmar hired someone to plant evidence. Prior to the discussion between Kaczmar and Filancia about having someone plant evidence, Kaczmar saw Filancia volunteer the same services to Healy. Shea even made note of this at a pre-trial hearing.[14] He stated the following:

> I guess the only relevance is the fact that Filancia is at the jail. Kind of drumming up this enterprise where he can contact the State to help his own case. And Mr. Kaczmar is just one of the victims to this as the other people are, Healy and then the other gentleman.

[14] The hearing was on a pre-trial motion of the State's to exclude any testimony relating to Keith Healy and/or Darrel Thornton (R1. 1155).

(R1. 1793). Had Shea raised the issue of suppression, it is very likely that the Judge would have granted it, as he seemed to realize that the tampering evidence was prejudicial and irrelevant. (R1. 1791). During this pre-trial hearing, the State attempted to explain the undercover operation to the Court, at which time the Court interjected and asked: "How is this even part of the trial? Is there a tampering charge that you're going to try at the same time of the murder case?" (R1. 1791).

Filancia's testimony and the testimony regarding the "Carlos" operation was crucial in securing Kaczmar's conviction. Shea's failure to move to suppress that testimony was clearly prejudicial. In a letter to Sheriff Beseler, State Attorney James Colaw said that the evidence presented with regards to tampering with witnesses and fabricating evidence was "essential to this successful outcome." (PCR. 550).

In *United States v. Henry*, the United States Supreme Court held that the Government violated the defendant's Sixth Amendment right to counsel by "intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of

counsel." *United States v. Henry*, 447 U.S. 264, 274 (1980). Similarly, in *Malone*, this Court held where incriminating statements were "directly elicited by the State's stratagem" the introduction of those statements violated the defendant's Sixth Amendment right to counsel. *Malone v. State*, 390 So. 2d 338, 339 (Fla. 1980). The situation in *Malone* is strikingly similar to the situation in Kaczmar's case. The following outlines the "stratagem" in *Malone*:

> The plan was to have the informer transferred to another county jail and then to have him come back and visit Malone in civilian clothes. Prior to being transferred, the informer went back to his cell and told Malone that he was being released and assured Malone that he knew a black female attorney whom he would try to retain for Malone. Under the misimpression that the informer would be able to assist him on the outside, Malone then told the informer that he had killed Woodward, that there were several things he wanted the informer to do for him, and that he would tell the informer about them when he returned on visitation day. Sometime later, dressed in civilian clothes, the informer returned to the jail, as requested by Malone.

Malone v. State, 390 So. 2d 338, 339 (Fla. 1980).

The interview conducted on August 8, 2009, showed that detectives, Filancia, and Kuritz concocted the stratagem for an outside person to meet with Kaczmar at visitation and discuss witness tampering. Like *Malone* where the incriminating statements

are the products of the "State's stratagem" they should be suppressed.

In rejecting this claim the postconviction court reasoned that even if evidence of the tampering were suppressed, there was still enough evidence to convict Kaczmar. The court then pointed to wholly circumstantial evidence, most of which only implicated Kaczmar in the arson, but not the murder.[15]

Shea had information from the discovery that he could have used to successfully argue for the suppression of this unconstitutionally obtained confession, as well as the subsequent evidence of tampering. Shea's failure to utilize this information to file a routine motion to suppress falls outside the boundaries of what a "reasonable" attorney would do. His failure to move to suppress Kaczmar's statements to Filancia allowed one of the key arguments for Kaczmar's guilt to go uncontested. For this reason, standing alone, as well as in conjunction with the other errors, Kaczmar is entitled to a new trial.

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[15] With the exception of the alleged confession to Filancia, which Kaczmar argues should be suppressed, or at least discredited based on Filancia's multiple biases.

VIII. THE POSTCONVICTION COURT ERRED IN SUMMARILY DENYING THIS CLAIM AND IN LATER FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO IMPEACH FILANCIA ON THE RATIONAL LIKELIHOOD OF HIS RELATIONSHIP WITH KACZMAR.

Trial counsel rendered ineffective assistance when he failed to impeach Filancia on the rational likelihood of his relationship with Kaczmar. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction court summarily denied this claim prior to the evidentiary hearing, without providing a reason for the denial. (PCR 979-80). The court sought to rectify this by providing a rationale in its final order denying any guilt phase relief. (PCR 1792). However, this rational relied on testimony that came out during the evidentiary hearing.[16] The court ultimately found that the State had not opened

[16] In part the court relies on Kaczmar's own testimony at the evidentiary hearing stating that he trusted Filancia "to a point." This

the door and this testimony would not have been permissible considering the pre-trial order. (PCR 1792).

Fla. R. Crim. P. Rule 3.851(5)(A)(i) and (ii), requires the postconviction court to schedule an evidentiary hearing on claims listed by the defendant that require a factual determination and to hear arguments on purely legal claims that are not based on disputed facts. The court may only summarily deny claims that are "insufficient, procedurally barred, or refuted by the record." *Morris v. State,* 317 So. 3d 1054, 1071-72 (Fla. 2021). *See also Kocaker v. State*, 311 So. 3d 814 (Fla. 2020); *Cannon v. State*, 310 So. 3d 1259 (Fla. 2020); *Matthews v. State*, 288 So. 3d 1050 (Fla. 2019); *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018); *Hojan v. State*, 212 So. 3d 982 (Fla. 2017); *Salazar v. State*, 188 So. 3d 799 (Fla. 2016). Moreover, this Court explained in *Anderson* that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim." *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993).

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testimony came after the court's summary denial of the claim and as such should not be relied on as a rationale for denying a hearing on the claim.

William Filancia was a state witness who testified about an alleged jailhouse confession by Kaczmar. Additionally, he arranged to have Kaczmar interact with a police informant posing as someone willing to plant evidence to aid Kaczmar in his defense.

The premise of Filancia's testimony was that he had shared his situation with Kaczmar and they had developed a bond of trust. (T. 785). This is misleading because Filancia's crimes would not instill one with a sense that he is trustworthy. During cross-examination, Shea did not elicit any testimony regarding what exactly Filancia shared about the reason he was incarcerated. It is clear from the record that Shea believed he was not permitted to get into that information and was limited to asking about his prior felony convictions. There was a pretrial order to that effect.[17]

[17] There was also a pre-trial order for Filancia not to mention co-defendant, Ryan Modlin's polygraph test, however when that testimony came out due to counsel's own questioning, the court denied a mistrial. Similarly here, it was the State's own questioning that opened the door for discussion of Filancia's current charges. This suggests that the trial court would have allowed the testimony notwithstanding the pre-trial order, as the moving party was the one who opened the door to the testimony.

Filancia was in jail for engaging in sexual relations with married men, taking incriminating photos of those encounters, and then using those photos to blackmail his sexual partners. (PCR 552). It strains credulity to believe Kaczmar would confess to Filancia, knowing that he had previously used sensitive information to blackmail people. While there was a pre-trial order restricting the impeachment of Filancia, the State opened the door to an examination of *how* Filancia alleged he and Kaczmar forged this deep bond that would lead Kaczmar to confess to him. Shea should have inquired of the specifics of their conversations as those were relevant to Filancia's testimony.

Failing to elicit this testimony was highly prejudicial to Kaczmar because it leaves unchallenged the underlying premise of Filancia's testimony – that is, Filancia's disclosure of details about his crime would lead Kaczmar to trust him enough to confess to him. Armed with the underlying behavior Filancia alleges he told Kaczmar, counsel would have been able to argue to the jury that Kaczmar did not confess to this man.

Opening the door "allows the admission of *otherwise inadmissible testimony* to 'qualify, explain or limit' testimony or evidence previously admitted. *Dennis v. State*, 817 So. 2d 741, 753 (Fla. 2002) "The opening the door concept is based on considerations of fairness and the truth-seeking function of a trial, where cross-examination reveals the whole story of a transaction only partly explained in direct examination." *Mosley v. State*, 739 So. 2d 672, 676 (Fla. 4th DCA 1999).

On direct examination the State sought to establish some sort of basis for why Kaczmar trusted and confessed to Filancia. The defense needed to probe further into that basis to discredit Filancia. The failure to do so was prejudicial and a violation of Kaczmar's Sixth Amendment right of confrontation as Filancia's testimony was vital to securing a conviction. The trial court should have allowed an evidentiary hearing on this issue as it is not refuted by the trial record. Kaczmar is entitled to relief on this claim.

IX. THE POSTCONVICTION COURT ERRED IN FINDING THAT A *BRADY* VIOLATION DID NOT OCCUR AT KACZMAR'S TRIAL CONCERNING LAURA FRASER.

The State committed a *Brady* violation by failing to disclose Filancia's relationship with Laura Fraser, the foster mother of the victim's daughter. *See Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* claims present mixed questions of law and fact. *See Sochor,* 883 So. 2d at 785. This Court defers to the lower court's findings of fact if they are supported by competent, substantial evidence. *See Hurst v. State,* 18 So. 3d 975, 988 (Fla.2009); *see also Taylor v. State,* 62 So. 3d 1101, 1114 (Fla.2011) (noting that "[q]uestions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence"). This Court reviews the trial court's application of the law to the facts de novo. *Hurst,* 18 So. 3d at 988.

