CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

TINA LASONYA BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITIONER'S APPENDIX

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Exhibit 1

304 So.3d 243
Supreme Court of Florida.

Tina Lasonya BROWN, Appellant,
v.
STATE of Florida, Appellee.
Tina Lasonya Brown, Petitioner,
v.
Mark S. Inch, etc., Respondent.

No. SC19-704
|
No. SC19-1419
|
August 27, 2020

Synopsis
Background: Defendant was convicted in the County Court, Escambia County, Gary L. Bergosh, J., of first-degree murder and sentenced to death. Defendant appealed. The Supreme Court, 143 So.3d 392, affirmed. The County Court, Escambia County, Bergosh, J., denied defendant's motion to vacate her conviction. Defendant appealed and petitioned for writ of habeas corpus.

Holdings: The Supreme Court held that:

[1] defendant could not establish actual bias required to prove that she was prejudiced by trial counsel's failure to challenge juror for cause;

[2] counsel was deficient in failing to call witness to impeach alleged accomplice's trial testimony;

[3] substantial evidence supported postconviction court's finding that counsel was not deficient in failing to present inmate's testimony about her observations of defendant in jail;

[4] defendant failed to show cumulative prejudice arising from trial counsel's alleged deficiencies;

[5] trial court's error in summarily denying defendant's claim that she was entitled to relief from her death sentence because jury did not unanimously find existence of statutory aggravating circumstance beyond reasonable doubt was harmless; and

[6] prosecutor's statement during rebuttal closing argument that defendant was "cold-blooded murderer" did not amount to fundamental error.

Affirmed; habeas petition denied.

Canady, C.J., concurred in result with opinion.

West Headnotes (48)

[1] Criminal Law Deficient representation and prejudice in general

To prevail on an ineffective assistance of counsel claim, first, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards, and second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[2] Criminal Law Presumptions and burden of proof in general

Regarding deficiency prong of *Strickland* test for ineffective assistance claims, there is a strong presumption that trial counsel's performance falls within the wide range of reasonable professional assistance. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[3] Criminal Law Adequacy of Representation

Fair assessment of attorney performance under deficiency prong of ineffective assistance claim requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[4] **Criminal Law**Presumptions and burden of proof in general
Criminal Law Strategy and tactics in general

Regarding deficiency prong of *Strickland* test for ineffective assistance claims, defendant bears the burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. U.S. Const. Amend. 6.

[5] **Criminal Law**Prejudice in general

Regarding prejudice prong, *Strickland* test for ineffective assistance claims requires defendants to show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6.

[6] **Criminal Law**Prejudice in general

"Reasonable probability" that, but for counsel's errors, the result of the proceeding would have been different, as would support prejudice prong of ineffective assistance claim, is a probability sufficient to undermine confidence in the outcome. U.S. Const. Amend. 6.

[7] **Criminal Law**Review De Novo
Criminal Law Counsel

Because deficiency and prejudice prongs of *Strickland* test for ineffective assistance claims present mixed questions of law and fact, the Supreme Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence but reviewing the circuit court's legal conclusions de novo. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[8] **Criminal Law**Jury selection

To establish the prejudice required by *Strickland*, where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[9] **Criminal Law**Jury selection

Under the actual bias standard for analyzing prejudice required by *Strickland* where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that the juror in question was not impartial, i.e., that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[10] **Criminal Law** Defense counsel

Defendant failed to show actual bias on part of juror who initially stated during voir dire that he had open mind as to appropriate penalty, but then explained that whether he would vote to impose death penalty would "depend on the evidence," and that if proven "without a shadow of a doubt," he would "go with the death penalty," as would support prejudice prong of postconviction claim that defense counsel was ineffective in failing to challenge juror for cause; juror did not voice disagreement when counsel later asked entire panel whether they agreed that it was not automatic that defendant be sentenced to death if found guilty of murder, or whether there was anyone on panel who would not be able to consider her personal circumstances when making decision as to recommend life or death. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[11] **Criminal Law** Impeachment or contradiction of witnesses

Defense counsel's alleged deficiency in failing to impeach alleged accomplice on cross-examination with her prior convictions for two petit thefts and two felony failures to appear did not prejudice defendant, in prosecution for first-degree murder, and thus could not amount to ineffective assistance; contrary to defendant's argument, impeaching accomplice with her prior convictions would not have opened door to further detail about underlying detail of those convictions, and at best, accomplice's responses would have resulted in records of her convictions being introduced into evidence. U.S. Const. Amend. 6; Fla. Stat. Ann. § 90.610(1).

[12] **Criminal Law** Defense counsel

Alleged accomplice was not questioned at postconviction evidentiary hearing about her alleged prior inconsistent statements, and thus, what she would have said if questioned about them during guilt phase of capital murder prosecution was speculative, and could not support postconviction relief on claim that trial counsel was ineffective in cross-examining accomplice because he failed to impeach her with alleged inconsistent statements. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[13] **Criminal Law** Defense counsel

Trial counsel was not deficient in failing to impeach alleged accomplice, during cross-examination in guilt phase of capital murder trial, through evidence that she was biased due to her husband's affairs with defendant and victim, and thus had motive to kill victim and blame defendant, as would support postconviction claim for ineffective assistance of counsel; accomplice denied knowledge of husband's affairs when questioned about them at postconviction evidentiary hearing, and trial counsel could not be ineffective for failing to elicit information from accomplice that accomplice denied existed. U.S. Const. Amend. 6.

[14] **Criminal Law** Post-conviction relief

Defendant's argument, on appeal of denial of postconviction relief, that trial counsel was ineffective during his cross-examination of defendant's fellow inmate, in guilt phase of capital murder prosecution, because he failed to impeach her with her prior convictions was procedurally barred, where defendant 's argument was not included in her postconviction motion. U.S. Const. Amend. 6.

[15] **Criminal Law** Defense counsel

Fellow inmate did not testify at evidentiary hearing on defendant's postconviction motion, and thus, what she would have said if questioned about her jail records and statements made in her pretrial deposition was speculative, and could not support postconviction relief on claim that trial counsel was ineffective in cross-examining accomplice, during guilt phase of capital murder prosecution, because he failed to impeach her with jail records and deposition statements. U.S. Const. Amend. 6.

[16] **Criminal Law** Impeachment or contradiction of witnesses

Trial counsel was deficient, as element of ineffective assistance claim, in failing to call witness to impeach alleged accomplice's trial testimony, during guilt phase of capital murder prosecution, in order to lessen defendant's culpability, show that accomplice was ringleader, and corroborate similar powerful impeachment evidence from accomplice's husband; at pretrial deposition, witness testified that accomplice told him she had discovered that husband was having affair with victim, and that she had fought with victim about it two days prior to murder, and that on separate occasion, accomplice admitted to pouring gas on victim and to setting her on fire, and witness's testimony was consistent with counsel's trial strategy. U.S. Const. Amend. 6.

[17] **Criminal Law** Impeachment or contradiction of witnesses

Trial counsel was deficient, as element of ineffective assistance claim, in failing to call alleged accomplice's husband as witness at trial to impeach accomplice, during guilt phase of capital murder prosecution; husband's testimony about accomplice's statements would have impeached her trial testimony that she and victim were "real close friends" and other testimony in which she attempted to minimize her role in victim's murder and described defendant as ringleader, and husband's admission to having affairs with both defendant and victim could have been used to explain accomplice's motive for participating in murder and her bias for testifying and attempting to minimize her role in comparison with defendant's role. U.S. Const. Amend. 6.

[18] **Criminal Law** Presentation of witnesses

Counsel is generally not ineffective for deciding not to call a witness whose testimony will be harmful to the defendant. U.S. Const. Amend. 6.

[19] **Criminal Law** Defense counsel

Trial counsel was not deficient in failing to investigate and call alleged accomplice's fellow inmate as witness, during guilt phase of capital murder prosecution, about conversation inmate allegedly overheard in which accomplice confessed to victim's murder, as would support postconviction relief on ineffective assistance claim; even assuming trial counsel should have discovered information from fellow inmate, counsel testified at postconviction evidentiary hearing that he generally did not like to use "jailhouse snitches and rats" because they lied, and that he did not feel that having multiple witnesses testify that accomplice confessed would have been helpful for defendant's case. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[20] **Criminal Law** Defense counsel

Competent, substantial evidence supported postconviction court's finding that trial counsel was not deficient, as element of claim for

ineffective assistance, in failing to present, during guilt phase of capital murder prosecution, inmate's testimony about her observations of defendant in jail because it did not refute another inmate's testimony that defendant confessed to her early one morning; although inmate testified at postconviction hearing that, based on her observations of defendant while they were in jail together, defendant was not early riser, inmate admitted on cross-examination that it was possible defendant got up early at times. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[21] **Criminal Law** Specification of errors

Defendant failed to preserve for appeal her argument that postconviction court erred in ruling that entirety of evidence presented at evidentiary hearing with respect to trial counsel's alleged ineffectiveness regarding mitigation evidence, during penalty phase of capital murder trial, was either facially insufficient or unsubstantiated, where she challenged in her brief only postconviction court's alternative ruling that even if her claim were factually sufficient, mitigation alleged in her postconviction motion was cumulative to mitigation already presented at penalty phase. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[22] **Criminal Law** Right to counsel

Postconviction court did not err in ruling that portions of defendant's claim that trial counsel rendered deficient performance, as element of ineffective assistance, in investigating and presenting mitigation evidence, during penalty phase of capital murder trial, were facially insufficient, and that defendant failed to substantiate remaining portions of claim that related to named individuals; court correctly ruled that portions of defendant's motion failed to identify witnesses trial counsel was supposedly deficient for failing to discover, specific mitigation each would have provided, or how its absence prejudiced her were facially insufficient. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[23] **Criminal Law** Defense counsel

Competent, substantial evidence supported postconviction court's finding that trial counsel was not deficient, as element of claim for ineffective assistance, in failing to consult and present additional mental health experts to explain combined effects of polysubstance abuse, childhood trauma, and mental illness on defendant's brain, during penalty phase of capital murder prosecution; court found that record supported trial counsel's testimony at evidentiary hearing that she thought defense expert covered defendant's life history from the beginning to time of the crime, and linked defendant's life history to crime itself. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[24] **Criminal Law** Defense counsel

Defendant failed to show cumulative prejudice arising from trial counsel's alleged deficiencies, in guilt and penalty phases of capital murder prosecution, including failing to use available impeachment evidence of alleged accomplice's prior convictions, and failing to call additional witnesses to impeach accomplice's trial testimony and implicate her as ringleader, and thus she was not entitled to postconviction relief on ineffective assistance claim; likelihood that jury placed high value on accomplice's testimony was suspect, despite describing herself as victim and minimizing her role in victim's murder, and evidence of defendant's involvement and culpability in murder under both theories of premeditated and felony murder was overwhelming. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[25] **Privileged Communications and Confidentiality**Experts and professionals in general

Email from alleged accomplice's trial attorney to accomplice's mitigation specialist fell within attorney-client privilege, and thus was inadmissible, in prosecution for capital murder. Fla. Stat. Ann. § 90.502(2).

[26] **Criminal Law**Theory and Grounds of Decision in Lower Court

Appellate court may affirm a correct result reached by a lower court for any reason that is supported by the record, even if it is not the reason the lower court articulated for its ruling.

[27] **Criminal Law**Reply briefs

Defendant waived on appeal her argument that postconviction court erred in failing to consider witness's testimony as newly discovered evidence of alleged accomplice's motive for and role in victim's murder, and accomplice's pattern of violent conduct against those with whom her significant others "cheated," where defendant waited until her reply brief to challenge postconviction court's ruling on that issue. Fla. R. Crim. P. 3.851(e)(1).

[28] **Criminal Law**Newly discovered evidence

A defendant cannot plead a claim of newly discovered evidence on postconviction review without alleging that the specific evidence at issue could not have been discovered at trial with due diligence and that the specific evidence at issue is of such a nature that it would probably produce an acquittal on retrial. Fla. R. Crim. P. 3.851(e)(1).

[29] **Criminal Law**Newly discovered evidence

A claim of newly discovered evidence, as would support postconviction relief, is governed by the following two-part test: first, in order to be considered "newly discovered," the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known of it by the use of diligence, and second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Fla. R. Crim. P. 3.851(e)(1).

[30] **Criminal Law**Newly discovered evidence

To reach conclusion that newly discovered evidence is of such a nature that it would probably produce acquittal at trial, postconviction court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial. Fla. R. Crim. P. 3.851(e)(1).

[31] **Criminal Law**Newly discovered evidence

Two-part test for analyzing postconviction claim of newly discovered evidence applies not only to the guilt phase of a first-degree murder trial, but also to the penalty phase; when the penalty phase is at issue, the second prong, namely, that newly discovered evidence must be of such

nature that it would probably produce an acquittal on retrial, requires a determination of whether the newly discovered evidence would probably yield a less severe sentence on resentencing. Fla. R. Crim. P. 3.851(e)(1).

[32] **Criminal Law** Newly discovered evidence

Purported testimony of alleged accomplice's fellow inmates that, while in prison, accomplice told one inmate, without remorse, that she personally set victim on fire because victim was sleeping with her "baby's dad," and that defendant and defendant's daughter "did not do anything," and that accomplice told another inmate that she killed someone and would do it again because people involved in case were sleeping with her husband, was newly discovered evidence supporting defendant's claim for postconviction relief from capital murder conviction; testimony amounted to additional pieces of evidence that had been discovered since trial and related to circumstances that existed at time of trial. Fla. R. Crim. P. 3.851(e)(1).

[33] **Criminal Law** Newly discovered evidence

Purported testimony of alleged accomplice's fellow inmate, that accomplice would fight women her prison girlfriend cheated on her with, was not newly discovered evidence that would support defendant's claim for postconviction relief from capital murder conviction; testimony pertained to distinct criminal acts committed by accomplice after trial that did not relate to circumstances existing at time of trial. Fla. R. Crim. P. 3.851(e)(1).

[34] **Criminal Law** Newly discovered evidence

Assessment of the second prong of two-part test for analyzing postconviction claim of newly discovered evidence, namely, that newly discovered evidence must be of such nature that it would probably produce acquittal on retrial, includes consideration of whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence, whether the evidence is cumulative to other evidence in the case, and the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. Fla. R. Crim. P. 3.851(e)(1).

[35] **Criminal Law** Newly discovered evidence

When evaluating whether newly discovered evidence on postconviction motion would probably result in an acquittal or a lesser sentence on retrial, court considers it in conjunction with not only the evidence already presented at trial but also any new evidence the movant has developed in postconviction proceedings that could be introduced at a new trial, including evidence that has not been considered on its own because it was the subject of a procedurally barred claim. Fla. R. Crim. P. 3.851(e)(1).

[36] **Criminal Law** Newly discovered evidence

In evaluating newly discovered evidence on a motion for postconviction relief, court examines the newly discovered evidence at issue in light of a total picture of the case that could be presented at a new trial. Fla. R. Crim. P. 3.851(e)(1).

[37] **Criminal Law** Newly discovered evidence

Newly-discovered testimony of alleged accomplice's fellow inmates that, while in prison, accomplice told one inmate, without remorse, that she personally set victim on fire because victim was sleeping with her "baby's dad," and that defendant and defendant's daughter "did not do anything," and that accomplice told another inmate that she killed someone and would do it again because people involved in case were sleeping with her husband, and she "set the girl on fire," was not of such nature that it would probably produce acquittal on retrial of capital murder charges, as required for postconviction relief; impeachment of accomplice would do little, if anything, to disturb evidence of felony murder. Fla. R. Crim. P. 3.851(e)(1).

[38] **Criminal Law** Newly discovered evidence

It could not be said that newly-discovered testimony of alleged accomplice's fellow inmates that, while in prison, accomplice told one inmate, without remorse, that she personally set victim on fire because victim was sleeping with her "baby's dad," and that defendant and defendant's daughter "did not do anything," would probably result in lesser sentence on resentencing, in capital murder prosecution, as required for postconviction relief; although there would be more substantial question as to whether defendant actually lit fire and acted as primary aggressor, all evidence that murder itself was heinous, atrocious, or cruel would still stand, and new evidence would not carry any significant probability of showing defendant to have been minor participant. Fla. R. Crim. P. 3.851(e)(1).

[39] **Criminal Law** Post-conviction relief

Postconviction court's error in summarily denying defendant's claim that she was entitled to relief from her death sentence because jury did not unanimously find existence of statutory aggravating circumstance beyond reasonable doubt was harmless; state argued at trial that defendant was guilty of first-degree murder under both premeditated and felony murder theories and presented uncontroverted evidence that capital felony was committed while defendant was engaged, or was accomplice, in commission of kidnapping, and any jury that found, based on state's presentation, that defendant was guilty of first-degree murder could not have logically concluded that she was not also guilty of kidnapping, whether as primary aggressor or accomplice. Fla. R. Crim. P. 3.851.

[40] **Habeas Corpus** Post-trial proceedings; sentencing, appeal, etc

In general, claims of ineffective assistance of appellate counsel are properly presented in a petition for writ of habeas corpus. U.S. Const. Amend. 6.

[41] **Criminal Law** Preservation of error for appeal
Criminal Law Raising issues on appeal; briefs

Appellate counsel is not ineffective for failing to raise meritless claims or issues on appeal that were not properly raised in the trial court and are not fundamental error. U.S. Const. Amend. 6.

[42] **Criminal Law** Necessity of Objections in General

Error is considered "fundamental" if it reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have

been obtained without the assistance of the alleged error.

[43] **Criminal Law**🔑Particular statements, arguments, and comments
Criminal Law🔑Preservation of error for appeal

Prosecutor's statement during rebuttal closing argument in capital murder prosecution that defendant was "cold-blooded murderer" did not amount to fundamental error, and thus appellate counsel was not ineffective in failing to raise unpreserved prosecutorial misconduct claim on direct appeal; although prosecutor likely crossed line, statement was single occurrence. U.S. Const. Amend. 6.

[44] **Criminal Law**🔑Particular statements, arguments, and comments
Criminal Law🔑Preservation of error for appeal

Even if prosecutor's rhetorical question during rebuttal closing argument in capital murder prosecution, asking how state's witness would have learned information about victim's murder apart from gaining it from defendant, was improper, statement was not so prejudicial as to vitiate entire trial, as would amount to fundamental error, and thus appellate counsel was not ineffective in failing to raise unpreserved prosecutorial misconduct claim; although jury did not know witness had stated in pretrial deposition, at which prosecutor was present, that she had "heard on the news" that a "girl" was "lit on fire," prosecutor's argument could be viewed as properly directed at specific information about murder witness testified at trial to having learned from defendant, including names of individuals involved. U.S. Const. Amend. 6.

[45] **Criminal Law**🔑Inferences from and Effect of Evidence
Criminal Law🔑Appeals to Sympathy or Prejudice

Prosecutor's statement during closing argument in capital murder prosecution that defendant "baited" victim "into the lion's den by telling her things were okay" did not cross line into improper inflammatory argument; rather, prosecutor asked jury to make permissible inference based on evidence that defendant lured victim into her home under false pretenses.

1 Cases that cite this headnote

[46] **Criminal Law**🔑Appeals to sympathy or prejudice

Prosecutor did not improperly belittle defense counsel, during closing argument in capital murder prosecution, by disparaging his argument that defendant was not guilty of first-degree murder, as would amount to prosecutorial misconduct; rather, prosecutor permissibly explained why defense counsel's arguments seeking a conviction of second-degree murder were not supported by the evidence adduced at trial.

1 Cases that cite this headnote

[47] **Criminal Law**🔑Comments on evidence or witnesses

Prosecutor did not improperly vouch for credibility of state witnesses, during closing argument in capital murder prosecution, by asking what motive one witness had to make up her testimony and what other witness had to gain by testifying, as would amount to prosecutorial misconduct; rather, prosecutor's arguments were proper response to defense

counsel's credibility attacks on those witnesses in light of evidence presented at trial.

1 Cases that cite this headnote

[48] **Criminal Law** Appeals to sympathy or prejudice

Prosecutor did not improperly demand justice for victim or victim's family during closing argument in capital murder prosecution, as would amount to prosecutorial misconduct; rather, prosecutor's reference to "justice" was fairly read as response to defense counsel's explanation of jury's role, and it was made in context of addressing verdict that was required when state met its burden to prove guilt beyond a reasonable doubt.

***251** An Appeal from the Circuit Court in and for Escambia County, Gary L. Bergosh, Judge - Case No. 172010CF001608XXXAXX And an Original Proceeding – Habeas Corpus

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Ashley Moody, Attorney General, and Michael T. Kennett, Assistant Attorney General, Tallahassee, Florida, for Appellee/Respondent

Opinion

PER CURIAM.

Tina Lasonya Brown appeals the circuit court's order denying her motion to vacate her conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851, and she also petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons below, we affirm the circuit court's denial of postconviction relief and deny Brown's habeas petition.

I. BACKGROUND

The facts of this case, including the overwhelming evidence of Brown's guilt, were set out in this Court's opinion on direct appeal. *See Brown v. State*, 143 So. 3d 392, 395-402 (Fla. 2014). There, we explained that the evidence presented at trial established that Brown; her daughter, Britnee Miller; and her neighbor Heather Lee lived in the same mobile home park as the victim, Audreanna Zimmerman. *Id.* at 395. In March 2010, Miller and the victim had an altercation during which Miller attempted to strike the victim and the victim defended herself with a stun gun. *Id.* Thereafter,

> on March 24, 2010, Brown invited Zimmerman to her home under the guise of rekindling their friendship. Before Zimmerman arrived, Brown, Miller, Lee, and Miller's thirteen-year-old friend, [M.A.,] were inside the trailer. Brown and Lee were in the kitchen, where Lee instructed Brown on the proper use of a stun gun. Miller then pulled her friend aside and told her, "[W]e're fixing to kill Audreanna [Zimmerman]." Shortly after 9 p.m., Zimmerman entered the trailer. Brown waited several minutes and then used the stun gun on Zimmerman multiple times. When Zimmerman lost muscular control and fell to the floor, Brown continued to use the stun gun on Zimmerman, who was screaming and crying for help. Eventually, Brown pulled Zimmerman across the trailer into the bathroom. Zimmerman continued to scream and cry for help, so Miller struck Zimmerman in the face and Lee stuffed a sock into Zimmerman's mouth. Zimmerman was then forcibly escorted outside and forced into the trunk of Brown's vehicle.[n.2] Brown, Miller, and Lee then entered the vehicle and drove away.
>
> [N.2]. During trial, Lee disputed this summation of what occurred in the trailer after Brown began to attack Zimmerman. The veracity of Lee's testimony concerning her involvement in this crime, however, was significantly challenged during trial, particularly because Lee, who claimed that she was a victim and was not involved in Zimmerman's murder, *pled guilty* to second-degree murder based on her involvement in Zimmerman's death.

Id. at 395-96.

The record shows that when M.A. was asked at trial why

she did not intervene as ***252** Zimmerman was being attacked at Brown's trailer, M.A. testified that she was afraid that "[i]f all three of them [were] going to do it, they could do the same thing to [her]." M.A. further testified that Brown was the primary aggressor based on her observations at the trailer, although she said that Lee participated by putting a sock in the victim's mouth. According to M.A.'s trial testimony, Brown used the stun gun on the victim, held the victim's hands behind her back, led the victim to Brown's car, and forced the victim into the trunk. M.A. also testified that as Brown was attacking the victim with a stun gun, Brown screamed, "Did you call Crime Stoppers on me?"

Leaving M.A. behind at the trailer, Brown drove her car, with Miller and Lee inside and the victim in the trunk, "to a clearing in the woods about a mile and a half from the trailer park." *Brown*, 143 So. 3d at 396. According to Lee's trial testimony, the following events occurred once the women arrived at the clearing in the woods:

> Brown exited the car and pulled Zimmerman out of the trunk. Zimmerman attempted to flee, but stumbled in the darkness and was caught by Brown and Miller. The two women wrestled Zimmerman to the ground and simultaneously attacked her. Brown used the stun gun again on Zimmerman as Miller beat her with a crowbar. Brown and Miller then switched weapons and continued to torture and beat Zimmerman. Miller eventually dropped the stun gun and repeatedly punched Zimmerman. Brown returned to the car, retrieved a can of gasoline from the trunk, and walked back toward the beaten and prone, but still conscious, Zimmerman. Brown poured gasoline on Zimmerman, retrieved a lighter from her pocket, set Zimmerman on fire, and stood nearby to watch the screaming Zimmerman burn. Lee testified that she was standing beside Miller, who exuberantly jumped up and down and screamed, "Burn, bitch! Burn!" After a few minutes, the three women returned to the car and drove away. During the ride home, Miller said, "Mom, you've got to turn around. I left my shoes and the taser." Brown, however, refused to return to the location of the event.

Id.

After Brown, Lee, and Miller left the scene of the burning, they returned to Brown's trailer. *Id.* at 397. There,

> Brown and Miller removed their bloodstained clothing and placed it in a garbage bag. Lee removed her shoes, which were also stained with blood, and placed them in the bag. Miller informed her friend, [M.A.], who had remained at the trailer during the attack, that she had injured her hand striking Zimmerman, and that the three women had set Zimmerman on fire. Miller and [M.A.] then used Brown's car to drive to the hospital to get medical care for Miller.

Id.

Meanwhile, Zimmerman, who had not immediately succumbed to her wounds, walked about one-third of a mile to a neighboring home and asked for assistance. *Id.* at 396.

> At 9:24 p.m., an emergency medical technician (EMT) arrived at the scene. When the EMT approached Zimmerman, he observed her sitting on the porch, rocking back and forth with her arms straight out. Due to the extensive nature of Zimmerman's burns, the EMT testified that he could not initially identify whether she was wearing clothing. The EMT noticed that Zimmerman's skin was falling off her body, and he believed that over ninety percent of her body was burned. She had severe head ***253** trauma, and her jaw was either broken or severely dislocated. The EMT explained that the extent and severity of the burns prevented him from providing Zimmerman medical assistance. He testified that while he generally placed sterile gauze and oxygen on burns, he did not have enough gauze to cover her entire body. He attempted to stabilize her neck, but her skin was charred to such an extent that he could not touch Zimmerman without her skin rubbing off onto his gloves.
>
> Despite her injuries, Zimmerman was conscious and alert. She identified Brown and Lee as her attackers and told the EMT that she was "drug out of the house, tased, beaten in the head with a crowbar, and then set on fire." She also provided her address as well as the addresses of her attackers, and asked the EMT to protect her children. The ambulance arrived within a few minutes and transported Zimmerman to the hospital. Inside the ambulance, Zimmerman repeatedly asked if she was going to recover. She told the paramedic that Brown, Miller, and Lee poured gasoline on her and set her on fire. She also stated that she "thought they had made up." Zimmerman was stabilized at a local hospital and then transferred to the Burn Center at the University of South Alabama Hospital in Mobile, Alabama, where she died sixteen days later.

Id. at 396-97.

Based on the information provided by Zimmerman, Brown and Lee were arrested the night of attack, and Miller was arrested when she returned home from the hospital the next day. *Id.* at 397. However, all three were released while Zimmerman was still in the hospital. *Id.*

> During that time, Brown informed her friend Pamela Valley that she, Miller, and Lee had beaten Zimmerman, forced her into a car, driven her to an open field and "lit her on fire and didn't look back." A few days later, Brown informed Valley that Zimmerman was still alive and requested Valley to finish her off. Valley declined and later reported the conversation to law enforcement.

Id.

On April 9, 2010, the day that Zimmerman died as a result of multiple thermal injuries, Brown, Miller, and Lee were rearrested. *Id.* The State charged Brown with first-degree murder under both theories of premeditated and felony murder with kidnapping as the underlying felony.[1]

At trial, Brown's jury heard that, while Brown was awaiting trial in jail, she made statements to a fellow inmate, Corie Doyle, that were indicative of her state of mind following the altercation between her daughter and Zimmerman. *Id.* at 395 n.1. Specifically, Doyle testified at trial that Brown told her Zimmerman had used a stun gun on her daughter, Miller, and that when Brown had heard about it, she "informed Miller, '[D]on't worry, I'll take care of it.' " *Id.* Doyle also testified that she and Brown had a conversation early one morning during which Brown confessed her involvement in the murder. According to Doyle, at that time, Brown admitted that "they picked up the victim and beat her up and tazed her and set her on fire." When asked who "they" were, Doyle testified that it was "[Brown] and her daughter [Miller]" and that Heather Lee was there but that "she didn't have anything to do with it." When asked if she knew who Lee was at the time of this conversation, Doyle answered, "No. I have never laid eyes on her." Doyle further testified that she was ***254** eventually transferred and ended up housed with Lee.

In addition, Brown's jury heard that law enforcement had discovered physical evidence at the scene of the burning, "including a pair of white shoes; a stun gun with blood on the handle; paper stained with blood; an orange, gold, and black hairweave [that matched a large section missing from the back of Brown's hair]; a crowbar; and a pool of blood." *Id.* at 397 (footnote omitted). The jury also heard that blood discovered on the passenger seat headrest of Brown's vehicle matched Zimmerman's DNA profile, and that the blood on the stun gun matched Brown's DNA profile. *Id.*

Based on the evidence presented at trial, Brown's jury found her guilty of first-degree murder as charged. *See id.* at 397.

The case then proceeded to the penalty phase, where Brown presented evidence of mitigating circumstances through several family members and her mental health expert, Dr. Elaine Bailey. *Id.* at 397-400. Brown's penalty-phase presentation focused on how her traumatic background affected her and shaped her actions on the night of the murder. *See id.* This evidence included that Brown had suffered a deprived childhood; physical and sexual abuse, including being raped by her father and prostituted by her stepmother; parental and other familial abandonment; drug addiction; and exposure to her father's drug-related, violent criminal lifestyle as a child. *See id.* It also included evidence that, as an adult, Brown had experienced physically and sexually abusive relationships, including domestic abuse; and that she had struggled with addiction, particularly to crack cocaine, to the point that she lost custody of two of her children. *See id.* at 399.

Additionally, evidence regarding Lee's role in the crime factored into Brown's penalty-phase argument. For example, during the guilt phase, in addition to challenging Lee's denial of her role in the murder through cross-examination, trial counsel called Wendy Moye, a fellow inmate of Lee's, who testified that Lee admitted to her that she was the one who lit the victim on fire, that the group had gotten the victim into the car by telling her that they were going to the grocery store, and that the beating started in the car. Although Brown relied on this and other evidence to argue that Lee may have been more culpable and yet was allowed to plead guilty to second-degree murder, the jury heard from Dr. Bailey that "Brown did not deny her involvement in the murder, and that Brown felt remorseful for her actions." *Id.* at 400. More specifically, the penalty-phase record reveals that Dr. Bailey testified that Brown had described Lee as "the escalator" and further testified about "the impact of social mediation," telling the jury that if they "believe[d] that [Lee] was more involved in [the crime]" than she claimed, then "[t]here was social mediation going [o]n, social influence, and group-mediated emotion" that "makes more extreme behavior." However, Dr. Bailey said that it was not her opinion that Brown "acted under extreme duress under Heather Lee" and testified that Brown did "not deny being an aggressor, being involved, ... [or] what she did" and that Brown "was very frank about her role" in the victim's murder during her evaluations.

The State's expert, Dr. John Bingham, also evaluated Brown and "found no evidence that Brown lacked the capacity to conform her conduct to the requirements of the law[ ] or that she exhibited diminished capacity in understanding the criminality of her conduct." *Brown,*

143 So. 3d at 400. He also opined that Brown "was not under extreme duress or experiencing an ***255** emotional disturbance at the time of the offense." *Id.* Dr. Bingham testified that "there was no indication" Brown's feelings of anger and rage "inhibited her ability to think clearly or to recognize right from wrong," that "Brown's actions on the night of the attack demonstrated preplanning, direction, and were goal[-]oriented," and that "while there was substantial trauma in Brown's life, there was no cause and effect relationship connecting Brown's past to her actions in murdering Zimmerman." *Id.*

Following the penalty-phase presentation, the jury unanimously recommended a sentence of death. *Id.* During the *Spencer*[2] hearing, records and letters, including a letter from one of Brown's friends, were introduced into evidence. *Id.* Brown "apologized to the victim's family," stated that the victim "died a horrific death," admitted that she "was one of the ones who participated in taking [the victim's] life," and said that the victim "didn't deserve it at all." *Id.* Thereafter, the trial court followed the jury's recommendation and sentenced Brown to death, finding that the aggravating circumstances outweighed the mitigating circumstances. *Id.* at 400-02.

In so doing, the trial court found that the State had proven beyond a reasonable doubt the existence of the following aggravating factors and assigned them the noted weight: "(1) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) (great weight); (2) the murder was especially heinous, atrocious, or cruel (HAC) (great weight); and (3) the murder was committed while Brown was engaged in the commission of a kidnapping (significant weight)." *Id.* at 401.

The trial court found one statutory mitigating circumstance, "that Brown had no significant history of prior criminal activity," and assigned it minimal weight. *Id.* The trial court considered but rejected the following four statutory mitigating circumstances: "(1) the crime was committed while Brown was experiencing an extreme emotional disturbance; (2) Brown was an accomplice in the crime and her participation was relatively minor; (3) Brown acted under extreme duress; and (4) the capacity of Brown to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was significantly impaired." *Id.* at 401 n.7.

The trial court also found twenty-seven nonstatutory mitigating circumstances and assigned them the noted weight:

> Specifically, the [trial] court found that Brown: (1) was the child of a teenage mother (minimal weight); (2) was neglected by both parents (some weight); (3) lost her childhood due to parental neglect (some weight); (4) was abandoned by her mother (some weight); (5) had a history of family violence (some weight); (6) was exposed to drugs during her adolescence (some weight); (7) suffered developmental damage due to her parents' use of and dependence on drugs (some weight); (8) was subjected to sexual violence inflicted by her father; (some weight); (9) was betrayed by a trusted family member (i.e., her grandmother) (some weight); (10) experienced corruptive community influences and exposure to a criminal lifestyle (some weight); (11) experienced chaotic moves and transitions (little weight); (12) was a victim of domestic violence during her adult life (some weight); (13) witnessed a violent homicide and served as a State witness in a murder trial (little weight); (14) lost her family (her parental rights were terminated for her two sons, and ***256** she has no relationship with her mother or father) (little weight); (15) suffered repeated trauma throughout her life (little weight); (16) suffered from drug addiction (little weight); (17) suffered from the long term effects of chronic cocaine use on her brain (some weight); (18) was a productive citizen during periods of sobriety (little weight); (19) was living in poverty at the time of the crime (minimal weight); (20) behaved well in jail (little weight); (21) conducted a [B]ible study program (little weight); (22) exhibited good courtroom behavior (little weight); (23) has no possibility of parole (little weight); (24) showed remorse (some weight); (25) received a different sentence than that of her codefendants (some weight)[n.8]; (26) had no history of prior criminal violence (moderate weight); and (27) was using cocaine on the day of the crime (moderate weight).
>
> [N.8] In finding th[e] mitigating circumstance [that Brown received a different sentence than that of her codefendants], the trial court noted that:
>
> > the three people involved in the murder of Zimmerman are not similarly situated. Despite her involvement in Zimmerman's murder, Britnee Miller cannot legally be sentenced to death as she was less than 18 years of age when the murder was committed. Heather Lee was convicted, pursuant to a negotiated plea agreement with the State, of second[-]degree murder. Heather Lee cannot legally be sentenced to death.
>
> (Citation omitted.)

Id. at 401 & n.8.

In sentencing Brown to death, the trial court "noted that

this case, 'particularly because of the heinous, atrocious, [or] cruel nature of the murder of Audreanna Zimmerman, falls into the class of murders for which the death penalty is reserved.' " *Id.* at 402.

