IN THE SUPREME COURT OF FLORIDA

PAUL DUROUSSEAU,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC15-1276

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, PAUL DUROUSSEAU, the defendant in the trial court, will be referred to as appellant, the defendant, or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (2014), this brief will refer to a volume according to its respective designation within the Index to the Record of Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained.

STANDARD OF REVIEW

Because both prongs of *Strickland* present mixed questions of law and fact, this Court employs a mixed standard of review. The Court will defer to the circuit court's factual findings that are supported by competent, substantial evidence, and will review the circuit court's application of the law to those facts de novo. *Hernandez v. State*, No. 13-718, 2015 WL 5445655, at *3 (Fla. 2015) (citing *Johnson v. State,* 135 So.3d 1002, 1013 (Fla. 2014)).

STATEMENT OF THE CASE AND FACTS

Durousseau was convicted of first-degree murder for which he was sentenced to death. The facts of this case as recited by this Court in the direct appeal opinion are:

> On June 28, 2007, Durousseau was sentenced to death in the Fourth Judicial Circuit in and for Duval County, Florida, after being convicted of first-degree murder for the strangulation murder of Tyresa Mack. The evidence presented at trial established the following facts. On July 26, 1999, between the hours of 9:30 a.m. and 1 p.m., Mack and a friend applied for employment at various business establishments. Eyewitnesses placed Durousseau at Mack's Jacksonville apartment sometime between noon and 2 p.m. One of the eyewitnesses saw Durousseau carrying a television out of the apartment and watched as he placed it in his car. The last time anyone heard from Mack was around 1:25 p.m. that afternoon when Mack spoke with a friend on the phone. Mack did not pick her children up from daycare that day and missed a 3 p.m. doctor's appointment for her youngest child. Around 7 p.m. that same evening, Mack's sister and her stepfather went to Mack's apartment in an attempt to locate her. At that time, they discovered Mack's body, lying in a semi-fetal position on the bed. Her body was nude from the waist down and a white cord was wrapped around her neck. The living room television and a "X's and O's" necklace and bracelet set that Mack always wore were missing. Durousseau's DNA was found in Mack's vagina and the medical examiner concluded that Mack died from asphyxia.
>
> On June 23, 2003, Durousseau was indicted on five counts of first-degree murder for the murders of Nichole Williams, Nikia Kilpatrick, Shawanda McCallister, Jovanna Jefferson, and Surita Cohen. The similar methodology employed by the perpetrator, as well as DNA evidence from each crime scene, caused investigators to conclude that Mack was one of Durousseau's victims. On August 26, 2003, Durousseau was arrested for the murder of Mack. While in the booking area, Detective Rodney McKean informed Durousseau that he was being formally charged with the murder of Mack. Durousseau stated, "I don't know no

> [Tyresa] Mack." When the police informed him that Mack had been murdered on Florida Avenue, Durousseau responded, "I don't know that girl." On September 4, 2003, Durousseau was charged, by separate indictment, with the murder of Mack. The trial court permitted the State to introduce *Williams* rule evidence of the Kilpatrick and McCallister murders. At the close of the State's evidence, Durousseau moved for judgment of acquittal, which was denied. On June 8, 2007, the jury found Durousseau guilty of first-degree murder.
>
> During the penalty phase, the State alleged the existence of four aggravators: (1) Durousseau was previously convicted of a felony involving the use or threat of violence, (2) the murder was committed while the defendant was engaged in the commission of a robbery or sexual battery, (3) the murder was committed for pecuniary gain, and (4) the murder was especially heinous, atrocious, or cruel (HAC). Durousseau asserted the existence of the following statutory mitigating circumstances: (1) Durousseau's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time he committed the murder, and (2) Durousseau suffered from an extreme mental or emotional disturbance at the time of the murder. He presented two mental health experts and seventeen lay witnesses. Durousseau also presented evidence of seventeen nonstatutory mitigators.
>
> The jury recommended the death penalty by a vote of ten to two. Following a *Spencer* hearing, the trial court imposed a sentence of death after finding the four requested aggravators, rejecting both of the requested statutory mitigators, and finding sixteen of the seventeen nonstatutory mitigators. The trial court gave great weight to the jury recommendation of death and concluded that the aggravating circumstances outweighed the mitigating circumstances. Accordingly, the trial court sentenced Durousseau to death.

Durousseau v. State, 55 So.3d 543, 548-50 (Fla. 2013) (footnotes omitted).

On direct appeal, Durousseau raised five issues: (1) the trial court erred in admitting *Williams* rule evidence of the two other murders; (2) the trial court erred in denying Durousseau's motion for judgment of acquittal of felony murder with robbery as the underlying offense and that the evidence was legally insufficient to support the pecuniary gain aggravator; (3) the trial court erred in rejecting an expert's opinion testimony regarding mental mitigation in favor of conflicting lay testimony; (4) the evidence was insufficient to support a first-degree murder conviction; and (5) the trial court erred in denying Durousseau's motion to declare Florida's capital sentencing scheme unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

On December 9, 2010, this Court rejected each of Durousseau's issues on appeal and affirmed his conviction for the first degree murder of Tyresa Mack. *Durousseau*, 55 So.3d at 564. This Court also found Durousseau's death sentence proportionate. *Id.* Durousseau's motion for rehearing was denied on February 21, 2011. Mandate issued on March 9, 2011. *Case Docket, Florida Supreme Court; Case Number SC08-68.*

On May 10, 2011, Durousseau filed a petition for certiorari in the United States Supreme Court. On October 3, 2011, the United States Supreme Court denied Durousseau's petition.

Durousseau v. Florida, 132 S.Ct. 149, 181 L.Ed.2d 66, 80 USLW 3183 (2011).

Thereafter on October 1, 2012, Durousseau filed a motion for post-conviction relief, setting forth two grounds: (1) ineffective assistance of penalty phase counsel by failing to request additional physical and psychiatric testing; and (2) ineffective assistance of counsel at jury selection by deficiencies in voir dire questioning concerning the death penalty; by failing to adequately inquire of juror Norie; by failing to adequately inquire of juror Cummings; by failing to exhaust all peremptory challenges and failing to request more; and by failing to strike juror Cruz, juror Norie, and juror Markley. On November 26, 2012, the State filed its response to the motion for post-conviction relief.

On April 9 - 10, 2015, the trial court held an evidentiary hearing on Durousseau's motion for post-conviction relief. Prior to commencement of the hearing, collateral counsel announced, on the record, that the defense was waiving Claim I because Durousseau's PET scan came back normal. The parties proceeded on Claim II only before Circuit Judge Jack M. Schemer. Durousseau was represented by Richard Kuritz, Esquire and the State was represented by Assistant Attorney General Carine Emplit and Assistant State Attorneys John Guy and Meredith Charbula.

Durousseau called Terrance Lenamon, Esquire and Brooke Butler, Ph.D. The State called Ann Finnell, Durousseau's trial counsel.

After both parties filed their post-hearing briefs, the trial court denied Durousseau's motion in a thirty-seven page order. This appeal follows.

SUMMARY OF ARGUMENTS

ISSUE ONE

Durousseau submits that the trial court erred in finding that trial counsel was not ineffective during jury selection, particularly for not inquiring of the venire about their attitudes towards the death penalty and aggravating and mitigating factors. Trial counsel was not ineffective because the record clearly rebuts his allegations and Durousseau has failed to meet his burden under *Carratelli*,[1] that is, to show that any juror who served on his juror was actually biased. The trial court's order should be affirmed.

ISSUE TWO

Durousseau contends that the trial court erred in finding that trial counsel was not ineffective for asking collective questions of the venire, as opposed to more individualized questions. The record clearly rebuts this claim. Furthermore, Durousseau cannot show that any juror who served on his jury was actually biased. Counsel was not ineffective and the trial court's order should be affirmed.

ISSUE THREE

Durousseau argues that the trial court erred in finding that trial counsel was not ineffective when counsel did not use all

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[1] *Carratelli v. State*, 961 So.2d 312 (Fla. 2007).

of her peremptory challenges, failed to preserve objections to the jury panel, and failed to adequately inquire into jurors who presented red flags. Once again, these allegations are clearly rebutted by the record and do not satisfy the *Carratelli* analysis. Consequently, the trial court's order should be affirmed.

None of the appellate issues merit any relief.

ARGUMENTS

ISSUE ONE

THE TRIAL COURT PROPERLY FOUND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE DURING HER INQUIRY OF THE JURY'S FEELINGS ABOUT IMPOSING THE DEATH PENALTY, AS WELL AS AGGRAVATING AND MITIGATING FACTORS (RESTATED)

Durousseau advances several arguments within his first claim, including the fact that Ms. Finnell did not explain to the venire that they are not required to recommend death; that Ms. Finnell did not address whether prospective jurors were capable of recommending life; that Ms. Finnell did not explore whether prospective jurors would consider brain damage as a mitigator; that Ms. Finnell did not ask prospective jurors to rate their support of the death penalty on a numerical scale; that Ms. Finnell did not explore what mitigating circumstances are with the venire; that Ms. Finnell failed to ask about specific mitigation potential jurors would accept; and that she failed to ask the venire what aggravators would lead them to automatically recommend death. (IB at 26, 28-30) Nearly all of these arguments are refuted by the record – Ms. Finnell did just what Durousseau claims she did not. More importantly, Durousseau falls woefully short of demonstrating that an actually biased juror remained on his jury and participated in deliberations. Thus, for these two reasons, this claim, in its entirety, should be denied and the trial court's order affirmed.

Jury Selection

Jury selection took place on May 21 – 23, 2007. (R/XX – XXIII)

Before actual questioning of the venire commenced, Ms. Finnell reminded the trial court that she had filed a pretrial voir dire motion, which sought a pre-voir dire instruction be read to the venire, explaining that they are never required to recommend a death sentence. (R/VII 1307-10) That motion was granted and the venire was instructed. (R/XX 5, 12-13) The trial court also instructed the venire that members would not be qualified to serve as jurors if their feelings about the death penalty would cause them to automatically vote for death or life without regard to the aggravating and mitigating circumstances. (R/XX 14)

Ms. Finnell addressed many issues related to the death penalty with the venire, including the fact that nothing requires them to recommend death, as well as their capacity to recommend life, as demonstrated by the following exchange:

> **FINNELL:** Yesterday, Mr. Taylor for the State Attorney's office began questioning you about your feelings towards the death penalty and I need to continue to do that with you this morning.
>
> And let me just say kind of up front because we have already told you that the defense is going to be asking you to return a verdict of not guilty at the close of all the evidence, so it seems a little inconsistent that we're also up here suddenly talking about, you know, your views towards the death penalty because obviously if you return a verdict of not

guilty there won't be a death -- there won't be a penalty phase.

