ORIGINAL

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

CASE NO: CF01-007078A-XX
SECTION: F9

MARK ANTHONY POOLE,
Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

THIS MATTER is before the Court upon Defendant's "Motion To Vacate Judgment Of Conviction And Sentence," filed on April 8, 2016; the "State's Response To Rule 3.851 Motion For Post-Conviction Relief," filed on June 6, 2016; the Court's Order On Case Management Conference," filed on September 22, 2016; the "Defendant's Motion To Amend Motion To Vacate Judgments of Conviction And Sentence of Death," filed on January 25, 2017; the "Defendant's Amended Claim 3 To Motion To Vacate Judgment of Conviction And Sentence," filed on January 25, 2017; the "State's Response To Amended Rule 3.851 Motion For Post-Conviction Relief," filed on February 20, 2017; the Defendant's "Notice of Supplemental Authority," filed on March 3, 2017; the Defendant's "Refiled Notice of Supplemental Authority," filed on March 6, 2017; the Court's Interim Order On Motion To Vacate Judgment Of Conviction And Sentence," filed on March 31, 2017; an Evidentiary Hearing held on July 10, 2017; the Court's "Order On July 10, 2017 Evidentiary Hearing And Order Regarding Submission Of Written Closing Arguments," filed on July 19, 2017; the "Defendant's Written Closing Argument Following Evidentiary Hearing On Guilt Phase Claims, filed on October 25, 2017; the "State's Written Closing Argument Following Post-Conviction Evidentiary Hearing," filed on November 6, 2017; and the

"Defendant's Response To State's Written Closing Argument Following Post-Conviction Evidentiary Hearing," filed on November 16, 2017. The Court having reviewed the postconviction Motion and Amended Postconviction Motion filed by the Defendant, the State's Responses; having heard the testimony and reviewed the evidence presented at the evidentiary hearing on July 10, 2017; having reviewed the written Closing Arguments from all parties (including the Defendant's Response); having reviewed the case file, and the applicable case and statutory law; and being otherwise fully advised in the premises, finds as follows:

STATEMENT OF PROCEDURAL HISTORY

On November 1, 2001, the Defendant, Mark Poole, (hereinafter referred to as Mr. Poole), was charged by Indictment with Count 1- First Degree Murder for the murder of Noah Scott. He was also charged in the Indictment with Count 2 - Attempted First Degree/ Attempted Felony Murder, Count 3- Armed Burglary, Count 4 - Sexual Battery –Great Force, and Count 5 - Armed Robbery. On April 25, 2005, the jury found Mr. Poole guilty of first degree murder with a weapon, attempted first degree murder with a weapon, armed burglary with intent to commit an assault or battery with a weapon, sexual battery with great force, and armed robbery with a deadly weapon.

On May 4, 2005, the jury recommended by a vote of twelve (12) to zero (0), that the Court sentence Mr. Poole to death. A Spencer hearing was held on July 22, 2005.

The Trial Court agreed with the death recommendation of the jury and sentenced Mr. Poole to death on August 25, 2005, for the murder of Noah Scott. A summary of the Aggravating Circumstances and Mitigators considered by the Trial Court are described in this Order below

under **STATEMENT OF THE CASE FACTS.** On August 25, 2005, the Trial Court also sentenced the Defendant to a term of life imprisonment for the attempted first degree murder of Loretta White, to life imprisonment for armed burglary with intent to commit an assault or battery with a weapon, to life imprisonment for sexual battery with great force, and to life imprisonment for armed robbery with a deadly weapon.

On December 11, 2008, on direct appeal, the Supreme Court of Florida affirmed the convictions but vacated the sentence of death and remanded the case to the Trial Court to conduct a new penalty phase proceeding. See Poole v. State, 997 So.2d 382 (Fla. 2008). A new penalty phase proceeding commenced on June 20, 2011.

On June 28, 2011, a jury recommended by a vote of eleven (11) to one (1) that the Court sentence the Defendant to death for the murder of Noah Scott. A Spencer hearing was held on July 29, 2011. The Trial Court agreed with the death recommendation of the jury and sentenced the Defendant to death on August 19, 2011.

The Trial Court found that the following Aggravating Circumstances were established for the murder of Noah Scott: (1) the Defendant was contemporaneously convicted of another capital felony or a felony involving the use or threat of violence to the person, (great weight) ; (2) the capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or in flight after committing or attempting to commit the crimes of armed burglary, sexual battery with great force, and armed robbery, (great weight); (3) the capital felony was

committed for financial gain, (moderate weight); and (4) the capital felony was especially heinous, atrocious or cruel HAC, (great weight).

The Court found that the following two statutory mitigators were established: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate to great weight); and (2) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired (great weight).

The Court found that the following eleven non-statutory mitigating circumstances were established: (1) the defendant has borderline intelligence, (little weight) ; (2) the defendant dropped out of school, either in the ninth or tenth grade, (very little weight); (3) the defendant lost his best friend, father figure, and employer, which had an emotional effect on the defendant and led to his drug abuse, (very little weight); (4) the defendant sought help for his drug problem in the past, (very little weight); (5) the defendant had an alcohol abuse problem at the time of the crime, (very little weight); (6) the defendant had a drug abuse problem at the time of the crime, (very little weight); (7) the defendant has and can continue a relationship with his son, (very little weight); (8) the defendant has a strong work ethic, (very little weight); (9) the defendant is a religious person, (very little weight); (10) the defendant is a dedicated uncle to his nephews, (very little weight); and (11) the defendant needs specialized treatment for a mental disorder unrelated to substance abuse, (very little weight). The Court also found that a proposed mitigating circumstance, (the defendant has a severe, chronic alcohol and cocaine addiction, for which he is in need of treatment), was not proven. The Trial Court found that the aggravating circumstances

far outweighed the mitigating circumstances for the murder of Noah Scott. The Trial Court also added, "Additionally, the Court is of the opinion that the heinous, atrocious, and cruel aggravator alone outweighs all mitigating circumstances in this case."

On June 26, 2014, on direct appeal, the Supreme Court of Florida affirmed the Trial Court's sentence of death. Rehearing was denied on November 20, 2014. Mr. Poole filed his "Motion To Vacate Judgment Of Conviction And Sentence," on April 8, 2016; and "Defendant's Amended Claim 3 To Motion To Vacate Judgment of Conviction And Sentence," was filed on January 25, 2017. On March 31, 2017, the Court rendered an "Interim Order On Motion To Vacate Judgment Of Conviction And Sentence."

STATEMENT OF THE CASE FACTS

The underlying facts of the case are set forth in Poole v. State, 151 So.3d 402, 406 -408, (Fla. 2014), and are presented below:

> On the evening of October 12, 2001, after playing some video games in the bedroom of their mobile home, Noah Scott and Loretta White went to bed sometime between 11:30 p.m. and 12 a.m. Later during the night, White woke up with a pillow over her face and Poole sitting on top of her. Poole began to rape and sexually assault her as she begged Poole not to hurt her because she was pregnant. As White struggled and resisted, Poole repeatedly struck her with a tire iron. She put her hand up to protect her head, and one of her fingers and part of another finger were severed by the tire iron. While repeatedly striking White, Poole asked her where the money was. During this attack on White, Scott attempted to stop Poole, but was also repeatedly struck with the tire iron. As Scott struggled to defend White, Poole continued to strike Scott in the head until Scott died of

blunt force head trauma. At some point after the attack, Poole left the bedroom and White was able to get off the bed and put on clothes but she passed out before leaving the bedroom. Poole came back in the bedroom and touched her vaginal area and said "thank you." White was in and out of consciousness for the rest of the night. She was next aware of the time around 8 a.m. and 8:30 a.m. when her alarm went off.

When her alarm went off, White retrieved her cell phone and called 911. Shortly thereafter, police officers were dispatched to the home. They found Scott unconscious in the bedroom and White severely injured in the hallway by the bedroom. White suffered a concussion and multiple face and head wounds and was missing part of her fingers. Scott was pronounced dead at the scene. Evidence at the crime scene and in the surrounding area linked Poole to the crimes. Several witnesses told police officers that they saw Poole or a man matching Poole's description near the victims' trailer on the night of the crimes. Stanley Carter stated that when he went to the trailer park around 11:30 that night, he noticed a black male walking towards the victims' trailer. Carter's observations were consistent with that of Dawn Brisendine, who knew Poole and saw him walking towards the victims' trailer around 11:30 p.m. Pamela Johnson, Poole's live-in girlfriend, testified that on that evening, Poole left his house sometime in the evening and did not return until 4:50 a.m.

Poole was also identified as the person selling video game systems owned by Scott and stolen during the crime. Ventura Rico, who lived in the same trailer park as the victims, testified that on that night, while he was home with his cousin's girlfriend, Melissa Nixon, a black male came to his trailer and offered to sell him some video game systems. Rico agreed to buy them for $50, at which point the black male handed him a plastic trash bag. During this exchange, Nixon got a good look at the man and later identified Poole when the police showed her several photographs. Nixon testified that the next morning, when her son was going through the trash bag, he noticed that one of the systems had blood on it.

Pamela Johnson also testified that on the same morning, she found a game controller at the doorstep of Poole's house, she handed it to Poole, and Poole put it in his nightstand. She indicated that she had never seen that game controller before that morning and did not know what it would be used for because neither she nor Poole owned any video game systems. During the search of Poole's residence, the police retrieved *407 this controller. In addition, the police retrieved a blue Tommy Hilfiger polo shirt and a pair of Poole's Van shoes, shoes Poole said he had been wearing on the night of the crimes. A DNA analysis confirmed that the blood found on the Sega Genesis box, Super Nintendo, Sega Dreamcast box and controller matched the DNA profile of Scott. Also, a stain found on the left sleeve of Poole's blue polo shirt matched White's blood type. The testing of a vaginal swab also confirmed that the semen in White was that of Poole. A footwear examination revealed that one of the two footwear impressions found on a notebook in the victims' trailer matched Poole's left Van shoe. The tire iron used in the crimes was found underneath a motor home located near the victims' trailer. A DNA analysis determined that the blood found on this tire iron matched Scott's DNA profile.

Based on this evidence, the jury returned a verdict finding Poole guilty on all charges, including first-degree murder. Following the penalty phase, the jury recommended death by a vote of twelve to zero. The trial court followed the jury's recommendation and sentenced Poole to death. The trial court found two statutory aggravating circumstances: (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, and (2) the murder was especially heinous, atrocious, or cruel. The court also found three statutory mitigators and numerous nonstatutory mitigators. The statutory mitigators were: (1) the crime for which Poole was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance (moderate weight); (2) Poole's capacity to conform his conduct to the requirements of law was substantially

impaired (moderate weight); and (3) Poole had no significant history of prior criminal activity (little weight). The nonstatutory mitigators were: (1) Poole is of borderline intelligence (some weight); (2) Poole received a head injury, which created dementia (little weight); (3) Poole's age at the time of the crime linked with mental deficiency and lack of serious criminal history (moderate weight); (4) Poole dropped out of school due to his low intelligence and learning disabilities (little weight); (5) Poole lost Mr. Bryant, his "best friend, father figure, employer," and that had an emotional effect on Poole and led to his drug use (some weight); (6) Poole sought help for his drug problem in the past (little weight); (7) Poole had an alcohol abuse problem at the time of the crime (little weight); (8) Poole had a drug abuse problem at the time of the crime (little weight); (9) Poole does not have antisocial personality disorder nor is he psychopathic (some weight); (10) Poole has and can continue a relationship with his son (minimum weight); (11) Poole has a strong work ethic (little weight); (12) Poole has a close relationship with his family (moderate weight); (13) Poole is a religious person (little weight); and (14) the murder and rape were impulsive excessive acts, not premeditated acts (little weight). The trial court determined that these mitigating factors did not outweigh the aggravating circumstances and, as a result, the trial court sentenced Poole to death on the count of first-degree murder. The trial court also sentenced Poole to consecutive life sentences for the attempted first-degree murder of Loretta White, armed burglary, sexual battery of Loretta White, and armed robbery.

[On direct] appeal, Poole raise[d] four issues: (1) whether the trial court abused its discretion in denying Poole's motion for mistrial when the prosecutor repeatedly commented during closing argument on Poole's failure to testify at trial and on his silence after his arrest; (2) whether the prosecutor violated Poole's right to a fair penalty phase proceeding by cross-examining defense witnesses about the unproven prior arrests, the unproven content of a tattoo, and the lack of remorse; (3) whether the prosecutor violated Poole's

right to a fair penalty phase proceeding by misleading the jurors about their responsibilities in recommending a sentence; and (4) whether Florida's death penalty statute violates the Sixth Amendment right to trial by jury.

Id. at 387–89 (footnote omitted). Based on the cumulative effect of the errors made during the penalty phase of the trial, this Court vacated Poole's death sentence and remanded the case for a new penalty phase. *Id.* at 394.

Resentencing

On remand, following the new penalty phase, the jury recommended death by a vote of eleven to one. Following a *Spencer*[2] hearing, the trial court followed the jury's recommendation and sentenced Poole to death. The trial court found four aggravating circumstances: (1) the contemporaneous conviction for the attempted murder of Loretta White (very great weight); (2) capital felony occurred during the commission of burglary, robbery and sexual battery (great weight); (3) capital felony was committed for financial gain (merged with robbery, but not merged with burglary or sexual battery) (less than moderate weight); and (4) the capital felony was committed in a heinous, atrocious or cruel manner (HAC) (very great weight).

