

A P P E N D I X

APPENDIX

Order Denying Rehearing, U.S. Court of Appeals for the Eleventh Circuit, <i>Winston Calder v. Sec’y, Fla. Dep’t of Corr.</i> , No 24-10309 (May 29, 2026).....	A-1
Opinion Affirming Denial of 28 U.S.C. § 2254 Petition, U.S. Court of Appeals for the Eleventh Circuit, <i>Winston Calder v. Sec’y, Fla. Dep’t of Corr.</i> , No 24-10309 (Feb. 13, 2026).....	A-2
Order Denying 28 U.S.C. § 2254 Petition, U.S. District Court, Southern District of Florida, <i>Winston Calder v. Sec’y, Fla. Dep’t of Corr.</i> , No. 23-cv-60762-Altman (Dec. 18, 2023).....	A-3
Opinion Reversing and Remanding on Direct Appeal, Florida Fourth District Court of Appeal, <i>Winston Calder v. State</i> , No. 4D11-4237 (January 8, 2014)	A-4
Trial Transcripts, Vol. X Florida Seventeenth Judicial Circuit, <i>State v. Winston Calder</i> , No. 08-1448 CF10A (Feb. 16, 2015)	A-5
Jury Note, Florida Seventeenth Judicial Circuit, <i>State v. Winston Calder</i> , No. 08-1448 CF10A (Feb. 16, 2015)	A-6

A-1

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10309

WINSTON CALDER,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:23-cv-60762-RKA

ON PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC

Before HULL, MARCUS, and WILSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in
regular active service on the Court having requested that the Court

2

Order of the Court

24-10309

be polled on rehearing en banc. FRAP 40. The Petition for Panel Rehearing also is DENIED. FRAP 40.

A-2

FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10309

WINSTON CALDER,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:23-cv-60762-RKA

Before HULL, MARCUS, and WILSON, Circuit Judges.

MARCUS, Circuit Judge:

Winston Calder appeals the denial of his petition for habeas corpus, brought pursuant to 28 U.S.C. § 2254. Calder was convicted in Broward County, Florida, for murder in the first degree on February 17, 2015, and sentenced to life in prison. The resulting

case has given rise to a lengthy and byzantine set of trial, appellate, and collateral attack proceedings. Central to the State's case was a confession obtained on January 21, 2008 (the "Statement"), which, although not admitted into evidence, was used extensively by the State to impeach Calder's testimony at trial. In the instant federal petition -- originally raised as an amended state motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 -- Calder claims his trial counsel was prejudicially ineffective for failing to challenge the Statement under *Strickland v. Washington*, 466 U.S. 668 (1984). The district court rejected Calder's petition, finding de novo that his trial counsel was not ineffective because any objection to the Statement as being coerced was doomed to fail.

After careful review, we agree with the district court that Calder is not entitled to relief under § 2254, but for different reasons. In denying Calder's petition, the district court determined that under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), no prior state court had adjudicated Calder's *Strickland* claim on the merits, thus warranting de novo review. As we see it however, the State's postconviction response brief (the "State's Response"), expressly adopted by the state postconviction court, argued that no matter what became of Calder's Statement, Calder was not prejudiced by any error his trial counsel may have committed. Under our controlling law, this finding by the state postconviction court amounts to an adjudication on the merits of Calder's *Strickland* claim, and therefore we are required to review Calder's petition only through the prism of AEDPA deference. Because the state adjudication that Calder was not prejudiced by his

24-10309

Opinion of the Court

3

trial counsel's alleged error is neither contrary to nor an unreasonable application of federal law, we affirm.

I.

These are the essential facts and procedural history.

“On January 20, 2008, during an argument in which his girlfriend, Georgia Lee, tried to remove him from their apartment, Calder shot and killed Lee. Police arrested Calder the following day.” *Calder v. State (Calder I)*, 133 So. 3d 1025, 1027 (Fla. 4th DCA 2014). Upon arrest, Calder recounted in some detail the events that precipitated Lee's killing. The description below covers, first, the exchange between Calder and the police leading up to the Statement, before dissecting the details of the Statement itself, and the winding proceedings that followed.

A. Initial Interrogation

Calder was arrested at around 1:00 AM on January 21, 2008, and was transported to the station of the Lauderhill Police Department. Upon his arrival, he was interrogated by Detective Rick Sessions.

At the start of the interrogation, Detective Sessions asked Calder a series of basic questions about his background and pedigree. Calder stated that he grew up in Jamaica and had been living in the United States for nearly a year. Calder also confirmed that although he had been drinking that weekend, he was sober at the time of the interrogation. Detective Sessions explained that Calder was under arrest “for the incident that happened on Saturday

night” and provided Calder with a sheet of paper containing a numbered list of *Miranda* warnings, an affirmation that the defendant understood each of the rights, and a signature block waiving the right to counsel and agreeing to speak without a lawyer present.¹ After the detective explained the warnings, Calder indicated he understood his rights, but asked for clarification on “number three.” Detective Sessions responded, “Number three says . . . if you decide to answer questions now without a lawyer present, you will have the right to stop questioning at any time and speak with a lawyer.” Calder then said, “Like number three now with a lawyer present. I -- me would prefer lawyer.”

¹ The sheet of paper included the following numbered warnings:

1. You have the right to remain silent; 2. Anything you say can be used against you in a court of law; 3. If you decide to answer questions now without a lawyer present, you will still have the right to stop questioning at any time and speak with a lawyer and have one present during questioning if you wish; 4. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish.

Following the numbered warnings, the paper’s written waiver, located just above the signature block, reads this way:

I, _____, have read this statement of my rights, or have had it read to me and I understand what my rights are. I am willing to make a statement and answer questions. I do not wish an attorney at this time. No threats or promises have been made to me. No pressure of any kind has been used against me, nor have I been deceived into giving this statement. I understand and know what I am doing.

24-10309

Opinion of the Court

5

As the Fourth District Court of Appeal (the “Fourth DCA”) later recounted, the exchange continued, and Detective Sessions repeatedly confirmed that Calder had requested a lawyer. *Calder I*, 133 So. 3d at 1028. Detective Sessions then got up to leave the room. Before departing however, Detective Sessions said the following:

[I]f you do change your mind and you do want to talk to me about your side of the story, okay, what I need you to do is -- knock on the door but knock kind of loud, just knock on it kind of loud, I’ll come back in and then if you say you know what, Detective Sessions, I really, it really would make me feel better if I got the opportunity to give my side of the story, talk about what happened on Saturday, I know what happened, okay? I know that it’s very difficult for you and it’s going to be tough for you to sleep because the bottom line is you been through a tough situation and nobody wants to be in your shoes, obviously, but at the same time one of the things that makes somebody feel a lot better is if they get the opportunity to get things off of their chest, it kind of clears their mind, it clears their conscious [*sic*] and it makes them feel better, you know.

Id. at 1028–29. With that, the detective left Calder alone in the interrogation room.

Calder began to cry, and soon thereafter (seven or eight minutes later) asked to speak to Detective Sessions again. Detective Sessions re-entered the room and said, “Hey Winston, what’s

going on, Bud?” Calder told Detective Sessions, “[G]o get the paper, I sign it.” Detective Sessions said, “You wanna talk [to] me about what happened?” Calder replied, “Yeah. Yeah.” After confirming that Calder wanted to speak without a lawyer present and that Calder could read and write in English, Detective Sessions presented Calder with the paper listing the *Miranda* warnings and offering a written waiver. Calder signed the waiver at 4:35 AM.

B. Calder’s Statement

In Calder’s recorded statement to Detective Sessions, he offered the following explanation of the events that unfolded that fateful night. Calder said he was involved in an intimate relationship with Lee, but the two had been arguing in the weeks before the altercation. Calder added that Lee had changed, and that she had become upset with him for being controlling and jealous.

On Saturday, January 19, 2008, Lee threw a birthday party for Calder. Many people attended. At the time of the party, Lee was no longer Calder’s girlfriend or, in his words, she was only “partially” his girlfriend, though the two were living together in an upper unit at an apartment complex identified as “The Villas.”² On the floor below Lee and Calder’s unit was a vacant apartment. When the party started, most of the guests were outside on the lawn behind the two apartments.

² Lee had several children who lived in the apartment, and had also lived in the apartment with her brother, Michael Green, for a few months before Calder moved in.

24-10309

Opinion of the Court

7

During Calder's birthday, a "special friend" of Lee's came to the party. Lee then stopped helping with the party and began visiting with him. Calder confronted Lee about who the friend was, and the two began to argue. At some point it started to rain, so Calder and his friends moved the food and speaker system upstairs to Lee's apartment. As the party continued, Calder realized that Lee had left, and had not helped move the food inside. Calder thought Lee was trying to embarrass him in front of his friends, though he did "no[t] really feel embarrassed."

After the party guests left at around 4:00 AM, Lee returned to the apartment. When Calder confronted her, Lee told Calder he "did not have any manners," and the two started to argue. Lee then began to pack Calder's clothes. Calder relayed that he then left the apartment and went downstairs to the empty unit below. While downstairs, Calder retrieved a gun from the vacant unit. As he returned outside, Calder saw Lee putting his clothes and other belongings outside the front door of her apartment. Just before, Calder's friend, Patrick Johnson, had arrived. Although he couldn't be sure, Calder surmised that Lee called Johnson before the fight escalated.

Calder went back upstairs to join Lee and Johnson. He asked Lee why she had placed his things outside. Calder then tried to force his way through the front door. This caused Lee and her brother, Michael Green, who was already inside, to brace the door. Lee and her brother also started to kick and punch Calder in an effort to repel him. During the scuffle, Green "thump[ed]" Calder

in the face several times. Lee also flung something at Calder, which he believed was a small vase. After Green hit Calder in the face again, Calder pulled the firearm out of his pocket. By Calder's own account, he reached around the door, aimed the gun inside, and fired a blind shot. The shot struck and fatally wounded Lee. Calder explained that the shooting was in self-defense and that although he knew Lee was behind the door, he did not know exactly where she was. After firing the shot, Calder left the apartment. He said that only later did he learn that Lee had been killed. He claimed he did not intend to kill Lee.

C. First Trial and Subsequent Appeal

In a one-count indictment, a grand jury sitting in Broward County charged Calder with first-degree murder. The case proceeded to trial in 2011. Prior to trial, the state court denied Calder's motion to suppress the Statement, finding that he had voluntarily reinitiated his conversation with Detective Sessions after requesting a lawyer, and that therefore there was no *Miranda* violation. The Statement was admitted as direct evidence, and Calder was convicted by the jury. *Calder I*, 133 So. 3d at 1027.

On direct appeal to the Fourth DCA, Calder asserted that the police had obtained his Statement through an involuntary waiver. *Id.* at 1029. Specifically, he argued "the detective's persistent attempts to persuade him to 'tell his side of the story' amounted to improper interrogation that vitiated the voluntariness of his subsequent waiver." *Id.* The Fourth DCA agreed, reversing Calder's conviction and remanding for a new trial. *Id.* at 1033. In

so doing, the appellate court determined that Calder unequivocally invoked his right to counsel. *Id.* at 1030. Next, it found that the detective’s continued interrogation “failed to scrupulously honor Calder’s invocation of his right to counsel.” *Id.* at 1030–31. The court noted, however, that “Calder himself initiated communication with the detective after having invoked his right to counsel.” *Id.* at 1031. Thus, the court asked “whether, under the totality of the circumstances, Calder’s confession during the second interrogation was voluntary.” *Id.* The Fourth DCA answered this question in the negative, explaining that “[Calder’s] action in requesting the detective was merely the delayed product of the coercive police conduct.” *Id.* at 1032–33 (citation modified) (first citing the Ninth Circuit’s opinion in *Collazo v. Estelle*, 940 F.2d 411, 419–24 (9th Cir. 1991) (en banc)³; then citing *State v. Brown*, 592 So. 2d 308, 308–09 (Fla. 3d DCA 1991)). The court reasoned that because “the officer’s improper comments . . . were designed to induce [Calder] to reinitiate the communication without a lawyer,” the “totality of the circumstances shows that Calder’s reinitiation of the interrogation” was “the product of improper police conduct.” *Id.* at 1033. The court then remanded the case for a new trial, concluding that the

³ In *Collazo*, the Ninth Circuit held that the defendant’s confession was involuntary where the defendant asked to talk to a lawyer, but the police warned him that speaking to a lawyer “might be worse” for him. *Collazo*, 940 F.2d at 420, 423. The *Collazo* court reasoned, as did the Fourth DCA in *Calder I*, that the exchange rendered the defendant’s waiver involuntary. *Id.* *Collazo* was not just a *Miranda* case. The Ninth Circuit expressly reached a “two-part conclusion,” finding that the confession was involuntary in violation of both *Miranda* and the Due Process Clause. *Id.* at 419.

admission of Calder's Statement was not harmless error. *Id.* at 1033.

D. Second Trial

Calder's case was again tried to a jury over the course of seven days in February 2015. At the second trial, Calder took the stand in his own defense. He recounted a story that differed in substantial ways from the Statement he gave to the police. He testified that on January 19, 2008, he got off work and returned to The Villas at 5:30 PM. While setting up for the party, he discovered a gun as he was cleaning out the vacant lower apartment. He placed the gun in his pocket for "safekeeping." During the party, Calder noticed Lee was missing, and spied Lee on the opposite side of the complex with one of her children, talking with an unknown man.

Calder approached the pair and introduced himself. He stated that seeing Lee with another man made him "a bit upset," and he took Lee's child with him when he turned to leave. Lee followed Calder and asked for her child back, saying Calder didn't "have any manners." Eventually, and at the urging of Calder's neighbor Desmond Hendricks, Calder gave the child back to Lee. Lee returned to the apartment, and Calder went back to the party downstairs.

After it began to rain, Calder and several guests started moving the food from the party up to Calder's apartment. Calder testified that Lee then told the guests that the party was over. After the guests departed, Calder went to Lee's room to ask why she had ended the party. She refused to give him a straight answer, at

which point Green returned to the apartment. Calder described Lee as being “really, really mad” at the time, and so he left her in the bedroom. Calder went out to the patio to “cool off,” and contemplated leaving the shared apartment. He walked down the stairs and went around to the complex’s parking lot, thinking he could perhaps depart and find a hotel.

At that point Calder received a call from Johnson, who had arrived moments before. Johnson was upstairs by the entrance to Calder’s apartment, and called down to Calder that there were several bags that appeared to be filled with his belongings placed outside the apartment, presumably by Lee. Calder saw this as further reason to leave the apartment, but when he went to retrieve his items, he noticed several important documents were missing. Calder then entered the apartment to search for the documents, where he saw Lee packing more of his belongings. He grabbed the documents and went outside and down to his truck.

Calder stowed his documents and went back up to the apartment to gather the rest of his belongings. When he got there, he passed Johnson before running into Lee and Green in the apartment’s hallway. Calder then testified that some kind of liquid was flung at his face. He claimed he was ambushed by Johnson and Green, who, along with Lee, began to hit him. Blinded and surrounded, he tried to back away. But, as Johnson blocked his path, he was unable to get away. Calder testified that he thought his life was threatened, and he pulled the gun from his pocket to scare his assailants. He claimed that he managed to back up until he was

near the entrance of the apartment, pinned between the wall and the front door, at which point he fired the weapon.

On direct examination, Calder first explained that he “fired the gun to scare them off,” but then said that he didn’t mean to shoot the gun at all. Rather, the gun was fired accidentally after he was forced back; he wasn’t aiming at anyone. Calder then fled the scene. He later learned that Lee had been shot.

At the start of its cross-examination, the State confronted Calder on the particulars of his story of when and how the shooting occurred. Through a lengthy demonstration, it sought to confirm where Calder was in the apartment in relation to his would-be attackers during the scuffle. Once the alleged facts were in place, the State assailed Calder’s credibility with, among other things, the observation that his account could not be reconciled with the forensic evidence at the scene. Thus, for example, the State observed that from Calder’s recounting, it wasn’t possible for Lee to have been shot in the way that she had been -- with the bullet entering the right side of her head -- nor could Lee’s body have been found the way it was, propped up against the apartment’s front door. Moreover, the State asked Calder why Johnson, Calder’s “best friend of 30 years,” had suddenly joined in the attack. Finally, though it did not squarely address the contradiction, the State confirmed that Calder volitionally fired a blind shot to scare his attackers, rather than discharging the weapon accidentally.

Later in its cross-examination, the State shifted its focus and impeached Calder with the contents of his Statement to Detective

24-10309

Opinion of the Court

13

Sessions. In painstaking detail, the State went over many discrepancies between the two accounts, insisting that pursuant to Calder's Statement, he was angry at Lee for having a "special friend" at the party, they had fought right after the party, and he had fired the gun while trying to force his way into the apartment.

In its own case in chief, the State produced substantial evidence of Calder's guilt wholly independent from the Statement. For one thing, the State introduced physical evidence, including the gun Calder fired and expert testimony on the trajectory of the bullet. The State also offered testimony from numerous witnesses recounting the events of that night. The most critical testimony came from Green and Johnson, who were present when the shot was fired. Both gave accounts that flatly contradicted Calder's trial testimony. Among other things, they explained that Calder and Lee had been fighting, that Lee had forced Calder out of the apartment, and that in the moments before the fatal shot was fired, Calder was outside the apartment trying to force his way in, when he reached around the semi-open front door to fire the weapon at Lee, who was inside the apartment.

The jury returned a verdict of guilty on the count of first-degree murder.

E. Postconviction Proceedings

i. Motion for New Trial and Direct Appeal

Following his conviction, Calder moved for a new trial. His lawyer complained about the use of Calder's Statement to Detective Sessions, asserting that the trial court "erred in allowing the

state to argue in closing the Defendant's statement [w]as substantive evidence when it was not admitted into evidence." At a hearing on the motion, counsel asserted that since the Statement had previously been suppressed, it should have been used only for impeachment purposes, and that the State crossed the line in attempting to use it as substantive evidence.

The trial court disagreed, observing that "even if it comes back on appeal that it should not have been admitted because of *Miranda* violations, the statement can still be used for impeachment purposes." Moreover, the trial court pointed out that the defense did not argue that the Statement had been coerced, noting that "Mr. Calder never alleged that he was physically beaten or something like that." It then denied Calder's motion. On direct appeal, the Fourth DCA affirmed Calder's conviction in an unexplained per curiam decision. *Calder v. State (Calder II)*, 224 So. 3d 232 (Fla. 4th DCA 2017) (per curiam). The only issue raised on appeal was whether the trial court erred when it allowed the State to show the jury gruesome photographs.

ii. Petition for Belated Appeal

On April 17, 2017, Calder, proceeding pro se, filed a petition "for a new appeal" pursuant to Florida Rule of Appellate Procedure 9.141 in the Fourth DCA, claiming the ineffective assistance of his appellate counsel. He alleged that appellate counsel failed to challenge on appeal the State's use of the Statement, because no hearing had been held in the trial court on the Statement's

24-10309

Opinion of the Court

15

voluntariness. The Fourth DCA summarily denied the petition on July 10, 2017.

iii. Rule 3.850 Motion for Postconviction Relief

Soon thereafter, on October 23, 2017,⁴ Calder filed still another collateral attack on his conviction pro se -- an amended motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 in the trial court. Rule 3.850 allows “a person who has been tried and found guilty or has entered a plea of guilty” to move for “relief from judgment or release from custody” under certain circumstances, including if “[t]he judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.” FLA. R. CRIM. P. 3.850(a). The second ground raised in the motion alleged that trial counsel was ineffective for failing to request a hearing in the first instance, on whether the Statement to Detective Sessions was coerced. Calder alleged that “[a]t no time prior to the prosecution using the January 21, 2008 statement against the defendant, did counsel request a hearing, outside the presence of the jury, on the issue of the voluntariness of the defendant’s . . . statements.” He further alleged that his counsel knew, or should have known, that the Statement

⁴ Calder filed an initial postconviction motion under Rule 3.850 on June 5, 2017. He then filed an amended postconviction motion in October 2017 for relief under the same rule. The amended motion is stamped October 16, 2017, though the document’s metadata and Calder’s brief both say it was filed October 23, 2017. The disparity in the dates is of no moment here, because the amended motion was timely filed.

was coerced in violation of the Due Process Clause, given the scope of the Fourth DCA’s opinion in *Calder I*.

In opposition to Calder’s motion, the State’s Response mistakenly said that Calder had raised this very issue before, even though his earlier petition only alleged the ineffective assistance of *appellate* counsel. It further insisted that usage of the Statement was proper, as a confession obtained in violation of *Miranda* could be used to impeach a testifying defendant. Finally, and independently, the State argued that any error was not prejudicial, since the State’s evidence was compelling enough that Calder could not show a reasonable probability of a different outcome absent the use of the Statement. On March 29, 2022, the state postconviction court denied the Rule 3.850 motion “[f]or the reasons stated in the State’s response.” The Fourth DCA summarily affirmed. *Calder v. State (Calder III)*, 350 So. 3d 347 (Fla. 4th DCA 2022) (per curiam).

iv. Federal Habeas Petition

On April 24, 2023, Calder filed the instant pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the Southern District of Florida. Calder’s petition rested on eight grounds, including that trial counsel was ineffective in failing to request a hearing on whether the Statement was coerced (“Ground Two”). In reviewing Ground Two, the district court observed that the State’s Response, which was the operative document for discerning the reasoning of the two state courts, failed to distinguish between an objection on *Miranda* grounds, which would exclude the Statement as direct evidence, and one on due process grounds, which would

24-10309

Opinion of the Court

17

exclude its use for any purpose. The district court reasoned that since the State's Response had misconstrued Calder's claim, no adjudication on the merits was rendered. Reviewing the matter de novo, however, the district court concluded that trial counsel was not ineffective for failing to object. The court explained that because the state trial court found the Statement to be voluntary in denying Calder's motion for a new trial, and because Calder never offered any explanation why his Statement was coerced beyond the *Miranda* violation itself, any objection by counsel would have been futile. Thus, the district court denied Calder's habeas petition.

This timely appeal ensued; we granted review only on Ground Two, and assigned Calder counsel.

II.

We review a court's denial of a petition for habeas corpus de novo, "ow[ing] no deference to the district court's decision about the state court's decision." *Brewster v. Hetzel*, 913 F.3d 1042, 1051 (11th Cir. 2019); *see also McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005). Further, "[a]n ineffective assistance of counsel claim is a mixed question of law and fact that [this] [C]ourt reviews de novo." *Jones v. Campbell*, 436 F.3d 1285, 1292 (11th Cir. 2006) (citing *Dobbs v. Turpin*, 142 F.3d 1383, 1386 (11th Cir. 1998)).

Section 2254 allows a state prisoner to petition a federal court for a writ of habeas corpus, provided the petitioner contends his custody is in violation of federal law. *See* 28 U.S.C. § 2254(a). In affording relief under § 2254, a federal court is sharply limited by AEDPA. The statute permits federal relief for claims first

adjudicated on the merits by a state court only if the underlying adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. § 2254(d)(1)–(2). AEDPA imposes a “highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.” *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation modified) (first quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); then quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). However, if no adjudication on the merits is rendered by the state court, “the claim is reviewed de novo.” *Reaves v. Sec’y, Fla. Dep’t of Corr.*, 872 F.3d 1137, 1151 (11th Cir. 2017) (quoting *Cone v. Bell*, 556 U.S. 449, 472 (2009)).

III.

A.

Ground Two of Calder’s habeas petition claims that his trial counsel rendered ineffective assistance by failing to object to the Statement’s use even for impeachment purposes on due process grounds at the second trial. To establish an ineffective assistance of counsel claim, a petitioner must “demonstrate both that (1) ‘counsel’s performance was deficient,’ and (2) ‘the deficient

performance prejudiced the defense.” *United States v. Webb*, 655 F.3d 1238, 1258 (11th Cir. 2011) (per curiam) (quoting *Strickland*, 466 U.S. at 687). As for the first prong, we assess counsel’s performance with an eye for “reasonableness, not perfection.” *Brewster*, 913 F.3d at 1056 (citing, inter alia, *Strickland*, 466 U.S. at 687). This requires an “objective inquiry” into counsel’s performance, and “because counsel’s conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take.” *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc) (citing, inter alia, *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc)).

Even if trial counsel was ineffective, the petitioner must also establish that such error was prejudicial. See *Strickland*, 466 U.S. at 693 (“[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.”). To prove prejudice, a petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Brewster*, 913 F.3d at 1052 (quoting *Strickland*, 466 U.S. at 694). Where the proffered error is the “failure to object . . . we ask whether there is a reasonable probability of a different result if counsel had objected.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

In reviewing Ground Two of Calder’s habeas petition *de novo*, the district court addressed only the first *Strickland* prong, concluding that Calder’s trial counsel was not ineffective for failing to challenge the Statement. The court reasoned that “counsel couldn’t have been ineffective for failing to argue that the . . . Statement was involuntary because the state court came to the opposite conclusion,” citing the state trial court’s observation that Calder “never alleged that he was physically beaten or something like that.” Moreover, the district court opined that Calder never explained why, other than pointing to *Miranda* itself, the Statement had been coerced.

Calder insists that the district court erred. He cites the Fourth DCA’s decision in *Calder I*, contending the state appellate court’s holding amounted to a dual finding that the Statement was involuntary under *both* *Miranda* and the Due Process Clause of the Fourteenth Amendment. From this, he infers that the district court’s conclusion that the Statement was voluntary rather than coerced was erroneous, for if the state appellate court issued a contrary holding, that holding would constitute binding law of the case, mandating the Statement’s exclusion. *See Owen v. State*, 862 So. 2d 687, 694 (Fla. 2003) (*per curiam*) (explaining that under Florida’s law of the case doctrine, “all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts” (quoting *Brunner Enters., Inc. v. Dep’t of Revenue*, 452 So. 2d 550, 552 (Fla. 1984))).

We need not decide, however, whether *Calder* is correct, because even if we assume that *Calder I* sweeps as broadly as he claims, and therefore that his trial counsel was ineffective for not raising an objection, his petition must nevertheless be denied because he cannot establish that this error was prejudicial. As we have observed, it is hornbook law that in order to prevail on an ineffective assistance of counsel claim, a defendant must satisfy both prongs of *Strickland*. See *Strickland*, 466 U.S. at 687. Indeed, “there is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697. An analysis under *Strickland* may “begin with either of [its] two components,” *Brewster*, 913 F.3d at 1051–52 (citing *Strickland*, 466 U.S. at 697), and “[a] court may decline to reach the performance prong of the ineffective assistance test if convinced that the prejudice prong cannot be satisfied,” *Dallas v. Warden*, 964 F.3d 1285, 1306 (11th Cir. 2020) (quoting *Waters*, 46 F.3d at 1510).

This approach makes sense in the instant case. AEDPA requires a federal habeas court to defer to a state court’s adjudication on the merits. As we explain, the two state courts only adjudicated the question of prejudice on the merits. Prudentially, it would be strange indeed to bypass the merits decision issued by the state courts, and assess instead a different matter de novo, especially where the merits decision is dispositive. Moreover, the question of ineffectiveness is arguable. The matter requires a difficult predictive analysis into whether an objection on due process grounds may have succeeded, and such a prediction is complicated by the

ambiguity found in *Calder I*.⁵ Accordingly, we need only answer whether the state courts' merits determination that there was no prejudice was contrary to or an unreasonable application of federal law as determined by the Supreme Court. After a searching review of the record, and applying the deferential lens of AEDPA, we conclude the answer is no.

B.

We are satisfied that the state courts adjudicated the prejudice question on the merits. When a state court does not explain the reasons for its decision, we are required to “‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale” and “presume that the unexplained decision adopted the same reasoning,” unless the State

⁵ The parties fiercely dispute the scope of *Calder I*'s holding, and with good reason. On a cursory review, it is unclear how broadly the Fourth DCA intended its holding to sweep. After all, the Fourth DCA did say, expressly, that the Statement was obtained through “coercive police conduct.” *Calder I*, 133 So. 3d at 1032–33. The court also cited with approval *Collazo*, a case in which the Ninth Circuit issued a dual finding of involuntariness under both *Miranda* and the Due Process Clause. 940 F.2d at 420, 423. On the other hand, if *Calder I* meant to issue a holding beyond *Miranda*, the opinion is subtle. The Fourth DCA never cited the Due Process Clause -- indeed, it never used the words “due process” at all. The mention of coercion, moreover, is not dispositive, as voluntariness is also a requirement under *Miranda*. See *Berghuis v. Thompson*, 560 U.S. 370, 382–83 (2010) (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). And finally, the procedural posture of *Calder I* suggests that the Fourth DCA had no occasion to comment on the applicability of the Due Process Clause, since the appeal arose only from the state trial court's holding that the Statement was admissible under *Miranda*. See *Calder I*, 133 So. 3d at 1029.

gives reason to think otherwise. *Wilson v. Sellers*, 584 U.S. 122, 125 (2018). The Fourth DCA offered no reason or rationale when it summarily affirmed the state postconviction court’s denial of Calder’s Rule 3.850 motion. *Calder III*, 350 So. 3d at 347. The state postconviction court itself also issued a summary order, but explained that it denied the matter “[f]or the reasons articulated in the State’s response.” Thus, in order to discern the state courts’ reasoning in their review of Calder’s motion, the State’s Response becomes the operative document. *Wilson*, 584 U.S. at 125; *see also Bilotti v. Fla. Dep’t of Corr.*, 133 F.4th 1320, 1327 (11th Cir. 2025) (*per curiam*).

Calder contends, nevertheless, that the State’s Response did not resolve Ground Two on the merits because it failed to address whether the use of the Statement for impeachment purposes violated the Due Process Clause. In this, Calder is only partially correct. Although the State’s Response misconstrued the nature of Calder’s claim as to why counsel’s performance was allegedly deficient, it directly addressed the second prong of prejudice. It reasoned this way:

[T]he Defendant is unable to demonstrate prejudice to the extent that it rendered the verdict unreliable. In the instant case, there was strong direct evidence proving [Calder] committed the crimes charged in the Indictment including testimony of the victim’s brother who was an eye witness to the crime and [Calder being] in possession of the murder weapon at the time of his arrest. Accordingly, there is no reasonable probability of a different outcome in this case.

