No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALVIN HERRON,
Petitioner,

v.

MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR THE PETITIONER

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11129-D

ALVIN HERRON,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Alvin Herron is a Florida prisoner serving a life sentence for first-degree murder. In his counseled 28 U.S.C. § 2254 petition, he raised a claim that trial counsel was ineffective for failing to object to the introduction of an unredacted recording of his pretrial interrogation. The District Court denied Mr. Herron's § 2254 petition and denied him a certificate of appealability ("COA"). Mr. Herron now moves for a COA in this Court.

I.

Mr. Herron was indicted for first-degree premeditated murder based on the shooting death of Peggy Anderson. At trial, the state introduced numerous eyewitness accounts of Mr. Herron's involvement in the murder.

Henry Perry, a friend of the victim, testified that Mr. Herron, the victim, and another man and woman came to his apartment on the night of the shooting. After the four of them left, Mr. Perry heard gunshots, went outside, and saw Mr. Herron and the other man run to a car where the second woman was waiting.

Shawanza Gardner testified that she was with Mr. Herron, the victim, and Sam Cosby on the night of the incident, and that she drove them to Mr. Perry's apartment. She stated that she saw Mr. Herron and the victim leave the apartment, and she and Mr. Cosby went to her vehicle. However, Mr. Cosby left the vehicle when they heard Mr. Herron and the victim arguing. Ms. Gardner then heard a gunshot, and Mr. Cosby ran back into the vehicle. She then heard additional gunshots, and Mr. Herron ran into the vehicle. She testified that she heard Mr. Cosby "ask[] [Mr. Herron] why did he do it," to which Herron answered, "A man's got to do what a man's got to do." Ms. Gardner testified that, in the vehicle, Mr. Herron was carrying an object wrapped in a white shirt.

Apart from these eyewitness accounts, the state offered testimony that Mr. Herron's cellphone records from the night of the offense placed him within the vicinity of cell towers close to where the shooting took place.

The prosecution also called Investigator James Besse. When the state began questioning him about Mr. Herron's pretrial interrogation, defense counsel immediately objected. The state responded that it did not intend to play a video of the interrogation because it showed Mr. Herron speaking about his criminal history. Defense counsel clarified that he objected to Investigator Besse's testimony because the video was the "best evidence, the complete evidence" of the interrogation. Defense counsel stated, "I'm not going to object [to the video], Your Honor. I'm going to make a strategic decision to let that other stuff come in. And I would require the complete video be played." Counsel further stated that he had discussed playing the unredacted video with Mr. Herron. Mr. Herron then confirmed to the court that he preferred his complete statement be published. Before the court published the video, counsel requested a curative instruction, and the court instructed the jury to disregard Mr. Herron's recorded statements concerning any other crimes or wrongful acts.

During the interrogation, Mr. Herron stated that he was not with the victim when the shooting occurred; was never in Ms. Gardner's vehicle with the victim and Mr. Cosby; and was nowhere near the shooting incident. Investigator Besse asked

Mr. Herron if he had ever been in trouble before, and Mr. Herron responded that he had, "[o]ne time drugs, and then another time for [possession of a firearm]," when he was 18 years old, for which the state withheld prosecution. Investigator Besse then told Mr. Herron that witnesses placed him at the scene, arguing with the victim with a gun in his hand. Mr. Herron denied this, and insisted that he was telling the truth. Investigator Besse stated that he could tell that Mr. Herron was lying from his body language. Investigator Besse accused Mr. Herron of lying a number of times during the interrogation.

The defense called Jerry Chambers, a friend of the victim. He testified that on the night of the shooting, he saw the victim and Mr. Herron walking down the street when they were joined by another man. Mr. Chambers testified that after he walked away, he heard gunshots; ran behind a car; and saw the other man running towards another vehicle. Mr. Chambers referred to this other man as the shooter, and testified that he did not see what happened to Mr. Herron. On cross-examination, however, Mr. Chambers was shown a photograph of someone whom he identified as the shooter, and the individual in that photograph was later identified by another witness as Mr. Herron.

During closing argument, defense counsel argued that the video showed Mr. Herron consistently denying that he shot anyone. Counsel conceded that Mr. Herron lied about being in the area of the shooting, but argued that Herron did so because

he was "streetwise," and was trying to find out what the police knew about the night in question. Counsel further argued that Mr. Herron was trying to "cover for somebody," and that his lies did not make him the shooter. Counsel argued that prior to the interrogation, the police had already made up their minds that Mr. Herron was the shooter, and were simply attempting to pressure him into confessing. According to counsel, Mr. Herron withstood the police's pressure because he was in fact innocent.

The jury found Mr. Herron guilty of first-degree premeditated murder, and the court sentenced him to life imprisonment. Mr. Herron appealed, and the Florida First District Court of Appeal ("DCA") affirmed. Through counsel, Mr. Herron then filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. As relevant here, Mr. Herron raised a claim that trial counsel was ineffective for failing to object to the introduction of the unredacted interrogation video. He argued that the video contained inadmissible and highly prejudicial information that affected the outcome of the trial. Mr. Herron specifically highlighted that the video showed: (1) Investigator Besse saying that witnesses placed Herron at the scene and arguing with the victim while holding a gun; (2) Herron admitting that he had a criminal history involving gun possession and illegal drug activity; (3) Investigator Besse saying that he could tell from Herron's body language that Herron was lying; and (4) Investigator Besse repeatedly accusing Herron of lying.

The state court held an evidentiary hearing on Mr. Herron's motion. Mr. Herron testified that, prior to trial, counsel never showed or discussed with him the interrogation video, and he did not realize that his interrogation was videotaped. He said he blindly agreed to the unredacted video being played because he trusted counsel, but that counsel did not discuss with him any strategy for playing the unredacted video. Mr. Herron stated that, had the unredacted video not been admitted, he would have "told the truth" at trial, namely that he was at the scene of the crime, but not the shooter.

Defense counsel also testified at the hearing. He stated that introducing the unredacted video constituted "a strategic decision" to convince the jury of Mr. Herron's innocence without subjecting him to cross-examination. Counsel believed Mr. Herron appeared credible in the interrogation video. Counsel said he discussed the unredacted video with Mr. Herron at trial, but was unsure how much Herron "really understood."

The state court denied Mr. Herron's Rule 3.850 motion.[1] The court explained that, even if counsel had elected not to have the interrogation video played, the court would have allowed Investigator Besse to testify as to certain aspects of the interrogation. Counsel's decision, therefore, was whether to allow the full,

[1] The same judge who presided over Mr. Herron's trial also presided over his state post-conviction proceedings.

unredacted video to be played, or to accept Investigator Besse's testimony. Given these options, the court concluded that counsel's decision to play the full video was a reasonable one. And while counsel could have, in theory, come to trial with a redacted interrogation video, the court concluded that this would have required the foresight of an "exceedingly exceptional defense attorney."

The court also held that Mr. Herron could not show prejudice because: (1) although the interrogation video's discussion of Herron's criminal history was inadmissible, the court provided a curative instruction; (2) the effect of Mr. Herron's criminal history from when he was 18 years old was "very minimal"; (3) Investigator Besse calling Mr. Herron a liar was not an "extreme case" of misconduct unless viewed "in a vacuum," and counsel mitigated those statements during closing; and (4) Investigator Besse commenting on Herron's body language was "to some degree" admissible, to the extent that Investigator Besse stated his actual observations. The court concluded that "[o]verall, [it did not] think that these statements were likely to have affected the outcome of the case."

Mr. Herron then filed this § 2254 petition, again arguing that he received ineffective assistance for counsel's failure to object to the introduction of the unredacted interrogation video. A magistrate judge issued a report and recommendation ("R&R"), recommending that the District Court deny the petition. The magistrate judge concluded that the state court did not unreasonably apply

Strickland,[2] because Mr. Herron could not show prejudice. This was because (1) Mr. Perry, Ms. Gardner, and the phone records established that Mr. Herron was at the scene with the victim; (2) Ms. Gardner heard the victim and Herron arguing, heard gunshots, and witnessed Herron flee into her car; and (3) Mr. Chambers identified a photograph of Mr. Herron as the shooter. The magistrate judge also pointed out that, even if counsel had objected to the video, the jury still would have heard Investigator Besse's testimony concerning the interrogation.

Over Mr. Herron's objections, the District Court adopted the R&R; denied Mr. Herron's § 2254 petition; and denied him a COA. Mr. Herron appealed, and now moves for a COA in this Court.

II.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000).

If a state court has ruled on the merits of a habeas claim, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or

[2] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a "highly deferential standard for evaluating state-court rulings . . . and demands that state-court decisions be given the benefit of the doubt." Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 1862 (2010) (quotation marks omitted). Thus, a state prisoner seeking federal habeas relief "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103, 131 S. Ct. 770 (2011).

To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. Our review of an ineffective assistance claim under

§ 2254(d) is "doubly" deferential to counsel's performance. See Harrington, 562 U.S. at 105, 131 S. Ct. at 788. Thus, under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

Reasonable jurists would not debate the District Court's conclusion that Mr. Herron failed to show how the state court's prejudice holding was an unreasonable application of Strickland. First, the evidence at trial established that Mr. Herron was with the victim on the night of the incident, and that he was with the victim and another man when the shooting occurred. Ms. Gardner testified that she heard Mr. Herron arguing with the victim, and that, after she heard gunshots, she saw Herron enter her vehicle with an object wrapped in a shirt. She also testified that she heard Mr. Cosby ask Mr. Herron why he did it, to which Mr. Herron responded, "A man's got to do what a man's got to do." Mr. Chambers also identified an individual depicted in a photo as the shooter, and that same individual was later identified by another witness as Mr. Herron.

Of course, the interrogation video was detrimental to Mr. Herron's case because it depicted a law enforcement officer repeatedly calling him a liar, and because it revealed Herron's criminal history. However, even if the video were not played, Investigator Besse would have testified concerning certain aspects of the interrogation. It was not an unreasonable application of Strickland for the state court

to conclude that the marginal impact of the interrogation video, especially viewed in light of the other evidence suggesting Mr. Herron's guilt, would not have tipped the scales in Herron's favor. The state court thus reasonably concluded that, even if Mr. Herron's counsel was deficient, he had not established a reasonable probability of a different outcome at trial. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

For these reasons, Mr. Herron's motion for a COA is DENIED.

Barbara B. Martin
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ALVIN HERRON,

Petitioner,

v. 4:19cv186–WS/CAS

SECRETARY, DEPARTMENT
OF CORRECTIONS,

Respondent.

ORDER ADOPTING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Before the court is the magistrate judge's report and recommendation (ECF No. 10) docketed December 9, 2019. The magistrate judge recommends that Petitioner's petition for writ of habeas corpus be denied. Petitioner has filed objections (ECF No. 13) to the magistrate judge's report and recommendation.

Upon review of the record in light of Petitioner's objections, the court has determined that the magistrate judge's report and recommendation should be adopted. Like the magistrate judge, the undersigned finds that Petitioner has failed to show that he is entitled to relief under 28 U.S.C. § 2254. Accordingly, it is

ORDERED:

1. The magistrate judge's report and recommendation (ECF No. 10) is hereby ADOPTED and incorporated by reference into this order.

2. Petitioner's petition for writ of habeas corpus (ECF No. 1) is DENIED.

3. The clerk shall enter judgment stating: "Alvin Herron's petition for writ of habeas corpus is DENIED."

4. Petitioner's request (ECF No. 13) for a certificate of appealability is DENIED.

DONE AND ORDERED this 21st day of February, 2020.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ALVIN HERRON

VS CASE NO. 4:19cv186–WS/CAS

SECRETARY DEPARTMENT

JUDGMENT

Alvin Herron's petition for writ of habeas corpus is DENIED.

JESSICA J. LYUBLANOVITS
CLERK OF COURT

February 21, 2020
DATE

s/Ronnell Barker
Deputy Clerk: Ronnell Barker

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

ALVIN HERRON,

Petitioner,

v. **Case No. 4:19cv186-WS/CAS**

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

REPORT AND RECOMMENDATION TO DENY § 2254 PETITION

On April 25, 2019, Petitioner, Alvin Herron, a prisoner in the custody of the Florida Department of Corrections, proceeding with counsel, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF No. 1. On August 27, 2019, Respondent filed an answer with exhibits. ECF No. 3. Petitioner filed a reply on December 2, 2019. ECF No. 9.

The matter was referred to the undersigned United States Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636 and Northern District of Florida Local Rule 72.2(B). After careful consideration of all the issues raised, the undersigned has determined that no evidentiary hearing is required for disposition of this case. *See* Rule 8(a), R. Gov. § 2254 Cases in U.S. Dist. Cts. For the reasons set forth herein, the

pleadings and attachments before the Court show that Petitioner is not entitled to federal habeas relief and this § 2254 petition should be denied.

Background and Procedural History

Petitioner was charged by Indictment filed in the Second Judicial Circuit of Leon County, Florida, on July 21, 2010, with the May 18, 2010, first-degree premeditated murder of Peggy Anderson by shooting with a firearm. Ex. A at 14-15.[1] The State did not seek the death penalty and jury trial was held on January 24-26, 2012, before a six-member jury. Exs. B at 263; D-H. The jury found Petitioner guilty as charged of first-degree murder and he was sentenced to life in prison with 601 days' time served. Exs. B at 292-303; H at 635.

Petitioner's appeal to the state First District Court of Appeal was affirmed per curiam without written opinion.[2] The mandate was issued on March 7, 2013. Exs. I, J. K, L. *See* Herron v. State, 107 So. 3d 409 (Fla. 1st DCA 2013) (table).

[1] Hereinafter, citations to the state court record, "Ex. –," refer to exhibits A through AA submitted in conjunction with Respondent's answer. *See* ECF No. 3.

[2] Petitioner raised one issue on direct appeal: Whether the trial court erred in admitting a photograph of him without a proper predicate.

On May 19, 2014, Petitioner filed a counseled motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850.[3] Ex. M at 4-13. An evidentiary hearing was held on October 18, 2017, at which Petitioner and his trial counsel testified. Ex. M at 714-804. The post-conviction court denied the motion for reasons stated on the record, which were adopted by reference in an October 18, 2017, written order. Ex. M at 700, 795-801.

Petitioner, with counsel, appealed to the First District Court of Appeal, which affirmed per curiam without opinion on March 5, 2019.[4] Rehearing and written opinion were denied and the mandate was issued on May 1, 2019. Exs. Z; AA. *See* Herron v. State, 267 So. 3d 357 (Fla. 1st DCA 2019) (table).

On April 25, 2019, Petitioner filed a petition for writ of habeas corpus, ECF No. 1, pursuant to 28 U.S.C. § 2254 in this Court raising the following ground for relief:

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[3] The issues raised in the Rule 3.850 motion were: (1) Trial counsel rendered ineffective assistance (IAC) in failing to call a favorable witness and/or failing to properly investigate; and (2) IAC in failing to object to admission of the unredacted recording of Petitioner's interrogation. Ex. M at 8, 9.

[4] The issues raised on appeal from denial of post-conviction relief were: (1) Error in denying IAC in counsel's failure to object to the unredacted recording of police interrogation; and (2) error in denying leave to amend or supplement first post-conviction claim. EX. W.

> (1) Trial counsel rendered ineffective assistance by failing to object to the admission of the unredacted video of Petitioner's police interrogation.

Analysis

Standard of Review

Pursuant to 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), federal courts may grant habeas corpus relief for persons in state custody only under certain specified circumstances. Section 2254(d) provides in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). *See also* Cullen v. Pinholster, 563 U.S. 170, 181 (2011); Gill v. Mecusker, 633 F.3d 1272, 1287 (11th Cir. 2011).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this

Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413 (O'Connor, J., concurring).

The Supreme Court has explained that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Harrington v. Richter, 562 U.S. 86, 102 (2011). The Court stated:

> As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. . . . It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. Jackson v. Virginia, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment). As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id. at 102-03 (citation omitted). The federal court employs a " 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.' " Pinholster, 563 U.S. at 181 (quoting Woodford v. Visciotti, 537 U.S. 19, 24 (2002)).

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); 28 U.S.C. § 2254(b). In order for remedies to be exhausted, "the petitioner must have given the state courts a 'meaningful opportunity' to address his federal claim." Preston v. Sec'y, Fla. Dep't of Corr., 785 F.3d 449, 457 (11th Cir. 2015) (quoting McNair v. Campbell, 416 F.3d 1291, 1302 (11th Cir. 2005)). In regard to claims of ineffectiveness of trial counsel, the Petitioner must have presented those claims in state court " 'such that a reasonable reader would understand each claim's particular legal basis and factual foundation.' " Ogle v. Johnson, 488 F.3d 1364, 1368 (11th Cir. 2007) (citing McNair, 416 F.3d at 1302).

This Court's review "is limited to the record that was before the state court that adjudicated the claim on the merits." Pinholster, 563 U.S. at 181. The state court's factual findings are entitled to a presumption of correctness and to rebut that presumption, the Petitioner must show by

clear and convincing evidence that the state court determinations are not fairly supported by the record. *See* 28 U.S.C. § 2254(e)(1). However, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions" and "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). *See also* Swarthout v. Cooke, 562 U.S. 216, 222 (2011) ("[W]e have long recognized that 'a "mere error of state law" is not a denial of due process.' " (quoting Engle v. Isaac, 456 U.S. 107, 121, n.21 (1982))).

Further, under § 2254(d), federal courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." Marshall v. Lonberger, 459 U.S. 422, 434 (1983). "Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review." Consalvo v. Sec'y, Dep't of Corr., 664 F.3d 842, 845 (11th Cir. 2011). Credibility and demeanor of a witness are considered to be questions of fact entitled to a presumption of correctness under the AEDPA and the Petitioner has the burden to overcome the presumption by clear and convincing evidence. *Id.*

For claims of ineffective assistance of counsel, the United States Supreme Court has adopted a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, a "defendant must show that counsel's performance fell below an objective standard of reasonableness." *Id.* at 688. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Burt v. Titlow, 134 S. Ct. 10, 17 (2013) (quoting Strickland, 466 U.S. at 690). Federal courts are to afford "both the state court and the defense attorney the benefit of the doubt." *Id.* at 13. The reasonableness of counsel's conduct must be viewed as of the time of counsel's conduct. *See* Maryland v. Kulbicki, 136 S. Ct. 2, 4 (2015) (citing Strickland, 466 U.S. at 690).

To demonstrate prejudice under Strickland, a 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." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* For this Court's purposes, "[t]he question 'is not whether a federal court believes the state court's determination' under the Strickland standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.' " Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) (quoting Schriro v. Landrigan, 550 U.S. 465, 473 (2007)). "And, because the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Mirzayance, 556 U.S. at 123. It is a "doubly deferential judicial review that applies to a Strickland claim evaluated under the § 2254(d)(1) standard."[5] *Id.* Both deficiency and

[5] Petitioner contends that because the First District Court of Appeal affirmed denial of post-conviction relief without explanation, the review in this Court is *de novo.* ECF No. 1 at 8. This is incorrect. The Eleventh Circuit has made clear that only if the federal district court determines that the state court unreasonably applied Supreme Court precedent may the district court apply a de novo review. Hawthorne v. Sec'y, Dep't of Corr., No. 18-12027, 2019 WL 4200005, at *3 (11th Cir. Sept. 5, 2019). A per curiam decision of the state court is presumed to be a decision on the merits absent any indication or state-law procedural principles to the contrary. Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1353 (11th Cir. 2012) (reversing Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289 (M.D. Fla. 2011) and citing Harrington v. Richter, 562 U.S. 86, 99 (2011)). The fact that a state court per curiam decision without explanation provides no precedential value under Florida law does not mean the court did not decide the case on the merits. Where no explanation is provided in a per curiam affirmance by the last state court to consider a constitutional issue, this Court is to "look through" the decision to the last reasoned state court decision and presume it provides the relevant rationale for the merits decision. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018) (cited in Hawthorne, 2019 WL 4200005,at *3).

prejudice must be shown to demonstrate a violation of the Sixth Amendment. Thus, the court need not address both prongs if the petitioner fails to prove one of the prongs. Strickland, 466 U.S. at 697.

Ground for Relief: Whether trial counsel rendered ineffective assistance by failing to object to admission of the unredacted video of Petitioner's interrogation.

Petitioner contends that his trial counsel rendered ineffective assistance by requesting that the entire unredacted video of Petitioner's interrogation by Investigator Besse of the Tallahassee Police Department be played for the jury. Petitioner contends that the video contained inadmissible and highly prejudicial information and comments by Investigator Besse that should have been redacted and that, but for the admission of these prejudicial comments, there is a reasonable probability—one being sufficient to undermine confidence in the outcome—that the result of the trial would have been different. ECF No. 1 at 10-26. Petitioner cites as inadmissible and prejudicial Besse's assertion to Petitioner that he had people putting Petitioner on the scene of the shooting with a gun in his hand arguing with the victim; that Petitioner had a prior record involving possession of a firearm and illegal drug activity; that Besse could tell from Petitioner's body language that he was lying; and that Besse made many assertions that Petitioner was lying. ECF No. 1 at 15-18.

At trial, the prosecutor did not intend to play any portion of the video for the jury—intending instead to have the investigator testify about some of Petitioner's statements, to which defense counsel objected. Ex. F at 369 (transcript pagination). The prosecutor explained:

> **MR. BAUER** [prosecutor]: I'm going to have [Investigator Besse] testify as to statements, because he [Petitioner] made statements about possession of [a] firearm. He talks about his criminal history. So counsel isn't going to stipulate to that. I can't redact that at this point. So I - - I told counsel that we weren't going to play it because it's going to put me in a Catch-22. I'm going to infringe on his rights. He knows I can't play that part. So I don't know why he's objecting.
>
> **MR. COLLINS** [defense counsel]: I'm objecting, Your Honor, because the best evidence, the complete evidence is the recorded video. It acknowledges the correct waiver of rights, the manner in which they were waived. And anything short of that, I would object to. If there's other inadmissible evidence, well that's the State's problem. But I would object to this manner of - -
>
> **THE COURT**: What's your legal objection?
>
> **MR. COLLINS**: Completeness.
>
> **THE COURT**: All right. I'll overrule that objection. Do you agree there is inadmissible evidence that you object to in the tape?
>
> **MR. COLLINS**: Your Honor, there are some things that are brought forward by law enforcement that probably shouldn't be presented to the jury. I would agree to that, yes, sir. But - - the best evidence is - -
>
> **THE COURT**: Well, I mean, I'm prepared - - if you want, we'll play the whole tape. But if there are portions you're objecting to, then I guess we're going to be in the posture of having to do it as proposed by the State.

> **MR. COLLINS**: Well, I'm not going to object, your Honor. I'm going to make a strategic decision to let that other stuff come on in. And I would require the complete video be played.
>
> . . . .
>
> **THE COURT**: All right. Mr. Collins, you had an opportunity to consult with your client on this issue?
>
> **MR. COLLINS**: Yes, Your Honor. I've talked with Mr. Herron about this possible, objectionable material contained in his - - his statement being given. And you agree with me, Mr. Herron, that you would prefer your complete statement be published - -
>
> **THE DEFENDANT**: Yes, sir.
>
> **MR. COLLINS**: - - than have this gentleman recite what you were saying?
>
> **THE DEFENDANT**: Yes, sir.

Ex. F at 369-371.

Before the video was played for the jury, defense counsel asked for a "curative instruction" regarding the references to prior crimes and possession of a firearm, and the trial judge instructed the jury as follows:

> **THE COURT**: . . . I have made a ruling that rather than allow the officer to paraphrase what was said by the defendant in the case, that I will - - that I will require that the full statement, the videotaped statement, be played for you so that you can hear it firsthand.
>
> I have not listened to this tape, but I understand from the attorneys that you may hear some information during the course of this statement that could be construed by you as involving other crimes or wrongs by the defendant. He is not on trial for any crime or wrong or act not contained in the indictment, and you should disregard any such mention.

Ex. F at 373. Thereafter, the entire video was played for the jury with the express agreement of defense counsel and with the express permission of Petitioner. Ex. F at 374-423, 371.