The trial court found two statutory mental mitigating circumstances: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate to great weight); and (2) defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (great weight).

The trial court also found eleven nonstatutory mitigating circumstances, according them little or very little weight: (1) borderline intelligence (little weight); (2) defendant dropped out of school (very little weight); (3) loss of father figure had emotional effect and led to his drug abuse (very little weight); (4) defendant sought help for drug problem (very little weight); (5) defendant had an alcohol problem at time of crime (very little weight); (6) drug

abuse problem at time of crime (very little weight); (7) defendant has a relationship with son (very little weight); (8) strong work ethic (very little weight); (9) defendant is a religious person (very little weight); (10) dedicated uncle (very little weight); and (11) defendant needs treatment for mental disorder unrelated to substance abuse (very little weight). The trial court determined that the proposed mitigator that the defendant has severe chronic alcohol and cocaine problem for which he needs treatment was not proven. The trial court sentenced Poole to death, finding that the aggravating circumstances "far outweigh the mitigating circumstances" and that the "heinous, atrocious, or cruel aggravator alone outweighs all the mitigating circumstances in this case."

POSTCONVICTION MOTIONS

The Defendant filed his "Motion To Vacate Judgment Of Conviction And Sentence," on April 8, 2016. The "State's Response To Rule 3.851 Motion For Post-Conviction Relief" was filed on June 6, 2016. On January 25, 2017, the Defendant filed "Defendant's Amended Claim 3 To Motion To Vacate Judgment of Conviction And Sentence." The State filed the "State's Response To Amended Rule 3.851 Motion For Post-Conviction Relief," on February 20, 2017.

CASE MANAGEMENT CONFERENCES

A Case Management Conference was held on September 15, 2016, pursuant to Rule 3.851, Fla. R. Crim. P. In the "Order On Case Management Conference" the Court stated, "The Court finds that it would be appropriate to have an evidentiary hearing on subclaims 1-1.1, 1-1.2, 1-1.3, of subclaim 1-1 of Claim 1; subclaims 1-2.1, 1-2.2 of subclaim 1-2 of Claim1, and subclaims 1-3, 1-4, and 1-5 of Claim1; subclaims 2-1.1, 2-1.2. and 2-1.3 of subclaim 2-1 of Claim 2; subclaims

2-2 and 2-3 of Claim 2; and Claim 4 of the Defendant's "Motion To Vacate Judgment of Conviction And Sentence." In the "Order On Case Management Conference," the Court also stated, "Subclaims 3-1, 3-2, 3-3, 3-4, and 3-5 of Claim 3 concern the impact of Hurst v. Florida, 136 S.Ct. 616 (2016). The Court defers making a ruling at this time on whether Claim 3 and these subclaims should be part of the evidentiary hearing pending a ruling by the Florida Supreme Court on this subject."

A Second Case Management Conference was held on March 10, 2017. At this Second Case Management Conference, the State and the Defense agreed that Amended Claim 3 of the Defendant's Motion involved legal matters that could be ruled on by the with Court without the necessity of an evidentiary hearing. On March 31, 2017, the Court rendered an "Interim Order On Motion To Vacate Judgment of Conviction and Sentence." In that "Interim Order," the Court held that "Claim 3 of the "Defendant's Amended Claim 3 to Motion To Vacate Judgment Of Conviction And Sentence," is **GRANTED** to the extent that he is entitled to a new penalty phase trial." The Court further stated that, "Because it is the determination of the Court that the Defendant is entitled ot a new penalty phase trial based on Hurst, as argued in Claim 3 of his Motion, the Court is not going to independently rule on each of the subclaims in Claim 3 of his Motion." In addition, the Court's "Interim Order," stated,

> 3. "An Evidentiary Hearing is set for July 10 – July 14, 2017, at 8:30 a.m. in Courtroom 9C on subclaims 1-1.1, 1-1.2, 1-1.3, of subsclaim 1-1 of Claim 1; subclaims 1-2.1, 1-2.2 of subclaim 1-2 of Claim 1, and subclaims 1-3, 1-4, and 1-5 of Claim1, which are Guilt Phase Claims in the Defendant's "Motion To Vacate Judgment of Conviction And Sentence."
>
> 4. The Evidentiary hearing set for July 10 – July 14, 2017, will include Claim 4 to the extent it involves Guilt Phase Claims.

5. The Evidentiary hearing set for July 10 – July 14, 2017, will not include subclaims 2-1.1, 2-1.2, and 2-1.3 of subclaim 2-1 of Claim 2 and subclaims 2-2 and 2-3 of Claim 2; which are Penalty Phase Claims, not based on Hurst issues, from the Defendant's "Motion To Vacate Judgment of Conviction and Sentence".

EVIDENTIARY HEARING - WITNESSES

An evidentiary hearing was held in this matter on July 10, 2017. The Honorable Howard Dimmig, Public Defender for the Tenth Judicial Circuit, was called as a witness by the Defendant. Mr. Dimmig was the only witness that testified at the evidentiary hearing. He was an Assistant Public Defender and a co-counsel for the Defendant at his jury trial in 2005.

ANALYSIS OF DEFENDANT'S CLAIMS

Strickland Standard:

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), set forth the standard for determining ineffective assistance of counsel. To establish ineffective assistance of counsel, a Defendant must prove two elements. First, the Defendant must show that counsel's performance was deficient. The defendant must show that counsel's representation fell below an objective standard of reasonableness. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. Second, the Defendant must show that counsel's deficient performance prejudiced the defense. This occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Strickland, 466 U.S. at 694. "Unless a Defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687. The Strickland standard requires establishment of both prongs. Where a Defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong. See Waterhouse v. State, 792 So. 2d 1176 (Fla. 2001).

In Douglas v. State, 141 So.3d 107, 117 (Fla. 2012), the Florida Supreme Court discussed Penalty Phase prejudice and stated,

> Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines the Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the Trial Court... That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in [that] outcome.' *Porter v. McCollum*, --U.S.---, 130 S. CT 447, 455-56, 175 L.Ed 2d 398 (2009) (alteration in original) (quoting *Strickland*, 466 U. S. at 693-94, 104 S. Ct. 2052), "To assess that probability, (the Court) consider(s) 'the totality of the available mitigation evidence ... and reweighs it against the evidence in aggravation.'" Id at 453-54 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed 2d 389 (2000).

3.851 CLAIMS

The Defendant has four Claims for relief which have numerous subclaims. These Claims and subclaims are set forth in his "Motion To Vacate Judgment Of Conviction And Sentence" and

"Defendant's Amended Claim 3 To Motion To Vacate Judgment of Conviction And Sentence."

The Defendant's Four Claims and subclaims are discussed below.

CLAIM 1

MARK POOLE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION.

1-1: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER COMMENTS BY THE STATE DURING CLOSING ARGUMENTS THUS DENYING MR. POOLE HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

1-1.1: Improper Comment on Mr. Poole's Right to Remain Silent.

The Defendant alleges, "Trial counsel was ineffective for failing to object to several improper comments by the prosecutor on Mr. Poole's right to remain silent. These comments prejudiced Mr. Poole, as there likely would have been a different outcome in their absence, and this Court

should grant Mr. Poole relief." In his Motion, the Defendant notes four comments made by the prosecutor that he considers to be comments on his right to remain silent:

(1) "Mr. Poole doesn't make any admissions and he doesn't resist. Of course, he's confronted with a tremendous amount of force. Detective Navarro himself was not some skinny little guy." (ROA, Vol. XXI, P. 2774). In his Motion, the Defendant notes that trial counsel did not object or move for a mistrial, and the issue was not raised on direct appeal.

In their written closing argument, the State alleges that this comment by the prosecutor was simply his recounting of facts admitted during trial, and he was not making a direct comment on the Defendant's right to remain silent. The State argues that Detective Grice's testimony recounted that when law enforcement first made contact with Mr. Poole he was brought to the station and he talked with police at the station. (V20/2637). The State further asserts that Mr. Poole consented to a search of his residence, provided law enforcement with a DNA sample, and was then released. (V20/2640-41).

Additionally, the State alleges that the prosecutor was not indicating that Mr. Poole refused to cooperate with police or had invoked his right to remain silent. At the evidentiary hearing, Mr. Dimmig was asked about this comment by the prosecutor and testified that he did not feel that the comment was injurious to the defense. Mr. Dimmig testified, "I wanted the jury to know that he did not resist in any way." (EH, V2/186).

With regard to this first statement, the Court agrees with the State that the prosecutor's

comment was not a comment on the right to remain silent. The prosecutor was recounting evidence that had been presented to the jury regarding Mr. Poole's initial contact with law enforcement. Mr. Dimmig testified that he wanted the jury to know that the Defendant was fully cooperative, and Mr. Dimmig reasonably thought that the prosecutor's statement did not hurt the defense theory of the case or presentation of evidence. (EH, V2/185-186). "Whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonably competent counsel." See Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982).

The Court finds that Counsel did not perform deficiently in not objecting to the State's comments in this first statement. In addition, the State presented a strong case against Mr. Poole. Even if counsel's failure to make an objection to this comment from the prosecutor could be considered to be deficient, it is not reasonable to think such a deficiency rendered the result of the Defendant's trial unfair or unreliable. Subclaim 1-1.1(1) of the Defendant's Motion is denied.

(2) "Well, there is no evidence in this case that at any time, either in this trial or anywhere else, Mr. Poole ever acknowledged that he did anything." (ROA, Vol. XXI, P. 2835). The Defendant notes in his Motion, "Trial counsel deficiently failed to object, the issue was raised on direct appeal and was found to be an invited response to the defendant's closing statement in *Poole v. State*, 997 So.2d at 390." The Court will further discuss (2) along with (3) below.

(3) "If Mr. Poole burglarized this house, and said, well, he talked – Mr. Poole talked to the police. And Mr. Poole – so that there's this other guy that was involved. Well, there's no evidence.

Keep in mind what's evidence and what's argument. [The Defense] is arguing all these things, but there is absolutely no evidence that Mr. Poole ever said, hey, somebody else was there before me and these people's heads were bashed in. There is no evidence of that." (ROA, Vol. XXII, P. 2840). In his Motion, the Defendant notes, "Trial counsel deficiently failed to object, the issue was raised on direct appeal and was found to be an invited response to the defendant's closing statement in *Poole v. State*, 997 So.2d at 390."

As noted by the Defendant in his Motion, the Supreme Court of Florida discussed comments (2) and (3) in Poole v. State, 997 So.2d 382, 389-390 (Fla. 2008). The Florida Supreme Court opined;

> The prosecutor began by stating that the defense's argument came from "Fantasy Land." A few sentences later, the prosecutor stated, "Well, there is no evidence in this case that at any time, either in this trial or anywhere else, Mr. Poole ever acknowledged that he did anything." A few paragraphs later, the prosecutor continued:
>
> Mr. Poole talked to the police. And Mr. Poole-so that there's this other guy that was involved. Well, there's no evidence. Keep in mind what's evidence and what's argument. Mr. Dimmig is arguing all these things, but there is absolutely no evidence that Mr. Poole ever said, hey, somebody else was there before me and these people's heads were bashed in. There is no evidence of that.
>
> And there's no evidence that Mr. Poole ever said, well, I went in there and raped her and left her and then somebody else came in and beat their heads in. There's no evidence of that either. That's argument. But when you look at what the testimony is and what the physical evidence is and what the photographs are, there is no evidence to support that theory.

The Florida Supreme Court goes on to note that these two comments were not followed by an objection from counsel.

> We have consistently held that "the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review." *Card v. State*, 803 So.2d 613, 622 (Fla.2001). However, we have carved out an exception to the contemporaneous objection rule when the unobjected-to comments rise to the level of fundamental error, that is, an error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error." *Id.* at 622. Neither of the two comments rises to the level of fundamental error because both comments were invited responses to the defense's closing argument. During his closing argument, defense counsel stated that Poole acknowledged that he committed the crimes of sexual battery, robbery, and burglary but denied that he was the person who inflicted the injuries on White and Scott. In response, the prosecutor was arguing that there was no evidence in the case to support the argument that Poole acknowledged that he committed those crimes or to support the argument that someone else inflicted the injuries on the victims. Because the prosecutor's comments were invited responses, the comments cannot be deemed improper. *See Walls v. State*, 926 So.2d 1156, 1166 (Fla.2006); *see also Dufour v. State*, 495 So.2d 154, 160-61 (Fla.1986). Therefore, these comments do not warrant reversal.

As noted above the Florida Supreme Court considered whether the two comments constituted fundamental error and concluded that both comments were invited responses based upon the closing argument of the defense and could not be deemed improper. In Rogers v. State, 957 So. 2d 538, 550 (Fla. 2007), the Florida Supreme Court stated "This Court has held that counsel's failure to object to improper comments cannot prejudice the outcome if the comments were raised on direct appeal and do not rise to the level of fundamental error. *See Chandler v. State,* 848 So.2d 1031, 1045-46 (Fla.2003)."

Even if counsel was considered deficient in not objecting to comments (2) and (3) there is no reasonable probability, given the strength of the State's case, that, but for counsel's deficiency

the result of the proceeding would have been different.

(4) "And if Mr. Poole wants to tell the state and Detective Grice that somebody helped him commit this crime, then let him come forward because - - " The Defendant notes that trial counsel objected to this comment and asked for a mistrial. He further notes that the motion for mistrial was denied by the trial court, and the Supreme Court of Florida on direct appeal found that the comment was an improper comment but not fundamental error in Poole v. State, 997 So.2d at 391.

