IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR TAYLOR COUNTY, FLORIDA

STATE OF FLORIDA CASE NO.: 2015-198-CF

vs.

GARRETT ARROWOOD,
Defendant.
_____/

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE comes before this Court upon the Defendant's "Motion for Post-Conviction Relief," filed with the Taylor County Clerk of the Court on January 23, 2017. On August 7, 2017, in accordance with this Court's order, the State filed its "State's Response to Defendant's Motion for Post-Conviction Relief." The Defendant filed an "Amended Motion for Post-Conviction Relief," on August 10, 2017. In addition, the State filed a "State's Response to Defendant's Amended Motion for Post-Conviction Relief," on August 14, 2017. On August 22-23, 2018, an evidentiary hearing was held. Upon the agreement of the parties, this Court ordered written arguments, limited to 15 pages, be submitted by October 26, 2018. Upon consideration of the motion, the responses, the evidentiary hearing, the record, and applicable law, this Court finds and concludes:

Pertinent Procedural History

On June 29, 2015, the Defendant was indicted on four counts: First-Degree Murder while Armed, Burglary while Armed, Dealing in Stolen Property: Trafficking, and Actual Possession of a Firearm by a Convicted Felon. On January 21, 2016, a superseding indictment was issued, which contained the same four counts, but amended the window during which the murder occurred. The Defendant proceeded to trial on the first three counts. On April 22, 2016, the Defendant was found guilty of First-Degree Murder, Burglary of a Dwelling, and Dealing in Stolen Property. The jury specifically found that the Defendant did not actually possess a firearm during the murder or burglary. On April 27, 2016, the Defendant was sentenced to life in prison for the First-Degree Murder, fifteen years in prison for the Burglary, and fifteen years in prison for Dealing in Stolen Property. The two fifteen-year terms were ordered to run concurrently to each other but consecutive to the life sentence. The Defendant was awarded 306 days of jail credit. The Defendant filed a timely notice of appeal. *First DCA Case No. 1D16-2001.* However, on July 14, 2016, the Defendant filed a motion for voluntary dismissal regarding his appeal.

In the Defendant's amended rule 3.850 motion, for which an evidentiary hearing was held on all grounds except for the cumulative error allegation, the Defendant raised ten grounds: seven ineffective assistance of counsel and three prosecutorial misconduct. Each will be addressed individually below.

Strickland Standard

The two-prong test for evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

A fair assessment of the adequacy or deficiency of trial counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the challenged conduct from trial counsel's perspective at the time. Id. at 689. Because of the difficulties inherent in making this evaluation, a court must indulge a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. Id. Trial counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690. Because there are countless ways to provide effective assistance of counsel in any given case, the burden lies on the defendant to overcome the presumption that challenged conduct could be considered sound trial strategy. Id. at 689.

Even if a defendant shows that trial counsel's errors were unreasonable, the defendant must also show that these errors actually had an adverse effect on the defense. Id. at 693. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent trial counsel's errors, the factfinder would have had a reasonable doubt regarding the defendant's guilt. Id. at 695. In this case, a reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694. A court must consider the totality of the evidence before the factfinder. Id. at 695.

IAC[1] Ground 1: Alibi Defense

In IAC Ground 1, the Defendant argues that trial counsel was ineffective for failing to investigate the Defendant's "alibi defense." *Amended Motion at 16.* The Defendant argues that his trial counsel, "months before trial," was informed that the Defendant was in Tallahassee and Jacksonville during the time of the murder. *Amended Motion at 16.* However, trial counsel allegedly "informed the defendant and family that to investigate the alibi may reveal damaging evidence that the State could really 'pound'

[1] IAC is a shorthand abbreviation for ineffective assistance of counsel.

the defendant with." *Amended Motion at 17.* The Defendant alleges that his trial counsel informed him that this was "not an alibi, rather his alibi should be he was passed out at the camper when the victim was killed." *Amended Motion at 17.* According to the Defendant's motion, subsequent testimony "strongly suggest[s] there was not an investigation at all." *Amended Motion at 18.* Ultimately, the Defendant alleges that "newly discovered evidence" confirms that he was in both Jacksonville and Tallahassee on June 23, 2015, which is the basis for his "alibi defense." *Amended Motion at 18.*

Of the attachments to the Defendant's motion, the first three are emails that relate to IAC Ground 1. These three emails will be discussed chronologically below.

First, Exhibit 3 is an email exchange between Mrs. Arrowood, the Defendant's mother, and trial counsel, which occurred on December 19-20, 2015. *Amended Motion at Exhibit 3.* Trial counsel stated that the victim's date of death was June 24, 2015, and asked Mrs. Arrowood why she believed that the date and time of death were "markedly different." *Amended Motion at Exhibit 3.* Trial counsel then asked whether the Defendant had an alibi for June 24, 2015, or the days prior because, if so, he had not shared it with trial counsel. *Amended Motion at Exhibit 3.*

Mrs. Arrowood stated, in her reply, that she believed the date of death was June 23, 2015, because someone spoke with the victim on June 22, 2015, at 9 p.m., but no one heard from her on Tuesday, June 23, 2015. Trial counsel responded with a single question: "Is there a significance as to the day and time of death that affects Garrett?" *Amended Motion at Exhibit 3.* Mrs. Arrowood replied, "None Other than the fact that Tues was the day that Manden was seen out there on that day." *Amended Motion at Exhibit 3.* She also requested that trial counsel discuss the Defendant's trip to Jacksonville at their scheduled meeting the next day, December 21, 2015. *Amended Motion at Exhibit 3.*

Next, in Exhibit 1, a letter from trial counsel to Mrs. Arrowood, dated December 23, 2015, in which trial counsel mentioned the "alibi situation" and indicated that this possible defense would require "some careful thinking." *Amended Motion at Exhibit 1.* He further explained that the Defendant "being in these stores during that fateful week" shows that he was "going to extremes to sell things" and that trial counsel was fearful that the State "would exploit this." *Amended Motion at Exhibit 1.* Trial counsel also explained that the Defendant would have to testify for this theory, which would be "a two edged sword" because the State would then be able to "pound" the Defendant. *Amended Motion at Exhibit 1.* Nothing in this email suggests that trial counsel knew or had been informed that the Defendant had narrowed down his Jacksonville visit to Tuesday, June 23, 2015.

In Exhibit 2, which is an email exchange between trial counsel, Ms. Marsh (trial counsel's investigator), and Mrs. Arrowood from March 8-9, 2016, Mrs. Arrowood asked Ms. Marsh whether she had gone over "the June calendar" with the Defendant because she thought "his whereabouts the days

before and after June 23/24 [we]re critical." *Amended Motion at Exhibit 2.* At this time, March 8, 2016, Mrs. Arrowood either did not know or did not share that the Defendant was in Jacksonville on June 23, 2015.

Exhibit 2 does not include a response from Ms. Marsh; however, trial counsel responded to the questions posed by Mrs. Arrowood. In his response, trial counsel discussed his limited knowledge regarding the details of the alleged alibi defense:

> As to Garrett's recollection of the days June 21-26, I have been over Garrett's possible trial testimony including his whereabouts during this time. He has no solid recollection of his comings and goings prior to his arrest that is helpful. The stuff about driving to and from Jacksonville and Tallahassee is troubling and not something I think we want to present to a jury. He has no alibi except to say that he must have been passed out at the camper when Shelly was killed.

Amended Motion at Exhibit 2. Therefore, these three exhibits, while mentioning the possibility of the Defendant being in Jacksonville during the week of the murder, do not show or even suggest that trial counsel was aware of and blatantly ignored this possible alibi defense for June 23, 2015.

Next, testimony at the evidentiary hearing regarding when the Defendant's trial counsel learned of the alleged June 23, 2015, alibi conflicts with the allegation contained in IAC Ground 1. Both Mrs. Arrowood, the Defendant's mother, and Ms. Marsh, trial counsel's investigator, testified that the Defendant, prior to trial, could not articulate when he drove to Jacksonville.

According to Mrs. Arrowood, she admitted that her son, the Defendant, could not specify, before trial, which day he had visited Jacksonville:

> [STATE]: Now, isn't it true that your son didn't realize he went to Jacksonville on Tuesday morning until after the trial?
>
> [MRS. ARROWOOD]: You would have to ask my son.
>
> [STATE]: Did your son tell you anything about going to Jacksonville specifically that Tuesday morning before trial?
>
> [MRS. ARROWOOD]: No, because that was the whole point. He wasn't sure. He just knew he went to Jacksonville.
>
> [STATE]: He wasn't sure he had been to Jacksonville so he couldn't say for sure when?
>
> [MRS. ARROWOOD]: No, he wasn't sure what day he had been to Jacksonville.
>
> [STATE]: He wasn't sure which day he had been to Jacksonville?
>
> [MRS. ARROWOOD]: That's correct.
>
> [STATE]: He never was able to tell you what day he went to Jacksonville all the way through the trial - - all the way up until and through the trial?

> [MRS. ARROWOOD]: No, sir, but our conversations were very limited. It was only through jail house visitation and which Mr. Harrison made it extremely known that he did not want us discussing the case, so there was not a whole lot of discussion about the case.
>
> [STATE]: But to answer my question, he never told you that he had been in Jacksonville Tuesday morning before the trial?
>
> [MRS. ARROWOOD]: But he didn't also tell me that it wasn't Tuesday. He didn't tell me which day. He didn't tell me Monday or Tuesday or Wednesday or Thursday or Friday.
>
> [STATE]: Right. He couldn't tell you which day?
>
> [MRS. ARROWOOD]: No, sir.

Evidentiary Hearing Transcript Vol. I, at 50-51. In short, Mrs. Arrowood admitted that she did not know when her son, the Defendant, had visited Jacksonville around the time of the murder.

