

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2009-CF-04417-AXXX
DIVISION: CR-C

STATE OF FLORIDA

v.

TERRY SMITH,
Defendant.

ORDER DENYING IN PART
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
AND
GRANTING IN LIMITED PART
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
AS TO A NEW PENALTY PHASE PURSUANT TO HURST V. STATE

This cause is before this Court upon Defendant's "Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," filed on November 20, 2015, as thrice amended ("Defendant's Rule 3.851 Motion").^{1 2} This Court held an evidentiary hearing on December 5, 6, and 8, 2017. Assistant State Attorneys Mark Caliel and Pamela Hazel were present representing the People of the State of Florida.

¹ Defendant filed his "[First] Motion to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence" on January 25, 2017; his "Second Motion to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence" on July 27, 2017; and his "Third Motion to Amend Defendant's Motion to Vacate Judgments of Conviction and Sentence" on November 22, 2017. Attached to each of Defendant's Motions to Amend were the proposed amendments to Defendant's Rule 3.851 Motion. All such Motions were granted by this Court and the amendments were deemed filed. As such, Defendant's Rule 3.851 Motion, as thrice amended, will be referred to collectively as "Defendant's Rule 3.851 Motion."

² On January 19, 2016, the State filed the "State's Response to Smith's Initial Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend." On June 7, 2017, the State filed the "State's Answer to Amended Motion to Vacate Judgments of Conviction and Sentence. On August 21, 2017, the State filed the "State's Answer to Second Amended Motion to Vacate Judgments of Conviction and Sentence."

Karen Moore and Kathleen Pafford were present as counsel for Defendant, who likewise was present before this Court. Following the evidentiary hearing, on March 12, 2018, both parties filed with this Court their written closing arguments. This Order will address all claims asserted in Defendant's Rule 3.851 Motion (as amended).

Having reviewed the record in this case, received the testimony and evidence presented at the evidentiary hearing, considered the written closing arguments, and being otherwise fully advised, this Court finds Defendant's Rule 3.851 Motion is due to be DENIED. However, as more fully set forth *infra*, Defendant's Rule 3.851 Motion is due to be GRANTED IN LIMITED PART as to granting Defendant a new penalty phase as required by Hurst v. State, 202 So. 3d 40 (Fla. 2016) ("Hurst").

I. Procedural History

The Florida Supreme Court described the facts of the case as follows:

While looking for narcotics on June 5, 2007, Terry Smith, then age nineteen, called an acquaintance, Breon Williams. Williams, a street level drug dealer, informed Smith that he was going to purchase some drugs and invited Smith to join him. Smith took Williams up on his offer. In the late evening of June 5, Williams picked Smith up from the home of Smith's mother. From there they rode on Williams' motorized scooter to a house in Jacksonville, Florida, where Desmond Robinson and Berthum Gibson sold drugs.

Williams had previously purchased drugs from Desmond Robinson at that location. On previous occasions, Williams had entered through the back door of the home, which was locked and contained a sheet of Plexiglas on its interior. When Williams and Smith arrived at the house, they pulled into the driveway, parked Williams' scooter, and walked up to the back door. Williams knocked on the door, and Robinson let them in.

After Williams and Smith entered the kitchen, Robinson locked the door and left the key in it. When they entered, Gibson and Keenethia Keenan were sitting at a table in the kitchen and dining room area of the home. Williams walked to the kitchen counter, which was located near the door, and began to count his money to determine how much cocaine he could purchase. While Williams

was counting his money, he heard Smith say “[g]ive it up,” followed by gunshots. Williams turned to run out of the residence, which required turning the key that was already in the door to unlock it. Before exiting, Williams saw Smith shoot Robinson multiple times. Williams was in such a hurry to leave the house that he left approximately \$400 on the kitchen counter and his scooter in the driveway.

The State then presented circumstantial evidence that instead of escaping out the back door after killing Robinson, Smith stepped over Robinson’s body and proceeded into the hallway, where he shot in the direction of Gibson and Keenan. Gibson and Keenan each died from a single gunshot wound that was attributed to Smith’s ten millimeter handgun. Keenan’s body was found unarmed in the back of the southeast bedroom, where she died within seconds of the gunshot piercing her heart. When police arrived, they found Gibson, who was still alive despite a gunshot wound to his abdomen. He was leaning against the bed in the same bedroom with a rifle in his hands. Paramedics transported Gibson to the hospital, where he died due to internal injuries from the gunshot wound. Police found shell casings from the gun used by Smith in the kitchen and dining room area as well as in the living room area of the home. They also found shell casings from the rifle used by Gibson in the southeast bedroom and the hallway leading up to the bedroom.

After shooting Gibson and Keenan, Smith ran out the back door of the house, touching the Plexiglas portion of the door on his way out. When police arrived, they found Williams’ money on the kitchen counter and drugs on the dining room table. After exiting the crime scene, Smith called Ulysses Johnson to pick him up from the area. At the time, Johnson was at home playing video games with his brother Raylan Johnson and Jonathan Peterson. The three then picked Smith up near the crime scene. In the car, Smith told them that he had shot three people.

After arriving at the Johnsons’ home, Ulysses Johnson and Peterson went inside, while Smith and Raylan Johnson remained outside. Smith gave his gun to Raylan Johnson, who buried it in the yard and then sold it a few days later to Walter Dumas. They also burned Smith’s clothes in a bin that was in the yard.

Smith v. State, 139 So. 3d 839, 841-42 (Fla. 2014).

On March 4, 2011, a jury found Defendant guilty as charged of three counts of First Degree Murder (Counts One, Two, and Three) and Attempted Armed Robbery

(Count Four). As to Count One, the jury found Defendant murdered Berthum Gibson ("Victim Gibson") with premeditation and during the commission of a felony while actually possessing and discharging a firearm. As to Count Two, the jury found Defendant murdered Desmond Robinson ("Victim Robinson") during the commission of a felony while actually possessing and discharging a firearm. As to Count Three, the jury found Defendant murdered Keneethia Keenan ("Victim Keenan") with premeditation and during the commission of a felony while actually possessing and discharging a firearm. As to Count Four, the jury found Defendant committed Attempted Armed Robbery while actually possessing and discharging a firearm.

On March 11, 2011, the jury recommended the death penalty by an eight-to-four vote for the murder of Victim Gibson, life without the possibility of parole for the murder of Victim Robinson, and the death penalty by a ten-to-two vote for the murder of Victim Keenan. On May 12, 2011, this Court sentenced Defendant to death for the murders of Victim Gibson and Victim Keenan; life in prison without the possibility for parole for the murder of Victim Robinson; and a twenty-five year minimum mandatory, pursuant to section 775.087, Florida Statutes (2009), for Attempted Armed Robbery. This Court further ordered all sentences to run concurrently.

This Court found three statutory aggravating factors were proven beyond a reasonable doubt as to the murders of both Victim Gibson and Victim Keenan: (1) Defendant was previously convicted of another capital felony (contemporaneous murder), (2) the murders were committed while Defendant was engaged in an attempt

to commit armed robbery, and (3) the murders were committed for financial gain.³ See § 921.141(5)(b), (d), (f), Fla. Stat. (2009).

This Court found two statutory mitigating circumstances: (1) the age of Defendant at the time of the crime, and (2) the existence of other factors in Defendant's background that would mitigate against imposition of the death penalty. See § 921.141(6)(g), (h), Fla. Stat. (2009). This Court assigned "moderate weight" to the mitigating circumstance of Defendant's age and considered the "other" mitigating factors along with the non-statutory mitigating circumstances.

This Court found ten non-statutory mitigating circumstances: (1) Defendant's mental and intellectual status (moderate weight); (2) Defendant loves his children and their mothers, and they love him (some weight); (3) Defendant is a good brother to his siblings (little weight); (4) Defendant took care of his sister's seven children while she worked (moderate weight); (5) Defendant is dependable (some weight); (6) Defendant was a good employee who would do well in a structured environment (slight weight); (7) Defendant was well behaved during court proceedings (no weight because not mitigating); (8) Defendant could be rehabilitated and make positive contributions to society (little weight); (9) Breon Williams was never charged with a crime arising out of the murders (no weight because not mitigating); and (10) Defendant grew up in a "terrible" neighborhood (some weight). Ultimately, this Court concluded the aggravating factors heavily outweighed the mitigating circumstances.

On June 9, 2014, the Supreme Court of Florida, on direct appeal, issued a Mandate affirming Defendant's convictions and sentences. Smith, 139 So. 3d at 839.

³ This Court considered the second and third aggravators as a single, merged aggravating circumstance.

On December 1, 2014, Defendant's convictions and sentences became final through the denial of certiorari by the United States Supreme Court. Smith v. Florida, 135 S. Ct. 711 (2014).

Following the filing of the Defendant's Rule 3.851 Motion and the State's responses thereto, this Court held a case management conference on August 22, 2017,⁴ at which this Court heard arguments on purely legal claims not based on disputed facts and determined which claims warranted an evidentiary hearing.⁵ On August 31, 2017, after reviewing the postconviction filings and hearing argument, this Court entered an Order granting an evidentiary hearing on Claims 2, 3, 4, 8, 9, 12, 14(a)-(c), 15, and 16 of Defendant's Rule 3.851 Motions.⁶

At the above-described evidentiary hearing, Defendant called eight witnesses to testify on his behalf, in addition to his own testimony. A transcript of the evidentiary hearing has been filed in this case with the Clerk of Court.⁷

II. Analysis

To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate two elements: (i) counsel's performance was outside the range of reasonable professional standards; and (ii) that counsel's deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Cherry v. State, 659 So.

⁴ Huff v. State, 622 So. 2d 982 (Fla. 1993).

⁵ More specifically, this Court received argument on Claims 10-11, arguing the imposition of the death penalty in this case was unconstitutional and violative of the Sixth and Eighth Amendments to the United States Constitution. As more fully set forth *infra*, this Court granted these claims as such were conceded by the State of Florida as compelled by Hurst.

⁶ The defense conceded Claims 1, 5, 6, and 7 were rendered moot by virtue of this Court finding that Defendant was entitled to a new penalty phase pursuant to Hurst. The defense further conceded Claim 13 did not warrant an evidentiary hearing, as it was premature and not yet ripe for judicial review.

⁷ This Court takes judicial notice of the Record of Appeal ("R.") on direct appeal.

2d 1069, 1072 (Fla. 1995). As to the first prong, counsel's performance need not be perfect, but must not fall below the requisite, reasonableness standard. Bruno v. State, 807 So. 2d 55, 68 (Fla. 2001). This involves a "context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." Jones v. State, 928 So. 2d 1178, 1186 (Fla. 2006) (citing Wiggins v. Smith, 539 U.S. 510, 523 (2003)); see also Strickland, 466 U.S. at 689. A defendant making an ineffective assistance of counsel claim must identify with specificity the acts or omissions alleged to be outside the range of reasonable professional conduct and bear the burden of overcoming the presumption that the challenged conduct "might be considered sound trial strategy." Id. at 690.

In addition to establishing counsel's performance fell below reasonable professional standards, a defendant must also establish prejudice. Id. at 687; Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). Generally, to establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's deficiency, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694.

CLAIM ONE

Defendant claims counsel was ineffective during jury selection for failing to object to misstatements of the law and improper questions by the State regarding the death penalty.

Because Defendant is entitled to a new penalty phase on unrelated grounds pursuant to the subsequently decided cases of Hurst v. Florida, 136 S. Ct. 616 (2016) ("Hurst v. Florida"), and Hurst, this claim—which attacks the propriety of Defendant's original death sentence—is moot. See State v. Mills, 788 So. 2d 249, 250-51 (Fla. 2001) (holding defendant's postconviction claim challenging the propriety of his sentencing

moot because defendant had already been granted a new sentencing hearing). At the August 22, 2017 case management conference, Defendant conceded this claim has been rendered moot. Accordingly, this claim is denied.

CLAIM TWO

Defendant contends the State exercised racially-motivated peremptory challenges during jury selection, thereby depriving Defendant of a fair trial. Specifically, Defendant claims the State used peremptory challenges on three of the four prospective black jurors who were otherwise unobjectionable from a reasonable, neutral point of view.

At the evidentiary hearing and in written closing argument, Defendant abandoned Claim Two. (EH Vol. 3 at 83-84.) Accordingly, this claim is denied.

CLAIM THREE

Defendant avers counsel was ineffective for: (A) stipulating or not objecting to the admissibility of written hearsay statements used to bolster various State witnesses; (B) failing to impeach various State witnesses; (C) failing to object to evidence impugning Defendant's character; (D) failing to object to the testimony of the medical examiner, Dr. Jesse Giles ("Dr. Giles"), regarding the autopsy findings; and (E) introducing portions of a videotaped interrogation that evinces Defendant's lack of remorse.

(3)(A) – Improperly Stipulating to the Admissibility of Hearsay Statements

Defendant claims counsel was ineffective for improperly stipulating to the admissibility of written hearsay statements that bolstered the testimony of various State witnesses. Specifically, Defendant points to (1) the testimony of Ray Dukes regarding Breon Williams's prior hearsay statements to him; (2) a booking photograph of Defendant in a six-photograph identification photospread on which Breon Williams

identified Defendant as the culprit of the triple homicide; (3) a written statement by Breon Williams in which he describes the events surrounding the triple homicide; (4) a booking photograph of Defendant on which Ulysses Johnson wrote “He said he shot three people, two dudes and a girl”; (5) a booking photograph of Defendant on which Jonathan Peterson listed the incriminating statements Defendant made after the triple homicide; and (6) a booking photograph of Raylan Johnson on which Walter Dumas indicated he had purchased a Glock 20 from Raylan Johnson for \$200 in 2007.

(1) Ray Dukes – Testimony Regarding Hearsay Statements of Breon Williams

A few days after the triple homicide, Breon Williams called his father, Ray Dukes, to tell him what happened during the triple homicide, implicating Defendant as the shooter. Sometime thereafter, a detective contacted Ray Dukes in an attempt to contact Breon Williams and asked him questions about any information he may have about the triple homicide. Ray Dukes told the detective Breon Williams may have information about the case. Ray Dukes testified to these facts at trial. (R. Vol. XIII at 754-61.)

Generally speaking, Ray Dukes’s testimony regarding what Breon Williams told him about the triple homicide would be hearsay and generally inadmissible when offered to prove the truth of the matter asserted by Breon Williams. See J.B.J. v. State, 17 So. 3d 312, 318 (Fla. 1st DCA 2009) (“Prior consistent statements are generally inadmissible to corroborate or bolster a witness’s trial testimony because such statements are usually hearsay.”). However, a prior consistent statement of a witness who testifies at trial and is subject to cross-examination is not hearsay if the prior statement is offered to rebut an expressed or implied charge of improper influence, motive, or recent fabrication. § 90.801(2)(b), Fla. Stat. (2009). The prior consistent

statement must have also been made before the improper influence or motive arose. Anderson v. State, 574 So. 2d 87, 92 (Fla. 1991).

Breon Williams testified at trial and was subject to cross-examination. Moreover, the prior consistent statement rebuts the charge that Breon Williams only testified against Defendant due to the purportedly coercive and improper influence of detectives. Additionally, the prior consistent statement made by Breon Williams to Ray Dukes was made before the detectives interrogated Breon Williams. Therefore, Breon William's prior consistent statement to Ray Dukes was admissible to rebut the inference that Breon Williams's testimony was a product of the improper and coercive influence of the detectives.

As a matter of Florida law, trial counsel cannot be ineffective for not objecting to the introduction of admissible evidence. See Schoenwetter v. State, 46 So. 3d 535, 546-48 (Fla. 2010) (holding counsel was not ineffective for not objecting to the introduction of admissible evidence); Hitchcock v. State, 991 So. 2d 337, 361 (Fla. 2008) ("Counsel cannot be deemed ineffective for failing to make a meritless objection.").

Further, at the evidentiary hearing, lead trial counsel, Richard Kuritz ("Mr. Kuritz"), testified he did not object to Ray Dukes's testimony regarding the hearsay statements of Breon Williams because he had made a strategic decision to attack Breon Williams's testimony as being the product of police coercion, thereby making the hearsay statements admissible as a prior consistent statement to rebut a charge of improper influence. (EH Vol. 1 at 171-72.) Specifically, Mr. Kuritz testified as follows:

The State: Okay. Let me talk a little bit about Ray Dukes' testimony.
 Ray Dukes was the father of Breon Williams, correct?

Mr. Kuritz: Correct.

The State: And a lot of what you attacked Breon Williams on is the fact that he years later when he was confronted by detectives in Tallahassee—

Mr. Kuritz: Right.

The State: —first came forward with this information about this and part of your attack on [Breon] Williams' testimony was the fact that the detectives kept on browbeating him and wouldn't let him go to his cell and things of that nature until they theoretically heard what they wanted to hear?

Mr. Kuritz: Yes.

The State: And that was a—a tactical decision that you were attacking the truthfulness of what Breon Williams said because of the conduct of police officers?

Mr. Kuritz: Yes.

