Filing # 185826407 E-Filed 11/09/2023 12:01:47 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 CORRECTED CROSS-REPLY BRIEF

Dawn B. Macready
Florida Bar No. 0542611
Elizabeth Spiaggi
Florida Bar No. 1002602
Capital Collateral Regional Counsel - North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Dawn.Macready@ccrc-north.org
Elizabeth.Spiaggi@ccrc-north.org

Counsel for Appellee/Cross-Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF CASES v

PRELIMINARY STATEMENT 1

ARGUMENT IN REPLY..... 3

REPLY TO ISSUE 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 3

REPLY TO ISSUE 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 7

REPLY TO ISSUE 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..... 10

REPLY TO ISSUE V

The postconviction court erred in finding that trial counsel was not ineffective in failing to impeach or refresh the recollection of Julie Ferrell..... 10

REPLY TO ISSUE VI

The postconviction court erred in finding that trial counsel was not ineffective in introducing harmful and misleading testimony through Detective Goldner 13

REPLY TO ISSUE VII

The postconviction court erred in finding that trial counsel was not ineffective in failing to move to suppress Kaczmar's alleged confession 15

REPLY TO ISSUE IX

The postconviction court erred in finding that a *Brady* violation did not occur at Kaczmar's trial concerning Laura Fraser..... 19

REPLY TO ISSUE X

The postconviction court erred in finding that trial counsel was not ineffective in failing to utilize his DNA expert..... 20

REPLY TO ISSUE 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..... 23

REPLY TO ISSUE 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 .. 25

REPLY TO 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 25

REPLY TO ISSUE 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 26

REPLY TO 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 26

REPLY TO ISSUE XIX

The postconviction court erred in finding that trial counsel was not ineffective in failing to request a jury instruction on heat of passion 27

REPLY TO ISSUE 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 28

REPLY TO ISSUE 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" 29

REPLY TO ISSUE XXV

The postconviction court erred in finding that cumulative error did not deprive Kaczmar of a fundamentally fail trial..... 30

CONCLUSION AND RELIEF SOUGHT..... 31

CERTIFICATE OF SERVICE..... 32

CERTIFICATE OF COMPLIANCE 32

TABLE OF CASES

Ault v. State, 213 So. 3d 670 (Fla. 2017)..... 30

Brady v. Maryland, 373 U.S. 83 (1963)..... 19, 20, 25, 30

Bowles v. State, 381 So. 2d 326 (Fla. 5th DCA 1980)..... 3

Burris v. Parke, 95 F. 3d 465 (7th Cir. 1996) 2

Chapman v. California, 386 U.S. 18 (1967) 30

Chavers v. State, 901 So. 2d 409 (Fla. 1st DCA 2005)..... 28

Croft v. State, 291 So. 3d 1285 (Fla. 5th DCA 2020) 28

Febre v. State, 30 So. 2d 367 (1947) 28

Guzman v. State, 868 So. 2d 498 (Fla. 2003) 30

Gallego v. United States, 276 F.2d 914 (9th Cir. 1960)..... 24

Gary v. State, 330 So. 3d 118 (Fla. 2d DCA 2021) 28

Giglio v. United States, 405 U.S. 150 (1972)..... 25, 30

Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)..... 31

Hurst v. State, 202 So. 3d 40 (Fla. 2016) 30

Howard v. Gramley, 225 F. 3d 784 (7th Cir. 2000) 2

Lopez v. State, 307 So. 3d 857 (Fla. 3d DCA 2020) 28

Mapp v. Ohio, 367 U.S. 643 (1961) 24

McGee v. State, 792 So. 2d 624 (Fla. 4th DCA 2001)..... 28

Napue v. Illinois, 360 U.S. 264 (1959) 25, 26

Ponticelli v. State, 941 So. 2d 1073 (Fla. 2006)..... 30

Rivers v. State, 78 So. 343 (Fla. 1918) 28

Sheppard v. State, 338 So. 3d 803 (Fla. 2022) 30

Simpson v. State, 344 So. 3d 1274 (Fla. 2022) 20

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) 30

Strickland v. Washington, 466 U.S. 668 (1984) ..... *passim*

Tumblin v. State, 29 So. 3d 1093 (Fla. 2010)..... 7

United States v. Friedman, 971 F. 3d 700 (7th Cir. 2020)..... 2

United States v. Scheffer, 523 U.S. 303 (1998) 9

Wiggins v. Smith, 539 U.S. 510 (2003) 21

PRELIMINARY STATEMENT

Appellant/Cross-Appellee has filed its answer to Kaczmar's cross-initial brief, and this reply follows.[1] The reply will address only the most salient points argued by the State. Kaczmar relies on his cross-initial brief in reply to any argument or authority argued by Appellant/Cross-Appellee that is not specifically addressed in this reply.

