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CAPITAL CASE NO. SC22-1671

In the

Florida Supreme Court

STATE OF FLORIDA,

APPELLANT/ CROSS-APPELLEE,

v.

LEO LOUIS KACZMAR, III,

APPELLEE/ CROSS-APPELLANT.

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

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

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INTRODUCTION

Kaczmar's answer/cross-initial brief raises 24 *numbered*, and about 39 *actual*, issues. It also answers the State's single appellate issue. While the State responds to all issues raised by Kaczmar, a word must first be said about indiscriminately raising numerous issues, most of which are frivolous. Delay caused by wasting scarce judicial resources on numerous, and often ill-briefed, issues is the *only* reason to raise numerous issues in an appellate postconviction appeal because it is (for any other purpose) altogether "bad appellate advocacy." *See Howard v. Gramley*, 225 F.3d 784, 791 (7th Cir. 2000); *see also United States v. Friedman*, 971 F.3d 700, 710 (7th Cir. 2020); *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 359 (7th Cir. 1987) (Posner, J., concurring). It is much more difficult to find the kernel of a meritorious claim when it is hidden under a mountain of chaff. *Kneale v. Kneale*, 67 So. 2d 233, 234 (Fla. 1953).

Briefs like Kaczmar's should therefore be discouraged in the strongest possible terms. Unfortunately, that is unlikely to deter the capital defense bar because delay "is the name of the game in death penalty cases." *Burris v. Parke*, 95 F.3d 465, 471 n.1 (7th Cir. 1996) (Manion, J., concurring). Raising numerous issues creates delay.

RECORD CITATIONS

The record below will be cited as "PCR" and then the page number: "(PCR:1.)" The record on appeal from Kaczmar's resentencing (SC13-2247) will be cited as "RS" and then the page number: "(RS:1.)" The direct-appeal record (SC10-2269) will be cited as DA, volume number, and page number: "(DA1:1.)"

ARGUMENT SUMMARY

Issue 1: Reply Argument

This Court should reverse the postconviction court's grant of a new penalty phase because Kaczmar was not prejudiced under the analytical framework governing ineffective assistance of counsel (IAC) claims.

Issue 2: IAC-Failure-to-Object-to-Vouching Claim

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his claim that counsel ineffectively failed to object to Detective Sharman's five words of vouching for Filancia.

Issue 3: IAC-Failure-to-Object-to-Filancia's-Comment-Modlin-Was-Innocent and IAC-Eliciting-Lie-Detector-Testimony-from-Filancia Claims.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his dual claims that counsel ineffectively: (1) failed to object to Filancia's comment that Modlin was innocent; and (2) elicited Filancia's testimony that Modlin passed a lie detector test.

Issue 4: IAC-Failure-to-Introduce-Kaczmar's-Self-Serving-Hearsay-at-Trial Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his claim that counsel ineffectively failed to introduce Kaczmar's self-serving hearsay statements under the rule of completeness.

Issue 5: IAC-Failure-to-Refresh/Impeach-Julia-Ferrell's-Recollection Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his dual claims that counsel ineffectively: (1) failed to refresh Juila Ferrell's recollection about hearing two men outside Kaczmar's house on the night of the murder; and (2) failed to impeach Ferrell's trial testimony expressing a lack of certainty on whether it was two men with her pretrial statements.

Additionally, Kaczmar failed to call Ferrell below and thereby waived both claims.

Issue 6: IAC-Calling-Detective-Goldner Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his claim that counsel ineffectively called Detective Goldner to demonstrate there were *untested* stains that looked like blood in Kaczmar's vehicle.

Issue 7: IAC-Failure-to-Suppress-Kaczmar's-Statements Claim.

Kaczmar raises three distinctly separate ineffectiveness claims on this issue: (1) IAC failure to suppress his statements to Filancia; (2) IAC failure to suppress his statements made to undercover Detective Humphrey; and (3) failure to argue his statements to Humphrey resulted from entrapment.

On the first sub-issue, Kaczmar has failed to demonstrate deficient performance or prejudice.

On the second, this Court should assume deficient performance and hold Kaczmar was not prejudiced. Given that assumption, there is no need to discuss Kaczmar's frivolous and fanciful entrapment theory.

Issue 8: Summary Denial of IAC-Failure-to-Impeach-Filancia-on-the-liklihood-of-his-relationship-with-Kaczmar Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his claim that counsel ineffectively failed to introduce evidence about the facts underlying Filancia's charges.

Issue 9: Laura Fraser *Brady* Violation

Kaczmar has failed to demonstrate either the favorable-evidence or materiality prongs of his *Brady* claim that the State suppressed evidence Filancia dated the victim's daughter's foster mother at some unspecified point in the past.

Issue 10: IAC-Failure-to-Utilize-DNA-Expert Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his four claims that counsel ineffectively: (1) failed to object to the State's opening argument that the victim's blood was on Kaczmar's socks; (2) failed to cross the State's expert on whether the DNA profile could have come from sweat/other bodily fluids; (3) failed to point out Kaczmar was the major donor on some sock areas; (4) failed to object to the State's

closing argument about the donor areas. Additionally, Kaczmar's fourth claim is unpreserved.

Issue 11: IAC-Failure-to-Challenge-the-Chain-of-Custody-of-Kaczmar's-Socks Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his dual claims that counsel ineffectively failed to either: (1) suppress Kaczmar's victim-DNA-stained socks or (2) argue chain of custody to the jury.

Issue 12: IAC-Failure-to-Challenge-Detective-Matos-Cell-Tower-Evidence Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his dual claims that counsel ineffectively failed to challenge cell-tower evidence "consistent with" Kaczmar being at home from 10:53p.m.-1:41a.m. on the night of the murder.

Issue 13: Summary Denial of IAC-Failure-to-Object-to-State's-Drug-Use-Closing-Argument Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his claim that counsel ineffectively failed to object to the State's closing argument. Additionally, he failed

to rebut the lower court's reasoning, which is an independent basis for affirmance.

Issue 14: Summary Denial of IAC-Failure-to-Object-to-Four-State-Closing-Arguments Claim.

Kaczmar has failed to demonstrate any of his four IAC failure-to-object claims in this issue meet either *Strickland*'s performance or prejudice prong. This Court should also affirm because these issues are poorly briefed to the point of waiver.

Issue 15: *Giglio*-Failure-to-Introduce-Guilt-Phase-Evidence-of-Filancia's-Lowest-Possible-Sentence Claim.

Kaczmar has failed to demonstrate the State violated *Giglio* at his 2010 trial by either: (1) failing to disclose Filancia's lowest possible guideline sentence; or (2) failing to correct Filancia's lawyer's testimony. The first *Giglio* claim is also ill-briefed to the point of waiver and seeks the benefit of a not-retroactive new rule of constitutional law.

Issue 16: IAC-Failure-to-Investigate-Filancia-and-His-Plea-Deal-Guilt-Phase-Evidence Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his IAC claim that counsel failed to investigate and introduce evidence of Filancia's lowest possible guideline sentence in Kaczmar's 2010 guilt phase.

Issue 17: IAC-Failure-to-put-Filancia's-Bias-Before-the-Penalty-Phase-Jury Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his IAC claim that counsel failed to introduce evidence of Filancia's lowest possible guideline sentence in Kaczmar's 2013 penalty phase.

Issue 18: *Giglio*-Failure-to-Introduce-Evidence-of-Filancia's-Lowest-Possible-Sentence Claim.

Kaczmar has failed to demonstrate the State violated *Giglio* at his 2013 resentencing by either: (1) failing to correct Filancia's true testimony that he was facing a maximum possible life sentence; or (2) failing to correct Filancia's lawyer's testimony.

Issue 19: IAC-Failure-to-Request-Heat-of-Passion-Instruction Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his IAC claim that counsel ineffectively failed to request a heat-of-passion instruction.

Issue 20: IAC-Failure-to-Object-to-State-Referring-to-Mitigation-as-Excuses-in-Closing-Argument Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his IAC claim that counsel ineffectively failed to object to the State's closing argument referring to mitigation as excuses. Additionally, this Court should recede from its prior caselaw holding the mere word "excuses" is improper. Mitigation is an attempt to lessen the blame attached to a murder in an effort to persuade the factfinder to impose life rather than death, which is exactly what an excuse is.

Issue 21: IAC-Failure-to-Object-to-Judge-Telling-the-Penalty-Phase-Jury-Its-Questions-Were-Not-Relevant Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his IAC claim that counsel ineffectively failed to object to the resentencing judge telling the resentencing jurors that their four questions were not relevant.

Issue 22: IAC-Failure-to-Request-Various-Jury-Instructions Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his IAC claim that counsel ineffectively failed to request several random jury instructions at his 2013 penalty phase, including ones on the use of cell phones, notetaking, and how the penalty phase would be conducted. Additionally, Kaczmar abandoned this issue because he did not ask counsel about it at the evidentiary hearing below.

Issue 23: IAC-Failure-to-Request-Presumption-of-Life-Instruction Claim.

Kaczmar has failed to demonstrate either the deficient performance or prejudice prong of his IAC claim that counsel ineffectively failed to request a presumption of life instruction at his 2013 penalty phase.

Issue 24: Summary Denial of Capital-Punishment-Violates-the-Eighth-Amendment Claim.

This Court should affirm. Kaczmar has failed to provide anything other than conclusory argument in support of this repeatedly buried issue.

Issue 25: Cumulative Error.

Kaczmar has failed to meet *his* burden to show cumulative error.

STANDARDS OF REVIEW

This Court reviews *Strickland*,[1] *Brady*,[2] *Giglio*,[3] and cumulative error claims under the same mixed standard: (1) giving deference to factual findings supported by sufficient evidence; and (2) reviewing the legal conclusions de novo. *Sheppard v. State*, 338 So. 3d 803, 827 (Fla. 2022); *State v. Mullens*, 352 So. 3d 1229, 1238 (Fla. 2022); *Geralds v. State*, 111 So. 3d 778, 787 (Fla. 2010). Additionally, this Court reviews the facts underlying all these issues in the light most favorable to the prevailing party, which is the State for all issues except the issue raised in its Initial Brief. *See Steinhorst v. State*, 695 So. 2d 1245, 1248 (Fla. 1997). This Court reviews the constitutionality of Florida's death-penalty system de novo. *Cf. Statler v. State*, 349 So. 3d 873, 878 (Fla. 2022).

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

[3] *Giglio v. United States*, 405 U.S. 150 (1972).

ARGUMENT

Kaczmar's first issue on appeal is his Answer to the State's Initial Brief. To avoid confusion, the State will respond in kind as "Issue 1" below. In his cross-appeal, Kaczmar ostensibly raises nineteen IAC-related issues, one *Brady* issue, two *Giglio* issues, one issue arguing the death penalty violates the Eighth Amendment, and one cumulative error issue for a grand total of 24 numbered cross-appeal issues. But when Kaczmar's issues are separated for analytical clarity, he is actually raising about 39 issues. Many of those issues are hidden, poorly briefed, or outright frivolous.

The State will do its best to sift the wheat from the chaff for this Court. But there is a lot of chaff. *See Jones v. Barnes*, 463 U.S. 745, 751-54 (1983) ("A brief that raises every colorable issue runs the risk of burying good arguments" in "a verbal mound made up of strong and weak contentions"); *Kneale v. Kneale*, 67 So. 2d 233, 234 (Fla. 1953) ("The litigant's right may be so embedded or hidden in the chaff that no amount of argument or reading may reveal it to the Court."); *Yanes v. State*, 418 So. 2d 1247, 1249 (Fla. 4th DCA 1982) (noting "appellate overkills are counter-productive").

Death by 100 stabs worked for Kaczmar once. But death by 100 cuts is not a valid postconviction appellate strategy. In the end, although not all of Kaczmar's issues are chaff, none of them are meritorious. This Court should entirely affirm the postconviction court's denial of Kaczmar's postconviction claims while reversing its grant of a third penalty phase.

1. Reply Argument Supporting Reversal of The Postconviction Court's Prejudice Determination Based on the Resentencing Judge's Pre-Jury-Selection Comment that Kaczmar Was Previously sentenced "to life -- to death."

This Court should reverse the postconviction court's grant of a third penalty phase based on the resentencing judge's pre-jury-selection comment that Kaczmar was previously sentenced "to life -- to death." Kaczmar's arguments provide no reason for this Court to ignore *Strickland*'s prejudice-prong analytical framework.

This Court has recognized, even on direct appeal, that in "a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law." *Lowe v. State*, 259 So. 3d 23, 52 (Fla. 2018) (quoting *Hurst v. State*, 202 So.3d 40, 63 (Fla. 2016). The United States Supreme Court recently reaffirmed the direct-appeal presumption that jurors follow the law and recognized that to "disregard or to make unnecessary exceptions to" that presumption "would make inroads into the entire complex code of criminal evidentiary law, and would threaten other large areas of trial jurisprudence." *Samia v. United States*, No. 22-196, 2023 WL 4139001, at *6-7 (U.S. June 23, 2023).

But Kaczmar is not on direct appeal. He is in postconviction challenging the "presumption of finality and legality" that has attached to his "conviction and sentence." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). The critical difference between direct appeal and postconviction justify the imposition of *more* onerous standards on a defendant, not less. *Id.* at 634-38. *See also Sanders v. State*, 946 So. 2d 953, 957 (Fla. 2006).

"An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, thus undermining the finality of jury verdicts. *For this reason, the rules governing ineffective-assistance claims must be applied with scrupulous care.*" *Weaver v. Massachusetts*, 582 U.S. 286, 303, 305 (2017) (holding the existence of unpreserved structural error on appeal does not equate to automatic prejudice in postconviction) (cleaned up; emphasis added).

The Supreme Court has unambiguously held that a court analyzing *Strickland*'s prejudice prong must assess the impact of counsel's deficiencies on an objectively reasonable decisionmaker "acting according to law" rather than speculating about the impact of counsel's errors on a particular jury or judge. *Strickland*, 466 U.S. at

694. That rule, too, must be applied with "scrupulous care." Not ignored in a manner that produces an ad hoc, impossible to reliably apply, analytical framework. *See Collier v. Turpin*, 177 F.3d 1184, 1203 (11th Cir. 1999) (reversing a no-prejudice holding based on the righteous anger of the actual jury in a widely-known-officer-murder case because "such considerations run afoul of *Strickland*").

Kaczmar urges this Court to ignore *Strickland*'s command about how to conduct the prejudice-prong analysis for two reasons: (1) the resentencing court's "to life -- to death" statement violated *Hitchcock v. State*, 673 So. 2d 859, 863 (Fla. 1996); and (2) the "to life -- to death" statement was fundamental error and so aggravation/mitigation therefore do not matter to the prejudice inquiry. Neither reason prevails over *Strickland*'s mandate.[4]

[4] Kaczmar's Answer also makes oblique references to the failure to give other instructions on notetaking, general rules, etc., and relies on a dissenting opinion from former Justice Pariente in Kaczmar's resentencing direct appeal. It is unclear how the failure to give these additional instructions have anything to do with the State's issue—considering the jury was given the most important instruction (that its recommendation must be based solely on the penalty-phase evidence). Kaczmar does not deign to explain further. And a *dissenting* opinion that did not discuss *Strickland*'s prejudice prong in any meaningful detail is not relevant to this appeal.

First, *Hitchcock* is irrelevant. *Hitchcock* was a direct-appeal case where this Court elected to issue an "unnecessary" advisory opinion to govern the new penalty phase it had already decided was required. *Hitchcock*, 673 So. 2d at 863. As part of that "unnecessary" opinion, this Court disapproved of trial courts telling juries that the defendant was previously sentenced to death. *Id.* This Court noted that telling the jury a prior "*jury* recommended death *and reemphasizing* that *fact*...*could* have the effect of preconditioning the present jury to a death recommendation" and adopted a standard instruction to "avoid this *potential* problem on remand." *Id.* (Emphases added.)

Hitchcock was not a case about ineffectiveness. It therefore has nothing to do with the correct application of *Strickland*'s prejudice-prong analysis. The only *Strickland* area where *Hitchcock* is arguably relevant is the deficient performance prong, which the State *did not challenge*. (See I.B. at 27 n.10.)

Hitchcock was also not a case reversing for fundamental error because a jury was told (once before jury selection) the defendant was previously sentenced to death. And this Court's longstanding precedent is that the jury's awareness of a prior death sentence is not fundamental error and can be harmless. The State affirmatively

cited this precedent in its Brief. (See I.B. at 36-39 & n.15.) Kaczmar ignores it.

Second, Kaczmar's assertion that this error is fundamental and therefore this Court cannot look at aggravation and mitigation runs aground on twin rocks. Initially, it is dashed by this Court's unambiguous precedent that a jury's awareness of a prior death sentence is not fundamental error and can in fact be harmless. (See I.B. at 36-39 & n.15.)

But Kaczmar's argument also fails because a fundamental error in a capital case "is one that is so significant that the sentence of death could *not have been obtained without the assistance of the alleged error*." *E.g., Wells v. State*, No. SC2021-1001, 2023 WL 2920535, at *7 (Fla. Apr. 13, 2023) (cleaned up; emphasis added). A proper fundamental-error inquiry requires looking at everything below to determine whether the State *could* have received the same

death recommendation/sentence absent the error.[5] *See Allen v. State*, 322 So. 3d 589, 600 (Fla. 2021) (holding guilt-phase instructional errors about the penalty phase were not fundamental "in light of the correct penalty-phase jury instructions and accurate descriptions of the jury's role in sentencing that otherwise permeated" the trial, because the State could have obtained the same jury recommendation without the instructional errors).

Kaczmar fails any rational fundamental error analysis. The error he complains about took place before the jury was even selected

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[5] When this Court departs from that premise, the mere existence of what this Court deems fundamental error is not necessarily prejudicial under *Strickland*'s governing analysis. *Compare State v. Montgomery*, 39 So. 3d 252, 259 (Fla. 2010) (holding an erroneous instruction on a lesser included offense was fundamental error because of the jury-pardon doctrine), *with Sanders v. State*, 946 So. 2d 953, 957-60 (Fla. 2006) (a defendant cannot establish prejudice from the failure to instruct on lesser-included offenses when the jury convicted of the greater offense). But since this Court later receded from *Montgomery*, that case does not currently form an exception to the rule that fundamental error requires looking broadly at the evidence below to determine whether the State would have obtained its death recommendation/sentence without the error. *See Knight v. State*, 286 So. 3d 147, 151 (Fla. 2019). Other cases from this Court, like *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991), for instance, have refused to find fundamental error even when the jury was not instructed on an element of the offense required to convict the defendant. It is unclear why Kaczmar thinks all "jury instruction errors are considered fundamental error by this Court" as he cites no case with that holding.

and never repeated, he presented essentially no mitigation because he wanted a death sentence, the jury was correctly instructed about its role at every other point, and the State provided qualitatively overwhelming evidence that death was the appropriate sentence. It is beyond reasonable dispute the State could still have obtained its death recommendation/sentence without the judge's pre-jury-selection "to life -- to death" comment.

More to the point, there is certainly not a just-under-51% chance that an objectively reasonable jury's recommendation would have changed in the absence of the judge's pre-jury-selection comment, particularly given the presumption the jury followed the court's instructions. *See Harrington v. Richter*, 562 U.S. 86, 112 (2011) (explaining the difference between *Strickland*'s prejudice standard and a more-probable-than-not-standard is "slight"); *Strickland*, 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.").

This Court should apply *Strickland*'s prejudice prong with "scrupulous care" as the Supreme Court has commanded. It should

hold Kaczmar was not prejudiced by the judge's pre-jury-selection comment that Kaczmar was previously sentenced to death due to the presumption the jury followed the resentencing court's final, and actual, instructions about how to arrive at its death recommendation. Those instructions precluded the jury from utilizing anything other than the penalty-phase evidence and final instructions, neither of which mentioned Kaczmar's prior death sentence.

The State rests on its initial brief for the rest of its arguments and requests this Court reverse the postconviction court's grant of a new penalty phase.

2. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO OBJECT TO DETECTIVE SHARMAN VOUCHING FOR FILANCIA DURING THE 2010 GUILT-PHASE.

Relevant Facts

Filancia was Kaczmar's cellmate who testified Kaczmar made the following incriminating statements: (1) a detailed description of how he murdered the victim and attempted to cover it up; (2) a statement (after an argument with his wife) that he should have "done to" his wife "what he did to Ms. Ruiz"; and (3) a statement that the victim's murder was different than the murder of a child because the victim "had a chance to get away." (DA16:787-800.)

During trial, counsel Shea elicited testimony that Filancia provided Detective Sharman with information on where to find evidence, but no evidence was in fact found. (DA16:734-35.)

On redirect, Sharman then explained that (a year after the murder) Filancia provided information about a knife hidden "somewhere behind the Kaczmar property" buried under "a beer can in the woods next to a path." (DA16:736-37.) It was not clear whether the knife was "used in the crime or" something else. (DA16:736.) Sharman found numerous beer cans in the area and never found the knife. (DA16:737.) The area had changed a lot since the day of the

murder. (DA16:738.)

Detective Sharman then stated: "The information that" Filancia "gave whether it's good or bad or indifferent came from Kaczmar. He didn't make that up." (DA16:738.)

Before deliberations, the court instructed the jury "it's up to *you* to decide what evidence is reliable" and gave several rules for judging a witness's credibility. (DA17:980-81 (emphasis added).)

Counsel's evidentiary-hearing testimony on this issue was not clear. (PCR:2688-93.)

Lower Court's Ruling

The postconviction court assumed deficient performance and held there was no *Strickland* prejudice. (PCR:1792-94.)

Merits

Kaczmar argues the postconviction court erred in rejecting his claim that counsel ineffectively failed to object to Sharman's comment as vouching.

A. No Deficient Performance.

Kaczmar has failed to overcome the presumption of reasonable performance and prove a Sixth-Amendment deficiency. While it is not entirely clear why Kaczmar's counsel did not object, that lack of

clarity does not benefit Kaczmar. *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (recognizing that, while "post hoc rationalizations" for counsel's actions that are contradicted by the available evidence are improper, courts may not "insist counsel confirm every aspect of the strategic basis" for his actions because *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind").