It is undeniable that the State’s Response, plainly adopted by the state postconviction court and affirmed without further explanation by the Fourth DCA, concluded that even if the Statement had been expressly challenged on due process grounds, and even if the Statement was excluded for all purposes at the trial, the corpus of evidence presented by the State still would have lead to a guilty verdict. This is an adjudication of prejudice on the merits. See *Raulerson v. Warden*, 928 F.3d 987, 1000 (11th Cir. 2019) (“[A] decision that does not rest on procedural grounds alone is an adjudication on the merits regardless of the form in which it is expressed.” (quoting *Wright v. Sec’y for Dep’t of Corr.*, 278 F.3d 1245, 1255–56 (11th Cir. 2002))). And it must be afforded deference under AEDPA.⁶ The remaining question, then, is whether the state

⁶ Notably, for some § 2254 cases predicated on a claim of ineffective assistance, the degree of deference given is heightened. The Supreme Court has explained that since “[t]he standards created by *Strickland* and § 2254(d) are both ‘highly deferential,’” “when the two apply in tandem, review is ‘doubly’ so.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). Double deference does not apply in this case, however, as here *Strickland* and § 2254(d) do not “apply in tandem.” *Id.* *Strickland* deference only applies to a court’s assessment of counsel’s performance. See, e.g., *Raheem v. GDCP Warden*, 995 F.3d 895, 928 (11th Cir. 2021); *Daniel v. Comm’r, Ala. Dep’t of Corr.*, 822 F.3d 1248, 1262 (11th Cir. 2016). As one judge on our Court has written, “[u]nlike the performance evaluation, which asks us to assess what counsel did or did not do . . . the prejudice question is, in the end, a legal one. There is no ‘what’ to analyze.” *Evans v. Sec’y, Dep’t of Corr.*, 703 F.3d 1316, 1334 (11th Cir. 2013) (en banc) (Jordan, J., concurring) (citing *Strickland*, 466 U.S. at 688). Because “[t]here is only the ex post legal determination . . . as to whether the defendant was or was not prejudiced by his

24-10309

Opinion of the Court

25

courts' determination was contrary to or an unreasonable application of federal law. We hold that it was not.

C.

To unseat the state courts' finding that the trial evidence was enough to convict him without the Statement, and thus that any error on the part of trial counsel was not prejudicial, Calder again must show that the state adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law," *id.* § 2254(d)(1), or otherwise "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

For AEDPA purposes, "clearly established Federal law" "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (plurality opinion)). A decision is "contrary to" Supreme Court precedent if it rests on a "rule that contradicts the governing law set forth in [the Court's] cases," or involves "a set of facts that are materially indistinguishable from a decision . . . and nevertheless arrives at a result different from [its]

counsel's actions," a court does not apply the *Strickland* layer of deference to the prejudice inquiry. *Id.* (citing *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). And since the only applicable adjudication on the merits in this case involves prejudice, we apply one layer of deference to Calder's claim, applicable to all adjudications on the merits under AEDPA.

precedent.” *Williams*, 529 U.S. at 405, 406. Alternatively, under the “unreasonable application” clause, a state court’s decision must be “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.” *Harrington*, 562 U.S. at 103.

Here, Calder argues that because the Statement was used extensively to impeach him when he testified in his own defense, and was also featured in the State’s closing argument, the evidentiary picture given to the jury was fatally tainted. He surmises that because the State spent “[h]alf of its questioning” focusing on the Statement, including “impeach[ing] [him] with the Statement at least 35 times and refresh[ing] his recollection with it at least 19 times,” the State heavily relied on the Statement to color the evidence.

To be sure, the Statement’s use in impeaching Calder may have been effective. There were substantial differences between the Statement and the testimony Calder supplied during the second trial, including how the altercation began, and how Lee was shot. Nevertheless, the state adjudication that Calder would have been found guilty anyway is not reversible under AEDPA. At the outset, the decision was not “contrary to” controlling federal law -- in this case, *Strickland*. Through the State’s Response, the state postconviction court held, and the Fourth DCA affirmed, that Calder would have been convicted anyway based on the compelling trial evidence. That finding is a straightforward application of *Strickland*’s second prong, which asks whether a defendant can show a

24-10309

Opinion of the Court

27

“reasonable probability” of a different outcome. *Strickland*, 466 U.S. at 694; *Brewster*, 913 F.3d at 1052. In finding that Calder failed to meet this standard, the state courts did not misapply *Strickland* - they issued a finding precisely within the bounds of prong two.

Moreover, the state courts’ decision did not involve an “unreasonable application” of *Strickland*. To show an unreasonable application of federal law, a state prisoner seeking habeas relief “must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103. Here, in finding Calder’s claim lacking under prong two of *Strickland*, the state courts did not misapply federal law -- rather, they found that Calder’s claim for relief was inadequate under the correct standard. It makes no difference that, under prong one of *Strickland*, the state courts adopted analysis that misconstrued Calder’s ineffective assistance of counsel claim. Because both prongs are necessary for relief, the state courts were entitled to rest their decision on either one, and weren’t required to make a finding on prong one in the first place.

Finally, the state adjudication did not “result[] in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). Although Calder contends that the State’s exclusion would “dramatically alter[] the balance of the evidence before the jury,” the state courts concluded that in light of

the State’s evidence, the exclusion would not have produced a reasonable probability of a different outcome.

Applying AEDPA deference, unless the state courts’ evaluation of the evidence was “so obviously wrong that its error lies beyond any possibility for fairminded disagreement,” their conclusion should be upheld. *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1041–42 (11th Cir. 2022) (en banc) (quoting *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (per curiam)). The evidentiary picture in the absence of the Statement is not so skewed as to meet this extraordinary showing, and any reasonable jurist could readily reach the same conclusion offered by the two state courts.

First, even without the Statement, the State had plenty of ammunition to confront, rebut, and undermine Calder’s credibility on the stand, as it did. On direct examination, Calder’s story had many gaps and inconsistencies that cast real doubt on the reliability of his narrative. Thus, for example, his story was murky as to how, exactly, the gun went off. He first said that he fired the weapon himself to scare his assailants. After being pressed by his lawyer however, he shifted course, and said he “never intentionally pull[ed] the trigger,” but instead the weapon went off because he instinctually “gripp[ed] on something” while being attacked. He also did not explain why, even though he said his argument with Lee was restrained and nonviolent, he was suddenly ambushed by Lee, Green, and Johnson -- his own childhood friend who had arrived only moments before. If Calder’s prior behavior had been truly innocuous, it is unclear why this sudden escalation occurred.

Moreover, on cross-examination, the State questioned the deficiencies in Calder's story outside its use of the Statement. The State pointed out that Calder changed his story as to who was beating him when the gun fired, where Lee was in relation to Calder when she was shot, and confirmed that Calder again "fire[d] to scare [his attackers] off," in flat contradiction to his earlier story that the gun went off only accidentally, not by volition. The State also suggested that given the location of Calder's body in relation to the door and Lee, Lee could not have been struck the way she was -- with a bullet lodged in the side of her head. Finally, the State cross-examined Calder as to why Johnson, Calder's "best friend of 30 years," participated in the attack. After all, the day following the alleged skirmish, Calder contacted and visited Johnson without incident, despite his supposed role in ambushing Calder. Although the State relied on the Statement to impeach Calder as to the details of his story, then, there were plenty of other threads that the State pulled at -- and could expand on in greater detail without the Statement -- that would unravel Calder's narrative before the jury.

Second, the State's case in chief was compelling. The State presented testimony from two witnesses, Green and Johnson, who testified against Calder and contradicted his story. Between them, the State's witnesses supplied a full account of who was where, and when: Green was inside the apartment with Lee when the fatal shot was fired, and Johnson was outside the apartment with Calder. Both testified as to substantially the same events leading up to the shooting: that neither ambushed Calder, but instead that Lee was bracing the front door to prevent Calder, who was agitated

following a fight with Lee, from entering the apartment. Both explained that Calder had been forced out of the apartment because he and Lee had been involved in a heated argument, which turned physical. This is why Johnson was called in the first place -- Lee had warned him that Calder was turning violent, and needed him to help cool Calder down.

The two testimonies also aligned on much of the specifics. Johnson testified that after he arrived, he followed Calder and Lee into one of the apartment's bedrooms, where Calder physically fought Lee. After Johnson pulled Calder off of Lee, Calder left with Johnson and then re-entered the apartment. Green confirmed that Calder again pushed Lee several times as she was packing his belongings, prompting her to throw liquid into his face and push him out of the apartment. Lee tried to close the door, but Calder kept his foot in the jam. Johnson was outside with Calder, while Lee held the door against him, but slipped on the liquid, falling to the ground and keeping her back to the door. Crucially, both Johnson and Green confirmed that when Calder couldn't force the door open again, he pulled out the gun and reached around the front door with his right arm, firing the gun at Lee. Green also remembered that at first the gun didn't go off, so Calder had to try again after removing the safety. After the shot, Calder fled and Johnson called Lee's phone, which Green answered. Johnson then told Green to call the police.

The testimony supplied by Green and Johnson was separately corroborated by the physical evidence at the scene. The

24-10309

Opinion of the Court

31

State called Dr. Khalil Wardak, an associate medical examiner and forensic pathologist, as an expert witness to testify as to the cause and manner of Lee's death. He explained that at the scene, Lee's body was laying up against the door, blocking entry. She was oriented with her back to the door, and Dr. Wardak observed a wound "on the right side of the frontal part of the head." After an autopsy where he recovered the bullet and x-rayed Lee's skull, Dr. Wardak determined that the trajectory of the bullet indicated that Lee was "standing back against the door, pushing the door to close" when she was shot. He surmised that her wound was caused by a hand reaching around the door, and firing a shot inward. This again reinforced the State's narrative, that Lee was trying to close the door and keep Calder out when she was shot.

The evidence supplied by the State thereby confirmed, through eyewitness testimony and expert assessment, the bulk of the State's theory against Calder: that Calder and Lee had fought, that Calder was forced out of the apartment by Lee, and that when the shot was fired, Calder was attempting to force his way back into the apartment, and he fired around the front door to hit Lee. This evidence did not rely on the Statement, but independently confirmed Calder's guilt. On this record, we cannot say the state courts were unreasonable in finding that, whether or not the

Statement was excluded, Calder would have been adjudged guilty of first-degree murder.⁷

Congress enacted AEDPA for the purpose of “reduc[ing] delays in the execution of state and federal criminal sentences,” *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citing *Williams*, 529 U.S. at 386), and to “further the principles of comity, finality, and federalism,” *id.* (quoting *Williams*, 529 U.S. at 436). In limiting habeas review when a state court has adjudicated a claim on the merits, AEDPA “give[s] the State a first opportunity to consider most matters and to insist that federal courts properly respect state-court determinations.” *Cullen v. Pinholster*, 563 U.S. 170, 206 (2011) (Breyer, J., concurring in part and dissenting in part).

These principles instruct us that the state adjudication should be respected in this case. A reasonable jurist could readily conclude, as the state postconviction court and Fourth DCA did, that the evidence was sufficient to establish Calder’s guilt even without the Statement, and thus that Calder’s asserted error was not prejudicial. The state courts’ decision is not subject to reversal

⁷ It makes no difference that the jury considered lesser included offenses, including second-degree murder and manslaughter. The same evidence that supported Calder’s guilt specifically confirmed that he acted with malice, and not accidentally or out of self-defense. Indeed, Calder did not contest that Lee had been shot; his sole theory at the second trial was that he did not mean to shoot her, and so conviction for a lesser offense was proper. It is precisely this theory that the State disproved with its case in chief. Thus, for our purposes, it is sufficient to say that the state courts were not unreasonable in determining that Calder would have been convicted of the same offense for which he was charged -- murder in the first degree -- even if his Statement was excluded.

24-10309

Opinion of the Court

33

under AEDPA, and Ground Two of Calder’s petition must be denied.

AFFIRMED.

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-cv-60762-ALTMAN

WINSTON CALDER,

Petitioner,

v.

RICKY D. DIXON, SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

Our Petitioner, Winston Calder, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his state-court conviction and life sentence for the first-degree murder of his ex-girlfriend. *See* Petition [ECF No. 1] at 1–2. The State says that Calder’s “claims are all either affirmatively contradicted by the existing record or patently frivolous[.]” Response in Opposition to Petition for Writ of Habeas Corpus (“Response”) [ECF No. 10] at 61. We agree and now **DENY** the Petition.

THE FACTS

On February 6, 2008, a grand jury in Broward County, Florida, charged Calder (by indictment) with one crime: the first-degree murder (with a firearm) of his ex-girlfriend, Georgia Lee. *See* Indictment [ECF No. 11-1] at 20. The State alleged that “during an argument in which his girlfriend, Georgia Lee, tried to remove him from their apartment, Calder shot and killed Lee.” *Calder v. State*, 133 So. 3d 1025, 1027 (Fla. 4th DCA 2014). During Calder’s first trial, the State introduced a statement Calder made to law enforcement on January 21, 2008 (the “January 21, 2008 Statement”), in which “Calder confessed to firing the fatal shot that killed Lee.” *Id.* at 1029. Although Calder’s first trial ended with a guilty verdict, the Fourth DCA reversed and remanded for a new trial after concluding

that the January 21, 2008 Statement should have been suppressed because it was obtained in violation of Calder's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *See id.* at 1033 ("Here, the totality of the circumstances shows that Calder's reinitiation of the interrogation and waiver of his previously invoked right to counsel were not voluntary, but instead, the product of improper police conduct.").

Calder chose to testify in his own defense at his second trial. *See generally* Trial Tr. [ECF No. 13-1] at 1130–1307. On cross-examination, the State impeached Calder with the January 21, 2008 Statement. *See, e.g., id.* at 1253–54 ("[Calder]: No. The door was already open, I was not forcing the door. The door was already open. [The Prosecutor]: Do you recall giving a different answer than that, Mr. Calder, back on January 21, 2008? . . . Q: Would you agree with me, Mr. Calder, the question [on January 21, 2008] was, 'You were trying to force it open?' And your answer was, 'Yeah.' 'And then they were kicking at you?'"). For the second time, a jury convicted Calder of first-degree murder. *See* Verdict [ECF No. 11-2] at 100. The trial court sentenced Calder to life in prison on February 17, 2015. *See* Judgment and Sentencing Orders [ECF No. 11-2] at 105–110.

Ten days later, Calder moved for a new trial under FLA. R. CRIM. P. 3.600. *See* Motion for New Trial [ECF No. 11-2] at 112. In that motion, Calder's lawyer argued that the trial court had "erred in allowing the state to argue in closing [that] the Defendant's [January 21, 2008] statement [was] substantive evidence when it was not admitted into evidence." *Ibid.* The trial court denied Calder's motion after a brief hearing, concluding that, "even though the State couldn't get the statement in their case in chief, it certainly was fair game for cross-examination. And that's exactly what the State did in this case." Motion for New Trial Hr'g Tr. [ECF No. 13-2] at 8.

Calder appealed his conviction and sentence to the Fourth DCA. *See* Direct Appeal Notice of Appeal [ECF No. 11-2] at 117. In that appeal, Calder's lawyer advanced only one argument: that the trial court had "erred reversibly in admitting excessively gruesome photographs depicting the deceased after her body had been moved from against the front door and placed face up on the floor." Direct

Appeal Initial Brief [ECF No. 11-2] at 195. The Fourth DCA summarily affirmed Calder's conviction in an unwritten opinion on March 16, 2017. *See Calder v. State*, 224 So. 3d 232, 232 (Fla. 4th DCA 2017). Calder, now proceeding *pro se*, filed a motion for rehearing, *see* Motion for Rehearing [ECF No. 11-2] at 218–20, which the Fourth DCA denied on April 24, 2017, *see* Order Denying Motion for Rehearing [ECF No. 11-2] at 225.

On April 17, 2017,¹ Calder filed a petition for a writ of habeas corpus in the Fourth DCA, alleging that his appellate counsel had been ineffective. *See* State Habeas Petition [ECF No. 11-2] at 227–42; *see also* FLA. R. APP. P. 9.141(d)(3) (“Petitions alleging ineffective assistance of appellate counsel must be filed in the court to which the appeal was taken.”). Calder argued that his appellate lawyer had erred by failing to “raise on direct appeal the issues of the trial court erring in allowing the State to argue in closing the Petitioner’s statement as substantive evidence when it was not admitted into evidence, and when no hearing was held on the issue of voluntariness before allowing prosecutor to use statement for impeachment.” State Habeas Petition [ECF No. 11-2] at 230 (errors in original). On July 10, 2017, the Fourth DCA summarily denied Calder’s state habeas petition in a one-sentence order. *See* Order Denying State Habeas Petition [ECF No. 11-3] at 208 (“ORDERED that the May 1, 2017 petition for ineffective assistance of counsel is denied.”).

Five days before that ruling came down (on June 5, 2017), Calder filed in the state trial court a motion for postconviction relief under FLA. R. CRIM. P. 3.850. *See* Postconviction Motion [ECF No. 11-3] at 9–54. Calder amended that Postconviction Motion on October 16, 2017. *See* Amended Postconviction Motion [ECF No. 11-3] at 220–65. The Amended Postconviction Motion advanced eight grounds for relief: (1) that “defense counsel was ineffective for failing to hire a ballistics and

¹ “Under the ‘prison mailbox rule,’ a *pro se* prisoner’s court filing is deemed filed on the date it is delivered to prison authorities for mailing.” *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009). “Absent evidence to the contrary, [courts] assume that a prisoner delivered a filing to prison authorities on the date that he signed it.” *Jeffries v. United States*, 748 F.3d 1310, 1314 (11th Cir. 2014).

blood spatter expert,” *id.* at 223; (2) that counsel was ineffective “for failing to request a hearing on the issue of voluntariness of the Defendant’s January 21, 2008 statement, prior to the State Attorney using the statement for impeachment purposes,” *id.* at 231; (3) that counsel was ineffective “for failing to discover that the January 21, 2008 statement had been tampered with by agents of the State of Florida,” *id.* at 235; (4) that counsel was ineffective “for failing to impeach State witness Michael Green with his prior inconsistent statements that he gave in his deposition and in his prior trial testimony,” *id.* at 240; (5) that counsel was ineffective for failing to “object to the prosecutorial misconduct during closing arguments,” *id.* at 250; (6) that defense counsel “was ineffective for [failing] to object and notify the trial court that a juror was sleeping throughout critical trial testimony,” *id.* at 257; (7) that counsel was ineffective for failing to argue “in closing arguments that [Patrick Johnson] testified that he witnessed the defendant go leave the bag at the truck and seen [sic] the defendant return right back to the house,” *id.* at 259; and (8) that counsel was ineffective for failing to “introduce evidence of [the victim’s] prior arrest record of domestic violence,” *id.* at 262. The State filed a voluminous Response to the Amended Postconviction Motion—it included over 1,800 pages of argument and exhibits—contending that all eight of Calder’s claims were meritless. *See* State’s Postconviction Response [ECF No. 12-1] at 23.

On March 29, 2022, the state postconviction court denied the Amended Postconviction Motion “[f]or the reasons articulated in the State’s response.” Order Denying Amended Postconviction Motion [ECF No. 12-7] at 56. Calder appealed this denial to the Fourth DCA, *see* Postconviction Notice of Appeal [ECF No. 12-7] at 58, contending that the state postconviction court had erred in denying all eight grounds for relief, *see* Postconviction Initial Brief [ECF No. 12-7] at 63–87. But the Fourth DCA summarily affirmed, *see Calder v. State*, 350 So. 3d 347, 347 (Fla. 4th DCA 2022), and its mandate issued on December 23, 2022, *see* Postconviction Mandate [ECF No. 12-7] at 97. The Fourth DCA also denied Calder’s motion for rehearing and for a written opinion, *see* Motion

for Rehearing [ECF No. 12-7] at 91–92; Order Denying Motion for Rehearing [ECF No. 12-7] at 95. Calder filed this Petition on April 17, 2023. *See* Petition at 24.

THE LAW

I. The Antiterrorism and Effective Death Penalty Act (“AEDPA”)

AEDPA instructs district courts to deny any claim that was “adjudicated on the merits” in a state-court proceeding unless that adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Harrington v. Richter*, 562 U.S. 86, 97–98 (2011) (summarizing 28 U.S.C. § 2254(d)–(e)). To have “adjudicated [the claim] on the merits,” the state court need not have issued any kind of formal opinion or even outlined its reasoning. *Id.* at 99 (“When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.”). Rather, when a state court doesn’t articulate its reasons for the denial, the federal court must “‘look through’ the unexplained decision to the last related state-court decision that does provide a rationale” and “then presume that the unexplained decision adopted the same reasoning.” *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). “Clearly established Federal law” means “the holdings, as opposed to the dicta, of [the United States Supreme Court’s] decisions as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). To be “contrary to clearly established federal law, the state court must either (1) apply a rule that contradicts the governing law set forth by Supreme Court case law, or (2) reach a different result from the Supreme Court when faced with materially indistinguishable facts.” *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010) (cleaned up).

For “a state court’s application of [Supreme Court] precedent” to be “unreasonable, the state court’s decision must have been more than incorrect or erroneous. The state court’s application must have been objectively unreasonable.” *Wiggins v. Smith*, 539 U.S. 510, 520–21 (2003) (cleaned up). “[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court.” *Richter*, 562 U.S. at 101. “And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice. To satisfy this high bar, a habeas petitioner is required to show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Woods v. Donald*, 575 U.S. 312, 316 (2015) (cleaned up).

Section 2254(d) similarly prohibits federal judges from reevaluating a state court’s factual findings unless those findings were “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). To establish that a state court’s factual findings were unreasonable, “the petitioner must rebut ‘the presumption of correctness [of a state court’s factual findings] by clear and convincing evidence.’” *Ward*, 592 F.3d at 1155–56 (quoting 28 U.S.C. § 2254(e)(1)). “[E]ven if a petitioner successfully carries his burden under § 2254(e)(1)—showing by clear and convincing evidence that a particular state-court factual determination was wrong—he does not necessarily meet his burden under § 2254(d)(2): Even if the state court made a clearly erroneous factual determination, that doesn’t necessarily mean the state court’s ‘decision’ was ‘based on’ an ‘unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’” *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022) (en banc) (quoting 28 U.S.C. § 2254(d)(2)). Indeed, habeas relief is not warranted “even if some of the state court’s individual factual findings were erroneous—so long as the decision, taken as

a whole, doesn't constitute an unreasonable determination of the facts and isn't based on any such determination." *Ibid.* (cleaned up).

"AEDPA's standard is intentionally difficult to meet." *Woods*, 575 U.S. at 315 (cleaned up). When reviewing state criminal convictions on collateral review, "federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong. Federal habeas review thus exists as a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 316 (cleaned up).

Even if a petitioner meets AEDPA's "difficult" standard, he must still show that any constitutional error had a "substantial and injurious effect or influence" on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The *Brecht* harmless-error standard requires habeas petitioners to prove that they suffered "actual prejudice." *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1307 (11th Cir. 2012). As the Supreme Court recently explained, while the passage of AEDPA "announced certain new conditions to [habeas] relief," it didn't eliminate *Brecht*'s actual-prejudice requirement. *Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022). In other words, a habeas petitioner must satisfy *Brecht*, even if AEDPA applies. *See id.* at 1526 ("[O]ur equitable precedents remain applicable 'whether or not' AEDPA applies." (citing *Fry v. Pliler*, 551 U.S. 112, 121 (2007))). In short, a "federal court must *deny* relief to a state habeas petitioner who fails to satisfy either [*Brecht*] or AEDPA. But to *grant* relief, a court must find that the petition has cleared both tests." *Id.* at 1524 (emphasis in original); *see also Mansfield*, 679 F.3d at 1307 ("[A] habeas petition cannot be successful unless it satisfies both [AEDPA] and *Brecht*.")).

II. AEDPA's Procedural Requirements

“[A] person in custody pursuant to the judgment of a State court” has one year to file a habeas petition in federal court. 28 U.S.C. § 2244(d)(1). That one-year period “runs from the latest of” the following dates:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)–(D). But this limitations defense is waivable. *See Paetz v. Sec’y, Fla. Dep’t of Corr.*, 947 F.3d 649, 655 (11th Cir. 2020) (explaining that the State may express its intent to “waive the limitations bar”).

Beyond meeting this one-year window, though, federal habeas petitioners must also *exhaust* their claims by “*properly* present[ing] [them] to the state courts.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (emphasis in original). Specifically, federal habeas petitioners must “fairly present every issue raised in [their] federal petition to the state’s highest court, either on direct appeal or on collateral review.” *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) (cleaned up). “If a petitioner fail[ed] to ‘properly’ present his claim to the state court—by exhausting his claim[] and complying with the applicable state procedure—prior to bringing his federal habeas claim, then [§ 2254] typically bars [courts] from reviewing the claim.” *Ibid.* In other words, where a petitioner has not “*properly* presented

his claims to the state courts,” the petitioner will have “procedurally defaulted his claims” in federal court. *O’Sullivan*, 526 U.S. at 848.

There are, to be sure, two exceptions to the general rule that a federal court may not consider a procedurally defaulted claim on the merits: “cause and prejudice” and “actual innocence.” *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (“[A] federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default. We have recognized a narrow exception to the general rule when the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense.”). A habeas petitioner can establish “cause and prejudice” if (1) “some objective factor external to the defense impeded the effort to raise the claim properly in the state court,” and (2) “there is at least a reasonable probability that the result of the proceeding would have been different.” *Harris v. Comm’r, Ala. Dep’t of Corr.*, 874 F.3d 682, 688 (11th Cir. 2017). “Actual innocence,” on the other hand, “applies to a severely confined category: cases in which new evidence shows ‘it is more likely than not that no reasonable juror would have convicted the petitioner.’” *McQuiggin v. Perkins*, 569 U.S. 383, 395 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). The petitioner bears the burden of establishing that one of these exceptions to the procedural-default rule applies. *See Gordon v. Nagle*, 2 F.3d 385, 388 (11th Cir. 1993) (“A defendant has the burden of establishing cause and prejudice.”); *Arthur v. Allen*, 452 F.3d 1234, 1245 (11th Cir. 2006) (“The petitioner must support the actual innocence claim with new reliable evidence[.]” (cleaned up)).

All that said, “[s]tates can waive procedural bar defenses in federal habeas proceedings, including exhaustion.” *Vazquez v. Sec’y, Fla. Dep’t of Corr.*, 827 F.3d 964, 966 (11th Cir. 2016) (cleaned up)). But “[a] State shall not be deemed to have waived the exhaustion requirement . . . unless the State, through counsel, *expressly* waives the requirement.” 28 U.S.C. § 2254(b)(3) (emphasis added); *see also McNair v. Campbell*, 416 F.3d 1291, 1304 (11th Cir. 2005) (same).

III. Ineffective Assistance of Counsel

The Sixth Amendment affords a criminal defendant the right to “the Assistance of Counsel for his defen[s]e.” U.S. CONST. amend. VI. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, a habeas litigant must demonstrate “that (1) his counsel’s performance was deficient and ‘fell below an objective standard of reasonableness,’ and (2) the deficient performance prejudiced his defense.” *Raleigh v. Sec’y, Fla. Dep’t of Corr.*, 827 F.3d 938, 957 (11th Cir. 2016) (quoting *Strickland*, 466 U.S. at 687–88). This same standard applies to alleged errors made by both trial counsel and appellate counsel. *See Farina v. Sec’y, Fla. Dep’t of Corr.*, 536 F. App’x 966, 979 (11th Cir. 2013) (“A claim of ineffective assistance of appellate counsel is evaluated under the same standard as for trial counsel.”).

To establish the first prong (deficiency), “a petitioner must [show] that *no* competent counsel would have taken the action that his counsel did take[.]” *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc) (emphasis added). So, if “some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial[.]” counsel could not have performed deficiently. *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) (quoting *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992)).

As for the second prong (prejudice), “a defendant is prejudiced by his counsel’s deficient performance if ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (quoting *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. To succeed on this prong, a defendant must

show that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

ANALYSIS

In this Petition, Calder asserts the same eight ineffective-assistance-of-counsel claims he originally advanced in his Amended Postconviction Motion in state court. To recap, those eight grounds for relief allege that his trial lawyer was ineffective for: (1) “failing to hire a ballistics and blood splatter expert,” Petition at 4; (2) “failing to request a hearing on the issue of voluntariness of the Defendant’s January 21, 2008 statement,” *id.* at 7; (3) “failing to [d]iscover that the January 21, 2008 statement had been tampered with by agents of the State of Florida,” *id.* at 8; (4) “failing to impeach State witness Michael Green with his prior inconsistent statements,” *id.* at 11; (5) “failing to contemporaneously object to prosecutorial misconduct during closing arguments,” *id.* at 15; (6) “fail[ing] to object and notify the trial court that a juror was sleeping throughout critical trial testimony,” *id.* at 17; (7) “failing to argue in closing argument that State witness Patrick Johnson testified that he witnessed the Defendant go leave the bag at the truck and seen [sic] the Defendant return right back to the house,” *id.* at 18; and (8) “failing to introduce evidence of Georgia Lee’s prior arrest record of [d]omestic violence,” *id.* at 21.

