IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, FLORIDA

JORDAN GADSON,

Appellant,

Case No.: 1D16-3327
L.T. No.: 16-2007-CF-003685

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF ON THE MERITS

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge Mark Borello
Judge of the Circuit Court, Division CR-D

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INTRODUCTION

In 2008, Jordan Gadson was represented in his murder trial by private counsel Refik Eler, an attorney who has been found ineffective by three Florida courts, but who nonetheless currently serves as the Fourth Judicial Circuit's Chief Assistant Public Defender, in apparent violation of section 27.7045 of the Florida Statutes.[1]

[1] This provision of the "Timely Justice Act," Chapt. 2013-216, § 13, Laws of Fla., disqualifies an attorney from representing capital defendants if he is found ineffective in postconviction proceedings by two Florida courts and, as a result, the defendants have been granted relief. Mr. Eler's biography on his employer's website indicates that his duties include not only handling a capital caseload, but supervising 150 employees. *See* http://pd4th.org/wp-content/uploads/2016/02/BIO_REler_webrev15_vf.pdf (last accessed Sept. 4, 2016).

Since Mr. Gadson's trial, Florida courts have deemed Refik Eler ineffective in three cases, two of which resulted in findings of prejudice and relief for the defendants. *See Shellito v. State*, 121 So. 3d 445, 460 (Fla. 2013) (reversing death sentence based on trial counsel Refik Eler's ineffective assistance of counsel for failing to conduct a "true follow up on the matters indicated in the various reports" of the defense mental health expert, and only making a "marginal attempt to present organic brain damage and other impairment as mitigation."); *Douglas v. State*, 141 So. 3d 107 (Fla. 2012), *as revised on denial of reh'g* (Sept. 13, 2012) (holding trial counsel Refik Eler ineffective, but declining to reverse for lack of prejudice); *Morrison v. State*, 1997-CF-00991-AXXX-MA (Fla. 4th Jud. Cir. Sept. 18, 2015) (reversing conviction and death sentence due to trial counsel Refik Eler's ineffective assistance of counsel on various grounds).

Currently, another claim of ineffective assistance of trial counsel regarding Mr. Eler is pending before the Florida Supreme Court. *See Bevel v. State*, SC14-770. Reportedly "pointed questioning from the justices during argument last month suggests that Eler could be found ineffective once again." Robert J. Smith, "The Worst Lawyers: Death sentences are down across the country – except when one of these guys represents you," Slate, Nov. 4, 2015 (available at www.slate.com/articles/

On January 22, 2007, Reggie Payne, Jr. was discovered shot and later died in the yard of 1018 Barnett Street in Jacksonville, Florida. Leronnie Walton had been with Mr. Payne that night when they both ran from two people shooting at them. Mr. Walton was able to get away unscathed, but came back to the crime scene about thirty minutes later and gave a statement to the police indicating that Mr. Gadson was one of the two shooters. Mr. Gadson was interrogated for numerous hours that morning, but always maintained his innocence. He was 19 years old when he was charged by the State with a two-count indictment for first degree premeditated murder and possession of a firearm by a convicted felon.

During Mr. Gadson's trial, the State relied on three lay witnesses: Leronnie Walton, Jarel Lewis, and Crystal Jones. Its entire case rested on the testimony of these three individuals. Following Mr. Gadson's trial and appeal, Mr. Walton and Mr. Lewis both admitted that their testimony at trial was false. Several other witnesses also provided information further calling into question the reliability of the State's three witnesses and supporting Mr. Gadson's innocence. Some of this evidence was readily available to defense counsel, Refik Eler, and some of it is newly discovered. All of it was presented in Mr. Gadson's Second Motion to Vacate

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news_and_politics/jurisprudence/2015/11/the_worst_defense_lawyers_for_death_penalty_cases_in_arizona_florida_louisiana.html, last accessed Sept. 4, 2016).

Judgment and Sentence, which included affidavits from Mr. Walton and a second exculpatory witness, Derwin Lembrick.

Yet, the trial court below, four years after Mr. Gadson's motion for relief was filed, summarily denied relief without making a single finding of fact or providing any legal analysis for this Court's review. Rather, the trial court stated, simply:

> the state has demonstrated in its response, by its legal arguments and references, that the record refutes Defendants claims. When viewed in the context of the entire record, each allegedly deficient act by counsel appears reasonably calculated to advance a legitimate interest of Defendant or not to have resulted in prejudice. This Court incorporates the argument and references set forth in the State's response and attaches portions of the record to support the state's references.

(R. 240) The court then attached the entire trial record, not excerpts, to support its summary denial.

The trial court failed to even acknowledge, let alone address, Mr. Gadson's newly discovered evidence claim. Further, the court's order represents a complete abdication of its role as fact-finder and precludes any meaningful appellate review by this Court. Most importantly, if any case warrants an evidentiary hearing, it is this one. Mr. Gadson has presented factual allegations that, if true, unequivocally establish his innocence of the first degree murder and felon-in-possession of a weapon convictions for which he is serving a life sentence without the possibility of parole.

PRELIMINARY STATEMENT

Appellant, JORDAN GADSON, will be referred to herein by "Mr. Gadson" or "Appellant." Appellee, State of Florida, will be referred to herein as "the State" or "Appellee." References to the record on appeal will be designated by "R." followed by the relevant bates stamp page number.

STATEMENT OF THE CASE

On March 14, 2007, Jordan Gadson was charged by indictment with Count I, first degree premeditated murder of Reginald Payne, Jr. by shooting him with a firearm, in violation of §§ 782.04(1)(a) and 775.087(1) and (2), Fla. Stat., and Count II, felon in possession of a firearm, in violation of §§ 790.23(1)(a) and 775.087(2)(a)(1), Fla. Stat.

After pleading not guilty to both counts in the indictment, Mr. Gadson was tried before a jury from May 17 to May 20, 2008. The jury returned a verdict of guilty of first degree murder as charged in the indictment, with a specific finding that he did *not* possess or discharge a firearm during the commission of the offense. Thus, he was found not guilty of Count II.

Mr. Gadson was sentenced to life imprisonment without the possibility of parole. (Vol. I, 103, 157-59) He timely filed a motion for a new trial, which was denied by the trial court on April 2, 2008.

Mr. Gadson's appellate attorney filed an *Anders* brief in the First District Court of Appeal. The Appellant then filed a *pro se* brief alleging that the court should vacate his conviction because the jury found him guilty of an offense that was not charged in the indictment, namely that he was only a principal to the crime of first degree premeditated murder. That is, without a gun, he could not have been the actual murderer. His appeal was *per curiam* affirmed by the First District Court, which issued its mandate on April 6, 2009. *Gadson v. State*, 4 So. 3d 1224 (Fla. 1st DCA 2009).

On June 4, 2010, Gadson filed his first motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (R. 1-32) On May 13, 2011, prior to the State filing its response, Mr. Gadson filed an unopposed motion to file an amended postconviction motion, along with an amended motion. (R. 118-120) On July 13, 2011, the State filed a response to the amended motion based on the trial court's "show cause" order. (R. 129-145) On August 9, 2012, Mr. Gadson filed a motion seeking leave to file a second amended motion (R. 147-149), along with his Second Amended Motion for Postconviction Relief. (R. 150-190; 194-234) (hereinafter "second amended motion").

On May 5, 2015, the Appellant filed a *pro se* motion to compel a ruling on his second amended motion. The motion to compel was returned to him because he was

represented by undersigned counsel. On June 3, 2016, the trial court issued an Order Dismissing Appellant's Unopposed Motion to File Amended Motion for Postconviction Relief, Granting Defendant's Motion to File Second Amended Motion for Postconviction Relief, and Denying Defendant's Second Amended Motion for Postconviction Relief. (R. 238-1131) (hereinafter "Order").

Mr. Gadson filed a timely notice of appeal on July 5, 2016, and this appeal follows. Mr. Gadson is serving a life sentence in the custody of the Florida Department of Corrections.