The reason that we have to do this is because the law requires us to do it, so that's the only reason we're delving into that at this time. . . .

. . .

Life in prison with no possibility of parole means just that, a person receiving such a sentence will live out his entire life behind bars until he is dead. Is there anyone here who thinks any differently or who believes despite what I just told you that there is some possibility that someone will be released from prison –

PROSPECTIVE JURY: (No response.)

FINNELL: -- if they get that sentence? Death means just that, that the person ultimately will be killed by lethal injection. Is there anyone here who thinks anything different?

PROSPECTIVE JURY: (No response.)

FINNELL: If you then find my client, Paul Durousseau, guilty of first degree murder you will have to make an individual decision whether he should live in prison for the rest of his life or whether he should be killed.

This is an individual weighing process on your part. **There is nothing that requires you to return a verdict of death.** It's not like a football game where the state, you know, scores so many touchdowns and the defense scores so many touchdowns, but the person that's ahead you have to vote that way. That's not how it is. It's not a counting process where the state puts on so many aggravating circumstances, the defense puts on so many mitigating and whoever has the most you vote that way. That's not how it is.

You as an individual have to make a decision based upon everything you've heard. It is a weighing process where you bring to bear your background, your experience and everything you feel into the process. Does that make sense?

PROSPECTIVE JURY: Yes.

(R/XXII 526-29)(emphasis added)

She informed the venire that they could not return a recommendation of death if they found that no aggravating circumstances were proven, as reflected in the following:

> **FINNELL:** Now, as Mr. Taylor told you, the law requires the State to prove what are called aggravated circumstances before you could even find a reason to vote for death and each aggravating circumstance must be proven beyond a reasonable doubt before you could even consider it as a reason for voting for death. **If you find no aggravating circumstances despite the fact that you would have convicted Mr. Durousseau of cold-blooded premeditated first-degree murder, you could never vote for death under any circumstance. Does everybody understand that?**
>
> **PROSPECTIVE JURY:** Yes.

(R/XXII 529) (emphasis added)

She reiterated that position with the following statements, to which the prospective jurors indicated they understood:

> **FINNELL:** Okay. Because if you find someone -- Mr. Durousseau guilty of first degree premeditated murder obviously -- well, let me say this: All persons who are convicted of first degree premeditated murder obviously are not eligible for the death penalty and the reason for that is kind of what I just talked about. The state would have to prove the existence of aggravating circumstances which would justify the death penalty.
>
> **If there were no aggravating circumstances despite the fact that the person was convicted of first degree premeditated murder they could never get the death penalty. Life in prison would be the only possible penalty that that person could receive.** You with me so far?

PROSPECTIVE JURY: (Nods head affirmatively.)

(R/XXII 532) (emphasis added)

She questioned individual jurors about their feelings on the death penalty and whether, given the right set of facts, they could recommend a life sentence. (R/XXII 530-35, 538)

Ms. Finnell continued asking individual members of the venire about the strength of their feelings for the death penalty, occasionally inquiring of their placement on a 1-10 scale.[2] (R/XXII 563-600; R/XXIII 605-627)

Ms. Finnell again reminded the venire that they are not required to render a particular recommendation in the penalty phase:

> **[t]here's nothing in the law that says anyone has to return any particular type of verdict**. You're not given that as a -- you know, you're not -- it doesn't say if you -- if you get to this and, you know, you count three here and four here and you've got to return this it's not that. **The law just requires you to consider the aggravating circumstances, to consider whether or not they've been proven beyond a reasonable**

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[2] Finnell asked potential juror Grizzard where he rated himself on the scale of one-to-ten with one being not strong at all and ten being very strong; he placed himself at a ten (R/XXII 561); she inquired of potential juror Mariea and he placed himself at an eight (R/XXII 563); potential juror Whyte placed herself at a three or four (R/XXII 582); she asked potential juror Mullis the same and Mullis placed herself at a nine (R/XXIII 610-11); she asked potential juror Ms. Gill the same and Gill placed herself at an eight or nine (R/XXIII 611-12); potential juror Smith rated herself a five (R/XXIII 620); and prospective juror Griffin responded by placing himself in "the middle of the road." (R/XXII 624-25)

> **doubt, consider the mitigating circumstances, whatever you might consider as mitigation, and then to bring all that big package together and put it together and weigh it from your own personal experience and come to a decision. . . .**

(R/XXIII 617)(emphasis added)

Pursuant to Ms. Finnell's pre-voir dire request, the trial court also instructed the jury on this matter:

> There are aggravating factors that may be presented by the state. If the jury -- excuse me. There are mitigating factors that may be presented by the defendant. The jury will be asked to determine first if there are any aggravating factors and then do a weighing process as to whether or not those aggravating factors outweigh the mitigating factors or the mitigating factors outweigh the aggravating factors.
>
> If the jury finds that the aggravating factors outweigh the mitigating factors their recommendation should be death. If the jury finds -- and actually it's each individual juror because it's not a unanimous recommendation, that the mitigating factors outweigh the aggravating factors the recommendation should be life.

(R/XXII 536)

Ms. Finnell also delved into mitigators with the venire as reflected in the following:

> **FINNELL:** Mitigating circumstances are those circumstances which might cause you to vote for life even though the State has proved aggravating circumstances to your satisfaction beyond a reasonable doubt.
>
> **Mitigating circumstances include any aspect of Paul Durousseau's character or background that causes you to think life in prison might be the most appropriate penalty.** Mitigation, the Judge will tell you, doesn't have to be proven to any degree. If you feel it's a reason to vote for life then that's -- then that's

enough for you to use it to justify voting for life. Does that make sense?

PROSPECTIVE JURY: Yes.

(R/XXII 529-30) (emphasis added)

Ms. Finnell addressed mental health as an example of a mitigating circumstance, with the venire, as demonstrated in the following excerpt:

FINNELL: It's a hard concept, isn't it, to wrap your brain around a little bit? Okay. Let me come back to you, Mr. Foster, because I need to ask people a follow-up question. Your feelings about the death penalty then are so strong that I'm going to have -- can you envision under any circumstances having found Mr. Durousseau guilty of first degree murder that you would be able to recommend life?

PROSPECTIVE JUROR: No.

FINNELL: Okay. All right. Thank you. Who else -- I know somebody else raised their hands here. Who else raised their hands? Okay. I'm going to start -- let me keep over here on the left. Mr. --

PROSPECTIVE JUROR: Grizzard.

FINNELL: Mr. Grizzard?

GRIZZARD: Yes. I would have -- for murder in the first degree I would have a predisposition towards the death penalty. I would follow the law, but unless it was proved that there was a mental incapacity for the person who admitted the crime to understand that they had taken a life I don't know if I could go for life in prison.

FINNELL: So the only mitigating factor that you might consider would be one of mental health?

GRIZZARD: Without knowing the facts, without understanding the way the law works, so -- the way I understand it so far, that is what I would -- would be my first consideration.

. . .

FINNELL: Now do you think that strong, strong feeling of yours –

GRIZZARD: That would not over – my strong feeling for [the death penalty] would not overcome my sense of duty to follow the law.

FINNELL: Okay.

GRIZZARD: But I would have a predisposition towards that, yes.

FINNELL: Do you think it would substantially impair your ability to consider mitigating circumstances other than mental health?

GRIZZARD: No.

FINNELL: Other than mental health ones?

GRIZZARD: No, not if the facts bear that out.

(R/XXII 559-62)

Penalty Phase

The jury was instructed by the trial court at the penalty phase that they were not required to return a recommendation of death. (R/XL 3820-21)

The trial court defined aggravating circumstances for the jury and instructed the jury that they had to be proven beyond a reasonable doubt. (R/XL 3815) The court further instructed the jury that they had to determine that at least one aggravator had been proven beyond a reasonable doubt before they could recommend death. (R/XL 3815-16)

The trial court also defined mitigating circumstances for the jury. (R/XL 3818) The jury was instructed that a mitigator can be anything in the defendant's life which might indicate that the death penalty is not appropriate and that a mitigator need not be proven beyond a reasonable doubt by the defendant. (R/XL 3819)

Evidentiary Hearing Testimony

The evidentiary hearing in this case commenced on April 9, 2015 and concluded on April 10, 2015. The theme of the hearing was that trial counsel did not adhere to the professional norms concerning jury selection in capital cases. To that end, Durousseau called Terrance Lenamon, Esquire and Brooke Butler, Ph.D. The State called trial counsel, Ann Finnell, Esquire.

Terrence Lenamon, Esquire, a board certified criminal trial attorney since 1999, has tried twelve death penalty cases, none of which were in Duval county. (PCR/4 508) He has taught classes on jury selection. (PCR/4 508-09) All of his work in capital cases has been on behalf of the defendant. (PCR/4 546) He did not review the jury selection, guilt phase, or penalty phase transcripts in this case. (PCR/4 546-47) He did not interview the jurors in this case, nor did he conduct any research on them. (PCR/4 547) Lenamon stressed the importance, in his opinion, of utilizing the "Colorado method" of jury selection; that is, really focusing on getting one juror to vote for life

because most jurisdictions have unanimous verdict requirements. (PCR/4 509-10, 531) He agreed that the law in Florida is different and requires a different method of jury selection, which he deemed the "Florida method," using parts of the method employed by Public Defender Ms. Haughwout and parts of his method, ultimately seeking six pro-life jurors. (PCR/4 510, 531) He finds it important to utilize techniques, such as front-loading aggravation and mitigation, discussing the governing rules and law, and inquiring into whether the prospective jurors can follow those rules and law, and discussing their opinions on same. (PCR/4 510) He defined front-loading aggravation as "grasp[ing] the worst case scenario of evidence and [ ] hav[ing] to come clean with the jurors upfront and talk[ing] about the aggravating factors." (PCR/4 521) He opined that the worst decision an attorney can make during jury selection is asking group questions. (PCR/4 522) After addressing aggravating factors individually with each juror, he suggests attorneys speak to the jurors about the law, and then follow that up with mitigating factors. (PCR/4 524, 526)

