

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR
FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

Case No.: 2018-00426-CFFA

v.

KEITH J. JOHANSEN,
Defendant.

DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

COMES NOW, the Defendant, KEITH J. JOHANSEN, by and through undersigned counsel, pursuant to the Florida Rules of Criminal Procedures 3.850. The Defendant asserts the following grounds will prove his burden of establishing a prima facie case of ineffective assistance of counsel.

In support thereof, the Defendant states:

PROCEDURAL HISTORY

1. On or about April 27, 2018, the Defendant was arrested on April 28, 2018, the Defendant was indicted on one (1) count true bill indictment to the following:

Count One: First Degree Murder with a Firearm in violation of F.S. 775.087(1), 782.04(2) and 790.001 (6).
2. Defendant was represented at first appearance by retained counsel John Bull, Esq.
3. On or about October 25, 2021, the Defendant proceeded to trial, represented by Assistant Public Defenders (APD) Rosemarie Peoples and Gary L. Wood. The State was represented by Assistant State Attorneys (ASA) Jason S. Lewis and Jennifer L. Dunton. The Honorable Circuit Court Judge Christopher France presided over the jury trial and sentencing.

4. On October 25-28, 2021, the Defendant proceeded to jury trial, and found guilty as charged.
5. On October 28, 2021, the Defendant was sentenced to the following prison term:
 - Count (1): Natural Life with twenty-five year minimum mandatory in prison with 1281 days jail credit.
6. Trial Counsel filed a timely Notice of Appeal on November 5, 2021 with (7) judicial acts to be reviewed.
7. On or about November 7, 2021, the appellate court assigned new case number 5D21-2799.
8. On October 5, 2022, assigned appellate counsel Valarie Linnen filed an Anders Brief.
9. On April 6, 2023, The Fifth DCA issued a per curiam opinion. (See Johansen v. State, 359

So.3d 405 (Fla. 5th DCA 2023).

10. The Defendant has not filed any other postconviction motions in this court.

Standard for Review

This postconviction motion contains allegations of ineffective assistance of counsel in violation of guarantees provided by the Sixth and Fourteenth Amendments to the U.S. Constitution.

The facial sufficiency of an ineffective assistance of counsel claim is determined by applying the two-pronged test of deficiency and prejudice set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

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

Where a facially sufficient claim of ineffective assistance of counsel has been set forth, an evidentiary hearing is necessary, (generally, an evidentiary hearing is required to determine whether action or inaction by trial counsel was a tactical decision for which no relief can be granted). A postconviction motion pursuant to Florida Rules of Criminal Procedure Rule 3.850 is the proper vehicle to address ineffective assistance of counsel for failure to preserve meritorious issues for appellate review. Ineffectiveness is established where meritorious issues were not properly preserved for appeal without justifiable excuse but when raising such a claim it is necessary to show prejudice.

LITIGANT STATEMENT

In *Spera v. State*, 971 So. 2d 754 (Fla. 2007), the Florida Supreme Court held that "in dismissing a first motion based on a pleading deficiency, a court abuses its discretion in failing to allow the defendant at least one opportunity to correct the deficiency unless it could not be corrected." The Florida Supreme Court further discussed that upon receiving a Motion for Postconviction Relief, a court must first determine whether the motion is facially sufficient, i.e., whether it sets out a cognizable claim for relief based upon the legal and factual grounds asserted. The defendant relies upon the Florida Supreme Court's ruling in *Spera*, supra, and contends that he should be entitled to at least one opportunity to correct any alleged deficiencies within the claim of this motion should the court determine any of the grounds presented herein are facially insufficient.

GROUND ONE

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST A PRETRIAL STAND YOUR GROUND HEARING. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL, AND EFFECTIVE ASSISTANCE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

STATEMENT OF FACTS

The defendant was arrested and later was indicted by a grand jury on one (1) count to the following: Count (1): First Degree Murder with A Firearm in violation of F. S. 775.087(1), 775.087(2)(a)2, 775.087(2)(a)3, 782.04(1)(a)1 and 782.04(1)(a)2.

The following events led up to the defendant being arrested and charged with the allegations stated above.

On April 27, 2018 the State filed Information charging the Defendant, Keith J. A. Johansen with the sole offense of Second Degree Murder with a Firearm. The incident occurred on April 7, 2018 at his residence located at 23 Felter Lane, Palm Coast, Florida. The facts show that the Defendant called 911 and in the recording states his wife accidentally shot herself while he was in the shower. He stated there were two guns on the floor next to his wife's body and that he thought she accidentally shot herself while trying to put them away. Deputy Jeff Purvis testified that he responded to the 911 call at the Defendant's residence. Deputy Purvis stated that the Defendant stated that his wife had accidentally shot herself. Deputy Purvis stated the Defendant said he heard two shots while he was in the shower. He went on to say he exited the shower after hearing the gunshots and saw his wife lying on the floor. The decedent was lying on the floor in the bedroom next to the bed. Deputy Purvis checked the decedent and found no pulse. The police stated that the Defendant's hair was dry and the shower walls were dry.

The medical examiner testified that the fatal wound was discharged from two (2) to three (3) feet away from the body. Thus, making it impossible for the decedent to have self-inflicted the wound, therefore concluding the death was a homicide.

The detectives confronted the Defendant with new evidence from the camera videos and eventually, the Defendant changed his story to self-defense. The Defendant claimed the decedent was

delusional and saying that he was plastic and not real while pointing the firearm at him. The Defendant stated that the decedent had been binging on meth and marijuana for several days. The decedent engaged the slide on the gun and when he tried to disarm her of the handgun, his firearm accidentally discharged. As he was trying to separate from the decedent she was pointing the gun directly at him, so he discharged a second shot. He testified that he did not tell the truth to the police or his parents because of the decedent's use of methamphetamines and he did not want to defame her memory and was not represented by counsel.

The Defendant timely appealed the judgment and sentence. The court appointed Ms. Valarie Linnen as defendant's counsel. The State was represented by AAG Daniel P. Caldwell. Appellate Counsel filed an Anders Brief on direct appeal. On April 6, 2023, the Fifth District Court of appeal issued a per curiam Affirmed opinion in *Johansen v. State*, 359 So.3d 405 (Fla. 5th DCA 2023).

ARGUMENT

The detectives confronted the Defendant with new evidence from the camera videos and at some point the Defendant changed his story to self-defense. The Defendant contends that the decedent was delusional and saying that he was plastic and not real while pointing the firearm at him. The Defendant then pulled his Canik nine-millimeter in self-defense. The Defendant stated that the decedent had been binging on meth and marijuana for several days. The decedent engaged the slide on the gun and when he tried to disarm her of the handgun, his firearm accidentally discharged. The Defendant began giving the decedent verbal commands in accordance with his training to deescalate the situation. As he was trying to separate from the decedent, she swung back around pointing the gun directly at him, so he discharged a second shot. He testified that he did not tell the truth to the police or his parents because of the decedent's use of methamphetamine and he did not want to defame her memory and was not represented by counsel.

Trial counsel is tasked with knowing the applicable statutes, rules and case laws to the case he/she is defending. The defendant's defense at trial was that he acted with justifiable use of deadly force and did not have the state of mind necessary for premeditation. A theory of defense that the firearm discharged accidentally is not necessarily inconsistent with a theory of self-defense and therefore does not categorically preclude a theory self-defense. Trial counsel crafted the defense, knew the issues, and should have filed a motion to dismiss pursuant to stand your ground. Had trial counsel filed a pre-trial motion to stand your ground the pre-trial court would have been informed of the facts that the decedent was attempting to rack the slide to shoot the defendant the outcome of this case would have been different. There is a possibility the case would have been disposed of pre-trial.

Deficient Performance

Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case; counsel's failure to investigate and file a pre-trial "Stand Your Ground" motion. Under Florida statute, a criminal defendant may raise his claim of self-defense immunity from criminal prosecution at a pretrial immunity hearing. See

F.S. 776.032(4). The entire purpose of this immunity hearing is to provide a mechanism by which a person who is asserting a lawful self-defense may have the defense heard early in the process to avoid the time and expense of a trial. The critical case laws previously decided prior to the defendant's trial clearly show that Trial Counsel did no research in the "Stand Your Ground" laws applicable to his case. Trial counsel's performance in this case is far below the expected performance of reasonable trial counsel defending a self-defense case. This refusal to file a "Stand Your Ground" motion constitutes deficient performance by trial counsel, thus the first prong of *Strickland* is satisfied.