On direct appeal, this Court affirmed Brown's conviction and sentence of death. *Id.* at 408.[3] Thereafter, the United States Supreme Court denied Brown's petition for a writ of certiorari. *Brown v. Florida*, 574 U.S. 1034, 135 S.Ct. 726, 190 L.Ed.2d 453 (2014).

In 2015, Brown filed an initial motion for postconviction relief, which was amended several times after being stricken for noncompliance with rule 3.851, and, in 2017, ultimately filed the third amended motion at issue in this appeal.[4] Following an evidentiary hearing, the circuit court denied relief on all of Brown's claims. Brown appeals the circuit court's denial of several of her claims, and she also petitions this Court for a writ of habeas corpus.

***257 II. POSTCONVICTION APPEAL**

A. Ineffective Assistance of Trial Counsel

Brown argues that trial counsel was ineffective in numerous respects during the jury selection, guilt, and penalty phases of her trial. Specifically, first, she argues that trial counsel was ineffective during jury selection for failing to strike juror Taylor for cause. Second, she claims that trial counsel was ineffective during the guilt phase (a) for failing to adequately challenge the State's evidence through cross-examination of witnesses Heather Lee and Corie Doyle and (b) for failing to present witnesses Darren Lee, Terrance Woods, and Nicole Henderson for purposes of impeachment. Third, she argues that trial counsel was ineffective during the penalty phase (a) for failing to conduct a reasonably competent mitigation investigation and present adequate mitigation and (b) for failing to consult and present additional mental health experts. Fourth, and last, she contends that the circuit court erred by denying her claim that, cumulatively, trial counsel's deficient performance during the guilt and penalty phases deprived her of a fundamentally fair trial.

[1]To prevail on an ineffective assistance of counsel claim following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant must satisfy two requirements:

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

Bolin v. State, 41 So. 3d 151, 155 (Fla. 2010) (quoting *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986)).

[2] [3] [4]Regarding *Strickland*'s deficiency prong, there is a "strong presumption" that trial counsel's performance "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)).

[5] [6]Regarding the prejudice prong, "*Strickland* requires defendants to show 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ... [A] 'reasonable probability' is a 'probability sufficient to undermine confidence in the outcome.' " *Henry v. State*, 948 So. 2d 609, 621 (Fla. 2006) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

[7]Because both prongs of *Strickland* present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004). "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other ***258** prong." *Zakrzewski v. State*, 866 So. 2d 688, 692 (Fla. 2003) (quoting *Waterhouse v. State*, 792 So. 2d 1176, 1182 (Fla. 2001)). "Where trial counsel is deficient in more than one area, however, we must 'consider the impact of these errors cumulatively to determine whether [the defendant] has established prejudice.' " *Sparre v. State*, 289 So. 3d 839, 847 (Fla. 2019) (quoting *Parker v. State*, 89 So. 3d 844, 867 (Fla. 2011)).

For the reasons below, we affirm the circuit court's denial

of postconviction relief.

(1) Jury Selection

Brown argues that trial counsel was ineffective for failing to strike juror Taylor for cause because juror Taylor's voir dire responses indicate that he would automatically vote for the death penalty if Brown was convicted of first-degree murder. We disagree.

[8] [9]To establish the prejudice required by *Strickland*, "where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased." *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). "Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial—*i.e.*, that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record." *Id.* Moreover, to establish actual bias, the record must show "something more than mere doubt about [the] juror's impartiality." *Mosley v. State*, 209 So. 3d 1248, 1265 (Fla. 2016).

[10]When the record in this case is viewed as a whole, Brown cannot make the requisite showing of actual bias. Juror Taylor initially stated that he had an open mind as to the appropriate penalty. Subsequently, juror Taylor was asked if his response to defense counsel's question as to whether he could put aside his personal feelings, follow the judge's instructions, and consider the evidence before imposing the death penalty was "the same" as that of another prospective juror who had answered, "I could do that." Juror Taylor responded, "No," and then he explained his answer by stating that whether he would vote to impose the death penalty would "depend[ ] on the evidence" and that "[i]f it's proven without a shadow of a doubt, [he] would go with the death penalty."

Although that response arguably supports Brown's claim, the remainder of the record is to the contrary. For example, juror Taylor did not voice disagreement when trial counsel later asked the entire panel, "Do each of you agree that it's not automatic that [Brown] get the death penalty ... if [Brown] would be found guilty of first-degree murder. ... It's not automatic that she get the death penalty?" Similarly, juror Taylor did not voice disagreement with trial counsel's subsequent follow-up question to the entire panel as to whether there was anyone on the panel who would not be able to "consider the personal circumstances and background of the Defendant when you're making the decision as to whether to recommend life or death." Moreover, when trial counsel specifically questioned juror Taylor regarding his opinion of mental health professionals and the validity of the profession, juror Taylor was not dismissive of this type of mitigation and instead stated, "I would assume it's pretty valid."

On this record, at best, one of juror Taylor's voir dire responses raised some doubt as to his impartiality—doubt that is not enough to establish the requisite prejudice, *see Mosley*, 209 So. 3d at 1265, and that, in any event, is dispelled when the voir dire record is considered as a whole. ***259** Accordingly, because Brown cannot establish the actual bias required to prove that she was prejudiced by trial counsel's failure to challenge juror Taylor for cause, we affirm the circuit court's denial of relief. *See Carratelli*, 961 So. 2d at 324.

(2) Guilt Phase

Brown next argues that trial counsel was ineffective during the guilt phase (a) for failing to adequately challenge the State's evidence through cross-examination of witnesses Heather Lee and Corie Doyle and (b) for failing to present witnesses Terrance Woods, Darren Lee, and Nicole Henderson for purposes of impeachment.

(A) Cross-Examination of Witnesses

Heather Lee

Brown first argues that trial counsel's cross-examination of Heather Lee was ineffective because trial counsel failed to impeach Lee in several respects.

Prior Convictions

[11]First, Brown argues that trial counsel was ineffective in cross-examining Lee because he failed to impeach Lee with her prior convictions for two petit thefts and two felony failures to appear. Brown argues that if Lee had opened the door when questioned as to the existence and number of her prior convictions, trial counsel could have inquired further into the details underlying those convictions and used that information to argue that the

jury should not believe Lee's testimony and should instead believe that Lee was more culpable than Brown for the victim's murder due to Lee's violent history.

As an initial matter, the record refutes Brown's argument that impeaching Lee with her prior convictions would have opened the door to further inquiry about the underlying details of those convictions. Lee was questioned about her prior convictions at the evidentiary hearing, and postconviction counsel did not attempt to make such a record based on Lee's responses. Moreover, at best, Lee's responses would have resulted in the records of her convictions being introduced into evidence. *See Tilus v. State*, 121 So. 3d 1145, 1149 (Fla. 4th DCA 2013) ("The proper method to impeach a witness who provides inaccurate or misleading information regarding prior convictions is to admit certified copies of the convictions.").

Nevertheless, although Lee's prior convictions could not have been used to the extent Brown argues, they constitute available impeachment evidence that went unused by trial counsel. *See* § 90.610(1), Fla. Stat. (2019). However, we need not "delve into" whether Brown has made a showing as to the deficiency prong because there is no prejudice for the reasons explained below in our cumulative prejudice analysis. *Zakrzewski*, 866 So. 2d at 692.

Prior Inconsistent Statements

[12]Second, Brown argues that trial counsel was ineffective in cross-examining Lee because he failed to impeach Lee with four alleged prior inconsistent statements. First, she argues that trial counsel should have impeached Lee's trial testimony regarding her whereabouts on the day of the crime, namely that she went to Brown's trailer at approximately 9 p.m., with Lee's prior statements that she was around Brown's trailer between 3:15 and 3:45 p.m., but then went home to cook and visit with multiple family members. Second, Brown argues that trial counsel should have impeached Lee's trial testimony about who was present in the vehicle used to transport the victim and in the area where the victim was lit on fire—herself, Miller, and Brown—with her prior statement that M.A. was also present and that M.A. and Miller held her at the back of the vehicle while Brown pulled the victim out of the trunk. Third, Brown claims that trial counsel ***260** should have impeached Lee's trial testimony that she had not previously been to the area where the victim was lit on fire, but she could see the entrance to the area and the chains blocking it off, with her prior statement that she knew the area but it is usually blocked with strings to prevent people from entering. Fourth, and finally, Brown argues that trial counsel should have impeached Lee's trial testimony that she "guess[ed]" her shoes were bloody because she stepped in some blood while running with her prior statement that she "guess[ed]" blood flew on her when the victim was being attacked, although she was not taking part in it. Brown contends that trial counsel's deficient cross-examination prejudiced her because her jury did not hear additional evidence that it could have used to conclude that Lee was a liar.

However, Lee was not questioned at the postconviction evidentiary hearing about her alleged prior inconsistent statements on any of these subjects. Therefore, "what [she] would have said if questioned about [them] ... is speculative and, thus, cannot support postconviction relief." *Calhoun v. State*, Nos. SC18-340 & SC18-1174, —— So.3d ——, ——, 2019 WL 6204937, at *9 (Fla. Nov. 21, 2019). Accordingly, we affirm the circuit court's denial of relief with respect to all of these claims.

Bias

[13]Brown next argues that trial counsel was ineffective during her cross-examination of Lee by failing to impeach Lee through evidence of bias. *See* § 90.608(2). Specifically, Brown argues Lee's husband, Darren Lee, admitted during his pretrial deposition that he was sleeping with both the victim and Brown. She further argues that Terrance Woods testified during his pretrial deposition that Darren Lee was having an affair with the victim and that Heather Lee found out about it and got into a physical fight with the victim about it two days before the victim's murder. Brown argues that eliciting Lee's knowledge of her husband's affairs with both the victim and Brown during cross-examination would have established bias, namely Lee's motive to kill the victim and blame Brown. We affirm the denial of relief because Brown failed to present any evidence that would support this claim. Heather Lee denied knowledge of her husband's affairs when questioned about them at the postconviction evidentiary hearing. Trial counsel cannot be ineffective for failing to elicit information from Lee on cross-examination that Lee denies exists. However, we recognize that in addition to challenging trial counsel's cross-examination of Heather Lee, Brown argues that trial counsel was ineffective for failing to call Darren Lee and Terrance Woods to impeach Lee about this and other subjects, and we address those claims below.

Lee's Failure to Open the Door for Police

Brown further argues that trial counsel was ineffective in cross-examining Lee by failing to use Darren Lee's pretrial deposition testimony to discredit Lee's trial testimony that she did not open the door for the police because Brown told her not to. In his pretrial deposition, Darren Lee testified that no one opened the door because he was high. However, Brown cites no authority for her argument that trial counsel could have admitted Darren Lee's deposition testimony to impeach Heather Lee's trial testimony about why she did not open the door for police. To the extent Brown argues that trial counsel should have called Darren Lee as a witness to attack Lee's credibility by showing that the facts as to why Lee failed to open the door were not as Lee testified, *see* § 90.608(5), we address the argument that trial counsel was ineffective for failing to ***261** call Darren Lee as a witness to impeach Lee on this and other subjects below.

Corie Doyle

[14] [15]Brown next argues that trial counsel was ineffective during his cross-examination of Corie Doyle because he failed to impeach Doyle with her prior convictions, jail records, and deposition statements.[5] However, Brown's argument regarding Doyle's prior convictions was not included in her postconviction motion and is therefore procedurally barred. *See Thompson v. State*, 759 So. 2d 650, 667 n.12 (Fla. 2000) (holding claim "procedurally barred because it was not alleged in the postconviction motion filed in the trial court"). Regarding the jail records, Brown claims that trial counsel could have used them to impeach Doyle's testimony that Brown confessed to her before she had ever seen Lee. Brown explains that the records would show that Doyle was housed with Lee before she was housed with Brown and that this information undermines Doyle's claim never to have seen Lee before when this information is considered along with (a) Doyle's testimony that she approached Brown because Brown's jumpsuit was an eyecatching color and (b) other evidence that Lee's jumpsuit was the same color as Brown's. Regarding Doyle's pretrial deposition, Brown claims that trial counsel failed to impeach Doyle with statements that would have shown Doyle learned about the murder from the news and embellished the details on her own, including Doyle's deposition testimony that Brown told her Miller caught herself on fire. However, because Doyle did not testify at the evidentiary hearing, "what [Doyle] would have said if questioned" about the jail records and statements made in her pretrial deposition "is speculative and, thus, cannot support postconviction relief." *Calhoun*, —— So.3d at ——, 2019 WL 6204937, at *9. Accordingly, we affirm the postconviction court's denials with respect to these claims.

(B) Failure to Present Impeachment Witnesses

Terrance Woods

[16]Brown next argues that trial counsel was ineffective for failing to call Terrance Woods. Specifically, she argues that by calling Woods to impeach Heather Lee's trial testimony, trial counsel would have been able to lessen Brown's culpability, show that Heather Lee was the ringleader, and corroborate similar powerful impeachment evidence available from Darren Lee. We agree that trial counsel was deficient for failing to call Woods.

At his pretrial deposition, Woods testified that Heather Lee told him she had discovered that her husband, Darren Lee, was having an affair with the victim, and that she had gotten into a fight with the victim about it two days prior to the murder. On the day of the fight, Woods heard Heather Lee say, "I'm going to kill the bitch." On a separate occasion, after the victim's murder, Woods stated that Heather Lee admitted to him and Darren Lee that "all three of them"—referring to herself, ***262** Brown, and Miller—"got the girl, we took her, we beat her up, set her on fire." Woods further stated that Lee admitted to pouring gas on the victim and to setting her on fire.

At the postconviction evidentiary hearing, Woods testified consistently with his deposition.[6] Although trial counsel generally testified that his strategy was to blame Heather Lee as much as possible without losing credibility with the jury by saying that Brown was not involved, trial counsel would not take a position as to whether calling Woods as a witness would have been helpful to Brown's case. When pressed, trial counsel stated, "Unless I didn't believe him," but he did not testify that he had actual knowledge that Woods was lying, or even that he actually did not believe Woods. Like many of the witnesses in this case, Woods was subject to impeachment with prior felony convictions, and the record shows that he was in prison at the time of Brown's trial and hoped to benefit from his testimony. However, because the record shows that Woods' testimony was consistent with trial counsel's stated strategy, and when pressed on the issue, trial counsel could not articulate a reasonable strategy for failing to call Woods, we hold that

trial counsel was deficient for failing to do so. *See Schoenwetter v. State*, 46 So. 3d 535, 554 (Fla. 2010) ("Reasonable decisions regarding trial strategy, made after deliberation by a claimant's trial attorneys in which available alternatives have been considered and rejected, do not constitute deficient performance under *Strickland*.").

Because, as explained below, we find trial counsel deficient in an additional respect, we address prejudice cumulatively.

Darren Lee

[17]Brown next argues that trial counsel was ineffective for failing to call Darren Lee. Specifically, Brown argues that, after Terrance Woods testified at his pretrial deposition about incriminating statements Heather Lee made to himself and Darren Lee before and after the murder, no reasonable trial counsel would have failed to re-depose Darren Lee and call him as a witness at trial to impeach Heather Lee. Brown also argues that Darren Lee could have impeached Heather Lee's testimony as to why she did not open the door for the police, further discrediting Lee's attempts to paint Brown as the ringleader. We agree that trial counsel was deficient for failing to call Darren Lee.

Trial counsel testified at the postconviction evidentiary hearing that he could not see Darren Lee providing any useful information. However, when Darren Lee testified at the evidentiary hearing, he admitted to having affairs with both Brown and the victim, and he also testified to the statements that Heather Lee made to him in the presence of Terrance Woods. Darren Lee's testimony was consistent with that of Terrance Woods. Specifically, Darren Lee testified that before the victim's murder, after Heather Lee came home following a fight with the victim, she told him that he "won't be sleeping with that bitch." After the victim's murder, according to Darren's testimony, Heather Lee described how the victim begged for her life and claimed to have been the one who poured gas on the victim and lit her on fire. Finally, although Heather Lee testified during trial that she did not open the door for police following the victim's murder because Brown told her not to, during his pretrial deposition, Darren Lee stated ***263** that no one opened the door for the police because he was high.

[18]Trial counsel testified at the postconviction evidentiary hearing that he did not think it would have been helpful to Brown's case or to the impeachment of Heather Lee to have Darren Lee testify, as Darren Lee had spoken to the police three times and never told them that Heather Lee confessed. Generally, "counsel is not ineffective for deciding not to call a witness whose testimony will be harmful to the defendant." *Diaz v. State*, 132 So. 3d 93, 109 (Fla. 2013).

However, we fail to see—and the record is silent regarding—how calling Darren Lee to testify at trial would have been inconsistent with trial counsel's stated strategy to place as much blame on Heather Lee as possible without having the jury think he was trying to "scam" them by saying that Brown was not involved in the victim's murder. To the contrary, as Brown argues, Darren Lee's testimony about Heather Lee's statements would have impeached her trial testimony that she and the victim were "real close friends" and other testimony in which she attempted to minimize her role in the victim's murder and described Brown as the ringleader. Further, Darren Lee's admissions to having affairs with both Brown and the victim could have been used to explain Heather Lee's motive for participating in the murder and her bias for testifying and attempting to minimize her role in comparison to Brown's. Moreover, most of the available impeachment testimony from Darren Lee would have been corroborated by the available impeachment testimony from Terrance Woods, which we have already held that trial counsel was deficient for failing to present. *Cf. State v. Morrison*, 236 So. 3d 204, 220 (Fla. 2017) (ruling that there were sufficient facts to place trial counsel "on notice" that further investigation of the defendant's mental health and social background was required and that counsel's failure to investigate such defenses were "not reasonable under prevailing professional norms"). We similarly hold that trial counsel was deficient for failing to call Darren Lee, and in light of our holding that trial counsel was also deficient for failing to call Terrance Woods, we address prejudice cumulatively below.

Nicole Henderson

[19]In her last claim regarding trial counsel's guilt-phase representation, Brown argues that trial counsel was ineffective for failing to investigate and call Lee's fellow inmate Nicole Henderson as a witness at trial. At the postconviction evidentiary hearing, Henderson testified that while she was in jail with Lee, she overheard Lee talking to a third inmate about the victim's murder. According to Henderson, Lee told the other inmate that the murder happened because Lee's boyfriend had impregnated another lady and that Lee planned to "get

off" by blaming the murder on Brown and Miller with the help of two juveniles who were being housed with Miller. On cross-examination, Henderson testified that it sounded like Lee was bragging and that Lee had not said how she planned to contact the two juveniles. Henderson also testified that Lee had gotten into a fight with Henderson's sister because Lee's boyfriend wanted to have sex with her. Finally, Henderson testified to her observations of Brown in jail, including that she did not see Brown awake or out of her cell early in the mornings.

Brown argues that trial counsel was ineffective for failing to discover and use Henderson's testimony about the conversation Henderson overheard to impeach Lee, for failing to use Henderson's testimony ***264** regarding the fight as reverse *Williams*[7] rule evidence, and for failing to use Henderson's observations of Brown while they were in jail together to refute Corie Doyle's trial testimony that Brown confessed to her early one morning. We affirm the circuit court's denial of relief.

As an initial matter, Brown failed to establish a fact critical to all three of her arguments, namely that trial counsel should have discovered the information available from Henderson before trial. To the contrary, at the postconviction evidentiary hearing, trial counsel denied having knowledge that Lee had confessed to any inmate while in jail, except Wendy Moye. Also, Henderson testified at the evidentiary hearing that she did not tell anyone about Lee's confession when it occurred, and Henderson was not asked whether she told anyone about Lee's fight with her sister or about her observations of Brown.

However, even assuming that trial counsel should have discovered this information from Henderson, trial counsel testified at the evidentiary hearing that he generally does not like to use "jailhouse snitches and rats" because "[t]hey lie" and that he did not feel that having multiple witnesses testify that Lee had confessed would have been helpful for Brown's case. In light of the testimony about Lee's confession that the jury heard through Moye, the judgment call associated with presenting any witness, particularly one who is incarcerated, and trial counsel's strategy not to present testimony from multiple witnesses on the same topic, we cannot say that the record is devoid of competent, substantial evidence supporting the circuit court's finding that trial counsel was not deficient for failing to call Henderson to testify regarding Lee's statements to her. *Cf. Whitfield v. State*, 923 So. 2d 375, 380 (Fla. 2005) (explaining that "trial counsel have significant leeway in determining how to present [cumulative] evidence," in the context of addressing the claim that trial counsel was ineffective for failing to call additional witnesses to corroborate the defendant's voluntary intoxication defense).

Moreover, Henderson's testimony that Lee had gotten into a fight with Henderson's sister because Lee's boyfriend wanted to have sex with Henderson's sister would not have been admissible as reverse *Williams* rule evidence, even assuming that Brown preserved this argument, which she did not.[8] The circumstances of Lee's fight with Henderson's sister are not sufficiently similar to the circumstances of the victim's murder to constitute reverse *Williams* rule evidence. *See State v. Savino*, 567 So. 2d 892, 894 (Fla. 1990) (explaining that under the reverse *Williams* rule, a defendant may introduce evidence that another person has committed a similar crime if the evidence shows "a close similarity of facts, a unique or 'fingerprint' type of information").

[20]Finally, competent, substantial evidence supports the circuit court's finding that trial counsel was not deficient for failing to present Henderson's testimony about her observations of Brown because it did not refute Doyle's trial testimony that Brown confessed to her early one morning. Although, at the postconviction evidentiary hearing, Henderson testified that based on her observations of Brown while they were in jail together, Brown ***265** was not an early riser, Henderson admitted on cross-examination that it was possible Brown got up early at times.

Accordingly, we affirm the circuit court's denial.

(3) Penalty Phase

In her final claim of ineffective assistance of trial counsel, Brown argues that trial counsel was ineffective during the penalty phase in two respects, namely (a) for failing to conduct a reasonably competent investigation and present adequate mitigation and (b) for failing to consult and present additional mental health experts.

(A) Mitigation

[21]Brown first argues that trial counsel rendered deficient performance in investigating and presenting mitigation. After providing the necessary background about Brown's postconviction motion and the circuit court's rulings, we explain the procedural bar that applies to Brown's appeal of the denial of this claim and why, even without the

procedural bar, we would nevertheless affirm.

[22]Following the postconviction evidentiary hearing, the circuit court ruled that portions of Brown's claim were facially insufficient. Specifically, the circuit court found that the "blanket and non-detailed allegation" that trial counsel "failed to speak with any of [Brown's] cousins, friends, ex-boyfriends, or ex-husbands" was "facially insufficient" and denied it "with prejudice," "to the extent [it] can be considered a subclaim." In so ruling, the circuit court explained that Brown's motion "fails to identify with particularity the identity of these purported witnesses, the content of their testimony, if [Brown] told counsel about these people, if they were available to testify, and most importantly, how their testimony would have made a difference in [Brown's] sentence."

Similarly, Brown's motion alleged that trial counsel failed to fully explain Brown's background "including but not limited to: her extensive history of drug abuse, her extensive history of physical and sexual abuse, her mental illness, her family's background, and *how that background affected Ms. Brown and her conduct during the commission of the crime*." However, without attributing any of the information to a specific source, Brown's motion devoted approximately four-and-a-half pages to discussing the "wealth of mitigation" that she claimed would have been available had trial counsel "properly prepared and investigated." In finding that this portion of Brown's claim was also "facially insufficient," the circuit court ruled that Brown "goes on for pages, giving details of [her] life, but she does not link this information to any particular witness or indicate through which witnesses penalty-phase counsel should have presented this information" and further "does not explain specifically how any of this information would have made a difference in [her] trial." The circuit court also gave two other reasons for denying this portion of Brown's claim. First, the circuit court alternatively ruled that even if this portion of Brown's claim were facially sufficient, "the information alleged is cumulative to the lengthy mitigation already presented by penalty-phase counsel." Second, the circuit court ruled that Brown "failed to demonstrate how penalty-phase counsel did not 'link' [Brown's] background to its effect on [Brown] during the crime," crediting trial counsel's evidentiary hearing testimony that she "thought" that Brown's mental health expert, Dr. Elaine Bailey, "covered [Brown's] life history from the beginning to the time of the crime, and linked [Brown's] life history to the crime itself," and finding that the record "supports this ***266** conclusion."[9]

In addition to the above rulings, the circuit court ruled that Brown failed to substantiate the remaining portions of her claim that related to named individuals. Specifically, Brown's motion named three family members she claimed trial counsel was ineffective for failing to adequately investigate and prepare for the penalty phase: (1) her mother Lily Ramos; (2) her brother Willie Coleman, Jr.; and (3) her paternal uncle Gerald Coleman. The circuit court denied relief, finding that Brown "failed to present any evidence to support her allegations that the witnesses were ill-prepared." In so ruling, the circuit court cited trial counsel's explanation at the evidentiary hearing regarding why Brown's mother was not called as a penalty-phase witness, which included that Brown's mother "actually told [trial counsel] she believed [Brown] should get the death penalty." With respect to Willie Coleman, Jr., and Gerald Coleman, the circuit court found that although the documentary evidence showed defense counsel's trip to visit Brown's family occurred weeks before the trial, Brown "failed to present any testimonial evidence to show that penalty-phase counsel did not adequately prepare the witnesses who testified."

Brown's motion also identified three other individuals she claimed trial counsel was ineffective for failing to discover and present as penalty-phase witnesses: (1) her cousin Trina Bell; (2) one of her ex-husbands and the father of her three children, Gregory Miller, Sr.; and (3) her friend Jennifer Malone. Brown's motion alleged that Bell "could have provided evidence of [her] history of sexual abuse, drug use, and physical abuse by her boyfriends," that Miller "had firsthand knowledge of [her] daily cocaine and heroin use, physical abuse from her father, and episodes of domestic violence," and that Malone had sent a letter to the trial judge and had offered to be of assistance but that trial counsel failed to follow up. None of these individuals testified at the postconviction evidentiary hearing. Just as it ruled regarding the other named individuals, the circuit court ruled that Brown failed to substantiate these claims (in addition to providing alternate bases for denying relief with respect to Miller and Malone).

More specifically, regarding Bell, the circuit court denied relief because, despite being granted an evidentiary hearing on this claim, Brown "failed to present Ms. Bell's testimony or any evidence to substantiate her allegations regarding Trina Bell."

Regarding both Miller and Malone, the circuit court ruled that their failures to testify at the evidentiary hearing precluded it from assessing their credibility and determining whether their testimony would have made a difference in Brown's sentence. Alternatively, the circuit court ruled that even if they had testified consistently with what Brown's postconviction expert, Dr. Faye Sultan,

testified at the evidentiary hearing that they had told her, the information was cumulative to that presented during the penalty phase.[10]

***267** Brown now appeals the circuit court's denial, arguing that "the evidence presented at the evidentiary hearing was far from cumulative." As explained above, the circuit court found that the entirety of Brown's claim was either facially insufficient or unsubstantiated, and Brown fails to challenge those rulings on appeal. Instead, she challenges only the circuit court's alternative ruling that even if her claim were facially sufficient, the mitigation alleged in her postconviction motion was cumulative to the mitigation already presented at the penalty phase. In failing to challenge the circuit court's primary bases for denying relief, Brown has waived the argument that they are in error. *See Shelly v. State*, No. SC16-1195, 2019 WL 102481, at *1 (Fla. Jan. 4, 2019) ("[A]n argument not raised in an initial brief is waived.") (quoting *Tillery v. Fla. Dep't of Juvenile Justice*, 104 So. 3d 1253, 1255 (Fla. 1st DCA 2013)).

But, even if she had not, we would still affirm. The circuit court correctly ruled that the portions of Brown's motion that failed to identify the witnesses trial counsel was supposedly deficient for failing to discover, the specific mitigation each would have provided, or how its absence prejudiced her are facially insufficient. *See State v. Lucas*, 183 So. 3d 1027, 1032 (Fla. 2016) ("There is no question that when the ineffective assistance claim alleges trial counsel should have presented a *fact* witness, such witness must be named and his or her availability attested to."); *see also Booker v. State*, 969 So. 2d 186, 196 (Fla. 2007) ("To establish a claim of ineffective assistance of trial counsel for failing to call certain witnesses, a defendant must allege in the motion 'what testimony defense counsel could have elicited from [the] witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have so testified prejudiced the case.' " (quoting *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004))).[11] Regarding the remaining portions of Brown's claim related to the six named individuals, because the record supports the circuit court's finding that Brown failed to substantiate those portions of her claim, we would affirm.

Moreover, although as explained above, the procedural bar and affirmance on the alternate bases of facial insufficiency and failure to substantiate make it unnecessary to address the circuit court's alternative ruling regarding the cumulative nature of ***268** the mitigation, we agree with the circuit court's conclusion.[12]

Accordingly, we affirm the circuit court's denial of relief.

(B) Mental Health Experts

[23]Brown next argues that the circuit court erred in denying her claim that trial counsel was ineffective during the penalty phase for failing to consult and present additional mental health experts to explain the combined effects of polysubstance abuse, childhood trauma, and mental illness on her brain. The circuit court ruled that trial counsel was not deficient for failing to hire additional mental health experts based on trial counsel's testimony at the evidentiary hearing that Brown's penalty-phase mental health expert, Dr. Bailey, did not recommend doing so. Brown argues that "regardless of the court's finding that trial counsel was not deficient for relying upon Dr. Bailey, trial counsel was ... deficient for failing to recognize the[ ] red flags" of Brown's longtime struggles with drug addiction and her lifelong traumas. She contends that these red flags would have led reasonable trial counsel to investigate further and to retain and present the testimony of an addiction specialist and a neuropsychologist. We affirm because competent, substantial evidence supports the circuit court's finding that trial counsel was not deficient.

This Court has long held that "defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire." *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007) (finding no deficiency where "[t]he testimony presented during the postconviction evidentiary hearing may generally be described as only a more detailed presentation of the mitigation that was actually presented during the penalty phase").

Although Brown argues her case is similar to *Ellerbee v. State*, 232 So. 3d 909 (Fla. 2017), where this Court held that trial counsel was ineffective in the presentation of mental health mitigation, it is not. In *Ellerbee*, the penalty-phase jury heard "conflicting evidence and unsubstantiated ***269** claims that [the defendant] suffered from various mental disorders," *id.* at 928, and the penalty-phase mental health expert "did not provide a detailed explanation of the effect that abuse and drug use can have on cognitive development." *Id.* at 931. Instead, pursuant to trial counsel's direction, Ellerbee's penalty-phase mental health expert "focus[ed] on fetal alcohol syndrome while simultaneously presenting testimony directly contradicting its existence." *Id.* Unlike *Ellerbee*, where the "contradictory evidence would have confused the jury at best and, at worst, raised suspicions

of defense counsel's honesty," *id.* at 932, the theme of Brown's penalty phase was that her lifelong traumatic experiences (including childhood physical and sexual abuse) and her longtime struggles with addiction (including multiple relapses and use of crack on the day of the crime) affected her up through the time of the crime.

Indeed, as explained above, the circuit court denied Brown's separate claim that trial counsel was ineffective with respect to the mitigation investigation and presentation, in part, because Brown "failed to demonstrate how penalty-phase counsel did not 'link' [Brown's] background to its effect on [her] during the crime." In so ruling, the circuit court found that the record supports trial counsel's testimony at the evidentiary hearing that "she thought [the defense expert] Dr. Bailey covered [Brown's] life history from the beginning to the time of the crime, and linked [Brown's] life history to the crime itself." Competent, substantial evidence supports the circuit court's findings. For example, Dr. Bailey testified during the penalty phase to the "stressors" that would have affected Brown at the time of the crime, including "repeated traumas, addictions, abusive relationships, exposure to violence, a lot of sexual victimization, both in childhood being prostituted and adulthood[,] [and a] lot of community negative influence and crime, and [she explained that] all of those things c[a]me together." Dr. Bailey also testified that Brown's childhood experiences would have affected her into adulthood, that trauma affects brain development, and that "[t]he bottom line is trauma is cumulative." Moreover, as demonstrated in this Court's decision in Brown's direct appeal, trial counsel's penalty-phase presentation resulted in the trial court's finding of numerous mitigating circumstances related to Brown's traumatic experiences and struggles with addiction, including the long-term effects of chronic cocaine use on her brain and that she was using cocaine on the day of the crime. *See Brown*, 143 So. 3d at 401.

That new experts retained for postconviction would render more favorable opinions based on essentially the same information presented during the penalty phase does not render trial counsel deficient for relying on the opinions of Dr. Bailey. *See Darling*, 966 So. 2d at 377.

Accordingly, we affirm the circuit court's denial.

(4) Cumulative Prejudice

[24]Brown next argues that the circuit court erred in denying her cumulative error claim because, cumulatively, trial counsel's deficient performance in the guilt and penalty phases deprived her of a fundamentally fair trial. As explained above, we conclude that the available impeachment evidence of Heather Lee's prior convictions went unused by trial counsel, and we agree with Brown that trial counsel was deficient for failing to present Terrance Woods and Darren Lee to impeach Heather Lee's trial testimony and implicate her as the ringleader. Assuming counsel was deficient for failing to impeach Lee with her prior convictions and taking into account ***270** counsel's deficiencies in failing to call Woods and Darren Lee as witnesses, we must "consider the impact of these errors cumulatively to determine whether [the defendant] has established prejudice." *Sparre*, 289 So. 3d at 847 (quoting *Parker*, 89 So. 3d at 867).

They do not. All of trial counsel's deficiencies center around the failure to discredit Lee and her version of events. The likelihood that the jury placed high value on Lee's testimony is suspect, at best, because the jury knew that, despite describing herself as a victim and minimizing her role in the victim's murder, Lee had pleaded guilty to the victim's second-degree murder in exchange for testifying against Brown. Nevertheless, it is true that but for trial counsel's deficiencies, the jury could have relied on Heather Lee's prior convictions and testimony from Terrance Woods and Darren Lee to further discount Lee's testimony and conclude that her role in the crime was more substantial than she admitted during the guilt phase. However, there is no reasonable probability that but for trial counsel's deficiencies, individually or cumulatively, the outcome would have been different.

Regarding the guilt phase, the evidence of Brown's involvement and culpability in the victim's murder under both theories of premeditated and felony murder is overwhelming. For example, the victim named "Tina [Brown], Heather [Lee], and Britnee [Miller]" as her attackers and told a paramedic that "they poured gas on her and set her on fire." Although the paramedic acknowledged on cross-examination by trial counsel that the victim "didn't actually breakdown what each one of these people did to her," the victim's statement that "they" did it, at a minimum, indicates that in her experience her attackers were acting in concert. Moreover, M.A. testified that Brown was the primary aggressor based on her observations at the trailer where the attack began. According to M.A., Brown attacked the victim with a stun gun, held the victim's hands behind her back, forced the victim into the trunk, and screamed at the victim about calling Crime Stoppers. Consistent with M.A.'s testimony, Brown's DNA was on the stun gun,

Brown's trailer and vehicle were used in the crime, and Brown drove the victim to the area where she was lit on fire. Additionally, both Brown and her daughter, Miller, made incriminating statements: Miller told M.A. that they were going to kill the victim right before the attack began, and, within days of the crime, while the victim was still alive in the hospital, Brown told Pamela Valley that she wanted the victim "finish[ed] off." Accordingly, there is no reasonable probability of a different verdict.