Additionally, Kaczmar declines to respond to the State's voluminous and unnecessary attacks on Kaczmar and his counsel throughout its cross-answer brief. However, Kaczmar will address certain egregious statements made concerning what it perceives as Kaczmar's overall "strategy."

The State takes issue with the quantity of claims that have been raised in Kaczmar's postconviction. For some reason the State believes that this quantity of claims has caused delay, and that the delay somehow inures to Kaczmar's benefit. Nothing could be further

[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; "CIB. __"- Cross-Initial Brief; "CAB. __" - Cross-Answer Brief.

from the truth. For instance, Kaczmar's evidentiary hearing was delayed for several years, but it was the State who was responsible for those delays. (PCR. 2527, 2614, 2629). In fact the delay arguably was to Kaczmar's detriment, as one of his *listed* witnesses, passed away prior to his evidentiary hearing. (PCR. 971).[2]

The State's opinions on delay do not come from any Florida precedent, but rather from a footnote from a 7th Circuit case where the defendant *had a known execution date and was filing a successive habeas motion two weeks before that date. Burris v. Parke*, 95 F. 3d 465, 471 (7th Cir. 1996).[3] Even that court found that their holding was "confined to the very unusual circumstances of this case." When an execution has been set, arguably, delay may be the "name of the game," but this Court's precedent suggests that preservation is generally the "name of the game."

This Court routinely affirms the denial of claims as procedurally barred. A new law or case can quickly render a previously frivolous

---

[2]https://www.jacksonville.com/story/news/crime/2020/09/24/sgt-eric-twisdale-remembered-cops-cop-funeral/3515087001/

[3] Additionally, the *Gramley* and *Friedman* cases (cited by the State in their response) are not death penalty cases, making them irrelevant to a discussion of appellate strategy in capital cases.

claim into a meritorious one. This was illustrated in *Bowles*, where a claim regarding Mr. Bowles' intellectual disability was procedurally barred as it had not been filed earlier. However, based on the bright line cutoff for IQ, Mr. Bowles' claim would have been frivolous had it been raised before the Supreme Court struck down Florida's bright line IQ cutoff for intellectual disability claims. In denying the claim this court stated "Bowles' inaction should not be ignored on the basis of the perceived futility of his claim." *Bowles v. State*, 276 So. 3d 791, 794–95 (Fla. 2019). With such an emphasis on preservation, it would be ineffective for counsel to abandon meritorious claims solely for the sake of efficiency.

ARGUMENT IN REPLY[4]

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.

The State argues that trial counsel was not deficient in this instance and that "[t]he question for this Court is whether any reasonable attorney could have not objected in the circumstances faced by counsel." (CAB. 25). The State further submits that "it is not

[4] The Argument in Reply begins with Issue II, as Issue I encompassed the Answer portion of Appellee/Cross-Appellant's Answer/Cross-Initial Brief.

entirely clear why [] counsel did not object" and that counsel "struggled to explain why years later." (CAB. 24-25). The State then posits three reasons why a reasonable attorney could have hypothetically decided not to object in this instance, yet simultaneously argues that "*post hoc* rationalizations for counsel's actions that are contradicted by the available evidence are improper." (CAB. 25) (internal quotation marks omitted). Yet this is exactly what the State is doing here.

Trial counsel was asked directly about his reasons for failing to object to Detective Sharman blatantly vouching for Filancia, a critical State witness at trial. And trial counsel provided specific reasons for failing to do so. Therefore, any attempt to engage in speculation about what other attorneys might have done is improper since *post hoc* rationalizations are improper, as acknowledged by the State. What the available evidence shows is that when asked, trial counsel initially believed he *had* objected to this improper vouching by Detective Sharman. (CIB. 51-52; PCR. 2688). This admission alone by trial counsel demonstrates that he knew it was an improper statement and that he should have objected. He also directly

admitted that it is improper for one witness to vouch for another witness at trial. (CIB. 52; PCR. 2692).