The only clear evidence in the record is that counsel did not object to Sharman's statement as vouching and struggled to explain why years later. The question for this Court is whether any reasonable attorney could have not objected in the circumstances faced by counsel. *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1245 (11th Cir. 2011) (explaining *Strickland* does not give defendants the benefit of defense counsel's "short memory" and presumes all decisions were reasonably made even when counsel cannot remember why he made a specific decision).

For three reasons, the answer is yes. **First**, a reasonable attorney could have decided not to object because the vouching was brief and minor in this trial. *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009) (recognizing counsel often forgo technical

violations of the confrontation clause to avoid "antagoniz[ing] the judge or jury by wasting their time").

Second, a reasonable attorney could decide not to object because the jury would later be instructed that it was its job alone to determine credibility. (See DA17:980-81; Cf. PCR:2002-03 (penalty-phase counsel explaining that part of the decision on whether to object is whether the jury instructions will take care of the issue.)

Third, a reasonable attorney could decide not to object to this comment because objecting would simply draw more attention to a few words in Kaczmar's lengthy trial. *See e.g.*, *Johnson v. State*, 135 So. 3d 1002, 1017 (Fla. 2014) (collecting cases finding the decision not to object/request a limiting instruction was reasonable trial strategy); (Cf. PCR:2012 (explaining objecting can draw more attention to the issue).) Since a reasonable attorney in counsel's shoes could have elected not to object, there is no deficient performance here.

B. Alternatively, No Prejudice.

Kaczmar suffered no prejudice for two independent reasons. **First**, his 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. (DA17:980-81 (emphasis added).) An objectively reasonable jury following that instruction would not have taken Sharman's word about Filancia, and instead would have performed an individualized assessment of Filancia before deciding to credit his testimony. Since *Strickland* requires this Court to presume Kaczmar's jury did just that, Kaczmar has not suffered any prejudice at all, much less enough for a reasonable probability of an acquittal. *See* 466 U.S. at 695; *Smith v. Pulaski SP Warden*, 809 F. App'x 712, 718 (11th Cir. 2020) (holding there was no *Strickland* prejudice in light of a general instruction that covered the issue and despite the failure to seek a more specific curative instruction).

Second, even sans the five words of vouching in the roughly 1,000 pages of Kaczmar's trial, the State's case against Kaczmar was overwhelming. *See Kaczmar v. State*, 104 So. 3d 990, 1003-04 (Fla. 2012) (recounting the evidence in favor of premeditated murder). There is therefore no reasonable probability that "absent" Sharman's statement the jury "would have had a reasonable doubt respecting" Kaczmar's "guilt." *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

Kaczmar's reliance on a direct-appeal, mistrial-granted case, with much weaker evidence than he faced, see *Tumblin v. State*, 29 So. 3d 1093, 1096 (Fla. 2010), is misplaced because he is presently in postconviction and must prove his claim under *Strickland*'s framework. That means he must show a reasonable probability he would have been acquitted absent this testimony. This Court should not equate *Tumblin* to *Strickland* prejudice in the postconviction context, particularly given *Tumblin*'s dubious pedigree in the direct-appeal context. *See Tumblin v. State*, 29 So. 3d 1093, 1104-05 (Fla. 2010) (Canady, J., dissenting with Polston, J.).

Had Sharman not made this statement, or counsel successfully objected, the jury would still have heard: (1) Kaczmar was one of the last people with the victim;[6] (2) a neighbor testify Kaczmar was loudly screaming/swearing near his house around 5:00/5:30 a.m.; (3) pictures/video surveillance showing Kaczmar buying $2 of gas from a gas station less than a mile from his house at 5:59 a.m.;[7] (4) Kaczmar's wife's trial identification of Kaczmar as the one in the

[6] (DA15:582, 584.)

[7] (DA15:526-28; DA16:630-34, 645.)

pictures/surveillance; (5) a tight timeline where two witnesses drove by Kaczmar's intact house around 6:00 a.m., found it ablaze less than ten minutes later, and reported the fire;[8] (6) a forensic determination the arsonist used gasoline to set the house on fire; (7) Kaczmar's guilty-conscious lie to law enforcement that he left his home around 2:00 - 3:00 a.m. to go fishing and arrived at his fishing spot around 3:45 a.m.;[9] (8) there were cuts on Kaczmar's hands;[10] (9) about cell phone records showing Kaczmar actually left his home area around 6:26 a.m. and went towards Jacksonville (and his supposed fishing location) then; (10) the victim's blood was on Kaczmar's socks; and (11) testimony from William Filancia (Kaczmar's cellmate) that Kaczmar confessed three times and admitted he tried to invent the fishing alibi. *Kaczmar I*, 104 So. 3d at 996-97. This overwhelming evidence means there is no reasonable probability an objectively reasonable jury would have returned a not-guilty-of-first-degree-murder verdict had Kaczmar's counsel done

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[8] (DA14:287-92, 298; DA16:640.)

[9] (DA14:352; DA15:550-52, 581-82, 587-90.)

[10] (DA14:374; DA15:551.)

what Kaczmar now says he should have done. Therefore, this Court should affirm this issue on *Strickland*'s prejudice prong.

3. Kaczmar's Counsel Did not Ineffectively Fail to Object to Filancia's Comment About Modlin's Innocence or Ineffectively Elicit Lie Detector Testimony from Modlin.

This issue is comprised of two IAC claims: (1) failure to object to Filancia's testimony he knew Modlin was innocent; and (2) inadvertently eliciting testimony that Modlin passed a lie detector test. The State analyzes these issues separately for clarity.

A. IAC-Failure-to-Object Claim

Relevant Facts

Filancia testified Kaczmar graphically confessed to him and asked for his help *framing* Modlin before testifying he knew Modlin was innocent. (DA16:785-96, 798-800, 802-04.) Filancia stated that knowing Modlin was innocent was part of the reason he came forward when he did; he initially had no intention of telling law enforcement about Kaczmar's statements. (DA16:800-02, 804.)

Counsel testified he made a trial decision not to object to Filancia's statement about Modlin's innocence. (DA16:2698.)

Lower Court's Ruling

The postconviction court found neither deficient performance nor prejudice under *Strickland*. (PCR:1797.)

Merits

Kaczmar argues the postconviction court erred in holding his counsel did not ineffectively fail to object when Filancia stated he knew Modlin was innocent. But he has failed to prove deficient performance and prejudice. This sub-issue is frivolous.

a. No Deficient Performance

Kaczmar has failed to overcome the presumption of reasonable performance and prove a Sixth-Amendment deficiency for this *Strickland* claim. Filancia testified that Kaczmar confessed to him and was trying to "frame" Modlin before Filancia made the statement about Modlin's innocence. Given the entirety of Filancia's testimony, his statement that Modlin was innocent was a forgone conclusion that a reasonable counsel could easily choose not to object to. That is particularly true since the only objection Kaczmar asserted below was non-responsive, e.g., PCR:441, 1796, and the State would almost certainly have followed up if the objection was sustained. Trial practitioners in a murder trial have better things to do than nit-pick a witness's offhand comments to no effect given the rest of the witness's testimony. There is no arguable case for deficiency here.

See Brown v. State, 846 So. 2d 1114, 1122 (Fla. 2003) (failure to make minor objections not deficient).

b. Alternatively, No Prejudice

Kaczmar suffered no prejudice for at least three reasons. **First**, the jury was well aware that Filancia believed Modlin was innocent given his testimony that Kaczmar was trying to "*frame Ryan Modlin for the murder*." (DA16:802) (emphasis added). So the omission of Filancia's explicit statement about Modlin's innocence would have had no effect on a reasonable jury.

Second, had counsel objected to the question as nonresponsive, the State would simply have asked Filancia what changed his mind about coming forward and Filancia would have replied that he came forward because Kaczmar was trying to frame an innocent man. (See DA16:800-02, 804; PCR:2798-99 (Filancia's evidentiary-hearing testimony that the reason he came forward when he did was because Kaczmar was trying to frame an innocent man). The jury would thus have had Filancia's explicit Modlin-innocence testimony anyway as part of an explanation for why Filancia waited to come forward with Kaczmar's statements instead of doing so immediately. *Jackson v. State*, 347 So. 3d 292, 304 (Fla. 2022)

(rejecting an ineffective assistance claim based on what the State would likely have done in response).

Third and finally, the State's case against Kaczmar was overwhelming. There is no reasonable probability an objectively reasonable jury hearing all the evidence against Kaczmar would have found Kaczmar not guilty of first-degree murder had counsel successfully objected to Filancia's statement about Modlin's innocence. There is no arguable case for prejudice here.

B. Inadvertently-Eliciting-Modlin-Lie-Detector-Evidence Claim

Relevant Facts

During a pretrial deposition on 8/2/2010, Filancia gave two separate reasons he believed Modlin was innocent: (1) "Kaczmar told me that he wasn't guilty"; *and* (2) Kaczmar told him that "Modlin had taken a lie detector test and passed." (R:572, 1886-87)

Days later, Kaczmar's counsel successfully moved to exclude evidence that Modlin passed a polygraph test. (DA7:1341-42 (motion filed); DA8:1371 (order granting motion); DA17:821-24.) The motion requested the court order "all parties hereto, including but not limited to the State Attorney, agents of the State and all witnesses connected thereto, to absolutely refrain from introducing into

evidence and to absolutely refrain from making any mention or giving any testimony, either direct or indirect, that Christopher Ryan Modlin successfully passed a polygraph test." (DA7:1341.)

During trial, in response to counsel's question about how he knew Modlin was innocent, Filancia stated: "No. I know that. Kaczmar told me" Modlin "was not guilty of it *and* he also told me that" Modlin "passed a lie detector test." (DA17:821 (emphasis added).) Defense counsel expressed surprise, believed Filancia should have been instructed not to mention the lie detector, unsuccessfully moved for a mistrial, and ultimately requested a curative instruction. (DA17:821-23.)

The court instructed the jury: "Right before you left" the "answer came out that" Ryan Modlin "passed a lie detector test. That's not relevant here. You're not to consider that in any way, shape or form. You understand?" (DA17:824.)

At the evidentiary hearing, counsel Shea testified he believed the State would instruct its witnesses not to mention the polygraph. (PCR:2782; cf. PCR:2699-2703.) Filancia testified the State had instructed him to not mention the lie detector test. (PCR:2793.)

Lower Court's Ruling

It appears the postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1795-98.)

Merits

Kaczmar argues the postconviction court erred in holding his counsel did not ineffectively elicit testimony that Modlin passed a lie detector test when asking Filancia how he knew Modlin was innocent. But he has failed to prove either the deficient performance or prejudice prong of a valid ineffectiveness claim.

a. No Deficient Performance

Kaczmar has failed to overcome the presumption of reasonable performance and prove a Sixth-Amendment deficiency. Given 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. Any other analysis improperly penalizes counsel based on sheer hindsight. *See State v. Mullens*, 352 So. 3d 1229, 1240 n.12, 1242 n.16 (Fla. 2022). There is no arguable case for deficient performance here.

b. Alternatively, No Prejudice

Kaczmar suffered no prejudice for two independent reasons. **First**, the court issued a specific curative instruction telling the jury not to consider Modlin's lie detector test. (DA17:824.) That ends the prejudice analysis because objectively reasonable jurors do not disregard court instructions. *See Strickland*, 466 U.S. at 695. *Strickland*'s prejudice prong is not designed to deal with aberrant jurors that cannot follow instructions, it is meant to objectively, and without speculation, assess the impact of counsel's deficiencies in a sterile environment. *See id.*

Kaczmar's citation to a direct-appeal case rejecting a double-jeopardy challenge after a mistrial was granted due to polygraph testimony has no application to this case. *See Walsh v. State*, 418 So. 2d 1000, 1002 (Fla. 1982). 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.

Second, excluding the Modlin-lie-detector testimony, the State's case against Kaczmar was overwhelming. *See supra*, Issue

II.B. There is no reasonable probability an objectively reasonable jury would have acquitted Kaczmar of first-degree murder if counsel perfectly phrased his question and elicited *only* that Filancia believed Kaczmar was innocent because Kaczmar told him so while trying to frame Modlin *without* mentioning Modlin's lie detector test.

4. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO INTRODUCE KACZMAR'S SELF-SERVING HEARSAY AT TRIAL.

Relevant Facts

At the evidentiary hearing, counsel testified that he strategically chose not to elicit Kaczmar's self-serving hearsay because he did not want the jury to hear about his prior convictions. (PCR:2746-51, 2781.) In counsel's experience, "juries don't have much sympathy for people who have a prior conviction for a felony." (PCR:2781.) Counsel also did not want the jury to hear about Kaczmar's convictions because he was using Filancia's convictions against him. (PCR:2781-82.) Finally, counsel testified that he and Kaczmar discussed the issue and Kaczmar did not want his convictions coming in. (PCR:2786.) At trial, counsel also emphasized that Modlin and Filancia both had convictions. (DA17:926-29, 942.)

Lower Court's Ruling

The postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1806-07.)

Merits

Kaczmar argues his counsel ineffectively failed to introduce his self-serving hearsay statements to Detective Humphrey (the undercover officer who went by "Carlos" to Kaczmar) under the rule of completeness. But Kaczmar has failed to demonstrate either deficient performance or prejudice. This issue is frivolous.

A. No Deficient Performance

Unlike *Strickland*'s prejudice prong analysis, *Strickland*'s performance prong permits counsel to make their decisions based on their subjective assessment of the actual decisionmakers in front of them. *See Strickland*, 466 U.S. at 695 (recognizing the "idiosyncrasies of the particular decisionmaker" are relevant to "counsel's selection of strategies" but are "irrelevant to the prejudice inquiry").

Kaczmar has failed to demonstrate deficient performance for two independent reasons. **First**, his trial counsel made a reasonable, strategic decision not to admit Kaczmar's self-serving hearsay statements because the jury would then have learned Kaczmar was a convicted felon. *See Johnson v. State*, 239 So. 3d 135, 138 (Fla. 3d DCA 2018) (holding counsel's advice that the defendant not testify was a reasonable strategic decision because, among other reasons,

the jury would find out he was a convicted felon). That decision is even more reasonable considering trial counsel's strategy to utilize Filancia and Modlin's convictions as reasons to doubt their testimony. (DA17:926-29, 942.)

Second, Kaczmar did not want his felony convictions coming in. (PCR:1971.) He cannot argue his counsel deficiently made a decision he himself agreed with. *Smith v. State*, 330 So. 3d 867, 882 (Fla. 2021) (There "is no merit to a claim of ineffective assistance of counsel if the defendant consents to counsel's strategy."); *Acuna v. United States*, 494 F. App'x 961, 962 (11th Cir. 2012) (citing *Hammond v. Hall*, 586 F.3d 1289, 1327-28 (11th Cir. 2009), and *Ross v. Wainwright*, 738 F.2d 1217 (11th Cir. 1984) for the proposition that "ineffective assistance does not exist under *Strickland* where the defendant ultimately concurred in his counsel's tactical decision or strategy"); *United States v. Masat*, 896 F.2d 88, 92 (5th Cir. 1990).

This rule flows naturally from the fact that the actions of reasonable counsel are guided and influenced by his client's own wishes. *See Strickland*, 466 U.S. at 691 ("Counsel's actions are usually based, quite properly, on informed strategic choices *made by*

the defendant and on information supplied by the defendant.") (Emphasis added); *cf. Faretta v. California*, 422 U.S. 806, 820 (1975) ("The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.... [A]n assistant, however expert, is still an assistant."); *Summerlin v. Stewart*, 267 F.3d 926, 947-48 (9th Cir. 2001), *opinion withdrawn*, 281 F.3d 836 (9th Cir. 2002).

"To allow" Kaczmar to later claim ineffectiveness on a strategic decision he agreed with at the time would "exempt defendants from the consequences of their actions at trial and would debase the right to effective assistance of counsel enshrined in the sixth amendment." *See United States v. Weaver*, 882 F.2d 1128, 1140 (7th Cir. 1989).

For both reasons, there is no arguable case for deficient performance here.

B. Alternatively, No Prejudice

Kaczmar also clearly suffered no prejudice. There is no reasonable probability an objectively reasonable jury would have believed Kaczmar's self-serving statements and acquitted him given the conclusive evidence that Kaczmar is unreliable, including his status as a convicted felon, his lies to police about where he was the

night of the murder, his guilty-conscious decision to burn his home with the victim's body inside, and the rest of the overwhelming evidence in this case. There is no arguable prejudice here.

5. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO REFRESH/IMPEACH JULIA FERRELL'S RECOLLECTION.

Kaczmar raises two separate IAC claims as part of this issue, which the State analyzes separately for clarity. Both issues are frivolous.

Relevant Facts

In a pretrial deposition, Julia Ferrell[11] (Kaczmar's neighbor) stated that she heard a heated argument. (DA2:306.) When asked about whether the voices were male or female, she stated there "was two men." (DA2:307.) When asked if she was "sure" one of the voices was not female, she stated, "I am not sure but I don't think it was. It sounded like men to me" and "I mean I never heard a woman's voice that rough." (Id.)

At trial, she testified that she heard Kaczmar screaming and cursing around 5:00/5:30 on 12/13/2008. (DA14:311-12.) While she heard "another voice," she could "not make out what the other voice was" and "assumed it was Leo and his Uncle Ed" in "another

[11] Julia "Ferrell" is referred to interchangeably throughout prior proceedings as Julia Sims, Farrell, Ferrell, Ferrell Sims, and Sims Ferrell. *E.g., Kaczmar I,* 104 So. 3d at 996; (DA2:133; DA14:212, 280, 308, 354, 355.

fight." (DA14:312.) When asked if it was two male voices, she stated that she did not "know if it was two males" and was only certain she heard Kaczmar's voice. (DA14:313-14.)

Counsel Shea tried, through law enforcement witnesses, to introduce impeachment that Ferrell told officers that she heard two men fighting, but was not permitted to do so because the court found, in part, that Ferrell's statements were not truly inconsistent. (DA14:355-56, 379-80.)

At the evidentiary hearing, counsel testified he did not refresh/impeach Ferrell's testimony because it was consistent with what Kaczmar had told him, the victim very well could have sounded rougher than normal after being stabbed, and he did not believe Ferrell's trial testimony was actually inconsistent with her deposition. (PCR:2751-52, 2755-158, 2785-39.) Kaczmar at one point wanted to raise self-defense to the victim's murder. (PCR:2669, 2761, 2775.)

Detective Parker testified that Ferrell told him it: "*sounded like* two men arguing and someone banging on a door." (PCR:2925) (emphasis added.) Kaczmar did not call Ferrell to testify at the evidentiary hearing.

A. IAC-Failure-to-Refresh-Recollection Claim

Lower Court's Ruling

It appears the postconviction court found neither deficient performance nor prejudice under *Strickland*. (PCR:1808-09.)

Merits

Kaczmar argues the postconviction court erred in holding his counsel did not ineffectively fail to refresh Ferrell's memory with her deposition testimony. This sub-issue is completely frivolous.

a. No Deficient Performance

Kaczmar has failed to demonstrate deficient performance on this sub-issue for three reasons. **First**, Kaczmar failed to prove his claim. He did not call Julia Ferrell at the evidentiary hearing below and it is impossible to determine whether her trial testimony would have changed if she was shown her pretrial statements. *E.g., State v. Bright*, 200 So. 3d 710, 740 n.15 (Fla. 2016) ("failure to present" a "witness during" an "evidentiary hearing constitutes waiver").

Second, a reasonable trial attorney could decide it was not worth refreshing Ferrell's recollection when her trial testimony was not that different from either her deposition or report to Detective Parker. In all three, she could not certainly identify the second voice

as male or female. (Compare DA2:306-07 (“not sure” whether one of the voices was female because of how “rough” it was), with DA14:311-12 (Ferrell “couldn’t make out what the other voice was” and assumed it was “Uncle Ed”), and PCR:2925 (Parker’s report noting Ferrell said it “sounded like two men arguing”).

Third, a reasonable counsel could easily decide not to probe the issue further to avoid a potential redirect from the State asking if Ferrell had ever heard the voice of a woman stabbed several times. *Jackson v. State*, 347 So. 3d 292, 303 (Fla. 2022) (recognizing that an ineffectiveness claim requires not just viewing what counsel could have done, but also the State’s likely response). Counsel testified this was part of his reason for not pursuing the issue further with Ferrell, and this Court reviews the facts in the light most favorable to sustaining the postconviction court’s rejection of this claim.[12] But counsel’s failure to refresh Ferrell’s recollection was also particularly reasonable since her statements were consistent with Kaczmar’s depiction of the crime and desire to raise a self-defense theory to avoid it. *Strickland*, 466 U.S. at 691 (“The reasonableness of counsel’s

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[12] *Steinhorst*, 695 So. 2d at 1248.

actions may be determined or substantially influenced by the defendant's own statements or actions.").

b. Alternatively, No Prejudice

Kaczmar suffered no prejudice for two independent reasons. **First**, his failure to present Ferrell at the evidentiary hearing makes it impossible to know whether she would have changed or adhered to her trial testimony. That makes it impossible for Kaczmar to prove prejudice for failure to refresh her recollection.

Second, the State's case against Kaczmar was overwhelming. Even Ferrell definitively stating at trial she heard two men arguing instead of one would not have changed that. The key part of Ferrell's testimony was her absolutely certain identification of Kaczmar's voice at his house at a time when he told police he was actually out fishing. That part remains unchanged by this issue, particularly since Ferrell's trial testimony was that she assumed it was two men (Kaczmar and his uncle) fighting. There is no reasonable probability an objectively reasonable jury would have acquitted Kaczmar if Ferrell testified she definitely heard Kaczmar and another man fighting outside Kaczmar's home when Kaczmar lied and said he was miles away fishing at the time.

B. IAC-Failure-to-Impeach-Ferrell Claim

Lower Court's Ruling

It appears the postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1808-09.)

Merits

Kaczmar argues the postconviction court erred in holding his counsel did not ineffectively fail to impeach Ferrell with her deposition testimony. This sub-issue is completely frivolous.

a. No Deficient Performance

Kaczmar has failed to prove deficient performance for three reasons. **First**, he failed to call Ferrell to see what she would say if impeached with her prior statement. *Cf. Pearce v. State*, 880 So. 2d 561, 570 (Fla. 2004) (explaining the importance of giving a witness an opportunity to explain a supposedly prior inconsistent statement). Kaczmar's postconviction choice not to call Ferrell means this Court is unable to fully assess what would have happened if she was impeached at trial and operates to waive the claim. *Cf. Bright*, 200 So. 3d at 740 n.15 (recognizing "failure to present" a "witness during" an "evidentiary hearing constitutes waiver").

