IN THE SUPREME COURT OF FLORIDA

TINA LASONYA BROWN,

Appellant,

CASE NO. SC19-704
L.T. No. 2010-CF-001608A

v.

STATE OF FLORIDA,

DEATH PENALTY CASE

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ASHLEY MOODY
ATTORNEY GENERAL

MICHAEL T. KENNETT
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 177008
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3595 (tel)
(850) 487-0997 (fax)
capapp@myfloridalegal.com
Michael.Kennett@myfloridalegal.com
COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant challenges the "Order Denying Defendant's Third Amended Motion to Vacate Judgments of Conviction and Sentence" rendered by the Circuit Court of the First Judicial Circuit, in and for Escambia County, Florida.

Previously, this Court upheld Appellant's conviction for first-degree murder and her sentence of death. *See Brown v. State*, 143 So.3d 392 (Fla. 2014). As reported in this Court's decision on the direct appeal, Appellant and her co-defendants lured the victim into Appellant's home, tased and tortured the victim, drove the victim to a remote location, beat the victim again, doused the victim in gasoline, and then burned the victim alive. *See id.* at 395-96. The victim initially survived, identified her killers, and subsequently succumbed to her injuries while in a hospital bed. *Id*. at 396-97.

Citations to the record in this brief will be designated as follows: references to the direct appeal record are referred to by "R," followed by the page number; references to the trial transcript are referred to by "T," followed by the page number; and Brown's Initial Brief is referred to by "IB," followed by the page number.

STATEMENT OF THE CASE AND FACTS

The Victim

Audreanna Zimmerman

Audreanna Zimmerman is the victim in this case. In March 2010, Ms. Zimmerman lived in a mobile home park in Escambia County, Florida. *See Brown*, 143 So.3d at 395. On March 24, 2010, Ms. Zimmerman was lured into Appellant's trailer, tased, beaten, bludgeoned with a crowbar, tortured, driven to a remote location in Appellant's car, beaten again, doused with gasoline, and lit on fire. *Id.* at 395-97; *see also* R-5312. Ms. Zimmerman "lived long enough to tell persons [that Tina Brown and Heather Lee] committed the crime." R-5312; *see also Brown*, 143 So.3d at 396-97. On April 9, 2010, Ms. Zimmerman succumbed to the injuries that she received on March 24, 2010, and died. *Id*. The cause of Ms. Zimmerman's death was "multiple thermal injuries." *Id*. at 397. The manner of death was homicide. *Id*.

The Attackers

Tina Brown

Tina Brown is the Appellant in this case. In March 2010, Appellant lived in the same mobile home park as Ms. Zimmerman. *See Brown*, 143 So.3d at 395. On June 21, 2012, a jury convicted Appellant of the first-degree murder for the killing

of Ms. Zimmerman. *Id*. at 397. On June 26, 2012, the jury "recommended a death sentence by a unanimous vote." *Id*. at 400. On September 28, 2012, the trial court sentenced Appellant to death for the murder of Ms. Zimmerman. *Id.*

Britnee Miller

Britnee Miller is Appellant's daughter and was 16 years old in March 2010. *See Brown*, 143 So.3d at 395. Ms. Miller also lived in the same mobile home park as Ms. Zimmerman. *See id*. Ms. Miller is currently serving a life sentence as well as a 50-year sentence for the first-degree murder and kidnapping of Ms. Zimmerman. *See* http://www.dc.state.fl.us.

Heather Lee

Heather Lee lived in the same mobile home park as Ms. Zimmerman and Appellant. *See Brown*, 143 So.3d at 395. Pursuant to a plea agreement, Ms. Lee is currently serving a 25-year sentence for the second-degree murder of Ms. Zimmerman. *See* R-2787.

Mallory Azriel

At the time of the murder, Ms. Azriel was a 13-year-old friend of Appellant's daughter, Britnee Miller. *See Brown*, 143 So.3d at 395. Prior to the attack, Ms. Miller told Ms. Azriel "we're fixing to kill Audreanna." *Id*. Ms. Azriel "was present when the attack of the victim first began and later helped dispose of

evidence of the crime." R-5225. At trial, Ms. Lee testified that Ms. Azriel "did not get in the vehicle and was not present in the woods." R-5237. But in a recorded statement, Ms. Lee indicated that Ms. Azriel was in the car and was also at the wooded crime scene. R-5238.

Individuals to Whom Appellant Confessed

Corie Doyle

Ms. Doyle "was a fellow inmate of [Appellant's] at the Escambia County Jail after [Appellant's] arrest in this case." R-5228. At the trial, Ms. Doyle testified "that early one morning [Appellant] confessed to her the details of [Appellant's] participation in the murder." R-5228.

Pamela Valley

At one point in time, Ms. Valley was a close friend of Appellant's. R-5226. At the trial Ms. Valley testified that, after the March 2010 attack: (1) Appellant confessed her involvement in the murder; and (2) Appellant asked Ms. Valley to "finish off" the victim while the victim was still in the hospital. R-5226.

Other Individuals

Raygine Robinson

Ms. Robinson is the daughter of Pamela Valley. R-5226.

James Ronald Cook

Mr. Cook is an ex-husband of Appellant. R-5221.

Lilly Ramos

Ms. Ramos is Appellant's mother. R-2880, 5281-82.

Willie Coleman, Sr.

Willie Coleman, Sr. is Appellant's father. R-2880.

Willie Coleman, Jr.

Willie Coleman, Jr. is Appellant's brother. R-5281-82.

Gerald Coleman

Mr. Coleman is Appellant's uncle. R-2880, 5281-82.

Trina Bell

Ms. Bell is Appellant's cousin. R-5282-83.

Gregory Miller, Sr.

Mr. Miller is the father of Appellant's three children. R-2897, 5282-83.

Jennifer Malone

Ms. Malone is "an old friend" of Appellant. R-2894, 5282-83.

Mary Lewis

Ms. Lewis owned a restaurant in Danville, Illinois, where Appellant worked during the mid-2000s. R-2875.

Catherine Booker

Ms. Booker "is the secretary for the landlord of the trailer park where [Appellant], her co-defendants, and the victim lived." R-5221.

Darren Lee

Mr. Lee is the husband of Heather Lee. R-2788-89, 2801.

Terrance Woods

Mr. Woods grew up "in the same neighborhood" as Ms. Lee. R-3118. According to Mr. Lee, Mr. Woods "frequently" visited Mr. and Mrs. Lee at their trailer. R-2802.

Wendy Moye

Ms. Moye testified at trial that "Ms. Lee told her directly that she was the person who poured the gas and lit the victim on fire." R-5224. This statement was considered as impeachment evidence, not substantive evidence. R-5260.

Nicole Henderson

Ms. Henderson is currently serving a prison sentence at Lowell Correctional Institution Annex. R-2816. Ms. Henderson knows Heather Lee "from in the streets" in Pensacola. R-2817. Additionally, she has been incarcerated in the same institutions as Ms. Lee on more than one occasion. R-2818-20. Her current release date is in 2046. *See* http://www.dc.state.fl.us.

Shayla Edmonson

While incarcerated at Homestead Correctional Institution, Ms. Edmonson participated in a Bible study class with Ms. Lee called Hannah's Gift. R-2837.

Jessica Swindle

While incarcerated at Homestead Correctional Institution, Ms. Swindle participated in a Bible study class with Ms. Lee called Hannah's Gift. R-2811-12.

Tajiri Jabali

Ms. Jabali is currently serving a prison sentence at Lowell Correctional Institution. R-2825. Ms. Jabali is a former girlfriend of Heather Lee. R-2791. The two women were "in a relationship" while imprisoned at Homestead Correctional Institution. R-2791-92, 2825. Her current release date is in August 2020. *See* http://www.dc.state.fl.us.

The Relationships at the Time of the Murder

Appellant "obtained drugs by engaging in sex for drugs with Heather Lee's husband," Darren Lee. *Brown*, 143 So.3d at 399.

The victim, Appellant, Ms. Miller, and Ms. Lee "were initially good friends, but their relationships—particularly between Miller, [Appellant], and Zimmerman—were volatile and often escalated to violence." *Brown*, 143 So.3d at 395. Appellant, Ms. Miller, and Ms. Zimmerman "had a mercurial relationship

that frequently involved fights and occasionally let to physical violence." *Id*. at 402-03.

Ms. Zimmerman was "sexually involved" with the boyfriend of Britnee Miller. *See Brown*, 143 So.3d at 395. According to testimony at the evidentiary hearing, Ms. Zimmerman was also sexually involved with Darren Lee, the husband of Heather Lee. R-2780, 2803.

The Prior Accusations

Prior to March 24, 2010, Appellant accused Ms. Zimmerman of slashing Appellant's tires. *See Brown*, 143 So.3d at 395. And Ms. Zimmerman accused Appellant of "[(1)] shattering a window in her car, [(2)] having her boyfriend arrested, and [(3)] reporting to the Florida Department of Children and Families that she was providing inadequate care to her children." *Id*.

Prior Violent Incident

After discovering that Ms. Zimmerman was "sexually involved" with her boyfriend, Britnee Miller "attempted to strike" Ms. Zimmerman. *Brown*, 143 So.3d at 395. In order to defend herself, Ms. Zimmerman "attempt[ed] to disable Miller with a stun gun." *Id*.

Appellant's Motive to Kill Zimmerman

Ms. Lee informed Appellant that Ms. Zimmerman used a stun gun on Ms.

Miller. *See Brown*, 143 So.3d at 395. Appellant responded that she was "going to get" Ms. Zimmerman. *Id*. Additionally, Appellant told Ms. Miller "don't worry, I'll take care of it." *Id*. at 403.

The Plan to Kill Ms. Zimmerman

"Several days [after the stun gun incident between Ms. Zimmerman and Ms. Miller], on March 24, 2010, [Appellant] invited Zimmerman to her home under the guise of rekindling their friendship." *Brown*, 143 So.3d at 395. Appellant "lured Zimmerman into [Appellant's] home under false pretenses with the express intent to kill [Zimmerman]." *Id*. at 403.

"Before Zimmerman arrived, [Appellant], Miller, Lee, and Miller's thirteen-year-old friend, were inside the trailer. [Appellant] and Lee were in the kitchen, where Lee instructed [Appellant] on the proper use of a stun gun. Miller then pulled her friend aside and told her, 'we're fixing to kill Audreanna [Zimmerman].'" *Brown*, 143 So.3d at 395; *see also id.* at 403 ("…Miller stated [that] several minutes before Zimmerman entered the trailer that they—Lee, Miller, and [Appellant]—were going to kill [Zimmerman]. Before Zimmerman arrived, [Appellant] asked Lee to show [Appellant] the proper method of using a stun gun.").

The Victim's Arrival to Appellant's Trailer

"Shortly after 9 p.m., Zimmerman entered [Appellant's] trailer." *Brown*, 143 So.3d at 395.

The Initial Beating in Appellant's Trailer

"[Appellant] waited several minutes and then used the stun gun on Zimmerman multiple times. When Zimmerman lost muscular control and fell to the floor, [Appellant] continued to use the stun gun on Zimmerman, who was screaming and crying for help." *Brown*, 143 So.3d at 395; *see also id.* at 403 ("When Zimmerman entered the trailer shortly thereafter, [Appellant] proceeded to stun, beat, and kidnap Zimmerman with Miller and Lee's assistance."). At some point, "[Appellant] pulled Zimmerman across the trailer into the bathroom. Zimmerman continued to scream and cry for help, so Miller struck Zimmerman in the face and Lee stuffed a sock into Zimmerman's mouth." *Id.* at 395-96.

Putting the Victim in the Trunk of Appellant's Car

"Zimmerman was then forcibly escorted outside and forced into the trunk of [Appellant's] vehicle." *Brown*, 143 So.3d at 396. Appellant's car contained "a crowbar and a canister of gasoline." *Id*. at 403.

The Drive to a Remote Location

"[Appellant], Miller, and Lee then entered the vehicle and drove away. The women drove to a clearing in the woods about a mile and a half from the trailer

park." *Brown*, 143 So.3d at 396.

The Victim's Attempt to Escape

"[Appellant] exited the car and pulled Zimmerman out of the trunk. Zimmerman attempted to flee, but stumbled in the darkness and was caught by [Appellant] and Miller." *Brown*, 143 So.3d at 396.

The Subsequent Beating

"[Appellant and Ms. Miller] wrestled Zimmerman to the ground and simultaneously attacked her. [Appellant] used the stun gun again on Zimmerman as Miller beat her with a crowbar. [Appellant] and Miller then switched weapons and continued to torture and beat Zimmerman. Miller eventually dropped the stun gun and repeatedly punched Zimmerman." *Brown*, 143 So.3d at 396; *see also id.* at 403 ("Miller and [Appellant] then attacked Zimmerman with the stun gun and the crowbar.").

Appellant Lights the Victim on Fire

> [Appellant] returned to the car, retrieved a can of gasoline from the trunk, and walked back toward the beaten and prone, but still conscious, Zimmerman. [Appellant] poured gasoline on Zimmerman, retrieved a lighter from her pocket, set Zimmerman on fire, and stood nearby to watch the screaming Zimmerman burn. Lee testified that she was standing beside Miller, who exuberantly jumped up and down and screamed, "Burn, bitch! Burn!"

Brown, 143 So.3d at 396; *see also id.* at 403 ("As Zimmerman was lying on the

ground writhing in pain and crying for help, [Appellant] walked back to the car, retrieved the canister of gasoline, poured it on Zimmerman, lit her on fire, and stood nearby to watch Zimmerman burn.").

Appellant Drives Back to Her Trailer

"After a few minutes, the three women returned to the car and drove away. During the ride home, Miller said, 'Mom, you've got to turn around. I left my shoes and the taser.' [Appellant], however, refused to return to the location of the event." *Brown*, 143 So.3d at 396; *see also id.* at 403 ("The three women then returned to the car and drove away. Miller informed [Appellant] that she had left several items at the scene, but [Appellant] refused to deviate from the plan.").

The Victim's Attempt to Get Help

> Shortly thereafter, Terrance Hendrick was outside his home which was located approximately one third of a mile away from the location of the attack. Hendrick heard a faint female voice asking for help, but he could not see anyone in the darkness. Eventually, Hendrick saw Zimmerman walking slowly toward his house. When Zimmerman reached Hendrick's house, she asked for assistance and sat on the front steps.

Brown, 143 So.3d at 396.

The Victim's Injuries

> As he waited on the porch with Zimmerman, Hendrick noticed that she had suffered a significant head injury, did not appear to be wearing clothes, and had a strong odor of gasoline. He testified that her skin was black and he could not identify her race.

> At 9:24 p.m., an emergency medical technician (EMT) arrived at the scene. When the EMT approached Zimmerman, he observed her sitting on the porch, rocking back and forth with her arms straight out. Due to the extensive nature of Zimmerman's burns, the EMT testified that he could not initially identify whether she was wearing clothing. The EMT noticed that Zimmerman's skin was falling off her body, and he believed that over ninety percent of her body was burned. She had severe head trauma, and her jaw was either broken or severely dislocated. The EMT explained that the extent and severity of the burns prevented him from providing Zimmerman medical assistance. He testified that while he generally placed sterile gauze and oxygen on burns, he did not have enough gauze to cover her entire body. He attempted to stabilize her neck, but her skin was charred to such an extent that he could not touch Zimmerman without her skin rubbing off onto his gloves.

Brown, 143 So.3d at 396.

The Victim Identifies Her Attackers

> Despite her injuries, Zimmerman was conscious and alert. She identified [Appellant] and Lee as her attackers and told the EMT that she was "drug out of the house, tased, beaten in the head with a crowbar, and then set on fire." She also provided her address as well as the addresses of her attackers, and asked the EMT to protect her children. The ambulance arrived within a few minutes and transported Zimmerman to the hospital. Inside the ambulance, Zimmerman repeatedly asked if she was going to recover. She told the paramedic that [Appellant], Miller, and Lee poured gasoline on her and set her on fire. She also stated that she "thought they had made up."

Brown, 143 So.3d at 396-97.

At Appellant's Trailer, the Attackers Try to Cover-up

> When [Appellant], Miller, and Lee returned to [Appellant's] trailer,

> [Appellant] and Miller removed their bloodstained clothing and placed it in a garbage bag. Lee removed her shoes, which were also stained with blood, and placed them in the bag. Miller informed her friend, who had remained at the trailer during the attack, that she had injured her hand striking Zimmerman, and that the three women had set Zimmerman on fire. Miller and her friend then used [Appellant's] car to drive to the hospital to get medical care for Miller. Before returning from the hospital early the next morning, Miller discarded the bag of bloodstained clothing in a dumpster and attempted to remove the bloodstains from the inside of [Appellant's] car.

Brown, 143 So.3d at 397; *see also id.* at 403 ("When the three women returned to [Appellant's] house, they cleaned themselves and removed their bloodstained clothing. [Appellant] then left [Appellant's] trailer and hid at Lee's trailer next door.").

The Initial Arrests

"With the information provided by Zimmerman, law enforcement officers apprehended [Appellant] and Lee shortly after the attack and Miller was arrested after she returned from the hospital the next day. The three women were, however, released while Zimmerman was in the hospital." *Brown*, 143 So.3d at 397.

Appellant's Admission

"During [the time that Ms. Zimmerman was in the hospital], [Appellant] informed [Appellant's] friend Pamela Valley that [Appellant], Miller, and Lee had beaten Zimmerman, forced her into a car, driven her to an open field and 'lit her on fire and didn't look back.'" *Brown*, 143 So.3d at 397.

A Second Plot to Kill the Victim

"A few days [after Appellant's admission to Ms. Valley], [Appellant] informed Valley that Zimmerman was still alive and requested Valley to finish her off. Valley declined and later reported the conversation to law enforcement." *Brown*, 143 So.3d at 397; *see also id.* at 403 ("Several days later, when [Appellant] discovered that Zimmerman was still alive, albeit in critical condition in a hospital, [Appellant] asked a friend to kill [Zimmerman].").

The Victim's Death

"Zimmerman was stabilized at a local hospital and then transferred to the Burn Center at the University of South Alabama Hospital in Mobile, Alabama, where she died sixteen days later [on April 9, 2010]." *Brown*, 143 So.3d at 397.

Second Arrest

"[Appellant], Miller, and Lee were re-arrested on April 9, 2010, the date of Zimmerman's death." *Brown*, 143 So.3d at 397.

Physical Evidence

> At the scene of the burning, law enforcement officers discovered several pieces of evidence including a pair of white shoes; a stun gun with blood on the handle; paper stained with blood; an orange, gold, and black hairweave; a crowbar; and a pool of blood. [The officer that interviewed Appellant after she was arrested on the night of the attack noticed that Appellant was missing a large section of hair from the back of Appellant's head that matched the hairweave discovered at the scene.] Additional blood was discovered on the

> passenger seat headrest in [Appellant's] vehicle. During trial, a DNA expert testified that the blood on the headrest matched the known DNA profile of Zimmerman. Another DNA expert testified that the blood on the stun gun matched the known DNA profile of [Appellant].

Brown, 143 So.3d at 397.

Jury Verdict

On June 21, 2012, a jury convicted Appellant of the first-degree murder of Ms. Zimmerman.

Jury Recommendation of Death

On June 26, 2012, the jury "recommended a death sentence by a unanimous vote." *Brown*, 143 So.3d at 400.

