2013 WL 6511498 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-dade County

STATE OF FLORIDA, Plaintiff,
v.
Derek Lorenzo JOHNSON, Defendant.

No. F03-26562A.
May 10, 2013.

***1** Section 15

Order Denying Defendant's Verified Amended Motion for Post Conviction Relief

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Miguel M. De La O, Judge.

THIS CAUSE came before the Court on Defendant, Derek Lorenzo Johnson's ("Johnson"), Verified Amended Motion for Post-Conviction Relief ("Motion") pursuant to Florida Rule of Criminal Procedure 3.850. The Court has reviewed the Motion, the State's Response, conducted an evidentiary hearing, heard argument of Counsel, and conducted its own research.

PROCEDURAL HISTORY

A jury convicted Johnson of attempted second degree murder (as a lesser offense) on August 25, 2004. (T. 668-69). [1] The jury made a special finding that Johnson used a firearm and committed an aggravated battery during the commission of the offense. The State sought enhancement of Johnson's sentence as a Prison Releasee Reoffender and as a Violent Career Criminal. On September 28, 2004, the trial court sentenced Johnson to life in prison as a Violent Career Criminal, and imposed a minimum mandatory sentence of thirty (30) years in prison as a Prison Releasee Reoffender.

The Third DCA affirmed Johnson's conviction and sentence in *Johnson v. State*, 930 So. 2d 668 (Fla. 3d DCA 2006). Thereafter, Johnson sought review by the Florida Supreme Court, which dismissed the petition in *Johnson v. State*, 935 So. 2d 1220 (Fla. 2006). Johnson also petitioned the U.S. Supreme Court for a Writ of Certiorari, which denied the petition in *Johnson v. Florida*, 127 S. Ct. 940 (2007).

On April 25, 2008, Johnson timely filed a *Pro Se* Motion to Vacate, Set Aside or Correct Judgment and Sentence ("*Pro Se* Motion").

On May 21, 2008, Johnson filed a Petition for Writ of Habeas Corpus in the Third District Court of Appeal requesting that the court vacate his life sentence and remand for resentencing. The Third DCA denied Johnson's Petition for Writ of Habeas Corpus in *Johnson v. State*, 990 So. 2d 1075 (Fla. 3d DCA 2008).

On June 24, 2008, while Johnson's *Pro Se* Motion was pending, he filed a Motion to Correct Illegal Sentence. [2] The trial court denied Johnson's Motion to Correct Illegal Sentence on February 26, 2009. Johnson appealed the denial, and the Third District Court of Appeal affirmed on June 23, 2009 in *Johnson v. State*, 11 So. 3d 957 (Fla. 3d DCA 2009).

On March 26, 2009, Johnson retained Counsel with regard to his *Pro Se* Motion. His counsel and the State conducted discovery. On April 24, 2012, Johnson, through his Counsel, supplemented [3] the *Pro Se* Motion with the Motion. [4] The State filed its response to the Motion on July 2, 2012. This Court held an evidentiary hearing on the Motion on April 26, 2013 ("Evidentiary Hearing").

DEFENDANT'S CLAIMS FOR POST-CONVICTION RELIEF

***2** A motion for post-conviction relief can be denied summarily denied when the motion demonstrates the movant is not entitled to relief. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1016 (Fla. 1999). The substantive claims are procedurally barred if they either could have been raised on direct appeal, or were raised on direct appeal and found to be without merit. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983) ("Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."); *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1323 (Fla. 1994) ("Proceedings under rule 3.850 are not to be used as a second appeal; nor is it appropriate to use a different argument to relitigate the same issue."). A claim of ineffective assistance of counsel warrants an evidentiary hearing only where the defendant alleges specific facts which are not conclusively rebutted by the record *and* which demonstrate a deficiency in performance that prejudiced the defendant. *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990).

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) *("Strickland"); Crain v. State*, 78 So. 3d 1025, 1033 (Fla. 2011). "There is a strong presumption that trial counsel's performance was not ineffective." *Lukehart v. State*, 70 So. 3d 503, 512 (Fla. 2011). To establish the deficiency prong under *Strickland*, the defendant must prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, at 687. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy." ' *Id*. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91 (1955)).

In examining trial counsel's performance, courts are required to make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time and indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Blanco v. Wainwright*, 507 So. 2d 1377, 1381 (Fla. 1987).

White v. State, 729 So. 2d 909, 912 (Fla. 1999).

Under the prejudice prong, "Strickland places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, 558 U.S. 15 (2009) (quoting *Strickland*, 466 U.S. at 694).

I. JOHNSON'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT CALLING CERTAIN WITNESSES.

Johnson first asserts that his trial counsel was ineffective because he failed to investigate, interview, and call various witnesses who would have contradicted the testimony of Timothy Davis, the victim in this matter. In some instances, Johnson names individuals he contends his trial counsel should have called as witnesses. In other instances, Johnson refers to broad categories of witnesses that his trial counsel should have called to testify (*e.g.*, drug dealers who were ripped off by Timothy Davis in the past).

Defendants asserting a claim of ineffective assistance of counsel due to trial counsel's failure to call particular witnesses during trial must identify the witnesses, set forth the substance of the witnesses' testimony, and explain how the omission of their testimony prejudiced the outcome of the trial. *Highsmith v. State*, 617 So. 2d 825, 826 (Fla. 1st DCA 1993). To show prejudice, the movant must also establish that the omitted testimony is not cumulative. *Nelson v. State*, 73 So. 3d 77, 87 (Fla. 2011) ("failure of trial counsel to present evidence does not materially affect the outcome of a trial, and is not prejudicial to a defendant, if that evidence is cumulative to evidence previously presented to the jury."). The only testimony of a potential witness which Johnson sets out with any specificity is Emory Royal's (a lifelong friend of Johnson's) and Ahmed Jones' (Johnson's brother).