To grant relief on a *Brady* claim this Court must find that the state (1) failed to disclose evidence favorable to the defense and (2) that the evidence was material. *Brady v. Maryland*, 373 U.S. 83, 87

(1963). "Material" means that "there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceedings would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The postconviction court found that Kaczmar had not demonstrated that the Fraser issue was material and that he was prejudiced. (PCR. 1795). The court stated that "[w]hile the Fraser issue was arguably impeachment, it was attenuated impeachment at best." (PCR. 1795). This finding was not based upon competent substantial evidence.

At the evidentiary hearing Filancia testified that he met with detectives on multiple occasions and in one of the early meetings he told them that he knew Laura Fraser personally. (PCR. 2793-96). Fraser was the foster mother to the victim's daughter. (PCR. 1444). Filancia said he had seen her name in Kaczmar's discovery documents. (PCR. 2796). Filancia was told by detectives not to worry about this. (PCR. 2796). When Filancia brought it up again to Detective Sharman, "he just said not to mention it because I didn't

want to bring it up to Kaczmar that I knew it when I saw it in writing." (PCR. 2796). Detective Sharman testified to the following:

> He may have told me when Bill and I talked, it's what I called Mr. Filancia. We talked numerous times over a period of time, and he may have said something about Laura Frazier (sic) or something like that but my independent memory is I can't remember if he said it or not.

(PCR. 2840). Detective Sharman admitted that her name could have also come up in relation to Filancia's own charges. (PCR. 2841).

"Florida courts have uniformly held that prosecutors are imputed with 'constructive knowledge and possession of evidence' held by other departments of the executive branch of Florida's government for discovery purposes." *See Henderson v. State*, 745 So. 2d 319, 323 (Fla. 1999) (internal citations omitted).

Had defense counsel known this he could have argued that Filancia had a personal interest and bias in that he was related, if only distantly, to the victim's family. Shea was adamant that he was not aware of Filancia's connection to the victim's family. (PCR. 2694-95). When asked at the evidentiary hearing whether he would have used this bias to impeach Filancia, Shea stated that it was "a

textbook issue the answer is that a lawyer should do that if it exist" (sic). (PCR. 2696).

In its denial of this claim, the postconviction court ignored this testimony, instead seizing on Shea's testimony during cross-examination by the State, when he stated that "I see no relevance to where it would have an effect on the jury's decision." (PCR. 2782). However, Shea did not seem to think that any of the impeachment he did do was important either. (PCR. 2781). Regarding Filancia being a convicted felon, having access to Kaczmar's discovery, and testifying against Kaczmar to get himself a deal, Shea stated that he "didn't think [these points] were major but they are important obviously everything you get before the jury." (PCR. 2781).

Shea made an accurate portrayal of the law: every piece of bias that can be put in front of the jury is important. This Court has explained just this in *Simpson*, noting that the withheld impeachment evidence would have revealed a "new source of bias (one not revealed to the jury at trial)". *Simpson v. State,* 344 So. 3d 1274 (Fla. 2022); *see also Napue v. Illinois*, 360 U.S. 264, 269 (1959)('The jury's estimate of truthfulness and reliability of a given

witness may well be determinative of guilt or innocence, and it is upon such *subtle* factors as the *possible* interest of the witness in testifying falsely that a defendant's life or liberty may depend.')." *Simpson v. State*, 344 So. 3d 1274, 1284 (Fla. 2022) (emphasis added).

Defense counsel did not have the necessary information to impeach Filancia on this issue of bias. Filancia testified at trial with regards for the victim "the worst thing was is that I found out that she had a daughter. I had a sister that's a single mom and I have a niece." (T. 805). Given this testimony, it is clear that Filancia was affected by his personal connection to the case. It prejudiced Kaczmar because the jury never knew about Filancia's *personal motivations* to fabricate testimony that incriminated Kaczmar. This reason standing alone, and especially in conjunction with the other impeachment that could have been used on Filancia, warrants a new trial.

X. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO UTILIZE HIS DNA EXPERT.

Trial counsel rendered ineffective assistance when he failed to utilize his DNA expert. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

One of the key pieces of evidence in Kaczmar's case were socks seized from his person on December 13, 2008. The socks tested positive for blood and had Kaczmar's DNA, the victim's DNA, and the DNA of a third person on them. At trial, the State repeatedly (in opening, closing, and in questioning witnesses) referred to the blood on the socks as the "victim's blood." At the evidentiary hearing, Candy Zuleger, the expert who had been retained by Mr. Shea prior to trial, testified that it is not accurate to refer to the blood as the "victim's blood" because the testing does not identify what bodily fluid the DNA comes from. (PCR. 2088). Additionally, most of the samples

show Kaczmar as the major contributor. These points were not brought out at trial, and the many misstatements of the State went uncorrected. Shea should have utilized the DNA expert he had retained to help him correct the State's misstatements and bring out testimony that was favorable to Kaczmar.

Prior to trial it was clear that the State intended to present DNA evidence against Kaczmar. Shea hired his own DNA expert, Candy Zuleger. However, he did not utilize her expertise in this case to rebut the argument that the victim's blood was on Kaczmar's socks. He retained her in June of 2010. (PCR. 2084). She generated a draft of a report on July 26, 2010. (PCR. 1549-50). In that report she noted that the report by the State's expert did not acknowledge in their report that 10 samples were taken from the socks for STR testing. (PCR. 1549-50) On August 2, 2010, Zuleger was informally interviewed by the State over the phone and jury selection began on August 9, 2010. (PCR. 2087)

Maria Lam from FDLE did the DNA analysis on the socks and testified for the State. She was deposed on August 2, 2010. Shea did not ask Zuleger to be present for Lam's deposition. (PCR. 2086).

During the deposition, Shea did not ask her any questions about whether she could say that the DNA from Ruiz came from her blood and not another bodily substance. (PCR. 1169-81). He also failed to ask about Lam's report not explaining that 10 samples were taken, something Zuleger had made note of in her report. (PCR. 1169-81, 1549).

At trial, the prosecutor referred to the DNA mixture as Ruiz's blood during his opening statement. (T. 268). There was no objection by defense counsel. The prosecutor also stated in his opening that Lam was able to identify who contributed the blood in the DNA mixture. (T. 267). Even in the defense's opening, Shea himself referred to the DNA mixture as Ruiz's blood. (T. 281).

Lam testified that she tested for blood in 34 areas and then did STR DNA testing on 10 areas (5 per sock). (T. 672). She testified that the major contributor for the DNA mixture on the socks was Ruiz. (T. 674). She said that Kaczmar could not be excluded as the possible minor donor. (T. 675). At no point did she opine that Ruiz was the one who had donated blood to the DNA mixture, nor did she refer to the mixture as the victim's blood. (T. 659-92). The prosecutor,

however, continued to refer to the DNA mixture as Ruiz's blood throughout the closing. (T.895-96, 961-62). The State argued that Kaczmar had on socks that were "soaked in the blood of the murder victim." (T. 961-62) And again, even in the defense's closing, Shea referred to the mixture as "Mrs. Ruiz's blood." (T.932).

Shea is not a DNA expert, nor is he required to have the knowledge an expert would have. This Court has repeatedly held that counsel is entitled to rely upon their retained experts. (*Stewart v. State*, 37 So. 3d 243, 251-52 (Fla. 2010); *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007). What is deficient here, is that Shea failed to rely upon Zuleger's expertise. He allowed the State to repeatedly refer to the DNA mixture as the victim's blood and did so himself as well. Nowhere in Zuleger's report is the DNA mixture referred to as the victim's blood. (PCR. 1549-50). Had Shea asked Zuleger to sit in on trial she could have advised him that neither he nor the State should refer to the DNA mixture as the victim's blood. (PCR. 2911).

Kaczmar testified at the evidentiary hearing that Ruiz arrived at his uncle's house with a trash bag of her clothes. Having been homeless and having few possessions, she was not particular about

whose clothes she was wearing, and regularly wore clothes belonging to Kaczmar's father. (PCR. 2090-91). He also explained that there was not a properly functioning washing machine in the house, so his wife Priscilla would gather everyone's laundry and take it to her mother's or a neighbor's house to do laundry. (PCR. 2989-90). He said that dirty laundry was stored together in a hamper in the bathroom, or in the pantry where they left their shoes. (PCR. 2989-90). Zuleger testified that DNA can transfer through clothes being washed together, or dirty clothes being stored together. (PCR. 2912).

