

**IN THE DISTRICT COURT OF APPEAL  
FIFTH DISTRICT, STATE OF FLORIDA**

**ERIC DESHAWN WRIGHT,**

**Appellant,**

**v.**

**Fifth DCA Docket # 5D18-3953**

**STATE OF FLORIDA,  
Appellee.**

**Lower Tribunal Docket # 2014-CF-726-A**

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**On Appeal to the Fifth District Court of Appeal from the Circuit Court of the  
Eighteenth Judicial Circuit Court in and for Seminole County**

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**APPELLANT'S INITIAL BRIEF**

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## **PRELIMINARY STATEMENT**

This is an appeal as of right from a final order of the Eighteenth Judicial Circuit Court, Seminole County (Hon. Melissa D. Souto) entered on November 30, 2018, denying Appellant's motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, without the benefit of an evidentiary hearing. Appellant timely filed and served an Amended Notice of Appeal on December 26, 2018. This Court has jurisdiction over this matter pursuant to Florida Statutes § 35.043.

Appellant remains incarcerated pursuant to the judgment of conviction that was the subject of the final order appealed herein, and is represented by Halscott Megaro, P.A.

## **PROCEDURAL HISTORY**

On April 9, 2014, an information was filed against Appellant charging him with Attempted First Degree Premeditated Murder, in violation of Florida Statutes § 784.04(1)(A)(I). Appellant was arraigned on the charge on April 22, 2014 and entered a plea of "not guilty." Because he was indigent, the Public Defender was appointed to represent him. On April 30, 2014, the trial court entered an order appointing conflict counsel and Kenneth M. Hamburg, Esq. entered an appearance on May 6, 2014. On July 27, 2015, a joint stipulation for substitution of counsel was

entered, stipulating that Darryl Smith, Esq. would continue as counsel in the pending case.

On April 17, 2015, Appellant filed a motion to exclude improper opinion evidence pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Florida Statutes § 90.70. A hearing on the motion was held on May 18, 2015. On June 19, 2015, the trial court entered an order denying the motion.

Appellant was tried before a jury on August 31, 2015 and September 1, 2015 in the court below. At the conclusion of the trial, he was found guilty as charged, and later sentenced to 25 years' imprisonment, followed by 10 years of supervised probation on November 18, 2015.

Appellant directly appealed the conviction to this Court in Docket # 5D15-4066, which per curiam affirmed on June 21, 2016 and simultaneously granted appellate counsel's motion to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967).

Thereafter, Appellant retained Eddie Bell, Esq. for post-conviction representation. On April 16, 2018, Appellant filed a petition for post-conviction relief pursuant to Rule 3.850 of The Florida Rules of Criminal Procedure. In his motion, Appellant raised five claims:

- 1) Counsel failed to retain an independent firearm and ballistic expert
- 2) Counsel failed to impeach victim with prior felony convictions
- 3) Counsel failed to file motion to suppress pretrial identification of Appellant
- 4) Counsel failed to object to victim's and witnesses observations of Appellant before the shooting
- 5) Cumulative error

On November 30, 2018, the Circuit Court (Hon. Melissa D. Souto, presiding) denied Appellant's motion without an evidentiary hearing. This appeal follows.

### **STATEMENT OF FACTS**

#### **Background**

Appellant, James Bonomo, Patrick Jackson, and an individual named Radley all lived together in a rental home in Casselberry. This rental home was unique in the sense that each individual who lived at the home had a separate rental agreement with the landlord, essentially transforming the home into a boarding house.

At some point in early January, 2014, Appellant was evicted from the home. After being evicted, Appellant maintained friendly relations with the neighbors and was accustomed to visiting friends in the area. Even after being evicted, Appellant would still spend time at the home, though he was not living on the property.

The night of the shooting, March 2, 2014, Jackson was outside on his patio, playing a video game on his phone, while Bonomo was showering for the evening. Earlier that day, Appellant had been by the home and had asked to speak with



Radley and Jackson. Sometime around 9 pm, while playing the video game, Jackson noticed some rustling in the bushes, which he originally thought was a racoon. Suddenly, a shot rang out and Jackson was struck in the chest. After being shot, Jackson called Bonomo for help, who quickly responded, requesting police and medical assistance. When first responders came, there were no suspects found at the scene, and Jackson was rushed to the hospital. Jackson told authorities that Appellant was the shooter, and police immediately began searching for Appellant.

Upon police arrival to the crime scene, a forensic investigation commenced. No fingerprints, foot prints, DNA or other physically identifying forensic evidence was located at the scene. The only evidence left behind were 6 shell casings from the discharged firearm. These casings were collected and tagged into evidence. No other suspect was investigated other than Appellant. (TT: 131<sup>1</sup>).