***3** Johnson's claim does not satisfy *Strickland*. First, the record conclusively refutes Johnson's allegation that the failure to call these witnesses at trial was due to ineffective assistance by trial counsel. Instead, the record conclusively establishes that Johnson agreed with his trial counsel's decision with regards to which witnesses to call at trial.

THE COURT: Did you discuss with Mr. White any possible defenses or any possible witnesses that you would have on your behalf?

THE DEFENDANT: Yes, sir.

THE COURT: Has he called everyone to the stand that you wish for him to call?

THE DEFENDANT: Yes, sir.

(T. 557).

In *Terrell v. State*, 9 So. 3d 1284 (Fla. 4th DCA 2009), the appellate court held that the defendant's claim that trial counsel was ineffective for failing to call a particular witness was "refuted by the record," based on a nearly identical colloquy with the defendant. *Id*. at 1289. The court noted that the "defendant is [ ] bound by his sworn answers during the colloquy." *Id*.

Second, there is no reasonable probability that the testimony of the proffered witnesses would have changed the outcome of the trial. Nothing in Emory Royal's affidavit materially contradicts the testimony introduced by the State at trial. Emory Royal witnessed Timothy Davis' assailant (whom Emory Royal refers to as "Black Boy") enter Johnson's SUV with Timothy Davis, and thereafter saw Johnson get into the truck and drive away with Timothy Davis and Black Boy. (Royal Affidavit, ¶ 14). Later that day, Johnson returned to Emory Royal's house appearing hyper and upset. (Royal Affidavit, ¶ 18). Emory Royal states that it appeared Johnson was on the telephone trying to find out information "about someone." (Royal Affidavit, ¶ 19). It is Emory Royal's *suspicion* that Johnson was talking to "a doctor, nurse or hospital." (Royal Affidavit, ¶ 19). Johnson told Emory Royal that Timothy Davis had been shot and Johnson was trying to obtain information about what happened to him. (Royal Affidavit, ¶ 20). None of this information contradicts the testimony introduced at trial. There is nothing inconsistent about Johnson being a principal to the attempted murder of Timothy Davis and subsequently seeking information about Timothy Davis' medical condition.

Emory Royal further states that Johnson stayed in Miami (with Emory Royal and his children) for the next three days, and did not appear concerned about anyone seeing his truck parked on the street. Emory Royal never saw Johnson washing or cleaning out his truck. The Motion argues that Emory Royal would contradict the State's "substantial" (Motion at 17) argument of flight to Tampa. However, the Motion's sole reference to the State's "substantial" argument of flight is one citation to the State's opening statement where the prosecutor told the jury: "shortly after the shooting the defendant took that Lincoln Navigator into that shop in Tampa, Florida and told the owner of that shop to clean the car out." (T. 233-34). The State did not argue during its closing argument that Johnson immediately fled to Tampa after the shooting. Rather, the State argued that Johnson "about three days later, about 72 hours later, [Johnson] surfaces in his home in Tampa." (T. 629). During his testimony, Ben Foster, the owner of the Tampa body shop, testified that Johnson brought the Navigator into his shop in Tampa on September 16, 2003,

three days after the shooting. (T. 388-89). Therefore, Emory Royal's testimony would not contradict the testimony introduced at trial (nor the State's claim in its opening statement, or closing argument).

***4** Ahmed Jones' affidavit states that Timothy Davis is known to scam people and that he knows people who sell drugs in Miami. (Jones Affidavit, ¶ 5). Ahmed Jones also testified that on the night of September 13, 2003, Johnson was agitated and told Ahmed Jones that "something happened; Tim got shot." (Jones Affidavit, ¶ 11). In addition, Ahmed Jones says that Timothy Davis told him that Johnson didn't shoot Timothy Davis but "[Johnson] was there" and he wants Johnson to spend the rest of his life in prison. (Jones Affidavit, ¶ 15). This testimony does not materially contradict the testimony adduced at trial. *See Coleman v. State*, 718 So. 2d 827, 830 (Fla. 4th DCA 1998) (trial court did not err in denying an evidentiary hearing "because the proposed evidence [of four new eyewitnesses] would be merely cumulative to evidence already presented at trial.").

The transcript shows that during the trial Timothy Davis admitted he was a drug dealer and had come to Miami with Johnson to buy drugs. (T. 304-05). Timothy Davis also admitted he had ripped off people in the past. (T. 296). There is no shortage of evidence in the record demonstrating that trial counsel used Timothy Davis' reputation and prior illegal acts to discredit Timothy Davis and to suggest that the man who shot him had an independent motive for doing so. (T. 297-305, 528-539, 600-621). Timothy Davis never testified that Johnson shot him. (T. 270-72). Emory Royal and Ahmed Jones's testimony merely repeats issues which Johnson fully aired at trial. *See Williamson v. Dugger*, 651 So. 2d 84, 88 (Fla. 1994) (affirming summary denial of post-conviction motion, including claim of newly discovered evidence, which constituted cumulative impeachment evidence), *cert. denied*, 516 U.S. 850 (1995).