The State: But according to Mr. Dukes' testimony his son, Breon Williams, had told him years beforehand before he was ever arrested and confronted by Detective Nelson in Tallahassee that Terry Smith had told him about these acts and Terry Smith was the person who committed these crimes?

Mr. Kuritz: Yes.

The State: Okay. So yet again the—what would possibly be hearsay statements of Breon Williams to his father years before hand became admissible exceptions to the hearsay rule as a prior consistent statement when you attacked the credibility of Breon Williams' statement to the police when he was speaking to Detective Nelson?

Mr. Kuritz: Exactly.

The State: Because he told his dad years beforehand this is what happened?

Mr. Kuritz: He—yes.

The State: And that statement was consistent with what he was telling Detective Nelson when he was arrested in Tallahassee?

Mr. Kuritz: Yes. I think he told him that night or the next day, yes. He told him.

The State: Okay. And so based upon your knowledge of the evidence code and you knew that this was going to come in because you were—your theory of attacking [Breon] Williams' statement was the police conduct, there was no reason to object to nor could you have sustained an objection to that hearsay?

Mr. Kuritz: Correct.

(EH Vol. 1 at 225-27.)

Based on the line of questioning above, it is clear Mr. Kuritz's decision not to object to Ray Dukes's testimony regarding the hearsay statements of Breon Williams was a sound strategic decision as contemplated by Strickland. Reasonable strategic decisions do not constitute ineffective assistance of counsel. See Stein v. State, 995 So. 2d 329, 335 (Fla. 2008) (holding sound strategic decisions do not constitute ineffective assistance of counsel (quoting Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000))). Accordingly, this sub-claim is denied.

(2) Breon Williams – Written Statement on Defendant's Booking Photograph⁸

Detectives interrogated Breon Williams in January 2009. (R. Vol. XIII at 646-55.) Although Breon Williams initially denied having knowledge of the triple homicide, he eventually implicated Defendant. (R. Vol. XIII at 647-52; R. Vol. XV at 1088-90.) Breon Williams, however, did not know Defendant's last name, referring to him only as "Terry." (R. Vol. XV at 1092.) Because Breon Williams could only identify the shooter as "Terry," the detectives provided Breon Williams a six-photograph identification photospread to confirm that the shooter Breon Williams knew as "Terry" was, in fact, Terry Smith—who was suspected of being involved in the triple homicide based on his

⁸ Breon Williams's Written Statement on Defendant's Photospread Booking Photograph is State's Trial Exhibit 12.

palm print on the interior Plexiglas on the back door. (R. Vol. XV at 1092-95.) Breon Williams identified Defendant as the “Terry” who committed the triple homicide by writing the following on the booking photograph: “Terry I saw him shoot Desmond. It happened in the kitchen of Ahmad Dr.” (R. Vol. XV at 1095-96.) At trial, this written statement was read aloud to the jury by Breon Williams and Detective Robert Nelson (“Detective Nelson”). (R. Vol. XIII at 651, XV at 1095.)

When asked at the evidentiary hearing why he stipulated to the admissibility of various witnesses’ written out-of-court statements, Mr. Kuritz stated that he typically confers with counsel for the State to review exhibits and “try to stipulate to whatever is going to come into evidence anyway and not to be obstructionist and not to waste time” if such matters were admissible or if the witness would otherwise testify to such matters. Mr. Kuritz further stated, “I don’t understand what kind of prejudice there would be if [the witnesses are] going to testify to it directly.” (Ex. EH Vol. 1 at 172-80.) Mr. Kuritz provided no further explanation for his reasoning behind stipulating to Breon Williams’s written statement on Defendant’s photospread booking photograph. Given this testimony presented at the evidentiary hearing, this Court will limit its analysis to the prejudice prong of Strickland. See Durousseau v. State, 218 So. 3d 405, 412 (Fla. 2017) (“If the defendant fails to make a showing of one Strickland prong, it is not necessary to analyze whether the defendant satisfies the other prong.”).

Defendant was not prejudiced by the admission of Breon Williams’s written statement on Defendant’s booking photograph. Although this statement incriminates Defendant and buttresses Breon Williams’s in-court testimony, its exclusion from evidence would not have created a reasonable probability of Defendant being found not guilty at trial.

First, the written statement lacks detail and constituted a very small portion of Breon William's trial testimony. Second, the trustworthiness of Breon Williams's in-court testimony was otherwise buttressed by its consistency with his hearsay statement to Ray Dukes (which was discussed in sub-part 3(A)(1) above) as well as the testimony of Ulysses Johnson, Johnathan Peterson, and Edward Haney. More specifically, Ulysses Johnson testified that Defendant admitted to shooting three people. (R. Vol. XIV at 854-56.) Jonathan Peterson testified that Defendant admitted to (i) shooting Victim Robinson in the kitchen and two other people in the house, one of whom was returning fire; (ii) leaving drugs in the home; and (iii) touching the door. (R. Vol. XIV at 895-98, 901-03.) Edward Haney testified that Defendant admitted (i) riding to the scene of the triple homicide on Breon Williams's scooter to purchase drugs; (ii) shooting Victim Robinson and Victim Gibson along with an unknown female; and (iii) using a 10mm handgun. (R. XV at 1025-28.)

As a result of this evidence, the additional written statement on Defendant's booking photograph would have had, at most, a negligible effect on the jury's consideration and determination of the weight to be given to Breon William's testimony. Accordingly, even if Breon Williams's written statement on Defendant's booking photograph had been excluded from evidence at trial, there is no reasonable likelihood the outcome would have been different.

Additionally, Defendant was not prejudiced by the introduction of his booking photograph in State's Trial Exhibit 12. Generally, "an accused's right to a fair and impartial jury trial is violated when a jury is improperly made aware of defendant's arrest for unrelated crimes during the trial" Duncan v. State, 450 So. 2d 242, 245 (Fla. 1984) (emphasis added). To determine whether the introduction of "mug shots"

prejudices a defendant, the court must look at the entire record and surrounding circumstances. State v. Rucker, 330 So. 2d 470, 470 (Fla. 1976). Some of the probative factors include: whether the State or witnesses referred to the photographs as “mug shots” and whether the photographs were closely cropped so as to not identify their origin. See Davis v. State, 604 So. 2d 794, 796 (Fla. 1992); D’Anna v. State, 453 So. 2d 151, 152-53 (Fla. 1st DCA 1984).

Here, the State merely asked Breon Williams what he “wrote on the picture of Terry Smith when [he was] identifying him as the person [he] saw shoot [Victim Robinson],” after which Breon Williams read his written statement aloud. (R. Vol. XIII at 651.) The booking photograph is not closely cropped and the jury could recognize the photograph as a mug shot. Neither the State nor the witnesses, however, referred to the photograph as being a “mug shot. Further, there was no suggestion of a prior arrest of Defendant or any suggestion Defendant had a criminal background.

Moreover, and importantly, the evidence of Defendant’s guilt was overwhelming. The record and surrounding circumstances include, *inter alia*: Breon Williams’s eyewitness testimony identifying Defendant as the shooter; Defendant’s handprint on the interior Plexiglas of the back door; and Defendant’s confessions to Ulysses Johnson, Jonathan Peterson, and Edward Haney.

The glut of evidence makes it highly improbable—if not inconceivable—that the jury would have acquitted Defendant but for the introduction of this booking photograph. Given the overwhelming evidence of guilt and the totality of the circumstances, this Court finds there is no reasonable likelihood the jury would have acquitted Defendant if this booking photograph in the six-photograph identification lineup had not been introduced at trial. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla.

1986) (“The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.”). Accordingly, this sub-claim is denied.

(3) Breon Williams – Written Statement⁹

In January 2009, while being interrogated by detectives, Breon Williams provided the following written statement: “I pick up Terry to go to Desmond house to buy some dope. When we got in the house I was then counting my money to get something. That when I heard Terry tell Desmond to give it up and begin shooting. Then I ran out the back door. Then I went around the neighborhood and told Kurt to go get my scuda.” At trial, the State introduced this written statement into evidence based on the parties’ stipulation, and Breon Williams read it aloud before the jury. (R. Vol. XIII at 649-50.)¹⁰

At trial, Mr. Kuritz highlighted the fact that Breon Williams never contacted the police and vigorously denied having any knowledge of the triple homicide for more than two hours when detectives initially questioned him in January 2009. (R. Vol. XIII at 653-55, 664-67.) Mr. Kuritz also elicited testimony at trial suggesting the detectives “fed” Breon Williams information about the triple homicide and used what Defendant argued to be heavy-handed tactics to get relevant information from Breon Williams. (R. Vol. XIII at 653-69.) Ultimately, Mr. Kuritz attempted to paint Breon Williams’s testimony and written statement as the product of police coercion.

⁹ Breon Williams’s written statement to the detectives is State’s Exhibit 13.

¹⁰ Breon Williams’s trial testimony makes clear this written statement was provided to detectives in January 2009 while he was in the Leon County Jail. This does not appear to be in dispute. Thus, the Court concludes that the “1/11/08” date reflected on the written statement, which appears to have been written by one of the detectives, is a scrivener’s error.

When asked at the evidentiary hearing why he stipulated to the admissibility of various witnesses' written out-of-court statements, Mr. Kuritz stated that he typically confers with counsel for the State to review exhibits and "try to stipulate to whatever is going to come into evidence anyway and not to be obstructionist and not to waste time" if such matters were admissible or if the witness would otherwise testify to such matters. Mr. Kuritz further stated, "I don't understand what kind of prejudice there would be if [the witnesses are] going to testify to it directly." (Ex. EH Vol. 1 at 172-80.) Mr. Kuritz provided no further explanation for his reasoning behind stipulating to Breon Williams's January 2009 written statement. Given this testimony presented at the evidentiary hearing, this Court will limit its analysis to the prejudice prong of Strickland. See Durousseau v. State, 218 So. 3d 405, 412 (Fla. 2017) ("If the defendant fails to make a showing of one Strickland prong, it is not necessary to analyze whether the defendant satisfies the other prong.").

Defendant was not prejudiced by the admission of Breon Williams's written statement. Although this statement incriminates Defendant and buttresses Breon Williams's in-court testimony, its exclusion from evidence would not have created a reasonable probability that the jury would have found Defendant not guilty.

First, the written statement lacks detail and constitutes a very small portion of Breon William's trial testimony. Second, the testimony of Kirk Brewer, Ray Dukes, Ulysses Johnson, Jonathan Peterson, and Edward Haney corroborated Breon Williams's testimony, as each of them testified to at least some of the facts contained in Breon Williams's trial testimony. Specifically, Kirk Brewer testified that Breon Williams told him to pick up his scooter at the scene of the triple homicide. (R. Vol. XIII at 730-34.) Ray Dukes testified that his son, Breon Williams, implicated Defendant as the shooter

days after it occurred. (R. Vol. 754-61.) Ulysses Johnson testified that Defendant admitted to shooting three people. (R. Vol. XIV at 854-56.) Jonathan Peterson testified that Defendant admitted to (i) shooting Victim Robinson in the kitchen and two other people in the house, one of whom was returning fire; (ii) leaving drugs in the home; and (iii) touching the door. (R. Vol. XIV at 895-98, 901-03.) Edward Haney testified that Defendant admitted to (i) riding to the scene of the triple homicide on Breon Williams's scooter to purchase drugs; (ii) shooting Victim Robinson and Victim Gibson along with an unknown female; and (iii) using a 10mm handgun. (R. Vol. XV at 1025-28.)

Because Breon Williams's written statement is limited and generic as well as substantially supported by numerous other sources of evidence, its introduction likely had very little, if any, effect on the jury's verdict. Therefore, even if the written statement was not admitted into evidence, there is no reasonable probability of the jury acquitting Defendant. Accordingly, this sub-claim is denied.

(4) Ulysses Johnson – Written Statement on Defendant's Booking Photograph¹¹

Ulysses Johnson, along with Raylan Johnson (Ulysses Johnson's younger brother) and Jonathan Peterson, drove to pick up Defendant after the triple homicide. (R. Vol. XIV at 848-57.) Ulysses Johnson testified Defendant admitted to killing three people and possessed a black Glock handgun upon entering the car. (R. Vol. XIV at 853-57.) On direct, the State introduced a booking photograph of Defendant into evidence based on the parties' stipulation on which Ulysses Johnson identified Defendant as the perpetrator. (R. Vol. XIV at 861-62.) Mr. Kuritz attacked Ulysses Johnson's credibility by highlighting the fact that, when interrogated by detectives, Ulysses Johnson initially

¹¹ Ulysses Johnson's written statement on Defendant's booking photograph is State's Exhibit 85.

denied having any knowledge of, or involvement in, the triple homicide. (R. Vol. XIV at 863-65, 873-77.) He also highlighted subsequent instances during which Ulysses Johnson was not completely forthright with detectives. (R. Vol. XIV at 873-81.)

When asked at the evidentiary hearing why he stipulated to the admissibility of various witnesses' written out-of-court statements, Mr. Kuritz stated that he typically confers with counsel for the State to review exhibits and "try to stipulate to whatever is going to come into evidence anyway and not to be obstructionist and not to waste time" if such matters were admissible or if the witness would otherwise testify to such matters. Mr. Kuritz further stated, "I don't understand what kind of prejudice there would be if [the witnesses are] going to testify to it directly." (Ex. EH Vol. 1 at 172-80.) Mr. Kuritz provided no further explanation for his reasoning behind stipulating to Ulysses Johnson's written statement on Defendant's photospread booking photograph. Given this testimony presented at the evidentiary hearing, this Court will limit its analysis to the prejudice prong of Strickland. See Durousseau v. State, 218 So. 3d 405, 412 (Fla. 2017) ("If the defendant fails to make a showing of one Strickland prong, it is not necessary to analyze whether the defendant satisfies the other prong.").

Defendant was not prejudiced by the admission of Ulysses Johnson's written statement on Defendant's booking photograph. The written statement read: "He said he had shot three people, two dudes and a girl." (R. Vol. XIV at 862.) Although this statement incriminates Defendant and buttresses Ulysses Johnson's in-court testimony, its exclusion from evidence would not have created a reasonable probability that the jury would have acquitted Defendant at trial.

First, the written statement lacks significant detail and constitutes a very small portion of Ulysses Johnson's trial testimony. Second, the trial testimony of other

witnesses—namely, Breon Williams, Jonathan Peterson, and Edward Haney—confirms Ulysses Johnson’s in-court testimony. More specifically, Breon Williams testified he saw Defendant shoot Victim Robinson in the kitchen, but did not see Defendant shoot Victim Gibson or Victim Keenan because he had already run out of the house. (R. Vol. XIII at 638-42.) Jonathan Peterson testified that Defendant admitted to (i) shooting Victim Robinson in the kitchen and two other people in the house, one of whom was returning fire; (ii) leaving drugs in the home; and (iii) touching the door. (R. Vol. XIV at 895-98, 901-03.) Edward Haney testified that Defendant admitted to (i) riding to the scene of the triple homicide on Breon Williams’s scooter to purchase drugs; (ii) shooting Victim Robinson and Victim Gibson along with an unknown female; and (iii) using a 10mm handgun. (R. Vol. XV at 1025-28.)

For these reasons, there is no reasonable probability the jury would have acquitted Defendant had the written statement not been introduced into evidence.

Additionally, the introduction of Defendant’s booking photograph in State’s Trial Exhibit 85 did not prejudice Defendant. “[A]n accused’s right to a fair and impartial jury trial is violated when a jury is improperly made aware of defendant’s arrest for unrelated crimes during the trial” Duncan, 450 So. 2d at 245 (emphasis added). To determine whether the introduction of “mug shots” prejudices a defendant, the court must look at the entire record and surrounding circumstances. Rucker, 330 So. 2d at 470. Some of the probative factors include whether the State or witnesses referred to the photographs as “mug shots,” and whether the photographs were closely cropped so as to not identify their origin. See Davis, 604 So. 2d at 796; D’Anna, 453 So. 2d at 152-53.

Here, the State merely asked Ulysses Johnson if the face in the booking photograph was the person who got into his car and said he shot three people in June 2007. Ulysses Johnson responded affirmatively. (R. Vol. XIV at 861-63.) Although the booking photograph was entered into evidence (and, therefore, available for the jury to see), the State did not refer to the photograph as being a “mug shot” or otherwise suggest Defendant had a criminal background. The photograph also is closely cropped, and the Jacksonville Sheriff’s Office name and insignia are not visible. Moreover, the evidence of Defendant’s guilt is overwhelming, making it highly improbable that the jury would have acquitted Defendant but for the introduction of this booking photograph. Given the totality of the circumstances, this Court finds there is no reasonable likelihood the jury would have acquitted Defendant if this booking photograph had not been introduced at trial. Accordingly, this sub-claim is denied.

(5) Jonathan Peterson – Written Statement on Booking Photograph¹²

Jonathan Peterson rode in the back seat of the car with Ulysses Johnson and Raylan Johnson to pick up Defendant immediately after the triple homicide. At trial, Jonathan Peterson testified Defendant admitted to killing three people upon entering the car and again on a later date. (R. Vol. XIV at 895-98, 901-02.) The parties stipulated to the admissibility of, and Jonathan Peterson read aloud, his January 21, 2009, written statement in which he listed Defendant’s incriminating statements. (R. Vol. XIV at 905-08.) Mr. Kuritz extensively attacked Jonathan Peterson’s credibility by suggesting his testimony was motivated by his desire to comply with the favorable July

¹² Jonathan Peterson’s written statement on Defendant’s booking photograph is State’s Exhibit 86.