In denying this claim the postconviction court found that (1) it was reasonable for trial counsel not to object to the State's opening as openings are meant to outline what evidence will be presented and it was "reasonable for the prosecutor to infer that the stain was blood and that the blood was Ruiz's blood," (2) it was reasonable for Shea to "forego questioning either Lam or McElfresh about a perceived speculative argument about other possible sources of DNA when there was no innocent explanation for Ruiz's DNA being on Kaczmar's socks presented to the jury", and that (3) "whether Kaczmar's DNA was the major donor or minor donor would be no

surprise given Kaczmar was wearing the socks when the police retrieved them and there was a video showing Kaczmar rubbing his thumb on the socks." (PCR. 1803).

Addressing the first point, the prosecutor may certainly *argue* that it is the victim's blood, but the prosecutor here went further than that and attributed that argument to the DNA analyst as something that can be scientifically proven. He told the jury that the State's DNA analyst can actually identify who donated blood to the mixture.[18]

> But then more importantly they test the socks, the socks that were retrieved from this defendant the evening of December 13th, 2008, and what they do is they get a mixture. There's more than one donor to some of this – these parts where there's blood on the socks, **but what Maria Lam can do is separate out based on the amount of DNA that's there who is the major contributor to this profile, and she's able to do that and she gets a profile for who is the major contributor to that blood.**

(T. 267). That was a grossly inaccurate summary of how the testing works. At the evidentiary hearing Zuleger explained that DNA testing does not identify who donated what substance. (PCR. 2903). "With it

[18] During Colaw's testimony at the postconviction evidentiary hearing it also came to light that he had used a PowerPoint during his opening statement. The PowerPoint included a chart that only depicted one sample where Ruiz was the major donor and Kaczmar the minor.

being a DNA mixture you can't tell who donated the blood, you know, with the blood– it could have been from both of them, was one blood and one was saliva, was one blood and skin cells. You don't know which donated that DNA, that type of DNA." (PCR. 2903-04).

The postconviction court concluded it was "reasonable for Shea to forego questioning either Lam or McElfresh about a *perceived* speculative argument about other possible sources of DNA." (PCR. 1803) (emphasis added). In referring to Shea's perception, the court recognized that Shea did not fully understand the argument. At the evidentiary hearing Shea was confronted with the fact that although Ruiz's DNA profile was on the socks, it was not necessarily her blood, but could have been from another bodily fluid. (PCR. 2731-32). Unfortunately, Shea did not grasp the concept that Ruiz's DNA could have been present from another bodily fluid. He was emphatic that it was indeed Ruiz's blood stating "It was–it was–the stain that she tested was Ruiz' blood." (PCR. 2733). Had Shea taken the time to understand the DNA evidence, he could have used it to support the theory that the blood on the sock came from Kaczmar. Not having informed himself on the issue, his strategy decisions are not afforded

any deference. "A reasonable strategic decision is based on informed judgment." *Henry v. State*, 862 So. 2d 679, 685 (2003).

In finding that Shea's decision to forego questioning was reasonable the court seized on McElfresh's testimony that "[t]he only reasonable scientific explanation is that that was Maria Ruiz's blood on those socks." (PCR. 1803) (T.705). However, McElfresh was testifying as to the statistical likelihood that it was a match with Ruiz. He testified about the *statistical calculations* he had done and the *statistical likelihood* of the DNA match. (T. 704-05). In questions to McElfresh the State repeatedly referred to the mixture as blood, and McElfresh in turn also referred to it as blood, which confuses the purpose of his testimony. McElfresh was there to testify as to the *certainty of the DNA match*, not to conclude what the source of the DNA was. McElfresh has a PhD in molecular and population genetics. (T. 698). In explaining what they do in the study of population genetics he stated that they "predict and evaluate how common or rare a DNA type might be." *Id.* The importance of McElfresh's testimony was to impress upon the jury that the DNA was undeniably a match with Ruiz. It was the State's poorly worded question, "do

you have an opinion as to whose blood was on those socks?" that allowed McElfresh to testify that "[t]he only reasonable scientific explanation is that that was Maria Ruiz's blood on those socks." Had counsel realized that neither Lam nor McElfresh could say that it was the victim's blood, he could have cross-examined McElfresh about his conclusion and clarified that nothing in Lam's data allows for the conclusion that Ruiz's DNA came from her blood.

In finding that Shea's decision to forego questioning was reasonable the court also pointed out that there was no "innocent" explanation offered at trial as to how Ruiz's DNA got on Kaczmar's socks. (PCR. 1803). This is not entirely accurate. The court found that Kaczmar did not testify at trial, and there was no testimony relating to how "all the clothes of those who stayed in the house were washed together." (PCR. 1803). While there was no testimony about the laundry specifically, McElfresh testified that"[t]here are so many ways that [DNA] can get on that pair of socks…I mean the world is covered with material and some of it has DNA in it and socks are a wearer item, so, you know --." (T. 706). He agreed that it could have come from a hand or someone's skin from their finger or even from

walking on carpet while wearing the socks. (T. 706-07). Additionally, the jury heard testimony that Ruiz lived in the house with Kaczmar and that she slept in the living room. (T. 468, 560-61, 568). State's Exhibit 147 from trial was a diagram of the house that showed the main entrance to the house was through the living room and it would have been a high traffic area. (R1. 1836).

Lastly, the court assigned little significance to the fact that Kaczmar is the major donor for the DNA mixture in six of the ten samples taken. Zuleger's report, that Shea received on July 26, 2010, points out that Lam's report only represents the makeup of one of the ten samples. At the evidentiary hearing, Zuleger explained that Lam's testimony at trial only represented one of those 10 samples, Area 28. (PCR. 2904). The makeup of the other 9 samples is distinct. (PCR. 1522-48, 2090-91). Six of those ten samples show Kaczmar as the major donor and two of the ten have equal contributions of DNA from Kaczmar and Ruiz. (PCR. 1522-48, 2090-91) The other two show Ruiz as the major donor. ((PCR. 1522-48, 2090-91). Zuleger's report to Shea made note of this and it was deficient for Shea not to put testimony about the ten samples in front of the jury. Shea could

have either called Zuleger, or simply addressed the issue through cross-examination of Lam. Zuleger testified at the evidentiary hearing that she regularly observes the testimony of the State's DNA examiner at trial. (PCR. 2897). She would have *again* pointed out to Shea the issue of having only one out of ten samples mentioned during Lam's testimony. (PCR. 2910).

She also would have advised Shea to object to the State's closing argument, which Zuleger stated was inaccurate because the prosecutor argued that Ruiz was the major contributor in all ten samples. (PCR. 2095).

> You don't have to guess about the socks because Maria Lam tested a total of 34 areas from these two socks. Every area tested positive for the presence of blood. She pulled ten areas and did DNA on them and the match for the major contributor to the profiles on these socks is Maria Ruiz.

(T. 895). This is factually inaccurate because Ruiz is only the major contributor in two out of the ten samples. Shea could have used the fact that Kaczmar is the major donor in most of the samples to argue that it was more likely Kaczmar's blood on the socks and that the victim's DNA was present from another substance such as sweat.

Not understanding the distinction between DNA and blood hindered Shea from objecting to misinformation, and highly prejudicial arguments from the State. Had Shea taken the time to better understand the points on Zuleger's report and/or retained her to be present at trial, he would not have allowed the State to present misinformation during its opening statements by claiming that all ten samples showed the victim as the major donor, that testing could pinpoint who contributed the blood, and that the blood in the mixture belonged to the victim. Not objecting to misinformation, that Kaczmar had the victim's blood on his socks, was highly prejudicial to Kaczmar. It created the impression that the data is much more conclusive than it is. Even the State's current expert, Marcella Scott, agreed that it is possible that you could detect both people from them contributing sweat. (PCR. 3025).[19] Having the victim's blood on Kaczmar's socks left no room for a far less sinister explanation: that

[19] She also admitted that the presumptive test, which is what was used to identify areas for blood, would not differentiate between human blood and animal blood. She admitted that the blood could have been contributed by **neither** Kaczmar nor the victim, but by an animal. The results would be the same if they both contributed DNA through sweat and blood was present from an animal. (PCR. 3023-24).

these are dirty socks that have been worn around the house and have co-mingled DNA from the victim, Kaczmar, *and* some third person.[20] Failure to challenge this scientific evidence was deficient performance that prejudiced Kaczmar. Confidence in the outcome had been undermined, and he should be granted a new trial.

XI. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CHALLENGE THE CHAIN OF CUSTODY OF THE SOCKS WORN BY KACZMAR.

Trial counsel rendered ineffective assistance when he failed to challenge the chain of custody of socks worn by Kaczmar. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

In denying this claim, the postconviction court held that "Kaczmar has presented no evidence that there was an issue with the

[20] At trial it came out that the sample had an extra allele not attributable to Kaczmar or the victim. At the evidentiary hearing it was established that this third contributor was present in four out of the ten samples. (PCR. 2090-91).

socks' chain of custody between December 13th and December 16th." (PCR. 1804). This finding is not based upon competent substantial evidence.