II. DEFENDANT'S COUNSEL WAS NOT INEFFECTIVE IN STIPULATING TO VARIOUS FACTS SURROUNDING THE IDENTIFICATION OF THE VICTIM'S BLOOD AND DNA TESTING OF THE SAME.

Johnson complains that his trial counsel was ineffective because he stipulated to various issues surrounding the testing and identification of Timothy Davis' blood inside Johnson's truck. However, Johnson does not deny that Timothy Davis was shot or that the shooting occurred in Johnson's truck. *Pro Se* Motion at 43-44. Johnson's defense is that Timothy Davis' shooter acted independently and without Johnson's prior knowledge or approval. *Id*. at 45.

Johnson claims trial counsel was ineffective based on his failure to object to "repeated testimony" about Timothy Davis' blood being located at various locations within Johnson's car. This claim fails because trial counsel's failure to raise a meritless argument and/or objection cannot constitute ineffective assistance of counsel. *See Teffeteller v. Duggar*, 734 So. 2d 1009, 1023 (Fla. 1999). The transcript reveals that the numerous blood stains Timothy Davis testified about were in different locations in the car (T. 288-91) - which does not constitute inadmissible "repeated testimony."

Moreover, in light of Johnson's factual defense, Johnson fails to identify what material advantage he would have gained by not stipulating to the identification of Timothy Davis' blood in Johnson's car. More to the point, the Motion fails to identify any prejudice which resulted from trial counsel's stipulation in light of Johnson's defense.

The Motion does not set forth any valid legal argument that the DNA evidence derived from the blood found in Johnson's car would have been excluded but for trial counsel's stipulation. Nor does Johnson's Motion cite to a single case supporting his argument that trial counsel's stipulation to the identity of the victim's blood should be deemed ineffective assistance where the defense does not dispute the victim was shot in the defendant's car. Consequently, Johnson fails to establish the prejudice required to show his trial counsel was ineffective within the meaning of *Strickland*.

III. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR ADVISING JOHNSON NOT TO TESTIFY.

***5** Grounds IV, V and VI of the Motion actually constitute one overarching argument: trial counsel was ineffective for "failing to put the defendant on the witness stand to testify to the events of September 13-16, 2003." Motion at 24. This argument has

two subparts: (a) trial counsel should have counseled Johnson to testify, and (b) trial counsel misadvised Johnson as to the admissibility of the nature of Johnson's prior convictions. A third subpart, which developed during the Evidentiary Hearing, is also addressed in this Order.

Because the record does not conclusively refute Johnson's claim, this Court held the Evidentiary Hearing. The Court heard from three (3) witnesses: Olivia Griffin, Esq. ("Griffin"), Jay White, Esq. ("White"), and Johnson (collectively referred to as the "Witnesses"). White was Johnson's trial counsel in 2004. Griffin was a law student in 2004, and White's law clerk. Griffin is now a practicing criminal defense lawyer.

The Witnesses agreed that during the trial court's colloquy of Johnson as to whether he would testify, the trial court recessed the proceedings to allow Johnson to confer with White in the jury room with regards to Johnson's decision not to testify. Although the genesis of this conference was subject to dispute during the Evidentiary Hearing, the transcript of the colloquy is clear on this point. During the colloquy, the trial court asked Johnson if he had "other questions that you want to ask in private [to] Mr. White about anything else about your right to testify?" (T. 556). Johnson indicated that he did have some questions, and the trial court invited Johnson and White to confer in the jury room. *Id*. The Witnesses agree that only Johnson, White and Griffin were present in the jury room for the discussion critical to the issues before this Court. [5]

The Witnesses agree that Johnson made it clear, initially, that he wanted to testify. The Witnesses also agree that White advised Johnson, in no uncertain terms, that it was his professional opinion that Johnson should not testify. Griffin and White testified that White had three primary reasons why he advised Johnson not to testify:

1. **The case was going reasonably well**. White had effectively impeached the State's main witness, Timothy Davis. [6] The nature of Timothy Davis' prior convictions had been revealed to the jury. (T. 297). The jury had learned Timothy Davis was a drug dealer (T. 291), who had a history of engaging in drug rip-offs (T. 295-96). Indeed, White established through cross-examination that Timothy Davis' primary source of income at the time of the shooting was ripping off drug dealers. (T. 300). They also learned he was capable of threatening great violence. *See* T. 536 ("[Timothy Davis] said he was going to kill me in front of my kids.").

***6** 2. **Johnson had six (6) prior felony convictions**.

3. **Johnson would make a poor witness**. White feared that exposing Johnson to a forceful cross-examination by Assistant State Attorney, Herb Andrews (a seasoned, experienced prosecutor), would damage Johnson's independent action defense. Additionally, White feared Johnson's demeanor and appearance (including his gold teeth) would hurt Johnson before the jury.

White testified that he made these reasons known to Johnson during their meeting in the jury room, which White says was a discussion - not an argument. Johnson, on the other hand, testified that the discussion with White was a heated argument. Griffin agreed with Johnson's characterization; she described their approximately ten minute discussion as "loud and forceful," but said White and Johnson were not yelling. The Court credits the testimony of Griffin and Johnson that the discussion about whether Johnson should testify was heated and intense, and White made his opinion known loudly and strongly to Johnson.

The Witnesses agree that at the conclusion of the discussion, Johnson agreed he would not testify and he so informed the trial judge. The critical issue before this Court is the reason why Johnson agreed not to testify.