Resulting Prejudice

The failure here was highly prejudicial. The Defendant need only show the slightest evidence of an overt act by the victim which may be reasonably regarded as placing the accused apparently in imminent danger of losing his life or sustaining great bodily harm. The Defendant was justified in using deadly force if he reasonably believed that such force was necessary to prevent imminent death or great bodily harm to himself or the imminent commission of applicable forcible felony listed in 776.08, Fla. Stat. against himself. If defendant was not otherwise engaged in criminal activity and was in a place he had a right to be, then he had no duty to retreat and had the right to stand his ground. The Defendant told counsel that upon entering the bedroom the decedent while pointing the firearm at him asked "who are you" and stated "you are not my husband" and "you are not real" and "you are plastic". He then grabbed his firearm from the end table. As he approached the decedent pulled the slide attempting to put a bullet in the chamber and then swung the Beretta nine-millimeter firearm directly at the defendant in her delusion. The defendant then pulled his Canik nine-millimeter in self- defense. In spite of the fact the Defendant's story changed over the course of the case, the Defendant was still entitled to a pretrial immunity hearing. The defendant does not dispute that he fired a second shot and killed the decedent. However, he claims that he is immune from criminal prosecution under section 776.032 because he reasonably believed the force he used was necessary to prevent the imminent commission of a forcible felony (murder) against him by the decedent. The appropriate procedural vehicle to raise immunity under section 776.032 is a pretrial motion to dismiss under rule 3.190(b), Florida Rules of Criminal Procedure, and for the trial court to then conduct an evidentiary hearing to consider the factual disputes. Trial counsel's failure was highly prejudicial and but for counsel's unprofessional failure there is a reasonable probability that the outcome of the trial would have been different. Trial counsel denied the defendant his right to present this evidence at a pretrial immunity hearing. The failure effectively denied the Defendant to his right to proceed to a fair pre-trial stand your ground hearing. This failure effectively

denied the Defendant this right to a fair and impartial jury trial, thus satisfying the second prong of *Strickland*. Mr. Johansen prays this Honorable Court grants postconviction relief, order an evidentiary hearing, vacate the judgments of convictions and sentences, and/or any other relief deemed just.

GROUND TWO

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECTIVE TO THE EDITED VIDEO WITH FLASHING WORDS PREMEDITATION AND MURDER AT THE JURY. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

STATEMENT OF FACTS

The State moved to introduce a large number of motion-captured recordings of a Netgear video surveillance from inside and outside of the defendant's home to include sex acts and verbal arguments between the defendant and the decedent which occurred on April 3, 2018 through April 5, 2018. (See Trial Transcripts pgs. 484-515). Trial counsel did file a motion in limine to exclude the showing of the Netgear video. Trial counsel objected to the testimony of Brian Busse, General Counsel of Arlo Technologies based on violation of the confrontation clause; however the trial court denied both these attempts to keep the videos out of the trial. Trial counsel saw the videos pre-trial; however, at trial the State had added power points in the presentation showing the big/bold words premeditation and murder on the screen. did not object to the highly prejudicial State edited version of the video dated from April 3 through April 5, 2018. There were no video recordings of the bedroom on April 7, 2018, which is when and where the incident happened. There are no recordings concerning the circumstances to support the allegations as charged. The video when shown to the jury flashed the words "premeditated" and "murder" to prompt the jury to find guilt of premeditated murder. The whole courtroom was appalled at the words "premeditation" and "murder" flashing on and off the screen as

the video was presented to the jury. Trial counsel sat silently as the State presented their power points in their showing of the video.

ARGUMENT

Neither trial counsel nor the Defendant had previously seen what the State edited and added in their power point presentation. Trial counsel did file a motion in limine to exclude the showing of the Netgear video, however when the edited power point presentation began to flash the words premeditation and murder there should have been a contemporaneous objection. The playing of the video had no evidentiary value to prove or disprove any material fact of the offense as charged on April 7, 2018. Trial counsel did raise the argument in the motion in limine "should the jury have an opportunity to view and listen to the recordings, they would be inflamed and prejudiced to the extent that the defendant could not receive a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution". Trial counsel must make a contemporaneous objection when the prejudicial editing, adding the State's power point to the presentation of this video is being shown to the jury.

Deficient Performance

Any error of prejudicial video evidence shown to the jury must be preserved by contemporaneous objection. Trial counsel's previous filing of a motion in limine to prevent showing of the video on the remoteness/relevancy of the videos does not preserve the issue based on the prejudicial words being flashed at the actual presentation. However when the added power points in the presentation showing the words premeditation and murder, counsel must make a contemporaneous objection. The flashing words were highly prejudicial and could only be preserved by contemporaneous objection explaining the prejudice. Neither trial counsel nor the Defendant had previously seen what the State edited and added in their power point presentation. Defense Counsel's

performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. This failure to request the impeachment jury instruction constitutes deficient performance by trial counsel, thus the first prong of *Strickland* is satisfied.

Resulting Prejudice

Counsel's deficient performance was prejudicial to the defense and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In order to be preserved for further review by a higher court an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved. The failure waived the issue for appellate review. Had counsel made the contemporaneous objection the lower court would have made a ruling and thus the appellate could have review the inflammatory words "premeditation" and "murder" in the State's edited version of the power point presentation of the Netgear video. This failure effectively denied the Defendant this right to a fair and impartial jury trial, thus satisfying the second prong of *Strickland*.

GROUND THREE

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE REMOTE TESTIMONY BASED ON THE VIOLATION OF RULE 3.116- USE OF COMMUNICATION TECHNOLOGY. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

STATEMENT OF FACTS

The State moved to introduce a large number of motion captured recordings of a Netgear video surveillance from inside and outside of the defendant's home to include sex acts and verbal arguments between the defendant and the decedent which occurred on April 3, 2018 through April 5, 2018. Trial counsel did file a motion in limine to exclude the showing of the Netgear video. Trial

counsel objected to the testimony of Brian Busse, General Counsel of Arlo Technologies based on violation of the confrontation clause; however the trial court denied both these attempts to keep the videos out of the trial. Trial counsel saw the videos pre-trial; however at trial the State had added power points in the presentation showing the big/bold words premeditation and murder on the screen. Trial counsel did not object to the highly prejudicial State edited version of the video dated from April 3 through April 5, 2018. There were no video recordings of the bedroom on April 7, 2018, which is when and where the incident occurred. There are no recordings concerning the circumstances to support the allegations as charged. Trial counsel sat silently as the State presented their power points in their showing of the video.

ARGUMENT

Trial counsel did not object to the showing of the Arlo Technologies videos based on the violation of rule 3.116 and many portions of the video being inaudible. Where a partially inaudible tape recording is appropriately played for the trier of fact, the case law is clear that neither a written nor oral interpretation of the inaudible portions of the tape recording is admissible unless such interpretation is properly authenticated by a person having personal knowledge of the contents of the tape recording or by an expert witness skilled in interpreting inaudible tape recordings. The representative from Netgear was not an expert in interpretation and the rule states all parties must consent to the witness testifying without being present in the courtroom.

Rule 3.116. Use of communication technology.

(a) Definitions. The definitions for the terms audio communication technology, audio-video communication technology, and communication technology in Florida Rule of General Practice and Judicial Administration 2.530(a) apply to this rule and to other rules in the Florida Rules of Criminal Procedure that use those terms.

(b) Generally. Use of communication technology in proceedings subject to the Florida Rules of Criminal Procedure is governed by this rule, except that rules 3.130(a), 3.160(a), 3.180(b), 3.220(h),

and 3.851(0 govern the use of audio-video communication technology in the manner authorized by those rules.

(c) Pretrial Conferences. A judge may, upon the courts own motion or upon the written request of a party, direct that communication technology be used by one or more parties for attendance at a pretrial conference, except that, before a judge may direct that the defendant participate in the pretrial conference using communication technology, the defendant or the defendants counsel must waive the defendants physical attendance at the pretrial conference pursuant to rules 3.180(a)(3) and 3.220(0)(1). A judge must give notice to the parties and consider any objections they may have to the use of communication technology before directing that communication technology be used. The decision to use communication technology over the objection of parties will be in the discretion of the trial court, except as noted below.

(d) Testimony.

(l) Generally. A judge may allow testimony to be taken through communication technology if all parties consent.

(2) Procedure. Any party desiring to present testimony through communication technology must, prior to the hearing or trial at which the testimony is to be presented, contact all parties to determine whether each party consents to this form of testimony. The party seeking to present the testimony must move for permission to present testimony through communication technology, which motion must set forth good cause as to why the testimony should be allowed in this form.

(3) Oath. The oath must be administered for testimony taken through communication technology in the manner provided by Florida Rule of General Practice and Judicial Administration 2.530(b)(2)(B).

(4) Confrontation Rights. The defendant must make an informed waiver of any otherwise applicable confrontation rights.

(e) Burden of Expense. The cost for the use of the communication technology is the responsibility of the requesting party unless otherwise directed by the court.