During the hour-long video of the interrogation on June 5, 2010, eighteen days after the shooting, the following statements were made and are at issue in this case:

> **INVESTIGATOR BESSE**: Okay. You ever been in any trouble before?
>
> **THE DEFENDANT**: Yeah. I done been in trouble before.
>
> **INVESTIGATOR BESSE**: For what?
>
> **THE DEFENDANT**: One time drugs, and then another time for a pistol.
>
> **INVESTIGATOR BESSE**: What happened with that pistol charge?
>
> **THE DEFENDANT**: I did county time.
>
> **INVESTIGATOR BESSE**: County time?
>
> **THE DEFENDANT**: Yeah, because that was my first charge. I got adjudicated withheld.
>
> **INVESTIGATOR BESSE**: Okay. What was it? Carrying a concealed weapon or something, or what kind of charge was it?
>
> **THE DEFENDANT**: Possession of a firearm, I think.
>
> **INVESTIGATOR BESSE**: By delinquent or convicted felon or what?
>
> **THE DEFENDANT**: No. I wasn't no convicted felon. I got adjudicated withheld because they said it was my first charge.
>
> **INVESTIGATOR BESSE**: Okay. How old were you when that happened?
>
> **THE DEFENDANT**: Eighteen.

INVESTIGATOR BESSE: That was your first adult charge?

THE DEFENDANT: Yes. Yes. Yes, sir.

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: First adult charge.

. . . .

INVESTIGATOR BESSE: Uh-huh. So when you have the opportunity right now to - - to, you know, explain yourself and give your side of the story as to what's going on, but - - I mean, I've got people putting you there on scene - -

THE DEFENDANT: Definitely can't put me - -

INVESTIGATOR BESSE: - - a gun in hand arguing with her.

. . . .

THE DEFENDANT: So how long will it take for y'all to get this squared away?

INVESTIGATOR BESSE: Well, you telling the truth would have done it.

THE DEFENDANT: Well, I already did it then.

INVESTIGATOR BESSE: No, you didn't.

THE DEFENDANT: Who didn't?

INVESTIGATOR BESSE: You didn't. I mean, you didn't tell the truth.

. . . .

INVESTIGATOR BESSE: I want you to tell me the truth and help yourself out.

THE DEFENDANT: I just told you the truth.

INVESTIGATOR BESSE: That's not the truth.

. . . .

INVESTIGATOR BESSE: Are you honestly sitting there and just do that when you know you are sitting across from a cop and lying your ass off to him?

(UNINTELLIGIBLE).

THE DEFENDANT: All right, sir. I'm telling you, you got the wrong dude, sir.

INVESTIGATOR BESSE: Well, let me tell you something from just sitting here watching you. As soon as I brought her up - -

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: Your whole body language changed immediately. (UNINTELLIGIBLE). It was - - it was just it was kind of interesting to watch. I mean, your lips started quivering. Things you can't - - you can't control. But I can tell by sitting across that as soon as I mentioned the [victim's name], your - - I mean, your level just went up.

THE DEFENDANT: I'm still here.

INVESTIGATOR BESSE: I know you're still here, but I'm saying your body language, things you don't realize, things that I watch - -

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: - - after doing this job for eight years - -

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: - - and sitting across from people like you for eight years, I mean, you learn lots of body language and stuff like that. And when I mention specific things they're involved in, man, it's like a immediate - -

THE DEFENDANT: Oh, yeah. That doesn't mean nothing. I have been sitting here chilling, sir. I told y'all the information.

INVESTIGATOR BESSE: You're not helping yourself by lying to me. I'll tell you that.

. . . .

INVESTIGATOR BESSE: I'm telling you you're making a mistake by lying to me.

THE DEFENDANT: I 'm not lying to you, sir.

INVESTIGATOR BESSE: Yeah, you are.

Ex. F at 383-84, 401, 405, 413, 415-16, 420). Besse accused Petitioner of lying on several other occasions during the interrogation. *See* Ex. F at 412, 414, 422.

This claim was raised in Petitioner's Rule 3.850 and an evidentiary hearing was held October 18, 2017. Ex. M at 714-804. Petitioner, who was represented by counsel, testified that trial counsel never showed him the video of his interrogation prior to trial and that he did not know at the time that he was being videotaped. Ex. M at 727-28. He said he blindly agreed to the tape being played because he trusted his lawyer. *Id.* at 729. He said his counsel never discussed with him, prior to trial, any objectionable evidence about his credibility that might appear on the video. *Id.* at 731, 734, 740. He denied that his counsel discussed any strategy reason with him for playing the full tape. *Id.* at 733. Petitioner further testified that his counsel never talked to him about any possible impeachment if he testified and never discussed with him that he had no prior convictions for the jury to hear about if he testified. *Id.* at 729-30, 749. Petitioner was asked on cross-examination whether his testimony at trial, if he had chosen to testify, would have been consistent with his statements on the video. Ex. M at 738. He responded:

A. No, sir.

. . . .

A. I would have told the truth. Only thing I just in the - - in the video, I was - - only part I was lying about being - - not being on the scene. You know, my testimony I would have gave in trial, you know, I would have told the truth.

Q. And the truth would have been that you were, in fact, at the scene?

A. Yes, sir.

Q. And that would have been totally inconsistent with what you told the police; is that right?

A. Right.

Ex. M at 738-39. Petitioner agreed that counsel's overall trial strategy was that Petitioner was not present at the shooting, as he stated numerous times in the police video, and that counsel presented a witness who testified that Petitioner was not there. *Id.* at 743.

Petitioner's trial counsel testified at the evidentiary hearing that he was not able to review his trial files, which had been damaged while in storage. He had no current recollection of pretrial meetings with Petitioner and what they may have discussed. Ex. M at 751-55. From reviewing the transcript of the trial, he agreed that the video had some otherwise inadmissible or objectionable evidence but "as the record reflects, this [was] a strategic decision." *Id.* at 756. His recollection was refreshed by the transcript such that he recalled a person (Sam Cosby) who was with

Petitioner on the night of the shooting, and who counsel suggested at trial was involved in the crime. Cosby was not allowed to testify because he was found incompetent. *Id.* Defense counsel testified that he believed the video provided an opportunity to convince the jury of Petitioner's innocence without subjecting Petitioner to cross-examination by testifying at trial. *Id.* at 757, 763.

Trial counsel also testified that he had a witness that he planned to (and did) present who would testify Petitioner did not commit the crime. He also planned to argue that Sam Cosby was present at the scene and was the shooter. Defense counsel said he believed having Petitioner on the video insisting he was innocent was a helpful addition to his defense strategy. *Id.* at 758. He said he discussed admission of the video with Petitioner, as the trial record reflected, but clarified, "I don't really think that Mr. Herron really understood much of what I was trying to tell him. . . . I would say that it's more my decision than an informed, intelligent agreement that he understood." *Id.* at 759-60. On cross-examination, counsel testified that he did not know then, and did not know now, that it is per se impermissible for the jury to hear a police office state that the defendant is a liar. *Id.* at 761.

The judge at the post-conviction hearing, who was also the trial judge in the case, denied the claim, setting forth the reasons on the record as follows:

> It is my ruling here today that I'll deny the motion for post-conviction relief. I do not find there was ineffective assistance of counsel, nor that the defense was prejudiced by any of the decisions of Mr. Collins.
>
> I think the first thing we need to focus on is what options were available to Mr. Collins. My ruling at trial was that either the State could present the verbal statement by Officer Besse, which Mr. Collins characterized as a cherry-picked version of what occurred, or that the whole statement be played. That was the Court's ruling at trial.
>
> To the extent it could be argued that ruling was in error, that is not cognizable here in a 3.850 motion. That could have been or should have been raised on appeal. I don't know whether it was or was not.
>
> I had made the determination that the State would be allowed to present Officer Besse's verbal testimony, if we could not play the entire tape. As I say, if this was error, it could have been or should have been raised on appeal.
>
> The defense here argues that Mr. Collins had many options. He didn't have many options. Those were his two options: either to hear the verbal version by Officer Besse or to play the whole statement. Whether or not the defendant testified or not really doesn't factor into that decision. That was not one of the alternatives. Certainly he could have called him in addition to those things occurring, but it was not an either-or situation.
>
> The defense has also suggested now that Mr. Collins should have been there with a redacted version of the statement. Again, that was not one of the options before the Court at that point in time. Frankly, it would be an exceedingly exceptional defense attorney that had that kind of foresight to

be there with a redacted statement. I was not going to make the State redact the statement.

Assuming what's presented here is cognizable, I do think that Mr. Collins' decision to insist on the full video being played was a reasonable strategy decision. The fact that he wanted to see, or felt that it would be preferable for the jury to see the defendant in the video rather than to have the officer describe how it had occurred is not an unreasonable decision. I think many attorneys would agree to that.

It's been suggested and I've indicated that the defendant testifying was not one of the alternatives. But it's been suggested here that that's what Mr. Collins should have insisted upon. There are many attorneys that prefer that their client not testify, particularly when the testimony in this instance would have had to have been in direct conflict to a prior statement.

Particularly when you have a defendant that Mr. Collins was - - you know, he's trying to be polite about this, but that Mr. Herron's apparent understanding of everything that was going on was somewhat limited.

I certainly don't think it was - - it's not one of the issues before the Court, but the defense has kind of suggested that the defendant's testimony was the answer to all these questions. I don't find that to be the case.

Looking at prejudice, I've looked at what was said. The drug involvement, as the defense has admitted, the comment was very minimal.

Much has been made of the firearm comment. Frankly, in my reading, very minimal. If you read, and I'm reading it, it says: "What happened with that pistol charge?

"I did county time.

"Yeah, because that was my first charge. I got adjudicated withheld.

"Okay. What was it, carrying a concealed weapon or something or what kind of charge was it?

"Possession of a firearm, I think.

"By a delinquent or convicted felon or what?

"No, I wasn't no convicted felon. I got adjudicated withheld because they said it was my first charge.

"Okay. How old were you when it happened?

"Eighteen.

"That was your first adult charge?

Yes, yes; yes, sir.

"Okay. First adult charge."

I mean, yes, it's inadmissible, but to say that it's greatly significant testimony I think overblows it, particularly in context with the Court gave a - - you know, I guess I shouldn't suggest it was a wonderful instruction since I made it up, but I think I did do a pretty good job, as I read back over it, of clarifying to the jury that he was not on trial for things mentioned in the statement.

Then the other argument, it relates in the statement as to hearsay being admitted by the officer and the opinion being commented on by the officer. I would agree with the defense that clearly under the current case law, those comments are inadmissible.

However, I will say that this is an area of the law that's been developing. The only Florida case cited by the defense is a 2015 case. I think there is a more recent Florida Supreme Court case where it is made a lot more clear that it has been in the past. I would say that the law has developed a good deal since 2012 clarifying that these kind of statements by law enforcement are not admissible.

Having said that, every interview by law enforcement of a defendant is going to have some observations by the interviewer, some comments by the interviewer. And I don't find this to have been an extreme case. Yes, the officer said he was lying. I don't know that you'll find any interviews of this type where the officer isn't at least suggesting that the defendant is lying. It is not a matter of degree. Those kind of statements are

> not absolutely prohibited. As I say, this is an area of the law that's been clarified.
>
> Certainly if we were in a vacuum, I would rule that those statements could not come in. At some point in time, you get where you have a statement that doesn't mean anything when you take out everything law enforcement said.
>
> I thought Mr. Collins did a good job of suggesting that some of these comments by law enforcement suggested overreaching, that they had already decided before they interviewed the defendant what their opinion was, they had already obtained a warrant for him, and that they weren't, in fact, searching for the truth. He made a good deal out of the fact that Mr. Herron had turned himself in to make this statement.
>
> The portion about body language, I'm not so sure that is inadmissible testimony. It is inadmissible testimony for the officer to say, based on what I saw, he was lying. I don't think the actual observations themselves are inadmissible. So I think to some degree some of that is admissible.
>
> Overall, I don't think that these statements were likely to have affected the outcome of the case. A jury can take these kind of relatively minimal extraneous things and set them aside. I don't see any likelihood that these statements impacted significantly the jury's decision in this case.

(Ex. M, p.796-801).

At trial, defense counsel argued in closing, among other things, that the video showed Petitioner vehemently denying numerous times that he shot anyone. Ex. H at 593. Counsel conceded Petitioner did not tell the truth about being in the area, but explained that Petitioner was "streetwise" and was just trying to find out what the police knew. Counsel suggested Petitioner was trying to "cover for somebody" and that his untruth during the

interview does not make him the shooter. *Id.* at 594, 613, 618, 620. Counsel argued that when Petitioner turned himself in, the police already had a warrant for his arrest, had concluded he was the shooter without even speaking to him, and were not seeking the truth in the interview, but were seeking only a confession. *Id.* Counsel emphasized that Investigator Besse implied to Petitioner that if he told the truth, *i.e.*, confessed, he could leave, but Petitioner never confessed to the shooting. *Id.* at 613.

Respondent contends that under § 2254 and under Strickland, Petitioner has the burden to show that the state court's ruling was an unreasonable application of Strickland or an unreasonable determination of the facts in light of the evidence in the record. Respondent argues that regardless of whether defense counsel knew if a police officer's allegation that the defendant was lying was legally admissible, defense counsel was fully aware of the prejudicial contents of the video and made a calculated decision for strategic reasons to have it played in full. ECF No. 3 at 32. Moreover, Respondent argues, Petitioner has not identified any facts that the state court unreasonably determined and has not rebutted any such facts by clear and convincing evidence as required by § 2254(e)(1). *Id.* at 33.

Under Florida law, it is not likely that Investigator Besse would have been allowed to testify at trial that Petitioner was lying when he said he did not shoot Anderson and that he was not in the area where the shooting occurred. The Florida Supreme Court has explained, " '[p]olice officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions. . . .' Accordingly, it is especially troublesome when a jury is repeatedly exposed to an interrogating officer's opinion regarding the guilt or innocence of the accused." Jackson v. State, 107 So. 3d 328, 340 (Fla. 2012) (quoting Tumblin v. State, 29 So. 3d 1093, 1101 (Fla. 2010) (quoting Bowles v. State, 381 So. 2d 326, 328 (Fla. 5th DCA 1980))). These same principles apply to an officer's opinion testimony or comments concerning a defendant's truthfulness. Tumblin, 29 So. 3d at 1101 ("Moreover, '[i]t is especially harmful for a police witness to give his opinion of a witnesses' [sic] credibility because of the great weight afforded an officer's testimony.' " (quoting Seibert v. State, 923 So. 2d 460, 472 (Fla. 2006) (quoting Page v. State, 733 So. 2d 1079, 1081 (Fla. 4th DCA 1999))).

The Florida Supreme Court has recognized that when the impermissible comments are contained in a recording of an interrogation, they may be admissible if they provoke a relevant response or provide a

context to the interview such that a rational jury would recognize that the statements are interrogation techniques used to secure a confession. *See* Jackson, 107 So. 3d at 340 (citing McWatters v. State, 36 So. 3d 613, 638 (Fla. 2010)). However, in the present case the comments by Investigator Besse did not elicit a confession or other relevant response, but only denials by Petitioner. As the Florida Supreme Court in Jackson concluded, "While the detectives may have intended to secure a confession by consistently expressing their conviction in Jackson's guilt, they did not secure a confession throughout their thirty-seven minute dialogue. In addition, although the detectives' opinions about Jackson's credibility, guilt, and the weight and sufficiency of the evidence were not expressed during in-court testimony, admission of these statements essentially permitted the State to improperly elicit police opinion testimony and invade the province of the jury." Jackson, 107 So. 3d at 341. *See also* Barnhill v. Jones, No. 3:17cv693-MCR/CAS, 2018 WL 9441324, at *13 (N.D. Fla. Nov. 15, 2018), *report and recommendation adopted*, No. 3:17cv693-MCR-CAS, 2019 WL 4017608 (N.D. Fla. Aug. 26, 2019) ("[G]enerally, a witness's opinion as to the credibility, guilt, or innocence of an accused is inadmissible as invading the province of the jury," (citing Seibert v. State, 923 So. 2d 460, 472 (Fla. 2006); Tumblin, 29 So. 3d at 1101; Jackson, 107 So. 2d at 340)), *appeal*

filed, Barnhill v. Sec'y, Dept. of Corr., No. 19-13799 (11th Cir Sept. 24, 2019).

Trial counsel conceded at the evidentiary hearing that he did not think the prosecutor would have presented those portions of the video in which Besse accused Petitioner of lying or having prior charges involving guns or drugs. Ex. M at 762. He also testified he did not think those portions of the interrogation would have been admissible. In spite of the likelihood that Investigator Besse's repeated comments that Petitioner was lying or had past criminal charges would not have been admissible in his trial, the State post-conviction court concluded that trial counsel did have a reasonable strategic reason for allowing the entirety of the video to be played for the jury. The court noted that counsel had only two choices made available by the judge—the entire video or Besse's recounting of only portions of the interrogation—and that counsel's choice to allow the entire video was reasonable in light of Petitioner's continuous and strong denial of guilt on the video and the other factors in counsel's defense strategy.

The Supreme Court has held that a defendant claiming ineffective assistance of counsel must show counsel's actions were not supported by a "reasonable" strategic choice made after the exercise of "reasonable professional judgment." Strickland, 466 U.S. at 690-91; *see also*

Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind."); Massaro v. United States, 538 U.S. 500, 505 (2003) ("[A] defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial."). Whether, with the benefit of hindsight, the state court was incorrect in finding that counsel made a reasonable strategic decision in allowing numerous inadmissible and potentially prejudicial comments of the investigator to come before the jury is a close question. However, the question before this Court turns on whether the state courts unreasonably applied Strickland or unreasonably determined the facts in finding that counsel was not deficient and that prejudice was not established. The issue is not whether the State court's determination was correct but whether it was unreasonable, which is a high threshold to meet. Knowles v. Mirzayance, 556 U.S. 111, 123 (2009). This Court gives a heightened level of deference to a state court's finding that the requirements of Strickland have not been met. *See id.*

Regardless of whether trial counsel may have been deficient in his decision to allow the video, the state court's determination was not unreasonable that Petitioner failed to prove prejudice as required by the

second prong of Strickland. The state court determined that the references to Petitioner's possession of a pistol and drugs when he was much younger, for which adjudication was withheld, were minimal and the jury was instructed to ignore them. The court noted that the investigator's reference to Petitioner's body language when confronted with the allegations were not necessarily inadmissible, and that counsel did a good job of pointing out to the jury that the officers had already made their mind up that Petitioner was guilty and were not in fact searching for the truth.

Moreover, in light of the evidence presented to the jury, the state court was correct that Petitioner failed to demonstrate that but for counsel's failure to object or redact the comments in the video, the result of the trial would have been different—a reasonable probability being one sufficient to undermine confidence in the outcome. *See* Strickland, 466 U.S. at 694. The jury heard evidence of six college students who were driving by the scene of the shooting. One student testified that the shooter was in her line of vision and was wearing a black shirt. Ex. D at 48-49. She said the other man present at the scene of the shooting was not wearing a black shirt. Ex. D at 49. Four other students in the same car testified that the shooter was wearing black. *Id.* at 62, 72, 83-84, 107. Two of those students also testified the other man, who was not the shooter, was not wearing a black

shirt. *Id.* at 62, 72. Three of the students in the passing car testified that the other man ran away before the shooter ran. *Id.* at 62-63, 71, 84-85. Two of the students testified that the shooter had short twists or dreadlocks. *Id.* at 72, 84. Three of the students testified the shooter was a black male. *Id.* at 62, 71, 85.

Henry Dell Perry, a friend of the victim, testified that Petitioner and the victim, along with another man and a woman, came to his apartment in the Sand Pebbles complex near the location of the shooting. He testified that during the visit, Petitioner and the victim went into the bathroom together for a few minutes. He did not note what Petitioner was wearing, but the other man had on a brown shirt. Perry testified that after they left, he heard shots and when he looked, he saw the same two men running from the corner back toward his apartment complex where they got into a car where the other woman was sitting. The victim was lying on the ground. He later gave Petitioner's cell phone number to police. Ex. D at 108-32.

Shawanza Catrice Gardner testified she was with Petitioner, the victim, and a man named Sam Cosby on the night leading up to the shooting. She said she and Cosby picked up the victim in the car Cosby was driving and then picked up Petitioner on Yaeger Street. Another

witness who resides on Yeager Street testified he saw the victim leave Yaeger Street with Petitioner and two others in a car on the night of May 17, 2010. Ex. E at 139-42, 185-86.

Ms. Gardner testified the four of them drove to a store for drinks and gas and then to Perry's apartment. *Id.* at 144-46. After being in the apartment, she left the apartment to wait in the car and Cosby came out and sat with her. *Id.* at 149. She saw Petitioner and the victim leave the apartment and walk toward another apartment complex. *Id.* at 150-51. She testified that Cosby left the car when he heard Petitioner and the victim arguing. She also heard loud arguing and heard the victim tell Petitioner to leave her alone. *Id.* at 155. Gardner testified, "I turned back around to look back, I seen Sam [Cosby] running after I had heard a shot." *Id.* at 156. More shots were fired and then Petitioner ran to the car. Gardner testified Sam threw his hat like he was mad and "asked him why did he do it" and Petitioner answered, "A man's got to do what a man's got to do." They drove away from the apartment complex and took Petitioner back near where they picked him up. *Id.* at 156-57. She testified that when Petitioner got out of the car, he had a white shirt with him that looked like it had something wrapped in it. Ex. E at 158-61. She also heard Petitioner comment that the victim did not give him his money. *Id.* at 158.

Gardner testified that Petitioner was wearing a black shirt that night and Cosby was wearing all garnet and gold FSU colored clothing. Ex. E at 164-67. She testified that Petitioner had a six or seven-inch-long Afro that was twisted on the night of the shooting and Cosby had a low fade haircut with designs, and he was wearing a hat when he was out of the car. Ex. G at 520-22; Ex. E at 177.

The jury also heard evidence that Petitioner's cell phone records were obtained and showed that he was in the vicinity of cell towers close to the site of the shooting at 11:23 p.m. on May 17, 2010, although no records showed where the cell phone was at the time shots were fired. The investigator also testified that on the morning of May 18, 2010, after the 12:15 a.m. shooting, Petitioner requested his cell phone carrier to change his telephone number. Ex. G at 446-67.

Jerry Chambers, Jr., testified for the defense that he knew the victim from the homeless shelter and that he saw Petitioner and the victim laughing and talking on the sidewalk on the night of the shooting. He said they gave him a light for his cigarette. Ex. G at 485-86. Chambers testified that when he walked away, he saw someone talking to Petitioner and the victim. *Id.* at 487. The man had twists or braids in his hair. Chambers testified he did not see that man in the courtroom. *Id.* at 488. Chambers

heard shots fired and ran behind a car to call 911. He said when he looked up again, he saw the back of the man with the "braids" and that the man went toward a four-door car and got in. *Id.* at 490-91. He implied but did not explicitly state that the man with the braids was doing the shooting. *Id.* at 489. He said he did not see what happened to Petitioner. *Id.* at 490. Chambers attempted CPR on the victim while waiting for emergency personnel. On cross-examination, Chambers identified a photograph, Exhibit C-1, as depicting the shooter. *Id.* at 498, 503-04. He testified that the person in the photograph was the shooter and he knew that "because that's what I seen." Ex. G at 498. He said he was sure. *Id.* The photograph was later identified by Gardener as depicting Petitioner and how his hair looked on the night of the shooting. *Id.* at 520-22.

Even if counsel had not requested the video be played in full, the officer would have testified to certain things Petitioner said in his police interrogation, which likely would have included the fact that he told police he was not with the victim when the shooting occurred. For example, he told Officer Besse that he did not go anywhere with the victim after meeting her on Yaeger street. Ex. F at 388-89, 390, 393, 400, 422. He said they never had a conversation. *Id.* at 394. He said he was never in the car with the victim or Sam Cosby. *Id.* at 395. He told Officer Besse he was

nowhere near the shooting incident. *Id.* at 396, 398, 403, 406, 407, 408. A verbal summary of the police interrogation in lieu of showing the video would have made clear to the jury—even without the officer accusing Petitioner of lying—that his statements of not knowing or being with the victim and not being in the area of the shooting were false.