10, 2009, plea deal that was contingent upon him “testify[ing] truthfully to the satisfaction of the State Attorney’s Office.” (R. Vol. XIV at 920-24.)

Jonathan Peterson’s written statement on Defendant’s booking photograph is hearsay and generally inadmissible when offered to prove the truth of the matter asserted. See J.B.J., 17 So. 3d at 318 (“Prior consistent statements are generally inadmissible to corroborate or bolster a witness’s trial testimony because such statements are usually hearsay.”). However, a prior consistent statement of a witness who testifies at trial and is subject to cross-examination is not hearsay if the prior statement is offered to rebut an expressed or implied charge of improper influence, motive, or recent fabrication. § 90.801(2)(b), Fla. Stat. (2009). The prior consistent statement must have also been made before the improper influence or motive arose. Anderson, 574 So. 2d at 92.

Jonathan Peterson testified at trial and was subject to cross-examination. Moreover, the prior consistent statement rebuts the charge that Jonathan Peterson was testifying against Defendant based on the improper motive of complying with the terms of the favorable plea deal. Finally, Jonathan Peterson made the prior consistent written statement on January 21, 2009, nearly six months *before* the plea deal that required Jonathan Peterson to testify against Defendant to the satisfaction of the State.

Therefore, given Mr. Kuritz’s intent to attack Jonathan Peterson’s credibility based on improper motive, the prior consistent written statement was admissible to rebut such an inference. See Chamberlain v. State, 881 So. 2d 1087, 1101 (Fla. 2004) (holding prior consistent statement admissible when made before the plea agreement because defense counsel implied the witness was testifying against defendant to protect a favorable plea deal and sentence); Rodriguez v. State, 609 So. 2d 493, 500 (Fla. 1992)

("[B]ecause the [prior consistent] statements . . . were given prior to the plea negotiations and therefore prior to the existence of both witnesses' motive to fabricate they were properly admitted."). As a matter of Florida law, trial counsel cannot be considered ineffective for stipulating or not objecting to the introduction of admissible evidence. See Schoenwetter, 46 So. 3d at 546-48 (holding counsel not ineffective for not objecting to the introduction of admissible evidence); Hitchcock, 991 So. 2d at 361 ("Counsel cannot be deemed ineffective for failing to make a meritless objection.").

Furthermore, at the evidentiary hearing, Mr. Kuritz testified it was his practice to stipulate to the admissibility of evidence that would eventually and inevitably be introduced at trial to save judicial resources, as a matter of professional courtesy, and to avoid being "obstructionist" (and being perceived by the jury as being obstructionist). (Ex. EH Vol. 1 at 172-80.) He further testified he knowingly chose to attack Jonathan Peterson's credibility with the plea agreement, thereby allowing the prior consistent written statement to be admitted into evidence, as a matter of trial strategy. (EH Vol. 1 at 224-25.) Mr. Kuritz's strategy was sound as contemplated by Strickland and does not constitute ineffective assistance of counsel. See Stein, 995 So. 2d at 335 (holding sound strategic decisions do not constitute ineffective assistance of counsel (quoting Occhicone, 768 So. 2d at 1048)).

Also, Defendant was not prejudiced—as required by Strickland—by the introduction of his booking photograph in State Trial Exhibit 86. "[A]n accused's right to a fair and impartial jury trial is violated when a jury is improperly made aware of defendant's arrest for unrelated crimes during the trial" Duncan, 450 So. 2d at 245 (emphasis added). To determine whether the introduction of "mug shots" prejudices a defendant, the court must look at the entire record and surrounding circumstances.

Rucker, 330 So. 2d at 470. Some of the most probative factors include whether the State or witnesses referred to the photographs as “mug shots,” and whether the photographs were closely cropped so as to not identify their origin. See Davis, 604 So. 2d at 796; D’Anna, 453 So. 2d at 152-53.

Here, the State merely asked Jonathan Peterson if the face in the photograph was Terry Smith, to which Jonathan Peterson responded affirmatively. (R. Vol. XIV at 861-63.) Although the booking photograph was entered into evidence (and, therefore, available for the jury to see), the State did not refer to the photograph as being a “mug shot” or otherwise suggest Defendant had a criminal background. The photograph is also so closely cropped that the jury would have been unable to tell the picture was a booking photograph. Moreover, the evidence of Defendant’s guilt is overwhelming, making it highly improbable that the jury would have acquitted Defendant but for the introduction of this booking photograph. Given the totality of the circumstances, this Court finds that there is no reasonable likelihood the jury would have acquitted Defendant if the State had not introduced this booking photograph at trial. Accordingly, this claim is denied.

*(6) Walter Dumas – Written Statement on Raylan Johnson’s Booking Photograph*¹³

At trial, Walter Dumas testified that, around June 2007, he purchased a 10mm Glock 20 handgun from Raylan Johnson, Defendant’s friend who picked him up immediately after the triple homicide. (R. Vol. XIV at 946-48.) The parties stipulated to the admission of Walter Dumas’s written statement on Raylan Johnson’s booking photograph where he identified Raylan Johnson as the seller of the handgun. (R. Vol.

¹³ Walter Dumas’s written statement on Raylan Johnson’s booking photograph is State’s Exhibit 96.

XIV at 946-47.) Mr. Kuritz attempted to undermine Walter Dumas's credibility by highlighting the fact that, when interrogated by detectives, Walter Dumas initially denied purchasing the handgun before ultimately issuing the written statement. (R. Vol. XIV at 948-50.)

When asked at the evidentiary hearing why he stipulated to the admissibility of various witnesses' written out-of-court statements, Mr. Kuritz stated that he typically confers with counsel for the State to review exhibits and "try to stipulate to whatever is going to come into evidence anyway and not to be obstructionist and not to waste time" if such matters were admissible or if the witness would otherwise testify to such matters. Mr. Kuritz further stated, "I don't understand what kind of prejudice there would be if [the witnesses are] going to testify to it directly." (Ex. EH Vol. 1 at 172-80.) Mr. Kuritz provided no further explanation for his reasoning behind stipulating to Walter Dumas's written statement on Raylan Johnson's photospread booking photograph. Given this testimony presented at the evidentiary hearing, this Court will limit its analysis to the prejudice prong of Strickland. See Durousseau v. State, 218 So. 3d 405, 412 (Fla. 2017) ("If the defendant fails to make a showing of one Strickland prong, it is not necessary to analyze whether the defendant satisfies the other prong.").

Defendant was not prejudiced by the admission of Walter Dumas's written statement on Raylan Johnson's booking photograph. The written statement read: "Yes, I know this guy and I bought a Glock 20 from him and I know him by Ray-Ray, and for 200 I bought the gun in 2007." (R. Vol. XIV at 947.) Although this written statement buttresses Walter Dumas's in-court testimony, its exclusion from evidence would not have created a reasonable probability the jury would have acquitted Defendant.

First, the written statement does not directly incriminate Defendant in this triple homicide. Second, the written statement lacks detail and constitutes a very small portion of Walter Dumas's testimony. Third, Ulysses Johnson and Jonathan Peterson corroborated Walter Dumas's testimony when they testified to at least some of the facts contained in the written statement. (R. Vol. XIV at 875-77, 901-03.) Given the fact that Walter Dumas's in-court testimony is substantially supported by other admissible sources of evidence—and, importantly, does not directly implicate Defendant—its introduction into evidence had no reasonable likelihood of changing the jury's decision. Therefore, this Court finds that, even if the written statement had not been admitted into evidence, there is no reasonable probability the jury would have acquitted Defendant. Accordingly, this sub-claim is denied.

For the reasons outlined above, Defendant's claim regarding counsel improperly stipulating to the admissibility of various hearsay statements is denied.

(3)(B) – Failure to Impeach

Defendant contends counsel was ineffective for failing to impeach various State witnesses, each of whom will be discussed below.

(1) Breon Williams

Defendant argues counsel was ineffective for not impeaching Breon Williams by pointing out his prior inconsistent statements to Detective Nelson in January 2009 and his self-interest in testifying against Defendant so as to not implicate himself.

This claim is conclusively refuted by the record, as trial counsel impeached Breon Williams on both of the above-listed subjects. First, as to Breon Williams's prior inconsistent statements, at trial, Mr. Kuritz repeatedly highlighted: (i) that Breon Williams initially lied to detectives regarding his lack of knowledge regarding the triple

homicide for more than two hours; and (ii) that he was “fed” information about the triple homicide by detectives during that time. (R. Vol. XIII at 653-54, 667-69.) Second, as to Breon Williams’s interest in not incriminating himself, Mr. Kuritz elicited testimony indicating detectives initially told Breon Williams they did not intend to arrest him for the triple homicide, but, after he denied having any knowledge of the crime, the detectives threatened to charge him in relation to the triple homicide. (R. Vol. XIII at 666-67.) Mr. Kuritz later established that Breon Williams was never charged in relation to the triple homicide. (R. Vol. XIII at 657.) The record makes clear trial counsel presented this evidence to argue that Breon Williams’s testimony was not driven by the truth but by his desire to avoid criminal charges. Moreover, Mr. Kuritz attacked Breon Williams’s credibility by painting him as a seasoned drug dealer. (R. Vol. XIII at 655-57.) This is precisely the thing Defendant now claims Mr. Kuritz failed to do. In short, “counsel cannot be ineffective for what counsel actually did” Bates v. State, 3 So. 3d 1091, 1106 n.20 (Fla. 2009).

The record conclusively refutes Defendant’s contention that Mr. Kuritz failed to impeach Breon Williams on his prior inconsistent statements and self-interest in testifying against Defendant. Accordingly, this sub-claim is denied.

(2) Ray Dukes

Defendant argues counsel was ineffective for failing to impeach Ray Dukes regarding his prior felony conviction and his self-interest in not incriminating his son, Breon Williams. Ray Dukes’s testified that, a few days after the triple homicide, Breon Williams implicated Defendant as the murderer of three people. (R. Vol. XIII at 754-55.) Ray Dukes was later contacted by a detective who wanted to speak to Breon

Williams; Ray Dukes told the detective his son may have information regarding the three murders. (R. Vol. XIII at 761.)

Based on Mr. Kuritz's testimony at the evidentiary hearing, the decision not to impeach Ray Dukes with his prior felony conviction was sound trial strategy as contemplated by Strickland. Mr. Kuritz testified he often would not impeach witnesses if they were older, like Ray Dukes, because it may be perceived by the jury as "beating up" a vulnerable witness. (EH Vol. 1 at 162, 171.) In fact, Mr. Kuritz stated Ray Dukes is "a prime example of somebody I would not impeach since he's—was the father of a witness and so I would not have tried to make him look bad." (EH Vol. 1 at 170.) This Court finds Mr. Kuritz's decision not to impeach Ray Dukes with his prior felony conviction constitutes reasonable trial strategy under Strickland.

Perhaps Mr. Kuritz may have been able to undermine Ray Dukes's credibility in the eyes of the jury by raising his prior felony conviction, but he also may have risked the jury viewing this tactic as a "below-the-belt" attempt to assault Dukes's character, even though he was an older gentleman and completely uninvolved in the crime. Under these circumstances, Mr. Kuritz's decision not to impeach Ray Dukes with his prior felony conviction does not constitute deficient performance under Strickland.

Furthermore, the record conclusively refutes Defendant's claim that Mr. Kuritz was ineffective for failing to impeach Ray Dukes based on his self-interest in not incriminating Breon Williams. As a matter of common sense, the jury would have understood that Ray Dukes had an interest in keeping his son, Breon Williams, out of prison. At closing, Mr. Kuritz seized upon this common-sense inference to undermine Ray Dukes's trial testimony that implicated Defendant instead of Breon Williams:

The first rumor out there is that Breon Williams is involved in this. Such that Breon Williams father, his father—he talked to Detective Paul. Detective Paul tells you that he got a call from Breon’s dad. He says: I haven’t seen my son since the shooting. I haven’t seen him since the shooting and I don’t know where he lives, but you need to talk to him. Now what father says—never never never mentions [Defendant]. The Sergeant said he never ever ever mentioned my client in that phone call. We submit to you that a father if the son confides in me and says: I was there, but oh my God. I had nothing to do with it, it was just this and all heck broke loose. I can submit to you that that father doesn’t call and say: My son has information in the case. That father says: There’s a dude named Terry Smith. I know him because he used to work for me. Let me tell you some information about him. Good luck. If you need me and my son to come down we will help you out because he didn’t do anything wrong. That’s what a father would do, but instead what you heard was he called in a tip on his own son. And never ever ever mentioned my client. That does not make sense. It does not make sense.

(R. Vol. XVII at 1411-12.) This is the precise type of impeachment Defendant now claims Mr. Kuritz failed to perform. See Bates, 3 So. 3d at 1106 n.20 (“[C]ounsel cannot be ineffective for what counsel actually did”). Therefore, the record conclusively refutes this sub-claim. Accordingly, this sub-claim is denied.

(3) Kirk Brewer

Defendant claims counsel was ineffective for failing to impeach Kirk Brewer regarding his prior felony conviction.

The decision not to impeach Kirk Brewer with his prior felony conviction was reasonable trial strategy as contemplated by Strickland. Further, trial counsel’s decision did not prejudice Defendant. At the evidentiary hearing, Mr. Kuritz testified there is generally no reason to impeach a witness based on a prior felony conviction if the witness’s testimony does not hurt the defendant. (EH Vol. 1 at 162.) As to Kirk Brewer specifically, Mr. Kuritz stated there was no reason to impeach him because he never mentioned Defendant. (EH Vol. 1 at 217-18, 242-43.) At most, Kirk Brewer’s testimony corroborated portions of Breon Williams’s testimony. (EH Vol. 1 at 242.) Mr. Kuritz

effectively impeached Kirk Brewer about his marijuana use on the night of the triple homicide, his prior inconsistent statements to detectives, and the purportedly heavy-handed police tactics that were needed for Kirk Brewer to finally admit his involvement. (R. Vol. XIII at 743-44, 736-38, 738-42.)

This Court finds Mr. Kuritz decision not to impeach Kirk Brewer with his prior felony conviction constitutes reasonable trial strategy as contemplated by Strickland. See Stein, 995 So. 2d at 335 (holding sound strategic decisions do not constitute ineffective assistance of counsel (quoting Occhicone, 768 So. 2d at 1048))

Further, this Court finds impeaching Kirk Brewer about his prior felony conviction would have done little to further undermine his credibility. Additionally, any further hypothetical injury to the credibility of Kirk Brewer's testimony—because it merely corroborated portions of Breon Williams's testimony and did not implicate Defendant—would not have any reasonable likelihood of changing the outcome of the trial. Accordingly, this sub-claim is denied.

(4) Ulysses Johnson

Defendant contends counsel was ineffective for failing to impeach Ulysses Johnson about his prior inconsistent statements and his self-interest in testifying to the State's satisfaction to avoid criminal charges for picking up Defendant after the triple homicide.

The record conclusively refutes this sub-claim, as trial counsel impeached Ulysses Johnson on both of the above-listed subjects. First, Mr. Kuritz impeached Ulysses Johnson based on his prior inconsistent statements. In fact, the first question Mr. Kuritz asked on cross examination was, "when you first get picked up at your place of work by the police, you go downtown, you lie to the police about what happened; right?"

(R. Vol. XIV at 863.) To that, Ulysses Johnson gave an equivocal response. Mr. Kuritz immediately followed up with the same question to obtain a definitive answer. (R. Vol. XIV at 864.) Ulysses Johnson then admitted he lied when initially questioned by detectives. (R. Vol. XIV at 864.) Mr. Kuritz then asked what Ulysses Johnson told his brother, Raylan Johnson, after returning home from the initial interrogation to suggest Ulysses Johnson “fed” his brother information so they could make their stories consistent. (R. Vol. XIV at 864-65.) Mr. Kuritz then brought up additional prior inconsistent statements. (R. Vol. XIV at 866-67.) To further drive the point home, Mr. Kuritz returned to Ulysses’ Johnson’s prior inconsistent statements. (R. Vol. XIV at 873-84, 878-80.) Therefore, the record conclusively refutes Defendant’s contention that Mr. Kuritz failed to impeach Ulysses Johnson about his prior inconsistent statements.

Second, Mr. Kuritz impeached Ulysses Johnson about his self-interest in testifying to the State’s satisfaction to avoid criminal charges for his involvement after the triple homicide. Mr. Kuritz brought out the fact that detectives had told Ulysses Johnson he could be arrested if he did not provide them with additional, truthful information and that Raylan Johnson was charged with accessory after the fact due to his involvement. (R. Vol. XIV at 874-75, 881.) Both of these questions highlight the fact that Ulysses Johnson may have been subject to criminal charges if he did not testify truthfully and to the detectives’ satisfaction. Therefore, the record conclusively refutes Defendant’s claim that Mr. Kuritz failed to impeach Ulysses Johnson about his self-interest in avoiding criminal charges.