Later during the evidentiary hearing, Ms. Marsh testified that she had interviewed the Defendant on three occasions: December 2015, February 2016, and March 2016. *Evidentiary Hearing Transcript Vol. I, at 167.* Regarding the first interview, Ms. Marsh testified that the Defendant indicated that he was with the Whiddons during the week of the murder. *Evidentiary Hearing Transcript Vol. I, at 189-190.* She further testified that there was no mention of being in Jacksonville or otherwise being out of town during this first interview. *Evidentiary Hearing Transcript Vol. I, at 190.* In February 2016, at the end of the second interview, the Defendant mentioned Jacksonville to Ms. Marsh without any further details. *Evidentiary Hearing Transcript Vol. I, at 167, 190.* Finally, at the third interview, in March 2016, the Defendant informed Ms. Marsh that he recalled going to Jacksonville and being at a pawn shop with the word "eagle" or "America" in its name sometime during the week of the murder. *Evidentiary Hearing Transcript Vol. I, at 167-168.* Ms. Marsh testified that during this time and even during trial preparation the Defendant was "hazy" and unable to provide details about his whereabouts. *Evidentiary Hearing Transcript Vol. I, at 191-192.* Therefore, according to Ms. Marsh, the Defendant did not even mention Jacksonville until the second interview in February 2016 and no mention of visiting any pawn shops until the third interview in March 2016. In other words, at no time was the Defendant actually able to pinpoint what day he visited Jacksonville.

The evidence submitted in support of his rule 3.850 motion and the testimony of Mrs. Arrowood and Ms. Marsh refute the claim that the Defendant's trial counsel knew of this alleged alibi defense "months before trial." At best, the Defendant's trial counsel was able to piece together, based on the Defendant's "hazy" recollection, that the Defendant had possibly traveled to Jacksonville sometime during that week; however, even Mrs. Arrowood admitted at the evidentiary hearing that the Defendant did not know when he actually visited Jacksonville. Without more and given that the Defendant's trial counsel had been preparing a trial strategy for weeks—perhaps even months—concerning a defense that

the Defendant was sleeping in the Whiddons' camper at the time of the murder, it was not unreasonable or ineffective for trial counsel to continue to pursue this more-developed defense.

In addition, at the evidentiary hearing, the Defendant's trial counsel was questioned at length regarding why he did not pursue this potential alibi evidence. The Defendant's trial counsel testified that he was "almost positive" that the Defendant, during their three interviews, did not tell him that he had left Taylor County, and trial counsel testified that he knew that the Defendant "never said anything about Jacksonville." *Evidentiary Hearing Transcript, Vol. II, at 289.* The Defendant's trial counsel further explained that they had "spent several, many hours dealing with the alibi issue and his whereabouts. This was one of the things that we discussed most often with him, yes." *Evidentiary Hearing Transcript, Vol. II, at 289.* In fact, according to trial counsel:

> When I first interviewed him he told me that he had an airtight alibi, that from June 22, 2015 around 10:30 a.m. when he picked Manden Whiddon up about two blocks from here until June 27, that Saturday, 2015, he was always out there at the camper that is at Lake Bird, the property owned by the Whiddons . . . If he wasn't there, he was sleeping on the couch in Tommy Whiddon's home or house, which is on that Whiddon property.
>
> * * *
>
> That was his alibi. I never left that area. That's where I was that whole time, you know, getting high and apparently took a lot of drugs that would cause him to be sleepy, so he slept a lot. That is what he told me.

Evidentiary Hearing Transcript, Vol. II, at 289-290. However, during the discovery process, the Defendant's trial counsel learned that the Defendant was not exclusively at the Whiddons' property during the week this murder occurred. *Evidentiary Hearing Transcript, Vol. II, at 290-292.* The Defendant's trial counsel confronted the Defendant about this:

> [STATE]: Well, after learning about these different things such as the fact that he was at the convenience store at two a.m. on June 23 and at the pawn shop in Tallahassee at noon on the 23rd, did you ask the defendant about that or confront him with that?
>
> [TRIAL COUNSEL]: Yes. What happened was this, I was working with Ms. Marsh. We uncovered all of this information - - and you haven't even mentioned his comings and goings on the 24th. He is at four or five different locations. You know, arrowheads are being sold.

Evidentiary Hearing Transcript, Vol. II, at 293-294. In essence, the Defendant's trial counsel explained that if video evidence corroborated that the Defendant visited "some place," "he would admit it." *Evidentiary Hearing Transcript, Vol. II, at 293-294.* However, if there was no video evidence, then the Defendant merely indicated that he forgot or could not remember. *Evidentiary Hearing Transcript, Vol. II, at 294.*

The Defendant's trial counsel explained that he eventually learned that the Defendant "could have been in Jacksonville during the week of the murder." *Evidentiary Hearing Transcript, Vol. II, at 295.*

This occurred during Ms. Marsh's third visit. According to trial counsel, Ms. Marsh "told me that [the Defendant] had said that he thought, he wasn't sure, he couldn't really remember, but he thought that sometime during this week, this five day period, he went to Jacksonville." *Evidentiary Hearing Transcript, Vol. II, at 296.*

According to the Defendant's trial counsel, even knowing that the Defendant had possibly visited Jacksonville during the week of the murder, he instructed Marsh not to go to Jacksonville to further investigate this possibility. He explained how looking into this, which included obtaining the GPS report, would likely harm the Defendant's defense and provide the State with further potential incriminating evidence:

> [TRIAL COUNSEL]: Because I felt that more than likely, again based upon the time of death very clearly at the front end of this continuum, that [the Defendant], his whereabouts if he was in Jacksonville, would have been afterwards and if he was over there afterwards and he couldn't help me at all in that regard that that was extremely incriminating to show flight and to show consciousness of guilt.
>
> [STATE]: Did your investigator, Ms. Marsh, and you discuss the fact that the defendant may have gone to Jacksonville during the week of the murder?
>
> [TRIAL COUNSEL]: Yes, absolutely.
>
> [STATE]: Did she offer to go to Jacksonville to try to find a pawn shop where the defendant went?
>
> [TRIAL COUNSEL]: She did. We discussed it and there is an e-mail. She said, Baya, I will go back over, you know, I will go over there. And I sent her an e-mail and said, Leilani, do not go to Jacksonville.
>
> [STATE]: Why did you tell her not to go to Jacksonville?
>
> [TRIAL COUNSEL]: Very simply, there was strong evidence that during this time period, especially after this lady was known to be dead, [the Defendant] is all over Perry with the Whiddons selling rare arrowheads or attempting to sell arrowheads and guns.
>
> Now, it was undisputed that [the Defendant] was desperate for money for drugs. If [the Defendant] was going around Taylor County attempting to sell arrowheads and guns with these murderers, what would he be selling in Jacksonville? I mean, it didn't take a genius to figure that out. What I wanted to avoid was some well-meaning investigator to go poking around over there in Jacksonville and show up at a pawn shop and say you remember this really tall gangly kind of goofy looking kid with a baseball cap - -
>
> * * *
>
> [TRIAL COUNSEL]: What I was worried about, as I say, if he is selling stuff over here in Perry, what would he be selling in Jacksonville. He didn't have anything. He didn't own anything to sell.
>
> What I was worried about, as I say, is some well-meaning investigator going over there poking her nose where we shouldn't ever be and you hit on a pawn shop person and maybe he would say, no, I say, yeah, you know, I do remember. I mean, it was a really tall kid that stands out and, yeah, it was kind of interesting that he had these arrowheads

> and a gun. The guy gets interested and watches the news and picks up the phone and calls Bummy Williams, hey, you know, this kind of strange thing happened here the other day and I wondered if you would be interested in this.
>
> * * *
>
> [TRIAL COUNSEL]: I did not want to happen what has happened now in this case now that the data on this GPS device has been made public to your office. I did not want to happen in my case what now has happened.
>
> [STATE]: Why did you not want that to happen?
>
> [TRIAL COUNSEL]: Because this evidence is incriminating.
>
> [STATE]: Why do you say this evidence is incriminating?
>
> [TRIAL COUNSEL]: Because it shows [the Defendant] 120 miles away from Perry, Florida, when he has told law enforcement that he never left and he is over in a place that makes no sense for him to be. It shows consciousness of guilt and it shows flight and I just think it is very unfortunate. I did not want to give you guys an easy way to convict him.

Evidentiary Hearing Transcript, Vol. II, at 305-308.

During cross-examination, the Defendant's postconviction counsel further pressed trial counsel regarding when he learned that the Defendant had travelled to Jacksonville:

> [POSTCONVICTION COUNSEL]: When did you actually learn and know that [the Defendant] on June 23, 2015 was in Jacksonville, Florida?
>
> [TRIAL COUNSEL]: I never knew for absolute certain that [the Defendant] was in Jacksonville, Florida on the 23rd. What I had from him was: I think I went over to Jacksonville during this time. I don't remember exactly when.
>
> In other words, we were constantly dealing with a situation where we couldn't get a straight answer.
>
> * * *
>
> [POSTCONVICTION COUNSEL]: I guess what I'm getting at is no one ever -- actually yourself or Ms. Marsh at your direction and by your decision ever investigated any type of presence of [the Defendant] leaving Taylor County going to Jacksonville and then returning to Taylor County via Tallahassee on June 23, isn't that true?
>
> [TRIAL COUNSEL]: That is completely false.
>
> [POSTCONVICTION COUNSEL]: Okay. Then explain why that is false.
>
> [TRIAL COUNSEL]: I carefully investigated [the Defendant]'s whereabouts. Normally, the best source of information of a client as to his whereabouts is from the client. So after lying to us for months, giving us various stories about his comings and goings, he finally begins coughing up a little bit of information about Jacksonville.

Evidentiary Hearing Transcript, Vol. II, at 349. The Defendant's trial counsel further explained exactly what he did with the limited information that the Defendant eventually provided. *See Evidentiary Hearing Transcript, Vol. II, at 349-352.*

As late as the morning of trial, the Defendant still could not pinpoint when he went to Jacksonville, as shown by his answer in the questionnaire provided by trial counsel. This lengthy questionnaire was to prepare the Defendant to potentially testify. There was a specific question related to where the Defendant was between June 22 and June 24, and the Defendant's handwritten response was "I don't recall exactly." *Evidentiary Hearing Transcript, Vol. II, at 301-302.* According to trial counsel, the Defendant provided this completed questionnaire to trial counsel on the morning of trial. *Evidentiary Hearing Transcript, Vol. II, at 302.* In short, even on the morning of the trial, the Defendant was unable to recall and therefore tell trial counsel where he was (including Jacksonville) between June 22 and June 24, 2015.

Moreover, trial counsel believed that pursuing a Jacksonville trip as a potential partial alibi defense was not in the Defendant's best interest. He also was of the opinion that it did not amount to an alibi for the murder.