In light of the evidence presented at trial, Petitioner did not demonstrate a reasonable probability sufficient to undermine confidence in the outcome that but for defense counsel's decision in allowing the video in full, the outcome of the trial would have been different. Moreover, Petitioner agreed to counsel's strategy on the record at trial. The state court's determination was not shown to be unreasonable in finding that both prongs of the Strickland test for ineffective assistance of counsel were not met. For this reason, habeas relief under § 2254 is not warranted and the petition should be denied.

Conclusion

Based on the foregoing, Petitioner Alvin Herron is not entitled to federal habeas relief. Accordingly, the § 2254 petition (ECF No. 1) should be denied.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Rule 11(b) provides that a timely notice of appeal must still be filed, even if the court issues a certificate of appealability.

Petitioner fails to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (explaining substantial showing) (citation omitted). Therefore, the Court should deny a certificate of appealability.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." The parties shall make any argument as to whether a certificate should issue by objections to this Report and Recommendation.

Leave to appeal in forma pauperis should also be denied. *See* Fed. R. App. P. 24(a)(3)(A) (providing that before or after notice of appeal is

filed, the court may certify appeal is not in good faith or party is not otherwise entitled to appeal in forma pauperis).

Recommendation

It is therefore respectfully **RECOMMENDED** that the Court **DENY** the § 2254 petition (ECF No. 1). It is further **RECOMMENDED** that a certificate of appealability be **DENIED** and that leave to appeal in forma pauperis be **DENIED**.

IN CHAMBERS at Tallahassee, Florida, on December 9, 2019.

s/ Charles A. Stampelos
CHARLES A. STAMPELOS
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Within fourteen (14) days after being served with a copy of this Report and Recommendation, a party may serve and file specific written objections to these proposed findings and recommendations. Fed. R. Civ. P. 72(b)(2). A copy of the objections shall be served upon all other parties. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Fed. R. Civ. P. 72(b)(2). Any different deadline that may appear on the electronic docket is for the Court's internal use only and does not control. If a party fails to object to the magistrate judge's findings or recommendations as to any particular claim or issue contained in a Report and Recommendation, that party waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. R. 3-1; 28 U.S.C. § 636.

time to try to put the wording down.

THE COURT: All right. Well, I'm going to grant the request to exclude Mr. Cosby's testimony. I think there is so little probative evidence as to what he has to say. You know, we can speculate that it's feigned. I don't know whether it's feigned or it's not. There appears to be no question that he does have significant mental history. He's been committed at least once. He's been, based upon the deposition, has serious mental history, has been in facilities numerous occasions. So whether it's totally feigned or not, I don't have any way to determine that. But it certainly would cause a great deal of confusion to simply put him on the witness stand based upon the proffer that I've heard.

But upon some agreement as to a statement along the lines of what I've indicated, I'll grant the motion to exclude Mr. Cosby's testimony. I'll let you work on that a little bit, and then discuss with Mr. Bauer and see if we can agree on some wording.

MR. BAUER: Judge, I was seeking to have him as a witness. But if there's a cautionary instruction, I would ask that it would -- there would not be an instruction based on lack of evidence of Mr. Cosby, or we state that he's, in fact, denied shooting anybody ever.

THE COURT: Say what?

THE COURT: All right. We'll be in recess.
(Court in recess at 9:50 a.m.)
(Court back in session at 10:11 a.m.)
THE COURT: Let's have the jury, please.
(Jury present in the courtroom.)
THE COURT: Everybody be seated.
You may call your next witness, Mr. Bauer.
MR. BAUER: Investigator James Besse.
THE COURT: Investigator Booth, you need to step out.
Would you face the clerk and be sworn, please?

Whereupon,

JAMES BESSE

was called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Have a seat and slide up to the microphone, please, sir.

DIRECT EXAMINATION

BY MR. BAUER:

Q Would you tell us your name?
A Investigator James Besse.
Q How do you spell your last name?
A B, as in boy, E-S-S-E.
Q Okay. And, Investigator Besse, how are you employed?

Q And all this occurred on video?
A That's correct.
Q What did you ask him, and what --
THE COURT: Are we going to play a video, Mr. Bauer?
MR. BAUER: No, sir.
THE COURT: We're not going to present the jury with a video?
MR. COLLINS: Your Honor, I'm going to object, then.
THE COURT: All right. Let's go sidebar.
(Sidebar discussion concluded.)
THE COURT: What's your plan, Mr. Bauer?
MR. BAUER: I'm going to have him testify as to statements, because he made statements about possession of firearm. He talks about his criminal history. So counsel isn't going to stipulate to that. I can't redact that at this point. So I -- I told counsel that we weren't going to play it because it's going to put me in a Catch-22. I'm going to infringe on his rights. He knows I can't play that part. So I don't know why he's objecting.
MR. COLLINS: I'm objecting, Your Honor, because the best evidence, the complete evidence is the recorded video. It acknowledges the correct waiver of rights, the manner in which they were waived. And anything short of that, I would object to. If there's other inadmissible

evidence, well, that's the State's problem. But I would object to this manner of --

THE COURT: What's your legal objection?

MR. COLLINS: Completeness.

THE COURT: All right. I'll overrule that objection. Do you agree there is inadmissible evidence that you object to in the tape?

MR. COLLINS: Your Honor, there are some things that are brought forward by law enforcement that probably shouldn't be presented to the jury. I would agree to that, yes, sir. But -- but the best evidence is --

THE COURT: Well, I mean, I'm prepared -- if you want, we'll play the whole tape. But if there are portions you're objecting to, then I guess we're going to be in the posture of having to do it as proposed by the State.

MR. COLLINS: Well, I'm not going to object, Your Honor. I'm going to make a strategic decision to let that other stuff come on in. And I would require the complete video be played.

MR. BAUER: Judge, he can play that on his own.

THE COURT: I'll sustain his objection, if you're not objecting to any portions. It's going to take a minute to get that set up?

MR. BAUER: Yes, sir. If you'll give us ten

MR. COLLINS: Yes.

THE COURT: Mr. Bauer?

MR. BAUER: That's fair, Judge.

THE COURT: All right. Let's have the jury, please.

(Jury present in the courtroom.)

THE COURT: Everybody be seated, please.

I have made a ruling that rather than allow the officer to paraphrase what was said by the defendant in the case, that I will -- that I will require that the full statement, the videotaped statement, be played for you so that you can hear it firsthand.

I have not listened to this tape, but I understand from the attorneys that you may hear some information during the course of this statement that could be construed by you as involving other crimes or wrongs by the defendant. He is not on trial for any crime or wrong or act not contained in the indictment, and you should disregard any such mention.

You may proceed, Mr. Bauer.

MR. BAUER: Thank you, Your Honor.

THE COURT: I don't know -- did we give this tape a exhibit number?

MR. BAUER: This would be 24, as I understand it.

THE COURT: State's Exhibit 24?

THE CLERK: Yes, sir.

photos were taken, not at the time the crime occurred, because we know by their own admission there's a four month difference between when the photos were taken and when the crime occurred regarding the photograph of Mr. Herron.

So we need someone who took the photograph to swear -- to authenticate that's an accurate description of him in February. Ms. Gardner cannot do that.

MR. BAUER: Judge, Ms. Gardner can say if the photograph depicts Mr. Herron on the day in question. And certainly it does.

Counsel is arguing over the hairstyle.

THE COURT: Sit down, Mr. Collins.

MR. COLLINS: I'm sorry.

MR. BAUER: Counsel is arguing over the hairstyle. She can be cross-examined on the exact hair, was it parted one way or another. Those intricacies regarding hairstyle can be questioned about, but she can identify Mr. Herron's photograph relative to the day in question. She can also identify Mr. Cosby relative to the day in question. And if I can't get this on, I frankly don't have a case, Judge.

THE COURT: Mr. Bauer, frankly, whether it is important testimony or not doesn't enter into the equation. Let's be clear on that. It is clearly

Herron was the shooter beyond a reasonable doubt, because let's face it, the identity of the shooter is what's at issue in this case. It's one of the elements. If you can't determine beyond a reasonable doubt that Alvin Herron is the shooter, then none of the rest of the stuff matters. He's not guilty.

A couple of things I want to talk about the State said in their closing. They omit, when they talk about the video of Mr. Herron, he turns himself in. Albeit three weeks later. Albeit after Sam and Shawanza had made statements. But he turns himself in. If he was trying to evade the police so much, intentionally powering down his phone -- first of all, what evidence did you have that the police actually tried to find him other than they tried to locate him through his cell phone? He turns himself in.

And, look, I'll get it into a little more later, he wasn't completely honest in that video. He wasn't. He wanted to deny any involvement whatsoever. That's clear. But there were some things he was telling partial truths about. But I think it was pretty clear he was vehemently denying that he shot anybody. I don't think anybody can argue with that. He vehemently denied that he shot anybody.

At that time -- remember, we know he's been in the

We don't know if those are dreads or those are twists. You'll decide the weight you want to give it, but we don't know.

And, while thinking about that for a minute, while we're talking about that picture, let's compare it to his hair on the video, where he voluntarily turned himself in, just for a minute. That was a short afro.

Now, you can alter your hair two ways. You can either grow it long or you can cut it back, right? You don't determine how fast your hair grows. You can determine if you want to cut it shorter. If you're trying to get rid of dreads or long twists or something of that nature, and I don't know for sure, you got to cut that hair off. That hair's got to be cut low.

That was a short afro in that video. Okay? You can only assume it was shorter than that three weeks earlier. I mean, you can assume anything you want. And I'm not a hair expert, but I know if you're going to be getting rid -- to try to alter your appearance, dreadlocks or twists, you don't come with that hair. The hair is a lot shorter than that. And, again, there's no evidence that he did alter anything. These are all assumptions. I'm just trying to point out a few things.

This man, this man turned himself in. And you saw that video. Yes, he wasn't completely truthful. But he

Annie Pressey, who assisted Carpentieri, was not even aware of the black t-shirt found at the scene.

Mr. Tubbs, he was the FBI guy with the prints. I don't want to spend a lot of time on that.

Dr. Flannagan, what did she really add as to who the shooter was? Nothing. She don't know. We know that she's dead, multiple gunshot wounds was the cause of death.

Investigator Booth, she started by telling us they had very little, all they knew was two black males were the possible shooters, not much more. She really wasn't aware of the t-shirt. She said the college students and Jerry Chambers witnessed the shooting. And they did.

Investigator Besse, that's when the video comes in. You see Alvin Herron. You judge it for what you give it. Again, I would submit to you that he's not truthful. He's truthful about some things, but he's certainly not truthful about where he was and his participation, what he did. But that does not mean he's the shooter. He turned himself in. He thought he could clear it up. He did not know what he was getting into.

He lied. He lied. He lied. But that lie does not make him the shooter. You don't take some picture at some unknown time with twists or longer hair and a black male and make that the shooter and charge him. That's

not even clear to be enough. And that's really all they've got when they boil it down. And Shawanza Gardner, who is Sam Cosby's girlfriend. She spends the night with him.

And Besse -- that's police work, that's the way they talk, I understand. But he was just looking for a confession. He was not going to let him go. There was an insinuation that, oh, if you tell me the truth, you can leave. But he ain't confessing to something he didn't do. He's lying about his involvement, covering for Sam or whatever happened, but that don't mean he's the shooter.

Makes a big deal about the cell phone towers and stuff. And we'll talk about that.

Okay, Chris Corbitt, the cell phone witness. The last known time that that phone was even in the area, which could have been in the apartments -- clearly it could have been -- well, not even clearly that. If you remember, he pointed outside the circle. If you remember, he pointed outside it. But it ain't exact, so let's assume that it was clear enough to be in the circle.

And we can suppose it was because we know, despite the fact that Alvin Herron denied it his video, he was in the area. We know. How do we know that? Jerry Chambers

told us. Jerry Lee Chambers told us that. And he ain't lying. And there's nothing to suggest he was. We can call him names, but there's nothing that rebuked that. Okay?

But his phone at 11:23 would have probably been in the apartment. We don't know where that phone was at. We don't know. The murder happened at 12:15. It happened at 12:15. Those are cold, hard facts.

Now, we can assume the phone was still in the area. We can. And it probably was. But they only know where the phone is when? When it's being used.

But that cell phone tower, all that does, all that evidence does, is prove that Alvin was lying on the video. And not completely lying. But, that's all. And that lie doesn't make him guilty of being the shooter.

And that cell phone technology that's supposed to be like the gotcha, we got you now, that doesn't prove he's the shooter, no more than me just telling you he is or anyone else telling you he is.

Then I put on Ms. Booth. That was the end of the State's case. Then I put on Ms. Booth again, so that you could hear Trice Gardner's lies, Shawanza Trice Gardner's lies. And you heard it. You knew then she lied under oath.

And then Jerry Chambers. He never said that was his

This is the problem with eyewitness testimony. Certainly, Shawanza Gardner is not the fix-it.

Problem number two, the cell phone records do not place the defendant's phone at the crime scene, at the shooting. And if it places him in the area, so what? If it places him in the apartment, so what? Okay. 11:23 is the last time we know where that phone is for sure. Now, we can speculate and assume everywhere else. The murder happened at 12:15. No records place the cell phone at 12:15 anywhere. You have to speculate.

Problem number three, Shawanza Gardner, their key witness, lacks credibility. We know she's lied under oath twice. The descriptions and where Sam was. Can you believe what she said enough to convict someone of first degree murder? It's up to you. You can if you want.

There's no do-overs.

The defendant's untruthful statement on the video does not make him the shooter. It does not. It's not conclusive beyond a reasonable doubt. Neither that or the hairstyle. The hairstyles are too -- there's too many different descriptions. You know, I want to tell you he didn't have dreads or twists, but I don't know what he had. And after all this testimony, you don't know either. It's too conflicting, unless you believe Shawanza Gardner.

want, but it's not legally conclusive beyond a reasonable doubt, I would submit to you.

They found a picture of him with scruffy hair. His phone was in the area at some time. He was a black male, who was present. But those three things do not prove he was the shooter.

And he lied about his involvement.

All they've proved is he's black, he lied, and was in the area sometime before the shooting occurred. You cannot exclude a reasonable explanation, he was there and he was covering for Sam, as was Shawanza Trice Gardner. But, by lying, he put himself in a bad position. He has. But that lie does not equal that he's lying because he shot somebody.

Ladies and gentlemen, I'm going to talk briefly about the law. The judge told you at the very beginning that it is your solemn responsibility to see if the State has proved each element of the crime against Mr. Herron, each element. And one of the elements is he must be the person who committed the crime.

It's your job to decide the facts. Now, I've gone over a lot of stuff with you. Probably bored you to tears. But it's my job to try to remind you of what you heard as opposed to cramming down what I believe happened.

that he was the shooter. And it's the legal instruction that is the linchpin of your decision when you apply it to these facts.

After carefully considering, comparing, and weighing all the evidence, there is not an abiding conviction of guilt. That's a heavy standard, an abiding conviction. That means -- you decide what it means. It's a heavy standard.

Or if you have a conviction, say you believe, well, I believe he probably did it, but it's not stable, it wavers, it vacillates, there's a question, there's a reasonable doubt in your mind whether you believe he did it or not, you find him not guilty because your doubt is reasonable. And you have to because you can't convict somebody you're not completely sure of.

Okay. I'm not saying this because I believe he's the shooter. I'm just trying to help explain the instructions. No way. This young man is not guilty. He's guilty of being stupid and lying. He's got himself in a bad position, hanging out with bad people.

It's the evidence, or the lack thereof, or the conflict, is what you base your decision on, not what I'm saying, not what the State is saying. But as the judge asks, listen carefully to us. And then you weigh the evidence under the parameters of your common sense and

THE COURT: I didn't understand your comment.

MR. BAUER: It shows him getting locked up at the end. You just see the officer comes in again just before he's locked up and says, Are you sure you want to deny everything. And he continues. The discussion is ongoing right up until he's locked up. Besse comes in while he's locked up. So if there's a point where you want me to turn it off, let me know.

THE COURT: Do you have a point you want to stop it?

MR. COLLINS: I can't say, Judge, at this time. I mean, I'm willing to review it with Mr. Bauer, take five more minutes. But if we don't come to an agreement, we're just --

THE COURT: Well, let's just play it all.

MR. COLLINS: Okay.

(Sidebar discussion concluded.)

THE COURT: You may proceed, Mr. Bauer.

MR. BAUER: Thank you, Your Honor. I would ask to introduce 24 and publish to the jury.

THE COURT: You may.

(Video played.)

INVESTIGATOR BESSE: What's up?

THE DEFENDANT: I said, yeah.

INVESTIGATOR BESSE: We're good.

THE DEFENDANT: All right. Explain to me how all

this done got me so confused.

INVESTIGATOR BESSE: Okay. All right. We're not going to do anything to you, though.

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: I'm going to read you your rights. You understand? Okay. Before I can start talking about anything, I need to read you your rights. Okay?

THE DEFENDANT: All right.

INVESTIGATOR BESSE: A-L-V-I-N?

THE DEFENDANT: Yes, sir.

INVESTIGATOR BESSE: H-E-R-R-O-N?

THE DEFENDANT: Yes, sir.

INVESTIGATOR BESSE: What's your current address?

THE DEFENDANT: 806 Bahama Drive.

INVESTIGATOR BESSE: Okay. Before I ask you to answer any questions or make any statements, you must fully understand your rights. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have them present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or

make any statements. Do you understand each of these rights I have just explained to you?

THE DEFENDANT: Yes, sir.

INVESTIGATOR BESSE: Have you previously requested any other law enforcement officer to allow you to speak to an attorney?

THE DEFENDANT: No, sir.

INVESTIGATOR BESSE: Having these rights in mind, do you wish to talk to me now?

THE DEFENDANT: Yes. I'll talk to you now.

INVESTIGATOR BESSE: Okay. I need you to go ahead and give me your signature right there. It says you understand these are your rights. (UNINTELLIGIBLE) question I just asked you.

Okay. All right. So why do you -- why do you think you're here? Let's -- let's --

THE DEFENDANT: My mom got a phone call and said my name was mentioned up on a homicide.

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: And that's all.

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: And I was telling her -- she was, like, yeah. So I called -- I called who she -- Mr. Laursen, I called him to talk to him and tell him, well, yeah, I got to come and talk to y'all, then,

because I -- I have no clue --

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: -- of what was going on. And then earlier, I made contact with another officer, though. I had got a phone call from my baby mother was like, a officer came to her house looking for me. I called her, but I didn't get no answer. And I left a message.

INVESTIGATOR BESSE: Okay. When was that?

THE DEFENDANT: Probably about five days ago, probably so, or something like that. I'm not sure, though. But I know they -- they came to my baby mother's house, though.

INVESTIGATOR BESSE: Okay. Where is that at?

THE DEFENDANT: In Magnolia.

INVESTIGATOR BESSE: Magnolia.

THE DEFENDANT: Terrace.

INVESTIGATOR BESSE: Magnolia Terrace. Okay. What's her name?

THE DEFENDANT: Deandra Blakely.

INVESTIGATOR BESSE: Blakely. Okay.

THE DEFENDANT: And then when my mom got that call and she contacted me and she told me that, and I was like, oh, no, that's -- and then she said that Mr. Larson mentioned that I had called the other lady. So I was like, okay, that's what that must was about. I wish she

would have told someone that that's what it was about and I could've been talk to y'all.

INVESTIGATOR BESSE: Yeah.

THE DEFENDANT: Yeah.

INVESTIGATOR BESSE: Okay. Where do you usually hang out at?

THE DEFENDANT: I'm from the south side part of town. I hanged around on the south side.

INVESTIGATOR BESSE: Okay. Where at?

THE DEFENDANT: Beacon Hill, where I stay at, Beacon Hill.

INVESTIGATOR BESSE: That's right here?

THE DEFENDANT: No. Beacon Hill is right off of Paul Russell. Beacon Hill, across the street like --

INVESTIGATOR BESSE: I'm thinking Macon Hills.

THE DEFENDANT: Oh.

INVESTIGATOR BESSE: That's Macon Hills over here where you live. Bahama, isn't it?

THE DEFENDANT: No. I live in Beacon Hills.

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: I don't know where Macon -- I don't know where that is.

INVESTIGATOR BESSE: Okay. All right. Maybe I'm getting confused on my -- on my addresses. Okay. So where else do you hang out at?

THE DEFENDANT: That's all.

INVESTIGATOR BESSE: That's all?

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: Okay. Well, this incident occurred about two weeks ago, going on three weeks ago now.

THE DEFENDANT: Okay.

INVESTIGATOR BESSE: Okay. What -- what's your cell phone number?

THE DEFENDANT: I -- I -- my -- the last cell phone number I had was 688-8113.

INVESTIGATOR BESSE: Okay. And what happened to that cell phone?

THE DEFENDANT: Oh, I ain't have no money to keep it on.

INVESTIGATOR BESSE: When did it go off?

THE DEFENDANT: Probably like two weeks ago.

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: About two weeks ago, yeah.

INVESTIGATOR BESSE: But how long had you had that cell phone and was it working for?

THE DEFENDANT: Oh, I had that phone for a little while, for a good long minute.

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: Yeah, a good long minute.

INVESTIGATOR BESSE: What -- what cell phone did you use --

THE DEFENDANT: Alltel.

INVESTIGATOR BESSE: It's Alltel?

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: With a 850 area code?

THE DEFENDANT: Yes, sir.

INVESTIGATOR BESSE: Okay. You usually carry that with you everywhere you go?

THE DEFENDANT: Yes, sir. Got to keep my cell phone.

INVESTIGATOR BESSE: So what you been using since that went off about two weeks ago?

THE DEFENDANT: Nothing. You know, whoever -- if I have to contact someone, I use my house phone or whatever.

INVESTIGATOR BESSE: Okay. What's your house phone number.

THE DEFENDANT: 671-2501.

INVESTIGATOR BESSE: That's your mom's house?

THE DEFENDANT: Yeah, that's the house number.

INVESTIGATOR BESSE: Who all stays there with you?

THE DEFENDANT: Just me and my mom.

INVESTIGATOR BESSE: You and your mom. That's your mom out there?

THE DEFENDANT: Yes, sir.

INVESTIGATOR BESSE: Okay. That's the one that goes to -- what's your mom's cell phone number? Do you know? Does she have a cell phone?

THE DEFENDANT: It's 510 -- no, it's 508.

INVESTIGATOR BESSE: 508.

THE DEFENDANT: I got -- I need a phone to -- 508-7390. 508-7390.

INVESTIGATOR BESSE: Okay. So why do you think your name would get mixed up in a homicide investigation?

THE DEFENDANT: That's what I'm really trying to figure out. I -- I really don't know.

INVESTIGATOR BESSE: How do you usually wear your hair?

THE DEFENDANT: I mean, like this. I got my -- you know, I was just doing my hair back, so I can get braids and stuff.

INVESTIGATOR BESSE: Do you wear it in twists at all?

THE DEFENDANT: No. No. I done had twists before.

INVESTIGATOR BESSE: Yeah. When was the last time you had twists?

THE DEFENDANT: Probably like, I say, four, five months, since the last time I cut my hair. Because this like three months right here, and my hair was longer than

this. So probably like four, five months ago.

INVESTIGATOR BESSE: Okay. You ever been in any trouble before?

THE DEFENDANT: Yeah. I done been in trouble before.

INVESTIGATOR BESSE: For what?

THE DEFENDANT: One time drugs, and then another time for a pistol.

INVESTIGATOR BESSE: What happened with that pistol charge?

THE DEFENDANT: I did county time.

INVESTIGATOR BESSE: County time?

THE DEFENDANT: Yeah, because that was my first charge. I got adjudicated withheld.

INVESTIGATOR BESSE: Okay. What was it? Carrying a concealed weapon or something, or what kind of charge was it?

THE DEFENDANT: Possession of a firearm, I think.

INVESTIGATOR BESSE: By delinquent or convicted felon or what?

THE DEFENDANT: No. I wasn't no convicted felon. I got adjudicated withheld because they said it was my first charge.

INVESTIGATOR BESSE: Okay. How old were you when that happened?

THE DEFENDANT: Eighteen.

INVESTIGATOR BESSE: That was your first adult charge?

THE DEFENDANT: Yes. Yes. Yes, sir.

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: First adult charge.