STATEMENT OF THE FACTS

On January 22, 2007, sometime between 11:00 P.M. and midnight, Reginald Payne, Jr. was discovered shot in his chest and neck in the yard of 1018 Barnett Street in Jacksonville, Florida. (R. 457-59) He was subsequently brought to the hospital by paramedics and died. (R. 492, 495)

After being charge with the first degree premeditated murder of Mr. Payne, by shooting him with a firearm, and felon in possession of a firearm, Mr. Gadson pleaded not guilty. He was represented in pre-trial and trial proceedings by Refik Eler. (R. 258)

The State prosecuted Mr. Gadson based on three witnesses who supplied the only direct evidence linking him to this crime: Leronnie Walton, Jarel Lewis, and

Crystal Jones. Leronnie Walton and Jarel Lewis testified they saw Mr. Gadson shoot Reggie Payne, which ultimately led to his death. (R. 523-32; 813-33) Crystal Jones testified that Payne's last words to her accused Mr. Gadson of being the shooter. (R. 460) The remaining witnesses were law enforcement officers and the medical examiner. None of these non-lay witnesses had any direct knowledge of the crime.

In the State's opening statement, and closing argument, it made clear the strength of its case rested on the above-mentioned three witnesses. (R. 440-41[2]; R. 1002-3[3]) However, since his trial and appeal, both Leronnie Walton and Jarel Lewis have recanted their trial testimony, stating that Mr. Gadson was not the shooter, and admitting that they lied under oath when testifying against him. (R. 105; 208-9) Additionally, new witnesses have come forward to present evidence that undermines the State's case. (R. 209-10)

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[2] The Assistant State Attorney ("ASA") told the jury in opening argument: "This case is about a dying boy's last words and about two men on two different sides of this crime who say the same thing, Jordan Gadson is guilty."

[3] The ASA argued the following in closing:

> At the beginning of the case I told you this case was about three things. It was about a dying man's last words, a dying declaration … The dying declaration by Reggie Payne, told you about the testimony of his friend, Leronnie Walton. Heard that now, too. I told you about the testimony of Reggie Payne's foe, Jarel Lewis, I told you those three things were going to carry the case for the State because all three of those things pointed to one conclusion, that man's guilt.

Leronnie Walton, Mr. Payne's friend, testified that he and Mr. Payne were walking in Jacksonville when they saw Mr. Gadson driving his mother's Durango. (R. 513-18) About five minutes later, he observed the Durango stop and the headlights turn off, and he watched as Mr. Gadson and the front passenger got out of the car. (R. 520-23) Mr. Walton testified that Gadson was carrying a semi-automatic handgun and opened fire on Walton and Payne, who began running. (R. 522-23) Mr. Walton ran and jumped over a fence to escape. Mr. Payne, who had been shot, did not follow. (R. 527-32; 577-78)

On January 26, 2010, Mr. Walton provided a sworn affidavit stating that he had not been truthful when he testified on behalf of the State at Mr. Gadson's trial. This affidavit was attached to Mr. Gadson's second amended motion. (R. 105) Walton states that while he *did* see Mr. Gadson driving the Durango, Gadson never exited the vehicle, nor did he shoot at Mr. Walton and Mr. Payne. *Id.* Rather, the two other men in the vehicle, whom Walton did not recognize, were the ones who got out and shot at them. *Id.*

This subsequent statement is corroborated by Walton's initial testimony at trial. At the trial, he told relatives of his "baby mama," Arial Swan and Deanna Duffy, that Mr. Gadson was not the shooter. The State, apparently surprised by this testimony, pressed Mr. Walton, asking him whether he was telling the truth to Swan

and Duffy. Walton replied, "I don't know, sir." (R. 175) When asked if he was scared, he testified that he was scared for someone else, not himself. *Id.*

The jury was excused and the State was given the opportunity to proffer further testimony from Walton. He testified that he was scared for his "baby mama," who is Swan's sister and Duffy's daughter, because "she been hearing stuff." He told Swan and Duffy Mr. Gadson did not commit the murder so that Swan and Duffy would leave him alone. When asked if he told them the truth, he shook his head. (R. 540) On cross, Walton changed his testimony, admitting once again that he told Swan and Duffy the truth. (R. 539-41)

After a recess, the court allowed the State to continue with Mr. Walton's testimony in the jury's presence. On cross-examination, Mr. Walton then *denied* telling Swan and Duffy that Mr. Gadson did not shoot at him and Mr. Payne. (R. 551-52, 581) Trial counsel did not move for a mistrial or otherwise try to exclude Mr. Walton's testimony.

Jarel Lewis, Mr. Gadson's co-defendant, was the State's second primary witness at trial. During the trial, Mr. Lewis testified that he was at Mr. Gadson's mother's, Yvette Wilson's, apartment building on January 22, 2007, along with Mr. Gadson, Mr. Walton, Tyree Swain, Danny Neil (Watson's boyfriend) and others. (R. 813-15) When asked if he left the house at any time that night, Mr. Lewis gave no

response. (R. 814-16) Finally, with significant prodding by the State, he told the jury he went to an Exxon station near the shooting with Mr. Swain and Mr. Gadson. While driving back to Watson's apartment, he alleged Mr. Gadson stated, "That's the little nigger" in the direction of Mr. Payne and another man whom Lewis did not recognize. (R. 822-23) Mr. Gadson then hopped out of the Durango and ran in the same direction as the two men. (R. 825-26) Lewis testified that he lost sight of Mr. Gadson as Gadson ran around a building to chase Payne. Swain remained in the middle of the road. Lewis then heard about six gunshots, which were not discharged by Swain, whom Lewis could see the entire time. (R. 829-33) Following the shots, Gadson and Swain returned to the Durango with their firearms. *Id.* According to Lewis, Gadson asked him to "ditch the truck," so Lewis dropped Swain and Gadson off at Watson's house and went to get rid of the Durango.

Following the appellant proceedings in this matter, Mr. Lewis came forward to confess he also lied during his testimony at the trial. (R. 208) In fact, he was not in the Durango on the night in question, and did not observe Mr. Gadson with a gun; rather, Mr. Lewis was at Yvette Watson's apartment building all night long, with several witnesses. (R. 208-9) This recantation is corroborated by testimony at trial that the jury apparently did not believe—that of Jasmine Graham, Jarel Lewis'

girlfriend, who testified that Lewis was home sleeping all night at Watson's home. (R. 97)

Corroborating the above-described recantations, on May 17, 2010, Derwin Lembrick provided a written affidavit regarding his encounter with Mr. Payne and Mr. Walton on the night of January 22, 2007, just before the shooting. (R. 106-8) In his affidavit, Lembrick stated that he observed Mr. Gadson pull into the parking lot of an Exxon near the offense, driving his mother's Durango with Mr. Swain and Mr. Neil as passengers. (R. 106) Mr. Lewis was not in the vehicle. *Id.* He noticed that Mr. Swain had a .45 caliber handgun in his lap, and he was sitting in the front passenger seat, while Mr. Neil was sitting in the back. (R. 106-7) Next, he observed Mr. Payne and Mr. Walton walking down the street. Shortly thereafter, he saw Mr. Swain and Mr. Neil jump out of the Durango and chase after Payne and Walton, who started running. They were about a block and a half away from Lembrick. *Id.* Lembrick heard gun shots, but did not see who fired. Derwin Lembrick stated in his affidavit that wo days after the above incident, Tyree Swain told him he shot Reggie Payne that night. (R. 107)

Crystal Jones was the State's third lay witness. She testified that on January 22, 2007, she heard gun shots and went outside to find Payne in her backyard, shot. Jones testified that while standing in the backyard, she heard an unnamed woman

ask Mr. Payne who shot him. In response, "[H]e said it was a nigger named Jordan." (R. 460) No one else heard this statement. (R. 202-3) During her testimony at trial, Jones stated she was "positive" about Payne's statement (R. 472); however, on the night of the offense itself, she provided a statement to law enforcement stated that she "believed" she heard Payne mention Mr. Gadson. (R. 222-23)