Regarding the penalty phase, impeaching Lee with her prior convictions and calling Terrance Woods and Darren Lee to impeach Lee's testimony and implicate her as the ringleader during the guilt phase would not eliminate the overwhelming evidence of Brown's involvement and culpability in the victim's murder from the sources other than Lee, such as those discussed above. Moreover, during the penalty phase, the jury heard even more evidence negating that Brown's role in the crime was minor, including testimony from Brown's own mental health expert that, despite describing Heather Lee as "the escalator," Brown "was very frank about her role" in the victim's murder, and "[did] not deny being an aggressor, being involved, ... [or] what she did." Nor would counsel's deficiencies with respect to Lee change the application of the weighty evidence in aggravation to Brown. Accordingly, there is no reasonable probability of a different sentence.

***271** Because Brown has failed to show that trial counsel's deficiencies, individually or cumulatively, establish the prejudice required by *Strickland*, we affirm the circuit court's denials of relief with respect to each of the individual claims at issue and with respect to Brown's cumulative error claim.

B. Newly Discovered Evidence

Brown next argues that the circuit court erred in denying her claim of newly discovered evidence related to Heather Lee's credibility as a witness and Lee's role in the murder. Specifically, Brown points to an email from Lee's trial attorney, which was disclosed to Brown's counsel without authorization; posttrial confessions by Lee to fellow inmates; and evidence of Lee's pattern of violence against individuals, like the victim, who engaged in affairs with her significant others. Brown argues that she is entitled to a new trial because this evidence would probably result in her acquittal or a reduced sentence. However, as explained below, portions of Brown's claim involve evidence that is inadmissible and allegations that are procedurally barred. Although portions of Brown's allegations do involve newly discovered evidence, it is not of such a nature that it would probably produce an acquittal on retrial. Accordingly, we affirm the circuit court's denial of relief.

(1) The email from Heather Lee's attorney is inadmissible.

Brown argues that the circuit court erred in ruling inadmissible an email from Heather Lee's trial attorney to Lee's mitigation specialist. We disagree.

[25]Below, Lee's trial attorney joined a motion filed by the State to exclude the email under section 90.502(2), Florida Statutes (2019). Section 90.502(2) provides that "[a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client." This privilege may be asserted by a lawyer on behalf of the client. § 90.502(3)(e).

The circuit court found that section 90.502(2) applies to require exclusion of the email, further finding that the attorney-client privilege had not been waived and noting that Brown had presented no evidence that Lee sought or obtained her attorney's services to enable her to commit a crime or fraud so as to establish an exception to this rule under section 90.502(4)(a). Indeed, Brown has not identified any such evidence or identified any other authority that would nevertheless allow the email to be admitted. Consequently, she has failed to show error in the circuit court's ruling.

[26]Although Brown asks us to disregard section 90.502(2) in the interests of due process and justice, her general arguments to this effect—unsupported by any case law addressing similar or analogous circumstances—are insufficient to overcome this well-established evidentiary rule, adopted in the broader interests of justice and in furtherance of the crucial relationship of client and counsel. *See Horning-Keating v. State*, 777 So. 2d 438, 445 (Fla. 5th DCA 2001) ("[One of t]he oldest and most revered principles of Anglo[-]American law is the attorney-client privilege .... The purpose of the privilege is to encourage broad communication between a lawyer and the client and thus promote the broader public interest in the proper administration of justice." (citing *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)); *see also R.L.R. v. State*, 116 So. 3d 570, 573 n.3 (Fla. 3d DCA 2013) (noting that the attorney-client

privilege "is an interest traditionally ***272** deemed worthy of maximum legal protection"). Even if Brown could overcome this evidentiary rule, the email is inadmissible for an additional reason, which was raised by the state below and has not been addressed by Brown on appeal: the email is inadmissible hearsay. *See* §§ 90.801-.802, Fla. Stat. (2019).[13]

Accordingly, we affirm the circuit court's order excluding the email.

(2) The circuit court properly refused to consider Tajiri Jabali's testimony as newly discovered evidence.

[27]Brown relies on testimony provided by Tajiri Jabali at the postconviction evidentiary hearing as newly discovered evidence of (1) Heather Lee's motive for and role in the victim's murder and (2) Heather Lee's pattern of violent conduct against those with whom Lee's significant others "cheat." However, the circuit court refused to consider Jabali's testimony as newly discovered evidence on the ground that "there is no claim regarding Tajiri Jabali alleged in [Brown's] motion." Because Brown waited until her reply brief to challenge the circuit court's ruling on this issue, Brown has waived any challenge to it. *See Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011).

[28]Moreover, even without the waiver, we would still affirm on the record before us. By its plain language, rule 3.851(e)(1) provides that "[e]ach claim or subclaim *shall* be separately pled" in the initial postconviction motion. (Emphasis added). A defendant cannot plead a claim of newly discovered evidence without alleging that the specific evidence at issue could not have been discovered at trial with due diligence and that the specific evidence at issue is of such a nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Brown's motion did not plead a claim of newly discovered evidence regarding Jabali, and there was no argument raised below as to why the circuit court should have nevertheless considered Jabali's testimony newly discovered evidence. Accordingly, we would not reverse the circuit court's ruling on this issue, even if it were properly before us.

(3) The evidence properly before the Court does not warrant relief.

The evidence properly before the Court as alleged newly discovered evidence is the following: (1) Jessica Swindle's testimony that, while in prison, Heather Lee told her, without remorse, that she personally set the victim on fire because the victim was sleeping with her "baby's dad" and that Brown and Miller "didn't do anything"; (2) Shayla Edmonson's testimony that, while in prison, Heather Lee told her that she "killed someone and she would do it again because the people that were involved in the case ... were sleeping with her husband ... and she set the girl on fire"; and (3) Nicole Henderson's testimony that Heather Lee would fight the women her prison girlfriend cheated on her with. When subjected to cross-examination, Swindle and Edmonson agreed that it seemed like Lee was trying to be tough.

[29] [30] [31]As we explained in *Jones*, 709 So. 2d at 521, a claim of newly discovered evidence is governed by the following two-part test:

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his ***273** counsel could not have known [of it] by the use of diligence." *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994).
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones* [*v. State*], 591 So. 2d [911] at 911, 915 [(Fla. 1991)]. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id.* at 916.

This test applies not only to the guilt phase of a first-degree murder trial, but also to the penalty phase; when the penalty phase is at issue, the second prong requires a determination of whether the newly discovered evidence "would probably yield a less severe sentence" on resentencing. *Swafford v. State*, 125 So. 3d 760, 767 (Fla. 2013).

First Prong of *Jones*

[32]Brown argues that the circuit court erred in denying relief based on its conclusion that the testimony provided by Swindle, Edmonson, and Henderson fails the first prong of the *Jones* test. We agree with Brown with respect to the testimony of Swindle and Edmonson. Lee's

confessions to these women could not have been discovered with due diligence at the time of trial because they did not yet exist.[14] Although Brown and her counsel knew that Lee had made a similar statement to another person, Wendy Moye, and if Lee's confessions are true, Brown would have known that fact, the defense's knowledge of the substance of these statements does not disqualify them from being considered newly discovered evidence. *See Archer v. State*, 934 So. 2d 1187, 1194 (Fla. 2006) (explaining that a defendant's knowledge at the time of trial of the facts that would be presented by a witness as newly discovered evidence does not invalidate a claim of newly discovered evidence, as the "appropriate question" is whether the defendant "was or should have been aware of the existence of" the evidence offered to prove those facts). They are additional pieces of evidence that have been discovered since trial and relate to the circumstances that existed at the time of trial and, as such, constitute newly discovered evidence. *See id.* Also, they add information not contained in Moye's testimony: that the reason Lee participated was that the victim was sleeping with Lee's husband, that Brown and Miller "didn't do anything," that Lee was not remorseful and in fact said she would do it again, and that Brown and Miller were sleeping with her husband. Therefore, because Lee's confessions to Swindle and Edmonson satisfy the first prong of *Jones*, the circuit court should have analyzed them under the second prong.

[33]The testimony of Nicole Henderson, however, is of a different nature and does not satisfy the first prong of *Jones*. This testimony pertains to distinct criminal acts committed by Lee after trial that do not relate to the circumstances existing at the time of trial and, contrary to Brown's argument, would not satisfy the reverse *Williams* rule. We have previously held that unrelated posttrial events do not qualify as newly discovered evidence. *See* ***274** *Kearse v. State*, 969 So. 2d 976, 987 (Fla. 2007) (affirming the denial of a newly discovered evidence claim where Kearse alleged that an expert's conduct in a subsequent, unrelated case demonstrated that expert's testimony in the Kearse's case was biased); *Porter v. State*, 653 So. 2d 374, 379-80 (Fla. 1995) (holding that Porter's good conduct in prison was not newly discovered evidence), *receded from on other grounds by Wyatt v. State*, 71 So. 3d 86, 99-100, 100 n.13 (Fla. 2011). Notably, contrary to the allegations of Brown's motion, Henderson's testimony does not include statements made by Lee comparing a woman she attacked or threatened in prison to the victim or admitting a larger role in the victim's murder than Lee claimed at trial. Therefore, Henderson's testimony about Lee's conduct in prison is simply evidence of unrelated posttrial events and does not satisfy the first prong of *Jones*.

Accordingly, only the testimony of Swindle and Edmonson is the newly discovered evidence that must be considered under the second prong of *Jones*.

Second Prong of *Jones*

[34] [35] [36]An assessment of the second prong of *Jones* includes consideration of "whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence," "whether the evidence is cumulative to other evidence in the case," and "the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence." *Jones*, 709 So. 2d at 521. When evaluating these factors to determine whether the newly discovered evidence would probably result in an acquittal or a lesser sentence on retrial, *see id.*; *Swafford*, 125 So. 3d at 767, this Court considers it in conjunction with not only the evidence already presented at trial but also any new evidence the movant has developed in postconviction proceedings that could be introduced at a new trial, including evidence that has not been considered on its own because it was the subject of a procedurally barred claim. *See Hildwin v. State*, 141 So. 3d 1178, 1181, 1184 (Fla. 2014). In other words, this Court examines the newly discovered evidence at issue in light of a "total picture" of the case that could be presented at a new trial. *See id.* at 1184.

[37]Brown argues that the testimony of Swindle and Edmonson constitutes valuable impeachment evidence that would probably result in an acquittal of first-degree murder or a life sentence for Brown. More specifically, Brown contends that Lee's statements to Swindle and Edmonson would impeach Lee because they are inconsistent with her trial testimony and reveal her motive for the murder. We agree with Brown that Swindle's and Edmonson's testimony of Lee's statements regarding her motive for, role in, and feelings about the murder is materially inconsistent with Lee's trial testimony. Specifically, it is inconsistent with Lee's portrayal of herself as an innocent bystander who tried to warn Zimmerman—her "good friend[ ]" whom she would never harm—of the impending attack as it began and who tried to run away herself but was nevertheless forced to go to the scene of the brutal beating and murder, where she encouraged her friend to run and contemplated escaping herself but was too afraid to make an attempt. Because Swindle's and Edmonson's testimony of Lee's posttrial statements is materially inconsistent with this account, it would be admissible as impeachment evidence under section 90.608(1). *Cf. Izquierdo v. State*, 890 So. 2d 1263,

1265-67 (Fla. 5th DCA 2005) (affirming a trial court's decision to admit testimony as to previous statements of a witness that the defendant had been violent toward her and others where she testified at trial that she had a good relationship with him, that he was "lovable and tender" ***275** and "nice," that he had never been controlling, and that she had never been afraid of him); *see also Pearce v. State*, 880 So. 2d 561, 569 (Fla. 2004) (explaining that impeachment material under section 90.608(1) does not have to "directly contradict" the witness's testimony as long as it is "materially different" from it).

In addition, we agree with Brown that the testimony that Brown and Miller were sleeping with Lee's husband would be admissible for impeachment purposes. Specifically, it would be admissible under section 90.608(2) to impeach Lee concerning her motive to place the blame on them. *Cf. Green v. State*, 691 So. 2d 49, 50 (Fla. 4th DCA 1997) (holding that the defendant in a sexual battery case should have been allowed to elicit testimony that the alleged victim, a witness in the case, had asked the defendant's wife if she could think of a way to "get rid of" the defendant so that the victim could move in with the wife); *see also Gibson v. State*, 661 So. 2d 288, 291 (Fla. 1995) ("Our evidence code liberally permits the introduction of evidence to show the bias or motive of a witness [in testifying].")[15]

At a retrial, the testimony of Edmonson and Swindle would combine with the impeachment evidence already presented at trial through the cross-examination of Lee and the testimony of Wendy Moye. Moye's trial testimony revealed statements Lee made in jail that are substantively similar to the statements she later made to Edmonson and Swindle regarding the actions she took in furtherance of the murder. As noted in our analysis of the first prong of the *Jones* test, however, the new evidence would also go further than Moye's testimony. This new evidence would challenge Lee's credibility as to her relationship with the victim and role in the events by providing her stated reason for the dominant role she denied at trial but subsequently claimed; indicate not only that she was dominant but that, in her words, Brown and Miller "didn't do anything"; show her lack of remorse for her participation in the brutal beating, burning, and killing of Zimmerman, contrary to her trial claim that she would not "harm a hair on [Zimmerman's] head"; and suggest an additional reason that she may want to blame Brown and Miller.

The efficacy of the testimony of Swindle and Edmonson would be enhanced by the testimony that could be presented from Darren Lee and Terrance Woods that Lee has made inconsistent statements about her involvement in the murder and indeed stated a couple of days before the murder that she intended to kill the victim for having an affair with her husband—evidence Brown now relies on as substantive proof of Lee's role and motive. Furthermore, Brown would be able to present impeachment evidence similar to that of Swindle and Edmonson from Jabali, including a confession by Lee that she was the "ringleader"; comments by Lee, which Jabali read in Lee's journal, that she forced Brown and Miller, who were scared, "[j]ust to do simple things," and bribed Brown with drugs, along with a statement that the victim "got what she deserved"; and a threat by Lee to do to other inmates what she had done to her "baby daddy's mistress" if they became involved with Jabali, who was in a relationship with Lee at the time.

We recognize that, although the new evidence presented through Swindle and Edmonson would be somewhat cumulative to the impeachment evidence presented ***276** through Moye, *cf. Williamson v. Dugger*, 651 So. 2d 84, 89 (Fla. 1994), it would likely have some effect, given the importance of the issue on which Lee would be impeached and the number and diversity of additional witnesses—not only those who met Lee in prison but also those who knew her before the crime—who could come forward on the matter at a retrial. Thus, at a new trial where Swindle and Edmonson's testimony was presented, Lee would have even less credibility than she had at Brown's original trial, and it would be more difficult for the State to rely on the position it took at trial that Brown was the one with motive and the one who poured gasoline on the victim and lit her on fire, while Lee's involvement was comparatively minimal.

Nevertheless, the newly discovered evidence must be considered in light of the other evidence presented at trial and available for any retrial bearing on Brown's involvement and culpability in the victim's murder.

When the victim first emerged from scene of the burning, she named two people as the perpetrators—Tina Brown and "Heather"—and said that they dragged her out of the house, "tased" her, beat her in the head with a crowbar, and then set her on fire. She repeated those two names several times and told where those individuals lived. Similarly, the victim told a paramedic that "Tina, Heather, and Britnee" poured gasoline on her and set her on fire. The victim did not distinguish among the perpetrators in terms of who did what, which suggests that in her experience, they were all acting in concert.

M.A., on the other hand, testified that from her observations at the trailer, Brown was the primary aggressor, although Lee also participated by putting a

sock in the victim's mouth. Brown is the one whose trailer and vehicle were used in the crime, and she is the one M.A. heard screaming at the victim about calling Crime Stoppers. She is the one who, according to M.A., operated the stun gun, held the victim's hands behind her back, and forced the victim into the trunk. Consistent with M.A.'s testimony, Brown's DNA was on the stun gun.

In addition to M.A.'s testimony and the forensic evidence, there were incriminating statements by Brown and her daughter. Just before the crime started, Brown's daughter, Miller, told M.A. that they were going to kill the victim. And Pamela Valley testified, albeit not without impeachment, that, days after the crime was complete, Brown wanted the victim "finish[ed] off." Further, in any retrial, Brown's new jury would hear compelling evidence against her that her original jury did not: Brown admitted at the *Spencer* hearing that she "was one of the ones who participated in taking [Zimmerman's] life" and commented that "[Zimmerman] didn't deserve it at all."

In consideration of the foregoing evidence that is independent of Lee's testimony, when considered cumulatively with all of the evidence that would be admissible in a new trial, the newly discovered evidence from Edmonson and Swindle fails the second *Jones* prong as to the guilt phase, as the evidence is not of such a nature that it would probably produce an acquittal on retrial. In fact, the impeachment of Lee would do little, if anything, to disturb the evidence of felony murder. While Swindle did testify that Lee said that the other two codefendants "didn't do anything," significant evidence belies that claim.

[38]The newly discovered evidence fails the second *Jones* prong as to the sentencing question as well. In reaching this conclusion, we recognize that the testimony of Swindle and Edmonson, along ***277** with corroborating evidence, would impeach Lee on a major point the State relied on in support of the death penalty: that Brown was the "main aggressor" and the one who lit the fire. Indeed, the trial court relied on this point in its sentencing order, concluding in its discussion of the HAC aggravator that, "[o]f all [Brown's] flagitious acts, ... the cruelest were her actions in dousing Audreanna Zimmerman with gasoline and setting her on fire." The trial court also reiterated this point in its discussion of whether Brown was a minor participant in the crime, stating, "The evidence introduced at trial proves [Brown] was the *leader* of the efforts to murder Audreanna Zimmerman. It is clear [Brown] poured gasoline on Zimmerman and set [her] on fire." Notably, Lee's testimony was the only evidence that unambiguously singled out Brown as the person who lit the victim on fire, but not the only evidence that she was a, if not the, primary aggressor, at least at the trailer.

Considering the attention given to the facts that Brown was the one who lit the victim on fire and was the main aggressor—both as points supporting the death penalty and as an explanation for the different treatment of Lee—we believe the additional impeachment of Lee *might* result in a lesser sentence at a retrial. However, it cannot be said that it *would probably* result in a lesser sentence. In delivering that additional impeachment testimony, Swindle and Edmonson would also testify that Lee seemed to be trying to act tough, as would Jabali in delivering her corroborating impeachment testimony concerning Lee's verbal statements to her. At the same time, Lee's posttrial claim that Brown and Miller "didn't do anything" would be obliterated by the forensic evidence, the victim's dying declaration, and the eyewitness testimony of M.A. concerning Brown's role in the events at her trailer. Although there would be a more substantial question as to whether Brown actually lit the fire and acted as the primary aggressor, especially once the testimony of Darren Lee and Terrance Woods was added, all the evidence that the murder itself was heinous, atrocious, or cruel—a weighty aggravating factor—would still stand, and the new evidence would not carry any significant probability of showing Brown to have been a minor participant. The subjective assessment of the jurors, and perhaps the trial court, as to whether Brown should receive a death sentence might change, but the possibility that it would change does not meet the standard required for a new trial, which is a showing that it would probably change. *See Swafford*, 125 So. 3d at 767.

Accordingly, we affirm the circuit court's denial of relief.

C. *Hurst*

In the final issue raised on appeal, Brown argues that the circuit court erred in summarily denying her claim that she is entitled to relief from her death sentence under *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). After the circuit court denied relief, we "recede[d] from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *State v. Poole*, 297 So.3d 487, 507 (Fla. 2020), *clarified*, 45 Fla. L. Weekly S121 (Fla. Apr. 2, 2020). Although the required jury finding does not exist in Brown's case, we agree with the circuit court that the error is harmless beyond a reasonable doubt.[16]

***278** [39]At trial, the State argued that Brown was guilty of first-degree murder under both premeditated and felony murder theories and presented uncontroverted evidence that the capital felony was committed while Brown was engaged, or was an accomplice, in the commission of a kidnapping. Any jury that found, based on the State's presentation, that Brown was guilty of first-degree murder could not have logically concluded that Brown was not also guilty of kidnapping, whether as the primary aggressor or an accomplice. Accordingly, we hold that, under the circumstances of this case, there is no reasonable doubt that a "rational jury," properly instructed, would have found beyond a reasonable doubt the existence of the statutory aggravating circumstance that the capital murder was committed while Brown was engaged in the commission of a kidnapping. *Galindez v. State*, 955 So. 2d 517, 522 (Fla. 2007) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)); *see also State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). Because the existence of a single statutory aggravating circumstance would render Brown eligible for imposition of the death penalty, *see Poole*, 297 So.3d at 501-03, it is unnecessary to address any of the other statutory aggravators found by the trial court to conclude that the sentencing error in Brown's case is harmless. Accordingly, we affirm the circuit court's denial.

III. HABEAS PETITION

In her habeas petition, Brown argues that appellate counsel was ineffective on direct appeal for failing to raise claims of fundamental error based on several statements made by the prosecutor during the State's rebuttal closing argument at trial that Brown now contends amount to prosecutorial misconduct. Because we disagree with Brown that these statements individually or cumulatively amount to fundamental error, we deny her habeas petition.

[40] [41]In general, claims of ineffective assistance of appellate counsel are properly presented in a petition for writ of habeas corpus, *Baker v. State*, 214 So. 3d 530, 536 (Fla. 2017); *Wickham v. State*, 124 So. 3d 841, 863 (Fla. 2013), and this Court has explained the applicable standard of review as follows:

> "The standard of review for ineffective appellate counsel claims mirrors the *Strickland* standard for ineffective assistance of trial counsel." [*Wickham*, 124 So. 3d at 863]. Specifically, to be entitled to habeas relief on the basis of ineffective assistance of appellate counsel, the defendant must establish
>
> > [first, that] the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, [that] the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> *Bradley v. State*, 33 So. 3d 664, 684 (Fla. 2010) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)).

England v. State, 151 So. 3d 1132, 1140 (Fla. 2014). Further, appellate counsel is ***279** not ineffective for failing to raise meritless claims or issues on appeal that were not properly raised in the trial court and are not fundamental error. *Valle v. Moore*, 837 So. 2d 905, 907-08 (Fla. 2002).

[42]An error is considered fundamental if it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Boyd v. State*, 200 So. 3d 685, 708 (Fla. 2015) (plurality opinion) (quoting *Rodriguez v. State*, 919 So. 2d 1252, 1282 (Fla. 2005)); *see Doty v. State*, 170 So. 3d 731, 743 (Fla. 2015) (explaining that the standard for fundamental error with respect to the sentence is "one that 'reaches down into the validity of the trial itself' and that a sentence of death 'could not have been obtained without the assistance of the alleged error' " (quoting *Snelgrove v. State*, 107 So. 3d 242, 257 (Fla. 2012))); *see also Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997) (describing fundamental error as error that is "so prejudicial as to vitiate the entire trial").

[43]Brown's habeas petition references two statements by the prosecutor that were arguably improper. First, the prosecutor likely crossed the line in referring to Brown, once, as a "cold-blooded murderer." *See Morris v. State*, 233 So. 3d 438, 447, 449 (Fla. 2018) (holding that the prosecutor's statements referring to the defendant as "cold-blooded," "stone cold," and "ruthless" may have crossed the line). However, this statement was a single occurrence, and we have declined to find fundamental error based on comparable statements. *See id.*; *see also Davis v. State*, 928 So. 2d 1089, 1127 (Fla. 2005) (holding prosecutor's references to the defendant as "a cagey little murderer" and a "[l]ittle robber, cagey little thief" did not constitute fundamental error).

[44]Second, and presenting a closer call as to whether the statement is even improper, is the prosecutor's rhetorical

question asking how Doyle, who was the State's witness, would have learned information about the victim's murder apart from gaining it from Brown. On the one hand, this argument could be viewed as improper because the jury did not know Doyle had stated in a pretrial deposition—at which the prosecutor was present—that she had heard on the news that "there was a girl that was lit on fire and that she was taken by helicopter and that before she died she said the ... names [of her killers]." *See Craig v. State*, 685 So. 2d 1224, 1229-30 (Fla. 1996) (recognizing that prosecutors have a duty not to present false or misleading arguments to the judge or jury); *Thompson v. State*, 273 So. 3d 1069, 1077 (Fla. 1st DCA 2019) ("Improper prosecutorial 'vouching' for the credibility of a witness occurs where a prosecutor suggests that she has reasons to believe a witness that were not presented to the jury, or, stated differently, where the prosecutor implicitly refers to information outside the record." (quoting *Jackson v. State*, 89 So. 3d 1011, 1018 (Fla. 4th DCA 2012))). On the other hand, this argument could be viewed as properly directed at the *specific* information about the murder Doyle testified at trial to having learned from Brown, including the names of the individuals involved and details of the crime, such as that the victim was beaten and attacked with a stun gun. Regardless, the record establishes that Doyle's testimony contained details of the victim's murder that were not among the general information that Doyle attributed to the news report during her deposition. Specifically, Doyle testified in her pretrial deposition that all she heard on the news was that a "girl" was lit on fire and that before she died she said "the girls' names," noting that the news report did not release the names. At ***280** trial, Doyle testified that Brown told her about details of the victim's murder, namely that Brown and her daughter beat the victim with a tire iron, "tazed" the victim, and caught the victim on fire, and that Miller accidentally set herself on fire during the crime. Although there is no indication in the record that Miller caught herself on fire during the crime, the other details Doyle testified to regarding the victim's murder indicate that Doyle learned of the details of the murder from Brown and not the news. Accordingly, even if improper, the prosecutor's statement was not so prejudicial as to vitiate the entire trial. *See Chandler*, 702 So. 2d at 191 n.5.

Moreover, even assuming that both of the prosecutor's statements were improper, when "viewed cumulatively in light of the record in this case," they do not "reach[ ] the critical mass of fundamental error" that is so prejudicial as to vitiate the entire trial. *Brooks v. State*, 762 So. 2d 879, 899 (Fla. 2000) (quoting *Cochran v. State*, 711 So. 2d 1159, 1163 (Fla. 4th DCA 1998)); *Chandler*, 702 So. 2d at 191 n.5.

[45] [46] [47] [48]Accordingly, because appellate counsel was not ineffective for failing to challenge on direct appeal unpreserved issues that do not amount to fundamental error, *see Valle*, 837 So. 2d at 908, we deny Brown's habeas petition.[17]

IV. CONCLUSION

For the foregoing reasons, we affirm the circuit court's order denying postconviction relief and deny Brown's habeas petition.

It is so ordered.

POLSTON, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

CANADY, C.J., concurs in result with an opinion.

LABARGA, J., concurs in result.

CANADY, C.J., concurring in result.

I agree with the per curiam opinion except for the analysis of the *Hurst* issue. Although I agree that the *Hurst* error here is harmless, I also adhere to the view that "[t]he new rule articulated in *Hurst v. Florida*—which simply requires that the jury find an aggravator—is an evolutionary refinement in the law that does not ***281** cast doubt on the veracity or integrity of penalty phase proceedings resulting in death sentences that are now final" and that the new rule therefore should not be given retroactive effect. *Mosley v. State*, 209 So. 3d 1248, 1291 (Fla. 2016) (Canady, J., concurring in part and dissenting in part).

Poole—which corrected this Court's misinterpretation of *Hurst v. Florida*—dismantled the foundation for the majority's analysis in *Mosley*. After *Poole*, *Mosley* is the ghost of a precedent. The retroactivity issue presented by this case therefore should be determined in light of *Poole*. And *Poole* makes clear that *Hurst v. Florida* was an evolutionary refinement in the law that should not be applied retroactively.

All Citations

304 So.3d 243, 45 Fla. L. Weekly S229

Footnotes

1 Brown was also indicted for kidnapping, but for reasons not explained in the record, the State entered a nolle prosequi as to the kidnapping charge as trial began.

2 *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

3 In her direct appeal, Brown raised the following claims: (1) the trial court erred in finding the CCP aggravating circumstance; (2) her death sentence was disproportionate; and (3) Florida's death penalty statute violates the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *Brown*, 143 So. 3d at 402-08. Although Brown did not contest her guilt, this Court found the evidence sufficient to support her conviction. *Id.* at 407.

4 During this period, Brown filed three petitions in this Court: a petition seeking review of a nonfinal order denying Brown's motion to reconsider the order striking her initial postconviction motion (with leave to amend) for noncompliance with rule 3.851(e)(1), which this Court denied without prejudice, *Brown v. State*, No. SC16-358, 2016 WL 3474843, at *1 (Fla. June 24, 2016); and two petitions for writ of prohibition seeking to prohibit the trial judge from further participation in her case, both of which this Court denied, *Brown v. State*, No. SC16-397, 2016 WL 3459727, at *1 (Fla. June 24, 2016), and *Brown v. State*, No. SC17-2166, 2017 WL 6493249, at *1 (Fla. Dec. 19, 2017).

5 Brown also argues that trial counsel was ineffective for failing to discover and use the testimony of another inmate, Nicole Henderson, that, in Henderson's observation, Brown was not an early riser. She argues that Henderson's testimony would impeach Doyle's trial testimony that Brown confessed to her early one morning. As explained below, Brown raises other ineffective assistance of counsel claims related to Henderson, which, like this claim, turn on whether trial counsel should have discovered the information available from Henderson prior to trial. Therefore, we address all of Brown's ineffective assistance of counsel claims related to trial counsel's failure to call Henderson as a witness below.

6 Prior to trial, Woods also wrote six letters to the State Attorney consistent with his pretrial deposition and evidentiary hearing testimony.

7 *Williams v. State*, 110 So. 2d 654 (Fla. 1959); *see also State v. Savino*, 567 So. 2d 892, 894 (Fla. 1990).

8 This argument is not preserved because Brown raised it for the first time in her initial brief. *See Thompson*, 759 So. 2d at 667 n.12. Below, Brown claimed the same evidence showed Lee's reputation for violence.

9 Indeed, it does. For example, Dr. Bailey testified during the penalty phase to the "stressors" that would have affected Brown at the time of the crime, including "repeated traumas, addictions, abusive relationships, exposure to violence, a lot of sexual victimization, both in childhood being prostituted and adulthood[,] [and a] lot of community negative influence and crime, and [she explained that] all of those things c[a]me together." Dr. Bailey also testified that Brown's childhood experiences would have affected her into adulthood, that trauma affects brain development, and that "[t]he bottom line is trauma is cumulative."

10 In its alternative ruling about the cumulative nature of the mitigation, the circuit court identified one exception regarding Malone. Specifically, the judge who presided over Brown's trial received an email from Jennifer Malone on the morning of the *Spencer* hearing that stated Brown "did A LOT for [Malone] when [she] had no one else" and that "the Tina [Malone] knew was a wonderful friend and person that would do anything to help anyone." Although the circuit court ruled that Dr. Sultan's testimony about her interview with Malone revealed "additional details regarding [Brown's] influence in Ms. Malone's life," it found that the information "would not have changed [Brown's] sentence." Moreover, the circuit court ruled that Brown provided no evidence to support her claim that penalty phase counsel should have known of Malone's existence in time to present her testimony to the penalty phase jury, and that "[c]ounsel cannot be found deficient for failing to investigate a person she did not know existed."

11 We note that Brown's noncompliance with rule 3.851 was a recurring theme below that delayed this case for years. Brown amended her postconviction motion multiple times after the circuit court struck the prior version for failing to comply with rule 3.851. The order on appeal constitutes the denial of Brown's third amended motion. Even still, the circuit court's order notes the

"disorganized" nature of the motion and finds that "to the extent that this court may have failed to address any claims, this Court considers those claims, subclaims, and/or arguments waived based on [Brown's] failure to comply with the pleading requirements of rule 3.851." Brown does not appeal this ruling.

12 Brown's focus in the penalty phase was on how her traumatic background affected her and shaped her actions on the night of the murder. The background information presented at the penalty phase included Brown's (1) suffering physical and sexual abuse (namely being raped by her father and prostituted by her stepmother), parental and other familial abandonment, drug addiction, and exposure to her father's drug-related, violent criminal lifestyle as a child and (2) experiencing domestic abuse and struggles with addiction as an adult, to the point that she lost custody of two of her children. Along with presenting this evidence, Brown argued that Heather Lee may have been more culpable and yet was allowed to plead guilty to second-degree murder. Indeed, of the twenty-seven nonstatutory mitigating circumstances found by the trial court, nineteen relate to Brown's traumatic experiences and struggles with addiction. *See Brown*, 143 So. 3d at 401 (nonstatutory mitigating circumstances 1-17, 19, and 27). Similarly, Brown's postconviction motion describes her deprived childhood; her struggles with drug addiction that began in childhood, particularly to crack cocaine; and her traumatic experiences, including that her childhood home was filled with violence and used in a drug operation, that she was neglected and emotionally, physically, and sexually abused (including being raped by her father and prostituted for drugs and money by her stepmother with her father's approval) as a child, and that she was abused by ex-husbands and ex-boyfriends as an adult. Although Brown's initial brief improperly references additional mitigation that was not included in her postconviction motion and that was obtained from sources who were not identified in her motion and who did not testify at the evidentiary hearing, even that mitigation falls within the scope of trial counsel's penalty phase presentation.

13 An appellate court may affirm a correct result reached by a lower court for any reason that is supported by the record, even if it is not the reason the lower court articulated for its ruling. *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002).

14 The circuit court ruled that none of this evidence was newly discovered precisely because it did not exist at the time of trial. This ruling is rooted in language we used in *Porter v. State*, 653 So. 2d 374, 380 (Fla. 1995), from which we have since receded, *Wyatt v. State*, 71 So. 3d 86, 100 (Fla. 2011).

15 To the extent Brown is suggesting that the testimony of Swindle and Edmonson could be admitted as substantive evidence of Lee's motive to kill the victim, she has not explained why the testimony would not constitute inadmissible hearsay if offered for that purpose.

16 In *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016), we held that *Hurst v. Florida* and *Hurst v. State* retroactively apply to sentences of death that became final after the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In a footnote in its answer brief, the State takes issue with *Mosley*, which applies to Brown because her sentence of death became final after *Ring*. However, we decline to revisit precedent based on assertions in a footnote. *Cf. Simkins Indus., Inc. v. Lexington Ins. Co.*, 714 So. 2d 1092, 1093 (Fla. 3d DCA 1998) (explaining that referencing a matter in a footnote "does not elevate the matter to a point on appeal").

17 The other statements that Brown references in her habeas petition were not improper and therefore could not have supported a claim of fundamental error. Specifically, first, the prosecutor's statement that Brown "baited" the victim "into the lion's den by telling her things were okay" does not cross the line into an improper inflammatory argument on the facts of this case. Rather, the prosecutor asked the jury to make a permissible inference based on the evidence that Brown "lured [the victim] into her home under false pretenses." *Brown*, 143 So. 3d at 407. Second, the prosecutor did not improperly belittle defense counsel by disparaging his argument that Brown was not guilty of first-degree murder. Rather, the prosecutor permissibly explained why defense counsel's arguments seeking a conviction of second-degree murder were not supported by the evidence adduced at trial. Third, the prosecutor did not improperly vouch for the credibility of State witnesses Valley and Doyle by asking what motive Valley had to make up her testimony and what Doyle had to gain by testifying. Rather, the prosecutor's arguments were proper responses to defense counsel's credibility attacks on these witnesses in light of the evidence presented at trial. Finally, the prosecutor did not improperly demand justice for the victim or the victim's family. Rather, the prosecutor's reference to "justice" is fairly read as a response to defense counsel's explanation of the jury's role, and it was made in the context of addressing the verdict that is required when the State meets its burden to prove guilt beyond a reasonable doubt.

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Exhibit 2

2020 WL 6609420
Only the Westlaw citation is currently available.
Supreme Court of Florida.

Tina Lasonya BROWN
v.
STATE of Florida
Tina Lasonya BROWN,
Appellant/Petitioner
v.
Mark S. INCH, etc., Appellee/Respondent

CASE NO.: SC19-704
|
SC19-1419
|
NOVEMBER 12, 2020

Lower Tribunal No(s).: 172010CF001608XXXAXX

Opinion

***1** Appellant/Petitioner's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

GROSSHANS, J., did not participate.