Kaczmar's socks contained a mixture of Kaczmar's and the victim's DNA, as well as the DNA of a third person. On December 13, 2008, Kaczmar was interrogated at the Clay County Sheriff's Office sub-station and asked to remove his socks. (PCR. 1381). Kaczmar was left alone with the socks, and he tampered with them. (PCR. 1381). At the conclusion of the interrogation seen in State's Exhibit 133, the socks were left in an unlocked interrogation room. On December 16th the socks were submitted to the evidence technician Rusty Monson. (PCR. 1337-1339). It is unclear who submitted the socks to Deputy Monson. Detective Matos testified that it is undoubtedly his name on the paperwork, however, it was Detective Sharman who handed them over to Deputy Monson. (PCR. 2855).

In order to exclude evidence based on a chain of custody issue, the person moving to exclude the evidence "bears the initial burden of demonstrating the probability of tampering. Once this burden has been met, the burden shifts to the proponent of the evidence to

submit evidence that tampering did not occur." *Murray v. State*, 838 So. 2d 1073, 1082 (Fla. 2002).

The court, the State, and Kaczmar all agree that Kaczmar tampered with the socks. Shea should have filed a motion to suppress the socks because the evidentiary integrity of the socks was compromised when Detective Sharman left the socks with Kaczmar. (PCR. 1442). As noted in the CCSO evidence procedures, "putting evidence into a paper bag as soon as possible is the best procedure." (PCR. 1364). As soon as Detective Sharman told Kaczmar to remove his socks, he should have placed them in a paper bag to prevent contamination.

> The processing, collecting, and marking of physical evidence, along with the processing, developing, lifting, and labeling of latent prints will be as described in the General Orders. The methods used are those that will preserve the condition of the evidence in the process of collection, and will ensure the sample's completeness and integrity….All Crime Scene and Patrol Evidence Technicians will be trained in proper procedure. (CFA 35.01M, c)
>
> For physical evidence to be accepted by the court at time of trial, it is essential that the chain of custody be maintained. **The initial step in this process is marking or labeling the item at the time it is collected, seized, or received. Items should be marked so as not to damage or contaminate the evidence. Items that cannot be marked, including liquids, should be placed in an**

> **appropriate container, sealed and the container labeled**.

(PCR. 1365) (emphasis added).

Detective Sharman did not follow procedure when he took the socks into evidence. This directly contradicted Shea's testimony explaining why he did not file a motion to suppress on the chain of custody issue. Shea stated: "They follow the rules. They package them properly." However, the video introduced at trial in 2009 as State's Exhibit 133 shows that after Kaczmar removed his socks and Detective Sharman left the room, Kaczmar contaminated the evidence.

Additionally, if the motion was not granted, Shea could have argued to the jury that the Clay County Sherriff's Office violated their own chain of custody procedures. This would have supported an argument of reasonable doubt and challenged the integrity of the investigation itself.

The postconviction court's order neglected to address the testimony of Detective Matos that he filled out the evidence submission form for the socks although he did not submit the socks to the evidence technician. (PCR. 2856). Detective Matos agreed that

"normally" the person submitting the evidence should be the one who fills out the paperwork submitting the evidence. (PCR. 2856). Indeed, the evidence procedures of CCSO delineate that "**all items of evidence will be turned over to the Evidence Technician by the FIRST MEMBER THAT TOUCHES IT**." (PCR. 1347)(emphasis retained).

Furthermore, Shea could have argued that the end of State's Exhibit 133 shows that the socks and the jacket were left unattended when Detective Sharman and Kaczmar exit the interrogation room. The time clock on the video indicated that it was shortly after midnight on December 14, 2008. This directly contradicted Detective Sharman's testimony that the socks were locked in his office from December 13th through December 16th. (PCR. 2834). The bottom line is that the socks were not handled according to procedure, they were left unattended in the presence of Kaczmar, and then left completely unattended in the interrogation room. As a result, they were contaminated and should have been excluded, or the jury should have at least heard about the Clay County Sheriff's Office's

violation of their own chain of custody procedure. Kaczmar is entitled to a new trial, as confidence in the verdict has been undermined.

XII. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO INVESTIGATE AND CHALLENGE THE CELL PHONE TOWER EVIDENCE PRESENTED BY DETECTIVE MATOS.

Trial counsel rendered ineffective assistance in failing to move to investigate and challenge the cell phone tower evidence presented by Detective Matos. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction court found that trial counsel was not ineffective in failing to investigate and challenge Matos' testimony or that Kaczmar suffered any prejudice. (PCR. 1826). The court based its findings on Shea's testimony that he did not believe there was anything for him to argue since Kaczmar had admittedly placed himself at his home at the time of the murder. (PCR. 1825).

Counsel's highest duty is to investigate and prepare for trial. Where, as here, counsel fails to investigate and prepare, the defendant is denied a fair adversarial testing process and proceedings. *Henderson v. Sargent*, 926 F.2d706 (8th Cir. 1991).

It was clear from the outset that the State planned to use cell phone data in its prosecution of Kaczmar. At no time did anyone on the defense team request the assistance of an independent expert to assist the defense in challenging this evidence at trial. Nor did anyone from the defense team consult with anyone from Spring/Nextel or any other cellular communications provider to better understand the evidence that was being presented and to challenge it. As a result, trial counsel was not prepared for his cross-examination of Matos about the cell tower site data.

Had the trial counsel investigated this critical evidence, he would have been prepared to challenge Matos' testimony that Kaczmar's calls made between 10:53 p.m. and 1:41 a.m. on December 12th through December 13th were consistent with Kaczmar being at the scene of the crime on the night of the murder. (T. 648-49). Such testimony overstated the evidence because

Kaczmar's cell phone usage would have been consistent with other locations, not just the house on Dothan Street.

Sawicki testified at the evidentiary hearing that Matos' testimony that the particular cell phone calls from Kaczmar's phone were consistent with the crime scene was not entirely accurate. (PCR. 2884). There should have been a follow-up question as to what else it is consistent with, considering the cell towers are only three to four miles apart and have overlap built in. (PCR. 2884-85). Another point from Matos' testimony was that the cell tower records were consistent with Kaczmar being in a single location for those four calls. (PCR. 2885). Sawicki testified that again, although not inaccurate, it could also be consistent with the phone moving to multiple places within the coverage area of that sector. (PCR. 2885).

Armed with this information, trial counsel could have effectively challenged the cell tower site data in this case. Trial counsel's preparation for confronting this critical evidence was deficient performance and the prejudice substantial. If trial counsel had challenged Matos' overreaching testimony on cross-examination, he could have raised reasonable doubt about whether Kaczmar was at

the house on Dothan Street during those calls, and could have challenged the integrity of the investigation itself. If such information had been presented there is a reasonable probability that the outcome of Kaczmar's trial would have been different. Kaczmar should be granted a new trial.

XIII. THE POSTCONVICTION COURT ERRED IN SUMMARILY DENYING THE CLAIM THAT COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE STATE'S ARGUMENT REGARDING KACZMAR'S DRUG USE AND ITS RELATIONSHIP TO THE JURY INSTRUCTION REGARDING VOLUNTARY INTOXICATION NOT BEING A DEFENSE.

Trial counsel rendered ineffective assistance in failing to object to the State's argument regarding Kaczmar's drug use and its relationship to the jury instruction regarding voluntary intoxication as a defense. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Fla. R. Crim. P. Rule 3.851(5)(A)(i) and (ii), requires the postconviction court to schedule an evidentiary hearing on claims listed by the defendant as requiring a factual determination and to hear arguments on purely legal claims that are not based on disputed facts. The court may only summarily deny claims that are "insufficient, procedurally barred, or refuted by the record." *Morris v. State,* 317 So. 3d 1054, 1071-72 (Fla. 2021). *See also Kocaker v. State*, 311 So. 3d 814 (Fla. 2020); *Cannon v. State*, 310 So. 3d 1259 (Fla. 2020); *Matthews v. State*, 288 So. 3d 1050 (Fla. 2019); *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018); *Hojan v. State*, 212 So. 3d 982 (Fla. 2017); *Salazar v. State*, 188 So. 3d 799 (Fla. 2016). In furtherance of this rationale, this Court explained in *Anderson* that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim." *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993).

The State presented extensive testimony regarding Kaczmar's alleged drug use on the night of Ruiz's death and made the following argument in closing:

> "You [Kaczmar] go to Jacksonville. You buy a bag of crack rocks. You come back to your house and smoke them you're responsible. You're responsible for your behavior. You don't get to ingest, use drugs, drink alcohol, get drunk, get high, whatever the case may be and claim that as an excuse, and that's what this [the jury instruction on voluntary intoxication] is telling you. That's not an excuse. You are not to consider that."

(T. 884).

The defense should have objected to this argument from the State's closing. The State argued that if you get high or drunk then that makes the defendant "responsible." This argument lessens the state's burden of having to prove premeditation. The concept of voluntary intoxication not being a defense is confusing on its face as it specifically states, "Evidence of the defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense." (T. 979). Notwithstanding that instruction, the State still has the burden of proving premeditation in order to secure a conviction on a first-degree murder theory. There is a substantial risk a jury will be misled by the State's argument and the instruction and conclude that since someone died as a result of Mr. Kaczmar's alleged drug use, he is guilty of first degree murder based on those facts alone.