The State concedes *both* that the Petition is timely, *see* Response at 18 (“[I]t appears that Petitioner’s petition is timely filed.”), *and* that Calder properly exhausted all eight of his claims, *see id.* at 20 (“Exhaustion and procedural default do not seem to be applicable to any of Petitioner’s claims of ineffective assistance of trial counsel.”). We’ll therefore review all eight “claim[s] that [were] adjudicated on the merits in State court proceedings” to determine whether the state court’s decisions “involved an unreasonable application of clearly established federal law” *or* “[were] based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)–(2). In assessing the “reasonableness” of these decisions, we look

to the “highest state court” that reached the merits of Calder’s claims. *Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir. 2008). But neither the Fourth DCA nor the state postconviction court “explain[ed] its decision on the merits in a reasoned opinion.” *Wilson*, 138 S. Ct. at 1192. The state postconviction court denied the Amended Postconviction Motion “[f]or the reasons articulated in the State’s response,” Order Denying Amended Postconviction Motion [ECF No. 12-7] at 56, and the Fourth DCA summarily affirmed in an unwritten opinion, *see Calder*, 350 So. 3d at 347. We’ll thus presume that these courts applied the reasoning of the State’s Postconviction Response. *Wilson*, 138 S. Ct. at 1192 (“[T]he federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale.”); *see also, e.g., Pierre v. Dixon*, 2022 WL 3549781, at *7 (S.D. Fla. Aug. 18, 2022) (Altman, J.) (“And, because the state postconviction court simply ‘adopted the reasoning as set forth in the response of the State,’ we presume that the Fourth DCA applied the reasoning in the State’s Postconviction Response when it denied Pierre’s trial-counsel claims.” (cleaned up)).

I. Ground One

In Ground One, Calder contends that his defense lawyer should have hired “a ballistics and blood splatter expert to testify” at his trial. Petition at 4. As Calder explains, his theory of defense was that he shot the victim in self-defense during a struggle with the victim *and* two other people who were inside the apartment at the time. *See ibid.* (“At trial, the Defendant testified that . . . there was a struggle, and that while Michael Green was attacking him from the front, Patrick Johnson was attacking him from behind, and would not allow him to leave.”). The State, Calder claims, attacked this theory by arguing that the position of the victim’s body was inconsistent with Calder’s self-defense claim. *See id.* at 5 (“The prosecutor asked: ‘Okay. So Mr. Calder, how is it, [if] she’s facing the door pushing it, and she’s facing you, how does the bullet go into the [right] side of her head?’” (quoting Trial Tr. [ECF No. 13-1] at 1207)). Calder now insists that, had his lawyer called ballistics and blood-spatter experts

at trial, they would have testified that “the decedent’s body had been moved by the police,” which would’ve prevented the State from arguing that the position of the victim’s body was inconsistent with Calder’s theory. *Id.* at 4.

The State offers five responses to this claim. *First*, Calder (it notes) told the trial court that “his attorneys had called all of the witnesses that he wanted to have called.” Response at 30. *Second*, Calder is (the State says) simply speculating that an expert “would have actually testified to the theories espoused by Petitioner.” *Id.* at 31. *Third*, the evidence at trial (the State maintains) refutes Calder’s view that “the decedent’s body had been moved by the police[.]” *Id.* at 33. *Fourth*, the State continues, counsel’s decision *not* to call these experts was a reasonable trial strategy because it allowed counsel to “exploit[] the conflict in the eyewitness testimony . . . [and] to argue to the jury at closing that the State failed to prove beyond a reasonable doubt that Petitioner did not act in self-defense.” *Id.* at 33–34. *Fifth*, the State contends that Calder wasn’t prejudiced by counsel’s failure to call these experts because the prosecution presented “overwhelming and uncontroverted evidence” of his guilt. *Id.* at 34. Because we agree with the State’s third and fourth arguments, we don’t reach the other three.

A lawyer has “no absolute duty to investigate particular facts or a certain line of defense, although a complete failure to investigate may constitute deficient performance of counsel in certain circumstances.” *Fugate v. Head*, 261 F.3d 1206, 1217 (11th Cir. 2001). The failure to call an expert witness thus doesn’t constitute ineffective assistance unless the decision “was so patently unreasonable that no competent attorney would have chosen it.” *Dingle v. Sec’y for Dep’t of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (cleaned up). To overcome this presumption of reasonableness, Calder must show that any “competent attorney” would have called these experts at trial. *See Denier v. Zant*, 3 F.3d 1445, 1453 & n.18 (11th Cir. 1993) (holding that counsel’s decision not “to procure expert psychological testimony on the effect that [the defendant’s] traumatic upbringing had on his social and emotional development” fell within “the wide range of professionally competent assistance”); *see also Day v.*

Quarterman, 566 F.3d 527, 538 (5th Cir. 2009) (“Thus, to prevail on an ineffective assistance claim based on counsel’s failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness’s proposed testimony, and show that the testimony would have been favorable to a particular defense.”).² But Calder *cannot* meet this burden by “mere[ly] speculat[ing] that missing witnesses would have been helpful” to his defense. *Cardona v. Dixon*, 2022 WL 2158715, at *13 (S.D. Fla. June 14, 2022) (Altman, J.) (citing *Streeter v. United States*, 335 F. App’x 859, 864 (11th Cir. 2009)); *see also, e.g., Finch v. Sec’y, Dep’t of Corr.*, 643 F. App’x 848, 852 (11th Cir. 2016) (“Without some specificity as to the proposed expert’s testimony, any assertion that an expert would testify consistently with his claims is mere speculation and does not entitle [the petitioner] to habeas relief.”).

This legal framework easily disposes of Ground One. Although Calder suggests that “a Ballistic and Blood Spatter expert for the defense would have helped to support the Defendant’s defense[,]” Petition at 5, he hasn’t identified any “actual testimony by the witness or an affidavit” to support his claim that any such expert actually exists, *Lucas v. Inch*, 2019 WL 5017431, at *13 (S.D. Fla. July 23, 2019) (White, Mag. J.) (quoting *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991)), *aff’d*, 842 F. App’x 357 (11th Cir. 2021). Indeed, he hasn’t even given us the name of a single ballistic—or blood spatter—expert, much less has he identified one who would’ve testified in the way he proposes. Just about every defendant can, years after his conviction, speculate about a set of experts (or other witnesses) who, unconstrained by ethical considerations, would testify to everything the defendant wants them to say—and rebut every piece of evidence the government had adduced at trial. But “mere

² Florida courts likewise deny ineffective-assistance claims premised on counsel’s alleged failure to call an expert witness unless the defendant “asserts both the substance of the proposed testimony and that the testimony would have been helpful to [his or her] defense at trial.” *Cooper v. State*, 336 So. 3d 415, 417 (Fla. 2d DCA 2022) (citing *State v. Lucas*, 183 So. 3d 1027, 1034 (Fla. 2016)).

speculation that missing witnesses would have been helpful is insufficient to meet the petitioner's burden of proof." *Streeter*, 335 F. App'x at 864.

That's enough to deny Ground One on the merits. We add here only that there's a good reason for Calder's inability to identify an expert who would say that the police moved the victim's body: The *unrebutted* trial testimony, after all, was that law enforcement made sure *not* to move the body. Detective Torok, for instance, testified that "[t]he front door [of the apartment] could not be opened" because the victim's body was lying against it, so he and the other officers could only enter and exit the victim's apartment by climbing a ladder and entering through "a window of the apartment where the incident occurred." Trial Tr. [ECF No. 13-1] at 984–85. This testimony plainly refutes Calder's belief that law enforcement moved the victim's body after she was shot. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) ("A petitioner is not entitled [to relief], however, when his claims are merely conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible.").

We therefore **DENY** Ground One.

II. Ground Two

Calder alleges in Ground Two that his lawyer "was ineffective for failing to request a hearing on the issue of voluntariness of the Defendant's January 21, 2008 statement, prior to the State Attorney using the Statement for impeachment purposes[.]" Petition at 7. He also says that, during closing arguments, the prosecutor improperly argued "that the Defendant's January 21, 2008 statements were substantive evidence of guilt, and showed premeditation." *Id.* at 8. The State cites *Harris v. New York*, 401 U.S. 222 (1971), for the proposition that "a defendant may be impeached with his own un-Mirandized statement" and urges us to deny Ground Two on that basis. Response at 38.

While we agree with the State that Ground Two fails, we think there's a little more to it than that. It's undisputed that Calder gave the January 21, 2008 Statement in circumstances that violated

his *Miranda* rights. See *Calder*, 133 So. 3d at 1031 (“When, as in this case, an officer persists in asking a suspect whether he wishes to give his ‘side of the story’ after the suspect has unequivocally invoked his rights, the officer is not asking harmless clarifying questions; he is violating the suspect’s rights under *Miranda*.”). And the State’s right that a defendant who testifies in his own defense may be impeached with his own prior statements—even if those statements were taken in violation of his *Miranda* rights. See *Oregon v. Elstad*, 470 U.S. 298, 307 (1985) (“Despite the fact that patently voluntary statements taken in violation of *Miranda* must be excluded from the prosecution’s case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination.”). But *Calder* *isn’t* arguing that the prosecutor was wrong to cross him with a statement that violated his *Miranda* rights. He’s saying that the circumstances of his police interview rendered his January 21, 2008 Statement *involuntary*. See Petition at 7 (“At no time . . . did counsel request a hearing, outside the presence of the jury, on the issue of voluntariness of the Defendant’s January 21, 2008 statements.”). And an *involuntary* statement—unlike a statement taken in violation of a defendant’s *Miranda* rights—*cannot* be used to impeach the defendant’s testimony in a criminal case. See *United States v. Thompson*, 422 F.3d 1285, 1295 (11th Cir. 2005) (“The Fifth Amendment prohibits the use of an involuntary confession against a defendant in a criminal trial.”); *Willacy v. State*, 640 So. 2d 1079, 1083 (Fla. 1994) (“Before the defendant’s statement can be admitted for impeachment purposes, the State must, by a preponderance of the evidence, show that the statement was voluntarily made.”). Unfortunately, neither the Response nor the State’s Postconviction Response (which is the presumptive reasoning of the state court) contemplated this distinction. See Response at 34–40; State’s Postconviction Response [ECF No. 12-1] at 9–10. We therefore must take the unusual step of reviewing this part of Ground Two *de novo*. See *Mason*, 605 F.3d at 1119 (“When, however, a claim is properly presented to the state court, but the state court does not adjudicate it on the merits, we review *de novo*.”).

Under Florida law, a “state has the burden to show by a preponderance of the evidence that a confession was voluntary.” *Roman v. State*, 475 So. 2d 1228, 1232 (Fla. 1985). The state trial court found that the State had met its burden of showing that the January 21, 2008 Statement was *voluntary*—and that the State properly used it to impeach Calder at trial—even though it violated *Miranda*. Here’s how the state court articulated its reasoning:

The Court: Well, my recollection of the caselaw is as follows: Even if it comes back on appeal that [the statement] should not have been admitted because of *Miranda* violations, the statement can still be used for impeachment purposes. . . . And Mr. Calder never alleged that he was physically beaten or something like that. And so, therefore, the statement was admissible for impeachment purposes and that’s exactly what the State did.

Motion for New Trial Hr’g Tr. [ECF No. 13-2] at 7–8; *see also Nelson v. State*, 688 So. 2d 971, 973 (Fla. 4th DCA 1997) (“The trial court’s finding that the confession was freely and voluntarily given is clothed with a presumption of correctness.”). As an initial matter, then, counsel couldn’t have been ineffective for failing to argue that the January 21, 2008 Statement was involuntary because the state court came to the opposite conclusion. *See United States v. Curbelo*, 726 F.3d 1260, 1267 (11th Cir. 2013) (“And it goes without saying that counsel is not ineffective for failing to file a meritless suppression motion.”).

And, in saying so, the state trial court correctly applied Florida and federal law. A statement isn’t involuntary unless “the defendant was coerced by the government into making the statement[.]” *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1475 (11th Cir. 1992) (citing *Colorado v. Connelly*, 479 U.S. 157, 163 n.1 (1986)), *abrogated on other grounds by Coleman v. Singletary*, 30 F.3d 1420 (11th Cir. 1994). Coercion typically requires proof that the police “subject[ed] the accused to an exhaustingly long interrogation, [applied] physical force or the threat to do so, or [made] a promise that induces a confession.” *Ibid.*; *accord Chavez v. State*, 832 So. 2d 730, 749 (Fla. 2002) (“To establish that a statement is involuntary, there must be a finding of coercive police conduct.”). Calder never tells us *why* he thinks the January 21, 2008 Statement was involuntary, *see* Petition at 7–8—which is reason enough to deny

his claim, *see United States v. Campbell*, 26 F.4th 860, 873 (11th Cir. 2022) (“[F]ailure to raise an issue in an initial brief . . . should be treated as a forfeiture of the issue, and therefore the issue may be raised by the court *sua sponte* [only] in extraordinary circumstances.”); *Sappupo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (“We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.”); *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) (“[T]he failure to make arguments and cite authorities in support of an issue waives it.”); *In re Egidi*, 571 F.3d 1156, 1163 (11th Cir. 2009) (“Arguments not properly presented . . . are deemed waived.”).

Calder may just believe that a statement is involuntary if it violates a defendant’s *Miranda* rights. But that’s plainly not the law. In *Willacy v. State*, 640 So. 2d 1079 (Fla. 1994), for instance, the defendant made an inculpatory statement after a police detective improperly “initiated a conversation with Willacy” after Willacy had invoked his *Miranda* rights. *Id.* at 1083. The Florida Supreme Court held that this *Miranda* violation—without evidence of additional coercive conduct—didn’t cast doubt on whether “Willacy’s statement was voluntarily made.” *Ibid.* And, the court went on, “a substantive violation of *Miranda* does not preclude a defendant’s voluntary statement from being used for impeachment purposes.” *Ibid.* (citing *Oregon v. Haas*, 420 U.S. 714, 722 (1975)). That’s precisely what we have here: a defendant who continued to be questioned *after* he’d invoked his *Miranda* rights—but who has pointed to no evidence of any other coercive tactics that might have rendered his statement involuntary. *See Calder*, 133 So. 3d at 1033 (noting only that “the officer’s improper comments, after Calder invoked his right to counsel, were designed to induce him to reinitiate the communication without a lawyer,” but *never* suggesting that Calder was subjected to any other coercive techniques). Calder’s claim that his statement was involuntary—and that the state court thus violated his constitutional rights when it allowed the State to impeach him with it at trial—therefore fails on the merits.

Calder's related argument—that, during closing arguments, the prosecutor turned the January 21, 2008 Statement into “substantive evidence of [Calder's] guilt”—is frivolous. Petition at 8.³ “[A]nything [a] lawyer[] say[s] [during closing arguments] is not evidence and is not binding on [the jury],” so the prosecutor's reference to the statement during closings didn't transform that statement into substantive evidence of anything. *United States v. Maradiaga*, 987 F.3d 1315, 1326 (11th Cir. 2021) (cleaned up); *see also Jenkins v. State*, 189 So. 3d 866, 870 (Fla. 4th DCA 2015) (“[T]he statements of counsel during opening statements and closing arguments are not evidence[.]”). In any event, the prosecutor properly used the January 21, 2008 Statement to cast doubt on Calder's testimony that he had acted in self-defense. *See, e.g., Trial Tr. [ECF No. 13-1] at 1341* (“[O]n cross-examination this morning you heard back on January 21, 2008, that the defendant said, they were blocking me from getting inside. Not that he was inside trying to get out. Over and over and over again I had to impeach him this morning that he was trying to get in and they were trying to keep him out.”). As the Eleventh Circuit has explained many times: “Juries may appropriately consider a defendant's credibility, so a prosecutor's otherwise proper comment on a defendant's credibility cannot inject harm into the jury's deliberation.” *Hammonds v. Comm'r, Ala. Dep't of Corr.*, 712 F. App'x 841, 857 (11th Cir. 2017) (citing *Portuondo v. Agard*, 529 U.S. 61, 67–68 (2000)).

We therefore **DENY** Ground Two.

III. Ground Three

Calder argues in Ground Three that counsel was ineffective for “failing to [d]iscover that the January 21, 2008 statement had been tampered with by agents of the State of Florida[.]” Petition at 8.

³ The state court considered—and rejected—this part of Ground Two. *See State's Postconviction Response [ECF No. 12-1] at 10* (“[T]here was no error in allowing the State to comment on [the January 21, 2008 Statement], and explain that it was impeachment evidence in her closing argument.”). We therefore review this part of the claim under AEDPA's rigorous standard of review. *See Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1263 (11th Cir. 2014) (“[I]f a state court has adjudicated the claim on the merits, then a petitioner must satisfy § 2254(d)(1)[.]”).

As “evidence” of this alleged tampering, Calder points to the transcript the Lauderhill Police Department prepared, which differs slightly from the transcript the court reporter prepared after Calder’s *second* trial had ended. *See id.* at 9 (“After the defendant’s second trial conviction, on appeal, the court reporter transcribed the January 21, 2008 statement for purposes of appellate review. Upon review of the two transcripts, the Defendant discovered that the police transcript of Defendant’s January 21, 2008 statement had been tampered with.”). Calder also notes that certain portions of the Lauderhill Transcript were “blanked out.” *Ibid.* This claim is silly.

At his second trial, the prosecutor impeached Calder with the transcript the Lauderhill Police Department had prepared. *See, e.g.*, Trial Tr. [ECF No. 13-1] at 1221 (referring to “Page 5, Lines 202, 203, 204” of the Lauderhill Tr. [ECF No. 11-2] at 2–81). The State *also* introduced this transcript into evidence at Calder’s *first trial* as a demonstrative exhibit to help the jury follow along as the January 21, 2008 Statement was played in open court. *See* First Trial Tr. [ECF No. 11-1] at 248 (“The Court: Members of the Jury, you’re going to get a transcript That transcript is to aid you in understanding the actual video tape or the video which is exhibit [46] in evidence.”). After the second trial, while Calder’s appeal was pending, a court reporter prepared a separate transcript of the January 21, 2008 Statement. *See* Court Reporter Tr. [ECF No. 11-2] at 129–82; *see also* Motion to Supplement the Record [ECF No. 11-2] at 122 (“Appellant again requests that the record be supplemented with Calder’s statement given to police on January 21, 2008.”). This second transcript starts with a warning from the court reporter: “Whereupon, the following was transcribed from a DVD by Jamie Mackrell, Court Reporter, *to the best of my ability*[.]” Court Reporter Tr. [ECF No. 11-2] at 129 (emphasis added).

For two reasons, the state postconviction court was right to reject this claim. *First*, the “blanks” Calder’s complaining about in the Lauderhill Transcript were inserted by the *trial court*—not clandestine agents of the State—to *avoid prejudicing* Calder. Before the transcript could be used as a demonstrative exhibit during Calder’s *first trial*—when, remember, the State introduced the January

21, 2008 Statement into evidence—the trial court ordered the State to redact certain irrelevant or prejudicial portions of the statement (and the transcript). *See* First Trial Tr. [ECF No. 11-1] at 249–50 (“[The Court]: So, therefore, in your transcript you’re going to see certain spaces, I think it’s whited out, it had no relevance, nothing [to] do with this case. . . . I ordered those things to be taken out.”). Calder cannot now use these redactions—which were made *for his benefit*—as evidence of a nefarious conspiracy against him.

Second, the minor differences between the two transcripts aren’t “proof” of anything. Calder is right that the court reporter’s transcript “ends at page 54, which is only page 12 of the [Lauderhill Transcript.]” Petition at 10. But that’s because the Court Reporter’s Transcript includes only part of the full transcript. Remember that the State played the *complete* January 21, 2008 Statement at Calder’s first trial. Unfortunately for Calder, the transcript from *that trial* shows that Calder said *everything* the Lauderhill Transcript records him as saying. *Compare* First Trial Tr. [ECF No. 12-7] at 125–217, *with* Lauderhill Transcript [ECF No. 11-2] at 2–81; *cf. Forbes v. Sec’y, Dep’t of Corr.*, 2022 WL 17082912, at *12 (S.D. Fla. Nov. 18, 2022) (Altman, J.) (“Looking at other parts of the trial record, in fact, we can see clearly that the jury heard the full recording—and that they were shown the full transcript of that recording as a demonstrative aid—even if the court reporter . . . was only able to understand (and transcribe) some portions of that recording.”).⁴

⁴ Even if there were an error in the transcription, that error would have been harmless. Calder insists that the prosecutor used the tampered-with statement “during closing arguments as substantive evidence of the Defendant’s guilt.” Petition at 10. But, as we’ve explained, the State did no such thing. The State properly used the transcript to impeach Calder with his prior inconsistent statements. *Cf. McGriff v. Dep’t of Corr.*, 338 F.3d 1231, 1236 (11th Cir. 2003) (“[S]tatements obtained in violation of a defendant’s Fifth or Sixth Amendment right to counsel cannot be used in the prosecution’s case-in-chief against the defendant, but may be used for impeachment purposes.” (citing *Harris*, 401 U.S. at 225–26)). In any event, the State never introduced the transcript itself into evidence, so there’s no reason to believe that its limited use as a demonstrative aid had a “‘substantial and injurious effect or influence’ on the jury’s verdict.” *Mansfield*, 679 F.3d at 1307 (quoting *Brecht*, 507 U.S. at 637).

Since we have no reason to believe that the Lauderhill Transcript was in any way tampered with, Ground Three is **DENIED**.

IV. Ground Four

In Ground Four, Calder claims that his trial counsel was ineffective for failing to impeach a witness, Michael Green, with two prior inconsistent statements Green had made about the shooting. According to Calder, during a prior deposition, Mr. Green had testified that the victim “threw liquid from a vase at Defendant’s face,” and that a third person, Patrick Johnson, was “pulling” Calder outside. Petition at 11–12. These details are important, Calder explains, because his self-defense claim relied on his testimony that the victim had blinded him with a liquid and that Patrick Johnson was “attacking” him from behind. *See id.* at 11 (“The Defendant’s theory of defense was that while he was attempting to go retrieve the rest of his clothes, . . . he was attacked by [the victim] whom [sic] threw liquid from a vase at Defendant’s face, which blinded the Defendant, and that Michael Green and Patrick Johnson started to attack him as well, causing the Defendant to fear for his life and fire a shot from the gun.”). In the State’s view, “Michael Green’s statements at this deposition, at the first trial, and then at retrial, were substantially similar,” so there were no “prior inconsistent statements” for Mr. Green to be impeached with. Response at 44.

“The decision as to whether to cross-examine a witness is ‘a tactical one well within the discretion of a defense attorney.’” *Fugate*, 261 F.3d at 1219 (quoting *Messer v. Kemp*, 760 F.2d 1080, 1090 (11th Cir. 1985)). How and when a defense attorney decides to cross-examine a witness “is one of the most important tactical decisions a lawyer will make during a trial—so, absent egregious error, we generally defer to the lawyer’s professional, in-court judgment.” *Wilkins v. United States*, 2023 WL 4509735, at *22 (S.D. Fla. July 13, 2023) (Altman, J.) (citing *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011)). Naturally, an attorney’s impeachment cannot be ineffective if there’s nothing to impeach the witness with. *See Lindsey v. Smith*, 820 F.2d 1137, 1152 (11th Cir. 1987) (“A

habeas petitioner who proposes alternative trial strategy that would itself have proved futile has failed to demonstrate that the representation at trial fell below an objective standard of reasonableness.”). Under Florida law, a prior statement is “inconsistent” when it “directly contradict[s], or [is] materially different from, the testimony offered at trial.” *Woods v. State*, 92 So. 3d 890, 892 (Fla. 4th DCA 2012) (citing *Pearce v. State*, 880 So. 2d 561, 569 (Fla. 2004)).

The state postconviction court reasonably denied this claim because Mr. Green’s prior statements about the liquid the victim threw at Calder’s face—and about the extent to which Patrick Johnson was “pulling” Calder from behind—were mostly *consistent* with Green’s testimony at trial. During his deposition, Green agreed that the victim had thrown liquid in Calder’s face. *See* Green Deposition [ECF No. 12-6] at 239 (“Then I saw [the victim] pick up a liquid something. She pick up a bottle of liquid and flinged it in his face.” (errors in original)). Green also said that he and the victim were trying to push Calder out of the apartment while Patrick Johnson was pulling Calder from behind—also trying to get him out of the apartment. *See id.* at 240–41 (“[Green:] After [the victim] splashed something in [Calder’s] face next thing I know he was like someone pulling him, pulling outside and she got behind the door, behind the door right there and push him out. . . . [Defense Counsel]: Patrick pulled him out? A: Yes.”). Green then repeated *most* of this testimony at trial:

[Defense Counsel]: Okay. And when you saw this, that is when [the victim] picked up something liquid?

[Green]: Yes.

[. . .]

Q: But you do know that it hit Winston in the face; is that right?

A: Yes.

Q: Did he put his hands to his face?

A: Don’t remember.

Q: You said at this point she was pushing Winston out the door?

A: Yes.

Q: And Patrick was pulling him out the door; is that right?

A: I don't know because I can't see Patrick because he was outside.

Trial Tr. [ECF No. 13-1] at 805–06.

Since Green testified—both at his deposition and at trial—that the victim threw liquid in Calder's face, Calder's claim that this aspect of Green's trial testimony was inconsistent with his deposition is flatly refuted by the record. On the other hand, Green's trial testimony about Patrick Johnson *did* differ from what he'd said at his deposition. Green originally said that Johnson was “pulling” Calder out, but then testified at trial that he didn't “know” what Patrick was doing. But this marginal change in Green's testimony didn't “contradict” or “materially differ[]” from his prior statement, *see Woods*, 92 So. 3d at 892, because Green still agreed that Johnson was right outside the apartment when he and the victim were trying to push Calder out, *see* Trial Tr. [ECF No. 13-1] at 762 (“[The Prosecutor]: Is Patrick Johnson anywhere near this situation when it's happening[?] [Green]: He was outside. Q: So he's on the other side of the door? A: Yes.”). The point Calder was trying to make at trial was that he was fighting off the victim, Green, and Johnson when he shot the victim in self-defense. Green admitted at trial that he and the victim were fighting Calder just before the victim was shot—and he admitted that Johnson was just behind Calder on the other side of the door. That Green didn't *also* say that Johnson was pulling Calder out the door doesn't materially advance Calder's self-defense claim. *See Smith v. Sec'y, Dep't of Corr.*, 2020 WL 1451680, at *16 (M.D. Fla. Mar. 25, 2020) (Honeywell, J.) (“Counsel's failure to highlight minor inconsistencies on largely immaterial matters was not ineffective assistance of counsel.”). This is especially true because (as we've said) Green *admitted* at trial the most important part of Calder's self-defense claim—which is that the victim had thrown a liquid at Calder's face just before Calder shot her.

In any event, there's no "reasonable probability that . . . the result of the proceeding would have been different" if Calder's lawyer had pressed Green on this (very) minor inconsistency. *Porter*, 558 U.S. at 40. Two separate witnesses (Green and Patrick Johnson) confirmed that, contra Calder's self-defense claim, *he* was the aggressor—and that *he* had attacked the victim before he shot her. *See* Trial Tr. [ECF No. 13-1] at 758 ("[Green]: After [Calder] pushed her and hit her head to the wall [the victim] have a cut [sic] and her glasses fell off."); *id.* at 836 ("[Johnson]: Calder pass the people in the front, go inside the house. As he reach in, [the victim] was in the living room there. So right away he started to fight her. I don't remember if he box her or if he tump her.").⁵ And the jury evidently believed these witnesses. As if that weren't enough, when Calder took the stand, the State impeached him with his own prior statement, in which he had *admitted* that he'd forced his way into the apartment because the victim wasn't letting him in. *See id.* at 1249 ("[The Prosecutor]: [Y]ou were trying to force your way back into the apartment, correct? . . . [Calder]: No, not force. I was trying to get in, not force. Q: Would you agree with me, Mr. Calder, that you were asked the question: 'Q: Why do you think she started to kick you? A: Because me force to come in her, me try to force to go through the door.' You used the word force two times. A: I was giving the police a scenario what happened." (errors in original)). Given all this evidence, Calder has failed to show that his lawyer's decision not to impeach Green on this minor inconsistency would've had any effect on the jury's verdict. *See Thomas v. United States*, 596 F. App'x 808, 810 (11th Cir. 2015) ("Thomas did not demonstrate that his defense was prejudiced by [counsel's] failure because the government presented strong evidence of his guilt." (citing *Strickland*, 466 U.S. at 694)).

Ground Four, in sum, is **DENIED**.

⁵ Johnson explained that both "box" and "tump" mean hitting someone—although "boxing" is hitting someone with an open palm. Trial Tr. [ECF No. 13-1] at 837–38.

V. Ground Five

Calder alleges in Ground Five that the prosecutor “repeatedly lied to the jury” during her closing arguments and that defense counsel should have objected to this “prosecutorial misconduct.” Petition at 15. Calder specifically accuses the prosecutor of telling “the jury that no liquid had been thrown on Defendant’s face,” even though Green admitted that the victim had thrown liquid in Calder’s face. *Ibid.* This, again, is frivolous.

In closing arguments, prosecutors may draw “inferences fairly suggested by the evidence or by matters of common knowledge outside the evidence.” *United States v. Johns*, 734 F.2d 657, 663 (11th Cir. 1984). But they cannot “materially misstate the facts shown by the evidence[.]” *United States v. Goldstein*, 989 F.3d 1178, 1199 (11th Cir. 2021). The prosecutor didn’t misstate any facts here. On the contrary, the prosecutor relied on Calder’s prior inconsistent statements to present a reasonable interpretation of the evidence. Calder’s theory of defense was that “the liquid had blinded him” and that he fired his gun out of desperation and without fully knowing where he was aiming. Petition at 15; *see also* Trial Tr. [ECF No. 13-1] at 1350 (“[Calder told you] that he was blinded by this liquid. . . . [He] shot, not knowing where he was shooting because he was blinded by this liquid.”). The prosecutor cast doubt on Calder’s story by juxtaposing his trial testimony with the January 21, 2008 Statement, in which Calder had denied that the liquid had blinded him. *See* Trial Tr. [ECF No. 13-1] at 1351 (“[Calder] was asked not once, but twice, ‘Was there liquid thrown in your face?’ And he said, ‘No, no liquid. No liquid.’”); *id.* at 1395 (“He was very clear in his statement about why he pulled the gun, because [he was hit] in the face. . . . Not, I pulled the gun, I aimed the gun and I shot the gun because I was blinded with chemicals in my eyes.”). It’s one thing to say that Calder was hit in the face by an object—of that there’s no dispute. It’s quite another, though, to say that he was *blinded* by it. And it’s this latter claim that the prosecutor attacked in her closing argument—and not without reason: As we’ve shown, Calder *himself* had previously said that, although he was hit in the face, he wasn’t

blinded when he fired. *See id.* at 1260 (“Q: So would you agree with me . . . that you were asked ‘Do you know what it was they threw at you?’ Answer from you, ‘It wasn’t liquid.’ . . . And you go on to describe, you think it was a small vase with no liquid. [Calder]: At that time. At that time.”); *see also* Lauderhill Transcript [ECF No. 11-2] at 41 (same). That’s enough to render the prosecutor’s statement wholly proper. *See United States v. Reeves*, 742 F.3d 487, 505 (11th Cir. 2014) (“[A]lthough a prosecutor may not exceed the evidence presented at trial during her closing argument, she may state conclusions drawn from the trial evidence.”).