All Citations

Not Reported in So. Rptr., 2020 WL 6609420

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Exhibit 3

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

STATE OF FLORIDA,

vs.

Case No.: 2010-CF-1608A
Division: "N"

TINA LASONYA BROWN,

Defendant.

ORDER DENYING DEFENDANT'S THIRD AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

THIS CAUSE comes before the Court upon Defendant's "Third Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," filed March 1, 2017. After due consideration of the instant motion, the State's answer to the motion, evidence adduced at evidentiary hearing, written arguments submitted by Defendant and the State, the record, and relevant legal authority, the Court finds that Defendant is not entitled to relief.

PROCEDURAL HISTORY

Defendant filed her original postconviction motion on November 24, 2015. On December 16, 2015, this motion was stricken with leave to amend for failure to adhere to the numbering requirements delineated in rule 3.851(e), Florida Rules of Criminal Procedure. On January 13, 2016, Defendant filed her first amended postconviction motion. On February 29, 2016, because Defendant's amended motion still did not comply with the numbering requirements of rule 3.851(e), the amended motion was stricken with leave to amend. On

December 14, 2016, Defendant filed her second amended postconviction motion. On March 13, 2017, the second amended motion was stricken with leave to amend for lack of facial sufficiency. The Court also indicated at the time of this strike that Defendant's second amended motion still did not comply with the numbering requirements of rule 3.851(e). On May 1, 2017, Defendant filed her third amended postconviction motion.

On September 14, 2017, the Court conducted a case management conference ("Huff[1] hearing") regarding Defendant's third amended motion. On October 23, 2017, the Court entered its Order on the case management conference, granting an evidentiary hearing on the following claims: 2A, 2B, 2C, 2E, 2F, 2G, 2H, 3A, 3B, 3C, 3D (regarding impeachment evidence of witness Sturdivant only), 7, and 8. The Court found that Defendant's remaining claims could be determined as a matter of law and were therefore inappropriate for evidentiary hearing.

The Court conducted a limited evidentiary hearing on May 14 through May 18, 2018, and January 29, 2019. Defendant was present and represented by counsel. Upon approval by the Court, the parties filed written closing arguments.

BACKGROUND

The relevant facts regarding the murder of Audreanna Zimmerman and the trial of Defendant Tina Brown appear in the Supreme Court of Florida's opinion Brown v. State, 143 So. 3d 392, 395-403 (Fla. 2014), and are provided as follows:[2]

> In March 2010, Tina Brown, Brown's sixteen-year-old daughter Britnee Miller, Heather Lee, and Audreanna Zimmerman lived in neighboring trailers in an Escambia County mobile home park. The four women were initially good friends, but their

[1] Huff v. State, 622 So. 2d 982 (Fla. 1993).

[2] Footnotes and internal page numbers have been omitted in the block quote.

relationships—particularly between Miller, Brown, and Zimmerman—were volatile and often escalated to violence. Brown had previously accused Zimmerman of slashing her tires. Zimmerman had accused Brown of shattering a window in her car, having her boyfriend arrested, and reporting to the Florida Department of Children and Families that she was providing inadequate care to her children. Lee testified that she had intervened on multiple occasions to stop physical altercations between Miller and Zimmerman. On one occasion, Miller, who had recently discovered that Zimmerman was sexually involved with her boyfriend, attempted to strike Zimmerman. Zimmerman, however, defended herself by attempting to disable Miller with a stun gun. Later that day, Lee informed Brown that Zimmerman had used a stun gun on Brown's daughter, to which Brown responded that she was "going to get" Zimmerman.

Several days later, on March 24, 2010, Brown invited Zimmerman to her home under the guise of rekindling their friendship. Before Zimmerman arrived, Brown, Miller, Lee, and Miller's thirteen-year-old friend, were inside the trailer. Brown and Lee were in the kitchen, where Lee instructed Brown on the proper use of a stun gun. Miller then pulled her friend aside and told her, "we're fixing to kill Audreanna [Zimmerman]." Shortly after 9 p.m., Zimmerman entered the trailer. Brown waited several minutes and then used the stun gun on Zimmerman multiple times. When Zimmerman lost muscular control and fell to the floor, Brown continued to use the stun gun on Zimmerman, who was screaming and crying for help. Eventually, Brown pulled Zimmerman across the trailer into the bathroom. Zimmerman continued to scream and cry for help, so Miller struck Zimmerman in the face and Lee stuffed a sock into Zimmerman's mouth. Zimmerman was then forcibly escorted outside and forced into the trunk of Brown's vehicle. Brown, Miller, and Lee then entered the vehicle and drove away.

The women drove to a clearing in the woods about a mile and a half from the trailer park. Brown exited the car and pulled Zimmerman out of the trunk. Zimmerman attempted to flee, but stumbled in the darkness and was caught by Brown and Miller. The two women wrestled Zimmerman to the ground and simultaneously attacked her. Brown used the stun gun again on

Zimmerman as Miller beat her with a crowbar. Brown and Miller then switched weapons and continued to torture and beat Zimmerman. Miller eventually dropped the stun gun and repeatedly punched Zimmerman. Brown returned to the car, retrieved a can of gasoline from the trunk, and walked back toward the beaten and prone, but still conscious, Zimmerman. Brown poured gasoline on Zimmerman, retrieved a lighter from her pocket, set Zimmerman on fire, and stood nearby to watch the screaming Zimmerman burn. Lee testified that she was standing beside Miller, who exuberantly jumped up and down and screamed, "Burn, bitch! Burn!" After a few minutes, the three women returned to the car and drove away. During the ride home, Miller said, "Mom, you've got to turn around. I left my shoes and the taser." Brown, however, refused to return to the location of the event.

Shortly thereafter, Terrance Hendrick was outside his home which was located approximately one third of a mile away from the location of the attack. Hendrick heard a faint female voice asking for help, but he could not see anyone in the darkness. Eventually, Hendrick saw Zimmerman walking slowly toward his house. When Zimmerman reached Hendrick's house, she asked for assistance and sat on the front steps. As he waited on the porch with Zimmerman, Hendrick noticed that she had suffered a significant head injury, did not appear to be wearing clothes, and had a strong odor of gasoline. He testified that her skin was black and he could not identify her race.

At 9:24 p.m., an emergency medical technician (EMT) arrived at the scene. When the EMT approached Zimmerman, he observed her sitting on the porch, rocking back and forth with her arms straight out. Due to the extensive nature of Zimmerman's burns, the EMT testified that he could not initially identify whether she was wearing clothing. The EMT noticed that Zimmerman's skin was falling off her body, and he believed that over ninety percent of her body was burned. She had severe head trauma, and her jaw was either broken or severely dislocated. The EMT explained that the extent and severity of the burns prevented him from providing Zimmerman medical assistance. He testified that while he generally placed sterile gauze and oxygen on burns, he did not have enough gauze to cover her entire body. He attempted to

stabilize her neck, but her skin was charred to such an extent that he could not touch Zimmerman without her skin rubbing off onto his gloves.

Despite her injuries, Zimmerman was conscious and alert. She identified Brown and Lee as her attackers and told the EMT that she was "drug out of the house, tased, beaten in the head with a crowbar, and then set on fire." She also provided her address as well as the addresses of her attackers, and asked the EMT to protect her children. The ambulance arrived within a few minutes and transported Zimmerman to the hospital. Inside the ambulance, Zimmerman repeatedly asked if she was going to recover. She told the paramedic that Brown, Miller, and Lee poured gasoline on her and set her on fire. She also stated that she "thought they had made up." Zimmerman was stabilized at a local hospital and then transferred to the Burn Center at the University of South Alabama Hospital in Mobile, Alabama, where she died sixteen days later.

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

With the information provided by Zimmerman, law enforcement officers apprehended Brown and Lee shortly after the attack and Miller was arrested after she returned from the hospital the next day. The three women were, however, released while Zimmerman was in the hospital. During that time, Brown informed her friend Pamela Valley that she, Miller, and Lee had beaten Zimmerman, forced her into a car, driven her to an open field and "lit her on fire and didn't look back." A few days later, Brown informed Valley that Zimmerman was still alive and requested Valley to finish her off. Valley declined and later reported the conversation to law

enforcement. Brown, Miller, and Lee were re-arrested on April 9, 2010, the date of Zimmerman's death.

At the scene of the burning, law enforcement officers discovered several pieces of evidence including a pair of white shoes; a stun gun with blood on the handle; paper stained with blood; an orange, gold, and black hairweave; a crowbar; and a pool of blood. Additional blood was discovered on the passenger seat headrest in Brown's vehicle. During trial, a DNA expert testified that the blood on the headrest matched the known DNA profile of Zimmerman. Another DNA expert testified that the blood on the stun gun matched the known DNA profile of Brown. Finally, the medical examiner testified that the cause of Zimmerman's death was multiple thermal injuries, and the manner of death was homicide.

On June 21, 2012, a jury convicted Brown of the first-degree murder of Audreanna Zimmerman. During the penalty phase, the defense presented the testimony of several family members, including Brown's two sons, her brother, her aunt, and two of her uncles. The defense also presented the testimony of Dr. Elaine Bailey, a psychologist, and introduced several family photos. The State presented one witness, Dr. John Bingham, a licensed mental health counselor, and also entered a photograph of Zimmerman into evidence.

The testimony presented during the penalty phase established that Brown's parents, Willie Coleman, Sr., and Lily, were teenagers when they married. Brown was born in North Chicago shortly after her parents were married, and her brother, Willie Coleman, Jr., was born eleven months later. Although many family members described Brown's parents as hard workers, they were also described as "partiers" who went to clubs at night and on the weekends where they would consume alcohol and use drugs. This lifestyle prevented Brown's parents from spending a significant amount of time with their children. Often Brown and Willie, Jr., were either left at home alone or taken to the homes of different family members for extended stays. Brown's uncle testified that Willie, Sr., would bring Brown and her brother to his house on Friday nights and would not return until Sunday evening to retrieve them. As a result, Brown was forced into a parenting role for her

brother at a very early age. She would prepare meals for Willie, Jr., dress him, assist him with homework, and walk him to and from school. Willie, Jr., testified that he spent ninety percent of his time with his sister, and that his sister and his aunts, uncles, and grandparents raised him.

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

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

the ages of fourteen and twenty, her father ran a gang-related drug operation out of their house. Brown's uncle testified that Willie, Sr., was the enforcer for the organization. Willie, Sr., was eventually investigated by the FBI, arrested, and served a year in prison for his involvement in the organization.

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

After she left the treatment facility, Brown was drug free for four years. She spent that time raising Britnee. She also met another man that she married. However, shortly after they married, Brown's husband was convicted of selling drugs. Brown was then hired as a bartender, which is where she met a third man, who was also a drug dealer. Brown and this boyfriend dated for two years. Although Brown was drug free during the relationship, she reported incidents of domestic violence. When Brown's boyfriend was arrested for selling drugs, Brown fell into financial disarray. As a result, Brown accrued multiple speeding tickets that she was unable to pay, and her driver's license was suspended. She was also criminally charged with writing worthless checks. Brown became an exotic dancer to pay the bills, and relapsed to depend on alcohol and cocaine.

Brown's relapse lasted for approximately nine years. During this time, Brown was broke, homeless, and prostituted herself for

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

During the summer of 2009, Brown enrolled in online college classes, moved to Pensacola, Florida, and started working at Waffle House. By Thanksgiving, however, Brown was struggling financially, had relapsed again and quit her job. Brown obtained drugs by engaging in sex for drugs with Heather Lee's husband. On the day of the attack, Brown told Dr. Bailey she had used "several hundred dollars" worth of cocaine.

Dr. Bailey testified that she interviewed Brown, Brown's mother, Brown's aunt, Brown's two uncles, Brown's brother, and Brown's two sons. Dr. Bailey also testified that she reviewed Brown's medical, legal, and academic records; Brown's psychological testing; the offense report; the supplemental investigative report; the autopsy report; and the statements of witnesses and codefendants. Based on her evaluation, Dr. Bailey concluded Brown suffered from repeated traumas, addictions, physically and sexually abusive relationships, negative community influences, and exposures to violence both in her childhood and adult life. Dr. Bailey testified that Brown's parents were neglectful and provided an inadequate and unhealthy foundation, which negatively impacted Brown's development. Dr. Bailey concluded that the repercussions from the repeated traumas in Brown's childhood extended for decades into her adolescence and adulthood. However, Dr. Bailey concluded that Brown was logical, and was able to think linearly and rationally. Nothing in Brown's past demonstrated a propensity for violence, or that she was suffering

from bipolar disorder, any mood disorders, or schizophrenia. While Brown did exhibit some psychotic symptoms, Dr. Bailey testified that Brown was not under extreme emotional distress at the time of the murder. Dr. Bailey would not diagnose Brown with any condition other than dependence on crack cocaine, which was in remission due to her incarceration. Finally, Dr. Bailey testified that Brown did not deny her involvement in the murder, and that Brown felt remorseful for her actions.

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

On June 26, 2012, the jury recommended a death sentence by a unanimous vote. During the Spencer[3] hearing, the State presented a letter from the mother of the victim. The defense presented several records from the Illinois Department of Children and Family Services and a letter from one of Brown's friends. Brown then apologized to the victim's family and stated that Zimmerman "died a horrific death, and I was one of the ones who participated in taking her life. She didn't deserve it at all."

On September 28, 2012, the trial court sentenced Brown to death for the murder of Audreanna Zimmerman. In pronouncing Brown's sentence, the trial court found that the State had proven

[3] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

beyond a reasonable doubt the existence of three statutory aggravating circumstances: (1) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) (great weight); (2) the murder was especially heinous, atrocious, or cruel (HAC) (great weight); and (3) the murder was committed while Brown was engaged in the commission of a kidnapping (significant weight). *See* §§ 921.141(5)(d), (h), (i), Fla. Stat. (2010).

The trial court found that one statutory mitigating circumstance, that Brown had no significant history of prior criminal activity, was established and gave it minimal weight. The trial court found twenty-seven nonstatutory mitigating circumstances. Specifically, the court found that Brown: (1) was the child of a teenage mother (minimal weight); (2) was neglected by both parents (some weight); (3) lost her childhood due to parental neglect (some weight); (4) was abandoned by her mother (some weight); (5) had a history of family violence (some weight); (6) was exposed to drugs during her adolescence (some weight); (7) suffered developmental damage due to her parents' use of and dependence on drugs (some weight); (8) was subjected to sexual violence inflicted by her father; (some weight); (9) was betrayed by a trusted family member (i.e., her grandmother) (some weight); (10) experienced corruptive community influences and exposure to a criminal lifestyle (some weight); (11) experienced chaotic moves and transitions (little weight); (12) was a victim of domestic violence during her adult life (some weight); (13) witnessed a violent homicide and served as a State witness in a murder trial (little weight); (14) lost her family (her parental rights were terminated for her two sons, and she has no relationship with her mother or father) (little weight); (15) suffered repeated trauma throughout her life (little weight); (16) suffered from drug addiction (little weight); (17) suffered from the long term effects of chronic cocaine use on her brain (some weight); (18) was a productive citizen during periods of sobriety (little weight); (19) was living in poverty at the time of the crime (minimal weight); (20) behaved well in jail (little weight); (21) conducted a bible study program (little weight); (22) exhibited good courtroom behavior (little weight); (23) has no possibility of parole (little weight); (24) showed remorse (some weight); (25) received a different sentence than that of her co-defendants (some weight);

> (26) had no history of prior criminal violence (moderate weight); and (27) was using cocaine on the day of the crime (moderate weight).
>
> The trial court concluded that the aggravating circumstances outweighed the mitigating circumstances and noted that this case, "particularly because of the heinous, atrocious, [or] cruel nature of the murder of Audreanna Zimmerman, falls into the class of murders for which the death penalty is reserved." Accordingly, the court imposed upon Brown the sentence of death.

STANDARDS TO BE APPLIED

With regard to Defendant's claims of ineffective assistance of counsel, Defendant must meet the requirements outlined in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) in order to be entitled to relief. The Florida Supreme Court, in Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995), set forth the Strickland standard as follows:

> Under Strickland, a defendant must establish two components in order to demonstrate that counsel was ineffective: (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 686, 104 S. Ct. at 2063. As to the second prong, the defendant must establish that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. "[U]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id.

Defendant also raises claims based on alleged Giglio[4] violations by the prosecution.

> To establish a claim under Giglio, the defendant must demonstrate that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3)

[4] Giglio v. U.S., 405 U.S. 150, 92 S. Ct. 763 (1972).

> the evidence was material. Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict.

Jones v. State, 998 So. 2d 573, 579-80 (Fla. 2008) (citations omitted).

FACIAL SUFFICIENCY STANDARDS

Pursuant to rule 3.851(e)(1), Florida Rules of Procedure:

> Each claim or subclaim [of the postconviction motion] should be separately pled and shall be sequentially numbered beginning with claim 1. If upon motion or upon the court's own motion, a judge determines that this portion of the rule has not been followed, the judge shall give the movant 30 days to amend. If no amended motion is filed, the judge shall deem the noncompliant claim, subclaim, and/or argument waived.

Additionally, the motion shall include "the nature of the relief sought," "a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought," and "a detailed allegation as to the basis for any purely legal or constitutional claim for which an evidentiary hearing is not required . . . ." Fla. R. Crim. P. 3.851(e)(1)(C), (e)(1)(D), (e)(1)(E). See also Hunter v. State, 29 So. 3d 256, 261 (Fla. 2008). The Florida Supreme Court requires attorneys who represent capital defendants to meet the minimal pleading requirements to allege a claim of ineffective assistance of trial counsel:

> In Downs v. State, 453 So. 2d 1102, 1104-05 (Fla. 1984), [The Supreme Court of Florida] explained that a defendant who seeks to present such a claim must (1) identify a specific omission or overt act upon which the claim is based, (2) demonstrate that the omission or act was a substantial deficiency which fell measurably below that of competent counsel, and (3) demonstrate that the deficiency probably affected the outcome of the proceedings. If a capital defendant fails to plead in accordance with these criteria, the claim will not meet the threshold of facial sufficiency.

Doorbal v. State, 983 So. 2d 464, 482-483 (Fla. 2008).

> To be entitled to an evidentiary hearing on a claim of ineffective assistance, the defendant must allege specific facts that are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant. Mere conclusory allegations are insufficient to warrant an evidentiary hearing. The defendant bears the burden of establishing a prima facie case based on a legally valid claim. The burden is also on the defendant, not the State, to show a reasonable probability that the result would have been different but for counsel's error. Summary denial is proper where the defendant fails to sufficiently allege both prongs of the Strickland standard.

Anderson v. State, 220 So. 3d 1133, 1142–43 (Fla. 2017) (citations omitted, punctuation omitted).

"A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record." Tanzi v. State, 94 So. 3d 482, 493 (Fla. 2012) (citations omitted; punctuation omitted). When a capital postconviction motion fails to comply with the pleading requirements of the rule and the trial court intends to deny the claim based on the omissions, the proper procedure is for the trial court to strike the motion with leave to amend so that the defective pleading can be completed and amended in good faith. See Davis v. State, 26 So. 3d 519, 527 (Fla. 2009) (citing Spera v. State, 971 So. 2d 754, 761 (Fla. 2007), extending the holding of Bryant v. State, 901 So. 2d 810 (Fla. 2005)). If the claim or subclaim remains facially insufficient, then the trial court may properly deny the claim with prejudice. See Tanzi, 94 So. 3d at 494 (after opportunity to amend, claim was properly denied when the defendant failed to allege specific facts explaining how the outcome would have been different if counsel acted otherwise).

In the instant case, despite being given three opportunities to amend, the third amended motion still does not comply with the numbering requirements of rule 3.851(e)(1), Florida Rules of Criminal Procedure. If Defendant had not filed an amended motion, this Court would without

question be justified in deeming the noncompliant claims, subclaims, and/or arguments waived. However, Defendant did file amended motions, albeit motions that still do not comply with the numbering requirements. As the rule does not speak to the current situation, this Court has attempted to address all of Defendant's claims and subclaims. However, the motion is disorganized, and to the extent this Court may have failed to address any claims, this Court considers those claims, subclaims, and/or arguments waived based on Defendant's failure to comply with the pleading requirements of rule 3.851. For ease of reference, this Court, to the best of its ability, has organized the subclaims.

This Court also observes that because each claim was not numbered separately, many of the claims and subclaims remain facially insufficient. The Court will address this situation on a claim-by-claim basis.

DEFENDANT'S CLAIMS

CLAIM 1: TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE JURY SELECTION PHASE OF DEFENDANT'S CAPITAL TRIAL

Defendant alleges that trial counsel was ineffective during the jury selection phase of Defendant's trial by A) failing to conduct a meaningful death qualification; B) failing to inquire about pre-trial publicity; C) failing to inquire about racial bias; D) failing to strike Juror Goodwin; E) failing to strike Juror Taylor; F) failing to strike Juror Courtney; G) failing to educate the jury on the penalty phase process; and H) failing to conduct any voir dire of certain jurors.

This claim is facially insufficient in its entirety. Defendant fails to allege specific details to support her contentions. Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002) (claim regarding

jury selection legally insufficient because defendant failed to assert how alleged deficiencies caused prejudice); Johnson v. State, 921 So. 2d 490, 504 (Fla. 2005) (summary denial proper when defendant failed to allege how counsel could have rehabilitated juror). Additionally, each of the subclaims are facially insufficient for failing to allege actual juror bias. See State v. Caratelli, 961 So. 2d 312, 324 (Fla. 2007); Boyd v. State, 200 So. 3d 685, 697-98 (Fla. 2015); King v. State, 211 So. 3d 866, 887 (Fla. 2017) ("[A] defendant must show that a biased juror served during the defendant's trial to satisfy Strickland's requirement of showing a reasonable probability of a more favorable result"). Because Defendant has been given multiple opportunities to amend her motion and this claim remains facially insufficient, claim 1 is denied with prejudice. See Tanzi v. State, 94 So. 3d 482, 493 (Fla. 2012); Davis v. State, 26 So. 3d 519, 527 (Fla. 2009).

CLAIM 2: TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF DEFENDANT'S CAPITAL TRIAL BY FAILING TO ADEQUATELY INVESTIGATE AND PREPARE A DEFENSE OR CHALLENGE TO THE STATE'S CASE

Defendant alleges that trial counsel's representation during the guilt phase of her capital trial fell below acceptable professional standards and but for counsel's errors, there is a reasonable probability the result of her trial would have been different.

Claim 2A: Counsel Failed to Conduct an Adequate Investigation and Prepare for Trial

Defendant alleges that trial counsel, Attorney John Gontarek,[5] was ineffective by failing to conduct "any sort of independent investigation into critical witnesses [namely Heather Lee, Mallory Azriel, Pamela Valley, and Corie Doyle], their relationship with

[5] Gontarek is now a circuit court judge. However, because Gontarek obviously was not a judge at the time he represented Defendant, this Court will not refer to him as Judge in the context of this Order.

Ms. Brown, and their motives for testifying."[6] Defendant alleges if counsel had investigated and prepared, he would have uncovered information to impeach these witnesses. Defendant also alleges that trial counsel exhibited an "utter lack of preparation" and that he provided "erroneous advice" to Defendant.

1. Heather Lee

Heather Lee was also charged with first-degree murder in this case and initially faced the death penalty. Ultimately, Ms. Lee pled guilty to second-degree murder in exchange for her testimony against Defendant. The State's theory at trial was based upon Ms. Lee's version of events.

Defendant alleges that counsel was ineffective for failing to investigate Ms. Lee's background and her "volatile" relationship with Defendant and the victim. Defendant contends that trial counsel should have discovered five witnesses who could cast doubt on Ms. Lee's trial testimony; specifically, a) Robert Cook, b) Catherine Booker, c) Darren Lee, d) Terrance Woods, and e) Nicole Henderson. Defendant further alleges that if counsel had properly investigated he would have found f) that each of the weapons used in the commission of the crime (the taser, crowbar, and gas can) came from Heather Lee's home; and g) Heather Lee and her family had a history of tampering with witnesses.

[6] To the extent that Defendant alleges counsel was ineffective for failing to attend or take the depositions of Deputy Caleb Lukkar, Terrance Hedrick, Solange Garcia, and Willie Bradley, the Court finds that Defendant has failed to specifically allege how she was prejudiced by counsel's failure to do so. Defendant's allegation lacks the specific, factual prejudice as to each witness that is required by Strickland. Consequently, this portion of Defendant's claim is deemed facially insufficient and is summarily denied with prejudice. See Tanzi v. State, 94 So. 3d 482, 493 (Fla. 2012).

Even though each of the subclaims alleged are facially insufficient for failure to allege specific factual prejudice, the entirety of this claim was scheduled for evidentiary hearing without objection from the State.

a. Robert Cook and b. Catherine Booker

Defendant alleges that if trial counsel had investigated he could have presented evidence showing Ms. Lee had a strained relationship with the victim, and not Defendant. Specifically, Defendant alleges that counsel could have discovered Robert Cook, Defendant's ex-husband, who had witnessed tension between Ms. Lee and the victim, Audreanna Zimmerman. Defendant further asserts that counsel could have discovered Catherine Booker, who is the secretary for the landlord of the trailer park where Defendant, her co-defendants, and the victim lived. Defendant contends that shortly before the incident, the victim told Ms. Booker that something had happened between her and Ms. Lee.

Defendant failed to present the testimony of either Mr. Cook or Ms. Booker to support her claim that counsel could have discovered evidence of Ms. Lee's "volatile" relationship with Defendant and the victim. Consequently, as no evidence was presented, these portions of the claim are deemed waived and denied. Ferrell v. State, 29 So. 3d 959, 977 (Fla. 2010) (capital postconviction claim must fail when Defendant does not present evidence at evidentiary hearing to support claim).

c. Darren Lee and d. Terrance Woods

Defendant further alleges that counsel never found any evidence to disprove Ms. Lee's version of events even though this evidence was available. Specifically, Defendant alleges that counsel failed to investigate Darren Lee and Terrance Woods. Defendant contends that mere

days before the fatal attack, Ms. Lee told both Darren Lee (her husband) and Terrance Woods that Darren Lee would not be sleeping with "that bitch" anymore. Further, a few days after the attack, Ms. Lee confessed to both Darren Lee and Terrance Woods that she had murdered the victim. Defendant asserts that if counsel had investigated and prepared for trial, trial counsel would have surely called Darren Lee and Terrance Woods as witnesses at trial.

These allegations are refuted by the record. Pretrial depositions were taken of both Darren Lee[7] and Terrance Woods. Sharon Wilson, Defendant's penalty phase counsel, was present for Darren Lee's deposition. Even though Mr. Gontarek was not present at the deposition, Mr. Gontarek credibly testified at evidentiary hearing that he reviewed all of the depositions before trial.[8] Both Ms. Wilson and Mr. Gontarek were present for the deposition of Terrance Woods. Consequently, as the record shows that trial counsel investigated both Darren Lee and Terrance Woods, this claim is denied.

e. Nicole Henderson

Defendant also alleges that trial counsel was aware of a rumor that Ms. Lee had confessed to planning and carrying out the murder, but he failed to present this evidence at trial. Defendant claims that Nicole Henderson, a jail inmate familiar with Ms. Lee's "reputation for violence since 2009," had witnessed Ms. Lee's violent behavior "first hand." Defendant further alleges that Ms. Henderson had also heard Ms. Lee make incriminating statements regarding the murder.

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[7] Contrary to Defendant's allegations, Darren Lee's deposition shows that he did not testify at deposition about what Heather Lee told him about the incident. Heather Lee's attorney objected to such questioning based on spousal privilege and Darren Lee was instructed by Heather Lee's attorney not to answer those questions. See Defendant's Evidentiary Hearing Exhibit #5, p. 31. Darren Lee testified for the first time at evidentiary hearing that Heather Lee told him she had poured the gasoline on the victim and lit her on fire.

[8] See Transcript, Evidentiary Hearing, pp. 49-50; 53-54.

Defendant presented Nicole Henderson's testimony at evidentiary hearing. In regard to this allegation, Nicole Henderson testified that she had known Ms. Lee from the "free world" since 2009.[9] Ms. Henderson further testified that she first had contact with Ms. Lee when Ms. Lee got into an altercation with Ms. Henderson's teenage sister.[10] According to Ms. Henderson, Ms. Lee tried to have a physical fight with Ms. Henderson's sister because Ms. Lee's boyfriend at the time wanted to have sex with the sister.[11]

Ms. Henderson also testified that at one point she and Ms. Lee were housed in the same correctional facility.[12] During that time, Nicole Henderson overheard conversations Ms. Lee was having with another woman named Miracle Sanders. In these conversations, Ms. Lee told Ms. Sanders that she was going to be "going home" because she was blaming Britnee Miller and Defendant for the murder. According to Ms. Henderson's evidentiary hearing testimony, Ms. Lee said the reason the murder happened was because "her boyfriend had got another young lady pregnant." Ms. Lee further indicated that she was going to get two other juvenile girls that had been housed with Ms. Miller to get on the stand and say what Ms. Lee wanted them to say, so Ms. Lee would "be able to get off."[13] On cross-examination, Ms. Henderson admitted that it sounded like Ms. Lee was bragging,[14] and that Ms. Lee did not say how she was going to contact the juveniles at the juvenile detention center to get them to say what she wanted.[15]

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[9] See Transcript, Evidentiary Hearing, pp. 101-102.

[10] See Transcript, Evidentiary Hearing, p. 102.

[11] See Transcript, Evidentiary Hearing, p. 102.

[12] See Transcript, Evidentiary Hearing, p. 104.

[13] See Transcript, Evidentiary Hearing, p. 104.

[14] See Transcript, Evidentiary Hearing, p. 107.

[15] See Transcript, Evidentiary Hearing, p. 108.

After reviewing the evidence regarding this claim, the Court finds that Defendant is not entitled to relief. Defendant has not shown that Ms. Henderson's testimony regarding Ms. Lee's reputation for violence would have been admissible at trial. Additionally, it is doubtful that Ms. Henderson's testimony would have been admissible regarding the conversation she overheard between Ms. Lee and Ms. Sanders. Even if it were admissible as an exception to hearsay, it would not have made a difference at trial. Ms. Henderson herself admits that Ms. Lee was bragging. There is no indication that Ms. Lee even had the ability to contact the juveniles at the facility to do her bidding. Additionally, if Ms. Zimmerman had been pregnant at the time of the murder, this information would have been presented at trial through the medical examiner's testimony. No such evidence was presented at trial. Further, and most importantly, trial counsel actually ***did*** present Wendy Moye at trial, who testified that Ms. Lee told her directly that she was the person who poured the gas and lit the victim on fire. Although admitted as impeachment evidence, this information was already before the jury. Defendant has failed to show that trial counsel was deficient for failing to call Nicole Henderson as a witness at trial, or that Ms. Henderson's testimony would have changed the outcome of this case. She is not entitled to relief as to this claim.

f. Weapons Used in the Crime

Defendant also contends that if counsel had properly investigated, he would have discovered that all of the weapons used in the commission of the crime (taser, crowbar, and gas can) came from Ms. Lee's home. Defendant failed to present any evidence at evidentiary hearing to support the validity of this claim, and therefore Defendant is not entitled to relief.

g. History of Tampering with Witnesses

Defendant also asserts that if counsel had investigated, he would have discovered that Ms. Lee and her family had a history of tampering with witnesses. According to the motion, Ms. Lee previously asked Defendant to beat up a witness to Ms. Lee's brother's criminal case in late 2009. Defendant has failed to submit any evidence in support of this claim, and Defendant is not entitled to relief on this basis.

2. Mallory Azriel

Mallory Azriel was present when the attack of the victim first began and later helped dispose of evidence of the crime. Defendant contends that counsel's failure to depose or investigate Ms. Azriel left counsel unacquainted with Defendant's case and unprepared to cross-examine her at trial.

Defendant failed to present any evidence at the hearing to support this claim. Ferrell v. State, 29 So. 3d 959, 977 (Fla. 2010) (capital postconviction claim must fail when Defendant fails to present evidence at evidentiary hearing to support claim). The Court further notes that this claim is legally insufficient. Defendant has merely alleged that counsel failed to adequately cross-examine Ms. Azriel without indicating what favorable information could have been elicited or how Defendant was prejudiced. See Anderson v. State, 220 So. 3d 1133, 1144 (Fla. 2017) (citing Reaves v. State, 826 So. 2d 932, 939-40 (Fla. 2002)). Consequently, this claim is summarily denied.

3. Pamela Valley

Pamela Valley had at one time been a close friend of Defendant's. At trial, Ms. Valley testified that Defendant had confessed to her involvement in the murder. Ms. Valley also testified that Defendant had asked her to "finish off" the victim when she was still in the hospital.

Defendant alleges that counsel failed to question Ms. Valley as to why her initial statement to law enforcement did not include the information about Defendant asking her to "finish off" the victim. Defendant also asserts that if counsel had investigated the relationship between Defendant and Ms. Valley, he would have found that Defendant was "no longer welcome" in Ms. Valley's home after Defendant "spurned" Ms. Valley's sexual advances. Defendant further asserts that if counsel had investigated he would have discovered that Ms. Valley's child, Raygine Robinson, and Defendant's child, Britnee Miller, were co-defendants in another criminal case that was pending at the time of the murder. Finally, Defendant claims that if counsel had investigated, he would have discovered that Ms. Valley had a reputation (according to two people) of "doing or saying anything for money, even lying."

Defendant failed to present any evidence regarding Ms. Valley and Defendant's troubled relationship. Defendant further failed to present any evidence regarding Ms. Robinson and Ms. Miller being codefendants in another criminal case and how such information might have been used to cast doubt on Ms. Valley's trial testimony. Consequently, as no evidence was presented, these portions of the claim are deemed waived and denied. Ferrell v. State, 29 So. 3d 959, 977 (Fla. 2010).

At evidentiary hearing, Mr. Gontarek was asked about his investigations into Pamela Valley's background.[16] Mr. Gontarek testified he did not feel like it was important to have an investigator travel "up north" (where Ms. Valley used to live) to investigate her background, because the facts in this case were so "horrific" that information about Ms. Valley's background would not have made a difference in Defendant's trial.[17] While Mr. Gontarek conceded that if he had information regarding Ms. Valley's reputation for dishonesty he probably would have tried to use it at trial,[18] he also confirmed his understanding that evidence of reputation would have had to come from a community and not just from one or two people who knew Ms. Valley.[19] Defendant's allegation regarding Ms. Valley's "reputation" is based upon a statement by Jennifer Malone, who did not testify at the evidentiary hearing at all, and Darren Lee, who did not testify at evidentiary hearing regarding Ms. Valley and her reputation.[20] The evidence submitted at hearing does not show that counsel was deficient for failing to investigate and discover "reputation" evidence that would not have been admissible at trial. Defendant is not entitled to relief as to this portion of the claim.

Even though counsel did not impeach Ms. Valley directly with her previous statement, a review of the trial transcript shows that counsel did, in fact, delve into Ms. Valley's evolving statements that added the detail about "finishing off" the victim:

> Q. [BY MR. GONTAREK] And then you said that after you went to Crime Stoppers, called Crime Stoppers, you went back to the police and said, oh, well, Tina told me to go to

[16] See Transcript, Evidentiary Hearing, p. 33.

[17] See Transcript, Evidentiary Hearing, p. 33.

[18] See Transcript, Evidentiary Hearing, p. 33.

[19] See Transcript, Evidentiary Hearing, p. 53.