Mr. Gadson argued in his second amended motion that several available witnesses should have been called to testify on his behalf to impeach the three witnesses on which the State's case rested, but Mr. Eler did not call any of them. These witnesses include, among others, Arial Swan and Deanna Duffy, who, if approached by defense counsel, would have testified that Mr. Walton told them that Jordan Gadson did not shoot at him and Payne, and that Payne's father, Reggie Payne, Sr., had threatened Walton into testifying against Gadson. Both witnesses attended Mr. Gadson's trial, but were never approached by defense counsel. (R. 94)

Next, Detective B.F. Bowers interviewed witnesses at Crystal Jones' residence following Payne's death. Bowers' supplemental police report indicates that he interviewed Sabrina Davis, whom Crystal Jones observed asking Payne questions after he was shot. Davis told Bowers that she only asked Payne his name and then went inside when the police arrived. (R. 96)

Devon Jones, Crystal's son, would have testified that he was by Payne's side from the time he, Crystal, and his brother, Kevin Jones, came out to the backyard. Devon was much closer to Payne than Crystal and would have testified that he never heard Payne state that Mr. Gadson shot him. (R. 97) Anthony McClain, Crystal's great nephew, would have testified to the same if he had been contacted by Eler. *Id.*

Finally, along with Jarel Lewis and Jordan Gadson, officers from the Jacksonville Sheriff Office brought to the police department several people found at Watson's home in the early morning after the murder, January 23, 2007. Among them were Samuel Stinson, Telvin Kennedy, DJ Gadson, and Immanuel Williams. All of these witnesses gave statements to the police and all would have testified, if approached by defense counsel, that Jarel Lewis was home all night at Watson's home, thereby corroborating Lewis' recantation.

Finally, Jarel Lewis identified Tyree Swain as the second shooter on January 22. Tyree was taken into custody twice by the Jacksonville Sheriff's Office, and questioned. Both times he was released, and was never charged with Mr. Payne's murder. (R. 100)

The forensic evidence in this case was limited. Law enforcement recovered numerous 9 millimeter live rounds of ammunition from Mr. Gadson's mother's home. (R. 681) The laboratory analyst testified that he never compared these bullets

with the bullet fragments found in Mr. Payne's body, or at the scene, to determine whether they were connected. (R. 681-82) However, these bullets were still entered into evidence at trial. (R. 681-83) Two different kinds of bullet fragments were found in Reggie Payne's body during his autopsy (R. 229-30), thereby demonstrating there were two shooters, not one, contrary to Lewis' testimony.

Mr. Gadson took the stand in his own defense. During his cross examination, he admitted he was in the driver's seat of the Durango, but he testified that two other persons, Mr. Neil and Mr. Swain, jumped out of the car and shot Mr. Payne. (R. 936-39) Mr. Gadson equivocated regarding the exact sequence of events after the two exited the vehicle, but he admitted he picked up both Swain and Neil after the shooting and drove them back to his mother's house. (R. 940-1) Mr. Gadson also maintained, however, that he did not know what they were planning to do, nor did he even know they were going to jump out of his car. Gadson speculated that they were "probably fixing to rob him. I don't know" (R. 945), and testified that they had only gone out that night to "get some weed." (R. 952). The State presented no evidence that Mr. Gadson had any knowledge of a plan to shoot Mr. Payne, nor, even, that he saw Mr. Payne get shot before letting Swain and Neil back into his car.

On March 20, 2008, the jury returned a verdict of guilty of first degree murder as charged in Count I of the indictment, with a specific finding that Mr. Gadson did

not possess or discharge a firearm during the commission of the offense. (R. 242-43) The jury found Mr. Gadson not guilty of Count II. *Id.* An appeal followed.

In Mr. Gadson's second amended motion for postconviction relief, he raised two claims, with several sub-claims, identifying why he is entitled to postconviction relief. (R. 207-12) First, Mr. Gadson argued he was entitled to relief based on newly discovered evidence *id.*, specifically, the (i) recanted testimony of Leronnie Walton, (ii) recanted testimony of Jarel Lewis, and (iii) new evidence from non-testifying witness Derwin Lembrick. *Id.* Second, Mr. Gadson argued he is entitled to a hearing or new trial based on trial counsel's ineffective assistance of counsel. (R. 213-34) Specifically, Mr. Gadson argued that trial counsel was ineffective for (i) failing to impeach Jarel Lewis with a false confession expert, (ii) failing to present testimony from Arial Swan, Deanna Duffy, Detective D.F. Bowers, Devon Jones, Anthony McClain, Samuel Stinson, Telvin Kennedy, DJ Gadson, and Immanuel Williams, to undermine the State's case and create reasonable doubt, (iii) failing to offer specific grounds to support counsel's motion for judgment of acquittal, (iv) failing to file a motion to exclude any reference to the 9-millimeter bullet rounds found at Mr. Gadson's mother's residence, and, in conjunction with this second claim, that (v) these cumulative failures of trial counsel warranted relief. *Id.*

In denying Mr. Gadson's motion without a hearing, the trial court provided no facts and no reasoning. It merely stated, "the state has demonstrated, by its legal argument and references, that the record refutes Defendant's claims." (R. 240) It also held, despite hearing no evidence, that "each allegedly deficient act by [trial] counsel appeals reasonably calculated to advance a legitimate interest of Defendant or not to have resulted in prejudice." *Id.* The court made no findings of fact or relied on any case law. It's "analysis" was a paragraph long. (R. 238-40) The Court did not attach specific excerpts from the record to establish Mr. Gadson is not entitled to relief—rather, it attached the entire record on appeal, including the full trial transcript, judgment, jury instructions, and PCA decision on direct appeal. (R. 241-1131)[4]

STANDARD OF REVIEW

The standard of review for a summary denial of a postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850 is *de novo*. *Flagg v. State*, 179 So. 3d 394, 396 (Fla. 1st DCA 2015). When a 3.850 motion is summarily denied, the order shall be reversed and the cause remanded for an evidentiary hearing unless the record conclusively shows that the appellant is entitled to no relief. Fla. R. App.

[4] In its order, the trial court attached Exhibits A through F, specifically noting that Exhibits D (R. 251-256 Jury Instructions), Exhibit E (R. 257-1114 Trial Transcript), and Exhibit F (R. 1115-1131 State's Response) refuted Mr. Gadson's second amended motion. (R. 240)

P. 9.141(b)(2)(D). Further, where no evidentiary hearing is held below, the appellate court must accept the defendant's factual allegations to the extent they are not refuted by the record. *See Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989).

Remand for a full hearing on a motion for postconviction relief is also required when the trial court, in its summary order, states no rationale for its rejection of the motion, fails to attach those specific parts of record that directly refute each claim raised, and instead attaches the entire record. *Hoffman v. State*, 571 So. 2d 449 (Fla. 1990). The attachment requirement in rule 3.850 is "not fulfilled by simply attaching to the order a copy of the trial transcript unaccompanied by any reasons for denial based on the attached record." *Loomis v. State,* 691 So.2d 34 (Fla. 2d DCA 1997). If the trial court finds a claim is facially sufficient, it must do so in the order. *Daniels v. State*, 701 So. 2d 1222 (Fla. 1st DCA 1997); *see also Crone v. State*, 835 So. 2d 342 (Fla. 1st DCA 2003).

SUMMARY OF THE ARGUMENT

The trial court erred in summarily denying Mr. Gadson's newly discovered evidence and ineffective assistance of counsel claims on both procedural and substantive grounds.

First, as to both claims, the trial court failed to state specifically whether the supporting allegations were inadequate or procedurally barred, to provide rationales

for its rejection of each claim, and to attach the specific portion or portions of the record to refute the claims. Instead, the court merely relied generally on the arguments and citations in the State's response and attached the entire record to its order. (R. 241-1131) This does not meet the procedural requirements of rule 3.850.