The State's theory of prosecution was that premeditation was established by a multitude of stab wounds administered to Ruiz. However, the States own narrative was that Kaczmar was attempting to commit a sexual battery when Ruiz armed herself with a knife. (T. 247). This enraged Kaczmar and he then proceeded to stab her. (T. 247). The State also argued that a felony murder theory was proven, but that theory has since been rejected by the Florida Supreme Court. *See, Kaczmar v. State*, 104 So. 3d 990 at 1002 (Fla. 2012).

This Court has held that the number of stab wounds is only circumstantial evidence of premeditation, and that "multiple stab wounds alone do not prove premeditation." *Perry v. State*, 801 So. 2d 78, 85 (Fla. 2001). The State's argument in combination with the instruction on voluntary intoxication, circumvented their obligation to prove premeditation. This claim is not refuted by the record and should not have been summarily denied. This court should remand for further development of the claim at an evidentiary hearing.

XIV. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTOR'S ARGUMENTS THAT DIMISHED THE STATE'S BURDEN OF PROOF AND REASONABLE DOUBT.

Trial counsel rendered ineffective assistance in failing to object to the prosecutor's arguments that diminished the burden of proof and reasonable doubt. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Fla. R. Crim. P. Rule 3.851(5)(A)(i) and (ii), requires the postconviction court to schedule an evidentiary hearing on claims listed by the defendant that require a factual determination and to hear arguments on purely legal claims that are not based on disputed facts. The court may only summarily deny claims that are "insufficient, procedurally barred, or refuted by the record." *Morris v. State,* 317 So. 3d 1054, 1071-1072 (Fla. 2021). *See also Kocaker v. State*, 311 So. 3d 814 (Fla. 2020); *Cannon v. State*, 310 So. 3d 1259 (Fla. 2020); *Matthews v. State*, 288 So. 3d 1050 (Fla. 2019); *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018); *Hojan v. State*, 212 So. 3d 982 (Fla. 2017); *Salazar v. State*, 188 So. 3d 799 (Fla. 2016). In

furtherance of this rationale, this court explained in *Anderson* that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim." *Anderson v. State*, 627 So. 2d 1170-71 (Fla. 1993).

The postconviction court held that the prosecutor's statements were not objectionable, and even if they were, there was no prejudice. (PCR. 1813).

During closing arguments, the prosecutor speculated that over the course of the trial, jurors had already made up their minds about the facts of the case. (T. 868). This is despite the jury instruction given at the beginning of trial directing jurors to refrain from forming any definite or fixed opinions on the merits of the case until they hear all the evidence. *See Fla. Standard Jury Instruction in Criminal Cases 2.01*. Trial counsel failed to object to this comment by the prosecutor.

Later in his closing, the prosecutor commented on the burden of proof and reasonable doubt:

> … [T]he court will tell you that **reasonable doubt can arise from the lack of evidence or conflicts in the evidence**
> …

> When you're thinking about lack of evidence, what the question you should be asking yourselves is not is what else could the state have done. What else could they have shown me? That's not the appropriate question. The question you should be asking yourself is: **Is what was presented sufficient, sufficient to convince me that this man committed these crimes? And that's it. Is what they showed me sufficient?**

(T. 912-13) (emphasis added). Trial counsel did not object to these misstatements of the law. Regarding where a reasonable doubt can come from, the prosecutor should have included a third basis: the evidence itself. Regarding the comment about lack of evidence, the court should have instructed the jury that it is wholly appropriate for the jury to consider what else the State could have done to prove their case as that is the essence of finding reasonable doubt based on the lack of evidence.

The prosecutor made further arguments about resolving conflicts in the evidence. **"If you can't [resolve the conflict] then you have to ask yourselves does it negate one of the elements of any of these offenses?** If it negates an element of the offense that's reasonable doubt. **If it doesn't that's not a reasonable doubt."** (T. 912-13) (emphasis added). There was also no objection by trial counsel to these misstatements of the law. The jury should have been

instructed that Kaczmar was presumed innocent and it was the State's burden to prove the elements and not the defense's burden to "negate" them.

In the none of the above-cited instances did trial counsel object, ask for a curative instruction, or ask for a mistrial. Kaczmar was prejudiced by trial counsel's failure to object to these misstatements of the law because the jury was left with the impression that the prosecutor's comments were an accurate interpretation of the jury instructions. The most egregious of the prosecutor's comments involved shifting the presumption of innocence into a presumption that an element is proven in the absence of proof to the contrary and that the jury should default to a presumption that the element is proven if there is a way to explain away a conflict in the evidence. This statement was a violation of due process. Kaczmar is entitled to a new trial based on counsel's failure to object to these improper comments to the jury misstating the State's burden of proof and reasonable doubt. In the alternative, this Court should remand for further development of this issue at an evidentiary hearing.

XV. THE POSTCONVICTION COURT ERRED IN FINDING THAT THE STATE HAD NOT COMMITTED A *GIGLIO/NAPUE* VIOLATION WHEN THE PROSECUTOR FAILED TO CORRECT TESTIMONY REGARDING FILANCIA'S POSSIBLE SENTENCE.

The State committed a *Giglio*/*Napue* violation during the guilt phase when the prosecutor failed to correct testimony regarding Filancia's possible sentence. *See Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959).

Giglio claims present mixed questions of law and fact. *See Sochor,* 883 So. 2d at 785. This Court defers to the lower court's findings of fact if they are supported by competent, substantial evidence. *See Hurst v. State,* 18 So. 3d 975, 988 (Fla.2009); *see also Taylor v. State,* 62 So. 3d 1101, 1114 (Fla.2011) (noting that "[q]uestions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence"). This Court reviews the trial court's application of the law to the facts de novo. *Hurst,* 18 So. 3d at 988.

The postconviction court did not find this testimony to be false or misleading. (PCR. 1827). The court further found that Kaczmar's *Giglio* claim concerning the State's non-disclosure of Filancia's lowest possible sentence should instead be considered as a *Brady* violation. In doing so, the court found that Kaczmar failed to establish a *Brady* violation because the information had not been suppressed by the State since both parties had access to this information. (PCR. 1828). Finally, the court found that there was ultimately no prejudice, as trial counsel sufficiently attacked Filancia's credibility. (PCR. 1828-29).

Due process precludes the State from presenting either false or misleading evidence and/or false or misleading argument. *Giglio v. United States*, 405 U.S. 150, 153 (1972) ("As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court has made clear that deliberate deception of a court and jurors by the presentation of false evidence is incompatible with 'rudimentary demands of justice.'")

To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Guzman v. State*, 868 So.

2d 498 (Fla. 2003). Under *Giglio*, false testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Guzman, citing United States v. Agurs*, 427 U.S. 97, 103 (1976). Further, the State, as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. *Guzman*, 427 U.S. at 506.

Although Filancia pled guilty prior to the guilt phase of Kaczmar's trial, he had not been sentenced. The State disclosed to trial counsel that Filancia was offered a deal of a cap of 20 years in exchange for his testimony at Kaczmar's trial. The State, aware of all the charges against Filancia, as well as the sentencing guidelines for those charges, failed to disclose that Filancia scored a lowest permissible sentence of 65.85 years according to the sentencing guidelines, and failed to correct the trial testimony of Filancia's lawyer Richard Kuritz that the reason he got 0-20 years was because of the sentencing guidelines. (T. 834-35).

The non-disclosure of Filancia's lowest possible sentence is a *Giglio* violation because it was an intentional effort to conceal the

depths of Filancia's motivation to testify on behalf of the State in Kaczmar's trial. The fact that the State agreed to a downward departure of 45-65 years in exchange for Filancia's substantial assistance in Kaczmar's case substantially affected Filancia's credibility. The State had a duty to disclose this information and correct testimony that incorrectly attributed the lenient sentence to the sentencing guidelines.

The State commits a violation of *Napue v. Illinois*, 360 U.S. 264, 269 (1959) when the prosecutor fails to correct false testimony. The State failed to correct the testimony of Filancia's attorney, Richard Kuritz, at the guilt phase of Kaczmar's trial that the reason Filancia got 0-20 years was because of the sentencing guidelines. The prosecutor was well aware of Filancia's charges and the Florida sentencing guidelines and knew that if Filancia had been sentenced according to the guidelines, he would be approximately 112 years old when he was released, without the benefit of gain time and credits. And even with the benefit of gain time and credits, he would still be approximately 102 years old upon release. The prosecutor knew that

he had offered Filancia a downward departure of approximately 45-65 years. Kaczmar is entitled to a new trial on this issue.

XVI. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO INVESTIGATE FILANCIA AND THE NATURE OF HIS PLEA DEAL WITH THE STATE.