This rule is created to authorize the use of communication technology for criminal proceedings while safeguarding the rights of the accused. It is based on Florida Rule of General Practice and Judicial Administration 2.530, as amended by In re Amends. to Fla. Rules of Jud. Admin., 73 So. 3d 210, 211 (Fla. 2011), but updates and revises the text of that version of the rule to: (l) use the terms audio communication technology, audio-video communication technology, and communication

technology; (2) identify other rules in the Florida Rules of Criminal Procedure that will continue to govern the use of audio-video communication technology under specified circumstances; (3) consolidate subdivisions (b) and (c) of rule 2.530, as amended in 2011, to recognize proposed amended rules 3.180(a)(3) and 3.220(0)(1) and provide that a court may, on its own motion or the written request of a party, direct the use of communication technology by one or more parties for attendance at a pretrial conference, except that, before a judge may direct that the defendant participate in the pretrial conference using communication technology, a waiver of the defendant's physical attendance must be obtained pursuant to rules 3.180(a)(3) and 3.220(0)(1); (4) substitute the term a pretrial conference for the phrase a motion hearing, pretrial conference, or a status conference used in subdivision (b) of rule 2.530, as amended in 2011, because case law has construed the term in the context of rules 3.180(a)(3) and 3.220(0)(1) as including a motion hearing and a status conference; and (5) add authority for the oath to be administered to a witness who is testifying through audio-video communication technology by an authorized person who is not physically present with the witness subject to specified requirements.

Deficient Performance

Trial counsel must object to the showing of this video based on the rule and the fact the representative from Arlo was not an expert in interpretation of video. The Defendant adamantly objected to the witness testifying to the videos. Any error of prejudicial video evidence shown to the jury must be preserved by contemporaneous objection. The defendant did not waive of any his applicable confrontation rights. Trial counsel objected to the testimony of Brian Busse, General Counsel of Arlo Technologies based on violation of the confrontation clause; however the trial court denied both these attempts to keep the videos out of the trial. Had trial counsel objected based on Rules of Criminal Procedure Rule 3.116. Use of communication technology the outcome of the trial would have been different. The defendant would not have been prejudiced by the showing of videos

that were not relevant to the charged homicide. This failure to object based on violation of Rule 3.116 constitutes deficient performance by trial counsel, thus the first prong of *Strickland* is satisfied.

Resulting Prejudice

The testimony of Brian Busse, General Counsel of Arlo Technologies should have been objected to based on violation of Rule 3.116 of the Rules of Criminal Procedure. The rule states: (1) Generally. A judge may allow testimony to be taken through communication technology if all parties consent. The defendant never consented nor through counsel did he consent to having this testimony through audio-visual production. The defendant did not waive any his applicable confrontation rights. Had trial counsel objected the outcome of the trial would have been different. The jury was allowed to hear testimony of video that presented evidence that was highly prejudicial to the defendant's case in chief. Where a partially inaudible tape recording is appropriately played for the trier of fact, the case law is clear that neither a written nor oral interpretation of the inaudible portions of the tape recording is admissible unless such interpretation is properly authenticated by a person having personal knowledge of the contents of the tape recording or by an expert witness skilled in interpreting inaudible tape recordings. *Wilson v. State*, 680 So. 2d 592, 594 (Fla. 3d DCA1996). Brian Busse, General Counsel of Arlo Technologies is not/was not an expert on interpretation of inaudible tape recordings. Mr. Busse operated in sales and distribution. Trial counsel is tasked with knowing the laws, rules, and procedures in defending a first-degree murder trial. His failures fall far below the norm in this case. The failures effectively denied the Defendant his right to a fair and impartial jury trial, thus satisfying the second prong of *Strickland*.

GROUND FOUR

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBTAINING LATENT PRINTS OFF THE BARRETTA NINE-MILLIMETER FIREARM THAT THE DECEDENT WAS POINTING AT THE DEFENDANT. THE FAILURE DEPRIVED

**DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL
GUARANTEED UNDER THE SIXTH AND FOURTEENTH
AMENDMENTS TO THE U.S. CONSTITUTION.**

STATEMENT OF FACTS

Defendant told counsel that he kept weapons in the home. He told counsel on the day of the incident, the Berretta was on the nightstand in his bedroom. He told counsel that the decedent usually had possession of the Baretta and they would go to the gun range together. The Defendant told trial counsel, that he came out of the shower and entered the bedroom. Upon entering the bedroom, the decedent while pointing the Baretta at him asked "who are you" and stated "you are not my husband" and "you are not real" and "you are plastic". The defendant began giving the decedent verbal commands in accordance with his training to deescalate the situation. The defendant then pulled his Canik nine-millimeter in self-defense. The decedent engaged the slide on the gun and when he tried to disarm her of the handgun, his firearm accidentally discharged. As he was trying to separate from the decedent, she swung back around pointing the gun directly at him, so he discharged a second shot. The police reports revealed that the Baretta Nine-millimeter firearm was jammed/stove piped. The Defendant told trial counsel that the decedent was pointing the firearm directly at him and a nine-millimeter round was found underneath the leg of the decedent.

ARGUMENT

Any trial counsel defending a first degree murder case where the defendant's sole defense is self defense must request that fingerprint lifts and DNA be attempted on the Baretta Ninemillimeter firearm in this case. The defendant told counsel that the decedent engaged the slide and pointed the firearm directly at him. The defendant told counsel that he fired the second round in self-defense. The defendant told counsel that the decedent carried the Baretta for protection. The decedent attempting to discharge the weapon would have left prints on the handle, slide, and the trigger. Trial counsel must

present fingerprint evidence to support the defendant's statement of self defense. The decedent's DNA and fingerprints on various parts of the gun would have shown her handling the gun. The defendant contends that this evidence would support the sole defense theory that the victim had the gun in her hands or, at the very least, had engaged the slide in an attempt to shoot the firearm because she had intended to kill the defendant. The facts showing the decedent's fingerprints/DNA on the firearm would have shown the decedent point possessed the firearm.

Deficient Performance

Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. Counsel's failure to request DNA/prints to be lifted from the Baretta was deficient performance. The sole theory of defense in this case was self-defense. A latent print examiner's testimony that prints were lifted from the firearm would have supported the fact that the firearm was in the decedent's possession. The State's theory of prosecution was first-degree premeditated murder. There is a probability that the fingerprint/DNA evidence may have created a reasonable doubt in the minds of the jury. Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. The failure constitutes deficient performance by trial counsel, thus the first prong of Strickland is satisfied.

Resulting Prejudice

The sole theory of defense in this case was self-defense. A latent print examiner's testimony that prints were lifted from the firearm would have supported the fact that the firearm was in the decedent's possession. The State's theory of prosecution was first degree premeditated murder. There is a probability that the fingerprint/DNA evidence may have created a reasonable doubt in the minds of the jury. The jury could have concluded that fingerprint evidence on the handle, slide, and trigger

showed that the defendant was placed in fear of death at the hands of the decedent. The jury may have concluded that the defendant was justified in his use of deadly force. Counsel's performance was highly prejudicial and well below the norm of any trial counsel defending a self-defense case. This failure effectively denied the Defendant this right to a fair and impartial jury trial, thus satisfying the second prong of *Strickland*.

GROUND FIVE

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ARGUE WHY THE BARRETTA'S EJECTOR SLIDE WAS JAMMED WITH A ROUND STOVEPIPED IN THE CHAMBER. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION
STATEMENT OF FACTS

Defendant told counsel that he kept weapons in the home. He told counsel on the day of the incident; the Baretta was on the nightstand in his bedroom. He told counsel that the decedent usually had possession of the Baretta, and they would go to the gun range together. The Defendant told trial counsel, that he came out of the shower and entered the bedroom. Upon entering the bedroom, the decedent while pointing the Baretta at him asked "who are you" and stated, "you are not my husband" and "you are not real" and "you are plastic". The defendant began giving the decedent verbal commands in accordance with his training in an attempt to deescalate the situation. The defendant then pulled his Canek nine-millimeter in self-defense. The decedent engaged the slide on the gun and when he tried to disarm her of the handgun, his firearm accidentally discharged. This would explain when the medical examiner moved the body there was a nine-millimeter round underneath the body.

As he was trying to separate from the decedent, she swung back around pointing the gun directly at him, so he discharged a second shot. The police reports revealed that the Baretta Nine-millimeter firearm was jammed/stove piped. The Defendant told trial counsel that the decedent was pointing the firearm directly at him and appeared to have chambered a round.

ARGUMENT

Any trial counsel defending a first-degree murder case where the defendant sole defense is self-defense must present and argue the issue why the Baretta Nine-millimeter firearm is jammed/stove piped in this case. The defendant told counsel that the decedent engaged the slide and pointed the firearm directly at him. The defendant told counsel that he fired the second round in self-defense. The defendant told counsel that the decedent carried the Baretta for protection. The decedent attempting to chamber a round jammed the firearm. Trial counsel must present evidence and argue this point to support the defendant's statement of self-defense. The facts showing the decedent's fingerprints are on the firearm would have shown the decedent at some point possessed the firearm and possibly stove piped the firearm.