The Florida Supreme Court had a lot to say about the fourth comment raised by the Defendant which was objected to by defense counsel at the trial:

> The final comment-"And if Mr. Poole wants to tell the state and Detective Grice that somebody helped him commit this crime, then let him come forward because...."-was objected to. Moreover, we find that this comment was an improper comment on Poole's failure to testify. Under article I, section 9 of the Florida Constitution, a defendant has the constitutional right to decline to testify against himself in a criminal proceeding. Therefore, "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." *Rodriguez v. State*, 753 So.2d 29, 37 (Fla.2000) (quoting *State v. Marshall*, 476 So.2d 150, 153 (Fla.1985)). In the instant case, the prosecutor's comment impermissibly suggested a burden on Poole to prove his innocence by stating that he had to come forward and testify. Although this was an erroneous comment on Poole's silence, we find that the trial court did not abuse its discretion in denying the motion for mistrial because in light of the evidence linking Poole to the crimes, the error was not "so prejudicial as to vitiate the entire trial." *Dessaure v. State*, 891 So.2d 455, 464-65 (Fla.2004). The evidence presented demonstrates that Poole was seen heading towards the victims' trailer on the night of the crime; Poole sold video games like those taken from the victims' residence immediately after the attack; the semen found in White matched Poole; Poole's shoeprint matched a shoeprint left inside the victims' trailer; and a stain found on Poole's shirt matched White's DNA Profile. Accordingly, relief is not warranted on this claim.

The Court agrees with the Florida Supreme Court that the comment is fairly susceptible to being interpreted as referring to a comment on Mr. Poole's right to silence. Like the Florida Supreme Court, the Court agrees that the error was not so prejudicial that the entire trial was vitiated. As indicated by the Florida Supreme Court, there was strong evidence presented, which linked Mr. Poole to the crimes.

On pages 10 - 12 of its closing argument, the State presents a compelling discussion of the strong evidence against the Defendant:

> This was simply not a close case. The State presented absolutely overwhelming evidence of Poole's guilt. Poole was identified heading in the direction of the victim's trailer immediately prior to the attack. Poole sold video games like those taken from the victims (some stained with the victim's blood) immediately after the murder and attempted murder. One video game was left on the porch of Johnson's (Poole's on again, off again girlfriend) trailer where Poole had been living at the time the victims were robbed.
>
> In addition to eyewitness testimony connecting Poole with the charged offenses, the State presented compelling and uncontradicted physical evidence to link Poole to the crimes. This evidence included DNA found on Poole's shirt matching or consistent with victim [L.W.]'s DNA, and DNA from the rape kit, matching Poole's genetic profile. From the vaginal swab, FDLE analysis Robin Ragsdale found a mixture, with the male contributor matching Poole's profile at 8 loci.
>
> ....
>
> Three of the games or game controllers linked to Poole after the offenses had blood on them matching victim Scott's DNA profile. In addition, a tire iron found in the vicinity of the victims' trailer had

> blood stains on it which were consistent with victim Scott's DNA profile. A footprint consistent with Poole's was found next to the bed where the attacks occurred.

Based on the Court's discussion above with regard to the four comments listed by the Defendant in his Motion, subclaim 1-1.1 is denied.

1-1.2: Improper Comments Which Shifted the Burden of Proof to Mr. Poole.

The Defendant alleges, "Trial counsel was ineffective for failing to object to several improper comments by the prosecutor which shifted the burden of proof to Mr. Poole. These comments prejudiced Mr. Poole, as there likely would have been a different outcome in their absence, and this Court should grant Poole relief."

The Defendant identifies three comments below, where he alleges the State improperly shifted the burden of proof to the Defendant. The Defendant asserts with respect to all three comments that his counsel deficiently failed to object to each comment or move for a mistrial, therefore this issue was not raised on direct appeal.

(1). "Well, had there not been all of this other evidence, had there been evidence that Mr. Poole was elsewhere or had his shoe impression not been found on the book, then maybe that could just be a coincidence." (ROA, Vol. XXI, P. 2761). Comment (1) was made during the State's Initial Closing argument.

The Court agrees with the State's closing argument that that the prosecutor's comment was

a fair comment on the evidence. In its closing argument, the State alleges that the prosecutor was simply stating that no evidence showed that Mr. Poole was somewhere else. Instead, the evidence placed Mr. Poole at the scene of the murder, rape, and robbery.

(2). "There's been plenty of time for Mr. Poole to request that any test in the world be done to any piece of evidence that the state put in in this trial. So it's not that it's only available to the state. If there was something that the defense thought they could test or do something with to prove that somebody else was in there, they had every opportunity to do that." (ROA, Vol. XXII, P. 2841). The Court will discuss (2) along with (3) below.

(3) "You've heard no evidence that some request was made of the state to get this bed sheet and have it examined by a defense expert. You haven't heard any evidence about that. That bed sheet was available, just as available to the defense as it was to the state." (ROA, Vol. XXII, P. 2847).

Comments (2) and (3) took place during the State's Rebuttal argument. On page 15 of its written closing arguments the State argues:

> This was a fair reply to defense counsel's closing wherein he stated that '[t]here could have been and there should have been so much more." (V21/2816). In his own closing, defense counsel criticized the investigators for not testing or examining other items, including unidentified fingerprints (V21/2815-16), conduct additional fingerprint analysis of the tire iron, additional footwear analysis on a pillowcase (V21/2817), or conduct DNA analysis of two hairs found at the scene of the murders. (V21/2818-19).

The Court agrees with the State that this was a fair comment on the closing arguments of

the defense, and it was permissible for the State to argue that the defense was not prohibited from doing its own testing on such items. In United States v. Long, 300 Fed. Appx. 804, 816 (11th Cir. 2008), the Eleventh Circuit Court of Appeal discussed comments made by a prosecutor after the defense questioned the prosecution's failure to call a particular witness. The Eleventh Circuit opined:

> We must consider allegedly improper prosecutorial comments in context when evaluating their propriety. *See United States v. Bright*, 630 F.2d 804, 825 (5th Cir.1980). "[W]hile a prosecutor may not comment about the absence of witnesses or otherwise attempt to shift the burden of proof, it is not improper for a prosecutor to note that the defendant has the same subpoena powers as the government, particularly when done in response to a defendant's argument about the prosecutor's failure to call a specific witness." *United States v. Hernandez*, 145 F.3d 1433, 1439 (11th Cir.1998) (quotation marks and citation omitted). It also "is not error to comment on the failure of the *defense*, as opposed to the *defendant*, to counter or explain the evidence." *United States v. Griggs*, 735 F.2d 1318, 1321 (11th Cir.1984) (per curiam) (quotation marks and citation omitted).
>
> The record reflects that in his closing statement, defense counsel asked the jury to consider why the government failed to call Agent Kiper as a witness:
>
>> Well, who is the lead Agent in this case? It was Agent Richard K[i]per. Why didn't he testify? He was the lead agent in this case. He was the person with all the information about everything going on, but why wasn't he called? ... That's something you can consider in deciding whether or not the Government has met their burden.
>
> The prosecutor's comments, which were made in direct response to this argument, "referred ... to the quality (or lack thereof) of the defense's evidence and the defense's failure to rebut the necessary inferences created by the government's case." *United States v. Exarhos*, 135 F.3d 723, 728 (11th Cir.1998). Moreover, even if the prosecutor's comments were prejudicial, they were rendered harmless by the court's instruction to the jury regarding the burden of proof. *See Simon*, 964 F.2d at 1087. Accordingly, we

conclude that the prosecutor's comments were not improper.

In its closing argument the State cites United States v. Simon, 964 F.2d 1082, 1087 (11th Cir. 1992). In that case, the Eleventh Circuit opined, "This court has held that the prejudice from the comments of a prosecutor which may result in a shifting of the burden of proof can be cured by a court's instruction regarding the burden of proof. *See Duncan v. Stynchcombe,* 704 F.2d 1213, 1216 (11th Cir.1983); *see also United States v. Casamayor,* 837 F.2d 1509 (11th Cir.1988), *cert. denied,* 488 U.S. 1017, 109 S.Ct. 813, 102 L.Ed.2d 803 (1989); *United States v. Johnson,* 713 F.2d 633, 651 (11th Cir.1983), *cert. denied,* 465 U.S. 1081, 104 S.Ct. 1447, 79 L.Ed.2d 766 (1984)."

The Court agrees with the State that the comments made by the Prosecutor did not shift the burden of proof and were responsive to the arguments of the defense. Should it be considered that the arguments caused confusion in the minds of the jury regarding burden of proof, the Court finds that any such confusion was cleared up by the Court's jury instructions which emphasized to the jury what the State had to prove for them to find the Defendant guilty of the crimes he was charged with. In addition, the Court does not find any reasonable basis to conclude that any deficiency by counsel in not objecting to these comments undermines confidence in the outcome of the trial. Subclaim 1-1.2 of the Defendant's Motion is denied.

1-1.3: Improper Comments Which Denigrated Mr. Poole's Theory of Defense.

The Defendant alleges, "Trial counsel was ineffective for failing to object to several improper comments by the prosecutor which denigrated Mr. Poole's theory of defense. These

comments prejudiced Mr. Poole, as there likely would have been a different outcome in their absence, and this court should grant Mr. Poole relief."

In his Motion, the Defendant sets forth seven instances, during the State's rebuttal closing argument, where he alleges the prosecutor made comments denigrating the defense's theory of defense:

(1) "I did check around at the lunch hour, and as far as I could tell, I was in still (sic) Polk County and this was still Bartow, and this was still the courthouse, and I still came back to 9-A. I think this is 9-A. And I don't think it's Disney, and I don't think it's Fantasy Land. That's still up the road. But that's where the argument came from for the defense, either there of somewhere in one of those video games that goes in one of those machines." (ROA, Vol. XXI, P. 2835). At the evidentiary hearing, Mr. Dimmig acknowledged that he did not know why he did not object at the time, and his understanding or denigration was now more refined. (EH, V1/91).

(2) "Well, folks, if you could believe a story like that, I don't know how we got you on this jury, because you don't have any common sense." (ROA, Vol. XXII, P. 2836). At the evidentiary hearing, Mr. Dimmig testified that he regarded the comments as a statement that denigrated the intelligence of the jury. He admitted that he did not recall having thought that the statement denigrated the defense at the time, but again he admitted that his understanding of the concept of denigration was more refined at this point in his career. (EH, V1/92-94) On cross-examimation, Mr. Dimmig agreed that judges routinely tell jurors to use their common sense. (EH, V2/218-219).

(3) "You could go back there and think about things like that, but that's just stupid It didn't happen that way." (ROA, Vol. XXII, P. 2838-2839). At the evidentiary hearing, Mr. Dimmig said

that at the time of the trial he did not recognize these comments as denigrating the defense. He was asked why he did not object and he answered, " I thought that the insult to the - - I, I didn't recognize that it was denigrating the defense, and 2, I thought insulting the jury was a negative thing for the Prosecution to be doing." (EH, V1/96).

(4) "I used a list of coincidences to explain circumstantial evidence, without having any idea that the most bizarre coincidence was going to be brought up by the defense, which is that there's somehow this other person. Now, talk about a coincidence that boggles the imagination... No, that didn't happen unless you are in Mickey Mouse Land." (ROA, Vol. XXII, P. 2839). At the evidentiary hearing Mr. Dimmig testified that at the time of the trial he did not believe the comments in (4) denigrated the theory of defense and that is why he did not object to it. (EH, V1/96-97). On cross-examination, Mr. Dimmig stated, "That particular comment about, you know, no reason to believe there was a second person there directly contradicted the testimony of (L.W.) who said in her 911 call and then when the police responded that she was aware of two people being in the trailer at the time, 3:30 in the morning, somewhere roughly right around there. So my view was the State Attorney - - the Prosecutor was saying to the jury, don't believe our eyewitness to the offense. (EH, V2/219-220). Mr. Dimmig was also asked about the phrase "boggles the imagination," and he testified that "[i]t was just a different way of saying that the evidence does not support it. (EH, V2/225).

(5) "Sir don't come in here with some wild story and tell the jury that they should be able to – or have to deliberate for hours to figure out a case that's an open and shut as this." (ROA, Vol. XXII, P. 2841). Mr. Dimmig testified at the evidentiary hearing that he did not think this comment denigrated the defense. (EH, V1/97).

(6) "And this is a motive, according to the defense, for somebody to go and commit this horrible crime? I think that also boggles the imagination." (ROA, Vol. XXII, P. 2844). Mr. Dimmig testified at the evidentiary hearing that he did not think this comment denigrated the defense. (EH, V1/97).

(7) "Basically, the defense is this: Are you ladies and gentlemen of the jury going to believe what you saw and heard in this courtroom, or are you going to believe what I'm telling you?" (ROA, Vol. XXII, P. 2847). Mr. Dimmig testified at the evidentiary hearing that he did not think this comment denigrated the defense. (EH, V1/97-98).