INVESTIGATOR BESSE: Who do you usually hang out with?

THE DEFENDANT: People on the south side where I grew up at, play basketball at the park.

INVESTIGATOR BESSE: Who are they?

THE DEFENDANT: Well, got Da-Da, but he's in the county.

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: And my little fake brother I call Dre, and he just got out the county.

INVESTIGATOR BESSE: Okay. Who do you usually hang out with if you're not hanging out with one of those two guys because they're in county?

THE DEFENDANT: Oh, I be home with my baby mama and my baby.

INVESTIGATOR BESSE: Yeah.

THE DEFENDANT: Yeah, because she have to go to work and stuff all through the day. I keep -- I keep the baby.

INVESTIGATOR BESSE: Yeah.
THE DEFENDANT: Uh-huh.
INVESTIGATOR BESSE: Where does she work at?
THE DEFENDANT: TCC.
INVESTIGATOR BESSE: Okay.
THE DEFENDANT: Well, she go to school. It's (UNINTELLIGIBLE).
INVESTIGATOR BESSE: Do you -- you know Monica?
THE DEFENDANT: Do I know Monica?
INVESTIGATOR BESSE: Uh-huh.
THE DEFENDANT: From where?
INVESTIGATOR BESSE: As far as what, from where? Like a older lady, Monica.
THE DEFENDANT: A older lady Monica. I met -- I met a Monica around my area.
INVESTIGATOR BESSE: Yeah.
THE DEFENDANT: Yeah.
INVESTIGATOR BESSE: What she look like?
THE DEFENDANT: But I don't know -- I had end up meting (sic) her from being over there on the south side where I be at. She look like -- she looked light-skinned?
INVESTIGATOR BESSE: Okay.
THE DEFENDANT: Yeah.
INVESTIGATOR BESSE: All right. When is the last

time you seen her?

THE DEFENDANT: Probably about -- on the south side, probably like a week ago or something, week and a half. I don't --

INVESTIGATOR BESSE: Where at?

THE DEFENDANT: Across from, like, Magnolia --

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: -- where my baby mama live because that's where I met her at from leaving my baby mother's house, I had met her.

INVESTIGATOR BESSE: How old is she?

THE DEFENDANT: I don't know. I don't know. I had met her.

INVESTIGATOR BESSE: How old do you think she is?

THE DEFENDANT: She look like she's about 27, 30, probably.

INVESTIGATOR BESSE: She got kids or --

THE DEFENDANT: Don't know.

INVESTIGATOR BESSE: Know anything about that?

THE DEFENDANT: Wouldn't know.

INVESTIGATOR BESSE: How did you meet her? I mean, (UNINTELLIGIBLE).

THE DEFENDANT: Through my partner across from Magnolia.

INVESTIGATOR BESSE: Uh-huh. Who is that?

THE DEFENDANT: I don't know his real name. They call him Buster.

INVESTIGATOR BESSE: Buster?

THE DEFENDANT: Yeah.

INVESTIGATOR BESSE: How old is Buster?

THE DEFENDANT: I don't know.

INVESTIGATOR BESSE: So -- do you know Monica's real name?

THE DEFENDANT: Uh-uh. I mean -- oh, Monica is not her real name?

INVESTIGATOR BESSE: I don't (UNINTELLIGIBLE).

THE DEFENDANT: Yeah. I don't -- that's what I know.

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: I met a Monica from over there.

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: Yeah.

INVESTIGATOR BESSE: Okay. I want to -- I want to get a picture of her just so we're talking about the right person. Make sure we're talking about the right person.

THE DEFENDANT: I wouldn't be able to know how to get a picture.

INVESTIGATOR BESSE: Oh, no. I can do that.

THE DEFENDANT: Oh, okay.

INVESTIGATOR BESSE: I'm going to go do that just to see, make sure we're talking about the right person. Let me go do that real quick. Okay? Hold on one second.

THE DEFENDANT: Yeah. So what is in (UNINTELLIGIBLE) about that question? Why you asking do -- if I know a Monica?

INVESTIGATOR BESSE: Let me get a picture, just make sure we're on the same track.

THE DEFENDANT: Okay.

INVESTIGATOR BESSE: Okay.

(Investigator left room.)

THE DEFENDANT: That look just like her to me. Yeah, she was over there.

INVESTIGATOR BESSE: When was the last time you seen her, you said?

THE DEFENDANT: That day I had met her.

INVESTIGATOR BESSE: The day you had met her is the last time you saw her?

THE DEFENDANT: Yeah. I mean, I never -- I just seen her that day.

INVESTIGATOR BESSE: Okay. Where did y'all go that day?

THE DEFENDANT: Where did who go?

INVESTIGATOR BESSE: You and her.

THE DEFENDANT: I didn't go nowhere with her. I

left, and I don't know where she went.

INVESTIGATOR BESSE: How long did you talk to her for?

THE DEFENDANT: Oh, I didn't talk to her long. We was out in the street, and I just met her. And then I went back up the hill walking.

INVESTIGATOR BESSE: Uh-huh. Okay. Who's Sam?

THE DEFENDANT: Who's who?

INVESTIGATOR BESSE: Sam.

THE DEFENDANT: Who is Sam? Oh, that's one of my partners.

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: Why? What -- what -- why are you asking me who is Sam?

INVESTIGATOR BESSE: Asking you if you know Sam.

THE DEFENDANT: Yeah, I know Sam.

INVESTIGATOR BESSE: Okay. When is the last time you seen Sam?

THE DEFENDANT: I seen him almost every day whenever he come by my house.

INVESTIGATOR BESSE: What kind of car does he drive?

THE DEFENDANT: He got a white Honda.

INVESTIGATOR BESSE: Any other cars he drives?

THE DEFENDANT: Not that I seen him in. White Honda.

INVESTIGATOR BESSE: Is something wrong with the Honda? Where does he stay at?

THE DEFENDANT: He was staying off of Paul Russell, on Paul Russell.

INVESTIGATOR BESSE: Who does he stay with?

THE DEFENDANT: His mom.

INVESTIGATOR BESSE: Okay. All right.

THE DEFENDANT: So where is that coming from?

INVESTIGATOR BESSE: Where is that coming from?

THE DEFENDANT: Yeah. You was like Sam. Like, how did my name get all brought up into a homicide. That's what I'm saying. Where is this coming from?

INVESTIGATOR BESSE: Well, we got information that you were with this girl, Monica.

THE DEFENDANT: I met -- right. I was with her. I wasn't with her. I was right in the same spot with her --

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: -- when I met her.

INVESTIGATOR BESSE: Uh-huh. Y'all didn't go to--

THE DEFENDANT: I didn't leave nowhere with nobody. I left up the street.

INVESTIGATOR BESSE: Down there -- down there off of some house right behind -- right behind where your baby mama lives --

THE DEFENDANT: No. It's --

INVESTIGATOR BESSE: -- on Yaeger Street right there?

THE DEFENDANT: That's where I met her at. Right. I met her right there on Yaeger Street.

INVESTIGATOR BESSE: Right.

THE DEFENDANT: Right.

INVESTIGATOR BESSE: So that house right there on Yaeger Street. Behind the -- the street right behind the complex?

THE DEFENDANT: Right.

INVESTIGATOR BESSE: So that's where you met her. Okay.

THE DEFENDANT: And I kept walking up and going (UNINTELLIGIBLE).

INVESTIGATOR BESSE: Who was she there with?

THE DEFENDANT: I don't know. I don't know who she was there with.

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: When I came out the door from watching my baby, baby mama come home, I went outside, talked to Buster. I know Buster, and she was there. So I guess, yeah (UNINTELLIGIBLE).

INVESTIGATOR BESSE: Is that Buster's house?

THE DEFENDANT: I think so.

INVESTIGATOR BESSE: Okay. Is he a older guy?

THE DEFENDANT: Yeah. Yeah, he's older. And I guess she was there with him or whoever. I don't know, though.

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: That's just strange. I don't see how the -- how my name come up in a homicide. So where does the homicide come from? Who -- that person there?

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: She did the homicide?

INVESTIGATOR BESSE: No.

THE DEFENDANT: Well, what are you saying?

INVESTIGATOR BESSE: She's the one that's dead.

THE DEFENDANT: Oh, she's the one that's dead?

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: Oh, man. That's crazy. I don't know how my name come up in that.

INVESTIGATOR BESSE: Well, I can tell you that we've got information. And I'll first say, Alvin, I mean, the best course of -- when you're in a situation like this is to always tell the truth.

THE DEFENDANT: I'm telling the truth.

INVESTIGATOR BESSE: And -- yeah. Because you don't want to go -- before we go and do what we do and, obviously, come to you last, we've -- you understand

we've been working this for almost three weeks now.

THE DEFENDANT: Okay.

INVESTIGATOR BESSE: Okay. Monday will be three weeks. Okay. So it hasn't been 100 percent of the time, but it's been a good amount of the time, you know, myself or other investigators been working this. And, you know, that's the way -- we don't just throw things together and do stuff. We do our homework, you could say.

THE DEFENDANT: Okay. Yeah. I know how it's going to be.

INVESTIGATOR BESSE: And -- and, basically, we have information that puts you with her --

THE DEFENDANT: Impossible.

INVESTIGATOR BESSE: -- right -- well -- right before she dies.

THE DEFENDANT: No. Can you show me how can you put me -- because that's impossible, sir. I met her on Yaeger and went to my house.

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: What do you say -- can you show me that? How you got information talking about --

INVESTIGATOR BESSE: Well, we're talking to other people. It's not, you know --

THE DEFENDANT: I don't know. That's definitely wrong. That's definitely wrong, sir.

INVESTIGATOR BESSE: Okay. Well, why would those other people put you there then?

THE DEFENDANT: I don't have no clue. I'm clueless. I don't know nothing right now.

INVESTIGATOR BESSE: The day you met her, what -- what was your conversation about?

THE DEFENDANT: There wasn't no conversation. It was just like, Alvin, this is -- this is Monica, you know. I was like, okay. How you doing, Monica? You know just talking (UNINTELLIGIBLE). I guess they was standing out in the road when I was coming through. So I went to holler at them.

INVESTIGATOR BESSE: How long ago was that, do you think?

THE DEFENDANT: How long ago what?

INVESTIGATOR BESSE: When you met her.

THE DEFENDANT: I said it was probably like two weeks ago, two weeks and a half or something.

INVESTIGATOR BESSE: (UNINTELLIGIBLE). Do you have a job?

THE DEFENDANT: No, sir.

INVESTIGATOR BESSE: Okay. How do you support yourself?

THE DEFENDANT: I be cutting grass.

INVESTIGATOR BESSE: Cutting grass?

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: Okay. Whose grass do you cut?

THE DEFENDANT: Whoever I can, sir. Yeah. I cut my mama's. I cut whoever I can.

INVESTIGATOR BESSE: Uh-huh. So there was an instance when you were in the car with her --

THE DEFENDANT: I don't have a car.

INVESTIGATOR BESSE: -- and Sam in Sam's car?

THE DEFENDANT: No. I -- no. How does that put -- I was never in the car with Sam.

INVESTIGATOR BESSE: Why would people tell us that you were?

THE DEFENDANT: That's what I don't know. We need to talk to these people.

INVESTIGATOR BESSE: I already talked to them.

THE DEFENDANT: Sir, I swear to you I don't know.

INVESTIGATOR BESSE: So you understand what DNA is, right?

THE DEFENDANT: Yeah.

INVESTIGATOR BESSE: Okay. So shell casings that were -- the shell casings and everything recovered on scene where she was shot, your DNA is not going to come back on there?

THE DEFENDANT: Oh, can't be. Oh, no, can't be. Not worried about none of that.

INVESTIGATOR BESSE: You're not worried about none of that?

THE DEFENDANT: No. Because I wasn't nowhere near what -- that incident.

INVESTIGATOR BESSE: Okay. And if I've got a few people putting you there, you're saying they're --

THE DEFENDANT: Can't put me there. It's no way possible.

INVESTIGATOR BESSE: Who else does Sam hang out with, then?

THE DEFENDANT: I don't -- I don't know. I don't know where Sam come from. I don't know.

INVESTIGATOR BESSE: Okay. Well, it comes a time when, you know --

THE DEFENDANT: There's a lot --

INVESTIGATOR BESSE: You ever hang out on Pensacola Street?

THE DEFENDANT: On Pensacola Street, no. That's way out of my league, Pensacola Street. I stay right around the south side. No transpo either. I walk from Magnolia to watch my baby, come back, walk back to Beacon Hill, go to the park right there, south side park, shoot a couple of hoops.

INVESTIGATOR BESSE: Uh-huh. Okay. Do you understand -- do you understand how a cell phone works?

THE DEFENDANT: Yeah.

INVESTIGATOR BESSE: Okay. Do you know that, like, when where you walk around -- like, I've got a couple of them on me now -- it hits all towers?

THE DEFENDANT: Okay.

INVESTIGATOR BESSE: And towers do what they call triangulate. And, basically, what that means is that, you know, as you leave the police department and you go down Monroe Street, you're on one tower. And then you switch to another tower as you get closer to there and you switch to another tower as you get closer to there.

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: And your cell phone right here --

THE DEFENDANT: Right.

INVESTIGATOR BESSE: -- what would you say if I told you that it was hitting off towers for that area where she was killed at the time she was killed.

THE DEFENDANT: Oh, no. Oh, no, sir.

INVESTIGATOR BESSE: All right. Like I said, that's something that's not a witness that might put somebody there for something wrong. That's not, you know --

THE DEFENDANT: Yeah, I understand.

INVESTIGATOR BESSE: That's not, hey, you know, that such-and-such or make a misidentification of who was

actually there and stuff. I mean, you just told me a while ago you are the only one that has that cell phone, you have it with you all the time. And I can honestly sit here and tell you, without bullshitting, that your cell phone is in the area triangulating off the time that this lady was killed.

THE DEFENDANT: No, sir. I don't --

INVESTIGATOR BESSE: And that's -- well, I'm not -- it was. I'm not bullshitting you. Because all we have to do is get a subpoena to the cell phone companies and we can get that information. And I'm not -- I'm not -- I'm telling you the truth.

THE DEFENDANT: Yeah. I swear I don't know nothing about none of that.

INVESTIGATOR BESSE: And you say it was way out of your league, but yet your cell phone that you just told me that you're the only one that carries it and you have it with you all the time --

THE DEFENDANT: I have my cell phone.

INVESTIGATOR BESSE: Yeah. It was there.

THE DEFENDANT: No. That couldn't have been me. Couldn't been --

INVESTIGATOR BESSE: You understand what I'm saying?

THE DEFENDANT: I hear what you're saying, but that -- it couldn't have been me, sir.

INVESTIGATOR BESSE: But it was.

THE DEFENDANT: No. You got to show me that. It's no way. The computer or these towers, something, something got to be wrong with that.

INVESTIGATOR BESSE: They're not wrong.

THE DEFENDANT: Well, sir, I don't know what to tell you, sir. I don't know what to tell you.

INVESTIGATOR BESSE: I mean, they're not wrong.

THE DEFENDANT: I don't know what to tell you, sir.

INVESTIGATOR BESSE: So we got -- we got information, Alvin, with your cell phone information with other information from people who put you there. That's how we got this.

THE DEFENDANT: I'm so confused. It's no way. I don't understand. I don't understand.

INVESTIGATOR BESSE: The ball is in your court. I mean, it's your -- it's your -- you know, we can sit here all night and go round and round with you lying to me or you can start telling the truth.

THE DEFENDANT: I'm telling the truth. We'll have to sit here then, sir. I'm telling the truth. There's nothing else I can tell you. There's nothing else I can tell you. I don't see how my name -- this is crazy, man. I don't like this shit, man. Boy. I don't like this. We need to get this cleared out. We need to get this --

because I don't know how this come up to this right here.

INVESTIGATOR BESSE: I told you how it came up to this.

THE DEFENDANT: I'm telling you I don't understand that. Don't understand that.

INVESTIGATOR BESSE: Did y'all have a disagreement? I mean -- I mean (UNINTELLIGIBLE) you and her. I mean, what's -- what's the problem?

THE DEFENDANT: There wasn't no disagreement. I don't even know her. What would be a disagreement about?

INVESTIGATOR BESSE: You might not know her know her, but, I mean --

THE DEFENDANT: I met her.

INVESTIGATOR BESSE: Yeah. Maybe hung out with her for a while and there was a disagreement over drugs, and that's how she ended up dead.

THE DEFENDANT: No, sir. Definitely don't know about none of that. No drugs or nothing. I met her on Yaeger, and I went back to Beacon Hill.

INVESTIGATOR BESSE: Well, what I think happened is you met her on Yaeger. You got picked up by Sam and another girl. And then y'all went over someone's house. She smoked up all of your rock, didn't pay you for it.

THE DEFENDANT: I don't know about none of that. I don't see how you get to that, sir.

INVESTIGATOR BESSE: I told you how I get to that.

THE DEFENDANT: That's what I'm saying. That's just totally wrong. That's totally wrong. I went to Beacon Hill. I went home. I walked home. I don't know where you get a car with Sam and picked her up in. I don't know -- I don't know where you get that from. I don't know where do you get that from.

INVESTIGATOR BESSE: I just told you where I get it from.

THE DEFENDANT: No, you hadn't -- I don't -- I mean, what I just told you. I don't understand. It just couldn't be. Can't be.

INVESTIGATOR BESSE: Well, it is. I mean, you know --

THE DEFENDANT: Sir, I already told you what all I know, sir.

INVESTIGATOR BESSE: Uh-huh. So when you have the opportunity right now to -- to, you know, explain yourself and give your side of the story as to what's going on, but -- I mean, I've got people putting you there on scene --

THE DEFENDANT: Definitely can't put me --

INVESTIGATOR BESSE: -- a gun in hand arguing with her.

THE DEFENDANT: Who?

INVESTIGATOR BESSE: A gun in hand arguing with her.
THE DEFENDANT: Yeah. Not me.
INVESTIGATOR BESSE: Yeah. They're -- they're saying it's you.
THE DEFENDANT: No. That's what I am saying.
INVESTIGATOR BESSE: Is your nickname Little Keith?
THE DEFENDANT: No. I don't have a nickname.
INVESTIGATOR BESSE: You don't have a nickname?
THE DEFENDANT: Uh-huh. My name is Alvin.
INVESTIGATOR BESSE: Alvin. You don't go by anything?
THE DEFENDANT: (UNINTELLIGIBLE) My name is Alvin.
INVESTIGATOR BESSE: Really.
THE DEFENDANT: People that know my dad call me Keith.
INVESTIGATOR BESSE: Uh-huh.
THE DEFENDANT: Yeah, and that's just people that know my dad, because my dad was Big Keith.
INVESTIGATOR BESSE: Uh-huh.
THE DEFENDANT: And people that know my dad call me Keith.
INVESTIGATOR BESSE: (UNINTELLIGIBLE).
THE DEFENDANT: Yeah. But nobody -- nobody call me that but my dad family.
INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: And people that know my dad.

INVESTIGATOR BESSE: Uh-huh.

THE DEFENDANT: Everybody else, it's Alvin. So what are we going to do about this, sir?

INVESTIGATOR BESSE: Well, I'm giving you the opportunity to explain yourself right now.

THE DEFENDANT: I already told.

INVESTIGATOR BESSE: After we're done talking, then -- I mean, there's -- there's a warrant out for you for a homicide. So after we're done talking, you're going to go to the Leon County Jail. That's where we're -- that's where we --

THE DEFENDANT: I don't see how, though. How can I go to jail for something I didn't do.

INVESTIGATOR BESSE: Well, I told you how we got to this point. And you're going to -- I mean, I can tell you right now while you're sitting over there maintaining that you weren't there and all of this kind of stuff, you ain't helping yourself.

THE DEFENDANT: I'm telling you -- I was not there. And you talking about taking me to jail for something I didn't do, and talking about a homicide?

INVESTIGATOR BESSE: Yeah.

THE DEFENDANT: Man, we need to clear this up with the people -- whatever you -- whatever you talked about

talking about people put -- talking about put -- talking about me put there with a gun in my hand, all that is nonsense, sir.

INVESTIGATOR BESSE: Well (UNINTELLIGIBLE). I know you peddle drugs for -- to support yourself. You don't cut grass.

THE DEFENDANT: Okay. That's what you say. I cut grass, sir.

INVESTIGATOR BESSE: Okay. All right. Well -- why would these people do that to you, then?

THE DEFENDANT: That's what I need to know. That's what I truly need to know, sir. That's what I truly need to know, because I do not like this at all. I'm not even the type of person to be out there all like that. I been chilled out, been chilled out. I don't hang out no more. Be with my baby, watching her, home. I don't have time for none of this crazy stuff. And we need to get this cleared away. We need to get this cleared. Because for real, this is serious.

INVESTIGATOR BESSE: It is serious. It's real serious. You don't get much more serious than a homicide charge.

THE DEFENDANT: Yeah.

INVESTIGATOR BESSE: Right?

THE DEFENDANT: I guess. Right.

INVESTIGATOR BESSE: So --

THE DEFENDANT: So how long will it take for y'all to get this squared away?

INVESTIGATOR BESSE: Well, you telling the truth would have done it.

THE DEFENDANT: Well, I already did it then.

INVESTIGATOR BESSE: No, you didn't.

THE DEFENDANT: Who didn't?

INVESTIGATOR BESSE: You didn't. I mean, you didn't tell the truth.

THE DEFENDANT: How you going to tell me --

INVESTIGATOR BESSE: Because I already told you, this is the biggest thing that's going to get you right here. Do you understand that? This right here. Your cell phone number.

THE DEFENDANT: Okay. That's my --

INVESTIGATOR BESSE: That's your cell phone number, correct?

THE DEFENDANT: Right.

INVESTIGATOR BESSE: That was in the area when it happened.

THE DEFENDANT: Yeah.

INVESTIGATOR BESSE: Okay. That's not anybody lying on you. That's not some girl telling some shit. That right there is -- it is what it is. (UNINTELLIGIBLE) or

anything like that record whatever cell phone number is on what towers.

THE DEFENDANT: Okay.

INVESTIGATOR BESSE: Now, what does that mean? That means that you were there, because you just told me no one else had your cell phone.

THE DEFENDANT: Right.

INVESTIGATOR BESSE: Okay. So that puts you in the area. Let's get rid of that hump. Let's get over that hump.

THE DEFENDANT: I wasn't in the area.

INVESTIGATOR BESSE: Well, see, you can't even get over that hump when some (UNINTELLIGIBLE).

THE DEFENDANT: I already told you, sir. I was not in no area.

INVESTIGATOR BESSE: Would your cell phone freaking walk over there by itself or what? I mean, seriously, you were there then.

THE DEFENDANT: No, I wasn't, sir. It's nobody --

INVESTIGATOR BESSE: You're the only one who had this cell phone, correct? That's what you're telling me?

THE DEFENDANT: I am --

INVESTIGATOR BESSE: Right?

THE DEFENDANT: Right.

INVESTIGATOR BESSE: All right. Okay. Your cell

phone was there, right? Okay. So that means you were there (UNINTELLIGIBLE).

THE DEFENDANT: No, sir.

INVESTIGATOR BESSE: Right?

THE DEFENDANT: No, sir. I'm trying to tell you. That's all I done told you is the truth. That's all I know. I'm done with it.

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: That's all I know, sir. I told you everything I know. That's it, sir. And we need to get this straightened out.

INVESTIGATOR BESSE: I'm trying to get it straightened out, but you're not understanding me.

THE DEFENDANT: That's all -- well, what you get on the paper, that's all I know. I don't know anything else about what are you talking about. That is it.

INVESTIGATOR BESSE: Well -- and then aside from that, the people you were with that night put you there.

THE DEFENDANT: The people I was with can't be there.

INVESTIGATOR BESSE: They do.

THE DEFENDANT: No, sir. I'm telling you. That's all -- that's all I know. I'm done with it, sir. Can't put me there. Nobody can't put me there. Y'all -- I got (UNINTELLIGIBLE) y'all need to run the test or run

anything. Can't put me there. I'm done with this, sir. We need to get this -- need to get this -- I mean, we got to carry on somewhere.

INVESTIGATOR BESSE: Carry on somewhere?

THE DEFENDANT: Yeah.