On March 19, 2014, police followed a public bus whereupon they identified Appellant exiting the bus. Police arrested Appellant without incident and seized a backpack on his person, which, among other things, contained a .22 caliber semiautomatic handgun. This handgun was taken into evidence, whereupon it was examined by Florida Department of Law Enforcement analyst Lynn Skoglund. Skoglund determined that this firearm was used in the shooting of Jackson, as it accurately matched the six shell casings found at the scene.

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<sup>1</sup> Trial transcripts will be referred to as TT, followed by the corresponding page number

Appellant was soon after charged with premeditated attempted first degree murder and proceeded to trial.

### The Appellant's Daubert Motion

Prior to trial, Appellant sought to exclude the ballistic firearm expert. The motion sought to exclude the testimony of Lynn Skoglund, a crime laboratory analyst with the Florida Department of Law Enforcement. Skoglund had conducted a forensic examination of six spent cartridge shells collected from the crime scene. She concluded in her report that the cartridge shells had been fired from a K12 pistol recovered from the Appellant. The motion to exclude contended that Skoglund's conclusion was not reliable enough to be admitted under the Daubert standard based on the methodology used in the field of firearm identification.

The motion was called up for a Daubert hearing on May 18, 2015. Skoglund testified that an impressed tool mark and a striated tool mark left on a shell after firing are unique to each particular firearm. She testified that, during the manufacturing process, tools that come into contact with a firearm leave behind unique surface imperfections which are unique to each firearm. Skoglund testified that it would have been practically impossible for the shells to have been fired from another firearm and, if she had any thoughts that the characteristics could have been made by another firearm, she would not have reached her conclusion. Skoglund admitted that her conclusion was a subjective determination. On June 19, 2015, the

trial court entered an Order denying the Motion to Exclude. In its Order, the Court ruled:

The Appellant relies largely on the case of United States v. Taylor, 663 F. Supp. 2d 1170, 1175-80 (D.N.M 2009), in which the Federal Court identified several issues relating to the reliability of ballistics testing. Nonetheless, the court did not exclude the evidence. That court limited the expert's testimony such that the expert could not testify that the bullet matched the gun or that the ballistics comparison excluded all other guns from consideration of having fired the bullets; the expert would allowed to testify that, "in his opinion, the bullet came from the suspect rifle to within a reasonable degree of certainty {emphasis added} in the firearm examination field." Id at 1180. That limitation is consistent with other federal courts that have considered this issue and will be imposed in this case. [cites omitted]

#### State's Motion to Exclude Appellant's Expert

On August 28, 2015, the State moved to exclude Appellant's forensic expert, Michael Knox, on the basis that Knox was unqualified to render an opinion on ballistic identification, as Knox had never testified as an expert before and that his primary specialty was in accident reconstruction. The State asked for a Daubert hearing, and Knox was subsequently precluded from offering an expert opinion in ballistic identification, with **both parties stipulating** Knox was unqualified [emphasis added]. Appellant's motion in limine, seeking to exclude historical character evidence of Appellant, was also granted in part and denied in part during this pre-trial hearing as reflected in the court's minutes.

## The Trial

The case was called up for trial on August 31, 2015. The victim, Patrick Jackson, was the only State's witness that gave testimony concerning the shooting. There were no eyewitnesses to the shooting. Other than law enforcement officers and the firearm expert, the other State's witnesses only provided testimony concerning what happened before and after the shooting. Prior to the shooting, Jackson testified that he observed Appellant multiple times for eighteen days after Appellant moved from the rooming house in which they had lived as roommates. After moving out, Jackson testified that he saw Appellant on a daily basis and "it made him feel very uncomfortable" [emphasis added] (TT: 51). The first time Jackson and Appellant saw each other after they moved out, was when Jackson observed Appellant outside of a store window. Jackson testified that Appellant appeared in an "aggressive stance upon their first interaction, and that Jackson continued to see Appellant on a daily basis after Appellant was evicted. Approximately 3 weeks passed between the time Appellant moved out and the shooting, and that this made Jackson feel very uncomfortable. (TT: 51).

At the time of the shooting, Jackson testified that he was preoccupied with drinking coffee and playing a video game (TT: 76). He only saw the upper torso of the person who shot him (TT: 77). He saw a flash and then immediately ran into the house. Most of the State's direct examination of Jackson concerned what had

occurred prior to the shooting. Jackson could not provide a physical description of the shooter or identify the clothes the shooter was wearing (TT: 82). After the State's re-direct examination of Jackson, Appellant's trial counsel, Darryl Smith, on redirect cross examination sought to impeach Jackson with his prior felony convictions (TT: 84-85). The State objected on the ground that the question went beyond the scope its redirect examination. The court sustained the objection. (TT: 86).

The State's next witness was James Bonomo, a former roommate of both Jackson and Appellant. Bonomo testified concerning alleged events that occurred prior to the shooting and after the shooting. He did not witness the shooting. He testified that he was present when the landlord had evicted Appellant from the boarding house that they shared prior to the shooting (TT. 86). Bonomo testified that Appellant came over to the house three and four times a day after he was evicted, and that the Appellant would frequently stare and smirk at Jackson and him (TT: 89).