Second, counsel could not properly impeach Ferrell because her statements were not truly inconsistent. (Compare DA2:306-07 ("not sure" whether one of the voices was female because of how "rough" it was), with DA14:311-12 (Ferrell "couldn't make out what the other voice was" and assumed it was "Uncle Ed"), and PCR:2925 (Parker's report noting Ferrell said it "sounded like two men arguing"). *See Floyd v. State*, 18 So. 3d 432, 450 (Fla. 2009) (rejecting an IAC claim for failure to impeach where there was "no evidence that the two statements" were "irreconcilably inconsistent"); *Pearce*, 880 So. 2d at 569 ("Nit-picking is not permitted under the guise of prior inconsistent statements.") (Cleaned up.) Indeed, both times counsel tried to offer this impeachment through law enforcement, the court found, at least in part, the statements were not truly inconsistent. (DA14:355-56, 379-80.) Counsel cannot be ineffective for failing do something Florida law does not allow.

Third, a reasonable counsel could choose not to pursue this line of impeachment with Ferrell to avoid cross-examination where the State would emphasize that Ferrell did not know what a woman who had been stabbed would sound like. Counsel's choice to avoid this issue (with Ferrell) prevented the State from crossing Ferrell on

the reason she believed the voice was not female (its roughness) and later reasonably arguing the roughness was caused by the wounds the victim suffered. Counsel's choice not to impeach Ferrell is eminently reasonable both in light of this potential line of argumentation and the fact counsel successfully got out testimony that Ferrell believed the second voice belonged to a male, Kaczmar's "Uncle Ed." (DA14:311-12.)

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. Had counsel been successful, then he would have placed Ferrell's statement in front of the jury *without an opportunity* for Ferrell to explain it further.[13] While counsel's attempt to sneak this impeachment in through other means ultimately failed, his decision not to broach the issue with Ferrell herself makes perfect sense. There is no arguable case for deficient performance here.

[13] Ironically, that seems to be what Kaczmar has tried to do by not presenting Ferrell below despite being granted an evidentiary hearing on this claim.

b. Alternatively, No Prejudice

Kaczmar has failed to prove prejudice for four independent reasons. **First**, he failed to call Ferrell at the evidentiary hearing below. **Second**, Florida law would not have allowed his trial counsel to impeach Ferrell with her prior *consistent* statements. **Third**, impeaching Ferrell on the collateral, two-man issue would not have made a difference to an objectively reasonable jury. The part of her statement that mattered was her identification of Kaczmar's voice at his home, in a fight, when Kaczmar said he was out fishing miles away. "Impeachment" on a collateral issue where the witness herself has not taken a definitively impeachable position does not give rise to a reasonable probability of an acquittal. That is particularly true since Ferrell's said she assumed the other voice belonged to Uncle Ed, a male. **Fourth**, the evidence against Kaczmar was simply overwhelming. There is no arguable case for prejudice here.

6. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY CALL DETECTIVE GOLDNER IN THE DEFENSE CASE.

Relevant Facts

During the guilt-phase defense case, counsel elicited testimony from Detective Goldner that law enforcement saw stains that looked like blood in Kaczmar's vehicle. (DA17:853-58.) The State stipulated this evidence was never tested. (DA17:860-61.) In closing, defense counsel utilized this evidence to argue the State's investigation was not thorough enough. (DA17: 944-48.) Kaczmar explicitly agreed with his counsel's decision to call Detective Goldner. (DA17:850.)

At the evidentiary hearing (over ten years after trial) Counsel Shea could not remember why he called Detective Goldner. (PCR:2741-42.)

Lower Court's Ruling

The postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1805-06.)

Merits

Kaczmar argues his counsel ineffectively presented Detective Goldner's testimony that there were stains that looked like blood in

Kaczmar's vehicle and that the State failed to follow up and test those stains. This issue is frivolous.

A. No Deficient Performance.

Sowing reasonable doubt by emphasizing a perceived lack of thoroughness in the State's investigation is a reasonable, strategic decision trial counsel can make. *Banks v. State*, 219 So. 3d 19, 29 (Fla. 2017). Capital defense counsel have routinely utilized this strategy over the years. *E.g., Patterson v. State*, 199 So. 3d 253, 259 n.3 (Fla. 2016); *Hayes v. State*, 660 So. 2d 257, 265 (Fla. 1995).

Kaczmar has failed to demonstrate deficient performance for two reasons. **First**, his counsel utilized Goldner's testimony to sow reasonable doubt by focusing on the avenues the State did not investigate. That is a reasonable trial strategy. It also does not matter that counsel could not remember why he called detective Goldner. *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1245 (11th Cir. 2011) (explaining *Strickland* does not give defendants the benefit of defense counsel's "short memory").

Second, Kaczmar explicitly agreed with his counsel's decision to call Detective Goldner. *See Smith v. State*, 330 So. 3d 867, 882

(Fla. 2021); *Acuna v. United States*, 494 F. App'x 961, 962 (11th Cir. 2012); *United States v. Weaver*, 882 F.2d 1128, 1140 (7th Cir. 1989).

For both reasons, there is no arguable case for deficient performance here.

B. Alternatively, No Prejudice

Kaczmar also clearly suffered no prejudice for two reasons. **First**, an objectively reasonable jury following the court's instructions would not have speculated about whether the untested stains were actually blood or something else. Such a jury would only have considered the State's lack of testing in a determination of whether the lack of testing created reasonable doubt. Kaczmar's speculative fears about what a jury might have done with this information is precisely why *Strickland*'s prejudice inquiry is confined to what an objectively reasonable jury would do. This Court need not speculate when it must only determine the impact of any assumed deficiency on an objectively reasonable jury. Kaczmar thus suffered no prejudice as a matter of law under *Strickland*'s prejudice inquiry.

Second, the State's case against Kaczmar was simply overwhelming and not calling Detective Golder would not give rise to a reasonable probability of an acquittal. *See supra*, Issue II.B.

For both reasons, there is no arguable case for prejudice on this frivolous issue.

7. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO SUPPRESS HIS STATEMENTS TO FILANCIA AND UNDERCOVER DETECTIVE HUMPHREY.

Kaczmar raises about three separate ineffectiveness claims in this issue: (1) IAC failure to file a motion to suppress Kaczmar's statements to Filancia on the theory that Filancia was acting as a state agent when Kaczmar made them; (2) IAC failure to file a motion to suppress recorded statements Kaczmar made to Detective Humphrey; (3) IAC failure to argue the recorded conversations between Kaczmar and Detective Humphrey were the result of entrapment to the jury.

The State will address sub-issues one and two in detail while ignoring the frivolously raised subclaim three because (as explained below) this Court should assume counsel deficient on sub-issue 2 and exclusively analyze the prejudice flowing from counsel's failure to suppress the recorded conversations between Kaczmar and

Detective Humphrey as substantive evidence.[14] That obviates the need to discuss the utterly frivolous, alternative entrapment theory Kaczmar argues as sub-issue three.[15]

Relevant Facts

Pretrial, counsel moved to suppress "all statements made by the defendant" after he "evoked his right to have an attorney present" on 12/13/2008. (DA5:858.) In another pretrial motion, counsel cited *United States v. Henry*. 447 U.S. 264 (1980) as holding "violations of the Fifth and Sixth Amendment do not occur unless the government initiates contact with an incarcerated Defendant, either directly or through an agent." (DA6:1034.) Neither of these motions encompass

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[14] These conversations would still be admissible to impeach Kaczmar if he took the stand or sought to delude the jury about his relationship with Filancia. *See Kansas v. Ventris*, 556 U.S. 586, 593–94 (2009) (statements obtained in violation of the right to counsel are admissible as impeachment); *Nock v. State*, 256 So. 3d 828, 837 (Fla. 2018) (opening the door is based on considerations of fairness, the truth-seeking function of trial, and preventing parties from misleading the jury).

[15] Entrapment would be a truly incredible defense in this case where the only evidence is that Kaczmar tried to prompt Filancia to find someone to plant evidence to frame Modlin. (See PCR:1790.) There is no possibility of deficient performance for failing to raise that frivolous issue. And there is no reasonable probability any objectively reasonable jury would have bought Kaczmar's fanciful entrapment theory either.

the precise arguments Kaczmar now alleges counsel should have raised.

Counsel deposed Filancia prior to trial. (DA8:1384, 1390.) Filancia told counsel that he shared a cell with Kaczmar beginning around 1/2009. (DA8:1390-92.) They were cellmates for about four/five months before Kaczmar moved out, and then became cellmates again about two/three months after that. (DA8:1392.) They exchanged stories about their cases. (DA8:1398.) Filancia didn't really care "about what" Kaczmar "was talking about and what he wasn't talking about" and just let him talk. (DA8:1399.) Filancia was not "relaying anything back to the state attorney or anything at that point about Kaczmar." (DA8:1399.)

At some point, Filancia began informing on two inmates, Healy and Thornton. (DA8:1395-97.) The first time he spoke with Detectives about Healy/Thornton was 8/5/2009. (DA8:1397.) During a conversation about Healy/Thornton, Filancia said he wanted to talk about Kaczmar, too. (DA8:1400.) Filancia decided to tell Detectives about Kaczmar's case because Kaczmar was trying to frame Ryan Modlin for the murder (DA8:1400, 1422.) The first time he tried to talk about Kaczmar's case, Detective Sharman refused to discuss it.

(Id.) They eventually discussed Kaczmar's case on 12/8/2009. (DA8:1401.)

Filancia told counsel Kaczmar made the following statements over several different periods of time: (1) a detailed confession that he stabbed the victim after she refused his sexual advances and drew a knife in self-defense; (2) that he should have done to his wife what he did to the victim; (3) that he tried to cover up the murder by burning his house down; (4) that he saw the victim's blood on his socks and tried to cover it with his own blood. (DA8:1400-04, 1407-18, 1427-28.) Since Filancia was not talking to the state attorney when Kaczmar made these statements, he did not question Kaczmar or try to pin him down on details. (DA8:1410-11.)

Detective Sharman made a report of his conversations with Filancia about Kaczmar. (PCR:533-42.) The first conversation where Filancia mentioned Kaczmar was August 8,[16] 2009. (PCR:533.) Sharman specifically noted he did not ask Filancia questions about Kaczmar or ask him to get information from Kaczmar. (Id.) On August

[16] "8" appears to be a typo for "5" since the entries are in chronological order and this entry notes a meeting was set up for the "next day (08-06-09.)" (PCR:533.)

27, 2009, Filancia told Sharman Kaczmar had “given him details about how he committed the murder of his victim.” (PCR:533-34.) Sharman again told Filancia he did not want to discuss Kaczmar and not to question Kaczmar, only listen. (PCR:533-34.) This entry ended with a notation that Kaczmar had “invoked his constitutional rights” and Sharman did not want to compromise the investigation by having Filancia act as an “agent” at this point. (PCR:534.)

On 10/2/2009, Filancia again mentioned that Kaczmar was talking about his case and Sharman told him he wanted to get with Filancia’s attorney (Kuritz) and the state attorney before discussing Kaczmar’s statements and case. (Id.) Filancia was documented as a confidential informant on 11/25/2009. (Id.) On 12/8/2009, for the first time, Filancia provided Kaczmar’s statements to law enforcement. (Id.)

At trial, Detective Sharman testified his first contact with Filancia about Kaczmar occurred in early 8/2009 while Filancia was informing on two other defendants. (DA16:732-33.) Later, Filancia came to him and told him that Kaczmar was trying to manufacture evidence to frame Ryan Modlin. (DA16:715-16.) Sharman instructed Filancia “not to question” Kaczmar and “just listen to what he has to

say and relay that back to me." (DA16:717.) Sharman had another meeting with Filancia and his lawyer in 12/2009 to discuss Kaczmar's case. (DA16:739.) Later, law enforcement developed a plan to have Detective Charles Humphrey pose as "Carlos," someone on the outside who would help Kaczmar frame Modlin. (DA16:716-17.) This led to Kaczmar making a map, sending it to "Carlos," and trying to get "Carlos" to plant evidence and tamper with witnesses. *Kaczmar I*, 104 So. 3d at 997.

Filancia testified at trial that he shared a cell with Kaczmar and first met him before 8/5/2009. (DA16:782-83.) They developed a friendship and Kaczmar shared details about his case over several conversations, including during the "first time" they shared a cell where he went into "a lot of detail." (DA16:786.) Kaczmar's admissions included: (1) a detailed description of how he murdered the victim and attempted to cover it up; (2) a statement (after an argument with his wife) that he should have "done to" his wife "what he did to Ms. Ruiz"; and (3) a statement that the victim's murder was different than the murder of a child because the victim "had a chance to get away." (DA16:787-800.)

Filancia testified he did not intend to come forward and tell anyone that Kaczmar was making these statements until Kaczmar began trying to frame Ryan Modlin. (DA16:800.) This occurred during the end of the second time they were cellmates. (DA16:801-04.) The first time he met with the Detectives was "August 5th" and they told him "they didn't want" to hear any "details about the case" and instructed him to just "listen to whatever" Kaczmar has to say." (DA16:806.) Filancia testified he followed their instructions. (DA16:806.)

Counsel Shea and Filancia both testified on this issue at the evidentiary hearing. Shea testified he did not believe Filancia was working as a state agent related to Kaczmar's case and did not believe they had a legal basis for suppression. (PCR:2680-84, 2686-38.) Filancia testified he began informing on inmate Thornton to Detective Sharman prior to meeting Kaczmar. (PCR:2794.) In the beginning, he just listened to Kaczmar, but later began doing a two-way conversation. (Id.) He had no intention of informing on Kaczmar at first, but that changed "at some" unspecified "point" when Kaczmar began trying to frame Modlin. (PCR:2794, 2798.) When he came forward with "all of that information," police had never "instructed"

him to "talk to" Kaczmar or "get information from him." (PCR:2798-99.) Later, while detectives did not give him questions to ask, they did ask for his help coordinating the sting investigation with "Carlos." (PCR:2795.)

Detective Sharman testified that Filancia was assisting with Thornton's case, later began assisting with Kaczmar's case, and was eventually documented as a confidential informant. (PCR:2835-36.) Prior to 12/8/2009, law enforcement did not ask Filancia to get information on Kaczmar's case. (PCR:2846.) The first time Filancia mentioned Kaczmar, Sharman "shut [him] down." (PCR:2846-47.) All the information before they decided to get Detective Humphrey (the undercover officer who went by "Carlos" to Kaczmar) involved "was not at any law enforcement direction." (PCR:2849.)

Analytical Framework

An ineffectiveness claim based on the failure to litigate a suppression motion must additionally show that the motion was "meritorious" and that "there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

The State is not permitted to interfere with a defendant's Sixth Amendment right to counsel by using a cooperating cellmate/prisoner as a state agent to circumvent counsel. *E.g.*, *Maine v. Moulton*, 474 U.S. 159, 167-80 (1985); *United States v. Henry*, 447 U.S. 264, 269-75 (1980). But the State only violates this rule where "the defendant establishes that the informant and the authorities had a preexisting plan for the informing witness to obtain a confession." *Cooper v. State*, 856 So. 2d 969, 973 (Fla. 2003); *Rolling v. State*, 695 So. 2d 278, 288–92 (Fla. 1997) (A "violation of a defendant's right to counsel turns on whether the confession was obtained through the active efforts of law enforcement or whether it came to them passively."); *see also State v. Zecckine*, 946 So. 2d 72, 74 (Fla. 1st DCA 2006).

The State may place an informant in the defendant's cell with instructions to simply listen for information as long as the informant obeys that instruction. *Rolling*, 695 So. 2d at 290. The fact that a prisoner informed in other cases does not automatically make him a state agent in the defendant's case. *See Muehleman v. State*, 503 So. 2d 310, 314 (Fla. 1987) (prisoner Rewis did not become a state agent when: (1) the defendant discussed the details of the crime with him;

(2) Rewis later approached authorities on his own initiative; (3) Rewis was instructed not to initiate conversations with the suspect; and (4) there was no contingent fee arrangement); *Muehleman v. Florida*, 484 U.S. 882, 884 (1987) (Marshall, J., dissenting from denial of certiorari) (noting "Rewis" had "provided information to correctional officials on at least two previous occasions").

This Court reviews motions to suppress in the light most favorable to the prevailing party below. *Cruz v. State*, 320 So. 3d 695, 712 (Fla. 2021). Since the postconviction court determined the motion would have been denied, this Court must review the facts in the light most favorable to sustaining that ruling. *See id.*

A. IAC-Failure-to-Suppress-Kaczmar's-Statements-to-Filancia Issue

Lower Court's Ruling

It appears the postconviction court found neither deficient performance nor prejudice under *Strickland*. (PCR:1789.)

Merits

Kaczmar's first sub-issue argues his counsel ineffectively failed to suppress his statements to Filancia. This sub-issue fails both prongs of *Strickland*'s framework.

a. No Deficient Performance

Kaczmar has failed to overcome the presumption of reasonable performance and prove a Sixth-Amendment deficiency for three reasons. **First**, a motion raising this argument would not clearly have been successful. Viewed in the light most favorable to the State as the prevailing party, Filancia was not a state agent with regard to Kaczmar's case before he gave details about Kaczmar's case to law enforcement; he actually had no intention of informing on Kaczmar at first and that only changed when Kaczmar began trying to frame Modlin.[17] As there was no preexisting plan with law enforcement for Filancia to obtain statements from Kaczmar before 12/8/2009, a suppression motion targeted at Kaczmar's statements prior to that point would have failed. Counsel was not deficient for failing to file a

[17] Kaczmar argues Filancia's testimony, which he concedes the court credited below, was "highly suspect." But that argument is irrelevant to this Court because competent, substantial evidence supports the lower court's decision to credit Filancia's testimony. *E.g.*, *Calhoun v. State*, No. SC2022-1286, 2023 WL 4359490, at *2 (Fla. July 6, 2023) (lower court decision to credit a witness's self-serving testimony he did not confess to a murder supported by competent, substantial evidence: the witness's testimony).

suppression motion that Kaczmar has not proved would have been meritorious.

Second, relatedly and at a minimum, a reasonable trial counsel could have determined (as counsel Shea did) under the caselaw and these facts that there was not a sufficient basis to suppress Kaczmar's statements to Filancia. This is particularly true since counsel was aware of, understood, and correctly cited, *Henry*, the case Kaczmar now relies on. Counsel's failure to argue for *Henry*'s extension to Kaczmar's case is not deficient performance. *E.g.*, *Sanchez-Torres v. State*, 322 So. 3d 15, 23 (Fla. 2020).

Third, Kaczmar has failed to establish when he made his admissions to Filancia. While he now argues that any "information he allegedly gained from Kaczmar after August 8, 2009, should be suppressed," he has not established any of his statements too Filancia took place *after* that date. (See DA16:782-86 (Filancia's trial testimony indicating Kaczmar made incriminating statements before August 5, 2009).) Kaczmar has therefore failed to meet his burden of proving deficient performance.

b. Alternatively, No Prejudice

Kaczmar has also failed to prove prejudice. While there is no doubt Kaczmar's statements to Filancia helped the State's case, that is not the test for prejudice. The test for prejudice is whether there is a reasonable probability an objectively reasonable jury would have acquitted Kaczmar had this evidence been suppressed. With this evidence omitted, the jury would still have heard the following: (1) a neighbor hearing Kaczmar loudly screaming/swearing around 5:00/5:30 a.m.; (2) pictures/video surveillance showing Kaczmar buying $2 of gas from a gas station less than a mile from his house at 5:59 a.m.;[18] (3) Kaczmar's wife's trial identification of Kaczmar as the one in the pictures/surveillance; (4) a tight timeline where two witnesses drove by Kaczmar's intact house around 6:00 a.m., found it ablaze less than ten minutes later, and immediately reported the fire;[19] (5) that gasoline was used to set the house on fire; (6) Kaczmar's statements to law enforcement that he left his home around 2:00/3:00 a.m. to go fishing and arrived at his fishing spot

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[18] (DA15:526–28; DA16:630-34, 645.)

[19] (DA14:287–92, 298; DA16:640.)

around 3:45 a.m.;[20] (7) Kaczmar had cuts on his hands;[21] (8) cell phone records showing that Kaczmar left his home area around 6:26 a.m. and went towards Jacksonville (and his supposed fishing location) then; and (9) the victim's blood was on Kaczmar's socks. There is no reasonable probability that an objectively reasonable jury would have acquitted Kaczmar of first-degree murder after hearing these facts. Therefore, regardless of deficient performance, Kaczmar was not prejudiced.

B. IAC-Failure-to-Suppress-Recorded-Statements-from-Kaczmar-to-Detective-Humphrey Sub-issue

Lower Court's Ruling

The postconviction court assumed deficient performance and held there was no prejudice. (PCR:1790.)

Merits

Kaczmar's second sub-issue argues his counsel ineffectively failed to suppress the recorded conversations between Detective Humphrey and Kaczmar. This Court should assume deficient performance and exclusively hold Kaczmar was not prejudiced.

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[20] (DA14:352; DA15:550-52, 572, 582, 587-590.)

[21] (DA14:374; DA15:551.)

a. Deficient Performance Note

There is at least an interesting question about whether Kaczmar's counsel could have suppressed any statements to Filancia after December 2009, along with the sting operation. *See Moulton*, 474 U.S. at 167-80; *Saunders v. State*, 208 So. 3d 99, 100-105 (Fla. 4th DCA 2017). But there is no need to answer that question because Kaczmar clearly was not prejudiced. *See Strickland*, 466 U.S. at 697 (holding the object of an ineffectiveness claim is not to "grade counsel's performance" and that if "it is easier to dispose of an ineffectiveness claim" on lack of prejudice grounds "that course should be followed").

Separately, to the extent that *Moulton* holds police cannot utilize statements obtained in the good-faith investigation of separate crimes as evidence in the primary offense, the United States Supreme Court should reconsider *Moulton*. If *Moulton* is receded from—regardless of whether a motion to suppress would have been successful under it—counsel cannot be deemed deficient here. *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993).