Second, Mr. Gadson argued in his second amended motion that the newly discovered statements of three witnesses would have altered the outcome of his trial: 1) Leronnie Walton, a surviving victim who witnessed the shooting of Reggie Payne; 2) Jarel Lewis, a juvenile at the time of the offense and during his coerced interrogation, and whose statement to the police and testimony were rife with inconsistencies; and 3) Derwin Lembrick, a witness who saw Mr. Gadson just before the offense and whose affidavit corroborates Lewis' recantation. Had Mr. Walton and Mr. Lewis told law enforcement the truth and refused to lie in testimony, Mr. Gadson would likely not even have been charged with murder, let alone convicted. Thus, the trial court erred in failing to hold an evidentiary hearing to determine the credibility of the above-listed witnesses.

Third, the trial court erred when it failed to hold an evidentiary hearing regarding Mr. Gadson's allegations of trial counsel's ineffective assistance, which include counsel's failure to call no less than eight, available lay witnesses and a false confession expert to impeach Jarel Lewis' testimony that Mr. Gadson exited his

vehicle and was the only one who shot at Reggie Payne on January 22. Counsel also failed to do the bare minimum—provide grounds for his motion for judgment of acquittal and, following the jury's inconsistent verdict, move for a new trial.

Trial counsel's ineffective assistance plagued Mr. Gadson's trial and the Appellant is now serving a life sentence for an offense he did not commit. The trial court's failure even to grant a hearing in this matter, on both procedural and substantive grounds, must therefore be reversed and this matter remanded for an evidentiary hearing.

ARGUMENT

I. The trial court's summary denial fails to adhere to the procedural requirements of Florida Rule of Criminal Procedure 3.850.

The trial court summarily denied both of Mr. Gadson's claims in his second amended rule 3.850 motion without stating its rationales or attaching specific portions of the record demonstrating that he is not entitled to relief. Instead, the court simply "incorporated the arguments and citations" in the State's response and attached the entire trial record to its order. This does not fulfill the procedural requirements of rule 3.850. *See Hoffman,* 571 So. 2d at 449; *Loomis,* 691 So. 2d at 35.

In *Hoffman*, the Florida Supreme Court reversed and remanded to the trial court for a hearing on a rule 3.850 motion based on the summary denial of a defendant's motion. *Id.* The court held it had "no choice but to reverse the order" and "remand for a full hearing" when the trial court "stated no rationale for its rejection" of the motion and failed to attach the portion or portions of the record that specifically refuted the defendant's claims. *Id.* at 450.

In *Loomis,* the Second District Court of Appeals held as follows:

> As interpreted, in order to support a summary denial without a hearing, this provision of the rule requires that "a 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." *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993) (emphasis added). We emphasize that these requirements are not fulfilled by simply attaching to the order a copy of the trial transcript unaccompanied by any reasons for denial based on the attached record. *See Hoffman v. State*, 571 So. 2d 449, 450 (Fla. 1990); *accord Jenkins v. State*, 595 So. 2d 1060 (Fla. 2d DCA 1992). We also reiterate that the rule contemplates more than attaching a copy of the state's response which has no supporting record attachments. *See Flores v. State*, 662 So. 2d 1350, 1352 (Fla. 2d DCA 1995) (disapproving of growing practice of incorporating state responses into orders denying postconviction motions as substitute for record attachments).
>
> Accordingly, we reverse and remand with directions that the trial court reconsider the merits of the appellant's motion. In so doing, we further direct the trial court that should it again deny relief on a summary basis, it must attach to its order those *portions* of the record which conclusively establish that the appellant is entitled to no relief as to the claims advanced along with its reasons for so concluding. Alternatively, it must explain why those claims are facially insufficient

> or cannot be appropriately considered under rule 3.850. *See McGee v. State*, 684 So. 2d 241, 242 (Fla. 2d DCA 1996).

691 So. 2d at 35.

Relying on *Hoffman* and *Loomis*, this Court in *Daniels v. State* reversed the trial court's summary denial of the defendant's claims where "the trial court did not address each of the ten claims separately, nor did the court identify which claims were facially sufficient and which, if any, were not." 701 So. 2d 1222, 1223 (Fla. 1st DCA 1997) (holding nine of ten claims "facially sufficient" and remanding those claims for an evidentiary hearing or for the trial court to attach portions of the record establishing that the defendant was entitled to no relief).

Thus, this Court has "no choice but to reverse the order" and "remand for a full hearing" because the trial court did not identify if the "allegations were inadequate or procedurally barred[,]" did not state a "rationale for its rejection" of the motion, and failed to attach the portion or portions of the record that refuted Appellant's arguments. *Hoffman*, 571 So. 2d at 450.

II. The record does not conclusively show that Mr. Gadson is not entitled to relief.

Because the trial court did not specify on what grounds it was summarily denying Mr. Gadson's claims, but, rather, simply relied on the reasoning in the State's response, Mr. Gadson addresses the State's primary arguments herein. None

of them demonstrate, nor does the record, that Mr. Gadson is not entitled to relief. Thus, this Court must remand this matter for an evidentiary hearing on Mr. Gadson's claims of newly discovered evidence and ineffective assistance of counsel.

A. Contrary to the State's argument, Mr. Gadson's testimony does not defeat any prejudice stemming from his postconviction claims.

The State's primary argument below was that neither of Mr. Gadson's claims, if true, could have changed the outcome in his case because his testimony established that he was a principal to the murder and the jury found that he did not possess a firearm. (R. 129-31) The State points to Mr. Gadson's testimony on cross-examination that he drove Danny Neil and Tyree Swain on the night of Mr. Payne's death, let them out of the car when they spotted Payne, and then drove them home following the shooting. Mr. Gadson speculated when he let the two shooters out that they might have been going to rob Payne, but did not know that they were planning to kill him. (R. 945) Because the jurors convicted Mr. Gadson of the murder, but not of possession of a firearm, the State argued, they must have found him guilty of the murder as a principal based on this testimony. The recantations, therefore, would not have changed the outcome in the trial. (R. 130-1).

This argument fails under the law of principals, which requires that the State prove that the alleged principal have an intent to commit the charged offense and

that he did some act to assist in committing it. *Staten v. State*, 519 So. 2d 622, 624 (Fla. 1988). "Mere presence at the scene, including driving the perpetrator to and from the scene or a display of questionable behavior after the fact, is not sufficient to establish participation." *Collins v. State*, 438 So. 2d 1036, 1038 (Fla. 2d DCA 1983) (citing *Interest of R.W.G. v. State*, 395 So. 2d 1279 (Fla. 2d DCA 1981); *Pack v. State*, 381 So. 2d 1199 (Fla. 2d DCA 1980); *G.C. v. State*, 407 So. 2d 639 (Fla. 3d DCA 1981)).

During the Appellant's testimony he stated repeatedly he was not aware that Neil and Swain intended to shoot Mr. Payne. He thought they were only going to buy marijuana. (R. 952) Taken as true, Mr. Walton's affidavit corroborating Mr. Gadson's testimony that he never exited his vehicle, and Mr. Lewis's clarification that his confession was coerced and he was not in the car at all on January 22, 2007, the State's case against Mr. Gadson crumbles.

At most, Mr. Gadson's testimony proved that he was an accessory after the fact to the murder under section 777.03 of the Florida Statutes, which defines an accessory as one who

> maintains or assists the principal or an accessory before the fact, or gives the offender any other aid, knowing that the offender had committed a crime and such crime was a capital, life, first degree, or second degree felony, or had been an accessory thereto before the fact,

> with the intent that the offender avoids or escape detection, arrest, trial or punishment....

§ 777.03, Fla. Stat. (2007). Ironically, this is exactly what Jarel Lewis, who claimed he was both in the car with the shooters *and* "ditched" the car thereafter, was charged with in exchange for his testimony against Mr. Gadson. The State's contention, therefore, that Mr. Gadson, who testified he had no idea that his passengers intended to commit a murder, nor that he himself intended to assist in committing even a robbery, let alone a murder, is entirely inconsistent with the evidence and the State's treatment of co-defendant Lewis.

The State's primary argument that Mr. Gadson's testimony establishes him as principal to the murder is both legally and factually incorrect. It therefore does not establish that Mr. Gadson is not entitled to relief and an evidentiary hearing must be held on both of his claims.