It was only when trial counsel realized that he had, in fact, *not* objected to this improper vouching by Sharman, that he attempted to justify his deficient performance by claiming that he intentionally did not object because he thought it would "open the door" and incriminate Kaczmar, yet offered no explanation as to exactly how this would legally occur. (CIB. 52; PCR. 2693). This Court should not lend any credibility to this *post hoc* rationalization. First, trial counsel misunderstands the legal concept of "opening the door," as discussed at length in Kaczmar's initial brief. (CIB. 52-58). Second, this Court's jurisprudence regarding the impropriety of one witness vouching for another, particularly when the witness doing the vouching is a law enforcement officer, is clear and longstanding. (CIB. 53-54). A reasonable criminal defense attorney would be familiar with such jurisprudence. It follows that no reasonable attorney would have failed to make such a textbook objection of a detective commenting on the truthfulness of one of the State's key witnesses at trial. It is well-settled that this is improper and prejudicial. (CIB. 53-55). Furthermore, no reasonable attorney would have thought that

making such an objection based on well-settled caselaw from this Court would have opened the door to any further testimony that would have incriminated Kaczmar. It simply would have been sustained by the trial court.

Additionally, the State argues that the jury instructions on assessing witness credibility are a cure for Sharman's vouching of Filancia. (CAB. 26). However, the cited instructions do not say that you should disregard a law enforcement officer's testimony about another witness, and rely instead on the witness's own testimony. (T. 980-81). In fact, the instructions state that "you may rely upon your own conclusions about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness." (T. 982). Based on these instructions, there is nothing improper in jurors taking Sharman's testimony at face value and believing that he has additional knowledge that assures him that Filancia is credible and his story is reliable.

The State contends that there was no prejudice for trial counsel's failure to object to Sharman's improper vouching because Kaczmar's "guilt-phase jury was instructed that 'it's up to you to decide what evidence is reliable' and given several rules for judging a

witness's credibility." (CAB. 26-27). This argument ignores this Court's well-settled jurisprudence that such improper vouching by a police detective of a key witness at trial is, in fact, harmful and can result in error. (CIB. 60-61). If such error could be alleviated by jury instructions, then there would be no need for this Court to find such error harmful, i.e., reversible, on direct appeal.

The State argues that Kaczmar's reliance on *Tumblin v. State*, 29 So. 3d 1093 (Fla. 2010), is misplaced because it was a "direct-appeal, mistrial-granted case." (CAB. 28). This misconstrues Kaczmar's argument. Kaczmar is not attempting to *equate Tumblin* to *Strickland* for prejudice purposes, as the State claims. Kaczmar is merely trying to illustrate the harmful nature of such improper testimony and the weight it should be given when conducting the *Strickland* prejudice prong analysis.

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.

The State argues that trial counsel was not ineffective in his handling of this Modlin innocence/polygraph debacle. First, the State claims that there was no deficient performance because it was

obvious that Modlin was innocent since Kaczmar was trying to frame him for the murder. (CAB. 32). Second, the State argues that eliciting testimony regarding the polygraph test was not deficient performance because the court told jurors not to consider it, and because the he believed the State would have instructed Filancia not to mention it. (CAB. 35-36). This argument completely ignores the fact that this was the same line of questioning that trial counsel conducted during Filancia's deposition, just a week prior, where he was asked the same question and gave the same answer.

The State contends that "[g]iven the pre-trial order, it was objectively reasonable for counsel to believe the State would instruct Filancia not to mention the lie detector test and that Filancia would only give the response that he believed Modlin was innocent because Kaczmar said so." (CAB. 36). This Court should give no credibility to this attempted justification by trial counsel, as it is implausible. The following exchange occurred during Filancia's cross-examination by trial counsel:

> 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). There was no reason for trial counsel to ask Filancia specifically *how* he knew Modlin was innocent. If trial counsel's reasoning was that he thought Filancia would say that Kaczmar told him, this does nothing to further the defense. There is no reasonable attorney who would have asked such a question, especially knowing what Filancia said in a deposition just a week prior to the trial about Modlin passing the polygraph test.

The State again improperly asserts that Kaczmar's reliance on cases that are decided in a posture other than postconviction -- are somehow totally irrelevant to a *Strickland* prejudice analysis. For instance, the United State Supreme Court held that "[b]y 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). The State asserts that "Kaczmar is not on direct appeal dealing with *Florida mistrial law*; he is in postconviction raising an ineffectiveness claim governed by *federal* law that explicitly requires assessing the impact of the error on a jury following its instructions." (CAB. 37). Exactly. And such jurisprudence as cited above and in

Kaczmar's initial brief, decidedly has an impact on the *Strickland* prejudice analysis, and in "assessing the impact of the error."

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.