Death Sentence Imposed

On September 28, 2012, the trial court sentenced Appellant to death for the murder of Ms. Zimmerman. *See Brown*, 143 So.3d at 400.

Direct Appeal

On July 8, 2014, this Court announced its decision in *Brown v. State*, 143 So. 3d 392 (Fla. 2014), affirming the judgment and sentence.

Postconviction

In the "Third Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," Appellant raised 10 claims with 109 sub-claims, sub-sub-claims, and sub-sub-sub-claims. All of the claims,

sub-claims, sub-sub-claims, and sub-sub-sub-claims are listed below in outline form:

Claim 1: Trial Counsel Provided Ineffective Assistance During Jury Selection.

A. Counsel Failed to Conduct a Meaningful Death Qualification.

B. Counsel Failed to Inquire About Pre-Trial Publicity of the Case.

C. Counsel Failed to Inquire About Racial Bias.

D. Counsel Failed to Strike Juror Goodwin.

E. Counsel Failed to Strike Juror Taylor.

F. Counsel Failed to Strike Juror Courtney.

G. Counsel Failed to Educate the Jury on the Penalty Phase Process.

H. Counsel Failed to Conduct any *Voir Dire* of Some Jurors.

Claim 2: Trial Counsel Provided Ineffective Assistance of Counsel During the Guilt Phase of Defendant's Capital Trial by Failing to Adequately Investigate and Prepare a Defense or Challenge to the State's Case.

Claim 2A: Trial Counsel Provided Ineffective Assistance by Failing to Conduct an Adequate Investigation and Prepare for Trial.

1) Heather Lee, concerning:

a) James Ronald Cook.

b) Catherine Booker.

c) Darren Lee.

d) Terrance Woods.

e) Nicole Henderson.

f) Weapons used in the crime.

g) History of tampering with witnesses.

2) Mallory Azriel.

3) Pamela Valley, concerning:

a) "Finish off" the victim.

b) Sexual advances/troubled relationship with Appellant.

c) Britnee Miller and Raygine Robinson as co-defendants.

d) Reputation for lying and using people for money.

4) Corie Doyle.

5) Prepare.

a) The Email About Witnesses.

b) Trial Counsel's Absence from Darren Lee's Deposition.

c) Opening Statement.

6) "Erroneous Advice" of Counsel.

Claim 2B: Counsel Failed to Adequately Challenge the State's Evidence

Through Cross-Examination of Witnesses.

1) Impeach Heather Lee with:
    a) Heather Lee's prior criminal record.
    b) Heather Lee's deposition – whereabouts on the day of the incident.
    c) Heather Lee's deposition – cleaning blood off shoes.
    d) Heather Lee's deposition – how blood got on shoes.
    e) Heather Lee's recorded statement – persons present in the vehicle and in the woods.
    f) Heather Lee's recorded statement – knowledge of crime scene.
    g) Darren Lee's deposition testimony – fish fry.
    h) Darren Lee's deposition testimony – failure to open door for law enforcement.
    i) Darren Lee's affair with Appellant.
    j) Darren Lee's affair with victim.
    k) Darren Lee's deposition testimony – gas can and crowbar.
    l) Returning to scene of the crime.
2) Cross-examine Corie Doyle regarding:
    a) Lime green jumpsuit.
    b) Viewing news reports regarding murder.

c) "Never laid eyes" on Heather Lee.

d) More than one lime green jumpsuit.

e) Friendship with Heather Lee.

f) Britnee Miller on fire.

3) Cross-examine Pamela Valley regarding:

a) Compensation for testimony.

b) "Finish off" the victim.

Claim 2C: Counsel Failed to Request *Richardson* Hearing and Move for Mistrial.

Claim 2D: Counsel Failed to Argue that Wendy Moye's Testimony Was Substantive and to Object to the Special Jury Instruction Limiting Her Testimony.

Claim 2E: Counsel Failed to Call Terrance Woods as a Witness to Support:

1) Defendant Less Culpable than Heather Lee.

2) Only Defendant had Motive.

3) Rejection of Premeditated Murder Theory.

4) Finding of Statutory Mitigator.

5) Weighing Aggravating Factors and Mitigating Circumstances.

Claim 2F: Counsel Failed to Call Darren Lee as a Witness to Support:

1) Reputation for Paying Witnesses and Victims.

2) Heather Lee's Statements Before the Murder.

3) Weapons Used During the Commission of the Crime.

4) Heather Lee's Confession After Attack.

5) Finding of Statutory Mitigator.

6) Weighing Aggravating Factors and Mitigating Circumstances.

Claim 2G: Counsel Failed to Call Nicole Henderson as a Witness to Support:

1) Heather Lee's Confession to Nicole Henderson.

2) Defendant's Sleeping Habits.

3) Nicole Henderson's Testimony – Statutory Mitigator.

Claim 2H: Counsel Failed to Refute the Statutory Aggravator of Cold, Calculated, and Premeditated with:

1) Pour the Gasoline, Light the Victim on Fire.

2) The Gasoline.

3) The Murder Weapons.

Claim 2I: Counsel Failed to Object to Improper Closing Argument.

Claim 3: Trial Counsel Provided Ineffective Assistance of Counsel During the Penalty Phase of Defendant's Capital Trial.

Claim 3A: Counsel Failed to Conduct a Reasonably Competent Mitigation Investigation and to Present Adequate Mitigation:

1) Failing to Investigate Mitigation.

2) Failing to Prepare Witnesses.

3) Potential Mitigation Witnesses:

a) Trina Bell.

b) Gregory Miller, Sr.

c) Jennifer Malone.

Claim 3B: Counsel Failed to Consult with and Present Experts to Explain the Combined Effects on the Brain of Polysubstance Abuse, Childhood Trauma, and Mental Illness.

Claim 3C: Counsel Failed to Present Evidence Supporting Statutory Mitigation:

1) Additional Mental Health Experts.

2) Lay Witnesses.

Claim 3D: Counsel Failed to Object to Hearsay Evidence from Ricki Atwood and Sheree Sturdivant.

1) Ricki Atwood.

2) Sheree Sturdivant.

a) Sheree Sturdivant's hearsay statement.

b) Failure to investigate Sheree Sturdivant.

Claim 4: Trial Counsel Failed to Comply with Rule 3.112, Florida Rules of Criminal Procedure.

Claim 5: Defendant Was Deprived of Fundamental Right to a Fair Trial, Due Process, and Reliable Adversarial Testing Due to Improper Prosecutorial Misconduct During the Guilt Phase of Trial.

Claim 5A: Inflammatory Statements.

Claim 5B: Belittling Defense Counsel.

Claim 5C: Expressing Personal Opinion.

Claim 6: Defendant Was Deprived of Her Right to Due Process Because the State Presented False and Misleading Evidence in Violation of *Giglio*.

Claim 6A: The False Testimony of Heather Lee Violated *Giglio*.

Claim 6B: The False Testimony of Pamela Valley Violated *Giglio*.

Claim 7: Defendant Was Deprived of Her Right to Due Process Because the State Withheld Evidence Which Was Material and Exculpatory in Violation of *Brady*.

Claim 8: Newly Discovered Evidence.

Claim 8A: Newly Discovered Evidence – Shayla Edmonson.

Claim 8B: Newly Discovered Evidence – Jessica Swindle.

Claim 8C: Newly Discovered Evidence – Nicole Henderson.

1) Heather Lee's Reputation for Violence.

a) Heather Lee's reputation for violence – 2009 incident.

b) Heather Lee's reputation for violence – after trial.

2) Heather Lee's Confession to Nicole Henderson.

3) Impeachment of Corie Doyle's Testimony.

Claim 9: Cumulative Error Deprived Defendant of a Fundamentally Fair Trial.

Claim 10: Defendant's Death Sentence Is in Violation of *Hurst v. Florida*, *Hurst v. State*, and the Sixth and Eighth Amendments.

Claim 10A: The *Hurst v. Florida* and *Hurst v. State* Decisions Apply Retroactively to Defendant.

Claim 10B: The *Hurst v. Florida* and *Hurst v. State* Decisions Apply Retroactively to Defendant's Case.

Claim 10C: The *Hurst* Error in Appellant's Case Is Not Harmless.

***Huff* Hearing:**

The trial court granted an evidentiary hearing on claims 2A, 2B, 2C, 2E, 2F,

2G, 2H, 3A, 3B, 3C, and 3D (for Sturdivant only). R-5205. The following witnesses testified at the hearing:

- The Honorable Jay Gontarek. R-2729-81, 3104-11.
- Heather Lee. R-2786-97.
- Darren Lee. R-2799-2810.
- Jessica Swindle. R-2810-15.
- Nicole Henderson. R-2815-24.
- Tajiri Jabali. R-2824-35.
- Shayla Edmonson. R-2836-40.
- Dr. Faye Sultan. R-2846-2965.
- Sharon Wilson. R-2973-3012.
- Dr. Drew Edwards. R-3022-61.
- Dr. Michael Herkov. R-3062-3100.
- Terrance Woods. R-3117-50.

The Honorable Jay Gontarek

Mr. Gontarek currently serves as a circuit court judge. R-2729. Previously, Mr. Gontarek served as lead trial counsel for Appellant during Appellant's trial for the murder of Ms. Zimmerman. R-2729-32. Throughout his 38-year career as a lawyer, Mr. Gontarek handled approximately 15 death penalty cases that "actually

went to trial and penalty phase." R-2763-64.

Mr. Gontarek viewed the case as "a penalty phase case, not a whodunit case." R-2734. Given Appellant's "background that she had growing up," which involved sexual abuse, terrible parents, and a crack cocaine addiction, Mr. Gontarek wanted the jury to feel "heartbroken" for her. R-2770. Mr. Gontarek personally felt "heartbroken for [Appellant]." R-3111.

As to the guilt phase, Mr. Gontarek believed that an "outright" acquittal of Appellant was impossible. R-2770. Mr. Gontarek thought that Appellant's best hope during the guilt phase was a conviction for second-degree murder. R-2770.

Mr. Gontarek's trial strategy involved a two-pronged approach: (1) putting as much blame on Heather Lee as possible; and (2) arguing that the murder was "not very well planned out." R-2734.

As to the first prong, Mr. Gontarek called Heather Lee a liar as many times as possible. R-2754. Additionally, he called the jury's attention to the "great" plea deal Ms. Lee received from the State. R-2758, 2771; *see also* R-2779 ("Try to get a second-degree murder because Heather Lee got 20 years, and I tried everything I could to make sure they understood that."); *see also Brown*, 143 So.3d at 396 n.2 ("The veracity of Lee's testimony concerning her involvement in this crime, however, was significant challenged during trial, particularly because Lee, who

claimed that she was a victim and was not involved in Zimmerman's murder, *pled guilty* to second-degree murder based on her involvement in Zimmerman's death.") (emphasis in original).

As to the second prong, Mr. Gontarek wanted "the jury to think it was some type of spontaneous action, we're going to try to teach Ms. Zimmerman a lesson and it got out of hand." R-2757; *see also* R-2775-76 ("I tried to convey to the jury that this was something that just got out of hand, it wasn't planned like a cold-blooded first-degree murder, is what I was trying to convey to the jury. This was really a second-degree murder.").

Because the evidence of Appellant's guilt "was so overwhelming," Mr. Gontarek sought to minimize Appellant's actions in the case as much as he could "without losing credibility with the jury." R-2738, 2735. While he wanted to "put as much off on Ms. Lee" as possible, Mr. Gontarek did not want the jury to think he was "trying to scam them by saying [Appellant] was not involved." R-2758. Mr. Gontarek believed that, with the strength of the penalty phase mitigation evidence, maintaining credibility with the jury was crucial for securing a life sentence. *See* R-2779 ("I didn't want to lose credibility with the jury because I thought we had a good penalty phase case. . . . I thought [Appellant's] background was such that we could get a life, but I misjudged that jury.").

Although Appellant "wanted to take a plea," the State refused to give Appellant "any kind of deal." R-2753, 2742, 2765-66. According to Mr. Gontarek, he asked the prosecutor many times "if she would accept a plea to a life sentence, and she would typically laugh and say no." R-2752, 3109. Mr. Gontarek thought "it was totally unfair that Heather Lee was getting 20 years and [Appellant] was — [the State was] seeking the death penalty." R-3109, 3111. Mr. Gontarek denied telling "Ms. Wilson or anyone we can't make any money if [Appellant] enters a plea." R-3110-11. Mr. Gontarek's sole motivation in representing Appellant was to save her life. R-3111.

Sharon Wilson

During Appellant's murder trial, Mr. Gontarek "was in charge of the guilt/innocence phase" and Ms. Wilson "was in charge of the penalty phase." R-2974. However, Ms. Wilson did participate in some guilt phase preparation and litigation, to include depositions and a motion in limine regarding a dying declaration. R-2974-75. Before the trial began, Ms. Wilson traveled to Chicago and Wisconsin to meet with Appellant's family members. R-2997. Some family members traveled to Pensacola for the trial, but it was "very difficult" for Ms. Brown to get the family members to cooperate. R-2997. For example, Appellant's mother told Ms. Wilson "that she believed [Appellant] should get the death penalty

if she did what she was charged with." R-3003.

Appellant told Ms. Wilson that "she wanted to be able to enter a plea to a life sentence if the State would lessen the charge against her daughter, Britnee, who was also a co-defendant." R-2976. According to Ms. Wilson, Mr. Gontarek told Ms. Wilson that "We can't make any money if she enters a plea." R-2976. However, Ms. Wilson admitted that both she and Mr. Gontarek repeatedly asked the prosecutor to let Appellant "plea to life"; and Ms. Wilson admitted that the prosecutor never agreed. R-2993.

As to the guilt phase, Mr. Gontarek "thought if he could maybe somehow lessen Ms. Brown's culpability that was the best approach." R-2977. Ms. Wilson did not believe that Mr. Gontarek was receptive to her attempts to have a cohesive theme from the guilt phase through the penalty phase. R-2977, 2980. However, Ms. Wilson admitted that "the evidence that the State had was difficult to overcome in the guilt phase." R-2995. Ms. Wilson did not believe that there was any evidence to support a theory that Appellant was an accomplice or minor participant or that Appellant was under extreme duress or domination of another. R-3007. Ms. Wilson did believe that evidence supported the statutory mitigator regarding capacity to appreciate the criminality of one's conduct. R-3007.

Ms. Wilson appeared to admit that, before the trial began, she knew of Ms.

Lee's statements to other inmates about throwing the gas on Ms. Zimmerman and lighting her on fire. R-2979:

> Q. Now, *prior to trial*, at some point, you became aware that — you became aware of some new information that Heather Lee had been confessing to people in jail saying that she had thrown the gas on Ms. Zimmerman and lit her on fire. Do you remember that?
>
> A. I remember hearing that. I don't remember when.

Additionally, Ms. Wilson admitted that Mr. Gontarek examined Wendy Moye as a witness concerning Ms. Lee's purported confessions. R-2995.

As to the penalty phase, Ms. Wilson believed that Dr. Bailey's 46-page PowerPoint presentation and testimony covered Appellant's life history "from beginning to the crime." R-3000. After Dr. Bailey testified, Ms. Wilson called six members of Appellant's family to testify. R-3001.

Darren Lee

According to Mr. Lee, during a conversation a few days before the murder of Ms. Zimmerman as well as during a conversation a few days after the murder, Ms. Lee said to Mr. Lee in the presence of Mr. Terrance Woods that Mr. Lee "won't be sleeping with that bitch." R-2802-03, 2805. According to Mr. Lee, "that bitch" was Ms. Zimmerman. R-2803, 2805.

Also according to Mr. Lee, Ms. Lee confessed to him on the night of the murder that she poured gasoline on Ms. Zimmerman and lit Ms. Zimmerman on

fire. R-2804-05.

Terrance Woods

The trial court specifically noted that Mr. Woods was an argumentative and difficult witness. R-3143.

Mr. Woods grew up "in the same neighborhood" as Ms. Lee. R-3118. According to Mr. Woods, he and Ms. Lee "had sex a couple of times." R-3118. Mr. Woods testified that he got to know Darren Lee through his acquaintance with Heather Lee. R-3118.

According to Mr. Woods, Ms. Zimmerman and Heather Lee were "friends once," but their relationship deteriorated because Ms. Zimmerman was "having a sexual affair" with Darren Lee. R-3119. Mr. Woods testified that a couple of days before the murder of Ms. Zimmerman, Ms. Lee and Ms. Zimmerman "had a fight" about the affair. R-3119. Mr. Woods did not actually see the fight. R-3139. According to Mr. Woods, Heather Lee told Darren Lee that she had a fight with Ms. Zimmerman and that "she was going to kill the bitch," meaning she was going to kill Ms. Zimmerman. R-3120, 3139. Mr. Woods testified that, a couple of days after the murder, Heather Lee told Darren Lee "that Darren wouldn't be fucking his girlfriend anymore, his little bitch anymore, because she killed her." R-3120. According to Mr. Woods, Heather Lee said that she set Ms. Zimmerman on fire.

R-3121. Previously, however, Mr. Woods told an investigator that Heather Lee said that "they" (i.e. Heather Lee, Britnee Miller, and Appellant) tased, beat, and poured gas on Ms. Zimmerman — but that Heather Lee did not say who actually poured the gas. R-3140, 3144.

Mr. Woods stated his belief that Ms. Zimmerman died "two hours" after the attack. R-3124. When asked if he was "almost begging to be a witness" in order to receive a reduction in his federal prison sentence, Mr. Woods replied: "Yes. I wanted out of prison, 26-and-a-half years, who wouldn't?" R-3130.

Jessica Swindle

While incarcerated at Homestead Correctional Institution, Ms. Swindle participated in a Bible study class with Ms. Lee. R-2811-12. According to Ms. Swindle, Ms. Lee told her that "she was there for murder, that she didn't get the death row, and that there was another lady with her, and her daughter was with her also, and that they didn't do anything, that it was just her, that she set a — a girl on fire that was sleeping with her baby's dad." R-2813. According to Ms. Swindle, it seemed "like [Ms. Lee] was trying to be tough." R-2814.

Nicole Henderson

According to Ms. Henderson, Ms. Lee previously got into a physical altercation with Ms. Henderson's sister "over [Ms. Lee's] boyfriend wanting to

have sex with [Ms. Henderson's] sister." R-2817. Additionally, Ms. Henderson alleged that Ms. Lee was "getting paid" for an underage Britnee Miller to engage in sexual intercourse with men. R-2818.

Ms. Henderson testified that, while at the Escambia County Jail, Ms. Henderson overheard Ms. Lee tell Miracle Sanders that: (1) "She was going home because she was going to blame it all on Britnee and Ms. Tina, and she's going to get off and live her life." R-2818-19, 2821; and (2) Ms. Zimmerman was murdered "because [Ms. Lee's] boyfriend had got another young lady pregnant." R-2819. It appeared to Ms. Henderson that Ms. Lee "was bragging" about the murder. R-2822.

According to Ms. Henderson, while at Homestead Correctional Institution, Ms. Henderson observed that Ms. Lee "used to date this girl named Gracie, and her and Gracie used to have it out all the time because Gracie used to cheat, but Heather used to fight the girlfriend that cheated with Gracie about the situation." R-2820.