Additionally, the fact that Jarel Lewis named Tyree Swain and Danny Neil as the two other participants in the crime, but neither was arrested or tried, makes clear that without Leronnie's identification of Mr. Gadson as the only person he recognized, Mr. Gadson, too, would likely not have been charged and tried. This is the likeliest explanation for the police letting Swain go when they had him in

custody. As such, this court should reverse and remand to the trial court for an evidentiary hearing.

B. Mr. Gadson is entitled to an evidentiary hearing on his newly discovered evidence claim.

A newly discovered evidence claim must satisfy the following two prongs:

> First, the evidence offered must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that neither defendant nor his counsel could have known of it by the use of diligence. Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial.

Archer v. State, 934 So. 2d 1187, 1193 (Fla. 2006) (citing *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

In determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991). *See also Swafford v. State*, 679 So. 2d 736, 739 (Fla. 1996) (requiring cumulative analysis of newly discovered evidence).

A witness' recantation may constitute newly discovered evidence, even if the defendant offered evidence at trial rebutting it. Thus, in the case of recantations, the requirement that the evidence was unknown to the defendant at the time of trial is

dispensed with. The defendant must show, rather, that "the record contains no evidence upon which to conclude that [he] could have established that [the witness] was lying in his trial testimony." *Archer*, 934 So. 2d at 1194.

When evaluating newly discovered evidence of a witness's recantation, a new trial is appropriate "only if the court is satisfied that the recantation is true and that 'the witness's testimony will change to such an extent as to render probable a different verdict." *Robinson v. State*, 736 So. 2d 93, 93 (Fla. 4th DCA 1999) (citing *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994), *cert. denied*, 514 U.S. 1085 (1995)). However, an evidentiary hearing is usually required to make this determination. *See e.g.*, *Hilbert v. State*, 666 So. 2d 1059, 1059 (Fla. 5th DCA 1996); *Venuto v. State*, 615 So. 2d 255, 256 (Fla. 3d DCA 1993); *Simpson v. State*, 100 So. 3d 1258, 1259–60 (Fla. 4th DCA 2012). Where there are factual allegations that are contradictory from trial testimony, a credibility determination of the new testimony is required, making an evidentiary hearing appropriate. *See Coley v. State*, 74 So.3d 184, 185 (Fla. 2d DCA 2011).

(i) *Recantation of Leronnie Walton*

Mr. Gadson's second amended rule 3.850 motion contains an affidavit from Leronnie Walton (R. 105), recanting his trial testimony that Mr. Gadson was one of two people who exited the Durango, chased Walton and Reggie Payne, and shot at

them, killing Payne. The State offered no citations to the record below establishing that Mr. Gadson was anything other than present in the vehicle when his two passengers jumped out and ran after Mr. Walton and Mr. Payne, let alone that he intended to kill Mr. Payne and committed an act to assist in committing it. *See Staten*, 519 So. 2d at 624. *See also Collins*, 438 So. 2d at 1038 ("Mere presence at the scene, including driving the perpetrator to and from the scene or a display of questionable behavior after the fact, is not sufficient to establish participation.").

Indeed, the State's argument on this portion of Mr. Gadson's newly discovered evidence claim is a mere paragraph long and relies on the inexplicable argument that Mr. Walton's recantation was somehow unreliable because at the time he gave it, he was in jail pending a trial on unrelated attempted robbery and attempted murder charges. (R. 131-32) Mr. Walton's affidavit was contrary to the State's case against Mr. Gadson; thus, signing it while he was pending trial for an offense that carries with it a possible life sentence could only have been against his best interest. In any event, a determination of the credibility of a witness' recantation is generally for the trial court to determine in an evidentiary hearing, *Simpson*, 100 So. 3d at 1258, which is precisely the relief Mr. Gadson sought in the court below.

Next, the State argued that Mr. Walton's affidavit, if true, does not meet the second, prejudice prong of the test for newly discovered evidence relief—again,

because Mr. Gadson testified that he drove the shooters before and after the offense. This argument is addressed in section I(A), *supra.*

(ii) *Recantation of Jarel Lewis*

At trial, Mr. Lewis' testimony could only be described as halting, inconsistent with the evidence, and inconsistent with his own statement to law enforcement. He testified he was in the vehicle with Mr. Gadson and Tyree Swain on the night Payne was killed. Mr. Gadson and Mr. Swain exited the vehicle and when Payne ran around a building, Gadson ran after him. Swain remained in the middle of the road. Both had guns, but Mr. Gadson appeared to be the only one who fired his weapon. (R. 199-200) This testimony was inconsistent in numerous ways with both the evidence and Mr. Lewis' statement to law enforcement.

Mr. Gadson alleged in his postconviction motion that Mr. Lewis recanted his testimony and admitted that he was not with Mr. Gadson in the vehicle the night Mr. Payne was killed, nor did he see Mr. Gadson with a gun. Mr. Lewis was at Mr. Gadson's mother's apartment all night. During his videotaped interrogation, Mr. Lewis maintained this testimony for the majority of the time until the very end, when he finally relented to threats and inducements from the detectives, telling them he was in the car when Gadson and Swain got out and Gadson shot Payne. *Id.*

Mr. Lewis was the only witness, other than Mr. Walton, to the shooting; thus, his testimony was far from trivial to the State's case. The State presented no legal or factual argument in its response to refute Mr. Lewis' recantation, simply stating that because Mr. Gadson did not attach an affidavit from Lewis to the motion, Lewis' recantation "should not be considered." (R. 132) However, at the time Mr. Gadson filed his second amended motion, Rule 3.850 had no affidavit requirement for newly discovered evidence claims, as it does now. *See In re Amendments to Florida Rules of Criminal Procedure & Florida Rules of Appellate Procedure*, 132 So. 3d 734, 738 (Fla. 2013) (amending rule 3.850 "to require that newly discovered evidence claims be supported by affidavits attached to the motion.").

(iii) ***Newly Discovered Evidence from Derwin Lembrick***

On May 17, 2010, Derwin Lembrick, who did not testify at trial, provided a written affidavit regarding his encounter with Reggie Payne and Leronnie Walton on the night of January 22, 2007. (R. 106-8) Corroborating Jarel Lewis recantation, Mr. Lembrick stated that he observed Mr. Gadson drive into the parking lot of a gas station in his mother's Durango with Tyree Swain and Danny Neil as passengers. (R. 106) Mr. Lewis was not in the vehicle. Lembrick noticed that Mr. Swain had a .45 caliber handgun in his lap in the front seat. (R. 106-7) Shortly thereafter, while walking down the road, Lembrick observed Swain and Neil jump out of the Durango

and chase after the Payne and Walton. *Id.* Lembrick did not observe the shooting, but he heard shots fired. Mr. Swain later confessed to Mr. Lembrick that he shot Payne. *Id.*

The State seemed to argue below that because Mr. Lembrick was serving a life sentence when he provided his affidavit for Mr. Gadson's motion, his statement should not be considered. (R. 132) As with Mr. Walton and Mr. Lewis, this is not a basis for denying an evidentiary hearing—it is a basis for *granting* a hearing, so that the trial court can determine the witness' credibility. As to the State's argument, once again, that even if true, Lembrick's testimony would not have exculpated Mr. Gadson, Appellant again points the Court to Section I(A), *supra.*

(iv) *Cumulative review of newly discovered evidence.*

The newly discovered evidence presented in Mr. Gadson's motion and discussed above was not known to the trial court. Further, Mr. Gadson could not have demonstrated that Mr. Walton and Mr. Lewis were lying during their testimony, thereby qualifying their recantations as newly discovered evidence. Finally, Mr. Lembrick was not listed as a witness at trial, nor could trial counsel have been aware that Lembrick had observed Mr. Swain and Neil exit the Durango, run after Payne and Walton, and fire shots that later killed Payne.