Mr. Dimmig was asked if at the time of trial, taking all of these statements together, he had grounds to seek a mistrial. Mr. Dimmig answered, "No, I did not think I had basis for a mistrial at the time of trial." (EH, V1/98). He was asked why he did not think he had grounds for a mistrial. He answered, "I did not believe that there had been sufficient denigration of the defense. The only denigration of the defense that I recognized was the early comments about Disney World or - -" (EH, V1/99). On cross-examination, Mr. Dimmig agreed that the prosecutor Mr. Aguero was a passionate person, and he expected him to be animated during the closing. (EH, V2/215). Assistant State Attorney Victoria Avalon asked him about the way Mr. Aguero was presenting the case.

> ASA Avalon : And did you feel that the way Mr. Aguero may have been presenting his case by this point might have been coming off a little over the top and perhaps even unreasonable?
>
> Mr. Dimmig: Yes. I mean, I thought he was over the top on how he discounted the evidence supporting our alternative theory.
>
> ASA Avalon: Once again, the old adage about when your opponent makes a mistake you let him. Right?

> Mr. Dimmig: Yes. Not sure that's exactly what, you know was going on here.
>
> ASA Avalon: Let me put it in slightly different terms. Did you feel at the time, taking in context while you were sitting there watching the jury react to Mr. Aguero, did you feel that his comments were so prejudicial as to wholly vitiate the entire trial?
>
> Mr. Brown: Judge, I'll object. That calls for a legal conclusion.
>
> Ms. Avalon: I'm asking what - - what he thought.
>
> Judge Harb: Overruled.
>
> Mr. Dimmig: With the understanding that I had at the time about denigrating the defense case, no, I did not think it completely vitiated the case.

(EH, V2/217).

Mr. Dimmig agreed in his testimony that he could have objected to the way Mr. Aquero was arguing the case. He testified that he did not remember what was going through his head at the time, but it was his usual practice to take into consideration all factors in deciding whether or not to object.

(EH, V2/221).

Mr. Dimmig agreed during his testimony that you run the risk of turning the jury off if you object every single time you can object to a statement by the prosecution. (EH, V2/214 -215). It is clear from listening to the testimony of Mr. Dimmig that his decision not to object to the majority of the closing comments identified above were based on his tactical decision that the comments in some respects showed the State overreaching and

insulting the jury, his belief that he did not want to turn off the jury with frequent objections, and his decision that a comment was within the wide latitude allowed the parties in closing arguments. The Court does not find that counsel's performance fell below an objective standard of reasonableness in not objecting to the comments (2) through (7) above.

With regard to comment (1), the testimony of Mr. Dimmig's testimony indicates this comment got by him. (EH, V2/214). Referring to Disney and Fantasy land could certainly be seen as disparaging the defense's theory of defense. However, if counsel's performance fell below an objective standard of reasonableness in not objecting to comment (1), there is no reasonable basis to believe that the result of the proceedings could have turned out differently but for such a deficiency in not objecting to comment (1), based on the strong case presented by the State. Even should it be considered that counsel showed some deficiency in not objecting to all the comments (1)-(7), there is no reasonable basis to conclude that the result of the proceedings could have turned out differently but for such a deficiency. Subclaim 1-1.3 of the Defendant's Motion is denied.

Subclaims 1-1.1, 1-1.2 and 1-1.3, having been denied, the Court denies Subclaim 1-1 of the Defendant's Motion.

1-2: TRIAL COUNSEL WAS INEFFECTIVE FOR STATING DURING CLOSING ARGUMENTS THAT MR. POOLE "ACKNOWLEDGES" HISGUILT FOR SEXUAL BATTERY, BURGLARY, AND ROBBERY, THUS DENYING MR. POOLE HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.,

AND UNDER SECTION 90.502, FLORIDA STATUTES.

The Defendant alleges, "During the closing statement, Mr. Poole's trial counsel stated: 'Mr. Poole acknowledges that he went in the trailer, 4-L, and committed a crime therein. That's a burglary. Mr. Poole acknowledges that he had sexual contact with (L.W.) against her will, and that's a sexual battery. And Mr. Poole acknowledges that he had possession of those games and he went down the road and sold them, and that's a robbery.' (ROA, Vol. XXI, P. 2795)". In his Motion, the Defendant asserts "This statement was not supported by the evidence submitted at trial, and violated Mr. Poole's right to remain silent and the attorney-client privilege."

1-2.1: Violation of the Right to Remain Silent.

The Defendant alleges, "Trial counsel was ineffective for violating Mr. Poole's right to remain silent by testifying during closing arguments that Mr. Poole acknowledged his guilt to the non-homicide offenses. This violation prejudiced Mr. Poole, as there likely would have been a different outcome in its absence, and this Court should grant Mr. Poole relief." The Defendant notes that the trial court held a colloquy with Mr. Poole regarding whether or not he wanted to testify. Mr. Poole agreed during the colloquy that he had decided in consultation with his attorney not to testify. (ROA, Vol. XI Pgs. 2725-2726).

The Court does not find that counsel violated the Defendant's Right to Remain Silent in his statements that Mr. Poole acknowledges his guilt for sexual battery, burglary and robbery. Defense Counsel was clearly making a reasonable tactical decision in light of the strong evidence the State had with regard to the non-homicide crimes to maintain some credibility with the jury

with regard to challenging the actual murder charge. This tactical decision is discussed in significant detail with regard to subsclaim 1-2.2 below. Subclaim 1-2.1 is denied.

1-2.2: Violation of the Attorney-Client Privilege.

The Defendant alleges, "Trial counsel was ineffective for violating the attorney-client privilege by testifying during closing arguments that Mr. Poole acknowledged his guilt to the non-homicide offenses. This violation prejudiced Mr. Poole, as there likely would have been a different outcome in its absence, and this Court should grant Mr. Poole relief."

The Defendant argues that "By telling the jury, 'Mr. Poole acknowledges' committing armed burglary, armed robbery, and rape, trial counsel clearly violated the attorney-client privilege by disclosing confidential communications that were made during the course of representation."

At the evidentiary hearing, the following exchange took place between Postconviction Counsel, Mr. Brown, and Mr. Dimmig regarding Mr. Dimmig's Closing at the trial:

> Mr. Brown: But let me direct your attention to Volume XXI and page 2795. That will be towards the back of your binder.
>
> Mr. Dimmig: I have it.
>
> Mr. Brown: All right. Just a moment, please. All right. We're going to begin by looking - - starting at Line 2. I'11 just read a portion of your – this comes from your closing argument in the trial. And at Line 2 you state, "And now - - "now that all of the evidence is in I can tell you that we're here for two trials; a trial for first degree murder and a trial for first degree" - - "and a trial for attempted first degree murder.
>
> "Mr. Poole acknowledges that he went into Trailer 4L and committed a crime thererin. That's a burglary. Mr. Poole acknowledges that he had sexual contact with (L.W.) against her

will and that's a sexual battery. And Mr. Poole acknowledges that he had possession of those games and he went down the road and sold and [sic] them that's a robbery."

You don't have any reason to doubt that that's an accurate transcript of your statement. Correct?

Mr. Dimmig: I have no reason to doubt it's accuracy.

Mr. Brown: All right. Do you remember making that statement?

Mr. Dimmig: I cannot say that I recall word-for-word. I can recall that that was the thrust of how I was going to begin the opening or the closing arguments. So yes I believe it's what I said.

Mr. Brown: All right. I'm going to ask you a lot about that statement, but let me get a little bit of background information with regards to it.

Did you know that Mr. Poole was going to be facing multiple life sentences if convicted of the robbery, sexual battery and burglary charges?

Mr. Dimmig: Yes, I did.

Mr. Brown: What sentence did you expect that he would received [sic] if convicted of those charges?

Mr. Dimmig: I believed he would receive the maximum sentence.

Mr. Brown: Did you discuss with Mr. Poole at any time conceding those charges?

Mr. Dimmig: I did.

Mr. Brown: Did he consent to that strategy?

Mr. Dimmig: I just want to clarify, because there have been some discrepancies or differences between the State Attorney's Office and then the Office of the Public Defender concerning waiver of attorney/client privilege. And I just want to make sure on the record that attorney/client privilege is waived for any questions you may ask me.

Mr. Brown: You're asking if I'm waiving the - -

Mr. Dimmig: Yes.

Mr. Brown: - - attorney/client privilege? The Defense's position would be that by filing an ineffective assistance of counsel claim against you that the attorney/client privilege is waived for these proceedings.

Mr. Dimmig: Okay. Could you repeat the question for me, then?

Mr. Brown: Did Mr. Poole consent to you conceding these charges?

Mr. Dimmig: To the best of my recollection, he did not.

Mr. Brown: Was he adamant that you not concede the charges?

Mr. Dimmig: He was consistent in that position. We were able to discuss it, but he was consistent in his position that he did not want it conceded.

Mr. Brown: How many times approximately would you say you discussed the strategy with Mr. Poole?

Mr. Dimmig: Again, I don't have an absolute memory. I would estimate at least five or six times, including during the course of the trial.

Mr. Brown: Why did you believe that admitting to the lesser charges or rather the non-homicide charges was the best strategy in the case?

Mr. Dimmig: Two reasons. One, I believed that the evidence of the burglary, robbery and sexual battery and Mr. Poole's involvement in it was overwhelming. And secondly, because I believed that the evidence of his involvement in the homicide was shaky at best.

There were - - there was testimony from the surviving victim, a (L.W.) that created significant time discrepancies. There were issues brought up by the medical examiner which raised significant time discrepancies. There was also testimony from (L.W.) about more than one perpetrator being in the house.

And so I thought that the evidence concerning the homicide was significantly weaker than the evidence concerning the other offenses and that in order to maintain credibility with the jury on the homicide charge it was appropriate not to challenge the other

charges.

Mr. Brown: And so was this part of the overall strategy of trying to avoid a conviction for first degree murder?

Mr. Dimmig: Yes, it was.

(EH. V1/18-22).

....

Mr. Brown: Let's talk now about the word "acknowledges." We – we read the statement or I read the statement already for you., but on three different occasions you stated that Mr. Poole acknowledges committing different offenses. Did you in turn - - intend to use the phrase "Mr. Poole acknowledges"?

Mr. Dimmig: If I can, let me sort of lead into that response. The short answer is yes, I did. I struggled - - and my memory is such that major things that happened this long ago I don't remember specifics of. Things that have, quite frankly, haunted me for 12 years I remember quite clearly.

I remember sitting at the table in my breakfast room writing notes about my closing argument and struggling over what or exactly how I should phrase this. And I settled on "acknowledges." I did not want to use the word "admits." I wanted to use the word "acknowledges." Where I missed, if you will, what - - what I should have said, what I had intended to say in closing argument was that Mr. Poole acknowledges that the evidence establishes that he committed these offenses. So the choice of the work "acknowledges" was quite intentional. The total phrase that is here is not what I intended to say.

Mr. Brown: All right. So just because this is an important issue let me just make sure that we're crystal clear. So you did intend to use the phrase "Mr. Poole acknowledges," but you intended to that - - for that craze - - for that phrase to include Mr. Poole acknowledges that the State has proven, or something to that effect?

Mr. Dimmig: Words to that effect, that the State has proven or the evidence establishes. Something to that effect.

Mr. Brown: Was it ever your intention to give the jury the impression that Mr. Poole was making a statement to the jury?

Mr. Dimmig: No. That's what I was hoping to avoid by using the word "acknowledges." That's part of what I was wrestling with, that in preparing my closing notes that I missed when I added on the additional part.

(EH, V1/23-24).

....

Mr. Brown: Why was it important to state during your closing argument that Mr. Poole was acknowledging that he committed those offenses?

Mr. Dimmig: It was a couple of things. One, to maintain degree of credibility that, you know, what we're doing was putting the State to its burden of proof and not, you know, admitting, but rather acknowledging what they had met that particular burden of proof.

So it was to try and indicate that Mr. Poole had not attempted to deceive the jury or anything, but was - - simply was putting the State - - holding the State to its burden. And second, it was to not get into anything about any statements that Mr. Poole may or may not have made to me in preparation of the case, not to get into anything that he has stated about the case.

Mr. Brown: All right. And that's what I want to focus on. Why was that important?

Mr. Dimmig: Well, you didn't want to open the door to the State Attorney getting into any – anything about any statement he may or may not have made.

Mr. Brown: Okay. And why is it important to not open door to statements that Mr. Poole might have made?

Mr. Dimmig: It would be potentially evidence that had not been received during the course of the trial. It could be comments on right to remain silent.

Mr. Brown: Did you believe when you made that statement that you had made a mistake?

Mr. Dimmig: I did not recognize at that exact moment in time. As soon as the State Attorney began his closing argument I glanced at

the notes that I had and realized the mistake I had made.

(EH, V1/25-26).

....

Mr. Brown: Did Mr. Poole ever acknowledge to you that he committed those offenses?

Mr. Dimmig: To the best of my recollection, he did not.

Mr. Brown: All right. So would you say that you were putting words into his mouth when you made that statement to the jury?

Mr. Dimmig: In the way that I put the statement to the jury, yes.

Mr. Brown: All right. So we'll clear that up a little bit. It wasn't your intention to put words into Mr. Poole's mouth.

Mr. Dimmig: Correct.

(EH, V1/28).

....

Mr. Brown: Did you talk to Mr. Poole about whether he was going to testify?

Mr. Dimmig: Yes.

Mr. Brown: What kind of discussions did you have with him about that?

Mr. Dimmig: I don't remember the specific conversations we had about it. There would have been the general sort of discussion about that that would mean from a practice point of view, that the State Attorney would have the opportunity to cross-examine him, areas that I believe the State would probably go into on cross-examination, and then, a more general discussion of the advantages or disadvantages to him of testifying.