In any event, there’s no “reasonable probability” that the prosecutor’s comments had any effect on the trial because the state court instructed the jury that the prosecutor’s arguments weren’t evidence. *See* Trial Tr. [ECF No. 13-1] at 1336 (“[The Court:] As I said earlier, you don’t need to take notes because what the lawyers say is not evidence.”). And we assume that the jurors heeded this instruction. *See Adams v. Wainwright*, 709 F.2d 1443, 1447 (11th Cir. 1983) (“A jury is presumed to follow jury instructions.”); *Sutton v. State*, 718 So. 2d 215, 216 n.1 (Fla. 1st DCA 1998) (“The law presumes that the jury followed the trial judge’s instructions in the absence of evidence to the contrary.”).

Remember, too, that a defense lawyer doesn’t perform ineffectively unless “no competent counsel would have taken the action that his counsel did take.” *Chandler*, 218 F.3d at 1315. But many lawyers take the commonsense view that objections during closing arguments aren’t worth the squeeze. *See, e.g., Ether v. Dixon*, 2022 WL 1908918, at *22 (S.D. Fla. June 3, 2022) (Altman, J.) (“Even if the prosecutor’s statement had been improper, a good lawyer might justifiably suppose that there’s little to be gained from objecting. . . . [A] seasoned lawyer might forego the objection . . . in order to avoid the dual implication that the State was onto something and that, whatever that harmful thing was, Ether was trying to hide it.” (first citing *Brewster v. Hetzel*, 913 F.3d 1042, 1057 (11th Cir. 2019); and then citing *Brown v. Dixon*, 591 F. Supp. 3d 1251, 1279 (S.D. Fla. 2022) (Altman, J.))). For one

thing, any such objection would only highlight for the jury the defense lawyer's view that the prosecutor had just said something damaging. For another, the trial judge's most likely response to a closing-argument objection would be to remind the jurors that the lawyer's comments aren't evidence—not exactly a ringing endorsement of the objection's merits. For all these reasons, we don't think Calder's trial counsel can be faulted for failing to object to this statement in closing argument.

Ground Five is therefore **DENIED**.

VI. Ground Six

In Ground Six, Calder castigates his lawyer for failing to notice that a juror “was sleeping throughout a span of approximately 5-7 minutes.” Petition at 17. Calder also alleges that, when the sleeping juror was brought to his lawyer's attention, she refused to ask the trial court to remove the juror. *Ibid*. In the State's view, the “Petitioner [failed] to establish that the unspecified juror was sleeping during critical portions of his trial.” Response at 56. We agree.

Under Florida law, a lawyer may be ineffective for failing to object when he or she becomes aware of a sleeping juror. *See Judd v. State*, 951 So. 2d 103, 104 (Fla. 4th DCA 2007) (finding ineffective-assistance claim sufficient where “appellant alleged that a specific juror was sleeping during his trial, that he informed his trial counsel of the sleeping juror, and that his counsel failed to bring this information to the attention of the court”). But Calder must show *both* “that a juror was asleep during crucial testimony” *and* that counsel knew about it. *Everett v. State*, 111 So. 3d 202, 203 (Fla. 5th DCA 2013); *see also Harper v. Florida*, 2018 WL 11207218, at *11 (S.D. Fla. Apr. 6, 2018) (White, Mag. J.) (“Under Florida law, in order to be granted relief on the matter of a sleeping juror, petitioner must show that the juror was sleeping, counsel knew about the problem, counsel failed to act on the problem, and petitioner was prejudiced by the inaction of counsel.”), *report and recommendation adopted*, 2019 WL 10744942 (S.D. Fla. Feb. 4, 2019) (Lenard, J.).

But Calder tells us almost nothing about this “sleeping juror”: He doesn’t tell us which juror it was, and he doesn’t try to identify the *specific* parts of the trial the juror (allegedly) slept through. What’s worse, he doesn’t tell us *when* exactly he notified his lawyer about the sleeping juror—and he never says that the juror continued to sleep *after* his lawyer found out about it. Most importantly, there’s no other evidence in the record to substantiate Calder’s claim. *See* Response at 56–57 (“Other than the Petitioner’s unsubstantiated allegations here and in the state forum, no showing has been made that a juror (Petitioner fails to specify which one) was nodding off . . . Petitioner [also] fails to allege which portion of the testimony the unnamed juror may have missed.”).

The state postconviction court thus reasonably concluded that there was no record evidence of a sleeping juror. *See* State’s Postconviction Response [ECF No. 12-1] at 20 (“The Defendant fails to specify who the alleged sleeping juror was, what the alleged missed testimony was and provides no record evidence to support his claim.”); *see also, e.g., Mackey v. Sec’y, Dep’t of Corr.*, 2017 WL 4003758, at *6 (M.D. Fla. Sept. 12, 2017) (Honeywell, J.) (“Furthermore, the record does not reveal whether the juror merely appeared to be sleeping, or, if he was in fact asleep, or, how long he slept. . . . Accordingly, Mackey has not shown that the state court . . . unreasonably determined the facts in rejecting this claim.”).⁶ Under AEDPA, “a determination of a factual issue made by a State court *shall be presumed to be correct.*” 28 U.S.C. § 2254(e)(1) (emphasis added). Calder can only “rebut[] th[is] presumption of correctness” by adducing “clear and convincing evidence” that the state postconviction court got it wrong. *Ibid.*; *see also Pye*, 50 F.4th at 1035 (“[A] state court’s factual determinations are ‘presumed to

⁶ True, the state postconviction court didn’t hold an evidentiary hearing on this claim. And Florida courts generally disfavor the summary denial of “sleeping juror” claims. *See McGraw v. State*, 796 So. 2d 1205, 1206 (Fla. 4th DCA 2001) (“It is usually improper to summarily deny a claim that counsel failed to act upon being informed that a juror was sleeping during trial.”). But “it is beyond debate that a state court’s failure to conduct an evidentiary hearing on a post-conviction motion does not constitute a cognizable claim for habeas relief.” *Carroll v. Sec’y, DOC*, 574 F.3d 1354, 1365 (11th Cir. 2009) (quotation marks omitted). And, for all the reasons we’ve identified, Calder’s federal sleeping-juror claim plainly fails on the merits.

be correct,’ and the petitioner has the burden of proving otherwise ‘by clear and convincing evidence.’” (quoting 28 U.S.C. § 2254(e)(1)). “Clear and convincing evidence entails proof that a claim is highly probable, a standard requiring more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Indeed, . . . review of findings of fact by the state court under § 2254(e)(1) is even more deferential than under a clearly erroneous standard of review.” *Mansfield*, 679 F.3d at 1309; *see also Turner v. Crosby*, 339 F.3d 1247, 1273 (11th Cir. 2003) (“[T]he state court’s findings of fact are entitled to a presumption of correctness and may be ignored only if the petitioner shows by clear and convincing evidence that the state court’s determination was not fairly supported by the record. . . . This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court’s findings lacked even fair support in the record.”).

Since Calder hasn’t produced *any* evidence—much less clear and convincing evidence—for his sleeping-juror claim, we **DENY** Ground Six.

VII. Ground Seven

Calder avers in Ground Seven that defense counsel was ineffective “for failing to argue in closing arguments that State witness Patrick Johnson testified that he witnessed the Defendant go leave the bag at the truck and seen [sic] the Defendant return right back to the house[.]” Petition at 18. This testimony was important to his defense, Calder explains, because it “clearly proved that the Defendant had not gone to the vacant apartment to get the gun” and refuted the State’s argument that he committed premeditated murder. *Id.* at 19.

Here, again, the record belies Calder’s claim. Calder’s lawyer *extensively* highlighted Patrick Johnson’s testimony during her closing arguments and *explicitly* argued that “there is no testimony that [Calder] went down to an apartment and picked a gun up out of there.” Trial Tr. [ECF No. 13-1] at 1370. Here’s how counsel framed this part of her argument:

Then we have [Calder] leaving and taking the suitcase to his truck—Patrick Johnson’s truck. Patrick Johnson is telling you that he’s standing at the doorway. Okay? . . . What did Patrick Johnson tell you? He went to his truck. *I would botly contest this whole idea suddenly today that [Calder] went down to the apartment to pick this gun up.* Okay?

[. . .]

Patrick Johnson told you [Calder] went to the truck, he brought his suitcase in there. There is absolutely no testimony before you—and please do not let this get confused. *There is no testimony that he went down to an apartment and picked a gun up out of there.*

Id. at 1369–70 (emphasis added). Since the record conclusively refutes Calder’s claim that counsel didn’t address Patrick Johnson’s testimony during her closing arguments, we **DENY** Ground Seven.

VIII. Ground Eight

Finally, in Ground Eight, Calder says that his lawyer should have introduced evidence that the victim had a “prior arrest record of [d]omestic violence.” Petition at 21. According to Calder, this arrest would have shown that the victim “had violent tendencies” and would’ve supported Calder’s “self-defense [claim] about being attacked by [the victim].” *Ibid.*

But the state postconviction court denied this claim because the victim’s prior arrest wouldn’t have been admissible under Florida law. *See* State’s Postconviction Response [ECF No. 12-1] at 22 (“[S]pecific acts of aggression and violence by the victim are inadmissible to prove that the victim was the aggressor and that the defendant acted in self-defense.” (quoting CHARLES W. ERHARDT, FLORIDA EVIDENCE § 405.3 (2012 ed.))). We cannot second-guess the state court’s interpretation of state law. *See McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992) (“A state’s interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of constitutional nature is involved.”). And (it goes without saying) a defense lawyer cannot be ineffective for failing to (try to) introduce inadmissible evidence. *See Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338, 1362 (11th Cir. 2020) (holding that counsel wasn’t ineffective “in failing to try to introduce inadmissible polygraph evidence”).

Calder’s claim that the victim had a prior arrest is also pure speculation. He doesn’t tell us when or where this arrest occurred, and he doesn’t give us a case number or other record by which we might find this arrest. *See* Petition at 21; Amended Postconviction Motion [ECF No. 11-3] at 262–64. A lawyer cannot be ineffective for failing to track down an arrest that may never have happened. *See, e.g., Giardina v. Sec’y, Dep’t of Corr.*, 2019 WL 5213331, at *13 (M.D. Fla. Oct. 16, 2019) (Scriven, J.) (denying an ineffective-assistance claim where “Giardina did not specifically identify or provide evidence of [the victim’s] prior conviction”); *see also Aldrich v. Wainwright*, 777 F.2d 630, 636 (11th Cir. 1985) (“Speculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation.”).

Ground Eight is therefore **DENIED**.

EVIDENTIARY HEARING

We won’t hold an evidentiary hearing in this case. “[W]hen the state-court record ‘precludes habeas relief’ under the limitations of § 2254(d), a district court is ‘not required to hold an evidentiary hearing.’” *Cullen v. Pinholster*, 563 U.S. 170, 183 (2011) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)). Based on what we’ve said—including and especially the presence of a robust trial and state-postconviction record—we don’t think we’d benefit from any further factual development.

CERTIFICATE OF APPEALABILITY

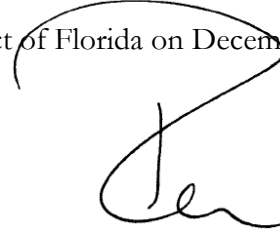
A Certificate of Appealability (“COA”) is appropriate only when the movant makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To deserve a COA, therefore, the movant must show that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a district court has disposed of claims . . . on procedural grounds, a COA will be granted only if the court concludes that ‘jurists of reason’ would find it debatable both ‘whether the petition states a valid claim of the denial of a constitutional right’ and ‘whether the district court was correct in its procedural

ruling.” *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001) (quoting *Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000)). Jurists of reason wouldn’t debate our assessment of Calder’s constitutional claims, so we’ll **DENY** any request for a COA.

* * *

Having carefully reviewed the record and the governing law, we hereby **ORDER AND ADJUDGE** that the Petition [ECF No. 1] is **DENIED**, that any demand for a COA is **DENIED**, that any request for an evidentiary hearing is **DENIED**, that all deadlines are **TERMINATED**, and that any pending motions are **DENIED** as moot. The Clerk shall **CLOSE** this case.

DONE AND ORDERED in the Southern District of Florida on December 18, 2023.



ROY K. ALTMAN
UNITED STATES DISTRICT JUDGE

cc: counsel of record
Winston Calder, *pro se*

A-4

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2013

WINSTON G. CALDER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D11-4237

[January 8, 2014]

TAYLOR, J.

Winston Calder appeals his conviction of first degree murder, arguing that the trial court erred in denying his motion to suppress the statements he made to police during a videotaped interrogation after he had invoked his right to counsel. Because the police failed to scrupulously honor Calder's invocation of his rights, and because the totality of the circumstances shows that Calder's reinitiation of the interrogation was nothing more than the product of improper police conduct, we reverse the denial of his motion to suppress and remand for a new trial.

On January 20, 2008, during an argument in which his girlfriend, Georgia Lee, tried to remove him from their apartment, Calder shot and killed Lee. Police arrested Calder the following day. After asking Calder some preliminary questions about his background, Detective Sessions advised Calder of his *Miranda* rights. When the detective asked Calder if he understood the rights he read to him, the following exchange occurred:

Calder: I would prefer a lawyer.

Detective: You would prefer to have a lawyer?

Calder: Yeah.

Detective: Okay. You have a lawyer?

Calder: I can't afford a lawyer, number four.

Detective: Four says if you cannot afford a lawyer one will be appointed to represent you, in other words, at no cost to you.

Calder: Yeah. When can I get that done?

Detective: When can you get that done?

Calder: Four, present a lawyer. You know, I want to know about those two, number three and number four.

Detective: Number three just simply means at any point in time during the interview if you wanted to have a lawyer present you would be allowed to have that. And number four means if you can't afford one, one will be appointed to represent you at no cost to yourself. In other words, it would be free of charge. If you couldn't afford it, that's what that basically means.

Now, the only thing is at that point in time I'm not gonna be able to get your side of the story and I'm not gonna be able to present your side of the story to the State Attorney's office.

. . . .

Detective: Are you willing to give your side of the story without a lawyer present, yes or no?

Calder: No, I want to feel the comfortable level.

. . . .

Detective: In other words, you want to tell your side of the story, however you will feel more comfortable having a lawyer present regardless of what happened?

Calder: Yes.

. . . .

Detective: So you saying you want to have a lawyer present? I can't talk to you anymore, do you understand that?

Calder: Yeah.

. . . .

Detective: Let me ask you this, would you feel more comfortable if the conversation we had was tape recorded . . . ?

Calder: Well a lawyer present to me--

Detective: . . . But the thing is I can't tape record a conversation with you without you first of all agreeing to speak to me without a lawyer being present. Do you understand?

Calder: I feel comfortable going to a lawyer.

Detective: You feel better having a lawyer?

Calder: Yeah.

Detective: Not a problem we can certainly do that. Okay, that is not a problem at all.

Calder: I feel more comfortable like that.

The detective told Calder that it was his legal right to have an attorney, but before leaving him alone in the interrogation room, the detective said to Calder:

[I]f you do change your mind and you do want to talk to me about your side of the story, okay, what I need you to do is -- knock on the door but knock kind of loud, just knock on it kind of loud, I'll come back in and then if you say you know what, Detective Sessions, I really, it really would make me feel better if I got the opportunity to give my side of the story, talk about what happened on Saturday, I know what happened, okay? I know that it's very difficult for you and it's going to be tough for you to sleep because the bottom line is you been through a tough situation and nobody wants to be in your shoes, obviously, but at the same time one of the things that makes somebody feel a lot better is if they get the opportunity to get things off of their chest, it kind of clears their mind, it clears their conscious [*sic*] and it makes them feel better, you know.

While Calder was alone in the interrogation room, he cried for several minutes. Less than ten minutes after the detective left Calder alone in the room, Calder opened the door and asked to speak to the detective. The detective returned and, after he administered *Miranda* warnings, Calder signed a waiver. Soon thereafter, Calder confessed to firing the fatal shot that killed Lee. He claimed that the shooting was accidental.

The trial court held a hearing on Calder's motion to suppress his statements. The court found that Calder unequivocally invoked his right to counsel when he told Detective Sessions that he would feel more comfortable with a lawyer. The court further

found that the detective ceased interrogating Calder after he invoked his right to counsel, and that Calder initiated further conversation with the detective. After considering the totality of circumstances surrounding the interrogation, the trial court found that Calder's decision to waive his right to counsel and give a statement to the detective was made knowingly, intelligently, and voluntarily. Based on those findings and conclusions of law, the trial court denied Calder's motion to suppress his statements.

Calder argues that the police obtained his confession in violation of his *Miranda* rights. He acknowledges that he initiated further discussions with the police after invoking his right to counsel, but contends that his subsequent waiver was not knowingly and voluntarily made. Instead, he contends that the waiver was the product of the detective's failure to scrupulously honor his right to counsel and to remain silent after he invoked his rights. He argues that the detective's persistent attempts to persuade him to "tell his side of the story" amounted to improper interrogation that vitiated the voluntariness of his subsequent waiver.¹

"A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *Jackson v. State*, 18 So. 3d 1016, 1027 (Fla. 2009); *State v. Triplett*, 82 So. 3d 860, 863 (Fla. 4th DCA 2011). Although an appellate court will defer to the trial court's findings of fact if they are supported by competent, substantial evidence, the appellate court will review *de novo* the trial court's application of the law to the facts; it will independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fifth Amendment. *Cuervo v. State*, 967 So. 2d 155, 160 (Fla. 2007); *State v. Glatzmayer*, 789 So. 2d 297, 301 (Fla. 2001); *Pierre v. State*, 22 So. 3d 759, 765 (Fla. 4th DCA 2009).

Both the Fifth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution "provide that persons shall not be 'compelled' to be witnesses against themselves in any criminal matter." *Moss v. State*, 60 So. 3d 540, 542 (Fla. 4th DCA 2011) (quoting *Ross v. State*, 45 So. 3d 403, 412 (Fla. 2010)). "To give effect to the Fifth Amendment right against self-incrimination, an accused person has the right to have counsel present during a custodial interrogation, and police must clearly advise the accused of that right." *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436, 467-72 (1966)).

"Under the well-settled principles of *Miranda*, once a suspect unequivocally invokes the right to counsel, all interrogation must cease." *McKenzie v. State*, 38 Fla. L. Weekly D898 (Fla. 4th DCA Apr. 24, 2013) (citing *Miranda*, 384 U.S. at 473-74). The suspect "'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges,

¹ We do not address Calder's argument that the detective minimized his *Miranda* rights by referring to the form as a "permission slip," i.e., a paper that would authorize the defendant to speak to him.

or conversations with the police.’ ” *Moss*, 60 So. 3d at 542-43 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)).

“[T]he term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *Black v. State*, 59 So. 3d 340, 345 (Fla. 4th DCA 2011).

When an accused invokes his right to counsel, “ ‘ . . . courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.’ ” *Moss*, 60 So. 3d at 544 (quoting *Smith v. Illinois*, 469 U.S. 91, 95 (1984)); *see also Sapp v. State*, 690 So. 2d 581, 584 (Fla. 1997) (“[O]nce an individual has invoked the *Miranda* right to counsel, a valid waiver of this right can be found only if the individual is the one responsible for reinitiating contact with the police.”); *Black*, 59 So. 3d at 346.

Contrary to the state’s argument that Calder’s invocation of his right to counsel was equivocal, the trial court correctly determined that Calder’s statement to the detective that he would “feel comfortable going to a lawyer” was an unequivocal invocation of his right to counsel. Moreover, the record shows that Calder made several statements during the interview that clearly invoked his right to counsel. As we commented in *Moss*, “it is hard to imagine more unequivocal statements.” 60 So. 3d at 543.

The record reveals that after Calder made his unequivocal request for counsel, the detective did not cease questioning him. Instead, he continued talking to Calder in an effort to coax him into speaking without counsel. The detective kept reminding Calder that this was his opportunity to present his side of the story and that doing so would benefit him. He further suggested that Calder might feel more comfortable telling his side of the story if he recorded the statement. He told Calder, however, that the only way he could record the interview was if Calder agreed to speak without a lawyer. The detective also told Calder that he would feel better and be able to sleep better at night if he got some things off his conscience.

These statements constituted interrogation because the detective should have known that they were “reasonably likely to elicit an incriminating response.” *Innis*, 446 U.S. at 301; *see also Cuervo*, 967 So. 2d at 164 (remarks by police to defendant that he still had an opportunity to tell “his side of the story” amounted to interrogation because the officers could reasonably anticipate they would elicit an incriminating response); *Black*, 59 So. 3d at 346 (detective was in violation of *Miranda* by continuing to ask defendant whether he wanted to talk to him about the crimes after the defendant had clearly invoked his right to counsel); *Gilbert v. State*, 104 So. 3d 1123, 1125 (Fla. 4th DCA 2012) (stating that “almost immediately after [the defendant] invoked his right to counsel, the detectives engaged in interrogation by telling the defendant that they were trying to ‘protect’ him and encouraging him to tell his ‘side of the story’ ”). Based on similar statements the

detective made in this case, we conclude that the detective did not cease questioning and thus failed to scrupulously honor Calder's invocation of his right to counsel.

Relying on *Serrano v. State*, 15 So. 3d 629 (Fla. 1st DCA 2009), the state argues that even if Calder did make an unequivocal request for counsel, the detective's statements to Calder did not constitute interrogation within the meaning of *Innis*, because they were intended only to clarify Calder's wishes and understanding of his rights before ending the session. However, as the state acknowledges, this view is contrary to our position in *Black* that *Serrano* contravenes *Miranda*'s holding that the police must cease questioning altogether when a defendant makes an unequivocal request for counsel during a custodial interrogation. *See Black*, 59 So. 3d at 346 n.6; *see also Green v. State*, 69 So. 3d 351, 354 (Fla. 2d DCA 2011) (noting our court's disagreement with *Serrano*). When, as in this case, an officer persists in asking a suspect whether he wishes to give his "side of the story" after the suspect has unequivocally invoked his rights, the officer is not asking harmless clarifying questions; he is violating the suspect's rights under *Miranda*. *See Cuervo*, 967 So. 2d at 165.

In any event, it is undisputed in this case that Calder himself initiated communication with the detective after having invoked his right to counsel. Several minutes after the detective left Calder alone in the interrogation room, Calder opened the door and requested to speak with the detective. The question therefore becomes whether, under the totality of the circumstances, Calder's confession during the second interrogation was voluntary.

Calder argues that the detective's continued interrogation of him, despite his invocation of the right to counsel, rendered his later confession inadmissible, notwithstanding the fact that he reinitiated contact with the detective. He contends that his decision to resume dialogue with the detective was a product of the detective's refusal to scrupulously honor his right to counsel by repeatedly urging him to tell his "side of the story."

The issue before us therefore lies at the intersection of two general constitutional principles. On the one hand, a suspect's request to cut off questioning until counsel can be obtained must be "scrupulously honored" and all questioning must cease. *Miranda*, 384 U.S. at 473-74; *Gilbert*, 104 So. 3d at 1125. On the other hand, "if the accused initiates further conversation, is reminded of his rights, and knowingly and voluntarily waives those rights, any incriminating statements made during this conversation may be properly admitted." *Welch v. State*, 992 So. 2d 206, 214 (Fla. 2008).

In *State v. Hunt*, 14 So. 3d 1035 (Fla. 2d DCA 2009), the Second District set forth a two-step analysis where a suspect makes statements to the police after invoking his rights:

Where, as here, a suspect has made statements to the police after invoking his right to remain silent, the correct approach to determining

whether the police have scrupulously honored the suspect's right to remain silent may require a two-step analysis. In the first step, courts must decide whether the police continued to interrogate the suspect despite his or her invocation of the right to remain silent. If the police continued the interrogation, then they failed to scrupulously honor the right to remain silent and the resulting statements are inadmissible. Under these circumstances, the court need not proceed to the second step.

On the other hand, if the interrogation ceased, the court must proceed to the second step of the analysis. In the second step, the court must determine who reinitiated the dialogue. The answer to this question determines what factors the court must examine in resolving the issue.

. . . .

[W]here it was the suspect who reinitiated the dialogue with the authorities, the inquiry is different. Under these circumstances, the courts consider whether the suspect's decision to change his or her mind and to waive his or her rights by speaking with the authorities was voluntary, knowing, and intelligent.

Id. at 1038-39 (emphasis added). The *Hunt* opinion, however, does not directly address a situation where the defendant reinitiated dialogue with the police after an earlier interrogation in which the police did not immediately cease questioning when the defendant invoked his rights.

On this issue, we find the Ninth Circuit's decision in *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991), to provide useful guidance. There, the Ninth Circuit held that the defendant's confession was involuntary where the defendant asked to talk to a lawyer, the police responded by telling the defendant it "might be worse" for him if he talked to an attorney, and three hours later the defendant "changed his mind" and talked to the police. According to the Ninth Circuit, the substance of the entire transaction demonstrated that the defendant could not be said to "initiate" further conversation with the police as that term is used in *Edwards*, and that the defendant's actions in requesting the officers were nothing less than the delayed product of coercive police conduct. *Id.* at 420, 423.

In a concurring opinion, Judge Kozinski advocated for a bright-line rule where the police badger a suspect after the right to counsel has been invoked:

[T]he police forfeit the benefit of the *Edwards* exception once they use the type of pressure tactics demonstrated in this record. Because *Edwards* is designed to prevent police from badgering suspects into giving up their right to counsel, the narrow exception to *Edwards* cannot apply in a case where the police actually engaged in badgering. If police want to keep the *Edwards* escape hatch open, they must cease their interrogation as soon as

the suspect asserts his right to counsel, and then hope he changes his mind on his own.

Id. at 427 (Kozinski, J., concurring).

Here, we need not decide whether we would adopt the rule suggested by Judge Kozinski. For resolving the present case, it is enough to say that the substance of the entire transaction confirmed that Calder did not voluntarily initiate the further conversation with police, and that his action in requesting the detective was merely the delayed product of the coercive police conduct. *See Collazo*, 940 F.2d at 419-24; *see also State v. Brown*, 592 So. 2d 308, 308-09 (Fla. 3d DCA 1991) (holding that the officer's statements after the defendant invoked his rights were likely to elicit incriminating responses and that the defendant's confession was not freely and voluntarily made, despite the fact that the defendant reinitiated the conversation); *but compare Craig v. State*, 599 So. 2d 170, 170-71 & n.2 (Fla. 3d DCA 1992) (even though the police continued questioning the defendant after what was at least an equivocal invocation of the right to counsel, the defendant's subsequent reinitiation of the interrogation two hours later cured any earlier Fifth Amendment defect where the defendant, who was awaiting transportation to the jail, overheard his co-defendant "throw him in" to the police, the defendant decided for his own best interests to confess his involvement, the police were "totally surprised" by the confession, and there was no indication that the confession arose out of a deliberate stratagem or any form of improper interrogation by the police).

We have considered *Stein v. State*, 632 So. 2d 1361, 1364 (Fla. 1994), but find it to be distinguishable. There, Stein was a suspect in a double murder. During an interrogation, Stein asked to speak to an attorney and the questioning was terminated. However, before leaving the room, one of the investigators told Stein that God would forgive him for what he had done. The investigators then left Stein alone in the interview room. Several minutes later, but before Stein had seen an attorney, Stein initiated contact with the investigators by knocking on the door and stating, "I want to talk about part of it." *Id.* at 1364. On appeal, the Florida Supreme Court held that the trial court properly denied the motion to suppress the confession, because Stein voluntarily initiated continued communication with the investigators. *Id.* Although the court noted that the investigator's comments regarding God were not appropriate, the court emphasized that, at the suppression hearing, Stein himself admitted that the brief conversation about God had no effect on his decision to talk to the investigators. *Id.* Therefore, in *Stein*, it was apparent from the record that the officer's comment did not induce Stein's reinitiation of the communication.

By contrast, in this case, it cannot be seriously questioned that the officer's improper comments, after Calder invoked his right to counsel, were designed to induce him to reinitiate the communication without a lawyer. This ploy was successful, bringing Calder to tears and prompting him to ask to speak to the detective only a few minutes after the first interrogation had ended. Although an appellate court must defer to the factual

findings surrounding the interrogation, it is not required to defer to the trial court's conclusions regarding voluntariness. This is a question of law subject to de novo review. *Brancaccio v. State*, 773 So. 2d 582, 583 (Fla. 4th DCA 2000). Here, the totality of the circumstances shows that Calder's reinitiation of the interrogation and waiver of his previously invoked right to counsel were not voluntary, but instead, the product of improper police conduct.

Based on the foregoing, we find that the trial court erred in denying Calder's motion to suppress his confession. Because we cannot consider this error to be harmless, we reverse for a new trial.

Reversed and Remanded.

DAMOORGIAN, C.J., and KLINGENSMITH, J., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ilona M. Holmes, Judge; L.T. Case No. 08001448CF10A.

Carey Haughwout, Public Defender, and John Pauly, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Melanie Dale Surber, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.