The State argues that trial counsel was not ineffective for failing to introduce Kaczmar's exculpatory statements into evidence at trial because the jury would have learned that Kaczmar was a convicted felon and because Kaczmar did not want the jury to hear about his prior convictions. (CAB. 40-41). Notably, in support of its contention that Kaczmar did not want jurors to hear about his prior convictions, the State cites to trial counsel's testimony at the evidentiary hearing. (CAB. 41; PCR. 1971). This argument by the State's hinges on the idea that counsel cannot be ineffective if Kaczmar consented to trial counsel's strategy. However, trial counsel emphatically testified during the evidentiary hearing to the contrary: "Ma'am, it was *my decision* not to go there." (CIB. 80; PCR. 2748) (emphasis added).

V. The postconviction court erred in finding that trial counsel was not ineffective in failing to impeach or refresh the recollection of Julie Ferrell.

The State argues that Kaczmar has failed to demonstrate deficient performance as to this claim because he did not call Julie Ferrell as a witness at the evidentiary hearing and "it is impossible to determine whether her trial testimony would have changed if she was shown her pretrial statements."[5] (CAB. 46). However, the *Strickland* analysis involves what trial counsel knew at the time of trial. The crux of Kaczmar's claim is that at the time of trial, counsel had two different statements from Ferrell -- her sworn deposition, which was introduced as evidence at the evidentiary hearing, and her testimony at trial, that is also of record. It is not relevant to the *Strickland* analysis whether Ferrell would have changed her trial testimony if she was shown her pretrial statements, as the State avers. What was important was for trial counsel to bring out the fact that she had made two different statements. The issue is not which statement was true, but the fact that she made two different statements under oath and is therefore, not a credible witness. A reasonable attorney would not have forfeited the chance to bring out this information, and would certainly not have left jurors with her unrefuted trial testimony that

[5] Julie Ferrell was deceased at the time of the evidentiary hearing and could not have been called as a witness.

she heard what sounded like a man and a woman arguing. This testimony supports the State's theory that it was Kaczmar and the victim arguing that night. A reasonable attorney would have brought out the fact that she made two different statements, and then argued to the jury that she was not credible because of that, as opposed to leaving the jury with testimony that she heard a man and woman arguing.

Alternatively, her deposition contained a more defense-favorable description of what she heard -- what sounded like two men arguing. Trial counsel could have argued that the statements contained in her deposition, which was taken closer in time to the crime, are more reliable. This is also something a reasonable attorney would have considered when encountering such a dilemma.

The State asserts that "Kaczmar fundamentally misses the point by focusing on counsel's attempt to get Ferrell's statement about hearing two men in through law enforcement as impeachment." (CAB. 51). But this is precisely the point, which the State seems to fundamentally miss. The fact that trial counsel attempted to ask Ferrell about her statements, but did not question her properly, and then tried to course correct during his questioning

of law enforcement, although ultimately failing at that attempt as well -- establishes that he knew she made two different statements, that her first statement was more favorable to the defense, and that he should have presented that information to the jury. Any reasonable attorney would have known how to question a witness about a prior inconsistent statement, just as any reasonable attorney would have been familiar with the procedure to impeach one witness with another witness.

VI. The postconviction court erred in finding that trial counsel was not ineffective in introducing harmful and misleading testimony through Detective Goldner.

The State argues that trial counsel was not deficient because sowing reasonable doubt by emphasizing a perceived lack of thoroughness in the State's investigation is a reasonable strategy for trial counsel to make. (CAB. 54). While such a strategy may be common among defense attorneys, this is most certainly not what trial counsel in Kaczmar's case did. It is one thing to emphasize a lack of investigation by police, however, it is quite another to highlight additional incriminating evidence against one's own client by pointing out that stains in Kaczmar's truck appeared to be blood.

Presenting such evidence does nothing to further a reasonable doubt defense, and no reasonable counsel would have emphasized evidence, not otherwise brought out by the State, that would further incriminate their own client.

The State also argues that since Kaczmar agreed to calling Detective Goldner as a witness, there can be no deficient conduct. (CAB. 54). The State is referring to questioning by the trial court to Kaczmar about whether he was in agreement with his attorneys' decision to call Goldner as the only defense witness. (R. 850). However, this was prior to Goldner actually testifying. Moreover, a defendant is supposed to be able to rely upon counsel to advise them. Had Kaczmar been advised that his attorney was going to elicit additional evidence of his guilt, it is doubtful that he would have acquiesced to the calling of this witness.