And then it was - - was and is my practice that I advise my client of my opinion as to whether or not they should testify. And so I would have advised Mr. Poole that in my opinion it was in his best interest not to testify.

> Mr. Brown: All right. Was part of the discussion about whether to testify or not, did that include advising him that by testifying that he would be waiving his right to remain silent?
>
> Mr. Dimmig: Yes.
>
> (EH, V1/29).
>
> ....
>
> Mr. Brown: Okay. Did the Court ultimately conduct a colloquy of Mr.Poole about whether he wished to exercise his right to remain silent.
>
> Mr. Dimmig: I believe they did, or he did. Judge did.
>
> Mr. Brown: Did Mr. Poole advise the Court unequivocally that he wished to exercise his right to remain silent?
>
> Mr. Dimmig: I don't have a specific recollection. I know that - - I do recall that there was not an issue that was created, so my assumption is that he indicated that he did not wish to testify.
>
> (EH, V1/30).

Mr. Brown asked Mr. Dimmig how he would describe the gravity of the realization that he had opened the door to the State in his closing argument and he responded that, "I considered it quite serious." Mr. Brown asked Mr. Dimmig about Florida v. Nixon, 543 U.S. 175 (2004), and Mr. Dimmig testified what he was familiar with that case at the time of the trial. (EH, V1/31-32). Mr. Brown directed Mr. Dimmg's attention to ROA, Volume XXI, page 2831 of the trial transcript where a brief exchange that took place between the attorneys and the Trial Judge.

> Mr. Brown: All right. And we're going to start at - - at Line 9. And this is a relatively brief exchange so I'll go through the exchange and then ask you some questions about it.
>
> All right. So on Line 9 Mr. Aguero – oh, wait. No. I'm sorry.

> Not Line 9. Line 20. "We have one" - - this is Mr. Aguero speaking, and Mr. Aguero was the State Attorney in this case; the lead State Attorney?
>
> Mr. Dimmig: Correct.
>
> Mr. Brown: Okay.
>
> [Mr. Aguero talking] "We have one matter that we would like to put on the record. Mr. Dimmig, in his closing, admitted guilt to certain of the offenses. The caselaw in that area has evolved over the last few years and I've had a discussion with Mr. Dimmig about his decision that he made in that regard and his understanding of the role of the attorney versus the role of the defendant, such that we're all aware that, as the Court did with Mr. Poole, that the right to testify or not testify has been held for years to be a constitutional right of the defendant, not a decision that an attorney can make, but rather one that has to be personally made by the defendant. And that's the reason that the standard inquiry that the Court went through was done.
>
> "Mr. Dimmig's interpretation of the law and his rationale behind the admission of guilt is a little different with regard to his closing. And so I'd like to make a part of the record, for whatever - - wherever that might go, either in appeal or in post-conviction."
>
> (EH, V1/33-34).
>
> ....

Mr. Brown asked Mr. Dimmig if he had a conversation with Mr. Aquero about the acknowledgment issue in between his closing argument and the State's rebuttal, and Mr. Dimmig agreed that they did. Mr. Dimmig went on to say, "I do not recall Mr. Aguero and I discussing the client's absolute right to decide whether or not to testify. I remember our conversation only dealing with his asking me, you know, did I think I had the authority to concede guilt. And I pointed out that I did believe that I had that authority and I mentioned the Nixon case at the time of that conversation." (EH, V1/35).

....

Mr. Brown: All right. I'll - - let me just continue now with the - - with the record.

And so the Court said, "Okay. Mr. Dimmig , do you wish to respond on the record?"

And you stated, " I would simply say , Your Honor, that it is my interpretation of the case law, and I do not have the cite, but there is a United States Supreme Court case, Nixon, that was decided."

....

I believe within the last year that my interp. - - well, that's not a good way to word that. All right. So - - and I do not have the cite, but there is a United States Supreme Court case, Nixon, that was decided, I believe, within the last year that my interpretation of the particular case, as I reviewed it in preparation for this trial - - for trial in this case is that a capital - - in a capital murder cases the decision as to whether or not to admit guilt of something other than the capital murder itself lies solely within the discretion of trial counsel, and I made that decision." (EH, V1/36-37).

Mr. Brown asked Mr. Dimmig if "[t]hat was a accurate statement of your understanding of the holding of Nixon that you had at the time that you cited it in Mr. Poole's case?" Mr. Dimmig responded "Correct." (EH, V1/37).

At the evidentiary hearing, Mr. Brown pointed out several differences between the Nixon case and Mr. Poole's case, including the fact that Mr. Nixon's counsel conceded his client's guilt to first degree murder whereas Mr. Poole was admitting to lesser crimes; Mr. Nixon was very disruptive as opposed to the demeanor of Mr. Poole; Mr. Nixon was unresponsive with regard to conceding guilt while Mr. Poole opposed the tactic; Mr. Nixon's counsel conceded guilt from the very beginning while Mr. Dimmig did not concede Mr. Poole's guilt until closing arguments. (EH,

V1/52-64).

With regard to conceding during the closing argument Mr. Dimmig testified, "I thought there was a distinction between conceding before the evidence is in, so that at least the question could be raised as to whether or not defense counsel put the State to its burden as opposed to what I did, which was not to concede in opening, hold the State to its burden of proof and concede only after the evidence was in." (EH, V1/58). Mr. Dimmig was asked if the holding in Nixon included the fact that the defendant was unresponsive, and he responded, " I don't know any other way of saying it is, I did not focus on the unresponsive part. I believed the holding to authorize me to do what I did." (EH, V1/62).

Although not specifically discussed by the parties with regard to the decision by Mr. Dimmig to concede the guilt of Mr. Poole, Mr. Dimmig was asked at the evidentiary hearing about the composition of the defense team and the theory of defense.

At the evidentiary hearing Mr. Dimmig: testified that Julia Jester, now Julia Williamson, and Steven Fisher also represented Mr. Poole on behalf of the Public Defender's Office. He testified that he handled the Guilt Phase and was not involved in the Penalty Phase. Ms. Jester was the Second Chair on the case and primarily responsible for the Penalty Phase, Mr. Fisher was almost exclusively involved with Mental Health experts for Penalty Phase purposes. (EH, V1/14-15).

The following discussion took place at the evidentiary hearing between Mr. Poole's

postconviction counsel, Mr. Brown, and Mr. Dimmig regarding why the trial defense team was composed the way it was and the Defense's theory of the case:

> Mr. Dimmig: There was inconsistency in the theory of the first phase and second phases of the case. And as lead counsel it was my opinion that it was in the best interest of Mr. Poole that I not be involved in the second phase in case I had lost credibility with the jury during the first phase of the case. So I tried to limit the role of Ms. Williamson and Mr. Fisher in the first phase and let them handle the second phase.
>
> Mr. Brown: So did you believe that you would have a credibility issue going forward if Mr. Poole was found guilty of first degree murder?
>
> Mr. Dimmig: Yes.
>
> Mr. Brown: And that is the main reason that the defense team was composed the way that it was?
>
> Mr. Dimmig: Correct.
>
> Mr. Brown: What was the Defense's theory of the case?
>
> Mr. Dimmig: Our theory of the case was that there were two independent criminal episodes that occurred. One in which there was a burglary, a robbery and a sexual battery, and that several hours later a perpetrator from that incident returned to the scene and committed the homicide.
>
> Mr. Brown: And so was your goal to avoid a conviction of first degree murder?
>
> Mr. Dimmig: Yes.
>
> Mr. Brown: And was that the overall strategy or was that strategy related simply to the guilt phase?
>
> Mr. Dimmg: (No response.)
>
> Mr. Brown: Let me rephrase that question if you need me to. You already said that you divided the defense team because you believed there would be a credibility problem if - - if there was a

> conviction for first degree murder. Correct?
>
> Mr. Dimmig: Yes.
>
> Mr. Brown: All right. So when you made the decision to divide the defense team that way did you decide at that time that trying to avoid a conviction for first degree murder was the best way to try to save Mr. Poole's life?
>
> Mr. Dimmig: Yes.

(EH, V1, 14- 15).

As can be seen by Mr. Dimmig's testimony above. The focus of the Defense was to avoid a conviction for first degree murder. Mr. Dimmig made a tactical decision to divide the defense team between the two phases of the trial to maintain credibility with the jury. He made the State meet its burden with respect to proving the non-capital crimes prior to conceding to them in his closing argument. Mr. Dimmig thought the Nixon case gave him the authority to concede Guilt on the non-homicide cases, and he reasonably thought that by doing so he gave Mr. Poole the best chance of not being convicted of first degree murder. The Court does not find that counsel's performance fell below an objective standard of reasonableness. Additionally, the Court finds no reasonable basis to conclude that any deficiency by counsel with regard to this claim undermines confidence in the result of the proceedings. Subclaim 1-2.2 of the Defendant's Motion is denied.

Subclaims 1-2.1 and 1-2.2 having been denied, the Court denies Subclaim 1-2 of the Defendant's Motion.

1-3: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO WITHDRAW FROM MR. POOLE'S CASE DUE TO AN ACTUAL CONFLICT OF INTEREST DUE TO THE FORMER REPRESENTATION OF STATE WITNESSES TREVOR

CAMPBELL AND ALBERT LEWIS IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATE [sic] CONSITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Defendant alleges, "Trial counsel in this case labored under an actual conflict of interest, and this conflict adversely affected trial counsel's representation of Mr. Poole. Based upon this actual conflict of interest which adversely affected trial counsel's representation of Mr. Poole, Mr. Poole must be granted a new trial."

In his Motion the Defendant argues, "In the present case, a hearing was held before the Honorable Susan Roberts on July 21, 2004. During that hearing, trial counsel advised the court that his office, the Public Defender for the 10th Judicial Circuit, had previously represented a series of state witnesses: Dawn Campbell, Charles Michael Butler, Denise Harris Wood, Rufus Knighton, Albert Lewis, Melvadine Miller, Venture Rico, Gary Seafort, and Gary Lynn Burton. ROA, Vol. V, Pgs. 754-55. Trial Counsel further advised that he had discussed this issue with Mr. Poole in his opinion this former representation did not constitute a conflict of interest. The trial court then conducted a colloquy of Mr. Poole to determine whether he had discussed the issue with his attorneys and wished to remain represented by the public defender's office. Mr. Poole advised the court that he had discussed the matter with his attorneys, but that he was not comfortable with the public defender's office continuing to represent him. At this point, the trial court recessed the proceedings and appointed independent counsel to advise Mr. Poole specifically as to the conflict of interest issue." (ROA, Vol. V, Pgs. 755-763)."

At the Evidentiary Hearing, the following discussion took place between Mr. Brown and Mr. Dimmig concerning the issue of a conflict of interest and the hiring of conflict free counsel to represent Mr. Poole regarding a possible conflict of interest.

> Mr. Brown: Okay. Had you discussed with Mr. Poole at this point the potential for a conflict of interest existing?
>
> Mr. Dimmig: I don't specifically recall if I had or not. I believe that I did, but I can't say that I specifically recall it.
>
> Mr. Brown: Okay. Had you discussed with him specific - - or do you remember specifically whether you discussed with him the fact that your office had represented those other individuals?
>
> Mr. Dimmig: Again, I don't have a specific recollection of it, but I believe that I did.
>
> Mr. Brown: Okay. Did you - - do you recall at any point Mr. Poole raising concerns with you over your continued representation?
>
> Mr. Dimmg: I do remember that at some point, and I don't remember if it was before or after this hearing, that there was conversation with Mr. Poole about some concerns.
>
> Mr. Brown: And was [sic] his concerns specifically - - do you recall if his concerns were specifically related to Albert Lewis and Trevor Campbell and their representation?
>
> Mr. Dimmig: Yes.
>
> Mr. Brown: Okay.
>
> Mr. Dimmig: It was.

(EH, V1/116-117).

....

> Mr. Brown: Did you personally represent Trevor Campbell or Albert Lewis?
>
> Mr. Dimmig: No.

Mr. Brown: Were you representing any individuals charged with lower level drug offenses at the time?

Mr. Dimmig: Not at that time, I was not.

Mr. Brown: Okay. Do you recall whether or not a subsequent hearing was scheduled and Mr. Point - - Mr. Poole was appointed conflict-free counsel?

Mr. Dimmg: Yes, I do recall that.

Mr. Brown: Do you remember who was appointed to represent him?

Mr. Dimmig:

Mr. Larry Shearer.

Mr. Brown: Is that someone that had been familiar to you at that point?

Mr. Dimmig: Yes, I had dealt with Mr. Shearer since I moved to Polk County in 1978.

Mr. Brown: Okay. What discussions - - after Mr. Shearer was appointed to represent Mr. Poole on the conflict issue what conversation did you have with Mr. Shearer?

Mr. Dimmig: Almost none. I considered that something that was between Mr. Shearer and Mr. Poole and did not want to interject myself into it. I believe that I shared the evidence of when we go appointed or would have caused to be shared with Mr. Shearer when we were appointed and what our involvement in the cases was, but I did not – I do not recall any direct conversation with Mr. Shearer about the merits of the - - wither [sic] of the cases or my opinion as to why there was not a conflict.

Mr. Brown: Did you make your files related to Mr. Poole available to Mr. Shearer?

Mr. Dimmig: I don't recall.

Mr. Brown: Do you not recall doing it or you don't recall one way or the other?