INVESTIGATOR BESSE: What do you mean by that?

THE DEFENDANT: Like, we got to get past this. We need to get --

INVESTIGATOR BESSE: Well, we're not going to get past that until -- I mean, you got to get past this -- (UNINTELLIGIBLE). I mean, that's the way it is.

THE DEFENDANT: All right, then, sir. I'm trying to tell you. I told you everything I know. That's it, sir.

INVESTIGATOR BESSE: I mean, I -- you're only going to help yourself and you're only going to hurt yourself.

THE DEFENDANT: I already told you, too. So I'm not worried about nothing. You just need to go ahead and get it cleared away. I told you I'm -- that's it done. I'm done with it. I gave you all the information, sir.

INVESTIGATOR BESSE: Well, I think the fact that I've got a couple of people that can put you there and your cell phone --

THE DEFENDANT: Can't put me there.

INVESTIGATOR BESSE: -- and your cell phone is in the area versus you sitting here just -- I mean, your

attitude, you were real -- you're real nice and respectful and everything when I first met tonight. But then when I confront -- when I -- I -- when I confront you with something, I can tell you're getting a little bit angry and perturbed by it.

THE DEFENDANT: No. I --

INVESTIGATOR BESSE: Because you can't get past -- you can get past people lying on you. I just -- I just have someone saying so-and-so saw you there and so-and-so -- you can say they're lying and, you know, it's human nature and whatever. But when you're dealing with an impartial thing such as cell phone towers who don't know who's what and they're just picking up numbers and that puts you there, you can't get past that.

THE DEFENDANT: That's what I'm saying. That can't put me there.

INVESTIGATOR BESSE: It does, though. (UNINTELLIGIBLE).

THE DEFENDANT: I got mad when you told me, you talking about you going to take me to jail for something I didn't do. And, you know, that's why I got mad because that's why I sat there and told you.

INVESTIGATOR BESSE: Uh-huh. Well, I mean, you got a warrant out for you. A warrant, you know, was signed by a judge, and it's in the system. So, you know.

THE DEFENDANT: But you already done talked to me and got -- you can take the warrant off.

INVESTIGATOR BESSE: You know I can't.

THE DEFENDANT: All right, sir. We need to get past this. I'm done. I told you everything I know. I'm done, sir.

INVESTIGATOR BESSE: I mean, we just don't take warrants off.

THE DEFENDANT: We got to figure out how to -- we got to get -- get that off because you got the wrong guy. You got the wrong guy. It's somebody -- whoever had supposed to done this is still out there or something. You got the wrong guy, sir. That's why I gave you all the information. I can't tell you nothing else, sir. Can't tell you nothing else.

What's up, sir?

INVESTIGATOR BESSE: I don't know.

THE DEFENDANT: So What am I going to do? Just sit in here?

INVESTIGATOR BESSE: You tell me what you want to do. Do you want to tell me the truth or do you want to --

THE DEFENDANT: I done told you the truth.

INVESTIGATOR BESSE: The part up to the point where you met her is the truth, and then that's about it.

THE DEFENDANT: Everything is the truth. Everything is the truth.

INVESTIGATOR BESSE: I don't understand why your cell phone is lying on you. Two other people -- three other people is lying on you.

THE DEFENDANT: Everything is the truth, sir. I have told you everything. This is so crazy, man. I need to go home.

INVESTIGATOR BESSE: I already told you you're not going home.

THE DEFENDANT: That is -- I don't see how they can do that.

INVESTIGATOR BESSE: Well, it's called building a case. Like I said, been working this case for three weeks.

THE DEFENDANT: I don't know nothing, sir. I don't know nothing, sir.

INVESTIGATOR BESSE: So you're willing to just run off to jail like that?

THE DEFENDANT: I gave you everything, sir.

INVESTIGATOR BESSE: How did your cell phone --

THE DEFENDANT: That's what I'm telling you. It's impossible. I don't know nothing about what -- see, I already told you, sir. That's it. I'm done, sir. You asking me the same questions I keep telling you. I'm

done with it, sir.

INVESTIGATOR BESSE: What do you mean you're done?

THE DEFENDANT: I'm telling -- I done gave you all the information. It's --

INVESTIGATOR BESSE: You didn't give me any information.

THE DEFENDANT: There's no more I can tell you. That's all I know. What can I do?

INVESTIGATOR BESSE: You can help yourself out by telling me the truth and telling me what happened.

THE DEFENDANT: Well, there you go. There you go, sir.

INVESTIGATOR BESSE: Well, we know it's not the truth. You can't explain how the cell phone puts you there.

THE DEFENDANT: I know it's the truth. I know it's the truth, sir.

INVESTIGATOR BESSE: You're the only one out of this whole investigation, everybody we talk to, would give that kind of a story.

THE DEFENDANT: Everybody -- that's what I'm saying. How does -- and I -- okay. I'm done with this. So what, we have to sit in here?

INVESTIGATOR BESSE: Uh-uh. We don't have to. They can take you to jail right now, if you want.

THE DEFENDANT: I don't -- I can't go to jail. There's no reason for me to be going to jail.

INVESTIGATOR BESSE: Well, you're going to jail. I already told you that's -- I mean, that's no ifs, ands, or buts about it.

THE DEFENDANT: How in the world -- all right, then, sir. Can I talk to my mom?

INVESTIGATOR BESSE: Huh?

THE DEFENDANT: Can we go out and talk to my mom so you can tell her what's going on?

INVESTIGATOR BESSE: I'll talk to her.

THE DEFENDANT: Can I please have a -- smoke a cigarette?

INVESTIGATOR BESSE: Not right now.

THE DEFENDANT: Please. Calm my nerves because this is -- this is bugging me.

INVESTIGATOR BESSE: Can't smoke up here.

THE DEFENDANT: I told you everything, sir. I promise you. I told you everything, sir. I can't tell you nothing else. I mean, what do you want me to do?

INVESTIGATOR BESSE: I want you to tell me the truth and help yourself out.

THE DEFENDANT: I just told you the truth.

INVESTIGATOR BESSE: That's not the truth.

THE DEFENDANT: Okay, sir.

INVESTIGATOR BESSE: Explain to me how your cell phone got there.

THE DEFENDANT: I can't explain to you. I don't know what you're talking about being there.

INVESTIGATOR BESSE: Your cell phone was in the area of where this happened.

THE DEFENDANT: Okay, then, sir. I'm telling you. You keep saying that. All right, then. There's no -- there's no way. I told you.

Lord, this got my nerves bad. I need a cigarette, boy. So what are we going to do, sir?

INVESTIGATOR BESSE: You tell me.

THE DEFENDANT: I mean, what do you mean -- I mean, you got there -- I mean, you need to get the warrant off so I can go home. That's what --

INVESTIGATOR BESSE: Well, that's not going to happen. I already told you that.

THE DEFENDANT: Oh, that's like the only thing left to do.

INVESTIGATOR BESSE: The only thing left to do is for you to tell me the truth or you go to jail. That's two choices.

THE DEFENDANT: I told you the truth. And then -- and then I don't see how y'all going to take me to jail, but --

INVESTIGATOR BESSE: I already told you.

THE DEFENDANT: Well, that's -- I guess I got to go -- man, I'm not going to even worry about it. Lord, you already know, Lord. Lord, let them try to do whatever, Lord. (UNINTELLIGIBLE) get out of this fast as possible until they find this person, Lord.

INVESTIGATOR BESSE: Are you honestly sitting there and just do that when you know you are sitting across from a cop and lying your ass off to him? (UNINTELLIGIBLE).

THE DEFENDANT: All right, sir. I'm telling you, you got the wrong dude, sir.

INVESTIGATOR BESSE: Well, let me tell you something from just sitting here watching you. As soon as I brought her up --

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: -- your whole body language changed immediately. (UNINTELLIGIBLE). It was -- it was just -- it was kind of interesting to watch. I mean, your lips started quivering. Things you can't -- you can't control. But I can tell by sitting across that as soon as I mentioned the name Monica, your -- I mean, your level just went up.

THE DEFENDANT: I'm still here.

INVESTIGATOR BESSE: I know you're still here, but

I'm saying your body language, things you don't realize, things that I watch --

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: -- after doing this job for eight years --

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: -- and sitting across from people like you for eight years, I mean, you learn lots of body language and stuff like that. And when I mention specific things they're involved in, man, it's like a immediate --

THE DEFENDANT: Oh, yeah. That doesn't mean nothing. I have been sitting here chilling, sir. I told y'all the information.

INVESTIGATOR BESSE: You're not helping yourself by lying to me. I'll tell you that.

THE DEFENDANT: I'm not lying. I'm not lying. We need to get all of this cleared away.

INVESTIGATOR BESSE: Well, we can get it cleared away by you telling me the truth.

THE DEFENDANT: (UNINTELLIGIBLE).

INVESTIGATOR BESSE: Tell me what happened with you and Sam and Monica and whoever else was in the car with you when you went over to the house off Pensacola Street. How do you think I got it?

THE DEFENDANT: I don't -- I don't know. That's what I'm saying. I don't know. I don't know where none of this is coming from.

INVESTIGATOR BESSE: How do you think I got that information? Do you not think I talked to the people that I just mentioned?

THE DEFENDANT: What people you just mentioned?

INVESTIGATOR BESSE: Sam.

THE DEFENDANT: I don't know if you talked them. I don't -- I mean, I don't know how would you talk to them.

INVESTIGATOR BESSE: If Sam is your boy, why would he put you there if you weren't there?

THE DEFENDANT: I don't know. He couldn't have put me there. I don't know why -- why would he do that, I don't know. He couldn't have put me there. No, sir. And I don't even know how you say his name bring up or -- and my name, you talking about getting in cars. I don't -- that is all -- all nonsense. Yeah. That is all nonsense.

INVESTIGATOR BESSE: So why would Sam lie on you, then?

THE DEFENDANT: That's what I'm -- I have no clue. I don't --

INVESTIGATOR BESSE: So he's not --

THE DEFENDANT: I don't have no clue, sir. I'm

totally lost.

INVESTIGATOR BESSE: (UNINTELLIGIBLE). Sam, a couple of other people say Alvin was there. Alvin said he wasn't. Let's put this together.

THE DEFENDANT: Yeah. Y'all got to put it together so --

INVESTIGATOR BESSE: Well, you're putting it together. That's why you're sitting here. That's what you don't get. That's what you don't get.

THE DEFENDANT: You right. I (UNINTELLIGIBLE).

INVESTIGATOR BESSE: We already put it together.

THE DEFENDANT: You right. I don't get none of this, sir. You right. I don't get it. I really don't. I do not get it.

INVESTIGATOR BESSE: Because you shot the girl over a 20-dollar rock, and that's why we're sitting here.

THE DEFENDANT: Impossible.

INVESTIGATOR BESSE: Because maybe she wouldn't give you oral sex or wouldn't pay you for it, pay you for the rock, and you had to do what you had to do?

THE DEFENDANT: Definitely not me, sir. Definitely not me, sir. Definitely. I don't know how I'm rolled up into this.

INVESTIGATOR BESSE: I just told you.

THE DEFENDANT: I --

INVESTIGATOR BESSE: We've already gone past that. So quit saying you don't -- quit saying you don't know how, because I already explained to you how you got brought up in it.

THE DEFENDANT: Okay (UNINTELLIGIBLE).

INVESTIGATOR BESSE: All right.

THE DEFENDANT: Sir, I gave you all the information, sir, that I -- there's nothing else I can tell you, and that's it. There's nothing else I can tell you, sir. I promise you. I promise you.

INVESTIGATOR BESSE: So you're willing to go to jail.

THE DEFENDANT: What do you mean, willing to go to jail?

INVESTIGATOR BESSE: (UNINTELLIGIBLE).

THE DEFENDANT: (UNINTELLIGIBLE) go to jail.

INVESTIGATOR BESSE: You're willing to go to jail, let this thing run its course.

THE DEFENDANT: I mean, what else can I do, sir?

INVESTIGATOR BESSE: Why don't you explain to me why --

THE DEFENDANT: I don't know nothing, sir.

INVESTIGATOR BESSE: You're killing me.

THE DEFENDANT: Yeah. This is killing me. This is killing me. I'm all in here for something I did not do

and you talking about you taking me to jail. This is killing me, sir. That's something -- and it's -- it's -- it's -- what time it is? It's getting kind of late. I don't want my mom to stay out there waiting.

INVESTIGATOR BESSE: It's 12:40 -- 1:45.

THE DEFENDANT: Can you please just tell her what's going on and tell her that for some reason y'all cannot let me go, so she can just go ahead and go home and let me kiss her and my cousin? I really appreciate it, sir. And I need to smoke a cigarette.

INVESTIGATOR BESSE: I'm telling you you're making a mistake by lying to me.

THE DEFENDANT: I'm not lying to you, sir.

INVESTIGATOR BESSE: Yeah, you are.

THE DEFENDANT: I'm not lying to you, sir.

INVESTIGATOR BESSE: That's why we have your cell phone over there, then.

THE DEFENDANT: It's impossible.

INVESTIGATOR BESSE: It's not impossible. It is.

THE DEFENDANT: Tell me -- do that (UNINTELLIGIBLE) is that -- my mom (UNINTELLIGIBLE) and you just say there's nothing I can do, there's nothing to do --

INVESTIGATOR BESSE: I said you can explain yourself is what you can do.

THE DEFENDANT: I done explained --

INVESTIGATOR BESSE: You're not explaining yourself, man. You're not.

THE DEFENDANT: (UNINTELLIGIBLE) sir. I already gave you the information, sir.

INVESTIGATOR BESSE: There's no information to give. You didn't give me nothing.

THE DEFENDANT: I gave the information I know, sir. I told you everything. I have nothing else to say. I come with you?

INVESTIGATOR BESSE: No.

THE DEFENDANT: You about to talk to my parents?

INVESTIGATOR BESSE: Yes.

THE DEFENDANT: I can give her a kiss, please, sir?

(Investigator left courtroom.)

THE DEFENDANT: What is going on, man?

THE COURT: Can you fast forward this through him just sitting there, Mr. Bauer?

MR. BAUER: You want me to skip that?

THE COURT: Maybe we can just fast forward. He's just sitting there. We don't need to watch him sit there.

MR. BAUER: Yes, sir.

(Video fast forwarded.)

MR. BAUER: Let me back that up, Judge.

THE COURT: Just play it, Mr. Bauer.

MR. BAUER: Just play it?

MR. COLLINS: Yeah. It's fine.

(Video resumed playing.)

INVESTIGATOR BESSE: I'm not saying your side of what happened that night.

THE DEFENDANT: I told you what I know, sir.

INVESTIGATOR BESSE: And that's all -- all you're saying is, you met her at Yaeger and you went home and that was it?

THE DEFENDANT: That's all I know, sir.

INVESTIGATOR BESSE: We know that's not the truth. I told you the cell phone -- I mean, that puts you there.

THE DEFENDANT: It's impossible, sir.

INVESTIGATOR BESSE: Yeah.

THE DEFENDANT: Yes, really.

INVESTIGATOR BESSE: No. It's really not.

THE DEFENDANT: Okay. All right, sir. I told you.

INVESTIGATOR BESSE: I hope you know what kind of mistake you're making.

THE DEFENDANT: I already told you the truth, sir. I already told you the truth.

Hey, sir?

INVESTIGATOR BESSE: Yes.

THE DEFENDANT: Like, how would I be able to see her?

INVESTIGATOR BESSE: Who?
THE DEFENDANT: My mama. You bringing her back in?
INVESTIGATOR BESSE: I don't know if I'm going to or not. Okay.
THE DEFENDANT: Please, sir.
MR. BAUER: Should I fast-forward, Judge?
THE COURT: If all he's going to be doing is sitting there, yes, please.
MR. COLLINS: We've agreed, Your Honor, that it can be terminated here.
THE COURT: All right.
(Video stopped.)
THE COURT: Further inquiry of this witness, Mr. Bauer?
MR. BAUER: Yes.
BY MR. BAUER:
Q We've stopped the video there. Was there any other time Mr. Herron gave you any different story other than he met this Monica and then went home?
A No. That's the only story he ever provided.
Q And in preparation for your interview with Mr. Herron, did you have access to the file, case file?
A I had been -- yes, I did.
Q And were you aware of witness statements?
A Witness statements, yes.

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 2010-CF-1746

STATE OF FLORIDA

vs.

ALVIN K. HERRON,

Defendant.
_____/

PROCEEDINGS:	EVIDENTIARY HEARING
BEFORE:	THE HONORABLE JAMES C. HANKINSON
DATE:	October 18, 2017
TIME:	Commencing at 1:00 p.m. Concluding at 3:33 p.m.
LOCATION:	Leon County Courthouse Tallahassee, Florida
REPORTED BY:	JULIE L. DOHERTY, RMR Notary Public in and for the State of Florida at Large

JULIE L. DOHERTY, RMR
Official Court Reporter
Leon County Courthouse, Room 341
Tallahassee, FL 32301

APPEARANCES

REPRESENTING THE STATE:

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LEON COUNTY COURTHOUSE
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REPRESENTING THE DEFENDANT:

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and

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PROCEEDINGS

THE COURT: Be seated, please, folks.

We're here in State of Florida v. Herron, 2010-1746. The matter is set for evidentiary hearing this afternoon. Let the record reflect Mr. Herron is present with his attorneys. Is the defense ready to proceed?

MR. UFFERMAN: Yes, Your Honor.

THE COURT: Is the State ready to proceed?

MR. EVANS: The State is ready to proceed, Your Honor.

MR. UFFERMAN: Your Honor, I do have a couple of procedural matters that I'd like to address.

THE COURT: Okay.

MR. UFFERMAN: Thank you. May it please the Court. Michael Ufferman on behalf of Mr. Herron; and, obviously, seated with me at counsel table is Don Pumphrey.

First, I'd ask the Court to take judicial notice of the record, including all the trial transcripts. Obviously, you were the Judge that presided over the trial, but I don't think the State objects to the request to take judicial notice of the record.

MR. EVANS: No, Your Honor.

THE COURT: So you want the record to be the entire trial record, including transcripts?

MR. UFFERMAN: Yes, please, Your Honor.

THE COURT: That appears to be appropriate and I will so order.

MR. UFFERMAN: Your Honor, we would invoke the rule also this afternoon. I believe there's going to be three witnesses, all three -- one witness is our client. The other two witnesses are currently out of the courtroom.

We've already instructed our witness not to have any conversations and we instructed her regarding the rule. And I know Mr. Collins is the other witness. I believe he's familiar with the rule and we've let him know that we've invoked the rule.

THE COURT: All right. So we'll invoke the rule of sequestration.

MR. UFFERMAN: The third, Your Honor, is a procedural matter and it's a bit unique. And I apologize up front to the Court for the position that we're in. At this stage, all I can do is tell you where we are and ask you what we'd like to do.

We have two claims that are in our post-conviction motion. The first claim concerns the failing to call a favorable witness who would have established that Mr. Cosby had dreadlocks at the time of the shooting in this case, which was May of 2010. As you recall, Mr. Bauer was the prosecutor in this case, Mr. Collins was the defense attorney.

An issue in this case was the identification of the shooter of the victim. And the defense was asserting that Mr. Cosby was the shooter. Mr. Cosby was going to be a witness for the State at trial. And he was asserting, at least pretrial, that Mr. Herron was the shooter. But during the trial, you had a proffer of Mr. Cosby's testimony and it was determined that Mr. Cosby actually was incompetent. So he wasn't permitted to testify during the trial.

But, again, a big issue in the case. And the issue on appeal concerned the evidence that was introduced to establish who the alleged shooter was. And one of those big issues concerned the hairstyles of Mr. Herron and Mr. Cosby.

In our motion, we listed Aaron Edwards as that witness. And at the time that we drafted the motion, that was my good faith understanding that Mr. Edwards would have, in fact, come to this evidentiary hearing and testified that he was familiar with Mr. Cosby's hairstyle in May of 2010. And his testimony would have been that Mr. Cosby had a hairstyle that included dreadlocks.

We have made every attempt to subpoena Mr. Edwards for today's hearing. Monica Jordan, who I know the Court is familiar with, is our -- the investigator that we've used. And Ms. Jordan has informed both me and

Mr. Pumphrey that Mr. Edwards is refusing service.

Ms. Jordan did have a conversation with Mr. Edwards' wife and she indicated that Mr. Edwards would not give the testimony that we have alleged in our motion. He does not want to be involved in this case, he will not show up in court, and he is refusing the subpoena. I believe Mr. Pumphrey's office also has an investigator that attempted to serve Mr. Edwards and he refused.

Now, we, of course, are aware that we could come to you and ask for you to issue some type of order to compel him to be here. But, in good faith, Mr. Pumphrey and I decided that wouldn't be very fruitful if we know Mr. Edwards is not going to give the testimony that we're alleging in this motion.

We'd hate for him to spend time in custody or in jail awaiting a hearing, only to give testimony that's not going to help this motion. So we didn't want to put him through that or put the Court through that. So we have not invoked that process and we understand that that was available to us.

What I'm asking the Court that we be able to do, and I have a case that I'll be relying upon, we're obviously well beyond the two-year time frame for Rule 3.850 to add a new claim, but I believe the case law says that we can amend an existing claim. And we would ask at this point

to be able to amend the motion to change the name of the witness.

Obviously, the title of this claim was presenting a favorable witness. We have another witness that we'd like to put on, her name is Taneci Blakely. That's T-A-N-E-C-I, Blakely, B-L-A-K-E-L-Y. And we believe that she'll give the testimony that Mr. Edwards would have given.

Again, I acknowledge that we're well beyond the two-year time frame, but I would ask that we be able to amend the claim. We're not changing the substance of the claim. We're simply changing the name of the witness.

May I approach, Your Honor? I've already given a copy of the case I'll be relying upon to the State.

THE COURT: You may.

MR. UFFERMAN: The name of the case is Graham v. State. The cite is 846 So.2d 617. It's just a two-paragraph opinion. And the second paragraph, I believe, says that the two-year time limitations did not preclude the enlargement of issues raised in a timely-filed initial motion for post-conviction relief, as long as the amendment is done prior to the court ruling on it.

I guess another option, Your Honor, is you don't necessarily have to rule on this now. We have her

available. So we would ask, at the very least, we be able to proffer her testimony, we think it will be short, and then you can take it under advisement as to whether or not you will allow us to amend the motion to include her name. But at the very least, the record then will contain what her testimony would have been.

Thank you, Your Honor.

THE COURT: Mr. Evans.

MR. EVANS: Your Honor, the State would object to the amendment. We're here at the hearing and now all of a sudden we're changing witnesses. So -- and what her allegations are, we don't know. There is no sworn affidavit or anything else that's been set forth that would set forth what she's going to testify to.

But, you know, the main thing is we're just getting this witness today; whereas, Mr. Edwards was the person who was alleged in the motion. And I, quite frankly, have not had a chance to talk to Mr. Collins to see if he would have any idea who this witness is, seen this witness, or have the chance to check to see if he has anything that would indicate whether he ever knew the existence of this witness.

THE COURT: Well, I think the issue would be is this an amended claim or a new claim. What would your position be on that?

MR. EVANS: Well, the initial claim is they should have called Mr. Edwards. And this is now -- it's no longer that claim. This is now a claim, well, you should have called yet another witness. And that's not alleged in here.

They didn't say that he should have investigated and found other witnesses. They said he should have specifically found Mr. Edwards, and Mr. Edwards would have testified to this. But apparently he's now changed his story and is not going to testify to what they thought he was going to. And now they're saying, well, they should have found yet another witness, this witness to testify to that.

So I think that is somewhat materially different whenever you're talking about you should have found this witness to testify this fact, and now you -- and now it's switching to, well, not that witness, you should have found another witness to testify to that fact.

THE COURT: Mr. Ufferman?

MR. UFFERMAN: Your Honor, I don't have anything further. I, again, would just ask that you allow us to proffer Ms. Blakely's testimony.

THE COURT: I'm going to deny the request to, what I view as, add a new claim. Although it's the same type of claim, a failure to call a witness, a failure to

investigate a witness, when you change the witness, it is an entirely new claim. Therefore, the new claim is time barred and I'm going to deny the request to amend.