[20] See Transcript, Evidentiary Hearing, pp. 85-95.

the hospital and finish her off, is that what you said? Is that what you testified to?

A. [BY PAMELA VALLEY] Yes, something like that.

Q. You didn't tell the police that right off, it was after you went to Crime Stoppers, wasn't it?

A. Because it wasn't right off. It wasn't right off.

Q. It was after you went to Crime Stoppers and the second time you went to the police isn't it?

A. I'm not sure. I'm not sure exactly. I don't know.

Q. You are not sure?

A. But I remember telling somebody something yes, I did.

Q. And everything is vague and ambiguous, isn't that right?

A. Yes.[21]

Defendant has failed to show how impeaching Ms. Valley with the actual previous statement would have been more effective than the approach employed by counsel. As counsel addressed Ms. Valley's differing accounts during her trial testimony, the Court finds that Defendant has failed to show that counsel was deficient. She is not entitled to relief as to this claim.

4. Corie Doyle

Corie Doyle was a fellow inmate of Defendant's at the Escambia County Jail after Defendant's arrest in this case. At trial, Ms. Doyle testified that one early morning Defendant confessed to her the details of Defendant's participation in the murder. Defendant alleges that if counsel had investigated, he would have discovered Nicole Henderson, another fellow inmate, who would have provided testimony to refute Ms. Doyle's trial testimony. Specifically,

[21] See Attachment 1, Transcript, Trial, pp. 574-575.

Defendant alleges that Ms. Henderson would have testified that Defendant was heavily sedated, slept a lot, and she had never seen Defendant alone in the early morning hours drinking coffee, as Ms. Doyle indicated in her trial testimony.

An evidentiary hearing was conducted regarding this claim. At evidentiary hearing, Ms. Henderson testified consistently with the motion: Defendant was heavily sedated, slept a lot, and the guards had to wake her up for both breakfast and lunch.[22] Ms. Henderson further testified that she had never seen Defendant alone in the common area, drinking coffee, early in the morning. However, upon cross-examination, Ms. Henderson confirmed that even though she had never seen Defendant in the common area early in the morning, it was "possible" Defendant got up early at times.[23] This Court finds that Ms. Henderson's testimony does nothing to refute Ms. Doyle's trial testimony. Counsel was not deficient and Defendant was not prejudiced by counsel's failure to present Ms. Henderson's testimony on this topic. Defendant is not entitled to relief regarding this claim.

5. "Utter Lack of Preparation"

Defendant asserts that trial counsel exhibited an "utter lack of preparation" when defending this case. Specifically, Defendant alleges that trial counsel: a) asked the State via email for a list of the State's witnesses so he could avoid reviewing all of the depositions; b) was not present for Darren Lee's deposition; and c) did not have an opening statement prepared on the first day of trial.

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[22] See Transcript, Evidentiary Hearing, p. 105.

[23] See Transcript, Evidentiary Hearing, p. 107.

a. The Email about Witnesses

Defendant alleges that one week before trial, counsel requested the State to send him a list of the witnesses it would be calling at trial so counsel could "save the time and expense [of] not having to read every deposition."

Mr. Gontarek explained at evidentiary hearing that in a different capital case, Mr. Molchan, another Assistant State Attorney who assisted Ms. Jensen on this case, had provided a list of his witnesses via email for each day of the trial.[24] Mr. Gontarek said he had never had an attorney provide this information before, and because Ms. Jensen was working with Mr. Molchan on this case, he was hoping that Ms. Jensen would follow Mr. Molchan's previous course of conduct.[25] Mr. Gontarek testified that Ms. Jensen chose not to answer his email and did not provide the witness list for each day of trial.[26] Mr. Gontarek confirmed that his question did not mean he had not reviewed the depositions; in fact, he had read all of the depositions before trial.[27] He just thought it was amusing that the State had provided the witnesses in the other case and was trying to see if he could "take advantage."[28] The Court finds trial counsel's testimony credible on this topic. Defendant has failed to show that trial counsel acted deficiently or that she was prejudiced. She is not entitled to relief as to this claim.

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[24] See Transcript, Evidentiary Hearing, pp. 34-35; 53.

[25] See Transcript, Evidentiary Hearing, p. 53.

[26] See Transcript, Evidentiary Hearing, p. 54.

[27] See Transcript, Evidentiary Hearing, pp. 49-50; 53-54.

[28] See Transcript, Evidentiary Hearing, pp. 53-54.

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

Defendant further contends that Mr. Gontarek was not present for Darren Lee's deposition. Defendant alleges she was prejudiced by trial counsel's absence at this deposition because Darren Lee's deposition testimony contradicted Ms. Lee's version of events, and trial counsel failed "to subject the State's evidence to the adversarial testing the Constitution requires."

This subclaim is facially insufficient. Defendant fails to specify what the contradictions were between Darren Lee's deposition testimony and Ms. Lee's trial testimony,[29] and what information counsel should have used to challenge the "State's evidence." Regardless, Mr. Gontarek testified credibly that he read all of the depositions in the case to prepare for trial.[30] Defendant has failed to show that trial counsel's absence from Darren Lee's deposition was deficient or she was prejudiced. She is not entitled to relief as to this subclaim.

c. Opening Statement

Defendant also cites to the trial transcript, in which trial counsel stated, "I don't know what my opening is going to be yet, judge." Defendant alleges "[t]his concession reveals the depth of counsel's apathy towards Ms. Brown and her case."

This claim is facially insufficient as Defendant fails to allege specific, factual prejudice. Regardless, Mr. Gontarek testified at evidentiary hearing regarding this claim. He indicated that when he prepares for trial, he does not sit down and write out pages for

[29] If Defendant is trying to imply that Darren Lee claimed Heather Lee had admitted to pouring the gasoline and lighting the victim on fire, contrary to Heather Lee's trial testimony, a review of Darren Lee's deposition testimony shows that this issue was never discussed during his deposition. See Defendant's Evidentiary Hearing Exhibit #5.

[30] See Transcript, Evidentiary Hearing, pp. 49-50; 53-54.

his opening statement.[31] Instead, he mentally prepares for what he wants to present during his opening statement.[32] The Court finds trial counsel's testimony credible on this topic. Defendant has failed to demonstrate that Mr. Gontarek was deficient or that his preparation methods prejudiced Defendant. She is not entitled to relief as to this claim.

6. "Erroneous Advice" of Counsel

Defendant also alleges that she relied on the "erroneous advice" of counsel when she "chose not to testify, not to take a plea deal, not to cooperate with the State, and in essence, not to bring her story to light." Defendant further asserts that trial counsel advised her that by "keeping quiet," she could "save" her daughter, Britnee Miller. Defendant alleges that following this advice put her at a "grave" disadvantage as Ms. Lee testified to events that had "no factual backing."

This claim is facially insufficient for lack of specific, factual prejudice. Defendant's claim of "erroneous advice" is also conclusory and speculative, without any facts offered in support of this allegation.

Even though the entirety of claim 2A was scheduled for evidentiary hearing, the only evidence presented that remotely relates to this claim is that the State refused to offer a plea in Defendant's case, despite both trial counsel and penalty phase counsel trying to persuade the State otherwise.[33] Consequently, the evidence shows that trial counsel did not erroneously advise Defendant not to enter a plea, as no plea offer was available. In regard to the other issues raised in this subclaim, because Defendant failed to present any evidence on these topics at the

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[31] See Transcript, Evidentiary Hearing, p. 54.

[32] See Transcript, Evidentiary Hearing, p. 54.

[33] See Transcript, Evidentiary Hearing, pp. 37-38; 50-51; 278-279; 394-396; see also State's Evidentiary Hearing Exhibit #1.

hearing, the Court finds the remaining issues are abandoned and denied. See Ferrell v. State, 29 So. 3d 959, 977 (Fla. 2010) (capital postconviction claim must fail when Defendant fails to present evidence at evidentiary hearing to support claim).

Claim 2B: Counsel Failed to Adequately Challenge the State's Evidence through Cross-Examination of Witnesses

Defendant next alleges that trial counsel failed to adequately cross-examine witnesses Heather Lee, Corie Doyle, and Pamela Valley regarding their previous inconsistent statements.

1. Heather Lee

Defendant alleges that trial counsel failed to impeach Heather Lee with the following: a) Ms. Lee's prior criminal record; b) Ms. Lee's deposition testimony regarding her whereabouts on the day of the incident; c) Ms. Lee's deposition testimony regarding cleaning blood off of her shoes; d) Ms. Lee's deposition testimony about how the blood got on her shoes; e) Ms. Lee's recorded statement to law enforcement about where she, the victim, and the other participants were sitting in Defendant's vehicle on the night of the incident; f) Ms. Lee's recorded statement to law enforcement about her knowledge of the wooded area where the crime took place; g) Darren Lee's deposition testimony on the topic of whether Ms. Lee was alone with Darren Lee at the home the day of the incident; and h) Darren Lee's deposition testimony regarding the reason no one opened the door when the police came to the Lees' residence. Defendant further alleges that counsel failed to ask Ms. Lee about the following: i) Darren Lee's affair with Defendant as motive for testifying against Defendant; j) Darren Lee's affair with the victim; k) whether the gas can and crowbar used during the crime came from her home; and l) Ms. Lee's return to the scene of the crime with Defendant. In general, Defendant alleges that none of Ms. Lee's given statements were consistent.

a. Heather Lee's Prior Criminal Record

Defendant claims that counsel was ineffective for failing to impeach Heather Lee with her prior criminal record: two felony convictions and two crimes of dishonesty. At evidentiary hearing, Mr. Gontarek testified that he did not believe it would make a difference in this case if he impeached Ms. Lee with her prior criminal record.[34] Instead, counsel felt that the fact Ms. Lee pled to second-degree murder and was getting a benefit as a result of her plea "was everything."[35] The record shows that trial counsel made the jury aware that Ms. Lee had been charged with first-degree murder in this case and was still convicted of second-degree murder after she entered into a plea in exchange for her testimony against Defendant.[36] Ms. Lee's previous criminal record is insignificant under these circumstances. Defendant has further failed to demonstrate that the results of Defendant's trial would have been different if counsel had used Ms. Lee's prior criminal record to impeach her trial testimony. Consequently, Defendant is not entitled to relief as to this subclaim.

b. Heather Lee's Deposition – Whereabouts Day of the Incident

Defendant alleges that counsel was ineffective for failing to impeach Heather Lee regarding her whereabouts on the day of the incident. Specifically, Defendant alleges that Ms. Lee testified at trial that she was at home all afternoon with her husband on the day of the incident. However, Defendant alleges that Ms. Lee testified at deposition and in her recorded interview of April 7, 2011, that she was at Defendant's house around 3:45 p.m., and then went to her own home to cook fish, during which several family members dropped by her home.

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[34] See Transcript, Evidentiary Hearing, pp. 39-40.

[35] See Transcript, Evidentiary Hearing, p. 56.

[36] See Attachment 1, Transcript, Trial, pp. 511; 535-536.

Defendant's claim is facially insufficient for failure to allege proper prejudice. Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim. While Defendant did introduce into evidence Ms. Lee's deposition and the recorded interview from April 7, 2011, Defendant failed to address the topic of these inconsistencies with trial counsel or any other witnesses called at the evidentiary hearing. Defendant has also failed to present any evidence to demonstrate how this inconsistency on such a tangential issue would have changed the results of Defendant's trial. Defendant is not entitled to relief as to this subclaim.

c. Heather Lee's Deposition – Cleaning Blood off Shoes

Defendant next alleges that counsel was ineffective for failing to impeach Heather Lee regarding cleaning the blood off her shoes. At trial, Ms. Lee testified that after she returned from the field to Defendant's trailer, she was not trying to clean the blood off her shoes. However, during Ms. Lee's deposition testimony, she stated that she tried to get the blood off her shoes. Defendant contends that counsel did not question Ms. Lee about this inconsistency even though a previous witness at trial, Mallory Azriel, testified she saw Ms. Lee try to clean her shoes.

Defendant's claim is facially insufficient for failure to allege proper prejudice. Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim. While Defendant did introduce into evidence Ms. Lee's deposition, Defendant failed to address the topic of this inconsistency with trial counsel or any other witnesses called at the evidentiary hearing. The record also shows that trial counsel did highlight in his cross-examination that Mallory Azriel, arguably a much more credible witness, had

testified that Ms. Lee had tried to clean the blood off her shoes.[37] Further, Defendant has failed to present any evidence that demonstrates how this inconsistency in testimony on such a tangential issue would have changed the results of Defendant's trial. Defendant is not entitled to relief as to this claim.

d. Heather Lee's Deposition – How Blood Got on Shoes

Defendant also alleges that counsel was ineffective for failing to impeach Heather Lee regarding how the blood got on her shoes. Defendant alleges that at trial, Ms. Lee stated that she got blood on her shoes because "I stepped in some." However, during deposition Ms. Lee stated that the blood "flew" on her while the victim was being hit.

Defendant's claim is facially insufficient for failure to allege proper prejudice. Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim. While Defendant did introduce into evidence Ms. Lee's deposition, Defendant failed to approach the topic of this inconsistency with trial counsel or any other witnesses called at the evidentiary hearing.

A review of the record shows that Defendant mischaracterizes Ms. Lee's testimony on this topic. Ms. Lee was not positive about how the blood got on her shoes. At trial, the following testimony was elicited regarding the shoes:

> Q. [By ASA Bridgette Jensen]: Why did she [Defendant] make you take your shoes off?
>
> A. [By Heather Lee]: Cause it had a little bit of blood on it.
>
> Q. How did you get blood on your shoes?

[37] See Attachment 1, Transcript, Trial, p. 540.

A. **I guess** when I ran, I stepped in some. Because her [Audreanna Zimmerman's] head was bleeding when Tina took the pillow case off.[38]

During Ms. Lee's deposition, she testified as follows:

Q. [By Attorney Sharon Wilson]: Why did your shoes have blood all over them?

A. [By Heather Lee]: **I guess** the blood had flew on me when they was hitting her; **but I don't know how it got on me because I didn't – I wasn't taking no part of it.**[39]

Considering this was Ms. Lee's testimony on the topic, it is doubtful if counsel had tried to impeach her with her deposition testimony that it would have made a difference at trial. Indeed, Defendant fails to even attempt to explain how this minor difference in testimony would have changed the results of Defendant's trial, especially since it appears Ms. Lee was merely guessing in both statements. Defendant is not entitled to relief as to this claim.

e. Heather Lee's Recorded Statement – Persons Present in the Vehicle and in the Woods

Defendant also alleges that counsel was ineffective for never questioning Heather Lee about her change in testimony regarding who was present in the vehicle at the time the victim was transported into the woods. At trial, Ms. Lee stated that she was in the middle of the backseat of the vehicle; Britnee Miller was in the front passenger seat; and Tina Brown was in the driver's seat. Ms. Lee indicated at trial that Mallory Azriel did not get in the vehicle and was not present in the woods. However, according to Defendant's allegation, Ms. Lee indicated in her April 2011 recorded statement that she was located in the middle of the backseat, with

[38] See Attachment 1, Transcript, Trial, p. 530 (emphasis added).

[39] See Defendant's Evidentiary Hearing Exhibit #8, p. 22 (emphasis added).

Britnee Miller and Mallory Azriel sitting on either side of her in the vehicle. Ms. Lee further indicated in this statement that both Britnee Miller and Mallory Azriel held Ms. Lee by the vehicle while Defendant pulled the victim out of the trunk.

Defendant's claim is facially insufficient for failure to allege proper prejudice. Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim. While Defendant did introduce into evidence Ms. Lee's April 7, 2011 recorded statement, Defendant failed to address the topic of these inconsistencies with trial counsel or any other witnesses called at the evidentiary hearing. A review of the recorded statement and Ms. Lee's trial testimony shows that Defendant's allegations are true that during the recorded statement Ms. Lee placed Mallory Azriel in the vehicle and also at the wooded crime scene. However, even if counsel had presented this impeachment evidence, it is doubtful it would have made a difference. Mallory Azriel, even by Ms. Lee's statement, has never been depicted as a key player in the murder of the victim. Whether Mallory Azriel was or was not present during the burning of the victim in the woods does not change the underlying facts testified to by Ms. Lee or the other evidence presented at trial. In fact, if counsel had introduced the impeachment evidence regarding Mallory Azriel's possible presence in the woods, it might have caused the jury to give Mallory Azriel's testimony more credence. Even though Mallory Azriel testified at trial that she did not get into the vehicle and was not present in the woods, if the jury believed that Mallory Azriel was actually present for these events, her testimony regarding Defendant being the main aggressor could have been even more compelling. Defendant has failed to demonstrate that she is entitled to relief as to this claim.

f. Heather Lee's Recorded Statement –Knowledge of Crime Scene

Defendant next alleges that counsel failed to effectively cross-examine Heather Lee regarding the inconsistencies in her testimony about the crime scene. Specifically, Defendant alleges that at trial, Ms. Lee testified that she had never been to the wooded area before. However, during her recorded interview of April 7, 2011, Ms. Lee stated that she knew the neighborhood because her grandmother lived there.

Defendant's claim is facially insufficient for failure to allege proper prejudice. Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this allegation. While Defendant did introduce the recorded statement, Defendant failed to address this inconsistency with trial counsel or any other witnesses called at the evidentiary hearing.

Regardless, Ms. Lee's recorded statement would not have impeached Ms. Lee's trial testimony on this topic. The trial transcript shows that Ms. Lee testified to the following:

> Q. [By ASA Bridgette Jensen]: Where did you guys go?
>
> A. [By Heather Lee]: We went down Detroit up Ashland to where it was two openings. There was a big chain and a small chain. Tina got out and took the big chain off and drove down in the area.
>
> Q. Had you been to that area before?
>
> A. No, ma'am. You could see the area as you go up Ashland though. You could see the chains.[40]

During Ms. Lee's April 7, 2011 recorded statement, she testified to the following:

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[40] See Attachment 1, Transcript, Trial, p. 522.

> DEFENDANT LEE: We ended up leaving out of the trailer park, turning right on Detroit. We went up Detroit, and I know the streets, we turned on Ashland.
>
> And when we turned on Ashland, it's dark up in that area. But I know that area as we're going up in there because I stayed in that neighborhood for a while.
>
> ATTORNEY JENSEN: Do you have a grandma that lives in there?
>
> DEFENDANT LEE: My grandmother stays on Boaz Street (phonetics).
>
> ATTORNEY JENSEN: Okay. Go ahead.
>
> DEFENDANT LEE: We went up Ashland, and we turned off to the side where it was blocked off at.
>
> Tina got out, and she unhooked the strings that was – they usually have strings blocking off where you can't go down in that little area. And Tina got out, she unhooked it, and got back in the Jeep, and we pulled down in there. And she turned the lights out.[41]

When reviewing the statements in context, the word "area" in Ms. Lee's trial testimony and recorded statement are referring to separate things. The "area" referenced in Ms. Lee's trial testimony is the blocked off wooded area where the offense took place. The "area" referenced in Heather's Lee's recorded statement is the neighborhood in which the blocked off wooded area is located. All the recorded statement shows is that Ms. Lee was familiar with the existence of the wooded area, not that she had ever been there before. Consequently, Ms. Lee's recorded statement would not have been effective in impeaching her trial testimony on this topic. Defendant is not entitled to relief as to this subclaim.

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[41] See Defendant's Evidentiary Hearing Exhibit #13B, pp. 41-42.

g. Darren Lee's Deposition Testimony—Fish Fry

Defendant further alleges that trial counsel failed to impeach Heather Lee's testimony by calling Darren Lee, Heather's husband, as a witness at trial. Defendant claims that during deposition, Darren Lee testified that in the late afternoon or early evening of March 24, 2010, Defendant and Ms. Lee were at their shared home cooking fish together. Darren Lee further indicated that various people stopped by that evening. Defendant asserts that this testimony contradicts Ms. Lee's trial testimony that she was home alone with her husband that evening.

Defendant's claim is facially insufficient for failure to allege proper prejudice. Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim. While Defendant introduced Darren Lee's deposition into evidence, and Darren Lee, Heather Lee, and Defendant's trial counsel testified at the evidentiary hearing, Defendant failed to address the topic of this supposed inconsistency with trial counsel or any other witnesses called at the evidentiary hearing.

Regardless, a review of the trial transcript shows that Darren Lee's deposition testimony on this topic would not have contradicted Ms. Lee's trial testimony. A review of Ms. Lee's trial testimony shows the following:

> Q. [By Bridgette Jensen, ASA]: I'm going to direct your attention specifically to March 24th of 2010; do you remember that particular night?
>
> A. [By Heather Lee]: Yes, ma'am.
>
> Q. Where were you during the afternoon?
>
> A. I was at home.
>
> Q. Was anyone with you at home?

A. My husband, Darren.[42]

Ms. Lee never denied that anyone else came by her home that day, but simply stated she was home with her husband during the afternoon. Additionally, during cross-examination, trial counsel questioned Ms. Lee about her previous statement that she did not know about the incident because she was with her husband at the time, cooking fish and french fries. Ms. Lee admitted at trial that her previous statement that she did not know anything about the victim's death was a lie.[43] Whether people came by Ms. Lee's home earlier in the day is an ancillary issue that has no bearing on the incident itself. Counsel elicited the testimony from Ms. Lee that she lied about her knowledge of the crime. This was a much more pivotal issue than whether people had or had not come by her home that evening. Defendant has failed to show how counsel was deficient by failing to use Darren Lee's deposition testimony on an issue that was far from crucial, especially when the testimony would not have even served to impeach Ms. Lee. Defendant is not entitled to relief on this portion of the claim.

h. Darren Lee's Deposition Testimony— Failure to Open Door for Law Enforcement

Defendant next alleges that counsel failed to cross-examine Heather Lee and failed to call Darren Lee as a witness to impeach Ms. Lee's trial testimony regarding law enforcement knocking on their door. Specifically, Defendant alleges that at trial Ms. Lee testified Defendant followed her back to her home after the incident. Ms. Lee stated she was crying and Darren Lee kept asking her what was wrong. Ms. Lee testified that when the police knocked on her door, Defendant told her "[s]he better not open the door." However, Darren Lee testified during his deposition that he was home watching a movie with Ms. Lee and Defendant right before the

[42] See Attachment 1, Transcript, Trial, p. 514.

[43] See Attachment 1, Transcript, Trial, p. 537.

police arrived. Darren Lee testified that the reason no one answered the door when the police knocked was because he was "high."

Defendant's claim is facially insufficient for failing to allege proper prejudice. Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim. While Defendant introduced Darren Lee's deposition into evidence, and Darren Lee, Ms. Lee, and trial counsel testified at the evidentiary hearing, Defendant failed to address the topic of these supposed inconsistencies with trial counsel or any other witnesses called at the evidentiary hearing. Regardless, even if Darren Lee had testified at trial consistent with his deposition testimony, his proposed testimony does not necessarily contradict Ms. Lee's testimony: Ms. Lee might not have answered the door because Darren Lee was high and Defendant told her not to open the door. Defendant has not shown that these events were mutually exclusive. Defendant has failed to show that counsel was deficient or that Defendant was prejudiced because counsel failed to use Darren Lee's deposition testimony to impeach on a minor issue, especially when the proposed testimony does not even necessarily contradict Ms. Lee's trial testimony. Defendant is not entitled to relief as to this subclaim.

i. Darren Lee's Affair with Defendant

Defendant next alleges that, prior to the murder, Heather Lee accused Defendant of having an affair with her husband Darren Lee, but counsel failed to cross-examine Ms. Lee on this issue. Defendant alleges that Ms. Lee admitted during her deposition that she had heard rumors Defendant was sleeping with her husband. Additionally, Darren Lee admitted during his deposition testimony that he was sleeping with Defendant. Yet, trial counsel never questioned Ms. Lee about this being a possible motive to testify against Defendant.

An evidentiary hearing was scheduled regarding this claim. Even though trial counsel testified at evidentiary hearing, he was never questioned on this specific topic. Ms. Lee was asked at evidentiary hearing whether Darren Lee was cheating on her with Defendant; Ms. Lee's responded "No, he was not."[44] Ms. Lee was not questioned further at evidentiary hearing regarding this issue. Darren Lee also testified at evidentiary hearing, but was not asked whether he was sleeping with Defendant at the time of the incident, or whether Ms. Lee suspected that he was.

By stipulation of the parties, Ms. Lee's and Darren Lee's depositions were entered into evidence, even though none of the witnesses at evidentiary hearing were questioned regarding the deposition testimony on this topic. Ms. Lee's deposition shows that she had heard from "somebody" that Defendant "liked" her husband Darren Lee, so she asked Defendant if she was sleeping with him. Ms. Lee specifically denied that she accused Defendant of sleeping with Darren Lee. Ms. Lee told Defendant that if it was true, Defendant needed to stay away from Ms. Lee and her family. Defendant told her it was not true. Ms. Lee confirmed during deposition that she and Defendant "got along okay after that."[45]

A review of Darren Lee's deposition shows that he admitted to sleeping with Defendant, but, to his knowledge, Ms. Lee was not aware of his sexual relationship with Defendant. Darren Lee further testified that Ms. Lee did not suspect he had a sexual relationship with Defendant, Ms. Lee had never said anything to him about it, and nobody else had ever said anything to him about his sexual relationship with Defendant.[46]

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[44] See Transcript, Evidentiary Hearing, p. 74.

[45] See Defendant's Evidentiary Hearing Exhibit #8, pp. 8-9.

[46] See Defendant's Evidentiary Hearing Exhibit #5, pp. 8-9.

The evidence submitted leads the Court to conclude that if Ms. Lee had been asked at trial whether Defendant was having an affair with her husband, her response would have been "No, he was not." Ms. Lee's evidentiary hearing testimony is consistent with the depositions in that Ms. Lee did not know Defendant was sleeping with Darren Lee.

Even had trial counsel somehow been able to introduce the information that Darren Lee was sleeping with Defendant to call into question Ms. Lee's motive for testifying, there is no reasonable probability that the outcome of this case would have been different. As the Florida Supreme Court has previously found, "[t]he record provides more than sufficient evidence to support Brown's conviction for the first-degree murder of Audreanna Zimmerman."[47] The evidence at trial showed that Defendant lured the victim to her home under false pretenses, and with the assistance of Heather Lee and Britnee Miller, Defendant stunned, beat, and kidnapped the victim, and then transported her to a clearing in the woods where Defendant and Miller continued to beat and stun the victim. Eventually, the victim was doused with a canister of gasoline and she was set on fire. Before she died, the victim walked to a local residence and identified Defendant, Britnee Miller, and Heather Lee as her attackers.[48] It is undisputed that Defendant's DNA was found on the handle of the stun gun used in the crime; the victim's blood was found on the headrest in Defendant's vehicle, and an orange, gold, and black hairweave that matched Defendant's hair the night of the incident was found in the clearing. It appeared to be the missing section of Defendant's hairweave from the back of her head.[49] With this convincing evidence, there is no reasonable probability that Defendant would not have been convicted of

[47] See Brown v. State, 143 So. 3d 392, 407 (2014).

[48] See Brown v. State, 143 So. 3d 392, 407 (2014).

[49] See Brown v. State, 143 So. 3d 392, 397 (2014).

first-degree murder if trial counsel had questioned Ms. Lee about her husband sleeping with Defendant. Defendant is not entitled to relief as to this claim.

j. Darren Lee's Affair with the Victim

Defendant next alleges that trial counsel was ineffective in failing to cross-examine Heather Lee about the "true nature" of her relationship with the victim. During trial, Ms. Lee testified that she and the victim were "real close friends." Defendant alleges that this testimony could have been impeached by two facts: 1) Heather Lee accused the victim of having an affair with her husband, Darren Lee, and 2) Darren Lee admitted in his deposition testimony he was, indeed, sleeping with the victim. Defendant alleges that, according to Terrance Woods' deposition testimony, Ms. Lee and the victim got into a physical fight because two days before the incident Ms. Lee confronted the victim about sleeping with her husband. Defendant contends that Ms. Lee was never challenged with "the fact that her statements were not credible in light of the antagonistic relationship between herself and the victim."

An evidentiary hearing was held regarding this claim. At evidentiary hearing, trial counsel indicated he was aware that "Ms. Heather Lee had some type of issue with Ms. Zimmerman having a relationship with her husband."[50] Darren Lee and Terrance Woods both testified that Darren Lee was sleeping with the victim, Ms. Lee found out about it, and as a result, she got into a physical fight with the victim a couple of days before the incident.[51] However, even if counsel had called Darren Lee and Terrance Woods to testify at trial regarding the affair and the physical altercation, this testimony would have done little to impeach Ms. Lee's trial testimony about Ms. Lee and the victim being "real close friends." As Defendant has

[50] See Transcript, Evidentiary Hearing, p. 28.

[51] See Transcript, Evidentiary Hearing, pp. 87-88; 404-406.

failed to show that counsel was deficient or Defendant was prejudiced by counsel's failure to attempt to impeach Ms. Lee's testimony regarding the "true nature" of her relationship with the victim, Defendant is not entitled to relief as to this portion of the claim.

k. Darren Lee's Deposition Testimony – Gas Can and Crowbar

Defendant next alleges Darren Lee made several statements incriminating Heather Lee in the victim's murder, but counsel failed to question Ms. Lee regarding these topics. Specifically, Defendant alleges that Darren Lee testified at deposition that the crowbar and gas can used in the crime belonged to him. In support of this claim, Defendant references Darren Lee's purported confirmation that the police found "male fingerprints" on the crowbar and that the fingerprints were his. Defendant claims that because counsel did not question Ms. Lee about this evidence, the jury never heard that the murder weapon came directly from Ms. Lee's house.

Defendant's claim is facially insufficient for failing to allege proper, specific prejudice. Regardless, an evidentiary hearing was scheduled for this claim. Although both Heather Lee and Mr. Gontarek testified at evidentiary hearing, neither witness was asked questions regarding this subclaim. As to Darren Lee, he testified as follows on the topic of the gas used in the crime:

> Q. [By Postconviction Defense Counsel]: Okay. Did she say anything – did Heather Lee say anything at that time in regards to where the gas came from?
>
> A. [By Darren Lee]: **No, not really**. I know that – I know that it came from the gas station.
>
> Q. The gas station?
>
> A. Uh-huh.
>
> Q. Did she say when she got it at the gas station?
>
> A. Before they went to the curve, **I guess**.

Q. Before they went to the – the woods?

A. Yeah.[52]

Darren Lee's evidentiary hearing testimony that Heather Lee did not tell him where the gas came from, but he guessed it came from a gas station before they went to the woods is hardly a revelation. Darren Lee was not asked about the gas can or the crowbar at evidentiary hearing.

Additionally, Defendant's claim is refuted by Darren Lee's deposition itself. Contrary to Defendant's allegations, Darren Lee never stated the crowbar and gas can came from his and Heather Lee's home. In regard to the crowbar, the evidence does not even show that the fingerprints in question were Darren Lee's. The deposition provides that the officers found some "male fingerprints" on the crowbar, the officers questioned Darren Lee and took his fingerprints, and then Darren Lee never heard anything more about the crowbar.[53] Darren Lee was asked during deposition, "So you assume that those fingerprints didn't match yours?" To which Darren Lee responded, "I know they didn't match mine. I was asleep."[54]

In regard to the gas can, Darren Lee admitted that there were two gas cans on his porch;[55] however, this testimony does nothing to establish that one of those gas cans was actually used in the crime. According to Darren Lee's deposition, before the gas cans were confiscated by the police, Darren Lee never noticed them being missing; he affirmatively testified "they was right there."[56] Defendant is not entitled to relief as to this claim.

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[52] See Transcript, Evidentiary Hearing, p. 90 (emphasis added).

[53] See Defendant's Evidentiary Hearing Exhibit #5, pp. 7-8; 23.

[54] See Defendant's Evidentiary Hearing Exhibit #5, p. 8.

[55] See Defendant's Evidentiary Hearing Exhibit #5, p. 34.

[56] See Defendant's Evidentiary Hearing Exhibit #5, p. 42.

l. Returning to Scene of the Crime

Defendant next alleges that counsel failed to cross-examine Ms. Lee about "returning to the scene of the crime" with Defendant. Specifically, Defendant alleges that during Ms. Lee's deposition she testified that she went with Defendant to the house where the victim went immediately after being burned. Defendant asserts that counsel never questioned Ms. Lee about why she went to the house and what she said to Terrance Hedrick, the person who found the victim. Defendant contends that counsel also failed to ask about Terrance Hedrick's friendship with Heather Lee's cousin, Eric, to whom Hedrick allegedly divulged facts about the crime.

This claim is facially insufficient for failure to allege specific, proper prejudice. Although this claim was set for evidentiary hearing, Defendant failed to present any testimonial evidence to support this claim. While Defendant did introduce into evidence Ms. Lee's deposition, Defendant has failed to address this issue with trial counsel or any other witnesses called at the evidentiary hearing. At deposition, Ms. Lee stated that it was Defendant who wanted to question Terrance Hedrick about what the victim told him about the crime.[57] The Court notes that questioning Ms. Lee regarding this issue might have served to further incriminate Defendant. Defendant has failed to show or allege how counsel was deficient or how Defendant was prejudiced by not introducing this evidence during the cross-examination of Ms. Lee. Defendant is not entitled to relief as to this claim.

2. Corie Doyle

Defendant also alleges that counsel failed to cross-examine Ms. Doyle about a) the "lime green jumpsuit" conversation with Defendant; b) televised news reports about the murder; c) Ms.

[57] See Defendant's Evidentiary Hearing Exhibit #8, pp. 41-42.

Doyle's trial testimony that she had "never laid eyes on" Ms. Lee before her conversation with Defendant; d) whether Ms. Lee and Defendant had the same color jumpsuit while housed at the Escambia County Jail; e) her friendship with Ms. Lee; and f) her statement that Defendant told her Britnee Miller caught herself on fire during the incident.

a. Corie Doyle – Lime Green Jumpsuit

Defendant alleges that counsel should have cross-examined Corie Doyle regarding her "lime green jumpsuit" conversation with Defendant. At trial, Corie Doyle testified that she first noticed Defendant because she was wearing a "lime green" jumpsuit as opposed to a "dark green" jumpsuit like the other inmates. Corie Doyle testified at trial that she asked Defendant why her jumpsuit was a different color.[58] However, Defendant asserts that Corie Doyle's taped statement shows Corie Doyle already knew what the lime green jumpsuit meant because she told the investigator Defendant was wearing a different colored jumpsuit because "she had done something bad." Defendant contends that counsel should have questioned Corie Doyle regarding this inconsistency.

This subclaim is facially insufficient for failing to allege specific, proper prejudice. However, an evidentiary hearing was scheduled regarding this claim. Defendant did not present any testimonial evidence to substantiate these allegations. Additionally, Defendant failed to submit into evidence Corie Doyle's taped statement. Consequently, the Court finds that this claim is abandoned and summarily denied. Ferrell v. State, 29 So. 3d 959, 977 (Fla. 2010) (capital postconviction claim must fail when Defendant fails to present evidence at evidentiary hearing to support claim).

[58] See Attachment 1, Transcript, Trial, p. 606.

b. Corie Doyle –Viewing News Reports regarding Murder

Defendant next alleges that even though Corie Doyle admitted during her June 6, 2012 deposition to seeing televised news reports regarding the murder, trial counsel never questioned her about this fact.

This subclaim is facially insufficient for failing to allege specific, proper prejudice. The entirety of this claim was scheduled for evidentiary hearing. Defendant failed to present any testimonial evidence to support this claim. Defendant did not even call Corie Doyle as a witness at the evidentiary hearing.