Bonomo testified that, on March 2, 2014, him and Jackson were in front of the house talking when Appellant came up to them and asked for Radley, another former roommate of the Appellant. They told the Appellant that Radley was out of town but would return the next day (TT: 91). Bonomo then texted and called Appellant's mother, informing her that Appellant was at the home. According to Bonomo, this interaction occurred around 8:00 P.M. on the night of the

shooting.(TT: 92). Bonomo did not text Appellant's mother until approximately an hour later. (TT: 93). After speaking with Appellant, Bonomo testified that he went inside the house to take a shower. Jackson then came running into the house and stated that he had been shot. Bonomo did not witness the shooting. Jackson appeared shocked and panicked. Bonomo then called 911 and waited for Police to arrive. (TT: 94).

James Ball testified that he was a police sergeant with the City of Casselberry. (TT: 115). Ball was dispatched to the scene at 9:37 pm. (TT: 116). As a responding officer, Ball conducted s search of the house and was unable to locate any suspects. Similarly, Ball was unable to locate any identifying fingerprints, footprints, or DNA samples indicating a match. Ball admitted on cross-examination that no other suspects were investigated in connection with the crime. (TT: 131).

Eric Brothers, a deputy with the Seminole County Sheriff's Office testified that he was a responding officer. Brothers collected six spent cartridges from the crime scene, and observed bullets holes in an outside sink and blood stains inside the residence. He collected a DNA sample from the head of one of a spent cartridge. Brothers testified that no DNA or fingerprint evidence matched that of Appellant (TT: 151). Brothers testified that the pictures of the crime scene showed dark lighting and that he had to use a flashlight to illuminate the area (T: 155).

Raymond Wimpleberg testified that he served as a Master Deputy with the Orange County Sheriff's Office fugitive unit. (TT: 162). Wimpleberg was a responding officer who originally executed a warrant on Appellant along with Aaron Smith.

Aron Smith testified that he was also employed with the Orange County Sheriff's Office fugitive unit. (TT: 175). Smith was a responding officer who helped execute the arrest warrant on Appellant. Smith was also the officer who searched Appellant's bag, finding a firearm. (TT: 182). The firearm was loaded and ready to fire. (TT: 186). Inside the bag there were two more rounds of .38 caliber ammunition, cartridges, and a box of .22 caliber long rifle cartridges in the bag. (TT: Id.). The firearm recovered in the bag was a .22 caliber long rifle. (TT: 187).

The State's next witness was Lynn Skoglund, a crime laboratory analyst who was the supervisor of the firearm section of Florida Department of Law Enforcement. Skoglund provided testimony that was consistent with her testimony in the pretrial hearing to exclude her testimony. She testified that the Association of Firearm and Tool Mark Examiners (AFTE) have procedures and guidelines for the matching of tool marks on spent cartridges to particular firearms (TT: 207). Namely, Skoglund concluded that the six .22 long rifle caliber cartridge cases found at the crime scene were within a reasonable degree of ballistic certainty to have been fired from the firearm recovered on Appellant's person. (Id.). Thereafter, the State rested.

### Defense Case

After the State rested, the court questioned the Appellant concerning whether he wanted to testify. The Appellant indicated that he did not want to testify. Appellant then rested without calling any witness to testify on behalf of the Defense. The defense argued in closing that the statistical uncertainty of ballistic evidence exonerated Appellant. (TT: 274).

### Verdict and Sentencing

After deliberations, the jury found the Appellant guilty as charged of Attempted First-Degree Murder. On November 18, 2015, the Court sentenced Appellant to the minimal mandatory sentence of twenty-five years state prison followed by a period of ten years of probation.

### Direct Appeal

Appellant appealed the verdict to this Court in Docket # 5D15-4066. After an Anders order was issued, this Court affirmed the trial court's decision in a Per Curiam Affirmance, with a mandate being issued on July 15, 2016.

### Post-Conviction Proceedings

On April 16, 2018, Appellant filed an amended motion for post-conviction relief, under Rule 3.850 Fla. R. Crim. P. Appellant raised the following issues in his motion:



- 1) Counsel failed to retain an independent firearm and ballistic expert
- 2) Counsel failed to impeach victim with prior felony convictions
- 3) Counsel failed to file motion to suppress pretrial identification of Appellant
- 4) Counsel failed to object to victim's and witnesses observations of Appellant before the shooting
- 5) Cumulative error

On July 18, 2018, the lower court issued an order requesting the State to respond to the second ground raised in Appellant's post-conviction motion. On November 5, 2018, the State filed its response, and on November 30, 2018, the Circuit Court (Hon. Melissa D. Souto, presiding) denied Appellant's motion without an evidentiary hearing. This appeal follows.