I don't see any purpose by proffering the testimony. Either I'm legally right and it's barred or I'm legally wrong and you'll get an opportunity another day to present the testimony.

I'm not going to make an alternative ruling today that says, well, if she were allowed to testify, and I was to consider the claim, this is what I would have ruled. I don't see any reason to do those mental gymnastics. So I don't see where a proffer changes anything.

If I'm missing something, Mr. Ufferman, tell me.

MR. UFFERMAN: Your Honor, as an appellate attorney, I've just always been taught, and then teach when I also teach other lawyers that, do everything you can to get the witness's testimony into the record. I understand the Court's ruling.

I think as an alternative to what you said, it won't take up any more time today, what I'll do is get an affidavit from Ms. Blakely and just submit that into the record for whatever purpose that might serve for the Appellate Court down the road, if necessary.

THE COURT: Right. I understand the theory when I

have excluded testimony at trial, you obviously want to proffer, but that's not the situation we're in here today. So I decline the request to take a proffer from Ms. Blakely.

MR. UFFERMAN: Thank you, Your Honor. With that --

THE COURT: Other than that, are you ready to proceed?

MR. UFFERMAN: Yes, Your Honor. And I know you know this, but when I have post-conviction evidentiary hearings, Mr. Pumphrey has agreed to assist me. And so normally I allow him to be the one to question the witnesses and I'll be the one to make the legal argument.

We'll have two witnesses we believe today; one for the defense and one for the State. The defense witness will be our client. And Mr. Collins will be the State witness.

So with that, we're ready to proceed, Your Honor.

THE COURT: All right. So are you going to be proceeding on -- simply on Ground 2? Is that where we're going to end up?

MR. UFFERMAN: Yes, Your Honor.

THE COURT: All right. The State's ready to proceed, with that understanding?

MR. EVANS: Yes, Your Honor.

THE COURT: You can call your first witness,

Mr. Pumphrey.

MR. PUMPHREY: Judge, I would call the defendant, Alvin Herron. Judge, may I release Ms. Blakely? She's sitting outside since we invoked the rule.

THE COURT: Certainly.

MR. EVANS: While he takes the stand, I need to give Mr. Collins something to read over.

THE COURT: If you'd face the clerk and be sworn, please.

Whereupon,

ALVIN KEITH HERRON

was called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Slide on up to the microphone there, please, sir.

MR. PUMPHREY: Please the Court?

THE COURT: Give me one second to log on here.

(Pause.)

(Off-the-record discussion.)

MR. PUMPHREY: May I take just a moment, Your Honor?

THE COURT: Yeah. I was just getting to the transcript of these proceedings.

MR. PUMPHREY: Yes, sir.

(Off-the-record discussion.)

MR. EVANS: Your Honor, I think what we're going to

be talking about is right around Page 369 of the transcript.

THE COURT: Say what?

MR. EVANS: I think we're going to be discussing what occurred right around Page 369 on the transcript.

THE COURT: You can proceed, Mr. Pumphrey.

MR. PUMPHREY: Thank you, Your Honor.

May I have just a moment?

THE COURT: Sure, certainly.

(Attorneys confer.)

DIRECT EXAMINATION

BY MR. PUMPHREY:

Q Please state your full name for the record.

A Alvin Keith Herron.

MR. PUMPHREY: And my apologies, may it please the Court?

THE COURT: You may.

BY MR. PUMPHREY:

Q Mr. Herron, the -- you went to trial back in 2012, I believe?

A Yes, sir.

Q Do you remember that?

A Yes, sir.

Q Okay. If you could, I know it's uncomfortable up there, if you could lean forward just a little bit so you can

hear when we talk into the mike. I know the court reporter does a great job, but is that better?

A (Nods affirmatively.)

Q All right. In 2012, who represented you?

A David Collins, sir.

Q All right. And do you know Mr. Collins?

A Yes, sir.

Q Okay. And did he come on board the case prior to the trial?

A Repeat the question again.

Q Did he -- did somebody hire him -- did he start his representation of you --

A Oh, yes, sir.

Q -- prior to the trial?

A Yes, sir.

Q How long before the trial, if you recall?

A Maybe a year.

Q Okay. And as you went up to the beginning of the trial, did you have certain meetings with Mr. Collins?

A No, sir.

Q And prior to the trial, did Mr. Collins ever go over or show you a videotape?

A No, sir.

Q Now, you went -- prior to the trial and prior to being arrested, you went and spoke to the police?

A Yes, sir.
Q And did you take notes?
A No, sir.
Q Did realize you were being videotaped?
A No, sir.
Q Do you know when the videotape started and when it stopped?
A No, sir.
Q The videotape that was introduced in the trial -- do you remember that you, the State Attorney, Mr. Collins, and the Judge went over to the sidebar during the trial? Do you remember that?
A Yes, sir.
Q And during that, your attorney was objecting to the tape not being played; do you recall that?
A No, sir.
Q Okay. Do you recall that your attorney was wanting the tape to be played in full in front of the jury?
A Yes, sir.
Q Okay. Now, the tape that we're talking about here, had your attorney gone over what the contents of the tape were?
A No, sir.
Q And had you seen that tape that I'm talking about right now prior to that moment when you, the Judge, and

everyone went to sidebar?

A No, sir.

Q So when your attorney was requesting that the full tape be played, were you doing that -- were you blindly trusting your lawyer's advice?

A Yes, sir, I was trusting my lawyer.

Q Okay. During that time, I noticed in going back in the transcript, do you recall the Judge actually asked you, the same Judge that's here today, if you were okay with the tape being played?

A Yes, sir.

Q Okay. Were you just following blindly the advice of your attorney?

A Yes, sir.

Q Now, in preparation, did your attorney -- or do you recall the prosecutor having concerns with what was on the tape that would be played or played in its entirety?

A Say that again, sir.

Q Do you recall, when you were at the sidebar talking about the tape, the prosecutor himself talking about he had concerns about what was contained on the tape and whether that should be played for the jury?

A Yes, sir.

Q And do you recall your attorney, even over the State having concerns, still insisting that --

A He still wanted it played.
Q -- the entire tape be played?
A Yes, sir.
Q Had your attorney talked to you about whether or not you could be impeached if you took the stand?
A No, sir.
Q And did he talk to you about your prior convictions?
A No, sir.
Q Did you have any prior convictions?
A No, sir.
Q Did you have any convictions of any crimes of dishonesty?
A No, sir.
Q Now, did you know that back then or do you know that today?
A I know that today.
Q Okay. Back then, did you know that about impeachment?
A No, sir.
Q Did your attorney discuss with you the issues about what the jury can actually hear and what their job is as far as determining the facts of the case?
A No, sir.
Q And when I say "your attorney," each time I say that, I'm talking about Mr. David Collins.

A Yes, sir.
Q Did Mr. Collins, prior to the decision for the tape to be played, discuss with you that there may be certain things on the tape that would actually invade the province of the jury?
A No, sir.
Q Now, back then, did you know what invading the province of the jury even meant?
A No, sir.
Q As you sit here today, do you understand what that means?
A Yes, sir.
Q And so had you known back then or been advised that invading the province of the jury is somebody making a credibility determination as to you, the subject of the case, would you ever have allowed that tape to be played or let your attorney insist on it being played?
A No, sir, I wouldn't have allowed it to be played.
Q You remember that when the tape was played, that the officer who was interrogating you kept saying that you were lying?
A Yes, sir, he was.
Q And he kept saying that he had reasons to believe why he knew you were lying?
A Yes, sir.

Q And so back then, had you been advised that none of that would have been admissible, had your attorney objected to it?

A I didn't know that, sir.

Q Do you know that today?

A I know that today.

Q Did you know, prior to your attorney insisting on that, how many times the officer had accused you of being a liar?

A Say that again?

Q Sure. At trial, did you know, prior to that tape being played, how many times the jury would hear the officer saying, you're lying to me?

A No, sir.

Q And did you -- did your attorney talk to you about the fact that -- that had he objected -- in the tape, the officer accuses you of being a drug dealer and having a firearm charge?

A Say that again?

Q Sure. Prior to the tape being played, did you have any information whatsoever that the jury was going to hear the officer talk about you personally in the interrogation, of being a drug dealer and having guns and things of that nature?

A No, sir.

Q Or gun charges?

A No, sir.
Q Now, had you known what you know today back then when the Judge asked you that question, back then when your attorney was insisting on the whole tape being played, knowing what you know now, would you have had any objection or voiced any concern about the tape being played?
A Yes, sir.
Q What would that objection be?
A I wouldn't have let it been played.
Q Did your attorney discuss any strategy or any reason why he would let those things get before a jury?
A No, sir.
Q So, now, let's assume for a minute that the objection had been made to the tape and the tape never came into evidence or the portions that should not have been played to the tape, or you would have objected to, did not come in. Let's assume that for a minute. Would you have testified in your own defense?
MR. EVANS: Your Honor, I'm going to object to speculation.
A Yes, sir.
THE COURT: Sustained.
BY MR. PUMPHREY:
Q There came a time in the trial when you were asked whether or not you were going to testify.

A Yes, sir.
Q Okay.
MR. EVANS: Your Honor, I'm going to object. I don't think this is relevant to the claim. The claim is ineffective assistance of counsel for failing to object to the introduction of --
THE COURT: I'll overrule the objection.
You can proceed, Mr. Pumphrey.
MR. PUMPHREY: Yes, sir.
BY MR. PUMPHREY:
Q And had Mr. Collins discussed with you whether or not -- or about your rights about whether or not you take the stand?
A No, sir.
Q All right. You do recall the Judge asking you about whether or not you would choose to take the stand and the rights you were giving up?
A Yes, sir.
Q All right. At the time the Judge questioned you about the rights you would be giving up, had you been counseled on whether or not you could be impeached in any way?
A No, sir.
Q Was there any strategy, to your knowledge, with your attorney for you not to take the stand?
A No, sir.

Q Were you afraid to take the stand?
A No, sir.
Q You heard -- or you heard what was played before the jury on the tape?
A Yes, sir.
MR. PUMPHREY: May I have a moment, Your Honor?
THE COURT: You may.
(Attorneys confer.)
MR. PUMPHREY: Your Honor, if it please the Court?
THE COURT: You may.
BY MR. PUMPHREY:
Q Mr. Herron, no further questions.
MR. PUMPHREY: I tender the witness to the State for cross-examination.
THE COURT: Mr. Evans.

CROSS EXAMINATION

BY MR. EVANS:
Q Sir, you've been convicted of this charge of first degree murder; is that correct?
A Yes, sir.
Q All right. And your testimony was you've never been convicted of any other crime; is that right?
A Yes, sir.
Q Now, during this time period -- you said Mr. Collins was on the case about a year before the trial took place; is

that right?
A Yes, sir.
Q Did you and he talk or you and he and any of his investigators talk?
A At that point in time, yes, sir.
Q And what did you talk about?
A Basically telling me, you know, he got -- he going to do my trial. And really didn't discuss too much of nothing.
Q He said he was going to do your trial. Did y'all talk anything about that?
A No, sir.
Q Did he ever ask you what your version of the events were?
A No, sir.
Q Did he ever indicate what witnesses he was going to call?
A Yes, sir.
Q And who was he going to call?
A They already -- just the State witnesses. We didn't -- he didn't say he had any witnesses or he failed to do that, any witness on my behalf.
Q Did you ask him to call any witnesses on your behalf?
A Yes, sir.

Q And who did you ask him to call?
A I can't remember.
Q Okay. Now, the video. When was it decided that you weren't going to testify at trial?
A In trial.
Q In trial. And were you going to testify consistent with what the video said?
A You could break that down to -- so I can understand it?
Q All right. You made statements to the police; is that right?
A You may say what?
Q You made the statement to the police that was video recorded; right?
A Okay, right.
Q Now, were you -- and you have indicated that you wanted -- that you would have testified, if that video wouldn't have came in; right?
A Right.
Q Now, would your testimony have been the same as what was on that video?
MR. UFFERMAN: Your Honor, I guess I object. I thought the Court sustained a speculation objection to the question of whether he would have testified if the video hadn't come in.

THE COURT: Well, that's a different question as to whether his testimony would have been consistent with the taped statement. I don't think that calls for speculation. I'll overrule the objection.

BY MR. EVANS:

Q Do you understand my question?

A Ask the question again.

Q All right. You saw the video?

A Right.

Q Would your testimony -- if you would have taken the stand to testify, would your testimony have been the same as what was on the video?

A No, sir.

Q So it would have been different from what was on the video?

A Yes, sir.

Q And how would it have been different?

A I would have told the truth. Only thing I just in the -- in the video, I was -- only part I was lying about being -- not being on the scene. You know, my testimony I would have gave in trial, you know, I would have told the truth.

Q And the truth would have been that you were, in fact, at the scene?

A Yes, sir.

Q And that would have been totally inconsistent with what you told the police; is that right?
A Right.
Q And the -- but the video puts you away from the scene; didn't it?
A No, sir.
Q Your testimony on the video wasn't that you weren't there?
A I can't really remember, but, yeah, probably so.
Q Did you ever ask Mr. Collins to play the video for you?
A No, sir.
Q Did you ever tell him during the trial, whenever the video was being played, that you wanted it to stop?
A I didn't know -- I didn't have no knowledge. He told me it was a good idea to have it played. I was going along with what he saying, being to the fact I was ignorant of the facts. I just agreed with my lawyer.
Q But this is a lawyer you said hadn't talked to -- really talked to you about the case or what defense he was going to put on. And --
A We discussed that right -- that just popped up right in trial.
Q So you were still trusting him, even though --
A Yes, sir.

Q -- he had been on the case for a year, really hadn't discussed the case with you, or what the defense was going to be?

A Yes, sir, I was trusting him.

Q Now, when the Judge asked you about whether or not you had any objection to playing the tape, the tape being played, you indicated that you didn't have an objection; is that right?

A Yes, sir.

Q If you hadn't talked to your lawyer about that, and what was on the tape, and some stuff that was going to -- that may not have otherwise been admissible, all that conversation occurred in front of you; didn't it?

A Yes, sir.

Q But you said you never talked to your lawyer about that?

A Right at trial. I haven't talked to my lawyer before trial about it.

Q All right. During trial it was discussed; is that right?

A Right that split second, yes, sir.

Q Okay. Now, the prosecutor in the case, Mr. Bauer, was going to actually just put the officer on the stand to testify as to what you had told the officer; is that right?

A Yes, sir.

Q And Mr. Collins had wanted to put your video on because it was your own words being spoken, as opposed to the officer telling the jury what you said; is that right?

A Yes, sir.

Q And everybody knew in advance there was some stuff on that video that might otherwise not be admissible; is that right?

A I didn't know.

Q So you didn't -- you wasn't in court whenever it was discussed?

A Yes, sir, I was in court.

Q So you knew about it then?

A Knew about what?

Q Before the tape was played, you knew there was some stuff on the tape that might not otherwise be admissible; is that right?

A But I didn't know -- I didn't know that.

Q But you were there when that was discussed before the tape was played?

A Yes, sir.

Q And after that was discussed, Mr. Collins asked you on the record, and had the Court inquire, about whether or not you wanted -- still wanted the tape played in spite of that; didn't he?

A Yes, sir. I was going with him. He told me to

trust him, let him run the trial. And I agreed with him, what he was going to do.

Q All right. So the choice sort of was, at that point, was to have either the officer testify to what you said or you to testify in your own words; is that right?

A Yes, sir.

Q Now, did you -- after the tape -- and Mr. Collins, in fact, asked for an instruction to go along with the tape being played; is that right?

A Say that again, sir.

Q Mr. Collins, in fact, asked for a tape -- I mean, an instruction from the Court that the jury was to disregard any -- any of those statements that may have implicated you in any other thing?

A I don't remember that, sir.

Q Okay. Did you feel it was important that the jury -- I mean, that the jury hear what you had told the police?

A Did I feel was it important?

Q Yeah.

A I didn't know at the time.

Q Well, it was your defense; wasn't it?

A According to Mr. Collins.

Q All right. Well, the defense was that you weren't there and that somebody else did the shooting; is that right?

A That's what he was going on, yes, sir.
Q And he, in fact, called a witness who testified that it wasn't you who did the shooting; is that right?
A Yes, sir.
Q All right. That was Mr. Chambers?
A Yes, sir.
MR. EVANS: No further questions, Your Honor.
THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. PUMPHREY:
Q Mr. Herron, the State Attorney asked you whether your testimony, had you taken the stand, would have been inconsistent -- would have been inconsistent with what was heard on the tape?
A Yes, sir.
Q But your testimony would not have included the officer making credibility determinations about your truthfulness or not?
A Yes, sir.
Q But you would have gotten on the stand and you would have had to have admitted that what you were telling the officers at that time was not true; wouldn't you?
A Yes, sir.
Q Why is that?
A I'm under oath, sir.

Q And being under oath, would you have been able to explain why it was inconsistent?

A Yes, sir.

Q Why would it have been inconsistent?

A From the interrogation tape --

THE COURT: I'm having a little hard time hearing you, Mr. Herron.

MR. PUMPHREY: I am, too, Judge.

THE COURT: Could you move the mike a little closer to him, please, Deputy?

MR. PUMPHREY: Judge, may I approach?

THE COURT: We'll get the deputy.

BY MR. PUMPHREY:

Q Mr. Herron, picking back up where I left off, what would have been your testimony or your explanation on an inconsistency of what was played on the tape?

A By me saying I wasn't there?

Q Yes, sir.

A I mean, nobody -- I wasn't -- I didn't want to just go around like just putting myself on a crime scene or anything like that. I was trying to stay away from all type of stuff like that.

Q When the officer was interrogating you on the tape, were you -- had you testified, would you have been able to explain what you were being inconsistent about and why?

A Say that again.
Q Sure. Had you taken the stand at trial, would you have been able to explain to the jury why you were being inconsistent with what your testimony would have been at trial?
A Yes, sir.
Q And let's back up just a minute. Did Mr. Collins ever ask you the specifics -- ask you personally specifically what happened that night?
A No, sir.
Q Did he ask you whether you had any concerns about selling drugs or why you would be concerned with being implicated with the police or being in a location?
A No, sir.
Q And earlier the State asked you whether or not your testimony would have been inconsistent with what the officer was asking you on the tape that was admissible, about saying you're not present?
A Right.
Q That's one of the things that would have been inconsistent?
A Right.
Q And why would it have been -- why were you not being truthful to the officer in the interrogation?
A Because I didn't want to place myself nowhere around

the crime scene.

Q Is that because you were the one that was the shooter?

A No, sir, I was not the shooter.

Q Were you worried that it was going to be found out that you were selling drugs?

A Yes, sir.

Q And I'm talking about when the police are interrogating you.

A Yes, sir.

Q And so the inconsistent testimony you gave, you would be able to be truthful with the jury and explain why you were basically lying to the police officers?

A Yes, sir.

Q Did any of the lying have anything to do with you committing the crime of murder?

A No, sir.

Q Did it have anything to do with you shooting anyone?

A I didn't shoot anyone, sir.

Q Now, prior to you making the decision about the tape, did Mr. Collins -- did he actually know whether you were at the scene?

A No, sir.

Q So he never questioned you about whether or not what the officer was interrogating you about was the truth or a

lie?

A No, sir.

MR. PUMPHREY: May I have just a moment, Your Honor?

THE COURT: You may.

(Attorneys confer.)

BY MR. PUMPHREY:

Q Now the State asked you about whether or not you had any prior convictions or got into your priors, just a moment ago.

A (Nods affirmatively.)

Q Do you remember that?

A Yes, sir.

Q And just to be clear, you did have two prior convictions; is that right?

A I had two charges, yes, sir.

Q Okay. But in those charges, did Mr. Collins ever discuss with you whether or not those were impeachable offenses?

A No, sir.

Q Okay. Did he discuss with you any strategy for getting your testimony out through the tape versus you not taking the stand?

A No, sir.

Q Would there be any reason or did you discuss any reason with Mr. Collins on why you wouldn't take the stand?

A No, sir.
Q Did Mr. Collins just tell you that we want the tape introduced in full?
A Yes, sir.
Q You had a possession of a firearm charge?
A Yes, sir.
Q Okay. And you had a misdemeanor drug charge?
A Yes, sir.
Q And on the initial firearm charge, did you receive a withhold of adjudication?
A Yes, sir.
Q Did Mr. Collins explain that to you?
A No, sir.
Q Was there any concern indicated to you by Mr. Collins about any of your prior record whatsoever?
A No, sir.
Q Was it ever discussed about you giving testimony that would explain why you lied to the police in the tape?
A No, sir.
Q Did Mr. Collins ever indicate to you that the drug charge that the officer talked about in the tape was eventually dropped or disposed of?
A No, sir.
Q Did he explain to you that the jury would never even hear about drug charges, had you taken the stand?

A No, sir.

MR. PUMPHREY: A moment, Your Honor.

Tender the witness.

THE COURT: You can step down.

Call your next witness.

MR. UFFERMAN: Your Honor, the defense rests.

THE COURT: State.

MR. EVANS: State would call Mr. Collins.

THE COURT: If you'd face the clerk and be sworn please, sir.

Whereupon,

DAVID COLLINS

was called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: You may be seated. Slide up to the microphone, please, sir.

Before we start, Mr. Collins, let me make a preliminary comment. Things we're going to be talking about here today normally would be considered as privileged under the attorney-client privilege. However, Mr. Herron has asserted ineffective assistance of counsel against you. Therefore, he has waived any privilege. I would ask that you answer any relevant questions, please, sir.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. EVANS:

Q How long have you been an attorney?

A (Pause.) Sorry, I left the State Attorney's Office as a prosecutor in '86 and I was an attorney before that. I began there in '84. I've been a defense attorney since '86, 30-something years.

Q And what type of cases have you -- you said defense attorney. Have you primarily handled criminal defense cases?

A Since I left the State Attorney's Office, with the exception of a year or two in Broward County, I've handled exclusively criminal trial, appeal, and post-conviction cases.

Q And are you qualified under the Supreme Court standards to represent defendants in capital cases?

A Yes, sir.

Q And how long have you been so qualified?

A I think since about 1991.

Q And approximately how many murder cases have you tried during that time period, or even before then, since '86?

A 1991 was my first murder case. I'm going to estimate. I know there has been more than 20 and probably less than 50. Somewhere in that area.

Q And besides those trials, how many cases have you -- murder cases have you dealt with?

A You mean -- in what manner?

Q In pleas or representing even in post-conviction or in appeals?

A Generally, if I'm handling a murder trial or murder charge, very few have ever resulted in a plea. So that's a minuscule number. They either go to trial and then they end up in a plea or they go to trial. About the same number.

Q Okay. Now, and that experience that you've just described, most of that would have occurred before the trial in this case, January 25th of 2012?

A The majority, yes, sir. There's been a lot since then.

Q So you are familiar during the trial phase and also the post-conviction phase?

A. In general, yes, sir.

Q Now in this particular case, do you recall it?

A I recall portions of it. I certainly recall Mr. Herron, his mother. I recall certain parts of it. But I will tell you, as I told Mr. Ufferman before trial -- am I pronouncing -- Ufferman?

MR. UFFERMAN: Ufferman.

THE WITNESS: That my files were subject of the weather of the storm that came through. And we have -- we built a building to put our files in so we're in compliance with the Bar requirements. Water got all of them and then some type of bugs got into them.

So Mr. Herron's file I did not have the opportunity to review, as I would normal cases. So some areas, my honest answer is going to be, unless you can refresh my recollection, I can't remember. That's a fact.

BY MR. EVANS:

Q Okay. Now, do you recall if you would -- how long you would have represented the defendant before the trial actually took place?

A No, I can't tell you a specific amount of time. I would look to the court file to see when the notice of appearance was filed, and generally it might have been a week before that. And then whenever the trial. So I would ask that that period of time come from the court file.

Q Okay. Now, do you have a general policy about providing discovery to the defendant if they're incarcerated?

A Generally, I advise against giving written discovery materials to a defendant because of the ability, and it has happened before, of other inmates to obtain such and the phenomenon known as jumping on the case occurs, where they now become witnesses to an alleged confession.

However, I say that with the caveat that if clients insist, with my advice against it, I'm probably going to give them copies.

Q Do you recall whether or not Mr. Herron made any such request?