Finally, Ms. Henderson testified that, while at the Escambia County Jail, she observed that Appellant slept "most of the time." R-2820.

Tajiri Jabali

According to Ms. Jabali, and while incarcerated together at Homestead

Correctional Institution, Ms. Lee told Ms. Jabali that "[Ms. Lee] orchestrated a — taking — taking care of her boyfriend's mistress, and she was kind of the ringleader." R-2826. Ms. Jabali also testified that Ms. Lee told Ms. Jabali "don't ever cheat [on Ms. Lee] and if [Ms. Jabali] did [Ms. Lee] would do to [her] what she did to her baby daddy's mistress." R-2827. According to Ms. Jabali, she observed Ms. Lee engage in a physical altercation with a woman with whom Ms. Jabali "cheated." R-2827. Ms. Jabali testified that, after the altercation, Ms. Lee said "I was going to get that bitch one way or another. Don't try me." R-2828.

According to Ms. Jabali, Ms. Lee kept a journal that mentioned the murder of Ms. Zimmerman and in which Ms. Lee "just kept referring to it in the journal as these — like, referring to them — the two people — the other two people that was involved was these bitches and they act like they were scared and they didn't want to do nothing. She had to, like, force them." R-2831. It appeared to Ms. Jabali that Ms. Lee "was bragging" about the murder. R-2834.

Shayla Edmonson

While incarcerated at Homestead Correctional Institution, Ms. Edmonson participated in a Bible study class with Ms. Lee called Hannah's Gift. R-2837. According to Ms. Edmonson, Ms. Lee stated that "she killed someone and she would do it again because the people that were involved in the case or something

were sleeping with her husband, or something about a man, and she set the girl on fire and, like, basically was just remorseful." R-2839. It appeared to Ms. Edmonson that Ms. Lee "was bragging" about the murder. R-2840.

Heather Lee

Ms. Lee denied that she wrote assignments during a Bible study class (Hannah's Gift) while incarcerated. R-2788. She denied that she kept a journal while in prison. R-2788. She denied that her husband had an affair with Ms. Zimmerman. R-2789. She denied that her husband had an affair with Appellant. R-2789. She denied knowing Terrance Woods by name, but admitted that "If I was to see him I might know him. . . ." R-2789, 2796. She denied telling Mr. Woods that she was going to kill Ms. Zimmerman. R-2796. She denied trying to fight with the sister of Nicole Henderson. R-2789-90. She denied telling Ms. Henderson, while incarcerated at the Escambia County Jail, that she "lit Ms. Zimmerman on fire because [Ms. Zimmerman] was sleeping with [Ms. Lee's] husband." R-2790. She denied saying that she "would be getting off easy because [she] was cooperating with the State." R-2790. She admitted that Tajiri Jabali was her girlfriend. R-2791. She denied telling Ms. Jabali that "[Ms. Jabali] had better not cheat on [Ms. Lee] or [Ms. Lee] would do to the person that [Ms. Jabali] cheated with what [Ms. Lee] did to [Ms. Lee's] baby daddy mistress." R-2791.

She denied telling Ms. Jabali that she "killed [her] husband's mistress because he was cheating. . . ." R-2791, 2795. She denied telling Ms. Jabali that "[Appellant] and Britnee were weak and that [she] had to do everything herself." R-2791. She denied telling anyone at Homestead Correctional Institution that "I'll set you on fire." R-2792. She denied knowing Shayla Edmonson. R-2792, 2794. She denied knowing Jessica Swindle. R-2792, 2796. She admitted to getting a prison tattoo depicting flames, but denied that it had anything to do with Ms. Zimmerman. R-2792-93, 2796.

Dr. Faye Sultan

In addition to testifying about Appellant's traumatic childhood, Dr. Sultan offered her opinion about how that trauma impacted Appellant's psychological development:

> Tina Brown was the victim of an extraordinary and extraordinarily high level of chronic trauma in her life. She experienced multiple periods of abandonment by the primary caregivers in her life by her closest attachment figures. She was neglected severely. She lived in an environment that was violent and chaotic both within her home and in her community. She became the victim of physical abuse as a young child. She witnessed abuse between her mother and her stepfather that was severe. As a consequence of all of that perhaps, and we think so through the social science research, she began to consume alcohol as a very young teenager. So by the time she was 12 or 13, she was drinking an awful lot of alcohol. She had some experience with marijuana but didn't find it particularly helpful to regulate her emotions.

> What we know about Ms. Brown is that on top of all of the horrible circumstances and the violence in her community, being locked out of her house and left in the street watching people be shot, all of those things that went on in her life, we know that Ms. Brown also began to experience sexual abuse at the hands of neighbors and at the hands of her own father, and so there are multiple rape episodes.
>
> At the point in which she begins to be raped, her substance abuse increases greatly. She's introduced to crack and crack cocaine by her stepmother and she develops a very significant addiction to illegal substances from that point on. . . .
>
> Well, I learned all of the things that I talked about, and I also learned that she followed very closely the pattern that is well-known for victims of chronic trauma, which is to say she developed both psychiatric illness and medical illness at a young age. And we know from the literature that this is to be expected.
>
> We also — it was also clear that she was experiencing disruption, disorder of her brain in her cognition, in her information processing, in her impulse control, all of the things that we also know are 100 percent true of trauma survivors, and all of that was apparent from my first interview with her.

R-2864-65.

Dr. Drew Edwards

Dr. Edwards offered his opinion about how Appellant's childhood trauma and subsequent cocaine addiction impacted her ability to make rational decisions. *See* R-3047:

> Her frontal brain has been dysfunctional for a long time, and I don't think she had any good inhibitory control at all, and particularly the ability to predict consequences. A stressor was there, it was over — she irrationally processed it as danger and her — her behavior,

> subsequent behavior, was just all reactive in the midbrain and just survival, basically survival. It's like a cornered animal really.

See also R-3059:

> I think the confusion is the high versus the addiction and her long-term brain damage that she's had from being a chronic drug user. So it's the long-term brain damage from her drug use and all the other stressors in her life and all the injuries she occurred emotionally. The cumulative effect of all of that was neuronal degradation between her midbrain and her front brain, unable under stressful situations to respond normally. She responded hedonically, you know, to survive. And that's typical. Prisons are filled with people who 15 minutes of bad choices have got them locked up, you know, and that's — that's kind of what we talk about when we talk about crack.

Dr. Michael Herkov

Dr. Herkov noted that Appellant's cognitive function, as measured by tests, increased during her period of incarceration and accompanying abstinence from cocaine; and he opined as to why this occurred. *See* R-3087:

> I think that, looking at my testing now, that it's my professional opinion within a reasonable degree of neuropsychological probability, that at the time of Dr. Larson's testing [in 2011], her brain was showing significant impairment and injury secondary to her drug use.
>
> My second opinion would be that the testing results from Dr. Larson would have likely represented a significant improvement from what her functioning would have been at the time of the offense [in 2010].

Trial Court's Order

The trial court denied all of the claims, sub-claims, sub-sub-claims, and sub-sub-sub-claims. *See* R-5204-5313.

SUMMARY OF THE ARGUMENT

Failure to Comply with Rule 3.851(e)

Despite repeated opportunities provided by the trial court, Appellant failed to comply with the pleading requirements contained in Rule 3.851(e). Graciously, the trial court afforded Appellant three chances to bring the motion into compliance with the requirements of the Rule. Yet, Appellant failed to do so, as the trial court specifically found that each of the four motions failed to satisfy the Rule's pleading requirements. This significantly delayed the proceedings: the original motion was filed on November 24, 2015, but the trial court did not enter its order on the third amended motion until April 5, 2019. *See* R-5204, 5217.

The trial court apparently felt powerless to act, noting that Rule 3.851 "does not speak" to a situation where "the third amended motion still does not comply with the numbering requirements of [the Rule]." R-5217. In these types of situations (multiple, unsuccessful attempts to amend), trial courts should feel empowered to deny such "shotgun pleadings" with prejudice.

To the extent that the trial court may have felt uncomfortable denying the motion with prejudice, this Court could reinforce the availability of that option by upholding the denial of every claim, sub-claim, sub-sub-claim, and sub-sub-sub-claim on the basis that the entire motion should have been rejected "out of hand."

Failure to Comply with Rule 9.210(b)(5)

For all six Issues raised in the Initial Brief, Appellant fails to identify the standard of review that applies to each claim, sub-claim, sub-sub-claim, and sub-sub-sub-claim. Consequently, it does not appear that the Initial Brief complies with Florida Rule of Appellate Procedure 9.210.

Issue I

In denying the claim of ineffective assistance of counsel for the entirety of the guilt phase, the trial court correctly determined that Appellant failed to establish specific prejudice for any claim, sub-claim, sub-sub-claim, and sub-sub-sub-claim. Given the overwhelming evidence of Appellant's guilt, this Court can take confidence in the result and affirm the trial court's decision to deny Appellant's claim.

Issue II

In denying the claim of newly discovered evidence, the trial court correctly determined that Appellant failed to satisfy either prong of the *Jones* test: the substance of Heather Lee's statements to fellow prisoners was known to trial counsel before the trial began; and the statements are not of such a nature that they would probably produce either an acquittal as to first-degree murder or a life sentence instead of death. Therefore, this Court can take confidence in the result

and affirm the trial court's decision to deny Appellant's claim.

Issue III

In denying the claim of ineffective assistance of counsel for the entirety of the penalty phase, the trial court correctly determined that the additional expert testimony presented at the evidentiary hearing was: cumulative to that presented at trial; and insufficient to mitigate the heinous, atrocious, and cruel (HAC); cold, calculated, and premeditated (CCP); and felony murder (kidnapping) aggravators. Given the extensive mitigation evidence admitted at trial, this Court can take confidence in the result and affirm the trial court's decision to deny Appellant's claim.

Issue IV

In denying the claim of ineffective assistance of counsel during the jury selection phase, the trial court correctly determined that Appellant failed to establish actual bias on the part of Juror Taylor (i.e. prejudice). Given the failure of Appellant to satisfy the prejudice prong of *Strickland*, the trial court was not required to make any determination regarding deficient performance; and this Court can take confidence in the result and affirm the trial court's decision to deny Appellant's claim.

Issue V

In denying the claim of cumulative error under *Strickland*, the trial court correctly determined that, because Appellant failed to establish multiple findings of deficient performance, there could be no cumulative error or cumulative prejudice. And with an insufficient demonstration of additional deficiencies in the Initial Brief, Appellant cannot establish cumulative error on appeal. Given the overwhelming evidence of Appellant's guilt, this Court can take confidence in the result and affirm the trial court's decision to deny Appellant's claim.

Issue VI

The trial court correctly followed this Court's decisions and denied Appellant's *Hurst* claim on the basis that the jury unanimously recommended a sentence of death. Nonetheless, this Court can clarify that: no *Hurst* error can occur when a prior violent felony conviction serves as a death sentence eligibility aggravator; and harmless error analysis can include a detailed examination of the evidence in the case (not just a quick look at the unanimity, *vel non*, of the jury's recommendation).

ARGUMENT

Before addressing the Issues raised in the Initial Brief, the State: highlights Appellant's repeated failure to comply with the pleading requirements contained in Rule 3.851(e); lists the sub-claims raised on appeal; lists the sub-claims abandoned on appeal; and lists the sub-claims impermissibly raised for the first time on appeal.

Florida Rule of Criminal Procedure 3.851(e)

Rule 3.851(e)(1) requires that "[e]ach claim or subclaim shall be separately pled and shall be sequentially numbered beginning with claim number 1." Fla. R. Crim. P. 3.851(e)(1); *see also In re Amendments to Fla. Rules of Judicial Admin.; Fla. Rules of Criminal Procedure; and Fla. Rules of Appellate Procedure—Capital Postconviction Rules*, 148 So.3d 1171, 1175 (Fla. 2014) ("Subdivision (e) (Contents of Motion) of rule 3.851 is amended to provide new requirements for organizing an initial postconviction motion. We have modified the Subcommittee's revised proposal to provide that each claim or subclaim in the motion shall be separately pled and sequentially numbered.").

Original Postconviction Motion

On November 24, 2015, Appellant filed her original postconviction motion. *See* R-379 ("Motion to Vacate Judgments of Conviction and Sentence with Special

Request for Leave to Amend"); *see also* R-5204.

On November 25, 2015, the State filed "State's Motion to Strike Postconviction Motion to Vacate Judgments of Conviction and Sentence," arguing that postconviction counsel "failed to abide" by the pleading requirements contained in Rule 3.851(e). R-613.

On December 16, 2015, the trial court struck the motion with leave to amend for failure to satisfy the numbering requirements outlined in Rule 3.851(e). R-769, 5204. The trial court granted Appellant "thirty (30) days from December 16, 2015, to amend its motion." R-770.

On February 8, 2016, Appellant filed a "Motion to Reconsider and Rescind the Court's Order Dated December 15, 2015." R-1019.

On February 11, 2016, the State filed "State's Response to Defense Motion to Reconsider and Rescind Court's Order Dated December 15, 2015." R-1118.

On February 12, 2016, the trial court denied "the motion to reconsider and rescind." R-1145.

On February 26, 2016, Appellant challenged the trial court's decision by filing "Petition Seeking review of Nonfinal Order in Death Penalty Postconviction Proceedings" with this Court. *See Brown v. State*, Case No. SC16-358.

On March 4, 2016, Appellant filed a Petition for Writ of Prohibition with

this Court, arguing that the trial court could not rule objectively on Appellant's postconviction motion. *See Brown v. State*, Case No. SC16-397. On June 24, 2016, this Court denied the petition with Justice Pariente dissenting. *Id*.

On June 24, 2016, this Court denied the "Petition Seeking review of Nonfinal Order in Death Penalty Postconviction Proceedings" without prejudice. *See Brown v. State*, Case No. SC16-358.

First Amended Postconviction Motion

On January 13, 2016, Appellant filed her first amended postconviction motion. *See* R-775 ("Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend"); *see also* R-5204.

On January 15, 2016, the State filed "State's Motion to Strike Amended Postconviction Motion to Vacate Judgments of Conviction and Sentence," arguing that the first amended postconviction motion "is again noncompliant with the rule as each claim is not separately pled." R-1002, 1003.

On February 12, 2016, the trial court granted "the motion to strike" and gave Appellant 30 days "leave to amend yet again." R-1145, 1150. During the hearing, the trial court stated that one of the purposes of Rule 3.851(e) is to ensure that claims do not get lost or overlooked. *See* R-1137 ("I'm not trying to be nitpicky. I just don't want anything lost.").

Appellant argued that she pled 10 big claims with supporting evidence, not sub-claims, underneath. *See, e.g.*, R-1146 ("I don't know if that's just a matter of semantics because it's all really one claim that we're talking about, and these are different things that support the claim."). For example, Appellant argued that she presented a "big claim" of ineffective assistance of counsel for the entirety of the voir dire proceedings (Claim 1). *See* IB-1154 ("Our claim is ineffective assistance of counsel at voir dire, and A through H are all supporting evidence of that claim. So those are not sub-claims. Those are all evidence that support the *big claim* of ineffective assistance of counsel.") (emphasis added). Additionally, Appellant presented a similar "big claim" of ineffective assistance of counsel for the entirety of the guilt phase (Claim 2). *See* R-1156-57 ("And so for Claim 2, this one's a little bit tricky because there's a lot of information because there was a lot of errors made at the trial, the guilt phase of the trial."); *see also* R-1610. And presumably, Appellant presented another "big claim" for the entirety of the penalty phase (Claim 3). *See* R-1637.

The trial court expressed his disagreement with this approach, highlighting that a claim of ineffective assistance of counsel requires a separate and distinct allegation of deficient performance with a corresponding allegation of specific prejudice. *See, e.g.*, R-1147 ("If we're talking about voir dire and that's Judge

Gontarek not asking questions of those three, whatever, that's individual in each one of those and you have to say one, two, three, four."); *see also* R-1156 ("next one is allowing Juror Goodwin to sit. That's going to be individual. Each of those has to be an individual number so [the State knows] what they're dealing with.").

The trial court warned that, under Appellant's approach, allegations of cumulative prejudice could be used to substantiate otherwise unsupported sub-claims of deficient performance. *See* R-1155 ("You got to specifically state what the prejudice is under each subclaim. That's why it needs to be individually numbered because *it has to have its own supporting weight*.") (emphasis added); *see also* R-1157 ("Each one of those is separate and you got to have specific reasons on how that affected trial and. . . . I don't think you can just lump them together, and at some point, *each one has to stand on their own* as I see it.") (emphasis added).

The trial court highlighted how Appellant's approach unfairly burdens trial courts and appellate courts with the task of "ferreting" out each individual claim and sub-claim. *See* R-1155-56 ("You can't just throw 40 things in there and say, well, maybe not all of them were but — but one of them was. I don't know. So I need to know each one."); *see also* R-1154-55 ("You threw something — and I'm not saying this pejoratively — you threw some mud on the wall and I said the

whole thing's not good except for this, [the Supreme Court of Florida] may have a hard time ferreting that out.").

On February 29, 2016, the trial court entered a written order granting the State's motion to strike. R-1177. In the order, the trial court highlighted some of the points addressed during the February 12, 2016, hearing:

> The Court noted that most, if not all, of the subclaims currently alleged could be considered individual claims. Defense counsel argued that Defendant is alleging cumulative claims under each of the broad headings, and the numbering proposed would not work for Defendant's motion. The Court informed defense counsel that many of Defendant's claims appear to be facially insufficient for failure to allege specific, factual prejudice as to each claim and subclaim. The Court instructed counsel that her allegations should not allege cumulative deficiency and prejudice as to each broad claim, but should allege specific, factual prejudice as to each claim and subclaim alleged. The Court brought this matter to counsel's attention to possibly avoid having to strike the motion again for lack of facial sufficiency pursuant to *Spera v. State*, 971 So.2d 754 (Fla. 2007).

R-1178-79.

Second Amended Postconviction Motion

On December 14, 2016, Appellant filed her second amended postconviction motion. *See* R-1292 ("Second Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend").

On February 10, 2017, the State filed "State's Answer to Second Amended Motion to Vacate Judgments of Conviction and Sentence," arguing that "Brown's

Second Amended Motion to Vacate Judgments of Conviction and Sentence, filed on December 14, 2016, does not comport with the requirements of Rule 3.851(e), Fla. R. Crim. P." R-1499, 1500.

On March 2, 2017, the trial court struck the second amended postconviction motion for failure to comply with the pleading requirements contained in Rule 3.851(e). R-1581. During the hearing, the trial court repeated his concern that Appellant's motion was disorganized and lacked allegations of specific prejudice. *See* R-1581 ("I want to adjudicate and hear any cognizable claim for post-conviction relief, but it's hard for me to do so with these facially insufficient — it is what it is."); *see also* R-1583:

> I want [Ms. Brown] to have a fair hearing, and it's difficult for me to see the specific, factual prejudice in some of these. And I don't want something at a case management conference to fall out when we get to an evidentiary hearing because there's not a factual prejudice that's alleged and maybe you just missed it or — I mean, this is voluminous.

The trial court granted Appellant 60 days to amend the motion. R-1585.

On March 13, 2017, the trial court entered a written order striking the second amended postconviction motion with leave to amend for failure to satisfy the numbering requirements outlined in Rule 3.851(e). R-5205.