Moulton was a 5-4 decision that drew a hefty dissent arguing both that (1) no Sixth Amendment violation occurs when the

defendant makes statements to state agents pursuing a good faith investigation into different crimes; and (2) the exclusionary rule should not apply regardless. *Moulton*, 474 U.S. at 181-92 (Burger, C.J., dissenting with JJs. White, Rehnquist, and O'Conner). The Supreme Court should recede from *Moulton* for those reasons.

As it did below, the State raises this argument for preservation purposes only because this Court has no independent power to recede from *Moulton*.

b. No Prejudice

Any assumed deficiency in counsel's failure to suppress the conversations between Detective Humphrey and Kaczmar did not prejudice Kaczmar. The lack of that evidence does not give rise to a just-under-51% chance an objectively reasonable jury would have acquitted Kaczmar of first-degree murder. *See Harrington v. Richter*, 562 U.S. 86, 112 (2011) (explaining the difference between *Strickland*'s prejudice standard and a more-probable-than-not-standard is "slight"). With the sting operation excluded, the jury would still have heard all the evidence described in prior sub-issue's prejudice analysis along with Kaczmar's confessions to Filancia. With

all this evidence, Kaczmar was definitely not prejudiced. This claim should be rejected on those grounds without further inquiry.

8. THE POSTCONVICTION COURT CORRECTLY, SUMMARILY, DENIED KACZMAR'S 2010 GUILT-PHASE IAC CLAIM RELATED TO THE LIKELIHOOD OF FILANCIA AND KACZMAR'S RELATIONSHIP.

Relevant Facts

The State moved for a pretrial order precluding any evidence, reference, or argument on the underlying circumstances of Filancia's charges. (DA5:895-96.) The court held a hearing and Kaczmar's counsel argued Filancia's sexual battery charges "really go to his credibility into the weight of his testimony." (DA10:1774-77.) The court granted the State's motion. (DA10:1777, 1793.)

At trial, Filancia testified he was "on a friendly basis" with Kaczmar while in prison, they talked about their cases, and he believed Kaczmar trusted him. (DA16:786.) Filancia then testified to the details Kaczmar told him about his case. (E.g., DA16:786-97.)

Kaczmar admitted (in recorded conversations with Detective Humphrey) that Filancia knew "everything about his case" and they were "friends." (DA16:766, 776-77.)

Lower Court's Ruling

It appears the postconviction court summarily denied this claim for failure to demonstrate either deficient performance or prejudice. (See PCR:1791-92.)

Merits

Kaczmar argues his counsel ineffectively failed to bring out Filancia was in prison for blackmailing men after having homosexual relations with them and taking pictures. This issue is frivolous.

A. No Deficient Performance.

Kaczmar has failed to demonstrate deficient performance given the trial court's pretrial order. Kaczmar's counsel wanted to bring out those details but could not properly do so in light of the trial court's order. There is no deficient performance when counsel cannot legally act.

Kaczmar attempts to get around this obvious point by arguing the State opened the door to Filancia's underlying charges. He argues the State opened the door by introducing testimony that Filancia shared the details of his charges, was on a "friendly basis" with Kaczmar, and believed Kaczmar trusted him. This argument fails for two reasons.

First, it is a novel use of the opening-the-door concept, particularly given the State introduced trial evidence Kaczmar conceded to his relationship with Filancia. (DA16:766; DA16:776-77.) Counsel cannot be ineffective for failing to pursue such a novel

argument. *E.g.*, *Sanchez-Torres v. State*, 322 So. 3d 15, 23 (Fla. 2020).

Second, the State's questioning of Filancia did not open the door to evidence about the precise nature of his underlying charges. The State did not seek to delude the jury about Filancia's convictions or argue they were unimportant. *Cf. McCrae v. State*, 395 So.2d 1145, 1151-52 (Fla. 1980) (holding that a prosecutor was entitled to inquire into the exact nature of a prior felony conviction where defense counsel sought to establish that that prior conviction was inconsequential). The State simply sought to establish that Kaczmar and Filancia were on a friendly basis and talked about their cases together, a fact it later introduced evidence that Kaczmar himself conceded. (DA16:766 (Kaczmar stating Filancia was the only one who "knows everything about my case"); DA16:776-77 (Kaczmar mentioned he and Filancia were friends).

Particularly in light of Kaczmar's concession, which the jury heard, the fundamental underpinnings of the opening-the-door concept—fairness, the truth-seeking function of trial, and precluding misleading testimony—would not require evidence about Filancia's underlying charges. *See Nock v. State*, 256 So. 3d 828, 837 (Fla.

2018) (explaining the underpinnings of the opening-the-door concept). Since the State did not open the door to evidence about the circumstances underlying Filancia's charges, counsel cannot be ineffective for failing to make a meritless argument attempt to bypass the trial court's order. There is no arguable case for deficient performance here.

B. Alternatively, No Prejudice

Kaczmar also clearly suffered no prejudice for two reasons. **First**, assuming the State opened the door to evidence about the facts underlying Kaczmar's charges, the State would have requested a limiting instruction on what that evidence could be used for. The jury would have only properly been permitted to consider whether the evidence underlying Filancia's charges made his testimony Kaczmar confessed to him incredible.

The prejudice problem, for Kaczmar, is the State had evidence that Kaczmar conceded to his relationship with Filancia. (DA16:766 (Kaczmar stating Filancia was the only one who "knows everything about my case"); DA16:776-77 (Kaczmar mentioning he and Filancia were friends). And even if otherwise suppressible, Kaczmar's statements admitting to his relationship with Filancia would have

been admissible if he admitted evidence seeking to delude the jury about that relationship.[22] *See Kansas v. Ventris*, 556 U.S. 586, 593-94 (2009) (statements obtained in violation of the right to counsel are admissible as impeachment); *Nock*, 256 So. 3d at 837 (opening the door is based on considerations of fairness, the truth-seeking function of trial, and preventing parties from misleading the jury).

An objectively reasonable jury considering Kaczmar's recorded admission that Filancia knew everything about his case and that they were friends would not be swayed by an argument that Filancia's underlying crimes made their relationship unlikely. There is no reasonable probability an objectively reasonable jury considering both Kaczmar's statements and the facts undergirding Filancia's crimes would have concluded Kaczmar's relationship with, and confessions to, Filancia were unlikely. So there is also no reasonable

[22] In this respect, Kaczmar's novel opening-the-door argument has an opening-the-door problem of its own. One of Kaczmar's strongest (though still not meritorious) issues is that counsel ineffectively failed to argue his statements to Detective Humphrey should have been suppressed as a violation of his right to counsel. (See Issue 7.) But even assuming those statements were suppressible, Kaczmar's introduction of evidence designed to delude the jury about his admitted relationship with Kaczmar would open the door for the State to introduce evidence that Kaczmar admitted to that relationship.

probability that a jury hearing all of this would have elected to acquit Kaczmar.

Second, the State's case against Kaczmar was overwhelming and arguments about the likelihood of Kaczmar's relationship with Filancia would have fallen on deaf ears from any objective jury that also heard the evidence against Kaczmar. *See supra*, Issue II.B.

There is no arguable case for prejudice here.

9. THE STATE DID NOT VIOLATE *BRADY* BY FAILING TO DISCLOSE FILANCIA DATED THE VICTIM'S DAUGHTER'S FOSTER MOTHER AT SOME UNSPECIFIED POINT.

Relevant Facts

Filancia dated the victim's daughter's foster mother for two to three years at some unspecified point and conveyed that to the prosecution team (Detective Sharman). (PCR:2795-96.) Filancia came forward to police about Kaczmar's statements before learning about the connection between the victim and his former girlfriend. (PCR:2798.) Counsel Shea stated he would not have brought this up even if he had known. (PCR:2782.)

Lower Court's Ruling

The postconviction court found this claim failed *Brady*'s materiality prong. (See PCR:1794-95.)

Merits

Kaczmar alleges the State suppressed information that Filancia dated the victim's daughter's foster mother at some unspecified point in the past. A *Brady* claim requires the defendant to show three elements: "(1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the

State, and (3) because the evidence was material, the defendant was prejudiced." *Sweet v. State*, 293 So. 3d 448, 451 (Fla. 2020).

Brady's second element is not in dispute because Filancia relayed the suppressed material *to part of the prosecution team*: Detective Sharman. *United States v. Stewart*, 433 F.3d 273, 298 (2d Cir. 2006) (Imputation "does not turn on the *status* of the person with actual knowledge, such as a law enforcement officer, prosecutor or other government official. In other words, the relevant inquiry is what the person *did,* not who the person *is*.") (Emphasis in original); *see also Horner v. Nines*, 995 F.3d 185, 205-06 (4th Cir. 2021); *Avila v. Quarterman*, 560 F.3d 299, 307-09 (5th Cir. 2009).

But this issue is still frivolous on *Brady*'s first and third prongs in light of its attenuated nature to Filancia's testimony.

A. No Favorable Evidence

Kaczmar has failed to prove the mere fact that Filancia dated the victim's daughter's foster mother at some unspecified point in the past is favorable evidence under *Brady*. Isolated, highly attenuated connections, like this one, are simply not favorable to the defense. *See Rodriguez v. State*, 39 So. 3d 275, 279-81, 292 (Fla. 2010) (holding the fact that a testifying codefendant was a business partner

and family member of a lieutenant in the prosecuting police department was not favorable evidence).[23] *See also Rimmer v. Sec'y, Fla. Dep't of Corr.*, 876 F.3d 1039, 1055-56 (11th Cir. 2017) (affirming this Court's denial of *Brady* relief based in part on counsel's assessment the information would not have been helpful).

B. Alternatively, Not Material

For much the same reason, Kaczmar has failed to demonstrate materiality. At best, evidence Filancia dated the victim's daughter's foster mother at some unspecified point is de minimis impeachment that cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *See Rodriguez*, 39 So. 3d at 292; *see also Turner v. United States*, 582 U.S. 313, 326 (2017) (holding evidence "that is too little, too weak, or too distant from the main evidentiary points" is not material under *Brady*). That is particularly true given the mountain of overwhelming

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[23] Additional evidence, not presented below, might have changed this analysis. For instance, if there was evidence Filancia's relationship occurred close in time to the victim's murder, and that he also had a friendly relationship with the victim and victim's daughter, that might be favorable evidence. But Kaczmar presented no evidence other than an attenuated connection that occurred at some uncertain point in the past and was not directly tied to either the victim or her daughter.

evidence against Kaczmar, along with the fact that he conceded Filancia knew everything about his case.

10. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO UTILIZE THEIR DNA EXPERT.

Relevant Facts

At the evidentiary hearing, counsel Shea testified he retained Candy Zuleger as a defense expert, but she only confirmed the State's information was accurate and the victim's blood DNA was on Kaczmar's socks. (PCR:2727-31). In counsel's view, Zuleger would have bolstered the State's case and so he did not call her. (PCR:2730, 2783.) While he recognized DNA could come from other bodily fluids, counsel noted the DNA tests were done on the dark blood spots on the socks. (PCR:2732-33.) Counsel did not see any point in emphasizing that Kaczmar was the major donor in some areas. (PCR:2732.) He did not want to argue about whether the victim's DNA on the socks came from a bodily fluid other than blood because there was no evidence to support that. (PCR:2733.) The "number one" most important thing is to keep credibility with the jury and avoid speculative arguments. (PCR:2695-96, 2707, 2711, 2775.).)

Counsel had utilized Ms. Zuleger before and used information she gave him while crossing the State's expert. (PCR:2783-84.) Additionally, Kaczmar admitted he was at home when the victim was

murdered and even wanted to raise self-defense to her killing. (PCR:2761, 2789-92.) The prosecutor (now-judge Colaw) shared counsel's assessment. (PCR:2960-62.) Counsel Shea also testified that he and Kaczmar agreed they did not want the jury to hear about Kaczmar's prior convictions. (PCR:2746-50, 2781, 2786.)

Ms. Zuleger testified that (1) she did not have any photos of the socks to tell what type of stains were tested; (2) there were more samples taken than just one and there was a third donor on four of the ten samples; (3) the tests do not indicate whose blood was on the socks; (4) DNA can come from saliva, sweat, or skin cells; (5) there was nothing improper with the State's testing; (6) there was only testimony about one sample instead of the total ten; (7) Kaczmar was the major donor on some of the samples; (8) the victim was an equal donor or the major donor on four of the ten locations on Kaczmar's socks; (9) it is wrong to say the victim's blood is on Kaczmar's socks because the victim's DNA could have come from some other bodily fluid; (10) the State was wrong to suggest the victim's blood was on Kaczmar's socks in opening; (11) the prosecutor's closing wrongly suggested all ten samples matched the victim; (12) DNA can be mixed together through indirect contact, direct contact, when clothes are

washed together, and when dirty clothes are stored together; (13) the socks should have been refrigerated. (PCR:2901, 2903-12.)

On cross, Ms. Zuleger admitted that the victim was the major contributor on two areas that presumptively tested positive for blood and was a contributor to more areas than just those two. (PCR:2913-14.) She also recognized that DNA profile kits in 2008 were much less sensitive to touch DNA than modern kits, but adhered to her testimony that a full profile from could come from touch DNA. (PCR:2915-16.) Her results indicated the victim matched at more loci than the State's. (PCR:2918.) Finally, she conceded that one possibility is that the victim's blood was on Kaczmar's socks and that the areas where they were equal contributors could be explained by Kaczmar wiping his blood in an area where the victim's blood was. (PCR:2919-20.)

Kaczmar testified and admitted he put his own blood on the socks while he was in the interrogation room because he wanted to make sure police did not plant evidence on the socks/switch them on him. (PCR:2983-86.) He also testified that he and the victim laundered clothes together and kept the clothes together before

washing. (PCR:2987-90.) The victim would sometimes wear clothing that did not belong to her. (PCR:2990.)

On cross, Kaczmar admitted he is a five-time convicted felon and that the victim's blood "shouldn't have been on his socks." (PCR:2994.) He acknowledged his own blood was on his socks before he put his blood on them in the interrogation room. (PCR:2995.) Kaczmar claimed counsel Shea lied when testifying Kaczmar told him that he was in the house when the victim was murdered. (PCR:2999.) He claimed he was up near Jacksonville at 6:00 a.m. on December 13, 2008. But he was photographed getting gasoline miles away from Jacksonville, near his house, just before the fire started, and his cell records confirmed he was not near Jacksonville at that time. (PCR:3003; DA15:526-28; DA16:630-34, 645); *Kaczmar I*, 104 So. 3d at 996-97.

Kaczmar—who is presently under a sentence of death and convicted of first-degree murder—claimed, in sworn testimony, "I am the only one that don't have nothing to gain by all these lies that's coming out." (PCR:3005.)

Marcie Scott, the State's expert, testified: (1) that the testing kits used in 2008 about 100 times less sensitive than modern ones and

were therefore not often used for touch DNA; (2) the samples from Kaczmar's socks all tested presumptively positive for blood and the chance of a false positive was very low; (3) co-mingling/laundered together clothing would not produce the results where the victim was the major contributor; (4) there is a high probability that the DNA from the victim on Kaczmar's socks came from blood; (5) it is preferable that biological evidence (like DNA on Kaczmar's socks) not be refrigerated. (PCR:3016-23.) On cross, Ms. Scott testified blood testing would alert to animal/fish blood, and that if both contributors wore the socks for equal amounts of time and never laundered them it would be possible to detect both people. (PCR:3023-26.)

Kaczmar's guilt-phase jury was instructed that opening and closing arguments were not evidence and it could look to the evidence alone when determining its verdict. (DA14:229; DA17:867, 979-980.)

Lower Court's Ruling

The postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1799-1803.)

Merits

Kaczmar raises about four sub-issues on this issue: (1) failure to object to the State's opening argument that the victim's blood was

on Kaczmar's socks; (2) failure to cross the State's expert on whether the DNA profile could have come from blood/sweat/other bodily fluids; (3) failure to point out Kaczmar was the major donor on some areas; (4) failure to object to the State's closing arguments about the number of sock areas containing the victim's DNA. The State analyzes each in turn for clarity.

A. Failure-to-Object-to-State's-Opening Claim

Kaczmar first argues his counsel should have objected to the State's opening argument that the victim's blood was on the socks. This sub-issue is frivolous.

a. No Deficient Performance

Kaczmar has failed to demonstrate deficient performance. He argues that counsel should have objected during the State's opening argument. But as demonstrated by Marcie Scott's testimony, the State simply argued a reasonable inference in opening that the victim's blood was on Kaczmar's socks. There "is a high probability that the DNA from the victim as the major contributor" was "blood DNA" and there is no scientific issue with saying that. (PCR:3021); see also DA17:705 ("The only reasonable scientific explanation is that that was Maria Ruiz' blood on those socks.").

Kaczmar's argument ties itself in knots to explain why the State was wrong for asserting in *opening argument* that its testing showed the victim's blood was on his socks, but the evidence adduced both at trial and postconviction supported the State's assertion. (PCR:3021; DA17:705.) In evaluating this issue from a reasonable counsel's point of view, it is also important to note that counsel had no reason to doubt that the victim's blood would be on Kaczmar's socks considering she was stabbed nearly a hundred times and Kaczmar initially wanted to raise self-defense. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.").

b. No Prejudice

Kaczmar has also failed to demonstrate prejudice for three independent reasons. **First**, any objection would have been overruled and so there can be no prejudice for failing to make a meritless objection. **Second**, the jury was instructed to rely on the evidence and not the arguments of counsel when making their decision. The State's opening argument would have made zero difference to a

reasonable jury following that instruction. **Third**, the evidence against Kaczmar was overwhelming.

B. Failure-to-Cross-About-Victim-DNA-Origin Claim

Kaczmar next argues his counsel should have crossed the State's expert on whether the profile could have come from sweat/other bodily fluids. This sub-issue is frivolous.

a. No Deficient Performance

Kaczmar has failed to demonstrate deficient performance. Counsel testified he avoided making speculative arguments and wanted to maintain credibility with the jury. There was no evidence in this trial that the victim's DNA on Kaczmar's socks came from anything other than blood and any other argument would have been speculative. Kaczmar did not testify at trial, his testimony below wholly lacked in credibility, and neither Kaczmar nor his counsel wanted the jury to learn he was a convicted felon. Having him testify would have gone against the strategy he and counsel agreed on, which defeats any deficient performance claim.

Kaczmar's reliance on general statements that DNA could get on a pair of socks in many ways does not mean his proposed argument is not speculative. There was, again, nothing Shea had to

utilize to say the particular DNA at issue here came from anything other than blood. Indeed, there "is a high probability that the DNA from the victim as the major contributor" was "blood DNA" and there is no scientific issue with saying that. (PCR:3021); see also DA17:705 ("The only reasonable scientific explanation is that that was Maria Ruiz' blood on those socks.").

b. No Prejudice

Kaczmar has also failed to demonstrate prejudice for three independent reasons. **First**, a speculative argument with no support from any of the evidence that the victim's DNA came from her wearing Kaczmar's socks and sweating in them does not give rise to a reasonable probability of a different verdict from an objectively reasonable jury. **Second**, had counsel made an issue of this, the State would simply have put on the evidence it utilized in postconviction that there "is a high probability that the DNA from the victim as the major contributor" was "blood DNA" and there is no scientific issue with saying that. (PCR:3021). **Third**, the evidence against Kaczmar was overwhelming.

C. Failure-to-Point-Out-Kaczmar-Was-the-Major-Donor-on-some-Sock-Areas Claim

For his next frivolous sub-issue, Kaczmar argues his counsel ineffectively failed to point out that Kaczmar was the major donor to some of the areas on the sock that also had the victim's DNA on it. No reasonable counsel would ever have made this point. This argument is much closer to ineffectiveness than competence.

a. No Deficient Performance

Kaczmar has failed to demonstrate deficient performance. His trial counsel did not see any point in emphasizing that Kaczmar was the major donor in some areas. The socks belonged to Kaczmar, and he was caught on video rubbing his blood onto them during his interview, so why his DNA on them would be relevant to any defense counsel is beyond comprehension. Counsel's position is reasonable, particularly since even Kaczmar's own expert conceded that the victim's DNA was on Kaczmar's socks.

b. No Prejudice

Kaczmar has also failed to demonstrate prejudice for two reasons. **First**, an objectively reasonable jury would not have acquitted Kaczmar had they learned he was a major contributor to

DNA on several areas of the socks he was wearing and the victim was the major contributor (or an equal contributor) to four other areas on those same socks. It is unclear why Kaczmar thinks this is even a helpful point considering he was wearing the socks, and intentionally bled on them on video. It is no surprise that his DNA was on them. **Second**, more generally, the evidence against Kaczmar was overwhelming.

D. Failure-to-Object-to-Closing-Argument Claim

For his final frivolous sub-issue, Kaczmar argues his counsel ineffectively failed to object to the State's closing argument that the victim was the major contributor to all ten sock areas tested. Kaczmar concedes the victim was the major contributor to two areas.

a. Unpreserved

Kaczmar's argument that counsel ineffectively failed to **object** to the State's **closing** argument was not raised in his 3.851 motion and is therefore unpreserved. *E.g.*, *Jackson v. State*, 347 So. 3d 292, 300 (Fla. 2022) (failure to raise specific ineffectiveness claim in the operative 3.851 motion renders it waived).

In Claim 8, Kaczmar's 3.851 motion argued DNA-related ineffectiveness for: (1) not objecting "to the State's statements in

opening that the victim's blood was found on Mr. Kaczmar's socks"; (2) not crossing Ms. Lam on the possibility that the DNA profiles could have come from "blood, sweat, or" another type of "bodily fluid"; (3) not crossing Mr. McElfresh on whether the victim's DNA could be from some other bodily fluid; (4) not calling Zuleger to testify; (5) not arguing the "victim had worn the socks and sweat in them prior to Mr. Kaczmar wearing them and bleeding in them"; (6) not questioning Lam on the different areas tested; (7) not pointing out the State "cherry picked" its data to use only the areas of the sock where the victim was the major contributor. (PCR:447-449).

These seven, mostly single-sentence ineffectiveness claims, were pled in egregious violation of Florida Rule of Criminal Procedure 3.851(e)(1). *See Brown v. State*, 304 So. 3d 243, 272 (Fla. 2020) (explaining the rule requires that each "claim or subclaim shall be separately pled"). Kaczmar's jumbled pleading and decision to throw (at least) seven ineffectiveness claims into a single "claim" should not be tolerated by this Court.