A. JOHNSON VOLUNTARILY CHOSE NOT TO TESTIFY OF HIS "OWN FREE WILL."

The decision not to testify at trial was Johnson's - a decision strongly encouraged and supported by his trial counsel. The fact that Johnson was convicted at trial does not establish that trial counsel's advice at the time was ineffective....or even wrong.

The trial judge thoroughly and precisely questioned Johnson about his decision not to testify.

THE COURT: Mr. Johnson, it is my understanding that since Mr. White has just rested the case in front of the jury that you do not wish to be a witness on your own behalf; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Now, while you have an excellent lawyer, Mr. White, and he may have given you advice on whether you should or should not but the ultimate advice about whether you testify is your decision, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Are you making a decision not to be a witness on your own behalf freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Is anyone whether it be the attorney, family, friends, or anyone else forcing you or threatening you so you do not testify?

THE DEFENDANT: Yes, sir.[7]

***7** THE COURT: Now, you realize that I will instruct the jury that you don't have to testify and that they can't hold that against you in any way because you don't have the burden of proof. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If you wish to testify and you say, you know, Judge, Mr.

White is a great lawyer, he doesn't want me to but I want to testify, I would make sure that you could. But, of course, then Mr. Walker would be allowed to cross examine you just like Mr. White's cross examination of the state's witnesses and also the fact that you may have prior convictions, that will also be made known to the jury that the state already knows now. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Did you discuss with Mr. White any possible defenses or any possible witnesses that you would have on your behalf?

THE DEFENDANT: Yes, sir.

THE COURT: Has he called everyone to the stand that you wish for him to call?

THE DEFENDANT: Yes, sir.

THE COURT: Is there any other questions that you want to ask in private with Mr. White about anything else about your right to testify?

THE DEFENDANT: Some, yes, sir.

THE COURT: Okay.

MR. WHITE: You want to talk.

THE COURT: Okay. Well, why don't you speak to him for a second and see. This is about your rights and whether you should testify. Go ahead.

MR. WHITE: Judge, you want me to go into the jury room?

(Thereupon, court stood in brief recess.)

THE COURT: Okay.

MR. WHITE: Mr. Walker is not here.

THE COURT: Okay. Mr. Johnson, I have now had you go back with Mr. White and Mrs. Griffin to ask any other questions that you may have. Are you satisfied with any discussion that you have reached back there?

THE DEFENDANT: Yes, sir.

THE COURT: You are still under the opinion that you do not wish to be a witness; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: This is of your own free will? No matter what was said back there, this is your choice?

THE DEFENDANT: Yes, sir.

THE COURT: Court finds that [Derek] Johnson is alert and intelligent, and does understand his right to waive his right to testify. The defendant is fully informed of it and is doing it freely and voluntarily and that all witnesses and defenses have been put on and so forth. Thank you, Mr. Johnson.

THE DEFENDANT: You are welcome, sir.

(T. 554-557).

Notwithstanding this Court's finding that White was forceful and strong in his advice to Johnson not to testify, the decision not to testify was made by Johnson. The testimony adduced during the Evidentiary Hearing supports this conclusion, as do Johnson's statements to the trial judge under oath. As a result, Johnson's ineffective assistance claim is unfounded based on *Lott v. State*, 931 So. 2d 807 (Fla. 2006).

The case most similar to this one is *Shere v. State*, 742 So. 2d 215 (Fla. 1999), where we also rejected an ineffective assistance claim based on interference with the right to testify. In *Shere*, defense counsel worried that the defendant would not be credible because he kept changing his story. They repeatedly advised him not to testify, and their investigator and the Chief Assistant Public Defender gave similar advice. In the end, however, "they allowed the defendant to make the final decision on whether he should testify in the guilt stage." *Id.* at 222. According to them, "[h]e agreed that he would not." *Id.* Yet a second-chair attorney testified that the defendant "did not understand the decision of whether or not to testify." *Id.* The defendant claimed that counsel "pressured him into deciding not to testify." *Id.* at 221. Nevertheless, we upheld the trial court's conclusion that the lead attorney's "advice was a reasonable, tactical decision that was in the realm of counsel's professional judgment-not ineffective

assistance of counsel." *Id.* at 222; *see also United States v. Teague*, 953 F.2d 1525, 1535 (11th Cir. 1992) (en banc) (rejecting a claim of interference with the right to testify where defense counsel "advised [the defendant] that it would be unwise and unnecessary for him to testify," and ultimately "believed that [he] had assented or acceded to her recommendation").

***8** We reach the same conclusion here. Notwithstanding Lott's initial desire to testify, both his attorneys stated that he ultimately agreed not to do so. Lott confirmed as much during a colloquy with the trial judge at the end of the guilt phase.

Lott, at 818-19.

B. TRIAL COUNSEL'S ADVICE NOT TO TESTIFY WAS REASONABLE IN LIGHT OF ALL THE CIRCUMSTANCES.

Although this Court finds that Johnson voluntarily chose not to testify, this finding does not end the inquiry. A separate question is whether White's advice to Johnson, "even if voluntarily followed, was nevertheless deficient because no reasonable attorney would have discouraged [Johnson] from testifying." *Id.* at 819.