Counsel impeached Ulysses Johnson about his prior inconsistent statements as well as his self-interest in avoiding criminal charges. Consequently, Defendant is not

entitled to relief. See Bates, 3 So. 3d at 1106 n.20 (“[C]ounsel cannot be ineffective for what counsel actually did . . .”). Accordingly, this sub-claim is denied.

(5) Jonathan Peterson

Defendant argues counsel was ineffective for failing to impeach Jonathan Peterson’s testimony based on his four prior felony convictions and the testimony of Anthony Vaughn.

Mr. Kuritz did not render deficient performance by not impeaching Jonathan Peterson based on his prior felony convictions. On direct examination, the State pointed out Jonathan Peterson pleaded guilty to two counts of manslaughter and one count of possession of a firearm by a convicted felon, was residing in county jail awaiting sentencing, and had a plea deal with the State in return for testimony against Defendant and others. (R. Vol. XIV at 903-05, 909-10.) The possession of a firearm by a convicted felony charge would lead a reasonable jury to conclude Jonathan Peterson had previously been convicted of at least one other felony. Mr. Kuritz questioned Jonathan Peterson regarding the crimes for which he was charged and pleaded guilty. (R. Vol. XIV at 920-21.) Furthermore, at closing, Mr. Kuritz argued that Jonathan Peterson’s felony convictions and negotiated plea deal undermine his credibility. (R. Vol. XVII at 1408-09, 1430-32.)

In Ferrell v. State, 29 So. 3d 959, 972 (Fla. 2010), the Florida Supreme Court held the trial court properly denied an ineffective assistance of counsel claim under the deficient performance prong of Strickland under substantially similar circumstances. The Ferrell Court denied the claim because, “[o]n direct examination, the State brought out that [the witness] had four felony convictions and two shoplifting convictions, was in jail at the time of trial waiting to be sentenced for dealing in stolen property, and had

a deal with the State in return for his testimony. Further, on cross-examination of [the witness], trial counsel asked him about his prior convictions and trial counsel addressed the prior convictions in closing arguments.” Based on Ferrell, this Court finds counsel was not deficient for failing to impeach Jonathan Peterson based on his prior felony convictions. See Bates, 3 So. 3d at 1106 n.20 (“[C]ounsel cannot be ineffective for what counsel actually did . . .”).

Defendant also claims counsel was ineffective for failing to impeach Jonathan Peterson with the testimony of Anthony Vaughn.¹⁴

Prior to Defendant’s trial, defense counsel represented Anthony Vaughn in an unrelated murder trial. (EH Vol. 1 at 61-63; EH Vol. 2 at 169-70; EH Vol. 3 at 61.) At the evidentiary hearing, Anthony Vaughn testified he met Raylan Johnson while awaiting trial in the Duval County Jail. (EH Vol. 2 at 165-66.) Anthony Vaughn testified Raylan Johnson asked him to use jailhouse “sign language” to communicate with Jonathan Peterson, who was housed nearby in the jail. (EH Vol. 2 at 166-68.) Anthony Vaughn testified that, while acting as their intermediary, Raylan Johnson and Jonathan Peterson agreed to pin the triple homicide on Defendant. (EH Vol. 2 at 168.) Anthony Vaughn later met Defendant in the jail and advised him of Raylan Johnson and Jonathan Peterson’s plan. (EH Vol. 2 at 168-69.) Thereafter, Defendant told trial counsel what Anthony Vaughn had said, and trial counsel dispatched their investigator, Michael Hurst (“Mr. Hurst”), to interview Anthony Vaughn, who was then being housed at the Gulf Correctional Institution. (EH Vol. 1 at 63-66, 74-75; EH Vol. 2 at 170.) Based on this interview, trial counsel chose to transport Anthony Vaughn to the Duval

¹⁴ This Court notes that Anthony Vaughn relates to Claim 3B.e., not Claim 3F.e. as indicated in Defendant’s Third Motion to Amend, filed on November 22, 2017.

County Jail and list him as a potential trial witness for Defendant. (EH Vol. 1 at 63-66; EH Vol. 2 at 170; EH Vol. 3 at 61-62.)

Ultimately, however, counsel chose not to call Anthony Vaughn as a witness. (EH Vol. 1 at 63-76; EH Vol. 2 at 171; EH Vol. 3 at 62-63, 82-83.) Mr. Kuritz and the State provided a succinct explanation of the circumstances surrounding the decision not to call Anthony Vaughn, and this Court conducted a colloquy tailored to Defendant's decision. (R. Vol. XVI at 1325-28.)

At the evidentiary hearing, Mr. Kuritz testified trial counsel chose not to call Anthony Vaughn because he did not want to unnecessarily associate Defendant with someone convicted of multiple homicides. (EH Vol. 1 at 73-76.) Specifically:

I didn't feel [Anthony Vaughn's testimony] was reliable or trustworthy and Mr. Smith—I don't even—he may have only had one prior felony conviction but he had really had no serious trouble in his life so we were trying to portray him, you know, as a—a newbie so to speak, that he's not a serial killer and we didn't want to associate him with somebody who was serving two life sentences and doing sign language to try to circumvent the system, so we chose and we all got together as you just read, myself, Mr. Hernandez and Mr. Smith, and we talked about it and we chose not to do it and the Court inquired and Mr. Smith agreed.

(EH Vol. 1 at 73-74.) Mr. Kuritz also said Anthony Vaughn was unwilling to testify without a reduction in sentence.¹⁵ (EH Vol. 1 at 66-67.)

Mr. Hernandez testified the defense did not call Anthony Vaughn because they thought his testimony would be detrimental to Defendant's case. (EH Vol. 3 at 62, 83.) Defendant and Anthony Vaughn, however, contend trial counsel chose not to call Anthony Vaughn due to a perceived conflict of interest created by their prior representation of Anthony Vaughn. (EH Vol. 2 at 171; EH Vol. 3 at 112-14.)

¹⁵ Mr. Hernandez, however, denied that Anthony Vaughn insisted on a reduced sentence in order to testify. (EH Vol. 3 at 62-63.)

Mr. Kuritz did not render deficient performance by not impeaching Jonathan Peterson with Anthony Vaughn's testimony. First, this Court conducted a colloquy that established Defendant did not desire to call Anthony Vaughn as a witness at trial.

Before the defense presented evidence at trial, Mr. Kuritz told this Court:

Mr. [Anthony Vaughn]—it was obviously—we needed to at least see if we wanted to call him as a witness. We had contemplated it, Mr. Caliel spoke with him, I believe by deposition. Afterwards, Mr. Hernandez and my client and I just a minute ago when the Court was giving us a few extra moments, we have spoken with our client about the pros and cons of his testimony, and its been [sic] our decision, and he's deferred to us on our decision not to call Anthony Vaughn

(R. Vol. XVI at 1326.) This Court then inquired as to Defendant's understanding of, and agreement with, trial counsel's decision not to call Anthony Vaughn:

This Court: Mr. Smith, you've heard your lawyer indicated that Anthony Vaughn is not going to be called as a witness in this case and that he has discussed all of the considerations related to whether or not he is to be called. A, has he, in fact, discussed that with you?

Defendant: Yes, sir.

This Court: B, has he indicated that you are in agreement with the decision not to call Anthony Vaughn. Is that, in fact, true?

Defendant: Yes, sir.

This Court: Do you need any additional a time to talk to your lawyer about whether or not you wish Mr. Vaughn to be called on your behalf?

Defendant: No, sir.

(R. Vol. XVI at 1328.)

Based on the above-quoted colloquy, it is clear Defendant voluntarily and knowingly chose not to call Anthony Vaughn as a defense witness to impeach the credibility of Jonathan Peterson. Any postconviction allegations which contradict prior

sworn statements will not be entertained by this Court. Johnson v. State, 22 So. 3d 840, 844 (Fla. 1st DCA 2009); Iacono v. State, 930 So. 2d 829, 831 (Fla. 4th DCA 2006). Defendant cannot now seek to go behind his sworn testimony at trial by making contradictory allegations in his postconviction motions. Davis v. State, 938 So. 2d 555, 557 (Fla. 1st DCA 2006). Therefore, the record conclusively refutes Defendant's desire to call Anthony Vaughn. 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." (citing Nixon v. Singletary, 758 So. 2d 618, 623 (Fla. 2000))).

Second, it is clear that defense counsel made a reasonable strategic decision not to call Anthony Vaughn. Trial counsel was aware of what Anthony Vaughn would have testified to at trial based on Mr. Hurst's interview with him at the Gulf Correctional Institution, their own discussions with him at the Duval County Jail, and his pre-trial deposition. (EH Vol. 1 at 64-66; EH Vol. 2 at 170; EH Vol. 3 at 62-63, 82-83; R. Vol. XVI at 1326.) Trial counsel was also aware the State intended to impeach Anthony Vaughn by calling a worker at the jail as a rebuttal witness. (R. Vol. XVI at 1327.) Trial counsel then weighed the "pros and cons" of calling Anthony Vaughn to testify. (R. Vol. XVI at 1326.) This type of informed, strategic decision is not subject to collateral attack. Whitfield v. State, 923 So. 2d 375, 381 (Fla. 2005) ("[T]rial counsel made a strategic decision not to call additional witnesses. Counsel cannot be held ineffective for these strategic decisions: 'Strategic decisions do not constitute ineffective assistance if alternative courses have been considered and rejected.'" (quoting Rutherford v. State, 727 So. 2d 216, 233 (Fla. 1998))). Accordingly, this sub-claim is denied.

(6) *Edward Haney*¹⁶

Defendant contends counsel was ineffective for failing to impeach Edward Haney with his prior felony convictions.

Mr. Kuritz did not render deficient performance by failing to impeach Edward Haney based on his prior felony convictions. The State brought out that Edward Haney pleaded guilty to two counts of racketeering, shooting deadly missiles, possession of a firearm by an adjudicated delinquent, and attempted first degree murder. (R. Vol. XV at 1030-31.) The State also pointed out Edward Haney was housed in a juvenile detention center at the time of the triple homicide and was incarcerated at Florida State Prison at the time of trial. (R. Vol. XV at 1018, 1020-21.) Mr. Kuritz questioned Edward Haney about the crimes for which he was charged and to which he pleaded guilty. (R. Vol. XV at 1040.) Furthermore, at closing, Mr. Kuritz mentioned Edward Haney's prior felony convictions multiple times. (R. Vol. XIV at 1408-09, 1428, 1432, 1434.)

Mr. Kuritz's performance was reasonable and well within professional norms of conduct. Ferrell v. State, 29 So. 3d 959, 972 (Fla. 2010) (holding counsel did not perform deficiently under substantially similar circumstances). Moreover, Mr. Kuritz testified there is no reason to impeach a witness with their prior felony convictions when those convictions were brought up on direct examination. (EH Vol. 1 at 218-19.) This is an appropriate and common trial practice. Further, Mr. Kuritz questioned Edward Haney about the crimes for which he was charged and to which he pleaded guilty. (R.

¹⁶ This Court notes counsel's alleged failure to impeach Edward Haney based on his prior felony convictions was not raised in Defendant's Rule 3.851 Motion. This claim was not raised in writing until Defendant filed his written Closing Argument. Nonetheless, in an abundance of caution, this Court will consider and dispose of this claim on the merits.

Vol. XV at 1040.) Therefore, counsel was not deficient for failing to impeach Edward Haney based on his prior felony convictions. Accordingly, this sub-claim is denied.

For the reasons outlined above, Defendant's claim regarding counsel failing to impeach the above-listed witnesses is denied.

(3)(C) – Failure to Object to Bad Character Evidence

Defendant argues counsel was ineffective for failing to object to the State introducing evidence of other crimes, wrongs, and acts at trial.¹⁷ Specifically, Defendant points to evidence that Defendant harbored Edward Haney and evidence that Breon Williams, Ulysses Johnson, and Jonathan Peterson were afraid to testify against Defendant for fear of retaliation. Defendant also claims counsel should have objected when the State argued that Defendant “picked” the State witnesses in this case.

“Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, . . . but is inadmissible when the evidence is relevant solely to prove bad character or propensity.” § 90.404(2)(a), Fla. Stat. (2009). In other words, “collateral-crime evidence, such as bad acts not included in the charged offenses, is admissible when relevant to prove a *material* fact in issue, but is inadmissible when the evidence is relevant *solely* to prove bad character or propensity.” Wright v. State, 19 So. 3d 277, 291-92 (Fla. 2009) (emphasis original); see also Charles W. Ehrhardt, Florida Evidence § 404.9 (2011 ed.).

¹⁷ In Defendant's Rule 3.851 Motion, he claims counsel was ineffective for failing to object to the State's presentation of bad character evidence. Defendant's claims, however, relate to evidence that is properly classified as evidence of “other crimes, wrongs, or acts,” not character evidence. Therefore, this Court will interpret and analyze this claim under section 90.404(2), Florida Statutes (2011), relating to evidence of “other crimes, wrongs, or acts,” not subsection (1), relating to character evidence.

(1) Evidence of Defendant Harboring Edward Haney

The triple homicide in this case occurred in June 2007. Edward Haney was later involved in an unrelated shooting in January 2008. (R. Vol. XV at 2013.) In April 2008, Defendant helped Edward Haney evade the police by allowing Edward Haney to stay in his home. (R. Vol. XV at 1023-24.) While Defendant was harboring Edward Haney, news of Edward Haney's shooting came on the television, and Defendant began to chide Edward Haney for being identified as the perpetrator in that shooting, while bragging that he (Defendant) had not been caught in the triple homicide in this case. (R. Vol. XV at 1025-26.) Defendant admitted to the triple homicide and provided Edward Haney details of the crime, including the names of two victims, the type of gun used, and that he was with Breon Williams. (R. Vol. XV at 1026-28.) The State elicited this information during direct examination, and defense counsel did not object.

Evidence that Defendant harbored Edward Haney was admissible because it was relevant to and probative of Edward Haney's credibility. Edward Haney's credibility is a material fact. See Morrison v. State, 818 So. 2d 432, 446 (Fla. 2002) ("All witnesses who testify during a trial place their credibility in issue.") (quoting Chandler v. State, 702 So. 2d 186, 195 (Fla. 1997)). Moreover, evidence that Defendant harbored Edward Haney is probative of Edward Haney's credibility. See Wright, 19 So. 3d at 291 ("All evidence tending to prove or disprove a material fact is admissible . . ."). It may have appeared odd to the jury that Defendant would voluntarily offer incriminating information to Edward Haney for the first time almost a year after the crime was committed. This oddity may have caused the jury to doubt Edward Haney's testimony. That Defendant was harboring Edward Haney while news of the shooting for which Edward Haney was sought appeared on television presents a context for why Defendant

made this tardy confession and lends credence to Edward Haney's testimony. Thus, the evidence is admissible to support Edward Haney's credibility.

Counsel cannot be ineffective for failing to object to the introduction of admissible evidence. Schoenwetter, 46 So. 3d at 546-48 (holding counsel not ineffective for not objecting to introduction of admissible evidence); Hitchcock, 991 So. 2d at 361 ("Counsel cannot be deemed ineffective for failing to make a meritless objection."). Accordingly, because counsel's performance was not deficient, this sub-claim is denied.

(2) Evidence that Witnesses Feared Retaliation

Defendant told Breon Williams, Ulysses Johnson, and Jonathan Peterson he killed three people when they picked him up immediately after the triple homicide. These three individuals never voluntarily came forward with this information. (R. Vol. XIII at 646; R. Vol. XIV at 859, 904-05.) In fact, each of them denied having information about the triple homicide when initially questioned by detectives. (R. Vol. XIII at 647-48; R. Vol. XIV 859-61, 906.) Eventually, however, all of them provided detectives information against Defendant. (R. Vol. XIII at 648-52; R. Vol. XIV 861-62, 906-08.) At trial, each testified they did not voluntarily come forward with information about the triple homicide and initially denied knowing about the triple homicide when questioned by detectives, because they feared Defendant would retaliate against them or their families. (R. Vol. XIII at 647; R. Vol. XIV 860-61, 904.)

Evidence that Breon Williams, Ulysses Johnson, and Jonathan Peterson were fearful of retaliation if they came forward with incriminating information is relevant to their credibility. Their credibility is a material fact. See Morrison, 818 So. 2d at 446 ("All witnesses who testify during a trial place their credibility in issue.") (quoting Chandler, 702 So. 2d at 195). Moreover, their fear of retaliation is probative of their

credibility because it provides a plausible explanation for why they did not voluntarily come forward and initially denied having knowledge about the triple homicide. See Wright, 19 So. 3d at 291 (“All evidence tending to prove or disprove a material fact is admissible . . .”). Had the jury not been informed of the witnesses’ fear of retaliation, they may have been more likely to question the veracity of the witnesses’ trial testimony due to their prior inconsistent statements denying having any knowledge of the triple homicide. That the witnesses feared retaliation, however, gives the jury an explanation for their reticence. Thus, this evidence is admissible as to credibility.