### **SUMMARY OF THE ARGUMENT**

An evidentiary hearing is appropriate where, as here, a claim of ineffective assistance of counsel is made and is not conclusively refuted from the record. As a claim of ineffective assistance of counsel necessitates, an evidentiary hearing is required to expand the record to accurately determine whether counsel's tactical strategy was within the range of prevailing professional norms.

Appellant was afforded ineffective assistance of counsel, when counsel failed to retain an independent ballistic expert, despite having the financial resources and desire to do so. Counsel similarly was ineffective for failing to impeach the victim's testimony, despite the victim being a convicted felon. Counsel's failure to maintain

an objection to improper character evidence entered against Appellant prejudiced Appellant, and all of these errors ultimately manifested in constitutionally deficient representation. The physical evidence against Appellant was limited and the failure to hire an independent ballistic expert, and failure to impeach the victim, Patrick Johnson, especially require an evidentiary hearing in order to determine the factual predicate for counsel's strategy, which is undeterminable from the record as currently constructed.

### **STANDARD OF REVIEW**

When a trial court denies a motion for post-conviction relief without an evidentiary hearing, Florida Rule of Appellate Procedure 9.141 sets the standard for review as follows: “[u]nless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief.” Fla. R. App. P. 9.141. The standard of review of a summary denial of a rule 3.850 motion is de novo. Lebron v. State, 100 So.3d 132, 133 (Fla. 5th DCA 2012) (citing McLin v. State, 827 So.2d 948, 954 (Fla. 2002)).

In McLin v. State, 827 So. 2d 948, 954 (Fla. 2002), the Florida Supreme Court explained, when reviewing the summary denial of a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, an appellate court should

overturn the trial court's denial when the appellant's claims are either facially valid or not conclusively refuted by the record.

Florida courts have also explained, when a trial court summarily denies a claim made pursuant to Rule 3.850, the trial court must "either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." *Id.* (citing Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993)). Specifically, "when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records should be attached to the order." McLin, 827 So. 2d at 954 (citing Fla. R. Crim. P. 3.850(d)). Indeed, the trial court's order must demonstrate the "motion, files and records in the case conclusively show that the movant is entitled to no relief." *Id.* An evidentiary hearing must be held on an initial motion for postconviction relief whenever the defendant makes a facially sufficient claim that requires a factual determination. Salazar v. State, 188 So. 3d 799 (Fla. 2016).

To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Peede v. State, 748 So.2d 253, 257 (Fla. 1999) (citing Fla. R. Crim. P. 3.850(d)). "Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." McLin, 827 So.2d at 954 (quoting Foster v. State, 810 So.2d 910, 914 (Fla. 2002)).

## ARGUMENT

### **POINT I – BECAUSE THE RECORD DOES NOT CONCLUSIVELY REFUTE APPELLANT’S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE POST-CONVICTION COURT ERRED IN SUMMARILY DENYING THE MOTION FOR POST-CONVICTION RELIEF**

The prevailing case law demonstrates that ineffective assistance of counsel claims are preferably adjudicated after an evidentiary hearing. As stated in Harley v. State, 594 So.2d 352, 353 (Fla. 2d DCA 1992), while defense counsel is certainly entitled to broad discretion regarding trial strategy, when the trial court is confronted with the claim of ineffective assistance of counsel, a finding that some action or inaction by defense counsel was tactical is generally inappropriate, without an evidentiary hearing. Instead, counsel should be heard from, and, if necessary, cross-examined as to whether a decision truly was “tactical.” See also Dauer v. State, 570 So.2d 314 (Fla. 2d DCA 1990); Gordon v. State, 608 So. 2d 925, 925–26 (Fla. 3d DCA 1992); Overton v. State, 531 So.2d 1382 (Fla. 1st DCA 1988); Kiser v. State, 903 So. 2d 290 (Fla. 3d DCA 2005).

This is because oftentimes the record is indiscernible and unable to objectively determine whether counsel’s strategy was reasonable on the basis of the record itself. Rather, counsel’s explanations and strategic plan is protected by attorney-client privilege. Until Appellant is afforded the opportunity to fruitfully cross-examine counsel, it will be impossible to determine whether counsel’s performance was

deficient or prejudicial. This inability to factually determine counsel's strategic decision making, specifically with regards to failing to retain an independent ballistics expert, and counsel's failure to impeach a key state witness, ultimately led to cumulative error. Counsel's similar failure in maintaining an objection to improper character evidence likewise prejudiced Appellant on appeal, resulting in an Anders brief being filed on his behalf. The cumulative effects of these tactical decisions require an evidentiary hearing to factually determine whether counsel's performance was deficient and whether Appellant suffered prejudice as a result of counsel's performance.