Deficient Performance

The State's theory of prosecution was first degree premeditated murder. There is a probability that the argument on the firearm being jammed/ stove piped by the decedent may have created a reasonable doubt in the minds of the jury. There was evidence at the scene where crime scene techs discovered a nine-millimeter round underneath the body of the decedent. Trial counsel should have questioned crime scene techs and ballistics techs regarding the possibility of this unspent round coming from the jammed/stove piped Beretta firearm. The sole theory put forth at trial was self-defense. If counsel put forth the argument that the decedent to discharge the firearm jammed/stove piped the weapon the outcome of the trial would have been different. Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. The failure constitutes deficient performance by trial counsel; thus, the first prong of *Strickland* is satisfied.

Resulting Prejudice

The jury may have concluded that the jammed/stove piped slide showed that the defendant was placed in fear of death at the hands of the decedent. The defendant told counsel that the Beretta was never loaded with non-lethal rounds because the decedent was usually kept the firearm on her person when she was in the house. Otherwise, it was kept in the car. A reasonable person could have understood had the argument been presented how the defendant felt his life was threatened. There was evidence at the scene where crime scene techs discovered a nine-millimeter round underneath the body of the decedent. Trial counsel should have questioned crime scene techs and ballistics techs regarding the possibility of this unspent round coming from the jammed/stove piped Beretta firearm. The jury may have concluded that the defendant was justified in his use of deadly force. Counsel's performance was highly prejudicial and well below the norm of any trial counsel defending a self-defense case. This failure effectively denied the Defendant this right to a fair and impartial jury trial, thus satisfying the second prong of *Strickland*.

GROUND SIX

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE SHOWING OF ALL NETGEAR VIDEO AFTER NETGEAR WARLO REPRESENTATIVE TESTIFIED THAT HE DELETED EIGHTY (80) VIDEOS AFTER THE STATE SUBPOENA AND INVOKING THE RULE OF COMPLETENESS. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

STATEMENT OF FACTS

On August 23, 2019 Assistant Public Defender Rosemarie Peoples filed a motion in limine pursuant to FRCP 3.190(a), the due Process Clause, Article I 9 of the Constitution of the State of Florida, the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and move the court to prohibit any showing and/or reference to the Netgear video surveillance dated April 3, 2018

through April 5, 2018. However, when the Netgear representative took the witness stand and stated that over eighty (80) videos had been deleted after the subpoena there should have been a contemporaneous objection to the showing of the remainder of the videos and the rule of completeness should have been requested by counsel. The State sought to only introduce portions of the video recording showing the disagreements and arguments that the couple was engaged in.

ARGUMENT

The Common Law Rule of Completeness began as a common law rule of evidence. At common law, the rule of completeness provided that "the opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." The common law version of the rule of completeness permitted the proponent to prove such part as he desired. At common law, the opponent could not force the proponent to broaden the scope of his questioning of the witness. However, when the proponent turned the witness over to the opponent for questioning, the opponent could then elicit the other parts relevant to the same topic. A "classic example of the possibilities of distortion" when a portion of a statement is omitted is where one mentions only the last phrase of the bible quote, "The fool hath said in his heart, there is no God." Quoting the Bible as saying, "there is no God," would "be a misleading half-truth because it divorces the quotation from its context."

The common law rule of completeness had two purposes: (1) to ensure "that the court not be misled because portions of a statement are taken out of context" and (2) to avoid "the danger that an out-of-context statement may create such prejudice that it is impossible to repair by a subsequent presentation of additional material. It also had two limitations: (1) that the additional portions of the

statement be "relevant" to an issue in the case and (2) that the additional portions of the statement be "necessary" to "qualify or explain the already introduced evidence allegedly taken out of context. "

In the case at bar, the State sought to introduce only portions of the recordings that showed the defendant and the decedent in arguments and disagreements. However, many of the recording leading up to the demise of the decedent showed them in a loving and caring posture.

Deficient Performance

Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. The "general rule" was that the defendant was entitled to have before the jury all that was said upon the subject upon the occasion, whether prejudicial or beneficial to him. The state having opened the door by proving a part of the conversation, it cannot close it upon the defendant, so that he cannot offer on cross-examination the other part of the conversation which relates to the same subject-matter. The whole conversation should be before the jury, and they should determine what weight, and effect should be given to the whole view of the relational events leading up to the day of the incident. This refusal to object and request the rule of completeness constitutes deficient performance by trial counsel, thus the first prong of *Strickland* is satisfied.

Resulting Prejudice

The State moved to introduce a large number of motion-captured recordings of a Netgear video surveillance from inside and outside of the defendant's home to include sex acts and verbal arguments between the defendant and the decedent which occurred on April 3, 2018 through April 5, 2018. As an evidentiary principle, the concept of 'opening the door' allows the admission of otherwise inadmissible testimony to 'qualify, explain, or limit' testimony or evidence previously admitted. "The concept of 'opening the door' is 'based on considerations of fairness and the truth-seeking function of a

trial.'" Trial counsel should have objected to all the (80) deletions and requested that the rule of completeness be applied to show the jury that the couple had a loving and caring relationship as well as having verbal arguments.

If the jury were able to view the couple's relationship as recorded in the Netgear videos in their completeness the outcome would have been different. The jury was only allowed to see the arguments and verbal disagreements which were highly prejudicial. This failure effectively denied the Defendant this right to a fair and impartial jury trial, thus satisfying the second prong of *Strickland*.

GROUND SEVEN

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PROPERLY EXAMINE WITNESS DR. DANIEL BUFFINGTON ON AGGRESSIVENESS, HALLUCINATIONS, AND SLEEP DEPRIVATION. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

STATEMENT OF FACTS

Following the defendant's testimony, defense counsel called Daniel E. Buffington, a clinical pharmacologist. Dr. Buffington testified that he had seen the victim's toxicology screens, and that methamphetamine could keep one awake, and that extended sleep deprivation could cause hallucinations. (See Trial transcripts pgs. 654-714). During cross-examination, Dr. Buffington admitted that the videos from April 7 did not show any evidence of the victim hallucinating. The defendant told the jury he had obtained three and half grams of methamphetamine, which the victim had been smoking for ten to twelve days prior to the shooting. The defendant testified that he stopped about two days before the shooting however the decedent did not sleep at all during the ten to twelve day period. The defendant admitted they both smoked marijuana intermittently during the ten to twelve day period. The Defendant told trial counsel that upon entering the bedroom the decedent while pointing the

Beretta at him asked "who are you" and stated "you are not my husband" and "you are not real" and "you are plastic". The defendant began giving the decedent verbal commands in accordance with his training to deescalate the situation. The defendant then pulled his Canik nine-millimeter in self-defense. On cross examination at trial, counsel asked Medical Examiner Dr. Bulic, "Okay. And to your knowledge, have chronic meth users experienced days without going to sleep, to your knowledge?" Dr. Bulic answered "Yes, I-- agree." Counsel goes on to ask "Okay. And would such sleep —could sleep deprivation lead to hallucinations?" Dr. Bulic answered "Yes, it could." Trial counsel never brings this critical argument in support of self-defense into the direct examination of defense expert witness Dr. Buffington.

ARGUMENT

The decedent had methamphetamine and cannabis in the chest blood retrieved for testing. The methamphetamine level was forty-seven nanograms per milliliter. Dr. Bulic testified that the amount meth in the blood stream was low and irrational behavior occurs in the two hundred to six hundred milliliter range. Dr. Buffington was tendered as an expert in clinical pharmacology. Methamphetamine impacts on human physiology have been known for "more than a century," but most studies analyzing amphetamine and methamphetamine are "case-type" studies, because doctors cannot ethically give human subjects impairing doses of amphetamine or methamphetamine. There is no set amount of amphetamine that would necessarily constitute impairment. A person binging on meth for several days becomes very irritable when the high is diminishing. There are certain withdrawal symptoms that come into play.

Deficient Performance

Trial counsel failed to properly research and prepare to cross-examine Dr. Buffington on the effects of a person withdrawing from a ten to twelve-day binge. Any trial counsel preparing a self-

defense case under the circumstances of this case must investigate and prepare to ask appropriate questions to elicit answers to support the defense. The decedent was agitated and needed to continue smoking to avoid going into a depressive state. Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. The failure to investigate the symptoms and prepare to properly cross-examine Dr. Buffington constitutes deficient performance by trial counsel, thus the first prong of *Strickland* is satisfied.

Resulting Prejudice

The Defendant told trial counsel that upon entering the bedroom the decedent while pointing the Baretta at him asked "who are you" and stated "you are not my husband" and "you are not real" and "you are plastic". The hallucinations and the irritability inherent with meth abuse are clearly observed in the alleged statements of the decedent. Had trial counsel investigated the withdrawal symptoms and properly cross-examined Dr. Buffington the jury would have understood the threat the decedent presented while pointing the firearm at the defendant. Had trial counsel asked questions regarding withdrawal symptoms such as aggression, depression and agitation, the jury would have heard expert testimony to aide them in understanding the fear the defendant claimed he experienced in self-defense. Had trial counsel not failed in this aspect the outcome of the trial would have been different. The jury would have found self-defense a viable claim and acquitted the defendant. This failure effectively denied the Defendant this right to a fair and impartial jury trial, thus satisfying the second prong of *Strickland*.