Third Amended Postconviction Motion

On May 1, 2017, Appellant filed her third amended postconviction motion.

R-5205. The trial court did not strike the motion, but did highlight that the motion failed to satisfy the numbering requirements outlined in Rule 3.851(e):

> In the instant case, despite being given three opportunities to amend, the third amended motion still does not comply with the numbering requirements of rule 3.851(e)(1), Florida Rules of Criminal Procedure. If Defendant had not filed an amended motion, this Court would without question be justified in deeming the noncompliant claims, sub-claims, and/or arguments waived. However, Defendant did file [an] amended motion, albeit motions that still do not comply with the numbering requirements. As the rule does not speak to the current situation, this Court has attempted to address all of Defendant's claims and sub-claims. However, the motion is disorganized, and to the extent this Court may have failed to address any claims, this Court considers these claims, sub-claims, and/or arguments waived based on Defendant's failure to comply with the pleading requirements of rule 3.851. For ease of reference, this Court, to the best of its ability, has organized the sub-claims.
>
> This Court also observes that because each claim was not numbered separately, many of the claims and sub-claims remain facially insufficient. The Court will address this situation on a claim-by-claim basis.

R-5217-18.

In this case, the trial court afforded Appellant three opportunities to bring the motion into compliance with the requirements of Rule 3.851. R-5217-18. Yet, Appellant failed to do so, as the trial court specifically found that each of the four motions failed to satisfy the pleading requirements of the Rule. R-5217-18. This significantly delayed the proceedings: the original motion was filed on November 24, 2015, but the trial court did not enter its order on the third amended motion

until April 5, 2019. *See* R-5204, 5217.

Apparently, however, the trial court felt powerless to act, noting that Rule 3.851 "does not speak" to a situation where "the third amended motion still does not comply with the numbering requirements of [the Rule]." R-5117-18; *but see* *Bryant v. State*, 901 So.2d 810, 818 (Fla. 2005):

> We understand that postconviction motions differ from civil complaints in significant respects. Postconviction motions cannot be "dismissed" as complaints can. Nevertheless, the same principles apply. Although a trial court may "strike" a postconviction motion where a civil complaint would be "dismissed," the trial court, like the court in the civil context, should grant leave to amend the motion to cure the defects that led the court to strike the original motion. In the civil context, dismissing a complaint without granting at least one opportunity to amend is considered an abuse of discretion unless the complaint is not amendable.

In these types of situations (multiple, unsuccessful attempts to amend), trial courts should feel empowered to deny "shotgun pleadings" with prejudice. *See* *Spera v. State*, 971 So.2d 754, 761 (Fla. 2007) ("The striking of further amendments is subject to an abuse of discretion standard that depends on the circumstances of each case."); *cf. T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1543 n.14 (11th Cir. 1985) (Tjoflat, Circuit Judge, dissenting):

> The purpose of these rules is self-evident, to require the pleader to present his claims discretely and succinctly, so that, his adversary can discern what he is claiming and frame a responsive pleading, the court can determine which facts support which claims and whether the plaintiff has stated any claims upon which relief can be granted, and,

> at trial, the court can determine that evidence which is relevant and that which is not. "Shotgun" pleadings, calculated to confuse the "enemy," and the court, so that theories for relief not provided by law and which can prejudice an opponent's case, especially before the jury, can be masked, are flatly forbidden by the letter, if not the spirit, of these rules. Attorney Berry's third amended complaint, *see* Appendix, Exhibit B, was a paradigmatic shotgun pleading, containing a variety of contract and tort claims interwoven in a haphazard fashion. . . . *The district court should have rejected the third amended complaint out of hand*. . . .

(Emphasis added.) *See also Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1321-23 (11th Cir. 2015):

> [W]e have identified four rough types or categories of shotgun pleadings. The most common type—by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint. The next most common type, at least as far as our published opinions on the subject reflect, is a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action. The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief. Fourth, and finally, there is the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against. The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests.
>
> Under Florida Rule of Criminal Procedure 3.850 as well as Federal Rule of

Civil Procedure 8, Appellant's first, second, and third amended postconviction motions could have been denied with prejudice by the trial court. *See* Fla. R. Crim. P. 3.850(f)(2):

> If the motion is insufficient on its face, and the motion is timely filed under this rule, the court shall enter a nonfinal, nonappealable order allowing the defendant 60 days to amend the motion. If the amended motion is still insufficient or if the defendant fails to file an amended motion within the time allowed for such amendment, the court, *in its discretion*, may permit the defendant an additional opportunity to amend the motion or may enter a final, appealable order summarily *denying the motion with prejudice*.

(Emphases added.) *See also Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1358 (11th Cir. 2018):

> This authority makes clear that dismissal of a complaint with prejudice is warranted under certain circumstances. Such circumstances existed in this case. In dismissing a shotgun complaint for noncompliance with Rule 8(a), a district court must give the plaintiff "one chance to remedy such deficiencies." The Jacksons had that opportunity.

(Citation omitted.)

In this case, where all of the amended motions failed to satisfy the pleading requirements of the Rule, denial with prejudice was an available option. In the written order, however, the trial court made conflicting statements that suggest a reluctance to exercise that option. On the one hand, the trial court stated that "[i]f the claim or subclaim remains facially insufficient, then the trial court may

properly deny the claim with prejudice."[1] R-5217. On the other, the trial court wrote that "the rule does not speak to the current situation." R-5218.

To the extent that the trial court may have felt uncomfortable denying the motion with prejudice, this Court could reinforce the availability of that option by upholding the denial of every claim, sub-claim, sub-sub-claim, and sub-sub-sub-claim on the basis that the entire motion should have been rejected "out of hand." *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d at 1543 n.14 (Tjoflat, Circuit Judge, dissenting) ("The district court should have rejected the third amended complaint out of hand."); *see also Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla. 1999) ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.").

By clarifying that its decisions in *Bryant* and *Spera* authorize denial with prejudice if the first amended postconviction motion still fails to satisfy the pleading requirements contained in Rule 3.851(e), this Court could empower trial courts to end the practice of "shotgun" motions.

Unfortunately, the lack of any clarification may encourage postconviction

[1] In its written order, the trial court cites to this Court's decision in *Tanzi v. State*, 94 So.3d 482 (Fla. 2012). However, it appears that the trial court may have mistakenly cited to *Tanzi* instead of *Spera*.

litigants to unfairly burden trial courts with the time-consuming task of trying to make sense of disorganized pleadings. *Cf. Jackson v. Bank of Am., N.A.*, 898 F.3d at 1357:

> In ruling on the sufficiency of the Jacksons' sixteen claims, the Magistrate Judge was put in the position of serving as the Jacksons' lawyer in rewriting the complaint into an intelligible document a competent lawyer would have written. It took fifty-four pages and untold hours of the Magistrate Judge's time to do so. And, in conducting a *de novo* review of the complaint after the Jacksons objected to the R&R, the District Court devoted a considerable amount of its time as well. Absent the dismissal of the amended complaint, the Defendants, in framing their answer, would likely have responded in kind, with a multitude of affirmative defenses bunched together applying to each of the amended complaint's counts. Put colloquially: garbage in, garbage out. Hence, the final resolution of the Jacksons' claims would have been time-consuming and even more of an undue tax on the Court's resources. Tolerating such behavior constitutes toleration of obstruction of justice.

To the extent that a different standard of review may apply on appeal, the denial of the motion with prejudice would not have qualified as an abuse of discretion because the trial court provided Appellant with multiple opportunities to amend. *See generally Bryant v. State*, 901 So.2d at 819 ("The striking of further amendments is subject to an abuse of discretion standard that depends on the circumstances of each case.").

Preservation

In her Initial Brief, it appears that Appellant attempts to challenge the trial court's denial of the following claims and sub-claims:

Claim Raised Below	Issue on Appeal	Page in Initial Brief
1E	IV.	114
2A(4)	I.A.8.	81
2B(1)(a)	I.A.1.	69
2B(1)(b)	I.A.2.	73
2B(1)(c)	I.A.2.	74
2B(1)(d)	I.A.2.	74
2B(1)(e)	I.A.2.	73
2B(1)(f)	I.A.2.	74
2B(1)(h)	I.A.4.	77
2B(1)(i)	I.A.3.	75
2B(1)(j)	I.A.3.	76
2B(2)(b)	I.A.7.	80
2B(2)(c)	I.A.6.	79
2B(2)(d)	I.A.6.	79
2B(2)(f)	I.A.7.	81
2E(1)	I.B.2.	90
2E(2)	I.B.2.	89
2E(3)	I.B.2.	90
2E(4)	I.B.2.	91
2F(2)	I.B.1.	87
2F(4)	I.B.1.	87
2G(1)	I.B.3.	92
2G(2)	I.B.3.	93
3A(1)	III.A.	108
3B	III.B.	112
8A	II.B	96
8B	II.A.	96
9	V.	116
10C	VI.	120

However, to the extent that it remains clear exactly what Appellant challenges on appeal, this Court can deny relief. *See generally Fla. Emergency Physicians-Kang & Assocs., M.D., P.A. v. Parker*, 800 So.2d 631, 636 (Fla. 5th DCA 2001) ("We do not address issues not clearly set out in the issues on appeal."); *but see also Singer v. Borbua*, 497 So.2d 279, 281 (Fla. 3d DCA 1986) ("It is well settled that, in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points on appeal.").

Abandoned Claims

The following postconviction claims and sub-claims are not specifically mentioned in Appellant's Initial Brief: 1A; 1B; 1C; 1D; 1F; 1G; 1H; 2A(1)(a); 2A(1)(b); 2A(1)(c); 2A(1)(d); 2A(1)(e); 2A(1)(f); 2A(1)(g); 2A(2); 2A(3)(a); 2A(3)(b); 2A(3)(c); 2A(3)(d); 2A(5)(a); 2A(5)(b); 2A(5)(c); 2A(6); 2B(1)(g); 2B(1)(k); 2B(1)(l); 2B(2)(a); 2B(3)(a); 2B(3)(b); 2C; 2D; 2E(5); 2F(1); 2F(3); 2F(5); 2F(6); 2G(3); 2H(1); 2H(2); 2H(3); 2I; 3A(2); 3A(3)(a); 3A(3)(b); 3A(3)(c); 3C(1); 3C(2); 3D(1); 3D(2)(a); 3D(2)(b); 4; 5A; 5B; 5C; 6A; 6B; 7; 8C(1)(a); 8C(1)(b); 8C(2); 8C(3).

Therefore, the above claims and sub-claims are abandoned. *See City of Miami v. Steckloff*, 111 So.2d 446, 447 (Fla. 1959) ("It is an established rule that

points covered by a decree of the trial court will not be considered by an appellate court unless they are properly raised and discussed in the briefs. An assigned error will be deemed to have been abandoned when it is completely omitted from the briefs."); *see also Whitted v. State*, 362 So.2d 668, 670 n.2 (Fla. 1978) ("Because appellant failed to raise on this appeal one of the points argued below in support of this motion to dismiss, we will not address or consider that issue."); *see also Chamberlain v. State*, 881 So.2d 1087, 1103 (Fla. 2004), citing *Shere v. State*, 742 So.2d 215, 217 n.6 (Fla. 1999) ("[B]ecause Chamberlain fails to advance any argument to this Court regarding the jury instruction issue he raised at trial, we conclude that he has abandoned that issue.").

Claims Impermissibly Raised on Appeal

Appellant raised the following arguments for the first time in her Initial Brief: I.A.5. ("Failure to Impeach Corie Doyle with Prior Convictions"); II.C. ("Heather Lee's Confession to Tajiri Jabali"); II.D. ("Similar-Fact Evidence of Heather Lee's Pattern of Violence as Witnessed by Tajiri Jabali"); II.E. ("Similar-Fact Evidence of Heather Lee's Pattern of Violence as Witnessed by Nicole Henderson"); II.F. ("Email Corroborating that Heather Lee's Testimony Against Ms. Brown was a Lie").

Therefore, these claims are unpreserved for appellate review. *See Jimenez v.*

State, 997 So.2d 1056, 1072 (Fla. 2008) ("We conclude that this factual-innocence claim is unpreserved because Jimenez did not present this specific claim to the trial court during the successive rule 3.851 proceeding."); *see also Henyard v. State*, 992 So.2d 120, 126 n.2 (Fla. 2008) ("This claim was not raised below and is therefore not properly raised for review by this Court."); *Deparvine v. State*, 146 So.3d 1071, 1094 (Fla. 2014) ("[T]his issue was not preserved for appellate review because it was not raised in his postconviction motion.").

With regard to II.E. ("Similar-Fact Evidence of Heather Lee's Pattern of Violence as Witnessed by Nicole Henderson"), Appellant argued below that Nicole Henderson could provide newly discovered reputation evidence, not "reverse" *Williams* Rule evidence. *See* R-1668 ("[Nicole Henderson] has known Heather Lee and her reputation for violence since approximately 2009."). The distinction between the two remains important, especially with respect to the admissibility of character evidence for a witness. *Compare* § 90.404, Fla. Stat. *with* § 90.609, Fla. Stat. Appellant's attempt to repackage the reputation evidence claim as a "reverse" *Williams* Rule claim is inappropriate. *Cf. Quince v. State*, 477 So.2d 535, 536 (Fla. 1985), citing *Dobbert v. State*, 456 So.2d 424 (Fla. 1984) ("[T]he use of a different argument to relitigate the same issue is inappropriate."). Consequently, this "reverse" *Williams* Rule sub-claim is not cognizable on appeal. *See Steinhorst v.*

State, 412 So.2d 332, 338 (Fla. 1982) ("[F]or an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Additionally, Appellant raised a sub-claim under I.B.3. regarding the failure to call Nicole Henderson as a witness to testify about the alleged 2009 incident. *See* IB-92 ("This testimony about Ms. Lee's altercation with Ms. Henderson's sister shows a fact pattern very similar to the one that played out in this case, wherein Ms. Lee went after the victim who was sleeping with her husband, rather than going after her husband."). However, Appellant never raised this specific argument in the proceedings below; consequently, this sub-claim is not cognizable on appeal. *See Doorbal v. State*, 983 So.2d 464, 492 (Fla. 2008), citing *Perez v. State*, 919 So.2d 347, 359 (Fla. 2005) ("For an issue to be preserved for appeal, it must be presented to the lower court, and the *specific* legal argument or ground to be argued on appeal must be part of that presentation.") (emphasis added).

Ultimately, none of these claims and sub-claims were raised in the trial court; therefore, they cannot be considered on appeal. *See Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So.2d at 644 ("Generally, if a claim is not raised in the trial court, it will not be considered on appeal.").

ISSUE I: DID THE TRIAL COURT REVERISBLY ERR WHEN IT DENIED 21 CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING THE GUILT PHASE?

Standards of Review

In her Initial Brief, Appellant fails to identify the standard of review that applies to each claim, sub-claim, sub-sub-claim, and sub-sub-sub-claim. Consequently, it does not appear that the Initial Brief complies with Florida Rule of Appellate Procedure 9.210. *See* Fla. R. App. P. 9.210(b)(5) ("The initial brief shall contain the following, in order … argument with regard to each issue, with citation to appropriate authorities, and *including the applicable appellate standard of review*.") (emphasis added).

On this basis alone, this Court could strike Appellant's Initial Brief. *See Greenfield v. Westmoreland*, 156 So.3d 1 (Fla. 3d DCA 2007) (Appellant's multiple violations of appellate rule governing the form and content of appellate briefs warranted granting of motion to strike appellant's initial brief; appellant's statement of the case and the facts was unduly argumentative and contained matters immaterial and impertinent to the controversy between the parties, brief contained inadequate citations to the record, table of contents did not list the issues or arguments on appeal or the places where each could be found, and brief failed to separately set forth argument with regard to each issue, *including the applicable*

appellate standard of review.). In the interests of judicial efficiency, however, the State elected not to file a motion to strike.

The following sub-sub-claims and sub-sub-sub-claims raised by Appellant in the third amended postconviction motion fall under Issue I of the Initial Brief: 2B(1)(a); 2B(1)(b); 2B(1)(c); 2B(1)(d); 2B(1)(e); 2B(1)(f); 2B(1)(h); 2B(1)(i); 2B(1)(j); 2B(2)(b); 2B(2)(c); 2B(2)(d); 2B(2)(f); 2E(1); 2E(2); 2E(3); 2E(4); 2F(2); 2F(4); 2G(1); 2G(2).

The trial court held an evidentiary hearing on all of the 21 sub-sub-claims and sub-sub-sub-claims listed above. R-5205. But, the trial court also found that 10 of these sub-sub-claims and sub-sub-sub-claims were facially insufficient for failure to allege specific prejudice.

The trial court only found deficient performance with respect to sub-sub-claim 2E(2). R-5266. As to that sub-sub-claim, the trial court found that, given "that the evidence in this case strongly supports the jury's verdict of first-degree murder," Appellant failed to demonstrate prejudice. R-5266. For this sub-sub-claim, the standard of review is mixed: competent substantial evidence as to factual findings; de novo as to legal conclusions. *See Kormondy v. State*, 983 So.2d 418, 428 (Fla. 2007):

> Generally, this Court's standard of review following a denial of a postconviction claim where the trial court has conducted an

> evidentiary hearing accords deference to the trial court's factual findings. *McLin v. State*, 827 So.2d 948, 954 n.4 (Fla. 2002). "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Blanco v. State*, 702 So.2d 1250, 1252 (Fla. 1997) (quoting *Demps v. State*, 462 So.2d 1074, 1075 (Fla. 1984)). However, the circuit court's legal conclusions are reviewed de novo. *See Sochor v. State*, 883 So.2d 766, 771-72 (Fla. 2004).

See also Davis v. State, 990 So.2d 459, 463 (Fla. 2008), citing *Sochor v. State*, 883 So.2d 766, 771-72 (Fla. 2004) ("Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo.").

For the following sub-sub-claims and sub-sub-sub-claims, the trial court found that Appellant failed to demonstrate deficient performance and/or prejudice:

- 2B(1)(a) "Ms. Lee's previous criminal record is insignificant under these circumstances. Defendant has further failed to demonstrate that the results of Defendant's trial would have been different. . . ." R-5234.
- 2B(1)(i) "Even had trial counsel been able to introduce the information that Darren Lee was sleeping with Defendant to call into question Ms. Lee's motive for testifying, there is no reasonable probability that the outcome of this case would have been different." R-5245.

- 2B(1)(j) "Defendant has failed to show that counsel was deficient or Defendant was prejudiced by counsel's failure to attempt to impeach Ms. Lee's testimony regarding the 'true nature' of her relationship with the victim. . . ." R-5246-47.
- 2E(1) "[T]his evidence was already presented to the jury. . . . Defendant has failed to demonstrate that the results of her trial would have been different. . . ." R-5265.
- 2E(3) "Regardless of whether the jury found premeditation or that the murder was conducted during the course of a felony, the jury's verdict of first-degree murder would have remained the same." R-5267.
- 2E(4) "Terrance Woods' testimony would simply not be enough for the court to find, or the jury to consider, this statutory mitigator." R-5268.
- 2F(2) "Counsel cannot be ineffective in failing to present Darren Lee as a witness on this issue when Darren Lee never made statements prior to evidentiary hearing regarding Heather Lee's confession." R-5270-71.
- 2F(4) "[C]ounsel cannot be deemed deficient for failing to call Darren Lee to testify on this topic at trial." R-5273.
- 2G(1) "Counsel was not deficient for failing to present Nicole Henderson's testimony regarding Heather Lee's alleged confession." R-5275.