The trial court properly interrupted collateral counsel's examination of Lenamon to inquire as to how Lenamon's jury selection process was relevant to the instant case; the trial court also sought collateral counsel's understanding of the standard applicable to the claim of ineffectiveness at jury

selection. (PCR/4 527) Collateral counsel incorrectly responded to the court, stating that the standard for trial counsel is "what the standard is everywhere else besides Duval County" and that it "should be" the procedure employed and testified to by Lenamon. (PCR/4 528-29)

During cross-examination by the State, Lenamon boldly concluded that trial counsel had been deficient for failing to inquire about the venire's position on the applicable aggravating and mitigating circumstances presented in this case. He reasoned that without having inquired into these matters and learning how potential jurors felt about them, Finnell lacked enough information on each juror to make complete or proper strikes. (PCR/4 548-49) When pressed for his opinion as to whether any particular juror who sat on Durousseau's jury was biased, he effectively refused to answer the question, directing the prosecutor to the last answer he provided to the preceding question. (PCR/4 549)

Brooke Butler was called as the defense's second witness. She is a legal psychologist, mitigation specialist, and litigation consultant. (PCR/4 553) She has held both tenure and non-tenure positions teaching psychology. She has authored over twenty peer-reviewed, as well as invited, publications in the areas of death qualification, jury selection, aggravating and mitigating circumstances, jury decision-making, and judicial

decision-making. She has given numerous presentations on those subjects. She has also trained judges, attorneys, and mitigation specialists on these matters. (PCR/4 554) She has been employed as a mitigation specialist, mitigation consultant, and legal psychologist since 2000. She worked in that capacity at the Office of the Public Defender, 12th Judicial Circuit from 2009 – 2011, before venturing into private practice, where she remains. (PCR/4 555) Approximately 90% of her practice is dedicated to capital cases. (PCR/4 555-56)

She had been provided with transcripts of jury selection from Durousseau's trial and reviewed them prior to testifying. (PCR/4 557) In addition, she conducted some online research into the publicity of this case; obtained a copy of the supplemental jury questionnaire that had been given to the prospective jurors; and reviewed Durousseau's direct appeal initial brief, as well as this Court's resulting opinion. (PCR/4 556-57) She opined that, based on her training, education, and experience, one of the common practices for jury selection in a capital case, is a lengthy jury selection – "the longer the better." (PCR/4 558, 569) She stated that individual, sequestered questioning of prospective jurors is better than group questioning. (PCR/4 560) Additionally, she opined that open-ended questions serve to gather more information than closed-ended questions. (PCR/4 563) She echoed Lenamon's position about

front-loading mitigation being key in capital jury selection. (PCR/4 565)

Interestingly, Butler, after reading the jury selection transcripts, inquired as to whether Durousseau was present for the questioning of all of the prospective jurors.[3] (PCR/4 578) She took issue with the fact that Finnell did not refer to or humanize Durousseau during jury selection. (PCR/4 579) She found fault with Finnell's alleged failure to ask the venire open-ended questions about their feelings on the death penalty and life in prison. (PCR/4 584) Contrary to the record, she asserted that Finnell implied to the jury that there would be a penalty phase, following the guilt phase (thereby inferring that the State's evidence would inevitably lead to a guilty verdict). (PCR/4 584-85; *but see* R/XXII 526-29) She also criticized Finnell for a lack of "probing questions." (PCR/4 587)

On cross-examination, Butler confirmed that she is not an attorney and when she testified on direct to "prevailing professional norms," she was not talking from a legal perspective. She admitted to not having reviewed the guilt or penalty phase transcripts, nor the *Spencer* hearing or sentencing hearing transcripts. (PCR/4 593) She also did not interview any of the jurors. She summarized her position, stating that there

[3] He was present for all of the questioning. (PCR/4 653)

had not been sufficient questioning of the prospective jurors to exercise challenges in an informed way. Notably, she conceded that she could not offer an opinion as to whether Finnell should have exercised her challenges any differently or that any juror who deliberated was actually biased. (PCR/4 594-95) Butler erred again when she testified that Finnell had used all of her preemptory challenges and did not request more. (PCR/4 595; *but see* R/XXIII 690) After being given an opportunity to review the transcript, she receded from her position. (PCR/4 598)

Ann Finnell, Durousseau's very experienced trial counsel, was called by the State. At the time of the evidentiary hearing, she was in private practice, handling primarily criminal law and death cases. (PCR/4 608-09, 611) She has been practicing law, and specifically, criminal defense, in Florida since 1979. She began her legal career at the Office of the Public Defender, first, as a certified legal intern, and then as an Assistant Public Defender. She was assigned to the county court division for less than one year before being promoted to the felony division. Later, in 1981, she became a division chief in the felony division, and in 1982 she was promoted to the homicide division. She worked as a full-time homicide attorney from that time until 1987, when she became the head of felony court. (PCR/4 609-10) She held that position until she left the Office of the Public Defender in January, 2009, when she entered

private practice. While she was the head of felony court, she remained a member of the homicide team and continued to handle homicide cases. She estimated that she has handled approximately 150-300 jury trials throughout her career. (PCR/4 610) She has previously lectured in the area of criminal law at 8-10 other state bar Public Defender Associations throughout the country. (PCR/4 611) She has also lectured for the National Association of Criminal Defense Attorneys; taught and lectured at the Florida Public Defender Association; and has taught at the Prosecutor Public Defender Conference in Gainesville, and the Gerald Bennett Prosecutor Public Defender Conference for approximately 15-20 years. Her lectures have included the areas of death penalty cases and jury selection. She received the Craig Barnett Award for outstanding service from the Public Defender Association. (PCR/4 612) In the past, she served on the Florida Criminal Rules Committee; the Florida Standard Instructions in Criminal Cases Committee; the Jury Instruction Committee; and the Supreme Court Committee for approximately ten years. For the past year, she has served on the Criminal Law Section of the Florida Bar. (PCR/4 613)

She undertook representation of Durousseau in the instant case while she was employed by the Office of the Public Defender. Durousseau had been offered a life sentence with a guilty plea, but refused to accept it, insisting on proceeding

to trial, despite her best efforts, which included having a mitigation specialist speak to him. Durousseau wanted her to try his case and attempt to obtain a not guilty verdict. (PCR/5 705; PCR/4 664) She acted as first-chair counsel in Durousseau's case and Waffa Hanania, a senior homicide attorney, also with the Office of the Public Defender, was second-chair.[4] (PCR/4 613-14) She and Hanania worked jointly on this case. She was the primary attorney responsible for understanding, organizing, and determining the division of labor for the guilt phase, and Hanania was the primary attorney responsible for directing the investigation and determining the division of labor in the penalty phase, as well as the DNA evidence. (PCR/4 616) She felt that she gave this case her full attention, even commenting that she felt the case had been thoroughly investigated with over 600 depositions having been taken. (PCR/4 614, 616-17) Ms. Finnell described her relationship with Durousseau as "good" and felt that they "got along well." (PCR/4 616)

Ms. Finnell filed a motion requesting the trial court give the venire a pre-voir dire instruction that recommending death

[4] Although she had not done so previously in any other case, Ms. Finnell recruited a third party, Gabriel Domini (an intern), to take notes and gather as much information as possible during Durousseau's voir dire. (PCR/4 618)

is never required.[5] (PCR/4 618-19) Judge Schemer so instructed the venire. (PCR/4 619)

Her general practice was to use a juror chart during jury selection to make notes regarding each venire member's responses. (PCR/4 634) She used a chart in this case; co-counsel Hanania had her own; and Durousseau had his own chart, on which he made notes. (PCR/4 635)

As a result of Durousseau's desire that his case proceed to trial, Finnell's primary strategy was to pick jurors who were capable of reaching a not guilty verdict, as opposed to jurors who would recommend life over death, which is her usual practice. (PCR/5 704; PCR/4 664) Consequently, she did not find it appropriate to front-load aggravators. (PCR/4 686) She certainly did not want jurors knowing Durousseau had a prior violent felony during jury selection, while trying to obtain a not guilty verdict on a murder charge. (PCR/4 677; PCR/5 705) Likewise, she did not want to front-load mitigation, especially mental health mitigation, while trying to obtain a not guilty

[5] She ran the proposed instruction by both Alan Chipperfield and Lewis Buzzell, also members of the homicide team at the Office of the Public Defender, before filing it with the court. She testified that she was "pretty engaged with the members of [her] office . . . [because] this was an extremely important case where death was a real possibility. . . ." (PCR/4 620-21)

verdict. She did not want the jury thinking he's psychotic or schizophrenic. (PCR/5 706) She further testified that,

> these folks that teach this front-loading have never picked a jury, they don't understand the law and they're -- and they are -- I personally don't want to be called down by a Court for misstating the law in front of a jury because I think that is associated with losing one's credibility with a jury as well. . . [S]ome of the these things they teach you, I've gone to jury seminars with Jerry Spence, touchy-feely, ask only open-ended questions, sometimes doesn't necessarily fly during jury selection in Jacksonville.