Counsel cannot be ineffective for failing to object to the introduction of admissible evidence. Schoenwetter, 46 So. 3d at 546-48 (holding counsel not ineffective for not objecting to the introduction of admissible evidence); Hitchcock, 991 So. 2d at 361 (“Counsel cannot be deemed ineffective for failing to make a meritless objection.”). Accordingly, because counsel’s performance was not deficient, this claim is denied.

(3) Reference to Defendant “Picking” the Witnesses

Defendant claims counsel should have objected when, during closing argument, the State noted many of its witnesses had extensive criminal backgrounds. The prosecutor explained the State did not freely select its witnesses, but was forced upon them based on Defendant’s criminal associations with the witnesses. (R. Vol. XVII at 1389, 1444-45, 1459-60.)

The State’s reference to Defendant “picking” the witnesses was proper because it was relevant to explaining their relationships with Defendant. The witnesses’ criminal associations with Defendant help explain why many of the State’s witnesses had extensive criminal backgrounds. Without this explanation, the jury may have questioned why nearly all of the State’s civilian witnesses had prior felony convictions.

The references to Defendant associating with and “picking” the witnesses provide an explanation and context for the witnesses’ criminal histories. Therefore, the argument was proper. Miller v. State, 926 So. 2d 1243, 1254-55 (Fla. 2006) (“[A]n attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue as long as the argument is based on the evidence.” (citing Craig v. State, 510 So. 2d 857, 865 (Fla. 1987))). Counsel cannot be ineffective for failing to object to an appropriate closing arguments. Hitchcock, 991 So. 2d at 361 (“Counsel cannot be deemed ineffective for failing to make a meritless objection.”).

Furthermore, the State’s reference to Defendant “picking” the State’s witnesses did not prejudice Defendant. There was overwhelming evidence of Defendant’s guilt produced at trial, and the omission of the State’s “picking” reference had no likelihood of changing the outcome of the trial in Defendant’s favor.

Accordingly, because counsel was not ineffective and because Defendant was not prejudiced, this sub-claim is denied.

(3)(D) – Failure to Object to Surrogate Medical Examiner Testimony

Defendant asserts multiple claims regarding Dr. Giles. The same or similar claims are also asserted in Claim Four below. This Court finds it appropriate to consider all claims regarding Dr. Giles’s together in Claim Four below.

(3)(E) – Introducing Interrogation Recording Indicating Defendant’s Lack of Remorse

On April 1, 2009, Detective Nelson and Detective Mitchell Chizik interrogated Defendant. (R. Vol. XV at 1107-09.) During the interrogation, the detectives drove Defendant to the home where the triple homicide occurred. The patrol car was equipped with a video recorder. (R. Vol. XV at 1169-70, 1199-200.) At trial, the State introduced portions of the recordings from the interrogation room and the patrol car.

In the recordings, Defendant repeatedly denied being involved in the triple homicide or having ever been inside the home where it occurred. (R. Vol. XV at 1170; R. Vol. XVI at 1205.) On cross-examination, Mr. Kuritz played the remainder of the video recording from the patrol car to highlight Detective Nelson's tactic of continuing to ask questions even after Defendant had repeatedly exercised his right to stop the interrogation. (R. Vol. XVI at 1218-23.) During the portion of the video recording Mr. Kuritz played, the detectives made multiple references to Defendant's lack of remorse. (R. Vol. XVI at 1228-29, 1241, 1248, 1264, 1269-70, 1272-74, 1279, 1288, 1290.)

Despite this, Mr. Kuritz did not perform deficiently for introducing the video recordings from Defendant's ride in the patrol car. Mr. Kuritz's decision was a sound, strategic decision as contemplated by Strickland because the publication of the remainder of the video was intended to provide a concrete example of Detective Nelson's aggressive interrogation tactics argued by Defendant at trial.

Defendant argues Detective Nelson deployed such tactics when he interrogated Breon Williams, Kirk Brewer, Ulysses Johnson, Raylan Johnson, and Jonathan Peterson, all of whom initially denied having any knowledge of the triple homicide. (R. Vol. XVI at 1210-11.) It was only after being subjected to Detective Nelson's purportedly heavy-handed and coercive interrogation tactics that they implicated Defendant in the triple homicide. According to Mr. Kuritz, he attempted to use this fact to suggest that the above-listed witnesses' trial testimony against Defendant was a product of Detective Nelson's coercion. (EH Vol. 1 at 181-86, 227-29, 243; Vol. 3 at 85-86.) At closing during trial, Mr. Kuritz repeatedly drove this point home. (R. Vol. XVII at 1403, 1413-14, 1415-17, 1419, 1436-43.) This strategy was not unreasonable under the circumstances. Accordingly, because counsel's performance was not deficient, this claim is denied.

CLAIM FOUR

Defendant asserts various claims relating to Dr. Giles's expert medical examiner testimony. First, Defendant claims counsel was ineffective for failing to object to Dr. Giles being unqualified as an expert in forensic pathology relating to gunshot wounds. Second, Defendant argues counsel was ineffective for not objecting to Dr. Giles's reliance on Victim Keenan's and Victim Gibson's autopsy reports because the State failed to lay a proper foundation under the business records exception to hearsay. Third, Defendant contends counsel was ineffective for failing to object to a violation of the Confrontation Clause relating to Dr. Giles's "surrogate" medical examiner testimony regarding the size and nature of Victim Gibson's and Victim Keenan's gunshot wounds. Finally, Defendant avers Dr. Giles's "surrogate" medical examiner testimony constitutes fundamental error cognizable in the postconviction context.

Dr. Giles performed the autopsy on Victim Robinson. The autopsies of Victim Keenan and Victim Gibson, however, were performed by Dr. Margarita Arruza and Dr. Aurelian Nicolaescu, respectively. Dr. Arruza was unavailable at trial due to medical issues. (EH Vol. 1 at 220-25, EH Vol. 3 at 72-73.) There is no indication in the record as to Dr. Nicolaescu's availability or unavailability during trial. At trial, Dr. Giles testified as to the causes and manners of death, as well as the size and nature of the gunshot wounds, for Victim Keenan and Victim Gibson in spite of the fact that he did not perform their autopsies. Dr. Giles based this opinion on his personal review of the autopsy files and photographs. Importantly, none of the autopsy reports were entered into evidence.

(A) – IAC for Failure to Object to Medical Examiner as Unqualified Expert

Defendant claims counsel was ineffective for not objecting to Dr. Giles as being unqualified as an expert regarding the forensic pathology of gunshot wounds. Specifically, Defendant claims Dr. Giles was not qualified to testify about the victims' gunshot wounds being consistent with the type and extent of injuries associated with a medium-to-large caliber firearm.

For an expert to render an opinion, the trial court must determine whether the witness is qualified to express an opinion on the subject. Chavez v. State, 12 So. 3d 199, 205 (Fla. 2009). "It is within the trial court's discretion to determine a witness's qualifications to express an opinion as an expert, and the court's determination in this regard will not be reversed absent a showing of error." Brooks v. State, 762 So. 2d 879, 892 (Fla. 2000). A witness may qualify as an expert based on specialized knowledge, training, or education; general knowledge, however, is insufficient. Chavez, 12 So. 3d at 205.

Dr. Giles is qualified to render his expert opinion regarding the caliber of firearm that caused the victims' gunshot wounds and the cause and manner of their deaths based on his extensive background and experience as a forensic pathologist. Dr. Giles specializes in forensic pathology, which he described as an area of medicine related to determining the cause and manner of death or injury, especially for presentation in a courtroom setting. (R. Vol. XIV at 821-22.) He is a member of both the national and Florida associations of medical examiners as well as the American Academy of Forensic Sciences. (R. Vol. XIV at 820.) Dr. Giles testified he has performed approximately 4,500 autopsies in his career and been certified as an expert witness in forensic pathology in more than 125 cases. (R. Vol. XIV at 820-21.)

Given his background and experience as a medical examiner, this Court concludes Dr. Giles is qualified as an expert in the area of forensic pathology and competent to testify regarding the victims' wounds being consistent with injuries associated with a medium-to-large caliber firearm. Because Dr. Giles was qualified to render his expert opinion regarding forensic pathology in general and the victims' gunshot wounds specifically, trial counsel was not ineffective for failing to object to Dr. Giles's purported lack of qualifications. See Schoenwetter, 46 So. 3d at 546 (“[C]ounsel cannot be deemed ineffective for failing to make a meritless objection.” (quoting Hitchcock, 991 So. 2d at 361)). Accordingly, this claim is denied.

(B) – IAC for Not Objecting to Business Records Foundation Re: Autopsy Reports

Defendant next argues counsel was ineffective for failing to object to the State's improper foundation to the business records exception to hearsay so that Dr. Giles could testify about the autopsy findings of Dr. Arruza and Dr. Nicolaescu.

This claim lacks merit. Dr. Giles's expert testimony regarding the autopsy findings for Victim Gibson and Victim Keenan was admitted pursuant to section 90.704, Florida Statutes (2011), not the business records exception to hearsay.¹⁸ Section 90.704, Florida Statutes, provides that “[t]he facts or data upon which an expert [such as Dr. Giles] bases an opinion or inference may be those perceived by, or made known to, the expert at or before trial.”

¹⁸ The autopsy photographs of Victim Gibson and Victim Keenan, which were introduced into evidence based on the parties' stipulation, were admissible pursuant to the business records exception to the hearsay rule. The State laid a general foundation under the business records exception to help convince the jury that the autopsy reports and pictures were customary and reliable. (R. Vol. XIX at 835-36.) Because defense counsel had already stipulated to the admissibility of the autopsy photographs, the State was not required to establish each requirement for the business records exception to apply.

It is well-established in Florida that an expert pathologist may testify to the findings of another doctor who performed the autopsy under section 90.704 if the testifying expert formed an opinion based upon his or her personal review of the autopsy report and other objective evidence. Schoenwetter v. State, 931 So. 2d 857, 870-71 (Fla. 2006); Brennan v. State, 754 So. 2d 1, 4-5 (Fla. 1999); Geralds v. State, 674 So. 2d 96, 100 (Fla. 1996); Capehart v. State, 583 So. 2d 1009, 1012-13 (Fla. 1991). Therefore, trial counsel was not deficient for failing to object to Dr. Giles's testimony because Dr. Giles's autopsy-related testimony was properly entered into evidence under section 90.704. See Schoenwetter, 46 So. 3d at 546 (“[C]ounsel cannot be deemed ineffective for failing to make a meritless objection.” (quoting Hitchcock, 991 So. 2d at 361)). Accordingly, this claim is denied.

(C) – IAC for Failure to Object to “Surrogate” Medical Examiner Testimony

Defendant next contends counsel was ineffective for failing to object to the “surrogate” medical examiner testimony of Dr. Giles regarding the autopsy report findings from Victim Gibson and Victim Keenan based on Crawford v. Washington, 541 U.S. 36 (2004), because Defendant was unable to cross-examine the original medical examiners. In Crawford, “[t]he Court held the right to confront witnesses applies not only to in-court testimony, but also to ‘testimonial hearsay.’” Rosario v. State, 175 So. 3d 843, 847 (Fla. 5th DCA 2015) (citing Crawford, 541 U.S. at 59, 68-69). “Following Crawford, the prosecution may not introduce testimonial hearsay against a criminal defendant, regardless of whether such statements are deemed reliable, unless the defendant has an opportunity to cross-examine the declarant at trial, or unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the witness.” Rosario, 175 So. 3d at 847 (citing Crawford, 541 U.S. at 59, 68-69). For the

three reasons listed below, counsel was not deficient for failing to object to Dr. Giles “surrogate” expert opinion testimony.

First, the Confrontation Clause was never implicated because Dr. Giles’s testimony was based on his own independent conclusions gleaned from a review of the objective autopsy reports and pictures, and Dr. Giles was subject to cross-examination. Nowhere in either Victim Gibson’s or Victim Keenan’s autopsy report do Dr. Nicolaescu or Dr. Arruza opine as to the caliber of firearm used to shoot the victims or their gunshot wounds being caused by the same or similar caliber of firearm. (Deft.’s EH Ex. 30-31, 33.) The only opinions contained in the autopsy reports are the causes and manners of death—namely, gunshot wounds and homicide. (Deft.’s EH Ex. 30-31, 33.) Neither party refutes these findings. As such, Dr. Giles did not, as Defendant claims, testify as to Dr. Nicolaescu’s or Dr. Arruza’s findings and conclusions.

Moreover, the autopsy reports themselves were not offered or admitted into evidence. Therefore, the Confrontation Clause was not implicated because the only expert medical examiner opinions rendered at trial were those of Dr. Giles himself—not Dr. Nicolaescu or Dr. Arruza—and Defendant was afforded the opportunity to confront and cross-examine Dr. Giles on these opinions. Because the Confrontation Clause was never implicated, counsel was not deficient for failing to object. See Schoenwetter, 46 So. 3d at 546 (“[C]ounsel cannot be deemed ineffective for failing to make a meritless objection.” (quoting Hitchcock, 991 So. 2d at 361)).

Second, the Florida Supreme Court has consistently held it is constitutionally permissible for a medical examiner to testify to the autopsy findings of a non-testifying medical examiner if the non-testifying medical examiner is unavailable at trial. Brooks v. State, 175 So. 3d 204, 237-38 (Fla. 2015) (allowing “surrogate” medical examiner

testimony when medical examiner performing the autopsy was unavailable and testifying medical examiner based his opinion on a review of objective evidence); Schoenwetter, 931 So. 2d at 870-71 (upholding “surrogate” medical examiner testimony when the medical examiner performing the autopsy was unavailable and the opinion testimony was based on an independent review of autopsy report); Brennan, 754 So. 2d at 4-5 (upholding use of “surrogate” medical examiner testimony because the testifying medical examiner “made independent conclusions using objective evidence”); Geralds, 674 So. 2d at 100 (allowing “surrogate” medical examiner testimony based because the testifying medical examiner “based his *independent* conclusions largely on objective evidence”); Capehart, 583 So. 2d at 1013 (holding the trial court properly allowed a “surrogate” medical examiner to provide an opinion “based upon the autopsy report, the toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed in the case”). Dr. Arruza, who performed the autopsy on Victim Keenan, was unavailable for trial. Therefore, it was proper for Dr. Giles to testify, and counsel was not ineffective for failing to object to Dr. Giles’s testimony regarding Victim Keenan. See Schoenwetter, 46 So. 3d at 546 (“[C]ounsel cannot be deemed ineffective for failing to make a meritless objection.” (quoting Hitchcock, 991 So. 2d at 361)).

Third, there is no controlling federal or state case law suggesting it is constitutionally improper for a medical examiner to render an independent expert opinion based off his or her review of an autopsy report generated by another, non-testifying medical examiner, so long as the autopsy report itself is not introduced into evidence. In all of the cases Defendant cites, the Confrontation Clause was violated due to the introduction of a testimonial affidavit, report, or document into evidence that was written or generated by someone who did not testify at trial. See, e.g., Bullcoming v.

New Mexico, 564 U.S. 647, 652 (2011) (holding the Confrontation Clause prohibits the introduction of a testimonial forensic laboratory report through the in-court testimony of an expert who did not perform or observe the testing process, unless the non-testifying expert is unavailable and subject to pre-trial cross-examine); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311, 329 (2009) (holding the Confrontation Clause prohibits the introduction of *ex parte* out-of-court forensic affidavits without the analyst testifying at trial unless unavailable and subject to pre-trial cross-examination); Johnson v. State, 982 So. 2d 672, 680 (Fla. 2008) (holding “lab reports and similar materials, when prepared for criminal trials, to be testimonial statements and that their admission without the preparer’s testimony runs afoul of Crawford and the Confrontation Clause”); Rosario, 175 So. 3d at 858 (holding “[w]hen a [medical examiner autopsy] report prepared pursuant to chapter 406 is introduced ‘against’ the defendant at trial, as in this case, he must be given an opportunity to cross-examine the medical examiner who prepared the report”).¹⁹ In fact, in Bullcoming, Justice Sotomayor highlighted the fact that “this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence.” Bullcoming, 564 U.S. at 672 (Sotomayor, J., concurring). Here, unlike the cases cited by Defendant, the autopsy reports were not introduced into evidence. Therefore, the cases cited by Defendant are inapposite to the admissibility of Dr. Giles’s expert testimony.

¹⁹ Bullcoming and Rosario were issued after Defendant’s March 2011 trial. Even if these cases, or any other post-March 2011 case, could be construed to suggest Defendant’s rights under the Confrontation Clause were violated, such case law is irrelevant to determining whether trial counsel was ineffective. See Cherry v. State, 781 So. 2d 1040, 1053 (Fla. 2000) (“[T]rial counsel cannot be held ineffective for failing to anticipate changes in law.”). Moreover, any changes in law stemming from Crawford do not apply retroactively. See Chandler v. Crosby, 916 So. 2d 728, 731 (Fla. 2005).

For the reasons discussed *supra*, Dr. Giles’s “surrogate” medical examiner testimony regarding the size and nature of the victims’ gunshot wounds did not violate the Confrontation Clause and, thus, was admissible. Therefore, counsel was not ineffective for failing to object. See Schoenwetter, 46 So. 3d at 546-48 (holding counsel was not ineffective for not objecting to the introduction of admissible evidence); Hitchcock, 991 So. 2d at 361 (“Counsel cannot be deemed ineffective for failing to make a meritless objection.”).