- 2G(2) "Defendant has failed to show that trial counsel was deficient for not calling Nicole Henderson as a witness at trial, or that she was prejudiced." R-5275-76.

For these sub-sub-claims and sub-sub-sub-claims, the standard of review is also mixed: competent substantial evidence as to factual findings; de novo as to legal conclusions. *See Kormondy v. State*, 983 So.2d at 428.

For the following sub-sub-sub-claims, the trial court found the allegations facially insufficient because Appellant failed to allege specific prejudice:

- 2B(1)(b) "Defendant's claim is facially insufficient for failure to allege proper prejudice." R-5235.
- 2B(1)(c) "Defendant's claim is facially insufficient for failure to allege proper prejudice." R-5235.
- 2B(1)(d) "Defendant's claim is facially insufficient for failure to allege proper prejudice." R-5236.
- 2B(1)(e) "Defendant's claim is facially insufficient for failure to allege proper prejudice." R-5238.
- 2B(1)(f) "Defendant's claim is facially insufficient for failure to allege proper prejudice." R-5239.
- 2B(1)(h) "Defendant's claim is facially insufficient for failure to allege

proper prejudice." R-5243.

- 2B(2)(b) "This subclaim is facially insufficient for failing to allege specific, proper prejudice." R-5251.
- 2B(2)(c) "This subclaim is facially insufficient for failing to allege specific, proper prejudice." R-5252.
- 2B(2)(d) "This subclaim is facially insufficient for failing to allege specific, proper prejudice." R-5253.
- 2B(2)(f) "Initially, this subclaim is facially insufficient for failing to allege specific, proper prejudice." R-5257.

As a general rule, trial courts may summarily deny legally insufficient motions without the benefit of an evidentiary hearing. *See, e.g.*, *Connor v. State*, 979 So.2d 852, 868 (Fla. 2007), as clarified (Apr. 10, 2008) ("Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record.").

In this case, however, the trial court found 10 sub-sub-sub-claims to be "facially insufficient" after an evidentiary hearing was held on the "big" claim of ineffective assistance of counsel for the entirety of the guilt phase. For each of these sub-sub-sub-claims, the trial court found that Appellant failed to present any supporting testimony during the evidentiary hearing:

- 2B(1)(b) "Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim." R-5235.
- 2B(1)(c) "Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim." R-5235.
- 2B(1)(d) "Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim." R-5236.
- 2B(1)(e) "Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim." R-5238.
- 2B(1)(f) "Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this allegation." R-5239.
- 2B(1)(h) "Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim." R-5243.
- 2B(2)(b) "Defendant failed to present any testimonial evidence to support this claim." R-5251.
- 2B(2)(c) Although trial counsel testified generally, "Corrie Doyle was not called as a witness at the evidentiary hearing." R-5252.
- 2B(2)(d) "Defendant failed to present any testimonial evidence in support of this claim." R-5253.

- 2B(2)(f) "Even though this claim was scheduled for evidentiary hearing, Defendant did not present any testimonial evidence regarding this subclaim." R-5257.

Because the trial court faulted Appellant for failing to present sufficient evidence to support these sub-sub-sub-claims at the evidentiary hearing, these sub-sub-sub-claims do not qualify as summarily denied. In other words, they were denied based upon their lack of merit, not their legal insufficiency. Consequently, the mixed standard of review should apply: competent substantial evidence as to factual findings; de novo as to legal conclusions. *See Kormondy v. State*, 983 So.2d at 428.

This might prove a distinction without a difference, however, as the lack of any testimonial evidence may render unnecessary any deference to the trial court's credibility determinations and factual findings. *See generally Tanzi v. State*, 94 So.3d 482, 493 (Fla. 2012), citing *State v. Coney*, 845 So.2d 120, 137 (Fla. 2003) ("Because a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review.").

Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are governed by the U.S.

Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to establish a successful claim for relief, a defendant must establish the dual prongs of deficient performance and prejudice:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986).

This Court's recent decision in *Allen v. State*, 261 So.3d 1255 (Fla. 2019), describes the requirements of those dual prongs in greater detail. *See id.* at 1269:

> To establish the *Strickland* deficiency prong, "the defendant must demonstrate that counsel's performance was unreasonable under 'prevailing professional norms.'" [*Peterson v. State*, 221 So.3d 571, 583-84 (Fla. 2017)] (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). There is a strong presumption that counsel's performance was not ineffective. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689, 104 S.Ct. 2052. Moreover, counsel's "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000).
>
> The *Strickland* prejudice prong requires the defendant to show that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different," where

> "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Specifically for claims of ineffective assistance of counsel during the penalty phase, a defendant must show that, absent the errors, "the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," *id*. at 695, 104 S.Ct. 2052, meaning that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding," *Hoskins v. State*, 75 So.3d 250, 254 (Fla. 2011).
>
> Further, "because the *Strickland* standard requires establishment of both prongs, when 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." *Waterhouse v. State*, 792 So.2d 1176, 1182 (Fla. 2001).

This Case

Under Issue I, Appellant challenges the trial court's denial of 21 separate sub-sub-claims and sub-sub-sub-claims that trial counsel ineffectively assisted Appellant throughout the entirety of the guilt phase. The trial court only found deficient performance with respect to one allegation, to wit: sub-sub-claim 2E(2). R-5266. Specifically, the trial court found that trial counsel performed deficiently by failing to call Mr. Woods to testify that Heather Lee had a motive to kill the victim because Heather Lee's husband, Darren Lee, had an affair with the victim. R-1632, 5266.

As to sub-sub-claim 2E(2), however, the trial court determined that Appellant failed to demonstrate prejudice. R-5266. The trial court highlighted that

"that the evidence in this case strongly supports the jury's verdict of first-degree murder." R-5266. Additionally, the trial court concluded that "[e]ven with Terrance Woods' testimony regarding Heather Lee's motive … the evidence was too strong against [Appellant] for the jury not to have returned a verdict of guilt for first-degree murder." Because Appellant "has been unable to demonstrate that the results of her verdict would have been different," the trial court ruled that Appellant "is not entitled to relief as to this subclaim." R-5266.

In denying sub-sub-claim 2E(2), the trial court specifically referenced the overwhelming evidence of guilt detailed previously. *See* R-5266 ("As detailed previously, the evidence in this case strongly supports the jury's verdict of first-degree murder."). As to that evidence, the trial court denied a similar allegation with respect to sub-sub-sub-claim 2B(1)(i). *See* R-5246:

> The evidence at trial showed that Defendant lured the victim to her home under false pretenses, and with the assistance of Heather Lee and Britnee Miller, Defendant stunned, beat, and kidnapped the victim, and then transported her to a clearing in the woods where Defendant and Miller continued to beat and stun the victim. Eventually, the victim was doused with a canister of gasoline and she was set on fire. *Before she died, the victim walked to a local residence and identified Defendant, Britnee Miller, and Heather Lee as her attackers*. It is undisputed that Defendant's DNA was found on the handle of the stun gun used in the crime; the victim's blood was found on the headrest in Defendant's vehicle, and an orange, gold, and black hairweave that matched Defendant's hair the night of the incident was found in the clearing. It appeared to be the missing section of Defendant's hairweave from the back of her head. With

> this convincing evidence, there is no reasonable probability that Defendant would not have been convicted of first-degree murder if trial counsel had questioned Ms. Lee about her husband sleeping with Defendant.

(Emphasis added.)

Additionally, in denying sub-sub-claim 2E(3) ("Rejection of Premeditated Murder Theory"), the trial court provided an explanation that applies with equal force to sub-sub-claim 2E(2). *See* R-5267:

> Defendant contends that if Terrance Woods' testimony had been presented at trial, the jury would have had a reason to reject the State's theory of premeditated murder in this case. However, Defendant neglects Mallory Azriel's trial testimony that Britnee Miller told her right before the attack on the victim, "we're fixing to kill Audreanna." This evidence would not have been refuted by Terrance Woods' testimony [that Heather Lee did indeed pour the gasoline and light the victim on fire]. This statement of the group's intent to kill the victim before the attack began is enough to support a finding of premeditated murder.
>
> For argument's sake, even if Terrance Woods' testimony regarding Heather Lee's admissions and her knowledge of her husband's affair had somehow given the jury "a reason" to reject the State's theory of premeditated murder, Defendant also ignores the fact that Defendant was not charged only with premeditated first-degree murder, but in the alternative with felony murder. Terrance Woods' testimony would do nothing to refute the evidence that the victim was also kidnapped: the victim was tased multiple times, stuffed in the trunk of Defendant's vehicle, and taken against her will to the wooded area, where the attack that eventually led to her death occurred. Regardless of whether the jury found premeditation or that the murder was conducted during the course of a felony, the jury's verdict of first-degree murder would have remained the same.

Given this overwhelming evidence of Appellant's guilt, this Court need not examine all 21 sub-sub-claims and sub-sub-sub-claims for deficient performance. *See Deparvine v. State*, 146 So.3d at 1083, quoting *Preston v. State*, 970 So.2d 789, 803 (Fla. 2007) (quoting *Stewart v. State*, 801 So.2d 59, 65 (Fla. 2001)) ("The Court does not reach both *Strickland* prongs in every case. '[W]hen 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 also Hodges v. State*, 213 So.3d 863, 880 (Fla. 2017) ("We have resolved three of Hodges's claims based on a lack of prejudice, without resolving whether counsel's performance was deficient.").

Conclusion

In denying the claim of ineffective assistance of counsel for the entirety of the guilt phase, the trial court correctly determined that Appellant failed to establish sufficient prejudice for each claim, sub-claim, sub-sub-claim, and sub-sub-sub-claim. Given the overwhelming evidence of guilt, this Court can take confidence in the result and affirm the trial court's decision. *See Anderson v. State*, 220 So.3d 1133, 1148 (Fla. 2017) ("Even if we were to assume that counsel was deficient, our confidence in the outcome would not be undermined.").

ISSUE II: DID THE TRIAL COURT REVERSIBLY ERR WHEN IT DENIED APPELLANT'S CLAIMS OF NEWLY DISCOVERED EVIDENCE?

Standard of Review

In her Initial Brief, Appellant fails to identify the applicable standard of review. Consequently, it does not appear that the Initial Brief complies with Rule 9.210. *See* Fla. R. App. P. 9.210(b)(5).

The standard of review for a challenge to the trial court's denial of a claim of newly discovered evidence is mixed: competent substantial evidence as to factual findings; de novo as to questions of law. *See Brooks v. State*, 175 So.3d 204, 231 (Fla. 2015):

> When a postconviction court rules on a newly discovered evidence claim after an evidentiary hearing, this Court will affirm those determinations that involve findings of fact, the credibility of witnesses, and the weight of the evidence provided they are supported by competent, substantial evidence. As with other postconviction claims, this Court reviews the postconviction court's application of the law to the facts de novo.

(Citations omitted.)

Preservation

Because Appellant did not raise the specific allegations in her motion for postconviction relief, Appellant failed to preserve the following arguments under Issue II for appellate review: C ("Heather Lee's Confession to Tajiri Jabali"); D

("Similar-Fact Evidence of Heather Lee's Pattern of Violence as Witnessed by Tajiri Jabali"); E ("Similar-Fact Evidence of Heather Lee's Pattern of Violence as Witnessed by Nicole Henderson"); and F ("Email Corroborating that Heather Lee's Testimony Against Ms. Brown was a Lie"). *See Jimenez v. State*, 997 So.2d at 1072; *see also Henyard v. State*, 992 So.2d at 126 n.2.

Newly Discovered Evidence

In order to establish a successful claim of newly discovered evidence, a defendant must establish two prongs:

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla. 1994).
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. [*Jones v. State*, 591 So.2d 911, 915 (Fla. 1991)]. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id*. at 916.

Jones v. State, 709 So.2d 512, 521 (Fla. 1998).

This Case

Appellant argues that Heather's Lee's post-trial statements regarding her involvement in the murder "would both weaken the case against her so as to give

rise to a reasonable doubt as to her culpability, and yield a less severe sentence." IB-95-96.

With regard to sub-claims 8A and 8B raised below, the trial court found that the purported statements made by Heather Lee to Shayla Edmonson and Jessica Swindle did not qualify as newly discovered evidence for two reasons: they were made after Appellant's trial; and trial counsel discovered the substance of the statements prior to trial. *See* R-5305 ("Shayla Edmonson's testimony of what Heather Lee said after Defendant's trial does not constitute newly discovered evidence. Regardless … [a]s this evidence was already discovered before trial by trial counsel, this testimony is not newly discovered information."); *see also* R-5306 ("Jessica Swindle's testimony cannot be newly discovered evidence because it concerns statements that were made after trial. Again, the substance of Jessica Swindle's testimony is not newly discovered.").

With regard to the first basis for denial, the trial court essentially relied on this Court's decision in *Wright v. State*, 857 So.2d 861 (Fla. 2003). *See* R-5303; *see also Wright* at 871, citing *Porter v. State*, 653 So.2d 374, 380 (Fla. 1995) ("[W]e have said that newly discovered evidence, by its very nature, is evidence that existed but was unknown at the time of the prior proceedings."); *Porter* at 380 ("Moreover, newly discovered evidence, by its very nature, is evidence which

existed but was unknown at the time of sentencing. Porter's conduct in prison since his sentencing obviously does not meet these criteria."); *Kearse v. State*, 969 So.2d 976, 987 (Fla. 2007) ("[T]he evidence did not exist at the time of the resentencing, and Kearse fails to meet the first prong of the test.").

However, this Court subsequently clarified the first prong of *Jones* and receded from its prior decisions in *Porter*, *Wright*, and *Kearse*. *See Wyatt v. State*, 71 So.3d 86, 100 (Fla. 2011):

> We now clarify that the language "must have existed ... at the time of trial," which was promulgated by this Court in *Kearse* and applied by the postconviction court in this case, has never been a part of newly discovered evidence analysis and was an incorrect recitation of the test set forth in the *Jones* decisions. [n.13 To the extent that *Porter v. State*, 653 So.2d 374, 380 (Fla. 1995), and *Wright v. State*, 857 So.2d 861, 871 (Fla. 2003), utilize language similar to that found in *Kearse*, we also conclude that such statements constitute incorrect recitations of the definition for newly discovered evidence.]

Regardless of any reliance on the *Porter* line of cases, however, the trial court correctly determined that Appellant failed to satisfy the first prong of *Jones* because the substance of Heather Lee's statements was known to trial counsel before the trial began. *See* R-5305:

> Regardless, the substance of Shayla Edmonson's testimony — that Heather Lee admitted to lighting the victim on fire because she was sleeping with Heather Lee's husband — is far from newly discovered evidence. Wendy Moye testified to a similar confession by Heather Lee at trial and Terrance Woods testified before trial regarding Heather Lee's husband having an affair with the victim.

See also R-5306 ("Trial counsel already found through his investigations before trial that Heather Lee confessed to pouring gasoline and lighting the victim on fire because her husband was sleeping with the victim."); *see also* R-2979:

> Q. Now, *prior to trial*, at some point, you became aware that — you became aware of some new information that Heather Lee had been confessing to people in jail saying that she had thrown the gas on Ms. Zimmerman and lit her on fire. Do you remember that?
>
> A. I remember hearing that. I don't remember when.

Furthermore, as demonstrated by the lack of sufficient prejudice to support a claim of ineffectiveness of counsel under *Strickland*, the overwhelming evidence of Appellant's guilt precludes Appellant from satisfying the second prong of the *Jones* test for newly discovered evidence. Put simply, Appellant cannot establish materiality — i.e. that the statements in question "would probably produce" an acquittal or life sentence.

In denying sub-sub-claim 2E(3) ("Rejection of Premeditated Murder Theory"), the trial court provided an explanation that applies with equal force to sub-claims 8A and 8B regarding the probability of an acquittal for first-degree murder. *See* R-5267:

> Defendant contends that if Terrance Woods' testimony had been presented at trial, the jury would have had a reason to reject the State's theory of premeditated murder in this case. However, Defendant neglects Mallory Azriel's trial testimony that Britnee

> Miller told her right before the attack on the victim, "we're fixing to kill Audreanna." This evidence would not have been refuted by Terrance Woods' testimony [that Heather Lee did indeed pour the gasoline and light the victim on fire]. This statement of the group's intent to kill the victim before the attack began is enough to support a finding of premeditated murder.
>
> For argument's sake, even if Terrance Woods' testimony regarding Heather Lee's admissions and her knowledge of her husband's affair had somehow given the jury "a reason" to reject the State's theory of premeditated murder, Defendant also ignores the fact that Defendant was not charged only with premeditated first-degree murder, but in the alternative with felony murder. Terrance Woods' testimony would do nothing to refute the evidence that the victim was also kidnapped: the victim was tased multiple times, stuffed in the trunk of Defendant's vehicle, and taken against her will to the wooded area, where the attack that eventually led to her death occurred. Regardless of whether the jury found premeditation or that the murder was conducted during the course of a felony, the jury's verdict of first-degree murder would have remained the same.

Similarly, in denying sub-sub-claims 2E(4) and 2E(5) ("Consideration of Statutory Mitigator"), the trial court provided an explanation that applies with equal force to sub-claims 8A and 8B regarding the probability of a life sentence. *See* R-5268:

> While Terrance Woods' trial testimony could have formed a basis for the jury to believe Heather Lee was more involved in the crime than her testimony would suggest, it does nothing to change the fact that Defendant was much more than an accomplice or a minor participant in the murder. Even if the jury had discounted Heather Lee's testimony, the evidence at trial was that Defendant was very active in the attack on the victim; in fact, it was Defendant who was the major aggressor against the victim. Terrance Woods' testimony would simply not be enough for the court to find, or the jury to consider, this

> statutory mitigator [that Defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct].

Cf. Henyard v. State, 992 So.2d at 126:

> The record affirmatively supports the State's position that regardless of whether Smalls or Henyard pulled the trigger, Henyard's substantial culpability as outlined by the trial court in great detail and as reflected in our opinion affirming his death sentence establishes the death penalty as a proportionate sentence for his actions. Even if Nawara's hearsay testimony was somehow deemed admissible at trial, we conclude Nawara's statement does not cast doubt on Henyard's culpability or death sentence for the murders. Henyard planned the carjacking. [*Henyard v. State*, 689 So.2d 239, 242 (Fla. 1996)]. Henyard raped and shot Dorothy Lewis. *Id*. at 243. The unrebutted evidence established that Henyard was in immediate proximity when Jasmine and Jamilya Lewis were shot. *Id*. As noted by the trial court in its order, the overwhelming evidence of Henyard's dominant role makes his current assertion that he was a "relatively minor participant" both unbelievable and without credibility.

Conclusion

In denying the claim of newly discovered evidence, the trial court correctly determined that Appellant failed to satisfy either prong of the *Jones* test: the substance of Heather Lee's statements to fellow prisoners was known to trial counsel before the trial began; and, the statements are not of such a nature that they would probably produce either an acquittal as to first-degree murder or a life sentence instead of death. Therefore, this Court can take confidence in the result and affirm the trial court's decision.