The affidavits attached by both Yvone Wright and Joshua Wright (Exhibit 8 and 9 on the post-conviction motion, respectively), further demonstrates that the record does not conclusively refute Appellant's claims to relief. With the lack of physical evidence at the crime scene, and an unsubstantiated and unreliable identification of Appellant, the ballistic evidence and subsequent expert opinion linking the firearm recovered on Appellant to the discharged cartridges at the crime scene was the determining factor in this case.

As Joshua Wright's affidavit makes clear, firearms identification is an objective forensic science that uses subjectivity to reach a conclusion. Misidentification, contextual bias, failing eyesight, and uncertainty plague and hinder 100% firearm identification metrics. Also of note is that the State's forensic

expert, Lynn Skoglund testified that the firearm was received in “fair to poor condition”. (TT: 205). This raises concerns about the reliability and suitability of forensic identification. See also Ramirez v. State, 810 So.2d 836 (Fla. 2001).

When considering the evidence as a whole, as reflected on the record, it is certain that an expanded firearm and ballistic analysis was warranted in this instance. Appellant’s family provided the money for such services, but counsel did not seek to retain an expert after the initial professional was deemed unqualified to testify. Joshua Wright, who has provided the accompanying affidavit in this case, has been qualified as an expert over sixty times in multiple jurisdictions. His testimony would highlight the discrepancies faced by firearms analysts, and would be able to offer an opinion as to the pitfalls often faced by firearms examiners, and the accompanying reliability a jury should place on these opinions. Wright swore in his affidavit that firearms analysts will often times determine that they can neither identify nor eliminate the questioned firearm or ammunition component when attempting to match ballistic evidence. Skoglund also confirmed this inconclusive category. (TT: 198). Wright’s affidavit raises enough independent grounds to warrant an evidentiary hearing to determine whether the failure to receive an independent examination of the firearm recovered by police, and whether counsel’s strategy was unreasonable in this circumstance, especially when considering the omnipresent risk of contextual bias.

**POINT II – ON THE MERITS, APPELLANT HAS ESTABLISHED THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO RETAIN AN INDEPENDENT BALLISTICS EXPERT, PROPERLY IMPEACH THE VICTIM, FAILED TO MAINTAIN AN OBJECTION TO IRRELEVANT AND PREJUDICIAL CHARACTER EVIDENCE, RESULTING IN CUMULATIVE ERROR**

As a general principle, to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel’s performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different had counsel not been deficient. See Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324 (Fla. 1994) (construing Strickland v. Washington, 466 U.S. 668, 687, 694 (1984)). Thus, there is a two-part inquiry: counsel’s performance and prejudice.

In reviewing counsel’s performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must “be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Spencer v. State, 842 So. 2d 52, 61 (Fla. 2003) (quoting Strickland, 466 U.S. at 689).

Indeed, the defendant bears the burden of showing that counsel’s errors were “so serious that counsel was not functioning as the ‘counsel’ guaranteed the

defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. Furthermore, a defendant must overcome the strong “presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment...” Blanco v. Wainwright, 507 So. 2d 1377, 1381 (Fla. 1987) (quoting Bertolotti v. State, 534 So. 2d 386, 387 (Fla. 1988)).

In addition to showing counsel’s deficient performance, a defendant must also meet the prejudice prong of the Strickland test. For this point, a defendant must demonstrate that there is a “reasonable probability that, but for the deficiency, the result of the proceeding would have been different.” Spencer, 842 So. 2d at 61. In other words, a defendant must demonstrate a “probability sufficient to undermine confidence in the outcome.” Id.

Defense attorneys are ineffective if they fail to investigate viable defenses. In McNeill v. Branker, 601 F.Supp.2d 694, 717 (E.D.N.C. 2009) trial counsel was ineffective where he failed to investigate the Defendant’s background and present mitigating evidence of his troubled childhood, which was marked by depression, substance abuse, and a suicide attempt, in mitigation at the sentencing phase of a capital murder trial. See also Stitts v. Wilson, 713 F.3d 887 (7th Cir. 2013) where trial counsel was found to be ineffective where he did not investigate possible alibi witnesses at a nightclub; United States v. Debang, 780 F.2d 81, 85 (D.C. Cir. 1986) where the complete failure to investigate potentially corroborating witnesses was



found to be ineffective; Thomas v. Lockhard, 738 F.2d 304, 308 (8th Cir. 1984) where counsel's failure to investigate three alibi witnesses whose names were supplied by the defendant constituted ineffective assistance of counsel because this information was critical in assessing intelligently whether the defendant was guilty.

"Strickland's objective reasonableness prong requires counsel to conduct appropriate factual and legal inquiries and to allow adequate time for trial preparation and development of defense strategies." Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998).

Although there is a strong presumption that a decision not to call a witness is strategic, "counsel prejudices his client's defense when counsel fails to call a witness who is central to establishing the defense's theory-of-the-case." Harrison v. Quarterman, 496 F.3d 419, 427-28 (5th Cir. 2007); See also Moore v. Johnson, 194 F.3d 586, 604 (5th Cir. 1999) ("The Court is ... not required to condone unreasonable decisions parading under the umbrella of strategy.").