A-5

Page 1215

IN THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL
CIRCUIT IN AND FOR THE STATE OF FLORIDA

THE STATE OF FLORIDA)

Plaintiff,)

Versus)

WINSTON CALDER,)

Defendant.)

Case No. 08-1448 CF10A
Judge Holmes

ORIGINAL

APPEAL OF PROCEEDINGS
VOLUME X PAGES 1215 - 1327

The above-entitled cause on for hearing before the
Honorable Ilona M. Holmes, Presiding Judge at the
Broward County Courthouse, 201 Southeast Sixth Street,
Fort Lauderdale, Florida on the 16th day of February,
2015.

APPEARANCES:

MICHAEL J. SATZ, State Attorney,
BY: SHARI TATE,
Appearing on behalf of the State of Florida.

BY: PHYLLIS COOK and SUSAN LAWSON,
Appearing on behalf of the Defendant.

Boss Certified Realtime Reporting
954-467-6867

1562

Page 1216

1	INDEX			
2	WITNESS:	CROSS	REDIRECT	RECROSS
3	WINSTON CALDER	1217	1267	1298
4				
5				
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

Boss Certified Realtime Reporting
954-467-6867

1563

Page 1217

1 THE COURT: The record will reflect the
2 presence of the defendant, Mr. Calder, along with
3 counsel on his behalf, Ms. Cook and Ms. Lawson, Ms.
4 Tate on behalf of the state. Anything I need to
5 take up before we resume the cross-examination of
6 Mr. Calder?

7 MS. COOK: No.

8 THE COURT: Nothing from The Defense?

9 From The State?

10 MS. TATE: No, Your Honor.

11 THE COURT: All right. Mr. Calder, why don't
12 you --

13 Yes?

14 MS. COOK: I'm sorry, Your Honor. I don't know
15 if you want -- The State had given you a packet for
16 the charge conference. We were going to be asking
17 for the justifiable use of deadly force instruction.
18 I don't know if you wanted me to let you know now?

19 THE COURT: It's not a special, so we can do
20 that at the appropriate time.

21 Mr. Calder, if you'll resume your seat and when
22 the jury comes in, please stand.

23 All right, please bring in the jury.

24 THE COURT: Just for record purposes I did
25 provide you with two cases. One is Amos V. State,

Boss Certified Realtime Reporting
954-467-6867

1564

Page 1218

1 from the Florida Supreme Court, 618 So. 2d 157,
2 Supreme Court for the State of Florida 1993. And
3 from the 4th District Court of Appeal Burgess,
4 B-U-R-G-E-S-S, v. State, cited at 117 So. 3d, 889
5 from the year 2013, which stands for the ruling that
6 The Court made on Friday when we took the recess,
7 not to prevent the defendant from speaking to his
8 attorney.

9 MS. TATE: Thank you, Your Honor, I read them.
10 Thank you.

11 (Whereupon, the jury was escorted into the
12 courtroom, after which the following proceedings
13 were had:)

14 THE COURT: All right, Ladies and Gentlemen,
15 and Counsel, you all may be seated.

16 Mr. Calder you may be seated.

17 The record will reflect the presence of the
18 Members of the Jury, Mr. Calder is present on the
19 witness stand, Ms. Cook and Ms. Lawson on his
20 behalf, Ms. Tate on present on behalf of the State.

21 You may resume your cross-examination.

22 MS. TATE: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 (Continued)

25 BY MS. TATE:

Boss Certified Realtime Reporting
954-467-6867

1565

Page 1219

1 Q. Mr. Calder, [REDACTED] had a friend come by
2 the party that you were not happy about, correct?
3 A. That is not correct.
4 Q. That is not correct?
5 A. That is not correct.
6 Q. Did you identify that person as a special
7 friend?
8 A. I don't know that person so I, I have no
9 judgment against the person. It was a meet and greet
10 party so anybody could be there.
11 Q. Did you ask her if she had a special friend at
12 the party?
13 A. No, ma'am.
14 Q. Okay. Do you recall giving an answer different
15 than the one you just gave now under oath back on
16 January 21, 2008?
17 A. I tell the police it seem like that person was
18 a special friend. I say it seem like that person was a
19 special friend, I did not say that person a special
20 friend, it seems because what happened, that's why I
21 say that.
22 Q. Did you tell the police that she's had a
23 special friend come to the party?
24 A. I tell the police it seem like she have a
25 special friend, seems as if she have a special friend,

Boss Certified Realtime Reporting
954-467-6867

1566

Page 1220

1 I couldn't speculate.
2 MS. TATE: Your Honor?
3 THE COURT: You may.
4 BY MS. TATE:
5 Q. Would looking at what you said back on
6 January 21, 2008 refresh your recollection, Mr. Calder?
7 A. I did not say I never said a special friend, I
8 said it seemed as if that person is a special friend.
9 Q. You didn't say that back on January 21, 2008,
10 did you? You said she had a special friend, not it
11 seemed like a special friend?
12 A. Well, that is what I meant, it seemed like that
13 person was a special friend.
14 Q. So you agree with me that you were talking
15 about that -- you were upset that she had a special
16 friend come to the party?
17 A. I said it seemed as if she had a special
18 friend.
19 Q. Did you tell the police "it seemed" back on
20 January 21, 2008?
21 MS. COOK: Objection, Your Honor, asked and
22 answered.
23 THE COURT: Overruled.
24 BY MS. TATE:
25 Q. Did you use the words, seemed like a special

Boss Certified Realtime Reporting
954-467-6867

1567

Page 1221

1 friend, or it was a special friend?

2 A. I don't quite remember, but that's what I mean.

3 Q. So would reading what you said back on
4 January 21, 2008, refresh your recollection, Mr.
5 Calder?

6 A. I don't really sure right now. I don't really
7 sure.

8 Q. Showing you --

9 MS. TATE: Counsel, Page 5, Lines 202, 203,
10 204.

11 BY MS. TATE:

12 Q. If you can read that to yourself and let me
13 know when you're done. Did you finish reading that?

14 A. Yeah.

15 Q. And do you recall saying "she has a special
16 friend at the party"? Do you recall that?

17 A. You show me that but that's not exactly what I
18 mean, ma'am.

19 Q. And you did not think it was appropriate for
20 her to have this special friend at the party, did you?

21 A. As I say, it was a meet and greet party.

22 Q. Did you say that it was not appropriate for her
23 to have this special friend at the party?

24 A. If that person was a special friend, I never
25 see appropriate for he to be there.

Boss Certified Realtime Reporting
954-467-6867

1568

Page 1222

1 Q. It was not appropriate, correct?

2 A. Yeah.

3 Q. And you didn't like her talking to this
4 gentleman that was there, did you?

5 A. I don't know the person, so I couldn't say I
6 don't want the person there. I don't know the person.

7 Q. You didn't like her talking to him, did you?

8 A. [REDACTED] could talk to him, anybody, I don't
9 know about this. She could -- there's a lot of men
10 there, a lot of people there, she could associate with
11 a lot of people, I don't speculate on who the person
12 be.

13 Q. Did you tell [REDACTED], Mr. Calder, that it was
14 not appropriate for her to be talking to this man and
15 [REDACTED] told you that it was none of your business;
16 isn't that what happened?

17 A. Can you rephrase for me?

18 Q. You didn't like [REDACTED] talking to this guy and
19 [REDACTED] told you that it was none of your business?

20 A. I saw [REDACTED] in a deceitful, deceitful talk at
21 the time when I say that. She was like hiding behind a
22 tree, behind the dumpster with this person. Whoever's
23 ever the person was when I say that.

24 Q. And [REDACTED] told you it was none of your
25 business who she spoke to?

Boss Certified Realtime Reporting
954-467-6867

1569

Page 1223

1 A. Correct.

2 Q. And you had other friends at the party that you
3 told your friends to follow [REDACTED] and watch all of
4 her movements during the party, correct?

5 A. I would have to say I did say that, but it's
6 before because [REDACTED] and I have a, some form of, like
7 a disagreement, so that's why I say that to them.

8 Q. So she's talking to a guy, you tell her she
9 shouldn't be, it's not appropriate. And you tell your
10 friends to watch all of her movements at the party?

11 A. No, that's not the way.

12 Q. And you got angrier at [REDACTED] when it started
13 to rain, because you felt that she was off with this
14 special friend and she wasn't helping get the items up
15 into the apartment, correct?

16 A. No.

17 Q. You weren't angry at her for that?

18 A. No.

19 Q. Were you hurt and upset that she wasn't helping
20 you?

21 A. I wasn't hurt, I was just a little bit upset.

22 Q. And she cancelled the party, correct, and you
23 were upset about that?

24 A. She canceled the party, yes.

25 Q. Now at this point in time [REDACTED] is not your

Boss Certified Realtime Reporting
954-467-6867

1570

Page 1224

1 girlfriend, is she?

2 A. [REDACTED] is my girlfriend.

3 Q. At the night of the party you're telling this
4 jury that she was your girlfriend?

5 A. Yes, she was my girlfriend.

6 Q. Do you recall saying something other than that
7 under oath at any other time, Mr. Calder?

8 A. No.

9 Q. Would reading something under oath that you
10 said on January 21, 2008, refresh your recollection?
11 Would it refresh your memory to read it?

12 A. Sure.

13 MS. TATE: May I have permission to approach?

14 THE COURT: You may. You have continuing
15 permission.

16 MS. TATE: Thank you.

17 Counsel, Page 8 starting at Line 322 to 327,
18 question and answer.

19 THE WITNESS: What is that question?

20 BY MS. TATE:

21 Q. Read this question to yourself and read your
22 answer. Did you read your answer? Did you read your
23 answer?

24 A. Let's see it again.

25 Q. 322 to through 327. Starting at Line 322,

Boss Certified Realtime Reporting
954-467-6867

1571

Page 1225

1 question.

2 A. I never lied, 322 -- the officer is 322 --

3 Q. Right. You're being asked this question:

4 "She's still your girlfriend at this point, right?"

5 Your answer, "No. No." Do you recall telling --

6 MS. COOK: Objection, Your Honor, I would ask
7 the State to read the full length of that.

8 THE COURT: You'll have redirect.

9 Overruled.

10 BY MS. TATE:

11 Q. Did I just read that correctly that you said
12 no?

13 A. Yeah, I did say that. But she was my
14 girlfriend.

15 Q. Is [REDACTED] a grown adult woman at this
16 point in time?

17 A. Yes.

18 Q. She's free talk to anybody she wants to talk
19 to, isn't she?

20 A. Yes.

21 Q. You don't have the right to tell her who she
22 has a right to talk to, do you?

23 A. No, not really.

24 Q. But you did, you did tell her who she can talk
25 to, didn't you?

Boss Certified Realtime Reporting
954-467-6867

1572

Page 1226

1 A. Not in the content that you are putting it.

2 Q. Would you agree with me that you cared a lot
3 more about [REDACTED] at that point in time than she
4 cared about you?

5 A. As I tell you before, it's like today she's
6 okay and tomorrow she's off, so...

7 Q. Mr. Calder, would you agree that you cared a
8 lot more about her than she cared about you?

9 A. I know I care, yes. I know I care, I don't
10 know on her side.

11 Q. And she had been trying to get you out of the
12 apartment and trying to get you to leave for over a
13 month, correct?

14 A. About that, yeah.

15 Q. She told you in December she wanted you out and
16 that you were not boyfriend and girlfriend, correct?

17 A. No.

18 Q. Didn't you call [REDACTED]'s mother and complain
19 to [REDACTED]'s mother about how [REDACTED] doesn't love you
20 anymore and why won't [REDACTED] love me?

21 A. No.

22 Q. Didn't you talk to [REDACTED]'s mother about how
23 you even bought her a television set for Christmas and
24 her mother told you, return it, you cannot buy
25 someone's love; isn't that true?

Boss Certified Realtime Reporting
954-467-6867

1573

Page 1227

1 A. I remember, I remember I told her about the TV,
2 I don't remember about buying love.

3 Q. You felt that [REDACTED] spoke to another man,
4 that that was disrespectful to you, correct?

5 A. No.

6 Q. She embarrassed you in front of all your
7 friends?

8 A. No.

9 Q. Do you recall saying something different than
10 that back on January 21, 2008, that she embarrassed you
11 in front of all your friends?

12 A. I don't remember. Probably, probably, yeah,
13 but probably no, I don't quite remember.

14 Q. Would it help if you read what you said back on
15 January 21, 2008? Do you recall saying anything about
16 [REDACTED] trying to embarrass you in front of your
17 friends?

18 A. I don't quite remember, I told you.

19 MS. TATE: Counsel, Page 11, Lines 425 and 426.

20 BY MS. TATE:

21 Q. If you can read your answer right there?

22 A. Yeah, it is here.

23 Q. So you said you were angry because she was
24 embarrassing you in front of all your friends at your
25 birthday party, correct?

Boss Certified Realtime Reporting
954-467-6867

1574

Page 1228

1 MS. COOK: Objection, Your Honor.

2 THE COURT: Overruled.

3 BY MS. TATE:

4 Q. Correct?

5 A. Something like that.

6 Q. That you felt that you had the right to control
7 [REDACTED]; didn't you?

8 A. I never controlled [REDACTED], no.

9 Q. You didn't think you could control her?

10 A. No, I never.

11 Q. Did you think that it was your business who she
12 spoke to on the phone?

13 A. No.

14 Q. Did you get angry at her when she would be on
15 the phone?

16 A. No.

17 Q. You didn't get angry and tell her it didn't
18 look proper when she's on the phone?

19 A. No.

20 Q. When she's on the phone talking to other people
21 you don't recall saying she must stop it because it
22 doesn't look proper?

23 A. I never hung, I never hung up, I just tell her
24 sometimes it don't look right, because sometimes it at,
25 1, 2 o'clock in the night she's on the phone and both

Boss Certified Realtime Reporting
954-467-6867

1575

Page 1229

1 of us inside the bed lay down and she answer the phone,
2 1, 2 o'clock and tell her, I say it did not look
3 proper.

4 Q. So you told her it wasn't proper. And you went
5 so far as you felt the right to take the phone away
6 from her when you didn't think she should be on the
7 phone?

8 A. If you're in bed at 1, 2 o'clock at night
9 beside, beside your lover and somebody call her at that
10 time of the night, I think you, you get upset.

11 Q. And you told her she couldn't talk on the phone
12 and you took her phone from her?

13 A. I didn't tell her she couldn't talk on it, it's
14 her phone.

15 Q. Did you take the phone away from her,
16 Mr. Calder?

17 A. No, ma'am.

18 Q. Do you recall saying something other than that
19 back on January 21, 2008, that you took the phone away
20 from her?

21 A. I don't remember if I took her phone from her.
22 That's inappropriate if I do take her phone.

23 Q. Page 16, Line 619 through 626. If you can read
24 your answer right there, Mr. Calder?

25 A. At least look in there and if I even say that

Boss Certified Realtime Reporting
954-467-6867

1576

Page 1230

1 at the time, at the time when the police was trying to,
2 was trying to come, probably I might say it, but that's
3 not what I really mean.

4 Q. Do you agree with me that you said back on
5 January 21, 2008, that you told her you don't like it
6 and you even took the phone from her. And you told
7 her, it doesn't look good?

8 A. I say a while ago if you're in the bed with
9 your spouse at 1, 2 o'clock at night and phone call
10 come in, you, you, you not feel right. I been saying a
11 while ago, a new lover would like to see their spouse
12 answer phone 1, 2 o'clock at night in the bed beside
13 them, so that's what I tried to tell her.

14 Q. And you took the phone from her?

15 A. No, I did not take the phone from her.

16 Q. But you'd agree you said back on January 21,
17 2008, you took her phone away from her?

18 A. I might say that back then, but that was not
19 what happened.

20 Q. And [REDACTED] put a lock on her bedroom door
21 specifically to keep you out of her bedroom, correct?

22 A. I couldn't say.

23 Q. You know she put a lock on her bedroom door,
24 correct?

25 A. Yeah, I know about that, I guess.

Boss Certified Realtime Reporting
954-467-6867

1577

Page 1231

1 Q. Now, she's told you that she wants you gone
2 back in December, she's put a lock on her bedroom door.
3 Do you leave? Do you move out?
4 A. No, she didn't ask.
5 Q. Do you move out in December?
6 A. No, and she did not say that either.
7 Q. Could you have moved out in December?
8 A. Yeah, I could of.
9 Q. But you didn't?
10 A. We didn't have an argument about that.
11 Q. Did you have arguments leading up to the night
12 of your birthday party where [REDACTED] was complaining
13 about you being controlling and jealous and that you
14 were having almost nightly arguments about you being so
15 controlling and so jealous?
16 A. No.
17 Q. Did you argue about you being controlling and
18 jealous?
19 A. No.
20 Q. Do you recall saying something different than
21 that back on January 21st, 2008?
22 A. I don't quite remember.
23 MS. TATE: Counsel, Page 17, Page 18, bottom of
24 17, top of 18.
25 MS. COOK: Your Honor, may we approach sidebar?

Boss Certified Realtime Reporting
954-467-6867

1578

Page 1232

1 THE COURT: You may.
2 (Thereupon, the following proceedings were had
3 at sidebar by Court and counsel out of the hearing
4 of the jury:)
5 MS. COOK: Your Honor, we're going to object to
6 this. He did not say controlling and jealous, the
7 officer said controlling and jealous.
8 MS. TATE: But he agreed to the term
9 controlling and jealous. He adopts controlling and
10 jealous because he says yes.
11 THE COURT: Doesn't he say yes?
12 MS. TATE: Yes.
13 THE COURT: It's there and you have the right
14 to the redirect if he says something that's not
15 there.
16 (Thereupon, the sidebar was concluded, after
17 which the following proceedings were had:)
18 THE COURT: You may proceed.
19 BY MS. TATE:
20 Q. Bottom of 17, top of 18. Mr. Calder, if you
21 can read that, and your answer. Do you see that?
22 A. That's what Mr. Session say, not me.
23 Q. Okay.
24 A. That's what Mr. Session said, he tried to
25 coerce with me. That's what Mr. Session said, not me.

Boss Certified Realtime Reporting
954-467-6867

1579

Page 1233

1 Q. But what he says to you is that you guys were
2 arguing over you being controlling and jealous and your
3 answer is what?

4 A. Mr. Sessions tried to make me say something, I
5 don't say something.

6 Q. Oh, this is where --

7 A. Mr. Session is the one who say that to me.

8 Q. The words came out from Detective Sessions --

9 A. Say that word from Detective Session.

10 THE COURT: Counsel, please read the question
11 and answer.

12 BY MS. TATE:

13 Q. Were you asked, Mr. Calder, about your arguing,
14 about you being controlling and jealous and that type
15 of stuff?

16 A. And I tell him, no.

17 MS. COOK: Your Honor, objection, improper
18 reading of the question.

19 THE COURT: Overruled.

20 BY MS. TATE:

21 Q. And your answer was, "yeah." Is that what you
22 just read?

23 A. I was not jealous. I have several, several
24 people more than kids (sic).

25 Q. Now, let's talk about the gun for a minute.

Boss Certified Realtime Reporting
954-467-6867

1580

Page 1234

1 You said you found the gun in the pantry downstairs in
2 that vacant apartment?

3 A. Correct.

4 Q. And it was in a bag?

5 A. Correct.

6 Q. And you said you took it -- on Friday, you told
7 the ladies and gentlemen of the jury that you took it
8 to keep it safe because you didn't want it around
9 children or anyone at the party, correct?

10 A. Correct.

11 Q. All right. Now, did you unload it, as well, to
12 keep it safe?

13 A. I don't know how to unload it.

14 Q. Did you check to see if it was loaded?

15 A. No.

16 Q. So your testimony Friday was that you felt it
17 was safer to keep a gun in your pocket for the whole
18 night than it was to put it somewhere?

19 A. Not for the whole night, I keep it for safety
20 around kids all day at the apartment.

21 Q. And you said Friday that it was on your person
22 the whole night.

23 A. Yes.

24 Q. Okay.

25 A. The reason for that I was busy paying attention

Boss Certified Realtime Reporting
954-467-6867

1581

Page 1235

1 to my party and the people who I was directing to come
2 to the party. So I was so busy paying more attention
3 to my party more than to have it on me. People was
4 calling me to find a way to come to the party. So I
5 was more concerned about my party and to direct the
6 people to come by the party, so that's why.

7 Q. Okay. So you have the gun on you the whole
8 night. Now, you said also on Friday that you see at
9 some point that [REDACTED]'s talking to this special
10 friend, this other man, and he's holding her baby.

11 A. I don't know who is the person, I am the one
12 who use the word special friend. I am the only person
13 because he could be a family member, he could be
14 anybody. I just use the word special friend, I don't
15 know who is he. I am the one that put the word
16 special. I don't know if it's a cousin, it could be a
17 cousin, could be a nephew, it could be anybody.

18 Q. And you were upset that she was over there
19 talking to this man?

20 A. No, I just feel upset knowing that, looking for
21 her people at the party to help out with some family
22 and she wasn't there.

23 Q. Well, there was what, 50 people at the party,
24 approximately?

25 A. I couldn't say if it was 50 or 60 or 70, I know

Boss Certified Realtime Reporting
954-467-6867

1582

Page 1236

1 people was there.

2 Q. There was a lot of people at this party,
3 correct?

4 A. People was there, I could not say.

5 Q. And there's a lot of people, when it starts to
6 rain everybody is pitching in and helping, correct?

7 A. No.

8 Q. Are a lot of people carrying the table in? We
9 saw pictures of the table that got moved in under the
10 roof.

11 A. It was just M [REDACTED] and me and about two of my
12 friend, about four of us.

13 Q. So four people were helping you. So you had
14 help?

15 A. Two of my friends, M [REDACTED] and me.

16 Q. So you had help getting things up?

17 A. Everybody at the party wasn't helping me. It
18 was M [REDACTED] and two of my friends from Jamaica was
19 there.

20 Q. You didn't need to have [REDACTED] help because
21 you had other people helping you, correct, Mr. Calder?

22 A. It would be a great asset if she was there
23 helping.

24 Q. Because you didn't like the fact that she was
25 talking to another guy and not helping you, correct?

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1583

Page 1237

1 A. No, I don't respond to [REDACTED] talking to
2 another guy, that's not my problem.
3 Q. Now, she's holding her baby while she's talking
4 to this man, isn't she?
5 A. The man have the baby, that person have the
6 baby.
7 Q. The man had the baby?
8 A. Yes, the man have the baby.
9 Q. And you did not like that, did you?
10 A. I don't know this person so I couldn't say. I
11 was just upset that she was over there talking to
12 somebody.
13 Q. You're upset she's over there talking to
14 somebody, and now that somebody, that man is holding
15 her baby and that angered you?
16 A. That man have the baby.
17 Q. And that angered you?
18 A. Not really.
19 Q. Well, you went over there and you took --
20 A. I went over there to, to meet and greet with
21 the person. I say, good night, sir. My name is
22 Winston night. Let me shake your hand. It's a meet
23 and greet party. So I would like to meet some of
24 [REDACTED] friend as well as [REDACTED] know my friend. I
25 just met her so we're trying to get together, trying to

Boss Certified Realtime Reporting
954-467-6867

1584

Page 1238

1 meet some of [REDACTED] family, as well as friend and she
2 know some of my friend as well as my family also.
3 Q. Mr. Calder, you went over and took the baby out
4 of her arms and took the baby from them, didn't you?
5 A. No. No. No.
6 Q. You didn't take the baby?
7 A. No, I ask for the baby. I asked for my baby.
8 Q. You asked for your baby?
9 A. Yes, that was my baby.
10 Q. That's not your baby.
11 A. Not, not baby. But I am the one who taking
12 care of that baby.
13 Q. Are you the baby's father, Mr. Calder?
14 A. I'm not the baby father, but presently I was.
15 Q. That's [REDACTED]'s baby, correct?
16 A. Yes, [REDACTED] the one that birth her, yes.
17 Q. And [REDACTED] was standing right there with
18 her child, correct?
19 A. No, [REDACTED] never had the child.
20 Q. She's standing right there, correct?
21 A. Yes, she was right there.
22 Q. So you think you had the right to decide over
23 the child's mother?
24 MS. COOK: Objection; argumentative.
25 THE WITNESS: No, I, I took --

Boss Certified Realtime Reporting
954-467-6867

1585

Page 1239

1 THE COURT: Mr. Calder, when your attorney is
2 objecting, would you let me make a ruling before you
3 answer. You've got to kind of listen out for that.

4 THE WITNESS: Yeah, I wasn't paying attention
5 over there.

6 THE COURT: I'm sorry to interrupt you, but I'm
7 going to overrule the objection. Ms. Tate, try not
8 to get too close to him unless you're showing him
9 something.

10 BY MS. TATE:

11 Q. You felt you had the right to the decide who
12 could hold that baby more than the child's own mother,
13 correct?

14 A. No, this is not correct.

15 Q. Well, it was okay with [REDACTED] that he had the
16 baby, wasn't it?

17 MS. COOK: Objection, Your Honor.

18 THE WITNESS: No.

19 THE COURT: He's answered the question.

20 Overruled.

21 BY MS. TATE:

22 Q. And after you take the baby you refuse to give
23 the child back to her mother, didn't you?

24 A. Yes, in some circumstances, yes.

25 Q. No. In those specific circumstances,

Boss Certified Realtime Reporting
954-467-6867

1586

Page 1240

1 Mr. Calder, correct?

2 A. No, you're wrong.

3 Q. Did you give the child back to [REDACTED] when
4 she wanted her baby?

5 A. Yes, ma'am.

6 Q. No, that was after everyone told you at Desmond
7 Hendrick's house, true?

8 A. That's true, yes.

9 Q. When [REDACTED] kept asking you, give me my baby,
10 you wouldn't give her her baby, would you?

11 A. No, not at first. I never say it look
12 appropriate, the baby want to go to sleep, you know.

13 Q. You said Friday in your testimony that [REDACTED]
14 didn't deserve her baby, correct?

15 A. I could not say she don't deserve her baby. I
16 say the baby need to sleep, so more or less it never
17 look right for her to have the baby out at 1:00 at
18 night, 1:30, it wasn't looking right.

19 Q. But the baby was with her mother, right, Mr.
20 Calder?

21 MS. COOK: Objection, Your Honor, as to
22 badgering and asked and answered and speculation.

23 THE COURT: Overruled. Please watch those
24 speaking objections, Ms. Cook.

25 BY MS. TATE:

Boss Certified Realtime Reporting
954-467-6867

1587

Page 1241

1 Q. Now, you said Friday in your testimony that
2 Georgia ruined your party, correct?
3 A. I say she ruined it?
4 Q. She ruined your party.
5 A. I wouldn't say ruin, but in some way she
6 stopped the party. She here and said the party must
7 end.
8 Q. So you go upstairs. The party is off and you
9 said that's the first time that you realize that you
10 needed to go. That you got the message loud and clear
11 that you need to go, correct?
12 A. Can you say that again, please?
13 Q. On Friday when you testified you said that that
14 was the first time you realized that you needed to go.
15 That you got the message loud that you needed to go,
16 after she called that party off?
17 A. No, I didn't say that.
18 Q. Did you say you then went out to the patio to
19 cool off?
20 A. Yeah, I did say that.
21 Q. And you were having to cool off because you
22 were so upset?
23 A. No, that was before I come back up, not -- I
24 didn't say that at that time.
25 Q. When the party's over and all of you are

Boss Certified Realtime Reporting
954-467-6867

1588

Page 1242

1 upstairs in the apartment, you, [REDACTED], her two
2 children, M [REDACTED], was there arguing?
3 A. No, there was no arguing.
4 Q. So if there's no arguing, why do you need to go
5 to the patio to cool off?
6 A. I ask [REDACTED] two question and she never want
7 to answer me. So M [REDACTED] came in, I told M [REDACTED] came
8 in, as respect for your mother, for she I walk from
9 her. I try to avoid her, avoid a confrontation and
10 walk to the patio.
11 Q. Now, isn't it true, Mr. Calder, that she told
12 you she did talk to you, and what she told you is you
13 had no manners and she started packing you bags right
14 in front of you?
15 A. She told me that I ain't got no manners and I
16 just walked to the patio, I don't know when she's
17 packing a bag.
18 Q. You said on Friday that you went downstairs.
19 A. That is correct.
20 Q. And then the next thing you know, you see
21 Patrick Johnson up on the stoop of the stairwell and
22 you see that she's packed some clothes, correct?
23 A. Yes, Patrick call me on the phone.
24 Q. Isn't it true, Mr. Calder, that while you were
25 in the apartment still, that you had words when she

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1589

Page 1243

1 told you you had no manners and she started packing
2 your clothes right in front of you, you saw her packing
3 your clothes?

4 A. I did not answer her. I never saw her packing
5 no clothes.

6 Q. You never saw her packing your clothes?

7 A. I went downstairs so I leave everything and
8 everything was fine and I walk out.

9 Q. Do you recall saying something under oath back
10 on January 21, 2008?

11 A. And for that information I never give no oath.

12 Q. Okay.

13 A. But that information, I not swear under no
14 oath.

15 Q. So the things you said were not under oath?

16 A. Wasn't under oath. I tell the officer I'm not
17 in court so I'm not under no oath. It's just a general
18 talk, just a talk, not even a statement. I never give
19 no statement, but I was just talking to him.

20 Q. Okay. So what I'm getting ready to show you,
21 your answer is these answers were not under oath?

22 A. Were never under oath. All that I say there,
23 nothing under oath there.

24 Q. So in your mind it doesn't count?

25 A. It doesn't count.

Boss Certified Realtime Reporting
954-467-6867

1590

Page 1244

1 Q. Oh, okay. Well, let me show you what you said
2 under oath on January 21, 2008, and see if this
3 refreshes your recollection.