Trial counsel rendered ineffective assistance in failing to investigate the nature of Filancia's plea deal with the State. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction court held that it was reasonable for trial counsel to focus on the fact that Filancia was facing a life sentence but took a plea deal that would only subject him to a maximum of twenty years. (PCR. 1830). The court further found that had the jury known about Filancia's minimum sentence, there was not a reasonable probability that he would have been found not guilty. (PCR. 1830).

Prior to Filancia's testimony at the guilt phase of Kaczmar's trial, the State disclosed that Filancia was facing a possibility of a life sentence on his pending charges, but the State offered a plea of 0-20 years in exchange for his testimony.

Shea and Anderson are experienced criminal defense attorneys. They could have discovered through minimum diligence - a review of Filancia's pending charges on CCIS and a computation of Florida's sentencing guidelines - that Filancia was actually facing a *minimum* sentence of over 65 years, which means he would be released when he is approximately 112 years old.

Filancia's testimony was critical to the State's case against Kaczmar, and trial counsel should have been prepared to undermine Filancia's credibility at trial. Kaczmar's jury heard general testimony that Filancia was facing the possibility of life in prison, but got a plea offer of 0-20 years. Had trial counsel effectively cross-examined Filancia on the details of his deal from the State, Kaczmar's jury would have learned that Filancia earned a 45-65 year departure from the minimum sentence he was facing under the sentencing guidelines. Even Colaw stated at the evidentiary hearing that if trial

counsel wanted to stipulate that Filancia had since been sentenced and got 15 years, he would have agreed to that. (PCR. 2950-51).

There is a reasonable probability that this information would have undermined Filancia's credibility to the point that the jury would not believe that Kaczmar confessed to Filancia, and there is a reasonable probability that the outcome of Kaczmar's trial would have been different. Kaczmar should be granted a new trial.

XVII. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO PUT EVIDENCE OF FILANCIA'S BIAS IN FRONT OF THE JURY.

Trial counsel rendered ineffective assistance during the second penalty phase by failing to put evidence of Filancia's bias before the jury. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction court found that it was reasonable for trial counsel to forego any further impeachment when it would have had a minimal effect on the outcome of the jury's decision. (PCR. 1830).

The court further stated that the jury already had evidence without Filancia's testimony to support the HAC aggravating factor. (PCR. 1830).

Most of the testimony at Kaczmar's 2013 penalty phase was entered by reading the 2010 trial transcript into the record. Filancia's testimony and Kuritz's testimony from the 2010 guilt phase were read into the record verbatim. Trial counsel did not object to this testimony even though they had the benefit in 2013 of Filancia's sentencing scoresheet, which clearly showed that his computed minimum sentence to be 790.2 months, or 65.85 years.

Prior to Filancia's testimony at the guilt phase of Kaczmar's 2010 trial, the State disclosed that Filancia was facing the possibility of a life sentence on his pending charges, but the State offered a plea of 0-20 years in exchange for his testimony.

Trial counsel are experienced criminal defense attorneys. They should have recognized the significance of this 45-65 year downward departure from Filancia's mandatory minimum of 65.85 years, and introduced this information at the 2013 penalty phase so Kaczmar's jury could properly assess the credibility of Filancia and Kuritz.

Alternatively, they should have insisted on live testimony from Filancia and Kuritz to ensure that the information put in front of the jury regarding Filancia's deal with the State was accurate. Filancia's testimony was critical to establishing the aggravators in this case and trial counsel should have been prepared to undermine Filancia's credibility in the 2013 penalty phase. Kaczmar's jury heard general testimony that Filancia was facing the *possibility* of life in prison, but got a plea offer of 0-20 years. Had trial counsel effectively brought out the details of Filancia's deal from the State, Kaczmar's jury would have learned that Filancia earned a 45-65 year departure from the *minimum* sentence he was facing under the sentencing guidelines. There is a reasonable probability that this information would have undermined Filancia's credibility to the point that the jury would not have believed his testimony, and there is a reasonable probability that the outcome of Kaczmar's penalty phase would have been different. Kaczmar should be granted a new trial on this issue.

XVIII. THE POSTCONVICTION COURT ERRED IN FINDING THAT THE STATE HAD NOT COMMITTED A *NAPUE* VIOLATION DURING THE PENALTY PHASE WHEN THE PROSECUTOR FAILED TO CORRECT TESTIMONY REGARDING FILANCIA'S POSSIBLE SENTENCE.

The State committed a *Napue* violation during the second penalty phase when it failed to correct testimony regarding Filancia's possible sentence.

The postconviction court found that Kaczmar presented no evidence that this testimony was false. (PCR. 1831). The court further found that had the jury known about Filancia's minimum sentence there was not a reasonable probability that the jury would have recommended a life sentence. (PCR. 1831). This finding is not based upon competent substantial evidence.

The prosecution commits a violation under *Napue v. Illinois*, 360 U.S. 264 (1959) when the prosecutor allows false testimony to go uncorrected.

At the second penalty phase of Kaczmar's trial, the State read into the record Filancia's testimony and Kuritz's testimony from Kaczmar's 2010 trial. Filancia had been sentenced prior to the second penalty phase and his sentencing sheet was a matter of record. Filancia's sentencing documents showed that his lowest permissible sentence based on the sentencing guidelines was 65.85 years. The State did not correct Filancia's testimony that he was

facing a maximum possible sentence of life in prison prior to his plea deal. (T. 901).

The State also failed to correct Kuritz's testimony from the 2010 guilt phase that the reason Filancia got a cap of 20 years was because of the sentencing guidelines.

The prosecutor knew that Filancia actually faced a *minimum* sentence under the sentencing guidelines of 65.86 years, and that the State agreed to a 45-65 year departure in exchange for his substantial assistance in Kaczmar's case. Under the guidelines, Filancia would be over 100 years old when he was released from prison. The departure was a direct result of a deal with the State to testify against Kaczmar. The distinction here is critical, because the testimony at Kaczmar's trial made it appear that Filancia's possibility of a life sentence was a worse-case scenario should things go badly at his sentencing, when in fact, spending the rest of his life in prison was the mandatory sentence he was facing without this deal with the State.

XIX. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO REQUEST A JURY INSTRUCTION ON HEAT OF PASSION.

Trial counsel rendered ineffective assistance by failing to request an instruction on heat of passion and argue heat of passion as a defense to first-degree premeditated murder during closing argument. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction court held that trial counsel cannot be deficient for failing to sufficiently present a defense without the facts to support it or request a jury instruction that was not supported by the evidence. (PCR. 1822). The court further noted Filancia's testimony that Kaczmar told him that he stabbed Ruiz after being enraged when she pointed a knife at him and he cut himself getting the knife away from her. (PCR. 1822). However, the court concluded that "Kaczmar could not rely on this evidence as a potential

provocation when he sought to completely discredit Filancia's testimony." (PCR. 1822). This finding by the postconviction court is not based on competent substantial evidence.

Trial counsel failed to request an instruction on heat of passion despite attempting to argue just that during his closing argument. This instruction could have been used to negate the State's argument for first-degree premeditated murder. Because he failed to ask for this instruction, he was not permitted to argue this in his closing arguments made to the jury. (T. 919-21).

This failure by trial counsel is outside the wide range of professionally competent assistance. Kaczmar wanted him to argue for second-degree murder via heat of passion, and trial counsel attempted to do so in closing arguments. For counsel not to be aware of the necessary jury instruction is simply deficient performance. He clearly was aware that he was going to argue this ahead of time and should have requested any and all jury instructions relevant to his defense.

The error here is even more critical since the jury found Kaczmar guilty of attempted sexual battery and this Court set aside

that conviction. The guilty verdict on the attempted sexual battery creates a legitimate likelihood that Kaczmar was convicted of felony murder based on a non-existent attempted sexual battery. The trial court's refusal to have the jury differentiate between a verdict of guilty of first-degree premeditated murder and first-degree felony murder makes it impossible to determine the full extent of the prejudice here. Kaczmar is entitled to a new trial where he can defend against the single theory of prosecution (i.e., first-degree premeditated murder) with a properly instructed jury.

XX. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTOR'S CHARACTERIZATION OF MITIGATION AS "EXCUSES" DURING CLOSING ARGUMENT.

Trial counsel rendered ineffective assistance by not objecting to the prosecutor's reference to mitigation as "excuses." *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction court found that trial counsel's decision not to object to this statement was reasonable because it was stated only one time and the jury was properly instructed on the law regarding mitigation. (PCR. 1824). The court further found that "given the minimal mitigation presented against the two aggravating factors, including HAC found in this case, the [c]ourt is not persuaded that the one-time mentioned word 'excuses' undermined the confidence in this case's outcome." (PCR. 1824). This finding by the postconviction court was not based upon competent substantial evidence.

During the State's closing argument to the jury after the 2013 penalty phase the State argued the following:

> **Now they may make arguments and ask you to speculate about some other things, you know create some excuses or mitigation as I would call them for his actions**, but at the end of the day that's your call. You determine whether those mitigators are present in the evidence I presented and you determine if they are present what weight to give them and at the end of the day you determine how they weight out with the aggravators that have been presented in this case.