In some "[c]riminal cases the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." Harrington v. Richter, 562 U.S. 86 (2011); Stapleton v. Greiner, 2000 WL 1207259 at \*16 (E.D.N.Y. 2000) ("[I]n some circumstances, an attorney's failure to arrange for an independent expert examination of critical evidence may be so objectively unreasonable as to violate the Sixth Amendment."); Dugas v. Coplan, 428 F.3d 317,

329 (1st Cir. 2005) (representation found deficient where counsel failed to investigate “not arson” defense and seek expert assistance or educate himself on techniques of defending arson); Rompilla v. Beard, 545 U.S. 374 (2005) (finding attorneys' failure to investigate material they knew that the prosecution would rely on was ineffective); Miller v. Anderson, 255 F.3d 455, 459 (7th Cir.2001) (Posner, J.)(finding defense counsel's failure to consult scientific experts constituted deficient performance where defense was that defendant was not present at scene of crime), remand order modified by stipulation, 268 F.3d 485 (7th Cir.2001).

Even the United States Supreme Court has weighed in on the topic, finding that prosecution experts can pose a significant threat to a criminal defendant’s Constitutional rights when their unchallenged testimony pointing to the defendant as the perpetrator of the crime is based on unsound science, an incompetent evidentiary foundation, or outright fraud. Hinton v. Alabama, 571 U.S. 263, 274-275 (2014). This is particularly so because an expert witness’ testimony, received along with impressive credentials, cloaks what would otherwise be incredible testimony and makes it seem credible.

At the same time, the Supreme Court has recognized that this threat is mitigated when the defense attorney, exercising due diligence, retains a defense expert to examine the opinion of the prosecution expert, and challenge its veracity. Id.

In the case at bar, Appellant was deprived of his right to the effective assistance of counsel, when counsel failed to obtain an expert witness in firearm and ballistic identification. Originally, counsel retained the services of Michael Knox, a former Florida Department of Law Enforcement (FDLE) analyst, in preparation of defense. However, the State successfully excluded Knox as a potential expert witness, on the basis that his expertise was in crime scene reconstruction, and that he lacked insufficient training under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). After being excluded, Knox subsequently refunded the family his retainer fee. This allowed for counsel to retain an expert who could successfully be certified as an expert to testify on Appellant's behalf, as to the reliability (or lack thereof) of the forensic evidence in the investigation.

Instead, counsel proceeded to trial without the benefit of expert testimony. As Knox refunded his original retainer, an inability to pay for these services was not the driving force behind this decision. Furthermore, counsel's original strategy to retain an expert demonstrates that, initially, an expert was thought to be a necessary expense in preparation for trial. Counsel's failure to retain a qualified expert, after learning Knox would be excluded from testifying is unexplainable, and the case law makes clear that this undermined Appellant's 6th Amendment right.

An evidentiary hearing is thus required to determine the strategic decision making behind choosing to proceed without a ballistic and firearms expert when

Appellant and his family had supplied the requisite finances to secure these services. An evidentiary hearing would allow for the trial court to independently evaluate the countervailing and diametrically opposed strategies between originally pursuing expert testimony and suddenly changing course after the Knox was excluded. As it is not clear from the face of the record why counsel abandoned expert assistance after Knox was excluded (instead of retaining another expert), an evidentiary hearing is required in order to expand the record and make an objective determination as to whether this strategy was reasonable under the circumstances.

Furthermore, the trial court applied the wrong evidentiary standard when contemplating the admission of expert testimony. Florida has oscillated between Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) and Daubert, concerning expert admissibility. Recently, Florida reaffirmed its commitment to Frye. See DeLisle v. Crane Co., 258 So. 3d 1219 (Fla. 2018), reh'g denied, No. SC16-2182, 2018 WL 6433137 (Fla. Dec. 6, 2018).

Under Florida's "pipeline rule," the "disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered." N. Broward Hosp. Dist. v. Kalitan, 174 So. 3d 403, 412 (Fla. 4th DCA 2015) (quoting Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467, 468 (Fla. 1978)); see Jabari Kemp v. State, Docket # 4D15-3472, (Fla. 4th DCA May 8, 2019).

This is directly relevant to the case at bar for multiple reasons. First, the trial court's application of Daubert led to both the admission of a State expert and the denial of Appellant's expert. This was a decision of constitutional significance, under DeLisle which allows for retroactivity application in post-conviction proceedings. See Witt v. State, 387 So. 2d 922, 931 (Fla. 1980).