(PCR/4 678)

She again explained that she felt the instructors' [at the jury selection seminars] approach to jury selection is one that involves asking a lot of questions which "sometimes goes overboard in what is needed to determine whether or not the jury can follow the law. . . . That's ultimately the goal here, is to . . . to get a juror . . . who can individually follow the law." (PCR/4 680)

She did not get the impression, from the panel that any venire member did not want to discuss specific issues. (PCR/4 682) If she had, she would have focused on them. (PCR/4 683) Conversely, her practice was not to go back and repeat a question posed by the State, just to do it. If there was a juror who had been thoroughly questioned by the State on their feelings and she felt that they've been forthcoming, she is not going to go back and talk to them again, unless there is something she needs to clarify. (PCR/4 684)

She testified that Durousseau was present for all of the questioning of the prospective jurors. (PCR/4 653) He was an active participant in voir dire. (PCR/4 617, 637) The venire completed juror questionnaires. (PCR/4 557, 617, 621-23) The questionnaires addressed general matters, as well as matters specific to this case, including a statement about the case; a list of all potential witnesses; a statement about the similar fact evidence (of two separate murders being offered by the State); inquiring into the venire's exposure to publicity concerning the case; and seeking information as to whether members of the venire had any fixed opinions about the case. (PCR/4 621-22) Ms. Finnell and her team reviewed the completed questionnaires. (PCR/4 623) Later, some individual, sequestered voir dire occurred as a result of the some of the venire members' answers to the questionnaire. (*Id.*) The trial court, State, and Ms. Finnell participated in that individual, sequestered voir dire. (PCR/4 624)

She used all ten of her peremptory challenges, and sought additional challenges; the court granted her one additional peremptory challenge. (PCR/4 653)

Ms. Finnell testified to having informed the venire that she was delving into the death penalty because the law required her to do so; that they would not have to consider making a sentencing recommendation if they found Durousseau not guilty;

that life in Florida means life; that the penalty phase is a weighing process; that each aggravating circumstance must be proven beyond a reasonable doubt; that if the State failed to prove any aggravating circumstance, their recommendation must be for life; and that nothing requires the jury to return a recommendation of death. (PCR/4 627-31) She also questioned each juror individually about their feelings on the death penalty, as reflected by the notes on her chart. (PCR/4 626)

She explained that the trial judge instructed the venire, which was followed by the State's thorough questioning of the venire, which then placed her third to inquire of the prospective jurors. She listened "intently" to the State's questioning as the prosecutor tried to uncover any prospective jurors who might have strong feelings one way or the other regarding the death penalty. (PCR/4 682) She testified, "if I didn't ask a question of a juror, that doesn't mean that they weren't talked to about their feelings about the death penalty." (PCR/4 683)

She also testified that she explained, to the venire, what a mitigating circumstance is and that it could include any aspect of the defendant's character or background. She informed the venire that a mitigating circumstance did not have to be proven to any degree for the jurors to use it in making a life recommendation. (PCR/4 631-33) She had a general discussion that

mental health could be a mitigating circumstance with prospective juror Grizzard.[6] (PCR/4 632)

She also explained what an aggravating circumstance is and that they must be proven beyond a reasonable doubt. (PCR/4 630) She continued explaining that if the State failed to prove any aggravating circumstances, then their recommendation must be for a life sentence. (PCR/4 631)

Ms. Finnell also explained that if she tried to get venire members to commit to how they would vote, including whether they would consider mental health as a mitigating circumstance, she would run the risk of the State raising an objection, just as she would if the State began asking the venire whether they would consider a prior violent felony an aggravating circumstance. (PCR/4 676-77)

Ms. Finnell delved into the similar fact evidence with the venire, explaining that the trial court would instruct them that they could only consider that evidence for the purpose of determining whether it proved motive, intent, plan, preparation, knowledge, or absence of mistake. She posed "a lot of questions" about the similar fact evidence, including whether they thought Durousseau was guilty of the similar fact offenses. (PCR/4 668)

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[6] This did not occur during sequestered, individual voir dire but actually in the presence of the entire venire.

Trial Court's Ruling

The trial court considered the allegation that Ms. Finnell did not inform the venire that they were not required nor compelled to return a death recommendation. (PCR/3 455-59) It found that Ms. Finnell's performance on this front, particularly her use of the football analogy quoted previously on page 10 of this Answer Brief, "correctly tracks Florida law." (PCR/3 456) Ms. Finnell sought a pre-voir dire instruction, informing the jury that they were not required to recommend death. The court so instructed the jury. (PCR/3 455) The trial court also cited various references made by Ms. Finnell during her voir dire of the venire concerning their obligation in rendering a sentencing recommendation. (PCR/3 455-57) Finally, the trial court cited its own instructions to the jury, during both jury selection and the penalty phase. (PCR/3 457-58) The trial court concluded that "the venire and jury were properly instructed that they were neither required nor compelled to recommend a death sentence in this case." (PCR/3 458) It also determined that the venire and jury were advised that the State must prove at least one aggravating circumstance in order to recommend the death penalty. (*Id.*) The court ultimately found that Durousseau failed to establish either prong of the *Strickland* analysis. (PCR/3 459)

The trial court addressed the claim that Ms. Finnell failed to explore mitigators with the venire and cited a portion of jury selection in which she did exactly that. (PCR/3 459-63) It cited an example of Ms. Finnell's explanation of mitigating circumstances. (PCR/3 460) The trial court also included a citation, reflecting its own instruction on mitigators given to the jury during the penalty phase. (PCR/3 460-61) The court found that Ms. Finnell was not ineffective when addressing aggravating and mitigating circumstances with the venire. (PCR/3 461)

The trial court considered Durousseau's claim that trial counsel was ineffective for failing to ask the venire why they held particular beliefs or feelings about the death penalty. The trial court referred to sequestered voir dire and the State's questioning of the venire before Ms. Finnell commenced her inquiry. It also referred to Ms. Finnell's evidentiary hearing testimony during which she stated that her goal during jury selection was not to retread on matters already discussed but to focus on questioning those jurors whom she felt had not been adequately questioned by the State. This is, of course, in addition to her evidentiary hearing testimony indicating that she had made notes next to each potential juror's name reflecting their views on the death penalty. (PCR/3 463) The court also relied on Ms. Finnell's testimony that she was

particularly concerned with picking a jury for the guilt phase; thus, it was reasonable for her not to spend an unwarranted amount of time exploring the individual reasons behind certain venire members' position on the death penalty. The trial court found Ms. Finnell's strategy to be reasonable trial strategy. The court also pointed out that Durousseau failed to identify any juror who would have been found to be unqualified or biased against him had Ms. Finnell explored this issue. (PCR/3 464)

The trial court also discussed Durousseau's argument that Ms. Finnell should have asked the venire whether they supported imposition of the death penalty for crimes other than first-degree murder. (PCR/3 464-65) The court found that the "record clearly demonstrates that the venire members' views on the death penalty were thoroughly fleshed out at voir dire, and it is pure speculation that these questions would lead to a more defense-oriented jury." (PCR/3 465) The court also pointed out that such questioning was less important because Ms. Finnell's strategy was to pick a jury who would acquit Durousseau. (PCR/3 465)

Likewise, the trial court considered and rejected the claim that Ms. Finnell should have asked all potential jurors to rate their feelings for the death penalty on a numerical scale. In rejecting this claim, the court found that Durousseau offered no proof that had the prospective jurors rated themselves on a

numerical scale, that would have revealed a viable basis for a cause challenge as to any particular juror. (PCR/3 464-65)

Analysis

This Court explained the legal test for ineffective assistance of counsel claims in *Bradley v. State*, 33 So.3d 664, 671-72 (Fla. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A claim for ineffective assistance of trial counsel must satisfy two criteria.

First, counsel's performance must be shown to be deficient. *Id.* at 671. Deficient performance means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. When examining counsel's performance, an objective standard of reasonableness applies, and great deference is given to counsel's performance. *Id.* The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955). This Court has made clear that "[s]trategic decisions do not constitute ineffective assistance of counsel." *Id.* (quoting *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000) There is a strong presumption that trial counsel's performance was not ineffective. *Id.*

Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. *Id.* at 672. A defendant must do more than speculate that an error affected the outcome. The prejudice prong is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052)

The dispositive question is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. "Given the strong presumption in favor of competence, the petitioner's burden of persuasion - though the presumption is not insurmountable - is a heavy one." *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000). Unless the petitioner can rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," he cannot establish that counsel's performance was constitutionally deficient. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask

only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary,* 972 F.2d 1218, 1220 (11th Cir. 1992); *see also Waters v. Thomas,* 46 F.3d 1506, 1514 (11th Cir. 1995) (stating that "perfection is not the standard of effective assistance"). Both deficient performance and prejudice must be shown. *Bradley*, 33 So.3d at 672.

This Court has carved out a special rule governing claims of ineffective assistance of counsel during jury selection because *Strickland's* prejudice prong does not fit well into an analysis of whether trial counsel was ineffective for failing to use an available challenge to remove a juror who actually sat on the defendant's jury. This makes sense because a capital defendant could never show a reasonable probability that a differently comprised jury probably would have acquitted him or recommended life.

The seminal case for the test to be applied for this type of claim is this Court's decision in *Carratelli v. State*, 961 So.2d 312 (Fla. 2007). In *Carratelli*, the issue was not the same as we have in this case. Instead, the issue in *Carratelli* was whether trial counsel was ineffective for failing to preserve a claim for direct appeal that the trial judge erred in denying four cause challenges. While trial counsel exercised peremptory challenges against three of the jurors he attempted,

unsuccessfully, to challenge for cause, trial counsel failed to use an available peremptory challenge against the fourth prospective juror. As a result, that fourth prospective juror actually sat on Carratelli's jury.

This Court concluded that to prove ineffective assistance of counsel for failing to raise and preserve a denial of a challenge for cause, the defendant must show that an actually biased juror sat on the jury. This Court went on to define an actually biased juror as one who is not impartial; one who is biased against the defendant.[7] This Court concluded that evidence of actual bias must also be plain on the face of the record. *Carratelli v. State*, 961 So.2d at 324.

The *Carratelli* standard makes sense because a defendant cannot presume that unasked and therefore unanswered questions would reveal a basis for challenge. The *Carratelli* standard is the only workable standard for issues concerning voir dire;

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[7] A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So.2d 1038, 1041 (Fla. 1984). Therefore, actual bias means bias-in-fact that would prevent service as an impartial juror. *See United States v. Wood*, 299 U.S. 123, 133-34, 57 S.Ct. 177, 81 L.Ed. 78 (1936) (stating, in a case involving a statute permitting government employees to serve as jurors in the District of Columbia, that the defendant in a criminal case still has the ability during voir dire to "ascertain whether a prospective juror ... has any bias in fact which would prevent his serving as an impartial juror").

otherwise, a defendant would simply have to speculate that a juror was biased because he/she was not asked particular questions. Speculation of that sort would open the floodgates for ineffective claims at jury selection and no convictions would be upheld on appeal.

Subsequently, in *Owen v. State*, 986 So.2d 534 (Fla. 2008), this Court applied the *Carratelli* test to a claim that trial counsel was ineffective for not challenging for cause or using a peremptory challenge to remove three jurors. This Court found no error in the trial court's denial of the claim. This Court noted that Owen failed to show that any of the three jurors were actually biased. Additionally, this Court rejected any notion that to prevail in a post-conviction motion, a defendant need only show there was a question about a juror's impartiality. Instead, this Court reiterated that, to prevail on a claim like the one raised in this case, the defendant must show that an actually biased juror served on his jury. *Owen*, 986 So.2d at 550.