4 A. January 21st?

5 Q. January 21, 2008.

6 MS. COOK: Page?

7 MS. TATE: Page 22, Counsel, from Lines 884 to
8 901.

9 BY MS. TATE:

10 Q. If you can read that and tell me if that
11 refreshes your recollection?

12 A. Anything I say there is not under oath.
13 Anything here not under oath. I did not take a oath.

14 Q. Mr. Calder, can you read what's on those pages,
15 please?

16 A. I can read it, but I did not take it under
17 oath. It was not under oath.

18 Q. Would you agree with me that that's what you
19 stated back on January 21, 2008?

20 A. If that is what is on the paper and I was
21 having a general talk, I wasn't under oath.

22 Q. Would you please read the answer?

23 A. Right from where to where?

24 Q. I just underlined it, 892 down.

25 A. Yeah, I read it.

Boss Certified Realtime Reporting
954-467-6867

1591

Page 1245

1 Q. And isn't it true, Mr. Calder, that not like
2 what you said Friday, but, in fact, you were standing
3 right there, "she started to pack up my clothes.
4 "Q. She told you to pack up your clothes?
5 "A. She hasn't told me to pack, she start to
6 pack up my clothes."
7 So you were standing there and she started
8 packing your clothes right in front of you, correct?
9 A. Let me just rephrase that for you.
10 Q. Is that a yes or no, Mr. Calder, is that what
11 you said?
12 A. At some point in time she was packing my
13 clothes in front of me, at some point in time. At some
14 point in time she's doing it.
15 Q. So you get upset about that she is now being
16 disrespectful?
17 A. No, at the time when I saw her doing it I was
18 so happy that she tell me that I can go now.
19 Q. So you're happy now?
20 A. Yes, at the time she was packing my clothes I
21 was happy.
22 Q. So now you're happy so you go get in your truck
23 and you leave?
24 MS. COOK: Objection, Your Honor.
25 THE COURT: Overruled.

Boss Certified Realtime Reporting
954-467-6867

1592

Page 1246

1 Did you understand the question?
2 THE WITNESS: Yeah, I answer the question.
3 I did saw her pack my clothes but at the time
4 when he she packed my clothes I was happy at that
5 time.
6 BY MS. TATE:
7 Q. So you're happy so you could leave, couldn't
8 you?
9 A. Yes, at that time she said I can leave now.
10 Q. So you get upset with her about her packing
11 your bags and packing your stuff up --
12 A. No, I was so happy.
13 Q. Mr. Calder, let me finish.
14 A. Okay. I was so happy that she was doing it.
15 Q. So you go downstairs because she's packing your
16 clothes, correct?
17 A. I went downstairs with my suitcase, that's when
18 I went with my suitcase and I brought it downstairs to
19 the landing.
20 Q. And is it at this point, Mr. Calder, isn't it
21 true that you say you realize that that man is not
22 really a special friend, but it's more like an intimate
23 thing going on and that's when you realize that,
24 correct?
25 A. Because the attitude of [REDACTED], that's why I

Boss Certified Realtime Reporting
954-467-6867

1593

Page 1247

1 say that. I still don't know if they are involved or
2 not, but just the attitude that she give me an idea
3 that probably that is the person, I do not know.

4 Q. Now she's packing your stuff, she's kicking you
5 out. And you're thinking she's sleeping with this
6 other guy and you head downstairs, correct?

7 A. No. No. No. Just like that, I just grab my
8 suitcase and I brought it downstairs.

9 Q. Now, you go downstairs and when you go back
10 upstairs you've decided you're going to go back up and
11 confront [REDACTED] at this point, correct?

12 A. No, that is wrong. I went back to collect more
13 of my property.

14 Q. And when you go back upstairs she's not letting
15 you come in, correct?

16 A. The door already open so I just step in and she
17 barred the door. She barred right at the kitchen, so
18 she was by the kitchen.

19 Q. She's trying to kick at you to keep you from
20 coming inside the apartment, correct?

21 A. No, she flung something into any face.

22 Q. We're going to get to that part. Now she's
23 trying to kick you because you're trying to force your
24 way back into the apartment, correct?

25 A. Door already open, I was just going in to get

Boss Certified Realtime Reporting
954-467-6867

1594

Page 1248

1 my second set of property.

2 Q. She didn't want you to come in the apartment,
3 did she?

4 A. More likely, yes, she was standing right at the
5 kitchen.

6 Q. And she's trying to keep you out of coming into
7 the apartment, correct?

8 A. Some sort of way, yeah, could say that.

9 Q. You didn't turn around and leave at that point,
10 did you?

11 A. I was going for the rest of the property.

12 Q. But [REDACTED] was making it very clear to you
13 that she did not want you in her apartment, correct?

14 A. No, not necessarily, no.

15 Q. She's trying to force you out of the apartment,
16 isn't she?

17 A. No.

18 Q. Do you recall saying something different than
19 that, Mr. Calder, back on January 21, 2008?

20 A. As I said to you, that ain't no oath, I just
21 say that, so...

22 Q. Are you denying that you said those things now?

23 A. I could have said it but what I'm saying, I
24 never say it under oath, so...

25 Q. Page 25, Lines 988. If you can read that

Boss Certified Realtime Reporting
954-467-6867

1595

Page 1249

1 question and that answer?

2 A. Can you please step up the paper for me,
3 please?

4 Q. Read that question and that answer, please.

5 A. Yeah, I see it there.

6 Q. So [REDACTED] did not want you in and you were
7 trying to force your way back into the apartment,
8 correct?

9 A. As I say, I was trying get my property inside.
10 I was glad to leave.

11 Q. Mr. Calder, that wasn't my question. My
12 question was, you were trying to force your way into
13 the apartment?

14 A. No, not force. I was trying to get in, not
15 force.

16 Q. Would you agree with me, Mr. Calder, that you
17 were asked the question:

18 "Q. Why do you think she started to kick you?

19 "A. Because me force to come in her, me try
20 force to go through the door."

21 You used the word force two times.

22 A. I was giving the police a scenario what
23 happened. I was just trying to give them a scenario
24 what happened.

25 Q. Now, after she wouldn't let you in the

Boss Certified Realtime Reporting
954-467-6867

1596

Page 1250

1 apartment at that point you go back downstairs again,
2 correct?

3 A. No, that's the way they called jammed me up,
4 that's the way [REDACTED], M [REDACTED] grabbed me right there,
5 right at the doorway.

6 Q. Would you agree with me, Mr. Calder, it's at
7 that point that you go downstairs and go into the
8 vacant apartment?

9 A. No, I would not agree with you.

10 Q. I'm showing you Page 26, Lines 1030 through
11 about 1042, about the argument and the apartment.

12 A. This is early on, this is earlier from the
13 party, this is not after [REDACTED] and I talked, this is
14 before the -- the during the party time.

15 Q. Let me ask you this, Mr. Calder: Would you
16 agree with me that you didn't find the gun that day,
17 that you actually had known that that gun was there for
18 two weeks because you had seen it two weeks earlier in
19 the apartment?

20 A. Say that again.

21 Q. Did you see the gun two weeks earlier in the
22 apartment?

23 A. I just was at that complex, I don't know much
24 about that complex. I haven't seen the gun for two
25 weeks.

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1597

Page 1251

1 Q. Do you recall saying you saw the gun about two
2 weeks ago?

3 A. Who said that?

4 Q. That you saw the gun in the vacant apartment
5 about two weeks ago.

6 A. Me saw that gun?

7 Q. Yes.

8 A. I not even know about that apartment, it's when
9 I came from work and she tell me that she get the
10 apartment. I did not know that apartment.

11 Q. Did you go down to the vacant apartment and get
12 the gun, Mr. Calder?

13 A. No, ma'am.

14 Q. When Patrick is there you still try and go up
15 and get into the door. When you see Patrick Johnson,
16 do you go up and try and get into the apartment again?

17 A. I was trying to get my property from the second
18 time, so Patrick was by the door so I was trying to go
19 and get my property.

20 Q. And [REDACTED], does she kick at up and brace
21 the door again?

22 A. She was by the door. She was by the kitchen
23 door.

24 Q. Is she bracing the door and kicking at you to
25 keep you out?

Boss Certified Realtime Reporting
954-467-6867

1598

Page 1252

1 A. Not at this time.

2 Q. When you try to push the door open, [REDACTED] is
3 kicking you, correct?

4 A. The door already open.

5 Q. Is she trying keep you out of the apartment at
6 this time, Mr. Calder?

7 A. When I was going back for the second thing she
8 was trying.

9 Q. She was trying to keep you out?

10 A. Yes, but I was trying to get my second
11 property.

12 Q. But you wouldn't leave, you were trying for
13 force your way in, correct?

14 A. I never reach in, so I never force my way.

15 Q. And everything happened because you forced the
16 door, correct?

17 A. I didn't force the door, the door was already
18 open.

19 Q. And you said on Friday that it was Patrick
20 Johnson that was hitting you and [REDACTED] was hitting
21 you, correct?

22 A. Patrick, [REDACTED], and M [REDACTED]

23 Q. Didn't you say M [REDACTED] had backed up and wasn't
24 hitting you, it was just Patrick and [REDACTED]?

25 A. I say after they flung the thing in my eye, I

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1599

Page 1253

1 cover my eye like this (Indicating). I was protecting
2 my eye and I feel the hit and kick all over my body.

3 Q. And it was [REDACTED] and her brother from the
4 inside trying to keep you out?

5 A. Yea, [REDACTED] and her brother from the inside
6 and Patrick was behind me right at the door. They trap
7 me.

8 Q. And you forcing -- you were trying to force the
9 door open?

10 A. No. The door already open, I was not forcing
11 the door. The door already open.

12 Q. Do you recall giving a different answer than
13 that, Mr. Calder, back on January 21, 2008?

14 A. The door was already open, I wasn't forcing the
15 door.

16 MS. TATE: Counsel, Page 32.

17 BY MS. TATE:

18 Q. Mr. Calder, Lines 1291 - 1293.

19 A. As I make it clear that's a reference with the
20 police.

21 Q. I know you want to say it's not under oath.

22 A. It's a reference, the police and I were just
23 talking, we were referencing, it wasn't no oath.

24 Q. Would you agree with me, Mr. Calder, the
25 question was, "You were trying for force it open?" And

Boss Certified Realtime Reporting
954-467-6867

1600

Page 1254

1 your answer was, "Yeah." "And then they were kicking
2 at you?"

3 A. I say I was not forcing.

4 MS. COOK: Objection. May we have -- may we
5 approach sidebar?

6 THE COURT: Overruled.

7 Denied.

8 BY MS. TATE:

9 Q. Would you agree with me, Mr. Calder, that
10 [REDACTED] and M [REDACTED] are kicking at you to keep you out
11 of the apartment? She's fighting you to keep you out
12 of her apartment?

13 A. That is correct.

14 Q. Not that you were inside of the apartment and
15 you were trying to leave, they were kicking at you to
16 keep you from being able to get in to them, correct?

17 A. I was going to get my second set of property.
18 That's what I was trying to get, my second set of
19 property.

20 Q. And you were physically trying to fight her and
21 her brother to get into the house, correct?

22 A. No.

23 Q. Now, at any point in time up to this point you
24 could turn around and walk down the stairs, get in your
25 truck and leave, correct?

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1601

Page 1255

1 A. Patrick Johnson was behind me, blocking me.
2 They trapped me right there. I could not go nowhere.
3 I could not go in or out.
4 Q. Would you agree, Mr. Calder, that you were the
5 one at the front door trying to get in, correct?
6 A. Can you rephrase that for me, please?
7 Q. You were trying to get into the apartment?
8 A. I was, I was going to get my second set of
9 things.
10 Q. And the person you were fighting with was
11 [REDACTED] and M [REDACTED] correct?
12 A. I wasn't fighting, they were fighting me. I
13 wasn't doing the fight, they was fighting me.
14 Q. The people you were having a confrontation with
15 was [REDACTED] and M [REDACTED] --
16 A. And Patrick.
17 Q. -- not Patrick?
18 A. And Patrick.
19 Q. You were not having any problems with Patrick,
20 correct?
21 A. I thought Patrick was my friend, so I pass him,
22 I thought he was there to protect me. He was there for
23 me, but I realize he was there then kicking and beating
24 at me.
25 Q. So on Friday you said that Patrick Johnson was

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1602

Page 1256

1 fighting you.
2 A. Yeah.
3 Q. But isn't it true, Mr. Calder, that the only
4 people you were having any physical confrontation with,
5 was you were trying to -- M [REDACTED] G [REDACTED] and [REDACTED]
6 were kicking at you to keep you out of their apartment,
7 correct?
8 A. And Patrick also.
9 Q. Do you recall saying something different than
10 that back on January 21, 2008?
11 A. No, I don't right now.
12 MS. TATE: Counsel, Page 34, Lines 1357 - 1360.
13 THE WITNESS: I did say that.
14 BY MS. TATE:
15 Q. So what you said is that it was [REDACTED] and
16 M [REDACTED] so they were basically physically fighting
17 with her and her brother, is that the truth? And you
18 said, yes?
19 A. And also Patrick, but at the time I thought
20 Patrick was there to aid me.
21 Q. You didn't say that. You didn't say Patrick --
22 A. As I say that ain't no oath, that's just a
23 reference to the police. That ain't no oath, so
24 whatever I say in there don't mean clar, (sic) you
25 know? That's no statement, that ain't nothing.

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1603

Page 1257

1 Q. Are these your words on January 21, 2008, Mr.
2 Calder? This is what you said, isn't it?

3 A. As a reference I was just talking about a
4 reference, it ain't no statement.

5 Q. So you didn't think it would be important to
6 say that?

7 A. No, it was general talking, a general talking,
8 just I talk to my girl, I talk to one of my friend, I
9 just talk general. I went there reference, I say I sex
10 that girl, I meant I like her, I tell him this basic
11 thing, so it's just a general talk to the officer.

12 Q. After she told you to leave and was throwing
13 your clothes out, is that the time that you went and
14 got the gun?

15 A. No.

16 Q. Do you recall saying something different than
17 that back on January 21, 2008?

18 A. Probably at this time I tell you that was a
19 talk with the officer, that ain't no statement. So if
20 you show me that it still -- I still say it's a general
21 talk. So if you show that to me, I did not give a
22 statement.

23 Q. Would it refresh your recollection to read what
24 you said back on January 21, 2008, Mr. Calder?

25 A. I could read the whole paper, I could read the

Boss Certified Realtime Reporting
954-467-6867

1604

Page 1258

1 whole paper but I still did not say -- I did not give
2 the police a statement, I did not make anything.

3 Q. Are you refusing to read to refresh your
4 recollection, Mr. Calder?

5 A. I can read the whole book, if you want me to I
6 can read with the whole book.

7 THE COURT: Mr. Calder, just read the portion
8 that Ms. Tate is showing.

9 MS. COOK: Page and line.

10 MS. TATE: 1537 - 1542, Page 38.

11 BY MS. TATE:

12 Q. Does that refresh your recollection,
13 Mr. Calder, yes or no?

14 A. It seems so, yeah.

15 BY MS. TATE:

16 Q. So do you recall being asked:

17 "After she told you she wanted you to leave and
18 she was throwing your clothes out, when you said
19 that you left for a while you went walking, is that
20 when you went to the vacant apartment to get the
21 gun?

22 "A. Yeah."

23 A. No.

24 Q. Is your answer yeah on January 21, 2008?

25 A. That say that, but that wasn't...

Boss Certified Realtime Reporting
954-467-6867

1605

Page 1259

1 Q. And it's after you go downstairs after she's
2 thrown your clothes out, refused to let you in, that
3 you go get a gun. You arm yourself and you head
4 upstairs, correct?

5 A. That is not correct.

6 Q. Now, you pulled the gun out when you go back
7 upstairs and M [REDACTED] is able to hit you when they're
8 trying to keep you out, and that's when you pulled the
9 gun; isn't it true?

10 A. Can you say that for me again?

11 Q. Did you pull the gun out when you went back
12 upstairs when M [REDACTED] was able to hit you in the face?

13 A. No, that is not true.

14 Q. Did you say that M [REDACTED] threw anything at you?

15 A. I don't quite remember.

16 Q. Now, you said Friday that you were blinded with
17 liquid that got thrown in your face while you were
18 inside the apartment trying to get out; is that what
19 your testimony was Friday?

20 A. Yes, correct.

21 Q. Now, is it actually true, Mr. Calder, that they
22 threw something at you, but it was not liquid, it was
23 actually what you described as a small vase?

24 A. A vase.

25 Q. And no liquid?

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1606

Page 1260

1 A. A vase having liquid.

2 Q. Do you recall saying something different than
3 that back on January 21, 2008? Page 40 Lines 1622, or
4 starting up at 1619 down to 1632, about what was thrown
5 at you.

6 A. As I say, this is a reference between me and
7 the police.

8 Q. It was just a reference?

9 A. Between me and the police.

10 Q. So would you agree with me, Mr. Calder -- so
11 would you agree with me --

12 A. They threw liquid at me.

13 Q. So would you agree with me what you want to
14 refer to as your reference, that you were asked.

15 "Do you know what it was they threw at you?"

16 Answer from you, "It wasn't liquid."

17 You were asked again, "It wasn't liquid?"

18 And your answer for the second time, "It wasn't
19 liquid." And then you go on to describe, you think it
20 was a small vase with no liquid.

21 A. At that time. At that time.

22 Q. So you pull a gun. You're not blinded by any
23 liquid, you're the one trying to force your way into
24 the apartment and they won't let you come in and you
25 pull a gun, correct?

Boss Certified Realtime Reporting
954-467-6867

1607

Page 1261

1 A. That is not correct.

2 Q. Is the reason you shot them, shot [REDACTED]
3 was because they kicked you and hit you at the door to
4 keep you out?

5 A. My life was in danger. I was trying to protect
6 my life.

7 Q. Was the reason you pulled the trigger and fired
8 a shot because they hit you in the face and kicked you
9 and tumped you when you were trying to get in?

10 A. I feel like I was about to pass out, that is
11 when I pull the gun to scare them.

12 Q. Because now you were going to pass out?

13 A. I said they was beating me and I feel like I
14 was about to pass out and so I pull the gun to scare
15 them.

16 Q. Mr. Calder, you could have turned around and
17 walked down those stairs any time you wanted, couldn't
18 you?

19 A. Patrick was there, he block me. As I tell you
20 before, they trap me.

21 Q. Again, I don't think I got a direct answer.
22 Was the reason you pulled the trigger and fired a shot
23 because they hit you in the face and kicked you?

24 A. They jumped me, they beating me, they punching,
25 kicking, everything, flung something in my face,

Boss Certified Realtime Reporting
954-467-6867

1608

Page 1262

1 everything.

2 Q. So that would be a yes, you pulled the gun
3 because they hit you in the face?

4 A. Yeah.

5 Q. Okay. And when you pulled the gun and you put
6 it around the door and fired a round, you knew that
7 [REDACTED] was behind the door, correct?

8 A. Not 100 percent. I knew somebody was standing
9 there because the door was bracing into my chest.

10 Q. Are you saying today that you didn't know
11 [REDACTED] was behind the door when you put the gun behind
12 the door and fired the shot at her?

13 A. I say I know somebody was behind there because
14 the person was bracing the door into the chest.

15 Q. Do you recall saying something different than
16 that, Mr. Calder, back on January 21, 2008?

17 A. I could have, yes.

18 Q. So you could have said back then that [REDACTED]
19 was behind the door and you knew it?

20 A. Yeah. As I say, I know someone was behind the
21 door, yeah.

22 Q. You didn't fire the gun up in the air, correct?

23 A. The angle I was, the angle I was -- can I
24 demonstrate it? Can I give an indicator? I was backed
25 up to the wall and I go in my pocket and come like this

Boss Certified Realtime Reporting
954-467-6867

1609

Page 1263

1 (Indicating). So I did not point any gun, just come up
2 like this.

3 Q. You didn't fire the gun up in the air, did you?

4 A. No, I did not put my hand in the air to fire.

5 Q. You didn't fire the gun at the ground, did you?

6 A. No.

7 Q. You didn't fire the gun out toward the parking
8 lot, if all you wanted to do was scare someone, did
9 you?

10 A. I just fire the gun. I did not indicate east,
11 west, north or south. I did not indicate if it was
12 east, west, north, south, I just secure it and I fire
13 to scare them off.

14 Q. Now, you also told this jury on Friday that the
15 way you found out that Georgia was dead and that you
16 had killed her was that you called a friend and a
17 friend told you, correct?

18 A. Yeah, first I called M [REDACTED] at first and then
19 I called a friend named Melanie.

20 Q. And that's how you say you found out that you
21 had actually successfully killed her, correct?

22 A. I don't understand that.

23 Q. You found out from Melanie that you killed her,
24 correct? That was your testimony Friday.

25 A. Melanie told me that Georgia die.

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1610

Page 1264

1 Q. Now, isn't it true that a couple of hours after
2 you shot and killed [REDACTED], that you were sitting
3 in McDonald's watching the news and it came on the news
4 at McDonald's about how she had been murdered in her
5 apartment; isn't that how you found out?

6 A. No, a different time, further down in the
7 afternoon.

8 Q. Do you recall saying something different than
9 that, Mr. Calder, back on January 21, 2008?

10 A. I don't quite remember.

11 MS. TATE: Counsel, Page 51, Line 2080, and
12 then Page 55, the top portion of the page.

13 BY MS. TATE:

14 Q. Mr. Calder, read this to refresh your
15 recollection about the first time. And then wait a
16 minute --

17 A. Maybe I first said that before.

18 Q. Is that what it says, first, Mr. Calder, that
19 you were at McDonald's and the news came on and that's
20 how you found out?

21 A. I clear it up before.

22 Q. Is that what it says, Mr. Calder?

23 A. I also say that, yeah, that's why. But later I
24 clarify this first. Somebody tell me [REDACTED], Melanie
25 first person tell me. I heard it on the news. There's

Boss Certified Realtime Reporting
954-467-6867

1611

Page 1265

1 a different between heard and hear. I hear it from
2 Melanie first, but I heard it on the news. So there's
3 two different things. So I first hear it from Melanie,
4 then I first heard it on the news. So there's two
5 time.

6 Q. And --

7 A. Somebody told me and then I heard it for myself
8 on the news, that's the first time I heard it.

9 Q. So you knew -- would you also agree with me,
10 Mr. Calder, at about 8 or 9 o'clock in the morning you
11 knew that you had shot and killed [REDACTED]? And at
12 8 o'clock, 9 o'clock in the morning sitting at a
13 McDonald's watching the morning news, you know that
14 [REDACTED] has been killed, correct?

15 A. I heard it on the news. I did not believe it,
16 I heard it on the news.

17 Q. And, again, going back to the main reason you
18 pulled the trigger was "because she and her brother
19 tumped me in the face and he kicked me," correct?

20 A. Because they gang me, they trap me, they tump
21 me and beat me.

22 Q. Not Patrick. M [REDACTED] and [REDACTED], correct?

23 A. I say Patrick, too, because Patrick was the one
24 behind me.

25 Q. But that's not what you said back on

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1612

Page 1266

1 January 21, 2008, was it?

2 A. But that's the way it go.

3 Q. And the reason you pulled the trigger and
4 killed somebody is because "she and her brother tumped
5 me in my face," correct?

6 A. I say they ganged me, they throw me in my face
7 several time. And I fire to scare them off. I didn't
8 know the shot catch her, I did not know.

9 Q. Would you agree with me, Mr. Calder, that it
10 was three weeks of build up and frustration and
11 stress --

12 A. For what?

13 Q. -- that led you to do what you did on that
14 night?

15 A. No, I won't agree with you.

16 Q. For three weeks you'd been trying to talk to
17 her, correct?

18 A. Can you illustrate what you're talking about?
19 I've been talking to her all months around, so I don't
20 know what talk you're talking.

21 Q. Would it help if you refreshed your
22 recollection from something you said January 21, 2008?

23 MS. TATE: Counsel, it's Page 65.

24 BY MS. TATE:

25 Q. About this whole situation, and read those,

Boss Certified Realtime Reporting
954-467-6867

1613

Page 1267

1 Lines 2644 through 2645, if you can read your answers.

2 A. Yeah, I read it. I don't have to read it, I
3 already know what is this.

4 Q. Would you agree with me, Mr. Calder, that you
5 were asked, "It was three weeks of build-up and
6 frustration and stress;" and you said, "yeah"?

7 A. I was explaining to the police that we have
8 like a disagreement for the past, you could say past
9 three weeks, past four weeks because this is the
10 domestic as man and woman. We are in a relationship,
11 we do talk, it's a form of a relationship with me and
12 her have a disagreement of things and it squash again
13 and we have love again and it squash again, that way
14 for about a disagreement for the past two, three weeks.

15 Q. Mr. Calder, you'd agree with me at no time did
16 [REDACTED] ever have a weapon in her hand, did she?

17 A. Yeah, they, they throw something in the face
18 with a weapon, and with a vase. And Patrick, yeah,
19 they use their fists and then hand for their weapon and
20 the vase to blind me.

21 Q. They blinded you, but you said there was no
22 liquid?

23 A. With the vase with the liquid.

24 Q. Would you agree with me back on January 21,
25 2008, you said not once but twice there was no liquid?

Boss Certified Realtime Reporting
954-467-6867

1614

Page 1268

1 A. I would not agree with you.

2 Q. You agree with me that's what you read?

3 A. As I say to you that was a reference to the
4 officer, that ain't no statement. He did not say he
5 want to take a statement, I was explaining to him
6 something.

7 MS. TATE: Your Honor, I have no further
8 questions.

9 THE COURT: Redirect? Before -- you've been
10 sitting for an hour and 10 minutes.

11 THE WITNESS: Can I say something, Judge?

12 THE COURT: No. No. No.

13 Do you need a bathroom break?

14 Redirect, please.

15 MS. COOK: Thank you, Your Honor.

16 REDIRECT EXAMINATION

17 BY MS. COOK:

18 Q. Winston, when we left here on Friday the State
19 was having you do a demonstration, so let's start
20 there. And let's make this clear, when you were
21 heading -- at the moment that you pulled out the
22 firearm, okay, where was your head, which side of the
23 door was it on?

24 A. Facing outside.

25 Q. At the moment that you pulled out the firearm,

Boss Certified Realtime Reporting
954-467-6867

1615

Page 1269

1 where was your back?
2 A. Back against to the wall.
3 Q. Was it on the wall -- where was the door frame?
4 Where was the door?
5 A. All right. The door open to your left. If
6 you're on the outside, the door swing, swing on the
7 inside, the door swing on the inside.
8 Q. So it comes on the inside?
9 A. Yes, it was swung on the inside, so I was on
10 the on the opposite side right on the wall there.
11 Q. Okay. Closer to the kitchen?
12 A. Yes, the wall by that kitchen.
13 Q. And was the -- and your head was on the
14 outside?
15 A. Yes, looking at the outside because the door,
16 the door would hit me in my forehead. So I have to
17 take away my forehead so it catch me between my chest
18 and my arm.
19 Q. Okay. And you said that before you kind of
20 like pulled the gun out of your pocket, right?
21 A. Yes, ma'am.
22 Q. Could you please stand up and demonstrate that
23 again, because you were trying to demonstrate it. Not
24 fully, just right there, Winston, is fine.
25 A. Yeah.

Boss Certified Realtime Reporting
954-467-6867

1616

Page 1270

1 THE COURT: You've got to keep your voice up
2 now that you're away from the mike.
3 THE WITNESS: I'm trying.
4 This is the wall, this is the wall, this is the
5 kitchen wall. This represent the kitchen wall. The
6 door, the door, the door swing, as I said, the door
7 swing on the inside. So she have to push it like,
8 and push it this way, crash into my chest. I was
9 like right here, so my face turn like this because
10 if I did not do it, the door would burst my
11 forehead. So I tried to protect my eye as well so
12 at the same time I remember and I go into my pocket
13 like this and I come my arm here (Indicating).
14 BY MS. COOK:
15 Q. That's the elbow?
16 A. Yes. This would hit onto the wall, so I do
17 like this just to fire to scare them off.
18 Q. Okay. Go ahead and sit down. When you fired
19 the gun were you aiming at anyone?
20 A. No. No.
21 Q. Were you able to aim at the ground?
22 A. No, neither.
23 Q. Were you able to aim at the ceiling?
24 A. No, neither.
25 Q. Okay. Were you able to aim at the parking lot?

Boss Certified Realtime Reporting
954-467-6867

1617

Page 1271

1 A. No, neither.

2 Q. Did you feel like at that point that you had
3 any other choice?

4 A. No other choice.

5 Q. All right. Let's go back through this morning.
6 The State was indicating to you -- let's start back
7 when Georgia was missing at the party and you located,
8 or you saw her off in a distance.

9 A. Can I say something?

10 Q. About that?

11 A. Can I take a few minutes? I feel like I'm
12 about to cry.

13 MS. COOK: Okay.

14 THE COURT: Ladies and Gentlemen, we're going
15 to take a break. Please do not discuss the case
16 while you're in the jury room and I'll get you out
17 in about 10 minutes.

18 (Whereupon, the jury was escorted out of the
19 courtroom, after which the following proceedings
20 were had:)

21 THE COURT: Ladies and Gentlemen, we're in
22 recess for 10 minutes.

23 (Whereupon, a recess was taken, after which the
24 following proceedings were had:)

25 THE COURT: Please bring in the jury.

Boss Certified Realtime Reporting
954-467-6867

1618

Page 1272

1 (Whereupon, the jury was escorted into the
2 courtroom, after which the following proceedings
3 were had:)

4 THE COURT: All right, Ladies and Gentlemen,
5 you all may be seated.

6 The record will reflect the presence of all the
7 members of the jury, Mr. Calder is present with Ms.
8 Lawson and Ms. Cook on his behalf. Ms. Tate is
9 present on behalf of The State.

10 You may resume your redirect.

11 MS. COOK: Thank you, Your Honor.

12 BY MS. COOK:

13 Q. All right. Winston, when you saw [REDACTED] you
14 said it seems -- during the party you said it was in a
15 deceitful way.