While Defendant did submit into evidence Corie Doyle's deposition transcript showing that she had seen something on the news about the incident, Defendant has failed to allege or demonstrate that this information would have made any difference at trial. A review of the deposition shows that all Corie Doyle saw on the news was "there was a girl that was lit on fire and that she was taken by helicopter and that before she died she said the girls' names."[59] Corie Doyle elaborated further that she never heard the names of the people; the names were not released.[60] Corie Doyle's deposition testimony on this topic only seems to support a conclusion that she learned the details of the murder from Defendant and not the news.[61] Defendant has failed to show that counsel was deficient or that Defendant was prejudiced by counsel's failure to highlight this information for the jury. Defendant is not entitled to relief regarding this subclaim.

[59] See Defendant's Evidentiary Hearing Exhibit #6, p. 29.

[60] See Defendant's Evidentiary Hearing Exhibit #6, p. 30.

[61] See Defendant's Evidentiary Hearing Exhibit #6, pp. 13-15; 29-30.

c. Corie Doyle—"Never Laid Eyes" on Heather Lee

Defendant next alleges that counsel should have questioned Corie Doyle about her statement that, prior to her conversation with Defendant, she had "never laid eyes" on Heather Lee. Defendant contends that jail movement records from the Escambia County Jail show that for a period of time in July 2011, Corie Doyle was housed in the same dorm as Heather Lee. Corie Doyle was not moved to Defendant's dorm until October 2011.

This subclaim is facially insufficient for failing to allege specific, proper prejudice. Regardless, the entirety of this claim was scheduled for evidentiary hearing. At evidentiary hearing, trial counsel testified that he "guess[ed]" jail records that reflected Corie Doyle was housed with Heather Lee before she was housed with Tina Brown might have been helpful in attacking Corie Doyle's credibility.[62] Corie Doyle was not called as a witness at the evidentiary hearing.

Even if Defendant's claim were facially sufficient, this claim would still fail. The Escambia County Jail movement records show that, near the beginning of her incarceration, Corie Doyle was housed in the same dorm as Heather Lee for a total of five days before Doyle was moved to a different dorm.[63] According to Corie Doyle's deposition testimony, there are approximately 90 women housed in each dorm.[64] Based on this information, it is more than probable that in those few days, Corie Doyle might not have known who Heather Lee was or have noticed her before being transported. Without Corie Doyle's evidentiary hearing testimony,

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[62] See Transcript, Evidentiary Hearing, pp. 30-31.

[63] Corie Doyle was housed in 4 West at the same time as Heather Lee from July 18, 2011, through July 22, 2011. See Defendant's Evidentiary Hearing Exhibit #18B , pp. 1-2 of "Doyle, Corie Kendall Movement Record" and p. 8 of "Lee, Heather Trinee Movement Record."

[64] See Defendant's Evidentiary Hearing Exhibit #6, pp. 6-7.

this Court can only speculate as to whether Corie Doyle's trial testimony might have been impeached regarding her having "never laid eyes" on Heather Lee before she met Tina Brown. Defendant has failed to submit the necessary evidence to support her claim. As such, Defendant has failed to show or allege how counsel was deficient or Defendant was prejudiced by counsel's failure to further question Corie Doyle about knowing Heather Lee. This claim is summarily denied.

d. Corie Doyle – More than One Lime Green Jumpsuit

Defendant next alleges that trial counsel failed to question Corie Doyle about a "contradiction" in her deposition and trial testimony regarding the lime green jumpsuits. Defendant asserts that during Corie Doyle's deposition and trial testimony she was adamant that the only reason she initiated any contact with Defendant was because Defendant's jumpsuit was "lime green," a different color than that worn by the rest of the inmates. However, during Corie Doyle's deposition, she also indicated that Heather Lee was wearing a "lime green" jumpsuit. Defendant claims that if Defendant's lime green jumpsuit was so "eye-catching and distinct," then Heather Lee's lime green jumpsuit should have stood out to Corie Doyle in July 2011, prior to her ever meeting Defendant.

This subclaim is facially insufficient for failing to allege specific, proper prejudice. The entirety of this claim was scheduled for evidentiary hearing. Defendant failed to present any testimonial evidence in support of this claim. While the Defendant did submit into evidence Corie Doyle's deposition testimony, Defendant failed to question trial counsel or any other witnesses about this subclaim. Defendant's allegation is based on pure speculation that Corie Doyle must have noticed Heather Lee's lime green jumpsuit in the short time span in which she

was housed in the same dorm as Heather Lee. The evidence before this Court shows that Corie Doyle first become incarcerated at the Escambia County Jail on July 14, 2011, and was in the same dorm as Ms. Lee for only five days before being moved to another dorm.[65] Defendant has failed to submit any evidence in support of her conclusory and speculative claim that Corie Doyle had to have noticed Heather Lee in a lime green jumpsuit before she noticed Defendant in October 2011. Additionally, Defendant has failed to allege how, even if Corie Doyle had noticed Heather Lee previously, this fact would have made a difference at Defendant's trial. Defendant is not entitled to relief as to this claim.

e. Corie Doyle –Friendship with Heather Lee

Defendant further alleges that counsel failed to adequately cross-examine Corie Doyle regarding her friendship with Heather Lee. In support of this allegation, Defendant references a single statement in Corie Doyle's deposition in which Corie Doyle called Heather Lee by her nickname, "Hetty." Defendant surmises that "[o]ne does not usually refer to another by their nickname unless they are acquainted with each other." Defendant asserts that "[c]ounsel failed to bring out this relationship between Lee and Doyle as a means of cross-examination into the veracity of Doyle's testimony."

This subclaim is facially insufficient, as it is conclusory and has no evidentiary support. The entirety of this claim was set for evidentiary hearing; however, Defendant has presented no testimonial evidence to support this subclaim. While Defendant introduced into evidence Corie Doyle's deposition transcript, the transcript does nothing to substantiate Defendant's speculative claim.

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[65] See Defendant's Evidentiary Hearing Exhibit #6, p. 6; and Defendant's Evidentiary Hearing Exhibit #18B, p. 1 of "Doyle, Corie Kendall Movement Record."

During deposition, Corie Doyle testified as follows regarding who Defendant told her was present during the incident:

> Q. [By Attorney Gontarek]: Anyone else?
>
> A. [By Corie Doyle]: And she [Defendant] said – I asked her, I said, Well, what does this other girl have to do with it? And she was like, Well, she was there, but she didn't have anything to do with it. She didn't have a choice but to be there.
>
> Q Now you are talking about –
>
> A. – Heather Lee.
>
> Q. – Heather Lee? You're saying Heather Lee didn't have a choice to be there?
>
> A. She said Heather Lee – **she said Hetty, Heather Lee**, was there but didn't have anything to do with it. She didn't have a choice but to be there.
>
> Q. Did you know Heather Lee before you met Tina?
>
> A. I never met Heather Lee until I moved to 4 West, and I went to 4 East before I went to 4 West.
>
> Q. Okay. So you didn't know who Heather Lee was before you talked to Tina Brown?
>
> A. Uh-uh. But when I walked over there, I saw her in lime green. I knew it was her. It's a different color jumpsuit.
>
> Q. Was she the only one there with lime green?
>
> A. Uh-huh.[66]

If anything, the transcript could just as easily be interpreted as Defendant calling Heather Lee "Hetty" when relaying the events to Corie Doyle. Even if Corie Doyle had actually called

[66] See Defendant's Evidentiary Hearing Exhibit #6, pp. 13-14 (emphasis added).

Heather Lee "Hetty" at one point during her deposition, this does nothing to establish that Corie Doyle had a friendship with Heather Lee. As admitted by Corie Doyle, she was eventually housed with Heather Lee before giving this deposition. At most, the deposition could suggest that Corie Doyle became acquainted with Heather Lee and her nickname while she was incarcerated at the Escambia County Jail, not that she had a friendship with Heather Lee.[67] This claim is summarily denied.

f. Corie Doyle – Britnee Miller on Fire

Defendant also alleges that counsel should have cross-examined Corie Doyle regarding her deposition testimony that Britnee Miller accidently set herself on fire during the incident. Specifically, Corie Doyle testified during her deposition:

> A. [By Corie Doyle]: And she [Defendant] didn't give me drastic details, but she did tell me that her daughter was so screwed up that she caught herself on fire.
>
> Q. [By Attorney Gontarek]: She told you that her daughter was so screwed up that she caught herself on fire?
>
> A. Yeah. When she caught that girl on fire, she said that – she giggled about it, and she was like, As funny as it sounds, my daughter was so screwed up, that she accidently caught herself on fire.
>
> Q. Did she say anything about how her daughter was injured?
>
> A. No.
>
> Q. Okay. Did she say what she did in any way?
>
> A. That they beat the girl with a tire iron and tased her and caught her on fire.

[67] The Court notes that several witnesses testified at the evidentiary hearing that Heather Lee's nickname in prison was "Cocoa."

Q. Now, who is "they"?

A. Her and her daughter.[68]

Defendant claims that if counsel had "bothered" to cross-examine Corie Doyle at trial on this topic, he would have been able to argue in closing argument that Corie Doyle's testimony was unreliable because there was no physical evidence to support the claim that Britnee Miller caught herself on fire. Defendant further asserts that counsel would have also been able to argue that Corie Doyle "concocted" this detail based on the information she had seen on the news about the murder.

Initially, this subclaim is facially insufficient for failing to allege specific, proper prejudice. Even though this claim was scheduled for evidentiary hearing, Defendant did not present any testimonial evidence regarding this subclaim. Defendant did submit Corie Doyle's deposition into evidence at the hearing by stipulation, but none of the witnesses, including trial counsel, were questioned regarding the substance of the deposition testimony.

While trial counsel could have argued that Corie Doyle's testimony was unreliable based on this information, Defendant has failed to show that the results of her trial would have been any different considering the strong evidence of guilt presented in this case. Additionally, Defendant's claim that trial counsel could have argued Corie Doyle had "concocted" this detail based on what she heard on the news is not supported by the evidence. According to Corie Doyle's deposition testimony, the news reports she saw only detailed that the victim had been set on fire, not who did it or any of the other details of the crime. Defendant has presented no other evidence to indicate the news reports viewed by Corie Doyle gave any further details of the

[68] See Defendant's Evidentiary Hearing Exhibit #6, p. 13.

crime. Although the information regarding Britnee Miller catching on fire might have been incorrect, the fact that Corie Doyle knew the details of the beating and the tasing, without proof that she saw any news reports regarding the details of the crime, makes her testimony that much more powerful. Defendant is not entitled to relief as to this claim.

3. Pamela Valley

Defendant further alleges that counsel failed to cross-examine Ms. Valley about: a) the compensation she received from the State Attorney to testify and the compensation Ms. Valley's daughter received to testify in Britnee Miller's case; and b) her trial testimony that Defendant asked her to "finish off" the victim.

Defendant failed to call Pamela Valley at evidentiary hearing to substantiate this claim. There is no evidence that has been submitted that shows Ms. Valley or Ms. Valley's daughter received money from the State Attorney in exchange for their testimony. Additionally, as detailed previously in this order, counsel ***did*** cross-examine Ms. Valley about the fact that she did not initially tell law enforcement Defendant had asked her to "finish off" the victim.[69] As Defendant has failed to submit any evidence to support this portion of the claim, it must fail. Ferrell v. State, 29 So. 3d 959, 977 (Fla. 2010) (capital postconviction claim must fail when Defendant fails to present evidence at evidentiary hearing to support claim). This claim is summarily denied.

[69] See Attachment 1, Transcript, Trial, pp. 574-575.

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

Defendant alleges that upon hearing Ms. Valley's trial testimony about Defendant's request to "finish off" the victim, counsel should have immediately moved for a Richardson[70] hearing and for a mistrial as that statement was never provided to the defense during discovery.

At evidentiary hearing, Mr. Gontarek testified he was not surprised by this trial testimony, as Ms. Lee testified during her deposition and her recorded statement that Defendant asked Pamela Valley to "finish off" the victim.[71] Mr. Gontarek confirmed that this alleged statement was something the attorneys were all aware of before trial.[72] As there was no discovery violation, there was no basis for counsel to request a Richardson hearing. Mr. Gontarek cannot be found ineffective for failing to file a baseless motion with the Court. See Hitchcock v. State, 991 So. 2d 337, 361 (Fla. 2008). Defendant is not entitled to relief on this claim.

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

Defendant's next allegation surrounds the alleged admissibility of Wendy Moye's trial testimony as substantive evidence. Defendant alleges that during her deposition testimony, Wendy Moye indicated Heather Lee confessed she had attacked the victim because the victim had been sleeping with her husband. At trial, Wendy Moye testified that Ms. Lee told her it was actually Heather Lee, and not Defendant, who lit the victim on fire.[73] Immediately before the defense presented Ms. Moye's trial testimony, the State asked for a special jury instruction,

[70] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

[71] See Transcript, Evidentiary Hearing, pp.57-58.

[72] See Transcript, Evidentiary Hearing, p. 58.

[73] See Attachment 1, Transcript, Trial, pp. 639-640, 641.

arguing that the testimony consisted of prior inconsistent statements of Ms. Lee and the testimony should only be considered as impeachment evidence and not substantive evidence.[74] Defense counsel did not object and agreed to the jury instruction.[75]

Defendant alleges that counsel should have argued that Wendy Moye's trial testimony was admissible as substantive evidence pursuant to section 90.803(3), Florida Statutes, as it was testimony regarding an existing mental, emotional, or physical condition. Specifically, Defendant alleges that Ms. Lee's statement to Ms. Moye goes to prove her intent, plan, motive, and design to murder the victim because the victim was sleeping with Ms. Lee's husband.

While Defendant alleges that she was prejudiced because Wendy Moye's testimony was not considered substantive evidence at trial, Defendant never alleges how this evidence would have changed the results of her trial if it had been considered substantive evidence by the jury. Consequently, this claim is facially insufficient. *Arguendo*, even if it were not facially insufficient, Defendant would still not be entitled to relief. Wendy Moye did not testify at trial regarding Ms. Lee's state of mind, emotion, or physical sensation. The record shows that Ms. Moye's trial testimony did not include any statements regarding Ms. Lee's husband sleeping with the victim, or Ms. Lee's emotions on that topic as it relates to the crime.[76] Consequently, any objection made by defense counsel on the basis of section 90.803(3), Florida Statutes, would have been meritless. Defendant is not entitled to relief as to this claim.

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[74] See Attachment 1, Transcript, Trial, p. 634.

[75] See Attachment 1, Transcript, Trial, pp. 634-635.

[76] See Attachment 1, Transcript, Trial, pp. 636-646. Even if the trial testimony had included information about Heather Lee's state of mind at the time of the crime, the state of mind exception to hearsay would not apply in these circumstances as the statement would be an after-the-fact statement of memory or belief. See § 90.803(3)(b), Fla. Stat.

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

Defendant next alleges that counsel was ineffective for failing to call Terrance Woods as a witness. Defendant contends that "central to Ms. Brown's defense, was the theory that the State's key witness, Heather Lee, lied about the extent to which both her and Ms. Brown participated in bringing about Ms. Zimmerman's death. Despite this being the defense's theory, counsel failed to impeach Heather Lee's testimony through the testimony of Terrance Woods." Defendant details Terrance Woods' deposition testimony pertinent to this claim. During his deposition, Mr. Woods indicated the following:

- Two days before the murder, Heather Lee got into a physical altercation with the victim because she found out the victim was sleeping with Darren Lee. After the altercation, Ms. Lee returned to her residence where Mr. Woods was present and he heard Ms. Lee say, "I'm going to kill that bitch."
- Darren Lee told him that Heather Lee had confessed "she had killed the girl." Heather Lee also told Terrance Woods "she had killed the girl."
- Heather Lee told Terrance Woods that she was the one who poured the gasoline on the victim and "lit" her.
- Sometime after the incident, Terrance Woods was over at the Lees' trailer playing Xbox games when Heather Lee and Darren Lee got into an argument. During this argument, Heather Lee yelled, "Well, you won't be fucking your little bitch no more, we beat her up and poured gas on her and set her on fire."

Defendant alleges that Terrance Woods' testimony would have 1) "refuted the State's theory that Heather Lee was less culpable by rebutting Lee's testimony that it was Ms. Brown

who poured gas on the victim and set her on fire"; 2) "refuted the State's theory that only Ms. Brown had a motive in this case"; 3) given the jury a reason to reject the State's theory of premeditated murder; 4) provided evidence for the trial judge to find by a preponderance the statutory mitigating circumstance of "defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct";[77] and 5) provided evidence for the jury to consider said statutory mitigators when making its sentencing recommendation to the trial court.

An evidentiary hearing was convened regarding this claim. Trial counsel testified at evidentiary hearing that he did not remember Terrance Woods.[78] When presented with some of the information included in Terrance Woods' deposition and asked whether he thought he could have used the deposition testimony to challenge the State's theory of the case, trial counsel responded, "Unless I didn't believe him."[79] On cross-examination, trial counsel confirmed that if Terrance Woods had written six letters to the State Attorney's office "practically begging to be a witness," he would not have thought Terrance Woods' testimony would be helpful at trial.[80] Trial counsel further confirmed that he would not have thought Terrance Woods' testimony would help Defendant if, in his deposition, the facts were not consistent with the evidence at trial.[81] Trial counsel also confirmed that if he knew Terrance Woods had been convicted of several felonies and was sentenced to twenty-six and a half years in federal prison, he would not have thought Terrance Woods' trial testimony would have been helpful to Defendant.[82]

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[77] See § 921.0026, Fla. Stat.

[78] See Transcript, Evidentiary Hearing, pp. 44-45.

[79] See Transcript, Evidentiary Hearing, p. 45.

[80] See Transcript, Evidentiary Hearing, p. 59.

[81] See Transcript, Evidentiary Hearing, p. 59.

[82] See Transcript, Evidentiary Hearing, pp. 59-60.

Terrance Woods also testified at evidentiary hearing. Terrance Woods indicated that he had been convicted of a felony seven times,[83] but he also testified consistently with the pertinent parts of his deposition testimony.[84] When asked why he did not go to the authorities earlier with the information about Heather Lee, Terrance Woods indicated that at the time of the attack on the victim, [85] he had approximately seven warrants out for his arrest.[86] According to Terrance Woods' evidentiary hearing testimony, he was taken into custody on April 1, 2010, and was later "picked up" by the "feds" in July of that year.[87] Terrance Woods testified that he was in custody on federal charges at the time he gave a recorded statement and a deposition in this case.[88] He also confirmed that he wrote six letters to the State, trying to become a witness in this case.[89] Mr. Woods further confirmed that when he spoke to an investigator with the State Attorney's office in 2018, he again asked if he would be receiving a benefit for his testimony.[90] Mr. Woods was hoping to get some kind of substantial assistance benefit regarding his federal charges by testifying at trial for the State. Mr. Woods candidly admitted to "almost begging to be a witness"

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[83] See Transcript, Evidentiary Hearing, p. 403.

[84] See Transcript, Evidentiary Hearing, pp. 404-406. Admittedly, during his 2011 deposition testimony Terrance Woods indicated that Heather Lee told him that her cousins were also involved in the incident. Terrance Woods explained at evidentiary hearing that he said this during deposition because this was the information Heather Lee told him initially. See Transcript, Evidentiary Hearing, p. 429. As Heather Lee has given varying accounts of who was involved in the attack on the victim, the Court does not find this inconsistency to be material. Additionally, this portion of Terrance Woods' deposition testimony does not go to the central issues this Court is addressing in this claim.

[85] Terrance Woods has consistently yet incorrectly testified that the victim in this case died in late March, close in time to the attack. At evidentiary hearing, he indicated that he thought the victim died a couple of hours after she was taken to the hospital. See Transcript, Evidentiary Hearing, p. 409.

[86] See Transcript, Evidentiary Hearing, pp. 410-411.

[87] See Transcript, Evidentiary Hearing, p. 410.

[88] See Transcript, Evidentiary Hearing, p. 406.

[89] See Transcript, Evidentiary Hearing, pp. 411-415.

[90] See Transcript, Evidentiary Hearing, p. 415.

in this case because "I wanted out of prison, 26-and-half years, who wouldn't?"[91] In fact, it was revealed at evidentiary hearing that Terrance Woods was no longer in federal custody because he had testified in other cases.[92] However, Terrance Woods indicated that if Defendant had subpoenaed him to testify at trial, he would have testified for the defense without receiving a benefit; in fact, that is what he was doing by testifying at the postconviction evidentiary hearing.[93]

Terrance Woods also testified regarding the recorded statement he gave by telephone in January 2018 while incarcerated at a maximum security federal penitentiary. Terrance Woods acknowledged that he did not feel he could talk freely when giving the statement because inmates have been killed for being witnesses in cases. A guard was in the room with Terrance Woods during the statement, and he did not trust that the guard would not tell someone else of the contents of the conversation.[94] According to what was presented at evidentiary hearing,[95] Terrance Woods testified inconsistently in 2018 from his other statements in that in 2018, he indicated that Heather Lee never said which of the three women poured the gasoline on the victim and lit her on fire.[96] At evidentiary hearing, Terrance Woods vigorously insisted he felt his life was in danger if it got out that he might be a testifying witness in a case.[97]

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[91] See Transcript, Evidentiary Hearing, p. 415.

[92] See Transcript, Evidentiary Hearing, pp. 402; 415-416.

[93] See Transcript, Evidentiary Hearing, pp. 406-407.

[94] See Transcript, Evidentiary Hearing, pp. 407-408; 416-424.

[95] Although Terrance Woods' 2018 telephonic statement was referenced during the evidentiary hearing, it was never entered into evidence at the hearing. Consequently, the Court is unable to review the actual statement. Additionally, Terrance Woods' affidavit regarding the circumstances of the 2018 telephonic statement was referenced during evidentiary hearing but was not entered into evidence at the evidentiary hearing.

[96] See Transcript, Evidentiary Hearing, pp. 424-426.

[97] See Transcript, Evidentiary Hearing, pp. 416-423.

1. Defendant Less Culpable than Heather Lee

Defendant first alleges that Terrance Woods' testimony would have "refuted the State's theory that Heather Lee was less culpable by rebutting Lee's testimony that it was Ms. Brown who poured gas on the victim and set her on fire." Defendant is simply incorrect. Based on Terrance Woods' evidentiary hearing testimony, this Court is convinced that if Terrance Woods would have been called as a witness at trial, he would have testified that Heather Lee admitted to pouring the gasoline and lighting the victim on fire. However, this evidence was already presented to the jury through the trial testimony of Wendy Moye, albeit as impeachment evidence. Even with this evidence, Defendant was found guilty of first-degree murder. As detailed previously in this Order, the evidence in this case was very strong against Defendant, even if Heather Lee did indeed pour the gasoline and light the victim on fire. Defendant has failed to demonstrate that the results of her trial would have been different if Terrance Woods' testimony would have been presented on this issue and she is not entitled to relief.

2. Only Defendant had Motive

Defendant next alleges that Terrance Woods' testimony would have "refuted the State's theory that only Ms. Brown had a motive in this case." While proof of motive is not required, at trial the State presented evidence that Defendant was motivated to attack the victim based on an argument in which the victim threatened to tase Britnee Miller. The record shows that this was the only evidence of motive presented in this case.

Contrary to the State's argument, Terrance Woods' testimony that the victim was having an affair with Heather Lee's husband and Heather Lee discovered the affair two days before the attack on the victim, is not cumulative to any other evidence that was presented at trial. The

Court is cognizant of the fact that Mr. Woods was "practically begging" the State to be a witness regarding this case, and he is now out of federal custody on a twenty-six year-plus sentence because he has testified in other matters. However, this Court cannot ignore the fact that Terrance Woods' testimony has never wavered on the topic of the affair, Heather Lee's discovery of the affair, and her reactions to the affair.[98] Counsel gave no good reason at evidentiary hearing why he did not call Terrance Woods as a witness. While trial counsel indicated he would not have called Terrance Woods "if he thought he were lying," this reason is not sufficient under these circumstances. Short of counsel having actual knowledge that Terrance Woods was lying, the stakes were simply too high for counsel not to call Terrance Woods as a witness. Considering the fact that Defendant was facing the death penalty, this Court finds that trial counsel was deficient in not presenting Terrance Woods' testimony regarding Heather Lee's motive in this case.

This Court must now consider whether Terrance Woods' testimony on this topic would have changed the results of the verdict. As detailed previously, the evidence in this case strongly supports the jury's verdict of first-degree murder. The fact that Darren Lee and the victim were having an affair, and Heather Lee's knowledge of such, still would not change the evidence presented regarding Defendant's participation in this crime. Even with Terrance Woods' testimony regarding Heather Lee's motive, the Court finds that the evidence was too strong against Defendant for the jury not to have returned a verdict of guilt for first-degree murder. As Defendant has been unable to demonstrate that the results of her verdict would have been different, Defendant is not entitled to relief as to this subclaim.

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[98] If Terrance Woods' statements have wavered on this point, it was not presented to this Court.

3. Rejection of Premeditated Murder Theory

Defendant contends that if Terrance Woods' testimony had been presented at trial, the jury then would have had a reason to reject the State's theory of premeditated murder in this case. However, Defendant neglects Mallory Azriel's trial testimony that Britnee Miller told her right before the attack on the victim, "we are fixing to kill Audreanna." This evidence would not have been refuted by Terrance Woods' testimony. This statement of the group's intent to kill the victim before the attack began is enough to support a finding of premeditated murder.

For argument's sake, even if Terrance Woods' testimony regarding Heather Lee's admissions and her knowledge of her husband's affair had somehow given the jury "a reason" to reject the State's theory of premeditated murder, Defendant also ignores the fact that Defendant was not charged only with premeditated first-degree murder, but in the alternative with felony murder. Terrance Woods' testimony would do nothing to refute the evidence that the victim was also kidnapped: The victim was tased multiple times, stuffed in the trunk of Defendant's vehicle, and taken against her will to the wooded area, where the attack that eventually led to her death occurred. Regardless of whether the jury found premeditation or that the murder was conducted during the course of a felony, the jury's verdict of first-degree murder would have remained the same. Defendant is not entitled to relief as this subclaim.

4. and 5. Consideration of Statutory Mitigator

Defendant also alleges that Terrance Woods' testimony would have provided evidence for the trial judge to find by the preponderance of the evidence that a statutory mitigator existed. Specifically, Defendant claims that the testimony would have shown that "defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct."

Defendant also asserts that the jury could have considered this statutory mitigator when making its sentencing recommendation if Terrance Woods' testimony had been presented.

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

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

Defendant further alleges that counsel was ineffective for failing to call Darren Lee as an impeachment witness during the guilt phase of trial. Defendant alleges that if counsel had called Darren Lee as a witness, he would have testified to the following: 1) Heather Lee and her family had a reputation for paying witnesses to influence the outcome of criminal cases; 2) two days prior to the attack on the victim, Heather Lee told Darren Lee he wouldn't be sleeping with "that bitch" anymore; 3) each of the weapons used in the commission of the crime had come from Heather Lee's home; and 4) a few days after the attack, Heather Lee confessed to the crime. Counsel asserts that if the jury had heard this evidence, it would not have found Defendant guilty of first-degree murder. Defendant further contends that counsel's failure to call Darren Lee prohibited the trial judge from finding that Defendant's participation was relatively minor

compared to Heather Lee's participation, and prohibited the jury from considering this "weighty" statutory mitigator in its recommendation to the court.

An evidentiary hearing was scheduled regarding the entirety of this claim.

1. Reputation for Paying Witnesses and Victims

Defendant alleges Darren Lee would have testified that Heather Lee and her family had a reputation for paying witnesses and victims in criminal cases to not come forward, refuse to testify, or to become non-cooperative with the State Attorney's Office. Defendant alleges that this testimony would have refuted the contention that Defendant was the mastermind behind the attack on the victim.

During the evidentiary hearing, Defendant failed to ask Darren Lee any questions about Heather Lee's reputation for tampering with witnesses and victims. As no evidence was presented on this issue, this portion of the claim must fail. Ferrell v. State, 29 So. 3d 959, 977 (Fla. 2010) (capital postconviction claim must fail when Defendant fails to present evidence at evidentiary hearing to support claim).

2. Heather Lee's Statements Before the Murder

Defendant further alleges that Darren Lee would have testified that a few days prior to the murder, Heather Lee walked into the Lees' residence while Terrance Woods was present and told Mr. Lee he would not be sleeping with "that bitch" anymore – referencing the victim.

Trial counsel testified that he did not remember Darren Lee.[99] Trial counsel went on to say that if Darren Lee had provided information that Heather Lee had confessed to Darren Lee

[99] See Transcript, Evidentiary Hearing, p. 46.

and Terrance Woods, he would not think this testimony would be helpful.[100] On cross-examination, trial counsel did not recall that Darren Lee had spoken to law enforcement multiple times and had never mentioned anything about Heather Lee confessing.[101] Trial counsel further confirmed that the fact that Darren Lee never told the police that Heather had confessed would not have been helpful to Defendant at trial.[102]

Darren Lee also testified regarding this issue at evidentiary hearing. Darren Lee admitted that he was having an affair with the victim.[103] According to his evidentiary hearing, a couple of days before the incident, Heather Lee and the victim were fighting.[104] Heather came inside after the altercation and told Darren Lee in front of Terrance Woods that Darren Lee would not be sleeping with "that bitch" anymore.[105] Mr. Lee testified that Heather Lee was referring to the victim Audreanna Zimmerman.[106]

Darren Lee's deposition testimony was also submitted into evidence by stipulation. A review of the deposition shows that even though Darren Lee testified to having an affair with the victim, Darren Lee was instructed not to answer any questions about what Heather Lee told him. As a result, there has been no evidence presented showing that Darren Lee ever testified previously regarding any confession made by Heather Lee. Counsel cannot be ineffective in failing to present Darren Lee as a witness on this issue when Darren Lee never made statements

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[100] See Transcript, Evidentiary Hearing, p. 46.

[101] See Transcript, Evidentiary Hearing, p. 60.

[102] See Transcript, Evidentiary Hearing, p. 60.

[103] See Transcript, Evidentiary Hearing, p. 88.

[104] See Transcript, Evidentiary Hearing, p. 87.

[105] See Transcript, Evidentiary Hearing, p. 88.

[106] See Transcript, Evidentiary Hearing, p. 88.

prior to evidentiary hearing regarding Heather Lee's confession. Defendant is not entitled to relief as to this subclaim.

3. Weapons Used During the Commission of the Crime

Defendant asserts that if called to testify at trial, Darren Lee would have testified that each of the weapons used during the commission of the crime had come from the Lees' home. Specifically, Defendant asserts that Heather Lee confessed to Darren Lee that she had taken Mr. Lee's crowbar and the gas can from their porch and had driven to the gas station to fill up the gas can.

Despite this claim being scheduled for evidentiary hearing, trial counsel was not questioned regarding this subclaim. As to Darren Lee, the following testimony was elicited on the topic of the gasoline used in the crime:

> Q. [By Dawn Macready]: Okay. Did she say anything – did Heather Lee say anything at that time in regards to where the gas came from?
>
> A. [By Darren Lee]: **No, not really**. I know that – I know that it came from the gas station.
>
> Q. The gas station?
>
> A. Uh-huh.
>
> Q. Did she say when she got it at the gas station?
>
> A. Before they went to the curve, **I guess**.
>
> Q. Before they went to the – the woods?
>
> A. Yeah.[107]

[107] See Transcript, Evidentiary Hearing, p. 90 (emphasis added).

Darren Lee's evidentiary hearing testimony that Heather Lee did not tell him where the gas came from, but he "guessed" it came from a gas station before they went to the woods is far from critical evidence. Darren Lee was not asked about the gas can or the crowbar at evidentiary hearing.

However, Defendant's claim is refuted by Darren Lee's deposition itself. Contrary to Defendant's allegations, Darren Lee never stated previously that the crowbar and gas can came from his and Heather Lee's home. As there has been no evidence submitted that the crowbar and gas can used in the crime came from the Lees' home, counsel cannot be found ineffective for failing to present such evidence to the jury. Defendant is not entitled to relief as to this subclaim.

4. Heather Lee's Confession after Attack

Defendant further alleges that if counsel had called Darren Lee to testify, he would have disclosed that Heather Lee told him she was the one who drove the vehicle into the wooded area the night the victim was killed. Heather Lee also told Darren Lee, that once they were in the woods, the victim was on her knees begging for her life and yelled to Heather Lee that Defendant was also sleeping with Darren Lee. At that point, Heather Lee became irate and poured gas on the victim and lit her on fire.

Defendant also alleges that if counsel had called Darren Lee to testify, he would have verified that two or three days after the crime occurred, Heather Lee told Darren Lee in Terrance Woods' presence that she had killed the victim and that Heather Lee "was not going to have that bitch to sleep with anymore."

At evidentiary hearing, Darren Lee offered no testimony regarding who was driving the vehicle; however he testified consistently with the rest of these allegations.[108] Regardless of this testimony at evidentiary hearing, Darren Lee's deposition shows he never made any statements before trial regarding the information relayed to him by Heather Lee. As this information was not available to trial counsel through Darren Lee's deposition testimony, and there has been no evidence submitted to show that Darren Lee relayed this information in any other statements prior to trial, counsel cannot be deemed deficient for failing to call Darren Lee to testify on this topic at trial. Defendant is not entitled to relief as to this subclaim.

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

Defendant also alleges that counsel was ineffective for failing to call Nicole Henderson as a witness during the guilt phase of trial. Defendant contends that Ms. Henderson's trial testimony would have established: 1) Heather Lee confessed to Nicole Henderson; and 2) Corie Doyle's trial testimony could have been impeached by Nicole Henderson. Defendant alleges that, much like Terrance Woods and Darren Lee, Nicole Henderson's testimony would have supported the statutory mitigator that Defendant was an accomplice to the offense and was a relatively minor participant in the crime. Defendant asserts if Ms. Henderson's testimony had been presented at trial, there is a reasonable probability that Defendant's conviction and/or sentence would have been different.

An evidentiary hearing was scheduled regarding the entirety of this claim.

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[108] See Transcript, Evidentiary Hearing, pp. 90-92.

1. Heather Lee's Confession to Nicole Henderson

Contrary to Defendant's allegation, Heather Lee did not confess to Nicole Henderson. Instead, Nicole Henderson testified at evidentiary hearing that she overheard Heather Lee talking to a woman named Miracle Sanders about the murders while they were all housed at the Escambia County Jail.[109] According to Nicole Henderson, Heather Lee told Ms. Sanders that Lee was going home because she was blaming the murder on Defendant and Britnee Miller.[110] Additionally, according to Ms. Henderson's evidentiary hearing testimony, Heather Lee told Ms. Sanders that she was going to get two girls who were doing juvenile time with Britnee Miller to "say what they wanted her to say so that she can be able to get off."[111] Ms. Lee told Ms. Sanders that the reason the murder happened was because Ms. Lee's boyfriend had gotten another lady pregnant.[112] On cross-examination, Ms. Henderson admitted that it sounded like Heather Lee was simply bragging,[113] and that Heather Lee did not tell her how she was going to contact the juveniles at the juvenile detention center to get them to say what she wanted.[114]

It is doubtful that Nicole Henderson's testimony would have been admissible regarding the conversation she overheard between Ms. Lee and Ms. Sanders. Even if it were admissible as an exception to hearsay, it would not have made a difference at trial. Ms. Henderson herself admits that Heather Lee was bragging. There is no indication that Heather Lee even had the ability to contact the juveniles at the facility to do her bidding. Additionally, if the victim had

[109] See Transcript, Evidentiary Hearing, p. 103.

[110] See Transcript, Evidentiary Hearing, p. 103.

[111] See Transcript, Evidentiary Hearing, p. 104.