In *Garcia v. State*, 21 So. 3d 30 (Fla. 3d DCA 2009), based on nearly identical facts, the Third DCA rejected an identical ineffective assistance of counsel claim. The defendant argued at trial that although he was present during the commission of an armed robbery, his alleged co-defendant acted independently without the defendant's knowledge or approval. *Id.* at 35 (defendant alleged "that the charged crime was the independent act of the passenger in his car, Arnold Cleveland" and "would have so testified at trial.") (Cope, J., concurring). The defendant did not take the stand based on his lawyer's advice. The trial court in *Garcia* colloquyed the defendant in nearly identical language to that used by Johnson's trial judge. *Id.* at 32-33. As here, the trial judge in *Garcia* advised the defendant that regardless of his trial counsel's advice it was the defendant's decision - and his alone - whether or not to testify. *Id.* at 33. Following the defendant's conviction, he filed a motion pursuant to Rule 3.850 and argued that his trial counsel was ineffective for advising him not to testify based on his prior convictions. The Third DCA in *Garcia* rejected the claim, concluding:

[T]he record shows that the decision not to testify was a mutually agreed-upon trial strategy directly related to the independent action defense. Cross-examination of the defendant's criminal past would have been limited to the number of the defendant's prior convictions. However, *even this limited information would have tarnished defense counsel's portrayal of the defendant as an unsuspecting driver unwillingly drawn into his passenger's criminal conduct*. Thus, defense counsel's strategic decision to advise the defendant not to testify was not unreasonable.

Garcia v. State, 21 So. 3d 30, 32 (Fla. 3d DCA 2009) (citation omitted) (emphasis added).

Based on *Garcia*, this Court finds that White's performance was not deficient. *See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)* ("strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct").

C. TRIAL COUNSEL WAS AWARE OF JOHNSON'S FACTUAL DEFENSE.

Johnson raised a new claim at the Evidentiary Hearing. During his Counsel's opening statement to the Court, he asserted that White advised Johnson not to testify because White had *never* discussed with Johnson what Johnson would testify had occurred before, during, and after the shooting of Timothy Davis. In other words, White had no idea about the substance of Johnson's defense to the charges, because he had *never* spoken to Johnson about it, and therefore was no position to effectively evaluate whether Johnson should testify.

***9** Upon hearing this argument in Counsel's opening statement, the Court immediately advised Counsel that Johnson had not raised this claim in either the *Pro Se* Motion or the Motion. Nevertheless, because of the seriousness of the claim, and the potential for it to justify granting Johnson's claim of ineffective assistance of counsel, the Court advised the parties it would hear testimony regarding this potential claim during the Evidentiary Hearing. [8] The Court also advised Johnson he could petition to amend the Motion if it appeared that the claim was well-founded. Although Johnson has not amended the Motion, the Court treats the issue as if fully raised and addresses it.

By the conclusion of the Evidentiary Hearing, it was obvious the new claim had no merit. Griffin testified that she first met Johnson on the day of trial, but that she already knew his defense to the charges from reading White's file. White testified that he had several pre-trial discussions with Johnson about what had transpired with the shooting of Timothy Davis. Johnson testified he had several pre-trial conversations about his defense with an investigator hired by White. Consequently, Johnson never presented any evidence at the Evidentiary Hearing that White was unaware of what Johnson would testify to if called to the stand. White did testify that he did not prepare a detailed direct examination of Johnson before the trial began because (1) there was never any serious possibility that Johnson would testify (for all the reasons previously discussed), and (2) White could seek a brief recess to prepare Johnson to testify if necessary.

On this basis alone, the Court could conclude that the new claim is unsupported by the record. But there is compelling evidence that the claim is actually false. For example, Johnson told the trial court that he had in fact discussed his defense with White.

THE COURT: Did you discuss with Mr. White any possible defenses or any possible witnesses that you would have on your behalf?

DEFENDANT: Yes, sir.

(T. at 556). Florida courts look askance at defendants who give answers during colloquies which they later seek to disavow out of convenience. *See Iacono v. State, 930 So. 2d 829, 831-32 (Fla. 4th DCA 2006)*(defendants "are bound by their sworn answers" during a plea colloquy); [9] *Terrell v. State*, 9 So. 3d 1284, 1289 (Fla. 4th DCA 2009) ("defendant is thus bound by his sworn answers during the colloquy" that he did not wish to call any other witnesses).

Moreover, in his sworn *Pro Se* Motion, Johnson admits that White knew Johnson's version of the events that transpired, and that they had discussed Johnson testifying at trial. [10] Johnson represented in his *Pro Se* Motion that, after retaining White, "upon their first meeting [Johnson] explained his version of the events as follows." The *Pro* Se Motion then sets out a nine (9) page, detailed recitation of the facts Johnson shared with White, and to which Johnson would have testified to at trial. *See Pro Se* Motion at 37-45. Johnson concludes the recitation thusly:

***10** Based on the foregoing story[,] attorney White and Mr. Johnson ultimately agreed that the theory of defense would be that the shooting of Mr. Davis was an independent act of Black Boy that was outside the common design to sell Mr. Davis cocaine and not foreseeable by Mr. Johnson; and that Mr. Johnson would testify as to his version of the events at trial.

Id. at 45.

Johnson's sworn colloquy with the trial court, the testimony presented at the Evidentiary Hearing, and Johnson's sworn *Pro Se* Motion, all conclusively contradicted the new claim that White commenced Johnson's trial without any knowledge of Johnson's factual defense. The fact that Johnson would posit such a meritless argument at the Evidentiary Hearing casts doubt on the veracity of his other uncorroborated factual assertions.