> [STATE]: All right. So, in other words - - let me ask you this, did you consider that Jacksonville trip that the defendant took on June 23 to be any sort of an alibi whatsoever?
>
> [TRIAL COUNSEL]: It was not an alibi. It was an illusion of an alibi, especially when on the morning of the trial I have in my hand a document from the defendant as to what he is going to say and so he gets up on the stand and he doesn't say I was in Jacksonville. He says, you know, I really don't know where I was. [The Defendant] did not offer me any support for a Jacksonville alibi. It was clear as it could be.

Evidentiary Hearing Transcript, Vol. II, at 308-309.

This Court finds that the Defendant's trial counsel did not perform deficiently regarding this alleged alibi defense. Instead, trial counsel implemented a sound trial strategy based on information the Defendant provided to him. First, the Defendant provided various versions of where he was during the week of the murder and was unable to pinpoint when and even whether he went to Jacksonville. Given this limited information, trial counsel was fearful that further investigation into a potential trip to Jacksonville, particularly regarding a possible pawn shop visit, would have more than likely resulted in damning evidence and, accordingly, did not pursue it. This was not an unreasonable course of action. Strickland, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.").

Second, the fact that the Defendant may have had an "alibi" for much of June 23, 2015, a 14-hour period, does not amount to an alibi for the murder given the time-of-death window. Granted, this window was uncertain and seems to have fluctuated during the pretrial discovery period and Dr. Anthony J. Clark's speculative opinion testimony.

The victim's body was found on Wednesday, June 24, 2015, in the late morning. According to the testimony of Dr. Clark, the autopsy occurred during the morning of Thursday, June 25, 2015. *Jury*

Trial transcript, Vol. IV, at 450, 454. During his direct examination, Dr. Clark was asked about the victim's time of death:

> [STATE]: Okay. And is a time of death of Monday night consistent with your findings at autopsy?
>
> [DR. CLARK]: With the changes we saw – with the decompositional changes that I saw and her being in a garage in a vehicle and her large size, heat is going to accelerate the decomp. changes, the decompositional changes.
>
> Normally with the changes we saw with the bloating and slippage and marbling and the discoloration and loss of rigor mortis, you would think in a room like this, somebody dies on this floor, that those changes would happen three to four days later, but because it's in Florida, and Georgia, too, the high heat and humidity on those days on and individual will accelerate that so we can see these changes in 12 to 24 hours after death.

Trial Testimony Vol. IV, at 454-455. Then, during cross-examination, the Defendant's trial counsel also inquired about the victim's time of death:

> [TRIAL COUNSEL]: Doctor Clark, you mentioned time of death. And I understood you to say that you have to consider the weather conditions and all of this, the temperature, the environment and all of that.
>
> I think you said normally this time of death could have been three to four days earlier than when she was found, but that time was probably less than that due to the conditions you referred to, right?
>
> [DR. CLARK]: That's correct.
>
> [TRIAL COUNSEL]: But you really can't just boil that down to a number of hours, can you? I mean this is an estimate. Can you just tell us what was maybe the earliest time and the latest time in your best estimate?
>
> [DR. CLARK]: In my best estimate, from the time she was found, I have seen these changes in individuals as quick as twelve hours, so that would probably be my minimum time. Of course a little bit longer time would help me out because it helps with that, but, again, with the conditions and her size, that in 24 hours, 36 hours at the outset, at the most.

Trial Testimony Vol. IV, at 455-456. During redirect, the State attempted to clarify Dr. Clark's opinion regarding time of death by asking whether he believed that it was 24-36 hours "before the body [was] taken by the funeral home or before your autopsy." *Trial Testimony Vol. IV, at 459.*

> [DR. CLARK]: That would be the time if those changes have been fairly consistent from the time she's found to the time I do the autopsy. We do put them in a cooler to slow things rapidly down, but, again, there's going to be some changes. But from what I understood, most of those changes were already there at the time they found her.
>
> [STATE]: Okay. And so we're talking about potentially 24 to 36 hours before she's found?
>
> [DR. CLARK]: Well, again, I'm favoring more like the 12 to 24. 36 would be kind of the outside number, but the 12 to 24, probably in that area.

> [STATE]: Okay. And is a time of death of Monday night consistent with your findings?
>
> [DR. CLARK]: That would be consistent with the findings, yes, sir.

Trial Testimony Vol. IV, at 459-460. On recross, the Defendant's trial counsel emphasized that the window articulated by Dr. Clark was merely an estimate, speculative and opinionated:

> [TRIAL COUNSEL]: But the time of death could have been later?
>
> [DR. CLARK]: Yes, sir, it could have been a little bit later, it could have been a little bit earlier.
>
> [TRIAL COUNSEL]: All right.
>
> [DR. CLARK]: That's just kind of a range I give.

Trial Testimony Vol. IV, at 460. Accordingly, the time of death was never narrowed down to be during the potential 14-hour window during which the Defendant was traveling in Jacksonville and Tallahassee. In paragraph 70 of the Amended Motion, the Defendant relies on Loudermilk v. State, 106 So. 3d 959 (Fla. 4th DCA 2013), to support this argument:

> [T]he law does not require that evidence of an alibi be a complete alibi accounting for all of the time that the defendant could have possibly committed the crime. It is sufficient if said evidence provides doubt that the defendant was present and committed the crime as to the time alleged the crime was committed.

Amended Motion at 19. Loudermilk concerns whether a defendant's trial counsel was ineffective regarding his right to testify despite "two on-the-record waivers of his right to testify." Id. at 960. The only relevant sentence from Loudermilk is

> As a result, testimony by appellant that he was employed for many hours a day for all but two months of the time period out of which his criminal charges arose had the potential to undermine the weight given by his jury to the victim's inculpatory testimony, and so counsel's advice to appellant not to testify was potentially prejudicial to his case.

Loudermilk, 106 So. 3d at 960. Accordingly, Loudermilk does not support the premise that an alibi defense need not be complete. On the other hand, the State, in its written final argument provided numerous Florida Supreme Court cases that allegedly support the opposite premise: that trial counsel does not render ineffective assistance when he or she fails to present a partial alibi. *State's Written Final Arguments as to the Defendant's Postconviction Claims at 4.* In all five cases cited by the State, the Florida Supreme Court found either that (1) the trial counsel made a strategic decision not to pursue and present the alibi defense because it was incomplete, incredible, or not provable; or (2) that counsel was otherwise not ineffective because the alibi defense was incomplete, incredible, or not provable. Reed v. State, 875 So. 2d 415 (Fla. 2004), Lott v. State, 931 So. 2d 807 (Fla. 2006), Mungin v. State, 932 So. 2d 986 (Fla. 2006); Overton v. State, 976 So. 2d 536 (Fla. 2007), Beasley v. State, 18 So. 3d 473 (Fla. 2009).

Nonetheless, to prevail on this ground, the Defendant must establish both deficient performance and prejudice, pursuant to Strickland.

> In order to establish prejudice, a defendant must show "a reasonable probability that 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Bradley*, 33 So.3d at 672 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). While a reasonable probability need not be "more likely than not," *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052 the likelihood of a different result must be "substantial, not just conceivable." *McQuitter v. State*, 103 So.3d 277, 280 (Fla. 4th DCA 2012) (quoting *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)).

Ibar v. State, 190 So. 3d 1012, 1024 (Fla. 2016). Here, had the Defendant's trial counsel pursued this defense and presented it to the jury, the Defendant would have testified that, at some time during the week of the murder, he travelled to Jacksonville because, as thoroughly discussed above, at the time of trial, the Defendant did not know when he travelled to Jacksonville. Assuming *arguendo* that this period would have been narrowed down to, as alleged in the Amended Motion, "2:00 a.m. on June 23, 2015, until later that afternoon, after 4:00 p.m." on the same day, based upon a more thorough investigation by trial counsel, this presentation to the jury may have conceivably impacted their verdict because it excludes the Defendant from the crime scene for that 14-hour period. However, given the State's theory, based on the last time that the victim communicated with anyone and the fact that she had not taken her Tuesday morning pills, that the victim was murdered sometime during the evening or night of June 22, 2015, which was supported by Dr. Clark's testimony, this Court cannot find a substantial likelihood that the jury verdict would have been different based on this potential partial alibi defense. Accordingly, the necessary prejudice prong has not been met.

Therefore, IAC Ground 1 is denied because the Defendant did not inform his trial counsel prior to trial that he had an "alibi" for Tuesday, June 23, 2015; trial counsel knew of the potential partial alibi but avoided it for strategic reasons; and even if pursued and presented, it would not have constituted an alibi such that there is a substantial likelihood the jury verdict would have been different.

IAC Ground 2: Advising the Defendant Not to Testify

In IAC Ground 2, the Defendant argues that trial counsel was ineffective for advising the Defendant not to testify. The Defendant claims that he was intending to testify that he was in Jacksonville during the time of the murder. "However, prior to his trial[,] Attorney Harrison informed the defendant that the Jacksonville alibi did not pan out and his alibi should be that he was passed out in the Whiddons' camper trailer for days . . . " *Amended Motion at 20.* Based on this advice, the Defendant

decided not to testify. The Defendant further argues that "Attorney Harrison's advice was for the defendant to commit perjury if he testified." *Amended Motion at 21.*

In his post-evidentiary hearing written closing argument, the Defendant, without any explanation, abandoned this claim. *Defendant's Memorandum in Support of Motion for Post-Conviction Relief at 13.* However, given that it was extensively addressed at the evidentiary hearing, this Court will briefly address the merits.

First, after the close of the State's case at trial, the Defendant's trial counsel was granted a recess to discuss with the Defendant and his family whether the Defendant would testify. *Jury Trial transcript, Vol. IV, at 491-492.* Trial counsel then announced that the Defendant did not intend to testify and requested that the trial court inquire about the Defendant's Fifth Amendment right not to do so. *Jury Trial transcript, Vol. IV, at 493.* A thorough colloquy was conducted whereby the Defendant stated that he understood it was his decision whether to testify, what relevant instructions would be given to the jury if the Defendant elected to testify, whether the Defendant had been threatened, coerced, or promised anything regarding his right to testify, whether he has had sufficient time to consider this right and discuss it with his attorney and family, whether he has any questions for the court or his trial counsel, and whether he remained satisfied with his trial counsel's services. *Jury Trial transcript, Vol. IV, at 493-495.* Accordingly, the colloquy at trial suggests that the Defendant was well aware of his right and made the ultimate decision not to testify.