(R6:10061-62) (emphasis added).

On direct appeal this court acknowledged that the prosecutor's reference to mitigation as "excuses" was improper. *Kaczmar v. State*, 228 So. 3d 1, 12 (Fla. 2017) This Court cited to *Oyola v. State*, 158 So. 3d 504, 512 (Fla. 2015) where the State's argument denigrated mental health mitigation. In *Oyola* this Court found the argument improper and that "when viewed cumulatively" with the "inappropriate aggravating consideration" the case had to be reversed. Additionally, this Court cited to *Delhall v. State* where the prosecutor referred to mitigation as excuses. *Delhall v. State*, 95 So. 3d 134, 167-168 (Fla. 2012). Like Kaczmar's case, *Delhall* presented only one source of mitigation. *Id.* Additionally in *Urbin*, this court found improper references to mitigation as "excuses." *Urbin v. State*, 714 So. 2d 411, 421-22 (Fla. 1998). *Urbin* was reversed and remanded not for a new penalty phase, but for "imposition of a life sentence." *Id.*

When asked about the failure to object to the prosecutor's characterization of mitigation, neither of Kaczmar's trial attorneys provided a specific reason for not objecting. Both testified that it would have been Anderson's responsibility to object. Shea stated "I

have been known to make objections during that phase but it was Chris Anderson who was listening to the mitigation and aggravators and he would have made the objections." (PCR. 2788). Similarly, Anderson agreed that he was in charge of the penalty phase. (PCR. 2817).

Both Shea and Anderson testified that in fact, mitigation is "excuses." (PCR. 2770; 2817; 2827). With this mindset, it is difficult to imagine that they would ever object to a prosecutor characterizing mitigation as "excuses." Both of them were unfamiliar with this Court's precedent in *Urbin*. (PCR. 2770; 2818).

When asked about this specific instance, Anderson testified that he did not have a present recollection of what had happened, but had been informed that this issue was being raised in postconviction. (PCR. 2816). While Anderson speculated that Colaw's tone was not demeaning, he testified that he did not have a present recollection of the issue. (PCR. 2817;2827).

This Court should not give any deference to the postconviction court's order on this issue. The court exclusively cited to Anderson's general reasoning as to why he *might* not object to this. (PCR. 1824).

Not being able to recall the event specifically, Anderson's alleged reasoning was speculative and generic. Additionally, the court cited to the fact that there was little mitigation presented and the State only used the word "excuses" one time. (PCR 1824). However, this does nothing to ameliorate the issue. If there is little mitigation presented, the jury's assessment of that mitigation becomes even more important. Kaczmar should be granted a new trial, as confidence in the outcome has been undermine.

XXI. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE DURING THE PENALTY PHASE IN FAILING TO OBJECT WHEN THE TRIAL COURT INTERFERED WITH THE JURY'S DECISION-MAKING AND USURPED THE JURY'S FUNCTION WHEN, IN RESPONSE TO FOUR QUESTIONS THE JURY POSED DURING ITS DELIBERATIONS, THE JUDGE TOLD THE JURY THE QUESTIONS WERE "NOT RELEVANT."

Trial counsel rendered ineffective assistance during the penalty phase by failing to object when the court told jurors that their questions were "not relevant", thereby interfering with the jury's decision-making process and usurping the jury's function. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the

circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction court held that the penalty phase judge's comment did not provide the jury with evidence, refer to evidence, remark on the weight of the evidence, or discuss Kaczmar's guilt. (PCR. 1823). The court further held that given the minimal mitigation against the two aggravating factors, there was no reasonable probability that the outcome would have been different. *Id*. These findings by the court are not based upon competent substantial evidence.

During deliberations after the penalty phase, the jury sent the following four questions to the judge:

1. Was the knife that was used in the murder ever retrieved?

2. Was Christopher Modlin a suspect in the victim's murder?

3. Was there any witnesses in the initial trial that testified to seeing or hearing the defendant speak or treat the victim derogatorily at any time while the victim was living in the house?

4. Was there any testimony in the initial trial that the defendant ever spoke of wanting to have sex with the victim before the 12th of December, 2008?

(R2. 297; 1096).

Defense counsel and the prosecutor agreed the judge could not answer the questions and discussed the appropriate response:

> Mr. Shea: Your Honor, I don't know that we can answer those.
>
> Mr. Colaw: Yeah, I don't think you can give them answers.
>
> The Court: What?
>
> Mr. Colaw: I don't think you can give them answers to those questions.
>
> Mr. Shea: They have to rely on their memory.
>
> Mr. Colaw: They have to rely on the evidence presented in this proceeding and the instructions you've given them.
>
> The Court: Everybody on board with that?
>
> Mr. Shea: Yes Sir.

(R2. 1096-97). When the jurors returned to the courtroom, the judge did not give the agreed-upon instruction but instead told the jury: "I read the four questions that you sent back and my answer is this:

It's not relevant to what you're here to decide right now so I can't answer these questions, okay?" (R2. 1097).

By telling the jurors their questions were "not relevant," the judge improperly invaded the province of the jury and interfered with its decision-making. "A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused." § 90.106, Fla. Stat. (2011).

> All matters of fact, and all testimony adduced, should be left to the deliberate, independent, voluntary, and unbiased judgment of the jury, wholly uninfluenced by any instruction, remarks, or intimation, either in express terms or by innuendo, from the judge, from which his view of such matters may be discerned. Any other course deprives the accused of his right to trial by jury, and is erroneous.

Gutierrez v. State, 177 So. 3d 226, 231 (Fla. 2015), *citing Lester v. State,* 37 Fla. 382, 20 So. 232 (1896).

Trial counsel failed to object to the trial court's improper comment to the jury. The judge's response to the jury's questions could have been construed as a comment on the evidence. By telling the jury its questions were not relevant, the judge in effect told the jury its consideration of those questions was not relevant. However,

the questions, even if not answered by the evidence, may have been **relevant** to the jury's consideration of the appropriate punishment. The jury's consideration of the fact that these questions were not answered by the evidence could have been a relevant consideration in their verdict.

At the evidentiary hearing trial counsel took the position that the questions were not relevant, and thus the judge's instruction was proper. (PCR. 2769). "There was nothing relevant in the questions that affected the jury's decision that day…They were asking for evidence from the original trial and so the Court told them it was not relevant." (PCR. 2769).

However, during the penalty phase of trial, counsel argued to the jury that "a fellow named Christopher Ryan Modlin that you'll be hearing from, got an unfairly - what we call a disparate sentence, a lighter sentence. That's a mitigation factor that you can consider in making that life-or-death decision." (R2. 813). And indeed, the jury heard from Modlin himself that he had lied about being at Kaczmar's house on the night of the murder. (R2. 852). They also heard his excuse for lying about it: "Because I guess cocaine was still in me. I

was – you know, I figured me hanging out down there around Leo's house like that they would automatically want to put me in the middle of something I didn't do." (R2. 852). Additionally, they heard about his involvement from Priscilla Kaczmar and Filancia. (R2. 896; 908). They also heard that Modlin was facing a life sentence and ultimately was sentenced to 24 months in prison and 24 months of probation. (R2. 834). Clearly, Modlin's involvement was relevant and the judge should have instructed the jury to rely on the evidence presented.

Filancia also testified to the alleged location of the buried knife. (R2. 912). In assessing Filancia's credibility, knowing whether the knife was found would have been relevant. Being told that the retrieval of the knife was not relevant, may have misled the jury into thinking that Filancia's testimony was to simply be accepted as fact.

While the parties all agreed the court could not answer the questions, the judge's instruction that the issues were not "relevant," may have precluded the jury from (1) considering Modlin's involvement and lesser sentence, and (2) questioning the veracity of

Filancia's testimony. Both of those considerations are permissible and related to the questions posed to the court.

This Court should not give deference to the postconviction court's order as it erroneously states that the previous court's comment to the jury "did not provide the jury with evidence, **refer to evidence already presented to the jury, remark on the weight of the evidence already presented to the jury,** or discuss Kaczmar's guilt." (PCR. 1823)(emphasis added). Modlin's involvement and sentence and the alleged hiding place of the knife had been presented to the jury, so the circuit court's statements did indeed both "refer to evidence already presented to the jury" and "remark on the weight of the evidence already presented to the jury."

Trial counsel's deficient performance during the penalty phase jury deliberations prejudiced Kaczmar because it allowed his jury to be unfairly influenced by the trial court's improper comment on the evidence. This deprived Kaczmar of a fair trial in violation of the United States and Florida Constitutions. Kaczmar should be granted a new trial.

XXII. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO HAVE THE JURY PROPERLY INSTRUCTED AT RESENTENCING.