[112] See Transcript, Evidentiary Hearing, p. 104.

[113] See Transcript, Evidentiary Hearing, p. 107.

[114] See Transcript, Evidentiary Hearing, p. 108.

been pregnant at the time of the murder, this information would have been presented at trial through the medical examiner's testimony. No such evidence was presented at trial. More importantly, trial counsel already presented the testimony of Wendy Moye at trial that Heather Lee confessed to her. Wendy Moye's trial testimony was much more salient than that of Nicole Henderson, who only overheard a conversation between Heather Lee and another inmate. Even though Wendy Moye's testimony was entered as impeachment, this information was still considered by the jury. Counsel was not deficient for failing to present Nicole Henderson's testimony regarding Heather Lee's alleged confession.

2. Defendant's Sleeping Habits

Defendant also alleges that Nicole Henderson would have testified that Defendant slept all day, thereby refuting Corie Doyle's testimony that Defendant confessed to Ms. Doyle when they were up early one morning drinking coffee. At evidentiary hearing, Nicole Henderson testified that she was aware of Defendant's habits at the Escambia County Jail. Ms. Henderson further testified "she was always sleeping a lot."[115] Ms. Henderson explained that Defendant had to be woken up by the guards for breakfast, and again for lunch.[116] However, Nicole Henderson admitted that just because she did not see Defendant get up early in the morning, it was "possible" Defendant might have gotten up early on occasion.[117]

Nicole Henderson's testimony does nothing to refute Corie Doyle's trial testimony. By Ms. Henderson's own admission, it is possible that Defendant might have gotten up early one morning and had a conversation with Corie Doyle. Defendant has failed to show that trial

[115] See Transcript, Evidentiary Hearing, p. 105.

[116] See Transcript, Evidentiary Hearing, p. 105.

[117] See Transcript, Evidentiary Hearing, p. 107.

counsel was deficient for not calling Nicole Henderson as a witness at trial, or that she was prejudiced. She is not entitled to relief as to this claim.

3. Nicole Henderson's Testimony – Statutory Mitigator

This Court rejects Defendant's assertion that Nicole Henderson's testimony would have supported the statutory mitigator that Defendant was a mere accomplice whose participation in the crime was relatively minor. Nicole Henderson's testimony, even when considered in concert with Terrance Woods' and Darren Lee's proposed trial testimony, would not have been able to provide sufficient evidence to support this statutory mitigator. As detailed *supra*, the evidence of Defendant's aggressive role in the victim's murder is simply too compelling for Defendant's participation to ever be considered as minor. Defendant is not entitled to relief as to this subclaim.

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

Defendant alleges that counsel's failure to call Terrance Woods, Darren Lee, and Nicole Henderson as witnesses at trial "prohibited" the trial court from finding Defendant did not act in a cold, calculated, and premeditated manner. Defendant asserts that the cold, calculated, and premeditated (CCP) aggravator was found in part because the Court believed Defendant had "doused" the victim with gasoline and set her on fire and had brought the filled gasoline canister to the woods to use for her "nefarious purpose."

Defendant alleges that 1) the trial testimony of Terrance Woods, Heather Lee, and Nicole Henderson would have demonstrated that it was Heather Lee who poured the gasoline and lit the victim on fire because she was sleeping with Darren Lee. She also alleges that Darren Lee's testimony would have 2) specifically refuted the State's theory that Defendant purchased and

brought the gas to the scene of the crime, and 3) shown that Heather Lee retrieved the "murder weapons" from her home and brought them to the woods that evening. Defendant alleges that if this testimony had been presented, the Court could have reasonably determined that the cold, calculated, and premeditated aggravator was not proven in this case. Defendant ultimately alleges that if this statutory aggravator had not been proven, Defendant's sentence would have been different. An evidentiary hearing was convened regarding the entirety of this subclaim.

1. Pour the Gasoline, Light the Victim on Fire

Defendant alleges that counsel was ineffective for failing to call Terrance Woods, Darren Lee, and Nicole Henderson to show that Heather Lee confessed to pouring the gas and lighting the victim on fire because the victim was sleeping with Darren Lee. This is a mischaracterization of the evidence before the Court. The record shows that of these three purported witnesses, only Terrance Woods testified to this information before Defendant's trial. Darren Lee testified that he was sleeping with the victim, but he never testified about Heather Lee's confession during his deposition. There has been no evidence submitted that Heather Lee ever confessed to Nicole Henderson, only that she overheard Heather Lee talking about the crime. During Nicole Henderson's evidentiary hearing testimony, she never indicated that Heather Lee said anything about pouring the gasoline and lighting the victim on fire.[118]

Wendy Moye testified at trial that Heather Lee admitted to pouring the gas and lighting the victim on fire; consequently, this information was already before the jury. Admittedly, this was entered as impeachment instead of substantive evidence, but the information was still submitted to the jury. The only information the jury did not already have was that the victim was

[118] See Transcript, Evidentiary Hearing, pp. 101-108.

sleeping with Darren Lee at the time of the incident. The Court finds that Defendant has failed to demonstrate that this one piece of information would have changed the jury's sentence recommendation or would have changed the Court's finding of the cold, calculating, and premeditated (CCP) aggravator. Indeed, when finding the CCP aggravator, the Court indicated in its sentencing order that even if Defendant's original plan for murdering the victim had not specifically included setting the victim on fire, the Court still would have found the CCP aggravator to be proven.[119] For argument's sake, even if the Court had not found the CCP aggravator, the Court still would have found the other two statutory aggravators in this case. The mitigation in this case would not have outweighed those two statutory aggravators; Defendant's sentence would have been the same. Consequently, Defendant has failed to show that the results of her sentence would have been different if this testimony had been submitted at trial.

2. The Gasoline

Defendant next alleges that Darren Lee's testimony would have refuted the State's theory that Defendant was the person who purchased the gasoline and brought it to the crime scene on the night of the incident. As detailed previously in this order, this allegation is a mischaracterization of the evidence. Darren Lee never stated during his deposition that Heather Lee bought the gasoline and brought it to the crime scene.[120] Instead, at evidentiary hearing, Darren Lee indicated that Heather did not say she retrieved the gasoline and he "guessed" the gasoline had been purchased from a gas station before the murder took place.[121] Contrary to Defendant's allegations, this testimony does not show that Heather Lee provided the gasoline for

[119] See Attachment 2, Sentencing Order, p. 7, n. 13.

[120] See Defendant's Evidentiary Hearing Exhibit #5.

[121] See Transcript, Evidentiary Hearing, p. 90.

the gas container. Defendant has failed to show that counsel was deficient for failing to call Darren Lee regarding this topic. Defendant is not entitled to relief as to this subclaim.

3. The Murder Weapons

Defendant next alleges that Darren Lee's testimony would have shown that it was Heather Lee, and not Defendant, who retrieved the "murder weapons" from the Lees' home and brought them to the woods that evening. This, again, is a mischaracterization of Darren Lee's testimony. Darren Lee never stated previously that the crowbar and gas can came from his and Heather Lee's home.[122] Additionally, Darren Lee was not asked about the gas can or the crowbar at evidentiary hearing. As there has been no evidence submitted that the crowbar and gas can used in the crime came from the Lees' home, counsel cannot be found ineffective for failing to present such non-existent testimony to the jury. Defendant is not entitled to relief as to this subclaim.

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

Defendant alleges that counsel failed to object to the prosecutor's improper closing arguments. Defendant alleges that "[t]hroughout the course of closing arguments, the State repeatedly expressed its personal opinion, degraded Ms. Brown's counsel, and used inflammatory language to incite the jury." Defendant claims that she is "fully incorporating" the prosecutor's comments as detailed in Claim 5 of this motion.

Defendant's claim is facially insufficient and will be denied with prejudice. Defendant fails to cite to any specific instance of improper comments by the State in closing. Further,

[122] See Defendant's Evidentiary Hearing Exhibit #5.

Defendant is not permitted to incorporate Claim 5 to cure this deficiency.[123] Additionally, Defendant fails to allege specific prejudice, as to how these allegedly improper comments affected the results of Defendant's trial. Because Defendant has already been given multiple opportunities to amend her motion and this claim remains facially insufficient, this subclaim is denied with prejudice. See Tanzi v. State, 94 So. 3d 482, 493 (Fla. 2012); Davis v. State, 26 So. 3d 519, 527 (Fla. 2009).

CLAIM 3: TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF DEFENDANT'S CAPITAL TRIAL

Defendant alleges that trial counsel's representation of her during the penalty phase "fell below acceptable professional standards in several respects." Defendant argues that, but for counsel's errors, there is a reasonable probability that Defendant would have been sentenced to life in prison. An evidentiary hearing was scheduled regarding the entirety of this claim.

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

1. Failing to Investigate Mitigation

Defendant alleges that counsel failed to fully explain Defendant's background "including but not limited to: her extensive history of drug abuse, her extensive history of physical and sexual abuse, her mental illness, her family's background, and *how that background affected Ms. Brown and her conduct during the commission of the crime"* (emphasis in original). Defendant contends that even though mitigating factors were presented during the penalty phase, counsel did not link those mitigators to the crime and therefore failed to construct a "persuasive narrative" of Defendant's life history.

[123] Even if Defendant were permitted to incorporate Claim 5, the prosecutor's statements referenced in that claim were proper and within the bounds of acceptable closing argument.

This subclaim is facially insufficient. Defendant goes on for pages, giving details of Defendant's life, but she does not link this information to any particular witness or indicate through which witnesses penalty phase counsel should have presented this information. Further, Defendant does not explain specifically how any of this information would have made a difference in Defendant's trial. Making a blanket statement at the beginning of the entirety of this claim that it would have affected Defendant's sentence simply is not enough. Even if this subclaim were facially sufficient, the information alleged is cumulative to the lengthy mitigation already presented by penalty phase counsel.[124] Penalty phase counsel is not deficient for failing to present additional, cumulative evidence. Troy v. State, 57 So. 3d 828, 835 (Fla. 2011) (a claim that counsel is ineffective for failing to present mitigation evidence will not be sustained "where the jury was aware of most aspects of the mitigation evidence that the defendant claims should have been presented"). Additionally, Defendant has failed to demonstrate how penalty phase counsel did not "link" Defendant's background to its effect on Defendant during the crime. Attorney Wilson testified that she thought Dr. Bailey covered Defendant's life history from the beginning to the time of the crime, and linked Defendant's life history to the crime itself.[125] The record before this Court supports this conclusion. Defendant is not entitled to relief as to this subclaim.

2. Failing to Prepare Witnesses

Defendant further asserts that counsel only spoke with Defendant's family members a few weeks before trial for a short period of time and therefore did not adequately prepare these witnesses to testify during the penalty phase of trial. Specifically, she alleges penalty phase

[124] See Attachment 1, Transcript, Trial, pp. 756-974.

[125] See Transcript, Evidentiary Hearing, p. 285.

counsel did not adequately prepare Defendant's mother, Lilly Ramos; Defendant's brother, Willie Coleman, Jr.; and Defendant's uncle, Gerald Coleman, to testify at Defendant's trial.

At evidentiary hearing, Sharon Wilson, Defendant's penalty phase counsel, denied Defendant's allegation that she waited until right before trial to interview these witnesses.[126] The record shows that Defendant's brother and uncle both testified as mitigation witnesses at trial. The only person who did not testify that is referenced in this claim is Ms. Ramos. Ms. Wilson testified that when she met with Defendant's mother, she "was very cold."[127] Attorney Wilson opted not to call Ms. Ramos as a mitigation witness because she had "no real relationship with Ms. Brown"[128] and she actually told Ms. Wilson she believed Defendant should get the death penalty.[129]

Defendant entered into evidence, with the stipulation of the State, records to show that the trip to visit Defendant's family in Chicago "was taken just weeks before trial."[130] However, Defendant failed to present any testimonial evidence to show that penalty phase counsel did not adequately prepare the witnesses who testified. As Defendant has failed to present any evidence to support her allegations that the witnesses were ill-prepared, this subclaim is denied.

3. Potential Mitigation Witnesses

Defendant alleges that penalty phase counsel failed to speak to "any of Ms. Brown's cousins, friends, ex-boyfriends, or ex-husbands." She specifically references the following persons to whom she claims penalty phase counsel should have spoken in preparation for the

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[126] See Transcript, Evidentiary Hearing, p. 282.

[127] See Transcript, Evidentiary Hearing, p. 288.

[128] See Transcript, Evidentiary Hearing, p. 288.

[129] See Transcript, Evidentiary Hearing, p. 288.

[130] See Defendant's Written Closing Argument, p. 21; see also Defendant's Evidentiary Exhibit #1, p. 323

penalty phase: a) Defendant's cousin, Trina Bell; b) the father of Defendant's three children, Gregory Miller, Sr.; and c) Defendant's friend, Jennifer Malone.

Defendant's blanket and non-detailed allegation regarding "any of Ms. Brown's, friends, ex-boyfriends, or ex-husbands" is facially insufficient on many different levels. Defendant fails to identify with particularity the identity of these purported witnesses, the content of their testimony, if Defendant told counsel about these people, if they were available to testify, and most importantly, how their testimony would have made a difference in Defendant's sentence. Booker v. State, 969 So. 2d 186, 196 (Fla. 2007) (citing Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004)). Consequently, to the extent this can be considered a subclaim, it is denied with prejudice.

The Court will now address Defendant's other subclaims regarding potential mitigation witnesses.

a. Trina Bell

Defendant alleges that Trina Bell could have provided evidence of Defendant's sexual abuse, drug abuse, and physical abuse by her boyfriends. An evidentiary hearing was scheduled regarding this claim; however, Defendant failed to present Ms. Bell's testimony or any evidence to substantiate her allegations regarding Trina Bell. Consequently, this subclaim is summarily denied. Guardado v. State, 176 So. 3d 886, 893 (Fla. 2015) (holding "[trial] court properly held that Guardado did not demonstrate deficiency or prejudice as to the first four witnesses because he did not provide any testimony from these witnesses at the evidentiary hearing"); Lebron v. State, 135 So. 3d 1040, 1055-56 (Fla. 2014) (claim that counsel failed to present witness at trial denied where defendant did not present that witness at the evidentiary hearing).

b. Gregory Miller, Sr.

Defendant alleges that Gregory Miller, Sr., could have testified about Defendant's daily cocaine and heroin use, physical abuse from her father, and episodes of domestic violence. An evidentiary hearing was scheduled regarding this claim.

Dr. Faye Sultan indicated at evidentiary hearing that she had interviewed Mr. Miller. Dr. Sultan testified that Mr. Miller might not have insight into the way he treated Defendant. Mr. Miller characterized their relationship as "they were young, they cared about one another, they had three children in rapid succession. He was very demanding of her according to him. He insisted that she be drug-free during her pregnancies and he knew that was difficult for her. He acknowledged that he had been physically violent with her, but he didn't talk about that much."[131] As relayed by Dr. Sultan's evidentiary hearing testimony, Mr. Miller talked some of Defendant's drug use, the abuse Defendant received from her father, and also detailed one "traumatic" episode of abuse that Mr. Miller inflicted upon Defendant that mimicked the way Defendant's father would abuse her.[132]

Dr. Edwards indicated at evidentiary hearing that he had reviewed a written statement of Mr. Miller's, along with other documents, and none of the documents changed any of the opinions that he stated in his report.[133]

Even though Defendant presented testimony at the evidentiary hearing from individuals who interviewed Mr. Miller or considered his written statement, Defendant failed to present Mr. Miller's testimony at evidentiary hearing. Sharon Wilson, Defendant's penalty phase counsel,

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[131] See Transcript, Evidentiary Hearing, p. 183.

[132] See Transcript, Evidentiary Hearing, pp. 183-184.

[133] See Transcript, Evidentiary Hearing, p. 312.

testified at evidentiary hearing that she did not believe Mr. Miller was willing to testify at Defendant's trial because he did not want to have to admit to his violence against Defendant.[134] The fact that Mr. Miller still has not testified in this matter seems to support Ms. Wilson's opinion. Regardless, because Mr. Miller did not actually testify at the evidentiary hearing, this Court is unable to assess Mr. Miller's credibility and determine whether his testimony would have made a difference in Defendant's sentence. Additionally, even if Mr. Miller had offered testimony in keeping with the testimony offered by Dr. Sultan, it appears that all of this information was already before the jury for consideration.[135] As Defendant has failed to submit the necessary evidence to substantiate this subclaim, it is denied. Guardado v. State, 176 So. 3d at 893; Lebron, 135 So. 3d at 1055-56; Ferrell v. State, 29 So. 3d 959, 977 (Fla. 2010) (capital postconviction claim must fail when Defendant does not present evidence at evidentiary hearing to support claim).

c. Jennifer Malone

Defendant alleges that Jennifer Malone could have provided evidence of Defendant's background and Defendant's relationships throughout her life. An evidentiary hearing was scheduled regarding this claim.

Dr. Faye Sultan indicated at evidentiary hearing that she had interviewed Jennifer Malone. Ms. Malone said that she was an old friend of Defendant's and Malone had at one time dated Defendant's brother, Willie Junior.[136] Ms. Malone characterized the physical abuse she

[134] See Transcript, Evidentiary Hearing, p. 283.

[135] See Attachment 1, Transcript, Trial, pp. 890-894.

[136] See Transcript, Evidentiary Hearing, p. 179.

herself suffered from Willie Junior as extreme.[137] Ms. Malone stated that Defendant was one of the most influential persons in her life because Defendant would intervene and try to protect Ms. Malone from the abuse.[138] She also told Dr. Sultan that Defendant would look after her and her brother, and make sure that they had food and a place to live.[139] Ms. Malone described both herself and Defendant as having "horrible childhood histories of abuse."[140] Ms. Malone stated to Dr. Sultan, "Guns and drugs were normal to us. That was the world we lived in. We lived in the world of guns and drugs."[141] Ms. Malone was in a psychiatric hospital several times during her childhood and adolescence.[142]

According to Dr. Sultan, Ms. Malone knew about the brief marriage Defendant had to a man named Anthony and also of her relationship with Steve Ivory.[143] Ms. Malone was also aware that Defendant's husband, Mr. Miller, had been very violent with Defendant during their marriage.[144] Ms. Malone stated that she had seen boyfriends of Defendant punch Defendant in the face.[145] Defendant also told Ms. Malone that lots of people had physically abused her.[146]

Ms. Malone told Dr. Sultan that she believed Defendant had been "abstinent" from intoxicants for approximately two years during the time Ms. Malone knew her.[147] Ms. Malone

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[137] See Transcript, Evidentiary Hearing, p. 179.

[138] See Transcript, Evidentiary Hearing, pp. 179-180.

[139] See Transcript, Evidentiary Hearing, p. 179.

[140] See Transcript, Evidentiary Hearing, p. 180.

[141] See Transcript, Evidentiary Hearing, p. 180.

[142] See Transcript, Evidentiary Hearing, p. 180.

[143] See Transcript, Evidentiary Hearing, p. 181.

[144] See Transcript, Evidentiary Hearing, p. 181.

[145] See Transcript, Evidentiary Hearing, pp. 181-182.

[146] See Transcript, Evidentiary Hearing, p. 182.

[147] See Transcript, Evidentiary Hearing, p 181.

knew that the "abstinence" had ended because Defendant had become an exotic dancer and it was very hard for Defendant to do that work without being intoxicated in some way.[148] Ms. Malone was aware that Defendant had become desperate to move from Racine, Illinois and Defendant's friend Pam had invited her to move down to Florida.[149]

Sharon Wilson, Defendant's penalty phase counsel, also testified regarding this claim. Ms. Wilson testified that she remembered Jennifer Malone had sent an email to the presiding judge the day of the Spencer hearing, which was admitted as a defense exhibit.[150] Ms. Wilson had not heard of Ms. Malone before the email.[151] As confirmed by Ms. Wilson at evidentiary hearing, Ms. Malone indicated in her email that she would prefer her statement remain private.[152] Ms. Wilson testified that she could not remember if she had tried to follow up with Ms. Malone about the email; however, she did remember that the email was received very close in time to trial so counsel could not do anything with it the day it was received.[153]

Even though Defendant presented testimony at the evidentiary hearing from Dr. Sultan who interviewed Ms. Malone, Defendant failed to present Ms. Malone's testimony at evidentiary hearing. As Ms. Malone did not actually testify at the evidentiary hearing, this Court is unable to assess Ms. Malone's credibility and determine whether her testimony during mitigation would have made a difference in Defendant's sentence. Additionally, if Ms. Malone had offered testimony consistent with the testimony offered by Dr. Sultan, it appears that the information

[148] See Transcript, Evidentiary Hearing, p. 181.

[149] See Transcript, Evidentiary Hearing, p. 182.

[150] See Transcript, Evidentiary Hearing, p. 289-290.

[151] See Transcript, Evidentiary Hearing, pp. 289-290.

[152] See Transcript, Evidentiary Hearing, p. 290.

[153] See Transcript, Evidentiary Hearing, p. 294.

about Defendant's childhood, drug addiction, abuse, and periods of recovery is cumulative to the information already presented at trial.[154] Further, while this Court did not hear the details before sentencing on how Defendant had been influential in Ms. Malone's life, it did have Ms. Malone's email. The email provided that Defendant "did A LOT for me when I had no one else," and that "the Tina I knew was a wonderful friend and person that would do anything to help anyone."[155] The Court finds that the additional details regarding Defendant's influence in Ms. Malone's life would not have changed Defendant's sentence.

Also, Defendant has provided no evidence to support the contention that Defendant's penalty phase counsel should have known of Ms. Malone before the email was received the morning of the Spencer hearing. There was no evidence presented that Defendant told Ms. Wilson about Ms. Malone being a possible mitigation witness. Counsel cannot be found deficient for failing to investigate a person she did not know existed. Defendant is not entitled to relief as to this allegation. Guardado, 176 So. 3d at 893; Lebron, 135 So. 3d at 1055-56.

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

Defendant alleges that counsel failed to ensure that Defendant received a reasonably competent mental health evaluation and failed to retain reasonably qualified experts who were tailored to Defendant's case. Defendant asserts that Dr. Faye Sultan, a psychologist and trauma expert, evaluated Defendant for purposes of postconviction litigation. Defendant contends that according to Dr. Sultan, Defendant's psychiatric and behavioral "picture" includes everything from her polysubstance abuse and her childhood trauma to her mental illness. In addition to Dr.

[154] See Attachment 1, Transcript, Trial, pp. 756-974.

[155] See Attachment 3, Defense Exhibit #2 at Spencer Hearing, August 22, 2012.

Sultan, Defendant retained Dr. Drew Edwards, an addiction specialist. Defendant alleges that such an expert, specifically tailored to her case, could have explained the effects of long-term drug abuse on the brain, as well as the effects of the drugs on Defendant's brain the night of the crime. Defendant alleges that counsel was deficient in failing to present an expert during the penalty phase that could explain the combined effects of these factors on Defendant's brain, and how she was affected by these factors at the time of the crime. Defendant claims "[s]he was prejudiced because the jury did not have a full comprehension of how the trauma Tina suffered and her long history of drug abuse affected her brain both throughout her life and on the night of the crime. Had the jurors heard this expert testimony there exists a reasonable probability that Ms. Brown would have received a life sentence."

At evidentiary hearing, Sharon Wilson, Defendant's penalty phase counsel, testified that she met with Defendant right after she had been appointed to this case.[156] Sharon Wilson hired Dr. Lisa McDermott as her mitigation specialist. Dr. McDermott is a psychologist and a certified private investigator.[157] Ms. Wilson also hired Dr. Elaine Bailey to conduct psychological testing on Defendant and to provide expertise on the issues of mental health in this case.[158] Attorney Wilson testified that she thought Dr. Bailey covered Defendant's life history from the beginning to the time of the crime, and linked Defendant's life history to the crime itself.[159] Sharon Wilson testified that Dr. Bailey never expressed to her that a neuropsychologist was needed in

[156] See Transcript, Evidentiary Hearing, p. 266.

[157] See Transcript, Evidentiary Hearing, pp. 267; 281-282.

[158] See Transcript, Evidentiary Hearing, pp. 269-270.

[159] See Transcript, Evidentiary Hearing, p. 285.

Defendant's case.[160] Dr. Bailey never advised Attorney Wilson that an addiction specialist would be helpful in Defendant's case.[161] During the evidentiary hearing, postconviction counsel showed Attorney Wilson some of Dr. Bailey's notes, in which Dr. Bailey actually referenced the possibility of hiring a neuropsychologist as well as an addiction specialist. Attorney Wilson said she had never before been given this information. She indicated several times during the evidentiary hearing that she had never seen those notes and that Dr. Bailey had never discussed the possibility of hiring these types of additional experts.[162] Attorney Wilson indicated that if either Dr. Bailey or Dr. McDermott had recommended a neuropsychologist and/or an addiction specialist be hired, she would have "absolutely" hired the additional experts.[163] Defendant has not experienced any known traumatic brain injuries.[164] There was no suggestion that Defendant had ever lost consciousness due to an injury, had been in any car accident, experienced head trauma – anything of that nature.[165] Attorney Wilson indicated that if she had known of anything like this she would have hired someone to look into those issues.[166] The Court finds Attorney Wilson's testimony credible on these topics.

"In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. "This Court must determine whether a

[160] See Transcript, Evidentiary Hearing, pp. 285-286.

[161] See Transcript, Evidentiary Hearing, p. 286.

[162] See Transcript, Evidentiary Hearing, pp. 273-274; 285-286; 297.

[163] See Transcript, Evidentiary Hearing, p. 274.

[164] See Transcript, Evidentiary Hearing, p. 286.

[165] See Transcript, Evidentiary Hearing, p. 286.

[166] See Transcript, Evidentiary Hearing, p. 286.

decision not to expand the investigation of potential mitigation was reasonable under the circumstances." Guardado, 176 So. 3d at 895 (citation omitted). The evidence presented at evidentiary hearing shows that penalty phase counsel was not deficient in failing to hire additional experts to offer mitigation testimony. Attorney Wilson took reasonable steps to use mental health experts and develop mental health mitigation by hiring Dr. Bailey and Dr. McDermott. Additionally, the evidence shows that Ms. Wilson reasonably relied on Dr. Bailey to recommend any additional experts that might have helped in Defendant's case, and Dr. Bailey never did. As in the Guardado case, penalty phase counsel had "no reason to doubt" Dr. Bailey's report or question Dr. Bailey's lack of suggestion to hire additional mental health experts. Guardado, 176 So. 3d at 896. In the circumstances of this case, Dr. Bailey, who was hired to provide mental health expertise and assess Defendant, failed to notify penalty phase counsel that other mental health experts might be helpful in developing mitigation in this case. Penalty phase counsel had a reasonable expectation that Dr. Bailey would share such information with her. Penalty phase counsel is not deficient for relying on Dr. Bailey's expertise and failing to hire additional mental health experts, when no such suggestion was provided to her by the professionals hired to do such an assessment.

Additionally, this Court finds that Defendant was not prejudiced by trial counsel's failure to consult with or present additional testimony from mental health experts during the penalty phase of trial. The expert testimony Defendant presented at evidentiary hearing was largely cumulative of the evidence presented through lay witnesses and Dr. Bailey at trial. Each of the three experts Defendant called at the evidentiary hearing – Dr. Faye Sultan, Dr. Drew Edwards, and Dr. Michael Herkov – presented opinions that largely reflected Dr. Bailey's testimony at

trial, albeit with some additional detail. To the extent the postconviction experts' opinions differed from Dr. Bailey's, "[s]imply presenting the testimony of experts during the [postconviction] evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief." Dufour v. State, 905 So. 2d 42, 58 (Fla. 2005). Further, as detailed throughout this order, the evidence in this case was overwhelming and supported the three weighty aggravators in this case: heinous, atrocious, and cruel (HAC), CCP, and felony murder (kidnapping). These aggravators would not have been outweighed by the cumulative mitigation evidence Defendant presented at evidentiary hearing. Defendant has failed to show that the additional experts' testimony, which was largely repetitive of that presented at trial, would have made a difference in the jury's verdict. Defendant is not entitled to relief as to this claim.

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

Defendant next alleges that counsel failed to present sufficient evidence to support the following statutory mitigators during the penalty phase: 1) the crime was committed while Defendant was under the influence of extreme mental or emotional disturbance; 2) Defendant was an accomplice in the capital felony committed by another person and her participation was relatively minor; 3) Defendant acted under extreme duress or other substantial domination of another person; and 4) the capacity of Defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired. Defendant claims that had penalty phase counsel hired the appropriate experts and called lay witnesses, their testimony would have supported these mental health statutory mitigators. Specifically, Defendant alleges that Dr. Sultan's testimony would have established evidence to support

statutory mitigators 1 and 4, as referenced above. Defendant further alleges that if trial counsel had presented the testimony of Terrance Woods, Darren Lee, and Nicole Henderson, and he had "effectively cross examined the witnesses who did testify in the guilt phase," this testimony would have supported statutory mitigators 2 and 3.

1. Additional Mental Health Experts

Defendant claims that if counsel had hired the "appropriate" mental experts, she could have established two of the enumerated statutory mitigators listed above: 1) the crime was committed while Defendant was under the influence of extreme mental or emotional disturbance; and 4) the capacity of Defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired. In support of this allegation, Defendant presented the testimony of Dr. Sultan, who testified at evidentiary hearing that in her opinion, "to a reasonable degree of psychological certainty," these two statutory mitigators existed in Defendant's case.[167]

As discussed, *supra*, penalty phase counsel reasonably relied on the recommendations of Dr. Bailey and was not ineffective in failing to hire additional mental health experts to provide mitigation evidence. Dr. Sultan's opinion regarding the mitigators is based upon Defendant's background and experiences – the same background and experiences testified to by Dr. Bailey at trial. Even though Dr. Sultan has now given a more favorable opinion than Dr. Bailey provided at trial, this testimony does not mean that penalty phase counsel was ineffective. The Florida Supreme Court has repeatedly declined to find ineffectiveness simply because the defendant

[167] See Transcript, Evidentiary Hearing, pp. 216.

presents experts in postconviction proceedings to provide more favorable opinions than those presented at trial. Knight v. State, 211 So. 3d 1, 9-10 (Fla. 2016); Dufour, 905 So. 2d at 58.

Even if penalty phase counsel had presented this testimony to support the statutory mitigators, there is no reasonable probability that it would have affected Defendant's sentence. Although the trial court rejected many of the requested statutory mitigators, the facts on which these mitigators are based were considered as nonstatutory mitigators.[168] Additionally, as stated by trial counsel himself, the evidence in this case was "horrific;"the three aggravators in this case –HAC, CCP, and felony murder (kidnapping) – were absolutely supported by the detailed and graphic evidence entered in this case. These aggravators would not have been outweighed by additional evidence to support statutory mitigation. This portion of the subclaim is therefore denied.

2. Lay Witnesses

Defendant alleges that if counsel had called Terrance Woods, Darren Lee, and Nicole Henderson at trial, and had "effectively cross-examined witnesses who did testify in the guilt phase," counsel could have established the other two alleged statutory mitigators: 2) Defendant was an accomplice in a capital felony committed by another person and her participation was relatively minor; and 3) Defendant acted under extreme duress or other substantial domination of another person. As already discussed in detail previously in this order, the testimony of Terrance Woods, Darren Lee, and Nicole Henderson could not have established that Defendant was a mere accomplice whose participation in the brutal and fatal attack was minor. The evidence is simply too strong against Defendant that she played a substantial role in the victim's murder.

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[168] See Attachment 2, Sentencing Order.

Additionally, the proposed testimony of these three witnesses does not show that Defendant acted under extreme duress or other substantial domination of another person. Again, the evidence at trial was that Defendant was the main aggressor in the attack against the victim. She was the one who tased the victim repeatedly, initiated stuffing the victim into the trunk of her vehicle, drove the victim to the clearing, and continued to tase and then beat the victim with a crowbar. Regardless of whether Defendant actually poured the gasoline and lit the victim on fire, the evidence at trial shows that Defendant was not being dominated or under extreme duress when she launched the fatal attack against the victim.

In regard to "effectively" cross-examining the witnesses who testified during the guilt phase, this claim is facially insufficient for failing to allege specific details on how "effectively" cross-examining witnesses would have somehow created evidence to support these two statutory mitigators. Defendant states in a footnote that "[t]hese facts are the subject of a guilt phase IAC claim in Claim 2 and are fully incorporated herein;" however, Defendant is not permitted to incorporate Claim 2 to cure deficiency. Even if incorporating Claim 2 would make this claim facially sufficient, this claim would still fail because the Court has made no finding of ineffectiveness regarding trial counsel. This portion of the subclaim is therefore summarily denied.

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

1. Ricki Atwood

Defendant alleges that during the penalty phase, Dr. Bailey was asked during cross-examination by the State whether she had reviewed the handwritten letter authored by Ricki Atwood. Defendant alleges that counsel was ineffective for failing to object to this inadmissible

hearsay evidence (the Ricki Atwood statement). Initially, the Court notes that this claim is facially insufficient as Defendant fails to allege proper prejudice. *Arguendo*, even if this claim were facially sufficient, Defendant would not be entitled to relief. The record conclusively refutes this claim. Contrary to Defendant's allegation, Ricki Atwood's letter was never admitted into evidence. Dr. Bailey was merely asked whether she had reviewed Ms. Atwood's letter, and Dr. Bailey responded she had not. As no hearsay statement of Ricki Atwood was admitted, counsel was not ineffective for failing to make a baseless objection. Defendant is not entitled to relief as to this claim.

2. Sheree Sturdivant

a. Sheree Sturdivant's Hearsay Statement

Within this same claim, Defendant alleges that counsel was ineffective for failing to object to the admission of the hearsay statement of Sheree Sturdivant during the penalty phase. Specifically, Defendant alleges that during Dr. Bailey's cross-examination by the State she was asked whether she had reviewed the recorded statement of Sheree Sturdivant. Dr. Bailey responded that she had. The State then asked Dr. Bailey if Britnee Miller (Defendant's daughter and co-defendant) had told Sherree Sturdivant that the killing was planned and it was Defendant's role to apologize to the victim to lure her over to Defendant's home. Dr. Bailey confirmed that information was included in the recorded statement. Defendant alleges that Sheree Sturdivant's recorded statement was double hearsay and inadmissible at Defendant's trial.

Hearsay statements are admissible in a capital sentencing proceeding. "Any such evidence the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to

rebut any hearsay statements." Perri v. State, 441 So. 2d 606, 607-08 (Fla. 1983)(quoting the pertinent portion of section 921.141(1), Florida Statutes). Additionally, Sheree Sturdivant's statement was not elicited to prove the truth of the matter asserted. Instead, it was elicited to attack a conclusion made by Dr. Bailey on direct examination. Consequently, the statement in question would not have even been considered hearsay under these circumstances. See § 90.801(1)(c), Fla. Stat. Defendant has failed to demonstrate how counsel was deficient for failing to make an unwarranted objection.

The Court also notes that Defendant's claim of prejudice is not supported by the record. Defendant argues she was prejudiced because without Sheree Sturdivant's recorded statement, as testified to by Dr. Bailey, "the State would not have been able to argue in closing that Ms. Brown lured the victim into the lion's den and that this was planned and premeditated by Ms. Brown." Defendant asserts that her showing of prejudice is that the jury unanimously recommended a death sentence, and the Court found the CCP statutory aggravator. However, the record shows that the State made this statement during its closing argument at the end of the guilt phase, ***before*** Sheree Sturdivant's statement was ever mentioned.[169] Additionally, the record shows that significant evidence was available that supported the premeditated prong of the CCP statutory aggravator.[170] Defendant has not demonstrated that the jury would not have returned an unanimous death recommendation or that the Court would not have found the CCP aggravator if Sherree Sturdivant's statement had not been referenced by Dr. Bailey. Defendant is not entitled to relief regarding this subclaim.