The State argues that Kaczmar suffered no prejudice because the jury would have only considered the lack of evidence and would not have speculated about whether the stains were actually blood. (CAB. 55). Yet, during his closing argument, trial counsel seems to invite jurors to make the assumption that there was indeed blood in

Kaczmar's truck, but it was never tested to confirm that it was actually blood. (T. 945).

> [Goldner] checks the steering wheel, the gearshift, all the doorknobs, the seats. Everything is checked to see if there's any residue blood. Even the pedal was taken off of the gas pedal and so forth to see if there's any type of blood residue anywhere in this vehicle, and, of course, none of that to my knowledge ever was sent over for testing to -- to really make sure that there isn't something else here that we should be looking at.

(T. 945). This argument by trial counsel only served to plant a seed in the minds of jurors that there was evidence found in Kaczmar's vehicle that very well could have been blood, but law enforcement simply failed to test it.

VII. The postconviction court erred in finding that trial counsel was not ineffective in failing to move to suppress Kaczmar's alleged confession.

In order to find that Filancia was a state agent well before he was documented as a confidential informant, the timeline of his interactions with detectives is crucial. The State's timeline omits certain details which tend to show that Filancia was always gathering information on Kaczmar from the very beginning.

The postconviction court denied this claim, incorrectly concluding that Filancia only began working with detectives after

December 8, 2009. However, the record shows that on August 27, 2009, Filancia was already working in conjunction with detectives and actively deceiving Kaczmar by passing communications that Kaczmar intended for Richard Kuritz (Filancia's attorney, who Kaczmar wanted to employ), to Detective Sharman. (PCR. 1456). While Sharman's report entry indicates that they instructed Filancia only to listen, it is too little too late as Filancia had already obtained information from Kaczmar about the murder investigation. Filancia was acting as a state agent, regardless of when Sharman officially authorized it.

At the evidentiary hearing Filancia testified that he only started informing on Kaczmar once Kaczmar started discussing framing Ryan Modlin. However, Sharman's report establishes that Filancia was interested in bringing information about Kaczmar well before any discussion of tampering. The first mention of planting evidence comes on February 16, 2010. (PCR. 1458).

Filancia's involvement with detectives on Kaczmar's case happens before he is documented as a confidential informant. (PCR. 1457). Trial counsel should have filed a suppression motion laying out the timeline of Filancia's documented interactions with

detectives, which pre-dated the scheme for tampering. The interactions themselves are informative. Prior to setting up Kaczmar, Filancia had already done the same thing with another individual in the jail, Darrell Thornton, who shared the cell with Filancia and Kaczmar. (PCR. 1232-36, 1218). As he did with Kaczmar, Filancia arranged for Thornton to be recorded while discussing illegal acts during visitation at the jail. (PCR. 1232-36). The idea of wire-tapping the visitation phones came directly from Filancia and Kuritz. (PCR. 1232). The discussion between Filancia and Sharman illustrates how Filancia is the one spearheading the undercover investigations. (PCR. 1232-36)

A motion to suppress regarding this issue likely would have been granted as the trial court had been very skeptical about whether the evidence about tampering was admissible.

The State gives too much credit to trial counsel in attempting to imbue a strategy where there was none. (CAB. 63). Trial counsel seemed completely unaware that Filancia was ever classified as a state agent. (PCR. 2681). Trial counsel also seemingly did not realize why it would be relevant that Filancia had a pre-existing relationship with detectives in the case. (PCR. 2680).

The postconviction court failed to address whether trial counsel was ineffective in failing to argue entrapment to explain Kaczmar's actions in attempting to have someone plant evidence. (PCR. 1791). The court found that an instruction on entrapment would not have been appropriate since the entrapment argument related to tampering and not to arson or murder. (PCR. 1791). Counsel should have argued the issue nonetheless, in order to combat the State's theory that the tampering was evidence of consciousness of guilt.

Trial counsel testified that it was Filancia's idea to have "Carlos" plant evidence on Ryan Modlin. (PCR. 2685). While, Sharman's report indicates that Kaczmar and Filancia had been discussing the topic of planting evidence for some time, there is nothing that indicates that those ideas originated from Kaczmar. What seems clear is that Filancia and Kaczmar had many discussions about Kaczmar's legal representation and what work was being done on his case. (PCR. 1456). Filancia told detectives that he and another individual, Mr. Healey, were discussing having someone tamper with Mr. Healey's jury. (PCR. 1260). He explained that it was after overhearing this conversation that Kaczmar and Filancia began discussing the idea of having someone on the outside do some work

on Kaczmar's case. (PCR. 1260). The idea came from Filancia. Trial counsel understood that it was Filancia who had convinced Kaczmar to utilize "Carlos" to plant evidence and it was deficient performance not to argue this to the jury.