16 A. Yes, suh.

17 Q. Can you please explain to the jury what you
18 mean by that?

19 A. I'm on my way back from the apartment to the
20 party. I saw her on the left between the parking lot,
21 between a car and there was a tree and there was a
22 dumpster there. So the dumpster would hide her, so I
23 go to my left and I saw her. So I do walk over to
24 introduce myself to the person she was talking to,
25 because I remember it's a greet and meet party. But I

Boss Certified Realtime Reporting
954-467-6867

1619

Page 1273

1 saw, I saw the guy stoop down. [REDACTED], [REDACTED] have
2 her hand over his shoulder and the guy have the baby
3 and it's like this. Can I just demonstrate?

4 Q. Sure.

5 A. The guy have the baby here and she's standing
6 over him like this (Indicating).

7 Q. All right. Was it in such a manner that you
8 felt like you had to -- did you feel jealous?

9 A. No, I wasn't jealous but I was, I showed I was
10 upset at first.

11 Q. Okay. Can you please explain to the jury why
12 you were upset?

13 A. Yeah, I was just a little bit upset because to
14 go I see her -- the position I saw her in, I was just a
15 little bit upset. I wasn't really that jealous. So I
16 asked for the baby and the guy hand the baby for me and
17 I just walk away.

18 Q. Okay. And that angered [REDACTED], right?

19 A. Yes, that angered [REDACTED] because I walk over
20 where she was with this guy.

21 Q. Okay. And did you -- at the point that you
22 took the baby from the guy, you said you felt you were
23 like a father, right?

24 A. Yeah, like a father.

25 Q. Can you please describe to the jury what you're

Boss Certified Realtime Reporting
954-467-6867

1620

Page 1274

1 basing that on?

2 A. Yeah, from when I met her with the baby, she
3 explained to me that the baby father --

4 MS. TATE: Objection; hearsay.

5 THE COURT: I'm going to sustain that, but if
6 you can rephrase?

7 BY MS. COOK:

8 Q. What did you do to -- what did you do to take
9 care of the baby? Before that moment that you took the
10 baby from the guy, what things had you done to take
11 care of the baby?

12 A. Yeah, I am the bread winner for the house. I
13 am the father for the house. I am the man for the
14 house. I do everything as a man supposed to do. I
15 would bath the baby at times, change the baby diaper, I
16 even feed the baby mix, and make sure that the baby --
17 feed the baby all of the time. I give her a shower,
18 take her out walk, we go out and we walk and take
19 picture. She just come like my baby. I have her as my
20 baby. I know she have a father, but I understand the
21 father was in [REDACTED], so I just take her as my own. I
22 have other child, I have three child of my own, so I
23 know what it's all about to take care of baby.

24 Q. Okay. Let me ask you, you said you were the
25 bread winner. Was anyone else working in the home?

Boss Certified Realtime Reporting
954-467-6867

1621

Page 1275

1 A. No. No. I was the only person working.
2 Q. Who was paying rent?
3 A. Me, ma'am.
4 Q. So you were the one paying rent in the
5 apartment?
6 A. Yes, suh.
7 Q. And who was buying the food?
8 A. I find everything, [REDACTED] only the -- I the
9 one that buy everything there, the rent, the light, the
10 water bill, food, cable, everything is me.
11 Q. Were you in the house, were you the oppressor,
12 meaning the one that controlled everything?
13 A. No. No. No. The residence was owned by
14 [REDACTED]? And I was just the -- [REDACTED] the one who
15 owned the house, I was just there as a...
16 Q. Okay. So the State asked during the party you
17 asked a friend to watch her or watch all of her
18 movements. Is that exactly what happened?
19 A. No, not really. Not exactly the way the State
20 put it. At first I was explaining to one of my
21 girlfriend that things did not the same as before.
22 Q. Right.
23 A. Because [REDACTED] was in the bar at the time
24 serving, serving beer and serving some food. So I
25 would say to the friend, [REDACTED] and I, we are not that

Boss Certified Realtime Reporting
954-467-6867

1622

Page 1276

1 100 percent again. We are just like having problems,
2 so I say sometimes you might not see, so it's just a
3 reference.
4 Q. So did you have people follow [REDACTED]?
5 A. No, I don't have anybody follow [REDACTED]. I
6 would just refer to my girlfriend that she and I are
7 not -- I don't have anybody following [REDACTED], I would
8 not do that.
9 Q. Okay. When [REDACTED]'s mom came in here to
10 testify, you agree she indicated that you guys
11 communicated in some phone calls; is that right?
12 A. Yes.
13 Q. Okay. Let's talk about that for a moment.
14 Before the shooting you reached out to [REDACTED]'s
15 mom; is that right?
16 A. Yes, ma'am. Yes, ma'am.
17 Q. It's this conversation that we're talking about
18 with the TV and you can't buy love. Did [REDACTED]'s
19 mom say that, or did [REDACTED]'s mom say that?
20 A. Yes, she did say that.
21 Q. Can you please describe first of all why you
22 called her mom?
23 A. I can remember [REDACTED] and I was in the bed, it
24 was like sometime, because more than one time and a
25 phone call, some phone call.

Boss Certified Realtime Reporting
954-467-6867

1623

Page 1277

1 Q. Okay.

2 A. And I would say to myself, the time is now 1:30
3 going on 2:00, who could be calling, who could be
4 calling you at this time? So in the morning or when I
5 wake up I would just call the mother, explain to the
6 mother.

7 THE COURT: Can you sit back.

8 BY MS. COOK:

9 Q. You've got to sit back.

10 A. I just call the mother to let the mother know
11 what happened, what's going on. [REDACTED] not acting
12 right. Trying to talk to the mother could talk to her
13 daughter, tell her whatever. I just talk, it's not
14 anything serious, just trying to let the mother, you
15 know, correspond with her daughter saying that things
16 that, you know, they are not proper.

17 Q. It doesn't look proper for her to be --

18 A. And then the mother would say to me, why you
19 don't leave? Why you don't leave? But at the time I
20 care for [REDACTED] like that, so when the mother tell me,
21 say I must leave, I did not understand that. I mean,
22 as a mother all over I thought she would, you know, try
23 to indicate --

24 Q. She didn't say to you, you have to leave,
25 [REDACTED] wants you out, did she?

Boss Certified Realtime Reporting
954-467-6867

1624

Page 1278

1 A. No, she never say that.

2 Q. She was saying to you, why don't you leave my
3 daughter?

4 A. Yeah, just as a reference.

5 Q. So she wasn't saying to you, you've got to get
6 out?

7 A. No. No. No. No.

8 Q. And at that point was it -- did you feel like
9 the relationship had ended and it was done, or did you
10 feel like there was still--

11 A. No, it never end. I was hoping it would get
12 more better.

13 Q. Now, the State brought up a statement that you
14 made to the police back then; is that right?
15 January 21, 2008, you talked to the police, right?

16 A. Yes, I told her I didn't make a statement.

17 Q. And that statement went on for a long time,
18 didn't it?

19 A. Yeah, yeah.

20 Q. Do you remember about how long you guys were
21 talking?

22 A. No, not really, but it seemed it was quite
23 sometime.

24 Q. And the conversation was in English, right?

25 A. English and my dialect.

Boss Certified Realtime Reporting
954-467-6867

1625

Page 1279

1 Q. Okay. So, and a lot of times the officer would
2 ask you questions and you would respond, yeah, yeah, or
3 yes, right?

4 A. Yeah, according to what he say I just give a
5 general yeah, yeah, yeah, you know.

6 Q. So there are many times in the statement where
7 you say yeah, yeah, or yes?

8 A. Yes, ma'am.

9 Q. Saying yeah, yeah, or yes, does not necessarily
10 mean that you're agreeing with what Detective Sessions
11 is saying?

12 A. No, it not necessarily agree.

13 Q. The State indicated to you about your
14 girlfriend, and indicated that you were no longer
15 girlfriend and boyfriend at the party; is that right?
16 During cross examination, the State...

17 A. Yes, that's what the paper said, but it wasn't
18 true.

19 Q. Is that -- the State had you read Page 8, Line
20 322 through 326; is that right?

21 A. Yes, ma'am.

22 Q. And they indicated that that was that she was
23 no longer your girlfriend?

24 A. Yes.

25 Q. The State on cross-examination the State was

Boss Certified Realtime Reporting
954-467-6867

1626

Page 1280

1 indicating that, right?

2 A. She still my girlfriend.

3 Q. Okay. Can you reread Page 8, Line 322 through
4 326?

5 MS. COOK: May I approach?

6 THE COURT: You may.

7 BY MS. COOK:

8 Q. Can you reread that carefully? Isn't it true
9 on that day the officer specifically asked you this one
10 question, "Well, I think you have a legitimate right to
11 be, she's still your girlfriend at that point, right?"
12 And that's what the officer asked you, correct?

13 A. Yes, that's correct.

14 Q. And you said, "No, no, I wouldn't consider, I
15 would partially, I would call it partially because we
16 both, we both live together"?

17 A. Yes.

18 Q. Isn't that what you said?

19 A. Yes, partially, yeah.

20 Q. What do you mean by that, partially?

21 A. Partially mean today things is fine and
22 tomorrow it ain't fine. It's like today she love me
23 and tomorrow it's like she not with me. Tomorrow and
24 the following day she will hug me up and kiss me and
25 another day I couldn't even touch her, so I give the

Boss Certified Realtime Reporting
954-467-6867

1627

Page 1281

1 word partially.

2 Q. On that note let's go to that lock on the door.

3 Okay. The lock on the door, the State brought that up
4 in cross. When do you remember [REDACTED] putting the
5 lock on the door?

6 A. I don't quite remember. I know I remember I
7 came from work and I see there, but I don't remember
8 that we have a little talk. And she was, like she
9 wasn't agreeing with me at the time. I don't remember
10 exactly what.

11 Q. Was it around the holiday?

12 A. I don't remember, but I was surprised to see
13 the lock on the door, I try to go in.

14 Q. Did it happen in that three-week period or did
15 it happen before that; do you recall?

16 A. I couldn't tell you if it was three week, one
17 week, I don't remember.

18 Q. Okay. The lock, was that to keep you out of
19 the bedroom, is that what she did it for?

20 A. I think so.

21 Q. And when she did it, was she angry at you?

22 A. No, we still --

23 Q. No, at the point that she put the lock on the
24 door, was she angry at you?

25 A. No, she wasn't angry at that time.

Boss Certified Realtime Reporting
954-467-6867

1628

Page 1282

1 Q. Okay. But she put the lock on the door?

2 A. Yes.

3 Q. Explain that.

4 A. Probably she might need some time for herself,
5 so when she put the lock on the door, she put it so she
6 can go in her room and have her privacy. So she would
7 come in and have her privacy, but otherwise the door
8 would be open.

9 Q. Okay. Well, did she put the lock on the door
10 because she was afraid of you?

11 A. No. No. No. No. No.

12 Q. Did she put the lock on the door and then
13 afterwards let you into the bedroom?

14 A. Yes, sometimes I do go in there and sometimes
15 she'll -- as I say, she put it on it when she need her
16 privacy.

17 Q. Did she also do it to keep the other people out
18 of the room, M [REDACTED] and --

19 A. At that time she would be in there and nobody
20 can go in there.

21 Q. So she kept this room locked to keep not only
22 you but, M [REDACTED] and other people out?

23 A. No. The baby is okay, but like for M [REDACTED] and
24 I.

25 Q. Okay. Now, the State indicated on cross that

Boss Certified Realtime Reporting
954-467-6867

REDACTED
1629

Page 1283

1 you said that "she embarrassed me," is that right, on
2 the statement? The State was saying that, right?

3 A. Yes, sometimes she try to embarrass me, yes,
4 yes.

5 Q. And they read again your statement from July
6 21, 2008, right?

7 A. Yeah.

8 Q. They read your statement, right? It's okay.

9 A. I didn't make a statement.

10 Q. I know, can I call it a statement? You were
11 having a conversation, right?

12 A. Thank you, a conversation.

13 Q. All right. Now --

14 MS. COOK: May I approach, Your Honor?

15 THE COURT: You may.

16 BY MS. COOK:

17 Q. Page 11, Line 418 through 421. Can you read
18 that? Do you need your reading glasses?

19 A. 418?

20 Q. 418 through 421.

21 A. Yes.

22 Q. Okay. You read that, right? Isn't it true
23 that Detective Sessions asked you, "Did you feel
24 embarrassed?" Do you remember Sessions asking you
25 that?

Boss Certified Realtime Reporting
954-467-6867

1630

Page 1284

1 A. Yeah, I remember.

2 Q. And you said, "No, with me, me, no really feel
3 embarrassed, you know, but with me, within myself, I
4 don't feel embarrassed." Is that right?

5 A. Yeah, within me I don't really little feel
6 embarrassed.

7 Q. Okay. [REDACTED] had been accusing you of not
8 having any manners; is that right?

9 A. Yes, ma'am.

10 Q. But did you feel that you were embarrassed by
11 [REDACTED]? And I'm sorry, I don't want to confuse it.
12 Did you feel embarrassed?

13 A. Not really, I don't really feel embarrassed,
14 you know.

15 Q. Was [REDACTED] doing something that you felt was
16 embarrassing, or was it just that it wasn't proper?

17 A. She was just not proper.

18 Q. That's a Jamaican word with proper, right?

19 A. Yes.

20 Q. Does embarrassed and proper mean the same thing
21 necessarily?

22 A. Proper is not looking good, proper is not
23 looking good.

24 Q. Does that equate to embarrassing you, or is it
25 just that it doesn't look good to others?

Boss Certified Realtime Reporting
954-467-6867

1631

Page 1285

1 A. Just not looking good.
2 Q. Okay. The State also indicated on
3 cross-examination about you taking the phone away from
4 [REDACTED] when she had these late night phone calls,
5 right?
6 A. Yes.
7 Q. Okay. On that, did she have these late night
8 phone calls often or was it just once in a while or was
9 it every day?
10 A. Several occasions, several different occasion.
11 Q. Okay. And you indicated that you were in the
12 bed with her, right?
13 A. Yes, ma'am.
14 Q. Now, that upset you, right?
15 A. Yeah, I feel some way, I feel a bit upset.
16 Q. Why did it upset you?
17 A. As I say, again, it never looked proper. I was
18 there beside her and she still trying to -- somebody
19 calling her at that time, 1, 2 o'clock, it wasn't
20 proper.
21 Q. Was it a boyfriend? Well, don't guess. What
22 do you know, was it a boyfriend, was it --
23 A. It's a male voice.
24 Q. Okay.
25 A. I couldn't say it's a boyfriend, I know it's a

Boss Certified Realtime Reporting
954-467-6867

1632

Page 1286

1 male voice.
2 Q. And were there other people that called and she
3 was talking to, or she called and talked to at that
4 time, or was it just always a male voice?
5 A. Yes, I recognize the male voice first when her
6 phone ring and after she get up and walk to the
7 bathroom, so I realize it's a male voice. But I don't
8 know if that boyfriend or some emergency or some friend
9 call. I wouldn't know, but I know a male voice and she
10 would get up off the bed and walk to the bathroom to
11 talk.
12 Q. So did that -- that was within -- that was the
13 basis of your arguments a lot of times; is that right?
14 A. Yes. Yes.
15 Q. Now the State indicated that you took her phone
16 away. Page 15, Line 622.
17 A. I don't remember taking away her phone.
18 Q. It's okay. But can you indicate from this
19 statement how many times you told the police officer
20 you took the phone away? I'm not saying you remember
21 doing it. How many times does that say?
22 A. It say one time there.
23 Q. Okay. But you actually, sitting here today
24 seven years later, eight years later, don't remember
25 actually taking the phone away?

Boss Certified Realtime Reporting
954-467-6867

1633

Page 1287

1 A. Yeah, I don't remember.

2 Q. So the state attorney indicated that you agreed
3 with Officer Sessions when he said controlling and
4 jealous and that type of stuff, you just responded
5 yeah; is that right?

6 A. He would be -- but I never jealous, I never, I
7 not jealous.

8 Q. Just to clarify that, you didn't actually use
9 the words controlling and jealous, right?

10 A. No, I did not use the word control, the officer
11 used that word.

12 Q. Okay. He used the word jealous, right?

13 A. Yes, and jealous.

14 Q. And your own response to that was, yeah?

15 A. Yeah, in some way, yeah.

16 Q. Does that mean that you were agreeing with him,
17 that you were controlling and jealous?

18 A. No, I wasn't agreeing, it was a general talk.

19 Q. You were just saying --

20 A. It was a general talk.

21 Q. When you respond yeah, what does that mean? It
22 could mean yes, and so when I say yeah, it could mean
23 yes and sometimes it don't really --

24 A. It's like it don't really matter.

25 Q. So if somebody's talking to you and you're

Boss Certified Realtime Reporting
954-467-6867

1634

Page 1288

1 saying, yeah, as if, yeah, I hear you?

2 A. Yeah, I hear you. Just it don't really matter.
3 I say yeah just to -- if you ask me a question, I might
4 agree with you at the same time, I just say yeah to get
5 you to -- just to get you to stop talk.

6 Q. So the word yeah in that context, you weren't
7 agreeing that you were?

8 A. No, I did not agree with him.

9 Q. Okay. Did you feel that you were jealous of
10 [REDACTED] and this man?

11 A. No, I wasn't jealous. And I didn't know if
12 they was having an affair, I didn't know if they have
13 an affair, so I couldn't say.

14 Q. The State indicated also about this packing of
15 the clothes, and let's kind of clarify this. You and
16 [REDACTED] were having the initial argument in her
17 bedroom; is that right?

18 A. Yes, in her bedroom.

19 Q. And then where do you go?

20 A. As I say, M [REDACTED] walk in, I walk out because I
21 know he's a young man, and I never want him to see
22 [REDACTED] and I arguing -- that we're talking. I did
23 believe that he heard what I say, so I walk and I went
24 to the balcony to --

25 Q. You went to the balcony, right?

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1635

Page 1289

1 A. To cool off a bit, you know.
2 Q. And from there where did you go?
3 A. I went back to the door and I went down in the
4 parking lot.
5 Q. What were you thinking about in the parking
6 lot?
7 A. Yeah, I was thinking where could I go because
8 it seem as if things not right. So I was thinking
9 perhaps I could go to a hotel or somewhere, but not
10 sure -- not by Patrick, because Patrick is the only
11 person I know.
12 Q. Okay. And then that's when you got the phone
13 call?
14 A. Yes, that's when I got the phone call.
15 Q. And that's when you headed upstairs, right?
16 A. Yes, at the time they call that I receive, that
17 call is invite me, I don't want to say Patrick say, but
18 the call that I got was, come back up, let's talk this
19 thing out.
20 Q. Okay. And then you headed into the second
21 bedroom; is that right?
22 A. Yes, I went up there. I went up the stairs, I
23 look, I see Patrick. I went in. I saw all my property
24 was at the front door.
25 Q. Right.

Boss Certified Realtime Reporting
954-467-6867

1636

Page 1290

1 A. But when I look, the suitcase wasn't there,
2 which was important.
3 Q. Why is the suitcase more important to you?
4 MS. TATE: Objection; asked and answered.
5 THE COURT: Sustained.
6 BY MS. COOK:
7 Q. The State indicated that she packed your
8 clothes in front of you. At what point did she start
9 packing your clothes in front of you?
10 A. When I went in for the suitcase, it was when I
11 saw her packing when I went in for the suitcase.
12 Q. So it's at this point that you and her are in
13 that bedroom, right?
14 A. I see some of the clothes coming from the --
15 actually put those portion at the front of the door.
16 When I look, I did not see my suitcase. So I went in
17 to get my suitcase and that's when I see her packing
18 other things.
19 Q. And it's at that point that's when you told the
20 officer she was packing your clothes in front of you,
21 right?
22 A. Yes, that's when she was packing my clothes.
23 Q. That is the first time you start seeing her?
24 A. I saw her packing.
25 Q. It's at this point that you realize -- the

Boss Certified Realtime Reporting
954-467-6867

1637

Page 1291

1 State indicated that [REDACTED] didn't want you in the
2 apartment, is that right, to live with you anymore?

3 A. No. She been say that? She been say that but
4 I still there.

5 Q. All right. There's a difference here. Were
6 you still trying to live there at the point that you're
7 packing up your suitcase?

8 A. No, at that time I see the red light, that I
9 must go now.

10 Q. Okay. And did you still have things in the
11 apartment?

12 A. Yes, there were things still there for me.

13 Q. When you went back in at the time that
14 everything happened, the State indicated -- well, you
15 said, what? Why did you go through that door again
16 after you brought your suitcase down and went back up?

17 A. Can you state that again for me, please?

18 Q. Huh?

19 A. Can you state that for me?

20 Q. I'm sorry. I didn't mean to confuse you. You
21 took the suitcase, right?

22 A. Yes.

23 Q. Where did you put the suitcase?

24 A. I brought it downstairs near by my truck.

25 Q. So where did you go next?

Boss Certified Realtime Reporting
954-467-6867

1638

Page 1292

1 A. I went back upstairs to get my second set of
2 property.

3 Q. Did you cross through the doorway?

4 A. Yes, ma'am.

5 Q. Did you get all the way into the second
6 bedroom?

7 A. No, I stop right by [REDACTED] and M [REDACTED] and was
8 right at the kitchen there, the entrance way to the
9 kitchen.

10 Q. Okay. So you actually made it inside the
11 house?

12 A. Yes, I made about two to three steps in the
13 house.

14 Q. Okay. And it's at this point that you end up
15 in a physical situation with [REDACTED] and M [REDACTED] is
16 that right?

17 A. Not me physical, they try to beat me. They try
18 to get me right there.

19 Q. Okay the State indicated that in your statement
20 you didn't mention Patrick; is that right?

21 A. Probably, yes.

22 Q. Okay. Do you remember where Patrick was at the
23 point that they start beating you?

24 A. Yeah, Patrick was right behind me. Patrick was
25 by the door. I walked past him to get in the door, he

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1639

Page 1293

1 was behind me. He was walking, like he had to come in
2 the apartment, he was right there in the house.

3 Q. Do you remember at the point that [REDACTED] and
4 M [REDACTED] started beating you if Patrick had his hands on
5 you at that point?

6 A. I remember when [REDACTED] flung something into my
7 face and I hold it down, and M [REDACTED] was right there
8 but Patrick was behind me.

9 Q. We used the term today liquid, right?

10 A. Yes, ma'am.

11 Q. Is there any Patois word that came into your
12 mind of what was flung into your face?

13 A. Yeah, I use the would, say flung chemical, we
14 use Patois word chemical, chemical is liquid, it still
15 mean the same thing.

16 Q. They mean the same thing?

17 A. They mean the same thing.

18 Q. But in your mind was it a chemical that was
19 thrown in your face?

20 A. Yes, something liquid, a chemical, a liquid,
21 something like that. It's something from the vase, the
22 vase that she said.

23 Q. At the point that you have the liquid thrown in
24 your face, where are you trying to go to?

25 A. I step backward. I step backward, I went on my

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1640

Page 1294

1 face because I was trying to protect my eye. I make a
2 step backward, I face this way, but me make a step
3 backward.

4 Q. Okay. And how do you end up from stepping
5 backward to being wedged in the door?

6 A. That is how I been wedged in the door, that's
7 how.

8 Q. Can you please explain -- are you trying
9 demonstrate?

10 A. Yeah.

11 Q. Winston, I need you to tell me. When you're
12 trying to demonstrate -- it's okay. What are you
13 trying to do?

14 A. Yeah, I'm trying to demonstrate. When I been
15 thrown with the liquid catch me in the eye, I step back
16 like this, that means I was right here first.

17 Q. Right here being what?

18 A. Right against the wall. Right against the
19 kitchen wall. Against the kitchen wall. This is one
20 foot forward and one foot backward, that meantime
21 trying to get back by stepping backward because the
22 liquid thrown in my face. I was right here, the liquid
23 thrown in my face. I have to step back, I was more
24 stepping backward.

25 Q. Who's behind you?

Boss Certified Realtime Reporting
954-467-6867

1641

Page 1295

1 A. Patrick Johnson.
2 Q. Who's in front of you, right in front of you?
3 A. [REDACTED] and M. [REDACTED]
4 Q. How far away is M. [REDACTED]
5 A. M. [REDACTED] -- I can't see, but [REDACTED] was in
6 front of M. [REDACTED]
7 Q. Okay. All right. So you step back, right?
8 A. Yeah, I make a step back.
9 Q. And the next thing is what?
10 A. They start to hit me.
11 Q. Okay. And where were you trying to go with
12 your hands?
13 MS. TATE: Judge, I'm going to object, all of
14 this has been asked and answered on direct.
15 THE COURT: It's beyond the scope, counsel. If
16 you can try to just stay within the scope of the
17 cross.
18 BY MS. COOK:
19 Q. The State indicated that you told -- well,
20 let's see, Page 37 -- Page 38. The State indicated
21 that you told the officer that you got the gun that
22 night from the vacant apartment, that's what the State
23 asked you, right?
24 A. Yes, ma'am.
25 Q. Okay. And I'm going to ask you to read Page 37

Boss Certified Realtime Reporting
954-467-6867 **REDACTED**

1642

Page 1296

1 or 38, lines 515 to 522.
2 A. Say that again?
3 Q. Start here.
4 A. To where?
5 Q. To up here. Do you need to read it again?
6 A. I'm okay.
7 Q. Okay. Isn't it true that the officer said to
8 you, "Did you find it in the abandoned apartment after
9 the party or did you find it before the party?" And
10 you stated, "About in the evening, about 7, 6 o'clock"?
11 A. Yes, ma'am.
12 Q. And then the officer said, "So before the party
13 even started?" And you said, "Yes"?
14 A. Yes, suh.
15 Q. Okay. And then afterwards the officer inserts
16 that you went to the vacant apartment to get the gun
17 and the only thing you responded to was --
18 MS. TATE: I'm going to object, she skipped
19 through about seven lines.
20 THE COURT: Please, I'll give you recross, but
21 please watch your speaking objections.
22 Did you finish your question.
23 BY MS. COOK:
24 Q. So if you told the officer -- where did you
25 tell the officer you got the gun?

Boss Certified Realtime Reporting
954-467-6867

1643

Page 1297

1 A. I got the gun behind that building.
2 Q. And when you told him that, when did you tell
3 him that you got the gun?
4 A. I tell him I get it about 6, 7 o'clock in the
5 evening.
6 Q. And you used those words, right?
7 A. Yes.
8 Q. Okay. Why do you think Patrick ultimately
9 jumped you?
10 MS. TATE: Objection; speculation.
11 THE COURT: Sustained.
12 BY MS. COOK:
13 Q. You stated that Patrick jumped you, right?
14 A. Yes.
15 Q. Patrick testified that he was your best friend;
16 is that right?
17 A. Yes, ma'am.
18 Q. Okay. Why would a friend jump you?
19 MS. TATE: Objection; speculation.
20 THE COURT: Sustained.
21 BY MS. COOK:
22 Q. Was Patrick really your friend? In that moment
23 was Patrick really your friend?
24 A. I can say this first, Patrick and I have a
25 little disagreement on the work and also about a female

Boss Certified Realtime Reporting
954-467-6867

1644

Page 1298

1 that he met. So that is the reason why I did not let
2 him know where I live. So [REDACTED] invite him to the
3 party, but when he came, when he came I thought he was
4 there for me. So as a friend, I thought he was my
5 friend. So I was feeling very good to know that he was
6 there first, but after I realize he wasn't there for
7 me.
8 Q. Okay. So would you say he's your friend?
9 A. I would call him a back biter.
10 Q. A back biter?
11 A. Yes.
12 Q. Okay. You indicated that you had the chemical
13 thrown in your face. Do you still have problems with
14 your eyes?
15 A. Yes, ma'am.
16 Q. What type of problems?
17 A. I have to take medication. The doctor see me,
18 say I have to take like some form of coma, glaucoma. I
19 don't remember everything that I use.
20 MS. COOK: Okay.
21 One moment, Your Honor.
22 BY MS. COOK:
23 Q. When [REDACTED] was hitting you and throwing stuff
24 in your face, why were you scared?
25 A. When she did that and they all jumped me, they

Boss Certified Realtime Reporting
954-467-6867

1645

Page 1299

1 all jumped me so I thought more or less they were going
2 to kill me so...

3 Q. Were there -- during the course of the fight
4 were there times that you were alone with [REDACTED] in a
5 room without anyone there?

6 A. Yes, several time.

7 Q. At any time did you pull the gun and threaten
8 her with it?

9 A. Oh, no. No. No.

10 Q. Did you shoot her with it?

11 A. No. No. No.

12 Q. Okay. Did you ever intend to shoot her?

13 A. No, I never intend to shoot nobody.

14 MS. COOK: Okay. I have nothing further.

15 THE WITNESS: Can I say something before you
16 go?

17 THE COURT: Only answer the questions that are
18 posed. Recross?

19 THE WITNESS: I didn't -- I didn't.

20 THE COURT: Mr. Calder, only answer the
21 questions asked of you. Thank you.

22 Recross, please.

23 MS. TATE: Thank you.

24 RE CROSS EXAMINATION

25 BY MS. TATE:

Boss Certified Realtime Reporting
954-467-6867

1646

Page 1300

1 Q. Patrick Johnson is the man that you called the
2 next day for help, isn't it? You called Patrick
3 Johnson in the morning, correct?

4 A. I didn't call Patrick Johnson in the morning, I
5 call the next day, through the course of the day, about
6 8, 9 o'clock in the night.