Most recently, in *Guardado v. State*, this Court affirmed the trial court's postconviction denial of relief where Guardado simply alleged that jurors were biased without making an actual showing. Guardado argued that three jurors who deliberated on his case were biased. He argued that one juror, Pamela Pennington, should have been stricken because the victim had

served as a realtor for Pennington's son and Pennington had met with him regarding that transaction; that juror Hall was "strongly" in favor of the death penalty, he knew three of the police officers who worked on the case, and he had positive feelings about the victim, whom some of his family knew; and that juror Cornelius should have been stricken because his aunt and uncle had been murdered approximately 25 years prior under circumstances similar to the murder Guardado was charged with. This Court held that none of the allegations presented demonstrated actual bias. *Guardado v. State*, 176 So.3d 886, 897-99 (Fla. 2015).

Guardado's claims of bias were stronger on their face than those presented by Durousseau and still did not meet muster. In Durousseau's case, none of the jurors who deliberated in his case knew the victim or any of the State's witnesses, and none recounted having (or having family who) experienced events similar to those presented in Durousseau's prosecution.

This Court really need not address *Strickland*'s deficient performance prong because Durousseau plainly did not meet the *Carratelli* standard in showing that an actually biased juror sat on his panel. *Thompson v. State*, 796 So.2d 511, 516 (Fla. 2001) (noting that when a defendant fails to make a showing as to one element, it is not necessary to delve into whether he has made a showing as to the other element). However, if this Court should

do so, the record and the evidence introduced at the evidentiary hearing clearly demonstrate that Ms. Finnell's performance was not deficient. Because of Durousseau's decision to reject the State's offer and proceed to trial, with hopes for an acquittal, she had to make a strategic decision to conduct voir dire with a goal of obtaining a jury that was capable of returning a not guilty verdict. Thus, as she testified at the evidentiary hearing, front-loading aggravators and mitigators was inappropriate. Furthermore, she made the necessary strikes against potential jurors who demonstrated an inability to reach a not guilty verdict and kept those she felt she could. "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Lukehart v. State*, 70 So.3d 503, 512 (Fla. 2011).

Collateral counsel erroneously argued that the standard Finnell was expected to be held to during jury selection "is what the standard is everywhere else besides Duval County" and that it "should be" the procedure employed and testified to by Lenamon. (PCR/4 528-29) While Lenamon and Butler may disagree with Finnell's strategy at jury selection, their disagreement does not form the basis for an ineffective claim. As the *Pagan* Court held, "[a]n attorney can almost always be second-guessed

for not doing more but that is not the standard." *Pagan v. State*, 29 So.3d 938, 949 (Fla. 2009).

Even if Durousseau could show deficient performance, he cannot prevail because he cannot show prejudice applying the *Carratelli* standard. This standard has been announced and reiterated by this Court in numerous decisions. The test for an ineffectiveness claim related to jury selection is a simple one: whether an actually biased juror remained on the panel and deliberated.

Being unable to prove that an actually biased juror remained on the jury, it necessarily follows that Durousseau cannot demonstrate prejudice - a reasonable probability of a different outcome – that is, he cannot prove that he would have been acquitted, convicted of a lesser-included offense, or received a life sentence with a different jury. This is particularly true in light of the overwhelming evidence of guilt the State presented at the guilt phase, including the discovery of Durousseau's DNA in the victim's vagina and the similar fact evidence of two other murders he committed in a like fashion.

Furthermore, nearly all of Durousseau's allegations are clearly rebutted by the record. Durousseau argues that Ms. Finnell failed to explain to the venire that it was not required to recommend death; the record is replete with examples of just that. Furthermore, the trial court also instructed the venire on

that. Durousseau claims that Ms. Finnell did not address whether prospective jurors were capable of recommending life; again, the record contains numerous examples of Ms. Finnell exploring this issue. He submits that Ms. Finnell did not ask prospective jurors to rate their support of the death penalty on a numerical scale. Although the trial court did not cite any examples of this in its order, Ms. Finnell did ask a numbers of jurors to rate their support for the death penalty on a one-to-ten scale. Durousseau argues that Ms. Finnell did not explore what mitigating circumstances are with the venire – this, too, is rebutted by the record.

Furthermore, the trial court and State questioned the venire before Ms. Finnell had her opportunity to do so. As she testified at the evidentiary hearing, just because she didn't inquire of a venire person about their feelings on the death penalty, does not mean that they were not discussed at all. (PCR/4 683) In *Teffeteller v. Dugger*, 734 So.2d 1009, (Fla. 1999, the defendant claimed ineffective assistance of counsel at jury selection for failure to adequately question the prospective jurors about their pretrial knowledge of the case. In affirming the denial of the claim, this Court stated that it could not fault trial counsel for failing to repeat the questioning previously done by the trial court and the State.

Id. at 1020-21. *See also Johnson v. State*, 921 So.2d 490, 503 (Fla. 2005) (same).

Although Ms. Finnell did not specifically explore whether the venire would accept brain damage as a mitigator, the record reflects that she did explore mental illness. The claim that Ms. Finnell should have inquired about brain damage is speculative. In fact, Durousseau fails to explain, in his Initial Brief, how inquiring about this, would have led to bases for cause challenges of prospective jurors. *See Green v. State*, 975 So.2d 1090, 1105 (Fla. 2008) ("Parker did not render ineffective assistance in failing to ask Guiles more questions, because an allegation that there would have been a basis for a cause challenge had counsel followed up during voir dire with more specific questions is speculative") (citing *Johnson v. State*, 903 So.2d 888, 896 (Fla. 2005)); *Davis v. State,* 928 So.2d 1089, 1118 (Fla. 2005) (rejecting Davis's claim of ineffective assistance based on trial counsel's alleged failure to question the jurors about their views concerning drugs, alcohol abuse, and mental illness because Davis failed to demonstrate that any unqualified juror served in the case or that any juror was biased or had an animus toward Davis's theory of the case).

Durousseau complains that Ms. Finnell did not ask venire members about which aggravators would lead them to automatically recommend death. (IB at 29) However, Ms. Finnell explained that

if she tried to get venire members to commit to how they would vote, including whether they would consider mental health as a mitigating circumstance, she ran the risk of the State raising an objection, just as she would if the State began asking the venire whether they would consider a prior violent felony an aggravating circumstance. She did not want to run the risk of losing credibility with the venire. (PCR/4 676-77) This constitutes reasonable trial strategy and reflects her understanding of and intent to follow the law.

Since Ms. Finnell was focusing more on obtaining a jury that could find Durousseau not guilty, she wisely spent time delving into the similar fact evidence the State sought to introduce with the venire. (PCR/4 668)

Durousseau has failed to meet his burden before trial court and again before this Court. First, nearly all of his allegations are refuted by the record; and, second, even if they were true, he has failed to demonstrate that an actually biased juror remained on his jury and participated in deliberations. He has not pointed to any evidence indicating that any of those jurors did not deliberate the issue of his guilt fairly and impartially. He has not shown that the outcome of his case would have been any different had Ms. Finnell asked a few more questions. He is entitled to no relief and the order denying relief on this claim should be affirmed.

ISSUE TWO

THE TRIAL COURT PROPERLY FOUND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN ASKING COLLECTIVE AND INDIVIDUAL QUESTIONS OF THE VENIRE (RESTATED)

Durousseau argues that Ms. Finnell was ineffective for asking more collective questions than individual questions, and for failing to follow up when no prospective jurors answered group questions. (IB at 31-32) Ms. Finnell was not ineffective; the record rebuts both allegations. She asked both collective and individual questions and when the venire did not respond to collective questions, that was because no response was necessary.

Jury Selection

Ms. Finnell began her voir dire with group questioning, followed by individual questioning. She inquired of the venire as a whole about their position on searching for the truth as follows:

> **FINNELL:** Okay. Do you think that the truth and that finding the truth is an important job for a juror? Do you think that, Mr. Loczowski?
>
> **LOCZOWSKI:** Yes.
>
> **FINNELL:** How about you, Ms. Day?
>
> **DAY:** Yes.
>
> **FINNELL:** Is there anyone here that thinks that -- that doesn't think that searching for the truth and finding the truth is the ultimate job of a juror?
>
> **PROSPECTIVE JURY:** (No response.)

(R/XXII 487)

She also asked the venire whether they were willing to put the energy into examining the case in trying to find the truth with the following exchange:

> **FINNELL:** Okay. Do you agree that examining a case and really looking at it to try to find the truth is much harder than just taking somebody's word for it?
>
> **PROSPECTIVE JURY:** Yes.
>
> **FINNELL:** Does that make sense?
>
> **PROSPECTIVE JURY:** Yes.
>
> **FINNELL:** Now if you're chosen as a juror, are you willing to put that much energy into this case? Are you willing to examine the facts and really get into it and try to determine the truth?
>
> **PROSPECTIVE JURY:** Yes.
>
> **FINNELL:** Is there anybody here who won't really give it that kind of energy?
>
> **PROSPECTIVE JURY:** (No response.)

(R/XXII 487-88)

Ms. Finnell explored the venire's position on viewing and studying photographs and exhibits as follows:

> **FINNELL:** Okay. Now you're going to be able to physically -- you're going to have to be able to physically see photographs and exhibits and be able to study them and look at them. Is there anybody here who just can't do that? Anybody at all?
>
> **PROSPECTIVE JURY:** (No response.)
>
> **FINNELL:** Now I know you've got some problems with -- let's talk about these -- the autopsy photographs and crime scene photographs. They can be pretty doggone

horrible. They can be. On the other hand, I mean let's face it, folks, if you're going to be shown -- seeing -- shown -- looking at pictures of three dead women. Most of the time -- I know you indicated you thought you might have a physical getting sick reaction?

PROSPECTIVE JUROR: No. I don't think that's the case. That was someone over there. I just am very uneasy with the thought of it.

FINNELL: Okay. It's normal, I think, that sometimes, you know, you just get mad when see this kind of thing. It angers you. It's frustrating because, you know, here you have this person who is dead and there's not anything that anyone can do about that. Can you -- is there anybody who feels that they're not going to be able to put that aside, that possibility of anger or frustration or even just --

PROSPECTIVE JUROR: Getting sick.

FINNELL: Yes. Getting sick. Thank you. Because if you can't you might have problems actually studying and looking at these things for their forensic value and for the value in really finding the truth that sometimes these type of exhibits contain.