Second, even if the Defendant had opted to testify, he could not have testified that he was in Jacksonville at the time or near the time of the crime because, as explained above in IAC Ground 1, the Defendant did not know, as late as the morning of trial, when he was in Jacksonville. *Evidentiary Hearing Transcript at 301-302.* Therefore, he could not have provided the testimony he alleges in this ground at the time of trial.

Third, given that the Defendant did not know when he was in Jacksonville, it is unreasonable and illogical to claim that trial counsel should have rendered advice encouraging the Defendant to testify as to something neither the Defendant nor his trial counsel knew of.

Fourth, prior to trial, there was clearly very thorough discussions and plans regarding whether the Defendant should testify on his own behalf. Trial counsel certainly considered the possibility of the Defendant taking the stand, as evidenced by the lengthy questionnaire provided to the Defendant. He explained the purpose of this questionnaire:

> [TRIAL COUNSEL]: . . . This was we were thinking that he would testify and that was fine if that's what he wanted to do. So I wrote out about 15 pages of questions and I left space for him to answer the questions.
>
> [STATE]: Did you give him a copy of those questions?

> [TRIAL COUNSEL]: I handed him the questions. I believe it was at my second to last visit.

Evidentiary Hearing Transcript at 298-299.

Trial counsel also explained, at the evidentiary hearing, that he discussed with the Defendant his right to testify on "[s]everal occasions" and that he explained the pros and cons of testifying and not testifying. *Evidentiary Hearing Transcript at 310.* Trial counsel made clear that "If Garrett had insisted or even said he would testify, I would never have stood in his way." *Evidentiary Hearing Transcript at 310.*

Trial counsel testified that he is "not against a defendant testifying even when he has priors and things of that nature." *Evidentiary Hearing Transcript at 313.* Trial counsel was also asked to read a portion of the cover letter attached to the questionnaire provided to the Defendant, which explicitly discussed the Defendant testifying: "When you testify the state will have had the transcripts of your statements for months and if you deviate in your trial testimony from what you said in the transcripts the state will have a field day with you." *Evidentiary Hearing Transcript at 300-301; see also Memorandum preceding Questionnaire, State's Exhibit 5.*

Additionally, trial counsel discussed how each involved party felt on this issue: the Defendant's mother believed that the Defendant should testify, but the Defendant's father, trial counsel, and trial counsel's investigator all felt that the Defendant should not testify. *Evidentiary Hearing Transcript at 313.* Trial counsel explained his potential concerns regarding the Defendant possibly testifying:

> You know, maybe Garrett could have pulled it off. But the problem I had with Garrett was he is very good at looking you in the face and saying: I didn't do this. I didn't kill my aunt. I didn't burglarize her house. But when you start getting into details, he is not - he can't handle it.

Evidentiary Hearing Transcript at 313. Trial counsel explained that he advised the Defendant that if he testified, he would be under oath and would have to tell the truth. *Evidentiary Hearing Transcript at 314.* And trial counsel explained that "hours were spent on it." *Evidentiary Hearing Transcript at 314.* Ultimately, however, trial counsel testified that his "final recommendation" was that the Defendant should "not testify." *Evidentiary Hearing Transcript at 311.* This advice, especially in light of the Defendant's lack of memory regarding his whereabouts during the week of the murder, did not amount to deficient performance. Rather, this Court finds that the advice rendered was sound.

And finally, at the evidentiary hearing, the Defendant admitted that he understood it was his decision as to whether he would testify and that his trial counsel merely provided advice to aid in that decision:

> [STATE]: But you did understand it was your decision?

[DEFENDANT]: Yes, sir.

[STATE]: Not to testify?

[DEFENDANT]: Yes, sir.

[STATE]: You can take the advice of counsel and do what you want with it but it is still your decision?

[DEFENDANT]: Yes, sir.

[STATE]: All right. And you told the judge it was your decision that day?

[DEFENDANT]: Yes, sir.

[STATE]: Was it still your decision?

[DEFENDANT]: Yes, sir.

[STATE]: So nothing has changed about it being a voluntary decision on your part?

[DEFENDANT]: I did what my lawyer advised me to do, sir.

[STATE]: Right. You chose to follow the advice of your attorney, but your attorney didn't tell you that you have to do this?

[DEFENDANT]: Correct.

Evidentiary Hearing Transcript at 455-456. Accordingly, even if the Defendant did not abandon this ground, it would be denied.

IAC Ground 3: Failure to Investigate GPS

In Ground 3, the Defendant argues that trial counsel was ineffective for failing to investigate disclosed state evidence. The Defendant alleges that a Garmin Nuvi GPS device and a report of the contents would "prove the Defendant's presence in Jacksonville and other areas throughout north Florida on June 23, 2015." *Amended Motion at 22.* The existence of this device was disclosed to the State by August 2015. *Amended Motion at 22.* The Defendant claims the details of the report were not disclosed by the State;[2] however, if "Attorney Harrison or his investigator had investigated this they would have discovered such critical evidence which also corroborated the defendant's continued claims of an alibi." *Amended Motion at 22.*

This ground does not present a unique issue; rather, it rehashes the ineffective assistance of counsel claim based on failure to investigate and present the alleged alibi that the Defendant was in Jacksonville (IAC Ground 1), which could have allegedly been proven by investigating the GPS device. As this Court thoroughly explained in IAC Ground 1, the Defendant's trial counsel made a strategic

[2] The Defendant also alleges that this evidence was "willfully or inadvertently suppressed by the State" and therefore violates Brady v. Maryland, 373 U.S. 83 (1963). *Amended Motion at 23.* This claim is addressed below, in Prosecutorial Misconduct Ground 1: *Brady* Violation, and, as such, will not be addressed in this section.

decision to not obtain the GPS results because he felt it would likely be detrimental to the Defendant's case. This strategic decision was previously found to be proper in IAC Ground 1, given the limited information the Defendant provided to trial counsel regarding his whereabouts, and nothing raised in this claim alters this Court's finding. Accordingly, IAC Ground 3 is denied.

IAC Ground 4: Eliciting Inadmissible Opinion and Hearsay Evidence

In Ground 4, the Defendant argues that trial counsel was ineffective for eliciting inadmissible opinion evidence and hearsay during the cross examination of Agent Albert Willis. The Defendant argues that Manden Whiddon's hearsay statements "made to law enforcement were inadmissible and such was acknowledged by all counsel." *Amended Motion at 36.* The Defendant claims that "Attorney Harrison's questioning in eliciting improper opinion testimony and the aforestated hearsay was ineffective and the defendant was prejudiced by such and did not receive a fair trial because of such." *Amended Motion at 36.*

The Defendant's trial counsel explained that he knew, at the time, that this amounted to inadmissible hearsay evidence. *Evidentiary Hearing Transcript at 315.* Nonetheless, he opted to elicit this testimony as part of his trial strategy:

> [STATE]: Why then did you elicit this hearsay testimony from Agent Willis?
>
> [TRIAL COUNSEL]: As time went on, we got a very lucky break from the FDLE. We got information to the effect that blood was found in Garrett's vehicle and that blood was linked by DNA analysis to the Whiddons. So now I really had something working for us.
>
> I also had photographs of Ms. Strickland dead in her car and what it showed was that glass from the driver's side window had shattered and there was a back lash and that glass had shattered outward about 12 to 18 inches. Also, very importantly, in the autopsy report of Dr. Clark he states that glass striping is in the side of Ms. Strickland's face.
>
> So now I have got an argument. I have got a real argument to make that the defense is Garett Arrowood did not do this but we have shown you who did and that is the Whiddons because they got cut from this back lash and that is why their blood was in the car.
>
> All right. So, I then put all that together in an opening statement and a closing argument and in a case like this you want to try to draw things together and make a logical argument to a jury as to why your client is not guilty. What I labeled it, I worked on it for weeks, I labeled it a rush to judgment. I said that what happened here was that when this murder took place, this young inexperienced FDLE agent, Albert Willis, coming rolling in from Tallahassee, you've got some of the best local investigators here, Robbie Hooker and Rusty Davis, he pushes them aside and he is the big shot. He comes in and talks to Manden Whiddon and it is set out right in the complaint, in the arrest complaint, and Willis buys this murdering Manden Whiddon story hook, line and sinker, causes Garrett to be arrested and as Ms. Arrowood informed me he lets these two murderers walk out the door.

> So what I wanted to try to show is that Willis had been affected. He been tricked. He had been fooled by the Whiddons. They had fooled him and it had worked and now Garrett is indicted and these guys are walking the street. So to bring that out to show an example of this favoritism that was given the Whiddons, I used the situation where Manden tells Willis it was Garrett who put those guns up there. I wanted to show, to give an example, of this unfair favoritism given to the real killer and my client is sitting in jail looking at the death penalty.
>
> So I considered the pros and cons. I realize that, you know, this is a decision that you make considering all of the factors and I felt that the good for us would clearly outweigh the bad. Here is the reason. If it had been Rusty Davis who found those guns and said that Garrett –
>
> * * *
>
> [TRIAL COUNSEL]: In other words, what I am saying is this, if it had been a preacher or if it had been any reputable person who was the declarant - - you know, when you talk about hearsay you talk about a declarant, the person actually making the statement. If it had been any person with any credibility whatsoever, I wouldn't have opened that door, but Manden Whiddon by all accounts, your account, my account, everything that was fed to that jury was the Whiddons were the murderers. You said and Garrett as well, but I said no.
>
> So the point is that having evidence presented as to what Manden Whiddon had said I didn't think would hurt Garrett one bit but it made I think a pretty darn good cogent, put together defense. We worked on it for months, got great help from Ms. Arrowood. My opening statement and closing thing all discussed with Garrett and his family and I think it was a pretty darn good way to present the case.

Evidentiary Hearing Transcript at 316-319. Accordingly, trial counsel's eliciting of this otherwise inadmissible hearsay evidence from Agent Willis, was the result of trial strategy, which this Court finds to be both reasonable and professional given what trial counsel knew at the time of trial. Therefore, IAC Ground 4 is denied.

IAC Ground 5: Failing to Request an Independent Act Instruction

In Ground 5, the Defendant argues that trial counsel was ineffective for failing to request an independent act jury instruction. The Defendant argues that "the failure to request the independent act instruction by Attorney Harrison did not give the jury the opportunity to find the defendant guilty of either other lesser crimes or an outright acquittal." *Amended Motion at 38.*

According to the State, in its pre-evidentiary hearing response, "[t]he evidence presented during trial in this case did not support an Independent Act instruction": "[t]here was no evidence to show or suggest the murder was committed independent of the burglary. Since all three defendants were participants in the burglary, they were all three culpable for the murder." *State's Response at 3.* Rather, according to the State, "[t]he Defendant merely claims that there was no evidence he was the actual

shooter that killed the victim." *State's Response at 3.* As such, this claim is meritless and should be denied. However, in an abundance of caution, this Court set this ground for an evidentiary hearing.