GROUND EIGHT

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE RECORDED AUDIO/VIDEO OF THE DEFENDANT'S CONVERSATIONS WITH HIS

**PARENTS. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL
AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND
FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION**

STATEMENT OF FACTS

The incident occurred on April 7, 2018 at his residence located at 23 Felter Lane, Palm Coast, Florida. The Defendant was taken to the Flagler County Sheriff's Office and questioned by Corporal George Hristakopoulos. After two hundred and eleven (211) pages of questioning Corporal George Hristakopoulos on page two hundred and twelve (212) states, "Okay. So at this point, until they are done at the scene, you can't, you just can't be free to leave. I can't let you leave until that time". Corporal Hristakopoulos goes on to state "Okay. So whenever that happens, we have to unequivocally let you know what your rights are. It does not mean you're under arrest or whatever". On page number two hundred and twenty (220) Corporal Hristakopoulos begins to have the defendant read the standard Miranda card. On page two hundred and twenty-one (221) the defendant states "Yeah, I might want a lawyer because from what I hear, you guys are trying to pin it on me". Trial counsel moved in limine to prevent introduction of the statements allegedly procured in violation of his Fifth Amendment rights. Trial counsel filed a motion to suppress the statements based on being illegally detained, which was denied by the trial court. The police repeatedly told the defendant that he was not going anywhere even after he invoked his rights to an attorney. Trial counsel knew that even after the invocation of his rights, Corporal Hristakopoulos continued recording the conversations of the defendant and remained in the room taking notes.

ARGUMENT

In the case at bar, the defendant was held in the police interrogation facility for over sixteen (16) hours of questioning, and recording of statements to police, a chaplain, and his parents. On all occasions Corporal Hristakopoulos was present, recording and interjecting into the conversations. At

trial following the recording of the defendant's statements to police, the State published a recorded conversation between the defendant and his parents as they sat in the interview room. (See Trial Transcripts Pgs. 380-433). In the recorded evidence presented to the jury, the jury heard evidence of crimes of possession of over 20 grams of marijuana, the jury basically heard Gary Johansen, the defendant's father interrogate him, and the jury heard the defendant deny any wrong doing on several occasions. Corporal Hristakopoulos was present and recording all the conversation even after the defendant invoked his rights to have a lawyer present. Corporal Hristakopoulos never told anyone that he was recording and that the recording could and would be present in court. The police had ignored defendant's request for counsel and continued to gather incriminating information. As part of the totality of the circumstances analysis, many factors are considered by the courts, including: whether the confession was given in the coercive atmosphere of a station-house setting; whether the police suggested the details of the crime to the suspect; whether the suspect was subjected to a barrage of questions during predawn hours and not given an opportunity to sleep or eat; whether psychological coercion was applied; whether the police made threats, promises of leniency, or made statements calculated to delude the suspect as to his or her true position; whether the police made threats of harm; and whether the police exerted undue influence or made direct or implied promises of benefits. Although particular statements or actions considered on an individual basis might not vitiate a confession, when two or more statements or courses of conduct are employed against a suspect, courts have more readily found the confession to be involuntary. In assessing "voluntariness," the court is required to consider whether, in light of "the totality of the circumstances" surrounding the confession, coercive police activity produced that confession. Case law reveals that the "totality of the circumstances" may include police conduct and interrogation techniques used by the police; the duration and nature of the questioning; the physical setting in which the interview occurs; the content

of the confession-product, which, although not determinative, may shed light on whether it was "voluntary" or not; the mental condition and psychological makeup of the accused, and his history and background; the age, legal sophistication, intelligence, and education of the suspect; and all other factors which may assist the court in its determination.

Deficient Performance

Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. Trial counsel pre-trial reviewed and knew the circumstances surrounding the recorded audio/video of the defendant and his parents. On page number two hundred and twenty (220) of the recorded statements, Corporal Hristakopoulos begins to have the defendant read the standard Miranda card. On page two hundred and twenty-one (221) the defendant states "Yeah, I might want a lawyer because from what I hear, you guys are trying to pin it on me". After the defendant requested a lawyer the police continued to gather incriminating information to be used at trial against the defendant. Trial counsel must file a motion to suppress all statements recorded in the station house after invocation of his right to a lawyer. The failure here constitutes deficient performance by trial counsel, thus the first prong of *Strickland* is satisfied.

Resulting Prejudice

The unwarned recorded conversation of the defendant and his parents introduced at trial was highly prejudicial. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his privilege under U.S. Const. Amend.V; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have

him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

In the case at bar, the note taking and recording of the conversations continued and should have been suppressed. The Miranda case mandates that all interrogation cease at the request for a lawyer. The Florida Supreme Court suppressed a confession because the equivocal phrase "I think I might need an attorney" went unheeded by the police, who continued to pursue the interrogation on the belief that nothing had changed. This failure effectively denied the Defendant this right to a fair and impartial jury trial, thus satisfying the second prong of *Strickland*.

GROUND NINE

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBTAIN A HEPATOLOGIST TO EXPLAIN BEHAVIOR WHEN SUFFERING FROM HEPATIC NECROSIS COUPLED WITH METHAMPHETAMINE ABUSE. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

STATEMENT OF FACTS

The State called Dr. Pedrag Bulic, the Chief Medical Examiner for Flagler County. Dr. Bulic testified that he performed the autopsy on the decedent's body. The decedent also had methamphetamine and cannabis in her blood. The methamphetamine level was forty-seven nanograms per milliliter which was such a low level due to the sample being from pooling chest blood not taken from a blood vessel (i.e. vein). The autopsy report included a microscopic examination of the liver. The report states that the hepatic tissue shows most portal tracts expanded by mononuclear inflammatory infiltrate, foci of piecemeal necrosis of the limiting plate and early expansion of the chronic inflammatory cells into the lobular parenchyma. The inflammation of the liver is consistent with chronic hepatitis.

ARGUMENT

Hepatic necrosis causes levels of ammonia to elevate, and liver tissue dies. Transmission occurs from sharing of needles among drug users. Some of the symptoms include jaundice, malaise, anorexia, fever, and cirrhosis. As ammonia levels elevate the person experiences periods of sleepiness and occasionally coma. The elevated ammonia levels mixed with methamphetamine use acts to increase the agitation and irritability of the sufferer. Had trial counsel obtained a Hepatologist, the jury would have had additional information to support the defendant's theory of self-defense.

Deficient Performance

The medical examiner's report was available to trial counsel early in the proceedings. Trial counsel has a duty to prepare an adequate defense in this case. The jury should have known the symptoms of hepatic necrosis and how it affects the mental state of the person infected. Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. This constitutes deficient performance by trial counsel, thus the first prong of Strickland is satisfied.

Resulting Prejudice

Had the jury heard that hepatic necrosis and methamphetamine abuse causes aggressive and irrational behavior the outcome of the case would have been different. The expert would have explained that the meth and the high ammonia levels in the bloodstream would have caused aggressive agitation in the decedent. Had the jury heard this expert testimony the outcome of the trial would have been different. The jury would have understood why the defendant felt he was in risk of great bodily

ham or death. This failure effectively denied the Defendant this right to a fair and impartial jury trial, thus satisfying the second prong of *Strickland*.

GROUND TEN

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO JURY INSTRUCTION 2.2 WHICH WAS PREJUDICIAL AND CONFUSING. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL, AND EFFECTIVE ASSISTANCE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

STATEMENT OF FACTS

In the case at bar, trial counsel did not object to the court reading the jury instruction 2.2 that stated "Members of the jury, you are about to [view] listen to a video [audio] recording. The Court instructs you that the recording has been edited to eliminate irrelevant portions that would not add to your understanding of the case. The fact that the recording has been edited should not concern you in any way and must not impact the way you view, listen to and consider this evidence." The jury instruction is misleading and instructs the jury to dismiss the redacted portions of evidence.

ARGUMENT

Jury instructions are subject to the contemporaneous objection rule. *See State v. Delva*, 575 So. 2d 643, 644 (Fla 1991) (holding a trial court's un-objected to decision regarding the reading of a jury instruction will be upheld on appeal provided it did not constitute fundamental error); *see also Farina v. State*, 937 So. 2d 612, 629 (Fla. 2006) (holding "the sole exception to the contemporaneous objection requirement is fundamental error").

In the proceedings below, trial counsel did not object to the court reading the jury instruction 2.2 that stated "Members of the jury, you are about to [view] listen to a video [audio] recording. The Court instructs you that the recording has been edited to eliminate irrelevant portions that would not add

to your understanding of the case. The fact that the recording has been edited should not concern you in any way and must not impact the way you view, listen to and consider this evidence."