The trial court below did not even address Mr. Gadson's newly discovered evidence claim, let alone conduct legal analysis, render any findings of fact, or consider the evidence cumulatively. (R. 240) The State relied on several different arguments, but never cited a single case or page in the record, or attached any excerpts from the record, when addressing Claim I of Mr. Gadson's motion—his newly discovered evidence claim. The State also offered no cumulative analysis of the evidence. Thus, it failed to demonstrate, and the trial court failed to find, that the record conclusively refutes the claim. *See McLin v. State,* 827 So. 2d 948, 954 (Fla. 2002).

The cumulative evidence presented in Claim I would undoubtedly have changed the outcome of Mr. Gadson's trial. Crystal Jones' testimony—which was significantly impeached at trial and would have been additionally impeached with the testimony of Walton, Lewis, and Lembrick—would have been far from adequate to charge Mr. Gadson with murder, let alone obtain a conviction. Thus, the trial court erred in summarily denying the newly discovered evidence claim and this case must be remanded for an evidentiary hearing.

C. Mr. Gadson is entitled to an evidentiary hearing on his ineffective assistance of counsel claim.

To establish a claim of ineffective assistance of counsel, a defendant must satisfy two elements:

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

Strickland v. Washington, 466 U.S. 668, 687 (1984). In assessing performance, "[t]he court determines whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. Prejudice is demonstrated when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

A defendant alleging an ineffective assistance of counsel claim must set out in his or her motion sufficient alleged facts which, if proven, would establish both the deficiency prong and the prejudice prong established in *Strickland. Freeman v. State*, 761 So. 2d 1055, 1061-62 (Fla. 2000).

(i) The trial court erred by concluding, without an evidentiary hearing, that trial counsel's alleged deficient acts were strategic and reasonable, thereby justifying summary denial of Mr. Gadson's ineffective assistance of counsel claim.

If an ineffective assistance of counsel claim is sufficiently pled and unrebutted by the record, an evidentiary hearing must be held. *Ventura v. State*, 794 So. 2d 553 (Fla. 2001). Indeed, where there is a question of a defense counsel's trial performance, a trial court's finding that some action or inaction by defense counsel was tactical is generally inappropriate without an evidentiary hearing. *Hamilton v. State*, 860 So. 2d 1028 (Fla. 5th DCA 2003). Thus, a trial court cannot deny a motion for postconviction relief based on ineffective assistance of counsel by finding that defense counsel employed a particular trial strategy, and that such strategy was reasonable, without first holding a hearing. *Williams v. State*, 872 So. 2d 396 (Fla. 1st DCA 2004); *Perez v. State*, 128 So. 3d 223 (Fla. 2d DCA 2013).

In its order below, the trial court's only stated legal basis for summarily denying Mr. Gadson's motion was that "[w]hen viewed in the context of the entire record, each allegedly deficient act by counsel appears reasonably calculated to advance a legitimate interest of Defendant or not to have resulted in prejudice."

(R.240)[5] To the extent that the State and the trial court may have relied on the first of these two reasons for denial, this Court must vacate the order and remand for an evidentiary hearing—Florida law is clear that whether or not counsel's errors are reasonable and strategic cannot be inferred from the cold record.

(ii) Trial counsel was ineffective for failing to impeach Jarel Lewis.

In Mr. Gadson's motion, he alleged trial counsel was ineffective for failing to call an expert to opine that Jarel Lewis falsely confessed based on law enforcement's interrogation of him. (R. 214-9) Failing to call an expert witness to testify regarding improper or deliberate tactics to obtain a false confession may be a basis for ineffective assistance of counsel. *See, e.g., Ross v. State,* 45 So. 3d 403 (Fla. 2010), *as revised on denial of reh'g* (Sept. 8, 2010); *State v. Lucas,* 183 So. 3d 1027, 1029

[5] The trial court did not find any of Mr. Gadson's claims legally insufficient—*i.e.*, lacking in factual allegations. Rather, though its order was entirely lacking, the court made one thing explicit: it summarily denied Mr. Gadson's motion on the merits of his ineffective assistance of counsel claim, concluding that trial counsel's performance was strategic and reasonable, or, in the alternative, that the allegations failed to establish prejudice. Thus, this brief does not address the State's arguments below that Mr. Gadson's claims were legally insufficient. Appellant maintains, however, that each claim was, in fact, adequately pled so as to require an evidentiary hearing. To the extent that any of the claims were *not* adequately pled, the trial court had an obligation to provide Mr. Gadson with the opportunity to amend them before dismissing any of the claims. *See Spera v. State,* 971 So. 2d 754 (Fla. 2007).

(Fla. 2016) (affirming 4th District Court of Appeal's holding that a defendant need not identify an expert to warrant an evidentiary hearing on a claim of ineffective assistance of counsel for failure to call a certain type of expert witness at trial).

In his second amended motion, Mr Gadson identified two specific false confession experts, detailing the substance of their likely testimony by exhaustively addressing the problems with Mr. Lewis's interrogation by law enforcement, detailing the statements in question, and coercive tactics employed to elicit the false confession. (R. 170-74) As stated in section I(B)(ii), *supra*, and Mr. Gadson's motion below (R. 174-75), Jarel Lewis' testimony, and therefore his credibility, was critical to the State's case; thus, Mr. Gadson established in his IAC claim that trial counsel's failure to impeach Lewis' statement by showing his interrogation video to the jury and having a false confession expert establish the falsity of Lewis' confession and trial testimony constituted reversible error.

The State argued below that false confession experts have only been authorized to testify regarding the falsity of a confession made by a *defendant*, not by a witness. (R. 135-6). The State cites to no case law supporting this conclusion nor does it make any logical sense. A defendant is entitled to present admissible evidence designed to impeach a witness and exculpate himself—a false confession expert who examined Mr. Lewis' interrogation and eventual confession that he was

with Mr. Gadson on the night of the offense, and who concluded that such confession was false, would accomplish exactly that objective. Precluding such evidence would deprive the defendant of his right to present a defense. Thus, neither the State nor the trial court have demonstrated that the record refutes Mr. Gadson's allegation of ineffectiveness on this ground.

(iii) Trial counsel was ineffective for failure to move for a mistrial during Leronnie Walton's testimony.

Mr. Gadson argued below that trial counsel should have moved for a mistrial when the State allowed Leronnie Walton to testify falsely at trial in violation of *Giglio v. United States*, 405 U.S. 150 (1972). (R. 219-21) *Giglo* holds that a prosecutor cannot knowingly use false testimony against a defendant. *Id.* at 153–54. To establish a *Giglio* violation, a defendant must show the following: (1) the prosecutor presented false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. *Guzman v. State,* 941 So. 2d 1045, 1050 (Fla. 2006). Once the first two prongs are established, the State bears the burden of showing that the false evidence was immaterial by showing that its use was harmless beyond a reasonable doubt. *Id.* To do this, the State must show that "there is no reasonable possibility that the error contributed to the conviction." *Id.* (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986)). Trial counsel's

failure to move for a mistrial when grounds are present to do so is a basis for an ineffective assistance of counsel claim. *Middleton v. State*, 41 So. 3d 357 (Fla. 1st DCA 2010) (holding that defendant satisfied the prejudice prong of the test for ineffective assistance by showing that he would have requested, and been granted, a mistrial).

Mr. Gadson's second amended motion argued that Mr. Walton committed obvious perjury before the trial counsel, the State, and the trial court during his testimony at trial. (R. 220). First, he testified that he told Swan and Duffy that Mr. Gadson was not the shooter. When the State pressed him on this and asked if he was telling the truth when he told them this, Walton stated, simply, "I don't know, sir." (R. 175) During the proffer, when asked again on direct if he told Swan and Duffy the truth, he shook his head. (R. 540) On cross, when trial counsel asked him to confirm that he lied to Swan and Duffy when he told them Gadson was not the shooter, Walton initially did not respond. He was asked again and said, "I got no answer." Trial counsel continued, "The fact is they didn't pester you and you didn't lie to them, you told them what you told them, correct?" Walton answered, "Yes." (R. 539-41) But then, when the jury was brought back and Mr. Walton continued his testimony, trial counsel asked him on cross if he told Swan and Duffy that Mr.