As explained by the First District,

> The independent act doctrine is applicable "when one cofelon who previously participated in a common plan, does not participate in acts committed by his cofelon, 'which fall outside of, and are foreign to, the common design of the original collaboration.' " Ray v. State, 755 So.2d 604, 609 (Fla.2000) (quoting Ward v. State, 568 So.2d 452, 453 (Fla. 3d DCA 1990)). "Where, however, the defendant was a willing participant in the underlying felony and the murder resulted from forces which they set in motion, no independent act instruction is appropriate." Id.

Cannon v. State, 18 So. 3d 562, 564 (Fla. 1st DCA 2009). An independent act instruction is inappropriate when the defense theory at trial is that the defendant was not at all involved in the crime. Pestano v. State, 980 So. 2d 1200, 1203 (Fla. 3d 2008) ("Denying any involvement in a crime, which was defendant's theory at trial, as supported by his testimony, negates the propriety of an independent act instruction."); Boyd v. State, 912 So. 2d 26, 27–28 (Fla. 4th 2005).

Here, as made clear during opening statements, the defense theory was that the Defendant was not involved in the murder or the burglary; rather, the defense theory was that the Whiddons took the Defendant's vehicle and even his shirt and committed the murder and burglary while the Defendant was "passed out." *Jury Trial transcript, Vol. I, at 49-50, 52, and 57.*

The Defendant's trial counsel even explained that he understood the impact of requesting an independent act instruction:

> [STATE]: Now, I want to turn now to another topic. Did you request the independent act instruction be given to the jury in this case?
>
> [TRIAL COUNSEL]: Absolutely not.
>
> [STATE]: Why is that?
>
> [TRIAL COUNSEL]: Because if I had opened the door to you guys with regard to an independent - - if I had asked the judge, Judge, would you instruct the jury on independent act, I know what you would have done. You would have said, Judge, no problem; no objection, Judge. Maybe the Court, I don't know, maybe the Court would say, well, you know, I want to be liberal and fair and nobody is objecting, so sure read them the independent at instruction. If I had done that, I would have been guilty of malpractice.
>
> The independent act instruction is kind of a defense to the principal concept. Normally, when more than one defendant, when they are involved in a common plan or scheme to commit a crime, both defendants are responsible for everything that results but there is an exception and that is the independent act exception.
>
> There are very limited circumstances where one defendant will go off on a tangent while this common plan or scheme is being carried out to commit, you know, the initial crime and do some horrendous thing. In those situations where his co-defendant did not know

> what his other co-defendant was going to do, did not join in doing it or, most importantly, could not foresee that that might happen, then that is a defense.
>
> In this case the underlying core is the common scheme or plan to do the original act. Now, think about it. What was I supposed to concede to this jury that Garrett Arrowood did to this poor lady or anybody with regard to some common plan or scheme? What would I have to admit? Oh, well, you know, okay, so he just agreed to drive them over there to her house. You know, he just helped them commit the burglary but he didn't know that they were going to murder this poor lady. You would have eaten me alive and that is what I was very, very worried about and I did not want to open that door. That is what that independent act is all about.
>
> I noticed in the motion it said that when I did that what I did was I deprived Garrett Arrowood of the ability of the jury to convict him of burglary while armed. In other words, I deprived poor Garrett of getting convicted for a first degree felony punishable by life. That is absurd. No lawyer should make that mistake and I didn't make that mistake.

Evidentiary Hearing Transcript at 319-321.

Therefore, to have requested an independent act instruction would have required an admission that the Defendant was involved in the burglary of the victim's dwelling. This was in direct conflict with the defense theory. Accordingly, the Defendant's trial counsel, under Pestano and Boyd, was not ineffective for failing to request such an instruction. IAC Ground 5 is denied.

IAC Ground 6: Failing to Seek a Dismissal of Superseding Indictment

In Ground 6, the Defendant argues that trial counsel was ineffective for not seeking a dismissal of the superseding indictment. The Defendant argues that a member of the grand jury that returned the superseding indictment had intimate knowledge of the case. *Amended Motion at 38.* "Attorney Harrison was aware or should have been aware that the members of the grand jury which issued the superseding indictment had knowledge that a pending indictment existed against the defendant." *Amended Motion at 38.*

The State, in its pre-evidentiary hearing response, alleged that "[t]he Defendant has failed to allege sufficient grounds that would warrant a dismissal of the indictment." *State's Response at 4.* Rather, according to the State, the Defendant "claims there was a person that was familiar with the case that sat as a juror on the grand jury," which "would not justify dismissal of the indictment." *State's Response at 4.* Despite the State's claim, this Court set this ground for an evidentiary hearing.

This Court finds that this allegation is somewhat vague, in that the Defendant does not establish the actual legal justification that trial counsel should have relied on to seek dismissal of the superseding indictment. Rather, the Defendant merely alleges that at least one member of the subsequent grand jury knew that a pending indictment had been issued naming the Defendant.

The case law regarding such an allegation is sparse. However, the Eleventh Circuit has opined on this issue: in order to be entitled to dismissal of a superseding indictment premised on pre-indictment publicity, a defendant must show that that the prosecution is unfounded and that the surrounding publicity "'substantially influenced' the ultimate decision to indict [the Defendant] and thereby caused him actual prejudice." U.S. v. York, 428 F.3d 1325, 1332 (11th Cir. 2005) (quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988)). And according to the Florida Supreme Court, "the mere existence of pre-indictment publicity is insufficient to show that grand jurors might be prejudiced or biased." Bundy v. State, 455 So. 2d 330, 347 (Fla. 1984), abrogated on other grounds by Fenelon v. State, 594 So. 2d 292 (Fla. 1992). Moreover, the State, in its written closing argument, provided U.S. v. Lander:

> Defendant complains about a particular member of the grand jury based on the juror's prejudice against Defendant and prior knowledge of the facts underlying the charges against Defendant. Assuming for the sake of argument that the person Defendant names was a member of the grand jury that indicted Defendant and had such prejudice and prior knowledge, only challenges to a grand juror's legal qualifications can be raised. Estes v. United States, 335 F.2d 609, 613 (5th Cir.1964). " 'Challenges for bias, or any cause other than lack of legal qualifications, are unknown as concerns grand jurors.' " Id. (quoting United States v. Knowles, 147 F.Supp. 19, 20 (D.C.D.C.1957)); see also 28 U.S.C. § 1865 (Qualifications for jury service). Even if such a challenge were recognized, Defendant has not shown that there were not at least 12 other jurors who participated in the return of the indictment. Dismissal of the indictment is therefore not appropriate. Fed.R.Crim.P. 6(b); Castle v. United States, 238 F.2d 131, 136 (8th Cir.1956). Furthermore, Defendant has not made a credible claim that the particular juror's presence "substantially influenced the grand jury's decision to indict." Bank of Nova Scotia v. United States, 487 U.S. 250, 256, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988).

2009 WL 3230338 (N.D. Fla. 2009).

In the instant case, at the evidentiary hearing, the defense called Shania Mattingly, a member of the subsequent grand jury that issued the superseding indictment. *Evidentiary Hearing Transcript at 58-61.* Ms. Mattingly testified that she "was aware about the case and that [the Defendant] had been indicted" and "charged with his aunt's murder" prior to becoming a grand juror. *Evidentiary Hearing Transcript at 60-61.* No further testimony was offered by Ms. Mattingly or any other grand jury members. Therefore, no allegation of actual prejudice or unfounded prosecution was even alleged. Additionally, the Defendant did not show or allege that "there were not at least 12 other jurors who participated in the return of the indictment." Accordingly, the Defendant has failed to show, despite sufficient opportunity in both his postconviction motion and at his evidentiary hearing and even after the State noted this potential insufficiency in its August 7, 2017, response, that there existed some legal error or flaw in the superseding indictment that warranted seeking its dismissal. Therefore, this Court finds that the Defendant's trial counsel was not ineffective for failing to seek dismissal of the superseding

indictment, because such a motion would have been meritless. Darling v. State, 966 So. 2d 366, 383 (Fla. 2007) (holding counsel was not ineffective for failing to raise a meritless objection).

IAC Ground 7: Cumulative Error

In Ground 7, the Defendant argues that trial counsel was ineffective due to the cumulative deficient and ineffective assistance of counsel, which deprived the Defendant of a fair trial. "The Defendant is claiming relief on each individual claim and on claims made as a whole." *Amended Motion at 40.* The Defendant claims that trial counsel was deficient and thus affected the jury's verdict. This claim is without merit as a claim of counsel's cumulative errors will not succeed if a defendant fails to prove any of the individual errors he or she alleges. Suggs v. State, 923 So. 2d 419 (Fla. 2005). Accordingly, as each of the Defendant's individual allegations of ineffective assistance of counsel have failed, so too must a claim of cumulative error. IAC Ground 7 is denied.

Prosecutor Misconduct Ground 1: *Brady*[3] Violation

In Ground 1, the Defendant argues that the prosecution committed misconduct by committing a Brady violation. The Defendant argues that the Garmin GPS device report, which "ultimately confirmed the defendant's presence for a significant period of time on said date far away from the crime scene," was created in June of 2015. *Amended Motion at 44-45.* The Defendant contends that this "provide[s] real alibi evidence." *Amended Motion at 45.* However, "the state never voluntarily produced it until the defendant confirmed it existed, months after the trial." *Amended Motion at 45.* The Defendant claims that the failure to disclose the report was a Brady violation as the evidence would have reasonably altered the outcome of the trial.

The State concedes that the GPS report was not disclosed to the Defense. *State's Response at 4.* However, the State argues that this did not amount to a Brady violation. *State's Response at 5.* Specifically, the State alleges that the second prong of Brady is not met because the GPS report was equally available to the defense as its existence was disclosed to the defense and that "the item was turned over to the Digital Evidence section for further analysis" was likewise disclosed to the defense. *State's Response at 5.* In fact, the State argues, the defense was in a better position to recognize the prospective usefulness that this GPS report contained because the State had no idea that there was a potential alibi defense at issue. *State's Response at 7.*

The State also contends that the Defendant's trial counsel's failure to obtain or attempt to obtain the GPS report is not "the result of negligence or incompetence." *State's Response at 8.* Even before the

[3] Brady v. Maryland, 373 U.S. 83 (1963).