Furthermore, as to Victim Gibson, even if a court were to assume *arguendo* Dr. Giles’s testimony violated Defendant’s right to confrontation and cross-examination, Defendant was not prejudiced. At the evidentiary hearing, the forensic pathologist for the defense, Dr. Kathryn Pinneri (“Dr. Pinneri”), testified there was no evidence that Victim Gibson suffered a self-inflicted gunshot wound. (EH Vol. 2 at 67-68, 70, 75.) Additionally, Defendant’s own crime scene reconstruction expert, Christopher Robinson (“Mr. Robinson”), also testified that Victim Gibson was shot by the 10mm fired by Defendant. (EH Vol. 2 at 137.) Therefore, even if Dr. Giles’s testimony was improperly admitted into evidence, Defendant was not prejudiced with respect to Victim Gibson because the uncontroverted evidence establishes that Defendant shot and killed Victim Gibson. Accordingly, because counsel was not ineffective, and because Defendant was not prejudiced with respect to Victim Gibson, this claim is denied.

(D) – “Surrogate” Medical Examiner Testimony Constitutes Fundamental Error

Defendant next argues Dr. Giles’s “surrogate” medical examiner testimony violates the Sixth Amendment’s Confrontation Clause and constitutes fundamental error.

Defendant claims this error should be cognizable in a Rule 3.851 postconviction motion because the error constitutes fundamental error. “[T]he doctrine of fundamental error operates as a narrow exception to the general prohibition [against claims that could have been raised on direct appeal] contained in Rule 3.85[1].” Willie v. State, 600 So. 2d 479, 482 (Fla. 1st DCA 1992). “[F]undamental error — *i.e.*, ‘error . . . which amounts to a denial of due process’ — can be raised for the first time in a postconviction proceeding.” Hill v. State, 730 So. 2d 322, 323 (Fla. 1st DCA 1999) (quoting Willie, 600 So. 2d at 482); see also Haliburton v. State, 7 So. 3d 601, 605-06 (Fla. 4th DCA 2009) (defining “fundamental errors” as “so serious that they amount to a denial of substantive due process and may be raised at any time including for the first time in a postconviction motion” (emphasis omitted)). In other words, “[f]undamental error is that which ‘reaches down into the validity of the trial such that a guilty verdict . . . could not have been obtained without the assistance of the alleged error.’” Bell v. State, 108 So. 3d 639, 650 (Fla. 2013) (quoting Wade v. State, 41 So. 3d 857, 868 (Fla. 2010)).

As established above, no constitutional error occurred, let alone a fundamental one. Accordingly, because this claim could have and should have been raised on direct appeal, and because the purported error is not fundamental, this claim is denied.

CLAIM FIVE

Defendant claims counsel was ineffective during the penalty phase of trial for failing to investigate and present available mitigation evidence regarding the abuse and hardships Defendant experienced during his childhood.

Because Defendant is entitled to a new penalty phase on unrelated grounds pursuant to the subsequently decided cases of Hurst v. Florida and Hurst, this claim—which attacks the propriety of Defendant’s original death sentence—is moot. See Mills,

788 So. 2d at 250-51 (holding the defendant's postconviction claim challenging the propriety of his sentencing moot because the defendant had already been granted a new sentencing hearing). Accordingly, because this claim is moot, it is denied.

CLAIM SIX

Defendant contends counsel was ineffective during the penalty phase of the trial for failing to obtain an expert psychiatry witness to evaluate and testify as to Defendant's mental and intellectual capabilities as well as his state of mind during the commission of the crime based on Ake v. Oklahoma, 470 U.S. 68 (1985).

Because Defendant is entitled to a new penalty phase on unrelated grounds pursuant to the subsequently decided cases of Hurst v. Florida and Hurst, this claim—which attacks the propriety of Defendant's original death sentence—is moot. See Mills, 788 So. 2d at 250-51 (holding the defendant's postconviction claim challenging the propriety of his sentencing moot because the defendant had already been granted a new sentencing hearing). At the August 22, 2017 case management conference, Defendant conceded this Ground was moot. Accordingly, because this claim is moot, it is denied.

CLAIM SEVEN

Defendant argues his death sentence is constitutionally infirm under Caldwell v. Mississippi, 472 U.S. 320 (1985), because the State advised jurors that any recommendation for the death penalty would be advisory and subject to review by the trial judge.

As discussed *supra*, Defendant is entitled to a new penalty phase under Hurst v. Florida and Hurst. As such, this claim is denied as moot.

CLAIM EIGHT

Defendant claims this Court must vacate his conviction and sentence of death based on the newly discovered recantation evidence from Edward Haney. At deposition and trial, Edward Haney testified Defendant bragged about committing, and provided details about, the triple homicide while Edward Haney was staying with Defendant. Edward Haney now contends his prior testimony was false and denies Defendant ever admitted to the triple homicide. Defendant argues Edward Haney's recantation would likely produce an acquittal on retrial.

Under Florida law, there are two requirements for a conviction to be vacated based on newly discovered evidence. First, the evidence must have been unknown to the court and the parties at the time of trial, and the defendant or his counsel could not have known of it through due diligence. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (quoting Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994)). Second, the newly discovered evidence, considered alongside all other evidence adduced at trial, must be of such a nature that it would probably produce an acquittal on retrial. See Jones, 709 So. 2d at 521-22. The second prong is satisfied if the new evidence "weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability." Mansfield v. State, 204 So. 3d 14, 17 (Fla. 2016) (quoting Duckett v. State, 148 So. 3d 1163, 1167-68 (Fla. 2014)). "Specifically, recanted testimony that is alleged to constitute newly discovered evidence will mandate a new trial only if (1) the court is satisfied that the recantation is true, and (2) the recanted testimony would probably render a different outcome in the proceeding." Davis v. State, 26 So. 3d 519, 526 (Fla. 2009).

At trial, Edward Haney testified that, at the time of this triple homicide, he had been in a juvenile detention program outside Jacksonville. (R. Vol. XV at 1020-21.) Thereafter, between January and April 2008, Edward Haney was wanted by law enforcement as a suspect in an unrelated shooting. (R. Vol. XV at 1023.) During some of that time, Defendant allowed Edward Haney to reside at his home to help Edward Haney evade law enforcement. (R. Vol. XV at 1024.) While Edward Haney's case was being aired on the evening news, Defendant chided Edward Haney for being identified as the perpetrator in that shooting and bragged that he (Defendant) had not been caught in the triple homicide in this case. (R. Vol. XV at 1025-26.) Defendant admitted to the triple homicide and provided details of the crime to Edward Haney, including the names of two victims, the type of gun used, and that he was with Breon Williams. (R. Vol. XV at 1026-28.) Edward Haney first provided this information to a detective shortly after his arrest in April 2008. (R. Vol. XV at 1029-30.) In December 2010, Edward Haney gave a deposition in which he reiterated this story. (EH Vol. 2 at 149, 158, 161.)

At the evidentiary hearing, Edward Haney recanted all three prior statements, stating that Defendant never admitted to, or provided him any details about, the triple homicide. (EH Vol. 2 at 148-53.) Edward Haney stated his fabricated trial testimony was "emotionally driven" and the result of a "falling-out" between himself and Defendant shortly before Edward Haney was arrested. (EH Vol. 2 at 160.) Edward Haney claimed he learned about the details of this triple homicide from rumors circulating around the neighborhood. (EH Vol. 2 at 156-57.) Edward Haney recognized and admitted his perjury. (EH Vol. 2 at 162.)

This Court expressly finds that Edward Haney's recantation testimony is neither credible nor likely to produce an acquittal on retrial. This Court begins its analysis by

noting that “recanting testimony is exceedingly unreliable.” Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994). This is especially true where, as occurred here, the recantation involves a confession of perjury. Id.

Furthermore, there is substantial evidence establishing the falsity of Edward Haney’s recantation. First, at the evidentiary hearing, Mr. Kuritz testified Defendant told him that he did, in fact, give Edward Haney a detailed confession regarding this triple homicide:

The State: In your conversations with the defendant did he admit to you that he shared the information that was contained in the police reports with Mr. Haney?

Mr. Kuritz: Yes.

The State: Meaning—and to be clear Mr. Haney was arrested for the charges that he went to prison to before Mr. Smith was arrested?

Mr. Kuritz: Correct.

The State: And at the time that Mr. Haney was arrested he was brought in, interviewed by Detective Nelson and Mr. Haney provided an account of what your client had told him?

Mr. Kuritz: That’s right.

The State: And when you asked Mr. Smith about whether or not that was true, Mr. Haney being truthful about what he said to Detective Nelson when he was arrested—

Mr. Kuritz: Right.

The State: —your client told you [Edward Haney is] being truthful, I told [Edward Haney] all those things?

Mr. Kuritz: Correct.

(EH Vol. 1 at 205, 243-44.)

Second, Edward Haney knew details about the crime that he would not have known unless Defendant told him those details. For instance, Edward Haney testified that: (1) Defendant rode to the scene of the homicides on a scooter with Breon Williams; (2) Defendant used a 10mm firearm to shoot the victims; (3) Breon Williams ran off once Defendant began shooting; and (4) Defendant left the scene on foot.²⁰ It is unlikely that Edward Haney would have known these unpublicized details of the crime from rumors circulating around the neighborhood. The only plausible way for Edward Haney to have known these things was to have heard them from Defendant himself.

Third, at trial, Edward Haney testified Defendant told him to lie and implicate Raylan Johnson while the two were housed in the Duval County Jail prior to Defendant's trial. See Spann v. State, 91 So. 3d 812, 824 (Fla. 2012) (reasoning that a defendant's previous attempts to make a recanting witness alter his trial testimony undermines the veracity of the witness's later recantation).

Finally, Edward Haney's testimony amounts to perjury, which further discredits his recantation. See Armstrong, 642 So. 2d at 735 ("[R]ecanting testimony is exceedingly unreliable. . . . Especially is this true where the recantation involves a confession of perjury.").

²⁰ At the evidentiary hearing, the State questioned Edward Haney regarding other unique details about the crime that he divulged during his April 2008 interrogation and December 2010 deposition. These details include: (1) the temporal order in which Defendant shot the victims; (2) Victim Gibson pushing Victim Keenan towards Defendant, retreating to the back of the house, and returning fire on Defendant through the walls; (3) Victim Robinson being armed with a Glock handgun with an extended magazine; and (4) Defendant and Breon Williams leaving drugs and money behind at the house. (EH Vol. 2 at 156-59.) Edward Haney, however, did not testify to these details at trial. This Court finds these additional details elicited at the evidentiary hearing further undermine the credibility of Edward Haney's recantation.

Based on the reasons listed above, Edward Haney's recantation is unreliable, devoid of credibility, and demonstrably false.

Furthermore, even assuming *arguendo* this Court were satisfied that Edward Haney's recantation testimony were true, there is no reasonable probability it would produce an acquittal. As an initial matter, Edward Haney's original trial testimony is corroborated by the trial testimony of Breon Williams, Ulysses Johnson and Jonathan Peterson. Specifically, Breon Williams testified he saw Defendant shoot Victim Robinson in the kitchen, but did not see Defendant shoot Victim Gibson or Victim Keenan because he had already run out of the house. (R. Vol. XIII at 638-42.). Ulysses Johnson testified that Defendant admitted to shooting three people. (R. Vol. XIV at 854-56.) Jonathan Peterson testified that Defendant admitted to (i) shooting Victim Robinson in the kitchen and two other people in the house, one of whom was returning fire; (ii) leaving drugs in the home; and (iii) touching the door. (R. Vol. XIV at 895-98, 901-03.)

Additionally, the State would also be able to admit Edward Haney's trial testimony as a prior inconsistent statement to impeach his recantation testimony. Edward Haney's recantation does not tend to establish Defendant's innocence; it merely contradicts Edward Haney's prior testimony that tends to establish Defendant's guilt. Even excluding Edward Haney's testimony, there was overwhelming evidence of Defendant's guilt adduced at trial.

Finally, Edward Haney would likely have little to no credibility before a jury, as he is a five-time convicted felon who may well be convicted of perjury in a capital proceeding as well.

Edward Haney's recantation testimony is neither credible nor likely to produce an acquittal at retrial. Accordingly, this claim is denied.

CLAIM NINE

Defendant claims the State violated his constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. U.S., 405 U.S. 150 (1972), for failing to disclose the State agreeing to reduce Edward Haney's sentence in exchange for testifying against Defendant.

At the evidentiary hearing and in written closing arguments, Defendant abandoned his Brady and Giglio claims. Accordingly, this claim is denied.

CLAIM TEN & ELEVEN²¹

Defendant argues his death sentences are unconstitutional under the Sixth and Eighth Amendments in light of Hurst v. Florida and Hurst.

Following the imposition of the death penalty against Defendant, the United States Supreme Court issued its decision in Hurst v. Florida, holding "that Florida's capital sentencing scheme [is] unconstitutional to the extent that it fail[s] to require the jury, rather than the judge, to find the facts necessary to impose the death sentence." Hurst, 202 So. 3d at 43-44. The Supreme Court of Florida considered whether Hurst v. Florida and Hurst should apply retroactively in Mosley v. State, 209 So. 3d 1248 (Fla. 2016). In Mosley, the court employed the Witt²² retroactivity framework as well as the fundamental fairness retroactivity analysis set forth in James v. State, 615 So. 2d 688

²¹ In Defendant's original Rule 3.851 postconviction motion, filed on November 20, 2015, Claim 10 was based on Ring v. Arizona, 536 U.S. 584 (2002). In Defendant's first amended Rule 3.851 postconviction motion, filed on January 25, 2017, Defendant replaced his previous Ring-based claim with Claims 10 and 11 based on Hurst v. Florida and Hurst under the Sixth and Eighth Amendments, respectively.

²² Witt v. State, 387 So. 2d 922 (Fla. 1980).

(Fla. 1993). Id. at 1274-83. The court held that, “because [the defendant] raised a Ring claim at his first opportunity and was then rejected at every turn, . . . fundamental fairness requires the retroactive application of Hurst, which defined the effect of Hurst v. Florida, to [the defendant].” Id. at 1275. The court also found the Witt framework supported the retroactive application of Hurst v. Florida and Hurst to post-Ring cases. See id. at 1283.

In Hurst v. Florida, the Court left it to the Supreme Court of Florida to determine whether a defendant’s sentencing error was harmless. Hurst, 136 S. Ct. at 624. The test for harmless error focuses on the effect of the error on the trier of fact. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id.

In Mosley, the court explained it could not conclude the Hurst error was harmless beyond a reasonable doubt because there were no written findings “to discern what mitigation the four jurors who recommended against death relied on [and] what aggravating factors, if any, were found unanimously to be sufficient to impose a sentence of death” Mosley, 209 So. 3d at 1284; see also Duroousseau v. State, 218 So. 3d 405, 414 (Fla. 2017) (reasoning without unanimous recommendation for death, jury did not make requisite factual findings beyond reasonable doubt); cf. Kaczmar v. State, 228 So. 3d 1, 8-9 (Fla. 2017) (denying new penalty phase when jury recommendation was unanimous); Davis v. State, 207 So. 3d 142, 174 (Fla. 2016)

(concluding unanimous recommendation of death establishes jury found beyond reasonable doubt there were “sufficient aggravators to outweigh the mitigating factors”).

At the August 22, 2017 case management conference, the State conceded Defendant was entitled to a new penalty phase pursuant to Hurst and its progeny.

Upon a review of the above case law in conjunction with Defendant’s Rule 3.851 Motion and the State’s concession on this issue, this Court finds Hurst v. Florida and Hurst apply to Defendant’s case. Since Defendant’s death sentences stem from eight-to-four and ten-to-two votes, and as conceded by the State of Florida, this Court finds the error was not harmless. Accordingly, in light of Hurst, Defendant’s Rule 3.851 Motion is granted in limited part as to Grounds 10 and 11, and Defendant is entitled a new penalty phase.

CLAIM TWELVE

Defendant claims the cumulative effect of counsel’s ineffectiveness prejudiced Defendant and deprived him of a fair trial, requiring his convictions and sentences of death to be overturned.

This Court finds it appropriate to consider Defendant’s cumulative error claim after reviewing and disposing of all other claims. After reviewing all claims, this Court will be able to consider the cumulative prejudice Defendant may have experienced by virtue of counsel’s purported errors. See pp. 78-79, *infra*.

CLAIM THIRTEEN

Defendant argues Florida’s three-drug lethal injection protocol using Midazolam violates his Eighth Amendment right against cruel and unusual punishments.

At the case management conference, and in closing arguments, Defendant abandoned this claim as being premature. Accordingly, it is denied without prejudice.