Gadson was not the shooter and Walton denied having done so. In fact, he denied having spoken to them at all. (R. 551-52, 581)

As Mr. Gadson argued in his motion below, either Mr. Walton lied during his testimony or he lied during his proffer—either way, the defense, the trial court, *and* the prosecuting attorney knew he had lied under oath. The State's use of this evidence against Mr. Gadson constituted a *Giglio* violation, and trial counsel's failure to move for a mistrial constituted ineffectiveness. The false evidence was material because Walton was a central witness to the State's case; specifically, the only eye witness to the shooting *and* a surviving victim, whose testimony the jury would have been particularly likely to credit, and the State emphasized and relied on this testimony. (R. 440-41; R. 1002-3)

In the State's response, it argued that "although the witness was ambivalent about some things *and contradictory about others*, it was unclear at the end of his testimony what exact communications he had with Deanna Duffy and Arial Swan." (R. 136-8) This is precisely why Mr. Walton's testimony amounted to perjury, rendering him an incompetent witness whose testimony should have yielded a mistrial. The State's further argument that the evidence was not material misses the point. It is not whether Walton told Swan and Duffy that Mr. Gadson was not the shooter that is material, it is the fact that Mr. Walton changed his testimony about

this during the course of the trial. This perjury provided an opportunity for defense counsel to obtain a new trial *without* having to contend with Walton's testimony. To say that "there is no reasonable possibility" that the outcome would have been different under such circumstances, *see Guzman*, 941 So. 2d at 1050, is disingenuous.

(iv) Trial counsel was ineffective for failing to present several witnesses to undermine the State's case and create reasonable doubt.

A trial attorney may be found ineffective for failing to investigate and call a witness to undermine the State's case and create reasonable doubt. *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). To establish that trial counsel was ineffective in failing to investigate key witnesses who would have refuted the testimony of the State's witness, the movant must name the witnesses, allege that the witnesses would have been available to testify, and specify the content of their testimony. *See Robinson v. State*, 659 So. 2d 444 (Fla. 2d DCA 1995); *Puig v. State,* 636 So. 2d 121 (Fla. 3d DCA 1994); *Highsmith v. State,* 617 So. 2d 825 (Fla. 1st DCA 1993). To obtain a hearing, a defendant must show what testimony counsel would have elicited from the witness and how the failure to present that testimony prejudiced the defendant. *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004). Even where a witness's testimony can be said to have done no more

than increase the credibility of a defendant's testimony, there is a reasonable probability that his or her testimony may have changed the outcome of the trial. *Spencer v. State*, 842 So. 2d 52, 65 (Fla. 2003); *see also Perez*, 128 So. 3d at 226–27; *Pepin v. State*, 846 So. 2d 633, 634 (Fla. 1st DCA 2003).

(a) Arial Swan and Deanna Duffy

In his second amended motion, Mr. Gadson argued that trial counsel should have spoken with Arial Swan and Deanna Duffy and offered both as witnesses at trial. (R. 221) Both women would have testified that Reggie Payne, Sr. (the victim's father) made threats towards Mr. Walton that something may happen to his loved ones if he did not testify against Mr. Gadson at trial. (R. 221-22) These women would have also testified that Mr. Walton informed both of them that Mr. Gadson did not shoot at him. *Id.*

Both Ms. Swan and Ms. Duffy were in the courtroom on the day of trial, and Ms. Yvette Watson, Mr. Gadson's mother, informed trial counsel of their valuable testimony. (R. 221) However, counsel did not speak to them. *Id.* Their testimony would have corroborated Mr. Walton's initial testimony that he told them that Mr. Gadson was not the shooter, thereby undermining his subsequent change in testimony and providing a reason he might have lied—due to pressure from Reggie Payne, Sr.

In the State's response below, it argued that Mr. Walton had already testified that he told Ms. Swan and Ms. Duffy that Mr. Gadson was not the shooter; thus, the evidence would have been cumulative. (R. 138) In light of Mr. Walton's change in testimony on this very point, the State's argument fails.

(b) Detective B.F. Bowers

Mr. Gadson argued below that trial counsel should have called Detective B.F. Bowers as a witness to impeach Crystal Jones's testimony that she was "positive" she heard the decedent say on the night he died that Mr. Gadson shot him. (R. 222-23) Detective Bowers' report on his investigation states that Ms. Jones told him she *believed* Mr. Payne said Mr. Gadson was the shooter; thus, his testimony would have called into question her certainty. *Id.* Because Ms. Jones was one of only three witnesses implicating Mr. Gadson, her credibility was certainly a big factor in the State's case, *Nelson*, 875 So. 2d at 583, especially in light of Walton's equivocation and Lewis' inconsistencies.

In the State's response, the State argued that Appellant did not demonstrate or elaborate how this is truly inconsistent. (R. 138) Of course, "belief" demonstrates an uncertainty that "positive" does not. Thus, the State's argument is easily refuted.

(c) Devon Jones

Mr. Gadson argued below that trial counsel should have called witness Devon Jones regarding his mother Crystal Jones's testimony. (R. 223) Mr. Jones would have testified that he was closer to Reggie Payne in Crystal's backyard the night of the offense and that he never heard Payne say that Jordan Gadson shot Payne. This would have served to impeach one of the three witnesses who convicted Mr. Gadson. Mr. Jones was available to testify at trial.

(d) Jasmine Graham and other occupants of Yvette Watson's apartment

Mr. Gadson also argued in his motion that trial counsel was ineffective for failing to call Jasmine Graham to testify that Mr. Lewis never left the house the entire night of January 22, 2016, thereby impeaching Lewis' confession and testimony that he was in the car with Gadson and watched him get out of the Durango with a firearm and chase after Payne and Walton. (R. 223-24) Also available were several individuals who were staying at Watson's home that night and who were brought to the Jacksonville Sheriff's Office the morning after the offense for questioning. They could have corroborated Graham's testimony that Lewis never left the apartment on the night of January 22. Mr. Gadson named each one of these witnesses in his motion. (R. 224) (listing witnesses: Samuale Stinson, Telvin

Kennedy, DJ Gadson, Asia Kimbrough, Destiny Leng, Mike and Coby Wiggins, Corina Robinson, Lexis Watson, and Immanuel Williams).

The State's response alleges this testimony is cumulative and therefore trial counsel was not ineffective for failing to call her as a witness. (R. 139) However, where a witness's testimony can be said to increase the credibility of a defendant's testimony, then there is a reasonable probability that his or her testimony may have changed the outcome of the trial, and is neither cumulative nor irrelevant. *Spencer*, 842 So. 2d at 65; *Perez*, 128 So. 3d at 226–27; *Pepin*, 846 So. 2d at 634. Further, because the State may impeach one or more than one witness, calling additional witnesses to corroborate their testimony is often critical to proving a defense, not merely cumulative.

(e) Derwin Lembrick

In the event that the trial court found that Mr. Lembrick's proffered testimony does not constitute newly discovered evidence, as suggested by the State below, Mr. Gadson pled, in the alternative, that trial counsel was ineffective for failing to speak with Mr. Lembrick and present him as a witness. For the reasons enunciated in Mr. Gadson's newly discovered evidence claim above, this omission was prejudicial.

(f) Conclusion

The above deficiencies in trial counsel's investigation and defense were prejudicial to Mr. Gadson because there is a reasonable probability that had trial counsel presented these witnesses, the outcome of his trial would have been different. Specifically, he would have successfully impeached each of the three fact witnesses against him—Leronnie Walton, Jarel Lewis, and Crytal Jones, thereby crumbling the State's case. In its response below, the State offered no specific portions of the record, nor any case law, refuting these allegations and their impact, and the trial court, relied completely on the State's response for its order.

(v) Trial counsel failed to offer specific grounds to support his motion for judgment of acquittal regarding premeditation, a required element of Count I of the Indictment.