Mr. Dimmig: I don't recall one way or the other.

Mr. Brown: Okay. Do you recall if you made your files regarding Trevor Campbell and Albert Lewis available to Mr. Shearer?

Mr. Dimmig: The files themselves. I do not recall.

Mr. Brown: Is – would it have been your normal practice to provide client files to an outside attorney?

Mr. Dimmig: No, it would not be our common practice. Now, since Mr. Shearer was appointed as conflict - - conflict –free counsel to advise Mr. Poole I would not have considered him as outside counsel. He was one of Mr. Poole's attorneys at that point. So our general rule would have been different as it relates to Mr. Shearer than it relates - - well, at Mr. Shearer looking at Mr. Poole's file as opposed to his looking at the other individuals.

Mr. Brown: But as it - - as it relates to him reviewing Trevor Campbell and Albert Lewis' files would it have been your practice to make those files available to someone that didn't work for he Public Defender's Office.

Mr. Dimmig: No, it would not have been our practice.

Mr. Brown: And why not?

Mr. Dimmig: We would consider that a breach of attorney/client confidentiality and we would not turn the files over without a waiver from the client.

Mr. Brown: Do you recall if you sought or obtained a waiver from Albert Lewis or Trevor Campbell?

Mr. Dimmig: I do not believe that we did.

Mr. Brown: Okay. Do you recall a hearing - - do you recall the hearing where Mr. Shearer appeared on Mr. Poole's behalf to discuss the conflict issue?

Mr. Dimmig: Yes.

Mr. Brown: What do you recall taking place at that hearing?

Mr. Dimmig: The only part of that hearing that I really recall is Mr. Shearer advising the Court that it was his opinion that there was a conflict of interest.

Mr. Brown: Okay. Do you recall whether or not Mr. Shearer asked for an ex parte hearing?

Mr. Dimmg: Yes, he did.

Mr. Brown: And do you recall if the Court Granted an ex parte hearing?

Mr. Dimmig: My recollection is that the Court did not grant an ex parte hearing.

Mr. Brown: Do you recall whether Mr. Poole was maintaining that he believed that there was a conflict of interest?

(EH, V1/118- 122

....

Mr. Dimmig: I believe that he was.

Mr. Brown: He was?

Mr. Dimmig: Still objecting to the Public Defender remaining as his attorney.

Mr. Brown: Now, in terms of Mr. Poole's objection, was there any ill will between the two of you at the time?

Mr. Dimmig: I certainly did not perceive any, no.

Mr. Brown: Okay. So was it your belief that this issue was related solely to the conflict issue and not indicative of other issues in the lawyer/client relationship?

Mr. Dimmig: Correct.

Mr. Brown: Ultimately did your office remain counsel for Mr. Poole?

Mr. Dimmg: Yes.

Mr. Brown: And you personally remained lead counsel for Mr. Poole?

Mr. Dimmig: Yes, I did.

Mr. Brown: As far as conversations that you had had - - conversations you had with Mr. Poole at - - up to this point and up to the point of trial, was he maintaining that someone else committed the murder?

> Mr. Dimmig: Yes.
>
> Mr. Brown: How did the prior incident at the trailer park fit in with your theory of defense in the case?
>
> Mr. Dimmig: It was all part of the explanation of why these two individuals may have been targeted and it fit into the timeline. One of the two individuals, and I cannot recall which one right now, I believe it was Mr. Lewis, perhaps, was released from custody the night of this particular homicide, and it fit a timeline of the burglary, sexual battery and robbery occurring somewhere in the vicinity of midnight. And based upon when that individual was released from custody he could have arrived back at the trailer park within that time frame.
>
> Mr. Brown: Okay. At the time of the trial would you say that the prior incident at the trailer park was a [sic] important part of your theory of defense?
>
> Mr. Dimmig: Yes.

(EH, V1/123-124).

At the Evidentiary Hearing, Mr. Dimmig was asked by Mr. Brown if the prosecution had an objection to him bringing up the prior incident involving Albert Lewis and Trevor Campbell at the time of his opening statement. Mr. Dimmig agreed that there was an objection to him doing this. (EH, V1/124-125).

> Mr. Brown: And now, I want to just address or direct you to 1859, and at Line 23. "Your Honor," –this is you speaking."
>
> "Your Honor, I would ask that we go ahead and do that right now because I cannot made a competent and effective opening statement without presenting this defense theory of the case."
>
> Does that accurately reflect or would have able - - been able to present your theory of defense without presenting the Albert Lewis, Trevor Campbell incident to the jury?
>
> Mr. Dimmig: I do not believe I would have been able to present an effective opening statement.

> Mr. Brown: So it - - so was that integrated into your theory of defense?
>
> Mr. Dimmig: Yes.
>
> Mr. Brown: Okay. Would you characterize Albert Lewis and Trevor Campbell as alternative suspects within your theory of defense?
>
> Mr. Dimmig: Yes.

(EH, V1/125-126)

Mr. Brown and Mr. Dimmig had the following discussion regarding Dawn Campbell, a witness that he called at the trial.

> Mr. Brown: Okay. What was the purpose of presenting her testimony?
>
> Mr. Dimmg: Helping establish the timeline.
>
> Mr. Brown: Which timeline?
>
> Mr. Dimmig: Well, it - - the prior arrest and then the release of Gary Burton from the county jail at the time of the homicide.
>
> Mr. Brown: The release of Gary Burton or the release of Trevor Campbell.
>
> Mr. Dimmg: I'm sorry. As I said earlier, my memory – Gary Burton – names don't stick with me very well. I know that certain individuals went down to retrieve someone after they were released from the jail.
>
> Mr. Brown: Okay.
>
> Mr. Dimmig: And looking at it now, it was Gary Burton who was asked to go down and pick up Trevor.
>
> Mr. Brown: Okay, Do you did exam – or did examine Ms. Campbell abou the prior drug raid. Correct?
>
> Mr. Dimmig: Yes.

Mr. Brown: And you did examine her about when Trevor Campbell was released from jail?

Mr. Dimmig: Yes.

Mr. Brown: Did you examine her with regard to where Trevor Campbell was at the time of the murder?

Mr. Dimmg: I believe I did, yes.

Mr. Brown: And what was the purpose of that?

Mr. Dimmig: To establish that she could not verify where he was at all times.

Mr. Brown: Okay. So outside of the questioning her about the prior incident at the mobile home and the whereabouts of Albert Lewis and Trevor Campbell was there any other purpose to her testimony?

Mr. Dimmg: Not that I can recall, no.

Mr. Brown: All right. In preparation for trial did you personally ever attempt to speak to Trevor Campbell or Albert Lewis?

Mr. Dimmig: No.

Mr. Brown: Do you know if anyone at your office ever attempted to speak to them about the Poole case.

Mr. Dimmg: I do not believe anyone did.

(EH, V1/125-129).

....

Mr. Brown: Had you decided to investigate, depose or subpoena for trial testimony Albert Lewis and Trevor Campbell, and had you learned anything relevant to Mr. Poole's case would you have withdrawn in that situation?"

(EH, V1/132)

....

Mr. Dimmig: Let me give you a fairly lengthy answer if I - - in capital cases we followed a slightly different procedure then we did in non-capital cases as it relates to withdrawal.

> In a capital case we would look carefully at whether or not the information that we acquired from a former client was acquired in any way because of the attorney/client relationship. If it did not we would stay on the capital case. So the answer to your question would be, we might have had to withdraw depending upon what those individuals said either during the investigation or deposition or testimony at trial.
>
> Mr. Brown: Okay. But you don't know what they would have said because you didn't ask them any questions.
>
> Mr. Dimmig: Correct.
>
> Mr. Brown: Why didn't you investigate, depose or subpoena any of them for trial?
>
> Mr. Dimmig: We could make our defense case without needing to present them in my opinion.
>
> Mr. Brown: That's what you believed at the time?
>
> Mr. Dimmig: Yes. I believed that we could paint the picture and present the alternative theory that the homicide occurred later in the morning than the burglary, robbery, sexual battery, and that it was one or more of those individuals that was engaged - - or let me put it this way. At least it was not Mr. Poole who was engaged in that second criminal episode later in the morning.
>
> (EH, V1/133-134).
>
> ....
>
> Mr. Brown: But how would interviewing them or deposing them have prevented you from making that same case?
>
> Mr. Dimmig: Because if we had developed evidence that clearly established that they were not I could not perpetuate a fraud upon the Court and present the theory that they were involved.
>
> (EH, V1/134-135).

The following discussion took place between Mr. Brown and Mr. Dimmig concerning another event that took place at the trailer park where the murder occurred:

Mr. Brown: Did you at some point become - - some point before trial become aware of another incident that occurred at the same trailer park as the murder a few days before the murder?

Mr. Dimmig: Yes.

Mr. Brown: All right. What do you remember about the other incident?

Mr. Dimmig: It was an incident involving narcotics. There were two individuals who were taken into custody and there were questions concerning whether or not this case - - this homicide was retaliation for that incident - - for the reporting of that incident.

Mr. Brown: All right. You said there were questions. Do you remember why there were questions about whether it was retaliation?

Mr. Dimmig: No, I don't remember specifically or how that first came to my attention - -

Mr. Brown: Okay.

Mr. Dimmig: - - and why I initially thought it.

Mr. Brown: Do you remember learning at some point that the murder victim in this case had told his mother that people in the trailer park thought that he had called the police?

Mr. Dimmig: Yes.

Mr. Brown: Okay. Is that what you were referencing when you said questions?

Mr. Dimmig: Well, yes, that is what I - - but like I say, I don't remember if I first heard that or if I heard something else first and then that later, but yes, that is what I was referencing when I said that there were questions about a retaliation.

Mr. Brown: All right. And you said that there were two people arrested at that previous incident. Were those two people Trevor Campbell and Albert Lewis?

Mr. Dimmig: That's my recollection, yes.

Mr. Brown: And do you recall whether or not a Dawn Campbell was also arrested during the incident?

Mr. Dimmig: The name does not sound familiar. I do remember that there was a third person arrested.

Mr. Brown: Okay.

Mr. Dimmig: I think I remember that, yeah.

Mr. Brown: All right. Now did you at some point before trial become aware that your office was representing or had represented Trevor Campbell and Albert Lewis on charges related to that incident?

Mr. Dimmig: Yes.

Mr. Brown: Did you become aware of that fact while your office was representing those individuals or after their - - the representation had ceased?

Mr.Dimmig: I believe I became aware of [sic] while we were still representing them.

Mr. Brown: Okay.

Mr. Dimmig: I think. I'm not 100 percent certain.

Mr. Brown: Do you remember how you became aware of the fact that you were representing those individuals?

Mr. Dimmig: It is routine practice within the homicide division of the Public Defender's Office that any name that comes up in association with a case we run a records check on them and check to see if we've ever represented that individual. I believe that's how we identified that they were clients of the Public Defender's Office.

Mr. Brown: Let me ask you a little bit more about that. Does your office had any sort of - - or did your office at the time have any sort of procedure for how to deal with representing potential witnesses when you represented a capital defendant?

Mr. Dimmig: Yes, we did.

Mr. Brown: And what was that?

Mr. Dimmig: As a general rule of thumb, if we represented a critical witness or a significant witness in a cap - - if we currently or ever in the past had represented a significant witness in a capital case we would move to withdraw from the capital client.

Mr. Brown: Okay. And what a about a situation where you currently represent a capital defendant and you learn that you've been appointed to cases involving potential witnesses in the capital defendant's case?

Mr. Dimmig: We – if our appointment to the witnesses occurs after we're already representing the capital defendant there was a policy in place to attempt to catch those at the time of first appearance and move to withdraw in the non-capital clients. Technology being different than it is now we did not always catch them at first appearance. So there was a procedure in place where we could ask newly appointed clients if they were co-defendants or if they were witnesses in other cases. And if they disclosed to us that they were we would move to withdraw from their cases at that time.

Mr. Brown: Was priority given to attempting to keep the capital cases - -

Mr. Dimmig: Yes.

Mr. Brown: - - where a conflict had not yet become ripe?

Mr. Dimmig: Yes.

Mr. Brown: Any why were - - why - - what was the purpose of those procedures?

Mr. Dimmig: The procedure to keep - - primarily to keep the capital case or - -

Mr. Brown: No. More generally the procedure to try to recognize witnesses in capital cases before trial and withdraw from their cases.

Mr. Dimmig: To avoid ethical conflicts of interest.

(EH, V1/108-113)

....

Mr. Brown: Okay. Do you know in this case whether you withdrew from anyone's case?

Mr. Dimmig: My - - while I have no concrete recollection, my belief is that we did withdraw from the other two individuals.

Mr. Brown: Okay.

Mr. Dimmig: We kept Mr. Poole obviously.

(EH, V1/113).

The State alleges in its closing that the potential conflict alleged by the Defendant appears in the record on appeal and could have been raised, if at all, on direct appeal. The State asserts that the claim is procedurally barred as a matter that could have, and, should have been raised on direct appeal. The Court believes the State's argument has merit, but it also finds that the testimony from the evidentiary hearing makes it clear that the Defendant's claim has no merit.