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[169] See Attachment 1, Transcript, Trial, p. 704.

[170] See Attachment 1, Transcript, Trial, pp. 348-390; 440-480; 511-577; 604-623.

b. Failure to Investigate Sheree Sturdivant

Defendant alleges that counsel failed to "uncover evidence" that Sherree Sturdivant had previously been found incompetent to proceed in her own criminal case just prior to making this recorded statement. Defendant alleges counsel should have used this information to challenge Sheree Sturdivant's recorded statement.

This subclaim was scheduled for evidentiary hearing. However, Defendant failed to present any testimonial evidence to support this claim. While Defendant did submit into evidence, with stipulation by the State, a judgment and sentence of Sheree Sturdivant's and also a jail record for Sturdivant's commissary account, there was no evidence presented to show how counsel could have successfully challenged Sturdivant's recorded statement by using these documents. Defendant is not entitled to relief as to this claim.

CLAIM 4: TRIAL COUNSEL FAILED TO COMPLY WITH RULE 3.112, FLORIDA RULES OF CRIMINAL PROCEDURE

Defendant alleges that her right to due process was violated because Mr. Gontarek failed to comply with rule 3.112, Florida Rules of Criminal Procedure, because he had not obtained continuing legal education credits in the area of capital law. Defendant claims that as a result, Mr. Gontarek's representation "fell below adequate representation." Defendant asserts that if Mr. Gontarek had attended the correct continuing legal education courses he would have had a "wealth of information about handling capital cases." Defendant references claims 1, 2, 3, 5, and 9 "which are fully incorporated herein" as evidence of the effect of counsel's failure to obtain the proper continuing legal education credits in the area of capital law.

Defendant's claim is legally and facially insufficient. Initially, Defendant is not permitted to incorporate other claims instead of alleging the required specific, factual prejudice

as to this claim. Further, Defendant's allegation is conclusory that the alleged errors committed by Mr. Gontarek at Defendant's trial were a result of a lack of legal education credits. Regardless, failure to comply with rule 3.112, Florida Rules of Criminal Procedure, does not create an independent basis for a Strickland claim. Cox v. State, 966 So. 2d 337, 358 n.10 (Fla. 2007). Defendant is not entitled to relief as to this allegation.

CLAIM 5: DEFENDANT WAS DEPRIVED OF FUNDAMENTAL RIGHT TO A FAIR TRIAL, DUE PROCESS, AND RELIABLE ADVERSARIAL TESTING DUE TO IMPROPER PROSECUTORIAL MISCONDUCT DURING THE GUILT PHASE OF TRIAL

Claims 5A-5C: Prosecutorial Misconduct

Defendant cites to various statements made by the prosecution during closing arguments which she claims to have been A) inflammatory; B) belittling to defense counsel; and C) an expression of the prosecutor's personal opinion. These subclaims are procedurally barred. The Supreme Court of Florida has repeatedly held that substantive claims of prosecutorial misconduct can and should be raised on direct appeal. See Rogers, 957 So. 2d 538, 547 (Fla. 2007); Krawczuk v. State, 92 So. 3d 195, 206 (Fla. 2012). Consequently, these claims are summarily denied.

CLAIM 6: DEFENDANT WAS DEPRIVED OF HER RIGHT TO DUE PROCESS BECAUSE THE STATE PRESENTED FALSE AND MISLEADING EVIDENCE IN VIOLATION OF GIGLIO

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

Defendant alleges that the State presented the "false" testimony of Heather Lee at trial in violation of Giglio. Defendant asserts that Heather Lee's trial testimony was markedly different from her previously recorded statements and deposition testimony. Defendant then cites to some

of the same discrepancies referenced previously in this motion in claim 2B: 1) Heather Lee's whereabouts the day of the incident; 2) cleaning blood off of Heather Lee's shoes; 3) how the blood got on Heather Lee's shoes; 4) persons present in the vehicle and in the woods; and 5) knowledge of the crime scene. Defendant contends that Heather Lee's trial testimony was false, and the State knew the testimony was false because it contradicted Heather Lee's previous statements and deposition testimony. Defendant further asserts that Heather Lee's testimony was material, and because her testimony "undoubtedly affected the judgment of the jury," her false testimony "cannot be considered harmless beyond a reasonable doubt." Defendant alleges "[h]ad the State properly corrected this false testimony, Heather Lee would have been exposed as a liar, which would have given rise to reasonable doubt as to Ms. Brown's guilt."

> To establish a claim under Giglio, the defendant must demonstrate that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the evidence was material. Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict.

Jones v. State, 998 So. 2d 573, 579-80 (Fla. 2008) (citations omitted).

To demonstrate that testimony is false, the defendant must prove such falsity with more than mere inconsistencies. Franqui v. State, 59 So. 3d 82, 105 (Fla. 2011); Maharaj v. State, 778 So. 2d 944, 956 (Fla. 2000).

> A challenge to evidence through another witness or prior inconsistent statements is insufficient to establish prosecutorial use of false testimony. Mere differences in testimony found in witness statements made at different times . . . are not alone sufficient to show perjury. In the Giglio context, the suggestion that a statement may have been false is simply insufficient; the defendant must conclusively show that the statement was false.

Hernandez v. State, 180 So. 3d 978, 994 (Fla. 2015)(citations omitted; punctuation omitted).

Defendant has only cited to immaterial inconsistencies between Heather Lee's previous statements and her trial testimony. The suggestion that Heather Lee's trial testimony might have been false based on these inconsistencies is simply not enough to show that Heather Lee's trial testimony was false. Id. Defendant's only "proof" that the State offered false testimony at trial is the fact that Heather Lee's trial testimony contained some inconsistencies from her previous statements.[171] As stated above, "prior inconsistent statements [are] insufficient to establish prosecutorial use of false testimony." Id. Defendant has consequently failed to demonstrate that Heather Lee's trial testimony was false and the State knowingly presented this purportedly "false" testimony. As Defendant has failed to establish the first two prongs of the Giglio standard, this Court need not reach the third prong. Defendant is not entitled to relief as to this subclaim.

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

Defendant also claims that Pamela Valley's trial testimony was false, and that the State knowingly presented this false testimony at trial. Like Defendant's Giglio claim regarding Heather Lee, Defendant bases this claim on an inconsistency. Specifically, Defendant alleges that Pamela Valley's testimony that Defendant asked her to "finish off" the victim is false because she never mentioned it during her original statement to police investigators in April 2010.

Like the claim above, Defendant is unable to establish that Pamela Valley's testimony on this topic is false simply because this information was not included in her original statement to law enforcement. In fact, trial counsel explored the topic in cross-examination in an effort to

[171] The Court further notes that as discussed, *supra*, many of the alleged "inconsistencies" in Heather Lee's statements were not actually inconsistencies at all.

impeach this testimony. While the inconsistencies were properly addressed as impeachment evidence at trial, Defendant has certainly not satisfied the first two prongs of the Giglio test. As Defendant has failed to establish the first two prongs of the Giglio standard, this Court need not reach the third prong. Defendant is not entitled to relief as to this subclaim.

CLAIM 7: DEFENDANT WAS DEPRIVED OF HER RIGHT TO DUE PROCESS BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN VIOLATION OF BRADY[172]

Defendant alleges that the State violated Brady when it failed to reveal that the son of State expert Dr. John Bingham had been arrested and was facing felony charges at the time of Defendant's trial. Defendant claims that she could have used this information to impeach Dr. Bingham's testimony as being biased for the State. Defendant claims that if it could have lessened the strength of Dr. Bingham's trial testimony, there is a reasonable probability the results of Defendant's trial would have been different.

Even thought this claim was scheduled for evidentiary hearing, Defendant chose to unequivocally withdraw this claim.[173] Therefore, this claim is no longer before this Court for disposition.

CLAIM 8: NEWLY DISCOVERED EVIDENCE[174]

Defendant alleges that newly discovered evidence regarding Heather Lee was uncovered during the postconviction investigation of Defendant's case. Specifically, Defendant alleges that

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[172] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[173] See Transcript, Evidentiary Hearing, pp. 293, 298.

[174] Even though Defendant references the evidentiary hearing testimony of Tajiri Jabali as newly discovered evidence in her written closing arguments, there is no claim regarding Tajiri Jabali alleged in Defendant's motion. This Court cannot speculate as to what Defendant would have alleged or create an allegation that is not already included in the amended motion. Consequently, the evidentiary hearing testimony of Tajiri Jabali is not being addressed in this Order.

between October and December 2014, Heather Lee was enrolled in a prison course called "Hannah's Gift," while she was housed at Homestead Correctional Institution. Throughout the duration of the course, Heather Lee spoke about why she was in prison, giving details about her involvement in the victim's death to A) Shayla Edmonson and B) Jessica Swindle. Defendant further alleges that C) Nicole Henderson's knowledge regarding Heather Lee and the crime in question is newly discovered evidence.

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

Robinson v. State, 865 So. 2d 1259, 1262 (Fla. 2004) (citations omitted).

"As explained in Wright v. State, 857 So. 2d 861 (Fla. 2003), newly discovered evidence is evidence that **existed at the time of the trial** but was unknown by the trial court, by the party or by counsel at that time, and it must further appear that neither the defendant nor defense counsel could have known of the evidence by the exercise of due diligence." Moss v. State, 860 So. 2d 1007, 1009 (Fla. 5th DCA 2003)(emphasis added).

An evidentiary hearing was scheduled regarding the entirety of Defendant's newly discovered evidence claim.

Claim 8A: Newly Discovered Evidence – Shayla Edmonson

Defendant alleges that Shayla Edmonson was incarcerated with Heather Lee and they both were enrolled in the "Hannah's Gift" course. During one class addressing anger management, Shayla Edmonson heard Heather Lee state, "If I am pushed to a certain point, I will do anything. I am in for murder, and I did the murder. I lit a girl on fire. I jumped on a good plea deal because I have four kids. I do not regret anything I did because all of the women involved were sleeping with my husband."

At evidentiary hearing, Shayla Edmonson testified that she attended four or five classes of the "Hannah's Gift" course with Heather Lee.[175] Edmonson indicated that during the class session on anger, Heather Lee had a side conversation with a couple of the women in the class.[176] According to Edmonson, Heather Lee told the women that she had killed someone and she would do it again because the people involved were sleeping with her husband.[177] Heather Lee also said that she set the girl on fire.[178] She told Edmonson and the group that she took the plea deal so she could go home to her kids; that she was not going to court because she knew "she did what she did."[179] On cross-examination, Shayla Edmonson confirmed that it seemed Heather Lee was bragging, or trying to be tough when she made these statements.[180] Shayla Edmonson admitted that she did not know if what Heather Lee said was in fact true.

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[175] See Transcript, Evidentiary Hearing, pp. 122-123.

[176] See Transcript, Evidentiary Hearing, p. 123.

[177] See Transcript, Evidentiary Hearing, p. 124.

[178] See Transcript, Evidentiary Hearing, p. 124.

[179] See Transcript, Evidentiary Hearing, p. 124.

[180] See Transcript, Evidentiary Hearing, p. 125.

Shayla Edmonson's testimony of what Heather Lee said **after** Defendant's trial does not constitute newly discovered evidence. Id. Regardless, the substance of Shayla Edmonson's testimony – that Heather Lee admitted to lighting the victim on fire because she was sleeping with Heather Lee's husband – is far from newly discovered evidence. Wendy Moye testified to a similar confession by Heather Lee at trial and Terrance Woods testified before trial regarding Heather Lee's husband having an affair with the victim. As this evidence was already discovered before trial by trial counsel, this testimony is not newly discovered information. Defendant is not entitled to relief as to this subclaim.

8B: Newly Discovered Evidence – Jessica Swindle

Defendant alleges that Jessica Swindle was also a participant with Heather Lee in the "Hannah's Gift" classes. Jessica Swindle recalls Heather Lee talking about the reason she was incarcerated. According to Defendant's allegation, Jessica Swindle heard Heather Lee say, "I am in for murder. I poured gas on a girl and lit her on fire. There were two other women with me, a woman and her daughter. Neither one of them helped me. They both did not know I was going to light the girl on fire. But I did it because she was sleeping with my husband."

At evidentiary hearing, Jessica Swindle testified that she was previously incarcerated at Homestead Correctional Institution with Heather Lee where they voluntarily attended "Hannah's Gift" classes.[181] Ms. Swindle testified that Heather Lee said "[t]hat she was there for murder, that she didn't get the death row, and that there was another lady with her, and her daughter was with her also, and that they didn't do anything, that it was just her, that she set a – a girl on fire

[181] See Transcript, Evidentiary Hearing, pp. 96-97.

that was sleeping with baby's dad."[182] Ms. Swindle further testified that Heather Lee did not have any remorse when she talked about the crime; she did not cry, she just explained why she was there.[183] Jessica Swindle said it was not like Heather Lee was "bragging but kind of like, she – she kind of, like got away with it and the other one didn't."[184] However, on cross-examination, Jessica Swindle confirmed it seemed like Heather Lee was trying to be tough when she made these statements.[185]

Jessica Swindle's testimony cannot be newly discovered evidence because it concerns statements that were made **after** trial. Id. Again, the substance of Jessica Swindle's testimony is not newly discovered. Trial counsel had already found through his investigations before trial that Heather Lee had confessed to pouring the gasoline and lighting the victim of fire because her husband was sleeping with the victim. As this is not newly discovered evidence, this subclaim fails.

Claim 8C: Newly Discovered Evidence – Nicole Henderson

Defendant next alleges that Nicole Henderson is someone who was incarcerated with Heather Lee at both the Escambia County Jail and at Homestead Correctional Institution. Defendant contends that Ms. Henderson's trial testimony would have established: 1) Heather Lee had a reputation for violence; 2) Heather Lee confessed to Nicole Henderson; and 3) Corie Doyle's trial testimony could have been impeached by Nicole Henderson.

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[182] See Transcript, Evidentiary Hearing, p. 98.

[183] See Transcript, Evidentiary Hearing, p. 98.

[184] See Transcript, Evidentiary Hearing, p. 98.

[185] See Transcript, Evidentiary Hearing, p. 99.

1. Heather Lee's Reputation for Violence

a. Heather Lee's Reputation for Violence – 2009 Incident

Defendant alleges that Nicole Henderson has known Heather Lee to have a "reputation for violence" since 2009. Defendant contends that the first interaction Ms. Henderson remembers having with Heather Lee was when Heather Lee threatened to kill Nicole Henderson's younger sister because Lee believed her husband wanted to have sex with her. Defendant asserts that Nicole Henderson also knows Heather Lee from the nightclub scene in Pensacola, where Heather Lee would often break glass bottles and threaten to cut people. According to Defendant, Nicole Henderson recalls many nights in which Heather Lee actually did cut people with glass bottles.

Defendant fails to allege how this information is newly discovered evidence. According to Nicole Henderson's evidentiary hearing, she had known Heather Lee from the "free world" since 2009.[186] It was at this time Heather Lee first got into an altercation with Ms. Henderson's teenage sister.[187] Defendant has failed to allege how this information could not have been discovered by counsel through due diligence. In fact, Defendant alleges that counsel was ineffective for not investigating the testimony of Nicole Henderson before trial. In doing so, it would seem to this Court Defendant has conceded that this information could have been found by due diligence. Nicole Henderson's testimony regarding Heather Lee's reputation for violence in 2009[188] is not newly discovered evidence;[189] this subclaim fails.

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[186] See Transcript, Evidentiary Hearing, pp. 101-102.

[187] See Transcript, Evidentiary Hearing, p. 102.

[188] Contrary to Defendant's allegations, Nicole Henderson did not offer any testimony regarding Heather Lee in Pensacola clubs, breaking glass bottles and threatening to cut people, and actually cutting people. As there is no evidence to support this allegation, this subclaim necessarily fails.

b. Heather Lee's Reputation for Violence –After Trial

Defendant further alleges that during Nicole Henderson's incarceration at Homestead Correctional Institution, Heather Lee continued to have a reputation for violence. Defendant alleges that Nicole Henderson knew of Heather Lee getting into fights as a result of persons sleeping with her girlfriend. Defendant asserts that Heather Lee does not fight the girlfriend who cheats on her, but instead always fights the person with whom her girlfriend cheated. Defendant alleges that this practice of Heather Lee's is "common knowledge at the prison because of comments Lee has made to inmates, that she lit a woman on fire who slept with her husband."

At evidentiary hearing, Nicole Henderson testified that when she was incarcerated with Heather Lee at Homestead Correctional Institution, she knew Heather Lee dated a girl named Gracie.[190] Ms. Henderson testified that Gracie would cheat on Heather Lee, and Heather Lee would never physically fight Gracie, but would fight the person with whom Gracie was cheating.[191] Nicole Henderson never testified at evidentiary hearing regarding any comments made by Heather Lee about lighting a woman a fire who slept with Ms. Lee's husband.

Nicole Henderson's testimony on this topic is not newly discovered evidence because Heather Lee and Gracie's relationship occurred **after** Defendant's trial. Id. Even if this testimony could have qualified as newly discovered, Nicole Henderson's testimony regarding Heather Lee's reputation for violence would not have been admissible. Defendant is not entitled to relief regarding this subclaim.

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[189] Even if this evidence were newly discovered, reputation evidence would not have been admissible at trial.

[190] See Transcript, Evidentiary Hearing, pp. 104-105.

[191] See Transcript, Evidentiary Hearing, p. 105.

2. Heather Lee's Confession to Nicole Henderson

Defendant alleges that Heather Lee confessed to Ms. Henderson and a group of women that the victim was murdered because she was sleeping with Lee's husband. Defendant raised this claim previously in her motion, alleging that trial counsel was ineffective for failing to investigate Nicole Henderson's testimony before trial. Defendant has failed to allege how this information could not have been discovered by counsel's due diligence. In fact, it would seem to this Court that Defendant has conceded this information could have been found by the exercise of due diligence as she has essentially alleged such previously in her motion. As Nicole Henderson's testimony regarding Heather Lee's purported confession[192] is not newly discovered evidence, this subclaim fails.

3. Impeachment of Corie Doyle's Testimony

Defendant also alleges that Nicole Henderson would have testified that while Defendant was awaiting trial in the Escambia County Jail, Defendant slept all day, thereby refuting Corie Doyle's testimony that Defendant confessed to Ms. Doyle when they were up early one morning drinking coffee. Again, Defendant has already raised this claim previously in her motion, alleging trial counsel was ineffective for not impeaching Corie Doyle with Nicole Henderson's testimony. This testimony is therefore not considered newly discovered, as evidenced by Defendant's internally inconsistent motion. Defendant is not entitled to relief as to this subclaim.

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[192] As detailed previously, Heather Lee never actually confessed to Nicole Henderson.

CLAIM 9: CUMULATIVE ERROR DEPRIVED DEFENDANT OF A FUNDAMENTALLY FAIR TRIAL

Defendant next alleges that the "sheer number and types of errors in Ms. Brown's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death." Defendant further alleges that the cumulative effect of these errors denied Ms. Brown a fair trial. After reviewing all of Defendant's motion, this Court has found counsel deficient regarding one claim but found no prejudice. As there are no other claims in which error occurred, a cumulative analysis regarding this single claim does not render any different result. Defendant is not entitled to relief.

CLAIM 10: DEFENDANT'S DEATH SENTENCE IS IN VIOLATION OF HURST V. FLORIDA, AND HURST V. STATE, AND THE 6TH AND 8TH AMENDMENTS

Defendant alleges that Defendant is entitled to a new penalty phase pursuant to the holdings of Hurst v. Florida[193] and State v. Hurst.[194] Defendant asserts A) Both Hurst decisions apply to Defendant; B) the Hurst decisions apply retroactively to Defendant's case; and C) the Hurst error in Defendant's case is not harmless.

Claims 10A and 10B: *Hurst* Decisions Apply Retroactively to Defendant and her Case

The Supreme Court of Florida has held that the Hurst opinions apply retroactively to any death sentence that became final after the issuance of the United State Supreme Court's June 24, 2002 opinion of Ring v. Arizona, 536 U.S. 584 (2002). See Asay v. State, 210 So. 3d 1 (Fla. 2016); Mosley v. State, 209 So. 3d 1248 (Fla. 2016). Defendant's death sentence was not entered in this case until 2012, and the Hurst opinions undoubtedly apply retroactively to Defendant's case.

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[193] Hurst v. Florida, 136 S. Ct. 616 (2016).

[194] State v. Hurst, 202 So. 3d 40 (Fla. 2016).

Claim 10C: *Hurst* Decisions and Harmless Error

The application of the Hurst decisions to Defendant does not mean that she is automatically entitled to a new penalty phase. The Court must employ the harmless error test to determine whether Defendant is entitled to relief.

As explained in State v. Hurst:

> The harmless error test, as set forth in Chapman[195] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," DiGuilio, 491 So.2d at 1137, and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> The question is whether there is a reasonable possibility that the error affected the [sentence].

Hurst, 202 So. 3d at 68 (citations omitted; formatting changed).

[195] Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

As the Florida Supreme Court has held repeatedly, Hurst relief is denied to defendants who received a unanimous jury recommendation of death. As explained in detail in Grim v. State, 244 So. 3d 147, 148 (Fla. 2018):

> In Davis,[196] this Court held that a jury's unanimous recommendation of death is "precisely what we determined in Hurst to be constitutionally necessary to impose a sentence of death" because a "jury unanimously f[inds] all of the necessary facts for the imposition of [a] death sentence[ ] by virtue of its unanimous recommendation[ ]." Davis, 207 So. 3d at 175. This Court has consistently relied on Davis to deny Hurst relief to defendants that have received a unanimous jury recommendation of death. See, e.g., Bevel v. State, 221 So. 3d 1168, 1178 (Fla. 2017); Guardado v. Jones, 226 So. 3d 213, 215 (Fla. 2017), *petition for cert. filed*, No. 17–7171 (U.S. Dec. 18, 2017); Cozzie v. State, 225 So. 3d 717, 733 (Fla. 2017), *petition for cert. filed*, No. 17–7545 (U.S. Jan. 24, 2018); Morris v. State, 219 So. 3d 33, 46 (Fla.), *cert. denied*, —— U.S. ——, 138 S. Ct. 452, 199 L. Ed. 2d 334 (2017); Tundidor v. State, 221 So. 3d 587, 607–08 (Fla. 2017), *cert. denied*, —— U.S. ——, 138 S. Ct. 829, 200 L. Ed. 2d 326 (2018); Oliver v. State, 214 So. 3d 606, 617–18 (Fla.), *cert. denied*, —— U.S. ——, 138 S. Ct. 3, 199 L. Ed. 2d 272 (2017); Middleton v. State, 220 So. 3d 1152, 1184–85 (Fla. 2017), *cert. denied*, —— U.S. ——, 138 S. Ct. 829, 200 L. Ed. 2d 326 (2018); Truehill v. State, 211 So. 3d 930, 956–57 (Fla.), *cert. denied*, —— U.S. ——, 138 S. Ct. 3, 199 L. Ed. 2d 272 (2017). Grim is among those defendants who received a unanimous jury recommendation of death, and his arguments do not compel departing from our precedent.

Grim v. State, 244 So. 3d 147, 148 (Fla. 2018), reh'g denied, SC17-1071, 2018 WL 2338153 (Fla. May 22, 2018), and cert. denied sub nom. Grim v. Florida, 139 S. Ct. 480 (2018).

The jury entered a unanimous recommendation (12-0) for the death penalty to be imposed in this case. Additionally, the facts in this case – the victim was repeatedly tased, bludgeoned with a crowbar, and set on fire, and yet still lived long enough to tell persons who committed the crime

[196] Davis v. State, 2017 So. 3d 142 (Fla. 2016), *cert denied*, -- U.S. --, 137 S. Ct. 2218, 198 L. Ed. 2d 663 (2017).

– are so egregious that it supports the finding that any Hurst error in this case was harmless. See Davis, 207 So. 3d at 175. Defendant is not entitled to relief as to this claim.

ACCORDINGLY, it is hereby **ORDERED and ADJUDGED** that:

1. Defendant's "Third Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" is **DENIED**; and

2. Defendant has thirty (30) days from the rendition date of this Order to file a notice of appeal; should she so choose.

DONE and ORDERED in Chambers in Pensacola, Escambia County, Florida.

GARY L. BERGOSH
CIRCUIT JUDGE
4/5/2019

GLB/mco

The Clerk of Court shall effectuate service upon the following:

- Dawn B. Macready, Assistant CCRC-North *(via electronic delivery)*
- Bridgette Jensen, Assistant State Attorney *(via electronic delivery)*
- Jennifer Keegan, Assistant Attorney General *(via electronic delivery)*
- Tina Brown, DC# 155917, Lowell Correctional Annex, 11120 NW Gainesville Rd., Ocala, FL 33482 *(via regular mail)*

Exhibit 4

EXHIBIT 4. ROLE OF THE JURY IN CAPITAL SENTENCING IN AMERICAN DEATH-PENALTY JURISDICTIONS OTHER THAN FLORIDA

Juris-diction	Jury Unanimity?	What the Jury Must Find to Impose the Death Penalty	Burden of Proof for Jury's Decision
Alabama	No: 10 for death; 7 for life	That ags outweigh mits	No articulated burden of proof
Arizona	Yes	That mits are not sufficiently substantial so as to call for leniency	No burden on Defense[1]
Arkansas	Yes	That ags outweigh mits & that ags justify death	Prosecution / BRD
California	Yes	That ags outweigh mits & that ags are so substantial in comparison to mits as to make death appropriate and justified	Explicitly not subject to a burden of proof qualification
Georgia	Yes	That a death sentence should be imposed	No articulated burden of proof
Idaho	Yes	That mits, when weighed against ags, are not so compelling that the death penalty would be unjust	Unclear[2]
Indiana	Yes	That ags outweigh mits & that a death sentence should be imposed	No articulated burden of proof
Kansas	Yes	That mits do not outweigh ags	Prosecution / BRD
Kentucky	Yes	That, after considering ags and mits, a death sentence should be imposed	No articulated burden of proof
Louisiana	Yes	That, after considering ags and mits, a death sentence should be imposed	No articulated burden of proof
Mississippi	Yes	That sufficient ags exist, there are not sufficent mits to outweigh ags, & that defendant should be sentenced to death	No articulated burden of proof (but explicitly not BRD)
Missouri	Yes	That mits do not outweigh ags & that under all circumstances death should not be assessed	No articulated burden of proof

Montana	N.A.	N.A.: Once jury finds at least one ag, the judge decides sentence	N.A.
Nebraska	N.A.	N.A.: Once jury finds at least one ag, a panel of judges decides sentence	N.A.
Nevada	Yes	That mits do not outweigh ags & that a sentence of death is appropriate	No articulated burden of proof
North Carolina	Yes	That ags are sufficiently substantial & that mits do not outweigh ags	Prosecution / BRD
Ohio	Yes	That ags outweigh mits[3]	Prosecution / BRD
Oklahoma	Yes	That ags outweigh mits & that a LWOP sentence should not be imposed[4a]	Prosecution / ags "clearly" outweigh[4b]
Oregon	Yes	That defendant's conduct was deliberate & that, after considering ags and mits, the defendant should receive a death sentence[5]	Prosecution / BRD
Pennsylvania	Yes	That ags outweigh mits	No articulated burden of proof
South Carolina	Yes	That, after considering ags and mits, a death sentence should be imposed[6]	No articulated burden of proof
South Dakota	Yes	That a death sentence should be imposed	No articulated burden of proof
Tennessee	Yes	That ags outweigh mits	Prosecution / BRD
Texas	Yes for death; 10 for life	That there is a probability of future continuing violent dangerousness[7] & that there is not sufficient mit to warrant a sentence of LWOP[8]	Prosecution / BRD as to future dangerousness; neither party bears the burden as to sufficient mit
Utah	Yes	That ags outweigh mits & that death is justified and appropriate	Prosecution / BRD
Virginia*	Yes	(1) That there is a probability of future continuing violent dangerousness, or (2) that the defendant's conduct was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery, but (3) if the jury believes that death is not justified, it may return a sentence of life imprisonment.	Prosecution / BRD as to (1) and (2)

Wyoming	Yes	That the totality of aggs are so substantial in comparison to the totality of mits as to warrant the death penalty	Prosecution / BRD
U.S. Federal	Yes	That aggs sufficiently outweigh mits so as to justify a sentence of death, or, in the absence of a mit, that aggs are sufficient to justify a sentence of death	No articulated burden of proof

"ag" = agravating circumstance
"mit" = mitigating circumstance
"BRD" = beyond a reasonable doubt
"N.A." = not applicable

* After the date of the Florida Supreme Court's decision in Ms. Brown's case, the Virginia Legislature abolished the death penalty.

[1] Jurors in equipoise may vote for life; unclear whether they may vote for death.

[2] The applicable statute provides that if the jury cannot unanimously agree on whether the existence of mitigating circumstances makes the imposition of the death penalty unjust, the defendant is sentenced to life. Jury instructions implementing this provision in terms have been held correct. *State v. Hall*, 163 Idaho 744, 803-804, 419 P.3d 1042, 1101-1102 (2018). However, there is dictum in *Dunlap v. State*, 159 Idaho 280, 302-303, 360 P.3d 289, 311-312 (2015), saying "This Court has previously determined that placing the burden on the defendant to prove that mitigating circumstances are 'sufficiently substantial to call for leniency' does not run afoul of the constitution so long as it does not lessen the State's burden to prove the existence of aggravating circumstances." The "previous determin[ation]" refers to construction of an earlier form of the statute which *Dunlap* views as more demanding of the defendant than the current statute, and the relevance of this passage in the opinion to the issues presented in *Dunlap* is obscure.

[3] If and after the jury unanimously finds beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, the trial judge must also make that finding. If s/he does not, a death sentence may not be imposed. Otherwise said, in order to support a death sentence Ohio requires concurrent findings by a jury and the trial judge that aggravation outweighs mitigation.

[4a, 4b] Oklahoma Statutes Annotated §§ 701.11 provides: "Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed." The statute is glossed in *Paxton v. State*, 867 P.2d 1309, 1323 (Okla Crim.1993), as follows: "It is sufficient that the jury is instructed to weigh the mitigating and aggravating evidence, and only when the aggravating circumstances clearly outweigh the mitigating may the death penalty be imposed." The relevant pattern jury instruction adopts the Paxton formulation but omits the word "clearly. Oklahoma Uniform Jury Instructions Criminal, OUJI-CR 4-78, 4-80.

[5] If the issue of provocation is raised, the jury must also find that the defendant's conduct was unreasonable in response to the provocation.

[6] The judge may not impose a death sentence unless the jury unanimously recommends it. If and after such a recommendation is made, "[t]he trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor." Code of Laws of South Carolina 1976 Annotated § 16-3-20. Otherwise said, the judge must concur with the jury's judgment that a death sentence is warranted.

[7] The court is required to charge the jury that in deliberating on this issue it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

[8] In cases of accessorial liability, the jury must also find beyond a reasonable doubt that the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

Exhibit 5

EXHIBIT 5. SOURCES OF THE DATA IN EXHIBIT 4

Alabama: Michie's Alabama Code §§ 13-A-5-46, 13A-5-49.

Arizona: Arizona Revised Statutes Annotated § 13-752; Arizona Pattern Jury Instructions, Capital Case Instructions (Penalty Phase) RAJI (Criminal) CCSI 2.6 (4th ed., December 2016 Update); *State ex rel. Thomas v. Granville*, 211 Ariz. 468, 123 P.3d 662 (2005); *State v. Tucker*, 215 Ariz. 298, 316, 160 P.3d 177, 195 (2007) (dictum).

Arkansas: West's Arkansas Code Annotated § 5-4-603.

California: West's Annotated California Codes § 190.3, 190.4; California Criminal Jury Instructions 763, 766; *People v. Hawthorne*, 4 Cal.4th 43, 841 P.2d 118, 14 Cal.Rptr.2d 133 (as modified 1993).

Georgia: West's Code of Georgia Annotated §§ 17-10-30, 17-10-31.

Idaho: West's Idaho Code Annotated § 19-2515; *State v. Hall*, 163 Idaho 744, 419 P.3d 1042 (2018); *Dunlap v. State*, 159 Idaho 280, 360 P.3d 289 (2015).

Indiana: Burns Indiana Code Annotated, §§ 35-50-2-3, 35-50-2-9; *Miller v. State*, 623 N.E.2d 403 (1993).

Kansas: West's Kansas Statutes Annotated § 21-6617; Pattern Instructions, Kansas Criminal 54.060, 54.070, 54.100 (4th ed.).

Kentucky: Baldwin's Kentucky Revised Statutes Annotated, §§ 532.025, 532.030, 532.055.

Louisiana: West's Louisiana Statutes Annotated, Code of Criminal Procedure arts. 905, 905.1, 905.3, 905.4, 905.5, 905.6, 905.7, 905.8.

Mississippi: West's Annotated Mississippi Code § 99-19-101; *Ambrose v. State*, 254 So.3d 77 (Miss. 2018); *Evans v. State*, 226 So.3d 1 (Miss. 2017).

Missouri: Vernon's Annotated Missouri Statutes §§ 565.030, 565.032.

Montana: West's Montana Code Annotated §§ 46-18-301, 46-18-303, 46-18-304, 46-18-305.

Nebraska: West's Revised Statutes of Nebraska Annotated §§ 29-2521, 29-2522, 29-2523.

Nevada: West's Nevada Revised Statutes Annotated §§ 175.554, 175.556, 200.030, 200.033, 200.035; *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998); *Geary v. State*, 114 Nev.100, 952 P.2d 431 (1998).

North Carolina: West's North Carolina General Statutes Annotated § 15A-2000; North Carolina Pattern Jury Instructions for Criminal Cases, Crim. 150.10 (APP.)

Ohio:	Baldwin's Ohio Revised Code Annotated §§ 2929.03, 2929.04; Ohio Jury Instructions Criminal, 2 CR Ohio Jury Instructions 503.011.
Oklahoma:	Oklahoma Statutes Annotated §§ 701.10 – 701.12; Oklahoma Uniform Jury Instructions Criminal, OUJI-CR 4-72 – 4-80; *McGregor v. State*, 885 P.2d 1366 (Okla. Crim. 1994); *Paxton v. State*, 867 P.2d 1309 (Okla Crim.1993).
Oregon:	West's Oregon Revised Statutes Annotated § 163.150.
Pennsyl-vania:	42 Pennsylvania Consolidated Statutes Annotated § 9711; 234 Pennsylvania Administrative Code, Rule of Criminal Procedure 808.
South Carolina:	Code of Laws of South Carolina 1976 Annotated § 16-3-20; *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009).
South Dakota:	South Dakota Codified Laws § 23A-27A; *Piper v. Weber*, 771 N.W.2d 352 (S.D. 2009).
Tennessee:	West's Tennessee Code Annotated § 39-13-204.
Texas:	Vernon's Texas Statutes and Codes Annotated art. 37.071; Texas Criminal Jury Charges, TXJICRIM 6:390.
Utah:	West's Utah Code Annotated § 76-3-206, 76-3-207.
Virginia*:	West's Annotated Code of Virginia § 9.2-264.4; Matthew Bender Virginia Model Jury Instructions Criminal, Instructions P33.122 – P33.130(g).
Wyoming:	West's Wyoming Statutes § 6-2-102; *Olsen v. State*, 67 P.3d 536 (2003).
Federal:	United States Code Annotated §§ 3591– 3593.

* After the date of the Florida Supreme Court's decision in Ms. Brown's case, the Virginia Legislature abolished the death penalty.