Jury instructions are subject to the contemporaneous objection rule and, absent an objection at trial, can be raised on appeal only if fundamental error occurred. In the realm of criminal jury instructions, fundamental error occurs where the instruction pertains to a disputed element of the offense and the error is pertinent or material to what the jury must consider in order to convict. For jury instructions to constitute fundamental error, the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.

Thus, to prevail, he must demonstrate the instruction resulted in fundamental error. The jury not being allowed to view the entire footage violates the rules of completeness and the best evidence rule. The instruction was highly prejudicial and confusing. The instruction tells the jury they must only think about the video in the terms as presented by the State. The redactions delete portions of the video that are favorable to the Petitioner. The presented video footage was shown to show the Defendant threatening to kill his wife, to beat her, and to have someone else kill her. However, the remainder of the video shows the role-playing games involved in the interactions.

Deficient Performance

Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. Trial counsel basically conceded to having the State show only the portions of the video that supported their case in chief. There were portions of the video evidence during the days leading up to the shooting that would have refuted the State's case of premeditation. The evidence would have shown the couple sharing loving and compassionate moments leading up to the shooting. Counsel's performance fell far below prevailing professional

norms and was unreasonable under the facts and circumstances of this case. This constitutes deficient performance by trial counsel, thus the first prong of Strickland is satisfied.

Resulting Prejudice

Had the jury not been limited to what the State wanted to show them the outcome would have been different. Had counsel made a contemporaneous objection to the limiting instruction and requested to show portions of the video that rebutted the State's theory of premeditation, the outcome would have been different. the second prong of *Strickland*.

GROUND ELEVEN

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILURE TO CALL R.B. TO TESTIFY AT TRIAL. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

STATEMENT OF FACTS

The incident occurred on April 7, 2018 at his residence located at 23 Felter Lane, Palm Coast, Florida. The victim's six-year-old son, Ryland Bruce (RB), was transported to Flagler County Sheriff's Office Operation by Deputy Barnett. Deputy Barnett stood by with RB until Victim Advocate Mary Dinardi arrived to sit with Ryland. Victim Advocate Dianrdis subsequently stood by with RB until the Child Protection Team arrived.

Allison Ogden, the case coordinator with the University of Florida Child Protection Team initiated a CPT interview with RB at 2:42pm in interview Room 121. RB stated that his mother, father and they all ate cereal for breakfast that morning. He stated, "my dad was in the shower, my mom was in the bedroom, and she accidentally shot herself". RB advised he did not see it but heard the gunshots. He stated he was in his bedroom, watching the television before he heard the big loud bangs. RB stated

that he heard his mom texting on her phone that morning. RB stated mommy and daddy went outside on the hammock swinging and talking.

On page 8 of the interview Allison Ogden asked, "What happened when mommy and daddy um are fighting when they get mad at each other? RB answered they don't. RB stated they only fight with their words.

ARGUMENT

To state a facially sufficient claim of ineffective assistance of counsel based on the failure to call a witness, the defendant must allege the identity of the potential witness, the substance of the witness's testimony, an explanation of how the omission of the testimony prejudiced the outcome of the case, and a representation that the witness was available for trial. During the entire sequences of events in this case RB was in the home. RB would have been able to testify that his mom and dad were not fighting during the time the State alleges that the defendant was premeditating murder. RB would have testified that the morning of the incident everybody was happy eating cereal for breakfast. RB would have testified that his mom had problems and freaks out sometimes and hears sirens. RB would have testified that he heard his daddy in the shower. RB would have testified that mommy and daddy were on the hammock, and they were happy. (pg. 19). The testimony of RB would have corroborated the defendant's statements of the decedent's delusional words and aggressive actions she demonstrated the day of the incident.

Deficient Performance

A facially sufficient postconviction motion alleging ineffective assistance of counsel for the failure to call witnesses at trial must set forth only (1) the identity of the prospective witnesses, (2) the substance of the witnesses' testimony, and (3) an explanation as to how the omission of the testimony prejudiced the outcome of the trial. If trial counsel deposed and called RB to testify the jury would

have heard the truth about how the decedent and the defendant were engaging each other the morning of the incident. The State's case was based on hate and premeditation. If counsel called RB to testify the jury would have received a true impression of the situation from RB. The jury would have heard how the decedent would on occasion become delusional. Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. This constitutes deficient performance by trial counsel, thus the first prong of *Strickland* is satisfied.

Resulting Prejudice

A postconviction ineffective assistance of counsel claim that is based upon counsel's failure to call witnesses must include an explanation as to how the admission of the evidence prejudiced the outcome of trial. Had RB testified to the couple eating breakfast that morning and happily swinging on the hammock, the outcome would have been different. The State's entire case was based on the circumstantial evidence of the videos from several days prior to the incident. Had the jury heard RB's version of the interactions of the couple that morning the outcome of the trial would have been different. RB's testimony would have given the jury an unbiased view of the decedent's bi-polar behavior the morning of the incident. The State would not have been able to prove their theory of hate and premeditation. This failure effectively denied the Defendant this right to a fair and impartial jury trial, thus satisfying the second prong of *Strickland*.

GROUND TWELVE

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILURE TO PROPERLY PREPARE THE DEFENDANT TO TESTIFY AT TRIAL. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

STATEMENT OF FACTS

On April 27, 2018 the State filed Information charging the Petitioner, Keith J. A. Johansen with the sole offense of Second Degree Murder with a Firearm. The incident occurred on April 7, 2018 at his residence located at 23 Felter Lane, Palm Coast, Florida. The facts show that the Defendant called 911 and in the recording states his wife accidentally shot herself while he was in the shower. He stated there were two guns on the floor next to his wife's body and that he thought she accidentally shot herself while trying to put them away. Deputy Jeff Purvis testified that he responded to the 911 call at the Defendant's residence. Deputy Purvis stated that the Defendant stated that his wife had accidentally shot herself. Deputy Purvis stated the Defendant said he heard two shots while he was in the shower. He went on to say he exited the shower after hearing the gunshots and saw his wife lying on the floor. The decedent was lying on the floor in the bedroom next to the bed. Deputy Purvis checked the decedent and found no pulse. The police stated that the Defendant's hair was dry and the shower walls were dry.

The medical examiner testified that the fatal wound was discharged from two (2) to three (3) feet away from the body, thus making it impossible for the decedent to have self-inflicted the wound. Therefore concluding the death was a homicide.

The detectives confronted the Defendant with new evidence from the camera videos and at some point the Defendant changed his story to self-defense.

ARGUMENT

The Defendant claimed the decedent was delusional and saying that he was plastic and not real while pointing the firearms at him. The Defendant stated that the decedent had been binging on meth and marijuana for several days and when he tried to disarm her of the handgun it accidentally discharged. As he was trying to separate from the decedent, she was pointing the Berretta directly at

him, so he discharged his handgun. He testified that he did not tell the truth to the police or his parents because of the decedent's use of methamphetamines. (See Trial transcripts pgs. 540-627).

The defendant has maintained his innocence throughout the trial and postconviction process and continues to maintain his innocence. The defendant told trial counsel that he wanted to testify at trial. Trial counsel did not adequately prepare the defendant to testify at trial. The defendant gave many inconsistent statements during the times prior to his arrest. In preparing the defendant to testify trial counsel did not prepare the defendant on how to answer any questions on cross-examination by the State. Trial counsel knew that the Defendant participated in an interview with Dr. Buffington but not once went over the transcripts in preparation for the trial testimony.

Deficient Performance

Trial counsel testified of his many years of experience as a criminal defense lawyer but did nothing to prepare the defendant to testify in this premeditated murder trial. Counsel knew the State would focus on the reason why the defendant told police that the shooting was an accident but did nothing to prepare a statement as to why the defendant was not forthcoming at first glance. The only right more fundamental to a personal defense than the right of self-representation is an accused's right to present his own version of events in his own words. A defendant's choice to testify can be the most crucial decision in a criminal case. The most important witness for the defense in many criminal cases is the defendant himself. The defendant's presence on the stand gives him the opportunity to have the jury observe his demeanor and judge his veracity firsthand. The testimony of the defendant was the only avenue to support counsel's opening statements to the jury. The failure to properly prepare the defendant to testify in this instance constitutes deficient performance by trial counsel, thus the first prong of *Strickland* is satisfied.

Resulting Prejudice

Counsel's performance was highly prejudicial and well below the norm of any trial counsel defending a capital murder case. The failure to properly prepare the defendant to testify in this instance constitutes deficient performance by trial counsel, thus the second prong of *Strickland* is satisfied.

GROUND THIRTEEN

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILURE TO REQUEST A CHANGE OF VENUE. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

STATEMENT OF FACTS

The defendant was arrested and later was indicted by a grand jury on one (1) count to the following: Count (1): First Degree Murder with A Firearm in violation of F. S. 775.087(1), 775.087(2)(a)2, 775.087(2)(a)3, 782.04(1)(a)1 and 782.04(1)(a)2. The following events led up to the defendant being arrested and charged with the allegations stated above.