But setting that aside, nowhere does Kaczmar ever argue counsel ineffectively failed to **object** to the State's **closing** argument. He has therefore failed to preserve this issue and waived it. *E.g.*,

Jackson, 347 So. 3d at 300. To the extent this claim is found somewhere in the penumbras of Kaczmar's single-sentence claims, he has waived it by failing to comply with Florida Rule of Criminal Procedure 3.851(e)(1). This Court should not tolerate such gamesmanship and definitively hold this claim waived.

b. No Deficient Performance

Kaczmar has failed to demonstrate deficient performance for two reasons. **First**, it does not appear he ever asked counsel why he did not object to the State's closing argument. *Dunn v. Reeves*, 141 S. Ct. 2405, 2410-14 (2021) (recognizing the burden of rebutting the presumption counsel was effective rests exclusively with the defendant and that the absence of evidence cannot overcome the presumption); *cf. Bright*, 200 So. 3d at 740 n.15 (recognizing "failure to present" a "witness during" an "evidentiary hearing constitutes waiver"). **Second**, reasonable counsel could have decided it did not matter whether the State was right or wrong about how many areas the victim matched on Kaczmar's socks because no one (either at trial or in postconviction) disputes that her DNA was on his socks. Reasonable counsel could easily decide that this was not a fight worth having because it would simply refocus the jury (to no effect)

on the fact that both Kaczmar's and the victim's DNA was found on Kaczmar's socks, and there "is a high probability that the DNA from the victim as the major contributor" was "blood DNA." (PCR:3021); DA17:705 ("The only reasonable scientific explanation is that that was Maria Ruiz' blood on those socks.").

c. No Prejudice

Kaczmar has also failed to demonstrate prejudice under *Strickland*. His myriad arguments about non-evidence-related issues (like this closing argument claim) demonstrate one thing and one thing only: a fundamental misunderstanding of *Strickland*.

Missed closing-argument objections will **never** (at least where the jury is properly instructed) amount to *Strickland* prejudice because *Strickland*'s analysis requires this Court to presume the "jury acted according to law" and "reasonably, conscientiously, and impartially" applied the standards governing its guilt-phase decision. *Strickland*, 466 U.S. at 695. Those standards include the court's explicit instructions to Kaczmar's jury that the arguments of counsel are not evidence and that the jury's guilt-phase decision must be based on the evidence alone. (DA14:229; DA17:867, 979-980.)

There is no reasonable probability the jury violated its oath and instructions and found Kaczmar guilty based on the State's non-evidence arguments rather than the evidence in this case. *See Sanders v. State*, 946 So. 2d 953, 959 (Fla. 2006). There is therefore no reasonable probability that the jury would have returned a different verdict had Kaczmar's counsel objected that the victim's DNA was "only" found on two areas of Kaczmar's socks instead of ten.

This Court should take this opportunity to return *Strickland* to its proper station: focusing on *evidence* the jury should have heard and did not, or *evidence* the jury should not have heard that it did. Unless counsel's failure involved one of those two situations, *Strickland*'s proper prejudice analysis will never be satisfied as a matter of law. Recognizing, and limiting, *Strickland* to its intended office will aid this Court in honoring the Florida Constitution's promise of prompt finality to victims. *See* Fla. Const. art. I, § 16(b)(10) (providing Florida's victims with the right to proceedings "free from unreasonable delay, and to a prompt and final conclusion of the case and any related postjudgment proceedings" and requiring all capital "collateral attacks on any judgment" to be complete "within five years from the date of appeal in capital cases").

There is no arguable case for deficient performance or prejudice on these frivolous issues.

11. Kaczmar's Counsel Did Not Ineffectively Fail to Challenge the Chain of Custody for Kaczmar's Socks.

Relevant Facts

At the evidentiary hearing, counsel Shea testified he watched the video of Kaczmar's interview and saw Kaczmar trying to get his blood on the socks. (PCR:2736.) He had never had any issues with this police department. (PCR:2737.) He also compared the socks to the pictures and did not see new stains. (PCR:2785.) In his assessment, he did not have a chain of custody issue and it would not have helped to raise one. (PCR: 2738, 2785.) He was primarily concerned with keeping credibility with the jury and avoiding speculative arguments. (PCR:2695-96, 2708, 2711, 2775.)

Detective Sharman testified that he took the socks from Kaczmar on 12/13/2008 and put them into the evidence unit three days later. (PCR:2834.) This is common because murder cases move very quickly, and the evidence was taken from Kaczmar late Saturday evening. (PCR:2843-45.) Sharman put the socks in one bag and the jacket in another and locked them securely in his office filing cabinet. (PCR:2834-35, 2843-44.) The items were separately packaged but not refrigerated. (PCR:2834, 2859.)

The evidence was kept secure in Sharman's office with four barriers to entry: (1) the filing cabinet lock (only Sharman had the key to his cabinet); (2) his office lock (only he and a supervisor had a key to that); (3) the main office robbery homicide access; and (4) the outside robbery homicide lock for the building. (PCR:2844-45.) Not even the cleaning crew has access to Sharman's office or filing cabinet. (PCR:2845.) It is common during a rapidly evolving murder case to secure evidence like this while the officers continue to work. (PCR:2845.)

Sharman kept the socks in his possession until delivering them to Detective Monson. (PCR:2846, 2850.) The evidence was consistently handled separately and never mixed together. (PCR:2846.) Monson tested the socks and they presumptively tested positive for blood. (PCR:2852.)

Detective Matos testified he did not submit the socks into evidence. (PCR:2854.) He explained that he may have filled out a processing request, but that Sharman was actually the one in possession of the socks. (PCR:2855–56.) It often happens that officers in the robbery/homicide unit do paperwork for each other. (PCR:2856-57.)

Matos also had items collected from the victim, including a DNA card, jewelry, and fingernail clippings. (PCR:2858.) These items were stored in his office, packed separately, and not refrigerated before submission. (PCR:2858-59.) He and Sharman gave the evidence in their possession to an evidence custodian who submitted it to FDLE. (PCR:2858.)

At trial, Kaczmar's jury was instructed that opening and closing arguments are "not evidence." (DA14:229; DA17:867.) The jury was also instructed its guilt-phase decisions must be based on the evidence presented, and it could only find Kaczmar guilty if the State's evidence overcame Kaczmar's presumption of innocence beyond reasonable doubt. (DA17:979-980.)

Lower Court's Ruling

The postconviction court found no deficient performance under *Strickland* because there was no evidence of a chain of custody violation. (See PCR:1803-05.)

Merits

Kaczmar argues his counsel ineffectively failed to (1) move to suppress the socks on a chain-of-custody theory or, alternatively, (2) argue the chain of custody issue to the jury. These issues are frivolous.

A. IAC-Failure-to-Suppress Claim.

Kaczmar first argues his counsel should have moved to suppress the socks due to a chain-of-custody violation. In addition to the normal IAC framework, an IAC claim alleging ineffective failure to file a motion to suppress must show that the motion was "meritorious" and that "there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

a. No Deficient Performance

Kaczmar has failed to demonstrate deficient performance for two reasons. **First**, he is raising a novel, and quite frankly specious, argument (without any supporting caselaw) that *his own tampering* with the socks was sufficient to raise a chain of custody issue. Far from being grounds for suppression, Kaczmar's tampering was evidence of his consciousness of guilt and readily admissible. *E.g.*,

United States v. Clark, 24 F.4th 565, 580 (6th Cir. 2022). It makes absolutely no sense to suppress evidence based on a defendant's own actions in tampering with it before police have full control over it. Reasonable, competent counsel could easily have chosen not to move to suppress based on this novel, head-scratching theory.

Second, more generally, there was no evidence of a chain of custody violation when the evidence is viewed in the light most favorable to the State as required now that the issue is on appeal and Kaczmar is arguing the lower court's suppression ruling was wrong. *E.g.*, *Cruz v. State*, 320 So. 3d 695, 712 (Fla. 2021). Kaczmar's own tampering does not count in an accurate chain-of-custody analysis because his own tampering is evidence of consciousness of guilt occurring prior to police taking custody of the socks. And there is competent, substantial evidence that Sharman (and only Sharman) had the socks from the time police received them into custody and until they were delivered to Monson for testing and then to FDLE. Counsel cannot be deemed deficient for failing to file a frivolous motion to suppress the socks.

b. No Prejudice

Kaczmar has also failed to demonstrate prejudice due to the overwhelming evidence against him even absent the socks.

B. IAC-Failure-to-Make-Chain-of-Custody-Jury-Argument Claim.

Kaczmar next faults his counsel for failing to argue the chain-of-custody issue to the jury. But every reasonable counsel would have avoided making the argument Kaczmar now urges.

a. No Deficient Performance.

Kaczmar has failed to demonstrate deficient performance. The main "tampering" Kaczmar asserts on appeal is his own tampering with the socks. The simple truth is every reasonable counsel would have steered as far clear as possible from highlighting Kaczmar's consciousness of guilt. Any other argument that the socks were tampered with by police would have been based on sheer speculation of exactly the type any objectively reasonable counsel would have sought to avoid, particularly where his arguments would not have been evidence. There is no deficient performance here.

b. No Prejudice.

Kaczmar has failed to demonstrate prejudice. Counsel's closing arguments would not have been evidence and would not have been persuasive to an objectively reasonable jury because they would have rested on complete speculation that the socks were tampered with by police. Kaczmar's speculative, non-evidence arguments do not give rise to a reasonable probability that an objectively reasonable jury would have acquitted Kaczmar had counsel made them. Closing arguments, as a matter of law, will never sway an objectively reasonable jury because closing is not evidence. *Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). There is no arguable case for prejudice on this frivolous issue.

12. Kaczmar's Counsel Did Not Ineffectively Fail to Challenge Detective Matos' Cell-Tower Evidence.

Relevant Facts

At trial, Detective Matos testified Kaczmar made four calls "consistent with" him being at home between 10:53p.m.-1:41a.m. on the night of the murder. (DA16:649.) Post-*Miranda*, Kaczmar stated he was at home chilling and watching a movie from about 11:00/11:30 on 12/12/2008, until at least 2:00 a.m. the next day when he went fishing. (DA15:575-82.) Kaczmar stated he left to go fishing on Hecksher Drive between 2:00 and 3:00 a.m. and that the victim was asleep when he left. (DA15:550-52, 572, 582.) He stated he arrived at his fishing spot around "3:30, 3:45" a.m., and that it took about 30 minutes to get there from his house. (DA15:587.) Calls—which are not challenged in this issue—beginning at 6:26 a.m. showed Kaczmar in the Green Cove area of his home, traveling toward Jacksonville, and returning to his home location by 7:31 a.m. on 12/13/2008. *Kaczmar I*, 104 So. 3d at 995-96. These latter calls "contradicted Kaczmar's statements to police that he had been in Jacksonville all morning." *Id.* at 996.

At the evidentiary hearing, counsel testified that Kaczmar admitted he was at home when the victim was murdered and even wanted to raise self-defense to her killing. (PCR:2761, 2789-92.)

John Sawicki analyzed Matos' cell phone testimony and stated his only concern was that counsel did not bring out that the four calls between 10:53p.m.-1:41a.m were "consistent with" Kazmar being anywhere within a two-and-a-half to seven mile radius around his home. (PCR:2883-85, 2887-88.) On cross, Sawicki conceded that a defense attorney would not want to make it look like his client was lying if the client admitted to being home during the time when the calls originated. (PCR:2890-91.)

Lower Court's Ruling

The postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1825-26.)

Merits

Kaczmar argues his counsel ineffectively failed to investigate and present evidence that the calls Kaczmar made between 10:53p.m.-1:41 a.m. on the night of the murder were consistent with both him being at home and not being at home at that time. This issue is beyond frivolous.

A. No Deficient Performance

Kaczmar has failed to present a non-frivolous case for deficient performance. He told counsel he was home when the victim was murdered and there was no reason for counsel to investigate the cell tower data for the four challenged calls (between 10:53p.m. and 1:41a.m.) further. *Strickland*, 466 U.S. at 691 (counsel need not investigate further when his client has given him reason to think further investigation would be fruitless). This is especially true because the most damning and conclusive evidence in this case (the screaming match heard by Ferrell, the house fire, Kaczmar's lie that he went fishing sometime after 2:00 a.m., the pictures/surveillance of him purchasing gasoline near his house, etc.) happened after 2:00 a.m.

Bluntly, no one cared about proving where Kaczmar was before 2:00 a.m., particularly since Kaczmar gave a post-*Miranda* statement where he admitted he was at home from about 11:00 p.m. until at least 2:00 a.m. (DA15:575-82.) It goes without saying that a reasonable attorney could decide not to make his client look like a liar with a guilty mind, particularly when the trade-off benefit of that

position is nonexistent. There is no arguable case for deficient performance on this non-issue.

B. Alternatively, No Prejudice

There is also no arguable prejudice. Introducing testimony that the State's cell tower evidence between 10:53 p.m. on December 12th and 1:41 a.m. on December 13th was consistent with more than just Kaczmar's home location would hardly have left any objectively reasonable jury *any* doubt, much less a reasonable doubt, as to Kaczmar's guilt. The testimony introduced by the state essentially conceded the point Kaczmar wants to argue now. (See DA16:649 (Detective Matos testifying these four calls were "consistent with" Kaczmar being at home, not that they showed he was definitively at home).) Kaczmar stated he left home around 2:00 a.m. at the earliest, the shouting match he participated in around his home occurred around 5:00/5:30 a.m., he was caught on camera/video getting $2 worth of gas near his house at 5:59 a.m., and his house burned down between 6:00 a.m. and 6:10 a.m. There is absolutely no conceivable prejudice on this utterly frivolous issue.

13. Kaczmar's Counsel Did Not Ineffectively Fail to Object to the State's Drug-Use Argument in Closing (Summarily Denied).

Relevant Facts

Before trial, Kaczmar's trial counsel elected not to "resist any evidence of" a drug crime and noted they might even introduce evidence of Kaczmar's illegal drug use as part of the defense. (DA10:1780.) Kaczmar agreed with this trial strategy. (DA10:1781.) At trial, Kaczmar personally confirmed he wanted to introduce evidence of his drug use after a colloquy with the court. (DA14:237-38.)

The State began its closing arguments by noting there were only two ways to prove first-degree murder: premeditation and felony murder. (DA17:870-71.) The State then made the following argument to head off any argument about Kaczmar's drug use negating premeditation:

> The Judge is going to instruct you on the law about voluntary intoxication because you've heard evidence that the defendant was using crack cocaine that night and the Judge is going to tell you that voluntary intoxication resulting from a consumption, injection or other use of alcohol or a controlled substance including cannabis and or crack and or powder cocaine is not a defense to any offense that he's charged with.
>
> Beyond that evidence that the defendant – of the

> defendant's voluntary intoxication is not admissible to show he lacked the specific intent to commit any offense and is not admissible to show that the defendant was insane at the time of the offense. It's not a defense.
>
> You go up 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 go 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 is telling you. That's not an excuse. You are not to consider that.
>
> As you heard the testimony over the last two days if at any point in your mind that ever entered into it where you said, well, maybe that's a defense then purge it. Get rid of it because it's not and that's the law. That's what you have to follow. That's not an excuse.

(DA17:883-84.) Kaczmar's counsel did not object to these arguments. The State's rebuttal argument repeated there were only two ways to convict for first-degree murder: premeditation and felony murder. (DA17:950-52.)

The court's final instructions told the jury that the State was required to prove either premeditation or felony murder beyond reasonable doubt to obtain a first-degree murder conviction, and that voluntary intoxication does not negate premeditation and was not a defense to any crime Kaczmar was charged with. (DA17:972-74, 979.) These instructions also required the jury to "follow the law as it is set

out in these instructions" and warned that failure "to follow the law" would make its verdict "a miscarriage of justice." (DA17:983-84.)

Lower Court's Ruling

The postconviction court summarily denied this issue because Kaczmar agreed with counsel's strategy. (See PCR:1808-12.)

Merits

Kaczmar argues his counsel ineffectively failed to object to the State's closing drug-use arguments. This issue is entirely frivolous.

A. Failure to Rebut the Lower Court's Reasoning

The circuit court explicitly held that Kaczmar's consent to counsel's strategic decision to introduce drug-use vitiated any "claim of ineffectiveness for failure to object to . . . the State's statements regarding drug use." (PCR:1812.) Kaczmar's failure to explain why the lower court incorrectly, summarily denied this claim based on his conclusively-demonstrated consent operates to waive that issue on appeal and requires affirmance. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680-83 (11th Cir. 2014) (affirming issue where appellant failed to challenge a district court's alternative, independent basis for its decision); *State v. J.V.*, 184 So. 3d 662, 662 (Fla. 1st DCA 2016) (recognizing courts are constrained to affirm

when an appellant fails to challenge an independent basis the court below specifically used to reach its decision).

B. No Deficient Performance

Kaczmar's allegations below conclusively failed to demonstrate deficient performance because the State's arguments were not objectionable. Kaczmar zeroes in on an out-of-context statement that (in his skewed view) lessened the State's burden of proving premeditation beyond reasonable doubt. But read in its full context, it is clear that the State simply, and permissibly, was arguing that drug use is not a defense to any crime and does not negate specific intent. (DA17:870-71, DA17:883-84, DA17:950-52.) Since this argument was not objectionable, as a matter of law, counsel cannot be deficient for failing to object and summary denial was appropriate.

C. Alternatively, No Prejudice

Kaczmar also clearly suffered no prejudice because an objectively reasonable jury acting according to law would have followed the court's explicit instructions over any ambiguous, contrary closing argument. The court's instructions told the jury: (1) the State was required to prove either premeditation or felony murder beyond reasonable doubt to obtain a conviction; (2) voluntary

intoxication was not a defense and did not negate premeditation; and (3) it was required to follow the instructions. (DA17:972-74, 979, 983-84.) There is no risk an objectively reasonable jury following these instructions would (as Kaczmar speculatively claims) have lessened the State's burden of proof and found Kaczmar guilty of first-degree murder simply because someone died as a result of his drug use. Kaczmar cannot demonstrate prejudice as a matter of law.

This claim was properly summarily denied below and is frivolous on appeal.

14. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO OBJECT TO FOUR SEPARATE STATE CLOSING ARGUMENTS (SUMMARILY DENIED).

Kaczmar blithely asserts his counsel ineffectively failed to object to four different closing-arguments/statements by the State: (1) a statement Kaczmar speculates invited the jury to disregard their oath and form definitive and fixed opinions on the evidence before deliberations; (2) a statement that omitted the fact that reasonable doubt can arise from the evidence itself; (3) an argument that the reasonable-doubt question was whether what the State presented was sufficient to convince the jurors that Kaczmar committed the crimes rather than simply whether the State could have presented more evidence; and (4) an argument that reasonable doubt must negate an element of the offense.

The State analyzes all four of these *separate* failure-to-object claims *separately* for analytical clarity instead of joining Kaczmar and serving up another kitchen-sink-IAC-failure stew for this Court.

Nonetheless, a threshold argument is appropriate here. Apart from the merits, all four of these sub-issues are poorly raised, conclusory, and frivolous. Kaczmar cites no authorities these arguments were objectionable, makes nothing more than conclusory

argument that the State's comments were objectionable, and does not even try to argue prejudice in any noticeable way. This Court should therefore reject each of these failure-to-object claims as poorly briefed and conclusory for reasons it explained nearly seventy years ago:

> It is elementary that when a decree of the trial court is brought here on appeal the duty rests upon the appealing party to make error clearly appear. An appellant does not discharge this duty by merely posing a question with an accompanying assertion that it was improperly answered in the court below and then dumping the matter into the lap of the appellate court for decision. Under such circumstances it must be held, as we now hold here, that we are under no duty to answer the question.

Lynn v. City of Fort Lauderdale, 81 So. 2d 511, 513 (Fla. 1955). *See also Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal."). But this Court should also reject Kaczmar's claims on the merits by issuing explicit no deficiency and no prejudice holdings too. *See Hammond v. Hall*, 586 F.3d 1289, 1331 (11th Cir. 2009) (explaining each overarching reason (no prejudice and no deficient performance) for a state-court rejection of an IAC claim is due deference in federal court).

Relevant Facts

The court instructed the jury before opening arguments that it "should not form any definite or fixed opinion on the merits of the case until you have heard all the evidence, the arguments of the lawyer, and instructions by me." (DA14:230.) Later, the court instructed the jury that closing arguments were not evidence. (DA17:867.)

The State made the following comments in its guilt-phase closing argument: (1) with "respect to the evidence over the last couple days I am sure that each of you have already determined in your mind what the facts surrounding December 13th of 2008" are, and "in a few moments you are going to go back to that jury room and collectively decide on what the facts are about December 13th of 2008"; (2) the "Court will tell you that reasonable doubt can arise from lack of evidence or conflicts in evidence"; (3) "When you're thinking about lack of evidence, what the question you should be asking yourselves is not 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?"; (4) If "you can't" resolve the doubt "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 reasonable doubt." (DA17:912-13.) The State itself recognized it had the burden of showing Kaczmar's guilt beyond reasonable doubt and emphasized the jury must follow the court's instructions. (DA17:868-69.) And Kaczmar's counsel took on the State's reasonable-doubt arguments in their own closing argument. (DA17:945-47.)

The trial court thoroughly instructed the jury on reasonable doubt and the State's burden, and also warned the jury that its guilt-phase determinations had to be made exclusively based on the trial evidence. (DA17:972-73, 979-81, 983-84, 988.) It told the jury that "reasonable doubt" may "arise from the evidence, conflict in the evidence, or lack of evidence." (DA17:980.) The court's instructions also required the jury to "follow the law as it is set out in these instructions" and warned that failure "to follow the law" would make its verdict "a miscarriage of justice." (DA17:983-84.)

Lower Court's Ruling

The postconviction court summarily rejected this claim by finding neither deficient performance nor prejudice under *Strickland*. (See PCR:1812-13.)