ISSUE III: DID THE TRIAL COURT REVERSIBLY ERR WHEN IT DENIED TWO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING THE PENALTY PHASE?

Standard of Review

In her Initial Brief, Appellant fails to identify the applicable standard of review. Consequently, it does not appear that the Initial Brief complies with Rule 9.210. *See* Fla. R. App. P. 9.210(b)(5).

The standard of review is mixed: competent substantial evidence as to factual findings; de novo as to legal conclusions. *See Kormondy v. State*, 983 So.2d at 428.

Preservation

The Appellant preserved Issues III.A and III.B by raising sub-claims 3A(1) and 3B in the postconviction motion.

Ineffective Assistance of Counsel

A defendant must establish counsel's deficient performance and prejudice. *See Strickland*, supra.

This Case - Issue III.A [sub-sub-claim 3(A)(1)]

Appellant argues that "Had trial counsel investigated further, they would have uncovered additional, more specific, and more detailed information that would have been mitigating and would have led to a different result with regard to

her sentence." IB-112.

As clearly demonstrated by this Court's decision on direct appeal, however, trial counsel presented extensive mitigation evidence during the penalty phase. *See Brown* at 397-400:

> During the penalty phase, the defense presented the testimony of several family members, including [Appellant's] two sons, [Appellant's] brother, [Appellant's] aunt, and two of [Appellant's] uncles. The defense also presented the testimony of Dr. Elaine Bailey, a psychologist, and introduced several family photos. The State presented one witness, Dr. John Bingham, a licensed mental health counselor, and also entered a photograph of Zimmerman into evidence.
>
> The testimony presented during the penalty phase established that [Appellant's] parents, Willie Coleman, Sr., and Lily, were teenagers when they married. [Appellant] was born in North Chicago shortly after [Appellant's] parents were married, and [Appellant's] brother, Willie Coleman, Jr., was born eleven months later. Although many family members described [Appellant's] parents as hard workers, they were also described as "partiers" who went to clubs at night and on the weekends where they would consume alcohol and use drugs. [While the record reflects that Brown's father held steady employment, Appellant's family members believed that the primary source of Willie, Sr.'s, income came not from his jobs, but from selling drugs.] This lifestyle prevented [Appellant's] parents from spending a significant amount of time with their children. Often [Appellant] and Willie, Jr., were either left at home alone or taken to the homes of different family members for extended stays. [Appellant's] uncle testified that Willie, Sr., would bring [Appellant] and [Appellant's] brother to his house on Friday nights and would not return until Sunday evening to retrieve them. As a result, [Appellant] was forced into a parenting role for [Appellant's] brother at a very early age. [Appellant] would prepare meals for Willie, Jr., dress him, assist him with homework, and walk him to and from school. Willie,

Jr., testified that he spent ninety percent of his time with [Appellant], and that [Appellant] and his aunts, uncles, and grandparents raised him.

Shortly before [Appellant's] twelfth birthday, Willie, Sr., beat [Appellant's] mother. In response, [Appellant's] mother moved out, and [Appellant's] parents divorced shortly thereafter. [Appellant's] mother was later charged with child abandonment, so Willie, Sr., who frequently used and sold drugs from his home, retained custody of [Appellant] and Willie, Jr. After [Appellant's] mother moved out, [Appellant's] father began sexually abusing [Appellant]. [Appellant's] uncle testified that he suspected [Appellant] was being sexually abused by [Appellant's] father because [Appellant] was visibly uncomfortable around Willie, Sr., and Willie, Sr., interacted with [Appellant] as if he were [Appellant's] boyfriend and not [Appellant's] father. When [Appellant] attempted to discuss the abuse with [Appellant's] paternal grandmother, the grandmother grew enraged with [Appellant] for accusing her son of sexually abusing his child, kicked [Appellant] out of the house, and told [Appellant] never to return.

Willie, Sr., stopped sexually abusing [Appellant] when he met his second wife, Melinda. However, the living situation in their household did not improve. In fact, Willie, Jr., testified that after Melinda moved in, the family became "very dysfunctional." [Appellant's] uncles testified that on several occasions they attempted to persuade Willie, Sr., to end his relationship with Melinda because they believed she was sexually promiscuous, physically aggressive, a heavy drinker, and a drug user. Willie, Sr., and Melinda would often lock themselves in the bedroom with drugs and alcohol for hours without leaving. On those nights, [Appellant] and Willie, Jr., would wander the streets in an area known for gangs and violence while Willie, Sr., and Melinda used drugs and alcohol. Willie, Jr., testified that Melinda drank every day, and when she drank she became verbally abusive. Further, while Melinda and [Appellant] initially enjoyed each other's company, their relationship quickly deteriorated. Melinda introduced [Appellant] to drugs and forced [Appellant] to engage in sexual intercourse with men for money. Willie, Jr., testified

that their father would physically abuse them when he was high, and that [Appellant] eventually moved out because of this abuse. In addition, when [Appellant] was between the ages of fourteen and twenty, [Appellant's] father ran a gang-related drug operation out of their house. [Appellant's] uncle testified that Willie, Sr., was the enforcer for the organization. Willie, Sr., was eventually investigated by the FBI, arrested, and served a year in prison for his involvement in the organization.

[Appellant] moved in with [Appellant's] mother for a short period of time, but had trouble adjusting to [Appellant's] mother's rules and a structured living environment. [Appellant's] mother eventually ordered [Appellant] out of the house. [Appellant] moved from there to [Appellant's] aunt's house. During this transitional period, [Appellant] attended four different schools in four years. [Appellant] dropped out of high school for a year, but later returned and received her high school diploma. Eventually, [Appellant] moved into a drug house where she met Greg Miller, who is the father of her three children. During this relationship, both [Appellant] and Miller abused drugs and alcohol, and [Appellant] reported incidents of domestic violence. [Appellant's] first child was born cocaine positive. After her second child was born, [Appellant] quickly became pregnant again. During the third pregnancy, [Appellant] ended her relationship with Miller and entered a substance abuse treatment facility. [Appellant's] third child, Britnee Miller, was born while [Appellant] was in that facility. As part of her treatment plan, [Appellant] agreed to allow her mother to adopt her two sons.

After she left the treatment facility, [Appellant] was drug free for four years. [Appellant] spent that time raising Britnee. [Appellant] also met another man that she married. However, shortly after they married, [Appellant's] husband was convicted of selling drugs. [Appellant] was then hired as a bartender, which is where she met a third man, who was also a drug dealer. [Appellant] and this boyfriend dated for two years. Although [Appellant] was drug free during the relationship, she reported incidents of domestic violence. When [Appellant's] boyfriend was arrested for selling drugs, [Appellant] fell into financial disarray. As a result, [Appellant] accrued multiple

speeding tickets that she was unable to pay, and her driver's license was suspended. [Appellant] was also criminally charged with writing worthless checks. [Appellant] became an exotic dancer to pay the bills, and relapsed to depend on alcohol and cocaine.

[Appellant's] relapse lasted for approximately nine years. During this time, [Appellant] was broke, homeless, and prostituted herself for money to facilitate her drug addiction. [Appellant] wrote additional worthless checks and was ordered to participate in a court-ordered treatment program. [Appellant] graduated from the program at age thirty-five, and was hired as an assistant manager at a catering company. [Appellant] was promoted to manager, and was stable in this job for approximately four years. [Appellant] started dating a fourth man. [Appellant's] family members testified that at this time in her life she was doing very well, her relationship with her boyfriend was good, and her two sons visited her often. However, a few months later, [Appellant] discovered that her boyfriend was cheating on her with her brother's girlfriend and terminated the relationship. The emotional trauma [Appellant] suffered as a result of the breakup was substantial. [Appellant] left her job, wrote more worthless checks, and experienced another relapse. This relapse, however, lasted only about a month.

During the summer of 2009, [Appellant] enrolled in online college classes, moved to Pensacola, Florida, and started working at Waffle House. By Thanksgiving, however, [Appellant] was struggling financially, had relapsed again and quit her job. [Appellant] obtained drugs by engaging in sex for drugs with Heather Lee's husband. On the day of the attack, [Appellant] told Dr. Bailey she had used "several hundred dollars" worth of cocaine. [Appellant, however, told Dr. Bingham that she smoked "not as much" cocaine on the day of the attack as she had in the past.]

Dr. Bailey testified that she interviewed [Appellant], [Appellant's] mother, [Appellant's] aunt, [Appellant's] two uncles, [Appellant's] brother, and [Appellant's] two sons. Dr. Bailey also testified that she reviewed [Appellant's] medical, legal, and academic records; [Appellant's] psychological testing; the offense report; the

supplemental investigative report; the autopsy report; and the statements of witnesses and codefendants. Based on her evaluation, Dr. Bailey concluded [Appellant] suffered from repeated traumas, addictions, physically and sexually abusive relationships, negative community influences, and exposures to violence both in her childhood and adult life. Dr. Bailey testified that [Appellant's] parents were neglectful and provided an inadequate and unhealthy foundation, which negatively impacted [Appellant's] development. Dr. Bailey concluded that the repercussions from the repeated traumas in [Appellant's] childhood extended for decades into her adolescence and adulthood. However, Dr. Bailey concluded that [Appellant] was logical, and was able to think linearly and rationally. Nothing in [Appellant's] past demonstrated a propensity for violence, or that she was suffering from bipolar disorder, any mood disorders, or schizophrenia. While [Appellant] did exhibit some psychotic symptoms, Dr. Bailey testified that [Appellant] was not under extreme emotional distress at the time of the murder. Dr. Bailey would not diagnose [Appellant] with any condition other than dependence on crack cocaine, which was in remission due to her incarceration. Finally, Dr. Bailey testified that [Appellant] did not deny her involvement in the murder, and that [Appellant] felt remorseful for her actions.

Dr. Bingham, the State's expert, testified that he conducted a mental status evaluation of [Appellant] and concluded that she did not exhibit signs of psychosis and possessed an intelligence level in the low-average range. He further testified that while [Appellant] exhibited anger and rage, there was no indication that those feelings inhibited her ability to think clearly or to recognize right from wrong. He concluded that [Appellant's] actions on the night of the attack demonstrated preplanning, direction, and were goal oriented. Dr. Bingham found no evidence that [Appellant] lacked the capacity to conform her conduct to the requirements of the law, or that she exhibited diminished capacity in understanding the criminality of her conduct. He concluded that [Appellant] was not under extreme duress or experiencing an emotional disturbance at the time of the offense. Finally, Dr. Bingham concluded that while there was substantial trauma in [Appellant's] life, there was no cause and effect relationship

> connecting [Appellant's] past to her actions in murdering Zimmerman.

Given the extensive mitigation evidence admitted at trial, the trial court correctly determined that trial counsel was not deficient for failing to present additional, cumulative evidence of Appellant's life history. *See* R-5281:

> Even if this subclaim were facially sufficient, the information alleged is cumulative to the lengthy mitigation already presented by penalty phase counsel. Penalty phase counsel is not deficient for failing to present additional, cumulative evidence. *Troy v. State*, 57 So.3d 828, 835 (Fla. 2001) (a claim that counsel is ineffective for failing to present mitigation evidence will not be sustained "where the jury was aware of most aspects of the mitigation evidence that the defendant claims should have been presented"). Additionally, Defendant has failed to demonstrate how penalty phase counsel did not "link" Defendant's background to its effect on Defendant during the crime. Attorney Wilson testified that she thought Dr. Bailey covered Defendant's life history from the beginning to the time of the crime, and linked Defendant's life history to the crime itself. The record before this Court supports this conclusion.

This Case - Issue III.B [sub-claim 3B]

Appellant argues that trial counsel failed to present more detailed testimony describing how Appellant's history of sexual abuse and drug addiction impacted her behavior during the murder of the victim. IB-112-14.

In denying this sub-claim, the trial court correctly determined that the additional, expert testimony presented at the evidentiary hearing was cumulative to the evidence presented at trial and insufficient to mitigate the heinous, atrocious,

and cruel (HAC), cold, calculated, and premeditated (CCP), and felony murder (kidnapping) aggravators. *See* R-5291-92:

> [T]his Court finds that Defendant was not prejudiced by trial counsel's failure to consult with or present additional testimony from mental health experts during the penalty phase of trial. The expert testimony Defendant presented at evidentiary hearing was largely cumulative of the evidence presented through lay witnesses and Dr. Bailey at trial. Each of the three experts Defendant called at the evidentiary hearing — Dr. Faye Sultan, Dr. Drew Edwards, and Dr. Michael Herkov — presented opinions that largely reflected Dr. Bailey's testimony at trial, albeit with some additional detail. To the extent the postconviction experts' opinions differed from Dr. Bailey's, "[s]imply presenting the testimony of experts during the [post-conviction] evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief." *Dufour v. State*, 905 So.2d 42, 58 (Fla. 2005). Further, as detailed throughout this order, the evidence in this case is overwhelming and supported the three weighty aggravators in this case: heinous, atrocious, and cruel (HAC), CCP, and felony murder (kidnapping). These aggravators would not have been outweighed by the cumulative mitigation evidence that Defendant presented at evidentiary hearing. Defendant has failed to show that the additional experts' testimony, which was largely repetitive of that presented at trial, would have made a difference in the jury's verdict.

Conclusion

In denying the claim of ineffective assistance of counsel for the entirety of the penalty phase, the trial court correctly determined that the additional, expert testimony presented at the evidentiary hearing was: cumulative to that presented at trial; and insufficient to mitigate the HAC, CCP, and felony murder (kidnapping)

aggravators. Given the extensive mitigation evidence admitted at trial, this Court can take confidence in the result and affirm the trial court's decision.

ISSUE IV: DID THE TRIAL COURT REVERSIBLY ERR WHEN IT DENIED A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING COUNSEL'S DECISION TO NOT CHALLENGE JUROR TAYOR FOR CAUSE?

Standard of Review

In her Initial Brief, Appellant fails to identify the applicable standard of review. Consequently, it does not appear that the Initial Brief complies with Rule 9.210. *See* Fla. R. App. P. 9.210(b)(5).

The standard of review is mixed: competent substantial evidence as to factual findings; de novo as to legal conclusions. *See Kormondy v. State*, 983 So.2d at 428.

Preservation

The Appellant preserved Issue IV by raising sub-claim 1E in the postconviction motion.

Ineffective Assistance of Counsel

In order to establish ineffective assistance of counsel, Appellant must establish that counsel engaged in deficient performance that resulted in actual prejudice (i.e. real harm). *See Strickland*, supra.

Ineffective Assistance of Counsel for Failure to Strike a Juror

All ineffective assistance of counsel claims — to include claims that trial counsel failed to strike a juror — are subject to the *Strickland* standard. *See*

Carratelli v. State, 961 So.2d 312, 320 (Fla. 2007) ("A defendant's claim that his counsel offered ineffective assistance at trial, *for whatever reason*, must be analyzed under the standard the Supreme Court enunciated in *Strickland*.") (emphasis added).

Impact, if any, on the Trial, not any Subsequent Appeal

If an appellant challenges the effectiveness of trial counsel's decision, *vel non*, to strike a juror, then the court must examine the impact of that decision on the outcome of the trial, not any subsequent appeal; in other words, *Strickland*'s prejudice prong focuses on the proceeding during which counsel's performance occurred. *See Carratelli v. State*, 961 at 323 ("[W]e hold that a defendant alleging that counsel was ineffective for failing to object or preserve a claim of reversible error in jury selection must demonstrate prejudice at the trial, not on appeal."); *see also id.* at 322, quoting *Strickland v. Washington*, 466 U.S. at 696 ("[T]he 'ultimate focus of inquiry must be on the fundamental fairness of the proceeding *whose result is being challenged*.'") (emphasis in original). Thus, a postconviction claim alleging ineffective assistance during jury selection "must demonstrate prejudice at the trial." *Id.* at 323.

Actual Bias

In order to satisfy *Strickland*'s prejudice prong, a defendant must show

actual bias on the part of the juror. *See Carratelli v. State*, 961 at 324 ("We therefore hold that where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased."). In short, if there is no actual bias, then there can be no prejudice. *See Smithers v. State*, 18 So.3d 460, 464 (Fla. 2009) ("Without a showing of such actual bias of the juror, the defendant cannot establish the prejudice required by *Strickland*.").

What is Actual Bias?

In order to establish actual bias, a postconviction litigant must prove "bias-in-fact that would prevent service as an impartial juror." *Carratelli v. State*, 961 at 324. In order to establish that point, a postconviction litigant alleging ineffective assistance of counsel must show actual bias "against the defendant." *Id.* And, the evidence of actual bias "must be plain on the face of the record." *Id.*

Claims of theoretical, putative, or speculative bias remain insufficient to satisfy the *Carratelli* standard. *See generally Shellito v. State*, 121 So.3d 445, 452 (Fla. 2013), citing *Green v. State*, 975 So.2d 1090, 1105 (Fla. 2008) ("Shellito's claim [that trial counsel was ineffective in failing to determine if the prospective jurors could disregard their specialized training] is *speculative*.") (emphasis added); *see also Boyd v. State*, 200 So.3d 685, 697 (Fla. 2015):

> Besides, we do not think that it is pragmatic to promulgate a per se rule that one's status as a convicted felon denotes inherent bias against a criminal defendant's legal interests. Otherwise, courts would be placed in the precarious position of ordering new trials based not on legally sufficient evidence of actual bias or prejudice, *but wholly on gut reactions to sociological generalizations of human tendencies*.

(Citations omitted; emphasis added.)

Postconviction v. Direct Appeal

With respect to jury selection claims, the standard for obtaining relief in postconviction "is much more strict" and "more restrictive" than the "relatively lenient" direct appeal standard of establishing preserved error. *See Carratelli v. State*, 961 at 317-18:

> "[T]he test for prejudicial error in conjunction with a direct appeal is very different from the test for prejudice in conjunction with a collateral claim of ineffective assistance." *Sanders v. State*, 847 So.2d 504, 506 (Fla. 1st DCA 2003) (en banc) (quoting *Hill v. State*, 788 So.2d 315, 318 (Fla. 1st DCA 2001)), *approved*, 946 So.2d 953 (Fla. 2006). On direct appeal, to obtain a new trial a defendant alleging the erroneous denial of a cause challenge must show only that preserved error occurred. *See Goodwin v. State*, 751 So.2d 537, 544 (Fla. 1999). To obtain postconviction relief, however, the standard is much more strict.

See also id. at 320 ("[T]he standard for obtaining a reversal upon the erroneous denial of a cause challenge is relatively lenient: a defendant need only show that an objectionable juror—whether or not actually biased—sat on the jury. Our consideration of postconviction claims, however, is more restrictive.").

In postconviction litigant must demonstrate actual bias; on direct appeal, and presuming appropriate preservation, an appellant need only show that "reasonable doubt existed about the juror's impartiality." *Carratelli v. State*, 961 at 315; *see also Hall v. State*, 212 So.3d 1001, 1016 (Fla. 2017) ("This is a higher standard than on direct appeal—mere doubt about a juror's impartiality is insufficient under this standard.").

Purpose of the Stricter Standard

A stricter standard for postconviction claims serves two important purposes: it honors the preservation rule, thereby discouraging sandbagging at trial; and it respects the importance of finality of judgment. *Carratelli v. State*, 961 at 324-25.