7 Q. The place you went to in the morning was
8 Patrick Johnson's business?

9 A. No, that not Patrick Johnson business.

10 Q. Is it the business where the Fleet Wash
11 business was?

12 A. I go to Fleet Wash.

13 Q. And you know that's where Patrick Johnson has
14 his trucks?

15 A. Not Patrick Johnson alone.

16 MS. COOK: Objection; outside the scope.

17 THE COURT: Overruled.

18 BY MS. TATE:

19 Q. That's where you chose to go, to Patrick
20 Johnson and his location, correct?

21 A. Not Patrick Johnson location.

22 Q. You called Patrick Johnson, correct?

23 A. Yeah, I did call about 8, 9 o'clock p.m.

24 Q. And Patrick Johnson drove to where you were at
25 one point the next day, correct?

Boss Certified Realtime Reporting
954-467-6867

1647

Page 1301

1 A. I don't know about that.
2 Q. Who pulled the truck into the bay for you?
3 A. Me pull the truck in the bay.
4 Q. Who took the keys from the truck?
5 A. Patrick took the keys from the truck.
6 Q. Patrick Johnson, right?
7 A. That is about 6:30 in the morning after we been
8 together, it was 6:30 in the morning.
9 Q. That's what I'm talking about, Mr. Calder.
10 Patrick Johnson sees you, you have --
11 A. Yes.
12 Q. -- a nice interaction with him, don't you?
13 A. No.
14 Q. Does he grab the keys from you and punch you in
15 any way?
16 A. He just ask me. He just ask me.
17 MS. COOK: Objection, Your Honor. Can we
18 approach?
19 THE COURT: Overruled. Denied.
20 THE WITNESS: He helped me to put the truck in
21 the bay. He's the one who woke me up and he have me
22 to pull the truck --
23 THE COURT: Remember to sit back a little bit.
24 THE WITNESS: Yes -- the truck inside the bay.
25 BY MS. TATE:

Boss Certified Realtime Reporting
954-467-6867

1648

Page 1302

1 Q. And Patrick Johnson didn't do anything
2 whatsoever to hurt you when he sees you that morning,
3 does he?
4 A. No.
5 Q. You have no bad interaction with Patrick
6 Johnson, do you?
7 A. No, as I state before --
8 Q. And when you were asked by your counsel about
9 the gun again, and she refreshed your recollection on
10 Page 38 about you had the gun, you found the gun or got
11 the gun earlier that day, you saw the gun in the
12 apartment, correct?
13 A. Say that again for me, please.
14 Q. You saw the gun earlier in the apartment that
15 day, correct?
16 MS. COOK: Objection, Your Honor.
17 A. I saw it.
18 THE COURT: Overruled.
19 THE WITNESS: I saw it. Clear it for me so --
20 BY MS. TATE:
21 Q. So you were asked by Ms. Cook, did you find it
22 in the abandoned apartment after the party or during
23 the party, and you were talking about before the party
24 you saw the gun, correct?
25 A. No, I never say I saw it. I found the gun.

Boss Certified Realtime Reporting
954-467-6867

1649

Page 1303

1 Saw it and find it are two different things.
2 Q. All right. You find the gun downstairs,
3 correct?
4 A. I find the gun that evening about 6, 7 o'clock.
5 Q. And it's your testimony that you put it on you
6 and kept it on you for the rest of the night?
7 A. I put it in my pocket.
8 Q. For the whole night, correct?
9 A. I paid more attention to my party and the
10 people coming there so I never think it was necessary
11 for to bring it. So I have it, there were people to
12 come and find the party the way they could, so it was
13 still on me.
14 Q. You had the gun on you the whole night, right?
15 A. It was still on me, I did not kept it.
16 Q. Do you recall saying something different under
17 oath back on January 21, 2008, different than what you
18 just said here today in court and to your attorney?
19 A. As I tell you before, that was a reference, it
20 was not a statement.
21 Q. We're going to talk about that.
22 A. Okay.
23 Q. But would reading your statement now, those
24 seven lines on Page 38, I think you just read the half
25 page, but would you like to see it again?

Boss Certified Realtime Reporting
954-467-6867

1650

Page 1304

1 A. It was not a statement.
2 Q. I know you're saying it's not a statement, Mr.
3 Calder.
4 A. So why are you --
5 Q. Page 38, Lines 1528 through about 1540 where
6 you're asked about where the gun was through the night.
7 Okay, does it say before the party is when you find it?
8 "Q. So just kept the gun on you the whole
9 night?"
10 And your answer, "No, me never have it with
11 me."
12 "Q. You never had it with you?
13 "A. No, me never know who's, me never know
14 who's, I just see it there.
15 "So did you go and get it after she told you
16 she wanted you to leave and she was throwing your
17 clothes out when you said you left for a while, you
18 went walking, is that where you went, to the vacant
19 apartment to get the gun?
20 "A. Yes."
21 Do you recall that?
22 A. As I said to you before, Mr. Session and I were
23 just having a talk. That ain't no statement that ain't
24 nothing to say with that. I say I did not.
25 Q. Okay. And you're saying the statement is not a

Boss Certified Realtime Reporting
954-467-6867

1651

Page 1305

1 statement and you didn't swear to it and --

2 A. Yeah, did I not swear to it. That is not a
3 statement.

4 Q. And you didn't promise to tell the truth?

5 A. No, I did not promise to tell the truth.

6 Q. Do you recall saying something different than
7 that, Mr. Calder --

8 MS. COOK: Objection, Your Honor, this is
9 outside the scope.

10 THE COURT: Overruled.

11 BY MS. TATE:

12 Q. Do you recall saying something different than
13 that on January 21, 2008?

14 MS. TATE: Counsel, Pages 2 and 3, bottom of 2
15 through the middle of Page 3.

16 BY MS. TATE:

17 Q. If you can read what the detective is talking
18 to you about there and go onto the next page. Let me
19 know when you're done reading that.

20 A. When he said "the whole truth and nothing but
21 the truth"?

22 Q. Just read to yourself.

23 A. Yes, I remember. I remember.

24 Q. You remember, in fact, Mr. Calder, that the
25 Detective went on to explain to you how here in the

Boss Certified Realtime Reporting
954-467-6867

1652

Page 1306

1 United States how they swear people in to tell the
2 truth, the whole truth and nothing but the truth, do
3 you remember that?

4 A. Yes, the detective say that.

5 Q. And do you remember them having you raise your
6 right hand and swearing to tell the truth?

7 A. I did not agree with him. I tell him I don't
8 swear, I have to be in court. I tell, I don't swear
9 for the police.

10 Q. And following that did you, in fact, agree
11 though, since you didn't feel you could swear, that you
12 would promise?

13 A. I did not swear. I did not swear.

14 Q. Wait until I finish my question. Did you then
15 follow-up from, "when I asked you questions, are you
16 going to promise to be honest with me in the answers?"
17 And you said, "yes, I'm going to answer you, yes."

18 So, do you agree that you told Detective Sessions
19 what you said to him that you were promising you were
20 going to be honest with him?

21 A. Yes, I told him, I told I don't swear, but
22 whatever he ask me, probably I could tell the truth.

23 Q. And those are the answers that are in this
24 statement on January 21, 2008, correct?

25 A. Because I did not swear.

Boss Certified Realtime Reporting
954-467-6867

1653

Page 1307

1 Q. Where you said no liquid was ever thrown in
2 your face, correct?
3 MS. COOK: Objection, Your Honor.
4 THE COURT: Sustained.
5 MS. TATE: No further questions, Your Honor.
6 THE COURT: Thank you.
7 Mr. Calder, you may step down. Watch your step
8 as you go down.
9 All right, next witness.
10 MS. COOK: Your Honor, the Defense would rest.
11 THE COURT: Members of the Jury, the Defense
12 has rested in your presence. I need to take up some
13 matters with the attorneys, some are legal and some
14 are scheduling. I'm going to just ask you to step
15 inside of the jury room for a brief period of time.
16 If it looks like it's going to be longer then I'll
17 release you for lunch. But I think we can cover
18 scheduling and other legal matters in a short period
19 of time. Don't talk about the case. Leave your
20 notepads on your chair or on the railing in front of
21 you.
22 (Whereupon, the jury was escorted out of the
23 courtroom, after which the following proceedings
24 were had:)
25 THE COURT: All right, Ladies and Gentlemen,

Boss Certified Realtime Reporting
954-467-6867

1654

Page 1308

1 you all may be seated.
2 The Defense having rested their case in the
3 presence of the jury, I will hear from the Defense
4 at this time.
5 MS. COOK: Your Honor, the Defense is moving
6 for a second judgement of acquittal. The State has
7 the burden of proof and failed to meet its burden
8 burden. At this time the standard is reasonable
9 minds cannot differ as to the hypothesis of
10 innocence. And with the first degree murder charge
11 in this particular case the Defense has raised the
12 self defense and it indicated that -- I think prong
13 two, there was a criminal act. We would argue that
14 his act at the time of the shooting was not a
15 criminal act and the evidence is insufficient as to
16 that element.
17 THE COURT: Ms. Tate?
18 MS. TATE: Your Honor, the State would rely on
19 the evidence and testimony that The Court has heard
20 during the course of the trial and that reasonable
21 minds could differ in that the elements of first
22 degree murder have been shown.
23 THE COURT: All right. Well, self defense is
24 always an issue for the jury, or the trier of fact
25 to determine, that's not up to The Court, especially

Boss Certified Realtime Reporting
954-467-6867

1655

Page 1309

1 in different versions of how things could happen.
2 I am going to send this case to the jury and
3 let them determine whether or not The State has
4 proved its case beyond and to the exclusion of every
5 reasonable doubt. So therefore, the motion for
6 judgment of acquittal made at the close of the
7 Defense case is denied.
8 Ms. Tate, I have this package that was sent to
9 me and I'm going to go through it with you all. But
10 I do need to add the justifiable use of deadly force
11 instruction, that's 3.6, and you need to go through
12 that because not all of the sections are going to
13 apply.
14 MS. TATE: I don't have a printout of that. Do
15 you want me to get some printed out and send it
16 over?
17 THE COURT: If your secretary can send that to
18 me right now?
19 MS. TATE: E-mail?
20 THE COURT: Yes, she sent everything to Alicia,
21 but Alicia had her doctor's appointment today so
22 she'll have to do the FO Portal. Send it to me.
23 MS. TATE: We just want justifiable use of
24 deadly force, right?
25 THE COURT: Yes.

Boss Certified Realtime Reporting
954-467-6867

1656

Page 1310

1 MS. TATE: How does she get it to you, Your
2 Honor?
3 THE COURT: The same way you all do filings, in
4 Division FO.
5 MS. COOK: Your Honor, can I run to the
6 restroom?
7 THE COURT: Yes.
8 MS. LAWSON: Mr. Calder needs to use the
9 restroom, as well.
10 THE COURT: Delvin, can you make the call?
11 MS. TATE: I'm going to run out while everybody
12 is running.
13 (Whereupon, a recess was taken, after which the
14 following proceedings were had:)
15 THE COURT: Ms. Tate, your secretary hasn't
16 sent them. I just want to make sure that you all
17 have these corrections in your hands as we're
18 talking about it.
19 Just so the record is clear, I'm not going to
20 give nondeadly, the caselaw is clear, and the
21 firearm is a deadly weapon, so therefore, I don't
22 have to give it in this case, and I'll give you all
23 the case on that.
24 Ms. Lawson, I'm sending a copy over for you.
25 The first paragraph is going to be read, because it

Boss Certified Realtime Reporting
954-467-6867

1657

Page 1311

1 says "give in all cases".

2 I will give the definition of deadly force.

3 Now comes the tricky part, the decision of the
4 782.02, or 776.012. Sometimes the giving of both,
5 and the case is Giles, G-I-L-E-S, negates the
6 defendant's defense. So The Court has to be very
7 clear which paragraph I'm actually going to give.
8 I'm looking more at the second set. I don't think
9 the first 782.02 applies in this case.

10 I believe that what's applicable in this case
11 is a person is justified in using deadly force if he
12 reasonably believes that such force is necessary to
13 prevent: One, imminent death or great bodily harm
14 to himself, or the imminent commission of, I guess
15 it would have to be felony battery, since the
16 evidence did not bear out any weapons.

17 MS. COOK: Judge, I would ask --

18 THE COURT: I can't hear you.

19 MS. COOK: I'm just inquiring as to why we're
20 not doing the first one, since it does --

21 THE COURT: You know, another's attempt to
22 murder him, are you saying that them punching him, I
23 guess there's testimony that says to murder him, or
24 to -- it has to be a felony. Right now all I've got
25 is, you know, punching.

Boss Certified Realtime Reporting
954-467-6867

1658

Page 1312

1 MS. COOK: I thought it was aggravated battery
2 with great bodily harm or permanent disability. And
3 then the --

4 THE COURT: I guess the base could be agg.
5 battery.

6 MS. COOK: And then because of the dwelling...

7 THE COURT: Or any attempt to commit -- see,
8 I've got to be real careful in giving "any attempt
9 to commit". And technically he wasn't occupying the
10 dwelling in this case, he was trying to get in. But
11 the law recognizes, I guess, since no suit and
12 ejectment had been filed, he had as much right, I
13 guess, to be in that apartment. What I would do is
14 make Number 3, 2, any attempt, it would be another's
15 attempt to murder him, or any attempt to commit
16 aggravated battery upon or in any dwelling,
17 residence or residence occupied by him. We don't
18 have a vehicle.

19 So it would be dwelling or residence occupied
20 by him. And then I would define what an aggravated
21 battery is an unconsented touching or striking of an
22 individual using a weapon.

23 MS. COOK: One moment, Your Honor. I'm
24 thinking the second one might be better, more
25 applicable to what's going on. Your Honor, we're

Boss Certified Realtime Reporting
954-467-6867

1659

Page 1313

1 looking at it -- I'm sorry for this, I think now
2 we're looking, because of that murder, that Number
3 one attempt to murder thing, I think you might be
4 right, I think the second one might be more
5 applicable with the felony battery.

6 THE COURT: That's what I was thinking because
7 I don't want to confuse the jury.

8 MS. COOK: Right.

9 THE COURT: Okay. That's why I'd like to cross
10 off the first set of paragraphs there under 782, I
11 think it's more applicable under 776.012. It says,
12 a person is justified in using deadly force if he
13 reasonably believes that such force is necessary to
14 prevent, one, imminent death or great harm to
15 himself. Or, two, the imminent commission of a
16 felony any battery. Or did you want aggravated
17 battery? I've got the throwing of the vase or I've
18 got the punching.

19 MS. COOK: Felony battery.

20 THE COURT: The commission of a felony battery
21 against himself period. And then I'll define felony
22 battery and I'm going to take it right from a case,
23 and I'll give that case to you.

24 And then, however, the use of deadly force is
25 not justifiable -- I should not give that because I

Boss Certified Realtime Reporting
954-467-6867

1660

Page 1314

1 just cited to Giles, and I'm concerned with negating
2 the defendant's defense that he was resisting a
3 felony battery against himself. And if you'll see
4 the commentary it says, "give only if the defendant
5 is charged with an independent forceable felony."
6 And it sights to Giles, G-I-L-E-S, v. State, 831 So.
7 2d., 1263. I don't believe any of that is
8 applicable in this case.

9 I'd like to just define what a felony battery
10 is. Delete that next paragraph, delete the next two
11 with the A and B, delete that, take out all of the
12 law enforcement language and then just go into, in
13 deciding whether the defendant was justified in the
14 use of deadly force you must judge him by the
15 circumstances by which he was surrounded at the time
16 the force was used. The danger facing the defendant
17 need not have been actual. However, to use justify
18 the use of deadly force the appearance of danger
19 must have been so real that a reasonably cautious
20 and prudent person under the same circumstances
21 would have believed that the danger could be avoided
22 only through the use of that force.

23 Based upon appearances the defendant must have
24 actually believed that the danger was real. And
25 then I'll give the next paragraph, if the defendant

Boss Certified Realtime Reporting
954-467-6867

1661

Page 1315

1 was not engaged in an unlawful activity and was
2 attacked in any place where he had a right to be, he
3 had no duty to retreat and had the right to stand
4 his ground and meet force with force including
5 deadly force if he reasonably believed that it was
6 necessary to do so to prevent death or great bodily
7 harm to himself or to prevent in the commission of a
8 felony battery.

9 Then I will -- do you want the presumption of
10 fear, being in a residence? If the defendant was in
11 a dwelling or a residence where he had a right to
12 be, he is presumed to have had a reasonable fear of
13 eminent death or great bodily harm to himself.

14 MS. COOK: No, Your Honor, I think that would
15 confuse the issues.

16 THE COURT: Ms. Tate, it's not applicable here
17 but I'm just asking.

18 MS. TATE: I don't think it is applicable.

19 THE COURT: Take that out. And because I've
20 taken that out, the presumption of fear, I'm taking
21 out the next paragraph, A, B, C and D, because that
22 applies only if I give the presumption of fear,
23 these are the exceptions.

24 Then I've got 776.013, Paragraph 4, a person
25 who unlawfully and by force enters or attempts to

Boss Certified Realtime Reporting
954-467-6867

1662

Page 1316

1 enter another's dwelling or residence is presumed to
2 be doing so with the intent to commit an unlawful
3 act involving force or violence.

4 MS. TATE: I don't think that's applicable,
5 Your Honor.

6 MS. COOK: Agreed.

7 THE COURT: Taking that out. I will give the
8 definitions of dwelling and a residence, but I will
9 not give vehicle. I don't think prior threats
10 applies, because the testimony was everything was
11 fine until the night of the party and there's no
12 indication of threats. I think she just said leave
13 and the defendant said he was happy to leave. So,
14 I'm taking out prior threats.

15 I will give -- I'm taking out reputation of
16 victim. There's been no testimony to her being a
17 violent or dangerous person. I will give physical
18 abilities. I will read the next paragraph, if in
19 your consideration the issue of self defense you
20 have a reasonable doubt and the question of whether
21 the defendant was justified, I'll give that, and
22 I'll give the next paragraph, however.

23 MS. COOK: Your Honor, would the physical
24 abilities, it usually inserts the name of the
25 victim, because there's two other people, we're

Boss Certified Realtime Reporting
954-467-6867

1663

Page 1317

1 asking that the two other people be listed, M [REDACTED]
2 G [REDACTED] and Patrick Johnson.

3 THE COURT: That's confusing. I mean, you can
4 argue that he was being attacked by Patrick Johnson
5 and M [REDACTED] G [REDACTED] but this goes to the actual
6 person that was killed. It was a self defense of,
7 as to the killing of [REDACTED]. So the only name
8 that goes in there is [REDACTED].

9 There are no other victims that are indicated
10 in the indictment, and I looked at it again. So I
11 will deny the Defense request to include the other
12 names.

13 I'm not going to preclude your argument, but
14 there's only one named victim in the indictment. If
15 the State had charged him with battery on M [REDACTED]
16 G [REDACTED] for Patrick Johnson, I would consider that
17 request.

18 So I'm going to clean this up. I'm going to
19 insert it in the packet, and this is what I'd like
20 to do. It is now 12:13 p.m. I'd like to send the
21 jury to lunch until 1:30. I'd like for you all to
22 come back at 1:15 to go through the packet. I was
23 thinking an hour and a half apiece, 90 minutes a
24 piece.

25 Do you feel like you need more time, Ms. Tate?

Boss Certified Realtime Reporting
954-467-6867

REDACTED

1664

Page 1318

1 MS. TATE: No, Your Honor, that's fine.

2 THE COURT: An hour and a half, Ms. Cook?

3 MS. COOK: That's fine.

4 THE COURT: Who's doing it? Who's doing
5 closing?

6 MS. COOK: I am.

7 THE COURT: Okay. Because I look and I say,
8 Ms. Lawson. And you say, I'm going to do it. And I
9 say, Ms. Cook and Ms. Lawson says, I'm going to do
10 it.

11 MS. COOK: I'm going to do it.

12 THE COURT: I'd like to at least know who's
13 going to do it, that way I can say, Ms. Cook, you
14 may proceed. I need to colloquy the defendant then
15 I will type these up while you all get some
16 nourishment. They will be on the table. I need you
17 all back here at 1:15 to go through the final
18 packet.

19 The lessers that I'm including in this packet
20 are second degree murder and the new manslaughter
21 instruction. And I do need to talk to you all about
22 that for a second because the Supreme Court changed
23 it in light of the Montgomery case out of the 1st
24 District Court of Appeal. And I know you all have
25 the hard copy, so if you'll turn to manslaughter

Boss Certified Realtime Reporting
954-467-6867

1665

Page 1319

1 real quick? I don't think B applies.
2 MS. TATE: I agree, Your Honor.
3 THE COURT: There's no procurement. In other
4 words, nobody was hired to do this.
5 MS. COOK: Right.
6 THE COURT: So I'm taking B out. C might be
7 applicable, so I need some argument. Do you think I
8 should give culpable negligence?
9 MS. COOK: Yes.
10 THE COURT: All right.
11 MS. COOK: You're talking about doing either A
12 or B, correct?
13 THE COURT: A or C.
14 MS. COOK: A or C, I'm sorry.
15 THE COURT: But the instruction puts an or
16 there. So it's either or and you can argue which
17 one you think is -- given the defendant's testimony,
18 he says he just shot the gun, that could be
19 negligence.
20 MS. COOK: Okay. That's fine, Your Honor.
21 THE COURT: So I'm taking out 2B as in boy. I
22 will give 2A. It says give only if 2A is alleged
23 and proved. And then I'll give 2C.
24 Ms. Tate, any objection from the State?
25 MS. TATE: No, Your Honor.

Boss Certified Realtime Reporting
954-467-6867

1666

Page 1320

1 THE COURT: Ms. Cook, any objection from the
2 Defense?
3 MS. COOK: No, Your Honor.
4 THE COURT: Everything else on that instruction
5 remains the same. Weighing the evidence. Real
6 quick, I give the first five as a matter of law,
7 they apply in every case. The only other one that
8 would apply is Number 8, inconsistent statements,
9 and that would become Number 6. But I have no
10 testimony which was procured by Gigleo, or threats
11 promised or anything of that nature. I have no
12 reputation evidence and nobody testified to a prior
13 conviction.
14 MS. TATE: And then the --
15 THE COURT: Whether the State has met its
16 burden, doesn't depend upon the number...
17 MS. TATE: I'm farther down the page about the
18 defendant testifying and expert witnesses.
19 THE COURT: The defendant in this case has
20 become a witness. You should apply the same rules
21 of consideration of his testimony that you apply to
22 the other witnesses. It is entirely proper for a
23 lawyer to talk to a witness about what testimony the
24 witness would give if called to the courtroom. The
25 witness should not be discredited by talking to a

Boss Certified Realtime Reporting
954-467-6867

1667

Page 1321

1 lawyer about his or her testimony, and you may rely
2 upon your own conclusion about the credibility of
3 any witness. A juror may believe or disbelieve all
4 or any part of the evidence or testimony of any
5 witness. Is there something else you needed?

6 MS. TATE: No, you got expert and defendant,
7 that's what I wanted.

8 THE COURT: That's right after law enforcement.

9 MS. TATE: Right.

10 THE COURT: And I'll check the spacing. Some
11 of these are single space, some of them are double
12 space, so I'm trying to keep the spacing the same.

13 All right. Then I will tell the jurors about
14 the notes and what will I'll do is put your packets
15 in the order that I plan to give it.

16 And then at 1:15 we'll go through the packet.
17 It shouldn't take us -- in light of what you've just
18 said, I'll take care of the self defense instruction
19 and put that in the packet. They will be on your
20 tables.

21 I need you all back here at 1:15, and that will
22 give you an hour for lunch. Let me bring the jury
23 in and let them go to lunch, tell them to come back
24 at 1:30.

25 (Whereupon, the jury was escorted into the

Boss Certified Realtime Reporting
954-467-6867

1668

Page 1322

1 courtroom, after which the following proceedings
2 were had:)

3 THE COURT: All right. You all may be seated.
4 Ladies and Gentlemen, all Counsel may be seated.

5 The record will reflect the presence of all the
6 members of the jury. Mr. Calder is present, Ms.
7 Cook and Ms. Lawson on his behalf, Ms. Tate on
8 behalf of the State.

9 Members of the Jury, both the State and the
10 Defense have rested their cases, and because it's
11 now the lunch hour, this is what I want to do: I'm
12 going to send you to lunch and bring you back at
13 1:30. That's an hour and 15 minutes.

14 The attorneys are going to come back, because
15 right after lunch we're going to go into closing
16 arguments and I want to go over the instructions
17 with them on the law that I'm going to be
18 instructing you on. It's only fair that they know
19 what I'm going to be instructing you on, so they can
20 incorporate it into their closing argument.

21 So, we're right on schedule. If you realize
22 this is not Wednesday, it's Monday, is so we've kept
23 a good pace here. I appreciate your patience and
24 sometimes the legal arguments go a little longer
25 than I anticipate, but I've got to give them access

Boss Certified Realtime Reporting
954-467-6867

1669

Page 1323

1 to me to discuss the law. So, we're at that point
2 when you come back from lunch we'll go into closing
3 arguments in the case. You won't have to take notes
4 from this point on but, hold onto your notes because
5 I'm going to give you an instruction about the
6 notes.

7 And what I have found helpful over the years is
8 each of you, even though I'm going to read the
9 instructions that you have to follow, I'm going to
10 make sure that each of you has your own copy so that
11 whoever the foreperson is, remember don't write on
12 the main copy that I give you, I have to send the
13 actual instructions that I read back with you, but
14 they will be paper clipped differently. And what
15 I'll do is give each of you a set, your own set of
16 the instructions after I've read them to you for
17 your use in the jury room. And that way you don't
18 have to go through and everybody looking at one
19 page. You'll have your page to look at.

20 Now, you can write on the copies that I give
21 you because at the conclusion of the case, just like
22 your notes, whatever you've written on them will be
23 destroyed, ripped up, torn up, throw it in the
24 trash. Okay. I think that makes it easier for your
25 deliberations and your discussions.

Boss Certified Realtime Reporting
954-467-6867

1670

Page 1324

1 Please remember, please don't talk about this
2 case yet. I've not given you the green light yet.
3 Don't discuss it during lunch. Don't let anybody
4 else talk to you about this case. If you see us out
5 in the hallway, that means we are just trying to get
6 a quick bite to eat. Ignore us, we only exist
7 inside of this courtroom. I'll see you back here at
8 1:30. Enjoy your lunch.

9 (Whereupon, the jury was escorted out of the
10 courtroom, after which the following proceedings
11 were had:)

12 THE COURT: All right, counsel, anything else?
13 I do need to colloquy Mr. Calder really quick.
14 Mr. Calder, was there any other witness or witnesses
15 that Ms. Cook or Ms. Lawson failed to call in this
16 case other than you?

17 THE DEFENDANT: Your Honor, I never really have
18 any witness because who I thought would be my
19 witness --

20 THE COURT: You mean Mr. Johnson?

21 THE DEFENDANT: Yes.

22 THE COURT: He's testified and he's been
23 cross-examined.

24 THE DEFENDANT: At first I thought he would be
25 for me.

Boss Certified Realtime Reporting
954-467-6867

1671

Page 1325

1 THE COURT: Anybody else that you can think of
2 that you told them --

3 THE DEFENDANT: I don't know. I don't know the
4 address, I don't know where he's now, who I have in
5 mind. I don't know where to reach them, I just knew
6 here --

7 THE COURT: Did you tell Ms. Cook and Ms.
8 Lawson about them? That's what I'm trying to find
9 out.

10 THE DEFENDANT: No, I did not say nothing to
11 them.

12 MS. COOK: And I think, presuming he would want
13 to give me character witnesses, right, to testify of
14 your character?

15 THE DEFENDANT: Something like that.

16 MS. COOK: Something like that. So that's, I
17 think I've had multiple conversations with
18 Mr. Calder.

19 THE COURT: As long as, you know, he discussed
20 it with you. But he's telling me now that even
21 under the standard that I have to follow, these
22 people would not be available, they are not ready,
23 willing, and able to testify. He doesn't know where
24 they are. I've heard those names, that's why I
25 asked at the beginning of the case was there was a

Boss Certified Realtime Reporting
954-467-6867

1672

Page 1326

1 defense witness in the case so I could discuss that
2 with him. So, everybody that you wanted to testify
3 in this case that could have testified, your
4 attorneys know about them and put them on, if
5 they're available, and that includes you. Anybody
6 else?

7 THE DEFENDANT: No, I've talk with my attorney.

8 THE COURT: Speak now for forever hold your
9 peace. This is it, after all of this time I need to
10 know who they are, if not, we're going to go into
11 closing arguments.

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: No other witnesses?

14 THE DEFENDANT: No.

15 THE COURT: Ms. Cook, are you aware of any
16 other witnesses?

17 MS. COOK: No, Your Honor.

18 THE COURT: And Ms. Lawson, anybody in passing
19 that you would want to call?

20 MS. LAWSON: No, Your Honor.

21 THE COURT: All right. Enjoy your lunch. I'll
22 see you back here at 1:15.

23 (Whereupon, a recess was taken for the noon
24 hour, after which the following proceedings were
25 had:)

Boss Certified Realtime Reporting
954-467-6867

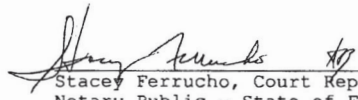
1673

Page 1327

COURT CERTIFICATE WITH ACKNOWLEDGEMENT

I, Stacey Ferrucho, Court Reporter, certify that I was authorized to and did stenographically report the forgoing proceedings and that the transcription is a true record.

Dated this 28th day of July, 2015.


Stacey Ferrucho, Court Reporter
Notary Public - State of Florida
Commission #FF144888
EXP. 07-31-18

Boss Certified Realtime Reporting
954-467-6867

1674

A-6

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO. 08-14480F101A

Plaintiff,

JUDGE: HOLMES

VS.

Filed in Open Court,
CLERK OF THE CIRCUIT COURT
ON 2-16-15
BY [Signature]

Defendant(s),

Winston Calder /

WE, THE JURY in the above entitled action request the following:

If possible, we request to see the ^{complete} transcript of
Winston Calder's statement on Jan 21, 2008.
to the police

Members of the jury,
The rules of evidence that we follow
does not allow the transcript to be introduced
into evidence. The transcript cannot be given to

This 16 day of February 2015.

you because it is
not in evidence.

FOREPERSON

[Signature] LARREN SINGER

Judge Flora Holmes

*** THIS IS AN OFFICIAL COURT DOCUMENT---PLEASE DO NOT DESTROY