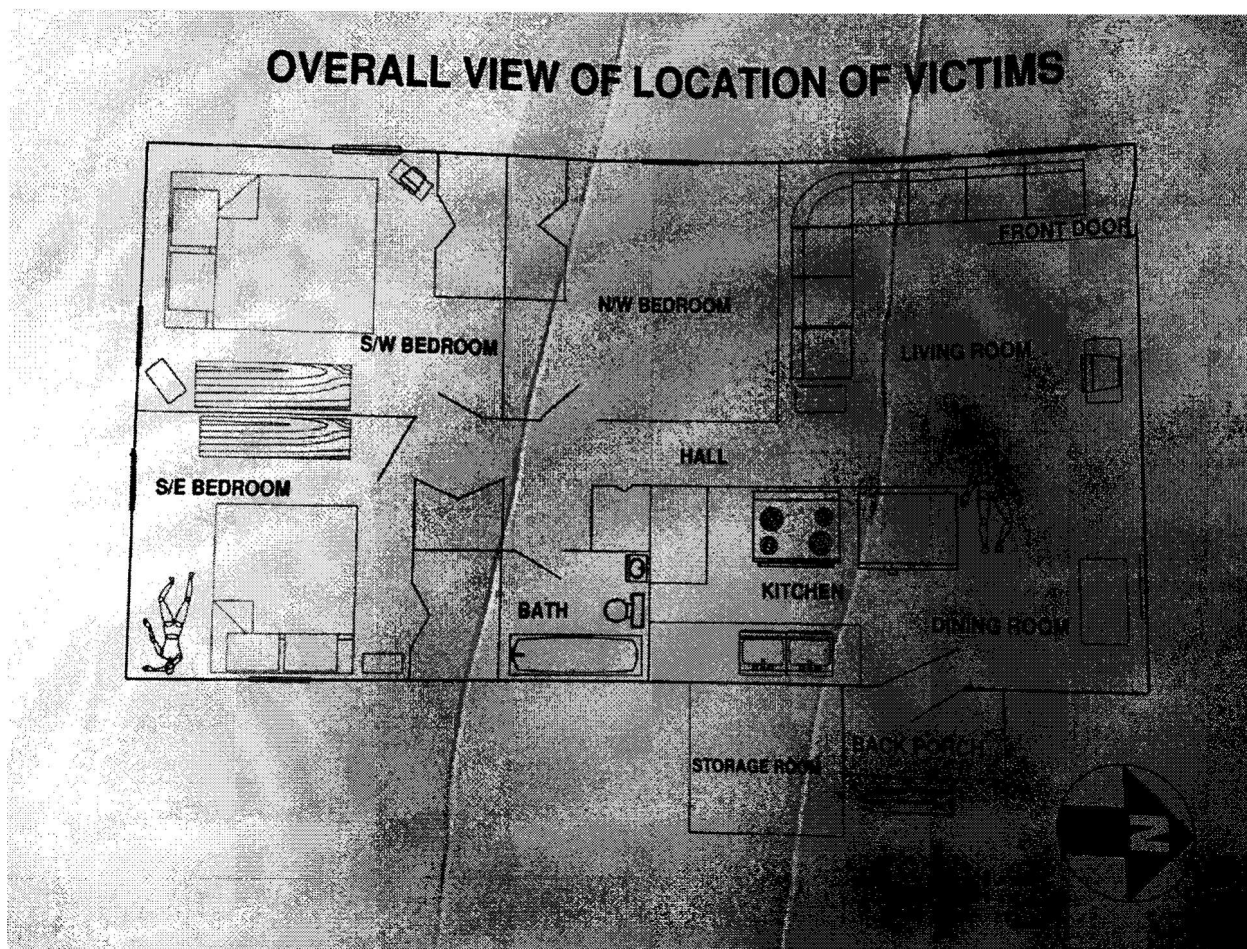
CLAIM FOURTEEN

Defendant contends counsel was ineffective for failing to investigate and prepare an adequate defense to challenge the State's case-in-chief. Specifically, Defendant contends counsel was ineffective for failing to retain an expert witness to: (A) investigate ballistic evidence that contradicted the State's theory and testify that Victim Gibson—not Defendant—shot Victim Keenan; (B) contradict Dr. Giles' testimony that the bullet wounds of Victims Robinson, Gibson, and Keenan were similar and consistent with being caused by a medium-to-large caliber handgun, not the high-velocity rifle used by Victim Gibson; (C) investigate the "bloody" handprint left on the east exterior wall of the home; (D) investigate the blood on the back porch and steps; (E) investigate the live ammunition on the back porch and gun cases in the back yard; and (F) investigate the shoe impression on the air conditioning unit outside the east wall.

(A) – Ballistic Evidence

Defendant claims trial counsel was ineffective for failing to retain a crime scene reconstruction, blood spatter, and ballistics expert, like Christopher Robinson ("Mr. Robinson"), who would testify that Victim Gibson—not Defendant—shot Victim Keenan.

At trial, the State called Officer Geraldine Hamilton, Detective Lisa Kicklighter, and Detective David Warniment to testify about the state of the crime scene after the triple homicide. A scanned image of State's (trial) Exhibit 1, a large poster-sized diagram of the Ahmad Drive residence where this triple shooting took place, is attached below for ease in understanding the testimony presented during trial and the evidentiary hearing regarding certain of the physical evidence and related, pertinent locations in and around the residence.



Detective Kicklighter testified Victim Robinson was found dead facedown between the kitchen and living room area. (R. Vol. IV at 777, 780.) Detective Kicklighter testified Victim Keenan was found dead near the southeast corner of the southeast bedroom. (R. Vol. IV at 777, 780.) Officer Hamilton testified Victim Gibson was found alive kneeling against the bed in the southeast bedroom with the semi-automatic 7.62x39mm caliber rifle (the "7.62 Caliber Rifle") still in his hands.²³ (R. Vol. III at 589-90.)

Detective Kicklighter testified the 9mm handgun in the hands of Victim Robinson was fully loaded and that no 9mm casings were found at the crime scene. (R. Vol. IV at

²³ Victim Gibson died after being transported to the hospital from the crime scene.

786-87.) Detective Kicklighter also testified eleven 10mm casings were found throughout the kitchen and living room and that thirteen 7.62x39mm casings were found along the hallway and inside the southeast bedroom. (R. Vol. IV at 791-97.) Those were the only two calibers of weapons fired inside the house. (R. Vol. IV at 797.) Detective Warniment testified all thirteen 7.62x39mm casings were fired from the same firearm. (R. Vol. XIX at 975.) He also testified all eleven 10mm casings were fired from the same firearm and that the imprints on the firing pin aperture of the casings were characteristic of casings ejected from a Glock semiautomatic, the type of gun Defendant was seen possessing immediately after the triple homicide. (R. Vol. XIX at 975-77.)

At the evidentiary hearing, Defendant called Mr. Robinson as an expert witness in crime scene reconstruction, blood spatter analysis, and ballistics. Based on the location of the bullet holes, blood spatter, and victims' bodies, Mr. Robinson opined Victim Gibson—not Defendant—shot Victim Keenan.

Specifically, Mr. Robinson suggested that Defendant shot Victim Gibson while Victim Gibson was returning fire down the hallway from the southeast bedroom. According to Mr. Robinson's theory, the force from the bullet's impact caused Victim Gibson to rotate in a clockwise direction (leaving the firearm pointed in an eastern direction) while Victim Gibson continued to pull the trigger. Assuming Victim Keenan was on the bed facing Victim Gibson while crouched on her hands and knees, Mr. Robinson reasoned the bullets fired by Victim Gibson could have travelled into Victim Keenan's left breast, out of Victim Keenan's left lateral chest wall, and through the east window of the southeast bedroom just above the bed's headboard. (EH Vol. 2 at 117-23.) At its core, Mr. Robinson's testimony is theoretical, speculative, and strains any reasonable interpretation of the evidence.

This Court concludes Mr. Kuritz was not ineffective for failing to retain a crime scene reconstruction and ballistics expert. At the evidentiary hearing, Mr. Kuritz explained his reasoning for not retaining a crime scene reconstruction or ballistics expert for trial. First, Mr. Kuritz explained that he did not choose to retain a crime scene or ballistics expert because the State's theory aligned with Defendant's confession and his own analysis of the evidence. (EH Vol. 1 at 129-30, 210-14, 244-46.) Second, Mr. Kuritz testified that he did not want to suborn perjury by putting on an expert whose testimony he knew to be false based on Defendant's confession. (EH Vol. 1 at 130.) Therefore, based on Mr. Kuritz testimony, it is clear the decision to not call a crime scene or ballistics expert was a sound strategic decision as contemplated by Strickland. See Stein, 995 So. 2d at 335 (holding sound strategic decisions do not constitute ineffective assistance of counsel (quoting Occhicone, 768 So. 2d at 1048)). Accordingly, trial counsel was not deficient.

However, even if a court were to assume *arguendo* counsel was deficient for not retaining a crime scene reconstruction expert for trial, Defendant was not prejudiced by that decision because there is no reasonable likelihood a jury would have acquitted Defendant based on Mr. Robinson's testimony. First, and importantly, when asked if the State's theory of the case was consistent with the crime scene evidence and Defendant's admission to Mr. Kuritz, Mr. Robinson responded, "[a]bsolutely." (EH Vol. 2 at 145.) Because Mr. Robinson's testimony confirms the reasonableness of the State's theory that Defendant shot all three victims, this Court concludes there is no reasonable likelihood the outcome of the trial would have been different, so as to undermine this Court's confidence in the outcome.

Second, Mr. Robinson's theory is at odds with the ballistic evidence. Simply stated, Mr. Robinson's testimony and opinions present a strained view of the evidence in this case.

The police report written by Detective M.A. Paul states:

A rear bedroom window located at the south end of the home was broken out from gunshots possibly fired from inside to the outside based on the bullet holes found in the extended storage room[s] outside walls. A long strike mark in the dirt could also been seen just northeast of the storage room, possibly caused by the shots fired from the rear bedroom window.

(Deft.'s EH Ex. 1 at p. 5 of 14 for Supplement No. 6.) In fact, it is readily apparent from photographs pp-rr in Defendant's Evidentiary Hearing Exhibit 34 that the trajectories of the bullet holes through the attached, wooden storage room match up with shots fired in a north-to-northeast direction from the eastern window of the southeast bedroom. This bullet trajectory is consistent with Victim Gibson shooting toward Defendant as he fled out the backdoor. This obvious explanation effectively eliminates the possibility that the bullet holes in the eastern window were caused by Victim Gibson's accidental, "friendly fire" at Victim Keenan while she was positioned on the bed.

Indeed, Mr. Robinson recognized these two bullet paths through the attached, wooden storage room, but ignored these bullet holes when concluding that Victim Gibson—not Defendant—shot Victim Keenan. (EH Vol. 2 at 105-07.) Mr. Robinson's failure to consider the highly likely possibility that the bullet holes in the attached, wooden storage room were fired from the eastern window of the southeast bedroom undermines his opinion as to how the shootout transpired.

Given Mr. Robinson's conclusion that the State's theory of the case was "[a]bsolutely" consistent with the evidence, together with the fact that his opinions

strain any reasonable evaluation of the evidence in this case, there is no reasonable probability a jury would have acquitted Defendant. Accordingly, this claim is denied.

(B) – Autopsy Findings Regarding Gun Shot Wounds

Defendant argues counsel was ineffective for failing to hire an expert forensic pathologist to challenge Dr. Giles's opinions and testify that the three victims' gunshot wounds could have been inflicted by the 7.62mm Caliber Rifle.

As to the gunshot wounds of Victim Robinson, Dr. Giles testified as follows:

The State: After examining all of the wounds, um, were you able to determine what caliber weapon is consistent with the injuries that you observed?

Dr. Giles: I really can't tell caliber except in general definitions of forensics in the sense that this is a medium to large caliber bullet.

The State: And are all the penetrating wounds consistent with being caused by the same type of weapon?

Dr. Giles: They certainly can be.

The State: Are you able to determine what type of weapon these injuries are consistent with?

Dr. Giles: Again, in some general terms. It's not a shotgun. Um, it's not a small caliber bullet. It's not a small caliber, high velocity assault weapon. This is more in the range of a medium to large caliber handgun.

(R. Vol. XIV at 833-34.) Turning to Victim Keenan, Dr. Giles stated:

The State: And after reviewing that photograph, are you able to determine if this is consistent with the caliber of weapon that was used on [Victim] Robinson on his penetrating wounds.

Dr. Giles: Well, in the same general forensic, medium to large caliber. That's the best I can do.

The State: And would this be consistent from being caused from a high velocity rifle or an AK-47 or something like that?

Dr. Giles: You don't go on just the outside, it's the insides. The high velocity rifle cause [sic] an immense amount of damage on the inside, a big cavity, lots of destruction. She doesn't have that pattern. So I would answer, no, this is not a high velocity rifle, *but not based on just the skin.*

(R. Vol. XIV at 838) (emphasis added). When asked whether Victim Gibson's gunshot wound was consistent with being caused by the same caliber of weapon used on Victims Robinson and Keenan, Dr. Giles stated, "[t]he same answer as before, using the totality of the autopsy and the appearance, yes." (R. Vol. XIV at 841.)

In sum, Dr. Giles testified that (1) each of the victim's wounds was consistent with being caused by a medium-to-large caliber handgun, and (2) each of the victim's wounds was similar enough to one another that one could reasonably conclude that they were caused by the same firearm. Trial counsel did not cross Dr. Giles. (R. Vol. XIV at 842.)

At the evidentiary hearing, defense counsel called Dr. Kathryn Pinneri ("Dr. Pinneri") as an expert forensic pathologist to discuss the nature of the victims' gunshot wounds. Dr. Pinneri was asked whether one can distinguish between a wound caused by a 10mm handgun and an AK-47 (like the 7.62 Caliber Rifle) firing a full metal jacketed bullet. Dr. Pinneri stated that "[j]ust based on the autopsy and *skin findings*, no, in my opinion it's not."²⁴ (EH Vol. 2 at 52) (emphasis added.) She further testified that one would need to look at the autopsy findings "in conjunction with the scene investigation,

²⁴ In Defendant's written closing argument, he states Dr. Pinneri "disagreed with the testimony of Dr. Giles that all [the] gunshot wounds to the victims were caused by a medium to large caliber handgun." (Def.'s Closing Argument at 47, 48.) Defendant's assertion in this regard is inaccurate. Dr. Pinneri only disagreed with the contention that the gunshot wounds could be attributed to a 10mm handgun. (EH Vol. 2 at 50, 55-56.) This contention was the result of multiple misstatements by defense counsel at the evidentiary hearing. (EH Vol. 2 at 50, 55-56.) Dr. Giles actually testified the wounds were consistent with a medium-to-large caliber handgun, not a 10mm handgun. (R. Vol. 833-34, 838, 841.) As the State pointed out on cross-examination, Dr. Pinneri agreed the victims' gunshot wounds were consistent with being caused by a medium-to-large caliber handgun, which is exactly what Dr. Giles stated at trial. (EH Vol. 2 at 66.)

what type of weapons, [etc.]" to make a determination as to the type of gun that caused the victims' gunshot wounds. (EH Vol. 2 at 53.)

Dr. Pinneri disagreed with Dr. Giles's testimony that ruled out the 7.62 Caliber Rifle as the murder weapon. (EH Vol. 2 at 64-65.) Dr. Pinneri, however, admitted the wounds were consistent with being inflicted by a 10mm handgun, echoing Dr. Giles's trial testimony insofar as Dr. Giles said the wounds were consistent with a medium-to-large caliber handgun, which includes a 10mm handgun. (EH Vol. 2 at 75.)

As to Victim Robinson, Dr. Pinneri was asked if "there [was] any evidence from the autopsy report on [Victim] Robinson that would cause you to believe that he could not have been shot by an AK-47 with a full metal jacket," to which she replied, "[j]ust based on the *skin wounds*, no, I don't know that I could exclude that completely." (EH at Vol. 2 at 53) (emphasis added.)

As to Victim Gibson, Dr. Pinneri testified that, based on the autopsy findings alone, she did not believe anyone could conclusively determine that Victim Gibson was shot by a 10mm handgun. Importantly, however, on cross-examination Dr. Pinneri stated that Victim Gibson did not suffer a self-inflicted gunshot wound. Therefore, it necessarily follows that Victim Gibson was shot with the only other gun fired during the shootout—Defendant's 10mm handgun. (EH Vol. 2 at 66-68, 70.)

As to Victim Keenan, although Dr. Pinneri stated Victim Keenan's gunshot wound was consistent with being caused by a full metal jacketed bullet fired from the 7.62 Caliber Rifle, she also stated Victim Keenan's wound was consistent with being caused by a 10mm handgun. (EH Vol. 2 at 63, 68.)

Trial counsel was not ineffective for failing to call an expert forensic pathologist because the decision not to call an independent forensic pathology expert was a sound

strategic decision as contemplated by Strickland. More specifically, James Hernandez (“Mr. Hernandez”), co-counsel for defendant during trial, stated he did not call an expert forensic pathologist as a witness because he “would have been inviting two examiners to testify.” (EH Vol. 3 at 73-74.) In other words, Mr. Hernandez thought it would not be in Defendant’s best interest to call an expert forensic pathologist because he or she may have confirmed the State’s theory. (EH Vol. 3 at 76.)