Trial counsel's failure to preserve an issue for appeal may be grounds for ineffective assistance of counsel. *See, e.g.*, *Davis v. Sec'y for Dept. of Corr.*, 341 F.3d 1310 (11th Cir. 2003) (holding trial counsel performed deficiently in failing to preserve *Batson* claim for review on appeal). An issue cannot be maintained on appeal unless the supposed error is adequately presented to the trial court so that it may be corrected below, because the motion must "fully set forth the grounds on which it is based." Fla. R. Crim. P. 3.380(b); *see Steinhorst v. State*, 412 So. 2d 332,

338 (Fla. 1982); *State v. Currilly,* 126 So. 3d 1244, 1245 (Fla. 1st DCA 2013) (holding that in order to adequately preserve an issue for appeal, an argument must be "sufficiently precise so as to fairly apprise the trial court of the relief sought and the grounds therefor"). Appellate courts have repeatedly declined to review the denial of a motion for judgment of acquittal where the motion failed to make the specific argument raised on appeal. *See, e.g., Pryor v. State,* 48 So. 3d 159, 162 (Fla. 1st DCA 2010) (finding a motion for judgment of acquittal that failed to raise the defendant's knowledge insufficient to address that element in a charge of tampering with evidence).

Trial counsel Eler failed to provide specific grounds to support his motion for judgment of acquittal, thereby failing to preserve for appeal that the State failed to prove premeditation. Premeditation is an essential element for a charge of premediated first degree murder. § 782.04(1)(a), Fla. Stat. "Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." *Green v. State,* 715 SO. 2d 94, 944 (Fla. 1998).

The State's three primary witnesses all testified that Mr. Gadson was the shooter in this offense. Yet, the jurors acquitted Mr. Gadson of the felon in possession of a firearm charge, thereby indicating that they did not believe he had a

weapon, but was merely present for the offense. This is not only inconsistent with all three witness' testimony, it demonstrates that at most, Mr. Gadson was guilty as a principal. The State would have had to prove, therefore, that he had the same intent as the shooter—that he intended to kill Reggie Payne. Mr. Gadson's testimony was that he was in the car during the offense and had no idea what Danny Neil and Tyree Swain were planning when they exited the vehicle. The State presented no evidence to rebut this reasonable hypothesis, except through witnesses who testified that Gadson was the shooter, which the jury apparently did not find credible. Thus, had trial counsel specified that the State did not prove premeditation when moving for a judgment of acquittal, Mr. Gadson would have been acquitted of first degree murder. *See Bigham v. State*, 995 So. 2d 207, 214 (Fla. 2008) (holding that where the evidence does not establish proof a defendant had the conscious purpose to kill the victim, a conviction for premeditated first degree murder cannot stand).

In the State's response below, many, if not all, of its arguments rest on the testimony of Mr. Gadson during cross-examination, admitting that he drove the Durango on the night of the offense. (R. 129-31) But he repeatedly stated he had no idea what they were planning on doing, and thought they were only going out to buy weed. (R. 952) The State pointed to no evidence in the record rebutting Mr. Gadson's lack of knowledge or intent and, therefore, neither did the trial court.

(vi) Trial counsel was ineffective for failing to file a motion to exclude any reference to the 9 millimeter ammunition found in Yvette Watson's residence.

Only relevant evidence is admissible at trial. § 90.402, Fla. Stat. "Relevant evidence" is defined as evidence "tending to prove or disprove a material fact." § 90.401, Fla. Stat. Even relevant evidence is inadmissible, however, "if its probative value is substantially outweighed by the danger of unfair prejudice." § 90.403, Fla. Stat. Where evidence is remote because it is too attenuated to the material fact in dispute, then it is not relevant. *See Donahue v. Albertson's, Inc.*, 472 So. 2d 482, 483 (Fla. 4th DCA 1985) (quoting *NLRB v. Ed Chandler Ford, Inc.*, 718 F.2d 892, 893 (9th Cir. 1983)).

Mr. Gadson argued in his second amended motion that trial counsel was ineffective for failing to preclude the State from admitting into evidence 9 millimeter rounds of ammunition found in Yvette Watson's apartment, where Mr. Gadson lived. (R. 228) After Mr. Walton identified Mr. Gadson as having been a shooter on the night Reggie Payne died, law enforcement obtained consent to search Gadson's mother's, Yvette Watson's, apartment building, where Mr. Gadson and numerous other people resided. The officers recovered numerous 9 millimeter live rounds of ammunition in the tan bedroom of the upstairs apartment of Ms. Watson's home, one live round of 9 millimeter ammunition in the center bedroom, and another in a

third bedroom. However, law enforcement could not identify who resided in those bedrooms.

The laboratory analyst for the Florida Department of Law Enforcement, testified that all seven shell casings recovered at the scene were fired from the same gun. (R. 229) He also examined the four bullet fragments recovered from the decedent's body. (R. 229-30) The analyst testified that he could conclude that one of the bullets was a fragment of a 9 millimeter luger caliber projectile, and the other three fragments were from a .40 caliber, not 9 millimeter bullet. *Id*. However, he was never asked to compare the ammunition found at Watson's apartment with the casings or fragments, and in fact testified that he would not have had enough information to form any conclusions about whether bullets were from the same manufacturer. *Id*. Nonetheless, the bullets recovered at Watson's apartment were admitted into evidence without even an objection from trial counsel.

This evidence was, at best, unduly prejudicial and, at worst, wholly irrelevant. *See, e.g.*, *Rigdon v. State*, 621 So. 2d 475, 478 (Fla. 4th DCA 1993) (admission of firearm evidence found under the defendant's bed required new trial where the State failed to establish a connection between the evidence and the crime). It implied a guilty connection between Mr. Gadson and the offense where none existed, thereby buttressing what we now know to be perjured testimony by Walton and Lewis.

In the State's response, it argued that evidence can be relevant for many reasons, but only provides one: "The presence of 9mm ammunition in the home is relevant to show that someone likely possessed a 9mm, which happened to be the same type of weapon used in the murder." (R. 143-44) This, of course, is precisely the reason the evidence should *not* have been admitted. In short, the State's (and, presumably, the trial court's) reasoning for denying this claim is unavailing. Thus, this Court should remand the claim for a hearing to determine whether trial counsel had any reasonable strategic reason for failing to move to exclude the ammunition, though undersigned counsel are not aware of any such strategic reason.

(vii) The trial court failed to assess the cumulative effect of trial counsel's errors, which demonstrate prejudice and require an evidentiary hearing.

As argued below, a court reviewing ineffective assistance of counsel claims under *Strickland* must consider the cumulative effect of trial counsel's alleged errors. *See, e.g.*, *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995) (cumulative effect of numerous errors in counsel's performance may constitute prejudice); *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995) (same); *Lightbourne*, 742 So. 2d 238; *Williams*, 529 U.S. at 398-99; *Hall v. Head*, 310 F.3d 683, 701 (11th Cir. 2002)

As to Mr. Gadson's ineffective assistance of counsel allegations, the trial court's order concludes only that, "in the context of the entire record, each allegedly deficient act by counsel appears reasonably calculated to advance a legitimate interest of Defendant or not to have resulted in prejudice." (R. 240) This demonstrates the trial court's failure to address the cumulative prejudice resulting from all of counsel's deficiencies, thereby requiring reversal. Because Mr. Gadson alleged, and the State's response and court's order fail to refute, that there is a reasonable probability that the outcome of Mr. Gadson's trial would have been different if trial counsel had not rendered deficient performance in the various ways alleged in his second amended motion, this Court should remand for an evidentiary hearing on this claim.

CONCLUSION

Based on newly discovered evidence and trial counsel's errors alleged in Mr. Gadson's second amended motion, none of which are refuted by the record, this Court should instruct the trial court to hold an evidentiary hearing. In the alternative, it should vacate the order and instruct the trial court to provide findings of fact and legal bases for its summary denial along with attached portions of the records demonstrating that Mr. Gadson is not entitled to relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the Office of the Attorney General at crimapptlh@myfloridalegal.com on this the 14th day of September, 2016.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman, 14-point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

s/ Rocco J. Carbone, III
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