The State argues that even though trial counsel was ineffective in not suppressing the statements made to "Carlos" in the pursuit of tampering, there is no prejudice because the jury would have still found Kaczmar guilty, even without this evidence. However, in support of this argument, the State points almost entirely to evidence that is indicative of the arson, or evidence that has been disputed in postconviction. (CAB. 69-70).

IX. The postconviction court erred in finding that a *Brady* violation did not occur at Kaczmar's trial concerning Laura Fraser.

Filancia had a connection to the victim in this case. His ex-girlfriend was the foster mother for the victim's daughter. Regardless of when that relationship occurred, it still makes the victim not just an anonymous person to him. Had this fact been disclosed it could have been utilized as impeachment as it indicates a bias and this is something the jury is instructed to consider. Even if it is attenuated it is still favorable evidence as it provided yet another reason to

discredit Filancia's testimony. It is important to note that all of the State's caselaw on this issue pre-dates *Simpson*, where this Court held that distinct avenues of impeachment are not cumulative, and therefore are material for the purposes of *Brady*. *Simpson v. State*, 344 So. 3d 1274, 1283-84 (Fla. 2022). It was distinct impeachment material and it should have been disclosed by the State.

X. The postconviction court erred in finding that trial counsel was not ineffective in failing to utilize his DNA expert.

The State argues that it was reasonable for trial counsel to not object to the State's opening, wherein the State asserted that the victim's blood was on Kaczmar's socks. The State's expert witness at trial pointedly, did not say that the substance on the socks was the victim's blood. Without testimony from the expert that the socks contained the victim's blood, it is difficult to see how the State anticipated that evidence being presented.

In its answer brief, the State confuses the importance of the testimony from the statistical expert Dr. McElfresh, who testified that "The only reasonable scientific explanation is that that was Maria Ruiz' blood on those socks." (CAB. 89; T. 705). McElfresh was responding to the State's question, where the State, and not an

expert, identified the item as blood: "Do you have an opinion as to *whose* blood was on those socks?" (T. 705) (emphasis added). Dr. McElfresh is not a DNA expert, he was called to testify as to the *strength* of the match, the statistical likelihood of the DNA coming from the victim. He is not intentionally rendering an opinion as to whether her DNA comes from blood or another DNA source, nor is he qualified to do so.

The State also argues that their expert at the evidentiary hearing, Marci Scott, believed it could be inferred that it is the victim's blood. However, she was not the expert who testified at trial. And *Strickland* looks at counsel's actions at the time of trial. At trial, there was no testimony that the DNA mixture contained the victim's blood, so the newfound conclusions are "*post hoc* rationalizations" and cannot support a strategic decision on the part of trial counsel. *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003). The *Strickland* standard (unlike the standard for newly discovered evidence) looks backward at what happened and whether it was reasonable at that time. It does not contemplate what could be presented at a new trial. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct

on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). In deposition Ms. Lam, the State's expert at trial, corrected trial counsel when he referred to the stain as the victim's blood. (PCR. 1174). This should've alerted trial counsel that he needed to better understand what a DNA mixture was. Had he conferred further with Zueleger, his expert, and asked her to sit in on the trial, she would have alerted him to the many misstatements and misrepresentations made by the State in their presentation.

Trial counsel should have cross-examined the State's expert about how six out of ten of the samples had Kaczmar as the major donor. A reasonable inference from this is that it was his blood on the socks. While the State points out that Kaczmar himself placed blood on the socks, Sharman noted that Kaczmar only tampered with one sock. (PCR. 1442). There were five samples taken from each sock. (PCR. 2903). If he is the major donor is six samples, some of those are samples from the sock he did not tamper with. If trial counsel had concerns about testimony relating to the tampering with the socks, he could have addressed those pre-trial. The DNA was a crucial piece of evidence and it was ineffective to allow the state to

reference the victim's blood and to do so himself, when there was no evidence presented at trial that victim's DNA came from her blood and not sweat or another substance.

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.