Defendant's trial counsel's testimony at the postconviction evidentiary hearing, the State argued that the Defendant's trial counsel "apparently determined the information from the Garmin GPS was not material to the Defense, and indeed, was potentially harmful to the Defendant were the State to learn of it." *State's Response at 8.* Further, the Defendant's trial counsel "stated that such evidence was not an alibi and was not pursued by him" in a post-trial deposition. *State's Response at 8.* Therefore, according to the State, "[t]he testimony of [the Defendant's trial counsel] absolutely refutes there was any Brady violation. [Trial counsel] stated he was aware of the GPS device and did not regard such evidence as exculpatory." *State's Response at 8.*

At the evidentiary hearing, the Defendant's trial counsel testified that he "was certainly aware" that a GPS device had been found in the Defendant's vehicle. *Evidentiary Hearing Transcript at 303.*

> [STATE]: How were you aware of this GPS device in the defendant's vehicle?
>
> [TRIAL COUNSEL]: In one of Mr. McCain's many supplemental notices of discovery, there is an FDLE generated list schedule of all of the items that were found in [the Defendant]'s vehicle when it was impounded and listed amongst those things was a GPS device.

Evidentiary Hearing Transcript at 303. Trial counsel then explained that, despite not being an "engineer" or "expert," he owned a GPS device and knew what they did, including that they could be "analyzed and studied" to reveal "one's comings and goings." *Evidentiary Hearing Transcript at 303.* When asked whether he was aware that the device was in the possession of FDLE and available for further analysis, trial counsel indicated "[a]bsolutely" to both questions and explained and that he "was just hoping [the State] would not pick up on it." *Evidentiary Hearing Transcript at 303.* Then, the State asked trial counsel about not having it examined, and trial counsel responded, "You better believe I didn't have it examined."[4] *Evidentiary Hearing Transcript at 304.* Therefore, the Defendant's trial counsel knew the GPS existed, that it had been submitted to FDLE, and that he could have requested further analysis of its contents. Accordingly, the State did not withhold the existence of the GPS or its subsequent report from the defense. Prosecutorial Misconduct Ground 1 is denied.

Prosecutorial Misconduct Ground 2: *Giglio*[5] Violation

In Ground 2, the Defendant argues that the prosecution committed a Giglio violation. The Defendant argues that "the testimony elicited by prosecutor Weed of Jessica Strickland, with his knowledge or inputted [*sic*] knowledge, it was not accurate, is a **Giglio** violation." *Amended Motion at 45.*

[4] For a further analysis as to why trial counsel did not have the GPS device examined, see IAC Ground 1. Here, whether trial counsel's conduct was deficient for failing to investigate or secure the report is irrelevant as this allegation concerns whether the prosecutor failed to disclose allegedly exculpatory evidence.
[5] Giglio v. United States, 405 U.S. 150 (1972).

"In a post-conviction deposition Jessica Strickland stated that she would now give a different answer than her response to prosecutor Weed." *Amended Motion at 43.* The Defendant claims that it is likely that Ms. Strickland's false testimony affected the jury's verdict.

According to the Defendant, the testimony in question relates to Ms. Strickland testifying about the contents of the victim's bathroom. *Amended Motion at 43.* Here is the exchange from the Defendant's trial:

> [STATE]: All right. Now obviously this pill tray was collected by law enforcement.
>
> [MS. STRICKLAND]: Yes, sir.
>
> [STATE]: Did anyone -- before it was collected, did anybody mess with it on June 24th?
>
> [MS. STRICKLAND]: No, sir, nothing was touched in her bathroom. I closed the door and I didn't touch anything. It's still that way.

Jury Trial transcript, Vol. III, at 299-300. The Defendant further alleges that "[i]n a post-conviction deposition[,] Jessica Strickland stated that she would now give a different answer than her response to prosecutor Weed that no one had messed with things in the bathroom." *Amended Motion at 43.*

According to the State, Ms. Strickland's answer "was not false or misleading" and "related to an immaterial issue so there was not a Giglio violation." *State's Response at 9.* Moreover, "the pill tray was already in evidence by the time Jessica Strickland testified," and it was admitted "without objection." *State's Response at 9-10.* In short, the State argued, "An answer that was completely superfluous about an issue that was not contested concerning an item of evidence that was stipulated into evidence cannot be said to have affected the judgment of the jury." *State's Response at 10.*

It is important to note that, at trial, the State did not inquire about whether the bathroom or its contents had been "mess[ed] with." Rather, the State inquired specifically about whether "anybody mess[ed] with it," which clearly referred to the "pill tray" given the previous question. Ms. Strickland's additional answer was not elicited by the State, as evidenced by the State immediately redirecting the questioning back to the pill tray.

As he pointed out during the evidentiary hearing, the Defendant's postconviction counsel learned, through a postconviction deposition taken on June 23, 2017, that Ms. Strickland misspoke at trial because the victim's bathroom had not been untouched. This discrepancy in her testimony was highlighted during the evidentiary hearing. *Evidentiary Hearing Transcript at 61-93.* Postconviction counsel first ensured that Ms. Strickland was familiar with her trial testimony before inquiring about the veracity of her answer, "No, sir. Nothing was touched in her bathroom. I closed the door and I didn't touch anything. It is still that way."

> [POSTCONVICTION COUNSEL]: Okay. All right. Do you remember in the deposition when I asked you about the same subject because you had testified in trial that nobody had touched the pill organizer, do you remember that?
>
> [MS. STRICKLAND]: Yes.
>
> [POSTCONVICTION COUNSEL]: And then we talked and I showed you some pictures, do you remember that?
>
> [MS. STRICKLAND]: Yes.
>
> [POSTCONVICTION COUNSEL]: And after that, you agreed with me that something had changed, the pill organizer had been moved, do you remember that?
>
> [MS. STRICKLAND]: By law enforcement?
>
> [POSTCONVICTION COUNSEL]: Yeah. Remember that?
>
> [MS. STRICKLAND]: Yes.
>
> [POSTCONVICTION COUNSEL]: So when you testified at trial and said nothing had changed, okay, it was exactly the way it was, okay, that pill organizer had actually already been seized by law enforcement and they in fact had moved it, isn't that true?
>
> [MS. STRICKLAND]: Yes, sir, but I was referring to prior to law enforcement taking the container in evidence.
>
> [POSTCONVICTION COUNSEL]: Exactly. You are saying it had been moved before they even took it. It had been moved from where it was originally?
>
> [MS. STRICKLAND]: No, sir.
>
> [Postconviction counsel attempted to clarify his question concerning both Ms. Strickland's earlier testimony and her deposition testimony and when the pill box had actually been seized.]
>
> [POSTCONVICTION COUNSEL]: Ma'am, as you just stated and you acknowledged what you said in your trial testimony, in your deposition you said that a lot of things had been moved and that your trial testimony was incorrect, didn't you?
>
> [MS. STRICKLAND]: I spoke specifically about the roll of toilet paper and paper towels.

Evidentiary Hearing Transcript at 73-76. After additional questioning, Ms. Strickland reiterated that she testified in her deposition that she "would answer those questions differently" "if they were asked clearly." *Evidentiary Hearing Transcript at 77.* She also reiterated that any change or movement to the bathroom was the result of law enforcement:

> [POSTCONVICTION COUNSEL]: But we really know a lot of things have changed because in January of 2016 Robbie Hooker came and moved things around as you testified to and took the pill organizer, isn't that correct?
>
> [MS. STRICKLAND]: Yes, sir.

Evidentiary Hearing Transcript at 79.

During cross examination, the State clarified that the question posed at trial concerned the pill organizer:

> [STATE]: Let me ask you this and maybe we can clarify it. The question that was posed to you was concerning the pill tray, had anybody messed with the pill tray and what was your answer?
>
> [MS. STRICKLAND]: No.
>
> [STATE]: All right. And is that still your answer?
>
> [MS. STRICKLAND]: Yes.
>
> [STATE]: And when you were talking about things have changed you are talking about items within the bathroom but not the pill tray?
>
> [MS. STRICKLAND]: Correct.

Evidentiary Hearing Transcript at 79-80. This Court does not find that a Giglio violation occurred. According to the Florida Supreme Court, "a Giglio claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant." Guzman v. State, 868 So. 3d 498, 506 (Fla. 2003) (citing Giglio, 405 U.S. at 154-55)). Additionally, "[t]o establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." Id. at 1050 (citation omitted). Here, the one particular statement that Ms. Strickland indicates she would change her answer to if the question was asked clearly is not material. Ms. Strickland clarified that some contents of the bathroom, namely the toilet roll and paper towel roll, had been moved, but her answer that the pill box had not been "messed with" is still accurate. Accordingly, the material portion of her testimony, regarding the condition of the pill box, was not false or misleading. Moreover, this Court has no reason to believe that the location or movement of the bathroom paper products is material to this case. The Defendant also believes that Ms. Strickland's trial testimony suggests that the pill box was collected on June 24 and not substantially later in January 2016. This is similarly immaterial especially in light of the fact that the pill box, as the State noted, was admitted into evidence prior to Ms. Strickland's testimony and upon the stipulation of both the defense and the State. Accordingly, Prosecutorial Misconduct Ground 2 is denied.

Prosecutorial Misconduct Ground 3: Tampering with Evidence[6]

In Ground 3, the Defendant argues that the prosecution tampered with evidence. The Defendant alleges that, because he and his defense were not permitted access to grand jury proceedings, "the defendant is left with no explanation of the state's action except for the evidence the defendant has

[6] The Defendant also discusses the GPS device again in this ground. This Court has already thoroughly addressed the GPS device, its report, and any potential mishandling by the State.

discovered," which supposedly suggests that the pill organizer was retrieved "the day before the grand jury convened" because the State "needed evidence to change the date of the indictment against the defendant." *Amended Motion at 46.* This allegation is pure speculation on the part of the Defendant.

Moreover, the Defendant alleges that the collection of this evidence "defied all protocols for collecting evidence." *Amended Motion at 46.* Additionally, the photographs of the pill organizer, which the Defendant alleges show that there are not three pills in the Tuesday compartment, prove "by a preponderance of the evidence that the pills were placed in the Tuesday compartment after Hooker seized it." *Amended Motion at 47.* Therefore, the Defendant alleges that pill organizer was tampered with and should not have been admitted.