On April 27, 2018 the State filed Information charging the Petitioner, Keith J. A. Johansen with the sole offense of Second Degree Murder with a Firearm. The incident occurred on April 7, 2018 at his residence located at 23 Felter Lane, Palm Coast, Florida. The facts show that the Defendant called 911 and in the recording states his wife accidentally shot herself while he was in the shower. He stated there were two guns on the floor next to his wife's body and that he thought she accidentally shot herself while trying to put them away. Deputy Jeff Purvis testified that he responded to the 911 call at the Defendant's residence. Deputy Purvis stated that the Defendant stated that his wife had accidentally shot herself. Deputy Purvis stated the Defendant said he heard two shots while he was in the shower. He went on to say he exited the shower after hearing the gunshots and saw his wife lying on the floor. The decedent was lying on the floor in the bedroom next to the bed. Deputy Purvis checked the decedent and found no pulse.

The medical examiner testified that the fatal wound was discharged from two (2) to three (3) feet away from the body. Thus making it impossible for the decedent to have self-inflicted the wound. Therefore concluding the death was a homicide.

The detectives confronted the Defendant with new evidence from the camera videos and eventually the Defendant changed his story to self-defense. The Defendant claimed the decedent was delusional and saying that he was plastic and not real while pointing the firearm at him. The Defendant stated that the decedent had been bingeing on meth and marijuana for several days. The decedent engaged the slide on the gun and when he tried to disarm her of the handgun, his firearm accidentally discharged. As he was trying to separate from the decedent she was pointing the gun directly at him, so he discharged a second shot. He testified that he did not tell the truth to the police or his parents because of the decedent's use of methamphetamines and he did not want to defame her memory and was not represented by counsel.

On or about October 25, 2021, the Defendant proceeded to trial, represented by Assistant Public Defender (APD) Rosemarie Peoples and Garry L. Wood, Esquire represented the Petitioner. Assistant State Attorney (ASA) Mr. Jason S. Lewis and (ASA) Ms. Jennifer L. Dunton represented the State. The panel of jurors to be selected was brought into the court room to begin the voir dire. The trial court instructed, "You must not do any research or look up words, names, maps or anything else that may have anything to do with this case. This means reading the newspapers, watching television, using a computer, cell phone, the internet, any other electronic device or any means at all to get information related to this case or the people and places involved in this case". The record of the jury selection clearly shows this case should have been tried in a different venue.

ARGUMENT

The trial court in this case asked the jurors on page 20 of the jury voir dire, "Now that you've heard the charge made in the indictment against the defendant, do any of you know anything about this case, either through your own personal knowledge or by discussion with anyone else or reading or hearing about it?" If we could just have a show of hands".

Numerous jurors raised their hands in response to the question. The case was highly publicized in the local newspapers, local TV news, Flagler Live and on Court TV. The jurors numbered 5, 16, 17, 26, 36, 47, 48, (See page 21 of the juror voir dire). The trial court held a bench conference out of the hearing of the court reporter and then proceeded with the basic questionnaire without addressing the prejudicial issue on the record. Trial counsel remained silent; no other inquiries were made into the publicity of this high profile case.

The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom. The trial court in its discretion must determine whether a defendant has raised such a presumption of prejudice under this standard. In exercising its discretion, a trial court must make a two-pronged analysis, evaluating: (1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in selecting a jury. When applying the prejudice prong to a claim that defense counsel was ineffective for failing to move for a change of venue, the defendant must, at a minimum, bring forth evidence demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if defense counsel had presented such a motion to the court. The trial court, when ultimately faced with the venue issue, was unquestionably aware of the large amount of publicity

surrounding this case from the early stages of the proceedings. Indeed, the trial court's orders on disclosure and testimony of jurors during voir dire revealed impact of the pretrial publicity.

Deficient Performance

In the postconviction context where a defendant is claiming that counsel was ineffective with regard to a venue issue, the defendant must, at a minimum bring forth evidence demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if defense counsel had presented such a motion to the court. Pretrial publicity must be examined in the context of numerous circumstances, including; (1) when it occurred in relation to the time of the crime and the trial; (2) whether the publicity was made up of factual or inflammatory stories; (3) whether the publicity favored the prosecution's side of the story; (4) the size of the community; and (5) whether the defendant exhausted all of his peremptory challenges. The failure here to move for a change of venue was deficient performance by trial counsel in light of the number of jurors that readily admitted possessing knowledge of the case through public media. The failure here satisfies the first prong of the *Strickland* standard.

Resulting Prejudice

When applying the prejudice prong to a claim that defense counsel was ineffective for failing to move for a change of venue, the defendant must, at a minimum, bring forth evidence demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if defense counsel had presented such a motion to the court. Pretrial publicity must be examined in the context of numerous circumstances. Trial counsel knew that at least (6) six jurors readily admitted having pre-trial knowledge of the case through media sources. Counsel failed to do any further inquiry into how many more had actually known about the case through media publicity.

Prospective Juror Ms. Staci Chambers on pages 39 & 40 of the voir dire expresses that from her knowledge of the case "I'm not sure I would be fair".

Prospective Juror Ms. Cabassa on Pages 96 & 97 stated that "And, like I said, I've read a little bit about this. And from my experience, I know how I would weigh, so.. ."

There was ample evidence during the jury voir dire presented on the record with minimal inquiry that proves this case should have been tried in another venue. The failure here was highly prejudicial and satisfies the prejudice prong of the *Strickland* standard.

GROUND FOURTEEN

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILURE TO CHALLENGE THE MULTIPLE SEARCH WARRANTS FOR VERACITY. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

STATEMENT OF FACTS

The initial affidavit for search warrant in this case dated April 7, 2018 was sworn before the Honorable Circuit Court Judge Chris France. The affiant Sgt. Bernard L. Woodward states the residence at 23 Felter Lane is said property being the residence and curtilage thereof under the control of Keith John Allen Johansen and Brandi Celenza. The affidavit states "23 Felter Lane, hereinafter referred to as the 'Premises' is being used by Keith John Allen Johansen for the purpose of violating the law relating to the crime(s) of Murder, in violation of chapter 782.04, Florida Statutes; additionally evidence relevant to proving a felony has been committed is contained therein, to wit: Firearms, ammunition, shell casings, trace, physical, microscopic, or biological evidence, cell phones, video surveillance media storage, red colored "vampire" shirt and sweatpants or any other item that may contain relevant evidence. Judge France on April 8, 2018 amended the search warrant to include cannabis, and other controlled substance defined in Florida Statutes 893.13, paraphernalia used to

package, store, or consume controlled substances and hard drives. Based on this affidavit the amended search warrant was issued. Sgt. Woodard received this search warrant on the 8th day of April 2018, and executed the same in Flagler County by making a search as therein directed and returned documents of inventory to the clerk of court on April 10, 2018.

ARGUMENT

The affiant Sgt. Woodard never filed an amended probable cause affidavit in this case. However, the Judge on its own accord amended the search to include search for cannabis, and drug paraphernalia and hard drives. The scope of the search was limited to searching only for items specified in the affidavit. The scope of the warrant does not allow for a general exploratory search. The Judge overstepped his authority when he took it upon himself to amend the warrant without an amended probable cause affidavit. The error invalidated the search warrant, and all items seized should have been suppressed.

Deficient Performance

If counsel moved to suppress the seized evidence based on the fact that trial court sua sponte amended the search warrant without an amended probable cause affidavit all items seized from 23 Felter Lane would have been suppressed upon a properly filed motion. Had counsel filed a motion to suppress fact there is a reasonable probability the motion would have prevailed and/or would have been preserved for appellate review. Trial counsel is tasked with knowing the applicable rules and laws regarding the suppression of evidence. Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. This failure to request the impeachment jury instruction constitutes deficient performance by trial counsel, thus the first prong of *Strickland* is satisfied.

Resulting Prejudice

The right of a criminal defendant to suppress evidence seized illegally is derived from the Fourth Amendment and due process rights to be free of illegal search and seizures. Had counsel moved to suppress the evidence collected from 23 Felter Lane based on the erroneous amendment by the Circuit Judge all the collected evidence would have been suppressed. Had counsel filed motion to suppress and prevailed the outcome of this case would have been different. The failure effectively denied the Defendant his right to proceed to a fair jury trial and thus satisfies the second prong of *Strickland*.