Kaczmar's case provides a textbook example of evidence being tampered with prior to it being secured. A motion to suppress would have been successful as there is video evidence of Kaczmar tampering with the sock. The evidence of tampering would not have been introduced in front of the jury, instead a motion to suppress socks based on chain of custody would have been filed: pointing out that the officer let them be tampered with, and that both Detective Sharman and Detective Matos each filled out conflicting processing forms, both asserting they were the one who secured the socks, further casting doubts on to who retained the socks and whether their integrity was further compromised. (PCR. 2856).[6] Similar to the exclusionary rule for violations of the Fourth Amendment,

[6] Trial counsel could potentially ask the jury to question the integrity of the socks due to sloppy police work, evidenced by the fact that both Matos and Sharman filled out processing forms for the socks, when only one of them actually had custody of the socks.

suppression of evidence that has not been properly maintained by law enforcement has a prophylactic intent *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). This is meant to encourage officers to be extra careful in the way that evidence is processed and maintained. *Id*. To this end, it is immaterial who is tampering with the evidence. One of the most frequently cited chain of custody cases states the following: "Before a physical object connected with the commission of a crime may properly be admitted in evidence there must be a showing that such object is in substantially the same condition as when the crime was committed. This determination is to be made by the trial judge." *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960). Again, the emphasis is on maintaining the integrity of the evidence so that its relevant link to the crime remains unaltered. Because of the tampering with the socks, their evidentiary value has been compromised. While Kaczmar was the one who tampered with the socks, it was a direct result of Sharman's negligence in failing to secure them, and suppression is appropriate in order to impress upon law enforcement the importance of following their own rules relating to chain of custody. It was ineffective of trial counsel not to raise this issue.

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 wholly misconstrues this claim by asserting that it is really "a *Brady* claim disguised as a *Giglio* claim and a *Giglio* claim." (CAB. 129). This is not a *Brady* claim. Kaczmar argues that the State violated *Giglio/Napue* by failing to correct testimony regarding Filancia's possible sentence, there is no assertion that any evidence was concealed from Kaczmar. The "non-disclosure of Filancia's lowest possible sentence" refers to the State failing to correct this testimony and disclose this information to the *jury*.

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.

In reference to the prejudice prong of the *Strickland* analysis in this claim, the State argues that trial counsel was not ineffective because "had counsel tried to over-complicate the guilt-phase with a guideline calculation mini-trial over Filancia's minimum sentence, the State would have certainly pointed out that Filancia was facing indefinite civil confinement even after his deal." (CAB. 143). Such a tactic is unlikely to be carried out by the State. It is unreasonable to

think that a prosecutor would alert the jurors to the fact that Filancia was a sex offender and facing indefinite civil confinement under the Jimmy Ryce Act. This improbable argument should not be given any weight by this Court.

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.

The State argues that trial counsel was not ineffective in failing to put evidence of Filancia's bias in front of the jury because trial counsel did not believe that Filancia's sentence was relevant to Kaczmar's penalty phase, and believed that that any HAC evidence given by Filancia was inconsequential. (CAB. 144; 146). During Kaczmar's second penalty phase, the State again presented Filancia's testimony. Despite the fact that he was primarily a guilt-phase witness, his testimony supported and gave context to HAC testimony presented by the medical examiner. In that regard, trial counsel had a duty to present evidence of Filancia's bias to the jury.

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 argues that what matters most is Filancia's possible sentence when he testified at the first trial, and that the sentence he actually received, *after testifying against Kaczmar*, is irrelevant. (CAB. 150). Indeed the significant departure from the sentencing guidelines in Filancia's case, a 45-65 year departure, was a direct result of his deal to testify against Kaczmar. Rather than hearing that Filancia faced the *possibility* of a life sentence, the jury should have been told that in actuality, spending the rest of his life in prison was the *mandatory* sentence he was facing. This distinction is critical to assessing Filancia's credibility, as his deal with the State significantly decreased his time in prison.

XIX. The postconviction court erred in finding that trial counsel was not ineffective in failing to request a jury instruction on heat of passion.

Kaczmar was entitled to a "heat of passion" instruction. This was not a marital squabble like the cases cited by the State. The State presented evidence that the victim brandished a knife and that Kaczmar had injuries to his hand. (T. 788-90, T. 374; T. 551).[7] Florida

[7] While, the heat of passion theory is not a good defense for Kaczmar, who maintains his innocence, it was the defense argued by defense counsel, which makes trial counsel ineffective not to insist on a proper instruction on the issue.