The testimony of Mr. Dimmig presented above clearly demonstrates that they investigated and found no conflict of interest that would interfere with their representation of Mr. Poole. Furthermore, the evidence presented leads this Court to conclude that Mr. Poole's defense team reasonably believed that it was able to provide him with competent and diligent representation. Rule 4-1.7 of the Florida Rules of Professional Conduct. A special counsel, Larry Shearer, was appointed by Judge Roberts to look into the matter. Judge Roberts found that the Public Defender's Office should continue to represent the Defendant, and that ruling was later affirmed by Judge Durrance. (EH, V2/229). Mr Dimmig: clearly made a reasonable tactical decision not to depose Cambell or Lewis, out of concern that there was a risk that information could be developed that would invalidate the timeline and excluded them as possible perpetrators of the homicide. The Court finds that the Defendant has not shown any deficiency by counsel with regard to Claim 1-3 of his Motion. Additionally, the Court finds that the Defendant had not presented evidence that would support a conclusion that the results of the proceedings might have been different but for some deficiency by counsel with regard to a claim of conflict of interest. Claim 1-3 of the Defendant's Motion is denied.

1-4: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE JUROR WILSON FOR CAUSE, AFTER JUROR WILSON INDICATED THAT HE WOULD NOT HOLD THE STATE TO THE BURDEN OF PROOF AND WOULD NOT PRESUME MR. POOLE INNOCENT UNLESS PROVEN GUILTY, THEREBY VIOLATING MR. POOLE'S RIGHT TO TRIAL BY AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDEMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Defendant alleges, "Trial counsel was ineffective for failing to strike Juror Wilson from the jury panel in violation of Mr. Poole's Sixth Amendment right to trial by jury. Mr. Poole was prejudiced by trial counsel's deficient performance, and this Court should grant relief."

In his Motion, the Defendant includes multiple exchanges that took place between Mr. Dimmig and Mr. Wilson during voir dire, and he has emphasized some of the language:

> **Mr. Dimmig**: So he is presumed innocent and to overcome that, Mr. Wilson, where does the burden of proof lie?
>
> **Prospective Juror Wilson:** I believe it belongs with both sides
>
> [...]
>
> **Mr. Dimmig:** If he starts presumed innocent, he is an innocent man. And if the state does not convince you to the exclusion of and beyond all reasonable doubt that he is guilty, they don't carry their burden of proof, what must he still be?
>
> **Prospective Juror Pearce**: Innocent.
>
> [...]

Mr. Dimmig: Okay. Mr. Wilson, how about you, mentally you can say that's the way things work, right?

Prospective Juror Wilson: Like I said, I have never done this, so I can't really tell you. But I would assume it goes in my mind right, my gut, if my gut said it was wrong, but I don't know. I have never been here, you know.

Mr. Dimmig: Okay, Well, let me ask you this. Does that made sense to you, if you start with the presumption of innocence, you told us you accept that and you believe that in your head you think that's right, if you start with the presumption of innocence, right?

Prospective Juror Wilson: Yeah.

Mr. Dimmig: And in your head you understand the burden of proof lies with state?

Prospective Juror Wilson: Correct.

Mr. Dimmig: So if you see how those two come together?

Prospective Juror Wilson: (nods head.)

Mr. Dimmig: If we start with the presumption of innocence and the state doesn't prove beyond a reasonable doubt and to the exclusion of all reasonable doubt, where you're left is innocence? I mean mentally does that make sense to you?

Prospective Juror Wilson: Yeah, it looks good that way. But then, you know, I have not gotten there yet.

Mr. Dimmig: I'm not talking about where you're going to be at the end.

Prospective Juror Wilson: Oh.

Mr. Dimmig: I'm just talking about concepts.

Prospective Juror Wilson: Yeah. The concepts – I mean every concept is great. There is [sic] always laws. There is always good points, bad points. But I can't say, I have not been there yet.

ROA, Volume XV, Pgs. 1607-1610.

Mr. Dimmig: That burden lies with the state. They have to go to get all the way there, and the way you judge whether or not they get all the way there is by looking at everything, the direction, the

physical evidence and the cross-examination. And in some cases, the defense case, if you the defense [sic] calls witnesses. You look at all of it. But what you're deciding is, did the state ever get there, not did the defense prove innocence. Does that make sense? [...]

Mr. Dimmig: Okay. Mr. Wilson, how do you feel about that?

Prospective Juror Wilson: Well, if I weigh everything and I feel he is guilty, then he is guilty. But if he is innocent, then he will be let free.

Mr. Dimmig: And what if you just don't know?

Prospective Juror Wilson: I think that somehow my God will let me know in my mind or in my gut, or wherever it comes from, but I will know you know before the end of this trial. **But I think that there won't be a doubt one way or the other.**

ROA, Volume XV, Pgs. 1613-1618 (emphasis added).

Mr. Dimmig: [...] And let's see, you have heard a circumstantial case. And when it is all done, you say I can put these circumstances together this way. A perfectly reasonable way of putting them together and that means they're guilty. But I can also put them together this way. I can look at it differently, but the same exact facts and that means he didn't do it, that means he is innocent. Which way do you go?

[...]

Prospective Juror Wilson: Whichever – if he is proven more innocent, that's the way I would go. But if he is proven guilty, then he is guilty.

Mr. Dimmig: Okay. So you're going to weigh them if I'm understanding.

Prospective Juror Wilson: (Nods head.)

Mr. Dimmig: This explanation is more reasonable to me that [sic] this one, so I'm going with this one. Is that what you're saying?

Prospective Juror Wilson: Yes.

Mr. Dimmig: How does that tie in with the presumption of innocence?

Prospective Juror Wilson: Well, innocence is middle ground to me. And I guess I deal with facts. And the more facts that I get and information that I get, the more weight it would carry whether it was good or bad. I think I have a good sense, you know, judging whether something is good or bad. I don't know any other way of putting it, but I guess I use my common sense.

ROA, Volume XV, Pgs. 1622-1623.

[...]

Mr. Dimmig: Okay. Mr. Wilson, I believe, and correct me if I'm wrong here, said that he would sort of weigh them. He would take the construction that indicates guilt and the construction which indicates innocence and whichever one he thought was more likely, is that right?

Prospective Juror Wilson: Right.

ROA, Volume XV, Pg. 1631.

[...]

Mr. Dimmig: But if you start with the presumption of innocence and the burden is on the State or Florida to prove to the exclusion of and beyond all reasonable doubt that the defendant is the one who did it, if there is a reasonable construction of circumstances that says he is innocent, what have you got there?

Prospective Juror Wilson: He is innocent.

[...]

Mr. Dimmig: Mr. Wilson.

Prospective Juror Wilson: Yes, sir.

Mr. Dimmig: Okay. Now, we have come to a point different from what you first indicated. I think haven't we?

Prospective Juror Wilson: Yes. You have shown me a little bit different way of looking at it. And I mean, if that's the way it is, then it would have to be there wouldn't be any really judging, because the facts would prove out that he would be innocent.

[...]

> **Mr. Dimmig:** For purposes of discussion, we will put that down here (indicating) where we have to get is up here, proof to the exclusion of and beyond all reasonable doubt. If you don't have proof that to the exclusion of and beyond a reasonable doubt, if you end up here in here somewhere (indicating). What is this in here? This is when you're putting on the evidence right?
>
> [...]
>
> **Mr. Dimmig:** You know, you start with the presumption of innocence. And some pieces of evidence comes in and you say, well, that's a look little bad, that looks a little worse, but you haven't gotten all the way up here yet to proof beyond and to the exclusion of all reasonable doubt. What is all of this in here in legal terms?
>
> **Prospective Juror Pearce:** It is doubt.
>
> **Mr. Dimmig:** What kind of doubt is it?
>
> **Prospective Juror Pearce:** It is reasonable doubt.
>
> [...]
>
> **Mr. Dimmig:** Mr. Wilson, how about you, do you understand it?
>
> **Prospective Juror Wilson:** I'm not going to say gut anymore. I don't think, I believe it is a good way of looking at it. And once again, I will strive – I have not come to this point and I can't tell you one hundred percent that I would think that way or with my gut, but I would, I mean, love to believe that I would weigh everything that comes in. And if there is reasonable doubt, then I have to vote innocent.
>
> ROA, Volume XV, Pg. 1633-34.

At the evidentiary hearing, the defense asked Mr. Dimmig if he thought his questioning had corrected the misconception that Mr. Wilson had regarding the burden of proof. Mr. Dimmig responded, "Yes. I thought that he understood what the burden of proof was, that his difficulty was in trying - - he was in - - my perception was that the was interpreting the questions as saying right then during voir dire did he have a reasonable doubt or didn't he have a reasonable doubt. He was

trying to project forward in the case instead of addressing the issue at - - relevant to the time we were doing the voir dire." (EH, V1/145).

Mr. Dimmig was asked about why he did not do a cause challenge regarding keeping Mr. Wilson on the jury. He responded, "I did not think his responses rose to the level where a challenge for cause would be granted. So I believe his understanding was adequate to get past a cause challenge and then it became a balancing question of him versus the other jurors that were available." (EH, V1/149 – 150).

The Court does not find that counsel's performance fell below an objective standard of reasonableness with regard to not challenging Juror Wilson For Cause. He actively questioned Mr. Wilson regarding his ability to properly consider the burden of proof and the presumption of innocence, and he made a reasoned decision that any attempt to exclude Mr. Wilson for cause would have been rejected by the Court on the basis that Mr. Wilson's answers indicated that he would follow the law. Additionally, the Court does not find that the Defendant can show any prejudice. To establish prejudice in this matter, the Defendant would have to show that an actually biased juror served on the jury. See Carratelli v. State. 961 So. 2d 312 (Fla. 2007). The Defendant did not present any evidence showing any actual bias by juror Wilson. The State's case against the Defendant was a strong one, and there is no reasonable showing that the results of the proceedings might have been different but for some deficiency of counsel with regard to Juror Wilson. Subclaim 1-4 of the Defendant's Motion is denied.

1-5: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND MOVE FOR MISTRIAL ON MULTIPLE OCCASIONS WHEN PREJUDICIAL HEARSAY TESTIMONY AND

OTHER INADMISSIBLE TESTIMONY AND EVIDENCE WAS ELICITED BY THE STATE, ANDTHIS HEARSAY EVIDENCE VIOLATED MR. POOLE'S SIXTH AMENDMENT CONFRONTATION RIGHT UNDER *CRAWFORD.*

The Defendant alleges, "Trial counsel failed on multiple occasions to object to improper hearsay evidence. This deficient performance prejudiced Mr. Poole, and this Court should grant Mr. Poole relief."

The First instance raised by the Defendant involves some testimony from Ms. Arlt., a crime scene technician for the Lakeland Police Department. In his Motion, the Defendant alleges, "[t]he State's theory of the case included an assertion that three video game systems were stolen during the crime, that these video games had the victims' blood on them, and that Mr. Poole sold the video games to Ventura Rico in the presence of Melissa Nixon." The following testimony came from Ms. Arlt when she was asked where the video game systems were seized from:

> **Ms. Arlt:** These items were seized from – an officer collect the from the residents of the Twelve Oaks Moblie [sic] Home Park across the street from Mr. Poole's home.
>
> **Mr. Aguero:** Why were you taking pictures of them at this point.
>
> **Ms. Arit:** They had blood on them, and that was obvious to the people that phoned in that they had these games for evidence.
>
> ROA, Vol. XVII, Pg. 2107.

The Defendant alleges in his Motion, "This exchange contained multiple instances of inadmissible prejudicial hearsay. Without calling the people who actually witnessed these events, the State elicited where the video game systems were recovered, that his location was acress the

street from the Mr. Poole's residence, that someone had phoned in that they had this evidence, and that the video games were obviously covered in blood."

At the evidentiary hearing, Mr. Dimmig was asked about a series of video games that Mr. Poole was alleged to have taken from the crime scene and sold to Ventura Rico. Mr. Dimmig agreed that there was DNA evidence on the video games that was identified by Dr. Robyn Ragsdale of FDLE. Mr. Dimmig said he did not believe there was any question that there was blood on the video games and it would be coming into evidence. Mr. Dimmig acknowledged that his recollection was that Ms. Arlt had been a crime scene technician for a long time and had taken the photos herself. He agreed that he was aware of her qualifications. He agreed that she probably could have been qualified as an expert at recognizing blood on the evidence. The following exchange took place between the Prosecutor, Victoria Avalon, Esq., and Mr. Dimming about the matter:

> Ms. Avalon – And did you particularly want Mr. Aguero to exhaustively qualify Ms. Arlt as being an expert witness as to the identification of a substance similar or looking like blood?
>
> Mr. Dimmig: No, I didn't. I didn't want to very aggressively challenge things that I believed were going to be coming into evidence on counts that I anticipated we would likely end up having to concede.

(EH, V2/244).

Ms. Avalon and Mr. Dimmig also discussed the fact that Ms. Arlt mentioned that the video games were collected from a house adjacent to Mr. Poole's house. Mr. Dimmig acknowledged that he thought at least one witness gave the address of Mr. Poole's house, and he was shown a portion of the trial transcript on page 2526 where Pamela Johnson gave the Defendant's address as 3328 North Florida Avenue. Mr. Dimmig also agreed that Mr. Rico described where he lived.

Mr. Dimmig agreed that the information provided by Ms. Arlt came in later from other witnesses and there was no harm from his perspective. (EH, V2/246).