Trial counsel rendered ineffective assistance by failing to have the jury properly instructed at resentencing.[21] *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The postconviction found that there was no evidence presented "that counsel was deficient or that there was a reasonable probability that the sentencing outcome would have been different had these preliminary, non-substantive instructions been given." (PCR. 1815).

The trial court failed to give the following instructions to jurors:

> (1) "Qualification Instruction" outlined in Section 1 of the Florida Standard Jury Instructions in Criminal Cases. *See In re Standard Jury Instructions in Criminal Cases--Report*

[21] The postconviction court granted penalty phase relief as to a portion of this claim. The State appealed that issue and will therefore be addressed by Kaczmar in the answer portion of this brief. Issue XXII above will address the portion of the claim that was denied by the postconviction court.

No. 2010-01 and Standard Jury Instructions in Civil Cases--Report No. 2010-01, 52 So. 3d 595 (Fla. 2010).

(2) Introductory Instruction 1.1, Florida Standard Jury Instructions in Criminal Cases.

(3) Standard Jury Instruction in Criminal Cases 2.1

(4) Standard Jury Instruction in Criminal Cases 2.1(a). *See In re Amendments to the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, the Standard Jury Instructions in Civil Cases, and the Standard Jury Instructions in Criminal Cases - Implementation of Jury Innovations Committee Recommendations*, 967 So.2d 178 (Fla. 2007).

(PCR. 467-69). These instructions include: the use of cell phones and other social media devices and is specifically designed to stop jurors from researching the case before they go to a specific courtroom for jury selection; rules involving note taking by jurors; and general rules for how the trial will be conducted.

The two prongs of the *Strickland* analysis are easily satisfied here. Defense counsel should have recognized the failure of the trial court to properly instruct the jury. Any reasonable counsel in this case would have insisted on the jury being instructed on the issues outlined above, as required by this Court's guidelines. Moreover, the error here is structural (i.e., not subject to a harmless error analysis).

See Weaver v. Massachusetts, 582 U.S. 286 (2017). "[A]n error has been deemed structural if the effects of the error are simply too hard to measure." *Id.* at 1908. The effect of the errors here are impossible to measure because of the postconviction court's denial of the motion to interview jurors. This failure by trial counsel to object and insist on the jury being properly instructed is sufficient to warrant a new sentencing proceeding in this case.

XXIII. THE POSTCONVICTION COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO REQUEST A PRESUMPTION OF LIFE INSTRUCTION AT SENTENCING.

The postconviction court held that trial counsel was not deficient, since the requested instruction was not a standard jury instruction, and that there is no evidence of prejudice, considering other relevant standard jury instructions were given. (PCR. 1819-20).

Recognizing this Court's recent jurisprudence in *Sanchez-Torres v. State*, 322 So. 3d 15 (Fla. 2020), Kaczmar argues that this Court should reconsider its previous position.

The jury instruction at issue is an amalgam of Standard Instruction 2.1 and Standard Instruction 3.7 and adjusted to reflect the issues in the sentencing phase.

The relevant part of Florida Standard Jury Instruction in Criminal Cases 2.1 states: "You should not form any definite or fixed opinion on the merits of the case until you have heard all the evidence, the argument of the lawyers and the instructions on the law by the judge."

Florida Standard Jury Instruction in Criminal Cases 3.7 states: "You must presume or believe the defendant is innocent. The presumption stays with the Defendant as to each material allegation in the charging document through each stage of the trial unless it has been overcome by evidence to the exclusion of and beyond a reasonable doubt."

The Fifth Amendment to the United States Constitution says that "life, liberty and property" shall not be taken absent due process of law. Likewise, Article I, Section 2 of the Florida Constitution specifies "life and liberty" among the inalienable rights of all persons. The deprivation of life, as discussed in these provisions, necessarily

implicates the death penalty. Moreover, the concepts of life and liberty are inextricably intertwined when the State seeks not only to deprive a citizen of liberty in a death penalty case, but of life as well. It would be absurd to suggest that there is no "presumption of life" attaching to the due process interest in life when there is a "presumption of innocence" attaching to one's liberty interest. To attach lesser protections to life than liberty devalues the former and elevates the latter for no moral, philosophical, legal or constitutional reasons.

XXIV.THE POSTCONVICTION COURT ERRED IN FINDING THAT FLORIDA'S DEATH PENALTY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT AS DEFINED BY COURT DECISIONS REGARDING SCENARIOS COURTS HAVE FOUND TO CONSTITUTE ESPECIALLY HEINOUS, ESPECIALLY ATROCIOUS, AND MOST IMPORTANTLY -- ESPECIALLY CRUEL.

The postconviction court held that this argument is without merit, as this Court has consistently rejected the argument that serving time on death row is cruel and unusual punishment, regardless of the time served. (PCR. 1820).

While recognizing this Court's jurisprudence in *Gore v. State*, 964 So.2d 1257, 1276 (Fla. 2007), Kaczmar argues that this Court should reconsider its previous position on this issue.

Florida's death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution because the delay of being executed is especially heinous, atrocious, or cruel and runs afoul of the prohibition against cruel and unusual punishment.

XXV. THE POSTCONVICTION COURT ERRED IN FINDING THAT CUMULATIVE ERROR DID NOT DEPRIVE MR. KACZMAR OF A FUNDAMENTALLY FAIR TRIAL.

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

A series of errors may accumulate a very real prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967); *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). These errors prejudiced Kaczmar. This Court is required to analyze the prejudice not only individual, but also cumulatively. *See Parker v. State*, 89 So. 3d 844, 867-8 (Fla. 2011); *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996).

In this case, the postconviction court found that Kaczmar has failed to establish any cumulative effect or resulting dispositive prejudice and, therefore, is not entitled to relief. (PCR. 1824-25). As Kaczmar has argued throughout this brief, those findings as to individual errors are not based upon competent substantial evidence and should be reviewed by this Court.

Trial counsel failed to make proper objections at trial when Detective Sharman vouched for Filancia's credibility, and when Filancia testified that Modlin was innocent and passed a polygraph. Trial counsel failed to bring out Kaczmar's exculpatory statements to explain that he was innocent of the murder, and only took matters

into his own hands in hiring "Carlos" because his attorneys were not doing anything to help him. Counsel failed to impeach or refresh the recollection of Julia Ferrell, who would have corroborated that Kaczmar and another man, i.e., Modlin, were outside arguing. Instead, trial counsel allowed her testimony at trial to stand, leaving jurors with the impression that it was Kaczmar and a woman, i.e., the victim, who were arguing. Trial counsel introduced misleading and harmful evidence by calling Detective Goldner to testify as their only defense witness. Detective Goldner left the jury wondering if the stains that he saw in Kaczmar's truck were, in fact, blood stains because he could not definitively say that they were not.

Trial counsel failed to move to suppress Kaczmar's supposed confession to Filancia, who was working as a state agent, or even attempt to impugn the idea that Kaczmar would trust Filancia enough to confess given the fact that Filancia was incarcerated for obtaining sensitive information on people and then blackmailing them with that information.

Trial counsel failed to utilize challenge DNA and cell phone tower evidence at trial. While trial counsel hired a DNA expert,

counsel failed to utilize that expert to challenge the DNA evidence. Counsel even referred to the DNA as coming from the victim's blood, which is an inaccurate statement. Trial counsel also failed to challenge the chain of custody of the socks from which the DNA was taken. Counsel failed to challenge the accuracy of the cell phone tower evidence, which could have been done by hiring their own expert or even consulting with someone from the phone company.

Additionally, there were a litany of instances involving arguments and instructions made to the jury, which constituted deficient performance and resulted in prejudice to Kaczmar. These included trial counsel's failure to object to the prosecutor's argument regarding Kaczmar's drug use and its relationship to the jury instruction regarding voluntary intoxication; trial counsel's failure to object to the prosecutor's arguments which diminished the burden of proof and reasonable doubt; counsel's failure to request a heat of passion jury instruction; counsel's failure to ensure that the jury was properly instructed at Kaczmar's resentencing; counsel's failure to request a presumption of life jury instruction; counsel's failure to object to the prosecutor's characterization of mitigation as "excuses";

and counsel's failure to object to the trial court telling the jury that their questions to the court during deliberations were "not relevant."

These instances of ineffectiveness by trial counsel, coupled with the *Brady* violation that occurred at trial involving Laura Fraser, as well as the *Giglio*/*Napue* violations involving Filancia's plea deal and sentence, ensured that Kaczmar would be found guilty and sentenced to death.

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

CONCLUSION AND RELIEF SOUGHT

Kaczmar respectfully requests this Honorable Court affirm the postconviction court's grant of penalty phase relief and reverse the postconviction court's denial of his guilt phase claims and remand for a new trial and/or new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service to all counsel of record, on this 19th day of May, 2023.

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CERTIFICATE OF COMPLIANCE

This is to certify that the Initial Brief of Appellant was generated in Bookman Old Style 14-point font and 39,449 words excluding the title page, tables, certificates and signature block, pursuant to Fla. R. App. P. 9.100 and 9.210.

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