Preservation Rule – Opportunity to Correct the Error

To properly preserve an issue for appellate review, a litigant must raise the issue with timeliness and specificity, thereby affording the trial court the opportunity to render an intelligent and well-informed decision at the earliest possible stage of the proceedings. *See* § 924.051(1)(b), Fla. Stat.; *see also Castor v. State*, 365 So.2d 701, 703 (Fla. 1978):

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

> To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal.

Thus, a timely objection or motion affords the trial court an opportunity to correct the purported error.

Preservation Rule – Discourage "Sandbagging"

As an additional consideration, strict adherence to the preservation requirement strongly discourages litigants from engaging in "sandbagging." *See Thompson v. State*, 949 So.2d 1169, 1179 n.7 (Fla. 1st DCA 2007), citing Black's Law Dictionary 1342 (7th ed. 1999) ("Sandbagging is defined as '[a] trial lawyer's remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem.'"); *see also J.B. v. State*, 705 So.2d 1376, 1378 (Fla. 1998), citing *Davis v. State*, 661 So.2d 1193, 1197 (Fla. 1995) ("[The contemporaneous objection rule] prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client."); *Murphy v. Int'l Robotic Sys., Inc.*, 766 So.2d 1010, 1026 (Fla. 2000):

> [R]equiring a contemporaneous objection prevents counsel from engaging in "sandbagging" tactics, whereby counsel may intentionally refrain from objecting to improper closing argument, hoping to prevail despite such argument, and then seek relief based on the unobjected-to

> argument in the event that the desired outcome in the case is not achieved.

See also Jones v. State, 571 So.2d 1374, 1376 n.3 (Fla. 1st DCA 1990):

> We do not want to encourage the creation of "gotchas" whereby the defense is allowed to sit on its rights, saying nothing until after it sees whether the jury returns an adverse verdict. These kinds of situations can occur just as easily early in protracted trials with enormous consequences of an inordinate waste of judicial time and resources.

See also Sailor v. State, 816 So.2d 182, 184 (Fla. 1st DCA 2002):

> This approach, whereby a party waits to see if the jury renders a favorable verdict while the party withholds a claim of error in the process, is the type of gamesmanship which the contemporaneous objection requirement is designed to prevent.

See also Lowe Invest. Corp. v. Clemente, 685 So.2d 84, 85 (Fla. 2d DCA 1996):

> Trial counsel simply cannot allow error to occur without objection, hope they will win in spite of the error, and be confident of a new trial when the trial court has not been afforded an opportunity to cure the error. The cases are legion that warn trial counsel they cannot have their cake and eat it too.

Preservation Rule – Juror Strikes

As this Court recognized in *Carratelli*, applying the direct appeal standard (reasonable doubt as to impartiality) to postconviction claims would "essentially eviscerate the requirement of contemporaneous objections." *Carratelli v. State*, 961 at 324-25. Without any preservation requirement, a postconviction litigant alleging ineffective assistance for failing the challenge a juror "would have no

greater burden than a defendant asserting preserved error on appeal." *Id*. at 325.

To preserve a challenge regarding a juror strike, a party must lodge two objections: (1) a contemporaneous objection that puts the trial court on notice; and (2) a second objection before the jury is sworn. *See Carratelli v. State*, 961 So.2d at 318. Failure to lodge the second objection indicates abandonment of the initial objection. *See Zack v. State*, 911 So.2d 1190, 1204 (Fla. 2005), citing *Joiner v. State*, 618 So.2d 174, 176 (Fla. 1993).

As this Court highlighted in *Carratelli*, "the renewal requirement provides the party with the opportunity *at trial* to timely raise a claim previously denied (or decide not to), and provides the trial court the opportunity to readdress the claim and possibly correct an error." *Carratelli v. State*, 961 at 321.

And in the context of juror challenges, this Court highlighted the importance of the preservation as a bulwark against such sandbagging. *See Carratelli v. State*, 961 at 319:

> Without such a requirement, the defendant "could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial." *Joiner*, 618 So.2d at 176 n.2; *see also Trotter v. State*, 576 So.2d 691, 693 (Fla. 1990) (noting that these requirements exist so that "[t]he defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial").

Finality of Judgment

An important complement to the sandbagging protections provided by the preservation rule, the stricter standard for postconviction juror claims reinforces the finality of judgments. *See Weaver v. Massachusetts*, 137 S.Ct. 1899, 1912 (2017):

> When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk, see *Strickland*, 466 U.S., at 693-694, 104 S.Ct. 2052 (noting the "profound importance of finality in criminal proceedings"), and direct review often has given at least one opportunity for an appellate review of trial proceedings. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.
>
> In sum, "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," *thus undermining the finality of jury verdicts*. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). For this reason, the rules governing ineffective-assistance claims "must be applied with scrupulous care." [*Premo v. Moore*, 562 U.S. 115, 122 (2011)].

(Emphasis added.) *See also Carratelli v. State*, 961 at 325:

> [B]y imposing no greater burden on postconviction than on appeal, a standard such as that articulated in [*Austing v. State*, 804 So.2d 603 (Fla. 5th DCA 2002),] allows courts to review—and order new trials based on—unpreserved non-fundamental error. *To make matters worse*, such new trials will occur much later in the process—after the postconviction motion is filed and decided, which may happen years after the original trial.

(Emphasis added.)

Issue IV (sub-claim 1E)

Appellant argues that, by failing to strike for cause Juror Taylor (due to his inflexible attitude regarding the death penalty), counsel engaged in deficient performance that resulted in actual prejudice. *See* IB-116:

> Counsel's failure to strike Juror Taylor constituted deficient performance because it denied Ms. Brown her right to due process, a fair trial, an impartial jury, and to be free from cruel and/or unusual punishment. Ms. Brown was prejudiced because Juror Taylor indicated that he would automatically vote for death if Ms. Brown was convicted of murder.

Of note, Appellant does not claim that counsel performed deficiently by failing to use a peremptory strike against Juror Taylor.

In raising her claim, Appellant relies upon direct appeal cases to support her argument that a "court should strike for cause any juror who would automatically vote for the death penalty." IB-114, citing *O'Connell v. State*, 480 So.2d 1284, 1287 (Fla. 1985). Appellant does not, however, mention *Carratelli*.

The failure to discuss *Carratelli* in the Initial Brief merits attention, as the trial court specifically cited to that decision and its holding that a litigant must establish "actual bias" when raising a postconviction claim involving a juror challenge. *See* R-5219, citing *Carratelli v. State*, 961 at 324.

The trial court even put Appellant on notice that her postconviction claim was denied because it failed to allege (much less demonstrate) actual bias. *See* R-

5219 ("[E]ach of the subclaims are facially insufficient for failing to allege actual juror bias. Because Defendant has been given multiple opportunities to amend her motion and this claim remains facially insufficient, claim 1 is denied with prejudice.") (citations omitted).

Nonetheless, in her Initial Brief Appellant refuses to acknowledge the postconviction standard for juror claims (actual bias); instead, Appellant inappropriately relies on the direct appeal standard (reasonable doubt as to impartiality). *Compare* IB-115, citing *Morgan v. Illinois*, 504 U.S. 719 (1992), *with Smithers v. Sec'y, Dep't of Corr.*, No. 8:09- cv-2200-T-17EAJ, 2011 WL 2446576, at *30 (M.D. Fla. June 15, 2011):

> As to the state courts' finding that Juror Collins was not biased, Smithers directs this Court to *Morgan v. Illinois*. . . .
>
> [A]s this claim must be considered in the context of ineffective assistance of counsel, the relevant federal law to be applied is *Strickland*, not *Morgan*.

Because Appellant fails to cite or even discuss *Carratelli*, this Court may deem any actual bias claim waived. *See Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So.2d 958, 960 (Fla. 4th DCA 1983):

> This Court will not depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention. It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of

> law involved, and the legal arguments supporting the positions of the respective parties. When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy. Again, it is not the function of the Court to rebrief an appeal. We basically work within the framework of the briefs although, admittedly, there are instances where errors are so glaring or fundamental that a court will adjudicate them on its own initiative in its original opinion.

(Citations omitted.)

And, any discussion of *Carratelli* in the reply brief cannot cure the defect in the initial brief. *See Jones v. State*, 966 So.2d 319, 330 (Fla. 2007) ("[B]ecause it was first raised in the reply brief, we need not address it."); *see also Hall v. State*, 823 So.2d 757, 763 (Fla. 2002) ("Hall made no argument regarding equal protection in his initial brief; thus, he is procedurally barred from making this argument in his reply brief."); *City Of Bartow v. Brewer*, 896 So.2d 931 (Fla. 1st DCA 2005) (Although employer and its insurer argued that workers' compensation claimant did not prove that her shoulder injury was work-related, employer and its insurer did not address the fact that the Judge of Compensation Claims found that the 120-day rule barred employer and insurer from disputing compensability, and only in the reply brief did employer and insurer argue that the 120-day rule did not control, and *their failure to raise this point in the initial brief precluded appellate court from considering it*.).

As to the actual merits, Appellant wholly ignores a significant portion of the voir dire questions directed at Juror Taylor. When initially questioned by the State, Juror Taylor demonstrated a neutral stance on the death penalty. *See* T-234-35:

> MS. JENSEN: Thank you. Mr. Taylor?
>
> PROSPECTIVE JUROR: Yes, ma'am.
>
> MS. JENSEN: How would you classify your personal opinion on the death penalty as a possible sentence? Would you consider yourself in favor, neutral, or opposed?
>
> PROSPECTIVE JUROR: I would say if I feel that it's deserving, then I would be in favor of it. If not, then I wouldn't. I don't know if that's neutral. I don't know.
>
> MS. JENSEN: Okay. Could you personally vote to impose the death penalty in an appropriate case?
>
> PROSPECTIVE JUROR: Yes, ma'am.
>
> MS. JENSEN: Do you have an open mind right now, since the State has not presented any evidence in this case, do you have an open mind as to what would be appropriate in this particular case?
>
> PROSPECTIVE JUROR: Yes, ma'am.

Rather than acknowledging Juror Taylor's initial responses, Appellant focuses exclusively on a subsequent answer to a question posed by defense counsel. *See* T-242:

> MR. GONTAREK: [Mr. Pope] could you put your personal feelings aside in the appropriate case and follow the Judge's instructions and consider the evidence before you'd impose a death penalty if you

thought that was appropriate in a case?

PROSPECTIVE JUROR POPE: I could do that.

MR. GONTAREK: You could? Okay. And the same with you, Mr. Taylor?

PROSPECTIVE JUROR TAYLOR: No. Depending on the evidence is how I would go either way. If it's proven without a shadow of a doubt, I would go with the death penalty. If not, then I would not.

When viewed in the appropriate context, however, none of the voir dire answers from Juror Taylor establish the actual bias necessary to support a postconviction claim for relief. Numerous cases from this Court show the importance of that context.

In *Smithers v. State*, 18 So.3d 460, a prospective juror said: "But if they are guilty without a doubt they should get the death penalty." *Id.* at 464. Rather than view that comment in isolation, this Court looked at the entirety of the questions and answers. *See id.*:

> In this case, the defense argues that the following exchange gave counsel reason to challenge juror Collins for cause.
>
> MR. ROBBINS: Okay, I guess the same questions, can you conceive of circumstances that you think might be worth considering as far as mitigating circumstances, things involving either people's mental or physical circumstances, upbringing, those sorts of things?
>
> PROSPECTIVE JUROR COLLINS: I guess it depends if the person is abused as a kid or something, I don't know. *But if they are guilty without a doubt they should get the death penalty*.

> MR. ROBBINS: If someone is found guilty and you are totally convinced they are guilty of the offense whatever that particular murder case is about, do you feel that there could ever be any other sentence except the death penalty for first degree murder?
>
> PROSPECTIVE JUROR COLLINS: Maybe life without parole.
>
> MR. ROBBINS: Those are the two choices by the way, life without parole or the death penalty. But what I'm asking is do you feel there could be circumstances where you vote for a recommendation for life?
>
> PROSPECTIVE JUROR COLLINS: Yes, if I have to.

(Emphasis added.)

Based upon that record, this Court concluded that the juror's statements did not support a claim of actual bias. *See Smithers v. State*, 18 So.3d at 465:

> Juror Collins' statements did not show a biased unwillingness to consider potential sentences other than death. Rather, similar to the comments considered in [*Owen v. State*, 986 So.2d 534 (Fla. 2008)], juror Collins expressed that he could consider life without parole as a possible sentence for first-degree murder and that if under Florida law the circumstances compelled a life recommendation, he would recommend life. Thus, the record does not demonstrate actual bias that would prevent juror Collins from serving as an impartial juror. Accordingly, the postconviction court did not err in denying this claim.

In *Bailey v. State*, 151 So.3d 1142 (Fla. 2014), a prospective juror said that "the death penalty is not used enough." *Id.* at 1149. Once again, this Court did not view that comment in isolation, but examined it in the context of all the voir dire answers from the juror. *See id*. at 1149-50:

> The record shows that after she initially stated that "the death penalty is not used enough," Juror Good responded to the State's questions during voir dire by subsequently attesting that she could follow the trial court's instructions and that she could absolutely consider all mitigation presented in the case. Also during voir dire, Juror Good responded in pertinent part by stating: "[A]s a jury member after hearing the evidence if I find that the person was not mentally stable, you know, other circumstances, I could vote for life." Juror Good further responded that in the event the State proved Bailey was guilty of first-degree murder, it would be the greater weight of the evidence for the circumstances in aggravation or mitigation that would sway her vote concerning the death penalty. The circuit court also noted in its final order that Juror Good agreed she could follow the law, and that she would not allow any pretrial publicity to influence her opinion about Bailey's guilt or non-guilt in Sergeant Kight's murder.

Based upon that record, this Court concluded that the juror's statements did not support a claim of actual bias. *See Bailey v. State*, 151 So.3d at 1150:

> We find that there is competent, substantial evidence in the postconviction evidentiary record supporting the circuit court's finding credibility in Bailey's former defense team's expressed views about Juror Good. The record shows that both of Bailey's former lawyers testified that Juror Good's affirmative statements, under oath, that she could perform her duties as an impartial juror in deciding Bailey's fate, persuaded them that she was not actually biased against their client. And, we find there is otherwise insufficient evidence in this record to establish that Juror Good was actually biased against him. Accordingly, Bailey fails to establish that he was prejudiced under the *Strickland* standard concerning this issue.

In *Owen v. State*, 986 So.2d 534 (Fla. 2008), one prospective juror expressed "a personal belief that the death penalty should be automatically imposed under certain circumstances" while another juror "created some doubt as to whether she

could lay aside her belief and apply the law in the circumstance of multiple victims." *Id.* at 550. Rather than view those comments in isolation, this Court looked at the entirety of the answers and concluded that the defendant failed to establish actual bias. *See id.*:

> Next, Owen argues that trial counsel should have removed two jurors, jurors Matousek and Griffin, because those jurors indicated a personal belief that the death penalty should be automatically imposed under certain circumstances. This argument is without merit. The record demonstrates that despite her personal viewpoint, juror Matousek stated a willingness and ability to lay aside her possible bias and follow the trial court's instructions. Juror Matousek never equivocated as to whether she could follow the law, and accordingly, Owen has not shown her to be actually biased. Juror Griffin's responses during voir dire created some doubt as to whether she could lay aside her belief and apply the law in the circumstance of multiple victims. However, as set forth in *Carratelli*, while the standard for obtaining a reversal upon the erroneous denial of a cause challenge on direct appeal is relatively lenient, consideration of a postconviction claim must be more restrictive. 961 So.2d at 320. To be entitled to postconviction relief, Owen must demonstrate that juror Griffin was actually biased, not merely that there was doubt about her impartiality. While Griffin answered that she "[p]robably" would vote for the death penalty in the circumstance of multiple victims and gave confusing answers regarding how she would consider mitigating evidence, she ultimately stated that she would consider mental health testimony and that such testimony could influence her toward a life sentence. No "evidence of bias" is "plain on the face of the record." *Id*. at 324. Thus, Owen did not demonstrate that juror Griffin was actually biased.

In *Patrick v. State*, 246 So.3d 253 (Fla. 2018), a prospective juror declared "that he leaned toward the death penalty at a level of 'eight or nine' on a scale of

one to ten." *Id.* at 263 n.5. Subsequently, however, the juror stated "that he was '[r]ight in the middle' concerning the death penalty, would 'go by the law,' and would have to 'hear everything.'" *Id*. Viewing the juror's answers in their entirety, this Court concluded that comments did not show actual bias. *Id.*, citing *Guardado v. State*, 176 So.3d 886, 899 (Fla. 2015).

In *Allen v. State*, 261 So.3d 1255, a prospective juror expressed "positive sentiment toward the death penalty and expressly outlined several circumstances in which she would recommend it." *Id.* at 1286. During follow-up questioning, however, the juror confirmed "that she was flexible, would 'absolutely' listen to aggravation and mitigation, and would listen to mental health evidence." *Id.* Additionally, the juror stated "that there were certain circumstances where she would not recommend the death penalty, such as if someone was 'a party of someone's death.'" *Id*. Viewing voir dire in its entirety, this Court concluded that "the record reveals that juror Carll assured the court that she was willing to listen to the evidence, be fair, and follow the law. Her statements showing that she would abide by the law and consider the evidence presented refute the claim that juror Carll was biased. Allen therefore cannot establish prejudice." *Id*.

In this case, Juror Taylor made a comment that, when viewed in isolation, may suggest possible bias, to wit: "If it's proven without a shadow of a doubt, I

would go with the death penalty." T-242. Earlier, however, Juror Taylor expressed a neutral opinion on the death penalty and professed that he had an open mind about the case. T-234-35. When viewed in the appropriate context, these comments remain indistinguishable from the comments at issue in *Smithers*, *Bailey*, *Owen*, *Patrick*, and *Allen*. And as those cases lacked a sufficient showing of actual bias, so too the present case fails to establish that Juror Taylor possessed an actual bias against the Appellant.

Conclusion

Because Appellant failed to establish actual bias on the part of Juror Taylor, the trial court properly denied the claim of ineffective assistance of counsel. *See Peterson v. State*, 154 So.3d 275, 281 (Fla. 2014) ("Because Peterson has not demonstrated actual bias, the postconviction court properly denied this claim."). Given Appellant's failure to satisfy the prejudice prong of *Strickland*, the trial court was not required to make any determination regarding deficient performance. *See McCoy v. State*, 113 So.3d 701, 708 (Fla. 2013), citing *Ferrell v. State*, 29 So.3d 959, 969 (Fla. 2010) ("[A] court evaluating a claim of ineffectiveness is not required to issue a specific ruling on the performance component of the test when it is evident that the prejudice component is not satisfied."); *see also Patrick v. State*, 246 So.3d at 263 ("Our cases addressing such claims tend to focus on this

prong of the *Strickland* test, as it is necessary to establish that the juror was actually biased before proving that counsel performed deficiently by failing to challenge that juror due to bias.").

ISSUE V: DID THE TRIAL COURT REVERSIBLY ERR WHEN IT DENIED APPELLANT'S CLAIM OF CUMULATIVE ERROR?

Standard of Review

In her Initial Brief, Appellant fails to identify the applicable standard of review. Consequently, it does not appear that the Initial Brief complies with Rule 9.210. *See* Fla. R. App. P. 9.210(b)(5).