Ultimately, a factual determination is required to decipher counsel's reason to forge an independent ballistic expert, which necessitates the need for an evidentiary hearing. The testimony linking the firearm found on Appellant to the cartridges found at the scene was the most significant evidence at trial. However, it is clear from the record that the ballistic expert could not identify with 100% certainty that the firearm recovered on Appellant matched the ballistic patterns at the crime scene. As the affidavit from Joshua Wright demonstrates, ballistic forensic science is a subjective area, where opinions may vary on a case by case basis. The fact that Appellant originally intended to have an expert testify, procured funds for such an event, unequivocally shows that Appellant recognized the importance of such a strategy. Counsel's failure to adapt and retain an expert severely undermined Appellant's right to a fair trial.

## Improper Impeachment

The proper method of impeaching a witness with prior convictions is to first ask whether the witness has ever been convicted of a felony, and, if the witness admits the conviction, the questioner may ask, “how many times,” and whether the witness has ever been convicted of a misdemeanor involving dishonesty; if the witness denies the conviction, the opposing party may produce the record of conviction, but counsel may not ask any questions of the witness unless he or she has knowledge that the witness has in fact been convicted of the crime or crimes. Brown v. State, 787 So. 2d 136 (Fla. 4th DCA 2001).

As a predicate to impeachment of witness by prior convictions, two questions may be asked: “Have you ever been convicted of a felony?” and “Have you ever been convicted of a crime involving dishonesty or false statement?” and it may be appropriate for the trial court on request of either counsel to instruct the witness out of the presence of the jury as to the types of crime which involve dishonesty or false statements. Cummings v. State, 412 So. 2d 436 (Fla. 4th DCA 1982).

If the witness denies having been convicted, or misstates the number of convictions, counsel may impeach by producing a record of past convictions. However, if the witness admits the conviction, then the inquiry by his adversary may not be pursued to the point of naming the crime for which he was convicted. Id. See

also Dessaure v. State, 891 So.2d 455 (Fla.2004) (citing Fulton v. State, 335 So.2d 280 (Fla.1976)); Trapp v. State, 57 So. 3d 269, 273 (Fla. 4th DCA 2011)

It is a well settled area of law that failure to impeach a key witness may amount to ineffective assistance of counsel, warranting relief. Tyler v. State, 793 So.2d 137, 144 (Fla. 2nd DCA 2001). Kelly v. State, 198 So. 3d 1077, 1078 (Fla. 5th DCA 2016) extensively analyzed this issue. In Kelly, a robbery defendant's counsel was ineffective for failure to conduct proper impeachment of a key State witness as to the number and nature of the witness's prior convictions; witness had twice as many felony convictions as he admitted at trial, and had counsel introduced certified copies of the witness's prior convictions, then he could have revealed to the jury the true number and nature of the convictions, which included robbery and three drug-related convictions. Kelly at 1077.

Kelly serves as a definitive guide on how the failure to impeach a witness may ultimately lead to the ineffective assistance of counsel. Kelly further held that this failure to impeach was:

Especially true in cases involving credibility contests, as the relative credibility of the witnesses becomes central to the trial. In Burch v. State, 977 So.2d 778 (Fla. 5th DCA 2008), a case where the defendant and the alleged victim provided markedly different versions of the events, this court reversed a summary denial of a rule 3.850 motion with directions for the trial court to conduct an evidentiary hearing regarding counsel's failure to impeach the victim about a single prior conviction for stealing beer and steak. Burch, 977 So.2d at 779–80 (Fla. 5th DCA 2008); see also

Head v. State, 35 So.3d 1008, 1008 (Fla. 5th DCA 2010) (holding that defendant satisfied the prejudice prong of the Strickland test where the trial amounted to a credibility contest between defendant and the victim).

Kelly at 1077,1078.

The improper impeachment of Patrick Johnson in this case deprived Appellant of effective assistance of counsel. The trial court specifically instructed the jury on proper procedures when evaluating evidence. Pertinently, the court instructed the jury that:

The attorneys are trained in the rules of evidence and trial procedure, and it is their duty to make all objections they feel are proper. When an objection is made you should not speculate on the reason why it is made; likewise, when an objection is sustained, or upheld by me, you should not speculate on what might have occurred had the objection not been sustained, nor what a witness might have said had he or she been permitted to answer. (TT: 29-30).

Juries are presumed to follow the court's instructions. See Knight v. State, 76 So. 3d 879, 888 (Fla. 2011); see also Goodwin v. State, 751 So. 2d 537 (Fla. 1999). When cross-examining Patrick Johnson, trial counsel did not initially impeach Johnson with his felony record. Instead, counsel attempted to impeach Jackson on re-cross. The trial court sustained an objection by the State as outside the scope. However, Jackson managed to answer the question before the objection was made and subsequently ruled on. In the summary denial, the trial court dismisses this argument, relying on the fact that Johnson answered in the affirmative (and before



an objection was sustained) as to his felony record. However, due to the objection, counsel was not able to ask the supplementary follow up questions as to the extent of Jackson's felony record as permitted by law. Ultimately, in a case where the State relies heavily on witness credibility, this prevented Appellant from fruitfully cross-examining this key witness. This likewise impacted Appellant's right to a fair trial. The lack of physical evidence in this case highlights the importance of proper impeachment of the victim, Patrick Jackson.