A I have no memory whatsoever one way or the other.
Q Now, would you have met with the defendant before trial?
A Oh, yes.
Q And so if somebody indicated that you had never met with the defendant -- and when I ask -- and during those meetings, would you have discussed the case and potential -- and potential trial defenses?
A Well, let me make sure I'm clear. If it is not a contact visit, and if it is a noncontact attorney booth visit, there will not be generally much discussion about the facts of the case because my understanding is that even though it becomes attorney-client privileged, that law enforcement has the ability to legally monitor those. I may be wrong, but that was my understanding. And so I never really get into the facts of a case unless I'm in a contact visit with my clients.
Q Now, would have you -- before a trial in Mr. Herron's case, do you recall whether or not you had contact meetings with him?
A I can't recall if I did or I didn't. I would believe I did, but I'm not going to say absolutely 100 percent I did because I just don't remember.
Q All right. How would you have been able to discuss with him any trial strategy, any potential witnesses or any potential defense witnesses be called or discussion what the

State's evidence was if you didn't have any contact with him?

A Well, that would suggest that I probably did have contact visits with him. I'm not saying I didn't. I'm just saying I don't recall them, that's all.

Q But it would have been your habit to engage in that type of conduct before trial on a first degree murder case?

A It depends on the defendant, too. Sometimes with what I call my less-sophisticated clients, I'm not gaining a whole bunch discussing things with them. I'm more better just answering what questions they have. If they don't have certain questions, the discussions between myself and what I call the less-sophisticated clients aren't usually that lengthy because I generally don't gain much from them telling me things other than facts. I don't need their advice on the law; I don't need their help.

Q Where would you place Mr. Herron?

A I would place Mr. Herron probably one of the most less-sophisticated clients that I've ever represented. I don't mean that as a personal insult, it's the truth. He just, I don't believe, comprehended a lot of what was actually taking place. He wasn't -- he wasn't dysfunctional. He was certainly not incompetent legally; I'm not suggesting that.

I just think the combination of the stress that he had upon him, his hopes and desires to be free, probably clouded a lot of his understanding. And then again, I don't

know how much I actually explained to him because, you know, I don't believe he really understood a lot of it anyway. And that's a fact.

Q Now, the issue in this post-conviction motion is the playing of his video interrogation or the video of the interrogation of the defendant, Mr. Herron. Had you had -- have you had an opportunity to review the transcript portion?

A Yes, sir. Prior to you having me read that to refresh my recollection while I was outside the courtroom, I had no recollection of any of that, quite honestly, other than I do remember the case was with Mr. Michael Bauer and I was very frustrated. That's all I really remembered.

Q Okay. And why were you frustrated?

A Mr. Bauer and I seemed to have some difficulties communicating in terms of what we were trying to understand.

Q Now, did Mr. Bauer attempt to get what Mr. Herron said during his interrogation out solely through the officer?

A Yes. After now looking at the transcript, I believe that Mr. Bauer's intent was to cherry-pick portions of the transcript of the video at issue and have the officer read those. I don't know if that was legal or not. I think I objected on the basis that it was not a complete representation of what the video stated.

There were some discussions, if I recall -- and I recall this now because I'm trying to remember what I just

read; I have no reason to believe that the transcript is incorrect -- that the video also obtained -- or contained otherwise inadmissible evidence regarding possible drug usage or sales and a gun charge that had been previously attributed to Mr. Herron.

And certainly that might be objectionable. So some people might say, why would you ever let that in or why would you agree to let that in? And it appears from the record that it was a concern of the Court's also. And I basically said, as the record reflects, this is a strategic decision of mine.

Q And as your foresight indicated from what you were indicating in the record, you're now being asked to explain what that strategy was.

A All right. After reading this, my strategy, whether it was a good one or not, obviously now it wasn't a good one because of the verdict, but I read the entire transcript and it refreshed my recollection that there was another gentleman named Mr. Cosby. Mr. Cosby, if I recall, was also allegedly in the vehicle with Mr. Herron and allegedly may have been involved in the crime that Mr. Herron was accused of.

I now know, as I remembered from the transcript, that Mr. Cosby was not allowed by the Court to become a witness because he was incompetent. That was proven both through a deposition and through the proffer that Mr. Bauer presented to the Court.

I objected under some rules, the Court sustained my objection and I think, for lack of better words, would not allow him to testify. His testimony, whether it was truthful, feigning or whatever, just consistently said he didn't remember.

So with that being said, I now knew I had someone to hopefully convince the jury was the shooter. Okay. So the video was an opportunity to hopefully convince the jury of my client's innocence because in the video, he denies he does it. He denies he does it. Those bad things come in; they do. But it's an opportunity for my client to testify without him testifying.

And I'm looking at it, trying to weigh it out, and going, I'm going to be able to have him give evidence that he did not do this. And, you know, hopefully the jury won't hold those other things, those collateral things against him. If they're following the rules of the law, what real evidence is that of anything?

And I weighed that versus his testimony, what I believe was a pretty good demeanor on the video, that can be argued, and said, you know, he can get to say through the video he didn't do it. I now have someone that I believe we can blame it on.

And if we remembered -- because that also made me remember of a witness named Mr. Chambers, who was an

eyewitness to the shooting. And he was a little sketchy, but he was your witness that you decided -- or not yours, but Mr. Bauer's witness who he decided not to call, who said, under oath, that Alvin Herron did not do this.

So I had a witness that said Alvin Herron did not do this, I had a video where Alvin Herron denied doing it, and I had a person on the scene who we could blame it on. I thought maybe that was a reasonable strategy.

But one other thing. I don't want people to judge the GPS cell phone tower through now 2017 through 2010 technology. Today, GPS error is a margin of 30 meters. That's because in 2011, they sent up another satellite. In 2010, it was a much larger error. So the testimony that came out on the video of them talking about, well, we have your phone there, was much more arguable in 2010 because there was a wider range. So for them to say he was there was subject to an attack, well, no, you can't really prove that.

So that's my thoughts on my strategy.

Q Now, if getting your client's statement out before the jury was so important and -- why didn't you have a redacted tape prepared for the trial?

A Well, I didn't have a redacted tape ready for the trial because I didn't know what the State's intention was going to be, and I didn't know that they were going to use it, per se.

Unless I have a ruling by the Court that it's relevant and admissible, that redacted tape would contain inadmissible self-serving hearsay, as I see it. You're not supposed to be allowed to present what a defendant says that's self-serving unless it's an admission against interest. So it wouldn't qualify as a hearsay exception.

So I don't think that I could really forecast what the State's strategy was going to be in regard to that. So for the reasons explained, I would not have had a redacted version available because that would have surmised that I knew it was going to be admissible. I didn't know.

Q Now, part of the record indicates that the defendant -- the defendant was part of the discussions and part of the agreement that the tape would come in, warts and all.

A Well, if the record says that, it does. But I will say this, I don't really think that Mr. Herron really understood much of what I was trying to tell him. I mean, I'm not just saying that to throw a bone, I'm just telling you the truth. I never thought he really got a whole lot of what I tried to tell him. And, again, I'm not going to sit there and listen to him tell me what to do.

Q In the end, it was your decision?

A I would say it's more my decision than an informed, intelligent agreement that he understood. That's what I would

say. I'm not saying he wasn't told, I'm not saying he didn't agree. But how much he actually comprehended, I don't know.

Q And I guess my point is, in the end, it is the lawyer's responsibility to decide which witnesses he's going to call, which witnesses he's not going to call. He may consider a client's input, but in the end, it's ultimately the lawyer's decision?

A Well, if that's what the law on ethics say, I agree with you. I don't know the law on ethics 100 percent on that. I just know the way I do things.

Q Now, had there ever been a real thought of putting the defendant on the stand to get his story out as opposed to using the unredacted tape?

A I don't remember. Specifically, I don't remember. Generally, with a client of Mr. Herron's capacity, it's only speculation that I would tell you what I would or wouldn't do. Okay. And with that caveat, I don't think I would have ever realistically considered putting him on the stand. I just don't think I would. I don't believe I did. I mean, I honestly can't even remember if I did or not, but I don't believe I would have. Now it's his decision, but I don't think I'd have ever advised him to take the stand.

MR. EVANS: Thank you. No further questions.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. PUMPHREY:

Q Mr. Collins, good afternoon.

MR. PUMPHREY: May it please the Court.

BY MR. PUMPHREY:

Q Mr. Collins, always in a position in these hearings where, as a defense attorney, hindsight is 20/20. Would you agree? In some cases?

A I don't really know that I understand that, but I'm not disagreeing with you.

Q So why would you choose not to put your client on the stand to deny that he committed the crime, in this case?

A I can't really answer that, Mr. Pumphrey, with any real recollection other than what I've said to Mr. Evans.

Q And at the time of the trial and at the time of your insistence on the tape being played, were you aware whether or not it is impermissible for the State to play an interrogation recording where a police officer specifically states that a defendant is a liar?

A I did not know then, nor do I know now, that it is per se impermissible to do such. I'm not saying it isn't, but I don't know of any law that per se precludes that from happening under the circumstances that we had. Mr. Bauer, again, it wasn't his intention to play those portions. It was basically my intention. So if there's any fault, it falls on me. If you look back at the transcript, which I just saw

today, you'll see I wanted the complete video in.

MR. PUMPHREY: A moment, Your Honor.

(Attorneys confer.)

MR. PUMPHREY: No further questions, Your Honor.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. EVANS:

Q Mr. Collins, Mr. Bauer was seeking just to have the officer testify; correct, as to what was in it?

A My understanding is Mr. Bauer -- and if I'm wrong, I'm wrong -- but my understanding, and it's based on what I just read, because other than that I don't have any memory, was he was intending to put certain portions of testimony from the video into evidence through an officer reading a transcript of that video.

And I do not believe that those contained any references of my client being a liar or guns or drug references of evidence. I don't believe he was intending to do that. I don't think that would have been admissible.

Q And so you made the decision that you'd rather have the tape come in, and everything that it had on it, as opposed to just having the officer read the testimony in?

A Yes. I made the decision that -- remember, it wasn't in a vacuum. You know, I always think of what we're doing as the old pie plate spinner on the Ed Sullivan show.

You've got to be thinking of a lot of things when you're trying a case.

And the first thing is you try not to lose credibility to the jury. And that's hard. But you have to try not to. If you're going to win one, you have to be credible, I think. So I'm thinking, I've got Cosby spinning here. He's no longer a witness now. I didn't know that. This is all happening at trial.

I've got Bauer trying to get in selective portions of the video. I've got GPS information that I know isn't as accurate as they're wanting to portray it is. I want to exploit that. And, while there are parts of the video that I don't like, I've got my client, I thought in a somewhat convincing way, saying he didn't do it. He wanted to go home. And, therefore, I wouldn't need to put him on the stand.

It was a strategic decision. Now if I messed up, I messed up. But that was my decision. So I'm thinking all those things.

Q Now, Mr. Pumphrey asked you about the cross -- or he asked you about the defendant becoming a witness and testifying. Now, it would have also opened him up to cross-examination based upon what was on the video; is that correct?

A I don't know if it would have opened him up for the extraneous factors of the drugs --

Q No, no --
A -- and the guns.
Q -- I wasn't -- I wasn't necessarily asking that.
A Yeah.
Q But it would have subjected him to cross-examination and -- about untruthful things that he was alleged to have said on the video?
A Well, you see, at that point, I don't know if what he said on the video could necessarily be proven as untruthful. Otherwise, I would not have allowed that video to come in. That was my reasoning, I'm looking back. Now I understand, Mr. Pumphrey, it is 20/20 hindsight.

So it's hard to say. I don't -- you know, I don't know, you know. I don't know. The cross-examination was going to be what it was. I generally -- I think my reasoning or my advice would have been that I just didn't want him to have to answer questions to a seasoned prosecutor; albeit, Mr. Bauer.

Q And part of it played because of your view of Mr. Herron's ability to deal with such questions?
A Absolutely. You know, and that's the problem here. I don't think that -- if I failed, I failed in not properly communicating to him what these crucial decisions were. I don't think it was his fault.
Q Okay. Thank you.

MR. EVANS: No further questions.

THE COURT: Do you have an opinion as to whether Mr. Herron would have been a good, credible witness on the stand?

THE WITNESS: I have a mixed opinion, Judge. On one hand, I don't think he would have been a very good witness. On the other hand, he may have been sympathetic.

THE COURT: You felt like in the video he was somewhat sympathetic?

THE WITNESS: I did, Judge. And, again, it's a hard thing to weigh all of this. He seemed somewhat sympathetic. Did he seem like he could be lying? Yeah, he did a little, but it was a judgment call.

THE COURT: Okay. Thank you, sir.

THE WITNESS: All right.

THE COURT: You can step down. Do we need to keep him any further?

MR. EVANS: No, Your Honor.

THE COURT: Do you need him any further?

MR. PUMPHREY: No, Your Honor.

THE COURT: Thank you for being here. You're excused.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. EVANS: The State doesn't have any further witnesses, Your Honor.

THE COURT: Defense have any rebuttal?

MR. UFFERMAN: No, Your Honor.

THE COURT: Do you want to make argument?

MR. UFFERMAN: Yes, Your Honor. If I can approach, Your Honor.

THE COURT: You may.

MR. UFFERMAN: I'm providing the Court with cases that I'll be citing to during the argument. I've provided a copy of the cases to the State as well.

May it please the Court. Michael Ufferman on behalf of Mr. Herron.

Your Honor, the claim in this case is that Mr. Collins was ineffective for insisting that the recording be played for the jury as opposed to simply letting the investigator testify as to what happened during the interrogation. And there's three areas of the unredacted recording that I would like to focus on that I believe are prejudicial.

Before I get into that, let me first -- and the Court's familiar with this, but just let me go over it to create -- make sure I make the record and to re-familiarize the Court with what was happening.

Mr. Bauer at that point had called the investigator,

I don't know if it's Beese or Besse, I apologize, Your Honor, but the investigator.

THE COURT: Besse.

MR. UFFERMAN: Besse, thank you, Your Honor, to testify about the interrogation that occurred in this case.

And he'd explained that it had been recorded, that he had gone over Miranda rights with Mr. Herron. And at that point, I think the Court even asked, are you going to be playing the video? And Mr. Bauer said, no. And it was at that point that Mr. Collins said, well, I would request that he be required to play the video, that's the best evidence. And then the Court heard this issue at sidebar.

It was Mr. Bauer at that point, Your Honor, that specifically said, "I'm not going to have him testify" -- I'm sorry, this is Page 369. "I'm not going to have him testify as to statements because he made statements about possession of firearm. He talks about his criminal history. So if counsel isn't going to stipulate to that, I can't redact it at this point. I told counsel that we weren't going to play it because it's going to put me in a Catch-22. I'm going to infringe on his rights. He knows I can't play that part so I don't know why he's objecting."

So Mr. Bauer is very aware that there's things in this recording that would infringe upon Mr. Herron's rights. And, yet, it's Mr. Collins who's insisting -- and the Court obviously agrees with the defense's request, that if that's what the defense was going to be requesting, that the entire recording be played. So then that's exactly what happens.

So what comes out during the recording? We have --

THE COURT: Give me some transcript notations as to what parts you think are bad as you go through this, would help me. I have the transcript in front of me.

MR. UFFERMAN: I will, Your Honor. If I say a page number and you want me to slow down to get there, please tell me.

The first one is going to be 383. And I'll just read from it, Your Honor, the portions that I think are important.

"The Investigator: Okay. Have you ever been in any --"

THE COURT: I was just reading it so I'm with you.

MR. UFFERMAN: "Have you ever been in trouble before?

"Yeah, I done been in trouble before.

"For what?

"One time drugs and then another time for a pistol.

"What happened with that pistol charge?

"I did county time.

"County time?"

Going down a little bit: "What was it, carrying a concealed weapon or something? What kind of charge was it?

"Possession of a firearm."

I would move forward, Your Honor, to Page 401 and kind of bleed over into 402. The bottom of 401.

"The Investigator: I mean, I've got people --"

THE COURT: Let me get there.

MR. UFFERMAN: I'm sorry.

MR. EVANS: That was page what?

MR. UFFERMAN: 401 going into 402.

(Pause.)

MR. UFFERMAN: Your Honor, can I --

THE COURT: Where are you?

MR. UFFERMAN: I'm starting at the very bottom.

"The Investigator: I mean, I've got people putting you there on scene.

"The Defendant: Definitely can't put me."

Investigator going on: "A gun in your hand arguing with her."

The defendant says, "who?" The investigator repeats it: "A gun in hand arguing with her."

And if we go over just a couple pages to 405, just in the middle, the investigator says: "I mean, you didn't tell the truth."

Then on 413.

THE COURT: Wait a minute; wait a minute.

MR. UFFERMAN: 413 at the bottom.

"The Defendant: I just told you the truth.

"The Investigator: That's not the truth."

Then 415 and this goes over onto 416. I think this is probably the most objectionable of anything that came out. About the middle of 415, the investigator says: "Well, let me tell you something. From just sitting here watching you, as soon as I brought her up --

"Uh-huh.

"-- your whole body language changed immediately. It was just -- it was kind of interesting to watch. I mean, your lips started quivering, things you can't -- you can't control, but I can tell by sitting across that as soon as I mentioned the name Monica --"

And Monica is another name for the alleged -- for the victim in this case.

"-- as soon as mentioned the name Monica, I mean, your level just went up.

"The Defendant: I'm still here.

"I know you're still here, but I'm saying your body

language, things you don't realize, things that I watch. After doing this job for eight years, and sitting across from people like you for eight years, I mean, you learn lots of body language and stuff like that. And when I mention specific things they're involved in, man, it's like immediate. You're not helping yourself by lying to me, I'll tell you that."

And the last one is pretty short. It's on Page 420. It's towards the end of the interrogation video. Again, that's 420.

The investigator says: "I'm telling you, you're making a mistake by lying to me.

"I'm not lying to you, sir.

"Yeah, you are."

So obviously the three areas that were improper by this interrogation are, No. 1, the jury hears about my client's other charges. And the record is established, the State hasn't disputed it, there is no dispute. My client did have a previous possession of a weapon charge and adjudication -- that charge ended in adjudication of guilt being withheld. Clearly, had he taken the stand, the jury would have never otherwise heard about that charge.

That's extremely important in a case likes this. I'm going to complain about the drug charge, but

obviously the drug charge isn't as big because the facts of this case involve drugs.

So, you know, the fact that he had a previous drug-type charge that ultimately was dismissed, so that jury wouldn't have heard about the previous charge anyways, but the case involved drugs so it's hard for me to say that there's too much prejudice with the jury hearing that he may have had a previous drug charge.

But for the jury to hear that he had a previous possession of a firearm charge, that is extremely prejudicial. This is a case where my client has denied having any involvement with any type of firearm, certainly wasn't the shooter, and yet the jury is now hearing, well, you've previously been involved with firearms. That's making it more likely that you were the one with the firearm on this night. And, again, had he testified, the jury wouldn't have heard about any of that.

So that's area No. 1, the previous charges.

Area No. 2 is the hearsay violation and what would have been the Crawford violation, a violation of my client's rights to confront alleged witnesses against him that, as I said when we were going over what the investigator said during the interrogation, he said that people -- basically people on the streets have told us

that they place a gun in your hand when you were with her.

I don't know if I'm reading that correctly. Let me go back to that exact quote so I can say it. "I've got people putting you there on the scene with a gun in hand arguing with her." No one at trial testified that my client had a gun in his hand arguing with the victim in this case.

That's extremely prejudicial because the jury is now hearing from some unnamed witness, in violation of my client's confrontation clause rights, that he's supposedly there on the scene. That someone, a witness, saw him on the scene with a gun in his hand arguing with her.

Mr. Collins was arguing throughout the trial, and certainly in closing, that the only one that there was any evidence about someone having a, quote, beef with the victim was Mr. Cosby, except for the fact that in this interrogation, the investigator points out that someone saw my client arguing with her with a gun in his hand. Evidence that never would have come out, but for this interrogation being played, at the insistence of Mr. Collins.

And then, finally, the third area of the problems with this unredacted recording coming in is all of the

statements from the investigator about my client lying. Over and over again, you're lying, you're lying to me.

And then this diatribe about I can read body language. I've been sitting across the table from people like you for eight years. As soon as I mentioned her name, your body language changed. I can tell you're lying.

Again, as the Court well knows, and I'm getting ready to cite to the case law, that's completely inadmissible. There's no way the investigator, had he been a witness on the stand, that Mr. Bauer could have said to him, you were sitting across from him. Did your -- the way you were reading his body language, did you have an opinion that he was lying to you?

So I didn't cite any cases to the Court about my client's charges not being admissible if they weren't impeachable offenses. That's well-established law. Clearly, those wouldn't have come in.

The case law is clear under Crawford that you -- it would be impermissible for a law enforcement officer to take the stand and say, someone on the street, an unnamed person who is not going to testify at this trial, told me that they saw the defendant with a gun in his hand arguing with the victim. That clearly violates my client's confrontation clause rights. That's clearly

inadmissible hearsay.

I did provide the Court with a number of cases that talk about this issue of can a law enforcement officer's statement during an interrogation that the defendant is lying be admitted during the trial.

The lead case that's recent from the Fourth DCA, but it relies upon other cases that were decided prior to the time of this trial, it's the Lopiano case, L-O-P-I-A-N-O. The cite is 164 So.3d 82, a Fourth DCA case from 2015.

And the quote from that case, which would be Page 84, is that: "Furthermore, the admission of the officer's repeated statements that he did not believe appellant's denials was also erroneous. A police officer's testimony or comments suggesting a defendant's guilt invades the province of the jury to decide guilt or innocence."

And it's citing to the Martinez case from the Florida Supreme Court stating that, "generally a witness's opinion as to the guilt or innocence of the accused is not admissible on the grounds that its probative value substantially outweighs the unfair prejudice to the defendant."

I've given you some cases from around the country. This is not a new issue. Courts around the country have dealt with this exact issue. Can the State, as part of

their case during a criminal trial, introduce a recording where an officer tells the defendant that we think you're lying.

I gave you the Kansas Supreme Court case of Elnicki, E-L-N-I-C-K-I, 105 P. 3rd, 1222. It's a Kansas case from 2005, the Kansas Supreme Court.

And in that case, I believe it's Page 1229, Your Honor, the Kansas Supreme Court said: "The jury heard a law enforcement figure repeatedly tell Elnicki that he was a liar, that Elnicki was BS-ing him and weaving a web of lies. The jury also heard the same law enforcement figure suggesting he could tell Elnicki was lying because Elnicki's eyes shifted.

"A jury is clearly prohibited from hearing such statements from the witness stand in Kansas and likewise, should be prohibited from hearing them in a videotape even if the statements are recommended and effective police interrogation tactics.

"As far as the context for Elnicki's answers are concerned, the State could have safely accomplished its goal simply by having Detective Hazim testify and point out the progression of Elnicki's various stories as the tape was played, minus Hazim's numerous negative comments on Elnicki's credibility."

That's exactly what Mr. Bauer was trying to do.

Mr. Bauer -- we don't know what Mr. Bauer was going to put on. There is no point in having him testify here today. I'm not sure he would remember today exactly what he would have had this investigator say. I think we can presume that he simply would have said, did you interrogate Mr. Herron? Did Mr. Herron -- what did he tell you during the interrogation? And his answer would have been, Mr. Herron denied that he was even at the scene.

If Mr. -- if that didn't come out in totality, clearly under the rule of completeness, on cross-examination Mr. Collins would have had every right to cross-examine him and get out the relevant portions of the interview; such as, did you specifically ask Mr. Herron did he -- was he the one that committed the shooting in this case? And the answer was: No, I was not the shooter. All of that would have come out through his testimony. The tape didn't need to be introduced to get that out.

More importantly, if Mr. Collins really thought there was some useful purpose of introducing the actual video so the jury could see Mr. Herron, Mr. Collins could have prepared a redacted tape prior to trial and said, Judge, I share in Mr. Bauer's concerns, but, you know, we've agreed, we've gotten together, and here is the

redacted portion. All the inadmissible portions are coming out.

So, again, Your Honor, I think it's clear that there are many areas of this unredacted recording that should not have come in. Our claim today certainly focuses on all of those areas.