The standard of review is mixed: competent substantial evidence as to factual findings; de novo as to legal conclusions. *See Kormondy v. State*, 983 So.2d at 428.

Preservation

The Appellant preserved Issue V by raising multiple claims of ineffective assistance of counsel.

Ineffective Assistance of Counsel

In order to establish ineffective assistance of counsel, Appellant must establish that counsel engaged in deficient performance that resulted in actual prejudice (i.e. real harm). *See Strickland*, supra.

What Is Cumulative Error Analysis?

If multiple actions by counsel independently rise to the level of constitutionally deficient performance, but none of those actions individually satisfy the prejudice prong of *Strickland*, then a court may perform a cumulative

error analysis in order to determine if the overall effect of counsel's multiple deficiencies warrants relief. *See Ellis v. Raemisch*, 872 F.3d 1064, 1090 (10th Cir. 2017) ("This doctrine applies in the context of *Strickland*, where counsel's individual actions have been found to be constitutionally deficient, but nonprejudical."); *see also Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003) ("*Strickland* errors require us to assess whether there is a reasonable probability that counsel's deficient performance affected the trial outcome. . . . [S]uch claims should be included in the cumulative-error calculus if they have been individually denied for insufficient prejudice.").

Cumulative Error Analysis Requires more than one Error

An important point, cumulative error analysis can only be performed if a court finds multiples instances of deficient performance. *See Hoxsie v. Kerby*, 108 F.3d 1239, 1245 (10th Cir.1997) ("Cumulative-error analysis applies where there are two or more actual errors."); *Taylor v. Beard*, 616 Fed. App'x 344, 345 (9th Cir. 2015) ("[Petitioner] has failed to demonstrate any error here; thus, there can be no cumulative error."); *Lowe v. State*, 2 So.3d 21, 33 (Fla. 2008) ("[B]ecause Lowe's individual claims are without merit, his cumulative error claim must fail."); *Griffin v. State*, 866 So.2d 1, 22 (Fla. 2003) ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative

error must fail."); *Vining v. State*, 827 So.2d 201, 219 (Fla. 2002) (holding that where alleged individual errors are without merit, the contention of cumulative error is similarly without merit); *Downs v. State*, 740 So.2d 506, 509 (Fla. 1999) (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit).

Accordingly, multiple instances of non-deficient performance cannot be combined to form cumulative error. *See United States v. Thomas*, 724 F.3d 632, 648 (5th Cir. 2013) ("[T]here is no precedent supporting the idea that a series of 'errors' that fail to meet the standard of objectively unreasonable can somehow cumulate to meet the high burden set forth in *Strickland*."); *see also Hooks v. Workman*, 689 F.3d 1148, 1194-95 (10th Cir. 2012) ("[A]s the term 'cumulative' suggests, '[c]umulative-error analysis applies where there are two or more actual errors. It does not apply ... to the cumulative effect of non-errors.'") (citations omitted); *Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir. 2007) (citing *Derden v. McNeel*, 978 F.2d 1453, 1454, 1461 (5th Cir. 1992) (Meritless claims or claims that are not prejudicial cannot be cumulated regardless of the total number raised.).

As succinctly stated by the Fifth Circuit, "twenty times zero" still "equals zero." *See Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987):

> Mullen finally asserts that even if none of his claims entitles him to relief individually, all of them collectively, do. Habeas relief is

> available only where a prisoner is in custody in violation of the Constitution or of federal law. 28 U.S.C. § 2254. Mullen cites no authority in support of his assertion, which, if adopted, would encourage habeas petitioners to multiply claims endlessly in the hope that, by advancing a sufficient number of claims, they could obtain relief even if none of these had any merit. We receive enough meritless habeas claims as it is; we decline to adopt a rule that would have the effect of soliciting more and has nothing else to recommend it. *Twenty times zero equals zero*.

(Emphasis added.) Put another way, without multiple errors there is "nothing to cumulate." *Yohey v. Collins*, 985 F.2d 222, 229 (5th Cir. 1993).

Cumulative Prejudice Analysis Requires Cumulative Errors

Similarly, a court cannot conduct any cumulative prejudice analysis unless it finds more than one instance of deficient performance. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible."); *see also Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006) ("In making this determination as to prejudice, this Court examines the combined effect of all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case.").

Put another way, only the prejudice associated with actual findings of deficient performance can support an argument for cumulative prejudice. *See Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1269 (11th Cir. 2012) ("While the prejudice inquiry should be a cumulative one as to the effect of all of the

failures of counsel that meet the performance deficiency requirement, only the effect of counsel's actions or inactions that do meet that deficiency requirement are considered in determining prejudice."). Thus, if a claim of prejudice is only tied to an unsubstantiated claim of deficient performance, then that alleged prejudice can offer no support.

Unfortunately, at least one decision from this Court appears to suggest otherwise. *See Asay v. State*, 210 So.3d 1, 25 (Fla. 2016) ("Asay's *Strickland* claim is insufficient for failing to demonstrate deficiency or prejudice. Therefore, *the only alleged error this Court could review for cumulative prejudice* is Asay's *Brady* claim based on the evidence showing another initial suspect and a witness's ownership of a gun similar to the murder weapon.") (emphasis added).

Nonprejudicial v. Harmless

Some courts view cumulative error as an argument against harmless error. *See, e.g.*, *Nicholas v. People of the Virgin Islands*, No. 2009-0022, 2012 WL 2053537, at *14 n.24 (V.I. June 6, 2012) ("In his appellate brief, Nicholas references the 'cumulative error doctrine,' under which an appellate court may order a new trial based on many separate and independent errors that, while individually harmless, rendered a fair trial impossible when aggregated."); *see also Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007), quoting *Darks v. Mullin*, 327

F.3d 1001, 1018 (10th Cir. 2003):

> This is the standard applicable here, because "a cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless."

To many, the two tests may appear to represent opposite sides of the same coin — particularly with the phrase "reasonable possibility" appearing in a pre-*Chapman* decision from the U.S. Supreme Court. *Compare Strickland v. Washington*, 466 U.S. at 694 ("The defendant must show that 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."), *with Chapman v. California*, 386 U.S. 18, 24 (1967):

> There is little, if any, difference between our statement in [*Fahy v. State of Connecticut*, 375 U.S. 85 (1963),] about "whether there is a *reasonable possibility* that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

(Emphasis added.)

And for all intents and purposes, both *Strickland* and *Chapman* focus on

materiality — an evidence-based analysis of whether the error significantly altered the outcome of the proceeding. *See Murphy v. Puckett*, 893 F.2d 94, 96 (5th Cir. 1990) ("The *Strickland* and *Chapman* standards of materiality both have the goal of preventing courts from 'setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'").

However, that does not mean that a claim of cumulative error under *Strickland* shifts the burden to the State to prove beyond a reasonable doubt that the multiple deficiencies did not contribute to the verdict. *See generally* § 924.051(7), Florida Statutes ("In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court."). Rather, the burden stays with the defendant to establish that, had counsel's performance not fallen below the professional standard required by *Strickland*, the outcome of the trial would have been different. *Compare Strickland v. Washington*, 466 U.S. at 694 (The defendant must show establish that "there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different.") (emphasis added), *with Chapman v. California*, 386 U.S at 24 (The State must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.").

Admittedly, if a defendant satisfies *Strickland*'s prejudice prong, then the State most likely cannot satisfy *Chapman*'s test for harmless error. *See Murphy v. Puckett*, 893 F.2d at 96 ("We conclude that *Chapman* harmless error analysis is inapplicable where, as here, the petitioner has shown that 'prejudice,' as defined in *Strickland*, resulted from counsel's deficient representation."). In other words, if a defendant can show materiality under *Strickland*, then it would be difficult for the State to prove immateriality under *Chapman*.

Nonetheless, a claim of cumulative error does not shift the burden to the State; under *Strickland*, that burden remains with the defendant. *See Murphy v. Puckett*, 893 F.2d at 96 ("[U]nlike *Chapman*, *Strickland* places the burden of proof on the defendant to establish that the outcome of the trial would have likely been different had the error not occurred.").

This Case

In her claim of cumulative error, Appellant argues that "[r]epeated instances of ineffective assistance of counsel significantly tainted Ms. Brown's guilt and penalty phases." TB-117.

From the Initial Brief, it appears that Appellant attempts to incorporate every claim of error and every claim of harm — not just those claims pertaining to *Strickland*. *See* IB-117 ("The errors as claimed in this brief are hereby specifically

incorporated into this claim and include: ineffective assistance of counsel at the guilt and penalty phase; *and all others listed and presented at the evidentiary hearing*.") (emphasis added).

Without specific citations to the record, however, Appellant's attempt at an overreaching claim of cumulative error across the entirety of the proceedings must fail. *See Mendoza v. State*, 87 So.3d 644, 663 n.16 (Fla. 2011):

> To the extent Mendoza seeks to incorporate by reference the other factual bases and arguments thereto raised in his motion to disqualify for purposes of appeal, having cited in his brief the record pages of the motion to disqualify and providing no argument, the rules of appellate procedure do not authorize that practice. We deem abandoned those other bases previously alleged in support of disqualification.

(Citation omitted.)

In raising a claim of cumulative error as to *Strickland* only, Appellant faults the trial court for failing to conduct cumulative error analysis — highlighting that the lower court based its decision on the lack of any finding of multiple instances of deficient performance. *See* IB-116 ("As to cumulative error, the postconviction court reasoned that since it only found trial counsel deficient regarding one claim, but did not find any prejudice as to that claim, then a cumulative analysis regarding this single claim would not render any different result.").

Despite the clear language of *Strickland*, Appellant argues that the State must prove beyond a reasonable doubt that the cumulative deficiencies in trial

counsel's performance did not impact the verdict. *See* IB-117-18 ("The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence.").

As highlighted above, however, a *Strickland* claim of cumulative error requires multiple findings of deficient performance — something that the trial court correctly identified as lacking in this case. *See United States v. Thomas*, 724 F.3d at 648; *see also Hooks v. Workman*, 689 F.3d at 1194-95; *Turner v. Quarterman*, 481 F.3d at 301. Additionally, the Appellant enjoys the burden of proving prejudice — the burden has not shifted to the State to prove harmlessness in this case. *See Murphy v. Puckett*, 893 F.2d at 96. Given these considerations, the trial court did not err when it denied Appellant's claim of cumulative error.

Conclusion

In denying the claim of cumulative error under *Strickland*, the trial court correctly determined that, because Appellant failed to establish multiple findings of deficient performance, there could be no cumulative error or cumulative prejudice. And with an insufficient demonstration of additional deficiencies in the Initial Brief, Appellant cannot establish cumulative error on appeal. Given the overwhelming evidence of Appellant's guilt, this Court can take confidence in the result and affirm the trial court's decision to deny Appellant's claim.

ISSUE VI: DID THE TRIAL COURT ERR REVERSIBLY WHEN IT DENIED APPELLANT'S *HURST* CLAIM?

Standard of Review

In her Initial Brief, Appellant fails to identify the applicable standard of review. Thus, it does not appear that the Initial Brief complies with Rule 9.210.

The standard of review is de novo as a question of law. *See Dufour v. State*, 69 So.3d 235, 246 (Fla. 2011) ("[T]o the extent that the circuit court decision concerns any questions of law, we apply a de novo standard of review.").

Preservation

The Appellant preserved Issue VI by raising Claim 10C below.

Hurst and Death Sentence Eligibility

Any fact, other than a fact of prior conviction, that makes a defendant eligible to receive a sentence of death must be found by a jury (absent the election of a bench trial). *See Hurst v. Florida*, 136 S.Ct. 616, 619 (2016) ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *see also Ring v. Arizona*, 536 U.S. 584, 597 n.4 (2002) ("No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence.").

***Hurst* Error Can Be Harmless**

A *Hurst* error can be considered harmless. *See Hurst v. Florida*, 136 S.Ct. at 624 ("This Court normally leaves it to state courts to consider whether an error is harmless. . . ."). However, this Court has declined to use an evidence-based approach to test for harmless error in cases involving *Hurst* claims; instead, the Court has focused exclusively on the unanimity, *vel non*, of the jury's recommendation. *See, e.g.*, *Hurst v. State*, 202 So.3d 40, 69 (Fla. 2016) ("We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty."); *but see id*. at 83 (Canady, J., dissenting) ("On the basis of the record here I would conclude that any rational juror would have found that both of the two aggravating circumstances on which the trial court relied in imposing the death sentence were proven beyond a reasonable doubt.").

Additionally, with respect to *Hurst* claims, this Court has yet to expressly acknowledge that no Sixth Amendment error can occur when a prior violent felony conviction serves as one of the aggravators making a defendant eligible for a sentence of death. *See generally Frances v. State*, 970 So.2d 806, 822 (Fla. 2007) ("[*Ring v. Arizona*, 536 U.S. 584,] did not alter the express exemption in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that prior

convictions are *exempt* from the Sixth Amendment requirements announced in the cases.") (emphasis added).

Of note, however, this Court has acknowledged the prior felony exemption with respect to *Ring* claims. *See, e.g.*, *Campbell v. State*, 159 So.3d 814, 834-35 (Fla. 2015) ("We have consistently held that *Ring*'s requirement of a jury finding does not apply in cases in which one of the aggravators supporting the death sentence is a prior violent felony conviction.").

***Hurst* and Retroactivity**

This Court determined that the U.S. Supreme Court's 2016 decision in *Hurst* does not apply retroactively to sentences that became final before the U.S. Supreme Court's 2002 decision in *Ring*, but does apply retroactively to sentences that became final after *Ring*. *Compare Asay v. State*, 210 So.3d 1 (holding that *Hurst* does not apply to death sentences that become final before the issuance of *Ring*), *with Mosley v. State*, 209 So.3d 1248 (Fla. 2016) (holding that *Hurst* does apply to death sentences that become final after the issuance of *Ring*).[2]

[2] To address the lingering problems created by the *Asay*/*Mosley* split, this Court should overrule *Mosley* and hold that, just like other Sixth Amendment cases, *Hurst* should not apply retroactively. *See, e.g.*, *Schriro v. Summerlin*, 542 U.S. 348 (2004) (*Ring* is procedural, not substantive, and therefore does not apply retroactively); *see also Hughes v. State*, 901 So.2d 837 (Fla. 2005) (*Apprendi* does not apply retroactively); *see also State v. Johnson*, 122 So.3d 856, 863 (Fla. 2013) ("[*Blakely v. Washington*, 542 U.S. 296 (2004),] does not apply retroactively.").

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Appellant claims the trial court erred when it determined that any *Hurst* error was harmless because: (1) the jury unanimously recommended death; and (2) the evidence of guilt was overwhelming. *See* IB-118 ("[T]he court also found that since the jury in Ms. Brown's case unanimously recommended the death penalty, and since the facts of the case were so egregious, any *Hurst* error was harmless...").

As to the first basis, the lower court correctly applied this Court's precedent. *See Taylor v. State*, 246 So.3d 204, 206 (Fla. 2018):

> In *Davis v. State*, 207 So.3d 142 (Fla. 2016), *cert. denied*, [*Davis v. Florida*,] —— U.S. ——, 137 S.Ct. 2218, 198 L.Ed.2d 663 (2017), we held that a jury's unanimous recommendation of death is "precisely

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Of note, this Court did not decide in *Johnson* that *Blakely* would be retroactive to cases decided after *Apprendi*. Applying the same test for retroactivity, however, this Court decided in *Mosley* that *Hurst* would be retroactive to cases decided after *Ring*. These disparate holdings highlight the problems inherent in the *Witt* retroactivity test and support adoption of the federal test for retroactivity outlined in *Teague*. *See Windom v. State*, 886 So.2d 915, 935 (Fla. 2004) (Cantero, J., concurring) ("I also write separately because I believe that we should answer questions about the retroactivity of decisions of the United States Supreme Court based on that Court's own standards, as articulated in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and not based on the now-outmoded test we announced in *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980); *see also Mosley v. State*, 209 So.3d at 1288 n.28 (Canady, J., concurring in part and dissenting in part), citing *Asay v. State*, 210 So.3d at 29-30 (Polston, J., concurring) ("I agree with Justice Polston that the framework established in *Teague* is more workable than *Witt*."); *but see Hughes v. State*, 901 So.2d at 853 (Pariente, C.J., dissenting) ("I further agree with Justice Anstead that we should adhere to the *Witt* test rather than adopt the federal test enunciated in *Teague*, whose purpose is to limit federal habeas review of final state court judgments.").

> what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death" because a "jury unanimously f[inds] all of the necessary facts for the imposition of [a] death sentence[ ] by virtue of its unanimous recommendation[ ]." 207 So.3d at 175. This Court has consistently relied on *Davis* to deny *Hurst* relief to defendants who have received unanimous jury recommendations of death. *See, e.g.*, *Smithers v. State*, No. SC17-1283, 244 So.3d 152, 2018 WL 1531428 (Fla. Mar. 29, 2018); *Grim v. State*, No. SC17-1071, 244 So.3d 147, 2018 WL 1531121 (Fla. Mar. 29, 2018); *Bevel v. State*, 221 So.3d 1168, 1178 (Fla. 2017); *Guardado v. Jones*, 226 So.3d 213, 215 (Fla. 2017), *cert. denied*, [*Guardado v. Jones*,] ––– U.S. –––, 138 S.Ct. 1131, 200 L.Ed.3d 729 (2018); *Cozzie v. State*, 225 So.3d 717, 733 (Fla. 2017), *cert. denied*, [*Cozzie v. Florida*,] ––– U.S. –––, 138 S.Ct. 1131, 200 L.Ed.3d 729 (2018); *Morris v. State*, 219 So.3d 33, 46 (Fla. [2017]), *cert. denied*, [*Morris v. Florida*,] ––– U.S. –––, 138 S.Ct. 452, 199 L.Ed.2d 334 (2017); *Tundidor v. State*, 221 So.3d 587, 607-08 (Fla. 2017), *cert. denied*, [*Tundidor v. Florida*,] ––– U.S. –––, 138 S.Ct. 829, 200 L.Ed.2d 326 (2018); *Oliver v. State*, 214 So.3d 606, 617 (Fla. [2017]), *cert. denied*, [*Oliver v. Florida*,] ––– U.S. –––, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017); *Truehill v. State*, 211 So.3d 930, 956-57 (Fla. [2017]), *cert. denied*, [*Truehill v. Florida*,] ––– U.S. –––, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017). Taylor is among those defendants who received a unanimous jury recommendation of death, and his arguments do not compel departing from our precedent.

As to the second basis, this Court has yet to apply an evidence-based harmless error analysis to a *Hurst* claim. *See Hurst v. State*, 202 So.3d at 69.

Conclusion

The trial court correctly followed this Court's decision in *Taylor* and denied Appellant's *Hurst* claim on the basis that the jury unanimously recommended a sentence of death.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, the State of Florida, respectfully requests that this Court affirm the trial court's denial of Appellant's motion for postconviction relief.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/*Michael T. Kennett*
MICHAEL T. KENNETT
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 177008
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3595 (tel)
(850) 487-0997 (fax)
Michael.Kennett@myfloridalegal.com
capapp@myfloridalegal.com
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished via the eportal to counsel of record, this 30th day of October, 2019.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/*Michael T. Kennett*
Michael T. Kennett
COUNSEL FOR APPELLEE