Merits

A. IAC-Failure-to-Object Claim 1

Kaczmar first (briefly) argues his counsel ineffectively failed to object to the following comment by the State: with "respect to the evidence over the last couple days I am sure that each of you have already determined in your mind what the facts surrounding December 13th of 2008" are, "and, in a few moments you are going to go back to that jury room and collectively decide on what the facts are about December 13th of 2008." (DA17:868.)

a. No Deficiency

Kaczmar's allegations conclusively fail to demonstrate a Sixth-Amendment deficiency for two reasons. **First**, in context, the State's comment was not objectionable. The State did not invite the jury to do anything and simply recognized each juror would have formed an opinion as to the facts of the case by then. That does not mean the opinion was "definite and fixed," or immoveable, hence the State's

follow up comment that the jury would have to "collectively" decide what the facts are during deliberations. Counsel cannot be deficient for failing to object to an unobjectionable statement.

Second, reasonable counsel could easily choose to ignore a comment like this one that does not invite the jury to do anything and where the court has instructed the jury not to form definite and fixed opinions. No evidentiary hearing was required because just about any reasonable counsel would take this position, and *Strickland* only "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *See Harrington v. Richter*, 562 U.S. 86, 110 (2011) ("*Strickland,* however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind."). In a situation like this one, where counsel's actions are reasonable as a matter of law and regardless of what he would say, no evidentiary hearing is required because the claim automatically fails. *Cf. Hannon v. State*, 941 So. 2d 1109, 1138 (Fla. 2006) (no evidentiary hearing required when the reason counsel did not act is obvious from the face of the record).

b. No Prejudice

Kaczmar's allegations also conclusively fail to demonstrate prejudice for two reasons. **First**, *Strickland* presumes the jury followed the court's instructions that they were not to form any definite and fixed opinions on Kaczmar's case, regardless of whatever the prosecutor stated in closing argument. *See Strickland*, 466 U.S. at 694.

Second, there is no reasonable argument, and Kaczmar has not even attempted to present one, that the absence of this comment by the State, or successful objection by counsel, would have created a reasonable probability that an objectively reasonable jury would not have found Kaczmar guilty of first-degree murder. There is no conceivable prejudice—as defined by *Strickland*—here. *See id.* at 695.

B. IAC-Failure-to-Object Claim 2

Kaczmar next takes issue with counsel's failure to object when the State omitted that reasonable doubt could come from "the evidence itself" while stating the court would tell the jurors that reasonable doubt can arise from "the lack of evidence or conflicts in the evidence."

a. No Deficiency

Kaczmar's allegations conclusively fail to demonstrate a Sixth-Amendment deficiency. **First**, the State's comments were not objectionable. The court would in fact tell the jury that reasonable doubt could arise from the lack of evidence or conflicts in the evidence and the State could choose to focus its arguments there instead of in an area where reasonable doubt was unlikely in this case (the evidence itself).

Second, reasonable counsel can choose to ignore comments like this one that will be clarified by the court's own instructions. Trial counsel in a murder case have better things to do than nit-pick arguments that will be clarified later by the court anyway.

b. No Prejudice

Kaczmar's nit-picking allegations also conclusively fail to pass *Strickland*'s prejudice barrier (again) for two reasons. **First**, the court, in fact instructed the jury that reasonable doubt could arise from the evidence itself. Since *Strickland* presumes the jury evaluated reasonable doubt from the evidence and did not find any, there is no arguable prejudice here. *See Strickland*, 466 U.S. at 694.

Second, Kaczmar's prejudice allegations are again absent and impossible to imagine. It is utterly inconceivable that any objectively reasonable jury acting according to law would have found Kaczmar not guilty of first-degree murder if the State had not made this argument, or if counsel objected and had the court issue a duplicative instruction to its final instructions that reasonable doubt can arise from the evidence.

C. IAC-Failure-to-Object Claim 3

For his third sub-issue, Kaczmar argues that his counsel should have objected when the State argued the reasonable-doubt question was whether "what was presented sufficient" to "convince me that this man committed these crimes?" and not merely whether the State could have provided more evidence.

a. No Deficiency

Kaczmar's allegations conclusively fail to demonstrate a Sixth-Amendment deficiency for two reasons. **First**, the State's comments, in context, were not objectionable. The State owned its beyond-reasonable-doubt burden and told the jury to follow the court's instructions. (DA17:868-69.) No fair reading of the comments Kaczmar complains about vitiated that burden. Instead, the State

was pointing out that the mere fact it could have introduced more evidence does not mean the evidence presented was not sufficient to prove the case against Kaczmar beyond reasonable doubt. (See DA17:912.) That is both a correct statement of law and a salient point to make considering Kaczmar's argument was reasonable doubt emerged from the lack of testing. (See DA17:944-46, 961-63.)

Second, reasonable counsel can choose not to nit-pick closing arguments when the court will later fully explain the State's burden. Reasonable trial counsel are not rabbits eager to hop at of their chairs at the whiff of an objection, particularly when the issue will be later cured or is unimportant. *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009) (recognizing counsel often forgo technical violations of the confrontation clause to avoid "antagoniz[ing] the judge or jury by wasting their time").

b. No Prejudice

Unsurprisingly by now, there is no arguable case for prejudice here for two reasons. **First**, Kaczmar's guilt-phase jury was fully instructed on the State's burden and reasonable doubt and is conclusively presumed to follow the court's instructions, not the

State's closing argument to the extent it could have left any misimpression. *See Strickland*, 466 U.S. at 694.

Second, there is no reasonable probability the omission of this comment, or an objection and curative instruction, would have caused an objectively reasonable juror to find Kaczmar not guilty of first-degree murder. Kaczmar's case was not a close one and the minor nature of the "error" he supposes occurred would have done nothing to change that.

D. IAC-Failure-to-Object Claim 4

For his final ill-briefed sub-issue, Kaczmar argues his counsel should have objected to the State's argument that "if you can't" resolve conflicts in the evidence "then you have to ask yourselves does" the conflict "negate one of the elements of any of these offenses. If it" does "that's reasonable doubt. If it doesn't that's not reasonable doubt."

a. No Deficiency

Kaczmar's allegations conclusively fail to demonstrate a Sixth-Amendment deficiency. The State has the burden of proving the elements of an offense beyond reasonable doubt to obtain a

conviction. In this case, that was all.[24] Conflicts in the evidence arise all the time on ancillary issues (was the getaway car grey or silver for instance) and the State is perfectly justified in pointing out those minor conflicts should not provide reasonable doubt unless they negate an element of the offense.

b. No Prejudice

Kaczmar's allegations also failed to demonstrate prejudice for the same two reasons the rest of his sub-issues fail. **First**, the jury was properly instructed on reasonable doubt and *Strickland* presumes they obeyed the court's instructions rather than the prosecutor to the extent there was any inconsistency between the two. **Second**, there is no reasonable probability an objectively reasonable jury would have switched to not guilty of first-degree murder if Kaczmar's counsel did what he now says should have been done. Kaczmar's failure to make any prejudice related argument, and the lack of any conceivable prejudice, requires affirmance.

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[24] If an affirmative defense were raised, the State would also have the burden of disproving it beyond reasonable doubt. But Kaczmar did not raise any affirmative defense separate from the elements of the offense. Heat of passion to negate premeditation does not count because the State already has the burden of proving premeditation beyond reasonable doubt.

The only argument Kaczmar proves by this issue is that "appellate overkills are counter-productive" and make appeals "unnecessarily tedious." *See Yanes v. State*, 418 So. 2d 1247, 1249 (Fla. 4th DCA 1982). But that was probably his intent all along. *See Rhines v. Weber*, 544 U.S. 269, 278 (2005) (recognizing "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death").

15. THE STATE DID NOT VIOLATE *GIGLIO* BY FAILING TO EITHER DISCLOSE/INTRODUCE EVIDENCE ABOUT FILANCIA'S LOWEST POSSIBLE SENTENCE OR CORRECTING FILANCIA'S LAWYER'S TESTIMONY IN KACZMAR'S 2010 GUILT-PHASE.

This is a confused issue raising a purported violation of *Giglio*/*Napue* for State *non-disclosure* of information regarding Filancia's lowest possible sentence and seemingly separate failure to correct testimony about Filancia's sentence from Filancia's lawyer. In other words, this issue appears to contain a *Brady* claim disguised as a *Giglio* claim and a *Giglio* claim, both of which should have been analyzed separately. *Cf.* Fla. R. Crim. P. 3.851(e)(1).

That being said, Kaczmar disclaims any reliance on *Brady* and affirmatively states "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." This Court should find Kaczmar has therefore waived any potential *Brady* claim and analyze his arguments under *Giglio* as he proposes, as strange as that is. *See Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003) ("By contrast to an allegation of suppression of evidence under *Brady,* a *Giglio* claim is

based on the prosecutor's knowing presentation at trial of false testimony against the defendant.").

Apart from being confused, both "*Giglio*" claims raised by Kaczmar are frivolous.

Giglio *Standard*

"To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false" or misleading; (2) the prosecutor knew the testimony was false" or misleading; and (3) the statement was material." *Guzman*, 868 So. 2d at 505; *United States v. Segurola*, 484 F. Appx. 349, 354 (11th Cir. 2012). Once the first two prongs are established, the burden shifts to the State to demonstrate that its knowing presentation of false evidence was harmless beyond a reasonable doubt. *Guzman*, 868 So. 2d at 506-08. Lack of testimony does not meet *Giglio*'s false/misleading testimony prong where the actually-provided testimony is accurate. *Truehill v. State*, 358 So. 3d 1167, 1184 (Fla. 2022).

Relevant Facts

During Kaczmar's guilt-phase opening arguments, the State told the jury that William Filancia was a three-time convicted felon, was facing a maximum life sentence, and that he entered a plea with

a 0-20-year sentence cap in exchange for his truthful testimony. (DA14:269.)

Filancia testified at trial that he was facing charges where he could be sentenced to life in prison. (DA16:780.) In exchange for his truthful testimony, he received a cap of 20 years on what the State would seek. (DA16:780-81; DA17:814-15.) Filancia freely admitted that he received a benefit for giving testimony against Kaczmar. (DA16:805; DA17:815, 827-28.) But he had been offered the same deal prior to coming forward about Kaczmar. (DA17:828.) Filancia's written plea contained an express warning that he could be subject to indefinite civil confinement under Jimmy Ryce. (PCR:1043.)

Later, when defense counsel asked Filancia's lawyer about his deal and how it came about that Filancia would only get 0 to 20 years, Kuritz gave the following convoluted answer:

> The guidelines. I mean there's a number of factors that go into a sentence or sentencing range. Just because a person has a life felony or a first degree felony, a 15 or 30-year offense, doesn't mean that's what they're going to get. There's guidelines as you know in the State of Florida. They'll calculate a numbers game crunch and then give you a range, and so that's -- wasn't necessarily looking at life but potential on the table, but to try to answer your question, sure, I mean everybody in jail who's ever been there knows that you can cooperate or provide substantial assistance in a case that it may benefit you in your own

case. Does that answer your question?

(DA17:834-35.) In closing, the State noted Filancia was facing life and getting the benefit of a 0-20-year cap due to his testimony in this case. (DA17:899-901, 929, 942.)

At the evidentiary hearing, Judge Colaw testified that he found Kuritz "guidelines" response convoluted and confusing. (PCR:2942.) He believed Kuritz was giving a general description of guidelines and sentencing instead of a case-specific answer. (PCR:2942.) He did not believe the jury could have been confused because no one ever argued that Filancia was facing 0-20 years due to the guidelines alone. (PCR:2943-46, 2953-54.) Judge Colaw tried to embrace the fact that Filancia cut a deal early on. (PCR:2954.) He was also not aware of Filancia's exact minimum sentence at the time of trial and only knew he was basically facing life. (PCR:2941.) Filancia's guidelines had not likely been calculated before Kaczmar's trial. (PCR:2945.)

Kaczmar's jury was told that Filancia was facing up to life in prison and his plea deal was 0-20 years. (PCR:2943-45.) Judge Colaw did not believe that omitting the bottom guideline 65 years was misleading, particularly since courts can divert from the guidelines.

(PCR:2943-46, 2970.) Filancia was also potentially facing civil confinement once he got out because of his sexual offender status. (PCR:2967-69.)

A. *Giglio*-Failure-to-Disclose-Filancia's-Pre-Deal-Lowest-Guideline-Sentence Issue

Lower Court's Ruling

The postconviction court found neither diligence nor materiality on this *Brady* claim. (See PCR:1826-29.) It viewed this as a *Brady* issue because Kaczmar was arguing nondisclosure rather than false testimony.

Merits

Kaczmar argues 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." This claim is ill-briefed and frivolous and should be rejected as such.

a. Insufficiently Presented for Review

It goes without saying that appellants have an obligation to "make the error clearly appear" rather than raise an issue and conclusory assert it was improperly decided below. *Lynn v. City of*

Fort Lauderdale, 81 So. 2d 511, 513 (Fla. 1955); *Heath v. State*, 3 So. 3d 1017, 1029 n.8 (Fla. 2009) ("Vague and conclusory allegations on appeal are insufficient to warrant relief.").

Arguments presented cursorily in an initial brief are waived. *Stanton v. Florida Dep't of Health*, 129 So. 3d 1083, 1085 (Fla. 1st DCA 2013) (collecting cases and holding a defendant who made "a point in his initial brief, but in a highly perfunctory manner, without providing any supporting argument or authority" had not sufficiently presented the issue for appellate review); *Caldwell v. Florida Dep't of Elder Affairs*, 121 So. 3d 1062, 1064 (Fla. 1st DCA 2013) (same). Failure to adequately argue an issue in an initial brief waives even otherwise preserved arguments. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990).

Kaczmar has insufficiently presented this "*Giglio*" claim for review. He does not indicate what part of the testimony undergirding this claim was false, makes no argument for why *Giglio* claims are satisfied by the omission of additional helpful evidence and merely asserts that as so, cites no cases to that effect, and his entire argument about non-disclosure comprises about

two sentences before moving on to the State's failure to correct Kuritz's testimony (a separate *Giglio* issue).[25]

That is not enough to properly present a novel *Giglio* issue to this Court. A "litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *Id.*

Kaczmar's failure to properly present this issue is particularly inexcusable since he decided to raise it in the first place among 24 numbered (and about 39 actual) issues. This Court should never excuse ill-briefed arguments like this one in a capital case where the appellant has refused to heed the well-worn rule about the folly of raising numerous issues.

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[25] Whatever Kaczmar might argue, correcting Kuritz's allegedly false testimony that could be viewed as attributing Filancia's 20-year-capped potential sentence to the guidelines would only require the State to tell the jury that Filancia's 20-year-cap resulted from his deal with the State, not what his minimum sentence was.

Holding Kaczmar has waived this argument is important for another reason. This is not the last court that will review this issue and Kaczmar very well may see fit to raise a much more complete argument in federal court in a gambit to obtain reversal years down the road. Holding his feet to the fire now and requiring proper briefing on pain of waiver ensures this Court is either able to bring its completed judgment to bear on the issue or reject it on state-law grounds that a federal court has no license to second-guess.

b. No False Testimony

Kaczmar has failed to identify any false/misleading testimony to satisfy *Giglio*'s first prong that would require State correction by information about Filancia's lowest possible sentence. Filancia unambiguously told the jury that he was facing life and obtained a cap of 20 years as a result of his deal with the State. (DA16:780-81, 805; DA17:814-15, 827-28.) That was all true. So Kaczmar has failed to demonstrate falsity and his "*Giglio*" claim fails.

c. No Materiality

This sub-issue also fails *Giglio*'s third prong because any assumed failure to correct false testimony is harmless beyond reasonable doubt. The State and Filancia admitted he was facing life before his deal and that the State lowered a potential life sentence to a maximum of twenty years in exchange for Filancia's truthful testimony against Kaczmar. The State's method of dealing with that fact was to point out that Filancia had actually been offered a twenty-year-cap before coming forward on Kaczmar and refused it. Coupled with the rest of the overwhelming evidence of Kaczmar's guilt, it is clear beyond reasonable doubt that an objectively reasonable jury would still have found Kaczmar guilty of first-degree murder even if the State introduced evidence about Filancia's lowest possible sentence.

d. Not Retroactive

Whether he recognizes it or not, Kaczmar is seeking the benefit of a new rule of constitutional law that the State is required to tell the jury evidence helpful to the defense even when there is no explicitly false or misleading testimony. That is a new rule of constitutional law that is certainly not retroactive under federal law.

See Beard v. Banks, 542 U.S. 406, 411 (2004) (requiring newness to be judged by the date of finality); *Edwards v. Vannoy*, 141 S. Ct. 1547, 1555-62 & n.3 (2021) (eliminating the watershed procedural rule exception to retroactivity and recognizing substantive rules that forbid punishment of conduct or forbid punishment on a class are automatically retroactive). To aid federal courts later deciding this issue, particularly in view of Kaczmar's insufficient briefing here, this Court should hold Kaczmar's claim seeks the benefit of a new rule of constitutional law that is not federally retroactive.

Since this Court is the last word for state-law purposes, and given Kaczmar's claim fails at numerous points other than retroactivity, this Court should reserve judgment on whether he satisfies the retroactivity standard laid out in *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980). But the State adheres to its argument that this Court should simply adopt the federal standard and forgo the confusing *Witt* standard.[26] *See Windom v. State*, 886 So. 2d 915, 941-95 (Fla. 2004) (Cantero, J., concurring) (detailed analysis urging the adoption of *Teague* retroactivity and overruling of *Witt* retroactivity).

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[26] This issue is currently pending before this Court in SC22-0417.

B. *Giglio*-Failure-to-Correct-Kuritz-Testimony Issue

Merits

Kaczmar's second, and more traditional, *Giglio* subclaim argues the State failed to correct Filancia's lawyer's false/misleading testimony about how Filancia got his twenty-year-capped sentence. This subclaim is frivolous.

a. No False/Misleading Testimony

Kaczmar fails *Giglio*'s first prong. While there is no doubt Kuritz's testimony was convoluted, it was not clearly false or misleading. It appears Kurtiz was simply pointing out that Filancia was not necessarily facing life due to the guidelines while also acknowledging that it is common knowledge that cooperating with the State can help a witness's case. This is neither false nor misleading, though it certainly could have been worded in a less confusing fashion.

b. No State Knowledge of Falsity

Kaczmar has failed to establish *Giglio*'s second state-knowledge prong. The only evidence adduced for state-knowledge was Judge Colaw's testimony that he believed Kuritz's statement was a general description of sentencing and guidelines rather than a case specific

statement that Filancia was looking at a 0-20-year sentence due to the guidelines instead of his deal with the State. Given Kuritz's convoluted statement, and the numerous points at trial where the State affirmatively told the jury Filancia's 0-20-year cap resulted from a deal with the State, Kaczmar has failed to prove the State was aware Kuritz's comments were false/misleading (assuming they in fact were). Kaczmar's *Giglio* claim fails on the second prong as well.

c. The State Corrected Any Assumed Falsity

Kaczmar's *Giglio* claim also fails because the State in fact corrected any assumed false or misleading testimony from Kuritz that Filancia's 0-20-year-sentence cap resulted from the guidelines. The State, and Filancia, repeatedly, throughout trial and arguments, told the jury that Filancia's 0-20-capped sentence came from his plea deal. (DA14:269; DA16:780-81, 805; DA17:814-15, 827-28, 899-901, 929, 942.) That is sufficient correction to deal with any misimpression Kurtiz left that Filancia's twenty-year-cap resulted from the guidelines.

d. Not Material

Any assumed failure to correct Kurtiz false testimony is harmless beyond reasonable doubt. *See supra*, Issue 15.A.c.

16. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO INVESTIGATE FILANCIA AND HIS PLEA DEAL DURING THE 2010 GUILT PHASE.

Relevant Facts

The State incorporates the issue 15 facts by reference and adds the following facts relevant to this issue. Counsel stated he believed that he had heard Filancia was facing over 65 years minimum but did not confirm that for sure. (PCR:2704-06, 2712-13). Counsel also noted that the State may have overcharged, or had a weak case on some of the claims, and he would not rely on scoresheet calculations. (PCR:2706-07.) He was primarily concerned with his own credibility in front of the jury. (PCR:2711.) Counsel chose to focus on the facts that Filancia had access to Kaczmar's paperwork, was facing life, and got a deal with the State. (PCR:2779-81.)

Lower Court's Ruling

The postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1829-30.)

Merits

Kaczmar argues his counsel ineffectively failed to investigate and introduce guilt-phase evidence that Filancia was facing a

minimum sentence of over 65 years in prison before his deal with the State. This issue is frivolous.

A. No Deficient Performance

Kaczmar has failed to demonstrate deficient performance. His counsel quite reasonably focused their impeachment on the fact that Filancia was facing *life* in prison and was not going to get anywhere near that due to his deal with the State. A reasonable attorney could certainly have chosen to avoid running through speculative calculations with the jury about a minimum sentence that was no longer on the table due to Filancia's deal with the State and instead focused on the fact that Filancia was no longer facing *life* (the second highest sentence in Florida). There is no arguable case for deficiency here.

B. Alternatively, No Prejudice

Kaczmar also clearly suffered no prejudice for two reasons. **First**, Filancia testified—undisputed—that he was offered the same deal he eventually took before coming forward to testify against Kaczmar. The State, defense, and Filancia also agreed that Filancia was facing a *life sentence* that was taken off the table by his 0-20-year deal with the State. Additional evidence about Filancia's

minimum guideline sentence would have had no impact on an objectively reasonable jury because the jury had already heard stronger impeachment about the *life sentence* that Filancia took off the table with his deal.

Second, 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. *See Jackson*, 2022 WL 2349360, at *7 (rejecting an IAC claim due to the "strong possibility" the State would have brought out additional damaging evidence if counsel did what the defendant claims should have been done). In other words, it would have become clear that Filancia's deal was not even as good as the 20-year-sentence cap made it sound.

Third, the evidence of Kaczmar's guilt was overwhelming and defeats any argument that there is a reasonable probability the omission of this minor impeachment prejudiced him.

17. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO PUT EVIDENCE OF FILANCIA'S BIAS BEFORE THE 2013 PENALTY-PHASE JURY.

Relevant Facts

The State incorporates the facts for issues 15 and 16 by reference and includes the following additional facts. The 2010 guilt-phase testimony from Filancia (including his admission that he was facing life, got a 0-20-year cap from the State in exchange for his testimony, and was offered the same deal before coming forward) and Kuritz (including his convoluted response about the guidelines) was read into evidence at Kaczmar's 2013 penalty-phase. (RS:898-930.)