In fact, at the evidentiary hearing, Dr. Pinneri confirmed the victims’ gunshot wounds were consistent with being caused by a medium-to-large caliber handgun, like Defendant’s 10mm handgun. (EH Vol. 2 at 66.) Dr. Pinneri further stated that she would need to look at all of the other evidence adduced at trial, like crime scene detective and eye-witness testimony, before rendering any definitive opinion on the type of gun used to shoot each of the victims. (EH Vol. 2 at 66-67.)

This is precisely the type of testimony Mr. Hernandez wanted to avoid because it confirmed the State’s theory of the triple homicide. Therefore, because counsel’s decision not to call an independent expert forensic pathologist at trial constitutes sound trial strategy, this Court concludes trial counsel was not ineffective. See Stein, 995 So. 2d at 335 (holding sound strategic decisions do not constitute ineffective assistance of counsel (quoting Occhicone, 768 So. 2d at 1048)).

Furthermore, Defendant was not prejudiced by trial counsel’s failure to call an expert forensic pathologist at trial. Dr. Pinneri testified she would need to review other detective and eye-witness testimony to give a definitive opinion as to the type of gun that shot each of the victims. As stated in sub-claim 14(A) *supra*, all the evidence before this Court suggests the jury would have found the State’s theory as to how the shootout transpired far more believable than the strained, unfounded hypotheses set forth by Mr.

Robinson. Therefore, even if Dr. Pinneri's testimony had been introduced at trial, there is still no reasonable likelihood the jury would have acquitted Defendant because Mr. Robinson's theory as to how Victim Gibson shot Victim Keenan is inconsistent with the evidence, and because Mr. Robinson confirmed the reasonableness of the State's theory.

Moreover, if admitted at trial, Dr. Pinneri's testimony would be undercut by the fact that both Victim Robinson and Victim Gibson's gunshot wounds—which Dr. Pinneri described as consistent with being caused by a full metal jacketed bullet fired from the 7.62 Caliber Rifle—were unquestionably caused by Defendant's 10mm handgun.²⁵ This may have led the jury to disbelieve Dr. Pinneri's testimony regarding the possibility that Victim Keenan's wound was caused by a full metal jacketed bullet fired from the 7.62 Caliber Rifle, because that same opinion regarding Victim Robinson and Victim Gibson was proven to be untrue.

Accordingly, because counsel was not ineffective and because Defendant was not prejudiced, this claim is denied.

(C) – “Bloody” Handprint on East Exterior Wall

Defendant avers counsel was ineffective for failing to investigate and introduce into evidence the “bloody” handprint on the exterior wall near the back, southeast bedroom. Defendant further contends the handprint's ridge detail did not match Defendant's and, if introduced, would have created a reasonable probability of acquittal.

There is nothing before this Court to establish the “bloody” handprint's relevance. First, the handprint was tested by evidence technicians at the scene and determined **not** to be blood; it was merely a reddish, possibly rusty, handprint on the exterior of the

²⁵ There is no suggestion by Defendant that Victim Gibson shot Victim Robinson. Further, even Dr. Pinneri ruled out the possibility that Victim Gibson died of a self-inflicted gunshot wound. (EH Vol. 2 at 66-68, 70)

house. (EH Vol. 1 at 209-10; Deft.'s EH Ex. 1 at p. 5 of 14 for Supplement No. 6.) Since the print was not bloody, there is nothing about the handprint that links it to the shooting in this case.

There is no way to determine when the handprint was left on the exterior wall. There is no evidence suggesting the involvement of some unknown third-party who was located outside the east wall of the house during the shooting. (EH Vol. 2 at 28-30.) Thus, there simply is no evidence supporting the theory that the handprint was left during, or by someone involved in, the shootout.

The evidentiary hearing reveals that the handprint evidence was considered by Mr. Kuritz, who testified that he did not consider the handprint relevant or probative given the fact that Victim Robinson and Victim Gibson sold drugs from inside the home and had many purchasers frequenting the property. (EH Vol. 1 at 140, 209-10)

Ultimately, this Court finds the handprint irrelevant. Therefore, given the handprint's irrelevance, counsel cannot be deemed ineffective for failing to introduce it into evidence, and Defendant was not prejudiced because introducing it at trial would not have changed the outcome of the proceeding. Accordingly, this claim is denied.

(D) – Blood on Back Porch and Steps

Defendant contends counsel was ineffective for failing to investigate and introduce at trial the droplets of blood on the back porch, stairs, and ground.

Based on one of the police reports, “[b]lood evidence could be seen on the rear deck, steps leading to the porch and on the porch. A leaf lying just south of the wood deck also contained a small amount of blood.” (Deft.'s EH Ex. 1 at p. 5 of 14 for Supplement No. 6.) At the evidentiary hearing, neither Mr. Kuritz nor Mr. Hernandez could recall the blood droplets found on the rear porch and stairs of the house. (EH Vol.

2 at 126-27, EH Vol. 3 at 29-30.) Evidence of the blood droplets on and around the rear porch was not introduced at trial.

Defendant was not prejudiced by the blood droplets on the rear porch and steps not being introduced at trial because the evidence was irrelevant. Defendant has not set forth any theory as to how this evidence could exculpate Defendant, except to speculate that there may have been other shooters outside the home. “Postconviction relief cannot be based on speculative assertions.” Rodriguez v. State, 919 So. 2d 1252, 1269 (Fla. 2005) (quoting Jones v. State, 845 So. 2d 55, 64 (Fla. 2003)). In fact, the evidence contradicts Defendant’s theory. There were no discharged casings found near the rear porch or anywhere else outside the home, and the undisputed ballistic evidence shows that only two guns were fired during the triple homicide. (R. Vol. IV at 791-97, R. Vol. XIX at 975-97; EH Vol. 2 at 134-35.)

It is more plausible that Victim Gibson left blood droplets on the back porch, stairs, and ground near the northeast corner of the house while being carried out of the house by emergency medical responders. (R. Vol. XII at 591, R. Vol. XIIV at 775.) This far more likely theory explaining the blood droplets does not tend to establish Defendant’s innocence. This Court finds the introduction into evidence of the blood on and around the rear porch would not have created a reasonable likelihood of changing the outcome of the trial. Accordingly, this claim is denied.

(E) – Live Ammunition in Storage Shed and Gun Case in Back Yard

Defendant claims counsel was ineffective for failing to investigate and introduce into evidence the live 9mm and 7.62x39mm ammunition found on the back porch, and in the adjacent storage room, as well as the rifle carrying case in the backyard.

Live 9mm and 7.62x39mm ammunition was found on the back porch and in the adjacent storage room. (EH Vol. 1 at 127-28; EH Vol. 2 at 93-94, 105; EH Vol. 3 at 63-67.) A rifle carrying case was also found in the backyard following the shootout. (EH Vol. 2 at 105; EH Vol. 3 at 65.) Victim Robinson was found dead in the kitchen with a 9mm Glock handgun in his right hand, and Victim Gibson was found leaning against the bed in the southeast bedroom with the 7.62 Caliber Rifle in his hands.

The live ammunition on the back porch and in the attached storage room is irrelevant. First and foremost, the ammunition was live and had not been fired in the shootout. Second, there is no evidence or suggestion that either Victim Robinson or Victim Gibson were on the back porch or in the attached storage room during the shootout, meaning the live ammunition had been put there beforehand. Third, the 9mm and 7.62x39mm ammunition corresponds to the two types of guns that Victims Robinson and Gibson were holding, suggesting the ammunition belonged to them. Finally, this Court notes Defendant has not set forth any theory as to the ammunition's relevance, leaving this Court to speculate as to its possible relevance. "Postconviction relief cannot be based on speculative assertions." Rodriguez v. State, 919 So. 2d 1252, 1269 (Fla. 2005) (quoting Jones v. State, 845 So. 2d 55, 64 (Fla. 2003)).

Likewise, the gun case in the back yard is also irrelevant. This Court fails to conceive of a scenario where the gun case could be relevant, nor has Defendant set forth any theory of relevance. This Court cannot and will not speculate as to the gun case's possible relevance because "[p]ostconviction relief cannot be based on speculative assertions." Rodriguez, 919 So. 2d at 1269 (quoting Jones, 845 So. 2d at 64). In fact, Defendant's crime scene reconstruction expert testified at the evidentiary hearing that the gun case may have very well belonged to Victim Robinson and Victim Gibson. (EH

Vol. 2 at 134-35.) Therefore, given the live ammunition and gun case's lack of relevance, counsel cannot be deemed deficient for not introducing these items into evidence, and Defendant was not prejudiced. Accordingly, this claim is denied.

(F) – Shoe Impression on Air Conditioning Unit

Defendant claims counsel was ineffective for failing to introduce evidence of the shoeprint left on the air conditioning unit outside the house.

At the evidentiary hearing, Mr. Robinson testified detectives found a shoeprint on the top of the air conditioning unit, but that they did not attempt to compare it to the footwear of the victims, Breon Williams, or Defendant. (EH Vol. 2 at 102-03.) Mr. Kuritz was asked whether he could have presented the footprint as evidence that Kirk Brewer, Breon Williams, or someone else at the house could have been the shooter, to which Mr. Kuritz responded, “no, I don’t think that’s something I could argue in good faith.” (EH Vol. 1 at 136-37.)

The shoeprint on the air conditioning unit is irrelevant. There is not one scintilla of credible evidence that another, unknown individual was present at or around the house or otherwise involved in the shootout. There is also no basis in evidence to conclude that the shoeprint is related to this triple homicide. Defendant has failed to set forth any theory as to the shoeprint’s relevance. This Court cannot and will not speculate as to the shoeprint’s possible relevance because “[p]ostconviction relief cannot be based on speculative assertions.” Rodriguez, 919 So. 2d at 1269 (quoting Jones, 845 So. 2d at 64). Therefore, given the shoeprint’s lack of relevance, counsel cannot be deemed ineffective for not introducing it and Defendant was not prejudiced. Accordingly, this claim is denied.

CLAIM FIFTEEN

Defendant avers counsel was ineffective for disregarding Defendant's version of events and, instead, presenting a false defense. Specifically, Defendant claims counsel should have presented evidence that the victims were shot by an unknown, light-brown-skinned male who was arguing with Victim Robinson when Defendant and Breon Williams arrived at the house.

This claim is contrary to the evidence presented at trial and the evidentiary hearing. At the evidentiary hearing, Defendant testified he told Mr. Kuritz "a light-brown-skinned man with three-to-four inch dreadlocks" shot the victims. (EH Vol. 3 at 101-10.) He testified Mr. Kuritz rejected this defense because it contradicted Defendant's prior denials of having ever been at the home where the shooting occurred and, instead, chose to present a defense that implicated Raylan Johnson and others. (EH Vol. 3 at 110-112.)

Mr. Kuritz denied Defendant told him the light-brown-skinned man committed the murders. (EH Vol. 1 at 117.) In fact, Mr. Kuritz testified Defendant confessed to committing the murders. (EH Vol. 1 at 129-30, 201-03.) Mr. Kuritz also testified Defendant admitted to confessing to Raylan Johnson, Ulysses Johnson, Jonathan Peterson, and Edward Haney. (EH Vol. 1 at 205, 220-21, 243-44.)

This Court finds Defendant's testimony is not credible. Defendant is a five-time convicted felon who has the strongest of motivations to commit perjury in this case—avoiding the death penalty. (EH Vol 3 at 126.)

Moreover, the testimony lacks credibility on its face and is contradicted by all of the other evidence presented at trial and the evidentiary hearing. Jonathan Peterson, who rode along to pick Defendant up immediately after the triple homicide, testified

about the type of gun used, the order and manner in which the three victims were shot, and that Defendant said he left a handprint on the interior Plexiglas on the back door. (R. Vol. XIV at 895-98, 902-03.) Ulysses Johnson, who drove to pick up Defendant after the triple homicide, testified about the order and manner in which the victims were shot. (R. Vol. XIV at 854-56.) Edward Haney, who was staying with Defendant while he was attempting to avoid the detection of local law enforcement for an unrelated shooting, testified about details of the triple homicide that were unknown to the general public. (R. Vol. XV at 1025-28.) Under Defendant's new explanation of events, these witnesses would have been unable to provide those details unless they were given to them by the light-brown-skinned man himself, as Defendant testified even he was unaware of this information. (EH Vol. 3 at 117-18.) There simply is no evidentiary basis upon which to believe some unidentified, "light-brown-skinned man" contacted these witnesses separately and provided them with this information, and that these witnesses all lied about acquiring these facts from Defendant.

Further, at trial, this Court inquired as to Defendant's desire to testify in his own defense, but Defendant expressly declined. (R. Vol. XVI at 1310.) To confirm, after explaining to Defendant his right to testify or not to testify in his own defense, this Court again inquired as to Defendant's desire to testify, to which Defendant repeated his desire not to testify. (R. Vol. XVI at 1310-11.) Based on the above-cited colloquy, it is clear Defendant did not desire to testify on his own behalf regarding the existence of the light-brown-skinned man with dreadlocks. Any postconviction allegations which contradict prior sworn statements will not be entertained by this Court. Johnson v. State, 22 So. 3d 840, 844 (Fla. 1st DCA 2009); Iacono v. State, 930 So. 2d 829, 831 (Fla. 4th DCA 2006). Defendant cannot now seek to go behind his sworn testimony at trial

by making contradictory allegations in his postconviction motions. Davis v. State, 938 So. 2d 555, 557 (Fla. 1st DCA 2006). Therefore, the record conclusively refutes Defendant's desire to testify regarding the existence of the light-brown-skinned man with dreadlocks.

In short, this Court finds Mr. Kuritz's testimony more credible than Defendant's. See Reynolds v. State, 934 So. 2d 1128, 1158 (Fla. 2006) ("The trial court is in the best position to assess the credibility of a witness . . ."). This Court concludes Defendant never told Mr. Kuritz about the unidentified, "light-brown-skinned man" being the assailant. Rather, the evidence and Defendant's own sworn statements make clear that Defendant has engaged in an unveiled attempt to fabricate matters in an effort to avoid the death penalty. Accordingly, this claim is denied.

CLAIM SIXTEEN

Defendant claims his convictions and sentences must be vacated due to misconduct of the State mischaracterizing the ballistic evidence and medical examiner testimony during closing arguments. This claim lacks merit.

A defendant is not entitled to:

relief based upon claims that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence. If claims that were raised on appeal or should have or could have been raised on appeal are contained in the motion, the memorandum of law shall contain a brief statement explaining why these claims are being raised on postconviction relief.

Fla. R. Crim. P. 3.851(e)(1). This claim could have and should have been raised on direct appeal. It was not.

Even considering the merits of this claim, "[a]ttorneys are permitted wide latitude in closing arguments. . . ." Merck v. State, 975 So. 2d 1054, 1061 (Fla. 2007)

(citing Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998)). “Closing argument is an opportunity for counsel to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.” Merck, 975 So. 2d at 1061.

This Court finds the State’s closing arguments fall within the wide bounds of proper closing arguments and are all reasonable interpretations of the evidence adduced at trial. In fact, even Mr. Robinson stated the evidence is consistent with the State’s theory as to how the shootout transpired. (EH Vol. 2 at 145.) Accordingly, because the State’s closing argument was consistent with the evidence, and because this claim is not cognizable on postconviction review, this claim is denied.

CLAIM TWELVE²⁶

Defendant claims the cumulative effect of counsel’s ineffectiveness prejudiced Defendant and deprived him of a fair trial, requiring his convictions and sentences of death to be overturned.

“[W]here the individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails. Parker v. State, 904 So. 2d 370, 380 (Fla. 2005) (citing Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999)). This Court has expressly found that neither Mr. Kuritz nor Mr. Hernandez rendered ineffective assistance of counsel under any of the claims asserted by Defendant. “[I]ndividual claims that fail to meet the Strickland standard for ineffective assistance of counsel are also insufficient to establish to establish cumulative error.” Hall v. State, 212 So. 3d 1001, 1031 (Fla. 2017) (citing Israel v. State, 985 So. 2d 510, 520 (Fla. 2008)). Therefore, because all of Defendant’s individual claims of ineffective assistance of

²⁶ This claim was moved to the end of the Order to allow this Court to analyze all of the individual claims before considering the cumulative error claim.

counsel are without merit, so, too, is Defendant's claim of cumulative error. Accordingly, this claim is denied.

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Defendant's Rule 3.851 Motions are **GRANTED IN LIMITED PART** as to Claims Ten and Eleven, entitling Defendant to a new penalty phase under the subsequently decided cases of Hurst v. Florida and Hurst.
2. Defendant's Rule 3.851 Motions are **DENIED** as to all other Claims, affirming Defendant's convictions and sentences on all Counts of the Indictment.
3. Defendant shall have thirty (30) days from the date that this Order is filed to take an appeal, by filing Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Chambers in Jacksonville, Duval County, Florida, this 20th day of September, 2018.


ADRIAN G. SOUD
Circuit Judge

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been served on the above-named
parties by United States Mail or electronic service on
September 21, 2018.


Deputy Clerk

Case No.: 16-2009-CF-04417-XXXX
Division: CR-C
/tbc