D. TRIAL COUNSEL DID NOT MISADVISE JOHNSON ABOUT THE INTRODUCTION OF HIS PRIOR CONVICTIONS IF JOHNSON TESTIFIED.

The *Pro Se* Motion asserts that Johnson decided not to testify because White misadvised him that the nature of his prior felony convictions would be disclosed to the jury if he testified. *Pro Se* Motion at 47-48. [11] Although there is disagreement among the Witnesses as to what exactly was discussed on this critical issue, the testimony - mostly - reconciles.

Griffin testified that her best recollection is that White advised Johnson that the details of his prior conviction "could" be disclosed to the jury. White testified there was a brief discussion regarding the jury learning the details of Johnson's prior convictions. White advised Johnson that the nature of convictions could come out if Johnson opened the door. White testified he never told Johnson that the details of his prior convictions would definitely come out, or would even under normal circumstances come out. White testified he knows the law well on this subject and he would not advise a client contrary to the law.

By contrast, Johnson testified that White not only told him that the nature of his convictions would be revealed to the jury if he testified, but White specifically mentioned that Johnson's 1991 robbery conviction, which was also a drug rip-off, would be disclosed to the jury and then Johnson would surely be convicted. Both White and Griffin contradict Johnson's account.

The Court gives Griffin's account the most weight for two reasons. [12] First, Griffin has the least interest in whether the Motion is granted or denied. She was not Counsel of record for Johnson, indeed she was not even a member of the Bar at the time. Any finding by this Court that Johnson received ineffective assistance of counsel would not reflect in any way upon Griffin's professional reputation. Second, Griffin's demeanor while testifying, and her careful response to all questions posed, demonstrated to this Court that she was at all times attempting to recount the events that transpired during the trial in 2004 as accurately as possible. She never slanted her testimony in favor of Johnson or White, nor did she attempt to protect either one. Her testimony did not uniformly corroborate either man's testimony; although, on this point, she does corroborate White's recollection.

***11** Therefore, this Court finds that White advised Johnson that if he testified the jury "could" learn the nature of his convictions. Despite Griffin's opinion that she believed White's advice on this point was wrong at the time, White's statement to Johnson was in fact exactly correct. No lawyer can guarantee that the nature of a defendant's prior convictions will not become admissible due to the defendant "opening the door." White's advice to Johnson was precisely right, and therefore the Court finds that White did not misadvise Johnson.

More importantly, even if White had misadvised Johnson, there was no prejudice to Johnson. Johnson testified, both in direct and in response to a question from this Court, that he wanted to testify even if the jury were to learn of his prior convictions. Johnson testified that when Griffin, White and Johnson entered the jury room, he told White that "If I don't testify, they will find me guilty." [13] White responded: "I'm not putting you on the stand." According to Johnson, White then brought up his prior convictions, including the 1991 robbery and said they "will f___ you." Johnson testified that he responded that he "did not care what came out" about his prior convictions. The Court later confirmed with Johnson he did not care about the jury learning about his convictions. Consequently, it is disingenuous for Johnson to now claim that he did not testify because of any alleged advice he received from White about the jury learning about the nature of his prior convictions.

E. REGARDLESS OF THE WISDOM OF TRIAL COUNSEL'S ADVICE, JOHNSON CANNOT SATISFY THE PREJUDICE PRONG OF *STRICKLAND*.

The Court has already found that White provided Johnson reasonably effective professional assistance [14] and therefore the Motion does not satisfy the *Strickland* performance prong. However, even if this Court had found that White unreasonably

counseled Johnson not to testify because the jury would learn of the nature of Johnson's conviction, the Court would nevertheless deny the Motion because Johnson cannot satisfy the *Strickland* prejudice prong.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

***12** *Strickland*, 466 U.S. at 693.

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. The Court finds there is no reasonable probability that the jury would have acquitted Johnson if he had testified.

The jury heard significant impeachment and character evidence regarding Timothy Davis, and still they convicted Johnson. Timothy Davis testified that he believed Johnson was involved in the rip-off by Moochie, [15] and this was the motivation for Johnson orchestrating the shooting. (T. 302). Moochie himself testified that Johnson was not involved in the rip-off of Timothy Davis (T. 535), and still the jury convicted Johnson. Timothy Davis admitted drug trafficking is a dangerous business, and one can get shot over a drug deal. (T. 302). And still the jury rejected the independent action defense and convicted Johnson.

It is irrational to believe that if only Johnson, a six-time convicted felon accused of orchestrating the shooting of his own brother, had taken the stand the jury would have acquitted him. There are many reasons why Johnson's testimony would not have a reasonable probability of changing the outcome of his trial. We begin with the *undisputed* facts: [16]

1. The State's main witness was Johnson's own brother.

2. A man by the name of Black Boy shot Timothy Davis two times in the head as they sat in Johnson's car, while Johnson sat in the driver's seat. *Pro Se* Motion at 43-44.

3. After Black Boy shot Timothy Davis, Johnson told Timothy Davis to go to one of the nearby homes "and have the residents call 911." *Id*. at 44.

4. Johnson did not seek medical attention for Timothy Davis, nor did he call the police. *Id*.

5. Johnson took his truck to a repair shop in Tampa, within three days of the shooting, to "have it cleaned up and repaired." *Id*. at 45.