So let me ask you. You know yourself a heck of a lot better than I could ever possibly know you in this short period of time. Is there anyone who thinks that they couldn't get past the anger or the frustration or just the physical discomfort and really look and study these type of photographs for their value in trying to find out what really happened.

PROSPECTIVE JURY: (No response.)

FINNELL: Okay. Do each of you agree that sometimes strong feelings about things can get in the way of and interfere with one's ability to find the truth?

PROSPECTIVE JURY: Yes.

FINNELL: Is there anybody here who has such strong feelings right now that they think that those strong feelings are going to get in the way of finding the truth?

PROSPECTIVE JURY: (No response.)

(R/XXII 488-90)

Finnell continued asking collective questions of the venire to determine whether prospective jurors would hold Durousseau's infidelity against him at trial:

> **FINNELL:** All right. Do any of you have such strong moral or religious beliefs about that type of behavior that you think it would cause you to be other than fair and impartial?
>
> **PROSPECTIVE JUROR:** What type of behavior?
>
> **FINNELL:** Extramarital affairs. Mr. Powell, you're not real happy?
>
> **POWELL:** Well, you know, all that's going to bear on my thinking about this gentleman.
>
> **FINNELL:** I understand. It's not a good thing, but he's not on trial for cheating on his wife, okay?
>
> **POWELL:** No. I mean it's just a pattern.
>
> **FINNELL:** Well --
>
> **POWELL:** I guess I'd have to --
>
> **FINNELL:** All right. No. I appreciate your candor. Does anyone else feel like Mr. Powell does? Okay. Does anyone think that somehow that's going to get in the way of your ability to be fair and impartial?
>
> **PROSPECTIVE JURY:** (No response.)

(R/XXII 495-96)

Later, Ms. Finnell inquired as to whether the prospective jurors would maintain their beliefs, during deliberations, even if in the minority or whether they would be swayed to agree with the majority:

> **FINNELL:** A juror has the right to have his or her own beliefs about the testimony and the evidence and what a proper verdict should be. If after carefully considering all the evidence and the testimony and engaging in discussions with your fellow jurors at the end of the case you find yourself in the minority, regardless of what that minority is, would you tend to abandon a consciously held belief or opinion on your part simply because you were in the minority?
>
> **PROSPECTIVE JURY:** No.
>
> **FINNELL:** Is there anyone here who would do that?
>
> **PROSPECTIVE JURY:** (No response.)

(R/XXII 519)

Evidentiary Hearing Testimony

Terrence Lenamon opined that the worst decision an attorney can make during jury selection is to ask group questions. (PCR/4 522)

Brooke Butler testified that individual, sequestered questioning of prospective jurors is better than group questioning. (PCR/4 560) Additionally, she opined that open-ended questions serve to gather more information than closed-ended questions. (PCR/4 563)

Ms. Finnell testified that she normally delves into the jury's role in searching for the truth and did so in this case. (PCR/4 633-34)

Ms. Finnell testified that she does not have a problem with collective questioning; whether she is going to ask collective questions depends on the circumstances of each individual case.

Certain questions are "quite appropriate to ask collectively." (PCR/4 669) She further testified that, based on her experience, individual questioning does not provide her with more information than collective questioning. (PCR/4 671)

In her view, there is a benefit to questioning the panel as a whole. It acts as a springboard for potential jurors to interject or comment after other jurors have spoken. (PCR/5 703) It also provides an opportunity for potential jurors to share common beliefs or opinions. (PCR/5 704)

In this case, she asked a lot of collective questions regarding the death penalty, but was afforded the opportunity to go back and ask additional questions of any juror she felt was necessary. (PCR/4 670)

She reminded collateral counsel, on cross-examination, that she was handling voir dire with the assistance of co-counsel, as well as Durousssseau's participation. If co-counsel, Ms. Hanania, wanted her to ask to a particular venire person additional questions, she would have done so. (PCR/4 685)

When asked about posing collective questions which did not result in answers from the venire, Ms. Finnell explained that those questions would have only required a response if prospective jurors disagreed. For instance, she asked whether any of the members of the venire would not give the trial the energy it would require. None responded because they all agreed

that they could give it the energy it required. (PCR/4 690-91) She asked the venire, collectively, whether anyone had such strong feelings that they thought those feelings might get in the way of finding the truth. No answer from the venire means that no one had any bad feelings. (PCR/4 691)

Trial Court's Ruling

The trial court found that the allegation that Ms. Finnell relied principally on collective questioning in lieu of more intensive individual questioning was contradicted by the record. (PCR/3 466-67) The court noted that it, along with trial counsel and counsel for the State, engaged in lengthy sequestered voir dire of individual jurors at the beginning of the jury selection process. Consequently, significant questioning of the venire on key issues had occurred before Ms. Finnell began her questioning. (PCR/3 453-54) The court also noted that the transcript of jury selection revealed that Ms. Finnell did "engage in significant individual questioning of venire members once the State completed its questioning of the venire. After generally going over some general points on the death penalty through collective questions, Ms. Finnell conducted an extensive individual inquiry into particular venire member's personal feelings on the death penalty." (PCR/3 454-55)

The trial court concluded that Durousseau had failed to identify any juror who would have been found unqualified or

biased against him had there been more extensive individual questioning and that Durousseau had not satisfied either prong of the *Strickland* analysis. (PCR/3 455)

The trial court also addressed the claim that Ms. Finnell failed to follow up on unanswered questions posed collectively to the venire. (PCR/3 466-67) As the trial court correctly found, "each of the selected questions [Durousseau claims were not answered] only required a 'no' response. Thus, it can be logically inferred from the venire's non-response to these three questions that the entire venire would have answered each question affirmatively if given the opportunity." (PCR/3 466)

The trial court concluded that Durousseau failed to satisfy either prong of the *Strickland* analysis. (PCR/3 467)

Analysis

Durousseau's claims are once again refuted by the record, a fact correctly identified in the trial court's order. In addition to being clearly rebutted by the record, Durousseau has not demonstrated that a juror who was actually biased remained on his jury.

As previously cited in this Answer Brief, Ms. Finnell engaged in both collective and individual questioning. Further, even if Durousseau's contention was correct, he has failed to cite any authority for the proposition that counsel must engage in individual questioning during jury selection in order to provide

effective assistance of counsel. Simply stated, Durousseau is engaging in a hindsight analysis, which this Court has repeatedly condemned. *Cherry v. State,* 659 So.2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, in hindsight....") "*Strickland* cautions that '[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's **c**hallenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Hayward v. State*, No. 12-1386, -- So.3d --, 2015 WL 3887692, at *4 (Fla. 2015) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052)

Ms. Finnell was not ineffective in her manner of questioning venire members and the trial court's order should be affirmed. Durousseau's conviction was a result of the weighty evidence against him, not the manner in which Ms. Finnell chose to conduct her voir dire.

ISSUE THREE

THE TRIAL COURT CORRECTLY FOUND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE DURING HER QUESTIONING OF SPECIFIC JURORS AND WAS NOT INEFFECTIVE FOR NOT CHALLENGING THEM (Restated)

Durousseau submits that the trial court erred in finding that his trial counsel was not ineffective for failing to exhaust all of her peremptory challenges, by failing to preserve objections to the jury, and by failing to thoroughly inquire of juror Norrie, juror Cummins, and alternate juror Markley. (IB at 35) The trial court's decision should be upheld because most of Durousseau's allegations are refuted by the record and more importantly, he is unable to demonstrate that a juror who deliberated on his case was actually biased. Lastly, his claim that objections to the jury were not preserved was abandoned when Durousseau failed to inquire of Ms. Finnell at the evidentiary hearing and should be denied as abandoned.

Jury Selection

Finnell used all ten of her preemptory challenges, and sought additional challenges; the court granted her one additional preemptory challenge. (R/XXIII 690; *see also* PCR/4 653) She later exercised that additional preemptory challenge, before finally accepting a jury. (R/XXIII 691)

The record is devoid of any indications that Ms. Finnell objected to any of the venire members who were selected to serve on Durousseau's jury.

Juror Markley

Juror Markley served only as an alternate and did not participate in deliberations at either the guilt or penalty phase.[8]

Regarding her support of the death penalty, juror Markley stated, "Well, I could go either way. You say you have a long row to hoe. Well, and this is just me, [the State] ha[s] just as much a road to hoe as you do when it comes to me." She continued explaining, "[b]ecause when it's all said and done I have to live with my decision. I have to be okay with that. I have to be able to sleep at night, so I have to hear both sides and go from there." (R/XXII 599-600) She also unequivocally stated that the killing of her close friend, which had occurred some twenty years prior, would have no bearing on her ability to be fair and impartial in this case. (R/XXII 408-09, 600)

Jurors Cummins

After a fellow prospective juror indicated that his beliefs would not impair his ability to weigh the aggravating and mitigating factors in consideration of whether to recommend the death penalty, juror Cummins was asked whether her feelings

[8] This is apparent by the transcripts of the jury polling from both the guilt and penalty phases, which do not include Markley's name, and were admitted into evidence at the evidentiary hearing without objection. (R/XXXVI 3140-42; R/XL 3832-35; PCR/4 597).

were the same, to which she replied, "That's correct." (R/XXII 432) During questioning about whether prospective jurors could make a life recommendation, juror Cummins testified as follows:

> CUMMINS: I do believe in the death sentence. I believe in it. **After sitting in here I feel that it's based on each individual case and as you stated and the Court has stated the aggravated and mitigating circumstances, but, yes, you do have to weigh that out, and, yes, I could vote either way, either death or life imprisonment depending on the circumstances.**

(R/XXIII 538-39) (emphasis added)

Juror Norrie

Juror Norrie initially indicated on her completed questionnaire that she thought she knew one of the potential witnesses in this case: Robert Ford. When questioned about this at jury selection, she stated that the Robert Ford she knew was an attorney. (R/XXI 388) In response, the prosecutor informed her that he did not believe that the Robert Ford he had listed was an attorney and thus was not the same person. (R/XXI 389)

The State asked her about her husband, whom she described as an attorney with Rogers Towers, a firm that handles little-to-no criminal work. (R/XXI 389)

Juror Norrie stated that she could set aside her feelings about the killing of her sister by a drunk driver in 1967, some 40 years before this trial, acknowledging that it had nothing to do with the case against Durousseau, and that she could give him a fair trial. (R/XXI 389-90; R/XXII 566-67) She testified that

she could critically evaluate the testimony of an expert just like any other witness. (R/XXII 521) In relation to her feelings on the death penalty, juror Norrie stated, "**If** we got to the penalty phase in this trial I feel like I could weigh the aggravating and the mitigating and if the aggravating outweighed then I could do the death, but I can go the other way as well." She continued with, "I believe in the legal system." (R/XXIII 566-67) (emphasis added)