The other two cases that I provided the Court are, one, it's the Charles case from the Fourth DCA, 683 So. 2d 583. Clearly, police officers, as well as other witnesses, are prohibited from offering opinions as to the truthfulness of a witness or a defendant. I think that was covered by the other cases I already mentioned.

The other one I want to mention just quickly is the Barnes case from the Fourth DCA, 1991 case, 576 So.2d 439. And the reason I'm citing to Barnes is there, the Fourth DCA recognized that a police officer is a different type of witness than other officers.

The quote is: "When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible, is a corroborating witness, the danger of impropriety of influencing the jury becomes particularly grave."

The context of this case was very different from our case, but it's the idea that it's one thing to have a normal lay witness testify as to the credibility of

another witness. That would be improper. But it's even more improper when it comes through a police officer.

And in this case when I have a police officer who is citing to his eight years of experience and his ability to read body language, again, when the jury -- it's generally established in the law that jurors see police officers as highly credible witnesses and he's all of a sudden giving the jurors in this case his opinion that he can read the language and tell that Mr. Herron is lying. So I submit that it was completely inappropriate to allow the tape in in this case.

We know that in 3.850 motions, many times courts look to did the defendant -- did the defense attorney have a strategy for doing what he or she did. But just because someone says that I have a strategy doesn't necessarily mean that the 3.850 must be defeated.

The Eleventh Circuit has written on this. There is a case called Horton v. Zant. It's 941 F.2d 1449. And the Eleventh Circuit said that "merely invoking the word 'strategy' to explain errors is insufficient since the particular decisions must be directly assessed for reasonableness in light of all of the circumstances."

So, yes, clearly I don't doubt -- well, there's no doubt. Mr. Collins told you during the trial that he had a strategy for doing this. The question for the Court is

was the strategy reasonable.

In another case, the Eleventh Circuit has said the relevant question is not whether counsel's choices were strategic, but whether they were reasonable. So that's the issue is were his choices reasonable.

There's another aspect of this case also. Mr. Pumphrey specifically asked him was he aware of the law that said that these types of statements from law enforcement officers would be inadmissible. And he said he was not aware of that law. And there is certainly case law, Eleventh Circuit case law and Florida case law, that says a misunderstanding of the law can never be deemed to be a proper strategy.

And if he didn't even realize that beyond just hearing about the possession of a firearm charge and the drug charges, that there was other things in this tape that were inadmissible, then he couldn't evaluate this under any type of proper strategy because he didn't understand the law to make such an evaluation.

And there was other alternatives. Not only was the alternative that either you simply ask the investigator what the defendant said during the interrogation, or that you prepare a redacted transcript or recording of the interrogation, but the other alternative was to put Mr. Herron on the stand.

And if Mr. Herron would have been put on the stand, clearly all this stuff about credibility and you're lying and I can read body language wouldn't come out. Clearly, anything about his prior gun possession charge would never have come out. And the jury never would have heard anything about someone else supposedly putting a gun in his hand arguing with the victim.

And when Mr. Collins was asked initially, why didn't you put him on, he said, you know, I can't really say other than I thought the tape would be better than having his testimony.

Now, Your Honor, you followed up on that and you asked would he be a good witness. And he gave, I believe, an honest answer that part of me says he wouldn't have been a good witness, but part of me says he may have been sympathic.

I submit to you, Your Honor, any reasonable lawyer having a defendant that has no impeachable criminal offenses, and you heard him testify today, and the risk that, yes, a seasoned prosecutor, Mike Bauer, whoever, was going to be able to cross-examine him, comparing the risk of that to all the things that I've been discussing with you: Crawford violation; someone else placed the gun in your hand; you know, liar, liar, you're a liar, I can read body language; and the jury is going to hear

that you previously were involved in a possession of a firearm charge, there's -- no reasonable attorney would come to the conclusion that the better choice is to go ahead and play the video at my insistence, even though the prosecutor acknowledges it's going to infringe on his Constitutional rights.

Any reasonable attorney at that point would have said, I need to put him on the stand or we just need to let the investigator answer questions without playing all the inadmissible portions of that video.

And then the other thing I would point out, there's this idea that, you know, that Mr. Collins felt that maybe what he was saying in that video was true and the State couldn't disprove that it wasn't true.

If you read the closing argument, that's not at all what Mr. Collins was arguing. Mr. Collins spent most of his closing argument, or certainly a substantial portion of it, admitting to the jury that Mr. Herron lied for big portions of that interrogation but he didn't lie when it came to the part about he wasn't the shooter.

And I don't necessarily need you to, unless you want to, Your Honor, look through each of the portions, but I'll give you the page numbers. But on Page 593, Mr. Collins says to the jury in closing: "He wasn't completely honest in that video. He wanted to deny any

involvement whatsoever." So right up front he acknowledges that he did lie in the video.

He comes back on Page 603: "Yes, he wasn't completely truthful."

He goes to 612: "Again, I would submit to you that he's not truthful. He's truthful about some things, but he's certainly not truthful about where he was and his participation, what he did."

Bottom of 612: "He lied, he lied, he lied, but that lie does not make him the shooter."

613: "He's lying about his involvement, covering for Sam or whatever happened, but that doesn't mean he's the shooter."

Next page, 614: "But that cell phone tower, all that does -- all that evidence does is prove that Alvin was lying on the video."

So he tried to say today that he didn't think the cell phone tower evidence was very competent to establish location in 2010. In his closing, he acknowledged to the jury that it was. He admitted that his client was lying about not being there, but believe him when he says he wasn't the shooter.

617: "The defendant's untruthful statement on the video does not make him the shooter."

620: "And he lied about his involvement. All

they've proved is that he's black and he's lied and he was in the area sometime before the shooting occurred. But by lying, he put himself in a bad position."

And then, finally, 622: "He's guilty of being stupid and lying, but he's not guilty of being the shooter."

Mr. Collins' own closing argument acknowledged that Mr. Herron, repeatedly, you just heard all the times I said it, was lying. And he had to do that because he's the one that insisted on having that video be played for the jury.

He simply -- he could have allowed the investigator to testify from the stand that he denied any involvement. He wouldn't have had to go to such extremes in his closing to have to try to cover for it. But once that was in front of the jury, he knew that was his only choice but to say all that.

There were so many other ways he could have gotten his idea in front of the jury that my client has denied involvement in this case without being the one to insist that this recording that had all of this damaging, prejudicial, inadmissible evidence come in.

And for those reasons, Your Honor, I submit that Mr. Collins was -- did not make a reasonable decision. He misunderstood the law. He didn't realize that there

was many other portions of this interrogation tape that were inadmissible. And, therefore, his strategic decision was not reasonable and should not be condoned.

I submit that this was a close case. Your Honor presided over it. Mr. Cosby did not testify. There was a real issue -- there's portions in the initial brief that Mr. Collins cited to about Mr. Bauer saying, I'm going to have a hard time proving this case if I can't get in a particular photo that shows what type of hairstyles they had there were.

There was conflicting testimony about who the shooter was, what clothing they had on. This was a very close case. And something as prejudicial as that video was what ultimately tipped the scales in favor of the State. If you take that video out, there's a reasonable probability this jury would have reached a different conclusion, Your Honor. Thank you.

THE COURT: Mr. Evans.

MR. EVANS: The premise the defense is missing in this motion is this: The real key to the defense in this case, if you'll look at the closing arguments, was Mr. Chambers. This is where really the hat was being hung because you had an independent witness who was there, who testified it wasn't this defendant who did the shooting, but it was the other person who did the

shooting.

So that being a key to your defense, that he wasn't the shooter but he was there, Mr. Collins was put in a position of, do I undermine Mr. Chambers' testimony by having the police just get up and tell how many times the defendant said he wasn't there, he wasn't involved, and being able to show that that was, in fact, not truthful.

Or does he -- so he's got to deal with the statement. Mr. Bauer was obviously trying to put it on. And he was obviously putting the most damaging part of it on. And we start talking about this part about whether or not Mr. Collins was aware whether -- was aware that putting on the officer saying stuff was untruthful was -- and I believe the question that was asked was it was per se inadmissible. It couldn't come in.

And I think what Mr. Collins said, he wasn't aware that it was per se inadmissible. He knew -- he understood Mr. Bauer couldn't put it on. So that was obviously clear that Mr. Bauer couldn't put it on, but he didn't understand that the law was that the defense couldn't put it on if they wanted it to come in.

That's what I understood his statement when we make this big to-do about him not understanding the law. I think he sort of understood it perfectly. Counsel may not have understood Mr. Collins' answer. Mr. Collins'

answer seemed to indicate that he was not aware that the law said it was inadmissible per se error for the defense to put on this type of evidence.

Because he certainly was aware, and Mr. Bauer made it perfectly clear that the State couldn't put it on. But Mr. Collins wasn't aware of any law that says he couldn't have put it on. I believe that's what -- when you look at his answer, that's what his answer was.

And he made the judgment that the tape was better and safer than attempting to have the defendant get up on the stand. Because if the defendant would have put himself there, well, then he has proved he was lying to the police the entire time.

If -- but he wasn't, in his estimation, going to be a very good witness. And to have a sympathetic witness, the defendant, was what was going to be needed and to have a sympathetic defendant saying he didn't do it.

Now, what he did in closing arguments was the officers had -- Mr. Chambers had said it wasn't the defendant. So he's hanging his hat on that. It was the codefendant.

So by virtue of making Mr. Chambers a believable witness, you had to concede your defendant was there. Because if Mr. Chambers is mistaken about whether or not the defendant was there, it was somebody else, why

couldn't he also be mistaken about who the real shooter was if all the other evidence was pointing to the defendant.

So -- and there was the evidence of the cell phone tower. And Mr. Collins, in his argument, did indicate that, you know, the cell phone stuff wasn't a -- was supposed to be a gotcha but it really wasn't. It could tell you some things, but it couldn't tell you who the shooter was and it couldn't tell you how close the defendant was around the area.

It could show that he wasn't where he said he was, but it couldn't show you that he was the shooter. So him trying to weave all of this together required the defendant -- show that the defendant was, in fact, lying to some degree.

And that's what he said. This was a rush to judgment by the police. As you can see by the video, you know, they're wanting to make the defendant say that he did it. They were seeking a confession, that's all they are. That's the reason they were harping on him about he was lying. And that was the picture he was trying to paint.

You know, sometimes when you overreach -- and it's showing, well, all the police focused in on him. They're ignoring the fact that Mr. Cosby was there, that he was

being the shooter, being identified as the shooter, and saying, hey -- and they're lying about something, too.

Now, as Mr. Ufferman pointed out, the officer overreached to some degree. And I think we're -- all who do trial work understand that if you start getting to the point of overreaching, saying to somebody, I've got a witness who is going to say he is, in fact -- puts the gun in your hand as being the shooter, and the jury never hears that evidence, they're going to say, like, yeah, dude, you were the one lying on the tape.

You were lying to the police. We're not hearing about, you know, the police were lying to the defendant. We're not hearing all this. And why were they lying? They were lying to try to get a confession out of the defendant. Well, they're telling him about evidence that we haven't heard about and we don't know about, trying to get something out of him. Maybe they did do a rush to judgment.

So I think when you look at this in the entire context of what occurred, because Mr. Collins is making here that, yes, the defendant wasn't honest completely in this video. There were things he was, in fact, not telling the truth about. But, well, isn't that sort of normal? You know, people tend to lie to stay out of it. He wanted to stay out of trouble.

And they were trying to put himself into something he says he didn't do. He turned himself in, you know. That he -- you know, they had already concluded that he was the shooter, that -- without ever speaking to him. And then, you know, he goes on to go over all the evidence.

I believe he made five or six points as he was going through everything. And one of the points was when it comes to the video, he said -- he fully acknowledged everything the defendant said wasn't truthful because it couldn't be truthful if he was going to maintain that what Mr. Chambers said was truthful. And just because he wasn't telling the truth about some things did not make him the shooter.

And on Page 613 was one of the areas where he's talking about the cell phone, about that, well, it's not exactly as clear as they wanted you to -- you know, the State wanted to lead you to believe. But, yeah, while the defendant may have been lying about some things, it doesn't make the fact that he's the shooter.

He then goes on to discuss the fact that when you listen to him, what he's saying is that he isn't the shooter, that he's sympathetic. Mr. Chambers is the one who makes the positive identification. So I think whenever you're in a position of trying to weave all the

evidence in the case together, to make this a credible defense, it wasn't unreasonable for what he did.

You know, the officer's statements was going to come in one way or the other about what took place during the interrogation. And the question was, well, how is the best way to mitigate that and to put it in the most favorable light. He made the decision.

And the test is would no reasonable attorney have made the same decision that Mr. Collins made. And I don't think we can say that. That he was trying to figure out the best way to deal with his defendant, who had lied to the police, the police had something they could point to that he wasn't telling the truth, to show that it was a rush to judgment by the police.

That his client's testimony was, in fact, that he didn't do the shooting was consistent with the fact of what Mr. Chambers said that he didn't do -- that Mr. Herron didn't do the shooting, but Mr. Cosby did the shooting.

And so I think whenever you look at it, it was a very reasonable way of how he tied all this evidence together to make the argument that this was a rush to judgment; his client, while he may have lied to some things, was telling the truth when he said he didn't do the shooting; and that Mr. Chambers' testimony was, in

fact, the best evidence in this case and that it wasn't the defendant who did the shooting but the alleged codefendant.

So I think that the defense has not met its burden. They have not shown that the conduct of the -- of defense counsel was prejudiced. The strategy in this case was, in fact, reasonable and the Court should deny the motion.

THE COURT: Mr. Ufferman.

MR. UFFERMAN: Thank you, Your Honor. May it please the Court.

I'll say it, no reasonable attorney would have allowed that video in, when compared to other alternatives. No reasonable attorney. No reasonable attorney would have insisted, over the State's concern that it contains inadmissible evidence, that, no, Judge, I want that in.

Mr. Evans is right. The theory of defense in this case was Mr. Chambers saw someone else as the shooter. Putting that video in is in no way consistent with that theory of defense. It's in no way consistent with the closing argument and certainly the portions that I read to you. In fact, putting that video in made his closing argument that much more difficult because he had to go over so many times that, yes, he was lying.

If the investigator had simply testified, he

wouldn't have been able to repeat that many times that I believe Mr. Herron was lying. He wouldn't have been able to say any of that. All he would have been able to say is I asked him were you there and he denied even being there at the scene. We can imagine that his testimony on that -- on those points wouldn't have lasted more than a couple of questions.

But here's the important thing, and this is really simple. Mr. Evans portrayed it like the decision had to be that either the video was played or Mr. Herron takes the stand. And although that may be a reasonable alternative, that's not the case, Your Honor.

You've presided over, I can imagine, hundreds of trials where, for whatever reason, the State chooses to ask the interrogating detective about the interview as opposed to playing the interview. And if it doesn't come out on direct, it would come out on cross. If the defendant, during the interrogation, denied involvement, the jury is going to hear that the defendant denied being the shooter.

So I can only imagine that Mr. Bauer would have brought out, through the investigator on direct, that he denied even being there; and, yes, he denied being the shooter. But if that last part had been left out, Mr. Collins could have gotten up there, in front of the

jury, with the investigator on the stand and say: Investigator, isn't it true that you asked him, were you the shooter and he specifically denied being the shooter?

And that testimony from the investigator would have come out, without all the additional prejudicial comments about, I believed he was lying, someone else placed a gun in his hand, and you previously had a possession of firearm charge.

There is no reasonable strategy that would have that information be put in front of the jury when you simply could have gotten out what you need to get out, which is he denied being the shooter. You would have had to have allowed that under any rule of completeness argument. If Mr. Bauer wouldn't have gotten it out himself, it would have come out.

That would have given everything Mr. Collins -- everything he would have needed to make his argument. And the rest of his argument would have focused not on, oh, I've got to get away from this interrogation video that he lied. He would have focused more on Mr. Chambers, Mr. Chambers, Mr. Chambers. He said someone else was the shooter, reasonable doubt, find my client not guilty.

Introducing this video made his case much harder. It made his closing argument much harder. No reasonable

attorney would have introduced that video when there were so many other alternatives.

And, therefore, Your Honor, I'd ask for you to grant the motion. Give my client a fair trial, a trial where the jury decides his guilt or innocence not based on some interrogation video with the detective's improper opinion and hearsay testimony that never should have come into this trial. Thank you.

THE COURT: I've read most of what y'all have cited to, but I've not read the closing argument and I want to take a few minutes and read those. Why don't we figure probably about 20 minutes and we'll meet back here and I'll make a ruling.

(Recess taken from 2:52 p.m. to 3:20 p.m.)

THE COURT: Be seated, please, folks.

Anything else from either side?

MR. EVANS: No, Your Honor.

MR. UFFERMAN: No, Your Honor.

THE COURT: All right. I've read over the parts that were cited to me that I had not reviewed. I did preside over this trial, although it's been quite some time ago. And I've refreshed my memory with what occurred, considered the testimony presented here today.

There is a single issue before the Court, whether it was ineffective assistance of counsel for counsel,

Mr. Collins, to insist on the whole statement being played rather than the verbal version that the State proposed to present of Officer Besse.

It is my ruling here today that I'll deny the motion for post-conviction relief. I do not find there was ineffective assistance of counsel, nor that the defense was prejudiced by any of the decisions of Mr. Collins.

I think the first thing we need to focus on is what options were available to Mr. Collins. My ruling at trial was that either the State could present the verbal statement by Officer Besse, which Mr. Collins characterized as a cherry-picked version of what occurred, or that the whole statement be played. That was the Court's ruling at trial.

To the extent it could be argued that ruling was in error, that is not cognizable here in a 3.850 motion. That could have been or should have been raised on appeal. I don't know whether it was or was not.

I had made the determination that the State would be allowed to present Officer Besse's verbal testimony, if we did not play the entire tape. As I say, if this was error, it could have been or should have been raised on appeal.

The defense here argues that Mr. Collins had many options. He didn't have many options. Those were his

two options; either to hear the verbal version by Officer Besse or to play the whole statement. Whether or not the defendant testified or not really doesn't factor into that decision. That was not one of the alternatives. Certainly he could have called him in addition to those things occurring, but it was not an either-or situation.

The defense has also suggested now that Mr. Collins should have been there with a redacted version of the statement. Again, that was not one of the options before the Court at that point in time. Frankly, it would be an exceedingly exceptional defense attorney that had that kind of foresight to be there with a redacted statement. I was not going to make the State redact the statement.

Assuming what's presented here is cognizable, I do think that Mr. Collins' decision to insist on the full video being played was a reasonable strategy decision. The fact that he wanted to see, or felt that it would be preferable for the jury to see the defendant in the video rather than to have the officer describe how it had occurred is not an unreasonable decision. I think many attorneys would agree to that.

It's been suggested and I've indicated that the defendant testifying was not one of the alternatives. But it's been suggested here that that's what Mr. Collins should have insisted on. There are many attorneys that

prefer that their client not testify, particularly when the testimony in this instance would have had to have been in direct conflict to a prior statement.

Particularly when you have a defendant that Mr. Collins was -- you know, he's trying to be polite about this, but that Mr. Herron's apparent understanding of everything that was going on was somewhat limited.

I certainly don't think it was -- it's not one of the issues before the Court, but the defense has kind of suggested that the defendant's testimony was the answer to all these questions. I don't find that to be the case.

Looking at prejudice, I've looked at what was said. The drug involvement, as the defense has admitted, comment was very minimal.

Much has been made of the firearm comment. Frankly, in my reading, very minimal. If you read, and I'm reading it, it says: "What happened with that pistol charge?

"I did county time.

"County time?

"Yeah, because that was my first charge. I got adjudicated withheld.

"Okay. What was it, carrying a concealed weapon or something or what kind of charge was it?

"Possession of a firearm, I think.

"By a delinquent or convicted felon or what?

"No, I wasn't no convicted felon. I got adjudicated withheld because they said it was my first charge.

"Okay. How old were you when that happened?

"Eighteen.

"That was your first adult charge?

Yes, yes; yes, sir.

"Okay. First adult charge."

I mean, yes, it's inadmissible, but to say that it's greatly significant testimony I think overblows it, particularly in context with the Court gave a -- you know, I guess I shouldn't suggest it was a wonderful instruction since I made it up, but I think I did do a pretty good job, as I read back over it, of clarifying to the jury that he was not on trial for things mentioned in the statement.

Then the other argument, it relates in the statement as to the hearsay being admitted by the officer and the opinion being commented on by the officer. I would agree with the defense that clearly under the current case law, those comments are inadmissible.

However, I will say that this is an area of the law that's been developing. The only Florida case cited by the defense is a 2015 case. I think there is a more

recent Florida Supreme Court case where this is made a lot more clear than it has been in the past. I would say that the law has developed a good deal since 2012 clarifying that these kind of statements by law enforcement are not admissible.

Having said that, every interview by law enforcement of a defendant is going to have some observations by the interviewer, some comments by the interviewer. And I don't find this to have been an extreme case. Yes, the officer said he was lying. I don't know that you'll find any interviews of this type where the officer isn't at least suggesting that the defendant is lying. It is a matter of degree. Those kind of statements are not absolutely prohibited. As I say, this is an area of the law that's been clarified.

Certainly if we were in a vacuum, I would rule that those statements could not come in. At some point in time, you get where you have a statement that doesn't mean anything when you take out everything law enforcement said.

I thought Mr. Collins did a good job of suggesting that some of these comments by law enforcement suggested overreaching, that they had already decided before they interviewed the defendant what their opinion was, they had already obtained a warrant for him, and that they

weren't, in fact, searching for the truth. He made a good deal out of the fact that Mr. Herron had turned himself in to make this statement.

The portion about body language, I'm not so sure that that is inadmissible testimony. It is inadmissible testimony for the officer to say, based on what I saw, he was lying. I don't think the actual observations themselves are inadmissible. So I think to some degree some of that is admissible.

Overall, I don't think that these statements were likely to have affected the outcome of the case. A jury can take these kind of relatively minimal extraneous things and set them aside. I don't see any likelihood that these statements impacted significantly the jury's decision in this case.

That would be my ruling. Does that leave anything outstanding? I guess I should go ahead and deny claim -- Ground 1 since no testimony was presented as to Ground 1. Does that leave anything outstanding?

MR. UFFERMAN: No, Your Honor.

MR. EVANS: No, sir.

MR. PUMPHREY: No, Your Honor.

THE COURT: I'll do a written order that simply indicates for the reasons as stated on the record, this is the Court's ruling.

Mr. Herron, you have 30 days to file a notice of appeal. If you can't afford a lawyer, I would appoint a lawyer.

Mr. Ufferman, are you planning to continue to represent him on appeal?

MR. UFFERMAN: I don't know, Your Honor, but I will represent that if he decides to go in a different direction but indicates he'd like to pursue an appeal, I will take care of filing the notice of appeal and filing the appropriate paperwork if he's indigent.

THE COURT: You'll perfect the record. If you decide that you're not able to proceed on with it, I would ask that you get an affidavit from him to see whether he qualifies for the services of the public defender. I mean, I think there are issues here that I would -- I am willing to give him an attorney on appeal, if you choose not to represent him.

MR. UFFERMAN: I will perfect the record, Your Honor.

THE COURT: All right. I'll need to retrieve the transcripts, Madam Clerk. And those have been made part of the record. I think that was clear enough.

Anything else?

MR. UFFERMAN: Your Honor, I believe the order to transport says that Mr. Herron should go back to DOC.

And, if not, I would make that request. And if there's anything I need to do to make that happen --

THE COURT: Thank you. Madam Clerk, would you reflect that Mr. Herron can be returned to the Department of Corrections?

THE CLERK: Yes, sir.

MR. UFFERMAN: Thank you, Your Honor.

THE COURT: All right. We'll be in recess.

(Court adjourned at 3:33 p.m.)

CERTIFICATE

STATE OF FLORIDA:

COUNTY OF LEON:

I, JULIE L. DOHERTY, Registered Merit Reporter, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED this 8th day of December, 2017.

Julie L Doherty

JULIE L. DOHERTY, RMR
OFFICIAL COURT REPORTER
LEON COUNTY COURTHOUSE
TALLAHASSEE, FLORIDA 32301