The Second instance identified by the Defendant in his Motion came during the testimony of State Witness Karen Gaugh, who was called to testify that her boyfriend's daughter told her that, "One of her friends said that this black man came to her house with a video system with blood on it." (ROA, Vol. XIX, Pg. 2334). The Defendant asserts in his Motion, "[a]t this point, the jury had now heard testimony from two separate witnesses about a "black guy" selling bloody video games "across the street from Mr. Poole's home," without having heard from a single witness who actually had any personal knowledge of the events." In the State's closing argument, the State alleges that the statement of Ms. Gaugh "was relevant to show how the police got involved and who they went to next. That caused the police to go to Mr. Rico's house. The fact these games were recovered and had blood on them was not something the defense was disputing. (TR. 248)."

The third instance raised by the Defendant in his Motion, concerns testimony from Mary Beth Byrie, who was tendered as an expert witness by the State in the field of footware examination. She testified that a shoe impression on a vinyl notebook at the crime scene was a conclusive match to a shoe that was recovered from the home of the Defendant. She further testified, "Whenever an identification is made, we have to have another independent analyst review the work and confirm or not confirm the identification. In this case the other analyst did confirm the identification." (ROA, Vol. XX, Pg. 2512).

The following discussion took place at the evidentiary hearing regarding a confrontation clause objection under Crawford:

Ms. Avalon: Okay. Now, let's say that you actually raised a confrontation clause objection to this or whatever under Crawford. You potentially could have. Correct?

Mr. Dimmig: I believe I could have, yes.

Ms. Avalon: And could then Mr. Aguero have produced the supervising analyst?

Mr. Dimmig: Assuming she was still available, yes, he could have.

Ms. Avalon: And then you've got two analysts testifying to these results. Do you particularly want that?

Mr. Dimmig: No.

Ms. Avalon: Beating that point into the ground?

Mr. Dimmig: Well, again, this was not a point we were seriously contesting.

Ms. Avalon: Right. It's one of those things - - Let me ask you this. Do you - - do you want to fight about things just to fight about them?

Mr. Dimmig: No.

Ms. Avalon: You try to save the fight for what matters.

Mr. Dimmg: I think that's critical to maintain credibility with the jury.

Ms. Avalon: And you were considering that as things were rolling in front of you. Right?

Mr. Dimmig: Yes.

Ms. Avalon: Including this point. Right?

Mr. Dimmig: Yes.

(EH. V2/249-250).

The Fourth instance raised by the Defendant involves testimony given by Melissa Nixon. The Defendant notes that the parties stipulated that a video tape of the deposition of Ms. Nixon could be played to the jury. Ms. Nixon identified Mr. Poole from a photopack as the person she

witnessed sell video game systems to her friend Ventutra Rico. Ms. Nixon also testified," My son was look through the bag to see which one he wanted. But then he found one, he said blood was on it, and he threw it on the ground." (ROA Vol. XX, Pg. 2597).

The Fifth and Sixth instances identified by the Defendant concerned hearsay that came out during trial testimony from Detective Bradley Grice, who was the lead Detective in the case. The Defendant alleges the defense had presented a theory of defense that revolved around Trevor Campbell and/or Albert Lewis committing the crime. The Defendant alleges, " During his direct examination, the prosecutor asked Detective Grice, "Did you find out where Mr. Lewis was up until about 3:00 or 4:00 in the morning on October 13th of 2001?" (ROA, Vol. XX, Pg. 2649). The Defendant asserts, "This question clearly called for a hearsay response, which Detective Grice provided, stating that Mr. Lewis had been in the Polk County Jail. This was clearly hearsay evidence even though the actual hearsay statement was not repeated, because the statement gave an inescapable inference that a non-testifying witness had provided Detective Grice information which negated Mr. Poole's theory of defense." The State asserts that the Detective's statements were not testimonial in nature and relayed easily verified background facts. The State further notes that Mr. Dimmig during cross-examination of Detective Grice also elicited that Campbell was released from jail on Friday night October 12, and Gary Burton was the person that was asked to pick him up in Bartow. (V19/2382).

The State also alleges, "[i]n addition, in cross-examining victim (L.W.), defense counsel asked (L.W.) if detectives had told her that Lewis has only been released from jail at 4:00 in the morning." (V19/2447). Counsel was not ineffective for failing to lodge an objection where Poole has not cast any doubt on when Lewis was actually released from jail." Mr. Dimmig was also

aware that the State could have called the custodian of the jail as a witness to introduce the information if it was necessary.

The next instance concerned a photopack that had been administered to Ventura Rico. The prosecutor asked Detective Grice about the photopack and he indicated that Mr. Rico had selected two photographs that looked like this person that sold him the video games, and that one of those photos was Mr. Poole. The Defendant argues that the statement by Mr. Rico did not fall into the exception for the hearsay rule involving identification. The State points out that Mr. Rico was called as a witness by the State and defense counsel cross-examined him about his out of court identification of Poole. Mr. Rico acknowledged that he was shown 15 pictures and picked out two of them. See ROA, V18/2228. Because Mr. Rico testified at trial and was subject to cross-examination there is no confrontation clause violation.

The Defendant has not shown that counsel's performance fell below an objective standard of reasonableness in not objecting to the hearsay instances he sets forth in his Motion. Defense counsel was aware that other witnesses would be providing the same information, had no dispute with the information elicited, or thought it appropriate not to give even more emphasis to the information by having the State call another witness to support it. Additionally, the Court finds no reasonable basis to conclude that the outcome of the proceedings might have been different but for some deficiency of counsel with regard to the hearsay incidents set forth in Subclaim 1-5 of the Defendant's Motion. Subclaim 1-5 of the Defendant's Motion is denied.

The Court having denied subclaims 1-1, 1-2, 1-3, 1-4, and 1-5, denies Claim 1 of the Defendant's Motion. Given the strong evidence presented by the State, there is no reasonable basis

to conclude that the result of the proceedings could have turned out differently but for any deficiency with regard to any or all of the subclaims under Claim 1. Claim 1 of the Defendants Motion is denied.

CLAIM 2

MARK POOLE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MARK POOLE'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITEDSTATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION AND UNDER FLORIDA COMMON LAW.

2-1: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FULLY INVESTIGATE AND PRESENT A COMPLETE MITIGATION CASE.

The Defendant alleges, "Trial counsel was ineffective for failing to fully investigate and present mitigating evidence. This deficient performance prejudiced Mr. Poole, and he should be granted a new sentencing hearing."

2-1.1: Failure To Fully Investigate and Present Evidence of Mr. Poole's Upbringing and Familial History.

The Defendant alleges, "Trial counsel's was deficient in failing to fully investigate Mr. Poole's upbringing and familial history. This deficient performance prejudiced Mr. Poole and he should be granted relief."

2-1.2: Trial Counsel Was Ineffective for Failing to Present Testimony of a Neuropsychologist, or Other Qualified Expert, Regarding Mr. Poole's Documented Brain Damage And Dementia.

The Defendant alleges, " Trial counsel's was deficient in failing to present the testimony of a neuropsychologist to the jury. This deficient performance prejudiced Mr. Poole as he would have likely been given a life sentence if this crucial mitigating evidence had been presented to the jury."

2-1.3: Trial Counsel was Ineffective for Failing to Have a PET Scan of Mr. Poole Conducted, and for Failing to Present the Results of the PET Scan to Show the Highly Mitigating Fact That Mr. Poole Suffered From Brain Damage Which Seriously Disabled His Ability to Conform His Behavior To The Requirements of Law.

The Defendant alleges, " In addition to being ineffective for failing to call a neuropsychologist to testify before the sentencing jury regarding Mr. Poole's brain damage and dementia, trial counsel was additionally ineffective for failing to have a PET brain scan conducted, and to present the results of such a scan to the sentencing jury. Trial counsel had a duty to investigate and present a complete mitigation case."

2-2: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND MOVE FOR MISTRIAL WHEN THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT AND MISTATED THE LAW ON SEVERAL OCCASIONS DURING HIS PENALTY PHASE CLOSING ARGUMENT.

The Defendant alleges, "The prosecutor in this case made several statements during his penalty phase closing argument that constituted prosecutorial misconduct and misstated the law regarding aggravating circumstances and the death penalty in Florida. Trial counsel failed to object to all but one of these statements. These failures, individually and collectively, constituted deficient performance by trial counsel, and prejudiced Mr. Poole in this case."

2-3: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO AND MOVE TO EXCLUDE IMPROPER VICTIM IMPACT TESTIMONY.

The Defendant alleges, "Trial counsel in this case was ineffective for not only failing to object to improper victim impact evidence, but to actually stipulating as to its admissibility."

Claim 2 was not considered at the evidentiary hearing, because the Court had already determined that Claim 3 would be **GRANTED** to the extent that the Defendant was entitled to a new penalty phase trial in the Court's "Interim Order On Motion To Vacate Judgment Of

Conviction And Sentence," filed on March 31, 2017. The Court makes no determination at this time regarding Claim 2 and the subclaims raised in Claim 2.

CLAIM 3

IN LIGHT OF *HURST V. FLORIDA, HURST V. STATE, RING, AND APPRENDI*, MR. POOLE'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTII AMENDEMENTS [SIC] OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND ARTICLE I, SECTIONS 15, 16, AND 22 OF THE FLORIDA CONSTITUTION.

3-1: MR. POOLE'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT IS UNCONSTITUTIONAL BASED ON *HURST V. FLORIDA* AND *HURST V STATE*, PRIOR PRECEDENT AND SUBSEQUENT DEVELOPMENTS BECAUSE MR. POOLE WAS DENIED HIS RIGHT TO A JURY TRIAL ON THE FACTS THAT LED TO HIS DEATH SENTENCE.

3-2: THIS COURT SHOULD VACATE MR. POOLE'S DEATH SENTENCE BECAUSE, IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*, AND SUBSEQUENT CASES, MR. POOLE'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE HIS DEATH SENTENCE WAS CONTRARY TO EVOLVING STANDARDS OF DECENCY AND IS ARBITRARY AND CAPRICIOUS.

3-3: THIS COURT SHOULD VACATE MR. POOLE'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED MR. POOLE TO THE DEATH [sic] WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

3-4: IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*, MR. POOLE'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT WAS OBTAINED IN VIOLATION OF THE FLORIDA CONSTITUTION.

3-5: *HURST V. FLORIDA* AND *HURST V. STATE* APPLY RETROACTIVELY IN MR. POOLE'S CASE.

3-6: THE *HURST V. FLORIDA* AND *HURST V. STATE* ERROR IN MR. POOLE'S CASE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

In the Court's "Interim Order On Motion to Vacate Judgment of Conviction And Sentence," filed on March 31, 2017, the Court ruled," Claim 3 of the 'Defendant's Amended Claim 3 to Vacate Judgment of Conviction and Sentence is **GRANTED** to the extent that he is entitled to a new penalty phase trial. The Court adopts by reference this ruling in the "Interim Order On Motion to Vacate Judgment of Conviction And Sentence."

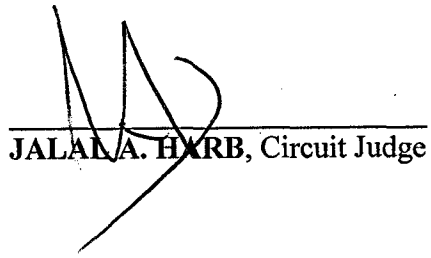
CLAIM 4

CUMULATIVE ERROR

The Defendant alleges, "[i]f not individually, the sum total of all of the aforementioned constitutional errors warrants relief in this case." The Court considered this claim with regard to the various errors alleged by the Defendant with regard to the Guilt Phase of the Trial. The Court did not find that counsel's performance fell below an objective standard of reasonableness with regard to Claim 1 and any of the subclaims made by the Defendant with regard to Claim 1 of his Motion. Any deficiency by counsel with regard to any of the claims and subsclaims asserted by the Defendant when combined could not reasonably be viewed as affecting the fairness and reliability of the proceedings and the outcome of the trial. Claim 4 of the Defendant's Amended Motion is denied with respect to the Guilt phase claims. The Court makes no determination at this time regarding cumulative error and penalty phase claims raised by the Defendant.

Therefore, it is **ORDERED AND ADJUDGED** that the Defendant's Motion To Vacate Judgment and Sentence is **DENIED** with respect to his Claims that he is entitled to a new guilt phase trial. It is further, **ORDERED AND ADJUDGED** that the the Defendant's Motion To Vacate Judgment and Sentence is **GRANTED** to the extent that he is entitled to a new penalty phase trial based on Claim 3 of his Motion To Vacate Judgment and Sentence. The Defendant has thirty (30) days to appeal this Order to the Florida Supreme Court.

DONE AND ORDERED in Bartow, Polk County, Florida this 9th day of January, 2018.



JALAL A. HARB, Circuit Judge

cc:

Mark Poole, #H12548
Union Correctional Institution
25636 NE SR-16
P.O. Box 1000
Raiford, FL 32083

Gregory Brown, Esq.
David Dixon Hendry, Esq.
James L. Driscoll, Jr., Esq
Capital Collateral Regional Counsel Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637

Scott Browne, Esq.
Assistant Attorney General
Concourse Center 4
3507 E. Frontage Rd., Suite 200
Tampa, FL 33607-7013

Victoria Avalon, Esq.
State Attorney's Office
225 North Broadway Avenue
Drawer SA, P.O. Box 9000
Bartow, FL 33831-9000

I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of Polk County, Florida, and that I have furnished copies of this order and its attachments to the above-listed on this 10 day of January, 2018.

CLERK OF THE CIRCUIT COURT

By: _____
Deputy Clerk