law is clear that a defendant is entitled to a jury instruction on the law pertaining to their theory of defense if there is *any* evidence that supports the theory. *McGee v. State*, 792 So. 2d 624, 626 (Fla. 4th DCA 2001); *Gary v. State*, 330 So. 3d 118, 120 (Fla. 2d DCA 2021); *Chavers v. State,* 901 So. 2d 409, 410–11 (Fla. 1st DCA 2005); *Lopez v. State*, 307 So. 3d 857, 859 (Fla. 3d DCA. 2020);*Croft v. State*, 291 So. 3d 1285, 1287-88 (Fla. 5th DCA 2020). Being threatened and injured with a knife provides "adequate provocation" for "sudden resentment" or "rage" contemplated by the heat of passion instructions. *Rivers v. State*, 78 So. 343, 345 (Fla. 1918) (heat of passion was rejected, and one of the considerations was whether the victim had a weapon); *Febre v. State*, 30 So. 2d 367, 369 (1947).

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.

The word excuse is inherently problematic and denigrating, not because of its dictionary definition, but because of its common usage. The dictionary definition for excuse and mitigation are quite similar. What is more instructive is to look at the synonyms for excuse: trick, rationalization, pretext, white wash, story, subterfuge,

cop-out, coverup, cover story.[8] Synonyms for mitigation include: cure, extenuation, moderation, reduction, relief, and remission.[9] Everyone has some knowledge of what excuses are and how they work; the word itself has a negative connotation. Where a jury is unfamiliar with the word mitigation, they are going to be especially receptive to a familiar word like "excuse," and allowing the prosecutor to use that word was ineffective and prejudiced Kaczmar.

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."

The State argues that there is no deficient performance by trial counsel, as the questions were, in fact, irrelevant. These questions all suggest that the jury had some doubts about the narrative presented to them by the State. No doubt, they wanted answers from the evidence. A reasonable trial attorney certainly would have requested a different response from the court, given the nature of the

---

[8] *Thesaurus.com*, https://www.thesaurus.com/browse/excuse, October 18, 2023.

[9] *Thesaurus.com*, https://www.thesaurus.com/browse/mitigation, October 18, 2023.

questions. It was deficient performance for trial counsel not to have done so.

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

In addressing the burden of proof for cumulative error, the State takes issue with Mr. Kaczmar's citing to "inapplicable direct-appeal cases," namely *Chapman v. California*, 386 U.S. 18 (1967) and *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). While, *DiGuilio* does articulate the harmless error standard, commonly used on direct appeal, this Court has applied it to claims in postconviction. *See Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006) (finding that it was the State's burden to prove that a *Brady* violation was harmless beyond a reasonable doubt); *Ault v. State*, 213 So. 3d 670, 679 (Fla. 2017) (finding a sentencing error under *Hurst* is subject to a harmless error analysis); *Ponticelli v. State*, 941 So. 2d 1073, 1088 (Fla. 2006) (explaining that it is the state's burden under *Giglio* to prove that a violation was harmless beyond a reasonable doubt); *Sheppard v. State*, 338 So. 3d 803, 827 (Fla. 2022) (reiterating that it is the state's burden under *Giglio* to prove that a violation was harmless beyond a reasonable doubt).

As noted in *Harvey v. Dugger*, the way the cumulative effect of multiple IAC claims is assessed is distinct from a prejudice assessment under *Strickland*. *Harvey v. Dugger*, 656 So. 2d 1253, 1257 (Fla. 1995). It follows then that a harmless error test is appropriate for the aggregate prejudice of various types of claims that have disparate prejudice analyses.

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,

/s/ Dawn B. Macready
Dawn B. Macready
Chief Assistant CCRC-North
Florida Bar No. 0542611
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Dawn.Macready@ccrc-north.org

Elizabeth Spiaggi
Assistant CCRC-North
Florida Bar No. 1002602
Elizabeth.Spiaggi@ccrc-north.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Corrected Cross-Reply Brief has been furnished via electronic service to all counsel of record, on this 9th day of November, 2023.

/s/ Dawn B. Macready
Dawn B. Macready
Chief Assistant CCRC-North
Florida Bar No. 0542611
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Dawn.Macready@ccrc-north.org

Elizabeth Spiaggi
Assistant CCRC-North
Florida Bar No. 1002602
Elizabeth.Spiaggi@ccrc-north.org

Counsel for
Appellee/Cross-Appellant

CERTIFICATE OF COMPLIANCE

This is to certify that this Corrected Cross-Reply Brief was generated in Bookman Old Style 14-point font and not more than 10,000 words or 35 pages excluding the title page, tables, certificates and signature block, pursuant to Fla. R. App. P. 9.100 and 9.210.

/s/ Dawn B. Macready
Dawn B. Macready