Neither counsel Shea nor Anderson believed Filancia's minimum guideline sentence was relevant to Kaczmar's penalty phase. (PCR:2713, 2821.) Counsel Anderson viewed Filancia as a guilt-phase witness, not a penalty phase one. (PCR:2821.) He thought Filancia's bias was entirely irrelevant to the penalty phase and could not argue for lingering doubt. (PCR:2827, 2829.) In his view, any HAC evidence Filancia gave was inconsequential. (PCR:2830-32.)

Like counsel, Judge Colaw also believed that Filancia was primarily a guilt-phase witness. (PCR:2950.) He also believed it would be inappropriate to judge Filancia's trial testimony based on later

events instead of what Filancia was looking at the time he gave his testimony. (PCR:2950.) While, in Judge Colaw's view, Filancia's testimony went somewhat to HAC, that aggravator would mainly be proven by the medical examiner's testimony. (PCR:2951-52, 2954.)

Lower Court's Ruling

The postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1830-31.)

Merits

Kaczmar appears to argue his counsel ineffectively (1) failed to introduce evidence of Filancia's pre-deal, minimum-guideline sentence at Kaczmar's 2013 penalty phase; and (2) insist on live testimony from Filancia and Kuritz to ensure the accuracy of the information about Filancia's deal put before the 2013 penalty-phase jury. While his arguments on this issue are entirely conclusory and often unclear, his main contention appears to be his oft-repeated complaints that counsel did not utilize the evidence of Filancia's minimum guideline sentence. The State analyzes this issue that way.

A. No Deficient Performance

Kaczmar has failed to prove deficient performance. His counsel reasonably believed that Filancia's bias was a non-issue in the 2013 penalty phase and Kaczmar has not tried to explain why every reasonable attorney would have believed otherwise. Considering counsel could not argue for lingering doubt, and the sole piece of HAC evidence Filancia gave was minor and overshadowed by evidence the victim suffered nearly 100 stab wounds, counsel's failure to attack Filancia's bias during the penalty phase was eminently reasonable.

B. Alternatively, No Prejudice

Kaczmar also clearly suffered no prejudice for two reasons. **First**, he relegates his entire prejudice argument to a single sentence with zero explanation of why Filancia's bias would matter to a reasonable jury exclusively tasked with determining the proper *sentence* and not guilt. His insufficient, conclusory briefing is a standalone reason to reject this issue. *Lynn v. City of Fort Lauderdale*, 81 So. 2d 511, 513 (Fla. 1955); *see Heath v. State*, 3 So. 3d 1017, 1029 n.8 (Fla. 2009) ("Vague and conclusory allegations on appeal are insufficient to warrant relief.").

Second, there is no reasonable probability that emphasizing Filancia's bias would have caused an objectively reasonable jury to switch from death to life. Filancia, at most, provided minor HAC evidence, but both of the State's aggravators (prior violent felony and HAC) were abundantly proven by other means.

For both reasons, there is no arguable case for prejudice on this frivolous issue.

18. THE STATE DID NOT VIOLATE *GIGLIO* BY FAILING TO INTRODUCE EVIDENCE/CORRECT TESTIMONY ABOUT FILANCIA'S LOWEST POSSIBLE SENTENCE AT KACZMAR'S 2013 RESENTENCING.

Relevant Facts

The State incorporates the facts for issues 15-17 and adds the following: Kuritz's testimony (including his convoluted response about the guidelines) was read at Kaczmar's 2013 penalty phase. (RS:932.) Filancia's testimony (including his admission that he was facing life, got a 0-20-year cap from the State in exchange for his testimony, and was offered the same deal before coming forward) was also read. (RS:900-27.) Unlike in issue 15, Judge Colaw was aware of Filancia's minimum guideline sentence at this point because it had been calculated in the years between Kaczmar's first trial and second penalty phase. (See PCR:2947-49.)

Lower Court's Ruling

The postconviction court held Kaczmar failed to prove *Giglio*'s[27] falsity and materiality[28] prongs. (See PCR:1831.)

Merits

As he has before for the guilt-phase, Kaczmar argues the State failed to correct false testimony regarding Filancia's possible sentence at the 2013 penalty phase. Kaczmar appears to raise two distinct false-testimony claims, but (as usual) jumbles them together: (1) the State did not correct Filancia's testimony that he was facing a maximum possible life sentence; and (2) the State failed to correct Kuritz's testimony that Filancia got a 0-20-year cap because of the sentencing guidelines.

Rather than re-cover already well-plowed ground, the State will summarize. Kaczmar's first false-testimony claim is frivolous for the

[27] Kaczmar cites *Napue* rather than *Giglio*, but the elements of both claims are identical. *E.g.*, *United States v. Magana-Gonzalez*, 781 F. App'x 615, 617 (9th Cir. 2019); *United States v. Clarke*, 442 F. App'x 540, 544 (11th Cir. 2011). It is unclear—and Kaczmar's conclusory briefing does nothing to elucidate—why Kaczmar finds it significant to label his claim under *Napue* rather than *Giglio*.

[28] The State notes that the circuit court accidently utilized the language undergirding *Strickland* and *Brady* claims rather than *Giglio* claims.

reasons addressed in Issue 15. *See supra*, Issue 15.A.b-d. (no false testimony, no materiality, no federal retroactivity).

There are two other points unique to the penalty phase worth elaborating on further. One, the failure to include Filancia's minimum guideline sentence could not be material because he only provided minor evidence in support of HAC, which was abundantly proven by the undisputed evidence the victim was stabbed nearly 100 times. Any assumed false testimony is harmless beyond reasonable doubt. Two, the sentence Filancia actually received years after his testimony was not relevant to his credibility. Filancia's credibility, legally, should be judged at the time he testified, not based on later-occurring events Filancia would have had to divine by a crystal ball. (See PCR:2950.) Since this testimony is irrelevant, it would not have been admissible in Kaczmar's second penalty phase anyway.

Kaczmar's second Kuritz-related false testimony claim is also frivolous for the reasons addressed in issue 15, augmented by the materiality analysis in the paragraph above. *See supra*, Issue 15.B.a-b, d. (no false testimony, no state-knowledge of falsity, no materiality).

This issue is frivolous.

19. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO REQUEST A HEAT OF PASSION INSTRUCTION.

Relevant Facts

Filancia testified at trial that Kaczmar confessed he "wanted to get f***ed" by Ruiz and began making passes at her. (DA16:788-89.) They got into a shoving match, and she fled to the bathroom and locked the door behind her. (DA16:789.) Kaczmar started pounding on the bathroom window, the victim ran to the kitchen, Kaczmar pursued her there, and they got into another shoving match. (DA:789.) The victim grabbed a knife to defend herself, but Kaczmar hit her in the head, knocked the knife out of her hand and cut his thumb in the process, hit her again, took his own knife out of his pocket, and started stabbing her. (DA16:790.)

Directly before closing argument, counsel spoke with Kaczmar. (DA17:915.) Counsel then told the court that—with Kaczmar's consent—he would present premeditation issues to the jury, including the "possibility of" arguing that, if they thought Kaczmar killed the victim, they "should be looking at second degree murder." (DA17:915-16.) When the prosecutor objected as counsel began reading cases about premeditation during closing, counsel stated

that "it is the law that as an example that -- that in the heat of passion or sudden provocation is not to be determined to be" premeditated. (DA17:919-20.) Counsel argued this killing could have come about as a sudden or unprovoked circumstance based on the number of stab wounds. (DA17:920.) Counsel just wanted the jury to "infer" a "heat of passion." (DA17:920.) When counsel returned to his closing arguments, he emphasized a perceived lack of premeditation. (E.g., DA17:948.)

The court instructed the jury that a killing is "excusable and therefore lawful" when "the killing occurs by accident and misfortune in the heat of passion upon any sudden and sufficient provocation." (DA17:972.) The court also instructed the jury that if it returned "a verdict of guilty it should be for the highest offense which has been proven beyond a reasonable doubt." (DA17:985.)

At the evidentiary hearing, counsel testified that Kaczmar did not initially want to raise a heat of passion defense/argue for lesser included offenses. (PCR:2761-62.) They did not go to trial with heat of passion in mind. (PCR:2761-62.) Counsel stated he ultimately would not have wanted to raise a heat of passion defense due to the number of times the victim was stabbed. (PCR:2762-63.) Kaczmar

never gave him permission to concede anything. (PCR:2788.)

Lower Court's Ruling

The postconviction court found no deficient performance under *Strickland* without explicitly addressing prejudice. (See PCR:1821-22.)

Merits

Kaczmar's argues his counsel ineffectively failed to request a heat-of-passion instruction.[29] This issue is entirely frivolous.

A. No Deficient Performance

There is no arguable case for deficient performance here for two reasons. **First**, Kaczmar was not entitled to a heat-of-passion instruction. *See Augustin v. State*, 244 So. 3d 336, 337 (Fla. 4th DCA 2018) (marital squabbles and arguments insufficient); *Daley v. State*, 957 So. 2d 17, 18 (Fla. 4th DCA 2007) (rejecting IAC-failure-to-request-special-heat-of-passion-instruction claim when the only supporting evidence was about arguments and gunshots and the

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[29] To the extent Kaczmar also argues counsel should have argued heat of passion better or more bluntly, the State notes counsel only wanted the jury to "infer" heat of passion and raised several premeditation-related arguments. (DA17:918-21, 937, 939, 943, 948.) But Kaczmar has not clearly presented that issue to this Court.

defendant did not testify); *see also Patrick v. State*, 104 So. 3d 1046, 1057 (Fla. 2012) (holding nonviolent homosexual advances are not adequate provocation).

Florida's courts have long held that adequate provocation is a prerequisite to a heat of passion defense and heated arguments alone are not enough. *Forehand v. State*, 126 Fla. 464, 471, 171 So. 241, 243-44 (1936); *Taylor v. State*, 316 So. 3d 420, 427 (Fla. 1st DCA 2021). "In order for the defense of heat of passion to be available there must be 'adequate provocation as might obscure the reason or dominate the volition of an ordinarily reasonable man.'" *Paz v. State*, 777 So. 2d 983, 984 (Fla. 3d DCA 2000) (quoting *Rivers v. State*, 75 Fla. 401, 78 So. 343, 345 (1918); *In re Standard Jury Instructions In Crim. Cases--Rep. No. 2013-02*, 137 So. 3d 995, 997 (Fla. 2014) ("Give only if there is evidence" of heat of passion and "legally adequate provocation.").

There was no legally adequate provocation here. Kaczmar did not testify at trial and there was no testimony that could support the adequate-provocation prerequisite to a heat of passion jury instruction. While Filancia had mentioned the victim had a knife, the *only* evidence introduced at trial was that the victim sought the knife

in response to Kaczmar's unwanted sexual advances and a shoving match. (DA16:788-90.) Kaczmar's creation of a situation where the victim felt compelled to defend herself is not adequate provocation justifying a stabbing. *Cf Thompson v. State*, 257 So. 3d 573, 581 (Fla. 1st DCA 2018) (recognizing the initial aggressor exception to a self-defense claim). There was no other testimony at trial that could even arguably give rise to adequate provocation. Counsel was not deficient for failing to request a jury instruction inapplicable to Kaczmar's case.

Second, the jury was instructed generally on heat of passion and reasonable counsel (consistent with this Court's precedent) could believe that was enough. *See Coday v. State*, 946 So. 2d 988, 995 (Fla. 2006) (affirming a court that declined to give a special premeditation heat-of-passion instruction because "the standard jury instruction on excusable homicide was sufficient to explain heat of passion in the context of premeditation").

B. Alternatively, No Prejudice

Kaczmar has also failed to prove prejudice for three reasons. **First**, as discussed above, he was not entitled to a heat of passion instruction.

Second, the jury received a more general heat-of-passion instruction and reasonably rejected it by finding the defendant guilty of first-degree murder. (See DA17:972 (instruction on heat of passion); DA17:998 (jury's guilty verdict).) An objectively reasonable jury following the law at Kaczmar's first trial (which would have had to reject heat of passion to find first-degree murder) would not have been swayed by introduction of a more specific heat-of-passion instruction. *See Coday*, 946 So. 2d at 995.[30]

Third, given the evidence "supporting" heat of passion, there is no reasonable probability an objectively reasonable jury would have bought it. No objectively reasonable jury would have acquitted Kaczmar after receiving a heat-of-passion instruction based on the fanciful theory that Kaczmar was "adequately provoked" when the victim spurned his sexual advances, attempted unsuccessfully to escape him by fleeing first to the bathroom and then to the kitchen, got into a shoving match with Kaczmar twice, and then got a knife to

[30] The State notes that the heat-of-passion instruction given to Kaczmar's jury did not limit heat of passion to premeditated murder. An objectively reasonable jury following the instructions would have had to reject heat of passion before finding Kaczmar guilty of either premeditated or felony murder.

defend herself. *See In re Standard Jury Instructions In Crim. Cases--Rep. No. 2013-02*, 137 So. 3d at 997 (heat of passion requires provocation sufficient that “a reasonable person would have lost normal self-control and would have been driven by a blind and unreasoning fury”).

Kaczmar may well have lost self-control and been in a blind, unreasoning fury due to the victim’s rejection of his sexual advances and attempt to defend herself from him when he would not leave her alone, but a reasonable man in his position would not have been. A reasonable man would have taken the victim’s no as a no and left it at that. And a reasonable jury would never have determined otherwise.

This issue is frivolous.

20. Kaczmar's Counsel Did not Ineffectively Fail to Object to the State Referring to Mitigation as Excuses in Penalty-Phase Closing Argument.

Relevant Facts

Prior to resentencing closing arguments, the court instructed the jury that "what the attorneys say is not evidence" or "law." (RS: 1051.) In closing, the prosecutor noted the only mitigation evidence before the jury was Kaczmar's age (twenty-four at the time of the murder) and stated: "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." (RS:1061-62 (emphasis added).) Counsel did not object. The jury was instructed it could only utilize the admitted penalty-phase evidence in arriving at its verdict and was required to consider mitigation. (RS:1085-92.)

At the evidentiary hearing, counsel Anderson testified that his assessment of the term "excuses" depends on how the word is said and used, and that a trial lawyer must make "a snap decision" about whether to object, which can "call even more attention to the word," or let the "jury instructions themselves" clear up the issue. (PCR:2002-03.) He could "easily see" himself "not objecting to" avoid

drawing "even more attention to the word excuses." (PCR:2011.) He also did not perceive the prosecutor's "excuses" comment as negating or denigrating the presented mitigation. (PCR:2011-12.) In counsel Anderson's view, "objecting to it or asking for a curative instruction would have actually drawn the wrong kind of juror attention to the word." (PCR:2012.)

Lower Court's Ruling

The postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1823-24.)

Merits

Kaczmar argues his counsel ineffectively failed to object to the prosecutor's reference to mitigation as "excuses" in closing argument. This issue is frivolous.

A. No Deficient Performance

This Court has repeatedly held a decision not to draw attention to an issue by objecting or requesting a curative instruction is a reasonable trial strategy. *E.g.*, *Johnson v. State*, 135 So. 3d 1002, 1017 (Fla. 2014) (collecting cases). Reasonable counsel could elect not to object to the word excuses because it was used only once, not

in a way that demeaned mitigation, and objecting would have drawn the wrong kind of attention to it. (PCR:2002-03, PCR:2011-2012.)

Kaczmar focuses on the fact that counsel was unaware that this Court has deemed the word "excuses" objectionable. But he misses the fact that counsel was aware of "a lot of cases" talking about the prosecutor not disparaging or diminishing mitigation and was aware he could raise an objection utilizing that argument. (PCR:2001-02.) Nonetheless, counsel could still see himself not objecting because he did not view the word as harmful in Kaczmar's penalty phase. (PCR:2011.) Kaczmar has failed to overcome the presumption that a reasonable attorney in his counsel's shoes could have decided not to object. *See Harrington v. Richter*, 562 U.S. 86, 110 (2011) ("*Strickland,* however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind."). There is no arguable deficient performance here.

B. Alternatively, No Prejudice

Kaczmar also clearly suffered no prejudice for three independent reasons. **First**, the State's closing-argument reference to mitigation as "excuses" would have had no impact on an objectively reasonable jury following its instructions. The

resentencing court expressly informed the jury closing arguments were not evidence, its recommendation must be based exclusively on the admitted penalty-phase evidence, and it was required to consider mitigation. (RS:1051, 1085-92.) Since *Strickland* requires this Court to presume the jury obeyed that instruction to the letter, there is no arguable case for prejudice here. *See Smith v. Pulaski SP Warden*, 809 F. App'x 712, 718 (11th Cir. 2020) (holding there was no *Strickland* prejudice in light of a general instruction that covered the issue and despite the failure to seek a more specific curative instruction).

Second, this Court should recede from its caselaw and hold that simply referring to mitigation as "excuses" is not improper. The word excuse simply means to reduce blameworthiness. ***Excuse***, New Oxford American Dictionary (3d ed. 2010) ("1. Attempt to lessen the blame attaching to (a fault or offense); seek to defend or justify."). That is exactly what mitigation is: evidence offered to reduce moral blameworthiness for aggravated first-degree murder in support of a life sentence. Given that the word "excuses," when used in isolation as here, is not even inherently derogatory, this Court should recede from its prior case law which, without any analysis or constitutional basis, proclaimed a word improper that simply is not. *See, e.g.*, *Merck*

v. State, 975 So. 2d 1054, 1070 (Fla. 2007) (prosecutorial references to mitigation as excuses improper). Receding from this Court's incorrect caselaw means Kaczmar suffered no prejudice. *See Jackson v. State*, 347 So. 3d 292, 306 (Fla. 2022).

Third, since Kaczmar wanted a death sentence, there was practically no mitigation in this case and abundant aggravation. Even sans the presumption the jury followed the law, there is no reasonable probability the omission of the word "excuses" would have changed an objectively reasonable jury's recommendation.

For all three reasons, there is no arguable case for prejudice on this frivolous issue.

21. Kaczmar's Counsel Did not Ineffectively Fail to Object to the Penalty-Phase Judge Telling the Jury Its Four Questions Were not Relevant.

Relevant Facts

Counsel argued a "disparate sentence of co-suspect" Modlin mitigator in opening and closing and submitted that mitigator to the jury. (RS:167, 814, 1077.) Later, the sentencing court found there was no evidence to support this mitigator. (RS:514, 548.)

During deliberations, the jury asked four questions: (1) "Was the knife that was used in the murder ever retrieved?" (2) "Was Christopher Modlin a suspect in the victim's murder? If so, was he charged with any crime related to this case?" (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?" (RS:1096–97.)

The judge informed 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." (RS:1096-97.)

At the evidentiary hearing, counsel Shea testified that he

believed the questions were not relevant and the judge's response was proper. (PCR:2766-69.) There "was nothing relevant in the questions that affected the jury's decision that day." (PCR:2769.) When pressed, counsel Shea went so far as to ask, "Why would I object to that?" (PCR:2769.)

Counsel Anderson also believed that telling the jury these questions were not relevant was proper and something he would go along with. (PCR:2812, 2815.) He believed these were primarily guilt-phase questions and did not believe the judge's answer was a comment on the evidence. (PCR:2812, 2815, 2828.) The "important point is that these questions are not answered because that's going to open up a whole can of worms." (PCR:2813.) He was not concerned with the judge's answer and "any other approach would have caused the defense more harm than good." (PCR:2828.)

This Court held this issue was unpreserved and not fundamental error in Kaczmar's resentencing direct appeal. *Kaczmar v. State*, 228 So. 3d 1, 11 (Fla. 2017).

Lower Court's Ruling

The postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1822-23.)

Merits

Kaczmar argues his counsel ineffectively failed to object when the judge told the resentencing penalty-phase jurors their questions were not relevant. This issue is frivolous.

A. No Deficient Performance.

Kaczmar has failed to demonstrate deficient performance for two reasons. **First**, he has failed to demonstrate the trial court improperly commented *on the evidence* by telling the jurors that their questions were not relevant. *Rutledge v. State*, 1 So. 3d 1122, 1131 (Fla. 1st DCA 2009) (holding a trial judge's three paragraph response to a jury's question was not a comment on the evidence because the "court's comments did not mention any fact or event of the trial, mention specific evidence, identify a witness, or refer to a particular ruling. The remarks said nothing about credibility or guilt."). At most, the penalty-phase judge commented on the relevance of the jurors' questions, not the evidence, which is what Kaczmar alleges by citing section 90.106, Florida Statutes. This is particularly true since it does not appear the answers to any of these questions were specifically answered by the evidence (hence the questions). Failing

to raise a meritless comment-on-the-evidence objection was not deficient performance.

Second, even if counsel could have objected, Kaczmar has not met his burden to show all reasonable counsel would in fact object. Neither of his counsel found the judge's response prejudicial to Kaczmar because the jury's questions were not primarily relevant to the penalty-phase. Counsel Anderson believed these were primarily guilt-phase questions and any other approach would have been worse for the defense. Counsel's assessment of these questions, when viewed in totality, is eminently reasonable.

Reasonable counsel could be concerned about questions (3) and (4), which Kaczmar lumps in with this issue but makes no affirmative argument about. Counsel could believe these questions either went to impermissible lingering doubt, *see Reynolds v. State*, 934 So. 2d 1128, 1152 (Fla. 2006) (lingering doubt is not a proper mitigator), *or* the jury was considering them as non-statutory aggravation. By not objecting to the judge's response, counsel (at worst) eliminated an improper lingering doubt argument and (at best) eliminated the possibility the jury would use speculation about past sexual mistreatment against the victim as non-statutory aggravation. This

is not deficient performance. As counsel Anderson testified, “any other approach would have caused the defense more harm than good.” (PCR:2828.)

That leaves question (1), which asked whether the murder knife was ever recovered and question (2), which asked whether Modlin was a suspect in the victim’s murder and was charged with any crime related to this case. Kaczmar argues the jury’s consideration of question (1) could go to Filancia’s credibility. But counsel was in a penalty phase. Reasonable counsel could choose not to object to the judge’s answer because the only testimony Filancia gave that supported an aggravator was “inconsequential” and overshadowed by the medical examiner’s testimony that the victim was stabbed nearly 100 times. That is particularly true since not objecting potentially prevented the jury from using speculation about Kaczmar’s prior sexual conduct toward the victim as non-statutory aggravation.