GROUND FIFTEEN

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILURE TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENTS ON FACTS NOT IN THE RECORD. THE FAILURE DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

STATEMENT OF FACTS

On page 773, the State's Attorney Ms. Dunton begins her closing argument. On page 775, Ms. Dunton tells the jury "And earlier in 2021, hired someone to help him and tell a story, which we'll talk about. Defense counsel Mr. Wood made an informal objection and approached the bench for discussion outside the hearing of the jury. Ms. Dunton goes on to clarify that the person she was referring to was Dr. Buffington. Defense counsel argues "But there is no evidence that Dr. Buffington assisted Mr. Johansen in creating the story. Ms. Dunton goes on "I don't think I've made that argument. The Judge overruled the objection based on the assertions of the State and where the argument's going". On page 777 of the trial transcript, Ms. Dunton makes a feature out of alleged facts that are not in evidence records. The State made a feature out of a zoom call interview that was not in evidence. Ms. Dunton was allowed to tell the jury her version of the zoom call without a contemporaneous objection by

defense counsel. On page 830 State Attorney Mr. Lewis in his rebuttal closing argument goes back into the story told to Dr. Buffington. Mr. Lewis tells the jury "How do you tell a different story to the person hired to help you and then a different story when you're in court in court to the jury".

ARGUMENT

A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing evidence introduced at trial; not to obscure the jury's view with personal opinion, emotion, and nonrecorded evidence. Unfortunately, prosecutorial misconduct in closing argument is neither a new nor fading phenomenon. See, e.g., *Crew v. State*, 146 So. 3d 101, 111 (Fla. 5th DCA 2014) (holding that "[t]he cumulative effect of the prosecutor's comments, which as seen above are well documented errors, denied Appellant a fair trial"); *Freeman v. State*, 717 So. 2d 105, 106 (Fla. 5th DCAI 998) (holding that "[t]he prosecutor's comments during closing argument collectively rise to the level of being 'so prejudicial as to vitiate the entire trial'" (quoting *State v. Murray*, 443 So.2d 955, 956 (Fla. 1984))).

Under the contemporaneous objection rule, an issue is properly preserved if the trial court knows that an objection was made, clearly understands the nature of the objection, and denies that request. Additionally, courts have avoided the necessity of magic words when stating an objection as long as counsel articulates the objection with sufficient specificity as "to inform the trial judge of the alleged error. Defense counsel initially objected to prosecutorial misconduct on the grounds of improper argument, however the objection was overruled. Ms. Dunton continually referred to Dr. Buffington's and later in rebuttal closing argument Mr. Lewis returns to make statements of fact not in evidence regarding the defendant's previous statements to Dr. Buffington.

Deficient Performance

When the trial court overruled the objection, the State continued, and defense counsel should objected on the basis of "arguing facts not in the record". Over and over again Ms. Dunton was allowed to argue facts not in the record in regard to what the defendant said in the zoom call with Dr. Buffington as written in his report. Then Mr. Lewis returns in rebuttal closing arguments to make statements of fact not in evidence regarding the defendant's previous statements to Dr. Buffington. Defense Counsel's performance fell far below prevailing professional norms and was unreasonable under the facts and circumstances of this case. This failure to object to the improper statements not in the record constitutes deficient performance by trial counsel, thus the first prong of Strickland is satisfied.

Resulting Prejudice

The failure to allow the State Attorneys to continually argue to the jury alleged facts of a zoom call not in the record was highly prejudicial to the defendant's case in chief. What the defendant said to Dr. Buffington was never introduced into evidence. As reflected above, the improper commentary that permeated the prosecutor's closing argument in this case included denigration of Dr. Buffington, blatant appeals to the jurors' emotions.

The cumulative effect of the numerous improprieties deprived the Defendant of a fair trial.

Counsel's performance was highly prejudicial and well below the norm of any trial counsel defending a capital murder case. The failure effectively denied the Defendant to his right to proceed to a fair jury trial and thus satisfies the second prong of *Strickland*.

GROUND SIXTEEN

**THE CUMULATIVE ERRORS COMMITTED BY TRIAL COUNSEL,
SHOWING DEFICIENT AND PREJUDICIAL PERFORMANCE**

**DEPRIVED THE DEFENDANT OF FAIR TRIAL IN VIOLATION OF THE
CONSTITUTIONAL GUARANTEE ESTABLISHED BY THE SIXTH AND
FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION**

ARGUMENT

Defendant asserts that the total impact of defense counsel's errors when combined produced a fundamentally flawed trial. This Court should consider the cumulative effect of all the errors presented herein.

GROUND SEVENTEEN

**DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF
COUNSEL BY FAILURE TO CHALLENGE THE BALLISTICS
EVIDENCE ON THE ALLEGED LETHAL ROUND. THE FAILURE
DEPRIVED DEFENDANT OF A FAIR TRIAL AND EFFECTIVE
COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH
AMENDMENTS TO THE U.S. CONSTITUTION.**

STATEMENT OF FACTS

On February 3, 2020, the State deposed Senior Crime Laboratory analyst in Firearms Laura Draga. At the deposition Ms. Draga described her actions in the examination of the Canik firearm. Ms. Draga testified that tests fires from the Canik were used for comparison to the other items. Ms. Draga swore that she received one bullet in three pieces. She stated unless you do a fracture match that it was one bullet at one time, we just address them each individually now. When asked "Were you able to compare to see if it was one bullet?" Ms. Draga answered, "I don't do fracture match." She goes on to say "Yeah what I can say is that, when you look at the markings on the bullet and compare them to the tests, you have the markings from this part and then it stops, and you have the markings from this part and then it stops." The fragmented bullet is labeled 827.55 in the ballistic reports. The three pieces were labeled 55-A, 55-B, and 55- C. Ms. Draga testified that she compared three test fired bullets to 827.55-A, B, and C.

Ms. Draga swore that "sometimes what will happen is you will have deformation from whatever the bullet is passing through. The bullet strikes any portion of a hard object, then it is actually going to deform or change the shape of that object, and metal does not deform elastically; so in other words, when I stretch, you know, I am stretching my sweater it bounces back, metal doesn't do that." On page 27 of the deposition Ms. Draga stated that she did not manipulate or bend the fragment to compare markings.

In this deposition there were no questions asked regarding the bullet passing through the body, passing through the nightstand, passing through the sheetrock wall and hitting the concrete block before stopping.

ARGUMENT

Forensic firearm and tool-mark identification evidence is not a new or novel methodology, and its admissibility in criminal cases is well-documented in Florida's jurisprudence. See *King v. State*, 89 So. 3d 209, 228 (Fla. 2012) ("Decisional law demonstrates that tool-mark identification in the context of ballistics has been used in the criminal context since at least 1929, and in Florida since at least 1937." (citations omitted)). Because of the widespread acceptance of ballistics evidence, courts have admitted expert testimony regarding such evidence under both the Daubert and Frye standards. See *United States v. Hicks*, 389 F.3d 514, 526 (5th Cir. 2004) (finding expert firearm comparison testing methodology reliable under Daubert standard and thus, admissible).

Trial counsel is tasked with investigating and making sure that the evidence produced at trial is credible. The photos of the bullet presented at trial show a bullet almost intact with two fragments

torn from the body of the bullet. There is no way the actual bullet that is presented at trial could be the lethal round alleged to kill the decedent.

Deficient Performance

The photos presented at trial show a bullet that is almost intact with the exception of two torn away fragments. Crime scene experts reports reveal that the alleged lethal round passed through the decedent's body, a dresser, sheetrock and struck the concrete block framing the house. Trial counsel had possession of these photos long before trial and should have investigated the fact the bullet is not deformed but still intact. This failure to challenge the ballistics in this case constitutes deficient performance by trial counsel, thus the first prong of *Strickland* is satisfied.

Resulting Prejudice

Any trial counsel defending a first-degree murder trial must challenge the ballistics presented in this case. The photos clearly reveal that the bullet introduced in evidence as the lethal round is still intact. The photos of the fragments reveal that there is a probability of fabrication. The bullet passing through two hard materials and then striking a concrete wall should have been flattened. This is not the case with the photos shown. The bullet is not flattened or mushroomed but the point of the round is still rounded. Trial counsel should have challenged the ballistics in this case. Had trial counsel challenged the ballistics the outcome of the trial would have been different. The failure effectively denied the Defendant to his right to proceed to a fair jury trial and thus satisfies the second prong of *Strickland*.

OATH

Under penalties of perjury and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this motion is found to be frivolous, malicious, or made in bad

faith, I certify that I understand the contents of the foregoing motion, that the facts contained in the motion are true and correct, and that I have a reasonable belief that the motion is timely filed. I certify that this motion does not duplicate previous motions that have been disposed of by the court. I further certify that I understand English and have read the foregoing motion or had the motion read to me dated this 15th day of November, 2024.


Keith J. Johansen, DC #E81321

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been e-filed to: Flagler County Clerk of Court located at 1769 E. Moody Blvd., Bldg. 1, Bunnell, FL 32110, and the Office of the State Attorney at: 1769 E. Moody Blvd., Bldg. 1, Bunnell, FL 32110 on this 15th day of November, 2024.

Respectfully submitted,



Marc Joseph
Marc A. Joseph, P.A
400 N. Ashley Drive, Suite 1900
Tampa, FL 33602
maj@yourbestdefensetampa.com
Bar No.: 168653