The evidence, as it stands, is that Patrick Jackson reported being shot by Appellant, but was unable to provide a height/weight description of the assailant, and was unable to describe the clothing worn by the perpetrator. The attack happened in a dimly lit area, and Jackson was distracted with video games when the shooting happened, and testified that he only caught a thirty second glance at the perpetrator while the crime took place. This lack of detail and specificity highlights how important Jackson's credibility was with the jury. Counsel's failure to impeach Jackson, in a case so heavily reliant on his testimony unduly prejudiced Appellant.

#### Failure to Maintain Objection to Character Evidence

Prior to trial, counsel filed a motion to exclude evidence of previous encounters and relationship history between Defendant and Jackson and Bonomo, but this motion in limine was denied. Counsel did not renew his objection when this evidence was admitted, and thus, waived the issue on appeal.

The trial court, in summarily denying Defendant's post-conviction motion, relied on nonbinding case law out of the 4th District Court of Appeals. However, this Court has specifically held that failure to preserve an issue for appeal may constitute ineffective assistance of counsel, so long as the requirements of Strickland v. Washington are met. Shade v. State, 59 So. 3d 1214 (Fla. 5th DCA 2011) ((citing Merkison v. State, 1 So.3d 279, 281 (Fla. 1st DCA 2009))).

The general rule is that a motion in limine is not sufficient to preserve the alleged error for appellate review in the absence of a further contemporaneous objection when the evidence is offered. See Rindfleisch v. Carnival Cruise Lines, Inc., 498 So.2d 488 (Fla. 3d DCA 1986), review denied, 508 So.2d 15 (Fla.1987). Similarly, Coffee v. State, 699 So. 2d 299, 300 (Fla. 2nd DCA 1997) analyzed the history of motion in limines in Florida, and the underlying purpose behind the procedural mechanisms. Coffee dealt with a situation whereby a motion in limine was made, yet the evidence excluded by the motion was introduced at trial, in violation of the motion in limine. In holding that an objection was required, the Coffee court stressed the importance that the trial court be given every available opportunity to potentially correct any issues before they manifest themselves on appeal.

Here, the trial court ruled that any further objections on the motion in limine would be futile- thus precluding further analysis from properly preserving the

objection. However, Shade v. State, 59 So. 3d 1214 (Fla. 5th DCA 2011) specifically holds the opposite, in that failing to properly preserve issues may indicate ineffective assistance of counsel.

If an error is properly preserved for review, the appellate court will apply the harmless error analysis to determine whether reversal is required; on the other hand, if the error is not properly preserved, the court must employ the fundamental error analysis to determine whether further review of the alleged error is appropriate. Crumbley v. State, 876 So. 2d 599 (Fla. 5th DCA 2004).

In determining whether an evidentiary error is harmless, the State must bear the burden, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, stated alternatively, that there is no reasonable possibility that the error contributed to the conviction. (Id.).

The character evidence concerning Appellant's attitude and socialization was improper and irrelevant. Despite the court ruling that the evidence was admissible, counsel still needed to lodge a contemporaneous objection to preserve the issue. This evidence largely provided the predicate upon which Appellant was convicted, as the State was able to cast these behaviors as a pseudo motive, making the prejudice undeniable. Appellant's residential history and status in the neighborhood severely prejudiced Appellant, without offering much probative value to the State's case-in-

chief. The lack of physical evidence tying Appellant to the crime highlights the importance of the issue

### Cumulative Error

Where multiple errors are found, even if deemed harmless individually, the cumulative effect of such errors may deny to defendant the fair and impartial trial that is the inalienable right of all litigants. Salazar v. State, 188 So. 3d 799 (Fla. 2016)((quoting Jackson v. State, 575 So.2d 181, 189 (Fla.1991)).

However, where the alleged errors urged for consideration in a cumulative error analysis are individually ‘either procedurally barred or without merit, the claim of cumulative error also necessarily fails.’ Id. (quoting Parker v. State, 904 So.2d 370, 380 (Fla.2005)).

As demonstrated above, a full evidentiary hearing is required to determine the efficacy of Appellant’s post-conviction claims. Therefore, it cannot be said that the cumulative error is procedurally barred when lingering questions remain, specifically as to the wavering on the decision to hire an expert ballistic witness, and the failure of counsel to properly impeach the State’s key witness, and counsel’s failure to properly preserve appellate review for improper character evidence relating to behavior prior to the shooting.

**CONCLUSION AND RELIEF REQUESTED**

Based on the foregoing, this Court should remand the matter to the trial court to hold an evidentiary hearing on his claims for ineffective assistance of counsel, specifically to determine the strategy for not hiring an independent ballistic expert, and counsel's failure to impeach the State's star witness, Patrick Jackson.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on May 24, 2019.

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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