On question (2), the simple truth is that no evidence supported this mitigator and reasonable counsel could easily determine that potentially losing an unsupported mitigator was better than the risk of the jury utilizing non-statutory aggravation. While Kaczmar points to scattered evidence throughout the penalty phase about Modlin,

none of it ties him as a suspect in this case. Indeed, the resentencing court expressly found this mitigator was unsupported by the evidence. (RS:514.)

Reasonable counsel could choose not to object to the judge's instruction in light of a fear the jury would otherwise utilize speculation about Kaczmar's past sexual misbehavior to aggravate his sentence. There is no arguable case for deficient performance here.

B. Alternatively, No Prejudice

In any event, Kaczmar also clearly suffered no prejudice for three reasons. **First**, there is no reasonable probability that "absent the errors, the sentencer" would "have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). Had counsel objected, and the judge told the jury they simply had to rely on the evidence provided, nothing would have changed. HAC was abundantly proven by the medical examiner's testimony that the victim suffered nearly 100 knife wounds, the jury could not utilize doubts about Filancia's testimony for lingering doubt, and there was no evidence Modlin was a "co-suspect" in the victim's murder.

Second, the "co-suspect" mitigator was not valid and should never have been introduced. Even under prior Florida law, the disparate sentence of a "co-suspect" was not mitigating. *See e.g.*, *White v. State*, 817 So. 2d 799, 810 (Fla. 2002) (affirming a trial court ruling that the life sentence of a co-defendant was not mitigating because the *co-defendant* did not share the same degree of culpability as the defendant); *Howell v. State,* 707 So. 2d 674, 682-83 (Fla.1998) (rejecting disparate sentencing claim where codefendant pled to second-degree murder and received a forty-year sentence). If the lesser conviction/sentence of a less culpable co-defendant is not mitigating, then certainly the alleged sentence of a "co-suspect" is not mitigating either. Kaczmar cannot establish prejudice based on perceived harm to an improper, unproven mitigator.

That is especially true since this Court has recently abolished relative-culpability analysis altogether. *Cruz v. State*, No. SC2021-1767, 2023 WL 4359497, at *5-6 (Fla. July 6, 2023) (holding a co-defendant's "life sentence is irrelevant to and has no bearing on Cruz's death sentence"). Kaczmar cannot rely on potential damage to the jury's consideration of a "mitigator" this Court has recently held irrelevant to his death sentence to prove prejudice. *See Lockhart v.*

Fretwell, 506 U.S. 364, 372 (1993) (holding counsel's failure to make an objection—valid at the time but invalid during postconviction—cannot result in *Strickland* prejudice).

Third, the State's aggravation case against Kaczmar was simply overwhelming. There is no reasonable probability the jury would have recommended life if counsel had objected here and the jury been instructed to rely on the evidence to answer these questions. For all three reasons, there is no arguable case for prejudice on this frivolous issue.

22. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO REQUEST VARIOUS, RANDOM JURY INSTRUCTIONS.

Relevant Facts

Against counsel's advice, Kaczmar refused to either take life-sentence offers from the State or put on mitigation because he wanted a death sentence in order to receive maximum review of his convictions in both state and federal court. (RS:573-76, 1115-26.) Kaczmar eventually agreed to let counsel argue his age and any guilt-phase mitigation. (RS:1039-42.)

Kaczmar's resentencing, penalty-phase jury was repeatedly told that his guilt had already been decided and it was exclusively tasked with providing a sentencing recommendation. (RS:623, 1081.)

During a break in jury selection, the judge instructed the prospective jurors, "You can go together, separately or whatever pleases you but you can't talk about the case, all right?" (RS:774). Later, after the jury was sworn, the court informed the jurors that notetaking was an individual decision and they were permitted to do so if they chose to. (RS:794.) Before the evening break in the two-day penalty phase, the court told the jury "[y]ou're free to go at this time. You cannot talk about the case with anyone, family members or

anyone, okay?" (RS:966.)

Finally, as part of its closing charge, the court instructed the jury that it could only look to the penalty-phase evidence when deciding its recommendation and was bound to follow the court's instructions. (RS:1082, 1085-86, 1091.)

Lower Court's Ruling

The postconviction court found neither deficient performance nor prejudice under *Strickland*. (See PCR:1815.)

Merits

Kaczmar argues his counsel ineffectively failed to have his penalty-phase jury given numerous random instructions. He specifically mentions instructions on the use of cell phones and social media to research the case, notetaking rules, and general rules for how the trial will be conducted, while generally citing a smorgasbord of standard instructions without further explanation.

Given Kaczmar's scattershot allegations, it would serve no purpose to go instruction by instruction and explain why counsel's failure to request each instruction was not ineffective. So the State analyzes them all together.

But this Court should reject this issue because Kaczmar has failed to actually do anything to explain the import of each instruction and why every reasonable counsel would have requested them in a second penalty phase where Kaczmar wanted a death sentence.

Poor, conclusory briefing aside, this issue is frivolous.

A. Abandonment

Kaczmar abandoned this claim because he failed to pursue it at the evidentiary hearing by asking counsel why he failed to request any of these instructions. *E.g.*, *Ellerbee v. State*, 232 So. 3d 909, 925 (Fla. 2017) (capital defendant abandoned claim where he was granted an evidentiary hearing on it and failed "to present any witnesses or other evidence to prove this claim"). *See also Dunn v. Reeves*, 141 S. Ct. 2405, 2410-14 (2021) (recognizing the burden of rebutting the presumption counsel was effective rests exclusively with the defendant and that the absence of evidence cannot overcome the presumption). This Court should therefore hold Kaczmar's failure to adduce any support for this claim at the evidentiary hearing *he requested* to prove it served to abandon the claim.

B. No Deficient Performance

Kaczmar also has failed to establish any Sixth-Amendment deficiency. He failed to develop these claims at the evidentiary hearing and an objectively reasonable counsel in Kaczmar's counsel's shoes could simply (reasonably) have thought these instructions were not necessary given the abbreviated penalty phase proceedings where guilt was irrelevant, the instructions the court would give would tell the jury that its decision could only be based on the presented evidence, and his own client's wish to receive a capital sentence. *Reeves*, 141 S. Ct. at 2410-14 (recognizing the burden of rebutting the presumption counsel was effective rests exclusively with the defendant and that the absence of evidence cannot overcome the presumption).

C. Alternatively, No Prejudice

Kaczmar has also failed to prove any prejudice stemming from counsel's failure to request these instructions during his 2013 second penalty phase. His essential argument is that the "error" in failing to give instructions on notetaking, researching the case by cell phone or social media, and general rules for the proceedings, is structural and automatically satisfies *Strickland*'s prejudice prong.

His argument is a completely perverted distortion of United States Supreme Court caselaw.

For starters, Kaczmar cannot point to a mere failure to instruct and validly call the error structural. The United States Supreme Court has repeatedly held that not all jury-instruction errors are structural. *See, e.g.*, *Hedgpeth v. Pulido*, 555 U.S. 57, 60-61 (2008) (holding instructing the jury on an valid and invalid alternative theories of guilt is not structural error and noting the Court has previously held failure to instruct on an element of the offense, misstating an element of an offense, giving an erroneous accomplice instruction, and giving an erroneous burden-shifting instruction, were all not structural errors). It appears the *only* instruction that can constitute structural error if not given, or if misstated, is the reasonable-doubt instruction. *See Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993); *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021) (listing several structural errors with the only instruction-related one being reasonable doubt instruction errors).

Kaczmar has utterly failed to offer any explanation why the failure to instruct on notetaking, researching the case, etcetera, constitutes structural error while the failure to instruct on (for

instance) an element of the offense does not. And he cannot do so for the first time in his reply brief when the State will have no ability to fully respond.

But even if Kaczmar had tried and succeeded in showing the jury-instruction errors here were structural, that would not automatically exempt him from *Strickland*'s prejudice prong under *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017).

Kaczmar's reliance on *Weaver* to support his structural-errors-always-result-in-*Strickland*-prejudice argument is egregiously misplaced. *Weaver* stands for the *exact opposite* proposition Kaczmar cites it for: structural error on direct appeal does *not* automatically equate to *Strickland* prejudice in postconviction. *Weaver*, 582 U.S. at 299-305 (requiring the defendant to show *Strickland* prejudice—a reasonable probability of a different outcome at trial—for a public-trial violation that would have been structural on direct appeal).

Weaver's rationale for imposing a prejudice requirement on structural errors raised in postconviction is the greater systemic costs for remedying the error, the finality interests, and the fact that one round of appellate review is already complete. *Id.* at 300-02. "These differences justify a different standard for evaluating a

structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel." *Id.* at 303. Any argument Kaczmar need not show prejudice now in *postconviction* merely because an error might have been structural on *direct appeal* is flatly contradicted by *Weaver*'s explicit holding that a structural, public-trial violation—which is structural because of the "difficulty of assessing the effect of the error"—does not absolve a defendant of proving *Strickland* prejudice. *Id.* at 298-305.

A final point of clarification on *Weaver*. The United States Supreme Court analyzed that case on the <u>*assumption*</u> *Strickland* prejudice could be shown either by demonstrating a reasonable probability of a different outcome or a showing that attorney error "rendered the trial fundamentally unfair." *Weaver*, 582 U.S. at 300 (stating the Court "need not decide that question here"). But as Justices Alito, Gorsuch, and Thomas all pointed out, there is only one way to demonstrate attorney errors rendered a guilt phase

fundamentally unfair under *Strickland*:[31] showing a reasonable probability of an acquittal. *See Weaver*, 582 U.S. at 306 (Thomas, J., concurring, with Gorsuch, J.), 307-09 (Alito, J., concurring with Gorsuch, J.) That an error may be properly labeled "structural" has nothing to do with *Strickland*'s prejudice prong inquiry. *See id.* at 308 (Alito, J., concurring) ("Weaver attempts to escape this framework by stressing that the deprivation of the right to a public trial has been described as a 'structural' error, but this is irrelevant under *Strickland*."). *See also Williams v. Taylor*, 529 U.S. 362, 391-94, 399 (2000) (holding the Virginia Supreme Court violated clearly established law by focusing on fundamental fairness for an ineffectiveness claim instead of reasonable probability of a different outcome).

Kaczmar's pseudo-prejudice analysis is faulty at every conceivable point. The only jury-instruction error that is labeled

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[31] There are, of course, narrow circumstances in right-to-counsel claims where prejudice is presumed and need not be shown. *See Strickland*, 466 U.S. at 692-93 (recognizing prejudice is presumed for actual or constructive denials of counsel, certain forms of state interference with counsel, and when counsel labors under an actual conflict of interest); *Weaver*, 582 U.S. at 308 (Alito, J., concurring) (same). But, shockingly, Kaczmar has not attempted to fit this square IAC issue into any of those round holes.

structural error is an error in the reasonable-doubt instruction, which he does not claim error in here. And merely labeling an error "structural" error does not mean the defendant automatically escapes his duty of proving *Strickland* prejudice, as *Weaver* explicitly held. Notably, Kaczmar has made no attempt to demonstrate that but-for his counsel's failure to request the instructions he mentions there is a reasonable probability a jury would have recommended life instead of death.

That is because there is no such likelihood. The jury was instructed its recommendation must be based on the evidence presented in the penalty phase alone and that the State bore the burden of proving an aggravator beyond reasonable doubt. (RS:1081-82, 1085-87, 1091-92). If the jury did that, and *Strickland* presumes it did, there is no possibility the recommendation would have changed with the addition of more instructions about notetaking, outside research, etcetera. That is especially true given the evidence in favor of a death sentence was overwhelming while the mitigation presentation was almost nonexistent because Kaczmar wanted a death sentence.

Kaczmar—in a single, cursory sentence—complains that he cannot prove prejudice because the postconviction court denied his motion for juror interviews. He fails to understand that juror interviews are irrelevant to *Strickland* claims because prejudice does not hinge on what the particular jury in his case would have done. Instead, *Strickland*'s analysis requires him to demonstrate the impact of counsel's errors on an objectively reasonable jury acting according to law and explicitly precludes additional evidence about the particular factfinders in his case as "irrelevant to the prejudice inquiry." *Strickland*, 466 U.S. at 695-96 (holding "evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination").

In *Strickland* itself, the State tried to introduce exactly the type of evidence that Kaczmar complains about lacking to no avail because the Supreme Court held it was "irrelevant to the prejudice inquiry." *Id.* at 678-79, 683, 700 ("Our conclusions on both the prejudice and performance components of the ineffectiveness inquiry

do not depend on the trial judge's testimony at the District Court hearing. . . that testimony is irrelevant to the prejudice inquiry.").

This Court should reject Kaczmar's escape-from-proving-prejudice arguments and hold he has failed to demonstrate prejudice as defined by *Strickland*. This issue is frivolous.

23. KACZMAR'S COUNSEL DID NOT INEFFECTIVELY FAIL TO REQUEST A PENALTY-PHASE, PRESUMPTION-OF-LIFE INSTRUCTION.

Relevant Facts

Kaczmar's counsel did not request a presumption of life instruction for the jury portion of Kaczmar's 2013 penalty phase. (See RS:619 (for the date only).) But the penalty-phase jury was instructed that the State bore the burden of proving an aggravator beyond reasonable doubt and that no death recommendation could be returned unless the State met that burden. (RS:1086-87, 1091-92.) The court also defined reasonable doubt and commanded the jury to utilize solely the admitted penalty-phase evidence when reaching its recommendation. (RS:1082, 1085-87.) Kaczmar's jury unanimously recommended death. (RS:1098.)

Lower Court's Ruling

The postconviction court summarily rejected this failure-to-request-presumption-of-life-instruction claim after finding neither deficient performance nor prejudice under *Strickland.* (See PCR:1819-20.)

Merits

Kaczmar argues his counsel ineffectively failed to request a presumption-of-life instruction for his penalty phase and that the postconviction court erred in summarily denying this claim. This issue is frivolous.

A. No Deficient Performance

Kaczmar's postconviction allegations failed to demonstrate deficient performance under *Strickland* and warranted summary denial for two reasons. **First**, Kaczmar's entitlement to a presumption of life instruction was not at all clear in 2013. This Court recently recognized that this issue has not been litigated in Florida.[32] *Sanchez-Torres v. State*, 322 So. 3d 15, 24 (Fla. 2020) (recognizing collateral counsel's concession that the issue of entitlement to a presumption of life instruction has not been litigated in Florida and holding appellate counsel cannot be ineffective for failing to raise a novel argument). That defeats Kaczmar's deficient performance claim. *Sanchez-Torres*, 322 So. 3d at 24 (failure to raise a novel

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[32] A forerunner to this issue was mentioned in passing but never discussed. *See Wilding v. State*, 674 So. 2d 114, 115 (Fla. 1996) (appellate issue 18).

argument not ineffective assistance of counsel); *Pitts v. Cook*, 923 F.2d 1568, 1571-74 (11th Cir. 1991) (recognizing the Supreme Court has held that the "existence of tools to construct" a "constitutional claim—and thus lack of novelty sufficient to constitute cause for procedural default—does not mean every astute, much less competent, counsel would have raised the claim") (citing *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982).)[33]

Second, as a matter of law, reasonable counsel could find a presumption-of-life instruction unnecessary even if Kaczmar was entitled to it. *See Harrington v. Richter*, 562 U.S. 86, 110 (2011) ("*Strickland,* however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind."). Kaczmar's jury was instructed it could not return a

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[33] As far as the State can tell, this presumption-of-life issue has not gained traction in federal court either. *Hill v. Mitchell*, 842 F.3d 910, 947 (6th Cir. 2016) (no ineffective assistance of appellate counsel for failing to argue for a presumption of life instruction on appeal);*Smallwood v. Gibson*, 191 F.3d 1257, 1271 (10th Cir. 1999) (holding the Constitution does not require a presumption of life instruction); *Brown v. Gibson*, 7 F. App'x 894, 912 (10th Cir. 2001) (recognizing the court rejected entitlement to a presumption of life in *Smallwood*). The presumption-of-life argument appears to stem from a 1984 law review article. *Adamson v. Ricketts*, 865 F.2d 1011, 1044 n.56 (9th Cir. 1988).

death recommendation unless it found an aggravator beyond reasonable doubt. A reasonable counsel could view a presumption-of-life instruction as redundant in light of that instruction. *See United States v. Thaxton*, 483 F.2d 1071, 1073 (5th Cir. 1973) (presumption of innocence is a corollary to the beyond-reasonable-doubt standard of proof and cautions to the jury to convict based solely on the trial evidence); *United States v. DeJohn*, 638 F.2d 1048, 1058 (7th Cir. 1981) (recognizing it is clear that "a careful, complete explanation to the jury that the prosecution bears the burden of proof beyond a reasonable doubt is not a logically separate and distinct proposition from the presumption of innocence") (cleaned up); *Turner v. Williams,* 812 F. Supp. 1400, 1436-37 (E.D. Va. 1993) (holding a presumption-of-life instruction is redundant to instructions that the State must prove an aggravator beyond reasonable doubt before death can be imposed). *See generally Taylor v. Kentucky*, 436 U.S. 478, 483 & n.12 (1978) (recognizing the error in the Court's prior view that the burden of proof and presumption of innocence were "logically separate and distinct").

For both reasons, there is no arguable case for deficient performance here.

B. Alternatively, No Prejudice

Kaczmar has also failed to demonstrate prejudice under *Strickland* in light of the instructions his jury was actually given. A presumption-of-life instruction would only have any force until the State removed that presumption by proving an aggravator beyond reasonable doubt. *See Kansas v. Marsh*, 548 U.S. 163, 170-73 (2006) (recognizing the State "may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances"); *State v. Poole*, 297 So. 3d 487, 501-05 (Fla. 2020) (only aggravators are "elements" to death-eligibility subject to the beyond-reasonable-doubt standard); *Davidson v. State*, 323 So. 3d 1241, 1247-48 (Fla. 2021) (sufficiency and weighing are not elements); *cf. Delo v. Lashley*, 507 U.S. 272, 278 (1993) (presumption of innocence serves to "remind the jury that the State has the burden of proving every" offense element beyond reasonable doubt); *Pinder v. State*, 53 So. 2d 639, 639 (Fla. 1951) (presumption of innocence follows the defendant "until the presumption is overcome by evidence establishing" guilt "beyond reasonable doubt").

Kaczmar's jury was informed that it could not return a death recommendation without finding an aggravator proven beyond

reasonable doubt and is presumed to have followed that instruction. *Strickland*, 466 U.S. at 695. A presumption-of-life instruction would therefore have made no difference to a jury following the law and ensuring the State proved an aggravator beyond reasonable doubt. So there is no reasonable probability Kaczmar's jury would have returned a life recommendation had it been instructed on a presumption of life. There is no arguable case for prejudice on this frivolous issue.

24. THE POSTCONVICTION COURT CORRECTLY, SUMMARILY DENIED KACZMAR'S CLAIM THAT CAPITAL PUNISHMENT VIOLATES THE EIGHTH AMENDMENT.

Merits

Kaczmar argues the delay between capital sentence imposition and execution violates the Eighth Amendment. He urges this Court to reconsider its contrary prior precedent without any substantive argument. Considering Kaczmar's conclusory argument, this issue is insufficiently presented and frivolous. But even in its best form, it is meritless. *E.g.*, *Dillbeck v. State*, 357 So. 3d 94, 103 (Fla. 2023). *See also Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). If Kaczmar wants to expedite execution of his death sentence, he is free to waive all state and federal postconviction proceedings.

25. KACZMAR HAS FAILED TO PROVE CUMULATIVE ERROR.

Lower Court's Ruling

The postconviction court found Kaczmar failed to demonstrate cumulative error. (See PCR:1824-25.)

Merits

Kaczmar argues the prejudice from the various errors in his case combine to require new guilt and penalty phases. He is incorrect.

Cumulative error claims are recognized in Florida, but (contrary to Kaczmar's legal misinterpretation and reliance on inapplicable direct-appeal cases) he has the burden of showing cumulative error while the State has no burden at all. *See Parker v. State*, 89 So. 3d 844, 867 (Fla. 2011) (noting cumulative error claims "determine whether [the defendant] has established prejudice"); *Brown v. State*, 304 So. 3d 243, 271 (Fla. 2020) (affirming denial of cumulative error claim where the defendant "failed to show that trial counsel's deficiencies, individually or cumulatively, establish" prejudice.).

This Court should also clarify that claims on which there is no prejudice as a matter of law add nothing to the cumulative-prejudice analysis. *Cf. Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (In "law as in mathematics zero plus zero equals zero."). For instance, claims where there is no prejudice as a matter of law due to the presumption the jury followed the court's instructions should not be cumulated in this analysis.

Kaczmar has failed to establish cumulative prejudice. Almost all his claims should be rejected on grounds other than insufficient prejudice therefore do not factor into a cumulative prejudice analysis. On many of his claims, there was no prejudice as a matter of law and,

therefore, those claims add nothing to a cumulative prejudice analysis either.

The only issue the State has urged this Court to decide solely on prejudice grounds is sub-issue 2 of issue 8. If this Court rejects the rest of the claims on grounds other than prejudice, there is no prejudice to cumulate. Regardless, in light of the overwhelming and valid evidence in this case, cumulative error should be denied even if this Court finds multiple instances of deficiency on claims where the prejudice determination is not zero prejudice as a matter of law. Kaczmar cannot demonstrate a reasonable probability of a first-degree-murder acquittal or life sentence even when any prejudice is viewed cumulatively.

CONCLUSION

The State respectfully requests this Honorable Court reverse the postconviction court's grant of a new penalty phase and affirm its rejection of Kaczmar's residual arguments.

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of August 2023, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Dawn Macready and Elizabeth Spiaggi, Assistants CCRC-North, 1004 DeSoto Park Drive, Tallahassee, Florida 32301, **dawn.macready@ccrc-north.org**, **elizabeth.spiaggi@ccrc-north.org**.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style in compliance with Florida Rule of Appellate Procedure 9.045. This brief contains 31,871 and exceeds the 25,000 word limit words in Florida Rule of Appellate Procedure 9.210(a)(2)(C), (a)(2)(E). A motion to accept enlarged brief has been filed contemporaneously with this brief.

/s/ *Jason W. Rodriguez*
Attorney for the State of Florida