The State argues, in its pre-evidentiary hearing response, that the Defendant "has failed to articulate a reason to believe there was tampering" and instead merely "offer[ed] a rambling series of allegations and questions to justify his [tampering with evidence] allegation." *State's Response at 11.* Moreover, the State contends that "this issue should have been put to rest with the testimony of Deputy Hooker." *State's Response at 11.*

In an effort to prove that the pill box was tampered with, the Defendant's postconviction counsel had Stutchman Forensic Laboratory, of Napa, California, conduct "clarification, analysis, forensic photogrammetry, and comparison" of the photographs taken by Robbie Hooker at the time he collected the pill box on January 20, 2016. Chief Forensic Analyst Gregg Stutchman and Forensic Analyst Steve Buller opined, based on their analysis of the photograph, that the Tuesday compartment contained only one pill. However, an examination of the pill box reveals that it clearly contains three pills in the Tuesday section. This discrepancy, according to the Defendant, clearly proves that the State tampered with the contents of the Tuesday compartment.

Both Robbie Hooker, who collected and photographed the pill box, and Ms. Strickland, who assisted Hooker by showing him the location of the pill box, testified that the pill box was not tampered with and that there were three pills in the Tuesday compartment at the time the pill box was photographed and collected. After photographing the pill box, Hooker placed it in an evidence bag. That evidence bag was sealed with Hooker's signature and placed in the locked evidence compartment of Hooker's patrol car's trunk until it was turned over to the Taylor Sheriff's Office. The evidence bag is still sealed.

This Court finds that a proper chain of custody has been established for the pill box from the time it was collected by Hooker until now. Therefore, the only potential proof of tampering is the photographs taken by Hooker at the time of collection. These photographs contain a massive glare that covers a large portion of the Tuesday compartment. Accordingly, the photograph does not clearly show the contents of the Tuesday compartment. For this reason, the defense had the additional analysis of the photograph

conducted, which concludes that the Tuesday compartment only contained one pill at the time the photograph was taken.

This Court finds the report of Stutchman Forensic Laboratory inconclusive as to what the Tuesday compartment contains. This Court finds it interesting that there is no testimony or argument about whether the additional two pills could have been on their sides, which, given their sizes, would have allowed them to be completely covered by the glare. In fact, when this Court was handed the pill box at the evidentiary hearing, there were an equal number of pills lying flat as on their side. The location and placement of the pills could be easily manipulated by moving or shaking the pill box. So the possibility that the pills were in the pill box at the time of the photograph but merely on their side and hidden below the glare is plausible, and this Court, as the finder of fact, finds this to be the most likely scenario.[7]

Additionally, this Court finds the possibility that the pills were present but hidden below the glare more likely than the possibility that Hooker, with or without the assistance of Ms. Strickland, tampered with the pill box so that it contained only one pill at the time of the photograph but later contained three pills before being placed in the evidence bag. This Court further finds that, had Hooker or the State tampered with the pill box, they more than likely would have ensured that the Tuesday compartment clearly showed three pills, which would have corroborated the victim's time of death as being sometime before Tuesday morning.[8]

Interestingly, the Defendant alleges that the pill organizer was tampered with, by adding pills to the Tuesday compartment, to defeat the Defendant's alibi. *Amended Motion at 47.* However, this allegation fails for two reasons. First, the Defendant did not file a notice of alibi. Second, the Defendant's supposed alibi of not being at or near crime scene on June 23, 2015, was not used at trial as this is the main feature of the postconviction proceedings. Accordingly, the State, at trial, could not have known which specific date(s) to target in order to defeat any potential alibi defense. Therefore, this Court finds that the Defendant has not proven that the pill box was tampered with by the State or one of its agents, and this Ground is denied.

Therefore, it is **ORDERED**:

[7] The State also noted this possibility in its written closing: "[The photograph expert] opined that the pills could not have fit under this glare. His determination was based upon the pills lying flat and side by side. However, the photograph in question shows pills in the other compartments that were lying on their side." *State's Written Final Arguments at 12.*

[8] Again, the State raised a similar concern: "It is illogical to think Robert Hooker would take a photograph of the pill tray without three pills in the 'Tuesday' slot, then put pills in said slot, then disclose this photograph which would prove his wrongdoing." *State's Written Final Arguments at 12.*

The Defendant's "Motion for Post-Conviction Relief" is hereby **DENIED**. The Defendant may appeal this decision to the First District Court of Appeal within **30 days** of the rendition of this order. Fla. R. Crim. P. 3.850(k).

DONE in Suwannee County, Florida, on November 29th, 2018.

DAVID W. FINA, CIRCUIT JUDGE

Attachments[9]

- Jury Trial transcript, Vol. IV, at 450, 454-456, 459-460, and 491-495
- Jury Trial transcript, Vol. I, at 49-50, 52, and 57
- Jury Trial transcript, Vol. III, at 299-300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Order and attachments was furnished by U.S. Mail and/or electronic transmission, on November 29, 2018, to the following:

David Collins, Postconviction Counsel
collins.fl.law@gmail.com

David Finger, Postconviction Counsel
djf@fingerlawoffice.com

Office of the State Attorney
Third Judicial Circuit
e.service@sao3.org

Person Sending Copies

[9] Additional supporting documents, including the Defendant's rule 3.850 motion, the State's response, the evidentiary hearing transcript, and the exhibits from the evidentiary hearing, will be part of the record on appeal and therefore are not attached to this order.

University.

I then became employed by the Georgia Bureau of Investigation, the division of forensic science as the southwest regional medical examiner from 1994 to 2007.

I then traveled down to Tallahassee where I'm currently employed.

Q And did you perform the autopsy of Michelle Strickland?

A Yes, I did.

Q And what date was that on?

A The date of the autopsy was June 25th, 2015, at 911 hours.

Q Were you able to determine a cause of death?

A Yes, I was.

Q And what was the cause of death?

A The cause of death as listed on the autopsy report was gunshot wound to the head.

Q Were you able to determine how many gunshot wounds?

A Yes, sir.

Q And how many?

A Three.

Q I'm going to show you State's Exhibit 99. Do you recognize that?

A Yes, sir.

Q And are those the fragments that were recovered from the wounds?

A Yes, these are the three fragmented bullets I recovered. These are the envelopes that I put them in and my seal is up here and they've opened them up and put their own seal on, but this is my label for each case you can see at the bottom and then my seal is on them.

Q And based on your autopsy do you have any opinion as to whether the gunshot wounds were caused by a large caliber or small caliber firearm?

A It appeared to be a small caliber.

Q And remind us what date was your autopsy on.

A My autopsy was on June 25th.

Q Would that have been Thursday morning?

A Yes, sir.

Q Okay. And is a time of death of Monday night consistent with your findings at autopsy?

A With the changes we saw -- with the decompositional changes that I saw and her being in a garage in a vehicle and her large size, heat is going to accelerate the decomp. changes, the decompositional changes.

Normally with the changes we saw with the bloating and slippage and marbling and the discoloration and loss of rigor mortis, you would think in a room like this, somebody dies on this floor, that those changes would happen three to

four days later, but because it's in Florida, and Georgia, too, the high heat and humidity on those days on an individual will accelerate that so we can see these changes in 12 to 24 hours after death.

MR. McCAIN: I don't have any other questions.

THE COURT: Very well. Cross-examination.

CROSS-EXAMINATION

BY MR. HARRISON:

Q Doctor Clark, you mentioned time of death. And I understood you to say that you have to consider the weather conditions and all of this, the temperature, the environment and all of that.

I think you said normally this time of death could have been three to four days earlier than when she was found, but that time was probably less than that due to the conditions you referred to, right?

A That's correct.

Q But you really can't just boil that down to a number of hours, can you? I mean this is an estimate. Can you just tell us what was maybe the earliest time and the latest time in your best estimate?

A In my best estimate, from the time she was found, I have seen these changes in individuals as quick as twelve hours, so that would probably be my minimum time. Of course a little bit longer time would help me out because it helps

with that, but, again, with the conditions and her size, that in 24 hours, 36 hours at the outset, at the most.

Q All right. So I understand. All right. Now did you look at any photographs of the vehicle that she was found in?

A Yes, I did.

Q All right, sir. I want to hand you what's in evidence as Defense Exhibit 18. Okay. I'd like to hand this to you.

MR. HARRISON: If I may, Your Honor?

THE COURT: Yes, you may.

Q *(Mr. Harrison continues)* And what is that, Doctor Clark?

A This is showing the side of a vehicle with glass on the ground and there's a shattered window and you can see the decedent's head in the seat.

Q Okay.

MR. HARRISON: And could I just show this to the jury? I won't show them all around, but this is the document, the exhibit I'm referring to.

Q *(Mr. Harrison continues)* All right, sir. Now are you familiar with the size of a Nissan Juke? The height, for example.

A Yes, kind of, sort of, yes, sir.

Q Okay. Isn't that a subcompact vehicle?

that fair to say since the glass is seen scattered out here at least a foot or so from the outside of the vehicle?

A I guess it depends on how close he was standing to the vehicle. Let's say if the hand was extended, how close that hand was to it. But it seems to me the glass is going to be blowing in or dropping down, not necessarily blowing back, but I wouldn't know for sure.

Q You wouldn't know the answer. All right.

MR. HARRISON: That's all I have, Your Honor.

THE COURT: All right. Very well. Thank you. Redirect.

MR. McCAIN: Yes, sir. Thank you.

REDIRECT EXAMINATION

BY MR. McCAIN:

Q I was a little confused. Is it 24 to 36 hours you're talking about before the body is taken by the funeral home or before your autopsy?

A That would be the time if those changes have been fairly consistent from the time she's found to the time I do the autopsy. We do put them in a cooler to slow things rapidly down, but, again, there's going to be some changes. But from what I understood, most of those changes were already there at the time they found her.

Q Okay. And so we're talking about potentially 24 to 36 hours before she's found?

A Well, again, I'm favoring more like the 12 to 24. 36 would be kind of the outside number, but the 12 to 24, probably in that area.

Q Okay. And is a time of death of Monday night consistent with your findings?

A That would be consistent with the findings, yes, sir.

Q Okay.

MR. McCAIN: No other questions.

THE COURT: All right. Anything further?