These are the objective, damning facts to which Johnson would have had to admit on cross-examination. These are the facts which implicated Johnson in the attempted murder of his brother before the jury even had to consider the other extensive testimony against him. A mere sampling of the State's evidence demonstrates why Johnson's self-serving testimony would have been insufficient to change the outcome of the trial:

1. The owner of the Tampa repair shop, Ben Foster, testified that Johnson brought the truck in with the passenger and rear seats missing, a portion of the rug cut out, and a seat belt cut out. (T. 390-91). Johnson wanted the truck cleaned, the floors sanded, the console removed and replaced, and new seats installed. (T. 390-91).

***13** 2. Timothy Davis testified that immediately before Black Boy shot him, Johnson slammed the truck's steering wheel and said to Black Boy: "God damn, man, what you gonna do?" (T. 270).

3. After Black Boy shot Timothy Davis the first time, Johnson looked directly at Timothy Davis. Johnson then turned his head and looked down. (T. 272).

4. After seeing Johnson look away, Timothy Davis tried to open the truck's door to get out. At that point, Black Boy put the gun to Timothy Davis' head and shot him again. (T. 273).

5. Johnson never said a word between the first and second shot. (T. 273; 275). He never tried to help Timothy Davis "at all." (T. 272).

6. The first time Johnson spoke after Black Boy shot Timothy Davis was to tell Black Boy, "Man, help me get him out of my shit [referring to the truck]. He is bleeding all in my shit." (T. 279).

7. Johnson and Black Boy removed Timothy Davis from the truck and threw him "in a ditch on the side of the road." (T. 281).

8. Black Boy was going to shoot Timothy Davis again to make sure he was dead, but Johnson assured him there was no need because "he is already dead, let's get out of here." (T. 282).

There is plenty more incriminating testimony, but this sampling suffices to show why the Court finds there is no reasonable probability that the jury would have acquitted Johnson if he had testified.

IV. THE STATE OF FLORIDA DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT BY ITS USE OF "INFLAMMATORY WORDS."

First, "this claim [is] procedurally barred because it could have and should have been raised on direct appeal." *Lukehart v. State*, 70 So. 3d 503, 523 (Fla. 2011).

Second, although Johnson's Motion painstakingly catalogues each use of the word "blood," and every instance of a graphic depiction of the crime, Johnson never once cites to a single case to support his legal argument. Seen in the light most favorable to Johnson, his argument is that the State was unnecessarily and gratuitously descriptive about the injuries Timothy Davis suffered. Although Rule 403 of the Florida Evidence Code prohibits the introduction of unduly prejudicial evidence, the evidence introduced at trial against Johnson does not fail a 403 balancing test.

This was a bloody crime scene. Timothy Davis was shot twice, point blank, in the head. (T. 271-72). It was not unfairly prejudicial [17] for the State to introduce evidence depicting the extent of Timothy Davis' injuries to aid the jury in determining whether Johnson was a principal to the crime. Johnson wanted the jury to believe that he was completely surprised by the shooting of Timothy Davis by Black Boy. The State argued that the shooting did not come as a surprise to Johnson. Part of the evidence on which the State relied to support this conclusion was Johnson's non-reaction to Timothy Davis' shooting and his subsequent plight. Johnson's incongruous reaction to Timothy Davis' serious injury is probative; and, the greater the injury, the greater a reaction reasonable people would expect Johnson to have to his brother's shooting. The State further relied on testimony that Johnson abandoned Timothy Davis by the side of the road and left in his own truck with Timothy Davis' assailant. (T. 283). [18] Even Johnson concedes that "[a]rguably, the most damaging evidence against [him] was the testimony of [Timothy

Davis] that [Johnson] aided the shooter or failed to assist [Timothy Davis] while 'callously' dumping his body on the side of the road." Motion, at 19. Consequently, it was not unduly prejudicial for the State to introduce a graphic description of the crime scene so the jury could determine the degree of Johnson's culpability for Timothy Davis' shooting. Although the testimony and prosecutorial argument were prejudicial to Johnson, they were not unduly so. Johnson can point to no case law supporting a contrary result, and thus fails to meet his burden under *Strickland*.

***14 IT IS HEREBY ORDERED AND ADJUDGED** that Defendant, Derek Lorenzo Johnson's, Verified Amended Motion for Post-Conviction Relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure is **DENIED**.

Defendant, Derek Lorenzo Johnson, is hereby notified that he has a right to appeal this Order to the Third District Court of Appeal of Florida within thirty (30) days of the signing and filing of this Order.

The Clerk of this Court is hereby ordered to send a copy of this Order to the Defendant, Derek Lorenzo Johnson, DC# 192640, Baker Correctional Institution, 20706 U.S. Highway 90 West, Sanderson, Florida 32087-2359.

In the event the Defendant takes an appeal of this Order, the Clerk of this Court is hereby ordered to transport, as part of this Order, to the appellate court the following documents with all of their attachments:

1. Defendant's Motion and Amended Motion;

2. State's Response;

3. The transcript of the trial proceedings, and

4. This Order.

DONE and ORDERED in Miami-Dade County, Florida this 10th day of May, 2013.

<<signature>>

Miguel M. de 0

Circuit Judge

cc:

George D. Cholakis, Esq.

via email: cholakislaw@gmail.com

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Footnotes

1 Citations to the transcript of the trial proceedings will be designated as (T.).

2 The Motion to Correct Illegal Sentence was amended on September 25, 2008.

3 Although not titled a "supplemental" motion, the Motion states in the opening paragraph that it "adopts all arguments previously made and offers this as a supplemental pleading to the previously filed [*Pro Se*] Motion to Vacate, Set Aside, or Correct Judgment and Sentence."