Evidentiary Hearing Testimony

Brooke Butler erroneously testified that Finnell had used all of her preemptory challenges and did not request more. (PCR/4 595; *but see* R/XXIII 690) After being given an opportunity to review the transcript, she receded from her position. (PCR/4 598)

Ms. Finnell testified that she used all ten of her preemptory challenges, and sought additional challenges; the court granted her one additional preemptory challenge. (PCR/4 653)

In explaining why juror Markley was chosen as an alternate, Ms. Finnell testified that some of her responses were "really good." (PCR/4 650) She recollected that Markley wanted a "high level of proof, no doubt." (PCR/4 649) Juror Markley expressed support for the death penalty, but said she could go "either way" and that the State "had a long row to hoe." Markley

explained that she had to live with her decision for the rest of her life, had to be okay with it, and had to be able to sleep at night, so she needed to hear from both sides before making an informed recommendation. Ms. Finnell discussed the similar fact evidence with her and Markley expressed an understanding that Durousseau was not being tried for the murders of the other two victims during this trial. (PCR/4 649) Markley did not raise any red flags to her. (PCR/4 650) Durousseau's chart indicates that Markley was "okay." (*Id.*)

Ms. Finnell testified that while juror Cummins initially presented a support for the death penalty, her response quoted on page 53 of this Answer Brief alleviated her concern. She added that, during jury selection, it's not just the words the prospective jurors speak, but also their actions – the way they say something, whether they maintain eye contact – that she takes into consideration. (PCR/4 643) She surmised that she must have gotten the impression that juror Cummins was sincere in saying that she could listen to both aggravating and mitigating circumstances and could vote either way. She placed a zero on her jury chart for juror Cummins, indicating that she did not have any strong feelings for or against her being selected as a juror. (PCR/4 644) Durousseau liked Cummins. He drew a smiley face and a plus sign next to her name on his chart. (PCR/4 645)

Ms. Finnell also testified about juror Norrie's responses. Norrie acknowledged that Durousseau had nothing to do with the death of her sister some 40 years prior and that it would not weigh on her mind, if chosen to sit on his jury. (PCR/4 646) Ms. Finnell also explored her support of the death penalty. Juror Norrie's response began with the phrase "if we got to the penalty phase," which Ms. Finnell described as a good response because it reflected her understanding that there was a guilt phase first. Juror Norrie also conveyed that she could weigh the aggravating and mitigating factors and if the aggravating factors outweighed the mitigating factors, she could recommend death; Ms. Finnell "felt good" about that response because it indicated that she understood the process – that is, that a guilt phase came first and that in order to recommend death, she would have to find that the aggravators outweighed the mitigators. She described juror Norrie's responses as "positive answers." She did not write any sign next to juror Norrie's name on her chart, which meant that she did not feel strongly either way about her. (PCR/4 647) She had no red flags." (PCR/4 648)

Trial Court's Ruling

The trial court considered the allegation that Ms. Finnell should have challenged alternate juror Markley; and should have inquired further into her friend's murder, as well as whether she was a member of any anti-crime or anti-violence

organizations. (PCR/3 477) The trial court initially and correctly pointed out that Durousseau cannot establish prejudice, since juror Markley only served as an alternate, who did not deliberate. (*Id.)* The court went on to discuss her statements, which included an indication that she was willing to listen to both sides before making a sentencing recommendation and that her friend's murder would have no bearing on her decision in this case. (*Id.*) Finally, the trial court cited Ms. Finnell's evidentiary hearing testimony in which she stated that she viewed juror Markley's responses to her individual questions as positive. (PCR/3 478) The trial court concluded that it was clear, from her responses, that Markley was not actually biased against Durousseau and that he could not establish that Ms. Finnell was ineffective for failing to challenge her or that he was prejudiced by her presence as an alternate juror. (*Id.*)

The trial court addressed the allegation that Ms. Finnell did not adequately inquire of juror Cummins. (PCR/3 476-77) It found that Ms. Finnell asked her about her views on the death penalty and that juror Cummins acknowledged that she believed in the death penalty, but would be able to review the facts of the case, consider the aggravating and mitigating circumstances, and thereafter vote for either life or death, based on those circumstances. (PCR/3 476) Not only did Ms. Finnell feel comfortable with juror Cummins' responses and demeanor, but so

did Durousssseau, as indicated by the smiley face he placed next to her name on his chart. The trial court determined that Durousseau failed to show either deficient performance or prejudice.

Lastly, the trial court found that juror Norrie's responses at voir dire reflected that she vaguely recalled hearing about the case on the news and that she had not formed any opinion as to Durousseau's guilt. (PCR/3 474) Juror Norrie clarified that the Robert Ford she knew was not a witness testifying at trial. (*Id.)* Although she indicated that her sister was killed by a drunk driver in 1967, she also testified that it would not affect her ability to serve as a juror, as Durousseau was not responsible for her sister's death. (*Id.*) The trial court also referenced Ms. Finnell's exploration into juror Norrie's views on the death penalty. (*Id.*) Consequently, the trial court found that Durousseau could not demonstrate deficiency or prejudice and that Ms. Finnell's decision not to challenge juror Norrie was reasonable under the circumstances. (PCR/3 474-75)

Finally, the trial court addressed the allegations that Ms. Finnell did not exhaust all of her peremptory challenges and thereby effectively waived Durousseau's right to appeal any errors made in jury selection. The trial court determined that Durousseau failed to identify a single venire member who would have been better qualified to sit on the jury than any seated

juror. The court referred to there being no case law, that it was aware of, that effective assistance requires counsel exhaust every peremptory challenge.[9] The trial court concluded that Durousseau did not satisfy either prong of the *Strickland* standard. (PCR/473)

Analysis

Durousseau claims that Ms. Finnell failed to exhaust all of her peremptory challenges (IB 35); however the record refutes this allegation. Not only did Ms. Finnell use all of her available peremptory challenges, but she sought, received, and exercised an additional one. (R/XXIII 690-91; *see also* PCR/4 653) Counsel cannot be deemed ineffective for failing to do something that she, in fact, did. *Bates v.* State, 3 So.3d 1091, 1106, n.20 (Fla. 2009) (observing that counsel cannot be held ineffective for what counsel actually did); *Stephens v. State*, 975 So.2d 405, 415 (Fla. 2007) (explaining that counsel cannot be deemed ineffective for failing to object, when, in fact, he did).

[9] Despite testimony to the contrary being provided at the evidentiary hearing, the trial court seemingly forgot that Ms. Finnell did in fact exhaust all of her peremptory challenges. Thus, most of its reasoning in its order relies on that mistaken belief. It did, however, arrive at the correct conclusion – that is, that Durousseau failed to satisfy the *Strickland* analysis.

Durousseau argues that Ms. Finnell did not thoroughly inquire of juror Norrie, specifically regarding the employment of the trial judge's son at her husband's law firm; her exposure to pre-trial publicity surrounding this case; the fact that she may have known one of the State's witnesses; that her sister had been killed; and the level of her support for the death penalty. (IB 35-36)

Prior to bringing juror Norrie in for additional questioning, the trial court informed the parties of a phone call he had received:

> Before we bring in Ms. Norrie let me disclose that during the break I received a telephone call from a lawyer named Ken Norrie. I don't know Mr. Norrie. He's a lawyer with Rogers Towers who called me because he knew my son is scheduled to start an internship at Rogers Towers beginning tomorrow and he wanted to advise me that his wife is Sallie Norrie, so I'm disclosing that my son is going to be working for her husband's firm. I don't know Mr. Norrie at all nor Ms. Norrie.

(R/XX 62-63)

Although neither party, nor the trial court, explored this matter further, there is no indication that Norrie possessed any bias for or against either party. Such a suggestion is simply speculation. Further, there is no indication that the fact that the trial judge's son was slated to intern at the same law firm that employed Norrie's husband had any effect on her ability to serve as an impartial juror. *See Davis v. State*, 928 So.2d 1089, 1118 (Fla. 2005) (finding claim that Davis was prejudiced by the

seating of a juror who knew the presiding trial judge to be without merit where the juror stated that her relationship with the judge would not affect her ability to sit as a juror; that she would not have a problem serving as a juror; and that Davis had not demonstrated any legal basis for the juror's removal or demonstrated any bias on the part of the juror).

The trial court initially explored Norrie's exposure to pre-trial publicity surrounding Durousseau's case. Norrie explained that she had a "vague recollection" of what had been reported in the news and in the newspaper. (R/XX 63) When asked what specifics she recalled, she could only state that Durousseau was a cab driver and "that they were trying to relate two different situations together on the news." (R/XX 63) The last time she had seen anything about the case was shortly after it happened; and she specifically stated that she had not seen anything in the last year. (R/XX 64) Most importantly, she agreed that should she be selected to serve on Durousseau's jury, she would set aside what she heard in the media and only base her verdict on evidence presented in the courtroom. She also informed the court and parties that she had not formed any fixed opinions about the case. (R/XX 65) Although Durousseau argues that Ms. Finnell failed to inquire about the "two situations," she did exactly that as reflected by the following exchange:

FINNELL: You said that you remember it involving a cab driver and relating to two different situations or trying to relate two different situations together. Can you elaborate on that a little bit?

NORRIE: That's about as much as I remember at my age.

FINNELL: All right. Okay.

NORRIE: I'm sorry.

FINNELL: That's fine. That's fine. That's fine. Thank you.

(R/XX 65-66)

Contrary to Durousseau's assertions, Norrie did not know any of the witnesses who testified at trial. Although she initially indicated, on her juror questionnaire, that she knew a "Robert Ford," her subsequent statements clarified that he was an attorney and the witness who was identified as a potential witness during jury selection was not an attorney. (R/XXI 388-89)

Norrie plainly stated that she could set aside her feelings about the killing of her sister by a drunk driver in 1967, some 40 years before this trial, acknowledging that it has nothing to do with the case against Durousseau, and that she could give him a fair trial. (R/XXI 389-90; R/XXII 566-67; *see also* PCR/4 646)

Norrie made statements which were beneficial to Durousseau concerning her feelings on the death penalty: "**If** we got to the penalty phase in this trial I feel like I could weigh the aggravating and the mitigating and if the aggravating outweighed

then I could do the death, but I can go the other way as well." She continued with, "I believe in the legal system." (R/XXIII 566-67) (emphasis added) Clearly, Norrie's use of the word "if" in discussing the possibility of proceeding to a penalty phase reflected her understanding that a penalty phase was not automatic and that the defense was not conceding guilt.