MR. HARRISON: Can I just ask this?

THE COURT: Sure.

RECROSS-EXAMINATION

BY MR. HARRISON:

Q But the time of death could have been later?

A Yes, sir, it could have been a little bit later, it could have been a little bit earlier.

Q All right.

A That's just kind of a range I give.

Q I understand.

MR. HARRISON: Thank you.

THE COURT: Anything else from the State?

MR. McCAIN: No, sir. He can be excused.

THE COURT: Okay. You may step down. Any objection to him being excused?

THE COURT: Okay. Thank you. What says the State?

MR. WEED: And, Your Honor, with the testimony of George Kevin Cook and Jason McNair there's direct evidence of the defendant's involvement in these crimes, so therefore it's not a purely circumstantial evidence case, so we'd ask that the Court deny the motion.

THE COURT: Very well. The Court finds in addition to the circumstantial nature of the evidence, there is direct evidence, albeit questionable, but I believe the burden here and the issue before the Court is whether or not the State has made a prima facie case based upon the evidence in the light most favorable to them, so based upon the legal requirements the Court does and must deny the motion for judgment of acquittal.

Now having denied your motion, are you ready to proceed?

MR. HARRISON: Yes, sir. Just so we've got all our ducks in a row, can you give me two minutes just to talk to the client and his parents?

THE COURT: Yes, I'll give you ten minutes. We'll take a ten-minute recess. What we'll do in addition is there was a document I think the two of you mentioned

in chambers a few moments ago that would also be admitted. Are you going to do that in your case?

MR. HARRISON: I would. Thank you for that, yes.

THE COURT: All right.

MR. HARRISON: We will just introduce the autopsy report. And I noticed that our copy isn't clean. Does anybody got --

THE COURT: You have one?

MR. WEED: Baya, we can give you one.

MR. HARRISON: Thank you so much.

THE COURT: So the autopsy report from Doctor -- pardon me?

MR. HARRISON: Doctor Anthony Clark.

THE COURT: Yes, Doctor Clark's autopsy report will be moved into evidence without objection, correct, from the State?

MR. WEED: Correct.

THE COURT: And you'll be doing that. We'll take a recess to give you an opportunity to discuss how you wish to proceed.

We'll be in recess ten minutes.

(A recess was held from 1:51 p.m. to 2:05 p.m.)

(The following proceedings were held in open court, outside the hearing and presence of the jury, with the defendant and his counsel present, to-wit:)

THE COURT: All right. Mr. Harrison, are you ready to proceed?

MR. HARRISON: Yes, sir. Your Honor, at this time -- Your Honor, at this time I'd like to advise that we intend to rest. The defendant has advised me that he does not wish to testify. He exercises his Fifth Amendment right not to do so, but I'd ask that you inquire of him about that.

THE COURT: I will. Thank you.

Mr. Arrowood, I placed you under oath earlier this week and indicated to you that you'd remain under oath. You can remain seated. You would remain under oath and you do remain under oath.

Your lawyer has just announced now that it's your decision that you will not give testimony in this case. Before I ask you some questions about it, I want to make sure that you understand the decision to testify or not to testify is your decision. It's not anyone else's, it's not mine, it's not your lawyer's decision, so the choice is yours. Mr. Harrison is there to give you legal advice, to advise you what he may feel is best, but the ultimate decision is yours. Do you understand that?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: If you choose not to testify, I will

give the jury an instruction that tells them they're not to consider the fact that you did not give testimony as any evidence of guilt. Do you understand that?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: If you decide, you know what, I think I should testify, then you're entitled to do so and I'll give them an instruction, if you wish, that your testimony should be considered as any other witness' testimony. Do you understand that?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: Now has anyone threatened you, coerced you, forced you into making your choice here today?

THE DEFENDANT: No, sir, Your Honor.

THE COURT: Have you been promised anything at all in order to get you to make your decision?

THE DEFENDANT: No, sir.

THE COURT: Have you had sufficient time to consider whether or not you would be giving testimony in this case?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And have you had sufficient time to discuss it, not only with your lawyer, but your family members as well?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And is the decision then not to testify your decision?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Do you have any questions of your lawyer or of the Court before we continue in this trial then without you giving testimony?

THE DEFENDANT: No, sir, Your Honor.

THE COURT: All right. And do you remain well satisfied, as we discussed earlier, with the services that Mr. Harrison has provided to you throughout this case?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: Okay. Anything else that you'd like to bring to the Court's attention at this time?

THE DEFENDANT: No, sir, Your Honor.

THE COURT: Okay. All right. And you plan to rest then once the jury is brought back in and that other exhibit is admitted, correct?

MR. HARRISON: That's correct.

THE COURT: Now you have a clean copy of that report?

MR. HARRISON: We do. We do.

THE COURT: Okay.

MR. HARRISON: If I could get this marked as Defense Exhibit 23 in evidence.

is down at Shelley's house, so they go back to Shelley's house. And in the course of all that, they make plans to help Shelley and Mr. O'Steen take off the trash that is there. Garrett has no evil intent in doing that.

The problem is that the Whiddons see an easy mark. They're out there. They know something about Taylor County, they're out in a part of the county that's not heavily populated. Manden Whiddon was in Shelley's class, Manden Whiddon knows she's got arrowheads. These Whiddon guys see an opportunity to do mischief. They see an easy mark. At any rate, once the trash is dumped and Garrett has gotten some money from Mr. O'Steen, he leaves and drives the Whiddons back to Lake Bird.

And to paraphrase again what Mr. Weed said, over the next 24 to 36 hours, Garrett is buying all the drugs he can get and he is either ingesting those drugs or going to buy more or passed out in that camper.

Now when Garrett wakes up, and this is a critical part of this case. When he wakes up early on that Wednesday morning, the 24th, he notices that a lot of gas has been run out of his vehicle. He also notices that there are more arrowheads in the camper than usual. He had seen the Whiddons with arrowheads

before. Out in this Lake Bird area there are a lot of arrowheads and it was not unusual for arrowheads to be there, but Garrett notices that there are substantially more out there than there were before, and he assumes that those arrowheads belongs to the Whiddons. Garrett does not recognize these arrowheads as having come from Shelley's house nor does Garrett Arrowood understand that over the last 18 hours or so the Whiddons have killed his aunt.

Then later on the 24th the Whiddons tell Garrett that they're going to try to make some money by selling these arrowheads at various places in Perry. They do, as Mr. Weed indicated, then go to various locations and meet up with various individuals, including South House and Mark Southerland. They meet up with Kenneth Wayne Walker, with Jerry Pullum, perhaps others. It's hard to tell from the sequence of events who they go to first, but Garrett, as you may see on exhibits introduced by the State, when he's at South House, he's walking around this building oblivious to anything. He's not trying to hide what he's doing. He thinks he's trying to get some money from the sale of arrowheads. He has no idea that they came from Shelley's house.

All right. Now as counsel said, around noon, and,

and the Whiddons as they're driving south on 221 in Garrett's Trailblazer.

It's important for you to know two things. At this stage of the game, June 27th, shortly after this tragedy, the Florida Department of Law Enforcement has taken over this investigation, has kind of pushed local law enforcement authorities like Robbie Hooker, Rusty Davis and others, kind of pushed them aside. The FDLE has come into town from Tallahassee, assumed charge of the investigation and pretty much pushed their weight around. A very serious mistake for them and you will see why, but at least at this point in time FDLE had not one scintilla of forensic evidence that suggested that Garrett Arrowood had been in any way connected to Shelley's death.

Counsel spent a lot of time talking about the statements that Garrett made between January *[sic]* 27 and the 29th, and even over until January *[sic]* 30th. Garrett is brought here and three times he is interviewed by law enforcement. You will find that Garrett never insists upon a lawyer, he doesn't invoke Miranda rights, he agrees to talk to law enforcement and he does so on three occasions.

The State's own witnesses are going to have to admit that all during these occasions Garrett was

Garrett Arrowood in that Strickland residence. That didn't matter to Mr. Willis. He wanted to close the case and get back to Tallahassee.

At any rate FDLE is forced to get off it's rear end and develop this forensic evidence. And so what do they do? Remember Mr. Weed said that they went into this vehicle of Garrett's and they did a careful and thorough search of the inside of that vehicle. And I hope I'm keeping on course here.

At any rate the blood samples taken from the car, they're found at three different places, three different places in Garrett's vehicle blood is found. There's blood on one of the panels, on one of the panels in the backseat, there's blood in the front seat. And interestingly, there is blood on a blue shirt, a blue shirt that's in that vehicle.

Well, you go to the Albert Willis school of quickie investigations, who would that blood belong to? According to the State of Florida that would be Garrett Arrowood, he shot and killed this woman, but the FDLE gets a big shock because those blood samples come back and guess whose blood and only whose blood is on or inside Garrett's car?

Remember Garrett's defense is, look, they took my car. I was passed out. They must have taken my car,

A Yes, sir.

Q And what is that?

A This is her pill organizer.

Q All right. And where did she keep it inside the house?

A When you walk into her bathroom, on the right-hand side there is a water bottle where she took her last medication and she kept it inside of a glass. I think it was a glass little container that she would put things inside of.

Q All right.

A On the right-hand side right when you walk in her bathroom.

Q I got you. Let me show --

A When she would brush her teeth, she would take her medication.

Q Okay. Let me so you State's Exhibit 28. What is State's Exhibit 28 a photograph of?

A Her bathroom counter.

Q All right. And is the pill tray located on this?

A Yes, sir, on the right-hand side.

Q *(Indicating.)*

A Yes, sir.

Q All right. Now obviously this pill tray was collected by law enforcement.

A Yes, sir.

Q Did anyone -- before it was collected, did anybody mess with it on June 24th?

A No, sir, nothing was touched in her bathroom. I closed the door and I didn't touch anything. It's still that way.

Q All right. And the pill tray, does it have the pills still inside?

A Yes, sir, it does.

Q All right. And could you describe for us, are the pills for Monday still in there?

A No, sir, she took her Monday medication as we spoke with her on Monday and she was still alive.

Q And what about Tuesday?

A Tuesday medication is not taken.

Q Okay. All right. Thank you. Do you know the defendant, Garrett Arrowood?

A Yes, sir, I do.

Q Are you related to him?

A Yes, sir.

Q All right. Do you see him here in the courtroom?

A Yes, sir, I do.

Q Could you point him out and describe --

A Yes, sir.

Q -- what he's wearing?