4 The Motion was originally filed by Counsel on April 15, 2011, but it lacked a proper verification. The only differences the Court can discern between the April 15, 2011 and the April 24, 2012 versions of the Motion are inconsequential formatting differences, and the inclusion of an executed verification page with the April 24, 2012 motion. This Order addresses the April 24, 2012 version of Motion.

5 Griffin, who was not a member of the Bar at the time, did not actively participate in the discussion.

6 In response to White's assertion, Johnson's Counsel repeatedly pointed out during his cross-examination of White that the jury convicted Johnson and he is serving a life sentence. The implication (which was at times expressly stated) being that the trial was not going as well as White believed, nor was his impeachment of Timothy Davis as effective as White believed. Johnson's Counsel is correct that - in hindsight - White's assessment proved incorrect.
Hindsight, however, is not the standard by which ineffective assistance of counsel claims are judged. *See Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, in hindsight...."); *Elledge v. State*, 911 So. 2d 57, 67 (Fla. 2005) ("[t]o fairly assess counsel's performance, the reviewing court must make every effort to eliminate the 'distorting effects of hindsight' and to evaluate the conduct from counsel's perspective at the time") (quoting *Strickland*, 466 U.S. at 689), *cert. denied*, 546 U.S. 1157 (2006). A review of the trial transcript demonstrates that White's confidence in how the trial was progressing was objectively reasonable at the time. *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000) ("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions.").

7 It appears from the context of the response that the defendant meant to say "No, sir" in response to this question. It is unknown if the "yes" is a transcription error or if Johnson misspoke. Given the trial court's extensive experience as a highly-regarded criminal defense lawyer and a felony division Circuit Judge, it is inconceivable that the trial judge would have simply ignored Johnson's answer that he was being forced or threatened not to testify. This belief is bolstered by the fact that a few questions later, when Johnson indicates a desire to ask White some more questions, the trial judge readily accedes to the request. In addition, after Johnson returned from his meeting with White in the jury room, Johnson reiterated that it was *his* decision, of his "own free will," not to testify. (T. 557).

8 The Court also allowed testimony regarding this argument because it could refute the rationale White gave for advising Johnson not to testify. Essentially, Johnson's argument is that White advised him not to testify because White was unprepared - not because White thought the case was going well, or because of Johnson's prior felony convictions, or because Johnson would make a poor witness.

9 Although these cases arise in the context of plea colloquies, that is a distinction without a difference.

10 During cross-examination of White, Johnson's counsel repeatedly asserted that White never had such a discussion with Johnson. White testified that he believed he did have such a discussion with Johnson, but could not recall the conversations specifically because so much time has passed.

11 The Motion does not raise this claim. The claim nevertheless is properly before this Court because the Motion supplemented the *Pro Se* Motion to Vacate.

12 This is not to imply the Court does not credit White's testimony. White appeared to testify in an honest, straightforward manner. White was careful to explain that he does not have a clear recollection of all events due to the passage of time. However, White has some interest in how the Motion is resolved, therefore, when his testimony conflicted with Griffin's, the Court credited Griffin's. Johnson, understandably, has the most obvious, direct interest in the outcome of the Motion. The Court gave little credit to Johnson's testimony except where it was corroborated or not contradicted.

13 Although some statements in this paragraph are in quotes, the Court has drafted the Order on the basis of its notes, without aid of a transcript. The statements may not be exactly verbatim, but the quotes reflect what Johnson testified to in sum and substance at the Evidentiary Hearing.

14 The fact that the Court makes findings consistent with the terminology of *Strickland* should not be read as minimizing the effectiveness of White's representation. The use of dry legal language, in this context, can appear as damning with faint praise; nothing could be further from the truth. First, no one should overlook the fact that - despite the fact Johnson's own brother testified that Johnson orchestrated his attempted premeditated murder - White was able to convince the jury to return a verdict on a lesser included crime. But for Johnson's *extensive* criminal history, for which White bears no responsibility, this result would have spared Johnson from a life sentence. Second, as he testified in the Evidentiary Hearing, White prepared for trial promptly, and filed a demand for speedy trial because Timothy Davis was in federal custody at the time. White made a strategically sound decision in the hopes that the

State would be unable to bring Timothy Davis to testify at trial. The fact the strategy did not succeed does not diminish from the effectiveness of White's representation.

15 "Moochie" is the nickname of Ramses Hankerson. He was the supplier of two kilos of cocaine which Johnson and Timothy Davis intended to buy when they travelled to Miami in September 2003. Moochie delivered (predominantly) fake cocaine to Johnson and Timothy Davis in exchange for $42,000.00 in genuine US currency. This is known in the drug trade as a rip-off.

16 The Court labels these undisputed facts because they are admitted to by Johnson in his *Pro Se* Motion.

17 "Most evidence that is admitted will be prejudicial or damaging to the party against whom it is offered. The question under the statute is not prejudice but instead, unfair prejudice: whether the 'probative value is substantially outweighed by the danger of unfair prejudice." ' *State v. Williams*, 992 So. 2d 330, 334 (Fla. 3d DCA 2008) (quoting § 90.403, Fla. Stat. (2005)).

18 At the Evidentiary Hearing, Johnson's counsel tried to get White to say that Johnson had wanted to testify that he waited at the end of the block for an ambulance or paramedics to arrive. The *Pro Se* Motion contradicts Counsel's assertion. *Pro Se* Motion at 44.

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