Ms. Finnell testified about juror Norrie's responses at the evidentiary hearing and described them as "positive answers." (PCR/4 647) She also testified that she had not added any signs next to juror Norrie's name on her chart, which meant that she didn't feel strongly either way about her. (*Id.*)

Durousseau claims that Ms. Finnell was ineffective for failing to effectively inquire of and failing to follow up with juror Cummins after she stated that she was in favor of the death penalty. (IB 37) Again, the record clearly rebuts this allegation. Cummins' answers during voir dire made clear she had an open mind toward potential penalties. After a fellow prospective juror indicated that his beliefs would not impair his ability to weigh the aggravating factors and mitigating factors in consideration of whether to recommend the death penalty, juror Cummins was asked whether her feelings were the same, to which she replied, "That's correct." (R/XXII 432) During questioning about whether prospective jurors could make a life recommendation, juror Cummins testified as follows:

> **CUMMINS:** I do believe in the death sentence. I believe in it. **After sitting in here I feel that it's based on each individual case and as you stated and the Court has stated the aggravated and mitigating circumstances, but, yes, you do have to weigh that out, and, yes, I could vote either way, either death or life imprisonment depending on the circumstances.**

(R/XXIII 538-39; *see also* PCR/4 642-45) (emphasis added). Additionally, Ms. Finnell testified that while juror Cummins initially presented a support for the death penalty, her response quoted above alleviated her concern. She added that, during jury selection, it's not just the words the prospective jurors speak, but also their actions – the way they say something, whether they maintain eye contact – that she takes into consideration. (PCR/4 643) She surmised that she must have gotten the impression that juror Cummins was sincere in saying that she could listen to both aggravating and mitigating circumstances and could vote either way. She placed a zero on her jury chart for juror Cummins, indicating that she did not have any strong feelings for or against her as being selected as a juror. (PCR/4 644) Durousseau had his own chart, as did co-counsel, Ms. Hanania. Durousseau liked Cummins. He drew a smiley face and a plus sign next to her name on his chart. (PCR/4 645) Because the full context of Cummins' statements does not show that she was actually biased, the collateral court did not err in denying this claim. *See Smithers v. State*, 18 So.3d 460, 464 (Fla. 2009) (affirming postconviction court's denial of

ineffective claim at jury selection when juror's statements did not show a biased unwillingness to consider potential sentences other than death, and thus did not demonstrate actual basis that would prevent said juror from serving as an impartial juror); *Johnson v. State*, 660 So.2d 637, 644 (Fla. 1995) (holding that jurors who initially express strong views pertaining to the death penalty are permitted to serve if they clearly indicate an ability to abide by the trial court's instructions).

Durousseau complains that Ms. Finnell was ineffective for failing to thoroughly inquire of juror Markley's feelings about her friend's killing and whether she was a member of any anti-crime or anti-violence organizations. (IB 37)

It should be noted that juror Markley was an alternate juror who did **not** participate in deliberations in either the guilt or penalty phase. This is apparent by the transcripts of the jury polling from both the guilt and penalty phases, which do not include Markley's name, and were admitted into evidence at the evidentiary hearing without objection. (R/XXXVI 3140-42; R/XL 3832-35; PCR/4 597). It is axiomatic that a person who did not deliberate cannot satisfy the *Carratelli* standard. *Lebron v. State*, 135 So.3d 1040, 1058 (Fla. 2014) (observing that alternate jurors who did not reach a verdict are not at issue under the *Carratelli* standard because a defendant can only be prejudiced by actually biased jurors who reach a verdict).

Even if Ms. Markley had participated in deliberations, she did not show any bias against Durousseau during voir dire. In fact, at the evidentiary hearing, Finnell testified that some of her responses were "really good." (PCR/4 650) Specifically, regarding her support of the death penalty, juror Markley stated, "Well, I could go either way. You say you have a long row to hoe. Well, and this is just me, [the State] ha[s] just as much a road to hoe as you do when it comes to me." She continued explaining, "[b]ecause when it's all said and done I have to live with my decision. I have to be okay with that. I have to be able to sleep at night, so I have to hear both sides and go from there." (R/XXII 599-600; *see also* PCR/4 649) She also unequivocally stated that the killing of her close friend, which had occurred some twenty years prior, would have no bearing on her ability to be fair and impartial in this case. (R/XXII 408-09, 600)

Durousseau does not point to any particular venire member that would have been better qualified to serve in place of a seated juror. *See Johnson v. State,* 903 So.2d 888, 896 (Fla. 2005) (rejecting appellant's argument that trial counsel could have used peremptory challenges in a different manner to obtain a more defense-friendly jury; "[s]uch speculation fails to rise to the level of ineffective assistance under *Strickland* ...."). Moreover, the record shows that Durousseau participated in

selecting the jury panel and expressed his approval of certain jurors, which further undermines his claim of ineffective assistance as to Ms. Finnell's exercise of his challenges. *See Gamble v. State,* 877 So.2d 706, 714 (Fla. 2004) ("[I]f the defendant consents to counsel's strategy, there is no merit to a claim of ineffective assistance of counsel.").

In his Initial Brief, Durousseau makes one vague and fleeting reference to Ms. Finnell's failure to preserve objections to the jury which was ultimately seated in this case, by arguing that she should have refused to accept the entire panel or accepted it only pursuant to her previously-raised objections. (IB at 35)

First, this allegation was abandoned when Durousseau failed to inquire of Ms. Finnell concerning it at the evidentiary hearing. *See Wickham v. State*, 124 So.3d 841 (Fla. 2013) (denying relief and finding claim was abandoned when defendant was granted an evidentiary hearing on claim and failed to pursue it); *Booker v. State*, 969 So.2d 186, 194-95 (Fla. 2007) ("When a defendant fails to pursue an issue during proceedings before the trial court, and then attempts to present that issue on appeal, this Court deems the claim to have been abandoned or waived." (citing *Mungin v. State*, 932 So.2d 986, 995 (Fla. 2006)). Although he was granted an evidentiary hearing on the claim involving multiple alleged errors in jury selection, he failed to ask Ms. Finnell about raising and/or preserving objections to

the panel. As such, this Court should not consider this allegation. Second, this allegation is insufficiently pled. Durousseau fails to identify, with specificity, which jurors Ms. Finnell should have objected to. As a result, this Court should decline to address this allegation. *See Greenwood v. State*, 754 So.2d 158 (1st DCA 2000) (declining to address an issue on appeal as not properly preserved nor properly presented as appellant addressed the issue in only one sentence, followed by a smorgasbord of case citations). Third, the record does not include any indications that Ms. Finnell had raised objections or challenges to any of the jurors who actually served and deliberated, which were then denied by the trial court. In short, there was nothing to preserve. Fourth, although the State is unclear which jurors Durousseau posits should have been challenged or which challenges should have been preserved, the State will assume, for purposes of this Answer Brief that he is referring to jurors Cummins and Norrie. As previously discussed and again discussed in the following paragraph, Ms. Finnell was not deficient in her examination or acceptance of these jurors. Finally, Durousseau cannot demonstrate prejudice – that any juror seated in his case was actually biased. For all of these reasons, this allegation should be denied.

Durousseau falls woefully short of meeting his burden in establishing that an actually biased juror remained on the

panel. First, juror Markley served as an alternate and did not participate in deliberations at either the guilt or penalty phase. Second, juror Cummins testified that she could weigh the aggravating and mitigating factors and could vote either way, depending on the circumstances. Durousseau's chart reflected his own approval of juror Cummins. Third, juror Norrie's use of the word "if" in discussing the possibility of proceeding to a penalty phase reflected her understanding that a penalty phase was not automatic and that the defense was not conceding guilt. She also testified that she was capable of weighing the aggravating and mitigating factors and vote either way, concluding with her position that she believed in the legal system. The record plainly shows that the two jurors and one alternate juror Durousseau complains of held no firm opinions, could be fair, could listen to the evidence, and could follow the law.

Durousseau urges this Court to disregard its decision in *Carratelli* because its "rationale does not apply to this situation. . . ." (IB 37) His attempt at swaying the Court to completely ignore its own law and progeny is without any legal support and frankly an unreasonable request. The standard is and has been that which was articulated in the *Carratelli* opinion, and that is what Durousseau is bound by. Durousseau has not demonstrated that any of the jurors who participated in the

deliberations were actually biased and that that bias is apparent from the face of the record. In light of the fact that he has not met his burden as set forth in *Carratelli*, this claim should be denied.

CUMULATIVE ERROR

Durousseau alleges the cumulative effect of the errors in his trial deprived him of a fair trial. (IB 37-28) As the trial court found, Durousseau failed to prove deficiency on any of his claims of ineffective assistance of counsel or any error as to his substantive claims, thus his cumulative claim fails. (PCR/3 478) The trial court properly denied this claim.

Applicable Law

This issue is not presented as an independent basis for relief in his Initial Brief, and Durousseau does not identify any purported errors beyond the ones already addressed in his brief. (IB at 37-38) He simply asserts that the effect of the errors must be considered cumulatively. Furthermore, because Durousseau's individual claims are without merit, his cumulative error claim must fail. *See Griffin v. State,* 866 So.2d 1, 22 (Fla. 2003) ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail."); *Vining v. State,* 827 So.2d 201, 219 (Fla. 2002) (holding that where alleged individual errors are without merit, the contention of cumulative error is similarly without merit); *Downs v. State,* 740 So.2d 506, 509 (Fla. 1999) (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit); *Patrick v. State*, 104 So.3d 1046,

1063-64 (Fla. 2012) (recognizing that a cumulative error claim must necessarily be rejected when the underlying errors are either procedurally barred or without merit). Accordingly Durousseau is not entitled to relief on this claim.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's denial of Durousseau's Motion for Postconviction Relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by email to Richard R. Kuritz, Esquire, jaxlaw1999@aol.com, 200 East Forsyth Street, Jacksonville, FL 32202 this 9th day of February, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted,

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